

## Reparation

February 2008

### Jury Trials in Personal Injury Actions

#### Background

In two recent personal injury actions the Outer House of the Court of Session has been asked to decide whether to allow a jury trial. In both cases liability was admitted but quantum remained in dispute. The court was prepared to allow a jury trial in *Smith*, provided the pursuer's pleadings were amended to provide more detail. However, a jury trial was denied in *MacDonald* due to the complexity of the calculations required.

#### The Decisions

##### *Smith*

In *Smith v Hughes & Another* the pursuer was injured in a road traffic accident in 2004 and as a result was unable to return to work as a carer. She sought damages for future wage loss on the basis that she was now unemployed and that but for the accident, she had prospects of further promotion. Her motion to allow a jury trial was opposed on the basis that her very brief pleadings were of doubtful relevance and entirely lacking in specification. The pursuer argued that she had a statutory right to a jury trial unless "special cause" existed.

Lord Brodie was not prepared to allow a jury trial on the pleadings as they stood but found that the deficiencies could be cured by amendment. He accepted the need to avoid a return to over-elaboration of pleadings. However, in his view there remained a need to give fair notice in relation to damages as well as in relation to the merits of the claim.

##### *MacDonald*

*MacDonald v Mallan* also concerned a road traffic accident in 2004. The pursuer was an apprentice joiner who sustained brain injury as a result of the accident. He was no longer capable of full time employment or

fully independent living and sought damages for future wage loss. His motion for trial by jury was opposed due to the complexity of the calculations involved.

Lord Emslie found the case unsuitable for trial by jury and that "special cause" had been shown. He recognised that application of the Ogden Tables was not, of itself, a sufficient reason for denying trial by jury. However, a personal injury action may involve such a degree of complexity that only a proof in front of an experienced judge would be appropriate. A judge would have the benefit of full submissions on both legal and factual issues, including the proper application of different parts of the Ogden Tables. A judge would also be able to derive the fullest possible assistance from the guidance notes in the Tables themselves. He or she could take time to carefully consider all the issues before pronouncing a fully reasoned, and thus reviewable, decision.

By contrast, trial by jury would have none of these advantages. Complex actuarial evidence would be required, which a jury might have difficulty in following. A multiplicity of different calculations would require to be undertaken and Lord Emslie foresaw formidable difficulties in the task of charging the jury.

#### Significance

Jury trials present significant risks for pursuers as well as defenders. Although typically juries are more generous than judges in awarding damages, they often deduct higher amounts for contributory negligence. In addition, some awards by juries for back injuries have been considerably lower than those by judges.

These two recent cases demonstrate that in order to successfully avoid a jury trial, something more than irrelevance and lack of specification will have to be shown. In high value cases where complex actuarial calculations are required, it is possible to argue that there is a special cause which makes proof in front of an experienced judge more appropriate.

This Alert! is correct to the best of our knowledge and belief at the time of going to press. It is however written as a general guide, so it is recommended that specific professional advice is sought before any action is taken. We are required by law to protect personal data.

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