PRACTICAL ISSUES ARISING

FROM THE NEW RULES

JOHN THOMSON

ADVOCATE

There are four matters I'd like to talk about this morning:-

1. How is special cause dealt with under the new rules?
2. Pre-Trial Meetings – how they are developing
3. Pleadings – the current approach
4. Valuations

How is Special Cause dealt with under the new Rules?

Actions of damages for personal injuries are one of the enumerated causes – Court of Session Act 1988, Section 11 and Chapter 28 of the Rules.

Chapter 43.6 –

"(5) The pursuer shall, on lodging the copies of the record as required by the paragraph (4), enrol a motion craving the court – (b) to allow a proof; (c) to allow issues for jury trial….

(6) In the event that any party proposes to ask the court to make any order other than one of those specified in sub-paragraphs (b) or (c) of paragraph (5), that party shall, on enrolling or opposing (as the case may be) the pursuer's motion, specify the order to be sought and give full notice in the motion or notice of opposition, of the grounds thereof."

In an old style action the party opposing issues would have the case sent to Procedure where special cause for withholding the case would be discussed. The party seeking to withhold the case is normally the defender (c.f. *Buchanan v Mason 2001* an unreported Jury Trial where initially the defenders had opposed issues. Lord Milligan allowed issues with an unreported indication that the case was the most straightforward sort of road traffic case he had encountered. The defenders proceeded with a specification and recovered material that was severely prejudicial to the

pursuer. After amendment procedure the pursuer then sought a Proof and the defender sought issues. Lord Johnston allowed issues.)

Under Chapter 43 procedure on the pursuer enrolling a motion seeking issues the defender requires to give full notice of what they say is special cause in their opposition to the motion. As a matter of procedure the matter is dealt with on the motion roll.

What material does the court consider in deciding if special cause exists? Does it consider only the pleadings? Or does it look at the valuations and productions? I have often suspected that Judges have their own instinctive approach as to whether the case is one for a Jury and this does tend to instruct their approach to special cause.

In *Miller v Watt 26 February 2004* Lady Smith found there to be special cause. In that case it was submitted the court should not look at the lodged reports. The rationale for the submission was that the reports and other productions may not be relied upon in evidence or only spoken to in part. At paragraph (13) of the opinion Lady Smith indicated it was competent to look at reports. In that case the Reports contained some apparent inconsistencies as to the causation of loss. As a footnote the case was set down for Proof next week but settled.

Lady Smith also indicates that the valuation can be looked at. In *Jones v Leslie* 19 May 2004 TG Coutts Q.C. thought otherwise preferring what might be thought of as the purist approach.

It remains to be seen what the final approach of the courts it to be as to what can be looked at when considering special cause. It might be best to assume the court will consider all available documentation.

Pre-Trial Meetings

Chapter 43.10 provides that a meeting shall take place between the parties not later than four weeks before the proof or trial. At that meeting settlement and agreement of undisputed matters is discussed.

The practice that seems to be developing is that two rooms are booked at the Consultation Centre with each party having pre pre trial meetings shortly before the meeting proper is due to begin. I also find it useful to have a Consultation a week or so before the meeting at which all aspects of the case can be discussed from preparation to presentation and including quantification. This perhaps allow the party who one represents time to assimilate the advice. We are all aware of situations where clients find it difficult (at least initially) to accept advice. The consultation can act as an exercise in making the client aware of the problems with their case.

The meetings themselves vary widely in content. Some parties treat the meetings as an attempt to settle the case as if it were a Tuesday morning. Other meetings are rather more peremptory affairs with no real discussion taking place. That said, however, there is an increasing trend for both pursuer and a representative of the Insurers to be present or at least contactable.

In the eight pre-trial meetings I have attended two have been form filling exercises with nothing really achieved, three have resulted in settlements and the remaining three resulted in at least some measure of agreement.

The meeting should allow both parties to focus or discuss:-

- Their relative positions on liability – in my experience this topic tends to be approached rather cagily - each party being reluctant to reveal the evidence they have. This part of the meeting does tend to be formulaic as rarely is there a dialogue.
- Their relative positions on each head of quantum – given the proof is only weeks away the differences on quantum should be narrowing. In practice with the Judicial Studies Board Guidelines being so widely used as the starting off point for solatium the differences between parties tend not to be as wide as they may have been in the past. The major differences tend to arise in relation to wage loss, care costs and services.
- Any witness timetabling difficulties
- The likely length of the proof

I consider that as time passes pre-trial meetings will grow in significance as parties realise the potential usefulness.

Pleadings

One purpose of pleadings is to let the other side know what facts you are relying on to prove your case – the facts that say why you win.

In practice the pleadings have varied from a sparse and almost generic statement to pleadings which resemble an overlong precognition with a wide variety between those two extremes.

When I first saw the new rules I did think that there might be occasions where parties could be on the eve of proof with both preparing to fight a different fight due to the pleadings either being so sparse or Delphic that neither had notice of the other sides case. I remain of that view.

I do consider that as a result there will be occasions that a case will either proceed by default or be considerably lengthened due to issues being raised that are not the ones the other party thought were to be discussed.

These difficulties could be overcome at the Pre-Trial Meeting but as I have previously indicated liability tends only to be discussed briefly.

The difficulties could also possibly be overcome at an earlier stage if either party sought an order for further specification under Rule 43.6.

It might be thought the better approach is for each party to consider what are the essential findings in fact that they wish the court to make after proof and plead those.

Valuations

Like pleadings the standard and quality of valuations tends to vary widely. In the cases I have been involved the valuations tend to serve as a starting point.

I hope that rather like the pre-trial meetings the practice will develop where they will become more detailed. In particular I wonder whether it might assist the other side if:-

Solatium – each part could refer to the reports they particularly rely on and the relevant part of the Judicial Studies Board Guidelines. It might be useful to attach copies to the Statement.

Wage Loss – as well as providing the arithmetical details consideration might be given to including the assumptions that underpin the figures – in other words set out the model of the pursuer that you will ultimately urge on the court.

Closing Thoughts

There has been a tendency and may still be for personal injury actions to be viewed as somehow less important than commercial actions.

I have always thought of this as clearly the wrong view. After all for the pursuer it may well be the only time he will ever come to court. The process might also require him to make the most important decision of his life. For the defenders, Insurance companies are professional litigants and probably the biggest commercial clients of the courts.

I think there is room in the new rules for a modern and professional claims handling culture to develop to reflect the responsibilities owed to both parties.
