LR : Coulfield

Introduction

The remit to the working party was to try to devise a means of simplifying and accelerating procedure in ordinary actions. At an early stage, the working party decided to concentrate on reparation actions which are at present conducted under ordinary procedure. The discussions in the working party covered a wide range of issues and occupied a considerable time. The key recommendations can be summarised under five heads, two negative and three positive.

Negatively, the working party decided against recommending a high degree of judicial case management in the class of actions to which the recommendations apply. The essential reason for this view was that is was considered that the time and effort which would be required for genuine and effective case-management would be disproportionate to any benefit likely to be achieved, and that the result of a case management system might well be to increase the burdens on the court and the parties rather than to reduce them. The second negative recommendation is similar, and is made for similar reasons. It is that there should not be any requirement for a routine pre-proof or pre-trial hearing before a judge. The working party concluded that the benefits which case-management or pre-trial hearings might produce could equally well be achieved if their other recommendations were accepted.

The three positive recommendations are:

(i) that there should be an automatic timetable laid down for cases of the class concerned, monitored by the court staff;

(ii) that both (or all) parties should be obliged to produce and lodge in process justified valuations of the claim at an early stage in the proceedings; and

(iii) that parties should be required to meet to discuss settlement at a defined stage in the procedure and make and lodge a minute of the meeting recording the points on which agreement had or had not been achieved.

The thinking behind these proposals is that under the present procedure, it is only at a very late stage that parties are in a position to discuss settlement realistically, and that if it were possible to bring forward the stage at which parties have to be properly prepared and have to face up to the realities of the case, earlier settlement could be achieved in a significant number of cases.

The working party also make recommendations on a variety of other matters including the content of pleadings, and the sanctions which may be open to the court to assist in securing the success of the proposals.

The report is available at www.scotcourts.gov.uk.

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REPORT BY WORKING PARTY ON COURT OF SESSION PROCEDURE

On 9 October 1997 the Lord President appointed this Working Party consisting of these members:

Lord Coulsfield
Lord Bonomy
M S Jones, QC
Laura Dunlop
G K Moore, Hamilton Burns & Moore
D F B Stevenson, Thompsons
A J Tyler, Balfour & Manson
D Shand, Depute Clerk of Session
Jane Ferrier, Private Office (Secretary)

The Working Party also had invaluable help from Ms Rachel Wadia of the David Hume Institute, who attended most of the meetings and as well as contributing to the discussion provided a great deal of information in relation to developments in other jurisdictions.

Between October 1997 and July 1998 the Working Party met on eleven occasions. In addition, members met separately in groups of two or three between meetings on a number of occasions to work on individual issues on which the Working Party considered it necessary to reach a view en route to reaching the proposals set out in this Report. During the discussions, widely diverging views were expressed. In the end, however, the Working Party succeeded in arriving at proposals which, with one exception identified later, they unanimously recommend.

1. INTRODUCTORY

When Lord Cullen's report of his Review of Business of the Outer House of the Court of Session was considered at a meeting of judges in January 1997, some judges expressed concern that to hold early case management hearings in all defended actions would simply add a further expensive layer of procedure to a large number of cases which would, in any event, settle well before proof or trial. While intensive case management might be desirable in more complex cases, it did not at first sight seem necessary in all. It was, therefore, suggested that it might be helpful to establish a system under which a judge would act as "gatekeeper", and assign incoming cases either to a simpler form of procedure or to a "case-managed" one, as might be appropriate.

Lord Coulsfield agreed to monitor the business coming into the court over a period of three weeks, to see whether it might be possible to identify at an early stage those cases which might require management and those which were of a more routine nature. He left out of account petitions for judicial review and commercial causes. He considered the open records lodged during the first three weeks of March 1997. There were 124, of which 19 related to road accidents and 75 were employers' liability claims. There was one occupiers' liability case. Among the remaining 29 were claims for professional negligence, commercial disputes and disputes over custody of children. Prominent among the employers' liability claims were 14 asbestosis cases, 13 cases relating to back injuries and six industrial deafness cases. During the same period only 14 cases appeared on the optional procedure diet roll.

Lord Coulsfield's examination of the incoming business suggested that cases might be divided fairly readily into those requiring only a simple form of procedure and those which might require management and that the division could be made without the degree of judicial involvement which the "gatekeeper" proposal envisaged. Having considered the views of the judges and Lord Coulsfield's report, the Lord President gave this Working Party the remit to consider whether, recognising that there is a group of cases, mainly cases of personal injury, which might reasonably be described as routine and which form a substantial proportion of the business of the court, a simplified procedure could be devised which would eliminate unnecessary delay and unnecessary expense in these routine cases and make the most efficient use of the time of judges and court staff. He envisaged a scheme in which the bulk of cases would not require early case management and in which trial or proof dates would be fixed very early in the progress of the case. In these cases the current right to a procedure roll hearing would be abolished, but a party to a case identified as of the routine variety could apply to have it transferred to the roll for non-routine cases. As will be mentioned later, there is an obvious analogy with the reasoning which led to the introduction of the optional procedure.

It was left to the Working Party to decide how to approach the matter, and at the first meeting it was agreed that, rather than try to analyse Lord Cullen's Review and the subsequent work of study groups appointed to deal with certain of his recommendations, this Working Party would, with Lord Cullen's principal recommendations in mind, start work with a blank page and a fresh mind. Further, although the Working Party had the advantage of detailed information and advice as to steps taken and experience gained in other jurisdictions, it has not been thought

necessary to discuss such matters in detail in this report. Wider comparisons are valuable, but there is a considerable variety in what has been experienced elsewhere and what this Working Party has had to do is try to produce a local solution to a local problem.

The exercise previously undertaken by Lord Coulsfield was repeated for a further three week period from 27 October 1997 by Lord Bonomy. During this period only 83 records were lodged. In addition there were 14 other cases without records taken into account, including six optional procedure actions, divorce actions and miscellaneous petitions. Of the total of 97 cases, 71 were identified as routine, consisting of 11 road traffic claims, 54 employers' liability claims 2 occupiers' liability claims, 2 claims for reparation for damage to property and 2 actions for breach of contract. The 54 employers' liability cases included 13 relating to asbestosis and other respiratory diseases, 15 in respect of back injuries and 8 for industrial deafness. The non-routine cases included 4 for medical negligence, of which 2 might well fall into the routine category, a number of property disputes and those without records referred to above.

The Working Party have concentrated on devising a scheme to deal with the routine reparation actions which form the bulk of the cases under consideration and a substantial part of the work of the Court of Session.

The collective experience of the Working Party suggests that it is unlikely that there is any advantage to be gained in these cases by early management hearings. Almost 95% of cases settle without proof. In the case of ordinary actions in respect of

personal injury or death the percentage is higher at 98.2%. A third of these settlements are in the last week before proof, so that two thirds of the cases which settle do so at a stage, and for reasons, which are not clearly identified on the material before us. Even if the provision of early case management could accelerate settlement in this group of cases, it is questionable whether the gain would justify the additional work required. It is important that extra work should not be created unnecessarily or without a real prospect of significant improvement being achieved. The advantage that so many cases come and go without troubling the court in any material way should not be lost without some compensating gain. Experience suggests in any event that the main problems in achieving early settlement lie in obtaining and co-ordinating expert reports and other evidence and in the availability of counsel. So to fix early case management hearings in all defended causes is likely to create unnecessary work. For these reasons the Working Party have devised a scheme, which would apply to all actions of reparation for personal injury, unless the parties, or one or other of them, convince the court that the case should be taken out of the scheme.

2. DEFICIENCIES OF THE PRESENT SYSTEM

Like all of those who have thought about the way reparation actions are presently dealt with, the Working Party has been impressed by the inconvenience caused by the large number of cases which settle either on the day of the proof or during the preceding week. Substantial numbers of witnesses are compelled to attend court unnecessarily, or are subjected to the inconvenience of being cited and then told that they need not attend. In the case of professional witnesses, substantial fees may be incurred in relation to cases which never start. At present a large number of people are assembled at the court on a Tuesday morning during term, and the scene can give

the appearance of a great deal of confusion. A considerable amount of court time is wasted. Judges are frequently left with no way of knowing which cases, if any, they will require to deal with, while simultaneously counsel, and others involved in the lower part of the allocated list, who have a case to try, often have to pace the Hall. The confusion and associated delay can lead to cases extending into an additional expensive day. The necessity of calling a much larger number of cases than can be heard leads on occasions to the inevitable result that cases which do require proof have to be sent away. Attention has also been drawn to the fact that pursuers may feel under last minute pressure to accept sums less than the full value of their claims, particularly in view of their fear of the sanction of a crippling award of expenses. The mere fact that there is a risk that, if the case is not called and no settlement is reached, there will be further extensive delay may create pressure to settle, particularly for a pursuer. It does seem quite inappropriate for so many actions to be settled in a pressure situation in Parliament Hall which may, to the litigant experiencing his first Tuesday morning there, appear chaotic.

On the other hand, a reform is not likely to succeed if it does not recognise that there are reasons why the present situation has developed. The system does have features which make it, if not efficient, at least effective. Firstly, on the day set for the proof, it is absolutely clear that parties are faced with the risk of having to go into court, with no escape, and their minds must therefore be concentrated fully on their final positions. Secondly, at that stage the parties have all the information that they can, or can hope to, get. Thirdly, not only the parties themselves and their advisers are present, but so are witnesses who can be consulted: in the case of professional witnesses, they too must be as well prepared as they can hope to be. Fourthly, the

mere excitement of the situation, and the atmosphere of Parliament House, may well be factors which contribute to a willingness to compromise; and given human nature, there may be a significant number of cases in which some such pressure is necessary to induce parties to take a realistic view of their prospects.

The Working Party recognised that a number of these features exist by chance rather than design. Under the present system pressure of work on busy agents and counsel and human nature combine to defer the application of minds to settlement to the days immediately before proof. The present system of pleadings and the procedures followed in the early stages of routine cases are not such as to lead parties to exchange at an early stage information of the kind and quality which is necessary to lead **to** early settlement. The general question of the role of written pleadings is discussed later in this report. At this stage, we would only observe that while written pleadings do, if well drawn, convey to the opposing party the case which a party hopes to make, they do not disclose the material on which that hope is based, and it is that material, particularly in regard to quantum of damages, which is critical for settlement discussions. Some forms of procedure, such as the automatic entitlement to a procedure roll hearing, encourage delay and legalistic criticism of details of pleading rather than the application of minds to resolution of the essential elements of the dispute. However, even if any positive factors in the present situation are the result of chance, it is necessary to recognise them, if there is to be any chance of making effective improvements.

3. THE RATIONALE OF THE PROPOSALS

In order to be effective, therefore, any system which seeks to reduce the number of late settlements will have to reproduce at an earlier stage some, at least, of the features which arise at the date of proof in the present system. To achieve that it is necessary to devise a scheme which will result in parties being fully prepared at an earlier stage. The scheme should aim to ensure that at some date significantly prior to the diet of proof or trial the issues between the parties are clearly identified. For that to be achieved it is important that there should be a full exchange of information relative to the value of a claim at the earliest possible stage.

It follows from that agenda that the individual aspects of the current system that the Working Party have concentrated on are the form of pleadings and whether they should be simplified; the exchange of information, particularly in regard to *quantum* and how that might be improved; and the timing of settlement and how earlier settlement, or alternatively the early identification of outstanding issues for proof, might be encouraged. The Working Party also consider that a vital factor in setting the agenda for litigants is the early fixing of the diet of trial or proof.

It is recognised that the conduct of litigation depends upon a degree of co-operation between all the parties involved: and that a difference may not be achieved simply by making draconian rules and attempting to enforce them strictly. The Working Party believe, however, that the great majority of those involved in litigation would like to see a system which encouraged early settlement of these cases which should settle and would be willing to work positively within a system which facilitated that end. There will be a place for strict enforcement of the rules, indeed in some circumstances for potentially serious consequences for failure to observe them: but coercion should not

be seen as providing the force behind the proposals. It is well known that in the past some unpopular procedural changes have, in effect, been bypassed or frustrated by the express or tacit consent of practitioners, and there are references later in this report to steps to be taken to reduce the opportunity for such a thing to happen in relation to these proposals. These references however, should not be taken to detract from the general view of the Working Party that the dynamic which will make any proposals of this kind work is agreement by the legal profession in general that it is desirable that they should work. Consistency and predictability in the application of the system are, of course, also vitally important, and it will be necessary to take steps, perhaps by issuing practice notes and perhaps by more elaborate means, to educate both the judiciary and the practitioners in what is required, and to ensure exchange of ideas as to how the scheme is working and could be improved. Consideration should therefore be given to setting up a consultation committee to review the operation of the scheme.

4. THE PROPOSED SCHEME

Since the fundamental objective of the proposals is a change of attitude or mind set among those involved in such routine cases which will move the point at which concentration and effort are directed from the trial or proof to an earlier stage, complementary amendments to current procedure would be necessary to ensure the required change in approach. A summary of the scheme of procedure envisaged is set out in Appendix 1. It involves an automatic timetable which will be generated when defences are lodged, and which will require all parties to take certain steps at certain set times. It is recommended that the scheme should apply, unless the court otherwise decides, to all actions of reparation for personal injury.

One of the first requirements for successful operation of the scheme is that its implementation should be policed. The progress of the case should be monitored to check that the steps have been taken in time. Each case should be tracked by the court's administration, and the initial timetable, and any later necessary intimations, should be sent automatically to parties. The scheme would, therefore, operate much more easily, and will probably only be practicable, if a computer operated system of case recording and tracking is available. It is also doubtful whether the scheme is practicable without alteration to the periods (formerly called vacation) during which the court does not sit to deal with ordinary civil business. In particular, it is thought that the period from the middle of July to the last week in September is too long to suspend the operation of the timetable for fixing proofs.

The second requirement for successful operation is that some action should follow if there is any failure by a party to take the appropriate action at the appropriate time. In particular, it will be necessary to prevent parties from displacing the timetable by express or tacit consent, without the specific authority of the court. The general question of sanctions for default is discussed later, but at this stage it can be said that any failure to comply with a timetable requirement should, at least in the early stages of introduction of the proposals, lead to a By Order appearance, at which the failure would have to be explained. Consistency in the application of the scheme by the judges will be vital to its success.

The essentials of the scheme are: limitation of written pleadings at the start of the action to the minimum strictly required: a requirement that both pursuer and defender should lodge a valuation of the claim, with supporting documents, at a point when that

can realistically be done: and a requirement that parties should meet and discuss settlement, and certify to the court that they have done so. Consistently with the objective of an automatic timetable, it is proposed to reduce the occasions on which an application to the court is necessary, by providing for automatic entitlement to recovery of documents. One way of doing that might be to provide for automatic recovery on service of the summons of documents which fall within the realms of the standard calls in personal injury actions for medical and wages records; another might be to institute a very liberal rule allowing wide ranging recovery. The Working Party favour the former, as being in keeping with the automatic character of the process. Rules would require to be drafted to list the categories of documents automatically recoverable and how they should be identified so that the necessary authority for recovery, particularly from third parties, can be given. What we envisage, in principle, is that medical records (both hospital and G.P.), records of wages or earnings, accident reports and pension records should be recoverable: and that if the information necessary to identify the records is in the summons, a simple form of authorisation should automatically be issued.

The timescale would lead to the early allocation of the diet of trial or proof. To deviate from the scheme and have the cause appointed to proceed as an ordinary action would require a motion for which there would be a deadline. The timetable would also accommodate additional parties.

As has already been said, there should be the minimum of judicial intervention. Consistently with what has been said earlier as to the need for consent, it is not possible to exclude some variation of the scheme to accommodate some individual

cases, but such variation requires to be under close control. It is recognised that there may be cases in which adjustment of the timetable may be required, but wherever possible that should be done without affecting the date allocated for the proof or trial. It follows that in general sisting of actions is to be discouraged: freedom for the parties to sist an action would open an obvious way to avoid the requirements of the timetable, and therefore any motion for a sist must come before a judge. If an action does require to be sisted, with the approval of the court, an "open-ended" sist should not be allowed: experience shows that such sists tend to delay settlement rather than contribute to it. A further complication is that on recall of such a sist the action would have to be slotted back into the timetable, which might not be difficult in some cases after a short period of time, but would create problems in others. Sists for legal aid should be granted only on special cause being shown: and, if the party applying for the sist cannot show that application for legal aid has already been made, the interlocutor allowing the sist should also require that application to be made forthwith and intimated to the Scottish Legal Aid Board. It is the view of the Working Party that the conduct of these cases on the basis of what is normally an automatic timescale will contribute to a change in the approach of agents and counsel thereto, especially when built into the timescale are stages for the lodging of vouched valuations of the claim.

Consistently with the spirit of the proposals, judges should be expected to produce judgments within eight weeks of the conclusion of a proof.

5. COMPARISON WITH OPTIONAL PROCEDURE

The thinking which has led to this proposed scheme has some similarities with that which led to the optional procedure for reparation actions. It would be naive, therefore, to omit to consider the reasons for that procedure being so little used. Certainly one of the reasons for that has been a dislike among agents of the relatively rigid structure of the procedure. For example, the rules as to the limitation of the number of experts and the listing of witnesses have been found unduly restrictive. At present, however, there remains the alternative of an ordinary action. So, when agents have the choice, they seem to prefer less rigidity. In our view, a scheme with a firm timetable, with the increased certainty that that gives to parties, is a better way to approach routine cases. As long as there are fairly strict criteria for applications to transfer cases to the roll for non-routine actions, and judges apply these firmly and consistently, the removal of the option of litigating under two different procedures should encourage agents and counsel to acclimatise quickly to the scheme proposed without causing any significant risk of injustice.

Another widely perceived reason for the unpopularity of the optional procedure is inconsistency among judges in the application of the rules, taken with a measure of uncertainty as to the approach the court might take to vague pleadings in optional procedure cases. The need for a consistent approach to the application of any new scheme cannot be over-emphasised. That should not be a problem in the scheme we propose, since we envisage the use of very simple forms of pleading. So, with a consistent judicial approach to the application of the proposed new scheme, we do not envisage that it will suffer from the problems which have beset optional procedure.

It has also been suggested that an additional safeguard may be to add to the scheme a requirement that, prior to initiating judicial proceedings, a pursuer must intimate his claim in formal fashion to the defender and his insurers. Failing that, there might be an additional period of time built into the early stages of the scheme to allow for the disadvantage the defender and his insurers might otherwise suffer by not having appropriate time to investigate a claim.

6. WRITTEN PLEADINGS AND DEBATES

It can be argued that routine reparation actions do not require any formal written pleading at all, apart from a statement of the date and place of the incident which gives rise to the claim for damages, and a statement of the items or heads of claim. The consensus view of the Working Party, however, is that some statement of the essential circumstances of the incident should be included in the summons initiating the action, and that there should also be defences disclosing the defender's position. It is, however, thought that the present form of pleadings is too elaborate and cumbersome, and occupies too much time at the start of a litigation, time which is often really wasted.

This Report is not an appropriate place to examine in detail the role of written pleadings in court procedure in Scotland in the past. However, some historical background may be useful, since it may indicate what are the tendencies inherent in a system in which there is extensive reliance on written pleadings, and how the resulting problems might possibly be avoided.

The form of written pleading now in use has been more or less the same since about 1850. It resulted from the earlier reforms of the Court of Session, together with the institution of the jury court and its later amalgamation with the Court of Session. It seems to have been generally agreed that the procedure of the Court of Session before the reforms in the early 19th century had become exceedingly cumbersome and unsatisfactory. The defects are discussed in the introduction to the fifth volume of *Murray's Jury Court Reports* (1838), in *Darling's Court of Session Practice* and in the 2nd Edition of *McGlashan's Sheriff Court Practice* (1847). The main criticisms which emerge are that the written pleadings were diffuse, that they mingled averments of fact and argumentative matter in such a way as to make it difficult to see what a party's case was, and they were drawn with a view to assisting the court to decide cases without entering into any factual enquiry, if that could be avoided. *Murray*, in particular, notes that it was the practice of the court to attempt to persuade parties to state their positions in writing in such a way that the judges could reach a decision on their own interpretation of the factual material. It was in order to combat these problems that there was introduced a form of summons which, apart from the purely formal elements, should contain conclusions, a statement of the claim and pleas-in-law identifying the legal propositions. In the first version of the reformed pleading there was provision for a separate condescendence to be lodged later, but this proved unsatisfactory, largely because it gave rise to argument about whether what was condescended on did or did not fall within the statement of claim in the summons itself. The forms were amended in 1850, creating more or less the form of summons which has been in use ever since. Consistently with the purposes of the reforms, one can find in the practice books statements of the requirements and the nature of written pleadings, designed to encourage brief and clear averments, distinguishing factual

material from legal propositions and excluding anything that was merely evidential. For example, *Mackay Practice of the Court of Session I. 389* says, with reference to the condescendence:

"Other facts than those which form the grounds of action should not be set forth: If relevant and admissible, they are proper for proof but not for averment in the condescendence. So statutes, correspondence, or other documents which do not constitute part of the grounds of action, should not be stated at length, but only referred to."

Later, with particular reference to defences, *Mackay* says,

"Mere evidence should not be set forth, but the facts necessary to show what the defence is should be... irrelevant matter should be strictly excluded, and may be ordered to be withdrawn, with expenses. But even relevant matter, which it is necessary to prove, is improper in the pleadings."

General statements to the same effect can be found in *Lees, Pleading and Interlocutors (1st Edition 1888, Revised Edition 1920)* and in other works dealing with practice. The effect of these general injunctions is not much different from what one finds, for example, in *Macphail, Sheriff Court Practice 9-13 ff.*

In its early stages, the reformed procedure was very much under the control of the court. *Darling supra* explains that after a summons had been served and defences lodged the pursuer was allowed to lodge replies, after which the whole case was

debated before a Lord Ordinary who examined each of the pleas in turn and determined whether or not proof was necessary. To some extent, that may have been a carry over from the anxiety of the judges under the older procedure to avoid anything so difficult as an enquiry into matters of fact. Whatever the reason, however, what was being done seems to have been very close to what is now called case management, of a detailed kind.

There are a number of matters in relation to the development of the pleadings from 1850 onwards which are not entirely clear. It is not clear precisely why the case management system sketched above was departed from, although one could hazard a guess that it was found to be unduly cumbersome. It is also not clear how far the injunctions that the pleadings should be brief, and confined to the necessary minimum matters of fact, were observed in practice although, again, a trawl through some of the cases cited in the practice books suggests that the pleadings were, in many cases, remarkably brief. A third point which is not entirely clear is why the pleadings began to be elaborated: but in this case one can see rather more of the reasons. *Lees, supra* for example, quite clearly displays an anxiety that the pleadings should be sufficient to ensure that the party will be able to use the evidence that he wants to use in order to prove his case and draws particular attention to the danger of an argument that the opposing party does not have "fair notice" of the case which has to meet. It may not be a mere coincidence that the cases cited by *Lees* and other writers in regard to the necessity of making detailed averments are cases of common employment. There is material in the reports to suggest that the need to make averments which would bring home to an employer personal responsibility in relation to an accident played a significant part in causing pleadings to become elaborate in what we might describe

as routine reparation cases. The cases also show that the court was liable, from time to time, to succumb to the temptation to reach conclusions on matters of fact simply by perusal of the pleadings, (see e.g. *Cameron* v *Walker* (1898) 25 R 449, *M'Manning* v *Easton Gibb & Son Ltd* 1911 SC 438).

The object of a written pleading system is to require each party to set out his case clearly in such a way as to enable the other side to have a fair chance to meet it. The advantages claimed for the system are that it should enable evidence to be concentrated on the points which are truly in issue and should also enable the court and the parties to avoid the expense of making enquiries into, and leading evidence about, matters which either have no connection with the real issue or which, even if established, cannot lead to any legal consequence. That statement of the advantages, however, also highlights the problems to which undue reliance on elaborate written pleading may give rise. It is immediately obvious that the task of identifying precisely the issues which require to be decided can only be carried out once the work necessary to enable the parties to identify those issues has been done. It is also immediately obvious that the job of stating the cases in the written pleadings must be precisely and expertly carried out if it is to succeed in its object without prejudicing the position of one party or the other. Daily experience confirms both of these points. It is, and has for many years been, normal that a party's true case is only made precise in a minute of amendment lodged relatively shortly before the date fixed for a proof. It is equally well known that the courts have repeatedly - perhaps more often in Sheriff Court cases but not exclusively so - drawn attention to the fact that blunders in pleadings have prevented the true issue in a litigation from being properly determined.

A glance at the historical background enables one to identify some of the ways in which the difficulty has been created or increased and, in particular, why written pleadings have demonstrated a tendency to expand, whatever the general rules are supposed to be. Four factors can be identified.

(1) The demand for "fair notice" has a tendency, which it is difficult to control, to expand the averments thought necessary beyond the facts to be proved, so as to bring in evidence used to prove them.

(2) There is a corresponding anxiety on the part of the pleader not to risk being excluded from leading essential evidence.

(3) The risk remains that a judge looking at the pleadings may be disposed to take a view about matters of probability which will influence his decision, even if that is not made blatant as it was in some of the earlier cases.

(4) In any case, written pleading is part of the pleading in the case, and a set of pleadings which look comprehensive and convincing may play a part in influencing the views of the judge or the conduct of the opposing party. Such well drawn pleading can be extremely valuable when the court has to discuss, for example, procedural matters.

Some of those who have been in practice over the last 40 years would put the problems of written pleading even more strongly, in the light of experience, particularly during the 1950s and 1960s. It is notorious that during that period highly technical objections were made, and were accepted by the court, at least to the extent of holding that a case was unsuitable for jury trial. It is not too strong to say that the system of written pleadings was distorted during that period. The extent of the

distortion is exemplified by the cases leading up to *Nimmo* v *Alexander Cowan & Sons* 1967 SC(HL) 79. In the earlier cases, two heresies became apparent. One was that, if a pursuer made an averment of a certain point, he then required to prove it, whether or not the averment was necessary to his case as a matter of law: the other was that, where a general duty was averred, followed by averments of particular duties or breaches, proof was limited to the particulars.

Consideration of the history of pleadings, therefore, suggests that it is not enough merely to say that pleadings should be short and simple. That has been the advice of the textbooks written since the present system came into effect in 1850. It has not prevented the elaboration of pleadings, and it has not prevented the development of a system in which a great deal of industry requires to be devoted to written pleadings which, for the reasons which are indicated above, may be wasted. There are other factors to be borne in mind in considering how simplification of pleadings can be achieved. Counsel have learnt, and indeed have devoted a considerable amount of time and energy to learning, the skill of writing written pleadings in their present form and the skill of analysing and picking holes in such written pleadings. Further, the composition of satisfactory written pleadings, and the criticism of them, are, in some ways, a challenging and a satisfying intellectual exercise. In the light of all these matters, it is not surprising that the most recent experience in the optional procedure, was that, as has happened before, the length and complexity of the pleadings, the extent to which they were criticised in detail, and the effect given to them in relation to the evidence ultimately led, tended to develop so that the distinction between the optional procedure and the ordinary procedure was blurred. For the purposes of a new routine procedure for reparation actions, therefore, it will be necessary to do

much more than simply express a general aspiration that pleadings should be short and simple. It will be necessary to phrase the rules in such a way as to ensure that pleadings are indeed kept to a very basic minimum.

The discussions in the Working Party tended to the conclusion that, realistically speaking, what is required in most cases in relation to liability is the briefest description of the events on which the claim is based, together with a brief indication of the ground of fault alleged, and a specific reference to any statutory provision which may be founded upon. In the majority of routine reparation cases the parties can appreciate what the issues are without elaborate pleading. Again, what is suggested is similar to what was envisaged when the optional procedure was introduced. There has, however, been a tendency to amplify the written pleadings, even in optional procedure cases. The reasons are not easy to identify with certainty, but one contributor has been unease as to what the court may require in the way of precision. It would, therefore, be of the greatest importance to provide guidance both to the parties and to the bench as to what degree of specification is necessary. Such guidance cannot easily be given in the form of rules. Examples or styles of acceptable pleadings are set out in Appendix 2.

On the other hand it is the consensus view of the Working Party that more detail and specification are necessary when it comes to a statement of the claim for loss, and that is dealt with below.

One incidental point is that, under the present Rules, quite lengthy averments are necessary, or at least customary, in regard to jurisdiction. It should be possible to

shorten them substantially. Indeed there is no obvious reason why the customary averments that there has been no agreement to prorogate jurisdiction etc. should not be taken to be implied without formal statement.

Consideration has been given to the question whether there should be a Closed Record. That is not required under the optional procedure, or in the Commercial Court, but the majority view of the Working Party is that the convenience of having the pleadings in one document outweighs any additional cost or slight delay that may be involved in producing a Closed Record (which with modern technology should not be excessive).

It is inherent in the proposals that there should not be any room for a debate in the bulk of cases. There may remain a need for debate in some exceptional cases, so that built into the timetable must be a point at which debate will take place. There may also be a need for an extension of the timescale where a debate is allowed, but it is hoped that in practice debates, where they occur, will be short and should be capable of being accommodated within the normal timetable. It will be for a party who claims that he has inadequate notice of the basis of the claim against him, or contends there is an issue to be debated, to set out in writing what specification of the case he seeks and why there should be a debate. A period of time is allowed for in the timetable so that in most cases, it would be hoped, matters of specification could be dealt with informally. A debate will be allowed only where the judge is satisfied an issue has been identified on which it is in the interests of justice for there to be a debate. In such circumstances, and bearing in mind the nature of the cases which will be subject to these rules, we do not envisage procedure roll hearings on specification. Indeed we

envisage that most issues of specification will be capable of resolution at the hearing on any motion for further specification or for a debate.

7. VALUATION OF CLAIM

Probably the most radical and important proposal being made is that both parties should lodge statements giving their valuations of the claim. The object is to bring forward, as far as possible, in the progress of the litigation the point which at present parties only reach, in many cases, on the brink of a proof, viz. the point at which each party can see how the other is approaching the valuation of the claim, and the material which he has to back it up. The experience of members of the Working Party is that at present those acting for pursuers often cannot or do not apply their minds to valuation until close to the diet of trial or proof. That results in those acting for defenders not being made aware of the full extent of the claim. The object of the proposal is disclosure of the parties' positions after allowing them a limited but realistic time to prepare for such disclosure. It is fully appreciated that for both parties time is necessary to ingather reports and other vouchers substantiating various elements of the claim, so that the claim can be properly calculated and vouched. Hopefully the introduction of a more liberal regime in regard to recovery of documents will help to enable parties to specify their valuations of the claim at a much earlier stage. Built into the proposed scheme are what the Working Party consider to be adequate periods of time for properly vouched valuations to be prepared and intimated. A form of statement of valuation of claim is given at Appendix 3. The information required in the statement may have to be reconsidered in the light of the decision in *Page* v *Sheerness Steel Co* 1998 3 W.L.R.329, but that

decision was published after the Working Party had in substance completed its discussions, and does not, in any event, affect the principle of the proposals.

The principal problem is how to give this requirement real teeth. Obviously there will be cases in which, at the time at which the statement has to be made, the condition of the pursuer will be uncertain and precision will be impossible. There is no way of overcoming that problem by rules and procedures. It will, however, be very important to ensure that, so far as possible, the statements made in relation to the quantification of the claim are realistic, and that can only be achieved if failure to be realistic has some adverse consequences for the parties. There are two proposals as to how the procedure can be made effective. The first is that the parties should require to deliver or exhibit to the other party the documents by which the statement is supported. The Working Party considered whether to recommend that the documents should be lodged, but concluded that such a requirement would unduly burden the Court offices. The documents to be exhibited will vary with the nature of the claim, but normally will include at least one medical report: a wages certificate or other document vouching earnings: a report or extract in respect of any special needs claim: and a statement of and vouching for the amount of any claims for services. In certain claims for services it may be necessary to lodge witness statements. The medical reports, or the latest reports, will be taken to represent the condition of the pursuer at the date of lodging of the statement, whatever the date of the report, except where adequate cause is shown. The second proposal is that the court should have a discretion to take into account any failure to provide a realistic and up to date valuation in dealing with questions of expenses. There is some further discussion of the general question of sanctions later in this Report.

It is also of some importance that under the proposed procedure the defender will be required to state his valuation of the claim, and be subject to similar requirements in regard to delivery or exhibition of supporting documents. This is a substantial innovation, but it is one which, in our view, may contribute a great deal to a realistic appreciation by each side of the position of the other.

In this connection, we should mention that it is likely that changes in the practice of the Auditor in dealing with accounts of expenses will be necessary to enable the scheme to work. At present, we understand, the Auditor places limits on the number of medical reports for which costs are recoverable. Clearly, extravagance in medical expenses is not to be encouraged, but it will be necessary for the parties to be able to incur and recover the costs which are required to make the scheme workable. Again, it will probably be necessary to ask the Scottish Legal Aid Board to review their practice in authorising reports at various stages of the progress of a litigation, to make it possible for a legally-aided party to comply with the scheme.

The objective of these proposals is to try to put the parties, in one respect at least, into the same position at the date of lodging of the statements as they are under the present system at the date of proof: that is, that each party will have the other's estimate of the claims, no doubt on a favourable view to that party, and the material on which it is based. One of the problems in the present system is that, understandably, pressure to produce information about quantum tends to be concentrated on the date, or anticipated date, of the proof or trial. The objective is to bring that point of

concentration forward, so that legal advisers, and medical or other witnesses would have that earlier date to work to.

8. PRE TRIAL HEARING

The Working Party gave lengthy and careful consideration to the suggestion that the way to require parties to concentrate their minds on settlement and the crucial issues in dispute at a much earlier stage than the proof was to fix a pre-proof or pre-trial hearing four to eight weeks before the date of the proof. What was suggested was that parties and their legal advisers would be required to attend, and that a judge would be available to supervise the process. The judge would require the parties to state their positions and examine them as to their preparedness, the evidence available and the matters which might be agreed. The object of this procedure would be, at the very least, to narrow the issues which would have to be considered at the proof. In an earlier version of this proposal, it was envisaged that the parties should attend, say on a Monday or Tuesday, and should appear before the judge and report their positions, and that the judge would permit the case to proceed to proof only if satisfied that all appropriate steps had been taken either to settle the case or at least to narrow the issues. Later consideration led to a modification of this proposal. It was appreciated that in its original form it would require a substantial commitment of judicial time, because there might be about 40 cases to be heard at pre-proof diets in any week. The proposal was, therefore, modified so that the parties would be required to attend on a Monday or Tuesday, but the appearance before a judge in the cases not resolved by agreement would be postponed to, say, the following Friday. It was also proposed that the pursuer should be required after the pre-proof hearing to state his final

position in regard to damages, that is, what he would accept, and the defender would state what offer, if any, he was prepared to make, and there should be rules in regard to the recovery of expenses if a settlement was arrived at a figure somewhere between these two valuations before the commencement of the proof.

The more the pre-proof hearing proposal was examined, the more complex it seemed to become: and the greater the demands made on judicial time and the time of parties' advisers. During the Working Party's deliberations the alternative proposal that is set out in the next section emerged. In the light of that, it was felt that to require a pre-trial hearing in an ongoing case was unnecessarily inflexible, and would in some instances merely add an additional stage of procedure, which would be expensive for the parties and very time consuming and burdensome both for the court and for the parties. The Working Party accordingly do not propose a mandatory pre-trial hearing.

10. PRE-TRIAL MEETING AND CERTIFICATES

The Working Party's extensive debates on the idea of a pre-trial hearing led them to the conclusion that the positive benefits of that idea could be achieved without the rigidity of requiring parties to meet at court one day and then appear before a judge on another in the course of a week, a number of weeks before the diet of trial or proof. The proposal is that parties and their representatives, fully instructed, should meet at least four weeks before the diet after all productions have been lodged, and should try to settle the case, and failing that should identify the outstanding issues for proof. In the opinion of the Working Party a meeting held at a time and place to suit the convenience of parties would be just as likely, if not more likely, to achieve the desired objective as one held on a specified day at Parliament House. The purpose of

the pre-trial meeting will be to provide parties with an opportunity to negotiate settlement or, where settlement can not be achieved, to narrow the issues between them. The features of this part of the scheme for which provision should be made by Rule of Court, Practice Note, or a combination of the two, are these:-

1. In any case in which a proof or trial has been fixed, parties would be required to lodge all the material on which they propose to found eight weeks before the proof or trial.

2. The pre-trial meeting will be arranged by the parties at a mutually convenient place and time, but should be held some time between six weeks and four weeks before the proof or trial.

3. At the pre-trial meeting counsel would have to be briefed and prepared sufficiently to enable him or her to discuss the merits and *quantum*.

4. During the meeting the legal representatives of all parties should have access to someone who can give immediate authority to compromise the action.

5. By a prescribed day before the proof or trial, say four weeks, parties should be required to lodge a Minute of Pre-trial Meeting, signed by counsel, certifying that they have met, and specifying the outcome of those discussions. (See Appendix 4)

6. The court may put the case out By Order whether or not a Minute of Pre-trial Meeting is lodged.

7. Either party may enrol for a hearing on any matter arising out of the pre-trial meeting.

8. If parties have certified that the diet of proof or trial is still required, and the case then settles, parties will be required to give an explanation to the court. The court should have the power to impose a sanction on any party who it considers failed to take all reasonable steps to settle at the time of the pre-trial meeting. Possible sanctions are liability in expenses on an agent and client basis; liability for an additional fee (with or without a specified uplift;); and modification of an award of expenses. Similar sanctions should apply where a party insists on going to trial on an issue where that insistence is unreasonable.

11. SANCTIONS

One of the subjects which engaged the attention of the Working Party for long periods was that of the sanctions which might be applied to render the scheme which they propose effective. As has already been explained, the general view of the Working Party is that litigation functions best if there is a degree of co-operation, and that attempts to bludgeon parties and their advisers into compliance with stringent requirements are unlikely to succeed and may even be counterproductive. It is also thought that there is considerable willingness among those practising in the courts in cases of the sort with which these proposals are concerned to see earlier settlement as desirable and to co-operate to that end, with the minimum of interference by the Court. The Working Party believe also, that that is what the majority of clients, and the public in general, want to see. If that assessment is wrong, the Working Party see

little real hope of changing the present system in any material way. The situation is quite different from that in regard to commercial cases. There the parties are understood to be willing to accept a relatively high degree of judicial interference and direction in return for having their cases, which may be very complex, heard by specialist judges and having them heard quickly.

There will, however, be exceptions to the willingness to co-operate. There are bound to be cases of dilatory agents or counsel. There are also bound to be cases in which some more or less definite advantage for a party can be seen in delay. Much thought was, therefore, given to proposals for different sorts of sanction, particularly with a view to ensuring that the new stages of procedure which are recommended are treated as real and are not seen as merely other formalities which have to be worked through. The ideas discussed included penal awards of expenses, awards of interest at a penal rate and prepayment and forfeiture of court fees on a significant scale. High court dues are, however, open to objection as an impediment to access to justice: and the rate of interest imposed would have to be very high indeed to be really effective. It is understood that the Lord Chancellor's Department has suggested 7% over base rate for similar purposes, but in our view that rate would have no material effect. No way has, however, been suggested which might get past the fundamental problem that in civil proceedings the court is not in a position to punish a party, other than by the traditional means of an award of expenses, a sanction which in many cases loses its bite if the parties settle, because the settlement will inevitably deal with expenses. In the end, therefore, the Working Party felt unable to go beyond recommending that the progress of cases should be monitored, so that any failure to lodge a step in process at the right time should be immediately noticed and should lead to the party or parties

having to appear to explain the failure. Any such failures should be taken into account in any questions of expenses. There are two stages of the scheme at which a more stringent sanction should be available, although it would be hoped it would be very rarely used. Firstly, in any case where any document or material is lodged late, or a date in the timetable is not adhered to, the court should have power to award expenses up to the expenses of process to date against the party in default. Secondly, in the event of failure by either party to lodge their valuation at the due date, the court should have power at a By Order hearing to dismiss the action or grant decree for the amount of the pursuer's valuation, as the case may be. The culture of a casual approach to timetabling, highlighted in Lord Cullen's review, which relies on an opponent's forbearance in, for example, consenting to late lodging of documents should be discouraged.

One more proposal needs further examination. It was suggested that at the final stage, after the settlement meeting, each party should be required to state a figure at which he would settle, and that the court should take this figure into account in deciding any question of expenses. Some members of the Working Party felt that this suggestion would contribute a great deal to making the settlement meeting proposals bite, and were strongly in favour of it. Others, however, felt, equally strongly, that the proposal could operate very unfairly. In particular, it was felt that a pursuer would suffer unfairly if, despite obtaining an award in excess of any tender lodged, his entitlement to recover full expenses was put at risk because his award was less than the amount which he had stated he was prepared to accept. This is the one significant issue on which the Working Party were unable to reach agreement.

12. PURSUER'S OFFERS

It is the view of a substantial part of the Working Party that the reintroduction of a form of pursuer's offer would be of substantial assistance to the early resolution of cases. It may not be within the remit of the Working Party to make such a proposal positively but it would be wrong to omit mention of it altogether.

13. ANCILLARY MATTERS

Since the successful operation of the scheme the Working Party has in mind involves a predictable timetable, we think it right to mention a number of miscellaneous areas in which reforms might be made to ensure the objective is achieved, although there are not, or not entirely, within our remit.

The Working Party are aware that the interrelation of civil and criminal business and the periods of time for which judges are allocated to each, are problems which continue to create difficulty in the proper running of the civil courts. That problem was referred to in the report of the Commercial Causes Committee and in Lord Cullen's review: and is otherwise well known. We are not in a position to discuss the problem, far less make recommendations: but we can say that we feel that it should not be left without attention.

A majority of the Working Party think that too many cases of insignificant value continue to be pursued in the Supreme Court, and are of the view that serious consideration should be given at an early date to increasing the sum concluded for in a reparation action for which the Sheriff Court has exclusive jurisdiction: there is, on the other hand, a contrary view strongly held.

The Working Party reaffirm the point, which has been made in many previous discussions of court procedure, that it is very important that every effort should be made to organise business so that proofs can start at 10 a.m. and continue until 4 p.m. Loss of court time for incidental business makes a substantial contribution to delaying the progress of proofs and increasing the expense for the parties.

As above noted, it may also be necessary to give further consideration to the conduct of trials and proofs during the still generally recognised Easter and Summer "Vacations" to ensure the smooth operation of the proposed standard timetable for routine actions.

Reference has been made above to the need to explain any new proposals and secure acceptance for them. There should be a Consultative Committee to review the operation of the proposals, and to collect data about that operation. Consideration should be given to the preparation of an explanatory booklet or practice note and to the provisions of seminars or other form for discussion, particular in regard to written pleadings. Such provision is likely to be necessary for judges as well as for practitioners.

Appendix 1

	Time	Action	Sanction
1	Summons	Intimation to Defender	
2	Intimation of summons + 21 days	Notice of Intention to defend	Motion for decree in absence
3	Case calls		
4	Intimation of summons + 4 weeks (or 8 weeks if no prior intimation of claim)	Defences to be lodged; Diet fixed (4 days assumed unless extended/ reduced on application of parties)	Motion for decree by default
5	Defences + 4 weeks	Third party notices; Additional defenders; Motions for further specification on merits (14 day intimation); for adjustment; for debate and for transfer to ordinary roll.	Motions at later stage only on special cause shown
6	Defences + 8 weeks	Pursuer lodges Record; Pursuer lodges detailed claim (with supporting documents); Pursuer enrols for further procedure and if appropriate lodges proposed issue.	Case put out By Order
7	Defences + 16 weeks	Defender lodges alternative calculation with list of supporting documents; or agrees pursuer's calculation; Defender consents to pursuer's motion for further procedure or enrols for further procedure and if appropriate lodges proposed counter issue.	Case put out By Order
8	Defenders + 18 weeks	Debate to be heard by this date.	
9	Diet - 8 weeks	Productions and lists of witnesses to be lodged; Pursuer lodges Notice to Admit	
10	Diet - 4 weeks	Certificates of settlement meeting to be lodged; certificate records Notice to Admit and response thereto.	Case put out By Order.
11	Diet		
12	Proof + 8 weeks	Judgment to be issued.	

Appendix 2

Form of Summons

1. Name and address of the pursuer

2. Name and address of the defender.

3. Averments re jurisdiction (unless a way can be found to eliminate them).

4. Statement of the basis of the claim, e.g. :-

(a) The pursuer was employed by the defenders as a woodworker at their premises at _____. On ____ he was working at a circular saw and was injured by coming in to contact with the saw blade which was unguarded.

(b) The pursuer worked as an insulation worker with the defenders for twelve years from ___ to ___, and contracted asbestosis because of exposure to asbestos in the course of his work. The risk of exposure to asbestos causing the disease has been well known to the industry for at least 30 years.

(c) On ___ at _____ p.m. the pursuer was crossing ___ Road when he was struck and knocked down by a car driven by the Defender's employee ___ in the course of his employment.

(d) The pursuer is employed by the defenders as a bus mechanic. On 29 September 1997, he and a colleague were removing a leaf spring from a double decker bus. The pursuer was standing in an inspection pit. When the spring was detached from its mountings, instead of descending on to a trolley placed at the side of the pit to receive it, it fell into the pit, causing the pursuer to sustain a serious crushing injury to his leg.

(e) The pursuer is employed by the first defenders as a scaffolder. On 16 April 1997 he was involved in erecting scaffolding at a tenement building in Hyndland Road, Glasgow. The second defenders were the main contractors undertaking repair

works to the building and the third defenders, by whom the first defenders had been sub-contracted, were the roofing contractors. One of the pursuer's colleagues stepped from the top of the scaffold on to the roof, to fix a further support. As he did so, he dislodged a coping stone around an oriel window. The coping stone feel and struck the pursuer, who was standing on the ground below.

(f) The pursuer is employed by the defenders as a nurse in Ward 17, the Royal Infirmary, Edinburgh. On 15 May 1997, she and the ward sister were called to assist two other members of staff, who had been dealing with a patient whose bed was wet. They had been attempting to place the patient on a commode when she had fallen on to the floor. The pursuer took up a position at the patient's right shoulder, opposite the ward sister, with the other two staff taking a leg each. The team lifted on a count of three and, as they did so, the pursuer felt pain in her lower back.

5. Statement of ground of claim, e.g.:-

Fault at common law.

Breach of statutory duty (section x of the y Act).

6. Summary of injuries (including reference to medical or hospital treatment).

7. Summary of heads of loss claimed.

Appendix 3

Form of Statements of Value of Claim

Head of Claim	**Components**	**Amount claimed**
Solatium	Past Future	£x £x
Interest on past *solatium*	Percentage applied to past *solatium* xx%	£x
Past wage loss	Date from which wage loss claimed Date to which wage loss claimed Rate of net wage loss (per week, per month or per annum) Interest	£x
Future wage loss	Multiplier Multiplicand (showing how calculated)	£x
Past services	Date from which services claimed Date to which services claimed Nature of services Person by whom, services provided Hours per week services provided Net hourly rate claimed Interest	£x
Future services	Multiplier Multiplicand (showing how calculated)	£x
Section 9	As for services	£x
Needs and other expenses	One off Multiplier Multiplicand Interest	£x £x

Appendix 4

Minute of Pre-Trial Meeting

IN THE COURT OF SESSION

Minute of Pre-Trial Meeting

in the cause

NAME

PURSUER

against

NAME

DEFENDERS

AB for the Purser and

CD for the Defenders hereby state to the court:-

(1) That the pre-trial meeting was held in this case at [ ] on [ ].

(2) That the following parties were present:-

(a) The pursuer.

(b) Mr. XYZ of Eagle Star Insurance, for the defenders.

(c) AB, Advocate, for the pursuer.

(d) CD, Advocate, for the defenders.

(e) Mr Solicitor of Solicitors and Co., for the pursuer.

(f) Etc.

(3) That the parties discussed settlement of the action.

(4) That the following questions were addressed:-

		Yes	No
1.	Is the diet of proof or trial still required?		
2.	If the answer to 1 is "yes", does the defender admit liability? (If "no", complete section 2.)		
3.	If the answer to question 1 is "yes", is the *quantum* of damages agreed? (If "no", complete section 3.)		

[To be inserted only if the proof or trial is still required.]

It is estimated that the hearing will last ..... days.

By notice(s) dated [ ], the pursuer called on the defender to make certain admissions. Those calls, and the defender's responses, are as follows:-

Call	Response	
1.	Admitted	
2.		Denied
3.		Denied
4.		Denied

By notice(s) dated [ ], the defender called on the pursuer to make certain admissions. Those calls, and the pursuer's responses, are as follows:-

Call	Response	
1.	Admitted	
2.	Admitted	
3.		Denied
4.	Admitted	

Quantum of Damages

Please indicate where agreement has been reached on an element of damages.

Head of Claim	**Components**	**Not Agreed**	**Agreed At**
Solatium			
Interest on past *solatium*	Percentage applied to past *solatium* xx%		
Past wage loss	Date from which wage loss claimed Date to which wage loss claimed Rate of net wage loss (per week, per month of per annum)		
Interest on past wage loss			
Future wage loss	Multiplier Multiplicand (showing how calculated)		
Past services	Date from which services claimed Date to which services claimed Hours per week services provided Net hourly rate claimed		
Interest on past services			
Future services	Multiplier Multiplicand (showing how calculated)		
Section 9	As for service		
Needs and other expenses	One off Multiplier Multiplicand		

Other heads as appropriate			

IN RESPECT WHEREOF

Signed by counsel/solicitor advocate for each side.

STATUTORY INSTRUMENTS

1998 No. (S.)

COURT OF SESSION, SCOTLAND

Act of Sederunt (Rules of the Court of Session Amendment No.) (Actions of damages for, or arising from, personal injuries) 1998

Made	*1998*
Coming into force	*1998*

The Lords of Council and Session, under and by virtue of the powers conferred on them by section 5 of the Court of Session Act 1988[1] and of all other powers enabling them in that behalf, do hereby enact and declare:--

Citation and commencement [j001]

1.—(1) This Act of Sederunt may be cited as the Act of Sederunt (Rules of the Court of Session Amendment No) (Actions of damages for, or arising from, personal injuries) 1998 and shall come into force on ^^^^^^^^^^ 1998.

(2) This Act of Sederunt shall be inserted in the Books of Sederunt.

(3) In this Act of Sederunt "the principal Rules" means the Rules of the Court of Session 1994[2].

Procedure for actions of damages [j002]

2—(1) For Chapter 43 of the principal Rules substitute–

"Chapter 43
Actions of damages for, or arising from, personal injuries

Part I

Procedure in actions of damages for, or arising from, personal injuries

Application and interpretation

43.1.-(1) This Part applies to an action of damages for personal injuries or the death of a person from personal injuries.

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1 1988 c.36; section 5 was amended by the Civil Evidence (Scotland) Act 1988 (c.32), section 2(3) and by the Children (Scotland) Act 1995 (c.36), Schedule 4, paragraph 45.

2 S.I. 1994/1443.

(2) In this Part–

"personal injuries" includes any disease or impairment of a physical or mental condition;

(3) Subject to paragraph (4), the following rules shall not apply to an action to which this Part applies–

(a) rule 4.9(2) (prorogation of time for lodging document);

(b) rule 6.2 (fixing and allocation of diets in the Outer House);

(c) rule 13.2 (form of summons);

(d) rule 13.6(b) (arrestment to found jurisdiction);

(e) rule 13.13(1) to (5);

(f) rule 22.2(3)(b) (time for adjustments on Adjustment Roll);

(g) rule 22.3(5) and (6) (motions for further procedure on closing of record);

(h) rule 26.3 (warrants for diligence where third party notice sought);

(j) Chapter 28A (notices to admit).

(4) Where an action to which this Part applies is appointed to proceed as an ordinary action under rule 43.4, paragraph (3) above shall have effect as if sub-paragraphs (a), (b), (f), (g) and (j) were omitted.

Form of Summons

43.2.-(1) The summons shall be in Form 43.2-A and there shall be annexed to it–

(a) a brief statement containing–

(i) the averments in numbered paragraphs relating only to those facts necessary to establish the claim;

(ii) the names of every medical practitioner from whom, and every hospital or other institution in which, the pursuer or, in an action in respect of the death of a person, the deceased received treatment for the injuries sustained, or disease suffered, by him; and

(b) appropriate pleas in law.

(2) An application for an order under section 12(2) of the Administration of Justice Act 19823 personal injuries shall be made by including in the summons a conclusion for provisional damages in Form 43.2-B; and, where such an application is made, averments as to the matters referred to in paragraphs (a) and (b) of section 12(1) of that Act shall be included in the statement made under paragraph (1)(a)(i).

(3) In paragraph (2) above "provisional damages" means the damages referred to in section 12(4)(a) of the Administration of Justice Act 1982.

(4) A summons may include–

(a) warrants for intimation in so far as permitted under these Rules; and

(b) a specification of documents containing such of the calls in form 43.2-C as the pursuer considers appropriate.

(5) In these Rules, in relation to an action to which this Part applies, any references to the condescendence of a summons and to articles of the condescendence shall be construed as a reference to the statement required under paragraph (1)(a) above and numbered paragraphs of that statement.

Calling and service of summons

43.3.-(1) Where a summons passes the signet, the Deputy Principal Clerk shall, subject to paragraph (2), fix a date on which the summons shall call.

(2) The date fixed under paragraph (1) above shall not be earlier than a date seven days after the expiry of the appropriate period of notice determined in accordance with rule 13.4.

(3) Where a summons in an action to which this Chapter applies is to be executed, a copy of the summons which has passed the signet shall be–

(a) served on the defender with a citation in Form 43.3 attached to it; and

(b) intimated to any person named in a warrant for intimation.

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3 1982 c.53.

(4) Service of a summons shall be executed so as to ensure that the period between the date of execution and the date fixed under paragraph (1) is not less than the appropriate period of notice determined in accordance with rule 13.4.

(5) Subject to paragraph (6), where service of a summons is not executed in accordance with paragraph (4), the instance shall fall.

(6) A pursuer who has failed to serve a summons in accordance with paragraph (4) may apply to the Court for fresh authority to serve it, and where such authority is granted the Deputy Principal Clerk shall fix a fresh date under paragraph (1).

Inspection and recovery of documents

43.4.-(1) This rule applies where the summons contains a specification of documents by virtue of rule 43.2(4)(b).

(2) Where defences to the action are lodged, the Deputy Principal Clerk shall make an order granting commission and diligence for the production and recovery of the documents mentioned in the specification.

(3) An order under paragraph (2) shall be treated for all purposes as an interlocutor of the court granting commission and diligence signed by the Lord Ordinary.

(4) Nothing in this rule shall affect the right of a party to apply under rule 35.2 for a commission and diligence for recovery of documents or for an order under section 1 of the Administration of Justice (Scotland) Act 1972 in respect of any document or other property not mentioned in the specification annexed to the summons.

Motion to dispense with timetable

43.5.-(1) Any party to an action may, within 28 days of the lodging of defences, by motion apply to have the action withdrawn from the procedure in this Part and to be appointed to proceed as an ordinary action.

(2) No motion under paragraph (1) shall be granted unless the court is satisfied that there are exceptional reasons for not following the procedure in this Chapter.

(3) In determining whether there are exceptional reasons justifying the granting of a motion made under paragraph (1), the Lord Ordinary shall have regard to–

(a) the likely need for detailed pleadings to enable justice to be done between the parties;

(b) the length of time required for preparation of the action.

(4) Rules 43.7, 43.12 and 43.13 shall apply to an action which is appointed to proceed as an ordinary action.

(5) A motion for a debate on any issue arising in the action shall not, of itself, justify the withdrawal of an action from the procedure in this Part.

Allocation of diet and timetable

43.6.-(1) The Keeper of the Rolls shall, on the lodging of defences–

(a) allocate a diet for proof or trial of the action; and

(b) issue a timetable in accordance with which–

(i) steps of process and productions must be lodged;

(ii) any motion or application shall be enrolled or made.

(2) A timetable issued under paragraph (1) shall be in form 43.6-A and shall be treated for all purposes as an interlocutor of the court signed by the Lord Ordinary; and in so far as the timetable order is inconsistent with any provision in these rules which relates to a matter to which the timetable relates, the timetable order shall prevail.

(3) Where a party fails to comply with any requirement of a timetable issued under paragraph (1)(b), the Keeper of the Rolls shall–

(a) put the cause out to be heard seven days after the date of the notice referred to in sub-paragraph

(b) on the By Order roll before the Lord Ordinary; and

(b) give notice to the parties to the action–

(i) of the date of the hearing of the cause on the By Order roll; and

(ii) requiring an explanation from the party in default as to why the timetable has not been complied with to be submitted to the Keeper of the Rolls before the date of the hearing.

(4) Where Keeper of the Rolls considers that the explanation supplied in response to a notice under paragraph (3)(b) is satisfactory, he may, with the consent of the parties, cancel the hearing on the By Order roll.

(5) At a hearing on the By Order roll under paragraph (3)(a) the Lord Ordinary–

(a) shall consider any explanation provided by the party in default in response to a notice under paragraph (3)(b); and

(b) may award expenses against that party.

(6) Expenses awarded under paragraph (5)(b) shall not exceed the expenses of the process before the date of the [hearing on the By Order roll][award]

Applications for interim payments of damages

43.7-(1) A pursuer may, at any time after defences have been lodged, apply by motion for an order for interim payment of damages to him by the defender or, where there are two or more of them, by any one or more of them.

(2) The pursuer shall give written intimation of a motion under paragraph (1) to every other party not less than 14 days before the date on which the motion is enrolled.

(3) On a motion under paragraph (1), the court may, if satisfied that–

(a) the defender has admitted liability to the pursuer in the action, or

(b) if the action proceeded to proof, the pursuer would succeed in the action on the question of liability without any substantial finding of contributory negligence on his part, or on the part of any person in respect of whose injury or death the claim of the pursuer arises, and would obtain decree for damages against any defender,

ordain the defender to make an interim payment to the pursuer of such amount as it thinks fit, not exceeding a reasonable proportion of the damages which, in the opinion of the court, are likely to be recovered by the pursuer.

(4) Any such payment may be ordered to be made in one lump sum or otherwise as the court thinks fit.

(5) No order shall be made against a defender under this rule unless it appears to the court that the defender is–

(a) a person who is insured in respect of the claim of the pursuer;

(b) a public authority; or

(c) a person whose means and resources are such as to enable him to make the interim payment.

(6) Notwithstanding the grant or refusal of a motion for an interim payment, a subsequent motion may be made where there has been a change of circumstances.

(7) Any interim payment shall be made to the pursuer unless the court otherwise directs.

(8) This rule shall, with the necessary modifications, apply to a counterclaim for damages for personal injuries made by a defender.

(9) In this rule "defender" includes a third party against whom the pursuer has a conclusion for damages.

Statement of valuation of claim

43.8.-(1) Each party to an action shall make a statement of valuation of claim in Form 43.8.

(2) A statement of valuation of claim (which shall include a list of supporting documents) shall be lodged in process.

(3) Each party shall, on lodging a statement of valuation of claim, give written intimation to every other party of the list of documents contained in the statement of valuation of claim.

(4) A party who has received intimation of a list of documents from another party under paragraph (3) may inspect those documents which–

(a) have not been lodged in process; and

(b) are in the possession or control of the party intimating the list,

within 14 days after the receipt of the list at a time and place which is reasonable to both parties.

(5) A party inspecting documents under paragraph (4) shall have the right to obtain a copy or copies of any such document on payment of a copying fee of not more than that prescribed in Chapter I of the Table of Fees in rule 42.16.

(6) Nothing in paragraphs (3) to (5) shall affect–

(a) the law relating to, or the right of a party to object to the inspection of a document on the ground of, privilege or confidentiality; or

(b) the right of a party to apply under rule 35.2 for a commission and diligence for recovery of documents or an order under section 1 of the Administration of Justice (Scotland) Act 1972.

(7) Without prejudice to rule 43.6(6), where a party has failed to lodge a statement of valuation of claim in accordance with a timetable issued under paragraph (2) of that rule, the court may at a hearing of the cause on the By Order roll under paragraph (4)(a) of that rule–

(a) where the party in default is the pursuer, dismiss the action;

(b) where the party in default is the defender, grant decree against the defender for the amount of the pursuer's valuation.

Pre-trial meeting

43.9.-(1) For the purposes of this rule, a pre-trial meeting is a meeting between the parties to discuss–

(a) settlement of the action; and

(b) to agree, so far as is possible, the matters which are not in dispute between them.

(2) A joint minute of a pre-trial meeting, made in Form 43.9, shall be lodged in process.

Application for variation of timetable order

43.10.-(1) The timetable issued under rule 43.6 may be shortened by the court on an application by motion.

(2) The time by which a step of process or productions must be lodged or a motion or application enrolled in accordance with a timetable issued under rule 43.6(1)(b) ("the relevant time") may be prorogated by the court on an application by motion.

(3) An application by motion under paragraph (2)–

(a) shall be enrolled before the relevant time has expired; and

(b) shall be granted only on special cause shown.

(4) Any reference in this Part to any thing being done in accordance with a timetable shall be construed as a reference to its being done in accordance with a timetable as varied under this rule.

Application for sist

43.11.-(1) An application to sist an action shall be made by motion.

(2) A motion made under paragraph (1) shall be granted only on special cause shown.

(3) Any sist of an action shall be for a definite period.

(4) Where an action has been sisted, the Keeper of the Rolls shall issue a revised timetable under rule 43.6(1)(b) and, if necessary, allocate a fresh diet for proof or trial of the action.

(5) In exercising the power conferred by paragraph (4), the Keeper of the Rolls shall have regard to–

(a) the extent to which the timetable issued under rule 43.6(1)(b) has already been complied with; and

(b) the date on which the action will cease to be sisted.

Adjustment on final decree

43.12.-(1) Where a defender has made an interim payment order under rule 43.7(3), the court may make such order, when final decree is pronounced, with respect to the interim payment as it thinks fit to give effect to the final liability of that defender to the pursuer; and in particular may order–

(a) repayment by the pursuer of any sum by which the interim payment exceeds the amount which that defender is liable to pay the pursuer; or

(b) payment by any other defender or a third party of any part of the interim payment which the defender who made it is entitled to recover from him by way of contribution or indemnity or in respect of any remedy or relief relating to, or connected with, the claim of the pursuer.

(2) In this rule "defender" includes a third party against whom the pursuer has a conclusion for damages.

Application for further damages

43.13.-(1) An application for further damages by a pursuer in respect of whom an order under section 12(2)(b) of the Administration of Justice Act 1982 has been made shall be made by minute and shall include–

(a) a conclusion in Form 43.13-A;

(b) averments in the statement of facts supporting that conclusion; and

(c) appropriate pleas-in-law.

(2) On lodging such a minute in process, the pursuer shall apply by motion for warrant to serve the minute on–

(a) every other party; and

(b) where such other party is insured or otherwise indemnified, his insurer or indemnifier, if known to the pursuer.

(3) A notice of intimation in Form 43.13-B shall be attached to the copy of the minute served on a warrant granted on a motion under paragraph (2).

(4) Any such party, insurer or indemnifier may lodge answers to such a minute in process within 28 days after the date of service on him.

Part II

Procedure in relation to connected persons in certain actions of damages

Application and interpretation of this Part

43.14.-(1) This Part applies to an action of damages in which, following the death of any person from personal injuries, damages are claimed–

(a) by the executor of the deceased, in respect of the injuries from which the deceased died; or

(b) by any relative of the deceased, in respect of the death of the deceased.

(2) In this Part–

"connected person" means a person, not being a party to the action, who has title to sue the defender in respect of the personal injuries from which the deceased died or in respect of his death;

"relative" has the meaning assigned to it in Schedule 1 to the Damages (Scotland) Act 1976.

Averments in actions to which this Part applies

43.15. The pursuer shall aver in the condescendence, as the case may be–

(a) that there are no connected persons;

(b) that there are connected persons, being persons specified in the warrant for intimation;

(c) that there are connected persons in respect of whom intimation should be dispensed with on the ground that–

(i) the names or whereabouts of such persons are not known to, and cannot reasonably be ascertained by, the pursuer; or

(ii) such persons are unlikely to be awarded more than the sum of £200 each.

Warrants for intimation

43.16-(1) Where the pursuer makes averments under rule 43.15(b) (existence of connected persons), he shall insert a warrant for intimation in the summons in the following terms:–

"Warrant to intimate to (name and address) as a person who is believed to have title to sue the defender in an action in respect of the personal injuries from which the late (name and last place of residence) died [or the death of the late (name and last place of residence)]".

(2) A notice of intimation in Form 43.16 shall be attached to the copy of the summons where intimation is given on a warrant under paragraph (1).

Applications to dispense with intimation

43.17-(1) Where the pursuer makes averments under rule 43.15(c) (dispensing with intimation to connected persons), he shall apply by motion for an order to dispense with intimation.

(2) In determining a motion under paragraph (1), the court shall have regard to–

(a) the desirability of avoiding multiplicity of actions; and

(b) the expense, inconvenience or difficulty likely to involved in taking steps to ascertain the name or whereabouts of the connected person.

(3) Where the court is not satisfied that intimation to a connected person should be dispensed with, it may–

(a) order intimation to a connected person whose name and whereabouts are known;

(b) order the pursuer to take such further steps as it may specify in the interlocutor to ascertain the name or whereabouts of any connected person; and

(c) order that such advertisement be made in such manner, in such place and at such times as it may specify in the interlocutor.

Subsequent disclosure of connected persons

43.18 Where the name or whereabouts of a person, in respect of whom the court has dispensed with intimation on a ground specified in rule 43.15(c) (dispensing with intimation to connected persons), subsequently becomes known to the pursuer while the action is depending before the court, the pursuer shall apply by motion under rule 13.8(1) (warrants after signetting) for a warrant for intimation to such a person; and such intimation shall be made in accordance with rule 43.15(2).

Connected persons entering the process

43.19.-(1) A connected person may apply to the court by minute in the process of the action craving leave to be sisted as an additional pursuer to the action.

(2) Such a minute shall also–

(a) crave leave of the court to adopt the existing grounds of action and to amend the conclusions, condescendence and pleas-in-law; or

(b) set out separate conclusions, a statement of facts and appropriate pleas-in-law.

(3) Before lodging such a minute in process, the minuter shall intimate to every party a copy of the minute and the date on which it will be lodged.

(4) Any party may lodge answers to such a minute in process within 14 days after the minute has been lodged.

Failure to enter process

43.20 Where a connected person to whom intimation is made in accordance with this Part–

(a) does not apply to be sisted as an additional pursuer to the action,

(b) subsequently brings a separate action against the same defender in respect of the same personal injuries or death, and

(c) would, apart from this rule, be awarded the expenses or part of the expenses of that action,

he shall not be awarded those expenses except on cause shown.".

(2) In the Appendix to the principal Rules, for forms 43.3 to 43.18 substitute the forms set out in the Schedule to this Act of Sederunt.

Consequential amendments [j003]

.-(1) In Rule 38.4 of the principal Rules (leave to reclaim in certain cases), paragraph (3) is revoked.

Recovery of evidence: optional procedure [j005]

.-(1) For Rules 35.3 and 35.3A substitute–

"Optional order for delivery of documents before execution of commission and diligence

35.3.-(1) This rule applies where a party has obtained a commission and diligence for the recovery of a document on an application made under rule 35.2(1)(a).

(2) Subject to paragraph (3), such party may, at any time before executing the commission and diligence against a haver, serve on the haver an order in Form 35.3-A.

(3) Where any party to the cause is a party litigant, such party may, at any time before executing the commission and diligence against a haver, serve on the haver an order in Form 35.3-B.

(4) The order and a copy of the specification referred to in rule 35.2(2), as approved by the court, shall be served on the haver or his known agent and shall be complied with in the manner and within the period specified in the order.

Procedure on optional order: party litigants and claims of confidentiality

35.3A.-(1)This rule applies where–

(a) an order has been served on a haver under rule 35.3(3); or

(b) a haver claims confidentiality for any document in his possession in respect of which an order has been served on him under rule 35.3.

(2) Not later than the day after the [day][date] on which the order, and any document recovered, is received from a haver by the Deputy Principal Clerk, he shall give written intimation of that fact to each party.

(3) No party, other than the party who served the order, may uplift any such document until the expiry of seven days after the date of intimation under paragraph (2).

(4) Where a party who served the order fails to uplift any such document within seven days after the date of intimation under paragraph (2), the Deputy Principal Clerk shall give written intimation of that failure to every other party.

(5) Where no party has uplifted any such document within fourteen days after the date of intimation under paragraph (4), the Deputy Principal Clerk shall return the document to the haver who delivered it to him.

(6) Where a party who uplifted any such document does not wish to lodge it, he shall return it to the Deputy Principal Clerk who shall–

(a) give written intimation of the return of the document to every other party; and

(b) if not other party uplifts the document within 14 days after the date intimation, return it to the haver.

Procedure on optional order: other cases

35.3B.-(1)This rule applies where rule 35.3A does not apply.

(2) Not later than the day after the [day][date] on which the order, and any document recovered, is received from a haver by the party who obtained the order, that party–

(a) shall given written intimation of that fact in form 35.3B-A to the Deputy Principal Clerk and every other party; and

(b) shall–

(i) if the document has been sent by post, send a written receipt for the document in form 35,3B-B to the haver; or

(ii) if the document has been delivered by hand, give a written receipt on form 35.3B-B to the person delivering the document.

(3) Where the party who has recovered any such document does not lodge it in process within 14 days of the receipt of it, he shall–

(a) forthwith give written intimation to every other party that that party may borrow, inspect or copy the document within 14 days after the date of that intimation; and

(b) in so doing , identify the document.

(4) Where a party, who has obtained any such document under paragraph (3), wishes to lodge the document in process, he shall–

(a) lodge the document within 14 days after the receipt of it; and

(b) at the same time, send a written receipt for the document in form 35.3B-C to the party who obtained the order.

(5) Where–

(a) no party wishes to lodge or borrow any such document under paragraph (3), the document shall be returned to the haver by the party who obtained the order within 14 days after the expiry of the period specified in sub-paragraph (a) of that paragraph; or

(b) any such document has been uplifted by another party under paragraph (3) and that party does not wish to lodge it in process, the document shall be returned to the haver by that party within 21 days after the date of receipt of it by him.

Optional order: custody and return of documents

35.3C.-(1) This rule applies to documents recovered on an order under rule 35.3.

(2) The party holding any such document (being the party who last issued a receipt for it) shall be responsible for its safekeeping during the period that the document is in his custody or control.

(3) Any such document lodged in process shall be returned to the haver by the party lodging it within 14 days after the expiry of any period allowed for appeal or reclaiming or, where an appeal or reclaiming motion has been marked, from the disposal of any such appeal or reclaiming motion.

(4) If any party fails to return any such document as provided for in rule 35.3A(6), rule 35.3B(5) or paragraph (3), the haver shall be entitled to apply by motion (whether or not the cause is in dependence) for an order that the document be returned to him and for the expenses occasioned by that motion.

Optional order: books

35.3D.-(1) Where an extract from a book of any description (whether the extract is certified or not) is produced under an order under rule 35.3, the court may, on the motion of the party who served the order, direct that that party shall be allowed to inspect the book and take copies of any entries falling within the specification.

(2) Where any question of confidentiality arises in relation to a book directed to be inspected under paragraph (1), the inspection shall be made, and any copies shall be taken, in the sight of the commissioner appointed in the interlocutor granting the commission and diligence.

(3) The court may, on cause shown, order the production of any book (not being a banker's book or book of public record) containing entries falling under a specification, notwithstanding the production of a certified extract from that book.

Optional order: execution of commission and diligence

35.3E. If the party who served an order under rule 35.3 is not satisfied that–

(a) full compliance has been made with the order, or

(b) adequate reasons for non-compliance have been given,

he may execute the commission and diligence under rule 35.4.".

(2) In rule 35.5(2) of the principal rules (execution of orders for production or recovery of documents under section 1(1) of the Administration of Justice (Scotland) Act 1972) for the words "Rule 35.3" substitute the words "Rules 35.3 to 35.3E".

(3) In rule 35.8(2) of the principal rules (confidentiality) for the words "rule 35.3(5)" substitute the words "rule 35.3A(4)".

(4) In the appendix to the principal rules–

(a) form 35.3 shall be renumbered form 35.3-A and in note (3) to that form for the words "35.3(9)" substitute the words "35.3C(4)";

(b) form 35.3A-A shall be renumbered form 35.3-B and in note (3) to that form for the words "35.3A(11)" substitute the words "35.3C(4)";

(c) form 35.3-B shall be renumbered form 35.3B-A;

(d) form 35.3-C shall be renumbered form 35.3B-B;

(e) form 35.3-D shall be renumbered form 35.3B-C.

SCHEDULE 1

Form 43.2-A
Form of summons and backing

[Insert the Royal Arms
in Scotland]

(This space will contain the cause reference number assigned to the summons on being presented for signeting and registration)

IN THE COURT OF SESSION

SUMMONS

(Action for reparation: personal injuries)

[A.B.] (designation and address), Pursuer

against

[C.D.] (designation and address), Defender

Elizabeth II, by the Grace of God, of the United Kingdom of Great Britain and Northern and of Her other Realms and Territories, Queen, Head of the Commonwealth, Defender of the Faith, to [C.D.].
By this summons, the pursuer craves the Lords of our Council and Session to pronounce a decree against you in terms of the conclusions appended to this summons. If you have any good reason why such decree should not be pronounced, you must enter appearance at the Office of Court, Court of Session, 2 Parliament Square, Edinburgh EH1 1RQ, within three days after (the date of the calling of the summons in court). If the date of service on you of this summons is less than (period of notice), you should notify the Deputy Principal Clerk at the Office of Court. Be warned that, if appearance is not entered on your behalf, the pursuer may obtain decree against you in your absence.

This summons is warrant for intimation to (name and address and reason for intimation as set out in the rule of the Rules of the Court of Session 1994 requiring intimation).

[Should you lodge defences to this action, [E.F.] (designation, address and qualification of proposed commissioner) will be granted a commission to recover the documents mentioned in the specification annexed to this summons.]

Given under our Signet at Edinburgh on (date)

(Signed)

(Name and address of or agent for pursuer)

[Back of first page]

Conclusions

FIRST. For payment by the defender to the pursuer of the sum of (amount of sum in words and figures) with interest thereon at the rate of (x per cent per annum) from the date of decree to follow hereon until payment.

SECOND. For the expenses of the action.

[Next page]

Statement of claim

1. The pursuer is (state designation, address, occupation and date of birth of pursuer). (In an action arising out of the death of a relative state designation of the deceased and relation to the pursuer).

2. The defender is (state designation, address and occupation of defender).

3. The court has jurisdiction to hear this claim against the defender because (state briefly ground of jurisdiction).

4. (State briefly the facts necessary to establish the claim)

5. (State briefly the personal injuries suffered and give names and addresses of medical practitioners and hospitals or other institutions in which the person injured received treatment)

6. (State whether claim based on fault at common law or breach of statutory duty; if breach of statutory duty, state provision of enactment)

Pleas-in-law

1. The pursuer having suffered loss, injury and damage through the defender's [fault and negligence and/or breach of statutory duty] is entitled to reparation therefor from him.

2. The sum sued for being a reasonable estimate of the loss, injury or damage sustained by the pursuer, decree therefor should be pronounced in that sum.

IN RESPECT WHEREOF

(Signed)

Solicitor [or Agent] for the pursuer

(address)

(Backing of summons)

(This space will contain the cause reference number assigned to the summons on being presented for signeting and registration)

IN THE COURT OF SESSION

Summons

in the cause

[A.B.], Pursuer
against
[C.D.], Defender

Action for reparation: personal injuries.

(Name of firm of agent for pursuer)

Form 43.2-B

Form of conclusion for application for provisional damages

For payment to the pursuer by the defender of the sum of (amount in words and figures) as provisional damages.

Form 43.2-C

Specification of documents

IN THE COURT OF SESSION

SPECIFICATION OF DOCUMENTS

for the recovery of which a Commission and diligence is sought by the pursuer

in the cause

[A.B.]

Pursuer

against

[C.D.]

Defender

1. All books, medical records reports, charts, X-rays, notes and other documents of (specify name of each medical practitioners named in summons in accordance with rule 43.2(1)(a)(ii)), and relating to the pursuer [or as the case may be the deceased], in order that excerpts may be taken therefrom at the sight of the Commissioner of all entries showing or tending to show the nature, extent and cause of the pursuer's [or, as the case may be, the deceased's] injuries when he attended his doctor on or after (specify date) and the treatment received by him since that date.

2. All books, medical records reports, charts, X-rays, notes and other documents of (specify name of each institutions named in summons in accordance with rule 43.2(1)(a)(ii)), and relating to the pursuer [or as the case may be the deceased], in order that excerpts may be taken therefrom at the sight of the Commissioner of all entries showing or tending to show the nature, extent and cause of all injuries from which the pursuer [or, as the case may be, the deceased] was suffering when he was admitted to that institution on or about (specify date), the treatment received by him since that date and his certificate of discharge, if any.

3. All wage books, cash books, wage sheets, computer records and other earnings information held by or on behalf of the defenders, for the period (specify dates) in order that excerpts may be taken therefrom at the sight of the Commissioner of all entries showing or tending to show (a) the pursuer's [or, as the case may be, the deceased's] earnings, both gross and net, over the said period and (b) the earnings of other employees in the same or similar employment over the said period.

4. All accident reports, memoranda or other written communications made to the defenders or anyone on their behalf by an employee of the defenders present at or about the time of the accident at or about the time at which the pursuer [or, as the case may be, the deceased] sustained the injuries in respect of which the summons in this cause was issued and relevant to the matters contained in the statement of claim.

5. Failing principals, drafts, copies or duplicates of the above or any of them.

Form 43.3

Form of citation of defender

CITATION

Date:

(date of posting or other method of service)

To:
[C.D.](address of defender)

IN HER MAJESTY'S NAME AND AUTHORITY, I, (name of agent), solicitor [or person having a right to conduct the litigation), for (name of pursuer) [or (name of messenger-at-arms), Messenger-at arms], serve the attached summons on you.

The summons contains a claim for reparation for personal injuries [or for reparation arising from the death of (name of the deceased) from personal injuries] made by (name of pursuer) against you in the Court of Session, Edinburgh.

If you intend to deny this claim you must: (1) enter appearance at the Office of Court, Court of Session, 2 Parliament Square, EDINBURGH, EH1 1RQ, within three days after (date on which summons will call); and (2) subsequently lodge defences within seven days after that date. If the date of service on you of the summons is less than (period of notice) before that date you should notify the Deputy Principal Clerk at the Office of Court. The date of service is the date stated at the top of this citation unless service has been by post in which case the date of service is the day after that date.

IF YOU ARE UNCERTAIN ABOUT THE EFFECT OF THIS NOTICE, you should consult a solicitor, Citizens Advice Bureau or other local advice agency or adviser immediately.

(Signed)

Messenger-at Arms
[or Solicitor [or Agent] for pursuer(s)]
(Address)

Form 43.6

Form of timetable order

IN THE COURT OF SESSION

TIMETABLE ORDER

In the cause

[A.B.]

Pursuer

against

[C.D.]

Defender

1. This order has effect as if it were an interlocutor of the court signed by the Lord Ordinary.

2. The diet allocated for the trial of this action will begin on (specify date). Subject to any variation under rule 43.10, this order requires the parties to undertake the conduct of this action within the periods specified in paragraphs 3 to 8 below.

3. Any motion under rule 26.1 (third party notice) shall be made within twenty eight days of the date of this order.

4. Where a party has obtained a commission and diligence for the recovery of documents by virtue of rule 43.4, an order under rule 35.3 shall be served by that party within [twenty eight days] of the date of this order.

5. For the purposes of rule 22.2(1), the adjustment period shall end on a date which shall be the date [eight] weeks after the date of this order. Rule 22.3(1) shall have effect as if the period specified in that rule were two weeks.

6. The pursuer shall lodge a statement of valuation of claim under rule 43.8(2) not later than eight weeks after the date of this order.

7. The defender [and any third party convened in the action] shall lodge a statement of valuation of claim under rule 43.8(2) not later then sixteen weeks after the date of this order.

8. Not later than four weeks before the date on which diet allocated for the trial of this action begins, the parties shall lodge a pre-trial minute under rule 43.9(2).

9. [Should we set out the consequences of failure?]

Form 43.8

Form of Statements of Value of Claim

Head of Claim	Components	Amount claimed
Solatium	Past Future	£x £x
Interest on past solatium	Percentage applied to past solatium (*State percentage rate)*	£x
Past wage loss	Date from which wage loss claimed (.....) Date to which wage loss claimed (.....) Rate of net wage loss (per week, per month or per annum)	£x
Interest on past wage loss	Percentage applied to past wage loss *(State percentage rate)*	£x
Future wage loss	Multiplier (.....) Multiplicand (showing how calculated)	£x
Past services	Date from which services claimed (.....) Date to which services claimed (.....) Nature of services (.....) Person by whom, services provided (.....) Hours per week services	

Head of Claim	Components	Amount claimed
	provided (.....) Net hourly rate claimed (.....) Total amount claimed (.....) Interest	 £x
Future services	Multiplier (.....) Multiplicand (showing how calculated)	£x
Past loss of capacity to provide personal services	Date from which loss of capacity claimed (.....) Date to which loss of capacity claimed (.....) Nature of personal services (.....) Person to whom, services would have been provided (.....) Hours per week services provided (.....) Net hourly rate claimed (.....) Total amount claimed (.....) Interest	£x £x
Future loss of capacity to provide personal services	Multiplier (.....) Multiplicand (showing how calculated)	 £x
Needs and other expenses	One off Multiplier (.....) Multiplicand Interest	£x £x

Form 43.9

Minute of Pre-Trial Meeting

IN THE COURT OF SESSION

Minute of Pre-Trial Meeting

in the cause

[A.B.]

Pursuer

against

[C.D.]

Defender

GH for the Pursuer and

IJ for the Defenders hereby state to the court:–

(1) That the pre-trial meeting was held in this case at [ ] on [ ]

(2) That the following parties were present:–

(State names and designations of persons attending meeting)

(3) That the parties discussed settlement of the action.

(4) That the following questions were addressed:–

		Yes	No
1.	Is the diet of proof or trial still required?		
2.	If the answer to 1 is "yes", does the defender admit liability? (If "no", complete section 2).		
3.	If the answer to question 1 is "yes", is the quantum of damages agreed? (If "no", complete section 3.)		

[To be inserted only if the proof or trial is still required.]

It is estimated that the hearing will last days.

By notice(s) dated [ ], the pursuer called on the defender to make certain admissions.

Those calls, and the defender's responses, are as follows:–

Call	Response	
	Admitted	Denied
1.		
2.		
3.		
4.		

By notice(s) dated [ ], the defender called on the pursuer to make certain admissions.

Those calls, and the pursuer's responses, are as follows:–

Call	Response	
	Admitted	Denied
1.		
2.		
3.		
4.		

Quantum of Damages

Please indicate where agreement has been reached on an element of damages.

Head of Claim	Components	Not Agreed	Agreed
Solatium	Past Future		

Head of Claim	Components	Not Agreed	Agreed A
Interest on past solatium	Percentage applied to past solatium (*State percentage rate)*		
Past wage loss	Date from which wage loss claimed (.....) Date to which wage loss claimed (.....) Rate of net wage loss (per week, per month or per annum)		
Interest on past wage loss	Percentage applied to past wage loss *(State percentage rate)*		
Future wage loss	Multiplier (.....) Multiplicand (showing how calculated)		
Past services	Date from which services claimed (.....) Date to which services claimed (.....) Hours per week services provided (.....) Net hourly rate claimed (.....)		
Interest on past services	Percentage applied to past services (*state percentage rate*)		
Future services	Multiplier (.....) Multiplicand (showing how calculated)		

Head of Claim	Components	Not Agreed	Agreed
Past loss of capacity to provide personal services	Date from which loss of capacity claimed (.....) Date to which loss of capacity claimed (.....) Nature of personal services (.....) Person to whom, services would have been provided (.....) Hours per week services provided (.....) Net hourly rate claimed (.....) Total amount claimed (.....) Interest (*state percentage rate)*		
Future loss of capacity to provide personal services	Multiplier (.....) Multiplicand (showing how calculated)		
Needs and other expenses	One off Multiplier (.....) Multiplicand		
Other heads as appropriate			

IN RESPECT WHEREOF

Signed by counsel/solicitor advocate for each side

Form 43.13-A

Form of conclusion for application for an award of further damages

For payment to the pursuer by the defender of the sum (amount in words and figures) as further damages.

Form 43.32.-B

Form of notice of application for further damages

Date: (date of posting or other method of service)

To: (name and address of persons on whom served)

TAKE NOTICE

(Pursuer's name and address), pursuer, raised an action against (defender's name and address), defender, in the Court of Session.

In the action, [Lord (name)] in the Court of Session on (date) made an award of provisional damages in favour of the pursuer against you [or (party's name)]. [The court specified that the pursuer may apply for an award of further damages at any time before (date).] The pursuer has applied by minute for an award of further damages against you [or (party's name)]. A copy of the minute is [and the summons in the action are] attached. You may lodge answers to the minute within [21] days after the date of service on you of the minute at the Office of Court, Court of Session, 2 Parliament Square, Edinburgh EH1 1RQ. The date of service is the date stated at the top of this notice unless service has been made by post in which case the date of service is the day after that date.

IF YOU ARE UNCERTAIN ABOUT THE EFFECT OF THIS NOTICE, you should consult a solicitor, Citizens Advice Bureau or other local advice agency or adviser immediately.

(Signed)

Messenger-at-Arms
[or Solicitor [or Agent] for pursuer]
(Address)

Form 43.16

Form of notice of intimation to connected person in an action for damages

Date: (date of posting or other method of intimation)

To: (name and address of connected person)

TAKE NOTICE

(Names and addresses of all pursuers) have raised an action against (names and addresses of all defenders) in the Court of Session, Edinburgh. The action relates to the death of (name and last address of deceased) [or the personal injuries from which (name and last address of deceased) died]. You are believed to have a right to sue arising from his [or her] death. If this is the case, you are entitled to be added as an additional pursuer in the action. A copy of the summons in the action is attached.

You may apply to the court to be added as a pursuer after the date of intimation to you of the summons [or if the warrant for intimation is executed at the same time as citation of the defender, within seven days after the date on which the summons calls in the court. The summons will call on (date of calling of the summons)]. The date of intimation is the date stated at the topo of this notice unless intimation has been made by post in which case the date of intimation is the day after that date.

If you do not apply to be added as an additional pursuer and subsequently bring a separate action, under rule 43.20 of the Rules of the Court of Session 1994 you may not be awarded the expenses of that action in the event of your being successful.

[It is proposed to apply to the court for authority to dispense with intimation to the person(s) mentioned in paragraph (number of paragraph) of the statement attached to the summons. The whereabouts of such person(s) are not known. If you know of that person (or any of those persons], you should inform the Deputy Principal Clerk of Session, Court of Session, Parliament Square, Edinburgh EH1 1RQ (Telephone 0131-225-2595)].

IF YOU ARE UNCERTAIN ABOUT THE EFFECT OF THIS NOTICE, you should consult a solicitor, Citizens Advice Bureau or other local advice agency or adviser immediately.

(Signed)

Messenger-at Arms
[or Solicitor [or Agent] for pursuer(s)]
(Address)

Lord President
I.P.D.

Edinburgh
1998

EXPLANATORY NOTE

(This note is not part of the Act of Sederunt)

This Act of Sederunt amends the Rules [.....]

Rule 43.** (1)(a)

Rule 43.** (3)

Rule 43.12(2)