PRACTICE DIRECTION - 18.1

THE PERSONAL INJURIES LIST

INDEX

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This **PRACTICE DIRECTION** replaces the Practice Directions of 10 April 1996, 24 July 1998 [Practice Direction 18.1] and 23 October 1999 [Practice Direction 18.2] in their entirety, with effect from 1 February 2001.

To assist litigants and practitioners in understanding and complying with the provisions of this Practice Direction, a Guidance Note is issued with and annexed to this Practice Direction.

1. The Personal Injuries List

1.1 With effect from 15 April 1996, all actions in which a claim is made for damages arising out of death or personal injury, including claims arising out of alleged medical negligence, but excluding all actions within the jurisdiction of the Admiralty Court, should have been commenced in the Personal Injury List. Any such actions commenced before that date shall be assigned to the Personal Injury List and marked with the appropriate Personal Injury Action number e.g. H.C.P.I. 1234 of 2000. Applications to assign shall be made by letter and where consent is given such consent shall be by letter also.

1.2 The Judge in charge of the Personal Injury List shall be known as the Personal Injury Judge. Pursuant to Order 72 Rule 2(3) of the Rules of the High Court, the Personal Injury Judge hereby directs that, unless otherwise stated herein or unless otherwise ordered, Masters may continue to hear interlocutory applications in cases in the Personal Injury List.

1.3 An action claiming damages arising out of death or personal injury in the Admiralty List may be assigned to the Personal Injury List if the Admiralty Judge so directs.

1.4 The Directions contained herein shall also apply, mutatis mutandis, to actions commenced in the District Court.

2. Letter before action

2.1 Prior to the commencement of proceedings, the claimant should send to the proposed defendant(s) two copies of a letter of claim which should follow the format of the specimen letter at Annex A. This format can be amended to suit the particular case. Where the identity of the insurer(s) concerned is known or can be ascertained a copy of the said letter should be sent to it/them in addition. If the claimant's Solicitors are in possession of any medical reports from the Government Hospitals these should be disclosed with the letter of claim.

2.2 In the event of a claimant failing to send such a letter, or failing to send a letter which contains information enabling a defendant's Solicitor or insurer to commence investigations and thereby evaluate the merits of the claim, the claimant and/or his Solicitor may be required to justify the incurring of costs of commencing proceedings and/or of any expenditure incurred which is argued to be premature.

2.3 The said letters should be sent no later than 4 months prior to the commencement of proceedings, and the defendants or insurers should reply constructively thereto within one month. A simple acknowledgement is not a constructive reply. If there is no such reply the claimant will be entitled to commence proceedings forthwith without risk as to costs. If a reply is received within the said time, the defendant and/or the insurer should have a period of three months in which to investigate the claim, by the end of which it shall state whether liability is denied and if so, giving the reasons therefor.

2.4 In the case of a claimant first instructing a Solicitor or in the case of a legally aided claimant first being assigned a Solicitor towards the end of the three year limitation period, so that the end thereof falls within the timescale set out in 2.3, the provisions of 2.3 will not apply and proceedings should be commenced but the claimant will nonetheless be expected to comply with the spirit of 2.1 and further progress in the action should be delayed, save in cases of urgency e.g. advanced age of the claimant, risk of early death, whilst the timescale set out in 2.3 is followed. The Plaintiff must nonetheless comply with the requirements of paragraph 10 herein (the Check List Review).

3. Commencement of Proceedings

3.1 If a Writ is indorsed with a full Statement of Claim, the whole document together with any materials attached thereto are vulnerable to search and public disclosure by virtue of Order 63 rule 4(1)(a). In view of the current practice of Solicitors and Counsel settling the Statements of Claim privileged and confidential material is disclosed from medical reports and such disclosure offends the Personal Privacy (Data) Protection Ordinance.

Where therefore the Plaintiff chooses to file a full Statement of Claim contemporaneously with a Writ, (a) the Writ should be physically separated from the Statement of Claim and any of the documents filed contemporaneously with the Writ; and (b) the Writ should also contain on its reverse the concise statement of the nature of the Plaintiff's claim as if the proceedings were commenced by the issue and filing of the Writ alone. Examples of such concise statements are attached hereto as Annexes B and C.

3.2 The Statement of Claim, whether it is filed contemporaneously with the Writ, or subsequent thereto, shall be given or shall bear the full number and heading of the action. It shall not include in the pleading itself any description of injuries other than those identified by hospital records or medical reports or identified immediately by the Plaintiff or by a medical report if no hospital treatment is received, and shall not include any verbatim recital from any medical report obtained. It must state the date of birth, and age of the Plaintiff or of the deceased in fatal accident claims as at the date of filing.

3.3 A medical report or reports within the meaning of Order 18 Rule 12(1C) including in a fatal accident case a post-mortem report (if one exists) shall be filed at the same time as the Statement of Claim but not attached thereto.

3.4 Full particulars of the heads of damage claimed shall appear in the Statement of Damages including a summary of the Plaintiff's injuries, the treatment received and where practicable, the prognosis. This Statement of Damages shall be filed contemporaneously with the Statement of Claim, and be physically separated from that and from any other document.

3.5 Any failure to observe strictly this direction may result in the Registry staff refusing to accept such documents until they all, at the same time of submission, comply with the above direction, save that the Registry staff will not check the contents of the Statement of Claim or Statement of Damages.

4. Pleadings

4.1 All pleadings subsequent to the Statement of Claim including the Defence and any Request for Particulars of a pleading and Particulars supplied pursuant to any such request, shall be filed at the same time as the service thereof.

4.2 All pleadings settled or drafted by Counsel shall bear Counsel's name in addition to the full name and address for service of the Solicitors acting for the party concerned. Where the firm of Solicitors concerned settles or drafts the pleading, its name and address for service shall appear in full at the end of the pleading and it shall be signed by the firm. All pleadings shall be dated with the date of filing.

4.3 Statements of Claim must state the age and date of birth of the Plaintiff and of any other person on whose behalf the action is brought.

5. Documents to be served with the Statement of Claim

5.1 The following documents must be served with the Statement of Claim or Counterclaim (in the case of a defendant claiming damages arising out of death or personal injury by way of counterclaim) in compliance with Order 18 Rule 12(1A):

i) A medical report (or reports) within the meaning of Order 18 Rule 12(1C), including in an action brought on behalf of the estate of a deceased person, a post-mortem report if one exists. At least one medical report must describe the Plaintiff's condition at a time preferably no earlier than four months prior to service thereof.

ii) A Statement of Damages claimed, giving the following:

"In Personal Injuries Cases" (including Medical Negligence cases)

(a) the Plaintiff's date of birth;

(b) a summary of the Plaintiff's injuries, the treatment received, the permanent disability, if any, suffered by him/her and, where practicable, the prognosis in respect of such disability;

(c) any special damages claimed for losses and expenses already incurred;

(d) an estimate of any future expenses and losses, including loss of earnings and pensions, and, where practicable, the multiplier or the range of multipliers claimed in respect of such future losses and expenses;

(e) where practicable, all material facts relied upon in support of a claim for damages for loss of earning capacity;

(f) where practicable, a statement of the range of damages claimed as general damages for pain,

suffering and loss of amenities (PSLA) and damages for loss of earning capacity;

(g) the amount claimed as damages for loss of society, where applicable.

"In Fatal Accident Cases" (including Medical Negligence cases)

(a) the name and date of birth of each dependant and the status thereof e.g. student at university or nature of employment;

(b) the deceased's date of birth, occupation and income at the date of the accident;

(c) any special damages claimed for losses and expenses already incurred (including loss of dependency);

(d) an estimate of any future expenses and losses, including loss of dependency, and, where practicable, the multiplier or range of multipliers claimed in respect of such future losses and expenses;

(e) an estimate of the claim for loss of accumulation of wealth, including, where practicable, a statement of all material facts relied upon in support of the claim and a statement of how such claim has been calculated, including, where appropriate, the multiplier or range of multipliers used in the calculations; and

(f) the amount claimed as damages for bereavement and/or loss of society.

5.2 In order to avoid unnecessary delay and costs, the Plaintiff(s) should additionally serve together with the Writ and Statement of Claim and documents set out under 5.1 the following documents, if they are available and in so far as this is practicable:

i) A copy of any Statement of Facts and finding of guilt, or otherwise, arising out of any prosecution of any party in respect of the incident in which the Plaintiff was injured or the deceased was killed, together with a sketch plan prepared by and photographs prepared by and taken by and/or on behalf of any investigating or prosecuting authority, and any statements made by any witnesses, including where available a Police Investigation Report or a report by the Occupational Safety Officer.

ii) Where the Plaintiff has returned to work other than with his pre-accident employer, a statement obtained from his employer of the nature of his employment and

earnings received from such employer, if such employer is not a Defendant in the action.

iii) A record of earnings and allowances received by the Plaintiff for the six month period prior to the relevant accident, obtained from his employers, if other than a defendant in the action, together with a copy of the last tax assessment from the Inland Revenue and any document relating to his payments to and benefits from the Mandatory Provident Fund.

iv) Copy of any statements by the Plaintiff and any other person who was an eyewitness to the accident in question as to the circumstances of the accident, upon which the Plaintiff relies in support of his pleaded case to the extent that this has not been fulfilled by (i) above.

v) In all medical negligence cases, a copy of any expert medical report relied upon as to liability and causation.

Failure to comply with this Direction may result in applications for disclosure with consequent orders for costs.

6. Documents to be served with the Defence

6.1 In order to avoid unnecessary delay and costs, the Defendant(s) should serve together with their Defence a copy of the following documents, if they are available and in so far as this is practicable:

i) Form 2 with English Translation and a copy of any other record or entry of the said accident in any statutory document including any Safety Officer's reports.

ii) A statement as to the current whereabouts of the machine or equipment concerned together with any brochure or manual in respect of it.

iii) Records of the service and maintenance of the said machine or equipment for the 12 months prior to the accident in question.

iv) Records of the Plaintiff's/deceased's gross and net earnings and allowances for the 12 months prior to the accident, and if the Plaintiff has returned to the Defendants' employment post accident, for the period following his return to date.

v) The Return to the Inland Revenue in respect of the Plaintiff's/ deceased's earnings for the 2 years prior to the accident.

vi) Records of the current earnings and allowances of two comparable workers or of the person who now occupies the Plaintiff's/deceased's pre-accident position, for a six month period prior to the date of service of the Defence.

vii) Copies of any statements by the Defendants and any other eye witnesses of the accident in question taken in the course of an investigation into the circumstances of the accident and of any witnesses relied upon in their pleaded case as to the system of work adopted or instructions given to the Plaintiff/deceased.

viii) Any photographs taken or obtained by the Defendant, their servants or agents, of the scene of the accident, the vehicles concerned, the equipment or machinery involved and of any other relevant feature.

ix) In all medical negligence cases, a copy of any expert medical report relied on as to liability and causation.

Failure to comply with this Direction may result in applications for disclosure with consequent orders for costs.

6.2 Of the foregoing only (vii) and (viii) apply to Defendants in Road Traffic Accident claims unless in such claims the Defendants rely upon

an allegation of pre-existing defect in the vehicle concerned, in which case (ii) and (iii) also apply.

7. Compliance with Order 25 Rule 8

If the above is applicable, there shall be strict compliance with it to the extent that disclosure of documents provided for under 5.1 and 6.1 of this direction has not fulfilled the requirements of disclosure. In considering whether to make any order for specific discovery or disclosure, the court will have regard to whether there is any compliance with the directions in 5 and 6 hereof and whether the documents and matters sought to be discovered or disclosed are strictly and directly relevant to the issues between the parties.

8. Interlocutory Applications

8.1 The Practice Direction in relation to Interlocutory Summonses which came into effect on 25 April 1995 [Practice Direction 5.4] shall not apply to cases in the Personal Injury List.

8.2 The following provisions shall instead apply.

a) Where the matter is of such urgency and at least one month is likely to elapse between the date of hearing of the application and the date of the Check List Review and the application is likely to last more than one hour, the applicant shall serve and lodge a short skeleton argument (of 1 page maximum) with the complete reference of any authority relied upon no later than 48 hours before the hearing and the respondent to it shall serve and lodge a short skeleton argument in reply (of 1 page maximum) no later than 24 hours before the hearing. The hearing will take place before the Master or Judge designated to conduct the Check List Review. An alternative to the above is an agreed request to expedite the hearing of the Check List Review.

b) When the application is to be made subsequent to the Check List Review but before any Pre-Trial Review and is of urgency and at least one month is likely to elapse between the date of the hearing of the application and the date of the Pre-Trial Review the same provisions as under a) shall apply and the hearing will take place

before the Judge designated to conduct the Pre-Trial Review. An alternative to the above is an agreed request to expedite the hearing of the Pre-Trial Review.

c) Where the application is to be made subsequent to the Pre-Trial Review, the same provisions as under a) shall apply and the hearing will take place before the designated trial Judge or, if not yet designated, the Judge who conducted the Pre-Trial Review.

d) Where the application is to be made subsequent to the Check List Review and there is no provision for a Pre-Trial Review, the party so applying shall ask for a Pre-Trial Review so that the matter may fully be dealt with.

8.3 In all cases, at the conclusion of the hearing the parties will be required to supply a short statement as to the costs of and occasioned by the application so that the Master or Judge may make an order under Order 62 rule 9(4)(b) or rule 9A for assessed costs, payable forthwith.

9. Transfer from the P.I. List

9.1 At any stage of the proceedings after the service of the Statement of Claim and the Statement of Damages, the Personal Injury Judge may release a personal injury case from the Personal Injury List if it appears to him to be a case involving complex issues of fact or law and he may, with the approval of the Chief Judge of the High Court, assign such cases to himself or to a nominated Judge, in which event all future interlocutory applications shall thereafter be made to the Judge so assigned and he may give such Directions as he deems appropriate and apply or vary or dispense with the Directions which follow.

9.2 He may also transfer an action commenced in the High Court to the District Court pursuant to section 43 of the District Court Ordinance, Cap. 336 where he considers that the maximum amount of damages likely to be awarded to the Plaintiff falls within the jurisdiction of the District Court.

10. The Check List Review

10.1 With effect from 1 September 1998, the Plaintiffs' Solicitors shall, at the same time as a Writ is filed at the Registry, lodge a Notice in duplicate in the form annexed hereto as Annex D (The Check List Review Notice). One copy shall be filed at the Registry and one copy sealed shall be returned to the Plaintiffs' Solicitors.

10.2 A date for the Check List Review Hearing shall be given on the date of the filing and issue of the Writ, which shall be not less than 4 months and not more than 5 months from the said date, and shall be indorsed upon the said Notice and the Writ.

10.3 Upon the service of the Writ upon the Defendant, the Plaintiff must also serve the Check List Review Notice bearing the hearing date of the said Check List Review Hearing. A Check List form (Annex E) shall be annexed to the said Notice.

10.4 In medical negligence actions and any Admiralty actions assigned to the P.I. List the hearing of the summons for directions under Order 25 Rule 1 shall be known as the Check List Review Hearing. In any such medical negligence and Admiralty action the Plaintiff's Solicitors shall file and serve a Check List Review Notice within 7 days of assignment.

10.5 In the event of either or any of the parties not being ready for the Check List Review, application may be made by either or any party to the P.I. Judge or P.I. Master to postpone the hearing. The said application shall be inter partes (unless the Writ has not been served) and supported by a detailed letter of explanation from the Solicitor having conduct of the case, explaining in full the reasons for the said application. The said application and letter shall be filed not later than 14 days prior to the said hearing. If the other party or parties oppose the application the grounds for such opposition shall be set out in a letter which is to be filed with the Court no later than 10 days prior to the said hearing. The application shall be determined on paper without a formal hearing unless the Court otherwise directs. The said Check List Review hearing may be adjourned, if considered appropriate but for no more than 2 months. Where the adjournment is necessitated by the Plaintiff's Solicitors not having served the Writ on the

Defendant(s), the Court may make such orders as it thinks fit with regard to the service of the Writ and any adjourned Check List Review hearing shall not be less than 4 months and not more than 5 months from the date of service of the Writ.

10.6 This direction shall not preclude either or any of the parties from applying for an earlier Check List Review date. Such application must be by summons which must set out the reasons for an earlier hearing, and may be made 4 weeks after the pleadings are deemed to be closed. A Consent Summons may be dealt with by the Court without a formal hearing.

10.7 In the event of the Plaintiff's Solicitors failing to serve the Writ and the Check List Review Notice as soon as practicable following the issue of the Writ, so as to give the Defendant(s) the full proper notice of the date of hearing of the Check List Review, the Plaintiff's Solicitors will be required to justify such failure in order to avoid any order for costs wasted by any adjournment of the Check List Review hearing.

10.8 The Plaintiff's Solicitors shall not later than 7 clear days prior to the Check List Review, file at the Registry and serve a Check-List (Annex E) and lodge the following documents whether already served or not:

(a) All witness statements relied upon in support of the Plaintiff's claim including a signed and dated statement by the Plaintiff verifying his claimed loss of wages, as well as all other items of special damage claimed.

(b) In a Road Traffic action any report made and statements taken in respect of any prosecution of a Defendant arising out of the collision in question, and a plan of the locus in quo and any relevant photographs.

(c) In any other action any report made by and statements taken by the Occupational Safety Officer or other government department arising out of any investigation of the incident in question.

(d) Any medical reports other than that or those served with the Statement of Claim and any other expert reports to be relied upon.

(e) A certified copy of any transcript or other record of any Magisterial proceedings or Inquest or Inquiry relating to the incident in question together with any exhibits supplied and list thereof.

(f) A copy of any proposed pleadings, particulars or interrogatories not already filed with the Court.

10.9 The Defendant or his Solicitors shall, not later than 7 clear days prior to the Check List Review, file at the Registry and serve a Check-List (Annex E) and lodge the following documents whether already served or not:

(a) Witness statements in support of the Defendant's claim.

(b) Any statutory record, report or form completed by or on behalf of the Defendants or by any other individual, partnership or corporation and in the Defendants possession or control arising out of the said incident.

(c) Any medical or other expert reports obtained in respect of the Plaintiff's injuries to be relied upon.

10.10 The documents lodged under 10.8 and 10.9 shall be contained in a composite bundle with a paginated index and properly sectioned.

10.11 The said bundles of documents lodged shall be released to the parties lodging the same after the Check List Review, or, in the event of the Check List Review being adjourned, after the adjourned hearing. The Solicitors for the respective parties are required to collect their bundles immediately after the hearing, which must be re-used, but are to leave with the court a copy of the Index or Indices.

10.12 At the Check List Review, the P.I. Judge or P.I. Master may consider applications for any of the following orders or make such

orders of its own motion where it is appropriate under the relevant rules of court:

(a) An order for a split trial under Order 33 Rule 4;

(b) An order for further discovery and inspection;

(c) An order under Order 38;

(d) An order for an interim payment;

(e) The entering of judgment under Order 18 Rule 19 and/or in the exercise of the inherent jurisdiction of the Court.

(f) Any other order as may be deemed appropriate for the just expeditious and economic resolution of the action including orders relating to the service or exchange of witness statements and expert reports not yet disclosed, to the obtaining of any joint medical or other expert reports and to the restriction upon and exclusion of any expert reports.

(g) Adjourn any matter of dispute for later resolution.

(h) Provide for a Pre-Trial Review where necessary. In medical negligence claims a Pre-Trial Review will always be provided for.

10.13 Representation at the said hearing shall be by Solicitor who shall be the Solicitor having prime responsibility for the conduct of the action. When Counsel is instructed unnecessarily for such hearing the Judge or Master may refuse to give a certificate for or disallow the costs of instructing Counsel.

10.14 If at the Check List Review the P.I. Judge or P.I. Master considers that no further order as to the conduct of the action needs to be made and the case is in a sufficient state of readiness for listing, he shall fix a date for expedited trial with or without a Pre-Trial Review.

10.15 The Registry will allocate not less than two days per week as the Check List Review days for the P.I. Judge or P.I. Master.

11. The Pre-Trial Review

11.1 The Personal Injury Practice Master or the Personal Injury Judge may provide for and fix the date for hearing of a Pre-Trial Review at the Check List Review or subsequently.

11.2 The parties by consent may apply for a Pre-Trial Review by letter setting out therein the reasons for such a hearing. Alternatively one of the parties may so apply by letter setting out the reasons giving notice to the other parties who must within 7 days of receiving such notice set out their objections thereto.

11.3 Each party to the action shall file and serve upon any other party a notice in the form annexed hereto as Annex F, not later than 7 days before the Review.

11.4 The Plaintiff must lodge not later than 7 days before the hearing of the Review a bundle or bundles of documents (in ring binders with a hard cover) paginated with the following sections:

1) An index identifying the items, sections and pagination together with a comment as to what reports or documents are agreed.

2) Pleadings and relevant orders (including the order(s) made at the Check List Review) in chronological order and a copy of the Revised Statement of Damages, if such has been necessitated, which must appear at the end of the Pleadings section and which must have been served upon the Defendants not later than 14 days before the Pre-Trial Review.

3) Witness statements as to liability and quantum.

4) Any expert report and documents relevant to liability.

5) Medical reports obtained on behalf of the Plaintiff in chronological order; other expert reports as to quantum

obtained on behalf of the Plaintiff in chronological order.

6) Medical reports obtained on behalf of the Defendant in chronological order; other expert reports as to quantum obtained on behalf of the Defendants in chronological order.

7) Any documents relevant to quantum which are agreed by both parties to be relevant to the Pre-Trial Review in chronological order.

11.5 At the conclusion of the Pre-Trial Review or any adjourned Review, the Plaintiff Solicitors must collect the bundle(s) of documents which must be re-used.

11.6 The Pre-Trial Review shall be attended by the following persons:

a) The Solicitor who has prime responsibility for the conduct of the action and authority from the Plaintiff or Defendant and/or Insurer to settle the action or resolve matters of dispute including medical evidence; or

b) Counsel fully instructed for the purposes of the trial and/or the Pre-Trial Review with like authority.

11.7 Save as is otherwise ordered by the Judge the costs of the Pre-Trial Review shall be costs in the cause. Where Counsel is unnecessarily instructed to appear or does not meet the requirements of 11.6(b) the Judge may disallow the costs of instructing Counsel.

11.8 At the hearing all parties must have the necessary information as to availability of Counsel and witnesses to enable the Judge to fix a trial date. Where it appears that the case will not exceed 3 days in length and is suitable for the Running List the Judge may direct that the case be set down for trial in the Running List.

11.9 At the Pre-Trial Review the Judge may consider applications for or make such orders as may be necessary and appropriate for the efficient resolution of all outstanding matters and to ensure that the

action is tried justly, speedily and efficiently, including the entering of judgment under Order 18 Rule 19 and/or in the exercise of the inherent jurisdiction of the Court, and any other orders referred to in 10.12.

12. Undue Delay, Default, unnecessary applications, and vexatious frivolous, or unmeritorious opposition to applications.

12.1 If a P.I. Judge or Master considers that any party has been at fault in any of the above respects, he may make such orders as to costs as he thinks fit including an order under Order 62 Rule 8 and Rule 9(4)(b) or under Rule 9A(1)(a) and (b).

12.2 Any such orders shall be forthwith orders.

13. Assessment of Damages

13.1 Where liability in an action is not in issue or has been conceded in advance of the Check List Review, or after the said hearing and in advance of the Pre-Trial Review, the parties must notify the Court of that fact immediately and the directions for those hearings in so far as they relate to the issue of liability, shall no longer apply. The relevant hearing will then give directions in relation to the assessment of damages by a Master or by a P.I. Judge.

13.2 Where at a Check List Review or Pre-Trial Review judgment has been entered by the Court for the Plaintiff under Order 18 Rule 19 (or by the exercise of judicial discretion generally) directions will be given for the assessment of damages either by a Master or by a P.I. Judge.

13.3 In all cases referred to in 13.1 the parties may, by agreement ask the Court to expedite the relevant hearing.

13.4 In all cases referred to in 13.1 the Plaintiff's Solicitors must serve and lodge with the Court, no later than 7 days before the hearing at which directions will be given

i) a paginated and indexed bundle containing all the documents and reports relevant to an assessment;

ii) a statement setting out what directions as to medical or quasi-medical evidence are sought identifying the

experts and areas of expertise, and what matters are agreed, and a realistic estimate agreed with the other party(ies) of the length of the assessment hearing.

13.5 A period of 20 minutes will be allocated to such hearings for the giving of directions. In the event of the parties, considering that in their particular case 20 minutes will not be adequate, they are required to inform the Court in advance of their agreed estimate.

13.6 In all cases which have been fixed for trial on liability and quantum in the fixture list or running/warned list, and where the parties have agreed the issue of liability in advance of trial, the action will nonetheless remain in the respective list for assessment of damages although with a revised estimate of the length of hearing which the parties are required to give to the Court immediately. Under no circumstances will the hearing of the assessment of damages be remitted to the Masters' List. Order 34 Rule 8(2) and (3) must be adhered to.

14. Filing of documents at the Registry

14.1 Save as is specifically provided for in this Practice Direction and as appears hereunder, there shall be no filing of documents at the Registry.

14.2 An affidavit or affirmation is required to be filed as are any documents annexed or exhibited thereto.

14.3 Hearsay notices are required to be filed but not the documents identified therein.

14.4 For the avoidance of doubt witness statements, expert reports, notes and other documents in relation to proceedings in any Court, investigation by any body, and photographs and plans are not to be filed.

14.5 No documents in relation to special damages, periods of sick leave, or census statistics of wages etc., are to be filed.

14.6 Lodging does not mean filing.

15. Photographs

15.1 All references to photographs in this Practice Direction means colour photographs produced from negatives or laser copies of original photographs. Black and white photostatic copies will not be accepted.

15.2 The original photographs are never to be lodged with the Court.

16. Bundles of documents for trial

16.1 These must be in a single ring binder where they are of such size that they can be easily and manageably accommodated. Where more than one ring binder is appropriate, all ring binders must be separately identified e.g. by colour or number or both.

16.2 They must be fully indexed and paginated.

16.3 They must be properly sectioned in accordance with the following format:

A. Pleadings in proper sequence viz. Statement of Claim/Amended Statement of Claim/Defence/Amended Defence/Statement of Damages/Answer thereto etc., and relevant orders viz. Check List Review Order/Pre-Trial Review Order. Any particulars of a pleading should immediately follow the pleading to which it relates.

B. Statements of witnesses as to liability and any statements or declarations to Police Officers and Department of Labour or other Government Department, followed by any expert reports on liability and investigation reports, and any other documents relating to liability (e.g. Form 2).

C. Medical and Quasi-medical reports obtained on behalf of the Plaintiff in chronological order but expert by expert.

Medical and Quasi-medical reports obtained on behalf of the Defendant in chronological order but expert by expert.

The Index must state which are agreed reports.

D. Any other documents and reports on the issue of quantum.

16.4 Plans and photographs must be lodged in a separate folder and all photographs must be properly mounted with an agreed description.

16.5 Any medical records (hospital or otherwise) must be in a separate file the nature of which depends on what is appropriate for the volume and nature of these records. Where there is any doubt as to their legibility, there must be an agreed transcription and they must be in chronological order. The original records must always be available at court for the trial unless they are agreed or the court directs otherwise.

16.6 No documents relating to special damages, sick leave or statistics shall be included in the bundle unless both parties agree that it or they are relevant to a material issue and that it is essential for the Judge or Master to read them and rule upon them.

17. Actions by persons under a disability

17.1 Order 80 Rule 3 sets out carefully the considerations for the appointment of the next friend or guardian. A divorced wife is not to be regarded as appropriate. Such a person is unlikely to meet the requirement of Order 80 Rule 3(8)(c)(iii).

17.2 Order 80 Rules 10, 11 and 12 will be strictly applied. It is not appropriate to seek a Consent Order under Order 42 Rule 5A.

Claims under the Fatal Accidents Ordinance and the Law Amendment Reform Consolidation Ordinance which include claims on behalf of an infant dependant, or a dependant under any other disability, require approval by the Court of any proposed settlement.

17.3 Practitioners are required to follow the procedure set out in the Hong Kong Civil Practice 2001 paragraphs 80/11/6 to 80/11/9 pages 1034 to 1035.

17.4 At the hearing of the application for approval of any compromise or settlement, the Plaintiff's Solicitors are required to set out all proposed directions as to disposal of any of the monies which form a part of the said compromise or settlement. The contents of the Order sought should follow Form PF 170 or PF 171, as appropriate, at pages 114/115 of Volume 2 of The Supreme Court Practice 1999.

17.5 Save as is otherwise ordered by the Judge the proper order for costs in respect of such compromised proceedings is on a common fund basis.

17.6 In the event of a Solicitor for a plaintiff seeking to charge against a plaintiff's damages, costs and disbursements which he considers he will not recover from the Defendants, he must produce at the hearing for approval a statement of the maximum amount of such costs and disbursements and will be required to justify them. The Plaintiff and/or the next friend must have been advised in writing of the estimate of the amount of costs and disbursement in question, and any consent thereto must be in writing and produced to the Court. The written advice must set out clearly why those costs and disbursements have been incurred and why it is considered that they are not recoverable from the Defendants. A general undertaking to be responsible for costs signed by the client will not be sufficient for these purposes.

The proposed direction set out by the Plaintiff's Solicitors pursuant to 17.4 should also set out how the balance of the amount of the said costs and disbursements after deduction of the taxed costs payable to them should be applied towards the Plaintiffs.

No approval will be given to any settlement unless the court can be told with reasonable accuracy, the maximum amount it is sought to be deducted from the Plaintiff's damages. If the court is not satisfied with the maximum amount as put forward by the Plaintiff's Solicitors as being necessary, the court may whilst granting an approval of the settlement figure, give such directions for dealing with the application

for approval of the distribution of the award as it thinks fit, including a speedy taxation of all the costs and disbursements.

17.7 No amount of damages will be released from the court's control and investment on behalf of a claimant, save for direct transmission to the claimant e.g. for the benefit of the widow and family in a fatal claim, until it is satisfied that any claim for further costs as set out in 17.6 above and/or by virtue of the First Charge of the Director of Legal Aid has been quantified.

18. Drawing up Orders

It is the duty of Solicitors to draw up orders made at Check List and Pre-Trial Reviews which accurately reflect the directions made by the Master or Judge. The orders should follow a logical sequence. Annex G, attached hereto, sets out the form and structure to be followed. The orders are to be drawn up and filed as soon as possible after the hearing and in any event no later than 5 days after the hearing. The date on the Order drawn up is the date on which the Order is made by the Master/Judge.

Dated this day of January 2001.

Andrew Li

Chief Justice

Annex A

To

Defendant

Dear Sirs

Re: Claimant's full name

Claimant's full address

Claimant's I.D. Number

Claimant's Date of Birth

Claimant's Clock or Works Number

Claimant's Employer (*name and address*)

We are instructed by the above named to claim damages in connection with *an accident at work/road traffic accident/tripping accident* on at (*place of accident which must be sufficiently detailed to establish location*)

Please confirm the identity of the insurers. Please note that the insurers will need to see this letter as soon as possible and it may affect your insurance cover if you do not send this to them.

The circumstances of the accident are:-

(*brief outline*)

The reason why we are alleging fault is:

(*simple explanation e.g. defective machine, broken ground, ignoring traffic lights; excess speed etc*.)

A description of our clients' injuries is as follows:-

(*brief outline*)

or as appears from the Government Hospital report attached hereto.

He is employed as (*occupation*) and has had the following time off work (*dates of absence*). His approximate monthly income is (*insert if known*).

If you are our client's employers, please provide us with the usual earnings details gross and net for the six months prior to accident which will enable us to calculate his financial loss.

We are obtaining a police report and will let you have a copy of the same upon your undertaking to meet half the fee.

We have also sent a letter of claim to (*name and address*) and a copy of that letter is attached. We understand their insurers are (*name, address and claims number if known*).

[At this stage of our enquiries we would expect the following documents to be relevant to this action:]

A copy of this letter is attached for you to send to your insurers. Finally, we expect a constructive reply to this letter within 21 days by yourselves or your insurers, failing which we shall forthwith commence proceedings.

Yours faithfully

Annex B

GENERAL INDORSEMENT ON WRITS
PERSONAL INJURY/ROAD TRAFFIC CLAIMS

The Plaintiff's claim is for damages, (together with interest thereon and costs), for personal injury, loss and damage arising out of the negligent driving of a motor vehicle by the defendants, their servants or agents on or about the _____day of _____ 19___ /20___ in _____Road/Street [at or near the junction with _____ Road/Street] _____ New Territories/Kowloon/Hong Kong Island, Hong Kong S.A.R.

FATAL ACCIDENT /ROAD TRAFFIC CLAIMS

The Plaintiff(s) claim(s) as Personal Representative(s) or Administrator(s)/Administratrix(ces) or Executor/Executrix of the estate of A_____ B_____, (deceased), damages, (together with interest thereon and costs), under the Fatal Accidents Ordinance and the Law Amendment and Reform (Consolidation) Ordinance, arising from the death of the deceased as a consequence of the negligent driving of a motor vehicle by the defendants, their servant(s) or agent(s), on or about the _____ day of _____ 19____/20____ in _____ Road/ Street [at or near the junction with _____ Road/Street] _____, New Territories/Kowloon/Hong Kong Island, Hong Kong S.A.R.

Annex C

PERSONAL INJURY/EMPLOYER'S LIABILITY CLAIMS

The Plaintiff's claim is for damages, (together with interest thereon and costs), for personal injury, loss and damage sustained in the course of his employment arising out of the negligence and/or breaches of statutory duty of the Defendant(s) their servants or agents at _____ [identify premises/building/construction site/wharf/vehicle and address etc.] on or about the _____ day of _____ 19____/20_____.

FATAL ACCIDENT CLAIM - EMPLOYER'S LIABILITY CLAIMS

The Plaintiff(s) claims(s) as Personal Representative(s)/ Administrator(s)/Administratrix(ces)/Executor(s)/ Executrix(ces) of the estate of A_____ B_____ (deceased), damages, (together with interest thereon and costs), under the Fatal Accidents Ordinance and the Law Amendment and Reform (Consolidation) Ordinance, arising from the death of the deceased in the course of his employment as a consequence of the negligence and/or breaches of statutory duty of the Defendant(s) their servant(s) or agent(s) at _____ [identify

premises/building/construction site/wharf/vehicle and location or address] on or about the _____ day of _____ 19___ /20____.

Annex D

(Title of the Action)

NOTICE OF CHECK LIST REVIEW

The Check List Review will take place on _____ (date) _____ (month) 2001 at _____ (time) before a P.I. Judge or Master of the High Court of Hong Kong.

You are required to attend the hearing at the time specified. If you intend to instruct a solicitor to defend the case on your behalf please give this Notice to your solicitor. He is required to attend the hearing on your behalf. If you or your solicitor does not attend the Court will make such order as it considers appropriate.

The Check List Form attached to this Notice must be completed and filed with the High Court Registry no later than 7 days before the Check List Review together with all the documents itemised in paragraph 10.9 of the Personal Injuries List Practice Direction 18.1.

_____

Name of Plaintiff's solicitor

Dated the _____ day of _____ 20___

Annex E

CHECK-LIST

1.	Has discovery been completed?		YES☐	NO☐
2.	Has inspection taken place?		YES☐	NO☐
3.	Are you satisfied no further discovery is required?		YES☐	NO☐
4.	Are you satisfied the pleadings will require no further amendment?		YES☐	NO☐
5.	Have all interrogatories been answered?	N.A.☐	YES☐	NO☐

6. Is there any outstanding request for further and better particulars to be made or YES☐ NO☐

   to be answered? YES☐ NO☐

7. Will there be expert evidence at trial? YES☐ NO☐

   How many medical experts will be called at trial? ☐

   How many other experts? ☐

   What are their areas of expertise?

8. How many witnesses will be called on factual issues? ☐

9. Is there any outstanding appeal in interlocutory or any other matter? YES☐ NO☐

10. Are you satisfied there is no need to deal with any further interlocutory matters? YES☐ NO☐

11. Please set out below any orders or directions you will seek at the hearing

_____

_____

_____

_____

12. Do you confirm that all steps that ought to be taken to prepare the action for trial have been duly taken and completed? YES☐ NO☐

    If not what needs to be done?

13. What is the agreed estimate of length of trial? ☐ DAYS

If there is no agreement, state your own estimate. ☐ DAYS

14. Does this case require a fixed date? YES☐ NO☐

If so, why?

I, _____, solicitor for the _____ Plaintiff/ _____ Defendant, having the conduct of this case declare that the above answers are true and accurate to the best of my information and belief.
Signed _____ (solicitor)
Dated _____

Annex F

(Heading of the Action)

To: The Clerk of Court

The Pre-Trial Review

1. We are solicitors for _____ .
2. All the orders made at the Check List Review made by Master _____ on the _____ 2000 have been complied with.

[The following orders have not been complied with:]

3. We intend to call _____ witnesses on facts, and the following medical experts and non medical experts:

Names	Areas of Expertise

The following reports from medical/non-medical experts have been agreed by the parties:

Names	Date of Report

4. The solicitors for all parties have consulted together concerning the estimated length of trial. There is agreement/disagreement concerning the length of time estimated for trial.
5. The time now estimated for the trial of this case is _____ days.
6. We intend to seek the following directions at the Pre-Trial Review hearing [set out in detail the nature of the directions sought].
7. The Pre-Trial Review will be attended by _____ counsel/solicitor.
8. There are complex/no complex features or issues to this case which will add to its length.
They are _____ (set out any in detail any such features or issues)

Dated the day of 20___

Solicitors for the Plaintiff/Defendant/Third Party

Annex G

Specimen Order on Check List Review/Pre-Trial Review

(Heading of Action)

BEFORE MASTER _____ /THE HONOURABLE MR JUSTICE _____ IN CHAMBERS

ORDER ON CHECK LIST/PRE-TRIAL REVIEW

Upon Hearing Counsel/Solicitors for the Plaintiff and Counsel/Solicitors for the Defendants and Counsel/Solicitors for the Third Party [and upon reading the Affidavit/Affirmation of A_____ B_____]

IT IS ORDERED THAT:

1) The Plaintiff/Defendant file and serve within ____ days/by the ____ day of _____ 2001, Further and Better Particulars of the Statement of Claim/Defence under paragraphs ____ of the Request dated the _____ day of _____ 20___.
2) The Plaintiff/Defendant has leave to amend/re-amend its Statement of Claim/Defence in accordance with the draft annexed to the application. The Defendant/Plaintiff has leave to amend/re-amend its Defence/ Statement of Claim, if necessary within 14 days. The costs of and occasioned by the amendments shall be the Defendant's/Plaintiff's in any event/costs in the cause/there shall be no order for costs.

3) The Application of the Plaintiff/Defendant to amend/re-amend its Statement of Claim/Defence be dismissed with costs to the Defendant/ Plaintiff/with no order as to costs.
4) The Plaintiff/Defendant is to serve/exchange the witness statement as to fact of

A_____ B_____;

C_____ D_____ and

E _____ F _____

within ____ days/by the ___ day of _____ 20___.
5) The Plaintiff/Defendant is to serve a copy of all statements to the Police/Declarations to the Department of Labour within ____ days.
6) The Plaintiff/Defendant is to serve/exchange the reports of

A_____ B_____ and

C_____ D_____

as to liability within ___ days/by the ___ day of _____ 20___. The issue of admissibility of such reports is to be determined at the Pre-Trial Review/by the trial judge.
or:
No expert evidence as to liability shall be adduced in written or oral form serve in the form of the report of the Occupational Safety Officer and/or the oral evidence of the Occupational Safety Officer.
7) The Plaintiff/Defendant is to file and serve a List of Documents [verified by Affidavit/Affirmation] relating to the following matters within ____ days/by the ____ day of ____ 20___:
8) The Plaintiff is to serve medical reports from the following experts within ____ days/by the ____ day of _____ 20___.

Dr. A _____ B_____

Prof. C _____ D_____

Dr. E _____ F_____

9) The Defendant is to serve medical reports from the following experts within ___ days/by the _____ day of _____ 20___.

Prof. A _____ B_____

Dr. C _____ D_____

Dr. E _____ F_____

10) The medical evidence is to be limited to one/two orthopaedic/ neurological/ophthalmic/cardiology/obstetric/gynaecological/ psychiatric/psychological consultant(s) for each party.
11) The parties are to instruct jointly an occupational therapist/ physiotherapist/rehabilitation expert/nursing consultant/architect/ surveyor whose agreed report is to be lodged with the court no later than 7 days prior to the Pre-Trial Review/Trial
12) The reports of the Government hospitals as to the treatment and care of the Plaintiff are to be adduced as agreed evidence without calling the makers thereof.
13) The Plaintiff is to serve a [Revised] Statement of Damages, together with any further statements as to quantum and any documentary support not already disclosed within ____ days/by the ___ day of _____ 20___.
14) The Defendant is to serve a [Revised] Answer thereto within ___ days thereof/by the ____ day of _____ 20___.
15) The Plan prepared by the Police in relation to the accident in which the Plaintiff was injured and the photographs taken by Police Officers/Department of Labour are agreed and are to be admitted in evidence at trial without calling the plan drawer/photographer.
16) The Defendants are to pay the sum of $____ by way of interim payment of damages into Court/to the Plaintiff's solicitors/to the Plaintiff/to the Director of Legal Aid within _____ days.
17) A composite bundle of medical records is to be agreed between the parties, fully paginated and indexed, with any original illegible entries in typed transcribed form in addition to the original entries and lodged with the court with the trial bundle and separate therefrom.
18) There be a Pre-Trial Review on the day of _____ 20___ at ____ a.m./p.m. before the Hon. Mr. Justice _____.
19) The issue of liability be tried separately from the issue of damages on the ___ day of _____ 20___.
20) The Plaintiff have leave to set this action down for trial within _____ days/by the ____ day of _____ 20___, before a ____ Judge without a jury, in the Fixture/Running List to commence on the ____ day of _____ 20___/not to be

warned before the ___ day of _____ 20___. The estimated length of trial of ____ days.

21) Judgment be entered for the Plaintiff against the Defendants with damages to be assessed. The estimated length of the trial on damages is _____ days.

22) The costs of the Check List Review/Pre-Trial Review shall be costs in the cause/the Plaintiff's costs in any event/the Defendant's costs in any event/There shall be no order for costs. The Plaintiff's own costs are to be taxed in accordance with the Legal Aid Regulations.

Dated the ____ day _____ 20___.

PRACTICE DIRECTION 18.1
THE PERSONAL INJURIES LIST
GUIDANCE NOTE

THESE NOTES SHOULD NOT BE REGARDED AS REPLACING THE MEMORANDUM ISSUED ON 17 APRIL 2000. ALTHOUGH THEY REPEAT SOME OF THE CONTENTS OF THAT MEMORANDUM, THESE NOTES ARE ESSENTIALLY GUIDANCE TO THE PRACTICE DIRECTION. THE CONTENTS OF THE MEMORANDUM WILL CONTINUE TO HAVE RELEVANCE AND FORCE ON THE BROADER ASPECTS OF PRACTICE.

Paragraph 2

A letter before action is essential. If it does not contain sufficient information to inform a defendant and/or his insurers of the basis, nature and extent of the claim, it is nothing more than a formal equivalent to "we have instructions to claim".

This protocol is to ensure that a defendant has proper notice of a claim with adequate detail and a realistic opportunity to investigate and react to the claim before a claimant plunges headlong into costs generating proceedings.

If the Defendant in the situation envisaged in §2.4, admits liability, then the Plaintiff is expected to accord to the Defendant full facilities for the purpose of obtaining the necessary information to evaluate quantum and make an offer in settlement. The Plaintiff should not advance proceedings in the meantime i.e. by service of Statement of Claim or Statement of Damages if not already served with writ. If any offer is made and it is unacceptable then the Plaintiff is justified in proceeding with its action. If no

offer is made within 3 months of the admission of liability then similarly the Plaintiff is justified in proceeding.

This protocol is not intended to be forced upon a claimant but if proceedings are initiated and costs generated without having given the defendant an opportunity to respond without such precipitate action, the claimant will have difficulty in justifying such premature expenditure.

Such letters are not to be treated as pleadings. Their purpose is to provide information and indicate what areas can be explored with a view to a compromise. Omission to mention a feature does not preclude it being raised later. The parties are expected to use their judgment in these matters. The overall objective of such correspondence is to inform reasonably and to invite reasonable and positive reaction.

Too many actions are commenced far too late without giving Defendants the chance to negotiate a settlement. An excessive level of costs is also generated before notification is given.

The costs implications i.e. the need for the Plaintiff to justify the incurring of costs by proceeding whilst the Defendants are accorded the facilities, will mean that if the Plaintiff's solicitors fail to hold their hand whilst giving the Defendants the opportunity provided for in §2.3, they are unlikely to be allowed their costs incurred in advancing the proceedings. The rationale is that having had to issue proceedings because of the circumstance illustrated in §2.4 they would be denying the Defendants the opportunity of complying with the form and spirit of §2.3.

It has been suggested that the 4-month period to be accorded in the recommended protocol to the Defendants for their investigation and opportunity of evaluating the merits of the claim so as to give the Plaintiffs solicitors their positive reaction, will simply act as a brake upon the progress of proceedings. This view is to misunderstand the whole structure of the Directions and its allied proposed protocol. If the Defendants do not use that 4-month period for the purpose for which it is intended they will not be able to obtain extensions of time in the course of proceedings to compensate for their omission or neglect in that regard.

Concern has been expressed about how reasonable costs can be guaranteed in a pre-action settlement which does not require court approval. Since many actions are settled without resort to proceedings and it is to be assumed that costs are paid in addition it is difficult to see how any problem can arise. The costs must always reflect the work necessarily and properly done - in cases where the common fund basis is appropriate the costs are of a reasonable amount and reasonably incurred.

Since an agreed settlement must include an agreement in respect of costs, if reasonable costs are not to be paid in addition, it is difficult to see how there can be a settlement. This is a matter for the practitioners to deal with in the context of each

such case. If there is no settlement on a comprehensive basis then proceedings will follow.

The fact that a Check List Review is fixed on the issue of the Writ does not entitle the Plaintiff to override the situation provided for in §2.4. An admission of liability will mean that the C.L.R. will be in the form of a directions hearing for assessment of damages. Any reasonable difficulties encountered by a Defendant would justify an application by consent to delay the C.L.R. under §10.5.

The Plaintiff must not delay the service of the Writ (and therefore of the C.L.R. Notice). It is implicit (if not explicit) in §2.4 that the Writ is to be served with the Notice. The period of validity of the Writ does not override the requirement to act in accordance with this direction. The onus will be on the Plaintiff's solicitors to justify delay in service.

Many practitioners obtain reports in every conceivable medical or quasi-medical discipline before they establish sensible contact with the insurance company concerned or their solicitors e.g. orthopaedic, neurological, urological and psychiatric reports, and reports from an occupational therapist, physiotherapist, rehabilitation consultant, surveyor etc. What they should be doing instead of this 'front-loading' exercise on costs is to invite the Defendants to take part in a joint examination by respective experts, or in a joint instruction to an agreed expert. Failure to do so is likely to result in the Plaintiff's' practitioners not recovering such costs from Defendants in the event of a settlement or a judgement against the Plaintiff.

The Court will be alert to prevent, when it can, practitioners from recovering such costs from the Plaintiff or out of the Plaintiff's damages.

Paragraph 3

Writs filed with a full Statement of Claim endorsed are vulnerable to search and inspection under Order 63 Rule 4. This order when originally devised had no intention of disclosing confidential and/or privileged material to the detriment of the parties because it was not envisaged that a full Statement of Claim would be so endorsed. Furthermore the Personal Data (Privacy) Ordinance should not be circumvented by an order which predated it. Pleadings are now so undisciplined and lacking in form that confidential material in a medical report is often extracted from it and repeated verbatim in the pleading. This needs to be curtailed.

Where liability is admitted following issue and service of the Writ a Statement of Claim is unnecessary but a comprehensive Statement of Damages is essential to assist the Defendants on quantum.

It is not appropriate for this Statement of Damages when dealing with the Pain, Suffering and Loss of Amenity element of the damages to contain sections of the

medical reports. It is sufficient to set out the prime injuries, and the principal sequelae and prognosis, in short form. Medical reports exist to provide the full picture.

Paragraph 4

Pleadings are now often served and filed in an incomplete state and without proper identification as to the pleader. If for example, Counsel has settled or drafted the pleading but it does not bear his name, it may well be difficult to obtain, on taxation of costs, Counsel's fee for so doing.

One of the purposes of requiring the identity of the person settling or drafting the pleading (Counsel or Solicitors) is to identify whoever is responsible for the state of the pleadings.

Paragraphs 5 & 6

The directions in these two paragraphs are not intended to override the provisions of Order 25 rule 8 and do not have such an effect. They are aimed at drawing the parties' attention to matters which are essential to the issues to be determined by the court so they can better prepare their cases at any early stage and avoid unnecessary delay and costs.

The quality and value of Statements of Damage are variable in the extreme. They are also revised, amended or re-revised with unjustified frequency.

The increase in the amount of material as to liability and quantum which must now be served with the Writ and Statement of Claim and with the Defence is to establish the level playing field at an early stage and enable proper assessment of the issues to be made. No action on behalf of a claimant can properly be pleaded unless the documents set out under 5.2 have been obtained. Similarly no Defence can properly be pleaded unless the documents set out under 6.1 have been obtained.

Too many actions are commenced "late in the day" i.e. close to the end of the limitation period. In view of that delay it is all the more essential for there to be early disclosure of material.

Medical negligence actions tend to be started late by reason of the innate problems associated with such claims. When a case is pleaded in such actions, there is invariably some expert evidence relied upon. Sometimes the pleaded case is not wholly intelligible without a consideration of the expert report on which it is based. Defendant doctors, hospitals etc. must have the full material setting out the case against them. There is often a professional reputation at stake. In view of this, and the likely passage of time in any event, the level playing field must be available at the earliest opportunity. In due course it will be necessary to establish a protocol exclusive to medical negligence claims.

The documents to be served with the Defence under 6.1 are those essentially appropriate in an employer's liability/accident at work action. Where one of the

Defendants is the employer most of the documents are available easily. Obviously if there is no machine or equipment relevant to the accident, (ii) and (iii) will not apply but the words in 6.1 - "If they are available and in so far as this is practicable" - simply provide for the inevitable variation according to the case.

If a prosecuting or investigating body (e.g. Labour Department, Commissioner of Police) declines to supply the unedited material requested, application to the court for full disclosure must be made promptly. (Order 24 Rule 7A(2)). Failure on the part of these investigating authorities to comply with a proper, valid and authoritative request is likely to result in orders for costs. At present such failure is delaying necessary evaluation of cases, and progress in proceedings, and causing unnecessary costs.

Regard should be had to the Ruling of Suffiad J in **Lily Tse Lai Yin & Others v. The Incorporated Owners of Albert House & Others** H.C.P.I. 828/97 - 10 December 1998 as well as to a commonsense appraisal of the position.

The requirements for the service of statements (in particular the statement of the Plaintiff) under 5.2(i) & (iv) and 6.1(vii) proceed from the simple fact that the obtaining of such statements is one of the earliest stages in the efficient preparation of a case by both parties. More often than not they have to be obtained before a pleading can be served. These are 'core' statements. There is an illogical and deeply ingrained view amongst practitioners that it is not necessary to obtain comprehensive statements until the final stages of an action and close to trial. There will always be room for supplemental statements where necessary, to be taken later (but still reasonably promptly) to deal with matters emerging from the other side's statements, or to bring important matters up-to-date. The requirements under these paragraphs do not remove a claim of privilege.

What is required is the service of documents, reports etc., upon which the parties rely in support of their case on the issues. It does not require the disclosure of material for which privilege is claimed. It is intended to enable the parties to identify the issues and concentrate on what is material to them, at an early stage.

Paragraph 7

Disclosure or discovery is often misunderstood and dealt with in a piecemeal fashion. A tighter discipline is called for and will be imposed. It is, for example, quite unnecessary to have a sequence of lists of documents disclosing medical and other reports which come into existence after the original list. The documents should simply be served under a covering letter.

Discovery is the disclosure of any fact resting merely (i.e. solely) within the Defendant's (or Plaintiff's) knowledge or the discovery of any document in his power, which would aid in the enforcement of a right, or the redress of a wrong. It is the right, as far as a Plaintiff is concerned, to extract from a Defendant discovery as to all

matters of fact which, being properly pleaded, are material to the Plaintiff's case and which the Defendant does not by his pleading admit. The right is limited to a discovery of such material facts as relate to the Plaintiff's case and does not extend to discovery of the manner in which the Defendants' case is to be exclusively established.

[See Wigram - Discovery; Jowitt - Dictionary of English Law.]

Paragraph 8

These provisions are designed to eliminate trivial and unnecessary applications which are wasteful of costs and judicial resources. There has been a considerable improvement since the Practice Direction of September 1998 but tighter discipline and thought is called for.

An example of such time and costs wasting exercises is where an application is made to amend a Statement of Claim to change or correct a figure for one item of special or continuing loss, or to correct a typographical error, or some other trivial or obvious error, where a simple letter of notification to the Defendants will suffice. There have been examples of a purported Amended Defence being filed and served in answer to an Amended Statement of Claim, where the only 'amendment' to the Defence is, the addition of the word 'Amended' in red ink to the word 'Defence' throughout. It is difficult to understand how practitioners could lend themselves to this activity but it has to cease. It is unnecessary to plead evidence and applications to amend pleadings in this regard will not be allowed.

The costs provision is to discourage unmeritorious applications as well as to introduce some practical early assessments for the benefit of all concerned.

A one page statement of such costs setting out the hours of preparation, attendances on client/counsel/at court, disbursements, number of letters and telephone calls, is sufficient.

Paragraph 9

This direction is aimed at better case management, particularly in more complicated cases.

The element of flexibility here is to facilitate efficient i.e. early and economic, disposal of cases.

There is similar provision in the District Court for transfer to the High Court.

Paragraph 10

The date of hearing has been advanced by two months. The reason for this is partly the response of many practitioners to the Practice Direction of September 1st 1998 which has demonstrated that progress can be made more quickly, and partly the response of other practitioners who think the Check List Review can be adjourned in order to enable them to catch up.

With the protocol encouraged in paragraph 2, an earlier Check List Review will provide, for all parties, tighter control and frame work, and an earlier trial date.

Too many solicitors are delaying service of the Writ and the Notice of the Check List Review until such time as they think suits them. This is not acceptable and must be avoided unless there are good grounds for not serving the Writ immediately after issue. The fact that a Writ is valid for 12 months does not justify with-holding service. It deprives the Defendants of proper notice of the Review. It is also seen as a deliberate attempt to circumvent the Practice Direction. Any application to adjourn the Check List Review hearing on the ground that the Writ has not been served must be justified and the Court may give such directions or make such orders with regard to the service of the Writ and costs as it thinks fit. (See note to paragraph 2)

The statements referred to in 10.8(b) and (c) must be in English as well as in the original Chinese. The translations need not be certified at this stage but effort should be made to agree the translations with the Defendants' solicitors.

There is an ill-considered, extravagant and unjustified use of a range of experts particularly in the medical and quasi-medical field. The court will make a determined effort to control this, reduce such use of expertise to the minimum necessary and give clear indications of instances where costs have been wasted in this area, in order to assist Taxing Masters.

The Court has the power under 10.12(f) to order the Defendants to serve an Answer to the Statement of Damages if one has not already been served. It will also direct, if necessary, the service of a Revised Statement of Damages.

An Answer is required to set out the Defendants' case in respect of each and every head of damage. A simple denial that the Plaintiff is entitled to claim a certain head of damage is not sufficient. That is no more than is likely to have been pleaded in the Defence save that more words will have been used in the Answer to say the same thing. What is required is the reason for the denial with a counter statement of what is claimable if it were to be proved. Counsel and solicitors are advised to take note. If the answer is simply in the form of a denial, cross-examination of the Plaintiff on a basis not pleaded in the Answer will not be allowed. Similarly submissions in relation to whether a head of damage is claimable at law will not be allowed unless this too is pleaded. Furthermore in the event of the Defendant succeeding in an action, the costs of an Answer which does not meet the requirements will not be allowed. Similarly a Statement of Damages which does not identify properly for the Defendants the heads of damage claimed will result in costs penalties.

Too many solicitors are sending a trainee solicitor to the Review hearing or some other solicitor who is not the one handling the case. Sub-paragraph 10.13 is

mandatory. It is becoming readily apparent where a firm of solicitors is at fault in this respect. Orders for costs will be made to enforce this.

In many cases solicitors are attending without their complete files of papers, thereby causing delay and adjournments for such files to be obtained. This is a waste of Court time and such instances are likely to be penalised by orders for costs against the solicitors concerned. This stricture applies with equal force to Pre-Trial Reviews.

In the event of either or any party to an action seeking disclosure or service by any other party of information, a document, a report or a statement, at or consequent upon a Check List Review, it must do so by letter to the party concerned, but not by formal summons or application to the Court, in good time, and in any event no later than 3 clear days before the said Review. This applies equally in relation to such information, document, report or statement required to be disclosed at or consequent upon a Pre-Trial Reviews.

Paragraph 11

Pre-trial Reviews are designed to finetune for trial the management of those cases which actually require a Pre-Trial Review. Most cases do not require such a hearing if the practitioners have properly complied with the requirements of the Check List Review.

Originally the Practice Direction of 10 April 1996 (18.1) provided for Counsel's Advice before the Pre-Trial Review by imposing it as an obligation. The current Pre-Trial Review Notice merely leaves the matter in paragraph 2 as a statement to be left in or deleted as is appropriate; otherwise the Practice Direction is wholly silent on this.

It is not an obligation to obtain such Advice. Many solicitors do not think it necessary to do so. This aspect must of course remain a matter of choice. Too often in the past practitioners have put forward the failure to obtain Counsel's Advice in time for the Check List Review or Pre-Trial Review as an impediment to their future progress or as an excuse for failure to comply with the Practice Direction. The fact that a practitioner does not have such Advice at either stage, whether it be because of late delivery of instructions or delay by Counsel, will not be allowed to interfere with the proper progress of the action, or excuse any default.

Whoever attends the Pre-Trial Review is expected to be thoroughly cognisant with the aspects of liability and medical evidence. The Review will require statements as to what medical evidence is agreed, and, if not agreed, a good explanation of the reasons why it cannot be agreed. Practitioners are expected to have a clear grasp of their cases and to have applied their minds to the question of agreeing expert medical evidence and items of damage.

The change set out in sub-paragraph 11.8 is necessitated by the fact that in many cases counsel is instructed at the last minute and is not a counsel already involved in the case. His appearance is often cosmetic and sometimes simply to act as a buffer for the practitioner's failures.

See also notes to paragraph 10.

Paragraph 12

This is self-explanatory. Since fault has occasioned the costs order it is more efficient that costs should be dealt with in this way.

Paragraph 13

This is self-explanatory and is a clarification of the various circumstances in which an assessment of damages will be provided for.

The reason cases referred to in 13.6 will not be remitted to a Master is that further delay will result and also that extra costs are unnecessarily generated. It is a simple matter to reduce the estimated length of the hearing.

Paragraph 14

This is a substantial departure from practice hitherto.

In future documents will be filed only where the Practice Direction requires this and/or where a Master or Judge specifically directs the filing of a particular document. Hitherto there has been wholly indiscriminate filing of documents to no good purpose. This past practice has been an enormous burden for the Registry, an inordinate waste of paper and copying (in some cases the same document has been filed on 3 or 4 occasions) and the means of generating a significant amount of cost which has no relevance to the issues.

The Practitioners must ensure that their outdoor clerks know what is to be filed and what is to be lodged. The document itself should on its backsheet make this clear i.e. "To be filed" or "To be lodged".

Although the following requirement was notified to the profession some time ago it is necessary to restate it. Where Hearsay Notices or Notices under Section 47A of the Evidence Ordinance and Order 38 of the Rules of the High Court are filed the documents identified in such Notices must not be filed.

Paragraph 15

Practitioners find it difficult to understand that black and white photostat copies of photographs are for the most part useless. Some complain that they are simply reproducing what has been served on them. The onus is on them to reject such black and white photostat copies and insist on either laser copies, or photographs properly produced from negatives. They are entitled to such proper photographs since they are paying for what they request.

The course best designed to achieve this is to make clear in the letter of request the form of photographs sought. In the event of such being refused an application should be made under Order 24 rule 7A.
In the last resort at trial, where actual photographs or their negatives have not been supplied hitherto, a sub-poena duces tecum must be served on the proper person required to produce these.

Paragraph 16

This is self-explanatory.
It is required that bundles for Check-List Reviews and Pre-Trial Reviews should be re-used and re-constituted, with necessary exclusions and additions, for the trial.
Bundles for Pre-Trial Reviews must not include medical literature.
Costs will not be allowed for duplicated bundles.
Practitioners are failing to inform the Registry and Court in time, of settlement or likely settlement of cases. They are ignorant of or are ignoring Order 34 Rule 8(2) & (3). In those cases where a fixed date has been allocated, the solicitors for the Plaintiff should maintain contact with the Listing Clerk and the Clerk to the P.I. Judge to keep him informed of a reduction in the likely length of a case i.e. where either quantum or liability has been agreed, and of course where a case has been settled. Sometimes the first notification is simply the lodging of a Consent Order under Order 42 Rule 5A. This does not by itself fulfil the professional obligation - it is the duty of Solicitors (as well as of Counsel where the brief has been delivered) to keep the Court informed promptly of the progress of an action which has been set down for trial. In the case of fixtures it is essential that the Clerk to the P.I. Judge is informed in writing of settlement (preferably by fax) confirming a telephone call to the like effect. This applies equally to fixtures before a Master for assessment of damages. The Solicitor lodging the Consent Order/Summons asking for the fixed date or possible listing for trial to be vacated must indicate, where it is within his knowledge, the Master or Judge and type of list concerned.
Any documents the translations of which require a certification, must be submitted to the Court Interpreters' Office in good time before trial. It is essential that the Solicitors submitting such documents adhere to the requirement that translations are submitted for certification. The Court Interpreters' Office is not to be used as a translation service to supplement a practitioner's shortcomings in this regard.

Paragraph 17

This requires careful reading.
Practitioners will have to justify fully any costs and disbursements which they seek to charge against the damages recovered for a client under a disability.

The court will not approve a settlement without knowing exactly to what extent costs and disbursements claimed will reduce such sum, and may withhold approval if unrecovered costs will reduce the damages to be paid for the benefit of the Plaintiff. There will be an examination of such identified costs in order to determine whether they can justifiably be claimed against the Defendants as being costs within the Common Fund basis or whether they are costs which have been incurred as a consequence of lack of judgment and therefore unreasonably incurred in any event. The court is concerned to ensure that unnecessary and unreasonable costs have not been incurred by solicitors on the basis that if they cannot recover them from the Defendants, then the Plaintiff's fund of damages can be used to reimburse them for those costs. The Plaintiff's damages will not be used to make up the shortfall in such circumstances.

There have been some disturbing instances of such claims being settled and Consent Orders made under Order 42 Rule 5A. Information suggests that these are not isolated cases. Rulings and directions in respect of two such cases were circulated on the 13 March 2000.

Order 80 Rule 10 requires Court approval. A settlement is not otherwise valid.

In cases where Order 80 Rule 11 applies experience suggests that practitioners would be well advised to obtain Court approval.

In future upon the filing of Consent Orders under Order 42 Rule 5A where the claim is made on behalf of the estate and dependants of a deceased person and by a Plaintiff suing by a next friend or guardian but who is no longer under a disability, the file will be referred in the first instance to the P.I. Practice Master or P.I. Judge for her or his approval before they are sealed in order to ensure that the Solicitors concerned have not overlooked the interests of minors or otherwise erred.

Paragraph 18

Very often solicitors submit for the Judge's clerk or the Judge himself draft orders which appear to bear little resemblance to the orders actually made by the Judge. It may be that the reason for this is that the solicitor or solicitor's clerk (if with counsel) or counsel himself has not bothered to take a clear note of the orders made, and, if in doubt, have not sought clarification. As a consequence a considerable amount of time has been expended by Judges' clerks, and Judges themselves on this mundane and time-consuming task which is unnecessary if solicitors carry out properly their task for which they seek remuneration. Hitherto Judges' clerks and Judges have acted as 'long-stops' for solicitors. This has to cease. Furthermore solicitors who fail to file in time a correct order will be denied their costs. Very often there have been instances in which the next stage hearing takes place before the order has been drawn up thereby occasioning difficulty for the court in checking what has and has not been complied

with. In such extreme, though not rare cases, it may be necessary to adjourn the hearing for the order to be filed. In that event the solicitors in default will bear the costs thrown away.

(Note from the Personal Injury Judge dated 13 March 2000)

APPROVAL OF SETTLEMENT OF ACTIONS INVOLVING PERSONS UNDER A DISABILITY

NOTE FROM THE PERSONAL INJURY JUDGE

H.C.P.I. No. 35 of 1998
& H.C.P.I. No. 722 of 1998

This Note is written and circulated for the benefit of all practitioners. It discloses a somewhat disturbing state of affairs in the context of the above two claims which were brought on behalf of dependants of a deceased, one of whom in each case was a person under a disability. Despite this fact the Solicitors acting for the respective Plaintiffs purported to settle the actions without Court approval and to the disadvantage of the persons under a disability.

No. 35 of 1998

This action was commenced in January 1998. It was brought by the widow arising out of the death of her husband who was struck and killed by a falling wooden batten at work on 26 June 1995, some 2 1/2 years earlier. There can have been no Defence to the action and in March 1998 judgment was entered by consent against the Defendants.

One of the dependants was the third daughter of the deceased (and the Plaintiff), born on 13 February 1982, a schoolgirl. At the time proceedings were started she was not quite 16 years old. She would not attain her majority until 13 February 2000. On 12 January 1999 at the Checklist Review I ordered that the assessment of damages be made by me on 8 March 1999. The matter came back before me on the Defendants' interlocutory application for some discovery. I obviously regarded the application as unmerited or unnecessary and dismissed it with an order for costs in the Plaintiffs' favour. The date of the assessment was ordered to stand.

Somehow the date of the assessment was vacated without the Court being informed of the infant's interest and a Consent Order was filed under Order 42 Rule 5A with the Court on 15 March. It was duly sealed.

That Consent Order purported to record a settlement between the parties for the sum of $1,190,000 to be paid to the Plaintiff in addition to a sum of $1,260,000 which had

already been paid in the Employee's Compensation proceedings in the District Court. It contained a provision ordering payment out of the sum of $840,000 then in Court, to the Director of Legal Aid and of $350,000 (the balance of the "Settlement") also to the Director of Legal Aid. Those sums were then paid in accordance with the sealed order. The final material provision was the costs with the Defendants agreeing to pay party and party costs.

The procedure adopted was inappropriate. The infant's interest required approval and consequent protection.

The next communication with the Court was the filing of an ex-parte summons on 28 July 1999 by the Plaintiff's Solicitors seeking Court approval of the Consent Order 4 1/2 months earlier. There was no memorandum in support of the settlement, an ex-parte summons was in any event inappropriate, and all it contained was a proposed apportionment between the dependents. It had all the hallmarks, regrettably, of being handled by someone who had little if any understanding of the practical requirements of Order 80.

Fortunately this was referred to me on my return from leave. In the meantime an affidavit had been filed by the Plaintiff's Solicitors. It did not contain much relevant information and paragraph 6 was almost incomprehensible. More importantly, although it mentioned the names of the children it did not identify the infant daughter's age or date of birth.

I withheld any consideration of the matter requiring first of all the Plaintiff's own agreement to the apportionment. At that stage I had not discovered the age of the younger daughter. Eventually - more than another 2 months passed by - an affidavit by a trainee Solicitor with the Plaintiff's Solicitors was filed. This purported to confirm the Plaintiff's agreement to the proposed apportionment. Although reference had been made earlier to Counsel's Advice on apportionment this had still not been filed or lodged at Court. I called for an explanation of the proposed apportionment.

The next step was the filing by the Plaintiff's Solicitors on 8 December 1999 of another copy of the ex-parte summons (which had already been filed on 28 July). The right hand, it appeared, did not know what the left hand was doing. Another copy of the inadequate affidavit was also filed.

The hearing came before me on 15 December 1999. As a result of further inquiries by me, the Plaintiff's Solicitors lodged an Advice from Counsel dated 18 May 1998 (over 9 months before the purported settlement was agreed). From that it was clear that a daughter, who was still an infant, was concerned. I raised, by correspondence with the Plaintiff's Solicitors, a number of matters which were an essential part of the consideration by a Court for an approval. In particular I wanted to know what had

happened to the money, the majority of which had been paid out of Court pursuant to the Order 42 Rule 5A Consent Order filed.

Such was my concern as to what had and had not occurred, and as to the effect of this upon the infant plaintiff's position, that I adjourned the hearing so that the Plaintiff's Solicitors could attempt to deal with the matter efficiently and provide me with all the necessary information. I also wished to make inquiries of the Director of Legal Aid and ask his representative to attend Court and help me to try and salvage the situation as best could be, for the infant's benefit. I ordered all sums held by the Director to be repaid into Court, and a statement in respect of the sum held in the District Court to be filed.

It transpired that the District Court had very properly retained funds for the benefit of the infant daughter and had invested them. They were subject to a monthly payment out to the mother for the support of the infant, as one would expect. A sum of money was still retained and invested for the benefit of the infant daughter (as well as for the next daughter who had already attained her majority).

The money paid out to the Director of Legal Aid on 30 March 1999, together with the further payments of $50,000 and $300,000 on 14 and 22 April respectively, did not earn interest whilst in the Director's hands. $600,000 was released to the Plaintiff on 16 July 1999 - 31/2 months' interest on that sum was lost to the Plaintiff. From that date $590,000 remained with the Director, again not earning interest. That was the sum I ordered to be paid back into Court. It was repaid on 26 January 2000. In total over 9 months' interest had been lost. In my view that was a significant neglect of the interest of a Plaintiff and her family which had led to that substantial sum of money lying fallow.

It was held by the Director for so long because the Plaintiff's Solicitors had not taxed or agreed their costs. Since they had not received Court approval for the settlement they had denied the Plaintiff proper use or investment of her money.

Regrettably when this matter came back before me on 15 February 2000, the Plaintiff's Solicitors still had not produced a proper memorandum of the proposed settlement and Counsel's Advice in respect of the settlement. I had to adjourn the matter once again.

In an effort to salvage the situation the Plaintiff's Solicitors very responsibly agreed to forgo any costs which it did not recover from the Defendants and repay lost interest.

The proper basis of costs in a case which requires court approval - i.e. where the Plaintiff or at least one of the dependants in a fatal claim is under a disability - is common fund costs leaving no, or negligible deduction from the claimant's damages. Orders will be made in this case to secure that objective.

No. 722 of 1998

This action was commenced in July 1998. It was brought by the widow arising out of the death of her husband when working on scaffolding at a height of at least 20 feet. He fell through the scaffolding and a canopy erected by the Defendants on 25 October 1996. On all the evidence available including that at the Coroners' inquest it is difficult to see how there can have been any Defence to the action, whatever the circumstances which led to his fall. Default judgment was entered against the 2nd Defendant, the principal contractor. The 1st Defendant was the deceased's employer. One of the dependants was the second daughter of the deceased; she was born on 15 September 1980. At the time of commencement of proceedings she was still an infant. She would attain her majority on 15 September 1998.

On 21 April 1999 the Plaintiff's Solicitors filed a Consent Order under Order 42, rule 5A recording a settlement reached with the 1st Defendant's Solicitors. By that time the younger daughter had attained her majority. The settlement provided for a judgment for $760,000 in favour of the Plaintiff. An amount of $560,000 paid into court on 18 March 1999 was to be paid out to the Plaintiff's Solicitors. $200,000 was to be paid to the Plaintiff's Solicitors within 21 days. The Plaintiff's costs were to be paid on a party and party basis. Any interest on the money in Court - and therein lies the rub - was to be paid out to the Defendant's Solicitors. No reference was made to any Employee's Compensation proceedings.

Although that Order was entered under Order 42 rule 5A it came before me through the Registry's practice. On the face of it, it seemed in order and with some minor amendments it stood on the record.

The next step was an ex-parte summons by the Plaintiff's Solicitors taken out on 13 December 1999 (almost 8 months after the purported settlement) seeking my approval of the settlement in particular in relation to the younger daughter who was now stated to be a patient within the meaning of Order 80 i.e. that she was a person under a disability. It sought by order that a sum of money in excess of $400,000 be apportioned to her. Otherwise it concealed completely the circumstances, in particular that all the monies had been paid out of court to the Plaintiff's Solicitors or otherwise directly to the Plaintiff's Solicitors. In those circumstances how was I to protect the daughter's position? In any event an ex-parte summons was the wrong method. Since I was being asked to approve the settlement an inter-partes summons was essential so that the Defendant could be present. I anticipate that the Plaintiff's Solicitors did not have the slightest idea of how to proceed in the case of this daughter who was now a patient and merely thought that I needed to approve an apportionment which approval would have no real effect because all the money had been released.

When I had considered the papers it was clear that the Plaintiff's Solicitors knew of the daughter's disability as a result of a medical report dated 1 April 1997. They had another report dated 29 July 1998 which confirmed the position.
Despite all this information, of which they were well aware, the Plaintiff's Solicitors had proceeded to "settle" the action without court approval.
It was also apparent that there had been Employee's Compensation proceedings in the District Court which had resulted in a settlement in July 1997. Not until the "approval" summons was issued was any mention made of this and then only a passing reference to the sum paid in those proceedings.
I adjourned the hearing on the 15 December 1999 so that I could make inquiries of the Director of Legal Aid, and so that his representative could attend on the adjourned hearing to assist me, and in order to give the Plaintiff's Solicitors the opportunity to obtain further essential information.
It transpired that on 13 August 1997 the Judge in the District Court had ordered that of the Employee's Compensation Settlement sum of $676,685, $140,000 should be apportioned to the younger daughter - then still an infant, and then in any case, known to be a patient within the meaning of the Mental Health Ordinance. After deduction of some common fund costs of $3,000 (of which I say no more only by reason of the relatively small amount involved) the balance of the compensation was released to the widow.
Of the Common Law damages referred to earlier, the $560,000 was recovered by the Director of Legal Aid on the 6 May and the balance of the "Settlement" damages ($200,000) on the 18 May 1999. $460,000 was released to the Plaintiff on 8 July 1999. Interest for two months had been lost.
The costs in the Common Law proceedings were agreed by the Defendants (on a party and party basis) - no sum is stated to enable any consideration to be given as to whether that sum was in itself at least reasonable remuneration for the solicitors work. But there was also the sum of $20,650 agreed, (I assume by the Legal Aid Department), which included profit costs of $14,500, as common fund costs. This was then deducted from the amount of damages of the Plaintiff still held. The balance was released to her on the 2 August 1999. Not only had that sum not earned interest for almost three months but the sum notionally apportioned (for that was all it was as a result of the Plaintiff's solicitors handling of the matter) to the daughter under the disability was released in its entirety to the Plaintiff. The real effect therefore was that no interest had accrued to the funds for the daughter for three months when in the hands of the Department of Legal Aid as a consequence of the solicitors actions. I do not know what the Plaintiff did with the money but in any event it was beyond protection of the Court. Fortunately the Legal Aid Department was able at my request

to recover $400,000 from the Plaintiff and pay it back into Court. Nonetheless a further 5 months interest had been lost.

On the 15 February 2000 I ordered that $400,000 be apportioned for the benefit of the daughter subject to a monthly payment to the Plaintiff for the daughter's support. I also ordered repayment of the common fund costs originally allowed to the Plaintiff's solicitors, to the Director of Legal Aid for onward transmission to the Plaintiff as some compensation for the lost of interest sustained and for the delay in receipt of the monies. Since the Plaintiff's solicitors had purported to settle the claim with party and party costs without full regard to their clients' interests it was only proper that they should forgo any costs which would otherwise have to be borne by the Plaintiff (or her daughter).

POINTS OF IMPORTANCE

1. Practitioners must identify infants and other persons under a disability (Order 80 rule 1). Failure to do so will render them liable to actions for negligence. The simplest way of alerting all staff handling the claim is to write in bold coloured lettering on the outside of the file "Infant" or "Patient".

2. If neglect has given rise to loss of interest on damages or a burden of costs the practitioner will be liable to compensate for the former and forego or reimburse the latter.

3. As a precaution and protective measure the Court will not release moneys even those which are subject to a first Charge by the Director of Legal Aid, until all outstanding calculations and quantifications of costs and charges have been made. This is in order to ensure that a claimant's damages are not held without earning interest and to enable the Court to ascertain what the real sum for the benefit of the claimant and defendant is as the figure net of all charges and costs. The present system, under the Ordinance, is that the Legal Aid Department holds Solicitors' fund in a non-interest bearing account. This is inconsistent with the purpose and practice of the Court in requiring an infant's and patient's funds to be held by it for the benefit of such in an interest bearing account (Order 80 rule 12).

However this will not prevent monies being released directly for the benefit of the claimant under a disability or, in fatal claims for the benefit of the surviving spouse and family.

4. There is a proper and time-honoured procedure laid down for applying to the Court to obtain approval of such settlement. It is set out in the Rules of the High Court and see Practice Form (PF) 171 in the Supreme Court Practice 1999 Vol. 2. The Notes as to the other requirements are to be found at page 1517 under 80/11/10A. Any summons taken out must be inter partes.

Conrad Seagroatt

(Judge in charge of the Personal Injury List)

13 March 2000

(Memorandum from the Judge-in-Charge of the List dated 17 April, 2000)

PERSONAL INJURIES LIST

MEMORANDUM FROM THE JUDGE IN CHARGE OF THE LIST

Although this is directed to all practitioners I am aware that only a minority are at fault in respect of the matters set out. Nonetheless the failures in these regards are creating unnecessary work for the Registry and Judicial Staff and for Judges themselves, delaying the swift and efficient progress of cases, adding unjustifiably to the cost of litigation and, in some respect, breaking the spirit if not the letter of the Practice Directions. In most respects they indicate a lack of professionalism and failure to comply with requests from the Bench.

A. Assessments of Damages

In cases where there is a fixed date before a Judge for trial on liability and quantum and liability is agreed before trial, the question of assessment will remain to be made on the fixed date. Under no circumstances should an application be made to vacate that fixture for assessment to be remitted to a Master. Too many practitioners are making applications to alter progress in this way. They will not be granted. Practitioners remain obliged to give a realistic revised estimate of the length of trial where the issues have been so reduced.

On the hearing of Check List Reviews and Pre-Trial Reviews, where liability has been conceded, or is agreed, or where judgment has been entered by the Court under Order 18 Rule 19 (or by the exercise of judicial discretion generally) directions will be given for the assessment of damages either by the Judge or by a Master. Such directions will include a realistic estimate of the length of the hearing, the provision for any further reports or statements and the preparation of a bundle of relevant documents for assessment which must be lodged with the Registry no later than 7 days before the hearing.

Where application for an assessment of damages by a Master is made other than in the situations set out above, practitioners should make application for a hearing for directions before the P.I. Practice Master (who may refer it to the P.I. Judge). The estimated timing of the hearing will be fixed at 20 minutes. They must:

1) at that time file a statement setting out what directions as to medical evidence are sought identifying the experts and areas of expertise relied upon by the parties, and stating what reports are agreed;

2) give a realistic estimate, agreed with the other side, of the length of the hearing; many practitioners are giving excessive, wholly unrealistic estimates which, as a consequence, cause delays for other cases;

3) lodge at the Registry no later than 7 days before the directions hearing the bundle of relevant documents i.e. reports and statements.

At the directions hearing the P.I. Practice Master/P.I. Judge will decide what is to be contained in the assessment bundle which will have to be lodged no later than 7 days before the assessment. For a period of time applications for directions will be heard by the P.I. Judge.

B. Notification of Settlement – Running List and Fixture Lists

Practitioners are failing to inform the Registry and Court in time, of settlement or likely settlement of cases. They are ignorant of or are ignoring Order 34 Rule 8(2) & (3). In those cases where a fixed date has been allocated, the solicitors for the Plaintiff should maintain contact with the Listing Clerk and the Clerk to the P.I. Judge to keep him informed of a reduction in the likely length of a case i.e. where either quantum or liability has been agreed, and of course where a case has been settled. Sometimes the first notification is simply the lodging of a Consent Order under Order 42 Rule 5A.

This does not by itself fulfil the professional obligation – it is the duty of Solicitors (as well as of Counsel where the brief has been delivered) to keep the Court informed promptly of the progress of an action which has been set down for trial. In the case of fixtures it is essential that the Clerk to the P.I. Judge is informed in writing of settlement (preferably by fax) confirming a telephone call to the like effect. This applies equally to fixtures before a Master for assessment of damages. The Solicitor lodging the Consent Order/Summons asking for the fixed date or possible listing for trial to be vacated must indicate, where it is within his knowledge, the Master or Judge and type of list concerned.

C. Claims by Persons under a Disability

There have been some disturbing instances of such claims being settled and Consent Orders made under Order 42 Rule 5A. I am led to believe that these are not isolated

cases. My rulings and directions in respect of two such cases have been circulated recently.

Order 80 Rule 10 requires Court approval. A settlement is not otherwise valid.

In cases where Order 80 Rule 11 applies experience suggests that practitioners would be well advised to obtain Court approval.

In future upon the filing of Consent Orders under Order 42 Rule 5A where the claim is made on behalf of the estate and dependents of a deceased person and by a Plaintiff suing by a next friend or guardian, the file will be referred in the first instance to the P.I. Practice Master or P.I. Judge for her or his approval before they are sealed.

D. <u>Bundles of Documents</u>

These are prepared haphazardly and it is clear the Guidance formulated to assist the profession is being ignored. See K & L of the Revised Guidance dated 6 September 1999. I also attach a copy of an extract from a judgment of Mr. Justice Stock. Both the substance and the strictures set out there will be applied to Personal Injury cases. The next Practice Direction will incorporate such provisions, adapted to Personal Injury cases, but otherwise identical in form and purpose.

E. <u>Collection of Bundles</u>

Solicitors or their Clerks who lodge bundles of documents for Pre-Trial Reviews, Trials or Assessments must collect these immediately after directions, trial or after judgment from the Judges/Masters clerk before they leave the courtroom. The Court or Registry will no longer act as a warehouse for practitioners' papers which in very many cases can be re-used and will be expected to be re-used to avoid costly waste and duplication.

F. <u>Solicitors Files</u>

Too often when solicitors are required to produce a letter or other document as a consequence of a point raised by them or by the other side, or by the Judge, they explain that they cannot do so, because they have not brought the file containing it with them and then attempt to give some garbled recollection of the content. This is sloppy management and unacceptable. Solicitors concerned are likely to find that the hearing will be adjourned and they will pay the costs of that personally i.e. the other side's costs as well as their own. Such costs will not be borne by their client nor will there be an order for Legal Aid Taxation when the Plaintiff is legally aided.

G. <u>Photographs</u>

Many practitioners persist in filing, or lodging in the bundles, black and white photostat copies of photographs. These are useless. Only proper photographs from

negatives or colour laser copies are of any use. All consequential copying costs of such photostat copies will be disallowed.

H. **Copy Documents**

Very many of these are unnecessary. In many cases there are thick wads of sicknotes, receipts etc. filed, and in the bundles lodged. It is a waste. It is only necessary for these to be in the trial bundles if the Defendants require them to be there for a specific issue at trial. In any event they are not to be filed with any hearsay notice or list of documents but simply identified in the list or notice. They should however be served upon the other side unless copies have been previously supplied or served. The costs of copying such documents in breach of this will not be allowed.

J. Interest

Too often at trial Counsel and/or Solicitors expect Judges to calculate interest for them. This is not part of the Judges' functions. The rates of interest are fixed and ascertainable. The periods for which interest runs on various heads of damage, are also fixed. Only when there is an issue as to whether a dilatory Plaintiff should be entitled to interest for the whole of the usual period, is the Judge required to make a decision. He does not however make the calculation. That is for the parties to agree and then submit as part of the final order or judgment.

K. Medical Examinations and Video Recordings

I have seen evidence of a recent disturbing development on this front. At least one consultant psychiatrist instructed by Solicitors for a Defendant to examine a Plaintiff for the purpose of providing a report has of his own volition taken to the practice of video recording his interview. This is a costly extension of the use of medical expertise. It is wholly unnecessary. I suspect it is being carried out without the knowledge and therefore without the consent of the Plaintiff's Solicitors. It is an unjustified extension by the expert(s) concerned of what they are required to do as professional men. It may even be done without instructions to that effect from the Defendants' Solicitors. The court will exclude all such material save in wholly exceptional circumstances. The costs of this additional exercise will not be allowed. In the case which came before me the Defendants were represented by a firm which regularly acts for insurance companies. It transpired on investigation that they knew of this psychiatrist's new practice of video-recording his examination. They expected the report which he was to provide them with would be accompanied by the video-film and his comments upon it.

They had done nothing to alert the Plaintiff's Solicitors to the practice and therefore had not obtained proper consent. They tried to argue that the psychiatrist concerned

had obtained the Plaintiff's consent at the beginning of the examination. Whatever tacit agreement the psychiatrist had secured, it was not clear in his report, and was along the lines "I propose to video-record this interview is that all right?" Whatever "consent" the Plaintiff gave was not an informed consent and there was no consent by his Solicitors which was a pre-requisite. It is not acceptable for a psychiatrist practising in the medico-legal/forensic field to conduct an examination in this manner without proper instructions so to do and in any event without ascertaining that the Plaintiff's legal advisers have consented. In the three cases revealed the additional costs involved ranged from $10,000 to $16,000 minimum.
It is equally unprofessional for the Defendants Solicitors to acquiesce in such a practice and, knowing it is or will be used, to conceal that fact from the Plaintiff's Solicitors.

L. General

Most of these matters will find their way into a revised composite Guide to the Practice Direction. Failure to comply with these straightforward requirements will from now on result in costs penalties imposed by the Judges, Masters or Taxing Officers.

(Conrad Seagroatt)

Judge in charge of the Personal Injury List

17 April 2000.

Extract from the judgment of Mr Justice Stock
in *Bahadur v. Secretary for Secretary*
H.C.A.L. No.18 of 1999

The Bundle of Documents and Practice Directions

I take this opportunity of reminding practitioners of the text of Direction 1.9.3 of the Constitutional and Administrative Law List Practice Directions :

> "The bundle should be properly indexed, and dividers should be used. The preparation of bundle should not simply be the mechanical reproduction of materials. Thought should be given to the format which would be of greatest use to the judge. In most cases it will be more convenient for the exhibits to be in a separate section of the bundle. In that event the exhibits should follow each other chronologically (without the front or back sheets), i.e. in the order in which they came into existence, rather than the order in which they were produced as exhibits, and should be accompanied by an index identifying the exhibit by page and exhibit number. In any event, to enable the judge to find quickly a document referred to in an affidavit, the number of the page which the document can be found should be marked at the side next to the appropriate part of the affidavit."

The bundle prepared in this case by those acting for the applicant had no regard to that Direction. Indeed, had they set out to disobey it in every detail, they could not have fared better. There was simply placed into one bundle a series of affirmations with exhibits attached; the index failed to identify even a single key document; the exhibits followed no chronological order of any kind; and in between affidavits and their exhibits were thrown a letter here, and a summons there, and a couple of notices of application.

I would like to think that practitioners who present bundles in that sort of condition would change their ways if they knew how difficult it is for a court to prepare for a case, then to follow a case, and then to work on the judgment, when faced with such an unhelpful bundle of documents.

Practitioners should please take note that henceforth, in cases within this List, the presentation of a bundle in this condition is likely to result in an adjournment with a requirement that the costs thrown away be borne by the solicitors personally.

PRACTICE DIRECTION 18.1

THE PERSONAL INJURIES LIST

GUIDANCE NOTE

THESE NOTES SHOULD NOT BE REGARDED AS REPLACING THE MEMORANDUM ISSUED ON 17 APRIL 2000. ALTHOUGH THEY REPEAT SOME OF THE CONTENTS OF THAT MEMORANDUM, THESE NOTES ARE ESSENTIALLY GUIDANCE TO THE PRACTICE DIRECTION. THE CONTENTS OF THE MEMORANDUM WILL CONTINUE TO HAVE RELEVANCE AND FORCE ON THE BROADER ASPECTS OF PRACTICE.

Paragraph 2

A letter before action is essential. If it does not contain sufficient information to inform a defendant and/or his insurers of the basis, nature and extent of the claim, it is nothing more than a formal equivalent to "we have instructions to claim".

This protocol is to ensure that a defendant has proper notice of a claim with adequate detail and a realistic opportunity to investigate and react to the claim before a claimant plunges headlong into costs generating proceedings.

If the Defendant in the situation envisaged in §2.4, admits liability, then the Plaintiff is expected to accord to the Defendant full facilities for the purpose of obtaining the necessary information to evaluate quantum and make an offer in settlement. The Plaintiff should not advance proceedings in the meantime i.e. by service of Statement of Claim or Statement of Damages if not already served with writ. If any offer is made and it is unacceptable then the Plaintiff is justified in proceeding with its action. If no offer is made within 3 months of the admission of liability then similarly the Plaintiff is justified in proceeding.

This protocol is not intended to be forced upon a claimant but if proceedings are initiated and costs generated without having given the defendant an opportunity to respond without such precipitate action, the claimant will have difficulty in justifying such premature expenditure.

Such letters are not to be treated as pleadings. Their purpose is to provide information and indicate what areas can be explored with a view to a compromise. Omission to mention a feature does not preclude it being raised later. The parties are expected to use their judgment in these matters. The overall objective of such correspondence is to inform reasonably and to invite reasonable and positive reaction.

Too many actions are commenced far too late without giving Defendants the chance to negotiate a settlement. An excessive level of costs is also generated before notification is given.

The costs implications i.e. the need for the Plaintiff to justify the incurring of costs by proceeding whilst the Defendants are accorded the facilities, will mean that if the Plaintiff's solicitors fail to hold their hand whilst giving the Defendants the opportunity provided for in §2.3, they are unlikely to be allowed their costs incurred in advancing the proceedings. The rationale is that having had to issue proceedings because of the circumstance illustrated in §2.4 they would be denying the Defendants the opportunity of complying with the form and spirit of §2.3.

It has been suggested that the 4-month period to be accorded in the recommended protocol to the Defendants for their investigation and opportunity of evaluating the merits of the claim so as to give the Plaintiffs solicitors their positive reaction, will simply act as a brake upon the progress of proceedings. This view is to misunderstand the whole structure of the Directions and its allied proposed protocol. If the Defendants do not use that 4-month period for the purpose for which it is intended they will not be able to obtain extensions of time in the course of proceedings to compensate for their omission or neglect in that regard.

Concern has been expressed about how reasonable costs can be guaranteed in a pre-action settlement which does not require court approval. Since many actions are settled without resort to proceedings and it is to be assumed that costs are paid in addition it is difficult to see how any problem can arise. The costs must always reflect the work necessarily and properly done - in cases where the common fund basis is appropriate the costs are of a reasonable amount and reasonably incurred.

Since an agreed settlement must include an agreement in respect of costs, if reasonable costs are not to be paid in addition, it is difficult to see how there can be a settlement. This is a matter for the practitioners to deal with in the context of each such case. If there is no settlement on a comprehensive basis then proceedings will follow.

The fact that a Check List Review is fixed on the issue of the Writ does not entitle the Plaintiff to override the situation provided for in §2.4. An admission of liability will mean that the C.L.R. will be in the form of a directions hearing for assessment of damages. Any reasonable difficulties encountered by a Defendant would justify an application by consent to delay the C.L.R. under §10.5.

The Plaintiff must not delay the service of the Writ (and therefore of the C.L.R. Notice). It is implicit (if not explicit) in §2.4 that the Writ is to be served with the Notice. The period of validity of the Writ does not override the requirement to act in accordance with this direction. The onus will be on the Plaintiff's solicitors to justify delay in service.

Many practitioners obtain reports in every conceivable medical or quasi-medical discipline before they establish sensible contact with the insurance company concerned or their solicitors e.g. orthopaedic, neurological, urological and psychiatric reports, and reports from an occupational therapist, physiotherapist, rehabilitation consultant, surveyor etc. What they should be doing instead of this 'front-loading' exercise on costs is to invite the Defendants to take part in a joint examination by respective experts, or in a joint instruction to an agreed expert. Failure to do so is likely to result in the Plaintiff's' practitioners not recovering such costs from Defendants in the event of a settlement or a judgement against the Plaintiff.

The Court will be alert to prevent, when it can, practitioners from recovering such costs from the Plaintiff or out of the Plaintiff's damages.

Paragraph 3

Writs filed with a full Statement of Claim endorsed are vulnerable to search and inspection under Order 63 Rule 4. This order when originally devised had no intention of disclosing confidential and/or privileged material to the detriment of the parties because it was not envisaged that a full Statement of Claim would be so endorsed.

Furthermore the Personal Data (Privacy) Ordinance should not be circumvented by an order which predated it. Pleadings are now so undisciplined and lacking in form that confidential material in a medical report is often extracted from it and repeated verbatim in the pleading. This needs to be curtailed.

Where liability is admitted following issue and service of the Writ a Statement of Claim is unnecessary but a comprehensive Statement of Damages is essential to assist the Defendants on quantum.

It is not appropriate for this Statement of Damages when dealing with the Pain, Suffering and Loss of Amenity element of the damages to contain sections of the medical reports. It is sufficient to set out the prime injuries, and the principal sequelae and prognosis, in short form. Medical reports exist to provide the full picture.

Paragraph 4

Pleadings are now often served and filed in an incomplete state and without proper identification as to the pleader. If for example, Counsel has settled or drafted the pleading but it does not bear his name, it may well be difficult to obtain, on taxation of costs, Counsel's fee for so doing.

One of the purposes of requiring the identity of the person settling or drafting the pleading (Counsel or Solicitors) is to identify whoever is responsible for the state of the pleadings.

Paragraphs 5 & 6

The directions in these two paragraphs are not intended to override the provisions of Order 25 rule 8 and do not have such an effect. They are aimed at drawing the parties' attention to matters which are essential to the issues to be determined by the court so they can better prepare their cases at any early stage and avoid unnecessary delay and costs.

The quality and value of Statements of Damage are variable in the extreme. They are also revised, amended or re-revised with unjustified frequency.

The increase in the amount of material as to liability and quantum which must now be served with the Writ and Statement of Claim and with the Defence is to establish the level playing field at an early stage and enable proper assessment of the issues to be made. No action on behalf of a claimant can properly be pleaded unless the documents set out under 5.2 have been obtained. Similarly no Defence can properly be pleaded unless the documents set out under 6.1 have been obtained.

Too many actions are commenced "late in the day" i.e. close to the end of the limitation period. In view of that delay it is all the more essential for there to be early disclosure of material.

Medical negligence actions tend to be started late by reason of the innate problems associated with such claims. When a case is pleaded in such actions, there is

invariably some expert evidence relied upon. Sometimes the pleaded case is not wholly intelligible without a consideration of the expert report on which it is based. Defendant doctors, hospitals etc. must have the full material setting out the case against them. There is often a professional reputation at stake. In view of this, and the likely passage of time in any event, the level playing field must be available at the earliest opportunity. In due course it will be necessary to establish a protocol exclusive to medical negligence claims.

The documents to be served with the Defence under 6.1 are those essentially appropriate in an employer's liability/accident at work action. Where one of the Defendants is the employer most of the documents are available easily. Obviously if there is no machine or equipment relevant to the accident, (ii) and (iii) will not apply but the words in 6.1 - "If they are available and in so far as this is practicable" - simply provide for the inevitable variation according to the case.

If a prosecuting or investigating body (e.g. Labour Department, Commissioner of Police) declines to supply the unedited material requested, application to the court for full disclosure must be made promptly. (Order 24 Rule 7A(2)). Failure on the part of these investigating authorities to comply with a proper, valid and authoritative request is likely to result in orders for costs. At present such failure is delaying necessary evaluation of cases, and progress in proceedings, and causing unnecessary costs. Regard should be had to the Ruling of Suffiad J in **Lily Tse Lai Yin & Others v. The Incorporated Owners of Albert House & Others** H.C.P.I. 828/97 - 10 December 1998 as well as to a commonsense appraisal of the position.

The requirements for the service of statements (in particular the statement of the Plaintiff) under 5.2(i) & (iv) and 6.1(vii) proceed from the simple fact that the obtaining of such statements is one of the earliest stages in the efficient preparation of a case by both parties. More often than not they have to be obtained before a pleading can be served. These are 'core' statements. There is an illogical and deeply ingrained view amongst practitioners that it is not necessary to obtain comprehensive statements until the final stages of an action and close to trial. There will always be room for supplemental statements where necessary, to be taken later (but still reasonably promptly) to deal with matters emerging from the other side's statements, or to bring important matters up-to-date. The requirements under these paragraphs do not remove a claim of privilege.

What is required is the service of documents, reports etc., upon which the parties rely in support of their case on the issues. It does not require the disclosure of material for

which privilege is claimed. It is intended to enable the parties to identify the issues and concentrate on what is material to them, at an early stage.

Paragraph 7

Disclosure or discovery is often misunderstood and dealt with in a piecemeal fashion. A tighter discipline is called for and will be imposed. It is, for example, quite unnecessary to have a sequence of lists of documents disclosing medical and other reports which come into existence after the original list. The documents should simply be served under a covering letter.

Discovery is the disclosure of any fact resting merely (i.e. solely) within the Defendant's (or Plaintiff's) knowledge or the discovery of any document in his power, which would aid in the enforcement of a right, or the redress of a wrong. It is the right, as far as a Plaintiff is concerned, to extract from a Defendant discovery as to all matters of fact which, being properly pleaded, are material to the Plaintiff's case and which the Defendant does not by his pleading admit. The right is limited to a discovery of such material facts as relate to the Plaintiff's case and does not extend to discovery of the manner in which the Defendants' case is to be exclusively established.

[See Wigram - Discovery; Jowitt - Dictionary of English Law.]

Paragraph 8

These provisions are designed to eliminate trivial and unnecessary applications which are wasteful of costs and judicial resources. There has been a considerable improvement since the Practice Direction of September 1998 but tighter discipline and thought is called for.

An example of such time and costs wasting exercises is where an application is made to amend a Statement of Claim to change or correct a figure for one item of special or continuing loss, or to correct a typographical error, or some other trivial or obvious error, where a simple letter of notification to the Defendants will suffice. There have been examples of a purported Amended Defence being filed and served in answer to an Amended Statement of Claim, where the only 'amendment' to the Defence is, the addition of the word 'Amended' in red ink to the word 'Defence' throughout. It is difficult to understand how practitioners could lend themselves to this activity but it has to cease. It is unnecessary to plead evidence and applications to amend pleadings in this regard will not be allowed.

The costs provision is to discourage unmeritorious applications as well as to introduce some practical early assessments for the benefit of all concerned.

A one page statement of such costs setting out the hours of preparation, attendances on client/counsel/at court, disbursements, number of letters and telephone calls, is sufficient.

Paragraph 9

This direction is aimed at better case management, particularly in more complicated cases.

The element of flexibility here is to facilitate efficient i.e. early and economic, disposal of cases.

There is similar provision in the District Court for transfer to the High Court.

Paragraph 10

The date of hearing has been advanced by two months. The reason for this is partly the response of many practitioners to the Practice Direction of September 1st 1998 which has demonstrated that progress can be made more quickly, and partly the response of other practitioners who think the Check List Review can be adjourned in order to enable them to catch up.

With the protocol encouraged in paragraph 2, an earlier Check List Review will provide, for all parties, tighter control and frame work, and an earlier trial date.

Too many solicitors are delaying service of the Writ and the Notice of the Check List Review until such time as they think suits them. This is not acceptable and must be avoided unless there are good grounds for not serving the Writ immediately after issue. The fact that a Writ is valid for 12 months does not justify with-holding service. It deprives the Defendants of proper notice of the Review. It is also seen as a deliberate attempt to circumvent the Practice Direction. Any application to adjourn the Check List Review hearing on the ground that the Writ has not been served must be justified and the Court may give such directions or make such orders with regard to the service of the Writ and costs as it thinks fit. (See note to paragraph 2)

The statements referred to in 10.8(b) and (c) must be in English as well as in the original Chinese. The translations need not be certified at this stage but effort should be made to agree the translations with the Defendants' solicitors.

There is an ill-considered, extravagant and unjustified use of a range of experts particularly in the medical and quasi-medical field. The court will make a determined effort to control this, reduce such use of expertise to the minimum necessary and give clear indications of instances where costs have been wasted in this area, in order to assist Taxing Masters.

The Court has the power under 10.12(f) to order the Defendants to serve an Answer to the Statement of Damages if one has not already been served. It will also direct, if necessary, the service of a Revised Statement of Damages.

An Answer is required to set out the Defendants' case in respect of each and every head of damage. A simple denial that the Plaintiff is entitled to claim a certain head of damage is not sufficient. That is no more than is likely to have been pleaded in the Defence save that more words will have been used in the Answer to say the same thing. What is required is the reason for the denial with a counter statement of what is claimable if it were to be proved. Counsel and solicitors are advised to take note. If the answer is simply in the form of a denial, cross-examination of the Plaintiff on a basis not pleaded in the Answer will not be allowed. Similarly submissions in relation to whether a head of damage is claimable at law will not be allowed unless this too is pleaded. Furthermore in the event of the Defendant succeeding in an action, the costs of an Answer which does not meet the requirements will not be allowed. Similarly a Statement of Damages which does not identify properly for the Defendants the heads of damage claimed will result in costs penalties.

Too many solicitors are sending a trainee solicitor to the Review hearing or some other solicitor who is not the one handling the case. Sub-paragraph 10.13 is mandatory. It is becoming readily apparent where a firm of solicitors is at fault in this respect. Orders for costs will be made to enforce this.

In many cases solicitors are attending without their complete files of papers, thereby causing delay and adjournments for such files to be obtained. This is a waste of Court time and such instances are likely to be penalised by orders for costs against the solicitors concerned. This stricture applies with equal force to Pre-Trial Reviews.

In the event of either or any party to an action seeking disclosure or service by any other party of information, a document, a report or a statement, at or consequent upon a Check List Review, it must do so by letter to the party concerned, but not by formal summons or application to the Court, in good time, and in any event no later than 3 clear days before the said Review. This applies equally in relation to such

information, document, report or statement required to be disclosed at or consequent upon a Pre-Trial Reviews.

Paragraph 11

Pre-trial Reviews are designed to finetune for trial the management of those cases which actually require a Pre-Trial Review. Most cases do not require such a hearing if the practitioners have properly complied with the requirements of the Check List Review.

Originally the Practice Direction of 10 April 1996 (18.1) provided for Counsel's Advice before the Pre-Trial Review by imposing it as an obligation. The current Pre-Trial Review Notice merely leaves the matter in paragraph 2 as a statement to be left in or deleted as is appropriate; otherwise the Practice Direction is wholly silent on this.

It is not an obligation to obtain such Advice. Many solicitors do not think it necessary to do so. This aspect must of course remain a matter of choice. Too often in the past practitioners have put forward the failure to obtain Counsel's Advice in time for the Check List Review or Pre-Trial Review as an impediment to their future progress or as an excuse for failure to comply with the Practice Direction. The fact that a practitioner does not have such Advice at either stage, whether it be because of late delivery of instructions or delay by Counsel, will not be allowed to interfere with the proper progress of the action, or excuse any default.

Whoever attends the Pre-Trial Review is expected to be thoroughly cognisant with the aspects of liability and medical evidence. The Review will require statements as to what medical evidence is agreed, and, if not agreed, a good explanation of the reasons why it cannot be agreed. Practitioners are expected to have a clear grasp of their cases and to have applied their minds to the question of agreeing expert medical evidence and items of damage.

The change set out in sub-paragraph 11.8 is necessitated by the fact that in many cases counsel is instructed at the last minute and is not a counsel already involved in the case. His appearance is often cosmetic and sometimes simply to act as a buffer for the practitioner's failures.

See also notes to paragraph 10.

Paragraph 12

This is self-explanatory. Since fault has occasioned the costs order it is more efficient that costs should be dealt with in this way.

Paragraph 13

This is self-explanatory and is a clarification of the various circumstances in which an assessment of damages will be provided for.

The reason cases referred to in 13.6 will not be remitted to a Master is that further delay will result and also that extra costs are unnecessarily generated. It is a simple matter to reduce the estimated length of the hearing.

Paragraph 14

This is a substantial departure from practice hitherto.

In future documents will be filed only where the Practice Direction requires this and/or where a Master or Judge specifically directs the filing of a particular document.

Hitherto there has been wholly indiscriminate filing of documents to no good purpose. This past practice has been an enormous burden for the Registry, an inordinate waste of paper and copying (in some cases the same document has been filed on 3 or 4 occasions) and the means of generating a significant amount of cost which has no relevance to the issues.

The Practitioners must ensure that their outdoor clerks know what is to be filed and what is to be lodged. The document itself should on its backsheet make this clear i.e. "To be filed" or "To be lodged".

Although the following requirement was notified to the profession some time ago it is necessary to restate it. Where Hearsay Notices or Notices under Section 47A of the Evidence Ordinance and Order 38 of the Rules of the High Court are filed the documents identified in such Notices must not be filed.

Paragraph 15

Practitioners find it difficult to understand that black and white photostat copies of photographs are for the most part useless. Some complain that they are simply reproducing what has been served on them. The onus is on them to reject such black and white photostat copies and insist on either laser copies, or photographs properly

produced from negatives. They are entitled to such proper photographs since they are paying for what they request.

The course best designed to achieve this is to make clear in the letter of request the form of photographs sought. In the event of such being refused an application should be made under Order 24 rule 7A.

In the last resort at trial, where actual photographs or their negatives have not been supplied hitherto, a sub-poena duces tecum must be served on the proper person required to produce these.

Paragraph 16

This is self-explanatory.

It is required that bundles for Check-List Reviews and Pre-Trial Reviews should be re-used and re-constituted, with necessary exclusions and additions, for the trial.

Bundles for Pre-Trial Reviews must not include medical literature.

Costs will not be allowed for duplicated bundles.

Practitioners are failing to inform the Registry and Court in time, of settlement or likely settlement of cases. They are ignorant of or are ignoring Order 34 Rule 8(2) & (3). In those cases where a fixed date has been allocated, the solicitors for the Plaintiff should maintain contact with the Listing Clerk and the Clerk to the P.I. Judge to keep him informed of a reduction in the likely length of a case i.e. where either quantum or liability has been agreed, and of course where a case has been settled. Sometimes the first notification is simply the lodging of a Consent Order under Order 42 Rule 5A. This does not by itself fulfil the professional obligation - it is the duty of Solicitors (as well as of Counsel where the brief has been delivered) to keep the Court informed promptly of the progress of an action which has been set down for trial. In the case of fixtures it is essential that the Clerk to the P.I. Judge is informed in writing of settlement (preferably by fax) confirming a telephone call to the like effect. This applies equally to fixtures before a Master for assessment of damages. The Solicitor lodging the Consent Order/Summons asking for the fixed date or possible listing for trial to be vacated must indicate, where it is within his knowledge, the Master or Judge and type of list concerned.

Any documents the translations of which require a certification, must be submitted to the Court Interpreters' Office in good time before trial. It is essential that the Solicitors submitting such documents adhere to the requirement that translations are submitted for certification. The Court Interpreters' Office is not to be used as a translation service to supplement a practitioner's shortcomings in this regard.

Paragraph 17

This requires careful reading.

Practitioners will have to justify fully any costs and disbursements which they seek to charge against the damages recovered for a client under a disability.

The court will not approve a settlement without knowing exactly to what extent costs and disbursements claimed will reduce such sum, and may withhold approval if unrecovered costs will reduce the damages to be paid for the benefit of the Plaintiff.

There will be an examination of such identified costs in order to determine whether they can justifiably be claimed against the Defendants as being costs within the Common Fund basis or whether they are costs which have been incurred as a consequence of lack of judgment and therefore unreasonably incurred in any event. The court is concerned to ensure that unnecessary and unreasonable costs have not been incurred by solicitors on the basis that if they cannot recover them from the Defendants, then the Plaintiff's fund of damages can be used to reimburse them for those costs. The Plaintiff's damages will not be used to make up the shortfall in such circumstances.

There have been some disturbing instances of such claims being settled and Consent Orders made under Order 42 Rule 5A. Information suggests that these are not isolated cases. Rulings and directions in respect of two such cases were circulated on the 13 March 2000.

Order 80 Rule 10 requires Court approval. A settlement is not otherwise valid.

In cases where Order 80 Rule 11 applies experience suggests that practitioners would be well advised to obtain Court approval.

In future upon the filing of Consent Orders under Order 42 Rule 5A where the claim is made on behalf of the estate and dependants of a deceased person and by a Plaintiff suing by a next friend or guardian but who is no longer under a disability, the file will

be referred in the first instance to the P.I. Practice Master or P.I. Judge for her or his approval before they are sealed in order to ensure that the Solicitors concerned have not overlooked the interests of minors or otherwise erred.

Paragraph 18

Very often solicitors submit for the Judge's clerk or the Judge himself draft orders which appear to bear little resemblance to the orders actually made by the Judge. It may be that the reason for this is that the solicitor or solicitor's clerk (if with counsel) or counsel himself has not bothered to take a clear note of the orders made, and, if in doubt, have not sought clarification. As a consequence a considerable amount of time has been expended by Judges' clerks, and Judges themselves on this mundane and time-consuming task which is unnecessary if solicitors carry out properly their task for which they seek remuneration. Hitherto Judges' clerks and Judges have acted as 'long-stops' for solicitors. This has to cease. Furthermore solicitors who fail to file in time a correct order will be denied their costs. Very often there have been instances in which the next stage hearing takes place before the order has been drawn up thereby occasioning difficulty for the court in checking what has and has not been complied with. In such extreme, though not rare cases, it may be necessary to adjourn the hearing for the order to be filed. In that event the solicitors in default will bear the costs thrown away.

(Memorandum from the Judge-in-Charge of the List dated 17 April, 2000)

PERSONAL INJURIES LIST

MEMORANDUM FROM THE JUDGE IN CHARGE OF THE LIST

Although this is directed to all practitioners I am aware that only a minority are at fault in respect of the matters set out. Nonetheless the failures in these regards are creating unnecessary work for the Registry and Judicial Staff and for Judges themselves, delaying the swift and efficient progress of cases, adding unjustifiably to the cost of litigation and, in some respect, breaking the spirit if not the letter of the Practice Directions. In most respects they indicate a lack of professionalism and failure to comply with requests from the Bench.

A. Assessments of Damages

In cases where there is a fixed date before a Judge for trial on liability and quantum and liability is agreed before trial, the question of assessment will remain to be made on the fixed date. Under no circumstances should an application be made to vacate that fixture for assessment to be remitted to a Master. Too many practitioners are making applications to alter progress in this way. They will not be granted. Practitioners remain obliged to give a realistic revised estimate of the length of trial where the issues have been so reduced.

On the hearing of Check List Reviews and Pre-Trial Reviews, where liability has been conceded, or is agreed, or where judgment has been entered by the Court under Order 18 Rule 19 (or by the exercise of judicial discretion generally) directions will be given for the assessment of damages either by the Judge or by a Master. Such directions will include a realistic estimate of the length of the hearing, the provision for any further reports or statements and the preparation of a bundle of relevant documents for assessment which must be lodged with the Registry no later than 7 days before the hearing.

Where application for an assessment of damages by a Master is made other than in the situations set out above, practitioners should make application for a hearing for directions before the P.I. Practice Master (who may refer it to the P.I. Judge). The estimated timing of the hearing will be fixed at 20 minutes. They must:

1) at that time file a statement setting out what directions as to medical evidence are sought identifying the experts and areas of expertise relied upon by the parties, and stating what reports are agreed;

2) give a realistic estimate, agreed with the other side, of the length of the hearing; many practitioners are giving excessive, wholly unrealistic estimates which, as a consequence, cause delays for other cases;

3) lodge at the Registry no later than 7 days before the directions hearing the bundle of relevant documents i.e. reports and statements.

At the directions hearing the P.I. Practice Master/P.I. Judge will decide what is to be contained in the assessment bundle which will have to be lodged no later than 7 days before the assessment. For a period of time applications for directions will be heard by the P.I. Judge.

B. Notification of Settlement – Running List and Fixture Lists

Practitioners are failing to inform the Registry and Court in time, of settlement or likely settlement of cases. They are ignorant of or are ignoring Order 34 Rule 8(2) & (3). In those cases where a fixed date has been allocated, the solicitors for the Plaintiff should maintain contact with the Listing Clerk and the Clerk to the P.I. Judge to keep him informed of a reduction in the likely length of a case i.e. where either quantum or liability has been agreed, and of course where a case has been settled. Sometimes the first notification is simply the lodging of a Consent Order under Order 42 Rule 5A.

This does not by itself fulfil the professional obligation – it is the duty of Solicitors (as well as of Counsel where the brief has been delivered) to keep the Court informed promptly of the progress of an action which has been set down for trial. In the case of fixtures it is essential that the Clerk to the P.I. Judge is informed in writing of settlement (preferably by fax) confirming a telephone call to the like effect. This applies equally to fixtures before a Master for assessment of damages. The Solicitor lodging the Consent Order/Summons asking for the fixed date or possible listing for trial to be vacated must indicate, where it is within his knowledge, the Master or Judge and type of list concerned.

C. Claims by Persons under a Disability

There have been some disturbing instances of such claims being settled and Consent Orders made under Order 42 Rule 5A. I am led to believe that these are not isolated

cases. My rulings and directions in respect of two such cases have been circulated recently.
Order 80 Rule 10 requires Court approval. A settlement is not otherwise valid.
In cases where Order 80 Rule 11 applies experience suggests that practitioners would be well advised to obtain Court approval.
In future upon the filing of Consent Orders under Order 42 Rule 5A where the claim is made on behalf of the estate and dependents of a deceased person and by a Plaintiff suing by a next friend or guardian, the file will be referred in the first instance to the P.I. Practice Master or P.I. Judge for her or his approval before they are sealed.

D. Bundles of Documents

These are prepared haphazardly and it is clear the Guidance formulated to assist the profession is being ignored. See K & L of the Revised Guidance dated 6 September 1999. I also attach a copy of an extract from a judgment of Mr. Justice Stock. Both the substance and the strictures set out there will be applied to Personal Injury cases. The next Practice Direction will incorporate such provisions, adapted to Personal Injury cases, but otherwise identical in form and purpose.

E. Collection of Bundles

Solicitors or their Clerks who lodge bundles of documents for Pre-Trial Reviews, Trials or Assessments must collect these immediately after directions, trial or after judgment from the Judges/Masters clerk before they leave the courtroom. The Court or Registry will no longer act as a warehouse for practitioners' papers which in very many cases can be re-used and will be expected to be re-used to avoid costly waste and duplication.

F. Solicitors Files

Too often when solicitors are required to produce a letter or other document as a consequence of a point raised by them or by the other side, or by the Judge, they explain that they cannot do so, because they have not brought the file containing it with them and then attempt to give some garbled recollection of the content. This is sloppy management and unacceptable. Solicitors concerned are likely to find that the hearing will be adjourned and they will pay the costs of that personally i.e. the other side's costs as well as their own. Such costs will not be borne by their client nor will there be an order for Legal Aid Taxation when the Plaintiff is legally aided.

G. Photographs

Many practitioners persist in filing, or lodging in the bundles, black and white photostat copies of photographs. These are useless. Only proper photographs from

negatives or colour laser copies are of any use. All consequential copying costs of such photostat copies will be disallowed.

H. Copy Documents

Very many of these are unnecessary. In many cases there are thick wads of sicknotes, receipts etc. filed, and in the bundles lodged. It is a waste. It is only necessary for these to be in the trial bundles if the Defendants require them to be there for a specific issue at trial. In any event they are not to be filed with any hearsay notice or list of documents but simply identified in the list or notice. They should however be served upon the other side unless copies have been previously supplied or served. The costs of copying such documents in breach of this will not be allowed.

J. Interest

Too often at trial Counsel and/or Solicitors expect Judges to calculate interest for them. This is not part of the Judges' functions. The rates of interest are fixed and ascertainable. The periods for which interest runs on various heads of damage, are also fixed. Only when there is an issue as to whether a dilatory Plaintiff should be entitled to interest for the whole of the usual period, is the Judge required to make a decision. He does not however make the calculation. That is for the parties to agree and then submit as part of the final order or judgment.

K. Medical Examinations and Video Recordings

I have seen evidence of a recent disturbing development on this front. At least one consultant psychiatrist instructed by Solicitors for a Defendant to examine a Plaintiff for the purpose of providing a report has of his own volition taken to the practice of video recording his interview. This is a costly extension of the use of medical expertise. It is wholly unnecessary. I suspect it is being carried out without the knowledge and therefore without the consent of the Plaintiff's Solicitors. It is an unjustified extension by the expert(s) concerned of what they are required to do as professional men. It may even be done without instructions to that effect from the Defendants' Solicitors. The court will exclude all such material save in wholly exceptional circumstances. The costs of this additional exercise will not be allowed. In the case which came before me the Defendants were represented by a firm which regularly acts for insurance companies. It transpired on investigation that they knew of this psychiatrist's new practice of video-recording his examination. They expected the report which he was to provide them with would be accompanied by the video-film and his comments upon it.

They had done nothing to alert the Plaintiff's Solicitors to the practice and therefore had not obtained proper consent. They tried to argue that the psychiatrist concerned

had obtained the Plaintiff's consent at the beginning of the examination. Whatever tacit agreement the psychiatrist had secured, it was not clear in his report, and was along the lines "I propose to video-record this interview is that all right?" Whatever "consent" the Plaintiff gave was not an informed consent and there was no consent by his Solicitors which was a pre-requisite. It is not acceptable for a psychiatrist practising in the medico-legal/forensic field to conduct an examination in this manner without proper instructions so to do and in any event without ascertaining that the Plaintiff's legal advisers have consented. In the three cases revealed the additional costs involved ranged from $10,000 to $16,000 minimum.

It is equally unprofessional for the Defendants Solicitors to acquiesce in such a practice and, knowing it is or will be used, to conceal that fact from the Plaintiff's Solicitors.

L. General

Most of these matters will find their way into a revised composite Guide to the Practice Direction. Failure to comply with these straightforward requirements will from now on result in costs penalties imposed by the Judges, Masters or Taxing Officers.

(Conrad Seagroatt)

Judge in charge of the Personal Injury List

17 April 2000.