

**SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT**

[2026] SC EDIN 91

PIC-PN2702-26

NOTE BY SHERIFF WATSON

in the cause

DANIELLE ROBERTSON

Pursuer

against

BRIAN WILSON

Defender

**Pursuer: McGeorge, Digby Brown LLP
Defender: Agnew, Keoghs Scotland LLP**

Edinburgh, 15 July 2026

[1] This opposed motion called before me on 29 June 2026. The pursuer's motion was

“(i) to grant decree in terms of the Minute of Offer to Settle for the Pursuer no. of process and Minute of Acceptance thereof no. of process; (ii) to find the defender liable to the pursuer in the expenses of the action and to allow an account thereof, when lodged, to be remitted to the auditor to tax and report”.

[2] The pursuer also sought certification of an expert. The defender opposed the motion for expenses and invited the court to modify the pursuer's expenses by 50% “on the basis of the pursuer's delay, and subsequent refusal, to disclose their Inventory of Productions timeously.”

[3] I granted the pursuer's motion, subject to modification of expenses by 50%. I was advised by parties' agents that the issues giving rise this motion were both important and

recurring, and that further such motions are pending before the court. I therefore agreed to write a Note.

Background

[4] On 25 May 2025, the pursuer was injured in a road traffic accident. Her car was in collision with a car driven by the defender. Her agents intimated a claim on her behalf. Having had no response from insurers for over six months, on 29 April 2026 they served an initial writ. The defender instructed agents on 5 May 2026. Over the following days those agents requested sight of the pursuer's inventory of productions. That was not forthcoming. The pursuer intimated that the inventory would be provided once they had lodged a notice of intention to defend ("NID"). The defender lodged a NID on 13 May 2026. On 14 May 2026, the pursuer intimated an inventory of productions, which included a medical report. The defender lodged a tender for £5,250 on the same day. On 22 May the pursuer's agents rejected the tender and intimated a minute of offer for £6,500. The defender's agents accepted it on the same day.

[5] Both parties adopted their written submissions. I was addressed first by the defender in opposition to the motion.

Defender's submissions

[6] The defender accepted that the pursuer was entitled to litigate. The defender's insurers had breached schedule 1, Act of Sederunt (Sheriff Court Rules Amendment) (Personal Injury Pre-Action Protocol) 2016, the compulsory pre-action protocol ("the CPAP") by failing to acknowledge the letter of claim. However, the pursuer was still

obliged to comply with the requirement for early disclosure of evidence. Macphail,

Sheriff Court Practice states at 24-12,

“In an action for personal injuries, it is incumbent on a pursuer to lodge with the initial writ when it is presented for warranting all medical reports on which it is intended, or intended to reserve the right, to rely in the action.”

[7] The defender accepted that the footnote to this statement referred to the now-omitted Ordinary Cause Rule 36.17C(1), but submitted that the rationale remained sound and that this was bolstered by Sheriffdom of Lothian and Borders Practice Note number 5 of 2016 at paragraph 5:

“To facilitate early settlement, the principles of early disclosure underlie the procedures set out in Chapter 36 OCR and 34 SCR. Last minute disclosure, i.e. lodging only in accordance with the timetable, of reports from skilled witnesses is discouraged. Failure without reasonable cause, to lodge reports on which it is intended to rely within a reasonable time after receipt may have a consequence in expenses.”

[8] Both this and the decision of Sheriff McGowan in *Zdrzalka v Sabre Insurance* 2019 Rep LR 11 underscored that a report upon which a pursuer relied should be made available within a reasonable time after receipt. Here, the pursuer was relying on a report dated 3 November 2025. At the point of raising proceedings the pursuer should have lodged it in process or served it with the initial writ. The pursuer had no sound basis for refusing to disclose the report until the defender had lodged a NID. Settlement was achieved shortly after the NID was lodged. It could have settled prior to the last date for lodging the NID if the report had been disclosed alongside the initial writ. This was part of a repeated pattern of agents refusing to disclose productions until a NID was lodged, for which there was no basis in the rules of court. The pursuer was entitled to expenses, but those should be modified by 50%.

Pursuer's submissions

[9] The pursuer submitted that they had dealt with matters reasonably throughout. Litigation was necessary because of the defender's breach of CPAP. It was the defender who had caused the delay. The defender had not entered process by lodging a NID. The pursuer had not refused to disclose their inventory of productions. Rather, they had advised it would be disclosed once a NID was lodged. The pursuer was entitled to know whether the case would be defended before providing their medical report. *Zdrzalka* should be distinguished: there, there had been a pre-litigation admission of liability. Early disclosure of evidence may be appropriate where there had been a non-binding admission of liability, but not where there was no position on liability.

[10] Further, the defender had failed to make a suitable offer. Their initial minute of tender was 20% below the figure in the pursuer's subsequent minute of offer, which the defender then accepted. It could not be said that earlier disclosure of the report would have made a material difference to the date of settlement.

[11] In response to questions from me, the pursuer submitted that they had not responded to the defender's request for a copy of their productions because they had wanted more information from them and had wanted to know their position on liability. It was accepted that they had not said this in their response. Lodging a NID established that the defender was now part of the court process. It was expressly not being submitted that the pursuer's agents had a policy of not disclosing productions until a NID was lodged.

[12] Both parties made reference to the correspondence between them, which had not been lodged. The defender stated they had not produced it as the pursuer had marked their correspondence as being without prejudice. However, parties agreed that I could have sight of it and provided me with a copy prior to concluding submissions.

Decision and analysis

[13] The defender accepts that they breached the CPAP by not responding to the pursuer's letter of claim. That constituted a breach of paragraph 12, the duty to acknowledge a claim form within 21 days of receipt, and paragraph 13, the duty to investigate the merits of a claim and send a reply within three months of receipt of the claim form. The pursuer was, accordingly, entitled to litigate in accordance with paragraph 9. The pursuer submitted that Ordinary Cause Rule 3A.3.(2) therefore applies. Where a sheriff considers that a party has failed, without just cause, to comply with the requirements of the CPAP, the sheriff may make an award of expenses against that party.

[14] That, however, was not the issue. The defender accepted that they were in breach of the CPAP and the pursuer was entitled to expenses. The question was whether those expenses should be modified. The pursuer submitted that the failure by the defender to comply with their responsibilities under the CPAP was still part of the picture to be taken into account.

[15] In *Zdrzalka v Sabre Insurance* Sheriff McGowan considered two questions. The first was whether the pursuer was entitled to raise an action for damages where the defender had made a non-binding admission of liability. He concluded that the pursuer was entitled to litigate: "I do not doubt that the defender was acting in good faith in putting forward the admission of liability which it did, but unfortunately, by doing so, it left itself exposed in terms of the CPAP." The pursuer seeks to distinguish *Zdrzalka* given that in that case the defender had made a non-binding admission of liability, whereas here the defender had made no such admission. I do not consider that to be a material distinction. What matters is the consequence of the defender's actions. In *Zdrzalka*, as here, the consequence was that the

pursuer was entitled to litigate. They can also then make an award of expenses against the defender in accordance with Ordinary Cause Rule 3A.3.(2). However, that does not determine the question of whether such expenses should be modified.

[16] The relevant sequence of events following service of the initial writ was as follows:

8 May – the defender emails the pursuer to request the date of service and last date for NID. “We note you have failed to provide a copy of your Inventory of Productions at service. Please now disclose this. Continued failure, or delay, will be founded on.”

8 May – the pursuer responds confirming proceedings were raised on 29 April and the NID was due on 20 May.

8 May – the defender reiterates their request for the inventory and that any failure will be founded upon.

11 May – the pursuer writes to the defender stating, “We note you have not yet entered process. Please provide your Notice if Intention to Defend, following which we will arrange to lodge our evidence in terms of the Ordinary Cause Rules.”

11 May – the defender replies, stating “The inventory of Productions should have been served along with the Initial Writ. Reference is made to the case of *Zdrzalka v Sabre Insurance* 2019 Rep LR 9, where Digby Brown acted for the pursuer and were criticised for their delay in disclosure.”

13 May – the pursuer writes to the defender’s insurers noting that they were in breach of the CPAP and they were therefore entitled to raise proceedings. they continued, “We understand that you have instructed Keoghs to defend the matter. We have informed them that are happy [sic] to lodge our inventory of productions once they have entered process. The only waste of time has been as a result of your failure to obey the Protocol.”

13 May – the defender intimates and lodges their NID and requests disclosure of the inventory of productions.

14 May – the pursuer intimates and lodges their inventory of productions.

14 May – the defender lodges a tender for £5,250.

22 May – the pursuer rejects the tender and lodges a minute of offer for £6,500.

22 May – the defender accepts the minute of offer.

[17] The question then is whether in these circumstances, the expenses to which the pursuer is entitled ought to be modified. At paragraph 19.14 Macphail states:

“Modification, in the sense of restriction of expenses, may be directed in order to mark the court’s dissatisfaction with some aspect of the behaviour of the successful party, either as regards the conduct of the litigation or in the matter which gave rise to it. Such modification may be appropriate where the behaviour of a party towards the other party before the litigation merits disapproval; or where a party’s conduct of the action has been inefficient or irresponsible. In such cases the sheriff usually finds the successful party entitled to only a proportion of the taxed amount of their expenses, and the modification is applied after taxation and the approval of the auditor’s report. Modification or restriction of expenses may also be directed where there has been divided success.”

[18] The defender referred the pursuer to, and in submissions relied upon, the decision of Sheriff McGowan in *Zdrzalka v Sabre Insurance*. Having concluded that the pursuer was entitled to raise an action, he then turned to consider their delay in disclosing the medical report upon which they relied. He held:

“[111] As a matter of generality, medical reports which are to be relied on should be disclosed within a reasonable period of their having been obtained. A failure to do this may have consequences in expenses: see, for example, para.5, Sheriffdom of Lothian and Borders Practice Note Number 3 of 2016.

[112] In this case, my judgment is that the medical report could and should have been disclosed no later than the date upon which the writ was served. In seeking to establish whether there was any impediment to that, I was told that it was the pursuers’ agents’ ‘policy’ not to disclose medical reports until actions were defended.

[113] No explanation or justification for such a ‘policy’ was put forward. In any event, the court’s discretion to deal with expenses in any given case cannot be constrained by the internal policies of practitioner firms.

[114] While it is true that the notice of intention to defend was lodged well before the expiry of the notice period, I infer that the medical report would not have been disclosed until that had happened.

[115] Once the medical report was disclosed, settlement was achieved quickly.

[116] It is reasonable to proceed on the basis that had the pursuer’s agents acted reasonably and disclosed the medical report at the time the writ was served (at the latest) the action would have settled within a similar time period and thus within the notice period (i.e. when the action was still ‘undefended’).”

[19] I consider that this is squarely in point and I adopt the same reasoning. The court expects parties to cooperate with the principles of early disclosure in order to facilitate early settlement. That is fundamental to personal injury litigation and is encapsulated in paragraph 5 of Practice Note 3 of 2016. The evil struck at is not only last-minute disclosure, but also failure, without reasonable cause, to lodge reports on which a party intends to rely within a reasonable time after receipt.

[20] The pursuer relied upon a report from a consultant trauma and orthopaedic surgeon. The report was dated 3 November 2025, roughly 6 months before the action was raised. In the same inventory the pursuer lodged photographs of the pursuer and defender's vehicles at the accident locus (including what I take to be a photograph of the pursuer's bleeding hand); a Police Scotland collision report; and the pursuer's post-accident medical records, to which their expert made reference. There was no suggestion that the report was not finalised until a later date. On the contrary, the pursuer was explicit that the only reason to delay disclosure was to await the lodging of a NID. I was given no rationale for that. None had been stated in the pursuer's correspondence. I was not pointed to any rule or practice note which would require or encourage a pursuer to delay intimating reports on which they relied until a NID was lodged. While the pursuer submitted that they were awaiting further (unspecified) information from the defender or confirmation of their position on liability, their correspondence was silent on this: they simply reiterated that they sought the lodging of a NID.

[21] In the words of the Practice Note, the pursuer failed, without reasonable cause, to lodge the report on which they intended to rely within a reasonable time after receipt, and this may therefore have a consequence in expenses.

[22] I do not accept the pursuer's submission that earlier disclosure would not have made a material difference to the date of settlement. The defender's tender was made on the same day as disclosure of the report. Eight days later the pursuer rejected the tender and lodged a minute of offer. The defender accepted that offer the same day. It is reasonable to proceed on the basis that settlement would have been affected within a similar timescale had the report been disclosed when first requested, and therefore within the notice period. The action would then have resolved with the pursuer entitled to the expenses of an undefended action.

[23] I consider that a practice of delaying the disclosure of reports upon which a pursuer relies until the lodging of a NID is unsupported in the Ordinary Cause Rules and runs counter to Practice Note number 3 of 2016. That should be reflected in the expenses awarded. The defender would always have incurred expenses on the raising of the action. Each case in which modification of an award of expenses is sought will turn on its own facts and circumstances. However, consistent with the approach in *Zdrzalka* and taking into account the similarity in circumstances, I found the pursuer entitled to the expenses of process as taxed, subject to a modification of 50%.