COURT OF SESSION

PRACTICE NOTE

No 2 of 2019

Personal Injuries Actions under Chapter 42A

1. This Practice Note has effect from 1st March 2020. It replaces Practice Note No.6 of 2017.

2. This Practice Note applies to actions to which Chapter 42A (Case management of certain personal injuries actions) of the Rules of the Court of Session applies. Any of the requirements of this Practice Note may be disapplied by the Lord Ordinary in any case, including where one or more of the parties are party litigants.

3. The ordinary rules of the RCS apply to a personal injuries action to which Chapter 42A applies except insofar as specifically excluded under RCS 42A.1(6), or except insofar as excluded by implication because of a provision in Chapter 42A.

4. Arrangements will be made to ensure that (save in exceptional circumstances) at all appearances of an action at a case management hearing, or at a debate or proof appointed under Chapter 42A, the same judge will preside.

5. Parties are expected to arrange that counsel, or solicitors having rights of audience, who are principally instructed, are authorised to take any necessary decision on questions both of substance and procedure and are available and appear at any case management hearing, or at a debate or proof. Practitioners are expected to liaise with each other and with the Keeper in order to facilitate, so far as possible, the appearance by counsel or solicitors having rights of audience, principally instructed, at all hearings, including Procedural Hearings in any reclaiming motion.

<u>Chapter 42A generally</u>

6. Chapter 42A applies to clinical negligence cases withdrawn from Chapter 43 and other complex personal injuries actions, including catastrophic injuries cases, where the Lord Ordinary is satisfied that managing the action under Chapter 42A would facilitate the efficient determination of the action. Pursuers wishing to raise a personal injuries action based on clinical negligence, as an ordinary action subject to Chapter 42A procedure, must apply for authority to do so in accordance with RCS 43.1A. Alternatively, parties may apply by motion in accordance with RCS 43.5 to

have the action withdrawn from Chapter 43 and to proceed in accordance with Chapter 42A.

7. The purpose of Chapter 42A is to allow the court, at an early stage, to identify and resolve issues that may otherwise result in a variation of the timetable or the discharge of a proof diet and to achieve the efficient disposal of such cases. This frontloading will allow the court to make more informed case management decisions when determining further procedure at a case management hearing. The timings may seem demanding, but, as the adjustment period can be extended in appropriate circumstances, there is sufficient flexibility to allow for the completion of the required matters prior to the closure of the record. Parties will then be expected to be in a position to comply with the timetable.

8. RCS 42A.5 provides for the exchange of information by the parties in the 12 week period which follows the lodging of the closed record. This exchange of information is to be carried out in stages and provides that parties will be fully informed of their respective positions before the case management hearing. The parties are required, by RCS 42A.6, to lodge in process statements containing proposals for further procedure. The pursuer must, after liaising with the defender, lodge a joint minute in process which sets out the matters which have been agreed. Where there are matters relevant to the issues in dispute, which are not included in the joint minute, the parties must lodge a written statement explaining why such matters have not been agreed. The aim is for the court to be fully informed in order that the case management hearing will be effective.

9. Where reference is made to witness statements in RCS 42A.5(2)(c), 42A.5(3)(f)(ii), 42A.6(2)(a)(vi) and 42A.7(2)(b)(viii), these statements should contain full and clear factual accounts. Witness statements should be exchanged before the case management hearing.

10. Where a party seeks to have the action appointed to debate, then that party must, on the lodging of the closed record in process, notify the court and the other party, or parties, that an application for a debate is to be made, and make such application to the court, by motion, no more than 1 week from the date on which the closed record is lodged in process.

11. Where a party seeks to have the action appointed to debate, then the time-frames set out in the rules concerning:

    a. the fixing by the court of a date for the case management hearing;

    b. the exchange of information by the parties;

c. the lodging in process of statements of proposals and joint minutes,

commence from the date on which the court determines the application for a debate.

12. Where parties are seeking to have the action sent to proof, the court will explore the issues set out in RCS 42A.7 at the case management hearing.

13. RCS 42A.7(4) allows the Lord Ordinary to fix a further case management hearing, whether or not the action has been appointed to debate or sent to proof. RCS 42A.8(4) allows the Lord Ordinary to fix a further case management hearing, or to vary the pre-proof timetable, at any time where the Lord Ordinary considers that the efficient determination of the action would be served by doing so.

14. RCS 42A.10 provides the Lord Ordinary with wide powers to make any order necessary to secure the efficient determination of the action, and, in particular, to resolve any matters arising or outstanding from the pre-proof timetable or the written statements for further procedure lodged by the parties in advance of the case management hearing. The court will attempt to ensure that parties are ready for proof and have provided an accurate estimate of the time required, before fixing a diet.

15. Where the court intends to fix a date for the proof, practitioners should liaise with the Keeper of the Rolls regarding potential dates. Where a proof diet has been fixed and the dates are no longer suitable, or there exists a concern about their suitability, practitioners should contact the Keeper as soon as practicable.

16. Under the transitional provisions, the Lord Ordinary may direct that Chapter 42A, as substituted by Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Case Management of Certain Personal Injuries Actions) 2019, is to apply to an action raised before 1st March 2020. Parties seeking to have such an action appointed to Chapter 42A, as revised, 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 are necessary to secure the efficient determination of the action irrespective of the stage which the action has reached.

Joint and core bundles

17. Where a cause has been appointed to a proof, the parties must lodge:

    a. a joint bundle of productions, including a joint bundle of records (medical records, and any other relevant records, for example social security, schools, and social work records etc.);

    b. a list of the contents of the paginated joint bundle of productions;

c. where the productions lodged on behalf of both parties comprise more than 500 pages, a core bundle,

in final form, in accordance with the pre-proof timetable fixed under RCS 42A.8.

18. Where a party lodges a joint bundle or a core bundle, that party must intimate the bundle to the other parties.

19. All joint bundles and core bundles should be properly identified and marked accordingly, containing an index at the beginning, and be presented in a form which is robust and manageable. Where lever arch folders or ring binders are used they should not be overfilled.

20. Where a passage in a production is to be referred to in the course of submissions, a copy should be lodged with the passage highlighted.

21. Prior to the lodging of the joint bundles and core bundles, the records should be kept, and exchanged by the parties, in accordance with the time-frames in RCS 42A.5. They should not be lodged until the timetable is issued under RCS 42A.8. Experts instructed for both sides should work from the same joint bundle(s) of records and use the same numbering and references to those bundles throughout the case, commencing from the time they are first instructed. If it has been necessary for any expert to have prepared report(s) prior to the development of the joint and core bundles of records, any report exchanged or lodged will require to be revised with reference to the bundles prior to lodging.

22. The joint bundle of records should be updated by the parties, as and when necessary, at the point records, not already included in the bundle, appear and after liaison with the other parties. This may be, for example, a scan or x-ray associated with a report which is already included in the joint bundle which only comes to light at a later date. The scan or x-ray should be inserted where it ought to appear in the joint bundle (i.e. with its associated report), as opposed to being intimated as a separate production. Parties should apply the same approach to all updates to reports which are already included in the joint bundle.

23. The joint bundle of productions should contain the productions upon which each party intends to rely.

24. Only productions relevant to the legal and factual issues to be raised at the relevant hearing, and likely to be referred to at that hearing, should be lodged.

25. Productions should be arranged chronologically or in another appropriate order, such as by reference to the subject matter of the claim or the issues in dispute.

Core bundles

26. The core bundle should contain copies of productions already lodged, as appropriate. It should contain copies of the productions which are central to the issues.

27. The core bundle should not ordinarily exceed 150 pages.

28. Joint bundles and core bundles should bear a certification by the agent for the party at whose instance the hearing has been fixed that the requirements of this Practice Note have been complied with in respect of each production included.

Notes of argument

29. Where a cause has been appointed to a debate, each party should lodge a note of argument.

30. Where a cause has been appointed to a proof, each party should consider whether or not it will be necessary to lodge a note of argument having regard to the issues in the case. They should either lodge such a note or a joint statement as to why a note of argument is not necessary.

31. The note of argument or joint statement should be lodged at least 10 days before a debate, and at least 21 days prior to a proof.

32. The note of argument should comply with the following general principles:

    a. It should be a concise summary of the submissions the party intends to develop at the hearing;

    b. It should contain an executive summary of the points which the party wishes to make, set out as subparagraphs within a single paragraph;

    c. It should be set out in numbered paragraphs;

    d. It should not contain detailed legal argument;

    e. It should be as brief as the issues allow and not more than eight A4 pages, or, where the relevant hearing is a proof, twelve A4 pages. It should be double spaced, font size 12;

    f. Each point should be followed by a reference to any evidence or document on which the party wishes to rely. The relevant passages in the document should be identified;

    g. It should state, in respect of each authority cited –

(i) the proposition of law that the authority demonstrates; and

(ii) the passages of the authority (identified by page or paragraph) which support the proposition;

h. More than one authority should not be cited in support of a given proposition.

33. Except on cause shown, no submission will be permitted to be advanced and no authority will be allowed to be referred to at the relevant hearing which is not included in the note of argument.

34. Where the note of argument has been lodged and a party subsequently becomes aware that an argument will no longer be insisted upon, that party should inform the other parties and the court of that fact as soon as practicable.

Joint lists of authorities

35. Where a cause has been appointed to a debate or a proof, the party at whose instance the hearing has been fixed should consider whether it is likely that authorities will be required for the debate or proof. That party should, after consultation with the other parties, either lodge a joint list of authorities or lodge a statement by both parties that authorities are not required for the hearing.

36. Where a Note of Argument has been lodged it will be expected that there will be a joint list of authorities unless parties have agreed the propositions of law, in which case a joint statement to that effect should be lodged in place of the joint list. The joint list or joint statement should be lodged at the same time as the note of argument, or the joint statement which is set out in paragraphs 30 and 31. The time-frames for the lodging of these documents are set out in paragraph 31.

37. The joint list of authorities should not contain more than ten authorities. The permission of the court is required to include any authorities beyond the maximum number. For the purposes of this paragraph, authorities do not include statutory provisions upon which the case or defence proceeds.

38. Authorities which have been reported in Session Cases, or in the Law Reports published by the Incorporated Council of Law Reporting for England and Wales, should be cited from those sources. Where a case is not reported in Session Cases or the Law Reports, references to other recognised reports may be given. Unreported Opinions should only be cited where they contain an authoritative statement of a relevant principle of law not to be found in a reported case or where they are necessary for the understanding of some other authority.

39. Joint lists of authorities should bear a certification by the agent for the party at whose instance the hearing has been fixed that the requirements of this Practice Note have been complied with in respect of the joint lists.

Failure to comply

40. RCS 42A.9 provides that where a party fails to comply with certain specified rules in that Chapter concerning the exchange of draft information by the parties then that party may, on the motion of the other party, be ordained to appear before the court to explain the reasons for their non-compliance. The court has the power to make any such order as appears appropriate in the circumstances.

41. Where a party fails to comply with any of the requirements of this Practice Note, the court may find that no expenses are payable, may make an award of expenses, or may modify any award of expenses, in respect of the failure to comply.

CJM Sutherland

Lord President

Edinburgh

27 November 2019