



Informing Progress - Shaping the Future

Scottish Civil Justice Council Consultation: Rules Covering the Mode of Attendance at Court Hearings.

The Response of the Forum of Insurance Lawyers (FOIL)

QUESTION 1

Civil Proofs

Introduction: FOIL Position

FOIL is concerned about the absence from draft rule 35B.2 of a general presumption that persons are not to be excused from attendance in person at all civil proofs.

The draft rules do create such a presumption for civil proofs falling within the exception found at sub-paragraph (3). However it is the submission of FOIL that there should be no such distinction and that the presumption should be that all civil proofs will take place in person unless the court otherwise directs.

Indeed it is our submission that new rules should encourage a hybrid model for civil proofs with rules stipulating careful pre-proof case management that allows for evidence to be taken from witnesses either remotely or in person as agreed between parties at a hearing prior to commencement of the proof. The presumption is that all evidence is to be taken in person.

That is not achieved by the current draft rules which anticipates application forms to be submitted by way of motion for any departure from the general presumptions.

General Presumption for all civil proofs to be in person

FOIL submits that draft rule 35B.2 should include a general presumption that persons should not be excused from attendance in person at all civil proofs. There should not be any distinction as set out in sub-paragraph (3). The submission is made for the following reasons:

(1) Open and accessible justice

The proof is the culmination of the case and the moment at which the court is to administer justice to the parties after hearing the evidence and the submissions of the parties. It is the

very function of the court and it is crucial that justice is seen to be done, and that the legitimacy and authority of the Court's decisions are supported by the court process.

The risk with conducting proofs entirely on online platforms, rather than the process remaining rooted in court buildings, is that the proof is relegated in status in the eyes of the participants and the public who continue to consider that in person interaction should be sought in the most important circumstances. The gradual effect may be the erosion of public confidence in achieving justice in civil proofs.

When proofs are being conducted in court buildings they are freely accessible to any member of the public and the press. Currently the press and public can access online proceedings if they apply to be provided with a link. That requires members of the public to have access to the technology and to be inclined to seek access in advance, which undermines accessibility. In time accessibility of online proceedings may be improved with the routine publication of links to proceedings on court rolls. However that should not be a reason to move away from proofs being held, on the whole, in court buildings. The ambition should be for proceedings in court buildings to be videoed and streamed live via a link, as well as being attended in person by any interested observers.

Our insurer clients are often remote from court proceedings and provide us with instructions by telephone or video during the course of the proceedings. There are benefits to our clients in being able to view important parts of the evidence without having to travel to court. Those benefits should not be to the detriment of the high standards of Scottish civil justice which are risked in taking the process entirely online. Technology can be used to keep civil proofs based in court buildings, but also accessible remotely.

(2) Taking evidence from witnesses

The exception as set out in sub-paragraph (3) requires parties to identify in advance whether they are engaged in proceedings where there may be "significant" issues of credibility of witnesses to be determined and therefore where the "demeanour or character" of the witness will be required to be analysed. It is submitted that the analysis of the demeanour and character of a witness is important to the weighing of all witness evidence, and there are considerable difficulties in taking witness evidence over online platforms:

- The significance of taking the oath in the Court building is diluted over video.
- It can be difficult for Sheriffs to verify that witnesses are alone when giving their evidence.
- It is difficult to ensure that witnesses that are yet to give evidence are not observing the proceedings.
- Court advocacy is more difficult, the natural flow of question and answer that is achieved in person is important for eliciting the best evidence.
- Only the face of the witness can be seen, and the clarity of the image can vary depending on internet connections. There can be no assessment of body language which can assist in considering the credibility, reliability and quality of the evidence being presented.
- The management of documentary productions can be awkward as screen share can mean that only the person speaking is visible and therefore the witness cannot be seen while the question is being put by the advocate.

- It is difficult to object to evidence in a remote hearing. The non-participating advocate will have to unmute and activate their camera before voicing an objection.

As set out more fully below there are witnesses, such as expert witnesses, where the difficulties of taking evidence remotely are felt less acutely, and the cost of those witnesses having to travel to court is greater. That is why a case managed, hybrid model is to be preferred rather than a general presumption against in person hearings unless the onerous requirement of sub-paragraph (3) are met.

Our clients must always be vigilant against fraudulent claims and they rely upon the support of the civil courts in that regard. The concern must be that fraudulent claims are encouraged where there is no presumed requirement for participants to attend at court in person. The exception as contained in sub-paragraph (3) requires a party to convince the court that there is a significant concern in relation to credibility before the evidence is heard. Often fraud can only be suspected in advance and therefore the test in sub-paragraph (3) will not be met. It is at the proof in person where the Court will determine credibility.

(3) Agent/ counsel/ client interaction and collegiality

The conduct of a proof in a court building allows for important interaction between agents, counsel, clients and opponents. These conversations between court sessions often assist in the progress of the proof by way of agreement of matters in dispute and even settlement. These interactions are of course still possible remotely but they are considerably less likely to occur.

The effect of civil proofs remaining rooted in court buildings is to allow for those relationships between practitioners to be enhanced and develop which will improve the conduct of proceedings where those same individuals are involved again.

(4) Training of junior lawyers

As we have returned to offices, solicitor firms have wrestled with the question of the balance to strike between working from home and the office. A major factor in most firms requiring junior lawyers, trainees and their supervisors to commit to a certain amount of time in the office is to ensure that junior lawyers are learning by exposure to in person interaction with more senior colleagues. A crucial part of that education is attendance at court and the conduct of in person civil proceedings, and most importantly proofs.

It is only possible to learn the unwritten rules and practice of dealing with witnesses, court officials, sheriffs, judges, clients and other lawyers during the course of a proof by experiencing the proof in person. It is more common for junior lawyers to be excluded from important conversations around the running of the proof if those proceedings and the participants are all remote from each other.

The continued successful operation of hybrid proofs, where part of the proceedings may be online, relies upon experienced practitioners who understand the proof process and the benefits and drawbacks of both in person and remotely taken evidence. That experience is more difficult to obtain where the majority of civil evidential hearings move online.

Hybrid Proofs and Case Management

The necessary move to online proceedings due to Covid has created an opportunity to retain the most successful aspects of taking evidence remotely.

FOIL accepts there are efficiencies to be achieved by allowing courts to sit remotely for certain parts of the evidence to be taken in civil proofs.

Expert evidence for example may often be taken remotely saving in the time and cost of having experts attend and wait at court to give their evidence. It is our submission that less is lost in taking expert evidence remotely than is the case with the evidence of lay witnesses and there is greater benefit in cost savings.

The court rules already contain provisions for vulnerable witnesses and there will be witnesses for whom travel will be restrictive where the court may consider allowing them to appear remotely.

In order to make decisions about the manner in which the proof is to be conducted there should be a case management hearing scheduled in all civil proceedings where parties are to provide submissions in respect of proof timetabling and the manner in which they propose their witnesses are to give their evidence. Such hearings are used successfully in the Commercial Court. An earlier focus on the manner in which a proof is to be conducted can assist parties in narrowing the issues in dispute and assist the case to resolution, as well as potentially shortening the expected duration of proofs thus freeing-up court time and reducing waiting times for proof dates.

The presumption is for all evidence to be given in person but the decision as to which witnesses will appear in person, or by electronic means, falls to the court as anticipated by draft rules 35B.4 and 35B.5 where the court is satisfied that any such order will not prejudice the fairness of proceedings or otherwise be contrary to the interests of justice. Applications should be made at the case management hearing by way of written application lodged in advance of the hearing by the parties. The case management hearing should be timetabled after the last date for lodging lists of witnesses and inventories of productions.

Conclusion

In summary it is the submission of FOIL:

- There should be an addition to draft Rule 35B.2 that it is presumed that all civil proofs be conducted in person.
- Therefore the exception contained at draft Rule 35B.2(3) should be deleted.
- There should be amendment to the Ordinary Cause Rules that for all civil proceedings culminating in a civil proof, unless already allowed for, there should be a case management hearing at least 6 weeks prior to the commencement of the proof where parties must lodge written submissions with their proposals for proof timetabling and the manner in which their witnesses will give their evidence.

QUESTION 2

The general presumption is appropriate for the categories of case listed as suitable for attendance at a hearing by electronic means subject to the exceptions discussed below. FOIL members' experiences of remote procedural business over the last 18 months have been largely very positive. SCTS, the judiciary and the legal profession ought to be proud of the way in which the civil justice system has adapted with pace to the challenges of the pandemic. The majority of FOIL members have no wish to return to routine in person procedural hearings.

However, the issues which arise in relation to evidential hearings which render in person hearings the preferred default mode (poor connection, difficulty obtaining instructions, management of documents, the appropriate standing of the proceedings, etc) do also arise in procedural hearings so that our agreement that the general presumption in draft Rule 35B.3 is correct is based on the understanding that there is a commitment to the continual development and improvement of the electronic platform and digital justice system. Procedural business has been conducted effectively by telephone for many years on a regular, albeit inconsistent, basis across the Scottish Courts and we would encourage its continued use where appropriate.

The draft Rules (35B.3(2)(e) and (g)) propose what effectively amounts to a two-tier system for legal debates and reclaiming motions or appeals with those hearings raising a point of law of general public importance/particular difficulty or importance benefiting from a presumption of an in person hearing. The justification for any distinction is not immediately clear. Neither is it clear how the Court could reasonably and consistently distinguish between matters of *general public* importance or matters of *particular* importance, for example. Such a two-tier system may also be at odds with the guiding principles including fairness. Views on an appropriate presumption for mode of legal debates are mixed with no obvious consensus. Some members maintain that many important factors which favour conducting evidential hearings in person (set out in answer to Question 1) are equally applicable in legal debates and appeals.

In summary, it is the submission of FOIL that:

- There should be a presumption for in person hearings for substantive business before the Court of Session.
- Substantive business includes legal debates and reclaiming motions or appeals.
- Any presumption should remain subject to the parties' ability to seek, or the Courts' power to make, appropriate directions as envisaged by draft Rules 35B.4 and 35B.5.
- Draft Rules 35B.3(2)(e) and (g) should be deleted.
- Draft Rule 35B.2(c) should be amended to read "legal debates on the procedure roll;"
- Draft Rule 35B.2(f) should be amended to read "reclaiming motions and appeals;"

QUESTION 3

It is agreed that the correct method for changing the mode of attendance is by way of court motion if circumstances warrant a departure from the general presumption, under explanation that FOIL disagrees with the general presumption contained in the draft rules as more fully explained in this response.

QUESTION 4

We agree the court should have the final say after hearing submissions from parties. The decision should be capable of being reclaimed however, in the usual way, if either party is so advised.

QUESTION 5

No further comments.

QUESTION 6

Our response to Question 6 mirrors that of Question 1. Therefore our submission is that the Court of Session Rules and OCR should match.

QUESTION 7

Our response to question 7 mirrors that of question 2. Therefore our submission is that the Court of Session Rules and OCR should match.

QUESTION 8

Our response to question 8 mirrors that of question 3. However we do not consider it necessary for there to be an application form to accompany the motion. A change to the mode of attendance is on cause shown and accordingly parties will require to make a sufficient written submission in the motion sheet in order for the motion to be granted by the court. The Court can of course require to be addressed on the motion even if it is unopposed. If opposed, the motion to change the mode of attendance should be dealt with in the ordinary way with a hearing and if appropriate, written reasons for the Court's decision.

QUESTION 9

Our response to question 9 mirrors that of question 4. Therefore our submission is that the Court of Session Rules and OCR should match.

QUESTION 10

No further comments.