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EXTRADITION

PLENARY 10: SCIENTIFIC, FORENSIC AND EXPERT EVIDENCE IN CRIMINAL LAW

“THE PRESENTATION OF EVIDENCE IN THE MODERN TRIAL ENVIRONMENT”

The Lord Justice Clerk will explore the theme of the modernisation of criminal trials and the use of digital technology in the fair and efficient presentation of evidence. His Lordship will examine the development of modern thinking on the nature and capture of the best quality evidence, observing the digital capabilities of the modern Scottish courts. The session will draw on the findings of the Scottish Court Service Evidence and Procedure Review (2015) and consider legitimate expectations of the scope and functionality of trials in the future.¹

Introduction

Modern criminality operates without borders, often taking advantage of the increased opportunities for wrongdoing presented by digital technology. Modern criminal justice systems must keep pace with these developments by ensuring that they too take advantage of technology in the trial of criminal charges.

In the particular Scottish context, significant reforms have already been made in recent years to modernise the trial process in line with developing attitudes to digitally enabled justice. There is much still to be done. The rules of criminal evidence and procedure are undergoing a process of far-reaching review, upon which public consultation is in progress. The vision of the proposals is of great significance for trial procedures across the range of criminal offences, not only for domestic crimes, but also in the context of cross-border and complex criminality. This paper will address the challenges that the digital age

¹ I am grateful to my law clerk, Jacqueline Fordyce WS, for her ingathering of materials and preparation of the initial draft of this paper.

presents for criminal trial procedure, and the response of the Scottish courts in moulding the form of the criminal trial of the future.

The need for digitally enabled justice

Modern criminality is a subject of universal concern. It impacts upon different jurisdictions in different ways. It is a multi-faceted concept. It inevitably involves cybercrime², cross-border crime, serious organised crime and fraudulent schemes. A need for an enhanced level of sophistication in the technical and scientific evidence required may be generated. The use of experts and witnesses located in different jurisdictions may be desirable.

The level of domestic criminality with a cross-border or international element is difficult to ascertain.³ The bulk of domestic criminality does not display any particularly sophisticated or progressive characteristics. Violent and sexual offending and the various forms of rudimentary offending, such as theft, assault, and road traffic contraventions,

² A distinction is drawn between “cyber-dependent” and “cyber-enabled” crime, the former being possible only by using computers, computer networks or other forms of ICT, the latter being traditional crimes, such as fraud or theft, that are increased in their scale or reach by such means (Scottish Government Consultation on proposal for a Cyber Resilience Strategy for Scotland, June 2015, p 24:

<http://news.scotland.gov.uk/imagelibrary/downloadmedia.ashx?MediaDetailsID=3708&SizeId=-1>).

³ The available statistics show recorded crime according to local authority area: Scottish Government Statistical Bulletin, Crime and Justice Series, Recorded Crime in Scotland 2013-14, 25 November 2014: <http://www.gov.scot/Publications/2014/11/6350/0>.

Where it is established that a reported crime occurred outwith the UK, it will be recorded only for the purpose of disseminating information to the relevant intelligence or foreign authorities. See the Scottish Crime Recording Standard (Police Scotland, April 2015), p 36:

<http://www.scotland.police.uk/assets/pdf/138327/232757/scottish-crime-recording-standard?view=Standard>.

continue to be a regular feature of court business.⁴ That notwithstanding, the capability of the criminal justice system must be developed in order to secure the best quality of justice in all cases, whatever the substantive nature of the crime, and the greater or lesser evidential challenges that it presents.

The requirement is to ensure a fair trial, as that concept is understood in accordance with domestic, European Convention and universal rights. Ultimately the *goal* of the criminal process is to seek to establish the truth regarding the criminality alleged, at least in so far as relating to the accused. Allied to the pursuit of truth are societal expectations about the investigation and prosecution of crime. The ultimate focus must remain fixed on securing and presenting the best possible quality of evidence in furtherance of the goal of truth in line with public expectations.

Digital technology and mobile devices offer immense scope for the capture of contemporaneous evidence. Online press and social media provide an instantaneous platform for the sharing of digital material and for criticism of the investigation and prosecution. Never before has there been such scope for trial by media on a global scale. In recent cases, CCTV footage of a major London jewellery heist was rapidly disseminated online soon after the high profile event had been discovered.⁵ Further afield, a bystander's mobile phone images, circulated widely online, captured a fatal shooting by a US police officer, leading to the officer's charge with murder⁶. In the United Kingdom, developments

⁴ Scottish Government Statistical Bulletin, Crime and Justice Series, Criminal Proceedings in Scotland 2013-14, December 2014: <http://www.gov.scot/Publications/2014/12/1343/0>.

⁵ "Hatton Garden raid: CCTV images of 'audacious' raid released" (BBC, 10 April 2015): <http://www.bbc.co.uk/news/uk-england-london-32263174>.

⁶ "South Carolina police charged after black man shot dead" (BBC, 7 April 2015): <http://www.bbc.co.uk/news/world-us-canada-32213482>.

in public surveillance have resulted in pilot projects to introduce body worn cameras to capture audio and visual images from the perspective of the police⁷, transport police⁸ and staff⁹, and even predicted victims of crime¹⁰. Such schemes of state-led surveillance may only just be beginning to catch up with the already well-established phenomenon of ‘peer to peer surveillance’ by the widespread capture and sharing of mobile phone images by and amongst members of the public. The courts cannot afford to close their eyes to such developments or to be seen to lag far behind them.

There are significant opportunities, for the increased use of digitally recorded material in criminal trials, presented by recent technological advances, by the capture of images of the alleged offending itself or related contemporaneous events¹¹, or of witness

⁷ Body-worn cameras have been trialled in Aberdeen and Paisley, Scotland – *Body Worn Video Projects in Paisley and Aberdeen, Self-Evaluation Report* (ODS Consulting, July 2011): <http://www.bwvsg.com/wp-content/uploads/2013/07/BWV-Scottish-Report.pdf>. See also the Bonomy Report, *infra*, at para 5.21 to 5.23.

See, also, “Backing for roll-out of police body cameras” (The Scotsman, Scotland on Sunday, 17 November 2013): <http://www.scotsman.com/news/politics/top-stories/backing-for-roll-out-of-police-body-cameras-1-3191731>

⁸ Body-worn cameras are used by the British Transport Police to provide a deterrent against anti-social behaviour and other incidents, and to gather evidence for the courts: [http://www.btp.police.uk/advice and information/how we tackle crime/body-worn video cameras.aspx](http://www.btp.police.uk/advice%20and%20information/how%20we%20tackle%20crime/body-worn%20video%20cameras.aspx).

⁹ “Trial of body-worn cameras to improve safety on Scotland’s railways” (ScotRail, 10 March 2015): <http://www.scotrail.co.uk/about-scotrail/media-centre/press-releases/trial-body-worn-cameras-improve-safety-scotlands-railways> (cached as at 13 March 2015).

¹⁰ “Police Scotland issue body worn cameras” (Police Scotland, 29 July 2013): <http://www.scotland.police.uk/whats-happening/news/2013/july/180091/>: “Police in Edinburgh have begun issuing body cameras to victims of hate crime... The mini ‘body cams’, which are capable of recording incidents at a touch of a button, will be offered to local shop staff who have experienced a significant or repeat incident.”

¹¹ There has been a reported 47% increase in demand for digital forensic examinations since the inception of Police Scotland, just over two years ago, on the basis that “very few investigations today do not have a digital aspect to them” (“£1.5 million investment in new cybercrime hub for East Scotland”, Police Scotland, 7 May 2015: <http://www.scotland.police.uk/whats-happening/news/2015/may/1.5m-investment-in-new-cybercrime-hub-east-scotland>).

accounts given in their aftermath¹². It is of critical importance to appreciate not only the opportunities that exist, but also the potential consequences of failing to take advantage of them. The obvious risk is to the quality of criminal justice itself, if the evidence that may be relied upon routinely at trial, circumscribed by rules developed in an era before Edison or Marconi, is not the best that might readily be produced. The public may, perhaps justifiably, perceive the criminal justice system as outdated and unreliable, if it fails to use commonplace technology to secure the best available evidence and to promote the most efficient modes of conducting trials. In short, it is vital, if the courts are to maintain their legitimacy as the primary forum for criminal justice, that they embrace digital technology in the courtroom.

Digital justice in the Scottish courts

Any vision of digitally enabled justice requires, first and foremost, the development of suitable infrastructure as a platform for cultural change. The support of government is key to ensure that the systems used in the criminal justice system are compatible with those in the wider public sector services. In Scotland, conditions are favourable for digitised criminal justice to flourish within a broader, progressive strategy for the digital delivery of public services generally.¹³ The strategy builds on the success of existing initiatives to allow

¹² See, generally, the Scottish Court Service, Evidence and Procedure Review Report (March 2015), available at <http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-full-report---publication-version-pdf?sfvrsn=2>.

¹³ The Digital Strategy for Justice in Scotland (Scottish Government, 2014) available at: <http://www.gov.scot/Publications/2014/08/5429>.

the transfer of information within the criminal justice system¹⁴, the submission and approval of criminal legal aid funding applications online and, most significantly, the introduction of live video links with prisons, allowing lawyers to advise their clients remotely, and accused persons and offenders to “appear” in court from prison¹⁵. A digital jury portal allows for electronic jury management by court staff. Digital disclosure of information, including text message reminders, allows for efficient communication by the prosecution service with lawyers and witnesses¹⁶. Ultimately, victims of crime should be able to “track their case” through a dedicated public information portal, whose introduction is anticipated by the end of 2017.¹⁷

A digitally enhanced justice system is envisaged, to provide “recording of evidence, reports, decisions and judgments, including submission of pleadings and the use of digital warrants; live video conferencing TV links throughout our justice systems...; [and] a secure digital platform to store all information relevant to a case or individual in one secure location.”¹⁸ By the end of next year, it is intended to create “a digital evidence vault” to store securely all documents, audio and video content relating to a prosecution, and to enable live video links in all courts, supported by Wi-Fi connectivity in all court buildings.¹⁹ There is an administrative will to identify and remove, as soon as practicable, any legislative obstacles

¹⁴ *Ibid*, p 4: the Integrated Scottish Criminal Justice Information Systems (“ISCJIS”).

¹⁵ *Ibid*.

¹⁶ *Ibid*.

¹⁷ *Ibid*, p 5.

¹⁸ *Ibid*, p 6.

¹⁹ *Ibid*, p 7.

to realising the full potential of digitisation, and to revisit and revise the strategy repeatedly over time to take account of improvements in digital capability.²⁰

Some aspects of the vision for digitally enhanced justice in Scotland are already in progress, with the use of live link technology already in operation in many courts.²¹ The use of such technology has been driven to a large extent by the need to provide measures of support and protection for child and vulnerable witnesses. They will normally give their evidence by live television link rather than having to appear in court.²² Incidental provisions exist for the giving of evidence by live link where a witness is located outwith Scotland.²³ Further provisions, subject to their passage through Parliament, are anticipated to confer broad powers on the courts to regulate the participation of the accused in criminal court hearings by live link, where to do so would not be contrary to the interests of justice.²⁴ Significant restrictions are likely to remain on the use of live link technology to the extent that the personal attendance of the accused will continue to be the norm where evidence is to be led or presented.

The recent acceptance of judge-led recommendations, with regard to the televising of proceedings in court, and the use of live text based communications from court, opens up new possibilities for increased transparency and public education in criminal trial

²⁰ *Ibid*, p 10 – 11.

²¹ See *Digital Justice Strategy: A view from the courts – Speech by Lady Dorrian at the launch of The Digital Strategy for Justice in Scotland*, Edinburgh 20 August 2014, available at: <http://www.scotland-judiciary.org.uk/26/1301/Speech-by-Lady-Dorrian-at-the-launch-of-The-Digital-Strategy-for-Justice-in-Scotland>.

²² See, generally, the Vulnerable Witnesses (Scotland) Act 2004 and the Victims and Witnesses (Scotland) Act 2014.

²³ Criminal Procedure (Scotland) Act 1995, sections 273 and 273A.

²⁴ Criminal Justice (Scotland) Bill (SP Bill 35) (as introduced), section 86, inserting sections 288H to 288K of the Criminal Procedure (Scotland) Act 1995.

proceedings.²⁵ Whilst the filming of criminal trials is not to be permitted for live transmission or news broadcast²⁶, except perhaps for the trial judge's sentencing remarks²⁷, the court may allow trials to be filmed for documentary purposes in certain circumstances and subject to safeguards²⁸. The resulting landscape is, therefore, already much altered. Yet, the modernised system does not realise the full potential for digitised justice.

The time has come for a more expansive and progressive view of the modern criminal trial. The phrase "digital or digitised justice" is useful shorthand for what is to be achieved, but it is important not to lose sight of the fact that the true meaning and intent is "digitally enabled justice". The vision is to integrate considerations of fairness and justice with those of efficiency and technological capability. The contrary idea that fairness in criminal trials is to be promoted by the exclusion of digital material recording the accounts of witnesses, in accordance with outdated ideas of what "best evidence" is, is difficult to comprehend. The capability exists, via digital recording and live link technology, to extend trials beyond the physical confines of the courtroom and the time limitations of the assigned trial diet. The vision is that both limitations of space and time need not govern the trial

²⁵ Report of the Review of Policy on Recording and Broadcasting of Proceedings in Court, and the Use of Live Text Based Communications from Court presented to the Lord President by Lady Dorrian, January 2015, available at: <http://www.scotland-judiciary.org.uk/25/1369/Report-of-the-Review-of-Policy-on-Recording-and-Broadcasting-of-Proceedings-in-Court--and-Use-of-Live-Text-Based-Communications>. See, also, the Lord President's speech to the Holyrood Digital Justice Conference, 28 January 2015, pp 8 – 10, announcing the acceptance of all of Lady Dorrian's recommendations, available at: <http://www.scotland-judiciary.org.uk/26/1368/Lord-Presidents-speech-at-the-Holyrood-Digital-Justice-Conference>.

²⁶ Report of the Review of Policy on Recording and Broadcasting of Proceedings in Court, and the Use of Live Text Based Communications from Court (*supra*), para 5.4.8.

²⁷ *Ibid*, para 5.6.2.

²⁸ *Ibid*, para 6.2.1.

process as a whole, but merely form one part of it. As has been suggested elsewhere²⁹, we ought to be moving towards a situation where the trial diet is primarily the day set down for the final determination of the case, upon evidence which will, to a significant extent, have been recorded and presented to judge or jury in electronic form.

A revised concept of the trial

Where the need for facilities enabling the increased use of digital technology is met, the second aspect of modernisation is in the consequential development of the concept of the trial itself. The origins of criminal trial procedure in Scotland have been discussed elsewhere.³⁰ Modern thinking suggests a move away from the traditional concept of the “show piece”, one off trial diet; the appointed day on which all necessary witnesses must attend court and deliver reliable, live testimony, months if not years after the alleged events have taken place. This procedure is inevitably productive of inefficiency and “churn” – that is, the repetition of stages of court procedure – particularly due to the failure of witnesses to attend.³¹ More fundamentally, it is likely to be productive of lower quality justice, in terms of the accuracy of the evidence eventually obtained from witnesses by way of live testimony, sometimes concerning events which the witnesses have been striving to forget. It has been

²⁹ Lord Justice Clerk (Carloway), “Scots Criminal Evidence and Procedure – Meeting the challenges and expectations of modern society and legal thinking”, Criminal Law Conference, Edinburgh, 9 May 2013, available at: <http://www.scotland-judiciary.org.uk/Upload/Documents/CriminalLawConferenceMurrayfield9May2013.pdf>

³⁰ *Ibid.*

³¹ *Ibid.* For recent statistics in the Scottish context, see the Scottish Court Service, Evidence and Procedure Review Report (*supra*), paras 1.15 to 1.19.

observed in the context of the abolition of the requirement for corroboration in Scots law³² that developments in technology should lead to the increased use of electronic recording devices to record witness statements. The recording of statements was recognised as an aid to the reliability of live witness testimony at trial. It is striking that, notwithstanding the recognition of the enhanced reliability of digitally captured statements³³, the precedence of live witness testimony, with its obvious deficiencies, remains prevalent. There would appear to be little logical reason for this preference, other than cultural conditioning borne of historical tradition or an excessive reliance on the presumed effect of the oath.³⁴

It is an altogether peculiar, yet widely permitted, habit to conduct a comparative evidentiary exercise at trial, in an effort to “prop up” or undermine unsatisfactory live testimony, which may suffer from little more than the fallibility of human memory. This involves repeated reference to apparently superior earlier accounts, recorded in a written statement or electronically, that are deemed not to be the witness’s primary evidence despite their proximity to the event.³⁵ It proceeds upon an acceptance of the increased reliability of such statements, and has as its very purpose the remedying of the relative shortcomings of belated live testimony. It does not accept the natural inference that the evidentiary focus should be in reverse. In the modern trial environment, all reasonable steps should be taken to ensure the reliability of testimony. Where the most reliable and accurate statements are those captured electronically, as near as possible in time to the events at issue, it is the

³² The Post-Corroboration Safeguards Review Final Report, April 2015 (“the Bonomy Report”), para 15.9.

³³ In the context of whether corroboration of hearsay evidence should be required in criminal proceedings, the Bonomy Report (*supra*, at para 9.23) identifies “the proper recording of the statement” as one of a number of factors which may be considered to be “indicators of reliability”.

³⁴ See Lord Justice Clerk (Carloway), “Scots Criminal Evidence and Procedure – Meeting the challenges and expectations of modern society and legal thinking” (*supra*), p 6.

³⁵ The Bonomy Report (*supra*), para 15.9.

digitally captured material that ought to take precedence, even if it might be legitimately devalued by subsequent retraction or modification.

The fundamental premise, to be explored in the coming months in Scotland³⁶, is that the administration of justice could be substantially improved by the widespread use of pre-recorded statements in place of, or as a precursor to, live testimony in court, combined with a more imaginative use of live link technology.³⁷ A significant aspect is the potential for the routine pre-recording of witness testimony, at the earliest opportunity, which may be taken as the witness's evidence in chief. Such an approach may sound mildly radical, but it was recommended as long ago as 1989, in relation to criminal proceedings in England and Wales in the context of child and vulnerable witnesses. The Pigot Report³⁸ proposed that the examination and cross-examination of child witnesses should take place at a preliminary hearing, which would be "video-recorded and shown at the trial", with the accused able to view the proceedings via a one-way window or CCTV and to instruct their legal representative via audio link.³⁹ Whilst the parallel work of the Scottish Law Commission addressed similar issues at around the same time, the proposals developed independently in relation to Scotland did not go that far.⁴⁰ The admissibility of video recorded statements was tied to, and generally remains dependent upon, the subsequent appearance of the relevant witnesses in court. Such an approach is not sustainable or justifiable in the modern

³⁶ Scottish Court Service, Evidence and Procedure Review Report (*supra*).

³⁷ *Ibid*, para 1.23 *et seq*, citing Westera et al, *Losing two thirds of the story: a comparison of the video-recorded police interview and live evidence of rape complainants* 2013 Crim LR 290 – 308.

³⁸ Report of the Advisory Group on Video Evidence (Home Office, London, December 1989) ("the Pigot Report") available at: <http://www.law.cam.ac.uk/faculty-resources/summary/pigot-report/8979>.

³⁹ The Pigot Report (*supra*), para 2.29.

⁴⁰ See the report on the Evidence of Children and Other Potentially Vulnerable Witnesses (Scot Law Com No 125, 1990).

technological age. The Pigot recommendations are, even yet, not completely in force⁴¹, and pilot projects are underway to test their operation.

A related issue is the view that Scotland would benefit from the introduction of a dedicated and integrated facility for the taking of children's evidence and the provision of related support services, which is exemplified in the "Barnehus" facility in all major Norwegian towns and cities.⁴² Whatever the precise method to be adopted in the taking of children's evidence, the basic principle of pre-recorded testimony merits examination beyond the sphere of child and vulnerable witnesses. Whilst considerations of welfare are most acute in considering the experience of such witnesses, the related and wider ambition of achieving the most accurate evidence applies to all witnesses, irrespective of age or vulnerability. The pre-recording of statements for use as evidence, to the exclusion of other forms of prior statement, could be extended with benefit throughout the criminal process as a generality. A safety valve would, no doubt, have to be incorporated, whereby witnesses may be called for further examination, whether pre-recorded or, if necessary in the interests of justice, at the trial diet itself. The emphasis should, however, be on the capture of the entirety of the witness's account at the earliest opportunity to ensure the best possible quality, and the least possible trauma associated with giving it.

The opportunity to review digitally captured evidence in chief creates the opportunity for focussed, pre-prepared and pre-recorded cross-examination according to what the witness has *actually* said, rather than what he or she is anticipated to recall and recite upon appearance in the witness box after months of delay. The accused must be

⁴¹ Youth Justice and Criminal Evidence Act 1999, sections 27 (video recorded evidence in chief) and 28 (video recorded cross-examination or re-examination).

⁴² Scottish Court Service, Evidence and Procedure Review Report (*supra*), at para 2.48 *et seq.*

permitted to observe the evidence being given and to challenge it by direct questioning.⁴³ However, the collection and preservation of recorded oral statements as evidence, as they become available, may conceivably become the norm. It is not so very different, after all, from the collection, examination and preservation of items of real evidence, for production in court at a later date, in the hope that no degradation will be suffered in the intervening period. Only in exceptional circumstances should it be necessary for a witness to supplement his or her statement – which is collected at an earlier stage, examined by the opposing side, and preserved for production in court at a later date – by attending in person on the appointed date for trial. There are incidental benefits, notably the convenience to witnesses in providing evidence at a time that best suits their availability, and in conditions that best suit their individual characteristics, including age, mental capability, disability or other vulnerability.

Where live testimony is required, with all of the uncertainty and scope for disruption and inaccuracy that it may entail, the use of live link technology should be available as a matter of routine. By minimising the need for personal attendance in court, the effect should be to maximise efficiency and convenience, particularly in the case of uncontroversial police and expert witnesses, or those located in remote areas and foreign jurisdictions. It is well-recognised even now that child and vulnerable witnesses, in particular, may benefit from giving evidence from outwith the traditional courtroom environment.⁴⁴ The general use of live link technology, where it is of equivalent audio and visual quality to that of a witness

⁴³ *AS v Finland* no. 40156/07, 28 September 2010; *Van Mechelen & Ors v Netherlands* (1997) 25 EHRR 647.

⁴⁴ See, eg, EU Directive 2012/29 establishing minimum standards on the rights, support and protection of victims of crime, esp Articles 23 and 24. Art 24(1) provides that Member States shall allow audio-visual recording of interviews with child complainants for subsequent use in criminal proceedings.

attending personally⁴⁵, would be a natural extension to existing practice. Such an approach would promote the recognition within the court system of the almost ubiquitous consumption of information “on screen” as much as “in person” in the modern world.

The purpose of this type of reform is not to produce an increase in conviction rates.⁴⁶ It is to promote improvements in the quality of justice and to engender the greatest confidence in the correctness of verdicts at trial, whether the result is conviction or acquittal. The provisional objective, therefore, is to make recorded statements generally admissible as the “best evidence” in criminal proceedings. This would enable the appointed trial diet to become “the culmination of an evidence gathering and testing exercise, rather than the entire exercise...closer to methods deployed successfully to record what is regarded as evidence in inquisitorial systems”.⁴⁷ Whereas the adversarial system in Scotland has hitherto directed preparation towards the end result of the trial diet, it is increasingly accepted that criminal proceedings require case management at intermediate stages.⁴⁸ It is recognised, in addition, that an accused cannot “fold his arms and prolong a prosecution in the off chance that a witness will abscond or that the prosecutor will make a blunder; or in the hope that the sheer volume of formal evidence will leave the jury weary or bewildered”.⁴⁹ There is already scope, in advance of trial, for an accused to agree certain facts, subject to being legally represented, and for the court to hold as conclusively proved

⁴⁵ See, eg, the Scottish Court Service, Evidence and Procedure Review Report (*supra*), at para 2.94, citing Ellison and Munro, *A ‘Special’ Delivery? Exploring the Impact of Screens, Live-Links and Video-Recorded Evidence on Mock Juror Deliberation in Rape Trials*, 2014 *Social & Legal Studies*, 23: 3.

⁴⁶ Cf. the Scottish Court Service, Evidence and Procedure Review Report (*supra*), para 2.32.

⁴⁷ *Ibid*, at para 4.1 *et seq*.

⁴⁸ *Ibid*.

⁴⁹ *Ashif & Ashraf v HM Advocate* [2014] HCJAC 23 (7 judges), Lord Justice General (Gill) at para [59].

any specified, uncontroversial facts that are not justifiably challenged.⁵⁰ The right to a fair trial does not require the determination of facts at particular stages of procedure, such as at a single and ultimate trial diet, or the cross-examination of witnesses only at the stage of trial.⁵¹ Especially in summary proceedings, there may be scope for the judge, as the trier of fact, to begin his consideration of the evidence in advance of, and in preparation for, the trial diet.

Ultimately, a progressive and technologically advanced legal system should embrace the idea of the modern criminal trial as descriptive of a *process* rather than a final event. The final event is not the trial itself; rather, it is the culmination of the trial process in the final determination of guilt or innocence.

Pitfalls and risk

Change is often accompanied by fear. In the criminal justice sphere, any proposed change to the operation of trials may be viewed as a potential threat to fairness, contrary to the interests of the accused. The legal system in Scotland is fortunate in having many practitioners who act strenuously in defence of individuals facing criminal prosecution. Scotland is fortunate too in enjoying an independent judiciary and a criminal court system generally free from systematic bias against those accused.⁵² The prospect of reform must therefore be viewed with an open, and not an unduly suspicious or cynical, mind. The

⁵⁰ *Ibid*; Criminal Procedure (Scotland) Act 1995, sections 257 and 258.

⁵¹ *Ashif & Ashraf v HM Advocate (supra)*, at paras [61] and [63] citing *Sadak v Turkey* (2003) 36 EHRR 26, at para [64].

⁵² See, however, the concession to contrary perceptions in *Kapri v HM Advocate (for the Republic of Albania)* 2015 JC 30, LJC (Carloway) delivering the Opinion of the Court at paras [111] to [118].

starting point should be a presumption that the use of technology, which advances accuracy and efficiency in the recording and presentation of evidence, promotes justice. The presumption is, of course, rebuttable, to the extent that safeguards may be required, if particular risks are identified. The process of consultation is ongoing in this regard. The underlying principle, however, cannot seriously be disputed; to pursue justice is to pursue truth.

Nothing in the recently published review of the safeguards that may be introduced upon the abolition of the residual requirement for corroboration in Scots law⁵³ is incompatible with the vision outlined here.⁵⁴ To the extent that the most recent Bonomy Report “recommends more extensive audio-visual recording of aspects of the investigative phase of cases, it is consistent with the ideas explored in the Evidence and Procedure Review”.⁵⁵ In the particular context of suspect interviews, for example, it is observed⁵⁶ that “an audio and video recording of a formal interview is a valuable way of vouching the fairness of proceedings, providing an accurate record, and enabling presentation of evidence in court in a form that enhances the opportunity for judge and jury to evaluate any statement made...” It is recognised⁵⁷ that “[t]he benefits of transparency, vouched accuracy, enhanced opportunity of assessment and the likely elimination of areas of contention warrant the expansion of audio-visual recording of interviews to encompass all formal interviews of suspects in police offices”. The review recommends the introduction of audio-

⁵³ The requirement for corroborated evidence in civil proceedings was abolished as long ago as 1988: Civil Evidence (Scotland) Act 1988, section 1. Likewise, hearsay evidence is generally admissible in civil proceedings: *ibid*, section 2.

⁵⁴ The Bonomy Report, para 1.7: “There is nothing in the present Report that appears to be in any way incompatible with the vision expressed in the Evidence and Procedure Review.”

⁵⁵ *Ibid*.

⁵⁶ At para 5.6.

⁵⁷ At para 5.7.

visually recorded out-of-court identification procedures⁵⁸, with the recording being made available to the court, if necessary, subject to effective case management procedures to ascertain whether identification is in issue and to ensure that it is addressed in advance of trial⁵⁹. Such recommendations demonstrate the importance of the digital capture of evidence from the earliest investigative stages in order to provide the basis for the delivery of digitally enabled justice in the subsequent trial process.

Conclusion

The vision of digitally enabled justice is within reach in Scotland, and the transformation of criminal trials is on the horizon. The trial is poised to become the end point of an integrated, enlightened and efficient process, capturing the best available evidence to secure the best quality of justice in the determination of criminal charges. For as long as they continue to reflect the digital capabilities of modern society, the Scottish courts will be ready to meet the challenge of modern criminality, with renewed confidence, now and in the future.

Lord Carloway

24 June 2015

⁵⁸ At para 6.52.

⁵⁹ At para 6.48.