PERSONAL INJURIES ACTIONS UNDER NEW CHAPTER 43 RULES

A PURSUERS AGENTS PERSPECTIVE

1. INTENTION

The primary purpose of the new Chapter 43 Rules was to cut down on the number of late settlements and to focus parties minds on the real issues between them including in particular quantum given the fact that over 95% of personal injury actions raised in Court settle without Proof.

The Scottish Parliament and Justice Committee considered this matter and thought it highly undesirable that large numbers of cases should settle on a Tuesday morning at Court, a view that Lords Ordinary have often expressed when cases call before them only to be told that it had been settled on the morning of Proof.

This of course matters very little to Agents and Counsel who appear regularly in the Court but it is quite a different matter for lay people and expert witnesses inconvenienced by such late resolution.

It was this overriding interest with a realisation that the Court did not want to be over-burdened with the requirements for judicial management when Judges time is unfortunately increasingly taken up with criminal business that underpinned the considerations of the Working Party under Lord Coulsfield and the Rules that were subsequently created from the considerations of that working party.

I intend to concentrate in this brief overview from the Pursuers perspective on those procedures within the new Rules which are designed to achieve this end.

2. PLEADINGS

Rule 43.2 requires that the Summons has a **brief** statement containing averments in numbered paragraphs relating only to those facts necessary to establish the claim.

The accompanying practice note to the Rules refers to the report of the Working Party and includes particularly the statement that “it was therefore emphasised for the purposes of these Rules Pleadings should be kept to a basic minimum”. The supplementary report from the Committee on Pleadings is referred to and in particular their conclusion that “**what is necessary is a method of pleading which encourages brevity and simplicity and discourages technicality and artificiality**”.

It was recognised by the Working Party and the subsequent Pleadings Sub-Committee that in order to achieve brevity and clarity there would have to be a change in mind-set of the pleaders on both sides who were charged with drafting relevant and specific pleadings without the

unnecessary and verbose artificiality of far too many pleadings in cases which were made complex quite unnecessarily.

It should not take many pages of pleadings to describe a rear shunt in a vehicle accident, the effect of machinery noise on the hearing of employees, a description of slipping on a wet factory floor or the inhalation of harmful dust in a manufacturing process.

Unfortunately to date it appears that Counsel have yet to have regard to the intentions of the Rule changes relative to Pleadings, that in the main Pleadings have changed little from what was drafted by Counsel previously. Where Counsel is instructed for Defences, and faced with more modern shortened Pleadings with specific short averments requiring a specific response, what is presented in Answer is a mirror image of what has gone before repeating the self same mantras of the past which make no sense to non-legally trained individuals.

If the intention behind the new Rules is to be realised, which is fired by public demand as represented by the Justice Committee of the Scottish Parliament, then this will have to change, failing which inevitably much more specific instruction by way of Rule and style will be required to ensure that the "quoad ultra denied" defence is a thing of the past, what can be admitted should be admitted and that there should be early concentration between the parties on the real issues that separate them. Pleadings game playing will be consigned to the dustbin of history.

Current Regulations and reporting requirements from arranging for police reporting of road traffic accidents to the requirements of risk assessment, accident reports and health and safety investigation mean that in by far the majority of cases both parties are armed with documented investigation of the circumstances with which the action is concerned and in reality it is those reports and investigations which parties and those instructing them rely. Where Pleadings pretend to be ignorant of them then it is Pleadings that will require to change and Pursuers will look to Lords Ordinary to ensure that that fact of modern life is recognised and the pretence is banished that one side or the other does not know a fact which has been the subject of pre-existing investigation.

The one matter which the Working Party on Pleadings had recommended which was not given effect to in the original form of Summons related to the heads of claim claimed and the new act of sederunt due to be pronounced shortly will address that issue.

A further issue which is being addressed is the issue of Pleas-in-Law. Pleas-in-law unfortunately have become mantras without meaning and as the intention of the Rules in relation to Pleadings is to ensure clarity and brevity those seeking to put in what is the equivalent of a plea-in-law will require to plead it in answer or in aid in the body of the statement of claim or defences thereto.

3. VALUATIONS.

Of all the complaints that the Defenders had regarding the conduct of Court of Session personal injury litigation the one put most strongly was that it was very difficult for insurers and their

advisors to resolve cases without having a proper documented valuation of the case and that far too often such a valuation did not materialise until almost the day of the Proof.

The Working Party accepted that this was a valid criticism of the previous arrangements and it is an essential feature of the new procedure that valuations are lodged following closure of Record by both parties with supporting documentation to enable each side to consider the assessment of the other and to encourage early settlement.

For Pursuers it is essential that this is taken seriously, that appropriate reports are obtained if necessary in advance of litigation, and that a proper schedule of damages with supporting documentation is lodged at the relevant period of time. While I cannot speak for other firms it has certainly been Thompsons policy to require of those managing and running cases that a draft valuation and supporting information is available at the commencement of proceedings.

It has unfortunately proved to be the case that the same care relative to the requirement of consideration of valuation (for these purposes it is most important to note that it is quite irrelevant whether there is a defence as to contribution or otherwise) is an accurate documented considered valuation be produced by the Defenders has not been realised. Experience suggests that this is being largely disregarded, that such valuations are produced with little thought, certainly without reference to any documentation and we have experience of seeing nil valuations, valuations that are tens of thousands of pounds apart from the Pursuers and enquiries as to documentation generally either produce no response or reference to some element of Hospital or GP records.

Again this will simply not do for the purposes of Chapter 43 and on behalf of Pursuer litigants in this Court I can advise that these matters are likely to result in Motions for production of documentation and requests for the case to be put out By Order in front of Judges. A similar mind set change as is required to Pleadings is necessary if the purposes of the new procedure are to be given effect to.

Both sides will need to address well prior to litigation (and by far the majority of Court actions have a pre-litigation history between Pursuer Agent and insurance company or claims handler) to the issue of quantification and for Defenders to the obtaining in the event of non-acceptance of the Pursuers evidence of early reliable medical evidence. Consideration of obtaining ones own medical report in anticipation of a forthcoming Proof should be and I believe will be a thing of the past.

4. PRE-TRIAL MEETINGS

The innovation of pre-Trial meetings as required by Rule 43.10 was driven by the primary intention of the Chapter 43 changes to effect earlier settlement in cases which are historically settled on the Tuesday morning at the Bar of Proof.

The initial proposal was for Judicial management as occurs in a number of jurisdictions in England and Canada but limited judicial time and the relevant straightjacket of such an approach

commended the alternative of seeking a re-enactment of a Tuesday morning Parliament Hall parade between parties properly prepared and represented and present at such a meeting.

Experience of such meetings is as at this date relatively limited but in such meetings as there have been the hope for a substantial level of settlement has not been achieved.

Once again mindset in old ways plays a substantial part. As before that mindset will have to change.

All relevant documents, valuations, reports and notices should be and indeed must be in front of the meeting. The Pursuers Agents should have regard to the provisions of Section 2 of form 43.10 being the Joint Minute at a pre-Trial meeting. This anticipates a Notice to Admit having been served on the Defenders and while Rule 43.10 as presently framed makes no specific reference to Notices to Admit this is undoubtedly the best vehicle to smoke out from Defenders precisely what they are prepared to admit or not and to flag up to the Court in the Joint Minute any matters which ought to have been capable of being dealt with by such admissions and which were not. Matters such as risk assessments, provision of equipment, accident reports as well as more general matters such as employment, foreseeability, pension entitlement and others can all be encompassed in such notices and so give a real opportunity to find out what matters are really in dispute.

It is a cornerstone of the new procedure that this meeting was intended to replicate the Tuesday morning negotiations and the Rules are designed to ensure that parties should have all the information they would have had on Tuesday morning at the Bar of Proof and have access to those instructing them if not actually present. I hope that effective sanctions by the Court are introduced in respect of those who are not in a position at that meeting to replicate pre-Proof discussions.

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