

SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES AND GALLOWAY  
AT HAMILTON

[2023] SC HAM 39

A577/22

JUDGMENT OF SHERIFF J SPEIR

in the cause

ROSE AMZALEG & ANOTHER

Pursuers

against

HASTINGS INSURANCE SERVICES LTD

Defender

**Pursuers: Ince & Co, Edinburgh**  
**Defender: Clyde & Co., Edinburgh**

HAMILTON, 19 October 2023

**Introduction**

[1] The pursuers in this action are sisters. They reside together. On 6 January 2020 the second pursuer was driving a car belonging to the first pursuer. She was involved in an accident with the defender's insured. As a result there was damage to the first pursuer's vehicle and the second pursuer sustained personal injuries. Both claims have been convened in the same ordinary action. That action was raised in December 2022. The first pursuer seeks payment in the sum of £4592.17 together with interest in respect of her pecuniary loss being repair costs to her vehicle and her insurance excess (albeit she also includes a very modest claim for inconvenience). The second defender seeks payment of £7500 together with interest in respect of solatium for her personal injuries. Liability for

the accident is in dispute.

### **The issue**

[2] The issue at debate was the form in which the pursuers have sought to vindicate their respective claims. The defender argued that the pursuers' action was incompetent. That was because in the first place the second pursuer's claim ought to have been brought as a personal injuries action. If that claim were dismissed for want of form, the first pursuer's claim would also require to be dismissed as being below the financial threshold for an ordinary action.

[3] In relation to the first leg of the argument, reference was made to chapter 36 of the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 ("Ordinary Cause Rules"). Ordinary Cause Rule ("OCR") 36.B1 (1) prescribes that subject to OCR 36.C1, the initial writ in a personal injuries action shall be in Form P11. Personal injury actions are subject to a special procedure which is both obligatory and exclusive (*Macphail on Sheriff Court Practice (4th edn.)*, paragraph 24.05). The second pursuer's claim had been brought under the ordinary procedure. It was in the form prescribed by OCR 3.1. It failed to comply with requirements of chapter 36 and as such was incompetent and ought to be dismissed.

[4] On such dismissal the first pursuer's claim was also rendered incompetent and fell to be dismissed. It was for a sum less than £5,000. Pecuniary claims below that threshold required to be brought under the simple procedure: Courts Reform (Scotland) Act 2014, s72 (3) (a). There was no requirement that both claims required to be contained in the one action.

[5] In response it was argued that the pursuers in the present case were bound by the

rule established in the case of *Stevenson v Pontifex & Wood* (1887) 15 R 125 that all the losses arising from one ground of action must be recovered in the one claim. Accordingly, it was submitted, that created a dilemma for the current pursuers standing the different nature of their claims and the threshold for simple procedure. Thus, the second pursuer's claim was above that threshold and the first pursuer's claim did not qualify as a "personal injuries action". As there were clear benefits in terms of expense and certainty in both claims being determined in one litigation the only viable solution was for them to be brought together in an ordinary action.

[6] Alternatively, the pursuers submitted that they should be relieved from any defect in form by the application of the inherent power of the court to cure technical errors. Reference was made to *Macphail, supra*, paragraph 13.53. This could be achieved by the action being remitted to the personal injury action roll and the requisite timetable being issued. The balance of prejudice favoured the pursuers rather than the defender.

[7] In response to this submission, the defender submitted that the court's inherent power to correct a defect in procedure and transfer a case to the correct roll did not apply in the present case. The first pursuer's claim was not one for personal injuries so it could not competently be remitted to chapter 36 procedure and as it was not competent to split up the action and remit each constituent part to the correct form of procedure the only available option was for the action to be dismissed as a whole. Had the second pursuer's action been brought under the correct procedure at the outset then the first pursuer's claim could also have been brought in that action but that opportunity had been lost. Separately, if a remit of both claims was competent the pursuers ought not to be entitled to the discretionary relief having regard to the inconvenience and expense to which the defender

had been put.

### Discussion

[8] The first issue for determination in this matter is whether it is mandatory for all parties having claims arising out of the one incident to bring those in a single action and if not the circumstances in which it is competent and appropriate to do so.

[9] The well-known rule in *Stevenson v Pontifex & Wood, supra* is to be found in the opinion of Lord President Inglis at page 129:

“...a single act amounting to a delict...cannot be made the ground of two or more actions for the purpose of recovering damages arising within different periods but caused by the same act...the whole damage must be recovered in one action, because there is but one action.”

While there are some recognised exceptions to this rule, not least the possibility in modern times of obtaining an award of provisional damages under and in terms of the Administration of Justice Act 1982, it remains generally applicable. The crux of the rule is a prohibition against repeat claims for damages being made arising out of the same delictual act. The defender’s submission misconstrues the rule as requiring different parties who may each have a discrete claim from such an act, in this case a road traffic accident, being bound to bring their claims in the same action. Although long-standing case law and rules of court prescribe that surviving relatives who wish to sue for damages arising from a death should conjoin in one action that does not transcend into a general requirement. Accordingly, I reject the submission made on behalf of the pursuers in this regard and with it the assertion that the second pursuer had no alternative but to raise an ordinary action rather than one under chapter 36. In consequence, the action as currently laid is incompetent for want of form.

[10] Prior to considering the consequences of that determination, and any relief that might be available, it is appropriate to observe that there is no prohibition against two or more pursuers conjoining their claims in one action subject to certain threshold requirements being met. The position is summarised in *Macphail, supra*, paragraph 4.45 as follows:

“An action in which two or more pursuers join is competent provided that two conditions are satisfied: (1) the ground of action by each pursuer must be identical; and (2) there must be no material prejudice to the defender by the pursuers’ combining in one action. The former rule is to be construed strictly”.

In the present case both pursuers claim to have been aggrieved by the same act of the defender and there is no obvious prejudice in both their claims being determined in the same proceedings. Indeed the agent for the defender quite properly conceded that course would have been appropriate had the second pursuer’s claim been made in proper form *ab initio*.

[11] What then are the consequences and potential outcomes where an action is incompetent for want of form? The issue is discussed in *Macphail*, paragraph 13.53:

“There appear to be two views of such a situation. One view is that the action is a total nullity upon which no further procedure can follow. The other, less drastic, view is that the sheriff has an inherent power to transfer the action to the correct roll, which he may exercise where the defender has suffered no prejudice by the error, as where the action has been raised within any statutory time-limit, the nature of the claim and the remedy sought have been made clear to the defender, and the error has been formal rather than substantial or the procedural rule contravened has been directory rather than mandatory. The latter view appears to be supported by the observations (in *Bliersbach v MacEwan* 1959 S.C. 406) that in the circumstances of that case any error in the initiation of the proceedings as a summary application instead of as an ordinary cause could easily have been remedied before the sheriff, who could have transferred the cause to the ordinary roll. The latter view is to be preferred, since it is in accordance with the tendency of modern practice to relieve a party of the consequences of merely technical irregularity.”

[12] For the purposes of the present case I have little reservation in also preferring the

latter view. The error here is not eloquent of the type of radical defect resulting in the action being a fundamental nullity. The present action was raised within the statutory time limits of five and three years applicable to the first and second pursuers' claims, respectively. The second defender's claim ought to have followed the prescribed procedure in chapter 36. The initial writ should have been drafted in accordance with Form P11 rather than Form G1. In practical terms, in the present case, that would have made little substantive difference to the contents of the writ save that the heading would have included the words "Personal Injuries Action". Had that been done it would have no doubt been booked by the sheriff clerk's office as a personal injuries action and the requisite procedure under chapter 36 would have been prescribed and then followed. As was conceded by the defender had that been done at the outset no issue would have been taken with the first pursuer's claim being included within that action. Indeed not to have done so would have resulted in two separate processes where the same issue would have been at stake in relation to liability. Both claims are contingent on liability being established in what is a straightforward road traffic accident dispute. That being so I can see no good reason for now treating the pursuers claims differently at this stage.

[13] In conclusion I consider the interests of justice come down in favour of granting relief to both pursuers and accordingly I shall appoint the action to proceed as a personal injuries action under chapter 36 and direct the sheriff clerk to issue a timetable.

[14] I was not addressed on the question of expenses in the event of the determination I have made and so shall reserve these meantime.