SCOTTISH STATUTORY INSTRUMENTS

2019 No. 404

Act of Sederunt (Rules of the Court of Session 1994 Amendment) (Case Management of Certain Personal Injuries Actions) 2019

Amendment of the Rules of the Court of Session 1994

2.—(1) The Rules of the Court of Session 1994(**1**) are amended in accordance with this paragraph.

(2) For Chapter 42A (case management of certain personal injuries actions)(**2**), substitute—

"CHAPTER 42A

Case management of certain personal injuries actions

Application and interpretation of this Chapter

42A.1.—(1) Subject to paragraph (3), this Chapter applies to actions—

(a) proceeding as ordinary actions by virtue of rule 43.1A (actions based on clinical negligence)(**3**) or rule 43.5 (motions to dispense with timetable)(**4**);

(b) appointed to the procedure in this Chapter under paragraph (2).

(2) The Lord Ordinary may, after considering the likely complexity of an action and being satisfied that the efficient determination of the action would be served by doing so, appoint an action to which Chapter 43 (actions of damages for, or arising from, personal injuries) applies (including actions relating to catastrophic injuries) to the procedure in this Chapter.

(3) Any party to an action may apply by motion to have the action withdrawn from the procedure in this Chapter.

(4) No motion under paragraph (3) is to be granted unless the court is satisfied that there are exceptional reasons for not following the procedure in this Chapter.

(5) In this Chapter—

"personal injuries" and "personal injuries action" have the meanings assigned to them in rule 43.1(2) (interpretation of Chapter 43)(**5**);

"proof" includes jury trial.

(6) Rule 22.3 (closing record)(**6**) does not apply to an action to which this Chapter relates.

(**1**) The Rules of the Court of Session 1994 are in schedule 2 of the Act of Sederunt (Rules of the Court of Session 1994) 1994 (S.I. 1994/1443, last amended by S.S.I. 2019/328).
(**2**) Chapter 42A was inserted by S.S.I. 2013/120 and last amended by S.S.I. 2015/227.
(**3**) Chapter 43 was substituted by S.S.I. 2002/570. Rule 43.1A was inserted by S.S.I. 2007/282 and substituted by S.S.I. 2015/227.
(**4**) Rule 43.5 was amended by S.S.I. 2008/349.
(**5**) Rule 43.1 was last amended by S.S.I. 2011/288.
(**6**) Rule 22.3 was last amended by S.S.I. 2007/7.

Lodging of closed record etc.

42A.2.—(1) The pursuer must, no later than 14 days after the date on which the record is closed—

(a) lodge three copies of the closed record in process;

(b) at the same time, send a copy of the closed record to every other party.

(2) A closed record is to consist of the pleadings of the parties and the interlocutors pronounced in the action.

Debates

42A.3.—(1) Where a party seeks to have the action appointed to debate, then that party must—

(a) on the lodging of the closed record in process, notify the court and the other party, or parties, that an application for a debate is to be made;

(b) make such application to the court, by motion, not more than 1 week from the date on which the closed record is lodged in process.

(2) The application must include—

(a) the legal argument on which any preliminary plea should be sustained or repelled;

(b) the principal authorities (including statutory provisions) on which the argument is founded.

(3) Following application being made to the court under paragraph (1)(b), before determining whether the action should be appointed to debate the Lord Ordinary is to hear from the parties with a view to ascertaining whether agreement can be reached on the points of law in contention.

(4) The Lord Ordinary, having heard the parties, is to determine whether the action should be appointed to debate.

(5) Where the action is appointed to debate, the Lord Ordinary may order that written arguments on any question of law are to be submitted.

(6) Where, following application made to the court under paragraph (1)(b), the court has determined that a hearing of any debate is not required then the time-frames specified in—

(a) rule 42A.4(3);

(b) rule 42A.5(2);

(c) rule 42A.5(3);

(d) rule 42A.5(4);

(e) rule 42A.6(2),

commence from the date on which the court has made such a determination.

(7) Where, following application made to the court under paragraph (1)(b), the cause is appointed to debate and is disposed of by the court, other than by decree of dismissal, then the time-frames specified in—

(a) rule 42A.4(3);

(b) rule 42A.5(2);

(c) rule 42A.5(3);

(d) rule 42A.5(4);

(e) rule 42A.6(2),

commence from the date on which the court disposes of all or any of the preliminary pleas.

Fixing a case management hearing

42A.4.—(1) Subject to paragraph (2), the court must, as soon as practicable after the closed record is lodged in process, fix a date for a case management hearing.

(2) Where a party seeks to have the action appointed to debate, the court must not fix a date for a case management hearing until such time as the court has determined such application and, as the case may be, disposed of the preliminary pleas at debate.

(3) Subject to rule 42A.3(6) and (7), the case management hearing fixed under this rule is to be not less than 16 weeks from the date on which the closed record is lodged in process.

Exchange of information by parties

42A.5.—(1) Where an application for debate has been made in terms of rule 42A.3(1)(b), this rule is subject to rule 42A.3(6) or (7), as the case may be.

(2) The parties must, no later than 3 weeks after the date on which the closed record is lodged in process, exchange—

(a) reports, in draft form, from all skilled persons upon whose evidence the parties anticipate relying in the case;

(b) lists of witnesses (including their addresses and, where known, their occupations), in draft form;

(c) statements of all witnesses, who are named on the lists which are provided under sub-paragraph (b), which are available, and where any statement is not exchanged, an explanation as to why such a statement is not available;

(d) lists, in draft form, showing the discipline or expertise, of the skilled persons whom the parties have either instructed or intend to instruct, as the case may be, other than those already disclosed under sub-paragraph (a).

(3) The parties must, no later than 7 weeks after the date on which the closed record is lodged in process—

(a) exchange statements of the provisional valuation of the claim, in draft form, together with any available vouching;

(b) exchange written statements containing proposals for further procedure for providing the information required by rule 42A.6(2)(a), in draft form;

(c) exchange a note of the issues which are in dispute between the parties, in draft form;

(d) exchange lists, in draft form, of all documentation in the possession of the parties relevant to the issues in dispute and upon which the parties intend to rely, to include—

(i) details of the institutions from which the parties have obtained medical records;

(ii) a note of the pagination of such medical records, and of any other records (such as social security, schools and social work records), including the dates which the records span;

(e) consider whether a meeting between skilled persons would be useful and, if so, at what stage of the action;

(f) make any requests for information to each other, to include—

(i) facilities for precognoscing witnesses;

(ii) statements from witnesses who are listed on the list mentioned in paragraph (2)(b) which have not yet been provided.

(4) The pursuer must, no later than 9 weeks after the date on which the closed record is lodged in process, send to the defender—

(a) a joint minute, in draft form, which includes—

(i) all matters, including matters admitted in the pleadings;

(ii) a glossary of terminology (such as medical or technical terms);

(iii) any heads of damage;

(iv) a chronology of events, as an appendix to the joint minute,

which are either agreed, or are considered by the pursuer capable of being agreed, by the parties;

(b) a paginated joint bundle, in draft form, of—

(i) medical records containing all the records from each institution;

(ii) other records (such as social security, schools and social work records),

in the possession of the pursuer which are relevant to the issues in dispute and upon which the pursuer intends to rely.

(5) The defender must, no later than 3 weeks after the date on which the defender received the draft joint minute and the draft paginated joint bundle of records, return to the pursuer—

(a) the joint minute, either in unamended form or following any revisals having been made to it, as required, by the defender;

(b) the paginated joint bundle of records, following the addition into the bundle of any further records in the possession of the defender,

relevant to the issues in dispute and upon which the defender intends to rely.

(6) Documents, when in draft form—

(a) must not be lodged with the court;

(b) must not be put in evidence at a proof or used in any other way, unless by consent of the parties.

Lodging of statements of proposals and joint minutes

42A.6.—(1) Where an application for debate has been made in terms of rule 42A.3(1)(b), this rule is subject to rule 42A.3(6) or (7), as the case may be.

(2) No later than 14 weeks after the date on which the closed record is lodged in process—

(a) the parties must lodge in process and, at the same time, send to every other party a written statement containing proposals for further procedure, which must include—

(i) the issues for proof;

(ii) a list of the witnesses (including their addresses and, where known, their occupations) who are intended to be called to give evidence, including the matters to which each witness is expected to speak and the time estimated for each witness;

(iii) information as to whether any such witness is considered to be a vulnerable witness within the meaning of section 11(1) of the Vulnerable Witnesses (Scotland) Act 2004 (interpretation of Part 2 of the Act)(**7**) and whether any child witness notice under section 12(2) of that Act (orders authorising the use of special measures for vulnerable witnesses) or any vulnerable witness

(**7**) 2004 asp 3. Section 11(1) was amended by the Victims and Witnesses (Scotland) Act 2014 (asp 1), section 22.

application under section 12(6) of that Act has been, or is to be, lodged in respect of that witness;

(iv) a list of the reports of any skilled persons which have been exchanged;

(v) a list of all relevant documents, including medical records, which have been exchanged;

(vi) a list of the witness statements which have been exchanged, and a note of any further witness statements which have not yet been exchanged but are anticipated;

(vii) the time estimated for proof and how that estimate was arrived at;

(viii) information as to whether any other progress that has been made, is to be made, or could be made in advance of the proof;

(ix) information as to whether an application has been or is to be made under rule 37.1 (applications for jury trial);

(b) the pursuer must, after liaising with the defender, lodge in process and, at the same time, send to every other party a signed joint minute setting out the matters which have been agreed between the parties;

(c) where there are matters relevant to the issues in dispute which are not included in the joint minute lodged under sub-paragraph (b), then the parties must lodge in process and, at the same time, send to every other party a written statement explaining why such matters have not been agreed by the parties.

Case management hearing

42A.7.—(1) At the case management hearing, after considering the written statements lodged by the parties under rule 42A.6(2)(a), the Lord Ordinary is to determine whether the action should be sent to proof on the whole or any part of the action.

(2) Before making a determination under paragraph (1), the Lord Ordinary is to—

(a) hear from the parties, with a view to ascertaining—

(i) the matters in dispute between the parties;

(ii) the readiness of the parties to proceed to proof;

(b) without prejudice to the generality of sub-paragraph (a), hear from the parties with a view to ascertaining—

(i) whether reports, in draft form, of skilled persons have been exchanged;

(ii) the nature and extent of the dispute between skilled persons;

(iii) whether there are any facts that have been agreed between the parties, upon which skilled persons can comment;

(iv) the extent to which agreement can be reached between the parties on the relevant literature upon which skilled persons intend to rely;

(v) whether there has been a meeting between skilled persons, or whether such a meeting would be useful and, if so, at what stage of the action;

(vi) where a meeting between skilled persons has taken place, the form of the report which is to be produced following that meeting;

(vii) whether a proof on a particular issue would allow scope for the matter to be resolved;

(viii) whether all witness statements have been exchanged;

(ix) whether any party is experiencing difficulties in obtaining precognition facilities;

(x) whether all relevant records have been recovered and whether there is an agreed bundle of records;

(xi) whether there is a relevant case that is supported by evidence of skilled persons;

(xii) if there is no evidence of skilled persons to support a relevant case, whether such evidence is necessary;

(xiii) whether there is a relevant defence to any or all of the case supported by evidence of skilled persons;

(xiv) if there is no evidence of skilled persons to support a relevant defence, whether such evidence is necessary;

(xv) whether causation of some or all of the injuries is the main area of dispute and, if so, the position of the respective skilled persons;

(xvi) if, following the exchange of valuations, in draft form, a significant disparity is shown, whether the parties should be asked to provide an explanation for such disparity;

(xvii) whether a further joint minute, other than the joint minute provided for in rule 42A.6(2)(b), has been considered;

(xviii) whether any of the heads of damage can be agreed;

(ixx) whether any orders would facilitate the resolution of the case or the narrowing of the scope of the dispute;

(xx) whether a pre-trial meeting should be fixed;

(xxi) whether amendment, other than updating, is anticipated;

(xxii) the time required for proof.

(3) Where the action is sent to proof, the Lord Ordinary must—

(a) fix a date for the hearing of the proof;

(b) fix a pre-proof timetable in accordance with rule 42A.8.

(4) The Lord Ordinary may fix a further case management hearing—

(a) on the motion of any party;

(b) at the Lord Ordinary's own instance.

Pre-proof timetable

42A.8.—(1) Subject to paragraph (4), the pre-proof timetable mentioned in rule 42A.7(3)(b) must contain provision for the following—

(a) no later than 6 months before the proof—

(i) a date for a further case management hearing;

(ii) the last date for the lodging of—

(aa) a valuation;

(ab) vouchings, with the exception of those records which are included, or are to be included, in the joint bundle of productions,

by the pursuer;

(b) no later than 5 months before the proof, the last date for the lodging of—

(i) a valuation;

(ii) vouchings, with the exception of those records which are included, or are to be included, in the joint bundle of productions,

by the defender;

(c) no later than 4 months before the proof, the last date for the lodging of—

(i) witness lists;

(ii) productions, including a paginated joint bundle of productions, and a list of the contents of the paginated joint bundle of productions, in final form;

(iii) a core bundle of productions, and list of productions that comprise the core bundle of productions,

by the parties;

(d) no later than 3 months before the proof, the last date for the pre-trial meeting;

(e) no later than 2 months before the proof, a date for a further case management hearing.

(2) Rule 43.10(1), (2)(b) and (5) (pre-trial meetings)(**8**) applies to a pre-trial meeting held under this Chapter as it applies to a pre-trial meeting held under Chapter 43 (actions of damages for, or arising from, personal injuries).

(3) Prior to the case management hearing mentioned in paragraph (1)(e)—

(a) the pursuer must lodge in process a joint minute of the pre-trial meeting in Form 43.10 (minute of pre-trial meeting)(**9**);

(b) the parties must lodge in process any other joint minutes.

(4) At any time the Lord Ordinary may, at the Lord Ordinary's own instance or on the motion of a party—

(a) fix a further case management hearing;

(b) vary the pre-proof timetable,

where the Lord Ordinary considers that the efficient determination of the action would be served by doing so.

Non-compliance by parties in the exchange of information

42A.9. Where a party fails to comply with a requirement provided by any of the following rules—

(a) 42A.5(2);

(b) 42A.5(3)(a) to (d),

then that party may, on the motion of any other party, be ordained to appear before the court to provide an explanation as to why they failed to comply, and the court has the power to make any such order as appears appropriate in the circumstances.

Power to make orders

42A.10.—(1) Following the fixing of a case management hearing under rule 42A.7(4) or 42A.8(4)(a), or the variation of the pre-proof timetable under rule 42A.8(4)(b), the Lord Ordinary may make such orders as the Lord Ordinary thinks necessary to secure the efficient determination of the action.

(**8**) Chapter 43 was substituted by S.S.I. 2002/570. Rule 43.10 was substituted by S.S.I. 2015/227.
(**9**) Form 43.10 was inserted by S.S.I. 2002/570 and last amended by S.S.I. 2015/227.

(2) In particular, the Lord Ordinary may make orders to resolve any matters arising or outstanding from the written statements lodged by parties under rule 42A.6(2)(a) or the pre-proof timetable fixed under rule 42A.7(3)(b).".