

Q1 & Q6 No

We are strongly of the view that Proofs and Debates should be normally undertaken in person. It would be appropriate that that presumption could be rebutted (possibly on a lesser test for debates).

i) the demeanour of witnesses in any case is important, including commercial cases. It is hard to gauge that online. This could be a significant barrier to justice.

ii) it is very hard to ensure that witnesses are not being influenced or assisted off screen – again an essential point.

iii) it is essential for the running of any major hearing such as a debate or proof that agents/clients can gauge the Court's reaction to points being raised which is far harder or impossible on line – that will allow them to decide to investigate a point further, or to move on when they are happy a point has been examined enough, or to object to an incorrect line at the appropriate time.

iv) it is an essential part of any significant hearing that a client can attract their agent's (or agent can attract counsel's) attention and speak to them confidentially to provide instructions, or discuss if a certain question should be asked, or provide other relevant information. That is currently impossible unless they are in the same location as their agent/counsel.

v) in most cases both parties are present in court during examination of witnesses.

(A) It is a legitimate part of the process (should the party choose to be in court) for the Court to consider their reaction to evidence that emerges

(B) when witnesses are giving evidence the fact that the relevant parties can normally see them adds impetus to them to tell the truth (as does the attention of the judge)

Justice has to be seen to be done for Scots. Allowing the general public to listen in but not see proceedings is not enough. Even if video was permitted (when the current issues of not recording that are overcome (how can they be? – if a person can see a video, they can record (a poor copy) by videoing that TV or monitor on their phone etc)). Unless there is an accessible video and sound access then this essential element is not being fulfilled.

As an aside, accessibility on-line would need separate consultation as it is clearly inappropriate to throw open the gates and let anyone in the world watch/ monitor with no details of them or

restriction. Having the public have to attend at court to view proceedings is a controlled way of allowing this. The person has to behave appropriately and can be prevented from recording the proceedings.

vi) the quality of access to the court depends on the size and quality of the equipment on which the proceedings are held together with the quality of the internet signal. If in particular the signal is poor, whilst a party could be sufficient to get online, lag could materially affect the ability to properly conduct the proceeding. One of our partners experienced this in a hearing during the pandemic. In critical stages of the case, such as debate or proof, a previously reasonable link could deteriorate unexpectedly. Given the delays in having such hearings, and the fact that delay tends to favour one party and disadvantage the other, the pressure to proceed and not lose the diet could prejudice the quality of access to justice.

vii) Requiring parties to attend at court in person assists justice significantly.

(A) The gravitas of the situation is lost to a great degree online. Parties may not consider their responses as carefully as they ought online.

(B) Having parties at court before a significant step such as debate or proof forces them to consider the case more carefully and gives them the opportunity for direct (via agents or otherwise) communication which is conducive to a negotiated part of full settlement taking place. It is usually a better outcome if parties negotiate a settlement themselves, but without the impetus of attending a court hearing, no amount of other opportunities to seek a settlement give the same encouragement to negotiate.

viii) some parties will struggle with online diets.

(A) Those hard of hearing (such as many older parties) may have issues properly hearing the proceedings.

(B) even if less computer literate parties can attend online, they will be materially prejudiced as they will not be as familiar as others as to how they can manipulate the software to allow them to participate fully – from being able either to arrange the screen to see all relevant participants to focusing on the person who is talking (especially on a small screen), through to all other adjustable features.

ix) In summary, whilst dealing with procedural business by video link could speed up the legal process and is to be pursued, debates and proofs are just too sensitive and important to be taken normally by video. Our view is that unless either both parties agree to a video hearing, the court should be persuaded as to the merit of same and in particular reasons why the foregoing points do not prejudice the other party before a court should order a video proof or debate.

Q2 & Q7 with the exception of all proofs and debates mentioned above, we think that the cases suggested in the draft is suitable for electronic delivery.

Q3 & Q8 yes. Provided the motion can be made at the bar also, such a process is familiar to users and has the necessary safeguards. For OCR set additional information can be requested – if you follow our strong view that proofs and debates should be presumed in person, information relevant could include the number and identity of witnesses (if not already detailed) and so on.

Q4 & Q9 yes.

Q5 & Q10 no.

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