

# The Professional Negligence Pre-Action Protocol

Prior to commencing Court proceedings in any professional negligence claims, parties are obliged to consider whether it is appropriate for them to follow the Professional Negligence Pre-Action Protocol (PNPAP). If a party does not follow the PNPAP or fails to provide a good reason for not following it, the Court can impose costs sanctions for their failure to comply.

If limitation is an issue, the parties may have a legitimate reason for not complying with the PNPAP. In these circumstances, parties should consider whether it would be appropriate to agree a standstill agreement, which essentially freezes the limitation period, in order to allow the parties to then follow the PNPAP. This may be a more cost-effective approach than issuing a claim and then agreeing a stay of proceedings.

## WHAT IS THE PNPAP?

The Protocol applies to negligence claims against professionals. Although the term 'professional' is not defined within the PNPAP, the Protocol applies to all professionals, except the following:

- Construction professionals, such as architects, engineers and quantity surveyors
- Healthcare professionals
- Cases concerning defamation

In those cases, a different pre-action protocol should be followed.

The aim of the PNPAP (along with other pre-action protocols) is to encourage the parties to exchange information with each other, so they can better understand each other's respective positions, with the aim of trying to settle the claim (or reduce any issues in dispute). This should also mean that costs are reduced and hopefully avoids the parties attending Court unnecessarily.

The PNPAP sets out a number of procedural steps that the parties should follow before formal Court proceedings are issued:

## PRELIMINARY NOTICE OF CLAIM

As soon as a Claimant decides that they wish to pursue a claim against the professional, a notice

should be sent to the professional to inform them of the claim. The notice should contain details of the identity of the parties, a brief outline of the Claimant's grievance and an indication of the value of the claim. The notice should also request that the professional notify their professional indemnity insurers about the claim.

This last requirement is important, as most professionals will hold professional indemnity insurance to cover them against such claims and often these policies are on a 'claims made' basis, so insurers will only cover the claim if they have been notified of the same by their insurer.

The professional (or their solicitor) should acknowledge receipt of the preliminary notice within 21 days of receipt of the same.

## LETTER OF CLAIM

Following the Preliminary Notice, the Claimant (or their solicitors) should then send the Defendant (or in most cases, the Defendant's insurers or their solicitor) a detailed Letter of Claim.

The Letter of Claim should provide a more detailed chronological summary of events upon which the Claimant's claim is based, and should also provide copies of key documents upon which the Claimant is seeking to rely. If the Claimant requires copies of any documents or information, they should request the same in the Letter of Claim.

The Letter should also set out in more detail the allegations against the professional and a summary of the law as to how the actions of the professional have led to the Claimant suffering a loss.

The Letter must also set out an estimate of the Claimant's losses and how these have been calculated, and again provide copies of any documents to back up those losses. If losses cannot

be quantified, the Claimant should explain when such details will be provided.

The Claimant should also confirm whether they have instructed an expert and if so, provide basic details, such as the expert's name, field of expertise and details of when they were appointed.

If the Letter is being sent directly to the Defendant, the Claimant should request that the Letter of Claim is forwarded to the Defendant's insurers.

Finally, the letter should state whether the Claimant wishes to refer the dispute to adjudication and provide details of suggested adjudicators. If not, the Claimant should provide reasons for not adjudicating the dispute at this time.

If the Claimant is pursuing other professionals as part of the same claim, then copies of each Letter of Claim should be sent to each of the Defendants.

### INVESTIGATIONS

The Defendant should acknowledge receipt of the Letter of Claim within 21 days of receipt.

Following this, the Defendant then has a period of three months to investigate the matters set out in the Letter of Claim and reply to the Claimant. If further time is going to be needed to carry out investigations, the parties should seek an extension to this three-month timeframe.

If the Defendant believes that the Letter of Claim is not compliant, or they require further information or documentation from the Claimant, they should write to the Claimant as soon as reasonably practical to highlight or request the same.

### LETTER OF RESPONSE AND/OR LETTER OF SETTLEMENT

The reply from the Defendant can either be in the form of a Letter of Response, a Letter of Settlement, or both.

The Letter of Response should be an open letter and should answer each of the Claimant's allegations and confirm which parts of the Claimant's claim are either admitted or denied. The Defendant should provide clear explanations as to why any parts of the claim are denied.

If the Defendant does not agree with the Claimant's estimate of loss, they should provide details of what they believe the losses are, or confirmation as to when they will be able to quantify such losses.

If the Defendant wishes to rely on any key documents that have not already been exchanged, they should provide them with the Letter of Response.

If the Defendant wishes to make an offer to settle the

claim, they may also wish to send a Letter of Settlement at the same time, or instead of the Letter of Response.

The Letter of Settlement can be an open letter, without prejudice letter, without prejudice save as to costs, or a Part 36 offer. It should set out the details of any offer from the Defendant.

### NEXT STEPS

If a Letter of Settlement is sent by the Defendant, the PNPAP provides that proceedings should not be commenced until six months after the Letter of Claim has been acknowledged (in essence a further three months from the Letter of Settlement). After six months, the parties are free to agree to extend this period for negotiations to continue. If such an extension cannot be agreed, then the Claimant will be able to commence proceedings.

If no Letter of Settlement is sent and the Letter of Response contains a complete denial of the claim, then the Claimant is free to commence proceedings. However, in practice, it is usual for parties to enter into a period of correspondence to see if issues can be narrowed and a settlement negotiated. If this is not possible however, the Claimant is free to commence proceedings if they wish to do so.

### ALTERNATIVE DISPUTE RESOLUTION

The PNPAP provides an obligation on the parties to consider a form of alternative dispute resolution (ADR) namely, mediation, arbitration, early neutral evaluation, adjudication or an Ombudsman scheme.

If proceedings are issued, the parties may need to show that they considered a form of ADR, and why it was not appropriate. If found to have unreasonably refused to participate in ADR, there could be costs sanctions against the party who refused to take part in ADR.

### ISSUING PROCEEDINGS

If no resolution can be reached, then it is open to the Claimant to issue formal Court proceedings. These should be seen as a last resort and before undertaking such a step, the parties are encouraged to carry out a 'stocktake' of their position and the relevant papers, and if possible, seek to narrow any issues to see if proceedings can be avoided.

### SUMMARY

Since its introduction, the PNPAP has provided a useful guide to pursuing and defending claims in professional negligence for both Claimants and Defendants (and their respective legal advisers).

Along with other pre-action protocols, the PNPAP provides parties with detailed guidance and highlights the risks to all parties of non-compliance with the protocol. Furthermore, it has no doubt led to many claims being settled without the need to issue proceedings in Court and has therefore saved parties the time and expense of those Court proceedings.

## GET IN TOUCH

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The lawyers have incomparable client service skills. They are very clear and always make sure they understand the picture, even if it is a complicated one.

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