Scottish Civil Justice Council Consultation on the Mode of Attendance at Court
Response by the Society of Solicitor Advocates
8th November 2021

Answers to the 10 Questions in the Response Form

We believe that the default position should always be that a hearing is in person, and that it should be the exceptions that call remotely. There should always be a presumption in favour of real rather than remote hearings.

RCS

Answer 1

All of the categories listed are suitable for an in-person hearing, for these reasons;

Regarding proofs, where there are issues of credibility it is crucial that the judge has the best possible opportunity to make an accurate assessment, and this requires that the judge is in proximity to the witness.

Debates and appeals where there is a point of general public importance should be heard in public to facilitate public access. Where it is felt that the physical presence of advocates will assist in achieving settlement, that should happen. We are aware that the U.K Supreme Court is able to broadcast very successfully its proceedings, but the Court of Session does not, so far, have the means to do this.

Family hearings concern uniquely personal matters and the parties need to be able to participate as closely as possible. Their physical presence is by far the best way of achieving this. Of course, a great many family proceedings are held in private.

We recommend that the following types of hearing be added to the existing list;

1) All other proofs, It is often impossible to predict when an issue of credibility or reliability will arise. In addition, hearing a proof in open means that it is treated by the participants with the full importance that it deserves. The gravitas of the court cannot be maintained when witnesses are sitting in their pyjama bottoms or where there are pets in the room. There is no bar officer to police a participant's kitchen or living room. It is impossible to smell whether a participant has been drinking alcohol. There are numerous other problems or distractions which could impair the dignity of the court or the quality of evidence.

2) All other debates. These deal with legal issues which will almost always arise again in future cases. They merit public hearing even if there is no immediately apparent public importance. All debates are important.

3) All other appeals, for the reason provided immediately above.

4) We do not believe that commercial actions should be treated any differently to other types of action.

5) All hearings in judicial review proceedings.

6) All motions where parties cite legal authorities other than the court rules themselves. So, for example, a motion for interim interdict, a reponing note but probably not a motion to allow amendment of the pleadings. There could be a more restricted category in commercial actions, although such actions are often of importance to the business or mercantile community, and any restriction should be slight.

Answer 2

We disagree with the presumption here. The categories are far too wide.

For reasons of convenience and cost, "procedural business" could reasonably be conducted by remote means. Parties should not have to pay for hours of lawyers' time in travelling and waiting where the hearing is a mere formality which could just as well be conducted using Webex.

The problem is that nowhere do we see a definition of "procedural business". This could be done by a Practice Note by the Lord President, but until we see such a draft note it is impossible ~~difficult~~ to comment any further.

We share the concerns referred to in the Consultation Paper over how best to maintain the gravitas of the court and how to enable facilitate effective participation to take place.

In principle, we oppose litigation in private. There are sound constitutional reasons why justice must be seen to be done. As matters stand, the public does not in practice have access to remote hearings. This is in sharp contrast to the Supreme Court, where television operates very effectively.

Anecdotally, it appears to us that members of the public rarely or never access remote hearings. So, we can assume that it will never or rarely happen in the future. In other words, in practice, remote hearings means that litigation will take place in private. We think that this is inappropriate.

Answer 3

Lodging a motion is the correct and appropriate way to seek to change the mode of attendance. This is the normal method of making an application to the court.

Answer 4

We agree. The judge always has control of the proceedings.

Answer 5

In our view, making remote hearings the norm is a drastic change to the ways in which the civil courts have operated for centuries. In this sense, because we cannot assume that Covid is a permanent problem the virus should be disregarded in considering these permanent proposals. Such radical changes should not be made unless they are in the interests of justice. We are not convinced that they are. Saving money should not be the paramount factor. Remote or virtual hearings are inherently inferior to real hearings insofar as they will never be able to replace the human interaction that occurs where people are in the same room. It is a fallacy to refer to remote hearings as involving "attendance" at court. We do not see remote hearings as being a mode of attendance at all. Instead, they are an alternative to attendance.

The court can alter a hearing from remote to actual, and *vice versa, ex proprio motu* and parties can move for such a change-and the court may grant the motion if it will not prejudice the fairness of proceedings and is not contrary to the interests of justice,

We cannot envisage a situation where it would ever prejudice fairness to call a case in open court. Equally, it is hard to see how could doing so ever be contrary to the interests of justice. Expense and inconvenience would be far better criteria by which the court could assess whether it would be appropriate to change the mode of hearing.

OCR

Answer 6

Answer 1 above applies equally well to the sheriff court.

Answer 7

Our Answer 2 applies *mutatis mutandis.* In the sheriff courts there is the problem of different rules in different sheriffdoms. This is already an issue in Covid lockdown.

Answer 8

See our Answer 3

Answer 9

Answer 4 applies *mutatis mutandis.*

Answer 10

Answer 5 applies *mutatis mutandis.*

The Society of Solicitor Advocates
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