

COURT OF SESSION

PRACTICE NOTE

No. 4 of 2015

Personal Injury Actions

1. This practice note takes effect from 22 September 2015. It replaces Practice Note No.2 of 2014; Practice Note No.2 of 2003 remains in force.
2. The purpose of this practice note is to inform practitioners of the court's approach to several procedural matters relating to actions of damages for, or arising from, personal injury. In particular, it covers matters relating to chapters 42A and 43 of the Rules of the Court of Session ("RCS"), and takes into account changes made to the RCS by Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (No.2) (Personal Injury and Remits) 2015.

Chapter 43

3. RCS 43.8 (applications for sist or variation of timetable order) provides that an application to sist an action or vary the timetable shall be granted only on cause shown. The purpose of this provision is to ensure that timetables are not varied as a matter of routine and diets of proof consequently discharged. Accordingly, motions enrolled under this rule, including those of consent, must specify the cause relied on. Where it is not clear to the court that cause has been shown the court will, ordinarily, star the motion. The recent removal of "special" from "special cause" is to offer some flexibility where there has been a failure to adhere to the timetable as a result of inadvertence which may be regarded by the court as excusable, having regard to the relevant circumstances. It is not to reverse the court's approach to such matters as expressed in *Smith v Greater Glasgow and Clyde NHS Health Board* [2013] CSOH 178.
4. A motion to vary the timetable to allow an application for a third party notice to be made, even where cause has been shown, may be refused if granting it will endanger the proof diet.

5. RCS 43.9 regulates statements of valuation of claim. These must contain figures. The practice of stating “TBC” (to be confirmed) is not acceptable.
6. RCS 43.10 (pre-trial meetings) provides that there will be a pre-trial meeting between the parties to discuss settlement and to agree matters not in dispute. As explained in Practice Note No. 2 of 2003, the meeting must be a real one (although it can be held by video-conference). It is the obligation of each party to take all steps as are necessary to comply with both the letter and the spirit of the rule. Where it is apparent to one of the parties that this has not been done, that party should not sign the joint minute in Form 43.10. This will trigger the case being put out By Order. The importance of section 2 of Form 43.10 is stressed. Practitioners are encouraged to make use of the procedure provided for in Chapter 28A (notices to admit and notices of non-admission).
7. Unless there is good reason for their deployment, such as incomplete instructions or lack of access to factual information, blanket denials or skeletal defences are not an acceptable starting point in the pleadings. The duty of candour exists at all times. It does so to serve both the court and the parties. The court will, ordinarily, bear this in mind when determining a motion for summary decree.

Chapter 42A

8. Chapter 42A applies to clinical negligence cases withdrawn from Chapter 43 and other complex personal injuries actions, including catastrophic injury 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.
9. 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.

10. 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.
11. 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.
12. 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.
13. 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.
14. 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.
15. 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 at which the action has reached.

Edinburgh

4th September 2015

Lord Justice Clerk