Case Management in Complex and Lengthy Trials and Sentencing

Lord Carloway, the Lord Justice General[1],

Royal Faculty of Procurators, 7 March 2019.

Introduction

We are concerned tonight with two distinct areas in criminal proceedings. First, case management in complex and lengthy trials; that is, measures aimed at securing the most efficient, effective and proportionate process leading to a verdict, while respecting the right of the accused to a fair trial. Secondly, achieving consistency and transparency in sentencing. The Protocol on the Management of Lengthy or Complex Criminal Cases, on the one hand, and the Scottish Sentencing Council's first Sentencing Guideline, on the other, deal with unconnected subjects falling on either side of the jury's or sheriff's verdict, but they have one common aim: securing and enhancing public confidence in the Scottish criminal justice system.

Part 1: Case Management in Lengthy Trials

Rationale

In 1930, in the essay "*Economic Possibilities for Our Grandchildren*"[2], Keynes predicted that technological development would mean that today's generation would be working a 15-hour week. He did not anticipate that his great grandchildren might choose to practise Scots criminal law. He did not recognise the paradox at the heart of information technology. Innovations, which are supposed to make lives more efficient and less time-consuming, leaving the citizen, as Keynes' intellectual forebear Marx put it, "to hunt in the morning, fish in the afternoon, rear

---

[1] I am grateful to my law clerk, Neil Deacon, for preparing the initial draft of this talk.

[2] John Maynard Keynes, *Essays in Persuasion*, New York: W.W.Norton & Co., 1963, pp. 358-373 (available: http://www.econ.yale.edu/smith/econ116a/keynes1.pdf).

cattle in the evening and criticise after dinner",[3] often cause an increase in workload. This is an attribute which is as acute in the prosecution and defence of accused persons as it is in any other field. Electronic and cloud-based documentation generates even more documentation. This is not an invitation to Luddism. The Protocol recognises that the electronic presentation of evidence has the potential to save time. It should, along with other modern forms of graphical presentation, be used as widely as possible.[4] It is a scene-setter for the measures which are being taken to mitigate the time and resources requirement in complex and lengthy trials. This requirement is caused in no small way by the advances in technology, which have given rise to more and more electronically held material, which must be reviewed, disclosed and presented effectively in this type of criminal proceeding.

A significant pressure on the system, which has been created irrespective of the changing nature of crime, is the volume of business being processed in the High Court of Justiciary, which is where most complex and lengthy trials are likely to be scheduled. The increased volume is in contrast to the fall in summary complaints at both sheriff and JP levels and in indictments proceeding in the sheriff court. By the end of the financial year 2018-19, it is estimated that registered indictments, trials assigned and trials which proceeded in the High Court will have increased by approaching one quarter, in comparison to the previous year. It is anticipated that the number of High Court indictments will break through the 1,000 mark for the first time in 2020. The potential effect of the increase, which is serious at a time when budgetary constraints continue to be applied, can be mitigated. That depends upon everyone – the courts (especially the judges), the Crown and the defence – playing their part. This is, in relation to all three components, particularly applicable to preparation and readiness to proceed to trial. It is this area that the Protocol is

---

[3] Marx & Engels, *The German Ideology*, Moscow: Marx-Engels Institute, written c 1846, published 1939.

[4] Practice Note 1 of 2018, The Management of Lengthy or Complex Criminal Cases, Schedule, section 7, paragraph (iii).

designed to cover; by promoting and encouraging advance consideration of the issues in relation to those trials which have the greatest potential to be prolonged or delayed by the volume or complexity of the evidence or the number of accused. This all comes following the trial in *HM Advocate* v *McLaren*, which started in Glasgow High Court in September 2015 and finished, after 320 days of evidence, in June 2017.

What is the justification for active judicial case management in criminal trials? In the traditional adversarial system, there was no pro-active management of the direction or progress of a criminal case by the judge. Pace was for the parties; or rather the Crown. The prosecutor was the exclusive master of the instance. The accused could not be compelled to co-operate in any way with the Crown in his own prosecution. The zenith of this type of thinking were the cases in which the courts refused to adjourn trial diets if the judge, perhaps applying his own outdated experience, considered that the case had taken too long and had passed the strict time requirements set in legislation which was devised for good reasons, but those applicable in 1701. It was for the Crown to see that the trial proceeded within a reasonable time. This was seen to be primarily an arithmetical exercise; that is, the court asked whether the case had proceeded within the then 110 day or 12 month time bars and if not, could that be attributable to the Crown. If resources to achieve the commencement, and earlier the resolution, of trials within the time limits, were not provided by the Government, the Crown and perhaps the public interest had to pay the penalty[5]. The law reports from 1980 to 2010 have many examples of this type of analysis[6].

This approach has been changing over the last few years[7]; a process accelerated by the incorporation of Article 6 of the European Convention, including the reasonable time requirement but also the other rights applicable to the victims of

[5] *Warnes v HM Advocate* 2001 JC 110, citing *Bucholz v Germany* (1981) 3 EHRR 597; *Riaviz v HM Advocate* 2003 SCCR 444
[6] From *HM Advocate v Swift* 1984 JC 83; *Early v HM Advocate* 2007 JC 50
[7] See *Uruk v HM Advocate* 2014 SCCR 369

crime. The realisation that our domestic time limits were radically shorter than those permissible under the European jurisprudence had a profound effect on thinking. In addition, there came to be a growing realisation that many cases cannot be conducted fairly within the strict constraints of the Scots time limits. This is not because of a lack of Crown resources, but because of changes in the nature of the evidence potentially available including DNA and electronic media. Most important in this context, the time limits gave the defence little time to prepare cases properly in an era which has been heavily influenced by the modern principles of disclosure, which were not, for a variety of reasons, a formal feature of the system in the early 18th Century. It is a significant fact that in the High Court, almost no cases proceed within the statutory time limits. There are good reasons for this too; notably the need to ensure that the defence, not the Crown, are ready to proceed to trial with its preferred representation.

The courts cannot, as yet, regulate the number of indictments; nor can they control the total level of resources available to process cases. That is a matter for Government, albeit in consultation with the Scottish Courts and Tribunals Service. The courts can control their procedures; to the extent that they have the power to do so under statute and the common law. They have to act in a manner which is compatible with the substantive law, common law notions of fairness, and the procedural requirements of Article 6. Within those bounds, the courts are entitled to devise systems which ensure that they and, to a large degree, the parties make the most efficient use of the available time and resources. The courts have an interest of their own to do so, separate from that of the parties. They have, in particular, a direct interest in the resolution of disputes in an efficient and effective manner.

The difficulty of the laissez faire or "hands off" approach to the management of cases was stressed more than a decade ago. Leaving the progress of indictments to the Crown had become increasingly hazardous in terms of securing the conclusion of any case within a reasonable time, unless a plea of guilty was tendered

and accepted. Especially with the advent of the drugs epidemic in the late 1980s and 1990s, backlogs of significant proportions began to develop, notwithstanding an increase in resources. Lord Bonomy,[8] in his review, recommended the introduction of the Preliminary Hearing, 30 days after service of the indictment. In the High Court, this example of judicial case management eventually, but not without a struggle, achieved a reduction in wasted time caused by multiple last minute adjustments, usually on the morning of the trial. It took some time for the new system to bed down. The "churn", as it is called, in trial diets came to be replicated by churn in the Preliminary Hearing court. The profession was persuaded, not without protest, of the merits of the new system and has now embraced the culture. It has worked particularly well since the Preliminary Hearing court has been held in one location; here in Glasgow. Consistency of approach by the judges who make the procedural decisions, which is an essential part of the system, has been achieved by establishing a small cohort of judges, who meet to discuss the problems which arise and to devise methods of how to address them consistently. The success of these measures depends not only on the engagement of the Crown and defence, but also, crucially, on a proactive and consistent approach to case management by the Bench. That means, bluntly, that the judges engaged in this work must have the skills and courage to drive it forward. The profession must have a clear understanding of what will be required by the court. In the sheriff court, this has been the subject of the Practice Note (No 3 of 2015) on solemn business. The simple expedient of describing in writing, and providing a form encapsulating, the steps which the court expects a party to take before and at the First Diet has been an important step in ensuring efficiency in that forum.

---

[8] The Hon Lord Bonomy, *Improving Practice – the 2002 Review of the Practices and Procedures of the High Court of Justiciary* (available: https://www2.gov.scot/Publications/2002/12/15847/14122).

The Protocol on long and complex cases seeks to enhance and enforce, with greater rigour, the standards of preparation and active case management where these are needed most. The Protocol itself is new, but it contains many familiar concepts, some of which have been tried and tested in civil practice and are designed to cure similar faults. These include :early, effective disclosure; prompt and proper focus of the issues and evidence, particularly expert evidence; the concept that evidence should not be heard until that focus has been achieved; and firm judicial control over the schedule and scope of the evidence. Positive effects have already followed upon the introduction of increased case management procedures in commercial and personal injury cases, and the streamlined processes of both the civil and criminal appeal courts.

There are distinct and more sensitive considerations peculiar to the criminal trial. The desire of the court to manage business efficiently must be consistent with fairness. It must pay due respect, not only to the constitutional independence of prosecutors as masters of the instance, but also to the professional entitlement of the defence to determine how best to represent the accused. This is expressly recognised in the text of the protocol, which cautions against the judge usurping the functions of the prosecution or defence, as distinct from "directing" and "managing" their efforts, in a flexible way,[9] in order: to identify and focus the primary issues in dispute; to keep the eventual trial within manageable limits; and to ensure fairness to all parties.

The drafting of the Protocol was substantially influenced by provisions issued some time ago by the Lord Chief Justice of England and Wales, in light of the considerable experience of similar problems in the criminal courts of that jurisdiction. In the Court of Appeal in 2005, in a passage cited in the English equivalent of our case management protocol, Lord Judge said:

---

[9] Practice Note 1 of 2018, *supra*, section 5, paragraph (iv).

> "115. It is not … a concomitant of the entitlement to a fair trial that either or both sides are … entitled to take as much time as they like, or for that matter, as long as counsel and solicitors or the defendants themselves think appropriate. Resources are limited. The funding for courts and judges, for prosecuting and the vast majority of defence lawyers is dependent on public money, for which there are many competing demands. Time itself is a resource. Every day unnecessarily used, while the trial meanders sluggishly to its eventual conclusion, represents another day's stressful waiting for the remaining witnesses and the jurors in that particular trial, and no less important, continuing and increasing tension and worry for another defendant or defendants … It follows that the sensible use of time requires judicial management and control. …
>
> 116. … Active, hands on, case management, both pre-trial and throughout the trial itself, is … an essential part of the judge's duty. …
>
> 118. … To enable the trial judge to manage the case in a way which is fair to every participant, pre-trial, the potential problems as well as the possible areas for time saving, should be canvassed. … The objective is not haste and rush, but greater efficiency and better use of limited resources by closer identification of and focus on critical rather than peripheral issues. "

This, admittedly long, passage encapsulates the reasons for and methods of case management in the complex or lengthy case.

As the Lord Justice Clerk (Lady Dorrian) recognised, the primary method of ensuring procedural efficiency in the Scottish context is the allocation, at the earliest opportunity, of responsibility to identified trial personnel who will in due course conduct the trial. They includes: (i) the advocate depute; (ii) defence counsel; and (iii) the judge. All three are critical to the successful operation of the Protocol. The most important figure in this early part of the equation is the trial judge. It is only when the judge is reasonably familiar with the case that management decisions can be requested and properly made. By the calling of the Preliminary Hearing, all three persons should have a working knowledge of the case. Each should be able to play his or her part in the knowledge that the other participants will be equally well informed. This should be communicated by well-prepared, focused written

statements by both prosecution and defence. Each defence counsel should be asked to outline the anticipated defence applicable to each accused. This should allow the Preliminary Hearing to operate as an effective case management hearing, with real dialogue, to identify the essence of the Crown case, the common ground and the issues in dispute. As the Protocol recognises, this is in the interests of all parties. It cannot be in the interest of any accused for the good points to become lost in a morass of uncontroversial or irrelevant evidence.

The Duty to Agree Uncontroversial Evidence

In 2005, Lord Judge implicitly rebutted the idea that case management conflicts with the accused's right to a fair trial. That it is in conflict is an outdated view. The European jurisprudence dictates that the responsibility of ensuring compliance with the reasonable time requirement in Article 6 rests with the state; that is the courts. The state has been found liable to compensate persons for perceived failings of the Scottish courts, notably the High Court sitting in its appellate capacity and the Court of Session, in not taking a pro-active approach in dealing with their caseloads. The effect of these rulings, coupled with the proposition that the courts are public authorities which require to comply with the Convention, have made it imperative that each judge takes control of the cases allocated to him or her. The judge cannot do his or her job without the requisite degree of co-operation by both sides of the table.

The judge's hand is strongest when it comes to the agreement of uncontroversial evidence. There is a reason why that subject appears so early in the Protocol. It deserves special attention. While the relevant provisions apply in all criminal proceedings, they take on added significance in complex and lengthy trials. The mechanisms in sections 257 and 258 of the 1995 Act are what the other measures

in the Protocol, in large part, depend upon. The Protocol states that they are "particularly important" and will be applied by the court with particular vigilance.[10]

These provisions were controversial when first proposed; they were said to impinge on the adversarial system. The argument was, in particular, that they conflicted with the presumption of innocence, the right to put the prosecution to its proof and the privilege from self-incrimination, manifested in the right to silence. They were opposed by the Scottish Law Commission as a "silent drift from traditional principles" and an "unsatisfactory blurring of the function of the judge and the rights of the accused".[11]

Section 257 is headed "Duty to seek agreement of evidence". This is misleading. It is about the agreement of fact. The provisions oblige the Crown or the accused to take all reasonable steps to secure the agreement of the other party about the facts which each considers are unlikely to be in dispute; that is to say uncontroversial facts. There is then a duty on the other side to take all reasonable steps to reach such an agreement. The traditionalist's concerns meant that, in the end, the duty to agree uncontroversial evidence was a duty without a sanction; and, thus, depending on the individual's jurisprudential tendencies, not a duty that required to be complied with at all. The view that the "principles underlying the Scottish system of criminal trial" meant that it was "not possible to contemplate the introduction of any procedure which would require an accused to make any admission against interest before the trial"[12] prevailed. This was confirmed in a petition to the *nobile officium* in 1998,[13] when the High Court, no doubt entirely correctly, quashed the decision of a sheriff in summary proceedings to revoke the petitioner's legal aid, backdated to the date of the intermediate diet, because the

---

[10] Practice Note 1 of 2018, *supra*, section 4.
[11] Scottish Law Commission, *Responses to 1993 Review of Criminal Evidence and Criminal Procedure (and) Programming of Business in the Sheriff Courts* (Scot Law Com, 1993), para 8.
[12] Scottish Law Commission, *Report on Documentary Evidence and Proof of Undisputed Facts in Criminal Proceedings* (Report No 137, 1992), para 4.15.
[13] *Reid (Philip Edward Strachan), Petitioner* 1999 SLT 212

accused, through his solicitor, had failed to fulfil his duty to agree facts that were not in dispute.

Before long, however, the issue of sanction for a failure to agree facts was back on the agenda. Academic commentary[14] convincingly argued that Scots law had already qualified the right of the accused not to co-operate with the judicial process in various ways because of the broader public interest. Several examples were given. The accused had to give advance notice of any special defence, at least ten days before trial in the High Court and now seven days before the Preliminary Hearing.[15] The reason for that is explained as the prevention of the ambush defence, regarded as contrary to the public interest because it facilitates the acquittal of the guilty rather than the innocent.

It is competent to grant a warrant requiring the suspect to take part in an identity parade[16], because the broader public interest requires identifying and convicting those guilty of crime. The police are entitled to take prints and samples from parts of the body of arrested persons, including fingerprints, swabs and blood samples. A warrant may be obtained if the accused does not consent. In *Hay* v *HM Advocate*, the court observed that in all such cases, there were "two conflicting considerations": the public interest in identifying the suspect; and the protection of the citizen from "undue or unnecessary invasion".[17] In a case involving a blood sample, the court, in upholding the grant of a warrant, referred to the "delicate balance … between the public interest on one hand and the interest of the accused on the other".[18]

---

[14] Duff, The Agreement of Uncontroversial Evidence and the Presumption of Innocence: An Insoluble Dilemma?, 6 *Edinburgh Law Review* 25 (2002).
[15] Criminal Procedure (Scotland) Act 1995, s 78(3).
[16] *McMurtrie* v *Annan* 1995 SLT 642.
[17] 1968 SLT 334, opinion of the full bench (Lord Justice General Clyde, Lords Guthrie, Cameron, Migdale and Johnston), at 336.
[18] *Morris v MacNeill* 1991 SLT 607, opinion of the court (Lord Justice Clerk Ross, Lords Morison and McDonald), at 609.

The right to silence is also qualified. In solemn procedure, the judge has long been able to comment to the jury upon the accused's refusal to give evidence at trial; even if that is only done sparingly. In summary cases, the sheriff is free to take such a failure into account in reaching his or her verdict. The right to silence is substantially diluted by inferences which the fact finder may legitimately draw about the accused's failure to rebut a case which cries out for an explanation.

Finally in this area, there is the advent of the defence statement,[19] which was introduced in the context of the disclosure regime. Despite its often anodyne content at present, this will, along with a prosecution custody statement style equivalent, become a more and more important document as the system moves away from the trial being the only important part of the criminal justice process. Procedural decisions cannot be taken if the judge does not know what the case is truly about. There must therefore be a method whereby the judge can be informed in writing about what the prosecution case, beyond the indictment, is about; notably what the anticipated evidence is. There must equally be a system whereby the defence can communicate what the defence is to be; even if that is simply to put the prosecution to its proof, in so far as that is seen as a reasonable course.

The legislative solution which was devised as long ago as 2004[20] was the introduction of the judge's power to direct that any challenge to one of the party's statements of uncontroversial evidence under sub-section 258(1) could be disregarded. This is not a sanction for non-compliance with the duty to agree evidence, but a power in the court to override the wishes of one side to challenge facts that the court decides are uncontroversial. The judge is answering that question for the parties. This provision, in sub-section 258(4A) of the 1995 Act was the subject of challenge in *Ashif* v *HM Advocate*.[21] The appellants had been indicted on a charge of fraud. The Crown listed 68 uncontroversial facts; all of which were

[19] 1995 Act s 70a.
[20] Criminal Procedure (Amendment) Act 2004 s 16
[21] 2016 SLT 1079.

challenged without discrimination. The appellants' counsel were said to have been instructed by the appellants not to agree any facts. They had been advised by the then Dean of Faculty that they were obliged to follow that instruction. The sheriff directed that the defence challenges were to be disregarded. On appeal, it was argued that the right of the accused to put the Crown to its proof was sufficient justification. The provision was beyond the competence of the Scottish Parliament because it: resulted in self-incrimination; shifted the burden of proof; and deprived the accused of the right to cross examine witnesses. The court did reverse the decision of the sheriff on the facts but, it rejected the arguments based on Convention rights. The Lord Justice General (Gill) prefaced his reasoning with a nod in the direction of the issues in complex and lengthy trials:

> "It is notorious that over the last 20 years the average length of trials on indictment has increased substantially. There are many reasons for this; but one reason is undoubtedly the defence strategy in complex cases of putting the Crown to the proof of every piece of evidence in the case. In current practice what is described as an exercise of the so called right to silence in a typical fraud case involving the production of thousands of documents can prolong the trial by a matter of weeks or even months."[22]

The function of the court was not to decide whether an alleged fact would be proved conclusively, but whether a challenge to the statement was "justified".[23] It was recognised that a plea of not guilty may in itself be a sufficient justification for a challenge, depending upon the nature of the averred fact.[24] The court held that it was no part of counsel's duty to carry out an "instruction" which was inconsistent with the obligation to take all reasonable steps to reach agreement on the evidence.[25]

A challenge to a statement of uncontroversial evidence, just like a challenge to testimony given at trial, requires a sufficient basis.[26] An accused is not at liberty to

---

[22] *Ashif*, Lord Justice General Gill, at para [3].
[23] *Ashif*, Lord Justice General (Gill), at para [42].
[24] Ibid.
[25] *Ashif*, Lord Justice General (Gill), at para [73].
[26] *Ashif*, Lord Justice Clerk (Carloway), at para [78].

deny a fact which he cannot reasonably dispute.[27] The right to silence does not mean that an accused can prolong a trial in the hope that a witness will abscond, the Crown will blunder, the jury will drop below the minimum (as it almost did in *McLaren*) or most important the jury will be overwhelmed by the volume of the material presented, whether in oral or written form.[28]

This last consideration is all the more important in complex and lengthy trials. The Protocol recognises this, but emphasises that an overwhelmed jury is just as likely to prejudice the accused as it is the prosecution.[29] In a morass of technical or scientific evidence, or even just multiple invoices each requiring to be spoken to by separate witnesses, the significance of exculpatory evidence may be missed. Reducing the quantity of evidence heard and disputed ought to minimise this danger.

Part 2: The New Sentencing Guideline

Just as timely, efficient and proportionately resourced justice should buttress public confidence in the criminal justice process, so should enhanced transparency and consistency of outcomes in the event of a conviction. These are two areas which have been targeted by the Scottish Sentencing Council's over-arching Sentencing Guideline, approved by the High Court in October 2018.

The Scottish Parliament identified a need for transparent, guiding principles. Their creation will, in so far as influencing those within the criminal justice system, be a revolution of style rather than substance. Principles have always underpinned sentencing in the criminal courts, albeit often latently. Past experience in Scotland has generally been that of a relatively non-prescriptive regime. It has not previously been thought advisable to provide judges and sheriffs with general written guidance

[27] *Ashif*, Lord Justice General (Gill), at para [60].
[28] Ibid.
[29] Practice Note 1 of 2018, *supra*, section 7.

on sentencing, beyond the general observations of the High Court, sitting in its appellate capacity, in particular cases. Often, if the High Court was refusing an appeal, there would be no written opinion produced.

The idea that the Government would develop sentencing principles would have met with fierce resistance on the grounds that it would encroach upon judicial independence; as indeed it would. More recently the judges have created their own Judicial Institute to provide training in this area. They also had a taste of things to come in two pieces of legislation. The first was the inappropriately (as it turned out) named Convention Rights (Compliance) (Scotland) Act 2001.[30] This required the court to specify the minimum period which a life prisoner had to serve before being entitled to apply for parole. The Act has played a major part in the undoubted increase in the sentencing of murder cases and hence, presumably, the prison population.

The setting of this punishment part involved a construct whereby the judge would fix a period which would satisfy:

> "the requirements for retribution and deterrence (ignoring the period… which may be necessary for the protection of the public)".

Hitherto, the courts had never considered attributing different periods of custody to different purposes of a sentence. Generally, all were grouped together when selecting an overall term. Dividing them was regarded as a somewhat artificial exercise.

The second area, in which the courts have been given statutory instruction in relation to the purpose of sentencing, is the power, which rests in the High Court, to impose an Order for Lifelong Restriction for sexual or violent offences. The crime may appear to be relatively minor, but the penalty is one of the most serious that the court can impose. This risk based sentencing is not, of itself, new. It was behind the introduction of the Supervised Release Order, which can still be imposed for short

[30] Section 2 of the Prisoners and Criminal Proceedings (Scotland) Act 1993

term prisoners. In imposing an OLR, an SRO or an extended sentence, the primary purpose is the protection of the public from serious harm. It meets the need, which undoubtedly exists, for the courts to afford adequate protection to the community from serious recidivist behaviour. In turn, that involves concentrating on methods, including incarceration, to achieve that end.

The courts had not previously been required to consider sentencing in terms of express general principles. The perceived problem was not an absence of principle, but of transparency. It is not difficult to enumerate a series of factors or objectives which the courts have traditionally taken into account when sentencing. This was done in the first textbook on the subject in 1981.[31] They include:[32] punishment; protection of the public; deterrence; denunciation; rehabilitation; restitution; economy of resources; and reduction of crime.

In its examination of the legislation, which previously suggested the creation of guidelines, the Justice Committee concluded that enshrining general principles in statute was not desirable. It said:

> "The common law has the advantage that it can more easily evolve and develop in response to changes in social attitudes; fixing this common-law understanding in statute carries a risk of unintended consequences, and may also lose some of the nuances of case-law jurisprudence."[33]

The new Sentencing Council is charged with making sentencing more consistent and transparent. The first of its three statutory aims is to promote consistency.[34] The first Sentencing Guideline is now in force under the title: "Principles and purposes of sentencing".[35] It applies to all offenders sentenced after

---

[31] CGB Nicholson, *Sentencing: Law and Practice in Scotland* (Green; 1981).
[32] CGB Nicholson, *Sentencing: Law and Practice in Scotland* (Green; 1992; 2nd ed), chapter 9, paras 9-03-9.11.
[33] Scottish Parliament Justice Committee, 18th Report, 2009 (Session 3), Stage 1 Report on the Criminal Justice and Licensing (Scotland) Bill, para 34.
[34] Criminal Justice and Licensing (Scotland) Act 2010, s. 2(a).
[35] Scottish Sentencing Council, *Principles and purposes of sentencing - Sentencing guideline*.

26 November 2018. "Similarity", as it is termed in the Guideline, is to be one of the core principles. "Sentencing decisions should treat similar cases in a similar way." Similarity means "having features or factors in common". It is said to assist "consistency and predictability". The aim of further guidelines, which will apply to specific categories of offence and offender, "will be to identify where cases should be treated as similar."

The new Guideline provides one universal principle: the sentence must be fair and proportionate. It details five particular purposes. They are in no particular order. First, protection of the public; sentencing may seek to protect the public by preventative measures and deterrence. Secondly, punishment; sentencing may seek to punish the offender. Thirdly, rehabilitation of the offender; a sentence may have in mind a reduction in risk through providing opportunities to change. Fourthly, giving the offender the opportunity to make amends; a sentence may acknowledge harm by requiring the offender to repair some of the harm caused. Fifthly, a sentence may be a way of expressing society's concern or disapproval. A separate ancillary consideration is the efficient use of public resources. As can be seen from the range of purposes, no mainstream sentencing philosophy is left out. The purposes largely correspond to the objectives outlined in the textbook and to the statutory purposes of sentencing which have been introduced in England and Wales.[36]

The benefit of guidelines is primarily transparency. They provide judges, practitioners, offenders, victims and other interested parties with a clear view of what might be anticipated, while retaining the flexibility required to deal with the individual case. In due course, a crime may be capable of being compartmentalised into an offence category with a guideline specifying a range of sentences, within which the judge will be able to select a penalty having regard to a number of other factors; some relating to the crime and others to the offender or the victim.

---

[36] Criminal Justice Act 2003, s. 142(1).

One concern with such guidelines is that they may promote an increase in sentences at a practical level. High profile cases or, to put it more accurately, those considered to be so by sections of the media, will lead to calls for the acceleration of this process and, in due course, to produce pressure to change, most likely to increase, the sentences in any existing guidelines. The Lord Justice Clerk, speaking as Chair of the Council, was correct last week to caution against a reactionary introduction of guidelines which have not been properly considered and tested. As she noted, each case is unique. Variations in sentencing will occur as a result of the presiding judge taking into account the particular circumstances. It would be undesirable to use decisions in individual cases as the rationale for changing sentencing policy in general. Such an approach would be unlikely to promote consistency, predictability, or transparency.

Conclusion

An individual with particular experience of a complex fraud prosecution once said: "The better deal you give the customer, the worse deal it is for you".[37] Hopefully, Bernie Madoff's words will not apply to the deal offered by the Protocol to all participants in long and complex trials. The trial is the forum in which society responds, publicly, to alleged wrongs. The public is ultimately a customer, if not the only one, of the service provided by the criminal justice system. What should be offered by the system is the optimal mode of searching for the truth. Despite often rhetorical remarks to the contrary, that is what criminal trials are about. It is certainly what the public expect them to be about. This search for truth must be fair and it must be efficient; not an endless endeavour. It must take place within an appropriate and proportionate timescale and be conducted in a way that promotes

[37] Attributed to Bernie Madoff at https://www.reuters.com/article/us-madoff-quotes-sb/factbox-bernard-madoff-quotes-idUSTRE4BG0C120081217.

fairness to the accused, any alleged victims, the witnesses and the jury. It is the window through which the public views and evaluates the system.

If the outcome is a conviction, the public is entitled to understand the process underlying the way in which society, through the intermediary of the courts, responds to criminal wrongs. That is the aim of the Sentencing Council's first guideline. Efficient, proportionately resourced criminal justice, with predictable and well-understood outcomes, are in the general public interest. It will help to strengthen faith in the operation of Scots criminal law. Both the Protocol and the Guideline will promote that faith as they both bed in. I commend them to you.