



Compass Chambers

ASPIC – UPDATE/USERS GUIDE

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Compass Chambers

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ASPIC

- Introduction
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- Procedural Court & Motions
- Remit to Court of Session (COS)
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ASPIC: Introduction

- The Courts Reform (Scotland) Act 2014
- Extension of the exclusive jurisdiction of the sheriff court to all actions with a value up to £100,000 (with effect from September 2015)
- 22 September 2015
- Jurisdiction over the whole of Scotland
- ASPIC based in Edinburgh
- ASPIC deals solely with personal injury claims

ASPIC: Stats

Breakdown of actions raised by type 2017-18

<u>CASE TYPE</u>	<u>ASPIC</u>	<u>COURT OF SESSION</u>
Accident at Work	1,272	94
Asbestos	455	108
Clinical Negligence	83	144
Slip, Trip or Fall	208	
Other	228	52
Road Traffic Accident	1,036	116
Total	3,282	514

ASPIC: Stats

- Business has moved out of the Court of Session, decreasing by 48% since 2015-16, some of which due to court reform
- ASPIC has expanded its caseload – now covers over 1/3 of PI cases

www.gov.scot/publications/civil-justice-statistics-scotland-2017-18

ASPIC: Stats

Court Dues

	<u>ASPIC*</u>	<u>COS**</u>
4 day Proof/Trial	£3,564	£18,392
1 day Appeal	£237	£10,440

* Payable by pursuer or appellant

** One half payable by each party

ASPIC: Stats

ASPIC – Cases in 2019

- Absolvitor 14
- Decree 5

Pursuers failed in more than 70% of decided cases reported on Scottish Courts Website

ASPIC - “The Team”

- Sheriff Principal Mhairi Stephen
- Sheriff Kenneth McGowan – Administrative Sheriff
- Sheriff Robert Fife
- Sheriff Robert Weir, QC
- Sheriff Fiona Reith, QC
- Sheriff Peter Braid
- Sheriff Gordon Liddle



ASPIC: User Group

Personal Injury User Group (PIUG)

- Meet quarterly to discuss issues
- Minutes on website – last dated 4th June 2019. Next meeting 3rd September. Minutes not yet on website.
- Any matters which a court user wishes to draw to attention of the court relating to Personal Injury procedures should contact Secretary to the group
- Fiona Pyke at NationalPICourt@scotcourts.gov.uk

ASPIC: Procedural Court & Motions

Procedural Court (Monday! 😞)

- From inception, delays were being experienced: staff shortages, higher than anticipated volume
- New arrangements as of 1st October 2018
- Reorganised procedural court (Procedural Court and Opposed Motion Guidance - www.scotcourts.gov.uk/the-courts/sheriff-court/personal-injury-court)
- Alternate pattern
- Week 1 and 2

ASPIC: Procedural Court

Week 1 - opposed motions and joint minute/no PTM by orders

- 30 minute time slots 10am – 12.30pm then 2pm to 3.30pm
- By orders call after all motions
- Motions with time estimates up to 30 mins allocated a single slot with specified commencement time
- Motions with estimates > 30 mins previewed by PI Sheriff who will decide whether longer time slot merited

ASPIC: Procedural Court

Week 2 - mixture of non-motions business (in am) and opposed motions (in pm)

- Non motions business e.g. Chapter 36A procedural hearings; Motions in Edinburgh “local” PI cases; Reponing notes; Peremptory diets; Rule 18.3 hearings; By Orders
- Opposed Motions – 30 min time slots

ASPIC: Motions

Principles to be adopted and applied

- Motions etc. to be framed with “*care and precision*”
- Dialogue **must** take place between principal agents before motion calls
- Duration of hearing to be closely managed by Sheriff



- Any supporting documents to be lodged **NO later than** Friday morning before the PI procedural court

ASPIC: Motions

Written Submissions in Opposed Motions

- Parties can make joint request that motion be dealt with by written submissions

“The parties have discussed this motion and have agreed that a request be made that it be disposed of by reference to written submissions.”

ASPIC: Motions

- No later than close of business on 4th working day after day on which opposition is lodged, mutual exchange of submissions
- No later than close of business on 6th working day after day on which opposition is lodged, parties must lodge finalised written submissions with court together with supporting material
- PI Sheriff will consider and issue interlocutor disposing of the motion with brief statement of reasons
- Sheriff may insist on hearing

ASPIC: Motions

- Importance of “*proper dialogue*” between parties
- Supplementary material e.g.
 - ✧ Adjusted pleadings
 - ✧ Timelines/chronology
 - ✧ Sources (case law, statutes & textbooks) to be annexed as pdf files to written submissions
- Supporting material must be “*relevant and proportionate*”
- Rule of thumb – no more than 3 sources/authorities
- Checklist for written submissions in Appendix to guidance

ASPIC: Remit to COS

Section 92 of 2014 Act

- A request to remit can be made by any party
- 2 stage process:
 - if the sheriff considers that (a) the importance or (b) the complexity of the proceedings make it appropriate to do so, a remit request to the COS MAY be allowed (a discretion): and
 - Once a remit request is lodged with the COS, a hearing before a judge in the Outer House will be determinative of the question of remit
- The decision of the Sheriff and the Judge can be appealed

ASPIC: Remit to COS

B v NHS Ayrshire & Arran [2016] CSOH 120; 2016 SLT 977

- 4 “mesh” cases
- Fell within privative jurisdiction limits under 2014 Act
- But, around 350 similar cases in COS where conduct of those cases subject to a practice direction to ensure dealt with in consistent and efficient manner
- Remit not contentious

ASPIC: Remit to COS

Cocker v Dumfries & Galloway Health Board & Anr, Sheriff McGowan

- Clinical Negligence proceeding as PI action
- Liability, causation & quantum in issue
- Sum sued for had been increased to £1.5M!
- First defenders' motion for remit to COS
- All parties agreed that if remit not granted, case to be remitted to proceed under Chapter 36A

ASPIC: Remit to COS

Held:

- Important and difficult
- But not so important or difficult that those factors alone merit a remit to COS
- Court has concurrent jurisdiction. ASPIC is a specialist court.
- No issues about expense, location and so on that would justify a remit
- Access to the court or its judiciary is not likely to be limited
- Likely to reach proof materially earlier if motion to remit is refused that it is granted.

.....a political decision?



ASPIC: Sanction for Counsel

Section 108 of 2014 Act

(2) The court must sanction the employment of counsel if the court considers, in all the circumstances of the case, that it is reasonable to do so.

(3) In considering that matter, the court must have regard to—

(a) whether the proceedings are such as to merit the employment of counsel, having particular regard to—

(i) the ***difficulty or complexity, or likely difficulty or complexity***, of the proceedings,

(ii) ***the importance or value of any claim in the proceedings***, and

(b) the desirability of ensuring that ***no party gains an unfair advantage*** by virtue of the employment of counsel.

(4) The court may have regard to ***such other matters as it considers appropriate***.

ASPIC: Sanction for Counsel

Cumming v SSE plc 2017 Rep LR 82 – [2017] SAC (Civ)
17 [paras 12 & 13]

- Test is one of objective reasonableness
- considered at time motion made, in all the circumstances of the case
- Having particular regard to matters specified in S108 (3)
- If court considers the reasonableness test is met, then it has a positive duty to grant sanction

ASPIC: Sanction for Counsel

Sanction for Senior ?

Burns v Hamilton & Forbes & ors, Sheriff Braid, 26th
October 2017

- Pleural plaques
- 3 defenders
- Senior counsel instructed following PTM (failure to achieve settlement)
- Sanction for employment of junior counsel not opposed
- Senior counsel - written submission



ASPIC: Sanction for Counsel

“While it may be true that many competent junior counsel could have conducted the proof, it does not follow that it is not reasonable to sanction employment of senior counsel, any more than that it would not be reasonable to sanction junior counsel in a case which might be capable of being conducted by some solicitors. The real issue is whether the issues which remained live at the time of instruction merited the employment of senior counsel. That involves consideration of the difficulty and complexity of those issues and whether they were such that the skill and experience of senior counsel would bring something to the table..Having regard to the matters identified....it seems to me that in combination, they were complex enough to merit the use of senior counsel.”

ASPIC: Sanction for Counsel

Daniel Graham v Enviro-Clean (Scotland) Ltd [2019] SC
EDIN 12, Sheriff Braid

- Pursuer's motion to sanction cause in relation to every piece of work undertaken by counsel
- Defenders opposition in relation to certain elements of that work



ASPIC: Sanction for Counsel

- Party seeking sanction should seek sanction for whole proceedings – “***blanket sanction***”
- Practice seeking sanction for specified work should cease.
- Ultimately a matter for the auditor to determine whether counsel’s fees for a particular piece of work should be allowed or not.
- Need to specify in motion the submissions in support of motion
- Competency/experience of specialist PI firm is NOT the test

ASPIC: Sanction for Counsel

Warning!

Act of Sederunt (Taxation of Judicial Expenses Rules)

2019 SSI 2019 No.75

- Came in to force on 29th April
- Brought in without consultation with profession
- Causing concern, particularly for those involved in clinical negligence cases
- Significant changes to way expenses dealt with, particularly sanction for employment of counsel and certification of skilled persons

ASPIC: Sanction for Counsel

Of note...

- Fees of skilled persons will not be recoverable unless certified as a skilled person **before** the work is carried out
- Introduces proportionality requirement for the instruction of an expert
- Counsel's fees will not be allowed for work carried out unless the proceedings, or a particular piece of work, have been sanctioned as suitable for employment of counsel **before** the work is carried out

ASPIC: Sanction for Counsel

- Anomalous – motions required in Chapter 36A (and Chapter 42A in CoS) but not Chapter 36 (or Chapter 43)
- See Lady Carmichael’s guidance in ***Vikki Davidson v Grampian Health Board*** [2019] CSOH
- Representations have been made to Lord President’s Secretariat and full response is awaited – meantime be aware!

ASPIC: Pitfalls!

- Beware the non productive PTM!
- Beware failure to complete Minute of PTM correctly!
- Beware failure to comply with timetable
e.g. *M v Aviva Insurance UK Ltd* 2017 Rep.L.R. 32
- Motion to vary the timetable – don't assume it will be granted or that it will be granted without delay



ASPIC: Pitfalls!

- Motions to discharge proof diets change ONLY the proof dates. If associated timetable is to be changed, there should also be a motion to vary that.
- Certification of “skilled persons”. Ensure motion uses correct terminology. “Skilled witness” no longer accepted by the PI court!

ASPIC: Recent cases

Stuart Lambert v Proserve UK Ltd, Sheriff Braid, 30th April 2019

- HAVS case.
- Defenders were in breach of regulations but successfully argued that the pursuer had failed to prove that he suffered from HAVS and did not establish causation.

Gheorge Dehenes v T Bourne & Son Ltd, Sheriff Reith QC, 2nd May 2019

- Pursuer claimed injury from manually handling piece of laboratory equipment. Proof on liability only
- Pursuer succeeded.
- Guidance on legal test for contributory negligence and law in employer liability cases post ERRA 2013

ASPIC: Recent cases

Danielle Weddle v Glasgow City Council [2019] SC EDIN 42, Sheriff McGowan, 30th April 2019

- Bin lorry case
- Pursuer claimed damages for psychiatric injury only
- Issue was whether pursuer was primary victim or not
- Held that driver could not have reasonably foreseen that his driving at relevant time would give rise to risk of physical injury to pursuer; that she did not suffer fear of physical injury to herself at the relevant time; therefore she did not qualify as primary victim and could not therefore recover damages for psychiatric injury suffered.

ASPIC: Recent cases

SJ (as guardian of L) v Cala Management Ltd [2019] SC EDIN 46, Sheriff McGowan, 23rd May 2019

- Child injured crossing a grid into a play park on housing estate
- D = developers of the housing estate
- Case originally made under Occupier's Liability (Scotland) 1960
- D title and interest ceased 5 years prior to accident when the last house in the development was sold. The residents thought (wrongly) that the developers interest continued
- Case under 1960 Act not insisted upon at proof. Proceeded under common law
- P sought to prove grid installed incorrectly
- Failed!

ASPIC: Recent cases

“In summary, evidence of ownership and/or occupation and control were fundamental to stating and making a case based on the 1960 Act. These points should have been properly investigated before a case based on the 1960 Act was brought. Instead, it appears to have been advanced on the strength of a wholly inadequate evidential basis, with the result that the defender was put to the time, trouble and expense of meeting a case which could never have succeeded and court time was needlessly expended to no purpose”

“before turning to examine that issue in more detail, I must repeat some observations made before in other cases about the manner in which written pleadings are framed.

ASPIC: Recent cases

*Statement of fact number 4 should set out **briefly** the pursuer's case. Here it runs to something close to 80 lines of text. Statements of claim of this length, when read along with the relevant answer thereto, make it very difficult for a reader to comprehend what the case is about and in particular which matters are in dispute and which are not. In addition to its length, statement 4 begins with the date of the accident, but then jumps back in time to things that must have happened earlier. It contains factual averments mixed up with averments of duty (which themselves appear in more than one place). In short, it follows no logical layout or order. These failures in drafting are calculated to defeat the purpose of written pleadings"*

ASPIC: Recent cases

Michelle Chisholm v Mr Mehmood & ERS Corporate Member Ltd [2019] SC EDIN 79, Sheriff Braid, 2nd October 2019

- RTA – P claimed car owned by D1 and insured by D2 collided with rear of her vehicle
- Proof on liability only
- D1 denied being involved in accident
- P did not aver that D1 driving at material time. Averred that it was D1's car that drove into rear of hers
- Failed to establish identity of driver ie failed to prove D1 was driver – held identity of driver unknown
- *“As a matter of law, mere ownership of a vehicle which is involved in an accident is insufficient to pin liability on the owner, even where the driver is negligent.”*
- *“sloppy pleading..” “action could have been dismissed as irrelevant”*

ASPIC: Recent cases

Sheila Varney v Fife Scottish Omnibuses Ltd [2019] SC EDIN 91,
Sheriff Fife, 18th November 2019

- P lost footing at emergency exit steps on coach operated by D and sustained injury
- Proof on liability
- Emergency exit steps formed ingress on main gangway
- Held that the ingress was a hazard for passengers
- No warning to passengers of presence of ingress
- D made safety route assessment but failed to risk assess onboard safety of passengers. Relied on EU Cert. of Conformity approved for use on UK roads.
- Any risk assessment for onboard passengers would have identified the ingress as a hazard and, a reasonably foreseeable risk of injury to passengers.
- There was requirement on D to take reasonable control measures to eliminate/minimise risk of injury to passengers. Decree!



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