

PE1712/C

The Law Society of Scotland submission of 8 January 2019

Introduction

The Law Society of Scotland is the professional body for over 11,000 Scottish solicitors. With our overarching objective of leading legal excellence, we strive to excel and to be a world-class professional body, understanding and serving the needs of our members and the public. We set and uphold standards to ensure the provision of excellent legal services and ensure the public can have confidence in Scotland's solicitor profession.

We have a statutory duty to work in the public interest, a duty which we are strongly committed to achieving through our work to promote a strong, varied and effective solicitor profession working in the interests of the public and protecting and promoting the rule of law. We seek to influence the creation of a fairer and more just society through our active engagement with the Scottish and United Kingdom Governments, Parliaments, wider stakeholders and our membership.

The Society's Criminal Law Committee welcomes the opportunity to consider and respond to the Public Petitions Committee in relation to Petition PE1712 (Petition) which "calls on the Scottish Parliament to urge the Scottish Government to review the use of soul and conscience letters in criminal proceedings and to produce guidance for the courts and GP practices on the use of these letters including alternatives to court appearances if an accused person is deemed unfit to attend in person".

Background to the petition

This Petition relates to the use of soul and conscience (S and C) certificates in relation to criminal proceedings. This Petition was discussed at the Scottish Parliament on 6 December 2018 by the Public Petitions Committee who requested our response.

Our members represent the Crown Office and Procurator Fiscal Service (COPFS), the defence and academia. Our views are designed to set out the background to S and C certificates and their use in criminal matters (including consideration of the alternatives if an accused person is unfit).

We fully support that accused persons should stand trial when appropriate. There must be fairness in criminal proceedings for all concerned be it Crown, defence witness or the accused. For the purposes of this response, we restrict our comments to consideration of the accused (though many of the procedures and issues apply equally to the witnesses).

Transparency of the S and C certificate processes may be a good outcome. There could be better information made available for the public about the meaning and

effect of S and C Certificates and to the medical profession about what information is required in a S and C certificate. We would emphasise that we are unaware of any current abuse of the process. Certainly, the courts have always had a discretion to look behind S and C certificates when they are produced.

What is a S and C Certificate?

S and C Certificates are produced to excuse the attendance of witnesses or an accused. They may be produced before any criminal proceedings are initiated by COPFS who will consider whether to prosecute.

S and C certificates are produced by the medical profession, usually by GPs but they can be produced by a relevant medical hospital consultant. They should be issued on the headed notepaper of the medical practice and:

contain information about the person (witness or accused)

appear crucially (our emphasis) with a form of the words that the information is either being provided on 'soul and conscience' or an affirmation "to certify and solemnly and sincerely affirm" that the information is true and

are signed by a qualified doctor.

S and C certificates should be differentiated from 'standard' medical certificates provided commonly to an employer about absence from work. The same information may well be relevant and appear in substantially a similar form. However, consideration of fitness for work and attendance at court involve different considerations.

Crucially, what is missing from such a 'standard' medical certificate is the expression that the information provided is being given on 'soul and conscience'. 'Standard' Medical certificates, though routinely provided to courts, should not normally be accepted. A S and C certificate should be obtained, certainly in relation to the accused.

The difference between a S and C certificate and a 'standard' medical certificate is that, apart from being more detailed, the doctor may be asked to attend court to confirm that the information contained in the letter is accurate. Such evidence would then be given under oath or by affirmation and subject to the consequences of perjury were the doctor to be found to have lied.

In attending at court, the doctor may well be asked for more information about their opinion as to any likelihood of recovery were this to be a factor. Doctors only state their opinion as an expert witness.

They would be expected to confirm their medical qualifications and experience before their expert opinion could be given and accepted.

Expert opinions can vary and if challenged and the case is in court, it would be a matter for the judge to consider. By way of example of the type of difficulties, the Lockerbie case illustrated the controversy that arose over the medical opinion where the accused Abdel Basset al-Megrahi¹ was released on compassionate grounds as he was terminally ill. He went on to live much longer than perhaps was anticipated by the medical profession.

A S and C certificate can be produced at any stage of criminal proceedings. It will be produced in relation to the accused by the accused themselves and/or through their defense agent.

Consideration as to initiation of criminal proceedings

The decision whether to initiate any criminal proceedings at the outset lies with COPFS and the Lord Advocate. COPFS assesses the facts and circumstances of the case reported to them and decides whether prosecution is merited and justified in the public interest.

The COPFS Prosecution Code² (Code) sets out factors which may, depending on the circumstances of the particular case, be relevant in determining what action is deemed to be in the public interest. These include, among other things, the nature and gravity of the offence; the impact of the offence on the victim and witnesses; the age, background and circumstances of the accused; the attitude of the victim; the motive for the crime; and the risk of further offending. The weight to be attached to any particular consideration will depend, of course, on the circumstances.

We refer specifically to paragraph (iii) of the Code which under paragraph (iii) the age, background, and personal circumstances of the accused states that “the prosecutor may consider that ill health or other adverse personal circumstances on the part of an accused person may justify the exercise of discretion in favour of action other than prosecution”.

The decision as to the accused’s fitness if known at that stage to stand trial will therefore be a matter for the COPFS. Such decisions are taken by COPFS in performing their role as “an effective, rigorous and fair prosecution service, acting independently in the public interest, [as] ... a central component in a criminal justice system which aims to deal fairly with persons who are suspected and accused of crime”³

¹ <https://www.reuters.com/article/us-britain-lockerbie/lockerbie-bomber-sent-home-to-libya-to-die-idUSTRE57J4SS20090820>

² http://www.copfs.gov.uk/images/Documents/Prosecution_Policy_Guidance/Prosecution20Code20_Final20180412__1.pdf

³ <http://www.copfs.gov.uk/images/Documents/Lord%20Advocates%20Apex%20Scotland%20Lecture.pdf> Lord Advocate 5 September 2017

Medical information however may well not be information that is provided or available to COPFS at that time.

Ongoing cases

Once criminal proceedings have been instructed by COPFS, if an accused produces a S and C certificate, it will be a matter for COPFS to decide whether or not to accept the certificate. The information disclosed in the certificate can result in different actions:

- If the accused is unfit on a short-term basis, any trial could be delayed until he is fit, but that depends on a range of factors requiring interests of justice considerations. Ultimately, an adjournment would be a matter for the court to decide. There will come a time when the case can be delayed no longer when the Crown can exercise its discretion as to whether to discontinue proceedings (as highlighted above).
- Where the accused is not fit, there may be arrangements which can be made to support the accused attending court which are discussed below.
- The accused is unfit and cannot stand trial. If this relates to mental disorders, (such as a plea in bar of trial in relation to insanity) these are dealt with procedurally under Part V1 of the Criminal Procedure (Scotland) Act 1995. If the accused is unfit for other reasons, as stated above the decision for discontinuing proceedings lies with COPFS.

Frequently, the S and C certificates that are supplied will have a number of omissions as GPs appear not always to understand fully what is involved in the court processes or the effect of a S and C certificate. Simple terms such as unfit to attend court due to “anxiety” or “stress-related illness” are not going to be accepted. Psychiatrists or psychologists may need to become involved to look behind a S and C certificate.

What the courts are interested in is their ability to arrange for special measures or other arrangements to ensure that the accused can attend and participate in the court process. For instance, for ongoing medical treatment, it could involve limited times for the court sitting and avoiding the times of appointments.

There should be a degree of flexibility as does exist in Scotland at common law that can address some of the common problems in attending court such as attention span, incontinence issues or medication requirements. With the demographic age in

Scotland increasing, problems faced by the elderly may well present challenges in the future. The German court⁴ has worked round the issue in arranging for a court to sit on a limited basis to accommodate the needs of the accused where:

“the unusual sight of a nonagenarian being tried in a juvenile court. Hearings in the Stutthof case, scheduled to start on 6 November, will last a maximum of two hours each day because of the poor health of the suspect”.

In our experience, where a S and C certificate is produced which is not in the terms required, contact is normally made with the doctor to explain what is involved by the accused attending court. Then that can ascertain if in the doctor’s view they are actually unfit to attend court. Not infrequently, anecdotally doctors tend to amend their views when they find out what is involved for the accused in attending court, arrangements which may be made to deal with any issues and for them to give evidence. Additionally, when advised as to the significance of “soul and conscience” and what it means, doctors do tend to change their mind. This may well result from a lack of basic information and knowledge about S and C certificates at the outset.

If the S and C certificate is not accepted, the accused should be advised accordingly. They then will be required to attend court. A warrant to arrest will be normally sought where there is any subsequent non-appearance. The court may adjourn for further inquiries to be made if they understand that there are health considerations although the question whether to grant a warrant is a matter for the sheriff. Normally, a warrant would be granted for unjustified non - attendance. Execution of a warrant is a matter for the Crown in the case of the accused.

On Conviction/Sentence

The consideration of any S and C certificate after conviction in respect of the accused is a matter entirely for the court and effectively for the judge to decide whether the accused must attend for sentence.

Considerations as to the accused’s unfitness to attend court

Accused: In solemn proceedings, a trial cannot normally be held out with the presence of the accused⁵. In summary proceedings, the court can proceed to trial on the motion of the prosecutor and if satisfied both as to the accused having been cited and it being in the interests of justice to proceed in the accused’s absence⁶. There are significant European Convention on Human Rights issues were the trial to be held in his absence. Unfitness would not be likely to be an appropriate ground unless the court really was satisfied that the absence was deliberate. Notwithstanding there

⁴ <https://www.theguardian.com/world/2018/sep/21/nazi-war-crimes-suspect-faces-trial-german-youth-court>

⁵ Section 92 of the Criminal Procedure (Scotland) Act 1995 (solemn).

⁶ Section 150A of the 1995 Act.

would be significant evidential difficulties in proceeding without the accused where identification may be relevant or in cases with multiple accused.

The accused should be present at his trial and understand what is taking place.

Where the accused is vulnerable, that is not grounds for deeming them unfit to attend court. They may well need support in court from a supporter or equivalent professional to help them understand the proceedings. That can and should be arranged. Their solicitor is also present, assuming representation, to ensure that the proceedings taking place are fair.

Where an accused person misconducts⁷ in court, they can be removed from court because of their behaviour. Unfitness does not equate to misconduct though there are statutory provisions for appointing a solicitor to act on their behalf in the trial. during their *enforced* (as a result of the decision to remove them from court) absence from court.

There are evidential considerations too as the accused may also elect to give evidence. Currently, there are no measures that allow the accused to give evidence on commission. While the accused could conceivably give evidence on commission, practically it is hard to see how that can be achieved. To answer the charges, they would need to give evidence at the conclusion of the Crown case. The provisions of the Vulnerable Witnesses (Criminal Evidence) (Scotland) Bill⁸ deal with evidence on commission but its provisions do not extend to the vulnerable accused.

The accused can appear on video link for procedural hearings such as committal proceedings from prison. That has a limited role where it is of short duration and procedural significance.

Technology: This exists to allow in theory to allow anyone to have a video conference so in effect they could watch and participate in the trial. There are a number of significant practical issues that would need to be overcome such as:

- Quality of the process to ensure that the accused can hear effectively and throughout the proceedings
- The accused is alone and not being influenced by others who may be present (in contrast to prison where the accused is in a secure environment)
- The need for confidential communication between the accused and the solicitor
- The ability for the accused to be identified by witnesses

⁷ Section 92(2) of the 2015 Act

⁸ <http://www.parliament.scot/parliamentarybusiness/Bills/108702.aspx>

- The ability for the accused to see all documentation/videos and productions during the trial
- The ability for the accused to see the judge and witnesses as well as the jury to see the accused

Appropriate safeguards and protections would need to be built in. These are really questions best answered by the Scottish Courts and Tribunal Service who are in charge of the court facilities. There could be remote court staff, who could take equipment to an accused's home / hospital to allow for remote participation with a secondary link to allow communication with the solicitor. That would tend to be costly and inflexible.

This would not really assist with the unfit accused, as we have stressed, where their condition impacts on their ability to meaningfully participate as much depends on the nature of the condition. There may well be means to accommodate the accused by holding shorter hearings and other arrangements specific to them.

During a trial, the accused has to be in a position to take an active role, be able to understand and see all witnesses in court as well as instructing their solicitor who also has to be able to make any objections to evidence timeously based on instructions. Remember too that legal advice is confidential to the accused.

There may be circumstances where the accused is unfit to stand trial. That should be accepted only in the last resort where all other considerations as to securing the accused's attendance have been exhausted. As highlighted above, that would be a matter for COPFS to decide in the public interest.

S and C certificates should be robust and capable of withstanding scrutiny by all interested in the criminal justice system.

We would make some suggestions regarding consideration as to their content:

1. **Hearsay:** We refer to section 259 of the Criminal Procedure (Scotland) Act 1995 which deals with the circumstances where hearsay (usually documentary) evidence can be taken. This section deals with witnesses' evidence. Normally, one seeks the attendance of the witness to give oral evidence as that is the best evidence which can be subject to challenge and is given on oath.

Under section 259, where a witness statement exists and was provided previously, and the witness is by reason of his bodily or mental condition unfit or unable to give evidence, the party by means of a section 259 petition may apply by notice to have such statement admitted in evidence.

Routinely, such applications will be accompanied by a S and C certificate confirming exactly that “the witness is by reason of his bodily or mental condition unfit or unable to give evidence”. The wording of that section may provide some guidance as to what the scope of a S and C certificate for the accused should cover.

2. **Civil:** Though dealing with civil procedure, reference too may be made to the case of *Stuart McCallion v Apache North Sea Limited and others*⁹. Paragraphs [27] – [33] set out a number of considerations regarding the provision to the court of medical certificates. In particular, paragraph [31] refers to:

“a medical certificate should be scrutinised carefully. A certificate to that effect that a person is unfit to attend court is not conclusive evidence of that; in every case it is for the court to decide whether it is persuaded that a person is unfit to attend and if so what the consequences are based upon the certificate and other relevant circumstances as to a whole(including the conduct of the case, and the nature of the party’s engagement otherwise with the case). Unfitness for work is not unfitness for court to attend to legal matters”.

Paragraph [33] deals with effective participation depending on the medical condition but also on the nature of the issues before the court and the role the party will have to undertake. That is equally in our view applicable to criminal proceedings.

3. **High Court:** Paragraph 39 of the High Court of Justiciary Practice Note¹⁰ No. 1 of 2005 deals with preliminary hearings and refers to obtaining S and C certificates where a witness is unable, or likely to be unable, to attend a proposed trial diet because of illness or injury. The party wishing to have that person attend the trial as a witness needs to produce at the preliminary hearing a medical certificate vouching the proposed witness’s inability to attend court to give evidence. Such S and C certificates should include:

- (a) that the certificate is given on soul and conscience¹¹
- (b) where necessary, explain what symptoms the witness suffers that prevent
- (c) shall contain a prognosis estimating when the witness is likely to be fit to give evidence;
- (d) shall state whether the witness is fit to give evidence on commission and, if so, under

⁹ [2018] SAC (Civ) 1

¹⁰ https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/criminal-courts/pn01_2005.pdf?sfvrsn=10

¹¹ Though this is the wording of the Practice Note, we suspect that an affirmation would be accepted where a doctor is not prepared to give a certificate on sole and conscience

what conditions.

We are not aware of any such comprehensive notes that have been issued covering the lower courts, but Practice Notes have been issued in Grampian Highland and Islands by Sheriff Principal Pyle and North Strathclyde by Sheriff Principal Murray that state:

“Unless otherwise prescribed by statute, a medical certificate which certifies that a person is unfit to attend court on a particular day whether as a party or a witness may bear either words “I certify this on soul and conscience or “I certify and solemnly and sincerely affirm this to be true.”

This makes it clear what type of S and C certificates must be produced in the court and deals with the doctor’s preference for affirmation.

Conclusion

We have noted the reference to the English position set out in the Petition¹².

Similar requirements in Scotland exist to request a GP to attend court to provide evidence regarding the fitness of the accused. The court would therefore require in the event of challenge to decide the issue.

The COPFS has the discretion as to continuing proceedings where they balance a number of factors in making that decision.

Video link does not seem possible at present to address the necessary demands of the court process as far as the accused is concerned. As advances are made there may be means of securing the accused’s evidence on commission in limited circumstances were this required.

The debate in the Scottish Parliament referred to the possible abuse of the process regarding S and C certificates. We agree with:

“a distinction to be made between something being delayed and something being discontinued because somebody is not well..... abuse of the system is one of the things that we want to identify¹³”.

We are not aware of abuse, but we do consider that there is scope to improve the quality and understanding of the S and C certificates. It would be good practice for doctors through their professional organisations to be advised as to what is meant by “being unfit to attend court”. As indicated, it is not merely being physically unable to

¹² “...a court is not absolutely bound by a medical certificate. The medical practitioner providing the certificate may be required by the court to give evidence. Alternatively, the court may exercise its discretion to disregard a certificate, which it finds unsatisfactory: R. v Ealing Magistrates Court Ex p. Burgess (2001) 165 J.P. 82”.

¹³ Scottish Parliament 6 December 2018 Convener on Public Petitions Committee

attend. They need of course to be able to follow what is taking place in court which is why the issue of longer-term prognosis too requires to be addressed.

Doctors have taken to charging for these certificates where the cost of such certificates can be in the region of £50 to £70. These may well present an access to justice issue for those who cannot afford such costs.