

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

Annex A – Consultation Response Form

RCS

Question 1:

For the categories of case listed as suitable for in-person hearing, we do not believe the general presumption given is appropriate. We believe that insofar as all proofs are concerned, the general presumption should favour of an in-person hearing.

The Scottish Government's recently devised digital strategy: A Changing Nation: How Scotland Will Thrive in a Digital World supports the preference for an ongoing shift to digital public services **where that can improve the overall experience.**

As a firm, we specialise in Personal Injury, Employment Law and Family Law. Since the shift to hearings by electronic means as a result of the Covid-19 pandemic, we have represented parties in a number of 'virtual' proofs – in the areas of Personal Injury, Family Law and Commercial Litigation. Our experience of running virtual proofs, combined with our litigation experience generally, tells us that the operation of Proofs by electronic means does not improve the overall user experience. On the contrary, our involvement tells us that the experience is far inferior. We also consider that the presumption in favour of Proofs proceeding in such a way is likely to impede access to justice for the people of Scotland. We can cite a number of considerations/observations:

Usually, a proof is a significant, stressful and emotional experience for a party to the litigation. We can probably assume, for example, that this will be the case for every pursuer in Personal Injury litigation. It is in their action. It is inappropriate that such a party should be remote from the individual determining their case, as well as the representatives for each party. In our experience this adds to their stress and creates a feeling of isolation from the process. A party should have the best possible experience of participation and a feeling of being heard. This creates and maintains confidence in the justice system.

The flow of questioning and answering and the natural discourse between representatives and witnesses is inferior in a hearing by electronic means. There are glitches and delays caused by a number of factors which impact on the likelihood of a fair hearing. It is difficult to timeously object to a specific line of questioning.

The vast majority of (non commercial) clients are unaccustomed to using devices for anything other than social and informal interaction. For such interaction, they use a mobile phone and usually do not own/never use a laptop. Even if such devices can be made available to them for the purposes of a proof, the experience will be an alien one. Over the course of the pandemic, we have found that the vast majority of our clients are unfamiliar with platforms such as Teams/Zoom and request that remote consultations with their solicitor proceed by telephone instead. In short, the vast majority are uncomfortable/unfamiliar with online video platforms. In the Personal Injury proof mentioned above, our client was relatively elderly and had no I.T experience. We required to bring our client to our offices in order that we could train her and then oversee her ability to work the technology. We required to have a member of staff on hand for our client each day for any potential technical issues.

With online hearings, collaboration, negotiation and discussion between representatives is inferior. The more junior members of a legal team tend to be left out of discussions between opposing counsel, for example. Outside an actual courtroom all members of a legal team will usually participate in discussion and junior members of the profession learn a lot from these experiences. The lack of involvement for junior solicitors/advocates in the informal discussions etc surrounding a proof is detrimental to their development. This will weaken the calibre of the profession in the long run.

In relation to witnesses, our experience is such that it is overly burdensome on a solicitor conducting a proof to ensure that witnesses are set up with the necessary software/hardware to join the proceedings as required. In addition, referring witnesses to large bundles of electronic documents is more challenging than referring the same witness to paper documents within the Courtroom.

In summary, our experience tells us that the reality is that in almost all cases the better experience for a proof would be an in-person hearing. Administrative convenience should not be the driving factor in determining the mode of attendance at Court hearings. Therefore, we believe that the default position/presumption in relation to all proofs ought to be in-person hearings, with parties having the ability to apply to the Court by motion to allow certain witnesses to attend by electronic means. (In some cases, certain witnesses (in particular experts) would benefit from giving evidence remotely.)

Question 2:

We do not believe the general presumption given is appropriate. See answer 1 above.

Question 3:

We believe that lodging a motion is the right way for parties to apply to change the mode of attendance if their circumstances warrant a departure from the general presumption. This is the appropriate way in which to bring the matter for determination by the Court.

Question 4:

We agree that the Court should have the final say if there is a disagreement between the parties in relation to a different choice to the general presumption. If parties are agreed on the different choice then we consider that that choice should prevail.

Question 5:

No

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Question 6:

For the categories of case listed as suitable for in-person hearing, we do not believe the general presumption given is appropriate. See answer 1 above.

Question 7:

See question 2 above.

Question 8:

See question 3 above.

Question 9:

See question 4 above.

Question 10:

No, we have no other comments.