

COURT OF SESSION: PERSONAL INJURIES: NEW RULES

NEWSLETTER No.1: February 2004

Personal Injuries User Group

A user group has been set up to monitor the operation of the new rules (Chapter 43 of the Rules of the Court of Session, as substituted by Act of Sederunt (Rules of the Court of Session Amendment No.2) (Personal Injuries Actions) 2002, S.S.I. 2002 No.570).

Membership is as follows:

Bruce Beveridge, Lord President's Private Office
Paul Cackette, Scottish Executive, Access to Justice Division
Ian Campbell, Scottish Health Service Central Legal Office
Bob Cockburn, Deputy Principal Clerk of Session
Gordon Keyden, Messrs. Simpson & Marwick, W.S.
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

Meetings of the group took place in October 2003 and February 2004. Further meetings are proposed, the next being in May 2004. Practitioners should send any queries or suggestions to the e-mail address mentioned below.

The group will unfortunately lose the services of Bruce Beveridge, who is moving to a new appointment at Register House. Ruaraidh Macniven is to take his place.

Changes in practitioners' work-methods

- Many practitioners are adapting their office procedures with a view to efficient compliance with the rules. For example (a) there is recognition that cases may require several months preparation *before* presenting the summons for signetting; (b) in some offices, computer entries and hard copies of the case timetable are being distributed to more than

one practitioner, in an effort to provide a back-up or double-check so that court-imposed deadlines are not missed as a result of oversight, human error, illness or absence from work; (c) efforts are being made to obtain experts' reports at an early stage to enable the statement of valuation of claim to be completed as accurately as possible.

- The Scottish Legal Aid Board have changed their procedures to accommodate the front-loaded nature of the new personal injuries actions.

Practitioner communication

- An **e-mail address** has been created. Practitioners will be able to send queries, suggestions, and information to: personalinjuries@scotcourts.gov.uk.
- A **web-page** has also been created on the Scottish Courts web-site at: www.scotcourts.gov.uk. News and developments of general interest (such as this newsletter) will be posted on that page.

Pro formas

- The style **summons** does not give the defender notice of the heads of damage claimed, such as solatium, past and future wage loss, necessary services, and so on. The defender has to await the lodging of the pursuer's statement of value of claim. A further Act of Sederunt may alter the style summons such that the pursuer will have to list, in the summons, the heads of damage claimed (although not the precise figures, which is a matter for the statement of value of claim).
- The *pro forma* **Specification of Documents** does not recover wages information where a pursuer is *employed by someone other than the defender*. Also any noise level records and risk assessments in the hands of the defender are not recovered. An improved specification (possibly including alternative paragraphs, to be inserted or deleted as appropriate) may be incorporated in future versions of the rules. Meantime practitioners must use the existing *pro forma*, as the defender has no opportunity to oppose the terms of the specification. Additional specifications may then be used as necessary.
- The *pro forma* **Statement of Value of Claim (form 43.9)** does not provide for every head of claim. For example, past necessary services (section 8 of the Administration of Justice Act 1982) are included, but not future necessary services; future personal services (section 9) are included, but not past personal services. Practitioners should therefore treat Form 43.9 as a model or template, to be adapted as necessary.

Terms of motions

- A motion **seeking a sist and/or a variation of the timetable** should give sufficiently detailed reasons. The expense of a hearing before a Lord Ordinary may then be avoided.
- Similarly, a motion in terms of rule 43.5 (to have the action withdrawn from the new rules and to appoint it to **proceed as an ordinary action**) should detail specifically all the items listed in rule 43.5(3), providing as much information as can conveniently be given: *Broadfoot's C.B. v. Forth Valley Acute Hospitals NHS Trust*, 2003 G.W.D. 26-729.

Late records

- Where a pursuer fails to lodge a record by the due date, the Keeper will put the case out By Order. The pursuer must be represented at that By Order. However a practice is evolving whereby a *defender* who does not oppose the late lodging of records, and who does not wish to address the court on further procedure, may advise both the pursuer and the Keeper in writing, and in those circumstances need not be represented at the By Order.

Relevancy and specification points

- The new rules discourage procedure rolls: see rule 43.6(5) and (6). Valid specification points (intimated in writing to the other party) will in general be dealt with by ordaining the party to aver the further detail required, and putting the case out By Order to ensure that the necessary specification has been given. More fundamental questions of relevancy, which might result in the disposal of the action without the necessity of leading evidence, must again be intimated in writing: rule 43.6(5) and (6). The party seeking the procedure roll will have to persuade the court that a debate should be allowed.

Pre-proof/trial meetings

- Some practitioners are making use of video-conferencing for pre-proof meetings.
- Several cases have already reached the stage of a pre-proof meeting, and have settled.

Proof dates

The first "new rules" proofs are expected to take place in April 2004.

Saturday seminar

It is planned to hold a half-day seminar on the new rules in the Mackenzie Building on Saturday 29 May 2004.

Recent cases

- *Broadfoot's C.B. v. Forth Valley Acute Hospitals NHS Trust*,
2003 G.W.D. 26-729: held that a motion to have an action withdrawn from the new rules and to proceed as an ordinary action should detail specifically all the items listed in rule 43.5(3) and should provide as much information as may be conveniently given.
- *Tudhope v. Finlay Park*,
2003 S.L.T. 1305: held that the new rules covered an action for alleged professional negligence against a solicitor (a time-barred claim for personal injuries); and *Mackenzie v. Digby Brown & Co.*, 1992 S.L.T. 891 distinguished.
- *Tudhope v. Finlay Park*,
2004 G.W.D. 3-46: motion in terms of rule 43.5 to withdraw the cause from the new personal injuries procedure granted.
- *Higgins v. DHL International (UK) Ltd.*,
2003 S.L.T. 1301: a "lifting" case where the pursuer's concise pleadings (compliant with the new rules) were held not appropriate for a jury trial.
- *Clifton v. Hays plc*,
2004 G.W.D. 2-23: held that while the new rules were designed to simplify the written pleadings and to avoid complexity where possible, the pursuer had to set out in his pleadings the "facts necessary to establish the claim" against a particular defender; circumstances (where a keg fell off a lorry-trailer at certain premises) in which held that the pursuer's pleadings did not contain averments of facts necessary to establish a claim against the second defenders (the owners of the premises); and debate allowed.

February 2004: The Hon. Lady Paton