

COURT OF SESSION

PRACTICE NOTE

No. 5 of 2017

Personal Injuries Actions under Chapter 42A

1. This Practice Note has effect from 24 July 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 (“RCS”) applies. Any of the requirements of this Practice Note may be disapplied by the Lord Ordinary in any case 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 Rule 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 on the By Order (Adjustment) Roll under Rule 42A.2, or at a debate or proof appointed under Rule 42A.4, the same judge will preside. Parties are expected to arrange that counsel, or solicitors having rights of audience responsible for the conduct of the case, and authorised to take any necessary decision on questions both of substance and procedure, are available and appear at any hearing on the By Order (Adjustment) Roll, or at a debate or proof.
5. This Practice Note deals with procedure in relation to :
 - a. Chapter 42A generally;
 - b. Joint and core bundles generally;
 - c. Joint bundles of authorities;
 - d. Joint bundles of productions;
 - e. Core bundles;
 - f. Notes of argument;
 - g. Failure to comply.

Chapter 42A generally

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 Chapter 42A applies to clinical negligence cases withdrawn from Chapter 43 and other complex personal injuries actions, including catastrophic injuries cases, where the Lord Ordinary is satisfied that managing the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, by motion, 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 Alternatively, parties may apply by motion in accordance with RCS 43.5 to have the action withdrawn from Chapter 43 and to proceed instead in accordance with Chapter 42A.
7. The purpose of Chapter 42A is to allow the court, at a procedural stage, to identify and resolve issues that are known reasons for seeking variation of the timetable or the discharge of the proof diet at a later date. This “frontloading” of the action will allow the court to make more informed case management decisions when it comes to fixing further procedure at the hearing on the By Order (Adjustment) Roll. The timing of some of the actions to be completed in advance of this hearing may seem demanding, but the court is of the view that, as the adjustment period can be extended in appropriate circumstances, there will be sufficient flexibility to allow for their completion.
8. Where reference is made to witness statements in RCS 42A.3(3)(c)(vi), the court expects these statements to contain full and clear factual accounts. Where possible, witness statements should be exchanged before the By Order (Adjustment) Roll hearing.
9. Where parties are seeking to have the action sent to proof, the court will explore the issues set out in RCS 42A.4 at the By Order (Adjustment) Roll hearing.
10. RCS 42A.4(6) and (7) allows the Lord Ordinary to fix a further hearing on the By Order (Adjustment) Roll at the first By Order (Adjustment) Roll hearing, or at any time thereafter, whether or not the action has been appointed to debate or sent to proof. RCS 42A.5 allows the Lord Ordinary to fix a procedural hearing, or to vary the pre-proof timetable, at any time.
11. RCS 42A.6 provides the Lord Ordinary with very 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 first hearing on the By Order (Adjustment) Roll. The court will ensure that parties are

ready to proceed to proof and have provided an accurate estimate of the time required, before fixing a proof diet.

12. Where the court intends to fix a date for the proof, practitioners should liaise with the Keeper's Office 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's Office immediately.
13. Under the transitional provisions in the Act of Sederunt (Rules of the Court of Session Amendment No.3) (Miscellaneous) 2013, the Lord Ordinary may, having given all parties an opportunity to be heard, direct that Chapter 42A is to apply to an action raised before 1 May 2013. Parties seeking to have an action appointed to Chapter 42A 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 generally

14. Where a cause has been appointed to a hearing on the By Order (Adjustment) Roll, a debate, or a proof, the party at whose instance the hearing has been fixed should, after consultation with the other parties, lodge:
 - a. a joint bundle of authorities;
 - b. a joint bundle of productions;
 - c. where the productions lodged on behalf of both parties comprise more than 500 pages, a core bundle.
15. Where a party lodges a joint bundle or a core bundle, that party must intimate the bundle to the other parties.
16. Where a passage in an authority or a production is to be referred to in the course of submissions it should be marked or highlighted. Where it would not be appropriate to mark a passage in an original production, a copy may be lodged and marked in its place.
17. Joint bundles and core bundles should be lodged at least 10 days before a hearing on the By Order (Adjustment) Roll or a debate, and at least 21 days prior to a proof.
18. Joint bundles and core bundles should be properly labelled, contain 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.

19. 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 authority or production included.

Joint bundles of authorities

20. The joint bundle of authorities should contain copies of the authorities upon which each party intends to rely.
21. The joint bundle of authorities should not include authorities on propositions not in dispute.
22. The joint bundle of authorities should not normally contain more than ten authorities, unless the scale of the substantive legal argument requires more extensive citation. The permission of the court is required to include any authorities beyond the maximum number of ten. For the purposes of this paragraph, authorities do not include statutory provisions upon which the case or defence proceeds.
23. 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.

Joint bundles of productions

24. The joint bundle of productions should contain the productions upon which each party intends to rely.
25. 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.
26. 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

27. The core bundle should contain copies of productions already lodged, as appropriate. It should contain copies of the productions which are central to the hearing.
28. 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.

29. The core bundle should not ordinarily exceed 150 pages. Where medical records are lodged as part of the core bundle, those records will not count towards the 150 page limit.

Notes of argument

30. Where a cause has been appointed to a hearing on the By Order (Adjustment) Roll, a debate or a proof, each party should lodge a note of argument.

31. The note of argument should be lodged at least 10 days before a hearing on the By Order (Adjustment) Roll or 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 relevant 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, unless additional argument is necessary for proper presentation of the case;

f. Each point should be followed by reference to any transcript of evidence or other document on which the party wishes to rely. The note of argument should identify the relevant passage in the document in question;

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 references) which support the proposition;

h. More than one authority should not be cited in support of a given proposition unless the additional citation is necessary for a proper presentation of the argument.

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 included in the note will no longer be insisted upon, that party should inform the other parties and the court of that fact at the earliest opportunity.

Failure to comply

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

Edinburgh

22 June 2017

CJM Sutherland

Lord President