



Informing Progress - Shaping the Future



COVID19 – APIL and FOIL Best Practice For Mutual Co-Operation

APIL and FOIL have set up a working party to discuss various aspects of our members' work, which have been affected during the coronavirus outbreak. We have agreed a set of best practices that we recommend their members consider and adopt where possible.

- **Telephone calls/Email**

Good communication is very important, particularly now that many offices have closed and are unable to access their post on a daily basis. Practitioners should engage with their counterparts by telephone and/or email with a view to resolving disputes effectively and efficiently. Many members' fee earners are able to make and receive telephone calls even while home working. Email signatures should be updated to indicate the correct contact numbers if they have changed due to remote working. Similarly, individual email addresses should be provided.

- **Service by email, including new proceedings**

It is our view that it is in the best interests of your clients and the effective conduct of claims to agree that firms temporarily agree to accept service by email.

It is entirely reasonable to seek express confirmation from your counterpart that this covers service of the claim form where appropriate (remembering that solicitors must have been given as the address for service for this to be effective).

You should consider using a dedicated email address for the receipt of service for documents and proceedings. Make it clear that service to this email address is subject to strict compliance with defined terms which limit your agreement to accept service by email for the purposes of paragraph 4.2 PD 6A CPR.

Where a firm has declined to accept service by email the best course is likely to be to serve in any event, having made application for an order under Part 6.15 (1).

- **Service of ongoing proceedings**

Where proceedings are already live, you may have the details of your counterpart and their direct email address.

- **Medical examinations**

It is inevitable in the current circumstances face-to-face examinations will be difficult to arrange. It will often be in the client's best interests to agree to use some form of video conferencing for experts' 'examinations' of the injured person.

The BMA has issued guidance to medics indicating that the NHS is turning to remote consultations in order to minimise the risk of infection for staff and patients. Its guidance for medics is here: <https://beta.bma.org.uk/advice-and-support/covid-19/practical-guidance/covid-19-remote-consultations-and-homeworking>

Medco has agreed the current ban on the use of remote examinations will be lifted. There are a number of conditions, and other factors, which users will need to consider before making any arrangements with claimants for a remote

examination. Further details are set out in a separate notice here:
<https://www.medco.org.uk/media/1186/remote-examination-guidelines.pdf>

Inevitably some appointments with experts will have to be postponed or rescheduled. Practitioners should try to adopt a consensual approach to the impact this will have on case timetables.

- **Exchange of evidence**

Parties should try to agree to the exchange of witness evidence and expert evidence by email, via a password protected pdf document.

- **Extensions of time**

It is likely that both parties will face challenges complying with existing court directions and timetables. There is case law to support extensions of up to 56 days. See *O`Driscoll v FIVE Bianchi S.p.A* where the court has recently held that the normal 28 day rule under CPR 3.8(4) will be relaxed in appropriate circumstances by granting a 56 day extension by consent. We recommend that practitioners invite parties to take a consensual approach to considering requests for the extensions and respond similarly to requests made by their counterparts.

- **Remote hearings**

HMCTS has issued guidance on the wider use of remote hearings, by telephone or Skype. It is recommended that parties adopt this guidance.

- **Adjournments**

It is also inevitable that some adjournments will be required due to non-availability of clients, witnesses or experts. We recommend that you take a consensual approach should it be necessary to seek an adjournment of either an interlocutory hearing or trial.

- **Interim payments**

Parties ought to adopt a reasonable approach to requests for interim payments. In the current climate, interim payments are likely to be of vital importance, and any unnecessary applications to the court ought to be avoided.

- **BACS payments**

To enable a more efficient and effective transfer of funds for damages and costs firms should use BACS payments wherever possible. Note that in light of the increased information security and financial crime risks associated with BACS payments, please ensure that you *only* make payments by BACS to the account details provided by your COLP, providing appropriate evidence to validate the bank account details provided.

- **Costs budgeting**

It is recommended that where possible parties exchange their costs budgets. Every court will deal with CCMCs differently and if they do proceed they will be held remotely usually by telephone hearing. Depending upon client instructions, the parties should consider whether the budgeting aspect of the CCMC hearing should be adjourned. However, the parties should seek to agree directions generally where possible without the need for a hearing. If the parties are unable to agree directions, the hearing should go ahead as scheduled.

- **Limitation**

where the effects of the Covid-19 outbreak mean that limitation becomes an urgent issue, then best practice is that, subject to any general deferment of deadlines: to

1. Enter a standstill agreement to extend the limitation period.

2. Issue and serve the claim form - either ask the defendant to agree an extension of time for medical evidence or, if they will not so do, seek an order from the court.

- **ABI & Thompsons Solicitors Limitation Protocol**

The ABI and Thompsons Solicitors have already agreed an Extension to the Personal Injury Protocol regarding limitation, which APIL has endorsed. A list of insurers and law firms which have signed-up to the Protocol is available on the ABI website here:

<https://www.abi.org.uk/products-and-issues/choosing-the-right-insurance/motor-insurance/coronavirus-protocol/>

For ease of reference, the wording of the ABI & Thompsons protocol is set out here:

Text of the Protocol agreed between the ABI and Thompsons solicitors

A protocol is agreed and immediately put into effect. This will involve, for a minimum of 4 weeks (until the 20th of April) with a joint review in the week commencing the 13th of April, the following:

1. *An agreement that all limitation dates in all personal injury cases are frozen and claimants undertake to respond constructively to defendant requests for extension of time to serve a Defence;*
2. *An escalation process whereby any issue arising by a party's failure to act in accordance with the agreement in 1. above and which cannot immediately be resolved between the parties is referred to an email and/or telephone 'hotline' specifically established for this situation; and*
3. *A commitment that the email and telephone hotline will be monitored regularly and referred to senior people within the respective organisations who will be able to make a swift decision as to whether the stance being taken should be adjusted in light of prevailing circumstances.*

Scotland specific provisions

- ABI, APIL, FOIL, MASS have agreed a Limitation Protocol for Scotland which will be circulated separately.
- **Service**
Service of Summonses or Initial Writs should be possible by email. Defenders' firms should confirm receipt and that no issue will be taken in relation to any aspect of service.
- **Extensions of time**
Guidance has been provided by the Court of Session, Sheriff Appeal Court and All-Scotland Personal Injury Court in litigated cases. Parties should take a consensual approach in relation to time limits and not seek to take unfair advantage of a party not complying with a procedural requirement. 'Particular regard in this respect should be had to service of an Initial Writ or Summons, and the lodging of a Notice of Intention to Defend or Defences'

APIL and FOIL, 31 March 2020