PERSONAL INJURIES ACTIONS – NEW RULES
THE DEFENDERS AGENTS PROSPECTIVE

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1. **Lack of Pre-action Protocols**

- Unfair advantage to pursuer, who can

  (a) Front-load the case.

  (b) Decide when to institute proceedings.

  (c) No equivalent to Part 36 offers.

- Failure to learn from Wolff Reforms, in England, which reduced the volume of litigation even if at the same time it created the replacement in cost-related, satellite litigation by reason of failure to "write the final chapter" on costs.

- The remit to Lord Coulsfield and his Working Party approached the problem from the wrong end, by taking litigation as a given rather than looking at creating a climate in which claims can be resolved at the pre-litigation stage where possible.

- Waiting time for Court actions currently 13 months from signet to proof. Volume of litigation equals delay, therefore reduce the volume.

2. **Medical Negligence Cases**

The view of the CLO and others involved in medical negligence cases is that the practical position is that a high percentage of these cases are being removed from the New Rules to the Old Procedure. It would therefore probably reflect the practical position if the New Rules excluded medical negligence cases but provided the pursuer with the means by which he could seek to "opt in" to the New Rules if he deemed it appropriate to make that motion.

3. **Pleadings**

(a) Form

Lord Coulsfield's Working Party was unanimous in its view that the "old" system of pleadings was too elaborate for routine personal injury actions. Its view was that pleadings should be kept to a basic minimum.

The suggestion is made that in fact that guidance has not been followed by Counsel. However my experience is that guidance is generally being followed, and that pleadings are "brief" and "support" without "technicality or artificiality."

This is further to be assisted by a change to be shortly introduced by Act of Sederunt which ***inter alia*** makes it clear that pleas-in-law are not to be included in Defences, and that Heads of Claim do need to be identified in the Summons.

However my fear that the pendulum may have swung the other way to a point where averments, particularly relating to statutory cases and loss may be simply too brief to enable a defender to know exactly what case he is facing, and what losses he is being asked to meet.

(b) More Jury Trials?

Will the result of brief pleadings be that it is easier for a pursuer to justify the allowance of Issues? The perception of defenders, and their insurers, at the time of introduction of the New Rules was that there would be an increase in the number of cases where issues were allowed which under the Old Rules would have been regarded as unsuitable for Jury Trial because the detailed pleadings revealed apparent considerations of mixed fact and law, or a lack of relevance. At the moment I am not aware of statistics which assist us in knowing whether Jury Trials are being allowed in a higher proportion of cases but it certainly seems to me to be a curious and dangerous proposition to suggest that more cases become suitable for consideration by a Jury simply because the pleadings in the case have become less detailed.

The decision in *Higgins v. DHL,* a decision of her Ladyships, is an example of a case where arguments of doubtful relevance were upheld, even in relation to pleadings in a format envisaged by the New Rules, which resulted in issues being refused.

(c) Proof or Proof Before Answer or what?

This seems to me to be a common question which may no longer need to vex us, in any event, if the pleas in law are being removed.

For my part I see no problem with the concept of giving notice in the pleadings, of lines of defence which as a defender you intend to argue at Proof, briefly if necessary, and the pursuer then being unnoticed of the fact that at the conclusion of the proof he or she will face legal argument as to why the defenders succeeds, or the pursuer's pleaded case fails. Clarification on this point which will feature in the next Newsletter issued by the New Users Group is simply that "Defences should provide fair notice of any substantive Defences e.g. time bar, reasonable practicability, contributory negligence, sole fault etc".

However the fact that the Defences do not specify that an accident was unforeseeable should not be interpreted by the pursuer, in my view, as an indication that that line will not be taken at the conclusion of the evidence. How can it be when the pursuer is not required, in the pleadings, to spell out why the accident was foreseeable in the first place!

4. **Valuations**

I am firmly of the view that this subject constitutes the biggest current problem with practical working of the New Rules. If this issue can be cracked then the whole problem of settling cases early which need to be settled will be solved.

The suggestion is made that it is the defenders who are guilty of a lack of care in providing an accurate, documented valuation. I would simply observe that to date I have yet to receive a valuation, from any source, that was accompanied by any documentation at all. Furthermore it is my perception that as matters stand both parties are guilty of producing valuations which merely present their best case scenario. The pursuer's valuation values the case at its highest, and the defenders at its lowest; in neither case is it generally the case that the valuation is backed by supporting documentation.

On behalf of the defenders I offer the following in mitigation of that situation to which, I accept, they contribute:

(i) I am back to the pre-action situation: with no specified rules as to what information should be exchanged, or what notice given of what is being claimed, the defenders will often have no detailed information when the litigation starts.

(ii) The requirement to produce a detailed valuation within 16 weeks of Defences, from a standing start, means that a medical report has to be obtained in that time scale:

- The medical profession are simply not geared up to produce medical reports that quickly, other than in very exceptional circumstances.

- The pursuer is the one with the automatic right to recover medical records and then only those medical records which date from the accident with which the case is concerned. Not that it is directly relevant to the issue of how the current rules are working, but why is it that in England the whole of the pursuer's medical records are recovered and yet in this jurisdiction we continue to adhere to the rule that says that only medical records from the date of the accident are recoverable unless specification can be given as to why earlier records should be made available. The classic Catch-22 if ever there was one! Even once the automatic Specification of Documents has been proceeded with, the pursuer then needs to make the medical records available to the defenders. All of that simply makes it the more improbable that a medical report will be available in time to enable the defenders to produce a properly considerate and realistic valuation within the 16 week period.

It should be observed at this point that after the allowance of Proof there is then a period of some 6 months, on the current time tabling of Proof Diets, before the pre-trial meeting has to have taken place.

What then is the solution?

- ***Either*** the requirement to lodge valuations comes too earlier for defenders, and in some cases pursuers as well (consider the problems created for legally aided pursuers), to lodge a realistic and reason to valuation. So push the deadline out and require both parties to produce their valuations later, as otherwise motions to vary the time table will be the norm and a Judge's refusal to vary the time table will simply contribute to the situation we have at the moment where unhelpful and in some cases misleading valuations are lodged.

- ***Or*** introduce a requirement on parties to lodge revised valuations at a specified point, say three months prior to proof.

The conclusion is that this is the most important aspect of the New Rules and as of now I doubt that it achieves much. Only by solving this problem will cases settle earlier, and pre-trial meetings work effectively.

5. **Pre-trial Meetings**

- By four weeks before the proof, and therefore on current time tables at a point one year after the signet of the Summons, both parties ought to have, in straightforward reparation cases, the information they need to value a claim, and to know what they can agree or not agree.

My experience of pre-trial meetings is limited, as I suspect is most peoples, but so far I am encouraged to think that they will increase the number of settlements achieved at that stage, and at least either identify areas of agreement or disagreement. A recent example (Murdoch) bears this out.

- Insurers like the concept of a pre-trial meeting. This is evidenced by the fact that they are anxious either to attend the meetings or to be available to give instructions. I do not believe that there is a need for the mind set of insurers to change in this area – it has already changed, and what they want are claims settled that need to be settled and as early as possible. Which is why the commonest gripe I hear from insurers about the New Rules is why is it that we have to wait 12 months to get to a situation where we can discuss settlement of the case!

Which is why I would suggest that in appropriate circumstances the pre-trial meeting should be brought forward to a point eight weeks prior to the Proof rather than four weeks.

In the end of the day however the key to that working for both parties to have available to them, and to have produced to the other side, documented and realistic valuations.