



## **SHERIFFDOM OF LOTHIAN AND BORDERS**

### **PRACTICE NOTE NO 3, 2016**

### **PERSONAL INJURY ACTIONS**

I, MHAIRI MARGARET STEPHEN, QC, Sheriff Principal of Lothian and Borders, for the purpose of regulating practice in the Sheriff Personal Injury Court and Sheriff Court at Edinburgh in pursuance of the powers conferred on me by section 27(2) and (4) of the Courts Reform (Scotland) Act 2014, and all other powers enabling me to do so, Order and Direct as follows:-

#### **Introduction**

1. The purpose of this practice note is to inform parties and their agents of the court's approach to several procedural matters in actions of damages for, or arising from, personal injury and, in particular, of what the court expects from them. It covers matters relating to Chapter 36 of the Ordinary Cause Rules (OCR) as amended by the Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment) (No. 2) (Personal Injury and Remits) 2015.
2. For so long as Chapter 34 of the Summary Cause Rules (SCR) continues in force, the following will also apply to actions raised under those rules. This is with the exception of Part 3 (Motions business by email), which does not apply to summary cause actions.

**Part 1: General***Pleadings*

3. While both the initial writ and statement of claim should contain only those facts that are necessary to establish the claim, it should be borne in mind that although brevity and simplicity of pleadings are encouraged, fair notice of the claim must be given. Agents may find it helpful to refer to the case of *Jean Lamb v Alison Wray* 2014 S.L.T. (Sh. Ct.) 2.

*Reports*

4. Delay in the decision to instruct a report from a skilled witness may not amount to sufficient cause to justify a variation of the timetable: see also paragraph 12 below.
5. To facilitate early settlement, the principles of early disclosure underlie the procedures set out in Chapters 36 OCR and 34 SCR. Last minute disclosure, i.e. lodging only in accordance with the timetable, of reports from skilled witnesses is discouraged. Failure, without reasonable cause, to lodge reports on which it is intended to rely within a reasonable time after receipt may have a consequence in expenses.

*Statements of valuation*

6. Statements of valuation of claim must contain figures. It is not acceptable to insert “to be confirmed” or some abbreviation or variation thereof. The purpose of the statement is to disclose to the other party the real assessment of the value placed upon the claim with a view to facilitating an early settlement. Whether liability or causation is in dispute does not prevent a claim from being valued. A “nil” value should only be inserted in circumstances where it is averred that no, or no such, loss has been sustained. An explanation of the reason for a “nil” value should be inserted in the statement.
7. Documents relied upon for the purpose of valuation must be noted on statements of valuation. A list of those documents must be intimated to other parties and lodged in process. Where a statement of valuation, in proper form, is not lodged timeously, rules Rules 36.J1(5) OCR and 34.9(5) SCR provide for dismissal or decree for the amount in the pursuer’s statement of valuation of claim.

8. Where statements of valuation, certified records and certified statements of claim are not lodged timeously, no reminder will be issued by the sheriff clerk.

*Pre-trial meetings*

9. Rule 36.K1 OCR provides that a pre-trial meeting of parties take place not later than four weeks before the diet of proof to discuss settlement and to agree so far as possible matters not in dispute. In order to be of value, the meeting must be a real meeting (although it can be held by video conference), conducted by the principal agent who is in charge of the conduct of the case, along with each of the parties or someone who has authority to act on behalf of a party at the time, including authority to agree to settlement of the action. It is the obligation of each party to take all such steps as are necessary to comply with both the letter and spirit of the rules. In signing a minute of the meeting, the signatories are accepting responsibility for the conduct of the meeting and the recording of what took place. The pre-trial meeting should not be considered a “box-ticking” exercise. Where it appears to one of the parties that the rule has not been complied with fully, that party should not sign the minute, thus triggering the case being put out for a hearing. This paragraph applies equally to pre-proof conferences which require to be held in summary cause actions under Rule 34.10 SCR.

*Settlement*

10. Parties should advise the sheriff clerk as soon as an extra-judicial settlement is reached. Ordinarily, a Personal Injury Action Settled (“PIAS”) form should be used, which may be sent by email. Upon receipt of such information, an interlocutor will be pronounced discharging the diet of proof, if assigned, and continuing the case for 28 days for the lodging of a joint minute. The period of 28 days is considered sufficient to allow payment of the agreed principal sum to be made. Cases will not be sisted for settlement unless cause is shown. Agents should not delay the lodging of a joint minute in order to agree the amount of expenses. If a joint minute is not lodged within 28 days, the case will be put out for a hearing.

*Form and signature of documents*

11. All documents lodged in process should be in proper form and, where appropriate, signed. Once lodged, documents cannot be “substituted”. Productions should be presented so as to be easily manageable and should be properly secured. They should be numbered and,

where appropriate, paginated. Productions should be numbered sequentially and should not relate to the number of the Inventory with which they are lodged.

## **Part 2: Timetables**

### *Variation*

12. Rule 36.H1 OCR and 34.8 SCR provide that applications to sist an action or vary the timetable shall be granted only on cause shown. The purpose of these provisions is to ensure that timetables are not easily varied and diets of proof consequently discharged. Accordingly, motions enrolled under these rules, including those of consent, must disclose fully what the cause being relied upon is and, where relevant, be accompanied by supporting documentation. Where there is insufficient information to justify the motion or it is not clear to the court that cause has been shown, the court may assign a hearing. The court expects the principal agent in charge of the case to appear at any such hearing, though an application may be made, if necessary, under Rules 32A.1 OCR or 37.1 SCR for submissions to be made by live link.
13. The removal of “special” from “special cause”<sup>1</sup> was intended to offer some comfort where there was a failure to adhere to the timetable as a result of simple inadvertence which may be regarded by the court as excusable in the relevant circumstances. It does not reverse the court’s robust approach to such matters. The approach expressed in the case of *Fiona Smith v Greater Glasgow and Clyde NHS Health Board* 2014 S.L.T. 137 is adopted by this court.
14. 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 would endanger the proof diet.

### *Proof diets*

15. When a timetable is issued in defended actions, each cause will ordinarily be allocated to a proof of four days duration commencing on the date shown therein. In ordinary actions, that date will be as near as may be within nine months after the lodging of defences. In summary cause actions, the date will be as near as may be within five months from the

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<sup>1</sup> OCR 36.H1(2)(b) and SCR 34.8 (2)(b)

lodging of the Form 10a. Proofs will ordinarily commence on the Tuesday of a proof week with each Monday being allocated to procedural business.

16. A diet of proof will not be assigned until, in an ordinary action, a certified record or, in a summary cause action, a certified adjusted statement of claim is lodged, together with a motion or incidental application, as appropriate, in which the form and length of further procedure is craved.
17. Parties are expected to keep the likely duration of the proof under active review. Where it is anticipated that proof will require more (or less) time than the court has allowed in the initial allocation parties should inform the court at the earliest opportunity so that the case might be brought to the attention of one of the PI sheriffs with a view to identifying appropriate alternative dates and further procedure.

### **Part 3: Motion business by email: Chapter 15A OCR**

#### *Scope*

18. The following guidance applies to the procedure for intimating, consenting to or opposing motions by email in accordance with Chapter 15A (“transacting E-motion business”). Chapter 15A applies where each party to such an action has provided to the sheriff clerk an email address for the purpose of transacting motion business.
19. This Part of the Practice Note does not concern summary cause actions. Chapter 15A only applies to personal injuries actions under Part A1 of Chapter 36 OCR.

#### *Email addresses*

20. An email address which is provided by a party or an agent for the purpose of transacting E-motion business must be in regular use. An email address for this purpose must be made to the sheriff clerk in writing. Any declaration by an agent that they do not have suitable facilities for the purpose of transacting E-motion business should also be made to the sheriff clerk in writing.
21. The sheriff clerk will maintain lists, both of which will be published on the Scottish Courts and Tribunals Service website of:
  - a. all email addresses provided for the purpose of transacting E-motion business and

- b. those agents who have made a declaration that they do not have suitable facilities for the purpose of transacting E-motion business.
22. A party or an agent may amend or withdraw an email address provided for the purpose of transacting E-motion business by sending a notice in writing to the sheriff clerk. Upon receipt of such a notice, the sheriff clerk will arrange to amend the email address on the list published on the Scottish Courts and Tribunals Service website or remove the email address from that list as soon as possible.
23. Where, in the case of an agent for a receiving party, the identity and separate email address of a fee earner or other person who is handling the matter for that agent is known, the lodging party should send any intimation required under Chapter 15A to that separate email address at the same time as sending it to the email address provided by the agent.

#### *Interlocutors*

24. Once a motion has been determined, all interlocutors will be sent to the email address provided by a party or agent for the purpose of transacting E-motion business. Any additional or duplicate interlocutor, including certified copies, requested by parties will incur a charge as provided in the Sheriff Court Fees Order 2015.

#### *Documents referred to in E-motions*

25. Where a motion lodged by email in accordance refers to a document, or the court requires a document to be lodged with the motion, the document is to be attached to the motion in electronic form, using either “Word” or “pdf” format. Where such a document requires to be signed, a scanned signature is acceptable.
26. Subject to paragraph 28, where any document comprising 20 pages or fewer is attached to a motion lodged by email, the necessary number of copies of that document will be printed at the court by court staff and lodged in the process.
27. Where any type of record or other document comprising more than 20 pages is attached to a motion lodged by email, one copy of the document will be printed at the court by court staff and lodged in process. Any necessary additional copies of the document must be lodged by the lodging party on the following court day.

28. Where a motion lodged by email refers to accompanying productions, only the inventory of productions should be sent by email. The inventory of productions will be printed at the court by court staff and lodged in process. The productions must be lodged by the lodging party on the following court day.
29. Where a motion is opposed, the parties must lodge productions prior to the motion calling in court where they are relevant to the hearing. For example, the productions must be lodged where a motion is made to allow those productions to be lodged late.

*Fee exemption*

30. Where a party lodging a motion by email claims a fee exemption, the appropriate fee exemption form should be attached to the motion in electronic form. The fee exemption form will be printed by court staff and lodged in process.

*Technical failure*

31. In the event of a failure of one or more electronic servers, resulting in delayed transmission or non-transmission of emails, the court may treat a motion intimated or lodged in writing or by facsimile as though it had been intimated or lodged in accordance with Chapter 15A.

**Part 4: Chapter 36A**

*Scope*

32. Chapter 36A OCR applies to clinical negligence cases withdrawn from Chapter 36 and other complex personal injuries actions, including catastrophic injury cases, where the sheriff is satisfied that managing the action under Chapter 36A would facilitate the efficient determination of the action. Pursuers wishing to raise a personal injuries action based on clinical negligence subject to Chapter 36A procedure must apply for authority to do so, in accordance with Rule 36.C1 OCR. Alternatively, parties may apply by motion in accordance with Rule 36.F1 OCR to have the action withdrawn from Chapter 36 and to proceed instead in accordance with Chapter 36A.
33. The purpose of Chapter 36A is to allow the sheriff, 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 allows the

sheriff to make more informed case management decisions when it comes to fixing further procedure at the Procedural Hearing. 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.

34. Under the transitional provisions in the Act of Sederunt (Rules of the Court of Session 1994 and Sheriff Court Rules Amendment)(No.2)(Personal Injury and Remits) 2015, the sheriff may, having confirmed that all parties consent, direct that Chapter 36A is to apply to an action raised before 22 September 2015. Parties seeking to have an action appointed to Chapter 36A are encouraged to apply as early as possible under the transitional provisions. The court will use the powers under Chapter 36A 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.

#### *Witness statements*

35. Where reference is made to witness statements in Rule 36A.8(c)(vi) OCR, the court expects these statements to contain full and clear factual accounts. Where possible, witness statements should be exchanged before the Procedural Hearing.

#### *Procedural hearings: Rule 36A.9 OCR*

36. Where parties are seeking to have the action sent to proof, the sheriff will explore the issues set out in Rule 36A.9 OCR at the Procedural Hearing. It is essential that parties or their agents attending a Procedural Hearing are fully prepared and in particular that they are aware of and able to articulate and discuss their position on all of the matters set out in sub-paragraphs (4)(a) – (c)(xxii) (inclusive) of Rule 36A.9 OCR, insofar as relevant to their case.

#### *Sheriff's additional powers*

37. The sheriff's additional powers to fix a further Procedural Hearing in terms of Rule 36A.9(6) and (7) OCR and/or fix a pre-proof hearing or to vary the pre-proof timetable at any time in terms of Chapter 36A OCR should be noted.

38. Rule 36A.11 OCR provides the sheriff 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 Procedural Hearing. The sheriff 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.

*Fixing proof diets*

39. Where the sheriff intends to fix a date for the proof, parties should liaise with the sheriff clerk 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, parties should contact the sheriff clerk immediately.

**Part 5: Pleural Plaques cases**

40. This paragraph applies to actions for damages arising out of the exposure to asbestos and the resulting development of pleural plaques only and to no other asbestos-related condition. In the interests of facilitating settlement of such actions, the court will look favourably upon any joint application for sist where parties wish to follow the steps set out in paragraphs 5 to 8 of Court of Session Direction No.2 of 2012, provided any such joint application is made before a timetable is issued under Rule 36.G1 OCR (i.e., before the lodging of defences). Where a joint application for sist or variation of the timetable is made after a timetable is issued, the court will take into account the parties' desires to follow the steps set out in paragraphs 5 to 8 of the Court of Session Direction.

**Part 6: Summary Cause Actions**

41. In summary cause actions in which an incidental application has been lodged and a date assigned for a hearing, the principal incidental application must be returned to the sheriff clerk with a certificate of intimation as soon as intimation has been made. The party receiving intimation must advise the sheriff clerk not later than noon on the day before the application is due to be heard if the application is **not** opposed. Unless the sheriff otherwise directs, an interlocutor will be pronounced as soon as it is clear that the application is not opposed and may be pronounced in advance of the date fixed for the hearing of the application.

**Part 7: Miscellaneous**

*Signature of documents*

42. The following documents do not require to be signed by parties or agents:
- ( i) minutes of amendment;
  - ( ii) answers to minutes of amendment; and
  - (iii) notes of objections.

*Interlocutors granting commission and diligence*

43. Interlocutors granting commission and diligence will provide for the appointment of a commissioner leaving only the name of the commissioner to be added if a commission is to be executed and a certified copy interlocutor required. The current practice of “finding it unnecessary to appoint a commissioner meantime” will be discontinued in these actions.

I APPOINT this Practice Note to be inserted in the Act Books of all the sheriff courts in the Sheriffdom of Lothian and Borders and to be posted on the notice boards in said sheriff courts for publication to the lieges.



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**Sheriff Principal Mhairi M Stephen QC**  
**Sheriff Principal of Lothian and Borders**  
**Edinburgh, 15 August 2016**