

Procedural Issues in Clinical Negligence Litigation

Euan Mackenzie Q.C.



Structure of talk

- Overview
- Look at three procedural issues in particular:
 - Witness statements
 - Expert witnesses
 - Advance sanction for experts (and Counsel)
- (if time) some other miscellaneous matters
- Conclude – need for “open loop” decision making



Overview

- Chapter 42A (PN 6/2017)
- Aim - to facilitate the efficient determination of actions
- (impliedly) in a way that does justice between the parties



Requires

- Proactive preparation
- Early disclosure of evidence
- A focus on agreeing what can be agreed, with a view to narrowing the issues in dispute
- A measure of pragmatism, cooperation and goodwill on all sides (including the court)



Witness Statements

- Treating clinicians
- Form of statement?
- What if treating clinician refuses?
- Powers of court to compel?
- Query – an area that requires further consideration and guidance to achieve greater consistency?



Expert witnesses

- Aim – to make sure expert is as prepared as possible in order that their opinion will stand up to scrutiny
- Consultations
 - Open Record
 - Closed Record
 - Before joint meeting?



Joint meeting of experts

- Pros and cons
- Aim – to agree and narrow issues
- Agenda
- England
- Evidence of experts at proof?



Advance sanction for experts (and Counsel)

- Act of Sederunt (SSI 75/2019), from 29.4.19
- Advance sanction of experts in RCS Ch42A and OCR Ch36A cases (but not RCS Ch43 or OCR Ch36)
- Advance sanction of Counsel in OCR Ch36A (but not Ch36)
- Retrospective sanction on “cause shown”
- *Davidson v Grampian HB*, L Carmichael, 24.5.19



Miscellaneous

- Hearings
 - By Order (A) Roll, Procedural and Further Procedural Hearings – opportunities for further spec/doc/info etc
- Notices to Admit – agree/narrow dispute
- Productions
 - Paginated and electronic; joint bundle; core bundle (always a need for core bundle?)
- Query – would an agreed Chronology be helpful?



Feedback

- The Scottish Civil Justice Council
 - Personal Injury Committee
 - Sub-group currently considering amendment to RCSCCh42A, PN and OCRCh36A
 - Feedback welcome!
- Court of Session PI User Group
- ASPIC User Group



Conclusion

- The rules work reasonably well but there is always room for improvement and, I suggest, a greater consistency of practice
- There is a need for “open loop” decision-making i.e. with practitioners’ experience of what works and what doesn’t work being fed back into the various working groups and decision-making bodies and I would encourage everyone to do so

Thank you!

