

## CHAPTER 43

### ACTIONS OF DAMAGES FOR, OR ARISING FROM, PERSONAL INJURIES

#### Application and interpretation of this Chapter

**43.1.**-(1) Subject to rule 43.1A (actions based on clinical negligence). this Chapter applies to a personal injuries action.

(2) In this Chapter-

“connected person” means a person, not being a party to the action, who has title to sue the defender in respect of the personal injuries from which a deceased died or in respect of his death;

“personal injuries” includes any disease or impairment, whether physical or mental;

“personal injuries action” means an action of damages for, or arising from, personal injuries or death of a person from personal injuries; and

“relative” has the meaning assigned to it in Schedule 1 to the Damages (Scotland) Act 1976.

(3) The following rules shall not apply to an action to which this Chapter applies:-

- rule 4.9(2) (prorogation of time for lodging document),
- rule 6.2 (fixing and allocation of diets in Outer House),
- rule 13.2 (form of summonses),
- rule 13.6A(1)(a) (arrestment to found jurisdiction),
- rule 13.7 (service and intimation of summonses),
- rule 13.13(6) (falling of instance),
- rule 18.1(1)(b) (defences to include pleas-in-law)
- rule 22.1 (making up open record),
- rule 22.2 (adjustment),
- rule 22.3 (closing record),
- rule 26.5(2)(c) (answers by third party to include pleas-in-law,”.
- rule 36.3 (lodging of productions).

#### Actions based on clinical negligence

**43.1A.** —(1) At the same time as a summons which includes a draft interlocutor in Form 43.1A is presented for signeting, a pursuer may apply by motion for authority to raise a personal injuries action which is based on alleged clinical negligence as an ordinary action.

(2) On the making of a motion under paragraph (1), the summons shall be placed before a Lord Ordinary in chambers and in the absence of the parties.

(3) On consideration of the summons in accordance with paragraph (2), the Lord Ordinary may—

- (a) if he considers that there are exceptional reasons for not following the procedure in the other rules in this Chapter such as would justify the granting of a motion under rule 43.5(1) (application to have action withdrawn from personal injuries procedure), grant authority for the cause to proceed as an ordinary action by signing the draft interlocutor in the summons; or
- (b) fix a hearing.

(4) The Keeper of the Rolls shall notify the parties of the date and time of any hearing under paragraph (3)(b).

(5) At a hearing under paragraph (3)(b), the Lord Ordinary may refuse the application or, if he considers that there are exceptional reasons for not following the procedure in this Chapter such as

would justify the granting of a motion under rule 43.5(1) (application to have action withdrawn from personal injuries procedure) grant authority for the cause to proceed as an ordinary action by signing the draft interlocutor in the summons.

(6) The other rules of this Chapter shall not apply to a cause commenced by a summons in respect of which a Lord Ordinary has granted an application under paragraph (1).

(7) In this rule—

“clinical negligence” means a breach of a duty of care by a health care professional in connection with that person’s diagnosis or the care or treatment of any person, by act or omission, whilst the health care professional was acting in his professional capacity; and

“health care professional” includes doctors, dentists, nurses, midwives, health visitors, pharmacy practitioners, registered ophthalmic practitioners, registered dispensing opticians, members of Professions Allied to Medicine, members of the Allied Health Professions, ambulance personnel, laboratory staff and relevant technicians.”.

### **Form of summons**

**43.2.(1)** The summons shall be in Form 43.2-A and there shall be annexed to it a brief statement containing-

- (a) averments in numbered paragraphs relating only to those facts necessary to establish the claim; and
- (b) the names of every medical practitioner from whom, and every hospital or other institution in which, the pursuer or, in an action in respect of the death of a person, the deceased received treatment for the personal injuries.

(2) An application for an order under section 12(2)(a) of the Administration of Justice Act 1982 (provisional damages for personal injuries) shall be made by including in the summons a conclusion for provisional damages; and, where such an application is made, averments as to the matters referred to in paragraphs (a) and (b) of section 12(1) of that Act shall be included in the statement made under paragraph (1)(a).

(3) In paragraph (2) above “provisional damages” means the damages referred to in section 12(4)(a) of the Administration of Justice Act 1982.

(4) A summons may include-

- (a) warrants for intimation insofar as permitted under these Rules; and
- (b) a specification of documents in Form 43.2-B.

(5) In relation to an action to which this Chapter applies, any references to the condescendence of a summons and to articles of the condescendence shall be construed as a reference to the statement required under paragraph (1) above and numbered paragraphs of that statement.

### **Service and calling of summons**

**43.3.-(1)** Where a summons in an action to which this Chapter applies is to be executed, a copy of the summons which has passed the signet shall be-

- (a) served on the defender with a citation in Form 43.3 attached to it; and
- (b) intimated to any person named in a warrant for intimation.

(2) Where a summons has not called within three months and a day after the date of signeting, the instance shall fall.

(3) Where a summons cannot be served within the period of notice determined in accordance with rule 13.4 and called before the expiry of the period mentioned in paragraph (2), the court may-

- (i) on the application of the pursuer by motion; and
- (ii) on cause shown,

extend that period.

(4) An application under paragraph (3) shall be made before the expiry of the period mentioned in paragraph (2).

### **Inspection and recovery of documents**

**43.4.**-(1) This rule applies where the summons contains a specification of documents by virtue of rule 43.2(4)(b).

(2) Upon signet an order granting commission and diligence for the production and recovery of the documents mentioned in the specification shall be granted and the Deputy Principal Clerk of Session shall certify Form 43.2-B to that effect.

(3) An order under paragraph (2) shall be treated for all purposes as an interlocutor of the court granting commission and diligence signed by the Lord Ordinary.

(4) The pursuer may serve an order under paragraph (2) and the provisions of rule 35.2 shall thereafter apply, subject to any necessary modifications, as if the order were an order obtained on an application made under rule 35.2(1)(a).

(5) Nothing in this rule shall affect the right of a party to apply under rule 35.2 for a commission and diligence for recovery of documents or for an order under section 1 of the Administration of Justice (Scotland) Act 1972 in respect of any document or other property not mentioned in the specification annexed to the summons.

### **Motions to dispense with timetable**

**43.5.**-(1) Any party to an action may, within 28 days of the lodging of defences, by motion apply to have the action withdrawn from the procedure in this Chapter and to be appointed to proceed as an ordinary action.

(2) No motion under paragraph (1) shall be granted unless the court is satisfied that there are exceptional reasons for not following the procedure in this Chapter.

(3) In determining whether there are exceptional reasons justifying the granting of a motion made under paragraph (1), the Lord Ordinary shall have regard to-

- (a) the likely need for detailed pleadings;
- (b) the length of time required for preparation of the action; and
- (c) any other relevant circumstances.

(4) Where the court appoints the cause to proceed as an ordinary action under paragraph (1)-

- (a) the pursuer shall, within seven days, lodge an open record in terms of rule 22.1;
- (aa) on the application of a party by motion, the court may, if satisfied that it is appropriate –
  - (i) ordain a party to lodge a medical report which would have been lodged under Chapter 43 had the action not been withdrawn from that procedure;
  - (ii) ordain a party to lodge a statement of valuation of claim which would otherwise have been lodged under rule 43.9;
  - (iii) ordain the parties to hold a pre-trial meeting which would otherwise have been held under rule 43.10, and to lodge a minute of such meeting within such period as the court deems appropriate; and
- (b) rules 43.11, 43.12 and 43.13 shall apply to the action.

### **Allocation of diets and timetables**

**43.6.**-(1) The Keeper of the Rolls shall, on the lodging of defences or, where there is more than one defender the first lodging of defences-

- (a) allocate a diet of proof for the action;
- (b) issue a timetable stating the date mentioned in sub-paragraph (a) and calculated by reference to periods specified from time to time by the Lord President, in accordance with which-
  - (i) an application for a third party notice under rule 26.1 may be made;
  - (ii) the pursuer may execute a commission for recovery of documents under rule 43.4;
  - (iii) parties may adjust their pleadings;
  - (iv) the pursuer shall lodge a statement of valuation of claim in process;
  - (v) the pursuer shall lodge a record;
  - (vi) the defender (and any third party to the action) shall lodge a statement of valuation of claim in process;
  - (vii) the parties shall each lodge in process a list of witnesses together with any productions upon which they wish to rely; and
  - (viii) the pursuer shall lodge in process the minute of the pre-trial meeting.

(2) A timetable issued under paragraph (1) shall be in Form 43.6 and shall be treated for all purposes as an interlocutor of the court signed by the Lord Ordinary; and so far as the timetable order is inconsistent with any provision in these rules which relates to a matter to which the timetable relates, the timetable shall prevail.

(3) Where a party fails to comply with any requirement of a timetable other than that referred to in paragraph (7), the Keeper of the Rolls may put the cause out to be heard on the By Order roll.

(4) The pursuer shall lodge two copies of the record, which shall consist of the pleadings of the parties, in process by the date specified in the timetable and shall at the same time send one copy to the defender and any other parties.

(5) The pursuer shall, on lodging the copies of the record as required by paragraph (4), enrol a motion craving the court-

- (a) to allow to parties a preliminary proof on specified matters;
- (b) to allow a proof;
- (c) to allow issues for jury trial; or
- (d) to make some other specified order.

(5A) The pursuer shall include in the enrolled motion under paragraph (5) his estimate of the likely duration of the preliminary proof, proof or jury trial, or any other hearing sought, and request that the diet be allocated accordingly.

(5B) If any party considers that the estimate included under paragraph (5A) is too low, he shall record upon the enrolled motion his own estimate.

(5C) Any estimate included or recorded by a party under paragraph (5A) or (5B) shall be certified in Form 43.6A by that party's solicitor or by any counsel or other person having a right of audience instructed by that party to represent him at the preliminary proof, proof, jury trial or other hearing, as the case may be.

(5D) A certificate under paragraph (5C) shall be lodged –

- (a) where it relates to an estimate included under paragraph (5A) at the time of enrolling the motion under paragraph (5);
- (b) where it relates to an estimate recorded under paragraph (5B) at the time of recording that estimate.

(6) In the event that any party proposes to ask the court to make any order other than one of those specified in sub-paragraphs (b) or (c) of paragraph (5), that party shall, on enrolling or opposing (as the case may be) the pursuer's motion, specify the order to be sought and give full notice in the motion or notice of opposition, of the grounds thereof.

(7) Where a pursuer fails to lodge a record by the date specified in a timetable issued under paragraph (1), the Keeper of the Rolls may put the case out to be heard on the By Order roll.

(8) A production which is not lodged in accordance with paragraph (1)(b)(vii) shall not be used or put in evidence at a proof unless-

- (a) by consent of parties; or
- (b) with the leave of the court on cause shown and on such conditions, if any, as to expenses or otherwise as the court thinks fit.

(9) In a cause which is one of more than one cause arising out of the same cause of action, the court may-

- (a) on the motion of a party to that cause; and
- (b) after hearing parties to all those causes,

appoint that cause or any other of those causes to be the leading cause and to sist the other causes pending the determination of the leading cause.

(10) In this rule, "pursuer" includes additional pursuer, noter or minuter, as the case may be.

### **Hearings on the By Order roll**

**43.7.**-(1) Where the Keeper of the Rolls puts a case out to be heard on the By Order roll under paragraphs (3) or (7) of rule 43.6 or paragraph (3) of rule 43.10 he shall-

- (a) put the cause out to be heard not less than seven days after the date of the notice referred to in sub-paragraph (b) on the By Order roll; and
- (b) give notice to the parties to the action-
  - (i) of the date of the hearing of the cause on the By Order roll; and
  - (ii) requiring the party in default to lodge in process a written explanation as to why the timetable has not been complied with and to intimate a copy to all other parties, not less than two clear working days before the date of the hearing.

(2) At a hearing on the By Order roll under any of the provisions mentioned in the foregoing paragraph, the Lord Ordinary-

- (a) shall consider any explanation provided by the party in default;
- (b) may award expenses against that party; and
- (c) may make any other appropriate order, including decree of dismissal.

(3) Expenses awarded under paragraph (2)(b) shall not exceed the expenses of the process before the date of the hearing on the By Order roll.

### **Applications for sist or for variation of timetable order**

**43.8.**-(1) The action may be sisted or the timetable issued under rule 43.6 may be varied by the court on an application by any party to the action by motion.

(2) An application under paragraph (1)

- (a) shall be placed before the Lord Ordinary; and
- (b) shall be granted only on special cause shown.

(3) Any sist of an action shall be for a specific period.

(4) Where a timetable issued under rule 43.6 is varied under this rule, the Keeper of the Rolls shall issue a revised timetable in Form 43.6.

(5) A revised timetable issued under paragraph (4) shall have effect as if it were a timetable issued under rule 43.6 and any reference in this Chapter to any action being taken in accordance with the timetable shall be construed as a reference to its being taken in accordance with the timetable as varied under this rule.

### **Statements of valuation of claim**

**43.9.**-(1) Each party to an action shall make a statement of valuation of claim in Form 43.9.

(2) A statement of valuation of claim (which shall include a list of supporting documents) shall be lodged in process.

(3) Each party shall, on lodging a statement of valuation of claim—

(a) intimate the list of documents included in the statement of valuation of claim to every other party; and

(b) lodge each of those documents.

(6) Nothing in paragraph (3) shall affect -

(a) the law relating to, or the right of a party to object to the recovery of a document on the ground of, privilege or confidentiality; or

(b) the right of a party to apply under rule 35.2 for a commission and diligence for recovery of documents or an order under section 1 of the Administration of Justice (Scotland) Act 1972.

(7) Without prejudice to paragraph (2) of rule 43.7 (hearings on the By Order roll), where a party has failed to lodge a statement of valuation of claim in accordance with a timetable issued under paragraph (2) of rule 43.6 (allocation of diets and timetables) the court may at a hearing of the cause on the By Order roll under paragraph (3) of that rule -

(a) where the party in default is the pursuer, dismiss the action; or

(b) where the party in default is the defender, grant decree against the defender for an amount not exceeding the amount of the pursuer's valuation.

### **Pre-trial meetings**

**43.10.**-(1) For the purposes of this rule, a pre-trial meeting is a meeting between the parties, which shall be held not later than four weeks before the date assigned for the proof or trial to discuss -

(a) settlement of the action; and

(b) to agree, so far as is possible, the matters which are not in dispute between them.

(2) A joint minute of a pre-trial meeting, made in Form 43.10, shall be lodged in process by the pursuer not less than three weeks before the date assigned for the proof or trial.

(3) Where a joint minute in Form 43.10 has not been lodged in accordance with paragraph (2) and by the date specified in the timetable order the Keeper of the Rolls shall put the case out to be heard on the By Order roll.

(4) During the pre-trial meeting, the representative of each party to the action shall have access to the party or another person who has authority to commit the party in the settlement of the action.

### **Application for interim payments of damages**

**43.11.**-(1) A pursuer may, at any time after defences have been lodged, apply by motion for an order for interim payment of damages to him by the defender or, where there are two or more of them, by any one or more of them.

(2) The pursuer shall give written intimation of a motion under paragraph (1) to every other party not less than 14 days before the date on which the motion is enrolled.

(3) On a motion under paragraph (1), the court may ordain -

- (a) any defender who has admitted liability to the pursuer; or
- (b) where the court is satisfied that, if the action proceeded to proof, the pursuer would succeed on the question of liability without any substantial finding of contributory negligence on his part, or on the part of any person in respect of whose injury or death the claim of the pursuer arises, and would obtain decree for damages, any defender who has not admitted liability to the pursuer in the action,

to make an interim payment to the pursuer of such amount as it thinks fit, not exceeding a reasonable proportion of the damages which, in the opinion of the court, are likely to be recovered by the pursuer.

(4) Any such payment may be ordered to be made in one lump sum or otherwise as the court thinks fit.

(5) No order shall be made against a defender under this rule unless it appears to the court that the defender is -

- (a) a person who is insured in respect of the claim of the pursuer;
- (aa) a person who is not insured but in respect of whose liability the Motor Insurers' Bureau will be liable to make payment;
- (b) a public authority; or
- (c) a person whose means and resources are such as to enable him to make the interim payment.

(6) Notwithstanding the grant or refusal of a motion for an interim payment, a subsequent motion may be made where there has been a change of circumstances.

(7) Subject to Part IV (management of money payable to children), any interim payment shall be made to the pursuer unless the court otherwise directs.

(8) This rule shall, with the necessary modifications, apply to a counterclaim for damages for personal injuries made by the defender.

(9) In this rule "defender" includes a third party against whom the pursuer has a conclusion for damages.

### **Adjustment on final decree**

**43.12.**- Where a defender has made an interim payment order under rule 43.11(3), the court may make such order, when final decree is pronounced, with respect to the interim payment as it thinks fit to give effect to the final liability of that defender to the pursuer; and in particular may order -

- (a) repayment by the pursuer of any sum by which the interim payment exceeds the amount which that defender is liable to pay the pursuer; or
- (b) payment by any other defender or a third party of any part of the interim payment which the defender who made it is entitled to recover from him by way of contribution or indemnity or in respect of any remedy or relief relating to, or connected with, the claim of the pursuer.

### **Applications for further damages**

**43.13.**-(1) An application for further damages by a pursuer in respect of whom an order under section 12(2)(b) of the Administration of Justice Act 1982 has been made shall be made by minute and shall include -

- (a) a conclusion in Form 43.13-A; and
- (b) averments in the statement of facts supporting that conclusion.

(2) On lodging such a minute in process, the pursuer shall apply by motion for warrant to serve the minute on -

- (a) every other party; and
- (b) where such other party is insured or otherwise indemnified, his insurer or indemnifier, if known to the pursuer.

(3) A notice of intimation in Form 43.13-B shall be attached to the copy of the minute served on a warrant granted on a motion under paragraph (2).

(4) Any such party, insurer or indemnifier may lodge answers to such a minute in process within 28 days after the date of service on him.

### **Actions by connected persons**

**43.14.**-(1) In an action of damages in which, following the death of any person from personal injuries, damages are claimed -

- (a) by the executor of the deceased, in respect of the injuries from which the deceased died;  
or
- (b) by any relative of the deceased, in respect of the death of the deceased,

the pursuer shall make the averments specified in paragraph (2).

(2) The pursuer in an action to which paragraph (1) applies shall aver in the condescence, as the case may be -

- (a) that there are no connected persons;
- (b) that there are connected persons, being persons specified in the warrant for intimation; or
- (c) that there are connected persons in respect of whom intimation should be dispensed with on the ground that -
  - (i) the names or whereabouts of such persons are not known to, and cannot reasonably be ascertained by, the pursuer; or
  - (ii) such persons are unlikely to be awarded more than the sum of £200 each.

### **Warrants for intimation in actions by connected persons**

**43.15.**-(1) Where the pursuer makes averments under rule 43.14(2)(b) (existence of connected persons), he shall insert a warrant for intimation in the summons in the following terms:-

“Warrant to intimate to (*name and address*) as a person who is believed to have title to sue the defender in an action in respect of the personal injuries from which the late (*name and last place of residence*) died [*or the death of the late (name and last place of residence)*]”.

(2) A notice of intimation in Form 43.15 shall be attached to the copy of the summons where intimation is given on a warrant under paragraph (1).

### **Applications to dispense with intimation in actions by connected persons**

**43.16.**-(1) Where the pursuer makes averments under rule 43.14(2)(c) (dispensing with intimation to connected persons), he shall apply by motion for an order to dispense with intimation.

- (2) In determining a motion under paragraph (1), the court shall have regard to -
- (a) the desirability of avoiding multiplicity of actions; and
  - (b) the expense, inconvenience or difficulty likely to be involved in taking steps to ascertain the name or whereabouts of the connected person.
- (3) Where the court is not satisfied that intimation to a connected person should be dispensed with, it may -
- (a) order intimation to a connected person whose name and whereabouts are known;
  - (b) order the pursuer to take such further steps as it may specify in the interlocutor to ascertain the name or whereabouts of any connected person; and
  - (c) order that such advertisement be made in such manner, in such place and at such times as it may specify in the interlocutor.

### **Subsequent disclosure of connected persons**

**43.17** Where the name or whereabouts of a person, in respect of whom the court has dispensed with intimation on a ground specified in rule 43.14(2)(c) (dispensing with intimation to connected persons), subsequently becomes known to the pursuer while the action is depending before the court, the pursuer shall apply by motion under rule 13.8(1) (warrants after signeting) for a warrant for intimation to such a person; and such intimation shall be made in accordance with rule 43.15(2).

### **Connected persons entering process**

**43.18.**-(1) A connected person may apply to the court by minute in the process of the action craving leave to be sisted as an additional pursuer to the action.

(2) Any such minute shall be placed before the Lord Ordinary who may grant the minute and shall make such order as he considers appropriate, having regard to the provisions in this Chapter.

### **Failure by connected person to enter process**

**43.19.**-(1) Where a connected person to whom intimation is made -

- (a) does not apply to be sisted as an additional pursuer to the action;
- (b) subsequently brings a separate action against the same defender in respect of the same personal injuries or death; and
- (c) would, apart from this rule, be awarded the expenses or part of the expenses of that action,

he shall not be awarded those expenses except on cause shown.

### **Mesothelioma actions: special provisions**

**43.20—**(1) This rule applies where liability to a relative of the pursuer may arise under section 1(2A) and (2B) of the Damages (Scotland) Act 1976 (liability where the personal injury in consequence of which the deceased died is mesothelioma)(a).

(2) On settlement of the pursuer's claim, the pursuer may apply by motion for any or all of the following:-

- (a) a sist for a specified period;
- (b) discharge of the proof
- (c) variation of the timetable issued under rule 43.6

(3) Paragraphs (4) to (7) apply where a motion under paragraph (2) has been granted.

(4) As soon as reasonably practicable after the death of the pursuer, any agent who immediately prior to the death was instructed in a cause by the deceased pursuer shall notify the court of the death.

(5) The notification under paragraph (4) shall be by letter to the Deputy Principal Clerk and shall be accompanied by a certified copy of the death certificate relative to the deceased pursuer.

(6) A relative of the deceased may apply by motion for the recall of the sist and for an order for further procedure.

(7) On the expiration of the period of any sist pronounced on a motion under paragraph (2) the Keeper may put the case out to be heard on the By Order roll.