

PRE-ACTION PROTOCOL FOR MEDIA AND COMMUNICATIONS CLAIMS

1 Introduction

1.1

This Pre-Action Protocol was updated after a consultation following the formation of the Media and Communications List in 2017. It now applies to cases within the scope of CPR rule 53.1: all cases involving claims in defamation, misuse of private information, data protection law or harassment by publication, and claims in breach of confidence and malicious falsehood which arise from publication or threatened publication by the print or broadcast media, online, on social media, or in speech.

1.2

This Protocol is intended to encourage exchange of information between parties at an early stage and to provide a clear framework within which parties to a media and communications claim, acting in good faith, can explore the early and appropriate resolution of that claim.

1.3

The courts will treat the standards set out in this Protocol as the normal reasonable approach for parties to a media and communications claim. Therefore, the courts will expect parties to have complied with this Protocol in good time before proceedings are issued. Should a claim proceed to litigation, the extent to which this Protocol has been followed by the parties will assist the court in dealing with liability for costs and making other orders.

1.4

There are important features which distinguish defamation claims and other media and communications cases from other areas of civil litigation, and these must be borne in mind when both applying, and reviewing the application of, the Pre-Action Protocol. In particular, time is frequently 'of the essence' in defamation and other publication claims; the limitation period is (uniquely) only 1 year in defamation and malicious falsehood cases, and often, a Claimant will be seeking an immediate correction and/or apology as part of the process of restoring his/her reputation.

Litigants in Person

If a party to the claim does not have a legal representative they should still, in so far as reasonably possible, fully comply with this Protocol.

If a party to a claim becomes aware that another party is a litigant in person, they should send a copy of this Protocol to the litigant in person at the earliest opportunity.

2 Aims of the Protocol

2.1

The aims of this Protocol are to enable the parties to prospective claims to:

- (a) understand and properly identify the issues in dispute and to share information and relevant documents;
- (b) make informed decisions as to whether and how to proceed;
- (c) try to settle the dispute without proceedings or reduce the issues in dispute;
- (d) avoid unnecessary expense and control the costs of resolving the dispute; and

- (e) support the efficient management of proceedings where court proceedings cannot be avoided.

Proportionality

2.2

In formulating both the Letter of Claim and Response and in taking any subsequent steps, the parties should act reasonably to keep costs proportionate to the nature and gravity of the case and the stage the complaint has reached.

3. Pre-action protocols for Media and Communications List causes of action

3.1 Letter of Claim

The Claimant should notify the Defendant of his/her claim in writing at the earliest reasonable opportunity.

In respect of all causes of action falling within the Media and Communications List, the Claimant should include the following information:

- name of Claimant;
- the nature of and basis for the entitlement to the remedies sought by the Claimant;
- any facts or matters relevant to England and Wales being the most appropriate forum for the dispute; and
- details of any funding arrangement in place.

3.2 Letter of Claim (Defamation, Slander and Malicious Falsehood)

The Letter of Claim should additionally include the following information -

- sufficient details to identify the specific publication which contained the statement complained of;
- the statement complained of and, if known, the date of publication; where possible, a copy or transcript of the statement complained of should be enclosed and, in the case of slander, where and in what circumstances as far as known the statement complained of was spoken;
- the imputation the Claimant contends was conveyed by the statement complained of;
- factual inaccuracies or unsupportable comment within the statement complained of; the Claimant should give a sufficient explanation to enable the Defendant to appreciate why the statement is inaccurate or unsupportable;
- for defamation claims, how or why the Claimant says that the statement complained of has caused or is likely to cause serious harm for the purposes of section 1 Defamation Act including, when the Claimant is a body that trades for profit, such details as are available of the nature and value of the serious financial loss which the Claimant says has been caused or is likely to be caused by publication of the statement complained of;
- for slander or malicious falsehood claims, how or why the Claimant says that publication of the statement complained of has caused, or is likely to cause, special damage or pecuniary loss, or why publication of the statement is actionable without proof of actual loss; and,
- in malicious falsehood claims an outline of the Claimant's case with regard to malice.
- where relevant, the Letter of Claim should also include
 - any facts or matters which make the Claimant identifiable from the statement complained of; and,

- details of any special facts relevant to the interpretation of the statement complained of and/or any particular damage caused by the statement complained of.

3.3 Letter of Claim (Privacy, Breach of Confidence)

The Letter of Claim should additionally include the following information-

- the information or categories of information which is claimed to constitute confidential information or in respect of which the Claimant is said to have a reasonable expectation of privacy;
- sufficient details to identify the publication or proposed publication containing the relevant information;
- details of the circumstances giving rise to confidentiality or a reasonable expectation of privacy (in breach of confidence or misuse of private information claims respectively);
- why the information is claimed to constitute information in respect of which the Claimant has a reasonable expectation of privacy or confidential information of a nature that should not be published or continued to be published, including details of any damage or distress suffered or anticipated, where an interim non-disclosure order or final non-disclosure order to restrain publication is sought; and,
- in claims for misuse of private information, why it is claimed that the Claimant's right to private and family life outweighs the right to freedom of expression; in respect of confidential information, in so far as known, the extent to which the information is already in the public domain; the nature and any available details of any particular damage caused or likely to be caused by the publication, proposed publication or processing complained of.
- When, at the time of sending the letter of claim, the Claimant intends to make an application for dispensation from the requirements of CPR PD16 (Statements of Case) with a view to bringing his/her claim anonymously, this should be indicated in the letter of claim, which should also give an indication of the basis upon which any application would be made. Any response from the Defendant should be provided to the Court upon an application.

3.4 Letter of Claim (Data Protection)

The Letter of Claim should additionally include the following information -

- any further information necessary to identify the data subject;
- the data controller to which the claim is addressed;
- the information or categories of information which is claimed to constitute personal data including, where necessary, the information which is said to constitute sensitive personal data or to fall within a special category of personal data;
- sufficient details to identify the relevant processing;
- the identification of the duty or duties which are said to have been breached and details of the manner in which they are said to have been breached, including any positive case on behalf of the Claimant;
- why the personal data ought not to be processed/further processed, if applicable;
- the nature and any available details as to any particular damage caused or likely to be caused by the processing/breach of duty complained of; and
- Where a representative data protection claim is intended to be brought on behalf of data subjects, the letter of claim should also: set out the nature of the entity which intends to bring the claim and explain how it fulfils the relevant suitability criteria - see Article 80 of the General Data Protection regulation (GDPR); include details of the data subjects on whose behalf the claim would be brought; and, confirmation that they have mandated the representative body to represent them and receive compensation, where applicable.

3.5 Letter of Claim (Harassment where the course of conduct includes publication)

The Letter of Claim should include the following -

- sufficient details about the course of conduct which is claimed to constitute harassment, including sufficient details to identify the publication(s) or proposed publication(s) forming part of the course of conduct;
- how or why the Claimant says that the course of conduct amounts to harassment, including, if relevant how or why it has caused, or is likely to cause, alarm or distress; and
- where relevant, how or why and in what amount the Claimant says that the course of conduct has caused financial loss.

3.6 Defendant's Response to Letter of Claim

The Defendant should provide a full response to the Letter of Claim, as soon as reasonably . If the Defendant believes that he/she will be unable to respond within 14 days (or such shorter time limit as specified in the Letter of Claim), then he/she should specify the date by which he/she intends to respond.

3.7

The Response should include the following -

- whether or to what extent the Claimant's claim is accepted, whether more information is required or whether it is rejected;
- if the claim is accepted in whole or in part, the Defendant should indicate which remedies it is willing to offer;
- if more information is required, then the Defendant should specify precisely what information is needed to enable the claim to be dealt with and why;
- if the claim is rejected, then the Defendant should explain the reasons why it is rejected, including a sufficient indication of any statutory exemptions or facts on which the Defendant is likely to rely in support of any substantive defence;
- in a defamation or malicious falsehood claim, the defamatory or false imputation(s) the Defendant contends was conveyed by the statement complained of, if any; and
- where the Claimant to a proposed action has indicated his/her intention to make an application to bring the claim anonymously, the Defendant should indicate whether the Defendant accepts such an order would be appropriate and give an indication of the basis for the Defendant's position.

3.9 Settlement and Alternative Dispute Resolution

Court proceedings should be a last resort. The parties should consider whether some form of alternative dispute resolution (ADR) procedure might enable them to settle their dispute without commencing court proceedings, and if so, endeavour to agree which form to adopt.

Although ADR is not compulsory, the court will expect the parties to have considered ADR. A party's refusal to engage with ADR (including its failure to respond to an invitation to participate in ADR) might be considered unreasonable by the court and could lead to the court ordering that party to pay additional costs.

3.10

Some of the options for resolving disputes without commencing proceedings are -

- (a) without prejudice discussions and negotiations between the parties;
- (b) mediation - a form of facilitated negotiation assisted by an independent neutral third party;

- (c) early neutral evaluation (ENE) - a third party giving an informed opinion on the dispute (for example, a lawyer experienced in the field of defamation or an individual experienced in the subject matter of the claim); and
- (d) reference to a press regulator established to deal with complaints from members of the public about the editorial content of newspapers and magazines or an arbitration scheme operated by such a regulator.

3.11

CPR Part 36 (Offers to Settle) permits claimants and defendants to make offers to settle before and after proceedings have been issued. The parties should consider if it is appropriate to make a Part 36 Offer before proceedings are issued. If such an offer is made, the party making the offer must supply sufficient evidence and/or information to enable the offer to be properly considered.

The defendant may make an offer to settle a defamation action through the offers to amend procedure under sections 2 – 4 of the Defamation Act 1996. This procedure requires the defendant to make an offer to publish an apology or a redaction statement.

The defendant may also be required to pay damages and costs to the claimant.

Stocktake

3.12

Where the procedure set out in this Protocol has not resolved the dispute between the parties, they should undertake a further review of their respective positions. The parties should consider the state of the papers and the evidence in order to see if proceedings can be avoided and, at the least, narrow the issues between them which can assist efficient case management.

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3.13 Further reference

The parties may find reference to the following of particular assistance:

- CPR Part 53 and Practice Direction: Defamation Claims;
- CPR Part 25: Interim Remedies and Security for Costs;
- Master of the Rolls' Practice Guidance: Interim Non-Disclosure Orders, August 2011 [2012] 1 WLR 1003, SEN CTS (White Book, Volume 1, B13-001 onwards);
- CPR PD48 paragraphs 3.1 and 3.2: Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 Relating to Civil Litigation Funding and Costs: Transitional Provision and Exceptions – Insolvency-related proceedings and publication and privacy proceedings; and
- 2013 CPR rule 44.15 and PD44.paragraphs 19.1 -19.6: Providing information about funding arrangements (White Book, Volume 1, 44x.15, 44xPD.3); 2013 Practice Direction – Pre-Action Conduct, paragraph 9.3: Information about funding arrangements (2013 White Book Volume 1 C1-008); and, 2013 CPR rule 44.3B(1)(c): Limits on recovery under funding arrangements (White Book Volume 1, 44x.3B).