

Defence and Counterclaim Training.

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Introduction

The aim of the Training is to provide some guidance and training in relation to Defences and Counterclaims.

1. Defences: Important Matters

a) Filing a defence CPR 15.2

A defendant who wishes to defend all or part of a claim must file a defence.

b) Consequence of not filing a defence – CPR 15.3

If a defendant fails to file a defence, the claimant may obtain default judgment if Part 12 allows it.

c) The period for filing a defence - CPR15.4

(1) The general rule is that the period for filing a defence is –

(a) 14 days after service of the particulars of claim; or

(b) if the defendant files an acknowledgment of service under Part 10, 28 days after service of the particulars of claim.

d) Agreement extending the period for filing a defence CPR15.5

(1) The defendant and the claimant may agree that the period for filing a defence specified in rule 15.4 shall be extended by up to 28 days.

(2) Where the defendant and the claimant agree to extend the period for filing a defence, the defendant must notify the court in writing.

**e) No statement of case after a reply to be filed without court's permission
CPR 15.9**

A party may not file or serve any statement of case after a reply without the permission of the court.

2. The contents of the Defence.

a) Statement of truth: CPR 15. PD 21.

Part 22 requires a defence to be verified by a statement of truth.

b) 2.2 - The form of the statement of truth is as follows:

[I believe][the defendant believes] that the facts stated in this defence are true.'

3. The Counterclaim: The Basics

a) Making a counterclaim CPR 15.7

Part 20 applies to a defendant who wishes to make a counterclaim.

b) CPR 15 PD 3.1 – Form of the Defence and Counterclaim.

Where a defendant to a claim serves a counterclaim under Part 20, the defence and counterclaim should normally form one document with the counterclaim following on from the defence.

3.2

Where a claimant serves a reply and a defence to counterclaim, the reply and defence to counterclaim should normally form one document with the defence to counterclaim following on from the reply.

3.2A

Rule 15.8(a) provides that a claimant must file any reply with his allocation questionnaire. Where the date by which he must file his allocation questionnaire is later than the date by which he must file his defence to counterclaim (because the time for filing the allocation questionnaire under rule 26.3(6) is more than 14 days after the date on which it is deemed to be served), the court will normally order that the defence to counterclaim must be filed by the same date as the reply.

Where the court does not make such an order the reply and defence to counterclaim may form separate documents.

4. Information to include within defence pleadings.

Content of defence CPR 16.5

(1) In his defence, the defendant **must state** –

(a) **which of the allegations in the particulars of claim he denies;**

(b) **which allegations he is unable to admit or deny, but which he requires the claimant to prove; and**

(c) **which allegations he admits.**

(2) **Where the defendant denies an allegation –**

(a) **he must state his reasons for doing so; and**

(b) **if he intends to put forward a different version of events from that given by the claimant, he must state his own version.**

(3) **A defendant who –**

(a) **fails to deal with an allegation; but**

(b) **has set out in his defence the nature of his case in relation to the issue to which that allegation is relevant,**

shall be taken to require that allegation to be proved.

(4) **Where the claim includes a money claim, a defendant shall be taken to require that any allegation relating to the amount of money claimed be proved unless he expressly admits the allegation.**

(5) **Subject to paragraphs (3) and (4), a defendant who fails to deal with an allegation shall be taken to admit that allegation.**

(6) **If the defendant disputes the claimant's statement of value under rule 16.3 he must –**

(a) **state why he disputes it; and**

(b) **if he is able, give his own statement of the value of the claim.**

(7) **If the defendant is defending in a representative capacity, he must state what that capacity is.**

MATTERS WHICH MUST BE INCLUDED IN THE DEFENCE

Personal injury claims

CPR 16 PD 12.1

Where the claim is for personal injuries and the claimant has attached a medical report in respect of his alleged injuries, the defendant should:

(1) state in his defence whether he –

(a) agrees,

(b) disputes, or

(c) neither agrees nor disputes but has no knowledge of,

the matters contained in the medical report,

(2) where he disputes any part of the medical report, give in his defence his reasons for doing so, and

(3) where he has obtained his own medical report on which he intends to rely, attach it to his defence.#

Other matters

CPR 16 PD 13.1

The defendant must give details of the expiry of any relevant limitation period relied on.

5. Counter Schedule of Loss

The Counter Schedule of Loss must be included if there is a claim for personal injury or the Defendant may be taken to admit the Loss at Trial.

CPR 16 PD 12.2

Where the claim is for personal injuries and the claimant has included a schedule of past and future expenses and losses, the defendant should include in or attach to his defence a counter-schedule stating:

(1) which of those items he –

(a) agrees,

(b) disputes, or

(c) neither agrees nor disputes but has no knowledge of, and

(2) where any items are disputed, supplying alternative figures where appropriate.

6. Information to include in Counterclaim Pleadings – Counterclaim against the Claimant.

a) Defendant's counterclaim against the claimant CPR 20.4

(1) A defendant may make a counterclaim against a claimant by filing particulars of the counterclaim.

(2) A defendant may make a counterclaim against a claimant –

(a) without the court's permission if he files it with his defence; or

(b) at any other time with the court's permission.

(Part 15 makes provision for a defence to a claim and applies to a defence to a counterclaim by virtue of rule 20.3).

Form of counterclaim

6.1

Where a defendant to a claim serves a counterclaim, the defence and counterclaim should normally form one document with the counterclaim following on from the defence.

6.2

Where a claimant serves a reply and a defence to counterclaim, the reply and the defence to counterclaim should normally form one document with the defence to counterclaim following on from the reply.

7. Advice in Relation to Drafting Defence and Counterclaims –

- a) The matters raised below are designed for a straightforward Defence and Counterclaim. Counsel strongly advises that anything other than very straightforward Defence or Counterclaims should be passed to Counsel to draft. Each case is fact specific and the matters below are for examples only and should not be relied upon to settle pleadings.**
- b) Ensure that the name of the parties and Court headings are correct. i.e the Claimant also becomes the Part 20 Defendant and the Defence becomes the Part 20 Claimant. The naming of the parties should be consistent throughout the pleadings.
- c) The title of the document will usually be “Defence and Counterclaim”.
- d) Ensure that each paragraph in the Particulars of Claim is dealt with. If a Defendant fails to deal with an allegation, he may be taken to admit it.
- e) Each paragraph of the Particulars of Claim, should be dealt with in a corresponding Paragraph in the Defence.
- f) Be careful not to admit an allegation in error. The Defence should be checked before it is filed to ensure the factual accuracy of the document.
- g) However any allegations that can be admitted should be conceded to narrow the issues, in accordance with the Defendant’s instructions. This may narrow the issues i.e

“It is admitted that a collision occurred between vehicle registration number P139 ABV and vehicle registration number SN53 THZ”.

- h) If an allegation is denied CPR 16 requires the Defendant to put forward any alternative version of events. This should be in as much detail as possible and in accordance with the Defendant’s instructions i.e:

“As to paragraph 2, Defendant / Part 20 Claimant denies the said collision was caused by the negligence alleged or at all and each and every allegation of negligence is denied. The Defendant’s driver, Mr [] will say that the accident occurred in the following manner:-“

- e) If the Defendant is unable to admit or deny an allegation, the Claimant should be put to strict proof i.e.:

“It is neither admitted nor denied that the Claimant/ Part 20 Defendant has a right of action under the 2002 Regulation. The Claimant/ Part 20 Defendant is required to prove that all preconditions, pursuant to any right of action, pursuant to the 2002 Regulations, have been satisfied”.

- f) In respect of the counterclaim, there must include a section of the allegations of negligence against the Claimant. These should be specific to the facts of the case. i.e:-

“The Claimant/ Part 20 Defendant was negligent in that he:-

- a) Drove into the collision with the Defendant/ Part 20 Claimant’s correctly proceeding vehicle”.
- g) The Defence should state the position in relation to causation, it is admitted, is causation denied, why?, is the Claimant put to strict proof? i.e:-

“It is denied that the Claimant/ Part 20 Defendant has suffered any loss or damage, due to the negligence of the Defendant/ Part 20 Claimant. Causation is denied”

- h) The Defence should normally include a separate Counter Schedule of Loss (see CPR 16 above) i.e:

“The Defendant/ Part 20 Claimant rely upon the attached counter schedule of loss.

The Claimant/ Part 20 Defendant is put to strict proof in relation to each and every loss that those losses were necessary and reasonably incurred”

- i) The Defence should deal with issues of whether the Claimant’s medical report is admitted, denied, or if no admissions are made. i.e.

“The Defendant / Part 20 Claimant is unable to admit or deny the medical report of [Dr] for want of knowledge. The Claimant is put to strict proof that any injury was sustained as a result of the accident”.

- j) The Defence should include a Paragraph in relation to interest i.e:-

“ No admissions are made as to the Claimant/ Part 20 Defendant’s entitlement to interest. The Defendant/ Part 20 Claimant contends that should only as a matter of principle be granted to compensate a Claimant/ Part 20 Defendant who has been out of money while awaiting payment of damages”.

- k) The Counterclaim must be fully pleaded, and usually comes after the Defence:- i.e

“The Defendant/ Part 20 Claimant repeats paragraph [] hereof.

By reason of the negligence of the Claimant, the Defendant/ Part 20’s Claimant’s vehicle was damaged and the Defendant/ Part 20 Claimant suffered injury, loss and damage”

- l) The Counterclaim must plead any claim for special damages, and will usually be accompanied by a separate Schedule of Special Damages i.e:-

**“PARTICULARS OF SPECIAL DAMAGE OF THE DEFENDANT/
PART 20 CLAIMANT”**

The Defendant/ Part 20 Claimant rely upon the attached schedule of loss and documents served with the schedule”

- m) The Counterclaim must also plead any claim for personal injury i.e:-

PARTICULARS OF INJURY OF THE DEFENDANT/ PART 20 CLAIMANT

“As a result of the accident, the Defendant/ Part 20 Claimant sustained injuries, as set out in the annexed medical evidence. The Defendant/ Part 20 Claimant relies upon the medical report of Dr [] dated [] and annexed hereto”.

- n) The Counterclaim must include any claim for interest: i.e:-

“Further, the Defendant/ Part 20 Claimant claims interest on Special Damages pursuant to Section 69 of the County Courts Act 1984 at such rate and for such period as the Court deems just”

- o) The Counterclaim must include the prayer i.e:-

“AND THE DEFENDANT/ PART 20 CLAIMANT COUNTERCLAIMS: -

1. Damages limited to £[]
2. Interest thereon pursuant to statute.
3. Costs”

- p) The Counterclaim must include a statement of truth i.e :-

I believe the facts stated in this defence and part 20 counter claim are true. [I am duly authorised to sign on behalf of the Defendant/ Part 20 Claimant]

Signed
Print.....
Dated
Position.....

It is usually advisable, wherever possible, to have the Defendant/ Part 20 Claimant, sign the Defence and counterclaim to ensure its accuracy.

8. The Reply to Defence

- a) It is not mandatory to file a Reply to a Defence but it is advisable to do so where:
- b) Fraud is alleged or credibility concerns are raised.
- c) Causation is raised i.e low velocity impact claims.
- d) There are complex issues in relation to quantum such as enforceability arguments in relation to a claim for credit hire or storage.
- e) There are complex arguments surrounding breach of duty.
- f) The CPR does not set out mandatory matters into the Reply to Defence, but allegation should be dealt with in terms of the allegations that are admitted, the ones that are denied, and the ones that can neither be admitted nor denied see CPR 16.

Reply to defence see CPR 15.8

If a claimant files a reply to the defence, he must –

- a) file his reply when he files his allocation questionnaire; and
- (b) serve his reply on the other parties at the same time as he files it.

Reply to defence CPR 16.7

(1) A claimant who does not file a reply to the defence **shall not** be taken to admit the matters raised in the defence.

(2) A claimant who –

- (a) files a reply to a defence; but
- (b) fails to deal with a matter raised in the defence, shall be taken to require that matter to be proved.

9. Specific wording required from the Claimant's insurers to confirm we have indemnity in respect of the Claimant's costs and disbursements and those of the defendants.

- a) As far as Counsel is aware there is no mandatory wording utilised may vary from insurer to insurer, depending upon the terms of the policy. Some suggested wording however in the form of a letter to the Claimant's insurer may be:-

“ We enclose a copy of the Defence and note you are our client's insurers. Our client has a counterclaim. Please confirm in writing within the next 7 days:-

- a) You will fully indemnify our client in respect of the Counterclaim, under the policy.
- b) You will fully indemnify our client in relation to the damages sought in relation to the Counterclaim.
- c) You will fully indemnify our client in relation to the Claimants Solicitor's costs and disbursements
- d) You will fully indemnify our client's reasonable costs and disbursements of defending the Counterclaim.
- e) You will fully indemnify the claimant's reasonable costs and disbursements of pursuing the claim.

If you can confirm we have authority for a-e, please confirm by return:-

- a) Whether we have delegated authority in respect of the above matters, or whether we are required to return to you for specific instructions to
 - i) make or accept of settlement in relation to liability, causation of quantum in respect of the claim or counterclaim
 - ii) incur disbursements.
 - iii) sign any pleadings in relation to the defence and counterclaim.
- b) Please confirm the prospects of success required under the policy to pursue the Trial in relation to liability, causation and quantum.
- c) Please forward details of any outlay to include in respect of the counterclaim.

We confirm our client requests that you to indemnify him under the policy in relation to the counterclaim, the claim and the costs of the claim and counterclaim”.

10. Where panel solicitors are instructed what is the best way for the Claimant's Solicitor to include the Part 20 counterclaim, if panel firm will not take over conduct and preserve the Defendant's costs

- a) If the Claimant's insurer wishes to instruct a panel Solicitor to defend the Counterclaim, it depends upon who the Claimant has sued.
- b) If the Claimant has sued both the Defendant's driver (your client) and the Defendant's insurer, the Defendant can enter a Part 20 counterclaim on behalf

of the driver (your client) and the other panel firm, can enter a Defence on behalf of the Defendant's insurer.

- c) The difficulty arises where the Claimant only sues the driver (your client) and the panel firm refuse to take over conduct of the counterclaim. Clearly only one firm can act on behalf of the driver. To protect the position, the counterclaim should be entered on behalf of the Defendant/ Part 20 Claimant (your client), and if the firm wish to represent the Claimant's insurer, they will be required to make an application to join as a second Defendant/ Part 20 Claimant. The Defendant (your client) cannot enter a Defence/ Part 20 counterclaim on behalf of the Defendant's insurer (usually for an outlay) unless it has instructions to do so. The Defendant's insurer should be invited to send you the details of the outlay to include in the counterclaim, or if they refuse, advise the Defendant's insurer they will need to make an application to join to do this themselves.
- d) Care should be taken with the Defendant's insurer given that the Defendant will often have a duty to co-operate with his insurer to ensure indemnity under the policy i.e investigations into liability, causation or quantum by his insurer. This may involve sharing information with the Defendant's panel Solicitor with the Defendant's instructions. However, this should not restrict his right to choose his own Solicitor.

11. Claims Against Third Parties

- a) Occasionally claims will need to be made against a Third Party, for example where your client says another vehicle caused the accident. Generally this is known as a contribution or indemnity.
- b) Your client may need to make a claim for a contribution or indemnity, from their own insurer if there is a refusal to indemnify.
- c) These claims are complex and it is advisable that Counsel is asked to settle the pleadings for these.
- d) The full procedural steps for a claim against a Third Party (usually another vehicle) or contribution/ indemnity are set out in CPR 20. Not recited here.

How can Counsel assist?

- My practice specialises in Defendant and Claimant Road Traffic Fraud, Credit Hire and RTA Cases, portal and litigated.
- Counsel can assist with advice, pleadings and advocacy in relation to all types of alleged RTA fraud, liability disputes, indemnity issues and credit hire.
- To instruct Counsel please telephone 0845 083 3000 or go to www.clerksroom.com or email andrewmckie@btinternet.com.

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