COURT OF SESSION: PERSONAL INJURIES: NEW RULES

NEWSLETTER No.2: May 2004

Personal Injuries User Group

The membership of the user group remains largely unaltered. Ruaraidh Macniven has replaced Bruce Beveridge as the representative from the Lord President's Private Office. Current members are:

Paul Cackette, Scottish Executive, Civil Justice Division
Ian Campbell, Scottish Health Service Central Legal Office
Bob Cockburn, Deputy Principal Clerk of Session
Gordon Keyden, Messrs. Simpson & Marwick, W.S.
Ruaraidh Macniven, Lord President's Private Office
Maria Maguire, Q.C.
Robert Milligan, Advocate
Lady Paton (chair)
David Stevenson, Messrs. Thompsons
Fred Tyler, Messrs. Balfour & Manson
Catriona Whyte, Scottish Legal Aid Board

A further meeting of the group took place on 20 May 2004.

Half day seminar: Saturday 29 May 2004

A half day seminar on the new personal injuries rules ("Progress so far") will take place on Saturday 29 May 2004 in the Mackenzie Building, High Street, Edinburgh from 10 a.m. to 1 p.m. The seminar is open to solicitors, solicitor-advocates, and advocates, and will qualify for 2.5 hours CPD. The speakers will be David Stevenson, Gordon Keyden, John Thomson, and Sandy Wylie Q.C.. Numbers may be limited. Those wishing to attend should contact Rosie Saunders, Training and Education Manager, Faculty of Advocates, Advocates Library, Parliament House, Edinburgh EH1 1RF (e-mail: Rosie.Saunders@Advocates.org.uk). An application form can also be down-loaded from the Scottish Courts web-site: www.scotcourts.gov.uk.

New Act of Sederunt

A new Act of Sederunt is in the course of preparation. It makes clear that (i) the summons under the new personal injuries rules should give the defender notice of the *heads of damage claimed* (such as solatium, past and future wage loss, necessary services and so on), although no amounts or figures are required; and (ii) defences under the new personal injuries rules do not require pleas-in-law. (iii) The Act of Sederunt also improves the standard specification of documents, providing a new Form 43.2-B, with broader and more flexible calls.

Motions for further procedure: rule 43.6(5)

At the motion roll, there may be a dispute as to whether the case should go to proof or jury trial. Alternatively, a party may seek to persuade the court that something other than a proof or jury trial should be allowed. If it appears that the arguments may take some time, and if the court has other pressing business, the court may continue the motion for a week or two, to enable the Keeper to allocate a hearing of (say) 2 hours. Meantime, the court may order parties to lodge notes of argument, and/or encourage a party to amend /provide further specification, so that the short postponement is used in the most constructive way possible.

Form of defences

There is no reference in the new rules as to the form of defences. This has caused some confusion as to the appropriate form and the degree of specification required. The Personal Injuries User Group is of the view that the defences should provide fair notice of any substantive defence e.g. time-bar, reasonable practicability, contributory negligence, sole fault etc. Some guidance can be obtained from the requirements under the old optional procedure and also from the law relating to counter issues. For example, in *Williamson v GB papers plc* 1994 SLT 173 Lord Cullen held that even in an optional procedure case the defenders had to give notice in the pleadings that they intended to raise a defence of reasonable practicability. The degree of specification will depend upon the circumstances of the case.

Similarly, when raising a defence of contributory negligence or sole fault, it may be sufficient to aver that the pursuer was in breach of his duty to take reasonable care for his own safety, without specifying the particular duties, so long as the factual basis is clear. This is consistent with the degree of specification required from the pursuer in pleading a case at common law. It is also consistent with the opinion of

Lord Osborne in the optional procedure case of *Dalson v Tayside Health Board* 1998 SLT 1034.

Third party procedure/additional defenders

Where a third party is brought into the action, it may be necessary to enrol to vary the timetable to allow for a new period of adjustment. Any motion seeking to bring a third party into the process should therefore seek an order for service on the third party, and also a variation of the timetable (with new time-limits as specified). A similar motion might usefully be enrolled where a pursuer seeks to bring in another defender.

New personal injuries rules proofs

The first "new rules" proofs began in May 2004. The user group awaits progress reports.

Intimation to Court of settlement

It is very helpful for administrative purposes for court staff to know when a case has been settled. While this is not a formal disposal of the case it enables staff to take the process out of the live cases where no further order will be necessary and will also help for statistical purposes in relation to the evaluation of the new procedures in due course.

A form has been designed for this purpose. It is in very simple terms and should only take a moment to complete (the telephone calls that are currently received are appreciated but do not usually inform whether the process needs to remain current). The co-operation of practitioners in this matter would be very much appreciated. The form is on the web-page and can be e-mailed to the personal injuries e-mail box.

Recent cases

- *Hamilton v. Seamark Systems Ltd.*, 2004 G.W.D. 8-167: held that, where defences contained pleas-in-law, and there were questions of law which could only be properly resolved after evidence had been led, the defenders were entitled to a proof before answer. *Observed* that in practice there may be little difference between the allowance of a proof and the allowance of a proof before answer in the context of the new personal injuries rules. If defences contain no pleas-in-law, and if a proof is allowed in terms of rule 43.6(5)(b), it is envisaged that parties may make submissions about points of law or mixed

fact and law arising from the evidence. Accordingly a diet of proof allowed under the new procedure may in practice be indistinguishable from a proof before answer. Questions of fair notice may arise at the proof, and will be dealt with according to the circumstances of each case. The pre-proof meeting offers an ideal opportunity for all parties to be forthcoming about any points likely to be taken. Until there is clarification, possibly by further Act of Sederunt, of the appropriateness or otherwise of pleas-in-law in defences under the new procedure, defenders who continue to add pleas-in-law to their defences should strictly speaking seek a proof before answer, unless the relevant pleas-in-law are repelled by the court. Such defenders should also comply with the requirements of rule 43.6(6) and give notice of their grounds for seeking an order other than a proof or jury trial.

- *Jones v. Leslie Limited,* May 19, 2004: a pursuer's motion to allow a jury trial was refused where damages in respect of necessary services were claimed, but the pleadings gave no details about the services or about the relatives who had rendered the services. *Observed* that the statement of valuation of claim does not form part of the pleadings, and that an issue for a jury must be framed on the basis of the pleadings.

May 2004: The Hon. Lady Paton