

Chapter 15

SMALL CLAIMS AND SUMMARY CAUSES

15.01 For personal injury claims, the jurisdiction level for summary causes is actions not exceeding the value of £1,500, exclusive of interest and expenses.¹ “Small claims” are a category of summary cause,² and in relation to personal injury claims describe actions for payment up to the value of £750, exclusive of interest and expenses.³ This chapter is written against the background of an anticipated increase in the privative jurisdiction level for summary cause cases. It may be that all personal injury actions up to £3,000 or possibly £5,000 (excluding interest) will be treated as summary causes. It is likely that personal injury actions will be excluded from small claims procedure. Consequently this chapter does not deal with it. In the interim, practitioners are referred to the terms of the Act of Sederunt (Small Claims Rules) 2002.

Choice of forum — Ordinary Action or Summary Cause?

15.02 It is increasingly important for agents to pick the proper forum from the start. Even although the new summary cause fees provide a reward for work properly carried out, there are significantly greater outlays involved with an ordinary cause action. There is no point in raising a case as an ordinary action if you are going to be stuck at the end of it with summary cause expenses, and are unable to recover motion dues, record dues, proof fixing dues and shorthand writer costs. The rule as to scale of expenses is that the level is decided by the sum eventually decerned for unless the court otherwise directs (General Regulation 2). This means the amount contained in the court decree and not the sum sued for. If no sum is decerned for (*e.g.* the defenders are successful) then an action raised as an ordinary cause will be taxed on the ordinary scale. This causes no difficulty in debt actions for a crystallised sum. You simply choose the appropriate forum. What about personal injury cases where differing views on damages for solatium, or a finding of contributory negligence, might well pull a claim below the ordinary cause level?

Level of expenses

15.03 This paragraph deals with cases which have been raised as ordinary actions but which settled for sums below the summary cause jurisdiction level.

The leading case in this area is *Coyle v William Fairey Ltd*,⁴ an action of damages raised in the Court of Session which sought payment of £10,000 and was settled in the sum of £1,000. At that time this was within the summary cause level. The defenders contended that expenses should be awarded on the summary cause scale. The Lord Ordinary stated that because the value of the case was within the summary cause scale, the action should have been raised in the sheriff court. He awarded expenses on the summary cause scale without certification of counsel. The Inner House overturned this decision. The proper approach for the court was to consider whether the initial choice of forum was justified in all the circumstances of the case at the time the action was raised. The pursuer had settled for £1,000, and it might readily be accepted that the settlement must have made some allowance for risk of failure on the merits or a finding of contributory negligence. Whilst the amount of settlement was a relevant factor, it was not determinative. In the event, having regard to the possible value of the case, the court awarded the expenses on the Sheriff Court ordinary cause scale with sanction for counsel.⁵ The courts cannot award more than you ask for. *Macphail* (2nd ed.) at p.639 states that the sheriff should consider two questions:

1. Was the pursuer entitled to raise the action as an ordinary cause in the first instance? And if so,
2. Should the pursuer in the course of the action have taken steps to have it remitted to the summary cause roll?

Mechanics of settlement

15.04 The other important point relates to settlement of these cases. In most circumstances cases will settle either by means of agreement between agents, or by way of tender and minute of acceptance of tender. The language of the General Regulations has the effect that where the sum decerned for is within the summary cause limit, summary cause expenses only will be awarded, in the absence of argument to the contrary. Practitioners should be careful not to forfeit

¹ Sheriff Courts (Scotland) Act 1971, s.35.

² *ibid.*, s.35(3).

³ Small Claims (Scotland) Order 1988.

⁴ 1991 S.L.T. 638.

⁵ See also the case of *Sunderland*, 1992 S.L.T. 1146 and the decision of Sheriff Principal McLeod in *Durham v Gateway Food Market*, 1992 S.L.T. 83, (Sh. Ct).

by default their right to argue the contrary. A competent tender must contain an unrestricted offer of expenses,⁶ and any attempt to restrict expenses, *e.g.* to the Summary Cause scale will make the tender invalid.⁷ This does not mean that you will get ordinary expenses whatever the settlement figure. If the case settles by way of tender and minute of acceptance of tender, the court will make a decerniture which will regulate the scale of expenses unless the sheriff directs otherwise. Where you have raised an ordinary action, and accept a tender for below the summary cause level you will have to persuade the court that ordinary expenses should be awarded. A convenient way of bringing the matter to a head is to add a crave in the minute of acceptance of tender along the lines of:

“and moves the Court to grant expenses on the ordinary scale”.

This will give you the opportunity to make the arguments discussed above.

Extra judicial settlements

15.05 Many cases settle on the basis of negotiation and exchange of cheques. Cases are frequently sisted to enable this to take place, and a joint minute is eventually lodged. A simple practical point is to make sure that there is agreement on the level of expenses, and that cheques for the principal sum and expenses on the ordinary scale are in your hands before the joint minute is lodged. Where the matter of expenses is still outstanding, you should ensure that the motion disposing of the case makes a finding of expenses for your client. The most likely format will be an interlocutor making a finding of absolvitor without any mention of a specific principal sum. Where there is such a mention of principal sum and it is below the ordinary cause level, then expenses will be on the summary cause scale unless the sheriff directs otherwise (*Lothian Hotels v Ferer*⁸). Where no specific sum is mentioned, the account should be taxed on the ordinary cause scale (*Macphail*, paras 14.67 and 19.50). As was stated in the case of *Lothian Hotels*:

“The reasons for settling actions are many. It seems to me wrong in principle that parties winning expenses in settlement should have constantly to look over their shoulders at the risk of having their expenses cut at taxation. The time for the paying party to seek a reduction to Summary Cause rates is in open court when the Joint Minute is before the Court.”

Summary cause actions for personal injuries

15.06 The rules are now contained in the Act of Sederunt (Summary Cause Rules) 2002. There are special rules in Chapter 34 for actions of damages for personal injuries, which are defined as including “any disease or impairment of physical or mental condition”.⁹ Careful stock should be taken of the pleadings position in summary cause personal injury actions. Much of the pleadings are now form based. The form of the claim is set out in r.34.2, and a detailed statement of valuation requires to be lodged at the time of warranting (Form 10c). The response form (10b) if properly completed will elicit much more information than the average record either in the sheriff court or in the Court of Session. What has been abolished is the requirement for line-by-line answers. What has not been abolished is the requirement to give fair notice of issues to be raised either in the statement of claim or in the defence. Existing cases on fair notice may be of some assistance. In particular, see *McInnes v Alginat Industries Ltd*,¹⁰ where a defence was stated “Liability denied. Contributory negligence. Sum sued for excessive.” This did not entitle the defenders to avail themselves of a statutory defence. In *Lochgorm Warehouses v Roy*¹¹ an action of payment which stated “sum sued for is not due and resting owing” did not allow evidence from the defenders on breach of merchantable quality. In *Roofcare Ltd v Gillies*,¹² which was an action for payment for repairs done on property, the defence “work not carried out satisfactorily” gave no notice of specific failures, and the defenders were not allowed to lead evidence on specific defects:

“In my opinion the defender and appellant should have given some general indication on the point or points upon which his attack on workmanship was directed.”

In practical terms a pursuer will not be allowed to prove a statutory case which has not been adverted to in the pleadings, and a defender will not be allowed to produce a factual defence out of the hat unless there is some notice.

⁶ See MacPhail, *Sheriff Court Practice* (2nd ed., W. Green, 2002) para. 14–39.

⁷ See *Bhatia v Tribax Ltd*, 1993 S.L.T. 1201.

⁸ 1981 (Sh. Ct) 52.

⁹ SCR 34.1(1).

¹⁰ 1980 S.L.T. 114, (Sh. Ct).

¹¹ 1981 SLT 45, (Sh. Ct).

¹² 1984 S.L.T. 8, (Sh. Ct).

For an example of the approach taken by the courts to the requirements of fair notice even in a small claims case, see the decision by Sheriff Principal Bowen in the case of *Scott v Chief Constable, Strathclyde Police*.¹³

Increasingly the requirements of fair notice will be met by what is contained in the form, response form, statements of valuation, and the documents and witness lists lodged. It is noteworthy that in the case of *Kendal v Davies*,¹⁴ Lady Paton stated that notice of care costs could come from the written pleadings, but even in a Court of Session action might also come from documents lodged as productions.

Statement of claim—SCR r.34.2

15.07 The Statement of Claim and other forms can be downloaded from the Scottish Courts website. The statement must contain:

- (a) a concise statement of the grounds of action and the facts relied upon;
- (b) date of birth and where applicable NI number of pursuer;
- (c) names of every GP or hospital where the pursuer received treatment for the injuries.

SCR, r.34.2(2)

15.08 There should also be lodged:

- (a) a medical report, or statement that there is no medical report;
- (b) statement of valuation of claim with list of supporting documents in form 10c.

SCR, r.34.2(5) (b)

15.09 The summons may include a specification of documents in terms of form 10e.

Practicalities

15.10 The Summary Cause Rules do not talk of inventories of productions, but rather lists of documents or articles (see Chapter 17). The suggestion would be that the pursuer makes up a sheet known as, *e.g.* “List of Documents for Pursuer as at 1st August 2002”, prior to warranting. The list would at that stage should include the medical report, and the statement of valuation of claim which would be attached. Note that the statement of valuation of claim itself requires a list of supporting documents if applicable, but there should be no need to lodge a separate list. At this stage the actual documents relevant to the statement of valuation do not require to be lodged (other than the medical report). The pursuer will then receive the warranted summons together with the statement of valuation of claim (including list of documents and medical report). In terms of rule 34.2(7) the pursuer must serve a copy of the form 10b, and a copy of the statement of valuation of claim, form 10c, which by definition includes the list of supporting documents. It is clear that the medical report will in every case be a supporting document. Although the rules do not specifically provide for service of the supporting documents on defenders, it is hoped that pursuers will effect this to enable realistic hearings to take place. If this is not done, there would be a basis for a defender seeking continuation of the hearing. It is implicit from the terms of response form 10b that the defender should have all the information required to make a full response at this stage, *e.g.* he has to state whether the medical report is agreed and whether other losses are agreed.

Triennium cases

15.11 There should be no problem obtaining a warrant without a medical report, provided the appropriate statement is made that there are no such medical reports in terms of SCR, r.34.2(2)(a).

Specification of documents—form 10e

15.12 The approved calls relate to medical records, wages details, and the standard accident report form. The specification of documents is to be included in the summons. This means that it should simply be attached to the summons. There is no need for any incidental application. The specification at this stage is restricted to the standard calls. Intimation must be made on the Advocate General or Lord Advocate as appropriate. Service of the summons will of necessity be service of the specification. If the defender, or the Advocate General or Lord Advocate as appropriate, objects to the specification, he must lodge an incidental application on or before the return date, and the specification will be determined at the rule 8.2 hearing (SCR, r.34.4(5)).

The standard specification does not cover documentation in the hands of third party havens, other than medical records, so that where further documentation is sought, a further specification may be lodged in terms of rule 18.1.

If there is no objection to the specification of documents, the sheriff clerk shall grant an order for commission and diligence for recovery of documents. At this stage there is no commissioner appointed.

¹³ 1999 S.L.T. 66, (Sh. Ct).

¹⁴ 2000 Rep. L.R. 126.

What goes to the defender?

- 15.13 1. Form 1, statement of claim form 10a, specification of documents 10e.
2. Blank form of response, form 10b.
3. Statement of valuation of claim with list of documents, form 10c.

It is suggested that supporting documents are sent on service, and returned to the court with the summons if a rule 8 hearing is fixed.

Response from defender—SCR, r.34.3

- 15.14 1. Terms of response form 10b.
2. Lodge counterclaim if appropriate—r.8.1(1)(c) and r.10.1.
3. Invoke third party procedure at this stage if appropriate—see r.11.1(2).

The hearing—SCR r.8.3(2)

15.15 The pursuer must return the summons to the court two days before the calling date. The statement of valuation and supporting medical report are treated as part of the summons and must also be returned together with the specification of documents. The documents in support of the statement of valuation do not require to be lodged in terms of the rules, but as is argued elsewhere you should lodge these to enable a realistic hearing to take place (SCR, r.5.12).

At the hearing,

“The sheriff shall:

- (a) ascertain the factual basis of the action and any defence, and the legal basis on which the action and defence are proceeding and
- (b) seek to negotiate and secure settlement of the action between the parties.”

This does not mean that his role will be restricted to identifying and noting the issues of fact and law on the summons (SCR, r.8.3(3)(a)).

The utility of the hearings will depend very much on the attitude of the agents and the extent to which sheriffs are prepared to take an interventionist role and ask difficult questions. He will require to look at the statement of claim, the supporting documents, and the response form 10(b). His first duty is to seek to negotiate and secure a settlement. Clearly this depends on a meeting of minds, and except as undernoted he cannot force a settlement on unwilling parties.

If he cannot secure settlement, rule 8.3 provides:—

“If the sheriff cannot secure settlement of the action between the parties he shall—

- (a) identify and note on the summons the issues of fact and law which are in dispute.
- (b) note on the summons any facts which are agreed.
- (c) where it appears that the claim as stated or any defence stated in response to is is not soundly based in law in whole or in part, hear parties forthwith on that matter and may grant decree in favour of any party; and
- (d) if satisfied that the claim and any defence have or may have a sound basis in law and that the dispute between the parties depends upon resolution of disputed issues of fact, fix a diet of proof or, alternatively, if satisfied that the claim and any defence have a sound basis in law and that the facts of the case are sufficiently agreed, hear parties forthwith on the merits of the action and may grant decree in whole or in part in favour of any party.”

Whilst it has recently been confirmed that a solicitor has ostensible authority to settle a damages action without his client’s instructions, this is rarely a good policy and to be used only *in extremis*. This means that you should clear in advance an authorised range of settlement, and refuse to settle outwith that range no matter the force of personality on the bench.¹⁵

Rule 8.2(3) enables the sheriff to continue the hearing to another date, and if you think there is a realistic prospect of obtaining instructions to settle, it might be appropriate to ask him to do so.

If there is a genuine issue of fact, it is likely that a proof will be fixed. However, the extent of the powers of an interventionist sheriff is well illustrated in the case of *Alexander Armstrong v Brake Brothers (Frozen Foods) Limited*.¹⁶

¹⁵ *Mowbray v Valentine*, Inner House, Court of Session, June 6, 2003.

¹⁶ A decision of Sheriff Principal Bowen Q.C., January 17, 2003, and reported on the Scottish Court website.

That case involved a claim for whiplash. Liability was admitted. Parties were well apart on quantum at first instance, and the sheriff was unable to secure a settlement in terms of rule 8.2(b). However the sheriff then proceeded to make an award of £150 without hearing evidence. Whilst the sheriff principal increased the award, he upheld the sheriff's approach as this "was a case in which she was entitled in terms of rule 8.3 (2)(d) to 'hear parties forthwith' and to grant decree". The sheriff principal stated:

"The power to take that step is dependent on the sheriff being satisfied that the facts of the case are sufficiently agreed. It is a power which ought to be exercised whenever the facts are readily ascertainable."

You must also be prepared to argue that your case has a sound basis in law. In the case of *Alexander Reid v First Glasgow Limited*, it was held from the agreed facts that the pursuer had no prospect of success. The Sheriff Principal upheld the Sheriff's decision to dismiss the action at the first calling.¹⁷

He continued to the effect that the terms of the medical report were perfectly clear and not in dispute.

The rule 8 hearings if properly conducted, represent an opportunity for the pursuer's agent to flush out the defence at an early stage, and in the absence of a defence to make real procedural progress by knocking out the case on liability and seeking to establish what the actual issues are on quantum. Examples might be where there is a conviction under the Road Traffic, or Health and Safety at Work Acts. You should look in particular at the existing case law on summary decree, and to argue by analogy from the approach there.¹⁸

Timetable after the hearing

- 15.16 1. Where a proof has been fixed the timetable is as contained in rules 8–8.17 (with the necessary modifications) (SCR, r.34.3(2)).
2. **Rule 8.5–list of documents.** Within 28 days after date of fixing a Proof, intimate and lodge a list of documents. The person receiving the list has the right to inspect the documents, but litigation privilege will apply to expert reports unless you waive it. However, see rule 8.7. Expert reports have to be lodged and disclosed not less than 28 days before the diet of proof. If you fail to do so, you may only call an expert witness at the proof on special cause shown (SCR, r.8.7(2)).
3. **Rule 8.6–list of witnesses.** A list of witnesses is to be intimated to every party and lodged with the sheriff clerk within 28 days after fixing proof.
4. **Rule 34.5–statement of valuation of claim.** Statement of valuation of claim to be lodged with sheriff clerk no later than 28 days before proof. This should relate to defenders. The pursuer will have lodged a statement of valuation with the summons.
5. **Rule 17.1–documents and articles.** Documents and articles to be lodged and intimated not later than 14 days before the proof. A copy for the sheriff's has to be provided 48 hours before proof–rule 17.2.
6. **Proof.** There is no shorthand writer required. The rules for the proof are contained in rules 8.13, 8.14 and 8.15. In terms of rule 8.8 it is provided:

"Where possible, the parties shall agree photographs, sketch plans and any statement or document not in dispute."

Miscellaneous procedures

- 15.17 1. *Provisional damages rule 34.2(3).* (See also rule 34.7.)
2. *Claims arising on death intimation.* (See rule 34.6.)
3. *Third party procedure rule 11.1.*
4. *Summary decree rule 12.1.*
5. *Alteration of summons rule 13.1.*
6. *Additional defender rule 14.1.*
7. *Recovery of evidence by way of specification rule 18.1.*
8. *Applications for information under Administration of Justice (Scotland) Act 1972 rule 18.3.*

Expenses

15.18 Expenses are normally to be assessed by the sheriff clerk in accordance with the statutory Table of Fees (rule 23.3). Where judgment has not been reserved, then the assessment on expenses must take place immediately upon the decision being pronounced. In practical terms you must be ready to make up your account there and then. Where the

¹⁷ Unreported, March 4, 2003, summarised in the Civil Practice Bulletin, May 2003.

¹⁸ See previous section on summary decree.

hearing is not held immediately the sheriff clerk shall fix a date, time and place, give 14 days in writing, and the party awarded expenses must lodge an account of expenses at least seven days prior to the date of any hearing fixed (rules 23.3(7) and 23.3(8)).

Appeal

15.19 An appeal is available on a point of law only and must be lodged with the sheriff clerk not later than 14 days after the date of the final decree.

The matter then proceeds by way of stated case (rule 25.1).

See Appendix—flow chart for summary cause actions.