



Compass Chambers

# TALES FROM ASPIC – A USERS GUIDE

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# ASPIC

- Introduction
- Statistics
- The Court
- Procedural Court & Motions
- Remit to Court of Session (COS)
- Sanction for Counsel
- Pitfalls
- Recent Cases

# 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
<b>Total</b>	<b>3,282</b>	<b>514</b>

# 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](http://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 - “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 5<sup>th</sup> December 2018 but due to meet on 5<sup>th</sup> March
- 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](mailto: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 1<sup>st</sup> October 2018
- Reorganised procedural court (Procedural Court and Opposed Motion Guidance - [www.scotcourts.gov.uk/the-courts/sheriff-court/personal-injury-court](http://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



# 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 4<sup>th</sup> working day after day on which opposition is lodged, mutual exchange of submissions
- No later than close of business on 6<sup>th</sup> 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

# 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, 26<sup>th</sup>  
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 witnesses

# ASPIC: Sanction for Counsel

Of note...

- Fees of skilled witness 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

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: Recent cases

## ***Diane Raybould v T & N Gilmartin (Contractors) Ltd*** [2018] SAC (CIV) 31

- Appeal following ex tempore judgment of Sheriff McGowan
- Applied maxim of *volenti* although not pled by defenders, nor were there submissions on the issue – his own innovation!
- SAC provide guidance on *volenti* and also comment on the style of opinion expected in ex tempore judgments

# ASPIC: Recent cases

***Stuart Lambert v Proserve UK Ltd***, Sheriff Braid, 20<sup>th</sup> April 2019

- HAVS case.
- Defenders 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, 2<sup>nd</sup> 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 ERA 2013

# ASPIC: Some cases

***Danielle Weddle v Glasgow City Council*** [2019] SC  
EDIN 42, Sheriff McGowan

- 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



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