



SHERIFFDOM OF LOTHIAN AND BORDERS

COVID-19

UPDATED GUIDANCE IN RESPECT OF THE CONDUCT OF PROCEEDINGS IN THE ALL SCOTLAND SHERIFF PERSONAL INJURY COURT

Introduction

[1] This guidance consolidates and updates all guidance issued from March 2020 during the course of the Covid 19 pandemic and informs of current practice in the All Scotland Sheriff Personal Injury Court (ASSPIC). Guidance notes issued on 17, 24 & 26 March 2020, 15 May 2020, 5, 19 & 26 June 2020, 9 July 2020 are superseded.

[2] Part 1.2 of Schedule 4 of the Coronavirus (Scotland) Act 2020 ("the 2020 Act") suspends the requirement for physical attendance at court unless the court directs otherwise. Under these provisions all hearings in ASSPIC will be conducted remotely by WebEx technology ("VC") until further notice unless the court directs otherwise.

Format of ASSPIC Hearings

[3] The default position is that all hearings in ASSPIC will proceed on a remote basis using VC unless the court otherwise directs.

[4] The VC hearing involves the following terminology which should be noted:

- (1) Host – This is the individual who is responsible for co-ordinating and controlling the VC hearing. Normally this will be the sheriff clerk.
- (2) Panellist - This is an individual who is able to interact with the other participants in the VC hearing. The panellists will be the sheriff, the clerk, agents / counsel and a witness when he or she is giving evidence.

- (3) Attendee – This is an individual who is able to view or listen to the VC hearing without having the ability to interact with the panellists. This function could be used by a witness after having given evidence or by members of the public or the press.
- (4) Practice Session – This is a subconference within a VC hearing which attendees are unable to view or listen to.

[5] Hearings may proceed as live “in-person” and under strict adherence of social distancing requirements if directed to do so by the court. Where a party considers that a hearing cannot proceed by VC, or cannot entirely be conducted in this manner, that party should advise the reason for that. It will be a matter for the sheriff to determine whether the hearing is suitable for VC. If the sheriff determines that VC is not suitable, consideration will be given to whether a physically distanced live “in-person” hearing can be accommodated. Any live hearings must be conducted in line with government restrictions and subject to any conditions and guidance set by the court.

Live hearings

[6] Where one or more parties seek a live hearing, intimation of such must be given to the court as early as possible and in any event, with particular reference to proofs, by no later than the date on which the pre-trial minute is to be lodged. Requests for live hearings will be considered by the court on a case by case basis. Cause must be shown why a case is not suitable for a VC hearing. The factors set out in Appendix 2 are matters which the court is likely to consider relevant to the manner in which the proof should be conducted.

[7] Where a request is made to have a live hearing, the court may fix a By Order/pre-proof hearing to hear parties thereon. At that stage, parties will be expected to be in a position to provide the court with the fullest information to enable it to properly consider and determine the most suitable mode of hearing.

Form and submission of Documents

[8] Schedule 4 Part 1.1 of the 2020 Act enables the use of electronic signature and electronic transmission of court documents. Where a document requires to be signed electronic signature will be accepted in accordance with Schedule 4.

[9] Court users must submit formal documents to be lodged in process electronically by email to nationalpicourt@scotcourts.gov.uk or via the civil online portal (Please note that Initial Writs, NIDS and motions cannot currently be submitted by portal) (i) All documents submitted by email should be in PDF format only and should be submitted with one such document per email communication, with the exception of motions as noted below. This is to enable separate distribution and allocation of tasks for processing by staff working remotely. Documents lodged in PDF format must not exceed 20mb to enable the file to be uploaded onto the electronic case management system (ICMS). If the document exceeds 20mb it will be necessary to lodge it in two separate PDFs. (ii) All documents submitted via the online portal should be in PDF, PNG, JPG or JPEG format. Five documents can be uploaded at any one time. Each document uploaded must not exceed 25mb at this time to enable the file to be uploaded directly to ICMS for review before accepting. If the document exceeds 25mb it will be necessary to lodge it in two separate file uploads. See paragraph [27] for guidance on productions including use of Objective Connect which may also assist with large file size documents that cannot be submitted by email or online portal.

[10] The following naming convention should be used for the subject line on all emails submitting electronic documents to be lodged in process: case name – case reference number – nature of document (eg A Smith v B Jones – PN900-20 – Defences).

[11] Any document lodged electronically will be deemed to have been lodged with the court on the date the email is received. An automated acknowledgement of receipt will be issued.

Lodging of documents specific to motions:

Practitioners should continue to lodge motions by 12.30pm, ensuring that the motion email communication contains separate PDF formatted attachments for all supporting documents relating to the motion (civil online cannot accept ASSPIC motions at this time). The document size limit of 20mb applies equally to documents lodged as attachments in support of a motion – see above.

Procedural Court / Opposed Motions

[12] The ASSPIC procedural court has an established remote format through the use of VC (unless the court directs otherwise when intimating any hearing diet). Telephone conference facilities remain available as a backup should technical difficulties be encountered and may also be used when the court so directs.

[13] The procedural court will be scheduled via the VC portal by the clerk. One week in advance of the procedural court the clerk will send invitation emails with joining instructions to parties' generic email addresses (those provided to the court as part of e-motions sign up or advised on the lodging of any chapter 15 motion). If counsel is instructed, parties will be responsible for forwarding the appropriate joining link ahead of the hearing. Media representatives may apply to join a VC hearing as an attendee by contacting the ASSPIC mailbox at nationalpicourt@scotcourts.gov.uk.

[14] Cases will be grouped together in allocated time slots at 10am and 2pm. Parties should join the procedural court at their allocated time and listen until their case is called. Parties will join with attendee status and will be promoted from attendee status to panellist status following joining. Parties are free to engage in other business while waiting on their case to call but they must have their microphone muted.

[15] Any cases assigned to the procedural roll require to have **ALL** documents that may be relied upon lodged with the court by email or civil online portal no later than 12.30pm on the Friday prior to the procedural court. Failure to comply with this requirement may lead to the hearing being postponed and/or have consequences in relation to expenses.

Opposed Motions

[16] Opposed motions should be lodged in the usual way as provided in OCR Chapter 15A. The scheduling of motion business will be allocated within the general procedural court (without specific hearings slots) at 10am and 2pm.

[17] Parties will be advised by the clerk via the ASSPIC e-motion generic email addresses (or individual email addresses provided where not signed up to the e-motion scheme) of the date and time of the remote hearing and provided with joining instructions.

[18] All documents to be relied upon should be sent electronically to the court not less than 48 hours before the hearing. If the opposed motion is calling only in the Monday procedural court these documents must be lodged with the court by email no later than 12.30pm on the Friday prior. A failure to comply with this requirement may lead to the hearing being postponed and/or have consequences in relation to expenses.

[19] The court cannot provide a prescriptive list of the type or number of documents which parties may wish to rely on, but practitioners are expected to exercise judgement about what is appropriate, taking account of the following:

- a) written submissions are helpful, but can often be kept to a summary or a series of bullet points;
- b) a timeline may be useful;
- c) supporting material must be apt (i.e. both relevant and proportionate);
- d) principle rather than precedent is the governing approach - tracing the development of the law or providing multiple examples of its application is neither necessary or useful if the applicable principle(s) are well known or can be identified in an authoritative decision;
- e) where authorities, pleadings or any other documents are to be referred to, the relevant passage(s) should be clearly highlighted or identified;
- f) documents in excess of 20mb in size cannot be lodged by email and at present each separate document in excess of 25mb in size cannot be lodged through the civil online portal.

Opposed Motion by Written submissions

The application

[20] When lodging an opposed motion, parties will be able to make a joint request that it be dealt with by written submissions.

[21] Where all parties have agreed to proceed by written submissions, the party lodging the motion is required to make that clear in paragraph 7 of Form G6A, along the lines of: "The parties have discussed this motion and have agreed that a request be made that it be disposed of by reference to written submissions."

[22] Parties must lodge their finalised written submissions no later than close of business 7 days after the motion is lodged along with Forms G6A and G9A respectively, together with such supporting materials as parties wish the court to consider. The motion will then be passed to a sheriff who will consider and determine it and arrange for an interlocutor disposing of the motion to be issued along with a brief statement of reasons. The sheriff may require to hear parties on the motion.

[23] It will be evident that not all types of opposed motion are apt to be dealt with by way of written submissions. Before seeking to proceed in that way, the court expects there to be a proper dialogue between parties as to (i) the substance of the motion, so that there is clarity as to the matter(s) actually in dispute; and (ii) the suitability of the motion for determination on the basis of written submissions.

[24] The submissions must be cross-referenced to the supporting material by page or paragraph number, section etc., as the case may be. Practitioners should also take account of paragraph [19] (above) in relation to documents produced.

Decision

[25] An interlocutor disposing of the motion will be provided as soon as reasonably possible, along with a brief statement of reasons.

Proofs

Prior to the Proof Diet

[26] VC proofs remain the default format for an evidential hearing. Where parties are seeking that the proof diet proceed by VC or an appropriate direction from the court for a physical “in-person” hearing, the form at Appendix 1 should be completed and lodged with the court alongside the pre-trial minute, and in any event no later than 14 days prior to the proof diet, to assist with determining the appropriate order of priority in advance of the scheduled calling date. Thereafter the following steps must be taken:

- (1) 8 working days before the proof diet, agents must email the clerk to confirm that the proof is still due to proceed and confirm the estimate of the number of days required;

- (2) 7 working days before the proof diet, the sheriff will consider each case and identify an appropriate running order of expected proofs. The clerks will advise parties of the proposed running order ahead of the proof diet.
- (3) 6 working days before the proof diet agents for both the priority proof and the back-up proof should provide the clerk with: (i) the email addresses of all participants to the proof; (ii) the agent's contact telephone number; and (iii) a marked up witness list containing, for each witness: (a) their email address; (b) the location where they will be giving evidence from (which could be home, work place, solicitor's office or other location); and (c) whether the witness wishes to take the usual oath / other oath / affirm. The clerk will issue an attendee joining link to the email address provided by parties ahead of the proof. Parties will be responsible for forwarding the same link to any witness required for attendance at the proof (see below for specific witness joining instructions);
- (4) The clerk may arrange, if requested by agents, a test of witness VC connection prior to the proof.
- (5) At least 4 working days before the proof diet parties should email to the clerk or upload via civil online, the up to date pleadings in pdf format and upload to Objective Connect (where signed up to the preferred document sharing platform) the core bundle of productions¹ (see para 27 below). A hard copy must also be provided to the court at the same time. If parties have not signed up to Objective Connect, then only the hard copy requires to be lodged with the Court. Parties will however, require to have access to an electronic version to enable them to share productions digitally during the course of the VC hearing.
- (6) not later than 4 working days before the proof diet agents must ensure the following matters:
 - (a) that all participants including witnesses have access to an appropriate laptop or other device, which has a suitable broadband connection to enable the use of the VC technology (technical guidance will be provided to agents but the court has been advised that the VC technology should work on most modern devices);

¹ This should contain only those documentary productions which are going to be put to witnesses at the proof.

- (b) that appropriate arrangements are in place to contact counsel (if instructed), their client, their opposite number and each of their witnesses during the proof via a device not being used for the VC proof;
- (c) that the core bundle of productions has been sent to each witness who will be referred to it;
- (d) that the witnesses have been instructed that the core bundle of productions they have been sent is to be left sealed / unopened until the proof commences and that after their evidence has been given the productions are to be returned to the party's agents;
- (e) that witnesses have been instructed that when they give evidence they will be required by the court to confirm the following:
 - (i) that they are alone in the room;
 - (ii) that to record any part of the proceedings in any manner without the court's permission may constitute contempt of court;
 - (iii) that they have not viewed the core bundle of productions sent to them;
 - (iv) that they have no means of receiving communications from other persons during the giving of their evidence (including that any mobile phone used for communicating with the agent is switched off whilst they are giving evidence);
 - (v) that they are aware that:
 - (i) if they are required to temporarily leave the hearing, (e.g. if a legal issue arises) they will be informed of that by the sheriff and the clerk will temporarily close down their WebEx connection;
 - (ii) they will need to have access to a means of communication so that the solicitor or the clerk can advise them to re-join the hearing (for example by turning on a mobile phone solely for that purpose);

(iii) if they leave the hearing, for any reason, they must not in the meantime discuss the evidence in the case with anyone else (including the solicitor calling them); and
(iv) once they have concluded their evidence they will not retain the productions sent or any copies of the productions.

Productions

[27] As noted at para [26](5) parties are expected to agree a core bundle of productions and upload these to the Objective Connect platform as the preferred option 4 working days in advance of the proof (see separate paragraph below for information on Objective Connect). Agents are also required to provide the court with a hard copy of the core bundle of productions at the same time. The core bundle of productions, should be paginated like a book (rather than the first page of each production beginning at page 1). Although a hard copy of the core bundle of productions is to be sent to every witness who is to be referred to these productions, the preferred method for referring witnesses to the productions is by using the “presenter” function with electronic display on the VC. The “presenter” function will allow the core bundle to be displayed on the screen so that it can be seen by all the participants, including the witness (it also includes a zoom and pointer facility). Agents will be issued separate guidance on the use of the “presenter” function. If there are difficulties with the “presenter” function the hard copies can be utilised.

Objective Connect

Objective Connect is a collaboration tool used by SCTS to assist external users upload, view and share productions with the court and other parties. This is the court's preferred method of submitting and viewing productions for use in VC hearings and can also be used to facilitate the lodging and upload of some larger documents where they are required for any other form of hearing and where email or online portal limitations do not allow (list of authorities etc). Documents not exceeding 2gb can be uploaded, viewed and shared within Objective Connect. Documents can be viewed by parties at any time before the closure of the workspace and without the involvement of the court. Productions can be accessed via the

Objective Connect platform and shared through the screen sharing function during the course of any VC hearing.

Agents require to sign up to the Objective Connect facility in advance of use by completing and submitting the relevant governance forms. Thereafter a workspace is created in Objective Connect by ASSPIC staff which allows the uploading, viewing and sharing of any documents being relied upon during the course of the action.

Parties seeking to sign up to the Objective Connect facility should email the ASSPIC team at nationalpicourt@scotcourts.gov.uk who will issue the necessary governance forms for completion and return.

The proof diet

[28] The proof will proceed, in so far as possible, in the normal way, but the following points should be noted and followed:

- (1) Unless otherwise decided by the court, the proof will be called at 10am and it is essential that all parties are ready to commence then. All preparations, discussions or negotiations must have taken place and concluded before the start time provided;
- (2) At 9.45am (or other time advised by the clerk), agents and counsel (if instructed) should join the proof hearing via the link provided in order to ascertain and check all connections ahead of commencement of the proof;
- (3) At 10am (or other time advised by the clerk) the sheriff will join the hearing and the proof will commence. The clerk will then call the case and the sheriff will deal with any preliminary matters. The agent / counsel for the pursuer (if the pursuer is leading) will then call the first witness by contacting the witness and telling them to join the proof using the link previously provided;
- (4) The witness will then be put on oath / affirm in line with the marked up witness list (see para [26]) and the matters set out in para [26](6)(e) will be confirmed with him or her;

- (5) When a witness is being examined all microphones (apart from those of the witness and the representative examining the witness) must be muted²;
- (6) If an agent / counsel wishes to object they will need to swiftly unmute their microphone and voice their objection. If necessary, the witness may be asked to temporarily leave the proof or be moved into a mode where they cannot see or hear the court;
- (7) If the witness requires to temporarily leave the proof (e.g. in order to allow the court to deal with an objection) it will, unless the court directs otherwise, be the responsibility of the agent calling the witness to make contact with the witness to advise when they should re-join the proof;
- (8) Where a witness requires to be referred to a production that will be done by the agent or counsel examining the witness using the “presenter” function on WebEx. This will require the agent or counsel to have, as a minimum, an electronic pdf copy of the core bundle of productions on the device they are using for the proof (agents / counsel may also find it helpful to have a further hard copy of the core bundle of productions or further electronic copy available on another device);
- (9) If a witness (including the pursuer or defender) wishes to watch the proof after giving evidence, they are able to do so. The clerk will deal with this by demoting the witness from panellist status to attendee status;
- (10) It will be the responsibility of the agent calling the witness to liaise with each of their witnesses in order to ensure they are available to give evidence when the court requires;
- (11) When an adjournment or break is required the clerk will initiate a practice session. Once in a practice session panellists should mute their microphones and disable the video for the duration of the adjournment. The panellists should then re-enable those functions at the agreed time or when advised to do so by the clerk. The clerk will then move from the practice session back to the live proof; and

² It is essential that all panellists are familiar with how to mute and unmute whatever device is being used. Experience thus far has shown that there are often problems with microphones being on when they should be off and vice versa.

(12) Once all the witness evidence has been concluded submissions will take place by VC in the manner directed by the sheriff.

Court Dress at VC Hearings

[29] It is not expected that counsel or solicitors will wear wigs or gowns at a VC hearing (whether a procedural hearing or a proof). Practitioners are expected to dress in an appropriate manner and to maintain equivalent standards of behaviour as if they were attending the court in person.

Civil Jury Trials

[30] Civil jury trials are programmed to resume in July 2021. Separate guidance has been issued providing detailed information regarding the conduct of civil jury trials.

Mhairi M Stephen

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Sheriff Principal Lothian and Borders

Date 7 June 2021

Appendix 1

Information to be provided to court in respect of diet of proof in ASSPIC	
Case Number	
Case Name	
Date of commencement of proof	
Length of proof diet allocated	
Estimated duration of proof	
Liability List all matters in dispute - Occurrence of accident Existence of duty Breach of duty Causation Other	
Quantum	
List all heads of claim	
Heads of claim not agreed	
If valuations show significant disparity, what is the explanation?	
Agreement of evidence - what averments remain in dispute?	
Are there any exceptional circumstances which may merit consideration of a physical proof hearing?	
Are parties ready to proceed to proof?	
Witnesses	
Total number to be called	
Which averments is each speaking to?	
Estimate of how long the evidence of each will take (evidence in chief, cross-examination and re-examination)	
Where will witnesses be located when giving evidence?	
Skilled witnesses	
The nature and extent of the dispute between skilled persons	

Can agreement be reached between the parties on the relevant literature upon which skilled persons intend to rely	
Whether there has been a meeting between skilled persons, or whether such a meeting would be useful	
Scope of proof	
Would a proof on a particular issue allow scope for the matter to be resolved?	
Documents	
Can a bundle of documents to be used at the proof be agreed?	
Procedural Hearing	
Do parties consider that a procedural hearing is required?	
If so, on what matters do they wish the court to give direction?	
Any reason(s) why should this proof be treated as the priority proof?	

Appendix 2

Number of issues to be tried

The extent of agreement or disagreement over primary liability (duty, breach thereof, causation); contributory negligence; and quantum. Practitioners should consider whether in some cases a proof restricted to liability would be of assistance.

Scope and nature of issues to be tried.

Are all the issues to be tried clear and well defined or is there a risk of a hearing punctuated by objections?

Sources of evidence

What is the evidence that is to be adduced and assimilated by the court e.g. is it written or oral, given by a skilled or lay witness, contested or uncontested, or factual or expert evidence?

Number of witnesses

A large number might increase witness management and scheduling problems for the parties and the court.

Duration of proof

Proofs which are likely to extend to multiple days or exceed the court days allocated.

Type of witnesses

Involvement of party litigant.

The involvement of lay witnesses who have communication or language issues.

The giving of evidence of a sensitive or private nature (see below).

Evidence from multiple skilled persons and/or which is of a highly technical or complex nature or requires reference to multiple documents.

Witnesses for whom personal attendance at court would pose health risks.

Witnesses who do not have access to or would have difficulty using computer devices.

Connection and privacy

Witnesses who cannot access suitable phone internet connection and appropriate location where they can participate undisturbed.

Public or Private Hearing

The need for evidence to be heard in private.

Documents

The requirement for large numbers of documents to be put in evidence or referred to.

Other productions

Are witnesses to be referred to items of real evidence?

Other factors

Are there other specific features of the case which make it unsuitable for a VC hearing?

Is a hybrid hearing feasible, with some evidence being heard in person and the remainder by VC?

Is there any reason why an urgent determination of the case is desirable?