



FOIL UPDATE

March 2009

Admissions - Andrew Parker, Head of Strategic Litigation at Beachcroft LLP, considers the imminent amendment to Rule 14.1A

As you know Rule 14.1A was introduced in April 2007 following a Court of Appeal decision (*Sowerby v Charlton*) which caused widespread confusion over the status of admissions made by parties before proceedings are issued. The rule in its original form provides:

(1) A person may, by giving notice in writing, admit the truth of the whole or any part of another party's case before commencement of proceedings (a 'pre-action admission').

(2) Paragraphs (3) to (5) of this rule apply to a pre-action admission made in the types of proceedings listed at paragraph 1.1(2) of the Practice Direction to this Part if one of the following conditions is met—

(a) it is made after the party making it has received a letter of claim in accordance with the relevant pre-action protocol; or

(b) it is made before such letter of claim has been received, but it is stated to be made under Part 14."

This rule is then backed up by provisions that are designed to make pre-issue admissions binding on the parties save for certain limited circumstances. This has the benefit for the receiving party (usually claimant) that they can rely on the admission and not worry about that aspect. Equally the party making the admission can rely on that fact to reduce costs related to that issue. The rule is most frequently encountered in admissions of liability, but you can see its application is broader. It applies to claims handled under the PI protocol, the Occupational Disease protocol and the Clinical Disputes protocol.

In Autumn 2008 the MOJ pressed the Rule Committee to approve changes to the general pre-action protocol and to the practice direction about protocols. This followed various rounds of consultation on the topic. The changes covered various points but included a change of the phrase "**letter of claim**" to "**letter before claim**" in the relevant practice direction. The MOJ argued that the new phrase was clearer to litigants in person and was technically more correct, as "claim" is understood by people to mean court proceedings. I argued against this in the Rule Committee, but the majority favoured the MOJ position.

What I hadn't spotted at the meeting was that there was a consequential change to rule 14.1A, to move from "letter of claim" to "letter before claim" as well. That has potentially more serious consequences, in that the rule only applies to protocols which use the phrase "letter of claim" and in the context of the PI protocol in particular, "letter before claim" could easily be confused with the concept of an early notification letter.

There is no intention on the part of the MOJ or the Rule Committee to change behaviour here and no practitioners on either side have called for any change. I am not aware of any problems in the operation of the rule in its original form since its introduction 2 years ago.

I did raise the point with the MOJ as soon as I spotted it, but by then the rule changes had been formally signed off by the majority of the Committee and they did not feel they were creating any real problem in practice. They also pointed out the Civil Justice Council is tasked with overhauling all the protocols, so that in time the language of the PI and OD protocols may be changed anyway, so there is no prospect that the change will be reversed. (There is no timescale set for this work and I am not aware that any approaches have been made to APIL or to insurers, who would need to be involved in particular.)

I felt that the change, coming into force as part of the 49th CPR Update on 6 April 2009, was likely to cause confusion where none is needed and that this was an area where APIL, FOIL and the ABI could agree on behalf of their members that the new rule should be applied in the same way as the old one. As indicated above, both sides have something to gain from admissions being binding. All that is really needed is an agreement that for the purposes of these protocols, the phrase "letter before claim" in rule 14.1A is to be interpreted as a reference to the "letter of claim" sent in accordance with those protocols.

The point may seem a small one but I am concerned that it may have some impact in practice. The attached draft Memorandum of Understanding once it is agreed between the interested parties should avoid confusion, at least until the overhaul of the protocols is undertaken.

If you have any comment on the above issue please contact Andrew Parker on 020 7894 6232 or at aparker@beachcroft.co.uk

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DRAFT

Memorandum of understanding

Between:

Association of British Insurers (ABI)
Association of Personal Injury Lawyers (APIL)
[Clinical Disputes Forum] (CDF) – *to be agreed*
Forum of Insurance Lawyers (FOIL)
[Motor Accident Solicitors Society] (MASS) - *to be agreed*
[National Health Services Litigation Authority] (NHSLA) - *to be agreed*

Dated 24 March 2009

Explanation

Civil Procedure Rule (CPR)14.1A was introduced in April 2007 following the Court of Appeal decision in *Sowerby v Charlton* [2005] EWCA Civ 1610, which had caused widespread confusion over the status of pre-issue admissions.

The rule is backed up by provisions which are designed to make pre-issue admissions binding on the parties save for certain limited circumstances. The rule applies to claims handled under the Personal Injury Pre-action Protocol, the Disease and Illness Pre-Action Protocol and the Clinical Disputes Pre-Action Protocol (the protocols).

The 49th Update of the CPR was issued by the MoJ on 14 January 2009 and comes into force on 6 April 2009. It provides that CPR 14.1.A (pre-action admissions) is amended to refer to pre-action admissions made after the ***letter before claim***, rather than the ***letter of claim***. However, the existing personal injury, disease and illness, and clinical negligence pre-action protocols refer to the requirement to make any pre-action admissions in the reply to the ***letter of claim***.

This has unexpected consequences, in that the rule only applies to protocols which use the phrase ***letter of claim*** and in the context of the personal injury pre-action protocol in particular, ***letter before claim*** could easily be confused with the concept of an early notification letter.

Terms of agreement

The parties to this memorandum agree that there was no intention on the part of the Rules Committee or the Ministry of Justice to create this unexpected change in behaviour and all parties agree that pre-issue admissions should continue to be binding. For this reason, the parties to this memorandum AGREE:

- **that for the purposes of the personal injury, occupational disease and clinical negligence pre-action protocols, the phrase *letter before claim* in CPR 14.1A is to be interpreted as a reference to the *letter of claim* sent in accordance with the protocols referred to in this memorandum.**

Signed.....