
SCOTTISH STATUTORY INSTRUMENTS

2015 No. 227

**Act of Sederunt (Rules of the Court of Session
1994 and Sheriff Court Rules Amendment)
(No. 2) (Personal Injury and Remits) 2015**

Amendment of the Rules of the Court of Session 1994: personal injury

- 6.—(1) The Rules of the Court of Session 1994⁽¹⁾ are amended in accordance with this paragraph.
- (2) In Chapter 42A (case management of certain personal injuries actions)⁽²⁾ —
- (a) in rule 42A.1(2) (application and interpretation of Chapter 42A)⁽³⁾, omit “speedy and”;
 - (b) for rule 42A.3 (lodging of closed record etc.)⁽⁴⁾, substitute—

“Lodging of closed record etc.

42A.3.—(1) The pursuer must, no later than 7 days before the hearing on the By Order (Adjustment) Roll—

- (a) send a copy of the closed record to the defender and to every other party; and
- (b) lodge three copies of the closed record in process.

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

(3) At the same time as lodging the record each party must lodge in process and send to every other party a written statement containing proposals for further procedure which must state—

- (a) whether the party is seeking to have the action appointed to debate or to have the action sent to proof;
- (b) where it is sought to have the action appointed to debate—
 - (i) the legal argument on which any preliminary plea should be sustained or repelled; and
 - (ii) the principal authorities (including statutory provisions) on which the argument is founded;
- (c) where it is sought to have the action appointed to proof—
 - (i) the issues for proof;
 - (ii) the names, occupations (where known) and addresses of the witnesses 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;

(1) The Rules of the Court of Session 1994 are in Schedule 2 to the Act of Sederunt (Rules of the Court of Session 1994) 1994 (S.I. 1994/1443, last amended by S.S.I. 2015/119).

(2) Chapter 42A was inserted by S.S.I. 2013/120.

(3) Rule 42A.1 was inserted by S.S.I. 2013/120.

(4) Rule 42A.3 was inserted by S.S.I. 2013/120.

- (iii) 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 and whether any child witness notice under section 12(2) of that Act or any vulnerable witness application under section 12(6) of that Act has been, or is to be, lodged in respect of that witness;
 - (iv) the progress made in preparing and exchanging the reports of any skilled persons;
 - (v) the progress made in obtaining and exchanging records, particularly medical records;
 - (vi) the progress made in taking and exchanging witness statements;
 - (vii) the time estimated for proof and how that estimate was arrived at;
 - (viii) any other progress that has been made, is to be made, or could be made in advance of the proof;
 - (ix) whether an application has been or is to be made under rule 37.1 (applications for jury trial).”;
- (c) for rule 42A.4 (hearing on the By Order (Adjustment) Roll)(5), substitute—

“Hearing on the By Order (Adjustment) Roll

42A.4.—(1) At the hearing on the By Order (Adjustment) Roll the Lord Ordinary, after considering the written statements lodged by the parties under rule 42A.3(3) and hearing from the parties, is to determine whether the action should be appointed to debate or sent to proof on the whole or any part of the action.

(2) 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.

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

(4) Before determining whether the action should be sent to proof, the Lord Ordinary is to hear from parties with a view to ascertaining—

- (a) the matters in dispute between the parties;
- (b) the readiness of parties to proceed to proof; and
- (c) without prejudice to the generality of subparagraphs (a) and (b)—
 - (i) whether reports of skilled persons have been exchanged;
 - (ii) the nature and extent of the dispute between skilled persons;
 - (iii) whether there are facts that can be agreed between 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;
 - (vi) whether a proof on a particular issue would allow scope for the matter to be resolved;
 - (vii) whether witness statements have been exchanged;

- (viii) whether any party is experiencing difficulties in obtaining precognition facilities;
 - (ix) whether all relevant records have been recovered and whether there is an agreed bundle of medical records;
 - (x) whether there is a relevant case that is supported by evidence of skilled persons;
 - (xi) if there is no evidence of skilled persons to support a relevant case, whether such evidence is necessary;
 - (xii) whether there is a relevant defence to any or all of the cases supported by evidence of skilled persons;
 - (xiii) if there is no evidence of skilled persons to support a relevant defence, whether such evidence is necessary;
 - (xiv) whether causation of some or all of the injuries is the main area of dispute and, if so, what the position of the respective skilled persons is;
 - (xv) whether valuations have been, or could be, exchanged;
 - (xvi) if valuations have been exchanged showing a significant disparity, whether parties should be asked to provide an explanation for such disparity;
 - (xvii) whether a joint minute 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; and
 - (xxii) the time required for proof.
- (5) 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.5.
- (6) The Lord Ordinary may fix a further hearing on the By Order (Adjustment) Roll—
- (a) on the motion of any party;
 - (b) on the Lord Ordinary’s own initiative.
- (7) A further hearing under paragraph (6) may be fixed—
- (a) at the hearing on the By Order (Adjustment) Roll or at any time thereafter;
 - (b) whether or not the action has been appointed to debate or sent to proof.”;
- (d) in rule 42A.5 (pre-proof timetable)(6)—
- (i) in paragraph (1), for “rule 42A.4(4)(b)”, substitute “rule 42A.4(5)(b)”;
 - (ii) for paragraph (2), substitute—
“(2) Rule 43.10(1), (2)(b) and (5) applies to a pre-trial meeting held under this Chapter as it applies to a pre-trial meeting held under Chapter 43.”;
 - (iii) in paragraph (4), omit the words “speedy and”;
- (e) after rule 42A.5 (pre-proof timetable)(7), insert—

(6) Rule 42A.5 was inserted by S.S.I. 2013/120.

(7) Rule 42A.5 was inserted by S.S.I. 2013/120.

“Power to make orders

42A.6.—(1) Following the fixing of a hearing under rule 42A.4(6) or 42A.5(4)(a), or the variation of the pre-proof timetable under rule 42A.5(4)(b), the Lord Ordinary may make such orders as the Lord Ordinary thinks necessary to secure the efficient determination of the action.

(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.3(3) or the pre-proof timetable fixed under rule 42A.4(5)(b).”

- (3) In Chapter 43 (actions of damages for, or arising from, personal injuries)(**8**)—
 (a) for rule 43.1A (actions based on clinical negligence)(**9**), substitute—

“Actions based on clinical negligence

43.1A.—(1) This rule applies to a personal injuries action based on alleged clinical negligence.

(2) Where a pursuer intends to make an application under paragraph (3) to raise the action as an ordinary action, the pursuer must—

- (a) present the summons for signeting in Form 13.2–A (form of summons and backing);
 (b) include in the summons a draft interlocutor in Form 43.1A (form of draft interlocutor granting authority to raise action based on clinical negligence as an ordinary action).

(3) At the same time as a summons which includes a draft interlocutor in Form 43.1A is presented for signeting, the pursuer must apply by motion for authority to raise the action as an ordinary action.

(4) On the making of a motion under paragraph (3), the summons will be placed before a Lord Ordinary in chambers and in the absence of the parties for consideration.

(5) On consideration of the summons, the Lord Ordinary may—

- (a) after considering the likely complexity of the action and being satisfied that the efficient determination of the action would be served by doing so, grant authority for the cause to proceed as an ordinary action by signing the draft interlocutor in the summons; or
 (b) fix a hearing;

(6) The Keeper of the Rolls must notify the parties of the date and time of any hearing under paragraph (5)(b).

(7) At a hearing under paragraph (5)(b), the Lord Ordinary may—

- (a) refuse the application; or
 (b) after considering the likely complexity of the action and being satisfied that the efficient determination of the action would be served by doing so, grant authority for the cause to proceed as an ordinary action by signing the draft interlocutor in the summons.

(8) Where the Lord Ordinary grants an application under paragraph (3) in respect of a summons—

(8) Chapter 43 was substituted by [S.S.I. 2002/570](#) and last amended by [S.S.I. 2014/152](#).

(9) Rule 43.1A was inserted by [S.S.I. 2007/282](#) and amended by [S.S.I. 2012/126](#).

- (a) this Chapter does not apply to a cause commenced by that summons; but
- (b) the following rules apply despite subparagraph (a)—
 - (i) rule 43.11 (applications for interim payments of damages);
 - (ii) rule 43.12 (adjustment on final decree);
 - (iii) rule 43.13 (applications for further damages).

(9) In this rule—

“clinical negligence” means a breach of duty of care by a health care professional in connection with that person’s diagnosis or the care and treatment of any person, by act or omission, while the health care professional was acting in a professional capacity; and

“health care professional” includes—

- (a) a registered medical practitioner;
- (b) a registered nurse; or
- (c) any other member of a profession regulated by a body mentioned in section 25(3) (the Professional Standards Authority for Health and Social Care) of the National Health Service Reform and Health Care Professions Act 2002.”;

(b) for rule 43.10 (pre-trial meetings)(10) substitute—

“Pre-trial meetings

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

- (a) discuss settlement of the action; and
- (b) agree, so far as is possible, the matters which are not in dispute between them.

(2) A pre-trial meeting must—

- (a) be held not later than four weeks before the date assigned for the proof or trial; and
- (b) be attended by parties—
 - (i) in person; or
 - (ii) by means of video-conference facilities.

(3) A joint minute of a pre-trial meeting, made in Form 43.10 (minute of pre-trial meeting)(11), must be lodged in process by the pursuer not later than three weeks before the date for the proof or trial.

(4) Where a joint minute in Form 43.10 has not been lodged in accordance with paragraph (3) and by the date specified in the timetable, the Keeper of the Rolls must put the case out to be heard on the By Order roll.

(5) If a party is not in attendance during the pre-trial meeting, the representative of such party must have access to the party or another person who has authority to commit the party in settlement of the action.”.

(4) In the Appendix—

(10) Rule 43.10 was substituted by [S.S.I. 2002/570](#).

(11) Form 43.10 was inserted by [S.S.I. 2002/570](#) and amended by [S.S.I. 2007/282](#).

Status: This is the original version (as it was originally made). This item of legislation is currently only available in its original format.

- (a) for Form 43.1A (form of draft interlocutor granting authority to raise action based on clinical negligence as an ordinary action)(**12**) substitute Form 43.1A set out in Schedule 1 to this Act of Sederunt;
- (b) in Form 43.10 (minute of pre-trial meeting)(**13**)—
 - (i) for “(1) That the pre-trial meeting was held in this case at [] on []”, substitute “(1) That the pre-trial meeting was held in this case at (*place*) [*or* by video-conference] on (*date*)”;
 - (ii) in Section 2, for “If the estimate is more or less than the 4 days”, substitute “If the estimate differs from the number of days previously allocated for the proof or trial”.

(**12**) Form 43.1A was inserted by [S.S.I. 2007/282](#).

(**13**) Form 43.10 was inserted by [S.S.I. 2002/570](#) and amended by [S.S.I. 2007/282](#).