21st Century Bar Conference

Friday 8 December 2017

Current Issues: Modern Case Management

Thank you for inviting me to give your key note address this morning. It is a pleasure and a privilege to be here.

Introduction

The focus of this year's conference comes with the somewhat enigmatic title "current issues". That title rather made me smile because "current issues" tend to be "recurring issues", like so many other things in life, "current issues" in the justice system are cyclical. In the immediate aftermath of the Civil Courts Review and its implementing legislation, we continue to focus our energies on securing the expeditious, efficient and cost-effective disposal of business in all courts throughout Scotland. A critical element of that, which will be my main theme, is modern case management.

Dwelling for a moment on the cyclical nature of things, we need to acknowledge that case management is not a new phenomenon. It has been a feature of our procedures for some time, but while the method may change, the process is an old one which can be traced back many years. That this is so was amply illustrated in

the excellent lecture by Prof Dr CH (Remco) van Rhee[1] entitled, "Who is in control? Historical perspectives on the role of the judge and the parties in civil litigation?"[2], delivered at the recent Stair Society conference. It was fascinating to note that active judicial case management may be traced back to the nineteenth century and to the influential work of the Austrian scholar, Franz Klein. That led me to make further inquiries about Klein, a jurist and politician born in Vienna in 1854[3], and best known for his drafting of new rules of civil procedure which entered into force in 1898[4] and which have had an influence all across Europe[5]. It has even been suggested that the Woolf reforms in England and Wales owe a great, but unacknowledged debt, to Klein.[6]

Before the reforms which Klein introduced, court procedures were characterised by passivity by the judge and control by the parties, in a pattern that will be very familiar to this audience. Access to justice was limited, and for the "besitzlose Volkslassen" (the unpropertied classes) simply did not exist[7]. However, with industrialisation and socio-economic changes resulted in a greater number of people becoming involved in a greater number of, and more diverse, legal

[1] Professor of European Legal History and Comparative Civil Procedure at Maastricht University.
[2] http://stairsociety.org/podcasts
[3] Susanne Frodl, *The heritage of the Franz Klein reform of Austrian civil procedure in 1895 – 1896",* 2012, Civil Justice Quarterly, p3.
[4] *Ibid*.
[5] See note 2, *supra*
[6] *Ibid.*
[7] *Susanne Frodl, The heritage of the Franz Klein reform of Austrian civil procedure in 1895 – 1896", supra*, p4.

relationship. Increased commerce and the changing structure of society called for easier access to the courts and speedier, more affordable adjudication[8].

Protracted, expensive and inaccessible justice led to societal break-up[9], reduced trust in the system, and adversely impacted upon productivity. Thus it was essential that the system enabled case resolved to be resolved in proceedings which were easy, affordable and as expeditious as possible[10].

Klein considered that the only way adequately to ensure parity between the parties was to strengthen the judge's power[11]. He proposed a more active role for judges, with increased case management powers. That would be supported by imposing an obligation of cooperation on the parties so that, in the procedural stages at least, court and parties would work together as a team to ensure the expeditious disposal of the case.

All of us, not just the judges but the solicitors and advocates too, have a part to play in securing the efficient disposal of business in our courts – reflecting, at least in procedural issues, Klein's idea of teamwork between court and parties. The issues we are debating today are very similar to the issues have been grappled with by our forebears. Klein is perhaps the godfather, but the issues are real and important, and they never go away. That is what I meant when I earlier described current issues in

[8] *Ibid*, p3, 5.
[9] *Ibid*, p7.
[10] *Ibid.*
[11] *Ibid*, p4.

the justice system as cyclical. The proper management of court business is a constant, always pressing demand, constantly requiring to be re-considered and re-cast in light of the specific demands of contemporary litigation in the onwards march of society.

The last few years have borne witness to the most significant reforms to our courts for over a century, with the creation of the Sheriff Appeal Court, introduction of summary sheriffs, the Bowen reforms, and the establishment of All-Scotland Sheriff Personal Injury Court. It has been an ambitious project, which constitutes a significant achievement in the re-distribution of business to the appropriate levels throughout the court hierarchy. However, the reform project is not complete and the innovations are continuing.

There are three specific areas in which innovations continue to be needed:

- First, in greater use of technology, in the creation of a digital court, and a summary justice redesign;
- Second, in the law of evidence; and
- Third, by enhanced case management.

Although I have listed enhanced case management as one of the elements where innovation is needed, modern case management is actually at the heart of developing innovation in all areas. It is undeniable that it is widely recognised in legal systems throughout the world that active case management by the court is an important condition for procedural efficiency. It was interesting, at a European

award ceremony a few weeks ago, to note the extent to which modern case management was also at the heart of most of the innovative projects devised by the four finalists. We are seeing more and more case management initiatives across specialist procedures – the family court, the commercial court, and personal injury cases all provide examples – which just goes to show how useful and effective it can be at delivering positive outcomes.

The Digital Court

We all know that this is the direction in which we must move. The initial implementation of an electronic case management system, initially for simple procedure in the sheriff court, has not been without difficulty, but the shift from a paper-based process to an electronic one whilst inevitable and necessary, was never going to be easy. However, significant progress is being made and the online portal should be up and running in the early part of next year marking the first steps in our aim to develop electronic processes in all courts and at all levels. An entirely electronic process is what the public expect and this start will go a long way towards increasing accessibility and efficiency. To this, we need to add greater use of digital evidence, remote links, videoconferencing and the like. We need to look at these issues with fresh and ambitious eyes, harnessing the opportunities presented by technology, not letting ourselves be hidebound by the way we have always done things in the past.

Enhanced Case Management

It has long been recognised that digital innovation must proceed in tandem with active judicial case management. One of the benefits of digital innovation is that it gives the opportunity for judges and sheriffs to oversee the progress and direction of a case from a much earlier stage than previously – in preparation before court, in court and beyond. There is no longer any room for the traditional view that the pace of litigation is simply down to the whims and desires of the parties. To get the most out of the development of a digital court, judges require to be more pro-active than before, to be more prepared to monitor progress in a case, to refuse to accept slack standards, and to make sure that they focus, at an early stage on the real issues in dispute in the case, and set aside the irrelevant or minor issues. As we shall see, enhanced case management is at the core of most of the reforms we are currently developing.

Summary criminal justice

As many of you will know, inefficiencies in summary criminal procedure have been a cause of concern for years, with problems of churn and the late resolution of cases just prior to trial. In recent years, we have seen determined attempts to address this problem, and the efforts of sheriffs all over the country has certainly been rewarded with success in this area. In reality though, we need to

address the fundamental problem that conducting business in the manner which has evolved in summary courts has inbuilt inefficiencies. A sticking plaster will no longer suffice - wholesale reform is needed.

The need to tackle these issues led to the SCTS Proposition Paper: A New Model for Summary Criminal Court Procedure, under the auspices of the Evidence and Procedure Review, in February 2017[12]. It is important to emphasise that, as has been the practice in all aspects of the Evidence and Procedure Review, the proposition was developed over time and with contributions from judges and practitioners from all parts of the system. It places significant emphasis on utilising digital technology and case management. The Key proposals originally were that:

- *Service of complaints in summary proceedings should be made electronically;*
- *all pre-trial procedures would take place by way of digital case management;*
- *sentencing following a guilty plea would proceed electronically;*
- *court hearings would be reserved only for contested preliminary pleas, issues and other preliminary or pre-trial applications;*
- *after a not guilty plea, the case would enter a digital case management process, a timetable would be assigned and the judge would decide when the case was ready for trial.*

It was frankly recognised that for such a major overhaul of the system to produce genuinely viable and sustainable reforms, the model would require to be tested as thoroughly as possible, at the coal face. Consultation over the summer

[12] http://www.scotcourts.gov.uk/docs/default-source/SCS-Communications/epr---a-new-model-for-summary-criminal-court-procedure.pdf?sfvrsn=7

showed that modernisation by way of increased use of digital resources was generally well-supported, and I think there is a general recognition that testing by way of pilot exercises would be sensible before introduction of wholesale change. The summer's consultation led to a follow-up Report in September 2017[13].

Two particular modifications came from the feedback. First, it was accepted that – for various reasons, not least transparency - the number of cases involving digital sentencing would have to be significantly less than originally proposed. Second, for obvious reasons, the recommendation for service of a summary complaint always and routinely to be done by email or other electronic means is to be revisited. Final proposals are being prepared for submission to Scottish Ministers and no doubt further consultation about the shape of eventual legislation.

The principles of modern case management - focusing on identifying the issues truly in dispute, encouraging early pleas, making sure that proper preparation takes place, and seeing that the case is not sent for trial until it is ready – are all central to the summary justice redesign.

Vulnerable Witnesses

A key area where we are already seeing intensive case management is in the taking of evidence from vulnerable witnesses. The most recent report of the pre-recorded further evidence stream of the Evidence and Procedure Review was

[13] http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/epr---follow-up-report---september-2017.pdf?sfvrsn=4

published in September[14], setting out a radical new approach to the evidence of vulnerable witnesses. I don't have time, today, to go into the detail of those proposals; what I intend to do is to say a bit about the case management aspects which will arise from increased use of commissions.

Of course, our current provisions for taking evidence by commissioner already allowed us to take evidence this way, as a non-standard special measure[15]. However, a practice note issued in 2005 was largely ignored because by the time that regular use of commissions actually took hold, the practice note was no longer up-to-date with changes in the legislation, or in practice.

If we are to extend the use of pre-recorded evidence to a larger number of children, and vulnerable adults, the system will require structure and order. We realised that we could devise such a structure and order without legislative change, and by this means help to start changing culture and attitudes in advance of further, more detailed reforms. That led to a new practice note[16] earlier this year. It applies to all cases on indictment proceeding in the High Court, but work has already begun on an equivalent Practice Note in respect of cases proceeding on indictment in the Sheriff Court. I think some sheriffs have already been trying to encourage parties to

[14] http://www.scotcourts.gov.uk/docs/default-source/aboutscs/reports-and-data/reports-data/evidence-and-procedure-pre-recorded-evidence-report-28-09-17.pdf?sfvrsn=2

[15] The provisions of section 271 of the Criminal Procedure (Scotland) Act 1995 have the practical effect of allowing either the full or partial evidence of a child under the age of 18 years or a vulnerable adult witness to be taken in advance of trial and visually recorded. Furthermore, section 271I of the 1995 Act permits the use of a live television link in commission proceedings. The 1995 Act does not place any restrictions on the location in which commission hearings can be conducted, although facilities must be available to enable the proceedings to be video recorded.

[16] Practice Note 1 of 2017 – Taking the evidence of vulnerable witnesses by Commissioner.

adopt the measures referred to in the PN, on the basis that this represents best practice.

The headline innovation of the new practice note is the introduction of a Ground Rules Hearing - a case management hearing providing the forum for exploring and agreeing in advance all those issues which might affect the witness's ability to give clear, comprehensive and reliable evidence, and the conduct of the Commission. At its core is the idea that the parties' representatives have a responsibility to think in some depth, and well in advance, about how to make the process appropriate and effective, and to explain to the judge what is required. Parties are expected to be in a position to address the court on all issues, including: the most suitable location and timing for the commission, in the interests of the witness; whether there should be pre-commission familiarisation with the location for the witness; where the accused is to observe & how he/she to communicate with legal advisors; if the commission is to take place in court, and the witness & accused are both present, what steps will be taken to prevent contact; are reasonable adjustments required to enable effective participation by witnesses? The court may address the appropriate form of questions to be asked, in which regard, the court may seek pre-prepared questions in writing.

On this point, the nature of the questioning has received considerable treatment in academic research and this has informed the new Practice Note, which introduces judicial oversight of the nature, format and appropriateness of the

questioning. There is compelling research evidence which demonstrates that if questioning is adapted to match a witness's capacity to understand and respond, the quality of the evidence elicited can be transformed and the witness's experience improved immeasurably.

Training has been taking place in the Judicial Institute, and using good examples from the High Court of Justiciary, of directions actually given at GRHs. As an example of why it is necessary: some films on the advocatesgateway.org.uk illustrate the point very well; but there is another example, from research carried out on the complexity of questions asked in Scottish courts where children were witnesses. The research found that the average number of phrases per question was >4; the maximum in one question was 57. These were questions asked of children! The maximum number of words in a question was 184! Imagine asking a child a 57 phrase, 184 word question? Imagine asking the child to remember it? Imagine even asking the judge to remember it, or note it!

Where children are involved, much greater attention needs to be given to the formulation of questions in a way which uses simple language, which does not rely on amorphous concepts, and which will be comprehensible. To that end, parties are also expected to address the court at the ground rules hearing on issues including the form, length and approach of chief and cross, including the type of questions, as well as how any documents/labels are to be put, how that is to be managed; whether any special equipment/assistance is required, including communication aids, such as

"body maps"; whether there is scope for further agreement which might shorten commission or issues covered; and so on. Clearly, this is all rooted in identifying the relevant issues and weeding out irrelevant ones. In the modern environment, case management is also a tool to protect the witness from the trauma associated with giving evidence in a criminal trial.

Clearly, the court is here taking a more active role, and is also seeking significant cooperation – Klein's team spirit – from parties. These are fairly and squarely the two measures which Klein championed all those years ago. Although updated to reflect contemporary concerns, the thinking behind the Practice Note would be readily understandable to Klein.

The Practice Note came into effect on 8 May 2017. Initial feedback is very positive: it seems that the culture change which has been thought to be necessary is being embraced by practitioners, and they are to be congratulated for their overwhelming willingness to engage with this process.

Long Proofs and Trials

Case management clearly has a significant role to play in dealing with cases where the duration of a trial or proof is expected to be particularly long, and steps have been taken to address this in both the civil and the criminal sphere.

Proofs

Chapter 42A: New Practice Note

Long running evidential hearings have increasingly been a feature of civil business, and a particularly acute problem in clinical negligence cases. The variety of the issues involved, the complexity, and sometimes the number of individuals involved, can all prove to be counterproductive to the effective and swift resolution of the dispute. Case management should be able to assist.

Enhanced case management is in fact available under Chapter 42A of the RCS for clinical negligence cases, requiring parties to lodge written statements of readiness, addressing a large number of issues. This is followed by a By Order at which the judge inquires of parties with a view to identifying the issues relevant for proof and whether parties are ready to proceed. The judge has significant powers to seek to narrow the issues in dispute or at least to focus them, to instruct that documents, reports or statements be exchanged, to consider whether a meeting of experts would be useful, to ascertain whether a joint minute has been considered, or whether restriction of the subject matter of the proof would make sense, and generally to ascertain whether there are any orders which the court could make which would facilitate the resolution of the case, or the narrowing of the issues in dispute.

This has been in place for a few years, but more recently, we wondered whether it was enough, or whether it needed to be backed up by other steps; and the

result was a new Practice Note[17] for these cases, published in the summer. The central innovation of the practice note is to ensure that the same, specialist, judge will preside over the case, "from cradle to grave" as the saying goes. Similarly, parties are expected to ensure that the counsel who will conduct the proof will appear at all procedural hearings in the case. The PN makes additional provision about the way in which material should be presented, seeking further to drill down to the real issues which are in contention between the parties.

Long, complex trials – Long Trials Protocol

It seems reasonably clear that, acknowledging entirely the very different nature of the criminal process, that it should be possible to adapt some of these case management principles to lengthy, or complex trials, which often have multiple accused. It must be borne in mind that these cases are decided by juries, and not judges, and it is important to minimise the burden on the jury, to find ways which might help them understand the evidence which is placed before them, to find ways of presentation which will aid that, and of course, to minimise also the burden which a long trial places upon an accused person.

To address this issue, we are seeking to develop a protocol for the control and management of complex criminal cases. It is currently in draft form, and subject to consultation within the profession. Again, the response so far has been very helpful, with many constructive suggestions being made.

[17] Practice Note 6 of 2017: https://www.scotcourts.gov.uk/docs/default-source/rules-and-practice/practice-notes/court-of-session/court-of-session---practice-note---number-6-of-2017.pdf?sfvrsn=6

The protocol is in draft form but it is envisaged that it will apply to cases which are likely to last eight weeks or longer. Save in exceptional circumstances, all trials, if properly managed, would be expected to conclude within a specified period of time. The Crown would be expected to allocate an AD at a very early stage to identify the essential components of the prosecution, to be involved in making sure the indictment is framed in a suitable way, with proper focus on the legal basis of the case, and with appropriate productions and witnesses identified as early as possible. For our part, we would allocate the trial judge as soon as the case is indicted, who would manage the case, again, "from cradle to grave". The judge would have enhanced case management powers throughout the process, and would be expected regularly to engage in real dialogue with parties to find out what is really in dispute and to seek to ensure that the case remains on track.

Disclosure is obviously a particular concern in lengthy trials, where, in fraud cases especially, the volume of documentation is liable to be immense. This is an area where the case management input of the judge may become particularly valuable.

The judge would expect to be provided with a schedule showing the sequence of witnesses and with dates of citation, all to be kept under review, with regular stock-taking case management sessions as the case progresses.

The judge would be expected to maintain some control of examination so that it remains focussed and relevant. That, of course, is one of the central roles of the judge as matters stand, but it can take on a particular significance in complex cases.

Parties would be encouraged to make more use of statements of uncontroversial evidence; and of schedules in fraud case; to provide core bundles for the jury; and to consider making more use of electronic presentation of evidence.

It would of course, be absolutely vital for the judge must respect the roles of Advocate Depute and defence counsel, and to be selective about intervention: the intention is not for the judge to take control, but for the judge to direct and manage the efforts of those involved in a way which fosters co-operation, assists identification of key issues, enables the trial to focus on the primary issues in dispute, and keeps the eventual trial within manageable limits.

This is all at a very early stage, but early responses are encouraging. Where it will eventually take us remains to be seen.

Conclusion

It is a cornerstone of the reform programme that cases must be dealt with in a manner which delivers high quality decisions, within a reasonable time and at a reasonable cost. That is precisely what was expounded by Klein more than 130 years ago. The reasons which he articulated then hold good for today, because they are bound up in concerns to secure access to justice. Indeed, modern procedural scholars also recognise that the interests of justice require not only that justice is done in the individual case, but also that court time and resource is allocated wisely, fairly and at proportionate cost. As the UK Supreme Court recently stressed, justice which is

unaffordable to litigants is inaccessible. It undermines the substantive rights of those who cannot afford to enforce them[18]. Justice must be delivered promptly, while the effect of the court's decision can still deliver benefit to the parties and perhaps to society too. In addition, the courts must be accessible and responsive in a manner which is truly reflective of the realities of modern life. We each of us have a role in making sure that all of these reforms actually work; that they produce real and sustainable benefits. It is no small thing to promote changes in law and practice. It takes time, it takes imagination, it takes careful and diligent thought and, we must all recognise, it takes a good deal of patience! But it is time, imagination, thought, and patience which it is well-worth expending if at the end of it we have a modern, adaptable, efficient and accessible legal system. It was effort which Klein expended all those years ago, and the positive effects of his work are still inspiring us today.

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