"THE SHERIFF COURT – THE FUTURE"

INTRODUCTION

It is an honour to be invited to give your annual lecture. The roll of former lecturers is a glittering array of distinguished judges and lawyers. Delivering this speech in this historic court makes the honour even greater. I thank the Lord President for allowing the use of this court where important national events are marked and which has been the cradle of Scots law.

It is rather special that tonight's event embraces the entire spectrum of the solicitor's branch of the profession. The solicitor advocates have on merit gained the right to appear in this court. Welcome also to the Scottish Young Lawyers' Association whose members are embarking on legal careers at a time when our court system is undergoing its greatest period of change in many generations. It has been said that this is the most significant justice reform programme currently in the western world.

Indeed, we stand at a portentous moment in time for Scottish justice following the court reform legislation receiving Royal Assent just a few weeks ago. Reform, of course, presents challenges for all of us – the judiciary, solicitors and the Faculty of Advocates.

The College of Justice of which this fine court is its physical manifestation – has as its members the Senators; the Faculty of Advocates; the Society of Solicitors in the Supreme Courts and the Writers to the Signet. That institution demonstrates that all parts of the legal profession have essential functions in the justice system. The same holds equally good of the sheriff court where the administration of justice requires the same collegiate approach. The sheriff court relies on the professional standards and advocacy of both solicitors and faculty.

The solicitor profession is well placed to both anticipate and participate in the process of reforming the way legal services are delivered to clients in the justice system of the future. More than that, the court reform programme presents great opportunities for solicitors themselves and their personal career development.

My career as a solicitor was spent in an SSC firm here in Edinburgh mainly involved in civil litigation in this court and also the sheriff courts. I am old enough to remember legislative

change which at the time was widely predicted to be ruinous for the bar and Edinburgh solicitors alike. In 1980 the Royal Commission for Legal Services recommended that the sheriff court have jurisdiction in divorce.[1] This apocalyptic event was then thought to herald the end of the Bar and the Edinburgh correspondent. Well the world did not end – and students and young lawyers of today will be incredulous that only 30 years ago we required married people to come to Edinburgh with a witness and give evidence before a judge in order to be divorced even if undefended. Of course, now the sheriff court deals with almost all divorce and other family actions. Society, of course, has changed a great deal in the past three decades. The solicitor profession has an excellent track record of adapting to change – indeed anticipating change – not only in the law but in society and in the market place.

The Lord President in his introduction to the Scottish Civil Courts Review[2] remarked that "*Two of the outstanding features of the legal profession are its resistance to change coupled with its endless adaptability*". That is true. The extension of rights of audience in the Supreme Courts to solicitors has reinvigorated both branches of the profession.

In the courts we deal with areas of law unheard of 30 years ago – extraditions; judicial review; immigration; environmental law and ECHR issues to name only a few.

Accordingly, the topic of this lecture gives more than a clue as to the importance of the Sheriff Court in the future success of our justice system. I hope to glimpse into the sheriff court of the future however to do so requires an understanding of how the sheriff court or “people’s court” currently operates at the heart of the court system.

THE SHERIFF COURT AS WE KNOW IT

The sheriff court has a very wide jurisdiction from the valuable and intellectually challenging to the more visceral. In Scotland there is no true hierarchy of courts in the civil jurisdiction. Currently, a sheriff may be programmed to hear a virtually unlimited case load with the exception of the types of action where the Court of Session retains exclusive jurisdiction – such as judicial review; exchequer causes, intellectual property and the enumerated causes to be heard by a jury of 12. Although the Court of Session retains exclusive competence in judicial review essentially statutory appeals from decisions of licensing boards and other

[1] Divorce, Jurisdiction, Court Fees and Legal Aid (Scotland) Act 1983 s.1

[2] Report of the Scottish Civil Courts Review (2009) - Introduction

public bodies, which sheriffs deal with on summary application, likewise involve judicial review of decision making.

Theoretically, in one week, sheriffs could deal with a valuable commercial action; a small claim for £100; an application for a permanence order for adoption; supervised payment by instalments of a debt or fine in either the civil or criminal jurisdiction rounding off the week with a summary criminal trials court. In practice this should not happen but the point I seek to make is this – it is not a good use of a sheriff who is qualified and appointed to deal with serious criminal and civil cases to have such a wide remit. In England the lower value civil cases would be dealt with by more junior judges and the summary crime by lay magistrates.

However, perhaps the most serious cases of all are handled by sheriffs – and by this I mean cases involving children and vulnerable adults – especially cases arising from state intervention in family life. Last year the President of the Family Division in England and Wales had this to say of such cases:-

> *"It must never be forgotten that, with the State's abandonment of the right to impose capital sentences, orders of the kind which family judges are typically invited to make in public law proceedings are amongst the most drastic that any judge in any jurisdiction is ever empowered to make."*[3]

Therefore, these can be some of the most important and anxious cases in the sheriff's and indeed in any court's jurisdiction.

Another important feature of the sheriff court is the almost unstoppable volume of criminal business (both solemn and summary) which the courts require to deal with. The court has no control over the volume which is driven by police reporting and Crown Office marking. In some courts, usually the smaller courts, the public may with justification complain that criminal business pushes civil cases to one side. It is somewhat oxymoronic that the accused who does not want to be in the court building at all appears to get priority over civil litigants who, in the main, have chosen to litigate in that court and have paid court fees.

THE INDISPUTABLE NEED FOR REFORM

[3] Sir James Munby in ReJ (as child) [2013] EW 8C2694 Fam para [28]

The indisputable need for reform arises not simply from the need to manage the wide jurisdiction of the sheriff court but also due to the unfettered right of appeal to this court (Inner House). It is a feature that in both the Court of Session and Sheriff Court the time of the court is taken up unnecessarily by low value claims. It is a worthwhile aim that litigation should be conducted in the most appropriate court by virtue of the nature, value and importance of the case. When cases are litigated at too high a level the litigation becomes more costly and therefore the risk for both parties becomes greater. Also the resources of the court are not used effectively.

The court reform legislation is borne out of the Scottish Civil Court Review. The recommendations driving reform have not been made for the sake of change but arise out of the most extensive public and professional consultation in our lifetime. The reforms stem from that consultation and an analysis of the operation of the courts.

It is a remarkable achievement that the recommendations have now moved from the drawing board to legislation and on into implementation. The ills of civil litigation are well known, largely as a result of our court system where litigants have a choice of two courts of equal jurisdiction; and the very modest privative limit in the sheriff court. Undoubtedly lawyers took advantage of that system. Litigation was too adversary in its nature. Delays were endemic because a leisurely pace was accepted and insufficient attention paid to time limits. Expenses were out of proportion to the amount at stake.

A further and important factor that the judiciary cannot ignore is national fiscal realities. The tension and challenge is how to minimise the impact on the administration of justice with the emphasis on doing justice. Judicial and court time is not an unlimited resource. Justice is not threatened if in a criminal trial a fair timetable is imposed or in a civil proof the parties are restricted to the points at issue. We can no longer afford the luxury of allowing the parties in such cases to dictate the length of the case and take as long as they think they want. The answer is to change the system and the culture – to transfer management of the pace and procedure of the litigation from the parties to the courts and to promote early preparation for early settlement. In most cases compromise is a worthwhile objective.

THE SHERIFF COURT OF THE FUTURE – A SET OF INTERLOCKING CHANGES

The summary sheriff will form the third tier of judiciary in Scotland. It has been said that the lack of a judicial third tier is a weakness in our system. There is a third tier of civil judiciary throughout the British Isles; in North America and other Commonwealth jurisdictions. The summary sheriff will require the same level of qualification and experience as sheriffs. This new judicial tier will remove a significant amount of the summary civil and criminal jurisdiction from the sheriffs. This new tier offers a real opportunity for a more diverse bench with opportunities for salaried part-time work which is less easy to factor into the sheriffs' jurisdiction. This may be attractive to people who otherwise are reluctant to apply for judicial office. It may be more attractive, for example, to women entering the judiciary. The focus in the summary sheriff's civil jurisdiction is problem solving skills, consumer and family law. These are skills possessed by most solicitors who have been the "*trusted advisor*" and problem solver for clients over the years. The new tier is not simply intended to be the entry level for the judiciary. The summary sheriff will be an important judicial office holder with experience and skills appropriate to his or her jurisdiction.

The sheriff, relieved of the summary criminal business in particular, will develop the enhanced civil jurisdiction and in the criminal sphere concentrate on solemn crime. Case management powers exist and will be developed and underpinned by training from the Judicial Institute. More specialisation and case management go hand in hand. As a result of the consultation on reform it was clear that the practitioners favoured specialisation in the judiciary reflecting a profession which is increasingly specialised. A sheriff with experience of the subject matter will bring significant benefits to active case management. Where specialisation is not required continuity of judicial involvement in any particular case is desirable.

Sheriffs will have the power to grant interdict beyond the limit of his or her Sheriffdom. This will prove beneficial to litigants who require the protection of a wider interdict enforceable throughout Scotland but who otherwise may have required to litigate in the Court of Session.[4]

THE NATIONAL PERSONAL INJURY COURT

[4] Section 80 of the Court Reform Act 2014

The Act allows Ministers to confer national jurisdiction on the sheriffs of a particular court.[5] This, of course, is not without precedent. Edinburgh Sheriff Court is the extradition court for Scotland – it is also the court of chancery.

Planning assumptions point to Edinburgh having national jurisdiction in personal injury (PI) cases as recommended by the Scottish Civil Courts Review. The commencement order will require to synchronise with the order putting into effect the new exclusive competence of the sheriff court at £100,000.[6] Civil jury trials will return to the sheriff court after an absence of nearly 35 years. Personal Injury sheriffs and staff will therefore require to be trained in civil jury practice and procedures. Proofs and jury trials will be fixed for the days required in accordance with the responsible estimates of parties' legal advisers.

It may be timely to allay some fears and comment on the more emotive responses to the personal injury proposals. Some calm realism is necessary to place the PI jurisdiction in context. Assuming all PI cases that are currently raised in the Court of Session find their way to Edinburgh Sheriff Court then a little in excess of two sheriffs' time would be required full-time to handle that business. My view is that a larger pool of personal injury sheriffs working together to apply rules consistently and preside over proofs and jury trials would be a better model. E-motion procedure will be adopted.

Approximately 1% of actions raised in the Court of Session (and also in the PI Court currently in Edinburgh) proceed to trial or proof. That equates to 18 proofs or jury trials per year. Fewer than five jury trials proceed in the Court of Session in any year. Currently the personal injury sub-committee of the Scottish Civil Justice Council are discussing pre-action protocols and whether they should be voluntary or mandatory. The compulsory protocol may have some disinfectant property resulting in the lowering of the numbers of actions raised.

So few proofs proceed because personal injury actions are raised to achieve just settlements. The rules provide the framework. The court applies the rules and the threat of judicial determination is a driver for settlement. This has been so for many years. The Chapter 43 Rules and their sheriff court equivalent have had the effect of advancing the timing of that

[5] Section 41 of the 2014 Act
[6] Section 39 of the 2014 Act

settlement from the door of court to the weeks prior to proof. The trigger for settlement discussions appears to be the pre-proof conference.

The rules themselves are harmonised as between the Court of Session and the Sheriff Court already. PI sheriffs in Edinburgh are very familiar with the rules and their ethos. The court controls the pace and progress of the action. It is case flow management with the timetable regulating procedural steps. In making the proposal of a National Personal Injury Court the review sought to replicate the advantages of Chapter 43 procedure in the Court of Session as urged by practitioners. The economies of scale for practitioners are recognised. It is also recognised that not all low value cases are straightforward. Complicated issues arise in any civil litigation regardless of value. Likewise, it is wrong to suggest that all claims raised in the Court of Session involve difficult issues of law or complicated procedure. The Act makes provision for remit to the Court of Session.[7] The test is "importance" or "difficulty". It is subject to a double lock test. The Court of Session must allow the remit. It is accepted that the Court of Session should be the forum where high value and complex cases are determined. Nevertheless in the sheriff court the PI sheriffs working with the profession will apply the rules and will develop law. Expenses should be lower.

In this context the concerns about the sheriff court being unable to cope and the imminent train wreck is simply ill-founded scare mongering.

Before I leave the sheriff's jurisdiction it is only fair to mention one of the main objections to the court reform bill – the effect on "*access to justice*". This in my view conflates choice of forum with the impact on instruction of counsel.

Access to justice is inextricably linked with cost. The risk of losing and incurring significant cost is a disincentive to using the legal system. Litigating in the sheriff court with the consequential reduction in expenses should not be seen as second rate justice. Affordability is the key to access to justice.

In personal injury cases funding is usually based on speculative fee agreements and success fees. Much relies on the skill of the pursuer's solicitor who is usually vastly experienced. Likewise, the defender's solicitor. In deciding the forum in which to litigate I would be

[7] S. 88 of the 2014 Act

surprised if the pursuer as an individual made that choice or was involved in the decision. Are litigants provided with the information as to expenses and risk to make the choice whether to litigate in the most expensive forum with counsel? The answer may depend on who is taking the risk commercially.

In the sheriff court litigants will have representation by skilled specialist solicitors and will have counsel where required. The provisions do not remove the right to instruct counsel, but merely removes the automatic sanction of counsel. Indiscriminate use of counsel cannot be right. However, the sheriff usually grants sanction where the case requires it. The principles set down in Sheriff Principal Taylor's review[8] deal with sanction for counsel. His proposals embrace reasonableness and equality of arms principles with which I concur.

THE SHERIFF APPEAL COURT – A NATIONAL INSTITUTION

The aim is to establish this new court as a National Judicial Collective of Sheriffs Principal supported by appellate sheriffs dealing with civil appeals from sheriffs and summary sheriffs and summary criminal appeals from summary sheriffs and JPs. Initially appeals with also lie from sheriffs in their summary jurisdiction.

The court will develop a more authoritative body of case law promulgating appellate decisions as binding precedent across all Sheriffdoms. The idea, of course, is that this judicial collective comprises those who are close to and knowledgeable of the workings of the sheriff court. The court will have relative autonomy. It is not designed to add yet another level of appeal. There is no automatic onward appeal to the Inner House. Cases involving complex issues of law or novel points may proceed if permission is sought. It is proper to have a system where only cases with such genuine grounds of appeal go to the Inner House. To place this in context few cases are appealed from the Sheriff Principal to the Inner House. Most cases which are appealed on are taken by party litigants who see the appellate process as an exercise in having another bite of the cherry or hoping that the next bench will be more sympathetic. Usually there is no issue of law and this leads to unnecessary delay and expense for all including the court. The provisions for permission to appeal to the Court of Session are set out in section 107 of the 2014 Act.

[8] Sheriff Principal Taylor Review of Expenses and Funding of Civil Litigation in Scotland (2013)

In summary civil appeals from simple procedure it is anticipated that a single member of the Sheriff Appeal Court will determine the appeal unless of course there is an issue of public importance, novelty or complexity which requires the case to be heard by a larger Bench.

The Sheriff Appeal Court may remit an appeal to the Court of Session on the application of a party and if satisfied that the appeal raises a complex or novel point of law.[9]

I am optimistic about the sheriff court of the future. Of course it requires the expertise, advocacy and support of a combined profession – solicitors and bar. The reformed Sheriff Court creates opportunities for all solicitors in Scotland at all levels. The Sheriff Appeal Court, for example, gives the opportunity to develop appellate advocacy skills in both the civil and criminal jurisdiction. The decisions of the Sheriff Appeal Court should lead to consistent application of Rules of Court across Scotland. The introduction of a third tier of judiciary opens the door wider to those who seek judicial appointment.

Another cause for optimism is the close co-operation between the Supreme Courts and the Sheriff Courts. There is a clear understanding of the need for consistency and coherence. There is a marked sense of collegiality which is welcome.

However, there is no need simply to take my word for it on the matter of the reform. The first manifestation of the reform programme has already been established and successful. It has shown that the civil justice system will be in good hands in the future. I refer to the Scottish Civil Justice Council. It has already achieved more than could ever have been expected at this stage. The Scottish Civil Justice Council (SCJC) demonstrates that success relies on a co-operative approach from all involved our justice system. The Rules Rewrite programme of the SCJC is well advanced and will bring great benefits to those using the court system.

I know all too well that solicitors and the Faculty of Advocates face challenges and see reform as somewhat daunting. But you are skilful and resourceful people who will recognise the opportunities which the reforms provide. I wish you and the society well.

[9] S.106 of the Court Reform (Scotland) Act 2014