Scottish Civil Justice Council
Modes of Attendance at Court Hearings
A response by the Association of Personal Injury Lawyers
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apil

Introduction

1. APIL welcomes the opportunity to respond to the Scottish Civil Justice Council's consultation on draft rules on the mode of attendance for hearings. We support the greater use of technology and remote hearings for procedural matters, and welcome the efficiency that this has brought. The default position in relation to proofs should be that they take place face to face, unless the parties agree to depart from this position, or the court on careful consideration of a range of factors decides that a remote hearing is appropriate. This default position should be restored as a matter of urgency, and should be made clear in the rules drafted by the Scottish Civil Justice Council.

General comments

2. In many ways, the increased use of technology brought about by the pandemic has improved the civil justice process. We welcome the efficiency provided by remote hearings for procedural matters, and the flexibility provided by the ability to sign and send documents electronically. In matters relating to proof, however, there is no suitable substitute for a face-to-face hearing. The default position for all proofs should be a face-to-face hearing, and this should be restored as quickly as possible. Our members, like the rest of the legal profession in Scotland, now have a wealth of experience in remote hearings as a result of the Covid-19 pandemic, and building on that experience, we believe that remote hearings as a default mode of attendance for proofs are not appropriate.

3. In personal injury cases in both the Court of Session, and the All-Scotland Sheriff Personal Injury Court, sections 9 and 11 of the Court of Session Act 1988, and sections 41 and 63 of the Courts Reform (Scotland) Act 2014 provide that a pursuer has a right to have his or her case heard by a civil jury. While we appreciate temporary measures have been adopted to allow civil jury trials to proceed remotely, and indeed the draft rules do allow these to take place in person, the rules should allow all evidential hearings whether by trial or by proof, to take place in person.

4. While we maintain that proofs should be heard in person as a default, there of course may remain some instances where the parties may agree that hearing some evidence remotely would be the best option. We also accept that the use of remote hearings in general is likely to become a mainstay of the justice system going forward. There are a number of general issues, therefore, that would need to be considered and addressed before any moves to make remote hearings more permanent, are rolled out.

5. Further, before remote hearings are made a more permanent fixture of the court system, there must be data collected to get user views on remote hearings. There has been no attempt thus far by the Scottish Government to ascertain the views of court users, and whether they prefer remote hearings or attending in person. It is extremely important that court users have confidence in the system, and

regardless of the outcome of their case, feel that justice has been done, and data on the views of court users must be collected to help inform the best way forward.

Access to the courts

6. One concern is around access to the internet. We note that the Scottish Government has promised to invest in increased broadband coverage in rural areas; supporting disadvantaged groups through the provision of devices, training and internet connections, and the funding of access to digital assistance through relevant third sector organisations. These changes would need to be made in advance of any rule changes to make the use of remote hearings more permanent. While the vast majority of the population have access to the internet, this does not necessarily mean that they have quality access – there are huge problems with Wi-Fi quality in rural areas – and even where there is "access", this does not mean that people will have the knowledge or confidence to take part in an online hearing competently. Many people will also not have access to the appropriate technology required to be able to join a hearing remotely. While many will have access to the internet via a mobile phone, far fewer will have access to a laptop, and joining a hearing via a mobile phone camera is far from ideal.

7. There must be caution exercised to ensure that the whole population is able to continue to access the courts on a level playing field. It should not be the case that whether a person can be heard is dependent on whether they have quality WiFi or whether they are of a generation or in a profession which means that they are comfortable using online technology. One member reported that even in the Lord Reid Building within the Faculty of Advocates, WiFi has been unable to cope with the demand resulting in some attendees being frozen or disconnected from the call, only for those hearings to proceed without those attendees. Another example has been given whereby a crucial witness in a recent Fatal Accident Inquiry was forced to give their evidence over the telephone due to unstable WiFi and ultimately a failed internet connection. This is not acceptable.

Maintaining a formal process

8. Members' report that remote hearings tend to encourage a more casual attitude from parties. This is inappropriate. Members have given examples of people joining a hearing while walking down the street, or during a train journey. There are other examples of appellants being contacted to attend a hearing remotely and simply hanging up their phone because they are at work. Others have not dialled into their appeal hearing at all. It is assumed that this is because they have abandoned their appeals, but in the absence of a formal withdrawal, the courts have had no choice but to continue the appeals as it could not be determined for certain why the appellants had not attended, therefore wasting court time and resources. There have also been issues of the conduct of parties when joining remotely, including examples of parties swearing and conducting themselves in a manner that they perhaps would not have done had they attended court in person.

9. In order to address the issue of overly casual conduct during remote hearings, there should be a requirement where remote hearings are conducted, that all witnesses attend at a registered solicitors office, or similar location, where the solicitor can ensure parties are segregated and that there remains a degree of formality. This will also assist with any issues that individuals may have experienced when joining from home.

Importance of open justice

10. The consultation sets out that the approach to court users observing traditional court proceedings is "mirrored where practicable". In place of simply being able to go to a court building and watch a hearing, for remote hearings, journalists and members of the public have to apply to the court for a dial-in number to hear telephone hearings, and while journalists can apply to see and hear video hearings, members of the public are limited to only an audio link for video hearings, at present. This restriction on the public is in place until appropriate safeguards can be devised to deal with potential contempt of court issues, i.e. unauthorised recording. There are barriers to open justice in relation to virtual hearings that are not present with in-person hearings, and this important principle is currently being ignored. Virtual hearings must be conducted in as much of an open manner as those that are conducted face-to-face.

Need for dedicated IT facilitator

11. If remote hearings are to remain a mainstay of the civil justice process in at least some capacity, there should be a dedicated IT facilitator within the courts for each case who can assist in dealing with technological issues and helping parties to present evidence and reveal documents in cross-examination.

12. Members also report that it would be beneficial for parties to be provided with a 15 minute time slot in which to join the remote hearing link, or a phone call 15 minutes before a hearing is due to start, to invite parties to join. At present, members report that they are often left waiting a considerable amount of time on a link before the hearing is commenced. It would be helpful to instead have a dedicated timeslot, to reduce waiting times. This is particularly an issue in the All Scotland Personal Injury Court. In the Court of Session parties are already given a dedicated time slot.

Increased costs

13. If remote attendance becomes the default position for cases, there will be increased use of court resources before a hearing, which may ultimately end up settling before the hearing takes place. We understand from law accountants who regularly prepare judicial accounts on behalf of pursuers that expenses for those cases heading for a virtual proof have been higher than if case was heard in person.

Rules of the Court of Session

Question 1 – For the categories of case listed as suitable for an in-person hearing: Do you think the general presumption given is appropriate? Would you make any additions or deletions and if so why?

14. The default position in relation to all proofs – civil and commercial - should be that they are held in person, and this should be set out clearly in the rules. Currently, the draft rules set out that proofs in which "there is a significant issue of credibility of a party or witness which is dependent upon an analysis of the party's or witness's demeanour or character" should be heard in person. This is too narrow a test. Most cases will turn on the reliability, not credibility of the witness. Most witnesses are credible, but ascertaining the reliability of a witness can often only be done effectively in person.

15. The rules as drafted are also unclear as to how proofs are to be conducted where there is not a significant issue of witness credibility. It is imperative that the default position for all proofs is a face-to-face hearing. In addition to the issues raised above in our general comments, for proof hearings in particular, the power and potency of pursuers being able to give their evidence in person should not be

underestimated. Vulnerable pursuers, for example survivors of child abuse, would be particularly disadvantaged if the default method of hearing were to become a remote hearing.

16. Pursuers must be entitled to a court hearing, and have the confidence that their case was fully and properly articulated and that the other side's contentions were tested. Parties are also entitled to know why their case was won or lost, and how the justice process operates. This transparency and openness of the process is somewhat lost in virtual hearings where there may be technical difficulties as described above at paragraphs 4 and 5. Judgments also tend to take the form of written statements. To have proofs heard remotely as a matter of course would chip away at the fundamental fairness of the law. The Equal Treatment Bench Book[1], which provides guidance to the judiciary in England and Wales, echoes this point in their guidance on remote hearings. The guidance sets out the importance of the process, rather than merely the result of a hearing, as a significant consideration in terms of the delivery of real justice. Proceedings must be "transparently just", where the needs of all are considered, and the parties felts engaged in the process and the outcome explained. This is far more challenging in remote hearings than in-person, and we believe that it is simply not possible to achieve the correct level of transparency in the conduct of remote hearings for proofs.

17. There has also been an impact on defender behaviour in having proofs take place remotely. Parties will know that there will be usually only one remote hearing per day, especially in the All Scotland Personal Injury Court, and so if a case is lower down the list, defenders know that their case is unlikely to be heard that day. In members' experience, this will lead to defenders making low-ball offers or no offers to settle at all. This behaviour will exacerbate the anxiety of pursuers, especially those who are particularly vulnerable such as survivors of abuse.

18. If the default position for proofs was to be a virtual hearing, the cost of litigation would increase. There is a greater degree of work required earlier in the process in cases heard virtually – bundles have to be prepared to be shared electronically and links for the parties need to be prepared, and tested involving significant time and resource on the part of the clerks of court, ahead of any hearing.

19. The default position should be that witnesses give their evidence face to face, but if this is not the case, there needs to be, at the very least, consistency in relation to whether a witness can give their evidence remotely or in person. Members report that they have had witnesses granted permission to give evidence in person on one day, but on another day, permission in a very similar case has been refused. In one particular case where permission was refused, the pursuer was suffering from mental health issues, and these issues had been exacerbated by her receiving treatment and having appointments remotely. A report was obtained stating that for these reasons it would be beneficial for the pursuer to give her evidence in person, but permission was refused. The lack of consistency is concerning, and must be addressed

Question 2 – For the categories of case listed as suitable for attendance at a hearing by electronic means (both video or telephone attendance): o Do you think the general presumption given is appropriate? and o Would you make any additions or deletions and if so why?

[1] Judicial College, February 2021 , Good Guidance for Remote Hearings

20. As above, the default position for proofs should be that they are subject to an in-person hearing.

Question 3 – The parties can apply to change the mode of attendance if their circumstances warrant a departure from the general presumption: o Do you think lodging a motion is the right way to do that? Please explain your answer.

21. Parties should be able to change the mode of attendance by agreement, if their circumstances warrant a departure from the general presumption. In relation to proofs, in personal injury cases in particular, it could be a requirement of the pre-trial meeting for the parties to make an assessment of how particular evidence should be heard, and if the parties are agreed that there should be a movement away from the default, then this should be permitted. At the point of lodging the pre-trial minute, the parties would make a determination of how each witness is giving their evidence. We suggest that in a high proportion of cases, parties would agree that evidence should be heard in a particular manner. This method would avoid having unnecessary motions being lodged before the court.

22. In actions under case management in the Court of Session, the issue of which witnesses give evidence or person or remotely can be addressed by parties at the procedural hearings fixed in the pre-proof timetable. As there are a number of hearings built into the procedure, it would not require a separate application.

23. Parties should also be able to make an application to the court to further alter the mode of attendance, if their circumstances change.

Question 4 – The courts can change the mode of attendance if circumstances warrant a different choice to the general presumption: Do you agree that the court should have the final say? Please explain your answer

24. It should be for the parties to agree initially about the mode of attendance that is most appropriate for the case. If the parties cannot agree, the courts will have the final say. In considering whether to depart from the general presumption, the courts must set out why they are directing a particular mode of attendance. There should be a checklist of factors that the courts must consider, and we suggest that this should include:
    - The wishes of the pursuer
    - Whether props or models will need to be shown as part of evidence and whether an in person hearing would be more suitable to allow accurate examination of these
    - The location of the parties
    - The parties' technical competence, access to Wi-Fi etc. court must take into account a number of factors. The wishes of the pursuer must be taken into consideration.

Question 5 – Do you have any other comments to make on the proposed changes within the Rules of the Court of Session?

25. We have set out our general thoughts and comments for the SCJC to consider at the beginning of this paper.

Questions relating to the Ordinary Cause Rules (OCR)

26. Our comments in relation to the OCR mirror those set out in Q 1-4, we do not have separate comments on the OCR.

Any queries about this response should be, in the first instance, directed to:

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