WORLD BAR CONFERENCE

THURSDAY 14 APRIL 2016

"The role of the court in ensuring access to justice: two themes"

Lord Carloway, Lord President of the Court of Session[1]

Introduction

A quotation:

> "*If the law is the skeleton that supports liberal democracies, then the machinery of…justice is some of the muscle and ligaments that make the skeleton work*".[2]

Some platitudes:

The courts play the central role in the administration of justice. Their function is to promote observance of the law through the process of resolving civil disputes and determining criminal guilt. The legal profession plays its own important role. Members of both branches, solicitor and advocate (or barrister), represent the interests of the system's users. They do more; specifically at the level of advocate, by assisting the court in finding the true facts and applying the correct law, albeit hopefully in the client's favour. The advocate owes duties to the court and to the public, over and above those to fellow members of his profession and to the client.

[1] I am grateful to my law clerk, Megan Dewart, for preparing the first draft of and carrying out much of the research for this address

[2] Genn: *Judging Civil Justice*, Hamlyn Lectures (2010) at 4, borrowing a metaphor from Tamanaha: *On the Rule of Law: History, Politics, Theory* (2004)

In this broad sense, the legal profession is the muscle and ligament which makes the skeleton of the law in our democracy move.

Both branches of the profession remain largely self-regulating. Each is responsible, albeit in some sphere under delegated authority from the court, for training, standards, and very occasionally, the discipline of its members. The court retains a keen interest in the effective representation of both those who rely on the system to vindicate their rights and those in need of protection from state action. It must ensure that parties are adequately represented. In Scotland, this obligation is enshrined not only within the concept of a fair trial under Article 6 of the European Convention on Human Rights but also in the much older and more established common law principles of fairness in court proceedings generally. What amounts to adequate representation may vary from case to case, but it is ultimately a matter for the court to determine. It must do so to ensure that there is access to justice for all parties. After all, if someone does not have effective representation, justice cannot be seen to be done.

And now the themes:

There are two to consider. They are related but only distantly. They are cousins, albeit possibly several times removed. The perspective on each is that from the court, as it performs its central role. The first is the importance of informed choice in the selection of legal representation, and, as a subsidiary consideration, the ability of parties to secure that choice. The second is the provision of justice in the modern

age. This concerns the interest of the court in promoting the effective administration of justice for all, through the use of digital innovation and technology. Both areas bring with them their challenges. Each challenge requires to be met. The desired solutions need support from the profession where they can be seen as advantageous in promoting justice for all.

Part one: effective legal representation; a little local difficulty

In Scotland, the selection of counsel was traditionally, in the world of the split profession, the sole preserve of the solicitor. Our leading writer on solicitors, or law agents as they are traditionally known in this jurisdiction, put it this way towards the end of the Victorian era:

> *"Keep in your own hands, gentlemen as one of your most important rights, the selection of your counsel. Who is answerable for the success of the action or suit? You, or your client? Yourselves; and you have a right which no client that was not a fool would venture to question, to fix on that counsel, or those counsel, whom you believe in the undisturbed exercise of your discretion, best qualified to conduct your cause…it is your duty to be firm, and to remind those who would thus trespass on your province, that it is you, and not they, who are charged with the responsibility of conducting the cause to a successful issue."*[3]

That statement concerns the selection of counsel rather than whether counsel should be instructed at all. Modern attitudes towards the right of an individual to make important choices relating to their own affairs may make it less tenable than it was in more paternalistic times. Yet it remains important that the decision on the

[3] Begg: *Law Agents* 341, citing Warren: *Duties of Attorneys and Solicitors*

instruction of counsel is based on an informed choice by which, subject to availability, the advocate selected is the best to conduct the case, free from the influence of other factors. If the solicitor elects, as his practice rules may be suggesting he should, to delegate the choice to the client, the solicitor remains in a position to influence whether an advocate or a solicitor advocate should be selected by the nature and quality of the information which he imparts. It is accepted right at the outset that the vast majority of solicitors in Scotland approach this matter in an entirely acceptable and objective manner. The issue is what should be done if some do not.

In a trilogy of cases,[4] the appellate division of the High Court of Justiciary examined the circumstances of the instruction of in-house solicitor advocates in trials where the accused was faced with a charge of murder. All three cases were what are called *Anderson* appeals[5]; that is appeals brought on the basis of defective representation at trial. All three appeals were unsuccessful. That is unsurprising, given the high threshold which must be crossed to overturn a conviction on this basis. That is not to say that the Court expressed its happiness with the selection of the trial representation. None of the solicitor advocates in the three cases were Queen's Counsel. This is, if not surprising, worthy of remark. The legal aid regulations specifically provide for automatic sanction for senior counsel (that is to

[4] *Woodside* v *HM Advocate* 2009 SCCR 350; *Addison* v *HM Advocate* 2015 JC 107; *Yazdanparast* v *HM Advocate* 2015 SCCR 374

[5] *Anderson* v *HM Advocate* 1996 JC 29

say a Queen's Counsel), as well as for junior counsel (the definition of which in the regulations includes solicitor advocates), in a trial for murder.[6]

Some important points of context require to be noticed. The first is the distinction between the solicitor advocate and the advocate in Scotland. Subject to the need to undergo additional training and examination, solicitors were afforded extended rights of audience to appear in the superior courts by the United Kingdom Parliament in 1990.[7] At that time, the then Lord President (Emslie) amongst others, made trenchant remarks about the value of the independent bar, working at arm's length from both agent and client and the dangers of some form of half way fusion of the two branches.[8] After all, only a few years earlier, in 1980, a Royal Commission had recommended that the respective roles of the two branches be retained.[9] It was no coincidence that the extension of rights of audience to solicitors in Scotland coincided with that in England and Wales,[10] albeit that the business of the advocate and the solicitor in Scotland was and is by no means identical in practical terms to that of their counterparts south of the border. One of the driving forces was the perception that the Bar enjoyed a monopoly over the work before the Supreme Courts, and that the public interest would be served by increasing "competition" in that market.

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[6] Criminal Legal Aid (Scotland) Regulations 1996 para 14

[7] Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 section 24

[8] *HL Deb 30 January 1990 vol 515 cc166-224 at 183-186*

[9] *Report of the Royal Commission on Legal Services in Scotland*, Chaired by Rt Hon Lord Hughes CBE (1980)

[10] Courts and Legal Services Act 1990, later replaced by the Legal Services Act 2007

The idea, promoted by only some solicitors and the then Conservative Government, was that a solicitor advocate would be able to run a case from start to finish, becoming involved in the investigations and doing all of the pre-trial preparation. He would have more of an opportunity to build up a relationship with the client. Indeed he may already have a pre-existing relationship. Of course, to many an advocate, these perceived strengths were actually weaknesses, having regard to the desirability of the advocate operating at arm's length. The Government's thinking was that reform would offer clients a wider choice of representation[11]. Is that what happened? Certainly, the predicted one stop shop did not generally materialise in the criminal sphere. Rather, some agents simply instructed a solicitor advocate (and sometimes two) in place of counsel. The costs remain at least the same! That is all very well if the choice was objectively made.

The second important contextual factor was the development of the defective representation appeal. Prior to 1996, they did not exist.[12] In *Anderson*, the court recognized, not surprisingly, that an accused person was entitled to have his defence put before the court. Where this had not been done, or his representatives had not followed the client's express instructions, a miscarriage of justice might, it was held, have resulted.[13]

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[11] See: The Scottish Legal Profession: *The Way Forward*, SHHD, October 1989 para 2.2

[12] Shiels: *Criminal Advocacy and Defective Representation* (2013) chapter 1 sets out the history prior to *Anderson*

[13] *Anderson* v *HM Advocate* 1996 JC 29 at 44

The final important contextual point is one that has already been mentioned. Almost all High Court criminal cases are legally aided. The fees payable are ostensibly fixed. Whilst there is a distinction based on seniority,[14] all solicitor advocates and advocates are paid on the same scale. There is no competition in the marketplace based on price. What remains clear is that, in murder cases, the accused is entitled to representation by a Queen's Counsel, being a solicitor advocate or advocate who has been formally recognised as deserving of that rank and dignity.[15]

In each of the three cases of *Woodside*, *Addison* and *Yazdanparast* (*supra*), the High Court voiced concern that the accused had not been given sufficient information to make an informed choice about his representation. That is to say, he had not been given adequate information about the pros and the cons of representation by a solicitor advocate as opposed to counsel, and in a charge of murder, his right to be represented by a QC, whether counsel or solicitor advocate.[16] The other concern of the court was the instruction of in-house solicitor advocates, which the court in that case considered to involve a potential conflict of interest.[17] The conflict arises from the simple fact that, if an instruction was retained in-house, the firm would benefit financially. Such concerns are not unique to Scotland. The

[14] Criminal Legal Aid (Scotland) Regulations 1996 reg 2(2)(a)

[15] *Addison* v *HM Advocate* (*supra*) per LJC (Carloway) at para 36

[16] *Addison* v *HM Advocate* (*supra*), LJC (Carloway) at para 38

[17] *Woodside* v *HM Advocate* (*supra*), LJC (Gill) at para 66 *et seq*; *Addison* v *HM Advocate* (*supra*), LJC (Carloway) at para 37

review of Independent criminal advocacy in England & Wales by Sir Bill Jeffrey has recently identified the same problem.[18]

Solicitors are subject to a number of duties which require them to act in the best interests of the client, including cases where there is a potential conflict of interest.[19] The current practice rules provide only that the client is to be advised that appearance in the supreme courts is essentially restricted to a solicitor advocate or counsel, and that the choice of who to instruct is that of the client.[20]

The court did not state that the conflict was incapable of resolution. Such resolution was possible by giving the client sufficient information to allow him to make a free and informed choice.[21] In-house instruction is not the only situation in which a conflict may arise, nor is it inherent in the fact that the instruction is to a solicitor advocate, as opposed to an advocate. Any situation in which the information given to a client is compromised by another interest, as for example the instruction of an advocate or solicitor advocate for personal financial gain in whatever measure, can equally do so. That risk has long been recognised:

> "*Do not attempt, but neither do you permit, undue familiarity. Should any member of the bar so grossly forget himself, as to attempt to court you, to seek to ingratiate himself with you, and gain your confidence, by illicit means, scornfully repel his*

[18] May 2014 at para 5.8

[19] Law Society of Scotland Practice Rules 2011 B1.4.1; B1.4.2; B8.4.1; B1.9.2; B1.9.1

[20] Law Society of Scotland Practice Rules (supra) Rule B8.4.1

[21] *Addison* v *HM Advocate* (*supra*), LJC (Carloway) at para 37; Lord Brodie at para 42

advances: for, rely upon it, such conduct only disgraces and injures both parties to it".[22]

If an accused does not have sufficient information or advice to make a free and informed decision, and as a consequence his defence breaks down to the extent sufficient to merit a successful appeal, the court is required to intervene and quash the conviction. The court, and the legal profession, has an interest which goes beyond that. Justice must be done, and it must be seen to be done.[23] If the court is not satisfied that accused persons are being given adequate information, one way in which it can do this is to provide the basic information in writing and ensure that the accused has received and understood it.[24] A procedural step ahead of the trial, to confirm that the accused has understood the choices available, would appear to be in the interests of justice as well as the profession. That is the current proposal in the draft Act of Adjournal presently being considered by the Criminal Courts Rules Council.

The focus thus far has been on the criminal sphere. Are the considerations different in civil litigation? Probably not but that is for another day.

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[22] Begg, *Law Agents* 341

[23] A corruption of the line from *R* v *Sussex Justices Ex p. McCarthy* [1924] 1 KB 256 at 259: "*of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done*"

[24] *Addison* v *HM Advocate* (*supra*), LJG (Gill) at para 29

Part two: access to justice in the modern age

Advances in technology mean that the courts operate in a world which would be unrecognisable to those who lived 100 years ago and, in many respects, unfamiliar to those practising 14 years ago when the first of these conferences was held. Last year saw the implementation of the most comprehensive reform of the practices of the Scottish courts since the early Victorian age. The implementation of Lord Gill's Review[25] has had, and will continue to have, a very significant impact on the level at which both civil and criminal cases are decided. Court procedure is closely linked to access to justice: it is the link between evidence, as proof of fact, and correct decisions based on a correct application of the law.[26]

Advances in technology influence users' expectations. On a fundamental level, the opportunities presented by modern technology could, to use the words of Lady Dorrian …"*make justice more accessible to a wider number of people, to make evidence more reliable and more readily available, and to make processes and procedures more efficient*".[27] This is something which is being considered on a wider basis as part of the Digital Justice Strategy of the Scottish Government.[28] It is a recognition of the fact that the court system should keep pace with developments and change in the society which it is intended to serve.

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[25] Report of the Scottish Civil Court Review (2009)

[26] Dame Hazel Genn, *Judging Civil Justice*, Hamlyn Lectures (2010) at p 13, attributing the sentiment to Bentham

[27] Lady Dorrian, "*Digital Justice Strategy: A view from the courts"* Edinburgh, 20 August 2014

[28] The Strategy for Justice in Scotland, Scottish Government, August 2014

In the criminal sphere, the Evidence and Procedure Review, conducted under the auspices of the Scottish Courts and Tribunal Service rather than Government, and which originally reported in March 2015, recently published a list of recommendations.[29] In broad terms, it recommends that the evidence of child and other vulnerable witnesses will be captured in pre-recorded form as soon as possible after a complaint is made, and certainly well ahead of any trial diet. This type of reform is being contemplated, and, in some instances, has been implemented in some of your jurisdictions.

The real significance of the Review is its promotion of more fundamental changes to the way in which criminal trials are conducted. The current procedure relies, as it did in Queen Victoria's time, on the coming together of all parties and witnesses at one time in a single court building. The Review proposes a significant departure from this and the introduction of a quite different model, whereby the trial ceases to be the event at which all evidence is heard. Rather it would become the end point of the evidence gathering process. It would be the point at which the evidence would be placed before the court, largely in pre-recorded electronic form. By this is meant digitally in audio and video format. Writing would not be acceptable as a generality. The parties would make their submissions, having had advance notice of what the testimony will actually be, rather than what the advocate might, on the night before the trial, have predicted it to be. Early disclosure of the

[29] Evidence and Procedure Review- *Next Steps*, 26 February 2016

recordings would mean that the defence would have what would be the bulk of the Crown's evidence-in-chief to consider at leisure. Cross examination could actually be accurately structured in advance, rather than, at least in part, dreamt up during the witnesses' appearance in court. Knowing, rather than guessing at, what the testimony is could facilitate earlier pleas or allow for effective focus of investigations.

Such a radical change would of course require primary legislation. The court cannot ultimately be the driving force. It does nevertheless have an interest in ensuring that justice is effectively administrated. It remains responsible for ensuring that a trial in any new format is fair. That is why the proposed reforms are being proposed by the judicial and not, at this point, the politicians. The court has recently considered a challenge concerning the use of pre-recorded evidence, in light of the procedural right of the accused under Article 6(3) to examine and have examined the witnesses against him.[30] It rejected the idea that, just because the very young children, whose post incident interviews had been agreed as examination in chief, had apparently forgotten everything by the time defence counsel rose to cross-examined them, there had been Article 6 unfairness in the trial process. At the same time, it recognised, as it had done in the past, the problems arising in the modern environment where trials seem to take longer and longer to prepare and present.

[30] *MacLennan* v *HM Advocate* [2015] HCJAC 128

The court maintains its traditional role of ensuring that the particular party or accused has access to justice. There is, however, a broader sense in which the court must ensure access to justice in the modern age. That is by recognising that the interests of justice require not only that justice is done in the individual case, but also that court time and resource is allocated wisely and fairly and at a proportionate cost. This is not, of course, the immediate concern of the advocate. Some may scream "What price justice?", but it does have a price and a budget. It may not be as much as we might want, but it may be all that we are going to get.

The current system places emphasis on the attendance of witnesses at the trial diet. Any system which relies exclusively, or almost exclusively on this, is vulnerable to time being wasted when witnesses fail to attend either deliberately, by forgetfulness, by chaotic lifestyle or because the Crown have forgotten to cite them.[31] Resources are finite. The interests of justice require that the best use is made of court time, which must be regarded as increasingly precious. Where modern technology would facilitate better use of time, resulting in more effective justice and the fairer allocation of resources, it is not only in the court's interest, but also in those of the users of the profession and the public, that it is investigated and, where appropriate, introduced.

[31] The results of two audits carried out by Audit Scotland describe the problem in detail: Audit Scotland, *An overview of Scotland's Criminal Justice System*, Sept 2011; Audit Scotland, *Efficiency of Prosecuting Criminal Cases Through the Sheriff Courts*, Sept 2015

Conclusion

What is the role of the legal profession in all of this? The profession is a vital part of the machinery of justice. The court relies on both branches of the profession to perform their functions as representatives of the parties. Without this input, the risk that the court will fall into error is greatly increased. The challenges posed by the development of the traditional roles of the profession, models of funding, competing interests, and modern technology are all ones which the profession, as well as the court system, require to meet. Of course, it is readily recognised that some of the more Luddite and perhaps rather paranoid elements may inevitably regard all change as inherently wrong, designed to cut costs (specifically their fees) and to secure wrongful convictions. They are wrong, but their views must be listened to. The rest of us in the profession, who have always seen their role as, not just to perform their particular task in the system but to improve it, to augment the quality of evidence and to promote justice generally, will alone continue to be the ligaments and muscle which move the skeleton of the law forward. You are clearly here with a view to discussion issues in the justice system. The importance of ideas coming from the profession cannot be underestimated. I wish you all well in your deliberations.