

# COVID-19: Litigation in the time of a pandemic

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The environment in which we all find ourselves is very different from that we faced only days ago, and there may be a significant impact on ongoing litigation from measures announced in response to the Covid-19 pandemic.

At present, and unless or until there is any official announcement to the contrary, the working assumption must be that the status quo is maintained and that insurers and their panels should work to comply with all directions timetables and attend hearings in the normal way. Notwithstanding that, it is likely that we are going to see a judicial reaction of some sort in the near future in view of what has already happened in other jurisdictions. In Gibraltar, the Chief Justice issued Contingency Rules on 16 March 2020 which vacate all court hearing dates and impose a stay on all civil actions until 7 days after the Court Registry has fully reopened to the public, the Rules being in effect for a minimum of 30 days.

We may also see slightly different approaches adopted between jurisdictions, there already being some divergence between the approach of the Scottish Parliament and Westminster in relation to Covid-19 policy generally, and Stormont now back to functioning in NI.

The judiciary is squarely being led by the official advice from central government, comments on the Senior Master of the Queen's Bench Division and a publication from the Court Service advising that those called to attend at court should still attend unless they are experiencing symptoms. The NI and Scottish Courts' websites had similarly not announced any relaxation of the timescales around civil procedure by 16 March 2020. That said, at a CCMC before Master Davison on 16 March 2020 he ordered that the parties have permission to extend the timetable by consent by up to 56 days (rather than the 28 allowed by r3.8(4)) (*O'Driscoll v F.I.V.E. Bianchi SPA*).

As and when we do see some form of impact on the judiciary, it is more likely to be a *partial* lock-down, as opposed to a complete cessation of judicial process; Spain and Ireland have suspended most judicial proceedings, but not all proceedings. Were the MOJ and its equivalents in Scotland and NI to sanction similar moves here, we should expect to see priority given to injunctive actions and hearings in connection with specific areas of the law, such as injunctive relief, child custody, constitutional law etc. In all likelihood, personal injury claims and property damage claims would be pretty low down on the list of priorities.

At present we can only speculate as to what measures might be implemented. Possible steps might include the following:

- adjournment of all hearings necessitating personal attendance before the courts, save for in connection with certain classes of action (see above).
- conversion of hearings in person to telephone hearings where personal attendance is not required.
- temporarily extending the ability and extent to which the parties to litigation can agree to extent court timetables (see the first signs of this outlined above).
- blanket stays in relation to certain classes of action for a fixed period.

Insofar as claims are concerned, the future landscape should be expected to change, and we wonder whether the following may arise:

- a reduction in UK travel but with road use as proportion of travel increasing as a mechanism of people maintaining 'social distance' from commuter groups, possibly leading to a reduction in accidents overall but perhaps not to the extent that might otherwise be expected.
- a reduction in claims presented in the short term, due to reduced staffing at Claimant law firms, most likely with a focus on claims coming up to limitation.
- a correlating increase in claims presented when the populous starts to return to work after any period of lock-down.
- potential issues around pre-action disclosure, Claimant lawyers seeking to take advantage of reduced insurer staffing and reduced insured responsiveness during any period of shut down, to the extent that Claimant lawyers have the resource to devote to this.
- an increase in requests to extend limitation / requests for limitation amnesties. This is something which should be considered on a case by case basis, in order to avoid unnecessary litigation followed by stayed claims. If litigation extensions are to be agreed, we recommend that you agree fixed (and relatively short) extensions rather than general open-ended extensions of time. In multi-Defendant claims, we advise that you also look to encourage Claimants to seek extensions from *all* potential tortfeasors, in order to ensure that you are not left as the only tortfeasor to sue in circumstances where other Defendants might also have been added otherwise. Indemnity/contribution proceedings

may mitigate such difficulties but may leave you disadvantaged from a tactical perspective.

- a possible increase incidents of missed limitation and/or compliance with deadlines for service, with a subsequent corresponding increase in applications for relief from sanctions. In this respect, we envisage some form of judicial direction and/or emerging case authority indicating that game play is likely to be frowned upon and met with costs penalties (just as post *Mitchell* we saw the Court of Appeal in *Denton* indicate that whilst compliance with directions was expected and parties were by no means precluded from taking issue with non-compliance, unreasonable refusals to agree extensions would not be tolerated).
- disruption to expert examinations due to experts refusing to conduct face to face examinations and/or deferring examinations and/or Claimants being unable to travel to examinations until after any period of lockdown.
- increased applications to extend directions timetables and more protracted proposed directions timetables pre-case management by consequence of the above.
- reduced/deferred engagement in Round Table Meetings and Joint Settlement Meetings as a mechanism of social distancing, in particular where Claimants have particular health vulnerabilities, as will habitually be the case for example with tetraplegics.
- an increase in Law Society interventions and/or high street law firms going into liquidation due to cash-flow disruption from any period of lockdown, feeding into delay with case progression and/or limitation issues within the cohort of claims emanating from that class of firm.
- a short term increase in claim life cycles by reason of the above trends collectively.

From an operational perspective, short term disruption and operational challenges around reduced staffing and resource issues are then likely to be followed by a period of heavy workloads during the subsequent 'catch-up period'.

The judiciary may find itself in a similar position and insurers should be wary of the possibility that, in an effort to address any related bottle-neck or back-log of case work, we see the Courts become more draconian in their approach to case management timetabling during that phase. It may be appropriate to seek to front end expert instruction at this stage in order to pre-empt that.

On a more positive note, alternative working practices resulting from an enforced period of lock-down may drive improvements in working efficiencies with longer term benefits.

It is clear that we are facing new challenges as a consequence of the Covid-19 pandemic. DAC Beachcroft is committed to assisting its clients through these challenges, and we have published a collection of articles to assist you [on our website](#).

## Authors



**David Johnson**

London - Walbrook  
+44 (0)20 7894 6856  
[dajohnson@dacbeachcroft.com](mailto:dajohnson@dacbeachcroft.com)



**David Williams**

Leeds  
+44 (0)113 251 4844  
[dwilliams@dacbeachcroft.com](mailto:dwilliams@dacbeachcroft.com)