

LAW SOCIETY OF SCOTLAND ANNUAL CONFERENCE KEYNOTE ADDRESS

“The Scottish Courts in the 21st Century”¹

Introduction

Things being for “the greater good” immediately conjure up the philosophy of Utilitarianism. Bentham, and his successors, developed the idea that the substantive law should reflect the greatest good for the greatest number: “It is the greatest happiness for the greatest number that is the measure of right and wrong”.² Writing over two centuries ago, the main focus of his work was on legal reasoning. He was a reformer, who pursued, albeit largely unsuccessfully, the idea of a complete codification of the common law with a view to making it accessible to the layman. Legal procedure did not completely escape his attention either. He critically examined and challenged the procedural rules which governed how rights could be enforced.³ He was clear that the only defensible purpose of procedural, or adjective, law was the enforcement of substantive rights and obligations.⁴ What are now identified as procedural rights, such as the concept of fairness or the rights of witnesses, were not a direct part of his utilitarian philosophy.

The fundamental concept of procedural rules existing to enforce the substantive law coincides with the constitutional purpose of the justice system. Just as procedure exists to assist the enforcement of substantive rights, so too the continued validity of the courts depends upon their effectiveness in achieving that purpose. That may be as obvious as it is fundamental. Substantive rights are valueless if they cannot be enforced. This leads on to

¹ I am grateful to my Law Clerk, Megan Dewart, for preparing the initial draft of this paper

² J Bentham, *A Fragment on Government* (edited by JH Burns and HLA Hart) (1977) at p 3

³ J Bentham, *The Rationale of Judicial Evidence*, John Bowring (ed) (1843)

⁴ *Ibid*, Vol 2 at p6

another of Bentham's concepts: that the only important feature of a judicial decision is its correct application of the law to the facts. For many years, this was what society collectively expected, or hoped for, from the court system; a high quality, accurate, well-reasoned, and thorough application of the law to the facts as best that they could be ascertained, no matter how long that process might take and no matter the cost to parties and to society. Dickens portrayed the difficulties of this approach in *Bleak House* wherein the costs of the fictional chancery case of *Jarndyce v Jarndyce* eventually swallowed the whole estate. The view, that the only important matter is the quality of the outcome, is still held by certain members of the legal profession, including some in the judiciary. Justice, they cry, can have no price! Maybe; but it certainly has a cost.

In recent times, the system has had to cope with extremely lengthy proofs, especially on health issues such as the fluoridation of water⁵, the effects of tobacco⁶ and, more recently, the proceeds of crime⁷. In crime itself, the longest ever criminal trial in the High Court has only recently been concluded⁸. The problem with an approach which focuses solely on the validity or quality of outcomes is immediately apparent from these cases. The modern concept of access to justice recognises that it is not good enough for a decision simply to be correct, or at least of a high quality, on the merits.⁹ It must be delivered timeously, that is to say at a time when the parties, and perhaps society too, can still benefit from it. If a decision is received too late for it to be effective, it is worthless. A just decision is one which is

⁵ *McColl v Strathclyde Regional Council* 1983 SC 225 (201 days)

⁶ *McTear v Imperial Tobacco* 2005 2 SC 1 (42 days)

⁷ *Scottish Ministers v Stirton & Anderson* [2012] CSOH 15 (130 days)

⁸ *HM Advocate v McLaren* 16 May 2017, Glasgow High Court (320 days)

⁹ see generally, Deirdre Dwyer (eds) *The Civil Procedure Rules Ten Years On* (2009) Chapter 6, A Zuckerman "Litigation Management under the CPR: A Poorly-Used Management Infrastructure" at 961

delivered within a reasonable time¹⁰. It must also be produced at a reasonable cost. As the United Kingdom Supreme Court has recently stressed, justice which is unaffordable to litigants is inaccessible. It undermines the substantive rights of those who cannot afford to enforce them¹¹. Where cases are allowed to drift, or where one party is permitted to prolong their resolution artificially for his own ends, there is a real risk that justice will not be done.

The focus of this talk, and it is one which reflects the starting point of the ambitious projects which have been undertaken over the last decade or so to reform our court procedures, is that the key purpose of the justice system is to ensure the practical and effective enforcement of rights and the prosecution of alleged offenders, in a manner which delivers high quality decisions, within a reasonable time and at a reasonable cost. It recognises the importance of access to justice; that justice is multi-dimensional and has important temporal and economic elements. The court service exists, fundamentally, for the benefit of all, both in its criminal and civil spheres. The particular topics which I intend to cover, and which are key areas having the most potential to achieve the purpose, are the selection of the judiciary, judicial case management and digital innovation.

It is worth pausing to consider how we ended up with the current system and, on a slightly more positive note, what we have already achieved and what we might now do in the journey towards a justice system which is fit for the 21st century; into which we are already some distance.

¹⁰ see in the criminal sphere *Toal v HM Advocate* 2012 SCCR 735, LJG (Gill) at paras [106] *et seq*

¹¹ *R (Unison) v Lord Chancellor* [2017] UKSC 51, Lord Reed at para 67 *et seq*

Who we were

Before looking at system, some regard must be had to the people in it; the members of the judiciary, especially at the higher level. No system, however well constructed, can work unless those with it have the skills and experience to make it work. A peculiar feature of courts, as distinct from most other institutions, is that those who are responsible for the effective operation of the courts have very little say in the selection of those who are to preside in them. Those tasked with the appointments process, have no responsibility for the subsequent performance of those selected by them as judges.

Under the *ancien regime*, before the advent of the Judicial Appointments Board, judges and sheriffs were recommended to the Queen for appointment by the Secretary of State, following consultation with the Lord Advocate and, in practice, the Lord President¹². It was perceived, by some, perhaps many, that judges were the product of cronyism or political patronage. It is true to say that every Lord Advocate in the century or so prior to 1970 was appointed to a superior court bench. Many nominated themselves as Lord President¹³, Lord Justice Clerk¹⁴ or became judges in the House of Lords¹⁵. That tradition was broken not so much with the appointment of Lord Wilson of Langside, who became Director of the old Scottish Courts Administration (now the Scottish Courts and Tribunal Service) and then Sheriff Principal of Glasgow, but when Norman Wylie appointed George Emslie to be Lord President in 1972. Nevertheless, Lord Advocates¹⁶ continued to be appointed as Lords Ordinary and, one way or another, often progressed rapidly to similar

¹² see Emslie "The Court of Session" para 929 in *Stair Memorial Encyclopaedia*, vol 6 "Courts and Competency"; later the recommendation was from the First Minister, after consultation with the Lord President; Scotland Act 1998, s 95

¹³ Lords Robertson, Dunedin, Strathclyde, Normand and Clyde (x 2)

¹⁴ eg Lords Inglis, Macdonald, Scott Dickson, Aitchison, Cooper, Thomson, Wheatley and Grant

¹⁵ Lords Watson, Shaw, Thankerton, Macmillan and Reid

¹⁶ including Lord Wylie

positions of high judicial office¹⁷. The appointment of judges generally was political in the sense of the selection being by government; a system which is common, albeit with different focus, in many western democracies. It is seen as an element in the balance of power. Its merits and demerits have recently been analysed by the new President of the UK Supreme Court, who has mooted re-involvement of politicians from both government and opposition in the appointment of the most important chairs in the English legal system.¹⁸

No-one would pretend that every judicial appointment from that era was of a person with complete legal and personal skills equipping him (as all judges then were) for high judicial office or a sheriffdom. There were problems. What is clear, however, is that the person who was, in practice, recommending the appointment would be fully appraised of the candidate's qualities and failings. The Lord Advocate would be well aware of his prospective appointee's experience, ability and knowledge. Consultation with the Lord President ensured that there was substantial input on suitability from the person who would be responsible for the new judge's future performance and behaviour.

Judicial Appointments

There has been much recent public discussion, both in Scotland and in neighbouring jurisdictions, about the challenges which exist in the recruitment of new members of the judiciary. It is imperative, if Scotland is to maintain a high quality judiciary, especially at Court of Session level, that those at the top of the profession in the litigation field are highly

¹⁷ Lords Mackay of Clashfern and Rodger

¹⁸ Lady Hale: *Judges, Power and Accountability; Constitutional Implications of Judicial Selection*, Belfast, 11 August 2017.

motivated to apply for judicial office. It is equally important that the selection process itself does not deter or subsequently reject those candidates best qualified to fulfil the role. The aim must be to secure the services of those whom the profession regard as the leaders in their field and who are seen as the most able of their generation.

The independence of the judiciary is a vital element in our system. It is maintained primarily by selecting persons who have acted as independent advocates or solicitors throughout their professional lives, who have prosecuted and defended, and who have acted on the one hand for government, insurance companies and global conglomerates and on the other for the private individual, legal aided or otherwise, who has allegedly been oppressed or who has a legal right requiring vindication. What must not be lost sight of is the simple fact, which cannot be underestimated, that for the Scottish justice system to operate properly, it needs judges and sheriffs who are not just competent lawyers with reasonable or even good people skills. It needs, at the high end, the best lawyers of the generation to lead the way; to take over the chairs of the permanent Divisions and to provide their wings. In the sheriff courts, although the same quality of legal skill and experience may not be a necessity, the appointments must be of people whom the profession recognise as prominent within their ranks.

I very much welcome the willingness of the new Chair of the Judicial Appointments Board to engage in a discussion about how the selection process might be improved to ensure that we do persuade the leading lights of the profession to apply for judicial office, and that the very best are successful in their applications.

Where we are

The difficulties which led to the introduction of the latest phase of court reforms are well known, but bear repeating. In the criminal sphere, historically, partly because of the 80 and 110 day and 12 month time bars, many more cases were scheduled to run in the High Court circuits and sheriff court sittings than could ever realistically take place within the allocated time and space. Although there were other factors, a culture of repeated adjournment of trial diets, resulting in the waste of court time and resources, developed. On the morning of the trial diets, adjournments were frequently granted on the basis that witnesses were unavailable, sometimes because they had not been cited, or, more commonly, that parties, usually a newly instructed defence team or counsel, were simply not ready. Preparations for trial had not been completed. The enhancement of the right to disclosure came to be a major factor in slowing down the criminal process. Developments in the field of forensic science, and the proliferation of electronically generated material, such as text messages and social media, created a far deeper pool of potential evidence requiring investigation than ever before.

In the civil sphere, there was a perception that, when it came to scheduling business, the civil proof was the poor cousin of the criminal trial. The need to bring accused to trial quickly meant that a significant proportion of the available court resource went, and continues to go, towards criminal business. Unlike a company or firm, which can determine how much business to take on and how to gear up for it, the courts are not in control of how many indictments or complaints are served in a given week, month or year, nor can they suddenly conjure up further capacity to meet any unexpected demand. It was, and continues to be, difficult to insulate civil business from the pressures of increasing numbers

of criminal trials. Particularly in the Court of Session, the non-commercial Outer House became characterised as a “Cinderella court”. The other problem with civil litigation was that actions would be raised, initial procedure and preparation undertaken, and many cases then continued for very significant periods with no progress being made. The General Department would be filled with processes which were in a constant state of limbo.

In both criminal and civil cases, the judge or sheriff traditionally took very little interest in progress. That was for the parties to manage and the clerk to schedule. Overall, where there was an attempt at judicial management, it was fragmented and inconsistent. The lack of court control over the pace of litigation was, to a large extent, attributable to the adversarial system. Historically, there was a marked reluctance on the part of judges or sheriffs to intervene with parties’ conduct of litigation. The extreme deference to the Crown as master of the instance is an illustration of this.

Looking at the bigger picture, a major factor, which has perpetuated the need for reform, is the advent of the digital age. Almost everyone transacts their most important business online. The internet has made information accessible in a way which it never was before. What could take a week to find in a library, can now be accessed almost instantly on Google or Westlaw. Video images, containing live recordings, can capture events and stream them instantly around the world. Alongside the development of digital technology, there has been a relative decline in reliance on paper and the so-called “wet signature”. Our court systems, being traditionally paper-based, were in a position in which they had to change or be left behind.

Reforms to date

Very significant progress has been made towards the implementation of the recommendations of Lord Gill's Scottish Civil Courts Review in 2007. A new tier was added to the existing court structure, in the form of the Sheriff Appeal Court. A new judicial officer was created, namely the summary sheriff. These are significant achievements. In order to administer limited resources effectively, it is essential that cases are dealt with at the right level from the outset. That has been a cornerstone of the reform programme. The All Scotland Personal Injury Court, based in Edinburgh Sheriff Court, has absorbed a significant proportion of the relatively low value personal injury work, which was previously litigated in the Court of Session. Cases below the new exclusive limit of £100,000 have been devolved to the sheriff court. The effects of the reforms are now becoming evident. A slimmer, leaner and fitter Court of Session will follow.

At the end of last year, the new Simple Procedure Rules came into force. They were designed to make it easier for individuals to represent themselves in low value claims. For the first time, the court rules were written in a manner intended to be more easily understood by the layperson. This is in recognition of the fact that, in many of these cases, it would be disproportionate to require legal representation.

The reforms in the civil sphere have so far been mainly structural. They have included restrictions on the hitherto unlimited right of appeal. The purpose, and it is succeeding, is to ensure that litigation is heard at the right level within the court hierarchy and that cases go no further without due cause being shown.

In the criminal sphere, the context is different. It is the Crown that decide at which level cases should be heard. One of the significant changes has been the effective management of the Preliminary Hearing system in the High Court, which has reduced the number of procedural hearings ahead of trial and radically cut the number of adjourned trials to around 15 per cent of the total. The Practice Note, which was issued in late 2015, followed by the provisions of the Criminal Justice (Scotland) Act 2016, will, hopefully, result in the same regime for sheriff court solemn business. By taking these steps, the court ought to be able to protect limited resources from being wasted. The new summary sheriffs will soon be dealing with the bulk of summary crime. The Sheriff Appeal Court is already coping with all summary appeals. Very few appeals, perhaps only two, have progressed to the High Court.

There are those who are, and will remain, resistant to change. The impact of continuing reform on court staff, the judiciary, and the profession generally is tiring. Reform fatigue is a recognised phenomenon. Maintaining business as usual, when substantial changes are being made, is a significant feat in itself. The court staff, judiciary, and the legal profession are to be thanked for their patience whilst the changes come in; not without tears. The reform project has benefitted and will continue to benefit considerably from the continued engagement of the legal profession.

Future reform

How can the aim of promoting access to justice by delivering high quality judgments, within a reasonable time and at a reasonable cost to parties and the system, be achieved? A tension exists between delivering the highest quality of decision-making with

the need to do so speedily and at proportionate cost. These factors can pull in different directions. The criminal courts have very little control over the volume of cases which they have to determine. There is some scope for control in the civil sphere. The recently introduced leave system both in appeals and in first instance judicial reviews will assist in weeding out unworthy causes. The level of court fees will sound as some form of cautionary note before a party decides to advance to the superior appellate courts, although the level of fees for Inner House hearings is a concern which, in relation to access to justice, will require continued monitoring.

With crime, the issue is very much a matter for the Crown. However, it is worth commenting that, in determining how many cases should be prosecuted, there has to be a pragmatic approach. On the assumption, which is not always justified, that the current system is operating at maximum capacity, it must be recognised that only a finite number of cases per week, month or year can be processed. That number is capable of advanced assessment in each court. Prosecuting more than that number will clog up the system, return it to a pre-reformed state and result in increased intervals between complaint, petition and indictment, and verdict. In circumstances where the total resources are fixed or may decline, and the number of cases to be introduced is unknown and can fluctuate, the only meaningful option is to make the systems as efficient as possible. The opportunity which digital innovation presents, to streamline our procedures, has to be embraced. Available resources have to be properly managed.

This is important both at what might be called macro and micro levels. At the macro level, resources must be distributed appropriately following consistent and well-planned policies. That is a matter primarily for the SCTS board. At the micro level, each case must

receive, but only receive, the right level of resource. The person who is in the best position to make this judgment is the decision-maker. It is the responsibility of the judge or sheriff in every case to assess how much time and procedure is required to resolve the dispute justly, within a reasonable time and at a proportionate cost. That is not to say that it is appropriate for the judge to micro-manage every aspect of the litigation. That is not what is being suggested. What is required is the assumption by the judiciary of the overall responsibility for the efficient progress of a case to its resolution. That is not a task solely for the administrative staff who timetable the cases, nor is it something which the SCTS can manage from afar. Parties and their representatives must take responsibility for assisting the judge or sheriff to make the appropriate procedural decisions. The more engagement there is with the judge, in terms of the level of information which is provided, the more likely it is that the judge will reach a case management decision which is both effective and acceptable. As with the reforms which have already been implemented, the engagement of the legal profession with the introduction of an active judicial case management system will be crucial to its success.

Digital innovation

In October 2016, the SCTS introduced an electronic case management system in the sheriff courts. The Integrated Case Management System (ICMS) was initially intended to herald the opening of a civil online portal, which would allow Simple Procedure claims to be initiated and processed electronically. Its implementation, which in time will result in the end of the paper process, has not been without difficulty. Numerous updates to the system have been needed to fix glitches and gremlins. Many of these have related to the perceived

need to enter the same information on repeated occasions, or an inability to pull through information to populate fields. There have been problems with functionality. As a consequence, the system has not yet been introduced to the Court of Session. The online portal, through which all civil claims will in due course be initiated and processed, with ICMS holding all the necessary documents, is expected to be up and running only in the early part of 2018.

It is easy to focus on the negative. Some are keen to do that. However, there is no fundamental problem. The system is working well in many, but not all, parts of the country. The shift from a paper based process to an electronic one is inevitable. The transfer to the electronic process was never going to be easy. Having said that, hard lessons have been learned, particularly with regard to the type of piloting which is required, and the importance of communication between those involved in the different aspects of the system.

An entirely electronic process is what the public expect. With the publication of Lord Justice Briggs' Review in England and Wales, there will be a move in that jurisdiction towards substantive online hearings in low value cases in the not too distant future. That will be the direction of travel in this jurisdiction as well, depending upon how the system progresses south of the border. The reality is that, if it is disproportionately expensive to litigate over a low value claim, an online civil court should be able to provide some justice in the place of no justice at all. I echo the sentiments recently expressed by the former President of the UK Supreme Court, Lord Neuberger, that "quick and dirty" or "imperfect,

but accessible and affordable” justice is a less of a bad option than the risk of no justice at all.¹⁹

In the criminal sphere, work led by the SCTS has been ongoing over the past 3 years to try and tackle the substantial inefficiencies which exist in many, but by no means all, of the summary criminal courts. “Churn”, that is the repeated and unnecessary continuation of cases, remains one of the most significant problems at this level. The factors, which are considered to be responsible for churn, include the unavailability of key evidence, a lack of preparation by parties, and the non-attendance of key witnesses. The system remains focused on bringing together all of the parties in the court building, every time a decision requires to be made. The incremental improvements, which have been made, have not changed the fundamental problem; that conducting business in this manner is basically inefficient. Many hearings could be conducted online with representatives engaging remotely.

Proposals to address these inefficiencies are contained in the proposition paper entitled “*A new model for summary criminal court procedure*”, which was published by a working group of the SCTS-led Evidence and Procedure Review in February 2017. The proposal is for all pre-trial procedures to take place by way of digital case management. Court hearings should only be used for contested preliminary pleas, issues and other preliminary or pre-trial applications. Strong judicial oversight of the case management process should be used to secure more agreement on evidence whenever possible. A trial diet would only be allocated once parties are ready to proceed. The citation of witnesses

¹⁹ Lord Neuberger, Welcome address to Australian Bar Association Biennial Conference, 3 July 2017 available at <https://www.supremecourt.uk/docs/speech-170703.pdf>

would be managed digitally. In some cases, in which guilty pleas are tendered, sentencing could be conducted digitally without the need for any court appearance on the part of the accused, in much the same way that pleas by letter are currently handled.

It is important to note that this model was been developed over time and with contributions from practitioners from all parts of the justice system. The members of the Working Group that prepared the proposition paper were drawn from all the justice agencies, the judiciary and defence practitioners. The model was discussed in some depth at a series of public roadshows and discussion sessions around the country attended by local defence agents, the judiciary, Crown Office officials, Procurators Fiscal, police, court staff, other justice agencies and members of the public. The purpose of these sessions was to test the model as thoroughly as possible, as it was recognised that the best way to develop genuinely viable and sustainable reforms is to draw on the insight and experience of those who practise in criminal justice on a daily basis. The outcome of the discussions will be published tomorrow in a further report, which, I hope, will encourage us all to seize this opportunity to bring about substantial modernisation and consequent efficiencies to summary justice in Scotland.

A crucial part of the success of these proposals will be the creation of a means to store, manage and share evidence digitally and securely. For the moment, the focus is on the digital storage of information which is currently shared in paper format or on the electronic case management system. The proposals, if implemented, ought to reduce significantly the waste of time and resources caused by churn. The plan is to record and store evidence, which is captured as close to the time of the alleged event as possible, in digital format. This means pre-recording witness statements in video format and using it in

place of testimony in court, subject, of course, to fairness requirement. The power which video and audio recording presents to capture the most accurate account, which is usually that given in the immediate aftermath of an incident, must be harnessed. That ultimate goal remains on the horizon, but it is clearly visible.

Case management

Digital innovation goes hand in hand with active judicial case management. The new processes, which are envisaged both in the development of the ICMS and the online portal, and in the proposals for summary criminal procedure, provide an opportunity for judges and sheriffs to oversee the progress and direction of a case from a much earlier stage than hitherto. Most criminal prosecutions, at least at solemn level, do not drift in the same manner as civil litigation, partly because of the time limits. The court has traditionally regarded the progress of criminal cases with a more critical eye, particularly where there has already been a delay, than it has done in civil processes. The problems, which existed a few years ago with the excessive delay in appellate proceedings in the High Court of Justiciary, are now resolved.

The situation is different in civil proceedings. Although case management powers have existed in the past, they have not always been used. There are exceptions. In personal injury procedure, concerns about delay, and the inefficiency of late settlement, prompted the timetable system, which was introduced as a result of the recommendations of Lord Coulsfield in 2003. As with any timetable, the deadlines have to be enforced for the system to be effective. Active judicial case management has been a part of the procedure of the Commercial Court since its inception. That having been said, it has not always led to the

most efficient use of available resources. This underlines the importance of any judicial case management having an overarching aim of achieving a just resolution of the dispute within a reasonable time and at proportion cost to both the parties and the system.

The Scottish Civil Justice Council, which is itself a creature of the programme of reform, has just published a report with proposals for new Civil Procedure Rules in both the Court of Session and the sheriff courts. Although the reforms have so far mainly altered the structure of the civil courts, these proposals have the potential to breathe life into their spirit. The experience in England and Wales, following Lord Woolf's review, which resulted in the introduction of the Civil Procedure Rules in 1998, has provided a useful lesson. The consultation paper preceding the Gill Report recommended the introduction of a guiding principle for civil procedure. Nearly three-quarters of the respondents were in favour of a Statement of Principle. The Report recommended that:

"A preamble should be added to the rules of court identifying, as a guiding principle, that the purpose of the rules is to provide parties with a just resolution of their dispute in accordance with their substantive rights, in a fair manner with due regard to economy, proportionality and the efficient use of the resources, the parties and of the court".

The Rules Rewrite working group, which is responsible for drafting measures designed to implement the recommendations of the SCJC, considered this. A draft Statement of Principle was included in the group's report. The core of the Principle is that the court ought to do substantive justice between the parties, and that substantive justice means taking account, in a proportionate way, of the cost of doing justice, with efficiency as an important aspect. The proposal is that the first chapter of the new Civil Procedure Rules will set out this principle. The chapter will make it clear that, although it is the duty of the

judge to take into account the purpose of the rules when interpreting them and making case management decisions, it is the duty of parties and their representatives, first, to respect the purpose of the rules when seeking a case management order and, secondly, to assist the judge in the performance of his duty to manage the case effectively.

There is an opportunity for all those interested in civil litigation to be involved in the shaping of the new rules. The working group's report makes a number of recommendations on initial case management, including case flow, along the lines of that which currently exists in personal injury procedure. The vast majority of PI cases can proceed without the need for active judicial intervention. The court will, however, have the power to intervene in every case where management is required. This power will not be limited to the procedural stages. The court will be given the express power to dictate the length of any hearing, including the ability of the parties to call witnesses and to make submissions. That power will be exercised in accordance with the Statement of Principle to do justice between the parties within a reasonable time and at a proportionate cost. Judges will have effective control over the conduct of hearings, as well as the general pace of litigation, through the use of deadlines and time limits.

As with any rule, there must be some sanction for non-compliance. The SCJC proposal is that the new Civil Procedure Rules will provide judges with a broad and general power to relieve parties from, and to sanction parties for, non-compliance. The primary objective of a sanction regime is not to punish, but to prevent non-compliance and to encourage efficiency. Past experience has taught that rules which are not enforced are not followed.

Over the next year, the SCJC will focus on the development of detailed models for Ordinary Procedure, defended and undefended, in the Court of Session and the sheriff courts. The work has been divided into 6 streams, each of which will be supervised by the SCJC and the Rules Rewrite committee. Four streams have been set up, each chaired by a member of the judiciary. Each will develop recommendations, which will culminate in a second report on Ordinary Procedure in the Court of Session and the sheriff courts. This report will contain a set of draft provisions, which will be published for consultation. Once again, it is important that the profession engage with this process as far as is reasonably possible.

It is one thing to change the rules, it is quite another to change the attitude of those who are operating under them. The true success or failure of the proposals for judicial case management will be in the response from both the judiciary and the legal profession. Success will require commitment to the objectives of the reforms. The Judicial Institute is providing training to the judiciary on how to manage cases effectively. No doubt, pockets of resistance will remain. That cannot hold back the success of the overall project. I invite everyone interested in the justice system to engage with the process of reform so that the rules are shaped by everyone's experience and in everyone's interests.

Conclusion

What is now considered to be for the greater good is undoubtedly different from the philosophy of Bentham. It is not good enough for judicial decision-making to be of high quality alone. Justice is a multi-dimensional concept. It must be delivered, by those who are sufficiently experienced and skilled to do so, within a reasonable time and at a proportionate

cost. The opportunities, which digital innovation can provide, must be embraced. If the power, which modern technology presents, can be harnessed, and the judiciary and the legal profession can be mobilised to make effective case management decisions, there is a real possibility, provided the system has the right people at its helm, that we will be able to create a justice system which is fit for the 21st century. That is what society is entitled to expect. Only then will be able to say that the Scottish courts in the 21st century operate for the greater good.

LORD CARLOWAY

Lord President

19 September 2017