PERSONAL INJURIES USER GROUP NEWSLETTER
December 2015

Introduction

It has been some time since the last PIUG newsletter in June 2011 and there have been significant developments, particularly the introduction of Chapter 42A on 1 May 2013. The new procedure was introduced following upon the recommendations of the PIUG who were responsible for the proposals and who continue to make recommendations about the content of Practice Notes for the operation of Chapters 42A and 43.

We thought it might be helpful to provide practitioners with an update about certain aspects of the operation of Chapter 43, of current practice within the context of Chapter 42A and to offer some views about current issues which have been raised with the Group. We also provide an update on Personal Injury ('PI') cases generally.

The number of PI cases raised in the Court of Session remains high at this stage. For the quarter to 30 September 2015 the figure was 1106 with PI cases accounting for 76% of all processes (including Appeals, Family and Ordinary Actions) registered during that period. Of these PI actions, 34.8% were accidents at work, 22.2% were RTA and 9.4% clinical negligence. In the years since 2007 the number of PI cases lodged each year has gradually increased overall. The current monthly average has risen from 207 to 296. Due to the anticipated implementation of the Courts Reform (Scotland) Act 2014 there was a sharp increase in the number of PI cases raised during September 2015. It is anticipated that there will be a reduction in the number of PI actions raised in the Court of Session from September 2015 and the Group will continue to monitor these statistics.

In August 2010 proof allocation was increased to 85 PI proofs per week in light of the high settlement rate which was being achieved. This reduced the waiting time for proofs. The current waiting time for new proofs of 4 days is 7 months. The waiting period for longer proofs is well over 12 months. The Group is monitoring the waiting periods for the longer proofs. The number of Jury Trials fixed per week was also increased from 4 to 5 per week. In the period from 1 January 2010 to 30 September 2015, 831 Jury Trials were fixed and 18 were

run. There has, however, been a decrease in the demand for Jury Trials. Fewer cases are being fixed each week meaning that Jury Trials are being fixed with earlier diets.

Chapter 43

The attention of practitioners is drawn to Practice Note 4. of 2015 which deals with issues such as variation of the timetable, the implications of the amendment of R.C 43.8 in the context of the views expressed in *Smith v Greater Glasgow and Clyde NHS Board* [2013]CSOH 178 and the proper approach to statements of valuations and pre trial meetings. The Inner House decision of *Moran v Fressyinet Ltd* 2015 CSIH 76, 2015 S.L.T. 829 confirms that statements of valuations are to be drafted on the hypothesis that the causation of the pursuer's loss injury and damage is established. It also makes it clear that a casual approach to the provisions of Chapter 43 can have serious consequences.

Chapter 42A

As at 30 September 2015 there were 496 PI cases proceeding under Chapter 42A with 39 cases having been transferred during the period 1 July 2015 to 30 September 2015. Practice Notes in respect of the procedure have been issued. Practice Note 4 of 2015 has now replaced Practice Note 2 of 2014 (which had replaced Practice Note 1 of 2013) but Practice Note 2 of 2003 remains in force.

Reports to the PIUG about the use of the Chapter 42A have been positive with practitioners reporting effective use of the court procedure by both parties; issues have been narrowed, proofs restricted and in some cases early resolution has been achieved.

One of the most significant features of the Chapter 42A procedure is the early disclosure of material by parties. Access to witness evidence is essential as this often informs expert opinion. In this context the PIUG have been asked to consider a number of issues arising out of precognitions and witness statements.

The position about witness statements was clarified in Practice Note No. 2 of 2014. Paragraph 8 (now paragraph 10 of Practice No. 4 of 2015) makes it clear that they are expected to contain clear and concise factual accounts that convey the evidence of the witness. It is envisaged that practitioners

will ensure that the full evidence of the witness is disclosed – failure on the part of the witness to disclose relevant matters will expose the witness to the potential of an adverse finding regarding credibility or reliability. Witnesses should be aware that they will be asked to adopt the written statement as their evidence. Practitioners may wish to consider having the witness statement signed by the witness.

The position about precognitions is that this is regarded as separate from the written statement and that parties should still be given the opportunity to precognose witnesses notwithstanding the production of a written statement. It is envisaged that the taking of precognitions will be facilitated by those who have access to witnesses and that the Court will expect to be addressed regarding any difficulties encountered in obtaining access to witnesses. Practitioners are expected to encourage witnesses to make themselves available for precognition and are not to place restrictions which impede access to the relevant information required from the witness. It is expected that parties will disclose the contact details of witnesses to enable precognitions to be taken from them and those contact details may include details such as email and Skype addresses.

One particular issue regarding medical witnesses has been brought to the Group's attention. This relates to the contact by defenders with the pursuer's treating physician without the prior consent of the pursuer. There have been instances of the treating physician being approached for a report without the knowledge of the pursuer. The pursuer is then prevented from speaking to the practitioner. Having discussed the matter at their meeting on 5 May 2015, the Group is of the view that this practice should stop. The pursuer should produce a factual report from the treating physician. If the defender wishes to explore further matters then permission should be requested from the pursuer for an approach to be made to that witness for that purpose and, if unreasonably withheld, the defender can raise this with the Court. Pursuers' practitioners may wish at the outset to advise all of a pursuer's treating doctors that, for the avoidance of doubt, the pursuer does not consent to the waiving of confidentiality and any request from anyone for

information should be directed to the pursuer's agent in the first instance.

The Group would remind practitioners of the benefits of utilising affidavit evidence. This can be a very efficient way of taking non-controversial evidence. It can also replace the evidence in chief of a witness.

Joint meetings of experts

The PIUG has considered various issues in relation to the meeting of experts in the context of complex personal injury litigation, which is of particular relevance to clinical negligence actions. Such meetings include meetings between experts of different specialities on the same side of a case and also meetings of experts on opposing sides who are of the same speciality. The Group agreed that there is no reason in principle why such meetings cannot be held; in appropriate circumstances they are extremely beneficial and can clarify and focus issues. However, each case will very much depend on its own facts and circumstances. It will be a matter for practitioners to decide whether a meeting would be appropriate. In relation to a meeting of opposing experts, which both sides are agreed should take place, it will be a matter for practitioners to determine the precise format and remit for the meeting. However, it is expected that practitioners will agree an agenda in advance and keep a written record of the discussion and any agreement. There is not thought to be a need for a formal report, unless the parties consider it to be appropriate in the particular circumstances of case. The Group considered that solicitors may wish to consider attending such meetings personally but that it is probably not appropriate or necessary for an 'independent' person to be present. The Group also considered whether, in the absence of agreement, the Court could order the meeting of experts. It was agreed that the terms of Rules 42A.4 and 42.A.6 would allow such an order to be made on the motion of a party. It would be entirely a matter for the Court to determine in an individual case as to whether a meeting was appropriate and would serve the efficient determination of the action.

Recovery of documents furth of the jurisdiction

A significant issue for agents has arisen as a result of the difficulty in obtaining

documentation furth of the jurisdiction of Scottish Courts, and in particular from havers in England. A Scottish Judge cannot grant a specification for recovery of documents outwith Scotland, which leaves the only way of recovery through the Courts as being by letters of request. This procedure is cumbersome, expensive and lengthy; as a consequence it is rarely used in practice. A pursuer can seek recovery of records under mandate and can also proceed by way of a data subject request. However, these options are not available automatically to a defender. The Group has given considerable thought to this issue but no alternative procedure has been identified. Practitioners are accordingly encouraged strongly to co-operate in relation to recovery of documents furth of Scotland, in particular in England and Wales. It is expected that pursuers' solicitors would co-operate with reasonable requests for recovery and facilitate the provision of a signed mandate to defenders. If such co-operation were not forthcoming, it would be open to a defender to ask the Court to sist the action.

Edinburgh Sheriff Court and the All Scotland Personal Injury Court

Practitioners will be aware that an Edinburgh Sheriff Court PIUG was set up under the chair of Sheriff Kathrine Mackie. The Court of Session PIUG has been liaising with Sheriff Mackie and with Sheriff Mackenzie at Glasgow. Information has been exchanged with a view to achieving consistency of practice across the jurisdictions. This has been particularly important in light of the launch of the All-Scotland Sheriff Personal Injury Court ('The Sheriff Personal Injury Court') on 22 September 2015 and the extension of the exclusive competence of all Sheriff Courts to actions with a value of up to and including £100,000. This will see an increase in the number of PI actions raised in the Sheriff Court and in particular, of course, the operation of the Sheriff Personal Injury Court. The Group will continue to monitor the impact of this on the level of PI cases in the Court of Session. The Group is keen to see the success of Chapters 42A and 43 replicated in Sheriff Court PI actions; the high settlement rate achieved in the Court of Session has been due in no small part to proper adherence to the rules and procedures in these chapters.

The PIUG is active in overseeing and improving the efficiency of all PI actions

in the Court of Session. If there are any matters relating to personal injury practice to which you would like to draw to the Group's attention please contact a member of the Group. Lord Armstrong has been appointed recently as Chair. The Membership of the Group is as follows: -

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