

COURT OF SESSION

PRACTICE NOTE

No. 2 of 2014

Personal Injuries Actions

1. The purpose of this practice note is to inform practitioners of the court's approach to several procedural matters arising from Chapter 42A (case management of certain personal injuries actions) and Chapter 43 (actions of damages for, or arising from, personal injuries) RCS and, in turn, what the court expects from them. This practice note replaces Practice Note No. 1 of 2013; Practice Note No. 2 of 2003 remains in force.
2. Rule 43.8 (applications for sist or variation of timetable order) provides that an application to sist an action or vary the timetable shall be granted only on cause shown. The purpose of this provision is to ensure that timetables are not easily varied and diets of proof consequently discharged. Accordingly, motions enrolled under this rule, including those of consent, must specify the cause relied on. Where it is not clear to the court that cause has been shown the court will, ordinarily, star the motion. The recent removal of "special" from "special cause" is to offer some comfort where there has been a failure to adhere to the timetable as a result of simple inadvertence which may be regarded by the court as excusable, having regard to the relevant circumstances; it is not to reverse the court's approach to such matters as expressed in the case *Fiona Smith v Greater Glasgow and Clyde NHS Health Board* [2013] CSOH 178.

3. Practitioners should note, however, that a motion to vary the timetable to allow an application for a third party notice to be made, even where cause has been shown, may be refused if granting it will endanger the proof diet.
4. Rule 43.9 (statements of valuation of claim) practitioners are reminded that these must contain figures. The practice of stating “TBC” (to be confirmed) will cease.
5. Rule 43.10 (pre-trial meetings) provides that there will be a pre-trial meeting between the parties to discuss settlement and to agree matters not in dispute. As explained in Practice Note No. 2 of 2003, the meeting must be a real meeting and it is the obligation of each party to take all such steps as are necessary to comply with the letter and the spirit of the rule. Where it is apparent to one of the parties that this has not been done, then that party should not sign the joint minute in Form 43.10, thus triggering the case being put out By Order. Practitioners are also reminded of the importance of section 2 of Form 43.10 and are encouraged to make use of the procedure provided for in Chapter 28A (notices to admit and notices of non-admission).
6. Blanket Denials. Practitioners are reminded that, unless there is good reason for their deployment, such as incomplete instructions or lack of access to factual information, blanket denials or skeletal defences are not an acceptable starting point in the pleadings. The duty of candour exists at all times and does so to serve both the court and the parties. The court will, ordinarily, bear this in mind when faced with a motion for summary decree.
7. Chapter 42A applies to clinical negligence cases withdrawn from Chapter 43 and other complex personal injuries actions, including catastrophic injury cases. The purpose of the Chapter is to allow the court, at a procedural stage, to identify and resolve issues that are known reasons for seeking variation of the timetable or the discharge of the proof diet at a later date. This

“frontloading” of the action will allow the court to make more informed case management decisions when it comes to fixing further procedure at the hearing on the By-Order (Adjustment) Roll. The timing of some of the actions to be completed in advance of this hearing may seem demanding but the court is of the view that as the adjustment period can be extended in appropriate circumstances there will be sufficient flexibility to allow for the completion of these actions.

8. Practitioners should note that, where reference is made to witness statements in rule 42A.3(c)(v), the court expects these statements to contain full and clear factual accounts that convey the evidence of the witnesses. Where possible, witness statements should be exchanged before the By Order (Adjustment) Roll Hearing.

9. Where parties are seeking to have the action appointed to proof, the court will explore the following issues at the By Order (Adjustment) Roll Hearing:
 - Whether expert reports have been exchanged;
 - What the nature and extent of the dispute between the experts is;
 - Whether there are facts that should be agreed between parties, upon which the experts can then comment;
 - Whether there is an agreement about the relevant literature upon which experts rely and which could be agreed between parties;
 - Whether there has been a meeting between the experts; if not, whether such a meeting would be useful;
 - Whether a proof on a particular issue would allow scope for the matter to be resolved;
 - Whether there has been an exchange of witness statements;
 - Whether any party is experiencing difficulties in obtaining precognition facilities;
 - Whether all relevant records have been recovered and there is an agreed bundle of medical records;

- Whether there is a relevant case that is supported by expert evidence; if there is no expert evidence to support a relevant case, whether such evidence is necessary;
 - Whether there is a relevant defence to any or all of the cases supported by expert evidence; if there is no expert evidence to support a relevant defence, whether such evidence is necessary;
 - Whether the dispute is essentially one of causation of some or all of the injuries and, if so, what the position of the respective experts is;
 - Whether valuations have been exchanged to date; if not, whether that is possible at this stage; if valuations have been exchanged, whether there is a significant disparity; if so, whether parties should be asked to provide an explanation for such disparity;
 - Whether a joint minute has been considered;
 - Whether any of the heads of damage can be agreed;
 - Whether any orders would facilitate the resolution of the case or the narrowing of the scope of the dispute;
 - Whether a pre-trial meeting would be beneficial at this stage;
 - Whether amendment, other than updating, is anticipated.
10. Practitioners should note the terms of rules 42A.4(5) and (6). Rule 42A.4(5) provides that the Lord Ordinary may fix a further hearing on the By-Order (Adjustment) Roll before appointing the action to debate or sending it to a proof. Rule 42A.4(6) provides the Lord Ordinary with very wide powers to make any order that he thinks necessary to secure the speedy and efficient determination of the action, and, in particular, to resolve any matters arising or outstanding from the written statements for further procedure lodged by the parties in advance of the first hearing on the By-Order (Adjustment) Roll. The court will ensure that parties are ready to proceed to proof and provide an accurate estimate of the time required, before fixing a proof diet.

11. Where the court is minded to fix a date for the proof, practitioners are reminded to liaise with the Keeper's Office regarding potential dates for proof. Where a proof diet has been fixed and the dates are no longer suitable or there exists a concern about their suitability, practitioners are reminded to contact the Keeper's Office immediately.
12. Practitioners should also note the terms of rule 42A.5, which increases the role of the Lord Ordinary in respect of the pre-proof timetable.
13. Practitioners should note that, under the transitional provisions of the Act of Sederunt, the Lord Ordinary may, having given all parties an opportunity to be heard, direct that Chapter 42A is to apply to an action raised before 1 May 2013. Parties seeking to have an action appointed to Chapter 42A are encouraged to apply as early as possible under the transitional provisions. The court will use the powers under Chapter 42A to make such orders as necessary to secure the speedy and efficient determination of the action irrespective of the stage at which the action has reached.

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Lord President

Edinburgh

16 October 2014