

Department for Justice Northern Ireland

Audio and Video Links (live links) for Northern Ireland

Court and Tribunal Hearings



A response by the Association of Personal Injury Lawyers

September 2022

APIL welcomes the opportunity to respond to the Department of Justice for Northern Ireland's consultation on audio and video links for court and tribunal hearings. We support the greater use of technology and remote hearings for procedural/interlocutory matters and review hearings, and welcome the efficiency that this has brought. We agree that there should be a default position enshrined in legislation, setting out the circumstances in which a hearing must take place face to face, and suggest that this should be where there is an evidential hearing. We believe parties should be able to depart from this position, if they agree to do so. We also believe that the court, on careful consideration of a range of factors, should be able to decide that a remote hearing is appropriate in cases where the statutory presumption applies.

We have responded only to questions within our remit.

General comments

In many ways, the increased use of technology brought about by the pandemic has improved the civil justice process in Northern Ireland. We welcome the efficiency provided by remote hearings for procedural and interlocutory matters such as applications, reviews and directions hearings, and strongly recommend that these remain in place. We are also supportive of undefended assessment of damages hearings taking place remotely, where the plaintiff elects, and the judge agrees. Additionally, we welcome the flexibility provided by the ability to sign and send documents electronically.

With regard to evidential hearings, however, there is – in most cases - no suitable substitute for a face-to-face hearing. Where a matter is contested, plaintiffs must be entitled to a court hearing, and have the confidence that their case was fully and properly articulated and that the other side's contentions were tested. Parties are also entitled to know why their case was won or lost, and how the justice process operates. This transparency and openness of the process is somewhat lost in virtual hearings. Judgments also tend to take the form of written statements where hearings are conducted virtually. Proceedings must be "transparently just", where the needs of all are considered, and the parties felt engaged in the process and the outcome explained. This is far more challenging in remote hearings than in-person, and we believe that it is simply not possible to achieve the correct level of transparency in the conduct of remote hearings for evidential matters.

While evidential hearings should take place in person as a default, there may remain some instances where the parties agree that hearing some evidence remotely would be the best option, particularly when evidence is given from a witness outside of the jurisdiction. We also accept that the use of remote hearings in general is likely to become a mainstay of the

justice system going forward – as above, we suggest that applications, reviews and directions hearings, as well as undefended assessment of damages hearings should be heard remotely. There are a number of general issues which have come to light in relation to the wider use of remote hearings, which must be addressed if remote hearings are to be used on a more permanent basis.

Access to the courts

One concern is around access to the internet. While the vast majority of the population have access to the internet, this does not necessarily mean that they have quality access – there are problems with Wi-Fi quality in rural areas – and even where there is “access”, this does not mean that people will have the knowledge or confidence to take part in an online hearing competently. Many people will also not have access to the appropriate technology required to be able to join a hearing remotely. While many will have access to the internet via a mobile phone, far fewer will have access to a laptop, and joining a hearing via a mobile phone camera is not ideal. The virtual platforms used by the court system should be in step with improvements in this area of technology.

There must be caution exercised, and investment in technological infrastructure and public information, to ensure that the whole population is able to continue to access the courts on a level playing field. It should not be the case that whether a person can be heard is dependent on whether they have quality WiFi or whether they are of a generation or in a profession which means that they are comfortable using online technology.

Maintaining a formal process

We welcome that guidance issued through the Lady Chief Justice’s Office includes behaviour requirements for participants. Remote hearings tend to encourage a more casual attitude from parties. While the comparative informality of a remote hearing can be beneficial for vulnerable parties, care must be taken to ensure that a greater use of remote hearings does not lead to generalised inappropriate behaviour.

Q1 Should the judiciary continue to decide whether a person’s participation remotely would be in the interests of justice

The default position for evidential hearings should be that these take place face-to-face. It should be for the parties to agree to depart from this presumption, if they believe it is appropriate to do so. If the parties cannot agree, the courts will have the final say. In considering whether to depart from the general presumption that a case should be heard in person if related to contested evidence, the courts must set out why they are directing a particular mode of attendance. There should be a checklist of factors that the courts must consider, to determine whether a person’s participation remotely would be in the interests of justice. We suggest that this should include:

- The wishes of the plaintiff
- Whether props or models will need to be shown as part of evidence and whether an in person hearing would be more suitable to allow accurate examination of these
- The location of the parties or witnesses
- The parties’ technical competence, access to Wi-Fi etc. court must take into account a number of factors. The wishes of the plaintiff must be taken into consideration.

- If there is scarring to be viewed

Q2 Should the statutory test for participating remotely include that the court must be satisfied the use of live links is in the interests of justice and not prejudicial or contrary to the fairness of proceedings?

Yes

Q8) The Department recognises that the introduction of a default statutory presumption to rule out a virtual hearing for oral evidence during a final or contested hearing (whether criminal, civil including public or private law or within the remit of a statutory tribunal) might satisfy those who hold reservations:

- about live links and the “effective” testing of evidence, -
- maintaining control of the court to ensure no undue interference with the evidence of a remote witness –
- minimising any risk to the solemnity or integrity of the court process.

Which of the following best describes what you think about this?

o I agree there should be a default statutory presumption to exclude the use of live links for final hearings where contested oral evidence is required.

o I do not agree there should be a default statutory presumption to exclude the use of live links for final hearings where contested oral evidence is required.

o I am unsure.

o I have no view

We agree that there should be a default statutory presumption to exclude the use of live links for final hearings where contested oral evidence is required. We believe the presumption should be wider however, and that all evidential hearings should, by default, take place face-to-face. Parties should be free to agree to depart from the presumption, or a judge should be permitted to determine, based on the factors identified above, that a remote hearing in the circumstances would be the most appropriate medium in which to conduct the hearing.

Q9) Do you agree that any statutory presumption, if introduced, to protect the principle of judicial independence, must be capable of being deviated from when the judge is satisfied that the statutory test is met

As above, we agree.

Parties should be able to change the mode of attendance by agreement, if their circumstances warrant a departure from the general presumption.

Parties should also be able to make an application to the court to further alter the mode of attendance, if their circumstances change.

Q11) The Department’s view is that protection of the principle of Open Justice, provided any legislation includes similar provisions to those within Part 2 of Schedule

27 of the Coronavirus Act 2020, can be left to a blend of secondary legislation, judicial guidance or practice directions? Which of the following best describes what you think about this?

o I agree.

o I do not agree. I think the primary legislation should include a reference to “open justice” arrangements.

o I am unsure.

o I have no view.

Please insert any additional comments/observations you wish to make.

We do not have any specific comments on whether provisions should be in primary or secondary legislation, but believe that “open justice” is an incredibly important principle and should be referenced in some way. As the consultation points out, there may be difficulties arising out of remote hearings as the information on how to join a hearing may not be disseminated effectively beforehand. There are barriers to open justice in relation to virtual hearings that are not present with in-person hearings, and these barriers must be acknowledged and a plan in place to overcome them. Virtual hearings must be conducted in as much of an open manner as those that are conducted face to face.

Q12 Factors to take into account when determining whether live links should be used

See answer to question 1

Ends –

Any queries relating to this response in the first instance should be addressed to:

Alice Taylor

Legal Policy Manager

Alice.taylor@apil.org.uk