

RULES OF THE SUPREME COURT, 1986

PRACTICE NOTE

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The following Practice Note was filed with the Registrar, as Secretary of the Rules Committee of the Trial Division, and is published consistent with rule 4.04 of the *Rules of the Supreme Court, 1986*.

ASSESSMENT OF DAMAGES FOLLOWING ENTRY OF DEFAULT JUDGMENT

Background:

1. Upon default of filing a Defence and proof of proper service of the claim, Rule 16.01 permits the entry of judgment for unliquidated damages against the defendant with damages to be assessed.
2. Rule 44 governs the practice and procedure respecting assessment of damages upon trial or following a hearing.
3. As a general rule, an assessment of damages will involve proof by way of oral evidence.
4. However, in cases where an insurer has made payments to its insured under Section B, Section D or SEF.44 coverage and is suing the tortfeasor by way of subrogation in the name of the insured and is able to enter default judgment with damages to be assessed, the practice has grown up of permitting the subrogated insured, on application to assess damages under Rule 44, to prove the damages by way of affidavit evidence and third party medical and damage reports. In effect, this process becomes a summary trial under Rule 17A.03(2).
5. Not infrequently, counsel bring applications to assess damages in these circumstances without giving any further notice to the defendant tortfeasor or without providing to the tortfeasor all of the material upon which the applicant intends to rely for the purposes of the assessment.

6. The purpose of this Practice Note is to clarify the requirements that should be satisfied by applications for an assessment of damages, following entry of default judgment, without proof by way of oral evidence.

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7. Counsel are reminded that a precondition for assessment of damages following entry of judgment by default by way of full trial or hearing, is the giving of notice of the assessment to the defendant tortfeasor. Rule 16.07 provides:

Unless the Court otherwise orders or a rule otherwise provides, a defendant who fails to defend or appear on the hearing under an originating document shall not be entitled to receive notice of any subsequent steps taken in the proceeding against the defendant, *other than the assessment of damages when ten days notice thereof by ordinary mail shall be given to the defendant.*

8. Inasmuch as a proceeding to assess damages without oral proof is in effect an application for summary trial, the notice contemplated by Rule 16.07 should involve provision of a copy of the complete application, including the affidavits, reports and other material to be relied on.
9. In the event the defendant cannot be located for the purpose of giving notice, substituted service may be ordered by the court in appropriate cases.
10. On an application to assess damages in a summary manner, the application should include:
 - (a) copies of all invoices and receipts for payment for each item of special damages claimed;
 - (b) in case of a claim for lost wages, proper backup showing the amounts of working time lost and a calculation of the wage loss;
 - (c) medical and other health care reports in support of any claim for general or non-pecuniary damages;
 - (d) details of the payouts, if any, made by the insurer under the section B, Section D or SEF.44 coverage;
 - (e) summaries of applicable case law supporting the levels of non-pecuniary damages claimed;
 - (f) a summary of each category of claim made, explaining the total amount for which judgment is sought to be entered.
11. Counsel should come to court prepared to speak to the justification for each of the items making up the subrogated claim.

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