

Employer's Liability

1. Purpose

The purpose of this instruction is to inform Unit Managers and their equivalents of the procedures in place where a claim for damages arises in England, Wales and Scotland from employees, ex-employees or people working on Forestry Commission (FC) land. In addition, Estate Management Guidance Note entitled Managing Public Access – Claims Management sets out the procedures to be followed when a claim is received from a member of the public who has suffered injury or loss while on Commission land. A copy of the Guidance Note can be viewed in the Estate Management area within each Country eConnect site.

All claims for damages from employees, ex-employees and people working on FC land are managed by Lorna Logan, HR, Silvan House.

When the terms "Forest District", "Forest District Manager" and "Forest Management Director" are used in this instruction they should be taken to mean "Forestry Commission Management Unit" and the Manager of that Unit.

2. Civil Procedure Rules

New Civil Procedure Rules in England and Wales were introduced in 1999. The new rules replaced previous High Court and County Court Rules, and were intended to speed the process of litigation at the same time reducing the cost. They set out "pre-action protocols" and rules to govern the conduct of litigation limiting the defendant's ability to delay proceedings.

The aims of the pre-action protocols are to:

- provide for more pre-action contact between the parties;
- enable better exchange of information;
- enable better pre-action investigation to take place;
- put the parties in a position to settle cases fairly and early, thus avoiding expensive litigation.

3. Claims for Damages

An employee, or indeed any person, can raise a civil claim for damages if:

1. They are owed a duty of care;
2. The duty of care has been breached; and
3. They have suffered injury as a result of the breach.

Past experience indicates that Employer's Liability Claims can be split into 3 broad categories:

- accidents at work;
- noise induced deafness; and
- Hand arm vibration syndrome.

There is also the potential for a further 3 categories:

- work related upper limb disorders;
- exposure to pesticides; and
- work related stress.

4. FC Solicitors

Separate firms of solicitors handle claims in Scotland and in England and Wales:

- Scotland Tods Murray LLP
- England Eversheds LLP
- Wales New procedures means that new claims go through the Welsh Assembly Government Legal Services who then allocate them to solicitors on their list.

5. The Letter of Claim

A letter of claim should contain a clear summary of the facts on which the claim is based, together with an indication of the nature of any injuries suffered and of any financial loss involved. If a letter is received in a FD from Solicitors intimating a civil claim for damages by an employee, an ex-employee or any other person at work, e.g. a Contractor, the Forest District Manager/Forest Management Director must:

- **Send the letter to HR in Edinburgh immediately so that they can acknowledge receipt of the letter as soon as it is received and, in any case, within 21 days. The acknowledgement must include the fact that FC is self-insured; and**
- **Ensure that management units do not enter into correspondence with the claimant's solicitors.**

When a letter is received in HR from Solicitors intimating a civil claim for damages by an employee or any other person at work, e.g. a Contractor, HR will:

- acknowledge receipt of the letter immediately and, in any case, within 21 days (sample letter at Appendix 1);
- immediately forward the letter and the acknowledgement to the FC solicitor; and
- inform the FDM/FMD of the claim.

6. Managing the Claim

HR in Edinburgh will act as the contact between FC Solicitors and FDs. All internal HR correspondence on the claim will be addressed to the FDM/FMD and marked "PROTECT - STAFF". Some of the correspondence will be routine requests for information, but some will be extremely commercially sensitive.

When a claim is made against the FC we, as defendants, have 21 days in which to respond; giving details of our status as "self-insured". Within 3 months of the date of the initial letter of claim the FC will have to admit or deny liability, complete with all documents in support of that assertion or denial, and a reasoned case.

While much of the responsibility for ensuring that the FC complies with the new Rules will rest with HR, who will liaise with the FC's solicitors, there is an impact on FDs. There are increased responsibilities placed on FD's as set out below:

- FDMs/FMDs must ensure that any letter received in the FD office intimating a civil claim for damages by an employee or any other person at work is dealt with immediately and sent to HR in Edinburgh.
- FDMs/FMDs must respond promptly to requests for information and documents from HR or from Eversheds and Tods Murray.
- It is essential that documentation in relation to employees, contractors, accident reporting and investigations etc is kept up to date and is easily accessible.
- The FC now has a legal responsibility to conduct thorough searches of files for documentation which is required for pre-action protocols, and staff may be required to sign Statements of Truth, saying that such searches have been carried out and that all assertions made in defence of claims are true. **Any person giving a false statement could be found in contempt of Court.**

A non-exclusive list of documents has been set out in the Personal Injury Pre-Action protocol, and is considered appropriate for standard disclosure depending on the type of case. The non-exclusive list of documents for workplace claims is reproduced at Appendix II. These are the types of documents which HR and FC Solicitors will request from FDs.

The FC, as Defendant, has a maximum of 3 months inclusive of the initial 21 days, to investigate the claim. At the end of that period the FC solicitors must reply stating whether liability is denied and if so giving reasons for the denial of liability.

FDMs/FMDs must ensure that the request for information is dealt with timeously (within 3 weeks). If the information is not available (e.g. if records have been destroyed or not kept) HR must be informed of this.

7. The Defence

If liability is denied proceedings will be issued. The longest time available for filing the defence will be 56 days from service of the Claim Form and Particulars of Claim. If further time is necessary, an application will have to be made to the Court - the claimant's consent is not enough.

Solicitors cannot file a holding defence while the FC carries out further investigations. The defence must be fully pleaded, spelling out why the claimant's allegations are denied and stating the FC's version of events, if different, and the FC's valuation of the claim. The defence also has to contain a statement of truth confirming that its contents are true and signed by the FC, in most instances by the FDM/FMD. A false statement in the defence could result in contempt of court proceedings being taken against the FC.

If the defence is a denial without evidence (bare denial) or discloses no reasonable grounds for defending the claim, the court will strike out the defence or a summary judgement may be given. Therefore, it is vital that sufficient information is available to substantiate fully the defence by the time the defence is filed - another reason why the investigations into liability and, to a certain extent, quantum (the value of the claim for damages) must be carried out prior to the issue of proceedings.

8. Disclosure

Deciding which documents the Commission will have to show to the other side - and locating them - is generally going to be one of the more time consuming tasks in the litigation process. Unfortunately, the new 'rules' have not simplified matters. The categories of documents that have to be disclosed are supposed to be narrower than in the past. Unless ordered otherwise, the parties have to give "standard" discovery of:

- All documents on which they rely;
- All documents which adversely affect their case;
- All documents which could adversely affect the other party's case;
- All documents which could support another party's case;
- All documents they are required to disclose by any practice direction, eg in accordance with the pre-action protocol in personal injury cases. In the Rules, the list

of documents which are defined as being within the remit of "standard" discovery in the pre-action protocol for personal injury cases runs to more than four pages.

In the case of the FC, the types of documents, which we are going to have to provide, will include (depending on the incident in question):

- history of employment within the FC giving dates of service, type of work performed, i.e. Harvesting/Forest Management;
- details of machines and tools used;
- relevant risk assessments;
- record of issue of Arboriculture & Forestry Advisory Group (AFAG) Safety Guides;
- AFAG Safety Checklists;
- minutes of Health & Safety meetings;
- sick records and any correspondence via the FC's current occupational health advisors (including HAVS and Deafness surveillance forms);
- records of issue of protective equipment and clothing (B157 and B160);
- training course records;
- accident book entry;
- pay details;
- FJP's;
- Any local information which may assist our case and can be substantiated by independent evidence which can be used in legal proceedings.

The above list is not exhaustive, and FC Solicitors, within the time limits, may require other relevant documentation in order to mount a successful defence.

The Rules also impose a "duty to search". Parties are required to make a "reasonable search" taking into account:

- The number of documents involved.
- The nature and complexity of the proceedings.
- The ease of retrieval.
- The significance of any document likely to be located.

When documents are disclosed, the list of such documents must include a disclosure statement which:

- Sets out the extent of the search;
- Draws attention to any limitations of the search;
- States that the search is believed to be reasonable under all of the circumstances;
- Confirms an understanding of the Duty of Disclosure;

- Certifies to the best of the party's knowledge that he/she has complied with that duty.

HR will identify the appropriate person (people) to make the disclosure statement. The statement must identify the person making the statement and explain why he/she is an appropriate person to make the statement.

Having to set out the extent of the search made and explain why the search was limited, if that is the case, focuses attention on the need to treat disclosure seriously.

9. Offers to Settle

The Commission will be able to make "Offers to Settle" prior to the issue of proceedings.

The claimant has 21 days in which to accept an offer. If the claimant is subsequently awarded less, the Commission will be entitled to costs from the last date upon which the claimant could have accepted the offer.

An offer made prior to proceedings being issued must be backed up by a 'Payment into Court' within 14 days of service of proceedings, if it is to retain its cost consequences.

Plaintiffs can now also make offers to settle. If the Commission refuses such an offer and the plaintiff is subsequently awarded more - or more in substance - than he offered to accept, the Commission could be ordered to pay:

- Higher interest on the damages awarded - up to 10% above base rate;
- Costs for the claimant on the indemnity basis from the latest date on which the Commission could have accepted the offer.

Note: If the claimant has the benefit of a conditional fee arrangement, costs on the indemnity basis could arguably include the conditional fee "bonus" that the claimant's solicitors are entitled to recover from their client. This could be as much as a mark-up on their costs of up to 100% up to a limit of 50% of the value of the claimant's damages award.

The claimant can make an offer to settle at any time. It would appear from the rules, however, that a claimant's offer would only have the consequences set out above when made after proceedings have been issued.

It does mean, however, that claimants are likely to make offers to settle when they serve proceedings. This again highlights the need to ensure that investigations into quantum - as well as liability - are well advanced by the time proceedings are issued, so that any such offer can be properly assessed and evaluated.

10. Provision of Information to FD's as the Management Unit

FDMs/FMDs will be informed of significant developments in cases. The decision on whether and when to settle a claim is made taking account of advice from Solicitors and, if appropriate Counsel. The final authority to settle a claim rests with HR following consultation with the appropriate Senior Manager.

If the FC, on advice from our Solicitors, decides to defend a case to the point of going to Court the FDM/FMD will be advised. If the case goes to Court all witnesses, including FC employees, will be cited to appear in court. The Solicitors and HR will speak to all FC witnesses and ensure that they are aware of court procedures. Every effort will be made to help witnesses prepare for the court appearance.

HR will prepare a monthly report for the appropriate Senior Manager summarising the overall situation on all active Employer's Liability claims in their area of responsibility. The report will include an estimate of the likely cost of the claim (including damages and legal costs) and an assessment of the year in which settlement may be made. Should a claim's estimated value greatly increase the appropriate Senior Manager and FDMs/FMDs will be notified immediately.

11. Budgets

Budget provision for Employer's Liability claims and their associated legal expenses for both the claimant and the FC will be held at Country/Business Unit level. HR will advise the Head of Financial Services and the relevant Senior Managers each year of the cases in their area of responsibility for the purpose of provision in the loss account. This will also include an estimate of damages and legal costs. Authority to settle claims will continue to rest with HR following consultation with the appropriate Senior Manager.

All employers' liability budget figures and settlement details are extremely sensitive commercial information and should not be disclosed below FDM/FMD level.

Appendix 1

Sample Letter



Forestry Commission

Human Resources

Silvan House
231 Corstorphine Road
Edinburgh
EH12 7AT

Tel: 0131 334 0303
Fax: 0131 314 6174

Director Human Resources

Jean Lindsay

Your ref:

Our ref:

Date

Dear Sirs

I refer to your letter dated addressed to our office at.....

I am in the process of obtaining information from our local office, which in due course will be handed to our solicitors. All further contact should be made with them at the following address.

Eversheds, Solicitors, Franciscan House, 51 Princes Street, Ipswich, IP1 1UR <<OR>>
Tods Murray, Solicitors, Edinburgh Quay, 133 Fountainbridge, Edinburgh, EH3 9AG

Please note that the Forestry Commission is a Government Department and is self insured.

Yours faithfully

Appendix 2

Personal Injury Pre-action Protocol

1. Workplace Claims

- Accident book entry
- First-aider report
- Surgery record
- Foreman/supervisor accident report
- Safety representatives accident report
- RIDDOR report to HSE
- Other communications between Defendants and HSE
- Minutes of Health and Safety Committee meeting(s) where accident/matter considered
- Report to DSS
- Documents listed above relative to any previous accident/matter identified by the Claimant and relied upon as proof of negligence
- Earnings information where Defendant is employer

2. Documents Produced to Comply with Requirements of the Management of Health & Safety at Work Regulations 1992

- Pre-accident Risk Assessment required by Regulation 3
- Post-accident Re-Assessment required by Regulation 3
- Accident Investigation Report prepared in implementing the requirements of Regulations 4, 6 and 9
- Health Surveillance Records in appropriate cases required by Regulation 5
- Information provided to employees under Regulation 8
- Documents relating to the employees H&S training required by Regulation 11

3. Workplace Claims – Disclosure Where Specific Regulations Apply

3.1 Workplace (Health, Safety and Welfare) Regulations 1992

- Repair and maintenance records required by Regulation 5
- Housekeeping records to comply with the requirements of Regulation 0
- Hazard warning signs or notices to comply with Regulation 17 (Traffic Routes)

3.2 Provision and Use of Work Equipment Regulations 1992

- Manufacturers specifications and instructions in respect of relevant work equipment establishing its suitability to comply with Regulation 5
- Maintenance log/maintenance records required to comply with Regulation 6
- Documents providing information and instructions to employees to comply with Regulation 8
- Documents provided to the employee in respect of training for use to comply with Regulation 9
- Any notice, sign or document relied upon as a defence to alleged breaches of Regulations 14 to 18 dealing with controls and control systems
- Instruction/training documents issued to comply with the requirements of Regulation 22 insofar as it deals with maintenance operations where the machine is not shut down
- Copies of markings required complying with Regulation 23
- Copies of warnings required complying with Regulation 24

3.3 Personal Protective Equipment at Work Regulations 1992

- Documents relating to the assessment of the Personal Protective Equipment to comply with Regulation 6
- Documents relating to the maintenance and replacement of Personal Protective Equipment to comply with Regulation 7
- Record of maintenance procedures for Personal Protective Equipment to comply with Regulation 7
- Records of tests and examinations of Personal Protective Equipment to comply with Regulation 7
- Documents providing information, instruction and training in relation to the Personal Protective Equipment to comply with Regulation 9

- Instructions for use of Personal Protective Equipment to include the manufacturers' instructions to comply with Regulation 10

3.4 Manual Handling Operations Regulations 1992

- Manual Handling Risk Assessment carried out to comply with the requirements of Regulation 4(1)(b)(i)
- Re-assessment carried out post-accident to comply with requirements of Regulation 4(1)(b)(i)
- Documents showing the information provided to the employee to give general indications related to the load and precise indications on the weight of the load and the heaviest side of the load if the centre of gravity was not positioned centrally to comply with Regulation 4(1)(b)(iii)
- Documents relating to training in respect of manual handling operations and training records.

3.5 Health and Safety (Display Screen Equipment) Regulations 1992

- Analysis of workstations to assess and reduce risks carried out to comply with the requirements of Regulation 2
- Re-assessment of analysis of work stations to assess and reduce risks following development of symptoms by the Claimant
- Documents detailing the provision of training including training records to comply with the requirements of Regulation 6
- Documents providing information to employees to comply with the requirements of Regulation 7

3.6 Control of Substances Hazardous to Health Regulations 1988

- Risk assessment carried out to comply with the requirements of Regulation 6
- Reviewed risk assessment carried out to comply with the requirements of Regulation 6
- Copy labels from containers used for storage handling and disposal of carcinogenic to comply with the requirements of Regulation 7(2A)(h)
- Warning signs identifying designation of areas and installations, which may be contaminated by carcinogenic to comply with the requirements of Regulation 7(2A)(h)
- Documents relating to the assessment of the Personal Protective Equipment to comply with Regulation 7(3A)
- Documents relating to the maintenance and replacement of Personal Protective Equipment to comply with Regulation 7(3A)

- Records of maintenance procedures for Personal Protective Equipment to comply with Regulation 7(3A)
- Records of tests and examinations of Personal Protective Equipment to comply with Regulation 7(3A)
- Documents providing information, instruction and training in relation to the Personal Protective Equipment to comply with Regulation 7(3A)
- Instructions for use of Personal Protective Equipment to include the manufacturers' instructions to comply with Regulation 7(3A)
- Air monitoring records for substances assigned a maximum exposure limit or occupational exposure standard to comply with the requirements of Regulation 7
- Maintenance examination and test of control measures records to comply with Regulation 9
- Monitoring records to comply with the requirements of Regulation 10
- Health surveillance records to comply with the requirements of Regulation 11
- Documents detailing information, instruction and training including training records for employees to comply with the requirements of Regulation 12
- Labels and Health and Safety data sheets supplied to the employers to comply with the CHIP regulations

3.7 Construction (Design and Management) Regulations 1994

- Notification of a project form (HSE F10) to comply with the requirements of Regulation 7
- Health and Safety Plan to comply with requirements of Regulation 15
- Health and Safety file to comply with the requirements of Regulations 12 and 14
- Information and training records provided to comply with the requirements of Regulation 17
- Records of advice from and views of persons at work to comply with the requirements of Regulation 18

3.8 Pressure Systems and Transportable Gas Containers Regulations 1989

- Information and specimen markings provided to comply with the requirements of Regulation 5
- Written statements specifying the safe operating limits of a system to comply with the requirements of Regulation 7
- Copy of the written scheme of examination required complying with the requirements of Regulation 8
- Examination records required complying with the requirements of Regulation 9
- Instructions provided for the use of operator to comply with Regulation 11

- Records kept complying with the requirements of Regulation 13
- Records kept complying with the requirements of Regulation 22

3.9 Lifting Plant and Equipment (Records of Test and Examination etc) Regulations 1992

- Record kept complying with the requirements of Regulation 6

3.10 The Noise at Work Regulations 1989

- Any risk assessment records required complying with the requirements of Regulations 4 and 5
- Manufacturers literature in respect of all ear protection made available to claimant to comply with the requirements of Regulation 8
- All documents provided to the employee for the provision of information to comply with Regulation 11

3.11 Construction (Head Protection) Regulations 1989

- Pre-accident assessment of head protection required complying with Regulation 3(4)
- Post-accident re-assessment required complying with Regulation 3(5)

3.12 The Construction (General Provisions) Regulations 1961

- Report prepared following inspection and examinations of excavations etc to comply with the requirements of Regulation
- Report prepared following inspections and examinations of work in cofferdams and caissons to comply with the requirements of Regulations 17 and 18