COURT OF SESSION: PERSONAL INJURIES: NEW RULES

NEWSLETTER No.3: June 2006

Personal Injuries User Group

The membership of the user group remains as follows:

> Paul Cackette, Scottish Executive, Access to Justice Division (sometimes represented by Glynis McKeand)
> Ian Campbell, Scottish Health Service Central Legal Office
> Bob Cockburn, Deputy Principal Clerk of Session
> Gordon Keyden, Messrs. Simpson & Marwick, W.S.
> Ruaraidh Macniven, Lord President's Private Office
> Maria Maguire, Q.C.
> Robert Milligan, Advocate
> Lady Paton (chair)
> David Stevenson, Messrs. Thompsons
> Fred Tyler, Messrs. Balfour & Manson
> Catriona Whyte, Scottish Legal Aid Board

The group met on the following dates: 20 May, 7 July, 30 September, and 25 November 2004; 3 March, 16 June, 20 October, and 15 December 2005; and 9 March 2006.

Scottish Executive evaluation of the Coulsfield reforms

As practitioners may be aware, a researcher funded by the Scottish Executive is carrying out an evaluation of the Coulsfield reforms. The Personal Injuries User Group act as a research advisory group. The main aim of the evaluation is to ascertain whether the new procedures are meeting their stated objectives: in particular, whether they are successful in reducing the scope of contentious issues in personal injury litigation, and in accelerating settlement where settlement is achievable. Many key users have been interviewed, including solicitors, advocates, Scottish Court Service staff, SLAB, the Central Legal Office (NHS), trade unions, and insurance companies. A questionnaire has been sent to Court of Session Outer House judges. The evaluation began in December 2004, and is nearing completion.

Personal injuries conference on 25 November 2005

A very successful Personal Injuries Conference took place in the Mackenzie Building on 25 and 26 November 2005. The conference was organised by the Faculty of Advocates, the Advocates Personal Injury Law Group, and the Advocates Professional Negligence Group. Speakers included D.I. Mackay Q.C., Simon Di Rollo Q.C., Dr. Alan Carson, Andrew Dalgleish, Lady Paton, Mike Wood, Gordon Dalyell, Robert Milligan, Fred Tyler, Lord Kinclaven, Mr. Justice Langstaff, Oonagh McCrann, Andrew Hajducki Q.C., and Angus Stewart Q.C. In the course of the conference, some useful suggestions were made about the Chapter 43 Personal Injuries Procedure.

Specification of documents

The group received some queries from practitioners relating to specifications of documents under Chapter 43 procedure. The group agreed on the following points:

> **The stamp:** The group's view is that the stamp put on the standard specification of documents annexed to the summons is authority for a commission. That is the effect of Rule of Court 43.4(3), and was the intention when the rule was drafted.
>
> **The timetable:** The timetable is designed to encourage early recovery and exchange of information. The commission based on the specification annexed to the summons should be "executed" (i.e. have taken place) by the date shown in the timetable. If a party wishes to postpone that date, for example to await the grant of Legal Aid, that party should seek a variation of the timetable, or alternatively a sist for a defined period. The standard computer timetable has been adjusted with effect from 25 October 2005 to allow a further 3 weeks within which to execute the commission.
>
> **Further specifications:** It is always open to a party to lodge further specifications for the recovery of documents at a later stage in the proceedings.

Estimates of length of proof or trial

Under the new Chapter 43 procedure, a proof date is fixed at an early stage. An assumption is made that 4 days will be sufficient. The only formal opportunity to alter that estimate is contained in Section 2 of the Pre-Trial Minute, which provides:

> "It is estimated that the hearing will last   days."

The Keeper has found that proofs and trials which do not settle often fail to finish within the 4 days allotted. Finding dates for continued proofs is not easy, as the early

allocation of fixed diets under the new rules has resulted in a very full court diary. Practitioners are therefore requested (i) to hold the pre-trial meeting at as early a date as possible: cf. *Zimmerman v. Armstrong,* 2004 S.L.T. 915; and (ii) to communicate with the Keeper about any re-estimate of the length of the proof or jury trial. The Keeper welcomes any form of communication on that matter (letter, e-mail, telephone call etc.) in addition to completion of Section 2 of the Pre-Trial Minute.

Proof or jury trial

A debate as to whether a case should go to proof or jury trial may take some time: yet the relevant rule, rule 43.6(5), envisages the matter being dealt with on the motion roll. Practitioners should attempt to make realistic estimates of the time required and advise the Keeper accordingly *when the motion is enrolled.* If an estimate is unrealistic, and the court has other pressing business, the court may continue the motion to enable the Keeper to arrange a more appropriate hearing. As Lord Wheatley observed in *May v. Jeeves Parcels Ltd.,* 2005 S.C.L.R.1099; 2005 Rep.L.R. 131:

> "[19] Finally, I should add that the motion which prompted this Opinion was noted by those who enrolled and opposed it as requiring fifteen minutes for disposal. Such a prediction was a serious underestimate. Counsel who conducted the hearing (who were not responsible for this inaccurate forecast) presented their submissions with clarity and brevity, but the hearing still took two hours. This practice of underestimating the time a case will take is apparently widespread, and is undertaken because of a perception that an indication that the case will only take a few minutes will obtain some kind of priority in being put out for a hearing. However, I am advised that this belief is wholly unfounded, and that the consequence of such practices is a considerable measure of disruption to the proper and orderly programming of business. It is to be hoped that counsel will in future take some care to forecast accurately how long such hearings will take."

Statements of Value of Claim

Form 43.9 should be used as a template, adjusted to suit each individual case: cf. Rule of Court 1.4:

> "Where there is a reference to the use of a form in these Rules, that form in the appendix to these Rules, or a form substantially to the same effect, shall be used with such variation as circumstances may require."

Practitioners are encouraged to lodge up-dated Statements of Value of Claim as necessary, although there is no specific provision in the rules.

Pursuers' offers

Practitioners are reminded that pursuers' offers may still have a useful role in personal injuries actions, despite the lack of any formal rule of court: see for example *Cameron v. Kvaerner Govan Ltd.,* 1999 S.L.T. 638 (pursuer's offer resulting in entitlement to an additional fee).

Pleural plaques: Rothwell case

The House of Lords is to consider the question of pleural plaques following the decision of the Court of Appeal in *Rothwell v Chemical & Insulating Co. Ltd. and others* [2006] EWCA Civ 27. A notice has been given in the Court of Session Rolls in the following terms:

> "Agents acting in cases in which the *only* physical consequence of the averred exposure to asbestos is the development of pleural plaques should therefore enrol a motion to sist the action pending the outcome of the appeal to the House of Lords in *Rothwell v Chemical & Insulating Co. Ltd. and others* [2006] EWCA Civ 27 and, where appropriate, to discharge any diet of proof, unless there are special circumstances, peculiar to the particular case, which make that course inappropriate."

Cases

- *Zimmerman v. Armstrong*, 2004 S.L.T. 915: observed that, while the wording of rule 43.10 might appear to suggest that pre-trial meetings were expected to be held about five or six weeks before the proof or jury trial, it was advantageous to hold a pre-trial meeting as soon as convenient following upon the lodging of the defender's statement of valuation of claim.
- *Alexander v. Metbro Ltd,* 2004 S.L.T. 963: held that it was important for the success of the new personal injuries rules that procedures were kept as simple, uniform and consistent as possible; accordingly pleadings which included pleas-in-law would not be accepted by the General Department; observed that defenders who wished to give a brief outline of their legal points

should do so in simple language at the end of the last answer of the defences.

- *Brogan v. O'Rourke Ltd,* 2005 S.L.T. 29: held by the Inner House that the court's dispensing power in rule 2.1 cannot not be used where a summons had not been lodged timeously for calling and the instance has fallen. Practitioners should note that the new personal injuries rule 43.3 imposes a much stricter timetable for lodging the summons for calling than in ordinary actions. In an ordinary action, the period allowed for lodging the summons for calling begins to run only on service of the summons on the defender (and rule 13.7 permits service at any time within a year and a day of the signeting of the summons). By contrast in a personal injuries action, the period allowed by rule 43.3(2) is three months and a day *triggered by the signeting of the summons whether or not there has been successful service on the defender*. In the light of the ruling in *Brogan v. O'Rourke*, failure timeously to lodge a summons for calling in terms of the new personal injuries rule 43.3 may result in a time-barred case. Where there is difficulty serving the summons on a defender, a motion should be enrolled *within the period of three months and a day* in terms of rule 43.3(3) to extend the period within which the summons may be lodged for calling.
- *Benson v. City of Edinburgh District Council,* 2005 S.C. 24; 2004 S.L.T. 1227: circumstances in which the court refused to modify expenses to the sheriff court scale in a personal injuries action brought under the new rules and settled at £3,400; observed that it seemed unjust to penalise the pursuer or her solicitor for achieving an early settlement in the Court of Session where the rules were designed to achieve speedy and economic resolution of personal injury claims. The case was reclaimed, along with *Wilson (and Gould) v. Glasgow City Council,* 2004 S.L.T. 1189; 2004 S.C.L.R. 638. Both cases were settled in the Inner House in 2005 with no formal ruling from the bench.
- *Galbraith v. First Glasgow (No.1) Ltd.,* 2006 G.W.D. 8-149: circumstances in which the court refused to modify expenses to the sheriff court scale in a personal injuries action brought under the new rules and settled at £2,875; observed that modification was essentially a matter for the court's discretion, and neither the pursuer nor her agents could be criticised for seeking to take advantage of the perceived benefits associated with Chapter 43 of the Rules of Court.

- *Towers v. Jack*, 2004 Rep.L.R. 100: in a jury trial in May 2004, Lord Drummond-Young ruled that sufficient notice had been given to the defender where concise pleadings were followed by (i) a pursuer's statement of valuation of claim; (ii) the lodging of certain productions; and (iii) discussions at the pre-trial meeting.
- *Sneddon v. Deutag Services Limited* (reported on quantum at 2005 Rep.L.R. 90): in a jury trial in autumn 2005, Lord Carloway permitted the pursuer's statement of value of claim to be put to the pursuer in cross-examination. Some might disagree with such a practice, taking the view, for example, that a statement of value of claim is "primarily to aid settlement of personal injury actions and that whatever was stated in those valuations was not binding on either party": *Scott v. Vieregge,* 2005 Rep.L.R. 59, paragraph [20].
- *Easdon v. A. Clarke & Company (Smithwick) Ltd.,* 25 January 2006: observed that although statements of value of claim could not be said to form part of the pleadings, and while the basic relevance of the claim may still require to be tested by the pleadings, there was no good reason why regard should not be had to statements of value of claim when assessing whether there was fair notice of the detail of the claim made.
- *Wallace v. Keltbray Plant Limited,* 7 February 2006*:* circumstances in which the court was reluctant to grant decree in absence for £5 million on the basis of a personal injuries summons containing brief pleadings in compliance with Chapter 43.

June 2006: The Hon. Lady Paton