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Journal

Journal of the Law Society of Scotland

Volume 65 Number 6 – June 2020

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Scotland's Hate Crime Bill: less a risk to free speech, more a recipe for uncertainty. Our authors' critique

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e: lawscot@lawscot.org.uk

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Editorial
Connect Publications (Scotland) Ltd

Editor: Peter Nicholson: 0131 561 0028
e: peter@connectcommunications.co.uk

Advertising: Elliot Whitehead: 0131 561 0021
e: journalsales@connectcommunications.co.uk

Review editor: David J Dickson

Online legal news:
e: news@connectcommunications.co.uk

Other Connect Publications contacts, telephone 0141 560 plus:

Head of design: James Cargill (3030)
james@connectcommunications.co.uk

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Editor

Email > peter@connectcommunications.co.uk
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The onus on Government

The first requirement for a society to live by the rule of law is respect for the law. Such respect was maintained pretty well over the first two months-plus of the COVID-19 lockdown, as people by and large stayed at home, observed social distancing and the rest.

Then we had the Dominic Cummings affair. The Government's insistence on defending the indefensible was only ever going to have one outcome – an "If he can do it, so can I" attitude which, combined with modest official relaxations of the rules (done with little sign of coherent planning) and some fine weather, has meant that so far as many people are concerned, the rules might as well no longer be there. So much for the Government trusting in "the common sense of the British people". And the anguish of NHS and care workers expecting a fresh wave of infection, and of those who still need to self-isolate, goes largely unheard.

Even in Scotland, with the partial shield of the Scottish Government's cautious approach to easing the restrictions, observance is slipping away. People cannot be blamed for feeling it has all gone on for long enough, and if those at the top fail to give a clear steer, part of which must be being seen to lead by example, controls are bound to unravel.

Nor do we have that transparency in Government (in either capital) which might help to encourage trust. The defensiveness over the transfers of hospital patients to care homes, for example, and the attempts to conceal what was known at an early stage of the crisis, undermine rather than inspire confidence.

We are a long way, then, from realising the approach advocated by the Scottish Human Rights Commission in its papers on laying the foundations for economic recovery, which could equally be applied in other contexts. "In the context of COVID-19, human rights standards and principles provide a means of taking transparent, accountable and participative decisions that require the balancing of competing interests and priorities, at a time when trust and public confidence is both fragile and critical," it states. "With the wide and meaningful participation of rights-holders, the Government would explore the necessary law, policy and budgetary resources required to improve rights realisation gradually, and in accordance with Scotland's fiscal envelope."

Devolution provides the opportunity to do things differently. That involves a measure of boldness and strategic thinking that is particularly needed at this time. That in turn needs the public to buy in to the chosen path, which they will do the more readily if they feel they have been given the chance to help lay it. If Westminster is failing to command respect, can Edinburgh show the necessary initiative?

Contributors

If you would like to contribute to Scotland's most widely read and respected legal publication please email: **peter@connectcommunications.co.uk**

Dr Piotr Godzisz Birmingham City University, co-author with **Professor Mark Walters**, Sussex University

Malcolm Gunnyeon partner, and **Fiona Caldow**, practice development lawyer, Dentons

Seonaid Stevenson-McCabe is a solicitor and lecturer in law at Glasgow Caledonian University

Clare Russell is a criminal defence solicitor in Inverness

Frances Ennis is head of Litigation & Regulation, Bellwether Green

THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.65 NO.6 – JUNE 2020

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In practice

ONLINE INSIGHT

PUBLISHED ONLY ON **WWW.LAWSCOT.ORG.UK/MEMBERS/JOURNAL/**

So you want to work from home...
Graham Fordyce commends the experience of working from home, but believes that attitudes to new ways of working need to change across the profession for the benefits to be fully realised.

COVID-19: the equality response
Concerned that COVID-19 and the responses to it may exacerbate existing inequalities across all areas of life, the Equality & Human Rights Commission explains how it will work to support disadvantaged groups.

COVID-19: the road for administrative justice
Access to justice, including administrative justice, is being severely tested by COVID-19, and with higher demand for benefits, a more holistic approach is needed, Richard Henderson argues.

Legal mediation: time to start talking!
With court business still at a low ebb, there has never been a better time to consider mediation, and a new collaboration is offering online CPD mediation training.

Scottish IP court reform: not so bananas
Bill Gates said IP has the shelf life of a banana, but it is a huge part of the Scottish economy, and Colin Hulme believes improvements could usefully be made to the relevant litigation rules.

Tradecraft: a miscellany
Ashley Swanson has collected another series of "tradecraft" matters of etiquette, including some suggestions on how to allow for the vagaries of client behaviour.

OPINION

Neil Hay

While most public concern in the criminal sphere arising from COVID-19 has focused on preserving and restarting jury trials, the great majority of trials are summary and this business deserves priority

Many hours of debate, hundreds of column inches and thousands of tweets have been devoted to defending the traditional jury trial from precipitate Government legislation in reaction to the COVID-19 crisis. I joined others in decrying hasty proposals by the Scottish Government for judge-only trials in the High Court; a jury is surely a hallmark of civilisation and a pillar of a democratic society.

By the end of May, it appeared that most publicity and political concern about the serious backlog of criminal trials was focused on jury cases, particularly those in the High Court. But what of the humble summary trial which takes place only before a sheriff and without a jury? What has been the effect of coronavirus on summary cases, and what action will be taken to recommence summary trials?

Since lockdown at the end of March, criminal courts have simply stopped hearing all trials (except for a very small number where the accused is in prison awaiting trial). Using emergency powers granted to the Government in April, the vast majority of trials have been compulsorily adjourned until August or later.

Scottish Courts & Tribunals Service (SCTS) statistics show that the highest volume of all business (civil and criminal) in all courts is summary crime. In 2019-20, evidence was led in about 10,000 summary trials (sheriff and JP court); jury trials amounted to about 1,600. Speaking to the Scottish Parliament Justice Committee on 19 May, Eric McQueen, the CEO of SCTS, stated that the COVID-19 crisis had created a backlog of almost 1,800 trials in Scotland, with the possibility of this rising to 3,000 by early next year.

The time period from the start of a summary prosecution to the date of the trial is usually between two and four months. That period is also growing, has increased to more than six months and may well grow to almost a year. Given that 85% of all trials in Scotland are summary trials, the scale of the backlog is simply enormous. This issue is not limited to Scotland. The Criminal Bar Association of England & Wales suggests that there is a backlog of 40,000 trials in that jurisdiction.

Most members of the public experience the criminal justice system through the summary criminal courts. With a maximum sentence of 18 months available, much of that court business is serious: drug dealing; serious assaults; sexual offences; and domestic crimes. Every case awaiting trial includes an accused person under pressure, a complainer suffering stress and any number of witnesses feeling anxious about giving evidence. In domestic cases, special conditions of bail usually require the accused to live away from the family home, with the additional strain on family relationships (especially children) and the financial burden of maintaining a second home.

The COVID-19 national emergency presented an incredible challenge for SCTS, and the response was immediate and responsible. The public will expect the speed of the recovery to match that of the lockdown. However, as at 1 June, although some local courts are reopening in June, there is no sign of any clear strategy from SCTS to clear the backlog. A well-planned strategy might include increasing the number of courts to hear summary cases or leasing temporary accommodation, employing part-time sheriffs more regularly and appointing new summary sheriffs to hear trials. Such action would also have consequences for COPFS and the defence bar.

When the time is right, the resumption of summary trials quickly and safely is distinctly possible. Jury trials require the participation of more than 20 individuals (jury, court staff and lawyers) and will now be spread across two or three courts to ensure social distancing. Summary trials require only one court and usually proceed with only six people present at any one time: the accused; the defence lawyer; the prosecutor; the court officer; the sheriff; and a witness (and the sheriff clerk for key trial events). Summary courtrooms and adjoining witness waiting rooms can easily accommodate a safe (and socially distanced) trial. Furthermore, the backlog of summary trials can be cleared quickly. While each jury trial usually takes a minimum of two or three days, each summary court might hear and dispose of two or three trials every day.

It is often said that justice delayed is justice denied. That is why, when it is safe to resume criminal court trials, summary cases must be prioritised. This approach offers an effective way of delivering justice swiftly and safely for the majority of the public anxiously awaiting a verdict in criminal cases.

Neil Hay is a solicitor advocate and a director with MTM Defence Lawyers

CORRESPONDENCE

SLCC's runaway train

The Scottish Law Agents Society (SLAS) welcomes the agreement between the Scottish Legal Complaints Commission and the Law Society of Scotland to defer payment of half of this year's levy, but remains concerned that the SLCC does not recognise the present crisis in the legal profession caused by the COVID-19 pandemic. It must now agree to revisit its spending plans and come up with a substantial reduction.

The SLCC's attitude can be summed up in three words: "Crisis? What crisis?" The budget of the Commission has grown exponentially, despite an actual drop in the number of cases from its inception in 2007. It is not sufficient for SLCC merely to claim that "cases are more complex". We suggest that its budget is akin to a runaway train.

SLAS has previously challenged the SLCC to "get real", and to acknowledge that coronavirus is a game-changer. It threatens the existence of many legal firms, big and small alike. Many more are likely to face a serious downturn in business and revenue. Loss of firms will lead to a loss of competition in the Scottish legal market. The SLCC is demonstrating either lack of awareness or deliberate and reckless conduct.

The Commission's budget plans were first proposed in January before the pandemic spread. We are now presented with exactly the same inflated levy but with payment simply deferred in part. The Law Society of Scotland has had to step in to organise deferment. The SLCC has just not taken proper account at all of the mayhem and threats to business that have engulfed the country.

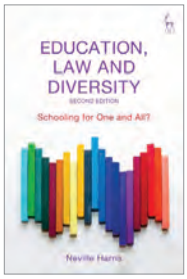
The problem is that the SLCC is unaccountable to the profession, one that pays its entire costs. The Scottish Government does not pay for it and neither do complainers. There is something wrong with the Commission's plans if it cannot make reductions in the levy or maintain the status quo with no increase, especially with the furlough on salaries. We think that a detailed investigation is required into the salaries and costs of SLCC during lockdown. We assume that the Commission is able to make considerable savings and that it ought to be able to finance a significant reduction in the levy. We are requesting the Scottish Government to look into this and veto the budget plans.

There is a bigger problem, and that is the SLCC itself. Despite seeming to harbour ambitions to be a regulator, it is meant to be a fair and impartial complaints service showing favour to neither complainer nor solicitor complained of.

As an organisation the SLCC is failing the profession and complainers. It operates at huge cost with little scrutiny and is the very worst model of a complaints body. It has lost the confidence of the legal profession. It is unfit for purpose and has had its day.

Andrew Stevenson, secretary, Scottish Law Agents' Society

BOOK REVIEWS



Education, Law and Diversity

NEVILLE S HARRIS
HART PUBLISHING
ISBN: 978-1509906703; £59.50

Neville Harris is Emeritus Professor of Law at Manchester University, so the legal context and specific legal provisions are always to the fore, but his fascinating consideration of the question of education, law and diversity goes so much further. It is as much a consideration of the place of education in society as it is a legal textbook, and really repays a cover to cover read.

The breadth and scope of the enquiry immediately strikes the reader, covering all the protected characteristics one might expect, and going well beyond them to, for example, the rights of transgender pupils, even where they do not fall within the Equality Act definition of gender reassignment.

It also covers areas where different interests come into conflict, such as tensions between LGBT+ inclusive education and the religious beliefs of some parents. The text highlights the issues and the legal and policy contexts in which they arise, without getting mired in controversies for its own sake.

There are times when the focus on the system in England makes the coverage less relevant to the Scottish practitioner, but these are both relatively rare, and interesting as a comparative exercise. The book is likely to be of most interest to those involved in education policy, at local or national level, but also to child and family law practitioners looking for a deeper understanding of this area.

The work is as comprehensive as it is ambitious, easy to read despite being in-depth, and well structured and laid out. A real *tour de force*!

Iain Nisbet, education law consultant. For a fuller review see bit.ly/2XAdGa9

The Flat Share

BETH O'LEARY
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This month's leisure selection is at bit.ly/2XAdGa9

The review editor is David J Dickson

BLOG OF THE MONTH

ukconstitutionallaw.org

To whom, if anyone, is the Prime Minister's special adviser Dominic Cummings accountable? What constitutional and behavioural obligations apply to his position?

Professor Mike Gordon of Liverpool University concludes that Cummings is answerable only to a Prime Minister "zealously committed" to keeping him, but that their respective failings may have fuelled much closer scrutiny of Government. "Consequently, it may be the case that the Dominic Cummings affair has, in different senses, generated both less accountability and more accountability than we might have expected."

To find this blog, go to bit.ly/3duv9pH

Yo ho... meh

Just when you thought the COVID fallout couldn't get any worse, up pops a Scrooge-like press release from Offices.co.uk predicting the demise of the office Christmas party.

Sadly, it claims that those who have already booked large work festive gatherings are being told to forget the idea. We shan't dwell on what that would mean for the hospitality sector, but the resourceful office space company has already drawn up its own list of ideas for "socially distanced" Christmas parties. Like:

- a videoconferenced festive drink and banter with colleagues
- fancy dress conference calls ("yes, this will be a thing this year")
- Secret Santa, if the post manages to deliver quicker than it did the editor's birthday cards
- microwave Christmas dinner: enjoy a burning hot conference call meal together [it says here]
- virtual wine and cheese course: you can get it delivered to your door and look up the virtual tasting notes
- Zoom karaoke: "As if it is not annoying enough, at least you can put mute on."

Hmm, definitely not much of a substitute. Never mind, at least you might not have to have the aunties round this year.

PROFILE

Ian Moir

Ian Moir is a Glasgow solicitor who is joint convener of the Law Society of Scotland's Criminal Legal Aid Committee

1 Why did you become a solicitor?

I was either going to study medicine or law. My dad was a doctor and he invented the epidural, which I felt was a tough act to follow, so I opted for law!

2 How has your career gone so far?

I did my traineeship in Cranhill and Blackhill, which had some interesting moments! I then worked in Possilpark for a number of years before joining a bigger firm which did other areas of work as well. I set up my own firm about 10 years ago; last year we changed the name to Moir & Sweeney Litigation, to recognise the huge contribution by my partner Paul Sweeney.

I have mainly focused on criminal defence work but have also done FAIs, regulatory work, children's panels etc.

3 Why did you join the Criminal Legal Aid Committee?

After the stipendiary magistrate fee and other cuts, I felt that rather than moan from the sidelines I should try to improve the situation. I have been involved for almost a decade, and that really helped during the COVID-19 negotiations as the people I was dealing with at SLAB and Scottish Government knew me well.

4 Can you tell us about any personal highlights?

Making sure we avoided the issues around contracting; the creation of a user-friendly system for claiming for police station work; and the recent concessions for COVID-19 to help legal aid firms survive. In terms of my own work I would say winning Criminal Law Firm of the Year 2017 and a judges' commendation for Solicitor of the Year in 2018 are right up there.

Go to bit.ly/2XAdGa9 for the full interview

WORLD WIDE WEIRD

1 Neighbour principle

bbc.in/3ct6iBt

Residents' welfare associations in Indian cities are having to be reined in for applying arbitrary, "tinpot dictator" rules purportedly to prevent COVID-19 spreading in their neighbourhoods.

2 Who let it out?

bbc.in/2XZ7x6a

Keeping wild animals is legal in Mexico with a permit and proof of ability to feed and house them, but last month a tiger was seized after it was seen wandering the streets of Jalisco, chased by a man with a lassoo.

3 Driven to it

reut.rs/2z4Bcmc

When police in Utah, USA found a five-year-old at the wheel of his parents' Lamborghini, the boy said he left home after arguing with his mother who told him she would not buy him one.

TECH OF THE MONTH

Be My Eyes

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Be My Eyes connects visually impaired people with sighted volunteers and company representatives who take video calls to help them with various tasks that require sight.

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PRESIDENT

Amanda Millar

While many challenges now face the Society as it seeks to continue the profession's contribution to civil society, I also intend my presidential year to advance the inclusiveness that will help the profession fulfil its responsibilities

So … here I am, President of your Law Society of Scotland, a profession of over 12,000 members with a responsibility to promote, protect and advance the legal interests of all aspects of society at a time of challenge for all and crisis for many… no pressure!

This is the next opportunity of my life and I am undaunted in my desire to face the many challenges with openness, compassion, and consideration. The Society will, under my watch, work with the profession and stakeholders to ensure the profession remains viable and continues to make a fundamental contribution to civil society. That includes protecting fundamental rights, ensuring our profession reflects the society it serves in its diversity, promoting wellbeing and standing up for and to challenge.

I and my colleagues are not complacent about the level of these challenges, particularly when it seems other priorities have taken over life, but a viable, valuable, committed legal profession must and will survive to ensure the values of our civil society do likewise.

At the start of the lockdown all areas of legal business were affected: courts closed; Registers of Scotland closed; businesses closed; emergency legislation produced. The Society through its staff and volunteers engaged with others including SCTS, Registers, SLAB, Westminster and Scottish Governments, and through sharing of expertise and compassionate challenge, we made and will continue to make positive progress.

This month has seen the start of the financial package delivering savings of £2.2 million, by offering members a delay in paying the SLCC levy. It is frustrating that the SLCC has maintained what appears to be a unique position in the crisis, making NO change to its budget produced in January and evidencing NO consideration to the challenges facing everyone at the moment. John Mulholland, my excellent predecessor, described it in April as "tone-deaf", and its hearing has not improved.

Support across the board

Of course all our work is influenced, and much of it driven, by the impact of COVID-19, but the Society's other work has not been forgotten, nor is it being allowed to stagnate. My start as President is also the end of an era, as the Society's longstanding executive director of Regulation, Phil Yelland, retired at the end of May. Phil's wealth of experience and support will be much missed, but I look forward to working with Rachel Wood, who brings her own insight and experiences to the role as we move forward.

In Mental Health Awareness week, I launched the Society's series of events offering training and ideas for individuals and businesses on how to support positive mental wellbeing. This is always important, but is particularly pertinent now as we manage through increased working from homes, personal and financial stress. Investing time and energy now to promote positive mental health will also help deliver future sustainability – we are in this for the long haul.

See p 41 of this issue for the results of our 2019 survey on the status of mental health stigma and discrimination in the legal profession, and the launch of a seven-step action plan to drive cultural change.

Friday 29 May, as well as being the day I received the President's chain of office (although I left John with the responsibility until 1 June!) was also the 50th anniversary of the passing of the landmark Equal Pay Act. In the same week, we published the results of gender round tables carried out last year, an important initiative led by Past President Alison Atack.

I commend to you her blog about the importance of this work (under "Blogs & opinions" in the news and events section of the Society's website).

As well as being the start of my time as President, June is Pride month which in recent years has launched a summer of celebrations of everything LGBTQ+. This year will be very different, but our LGBTQ+ community is not forgotten, notwithstanding the challenges of lockdown. There is particular symmetry in this timing as, if you didn't know already, I am the first person known to be a member of the LGBTQ+ community to become President in the Society's 71-year history.

I look forward to seeing and contributing to its #PrideInside work.

Some may say there is a lot here about work on inclusion and we are losing our focus on a core message to defend and promote the profession. To those I say, our profession has a responsibility to society and if it does not support its members' ability to bring all their skill, intellect and diverse experience then we cannot fully meet that responsibility.

Our profession with its responsibilities to individuals, business, government, justice delivery, society and its members are all in this together and I, my Vice President Ken Dalling, Past President John Mulholland and all the team at the Society led by the capable and persistently positive CEO Lorna Jack, look forward to working with you to lead the way in delivering legal excellence.

Amanda Millar is President of the Law Society of Scotland – President@lawscot.org.uk Twitter: @amanda_millar

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ADDLESHAW GODDARD, Edinburgh, Glasgow, Aberdeen and internationally, has announced the promotion of real estate solicitor **Paul Ewing** to partner in its Edinburgh office.

BKF (BANNATYNE KIRKWOOD FRANCE & CO), Glasgow has announced the appointment of **Alan Eccles** to the firm. Previously a partner at BRODIES, he works in three main areas: charities, private client, and parliamentary matters.

BRODIES LLP, Edinburgh, Glasgow, Aberdeen and Dingwall, has appointed solicitor advocate **Carly Forrest**, previously with BTO, as a partner in its Insurance & Risk practice, and made seven other solicitors up to partner in a total of 36 promotions across the firm: **Kate McLeish** and **Karren Smith** (Real Estate), **Andy Nolan** (Corporate & Commercial), **Jack Moir** (Banking), **Jared Oyston** and solicitor advocate **Niall McLean** (Litigation), and **Jennifer Wilkie** (Personal & Family). **Ms Smith** will also take on a leading role in Brodies' Dingwall office. There are eight new senior associates: **Jenna McCosh** and **Breda Deeley** (Real Estate); **Paul Green** (Corporate & Commercial); **Eoghann Green**, **Lynn Livesey**, **Gemma Nicholson** and **Ramsay Hall** (Litigation); and **Kimberley Ryder-Forman** (Banking); and 21 promotions to associate: **Dave Bales**, **Cameron McKay** and **Gail Smith** (Real Estate); **Jennifer Crawford**, **Will Rollinson**, **Harriet Rutherford**, **Sarah McConnell** and **Lucie Hassell** (Corporate & Commercial); **Ross Mitchell**, **Stephanie Clarke**, **Jamie Dunne**, **Lisa Kinroy**, **Alison McAteer** and **Jo Kelbrick** (Litigation); **Stewart Gibson, Rachael Noble** and **Garry Sturrock** (Personal & Family); and **Anna Bell, Katie Priester, Rachel O'Reilly** and **Claire Devlin** (Banking).

CAIRNS BROWN, Alexandria and Dumbarton, has appointed as a partner **Kenneth Owen McGowan**, based at its Alexandria office, with effect from 1 April. He will oversee the firm's criminal practice.

Brodies LLP, from top left: Kate McLeish, Karren Smith, Jack Moir, Niall McLean
Bottom: Andy Nolan, Jennifer Wilkie, Jared Oyston

CLYDE & CO, Edinburgh and globally, has appointed **Vikki Melville** as managing partner for Scotland from 1 May 2020, taking over from **David Tait**, who remains on the firm's Scottish executive committee.

Jacqueline Fordyce, advocate has been appointed as the sole registrar of the Upper Tribunal (Administrative Appeals Chamber) in Scotland.

GILSON GRAY, Edinburgh, Glasgow, Dundee and North Berwick, has appointed English-qualified commercial property lawyer **Mark Sabey** as legal director in its Glasgow Real Estate division. He was most recently a director with BURNESS PAULL.

Gilson Gray has announced seven promotions: to legal director, **Cheryl Edgar** (Residential Conveyancing, based in East Lothian); to associate, **Jean McAlpine** (Residential Conveyancing), **Iain Grant** (Litigation & Dispute Resolution), **Joe Davies** (Private Client) and **Shona Young** (Family Law); and to senior solicitor, **Emma Cowie** (Residential Conveyancing) and **Fraser Cameron** (Litigation & Dispute Resolution).

LINDSAYS, Edinburgh, Glasgow and Dundee, has appointed **David Rose** as a partner in its Commercial Property team. He joins from DENTONS. Also appointed are **Katherine McAlpine** (who joins from MILLER HENDRY) as a senior solicitor in Dispute Resolution & Litigation, and **Rhian Griffiths** as a solicitor in Commercial Property.

MUNRO & NOBLE, Inverness, Dingwall & Aviemore, has promoted **Kay Bevans Brown** (Residential Conveyancing) and **Laura McCarthy** (Litigation) to partner, and **Chris Allan** (Executry) and **James Noone** (Litigation) to associate, all with effect from 1 April 2020.

Gilson Gray, from top left: Cheryl Edgar, Joe Davies, Shona Young, Jean McAlpine, Iain Grant, Fraser Cameron, Emma Cowie

PROGENY, a UK professional advisory firm with offices in Edinburgh and elsewhere, has appointed **Stuart Easton**, of EASTONS, Glasgow, to its business to advise in wills, powers of attorney, trusts, executries and estate planning.

RAEBURN CHRISTIE CLARK & WALLACE LLP, Aberdeen, Ellon, Stonehaven, Inverurie and Banchory, announce the promotion of **Amy Watson** to partner, and **Ruth Lussier** to associate, both in the Private Client team, with effect from 1 June 2020.

ROONEY NIMMO, Edinburgh and London, has appointed commercial lawyer **Neil Anderson** as a partner, based in both offices. He was formerly a partner at LEDINGHAM CHALMERS.

TLT LLP, Glasgow, Edinburgh and UK wide, has appointed dual qualified solicitor **Stacey Cassidy**, who joins from PINSENT MASONS, as a partner in its Projects, Infrastructure & Construction team, based in Glasgow, and **Michael Spence**, previously head of Real Estate (Scotland) at WOMBLE BOND DICKINSON, as a partner in Real Estate, based in Edinburgh.

WOMBLE BOND DICKINSON, Edinburgh, Aberdeen and internationally, has appointed **Chris McLauchlan**, who joins from EVERSHEDS SUTHERLAND, as a legal director to lead its Banking team in Scotland, and **Ewelina Kurek**, who joins from SHEPHERD & WEDDERBURN, as an associate in its Real Estate team, both based in Edinburgh.

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Donna W McKenzie Skene

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This new text publishing in the SULI series takes the place of the classic work of McBryde on Bankruptcy. Recent years have seen a raft of new and amending legislation in relation to Bankruptcy, for example The Home Owner & Debtor Protection, changes to Trust Deeds and the introduction of diligence of Land Attachment. This is the core text for practitioners and academics working in this area.

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Agricultural Tenancies

4th Edition

The Right Honourable Lord Gill

The Agricultural Holdings Act 2003 resulted in completely new forms of tenancy and amended laws relating to holdings, resulting in a complete overhaul of this major work. There is now increased emphasis on the historical background to tenancies, providing a complete overview of the development of the law and an understanding of its current standing. The text includes up-to-date case law and full appendices of legislation as a second volume, making it the complete source of information.

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Hate crime: mapping the boundaries

Scotland's Hate Crime Bill seeks to modernise the law, but has reignited debates on freedom of expression and the need for such laws. The authors discuss how it would affect victims in Scotland, and the lessons for other parts of the UK

Scotland is looking to change its hate crime laws. The Hate Crime and Public Order (Scotland) Bill was submitted in Holyrood on 23 April. According to the Scottish Government, it "seeks to modernise, consolidate and extend existing hate crime law ensuring it is fit for the 21st century".

Its proposed changes include:

- expanding the list of protected grounds in the hate crime law by adding bias based on age and variations in sex characteristics (and possibly also sex, depending on the outcome from a working group) to those currently protected: disability, race (and related characteristics), religion, sexual orientation and transgender identity;
- introducing a new offence of stirring up hatred against any of the protected groups covered by the bill (currently these offences apply only to stirring up racial hatred);
- consolidation, by pulling most current laws into one bill.

The last of these should be welcomed by both legal practitioners and victims, but there are important conceptual and practical implications of the bill. We argue that, while the bill brings greater simplicity and more parity for the protected characteristics, there are possible implications for the effective application of the law, and for the concept of "hate crime" itself. There are also lessons for the law reform processes currently being undertaken in Northern Ireland and England & Wales.

Impact and statistics

There were 4,616 hate crime charges recorded in Scotland in 2018-19. More than half were race-related. There were 1,176 charges of sexual orientation hate crime, which has been steadily increasing year on year, 529 religiously aggravated charges, 289 charges with an aggravation of prejudice relating to disability, and 40 with an aggravation of transgender identity (compared to 52 in 2017-18). Under-reporting of hate crime is recognised as a key factor.

While relatively low in numbers when compared with volume crimes like robbery or shoplifting, hate crimes are a daily reality for many people belonging to at-risk groups. They are often associated with more serious psychological, social and community impacts compared with similar, but non-hate crimes (Iganski and Lagou, "Hate Crimes Hurt Some More Than Others", 30 *Journal of Interpersonal Violence* 1696 (2015)).

In his independent review of hate crime laws in Scotland, Lord Bracadale outlined three key reasons why the state is justified in legislating to prevent hate crime. These are summarised as:

"• recognition of the additional harm which hate crime offending causes to the victim, others who share the protected characteristic and wider society;

• the important symbolic message which the law can send;

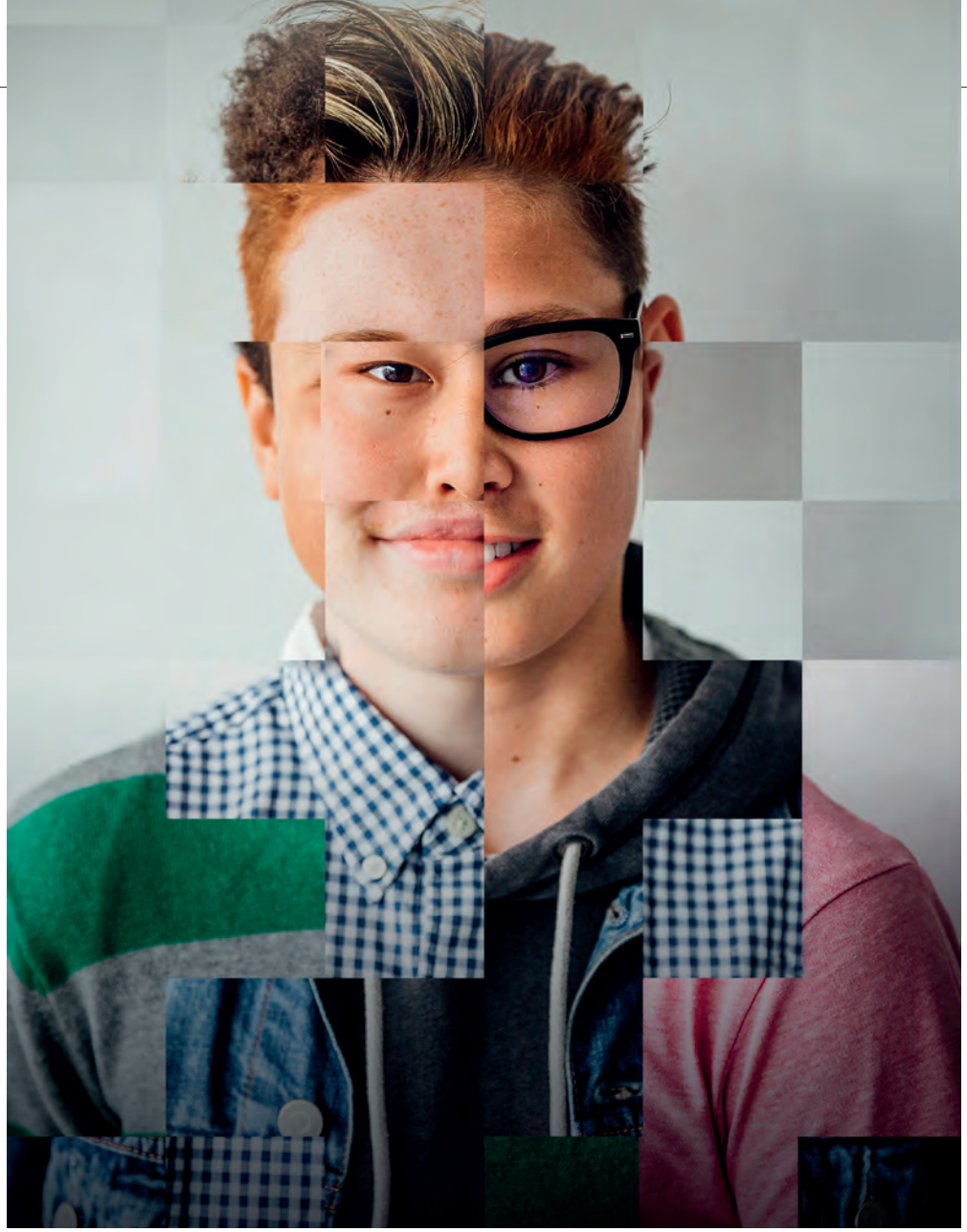
• the practical benefits which arise from having a clear set of rules and procedures within the criminal justice system to deal with hate crime".

The proposed new measures are meant to offer greater protection for people who experience hate crime. According to Justice Secretary Humza Yousaf: "By creating robust laws for the justice system, Parliament will send a strong message to victims, perpetrators, communities and to wider society that offences motivated by prejudice will be treated seriously and will not be tolerated."

Protected grounds

Even without the proposed reforms, Scots law is already among the most advanced in the world. By providing for higher penalties for offences aggravated by prejudice based on disability, race (and related characteristics), religion, sexual orientation and transgender identity (including intersex), the existing legislation covers most groups known to experience hate violence. Adding new protected grounds places Scotland among the handful of jurisdictions in Europe and North America that recognise "age" and "variations in sex characteristics" as protected grounds in hate crime law. For example, 13 USA states recognise bias based by age in their hate crime statutes, while Greece and Malta have legislated to include sex characteristics.

The bill also improves the parity of protected grounds through new "stirring up of hatred" offences, addressing the hierarchy of victimisation criticised by Lord Bracadale (more on this



below). As we will explain, some of these amendments will help to clarify existing laws. However, we argue that other changes lack sufficient evidential grounding and risk further complicating the legal framework.

We welcome the bill's removal of the awkward understanding of intersex as a type of transgender identity. The recognition of variations in sex characteristics on a par with other protected grounds helps to normalise the intersex identity, and removes legal uncertainty and possible confusion among judges. Separation will allow for the correct recording of the scale and types of transphobic and interphobic crime, enabling better understanding and evidence-based policymaking.

The move to include age as a new protected characteristic is a more controversial one, especially as there remains scant evidence that there are prejudice-motivated crimes based on age that are likely to cause additional harms to victims or others who share their characteristic, as set out by Bracadale. The Scottish Government noted that: "Although there might only be a relatively small proportion of crimes relating to malice and ill will towards a person because of their age", it "wants to ensure that these crimes are treated in the same way as other hate crimes through the use of the statutory aggravation model".

Yet, while the Government has moved to include age, somewhat surprisingly it has excluded "gender" or "sex" from the list of characteristics. Such a move ignores Bracadale's recommendation that gender hostility should be included under the legislation, considering the significant body of evidence that women experience various forms of violence based on hostility towards their gender. The Government has taken account of opposition from women's rights organisations who argued instead for a standalone offence of "misogynistic harassment". Bracadale dismissed this proposal, stating that a "new standalone offence would... have a considerable cross-over with other existing offences, which risks causing confusion and undermining the aim of collecting reliable data". The bill does provide for a window to allow the characteristic of "sex" to be added at a later stage; but notwithstanding the implications of misogynistic or gender-hostile crimes being labelled as ill will towards someone's "sex", there is the additional concern here that decisions about adding characteristics are not being based on any consistent criteria.

Failure to outline clear criteria for inclusion of characteristics in hate crime law could lead to the concept of hate crime becoming too nebulous and, in turn, its potency as a legal category being diminished. The legislature should instead set out general criteria for inclusion of characteristics. Then, using these criteria it can assess whether a characteristic requires legislative protection based on information and evidence provided by statutory agencies and, importantly, civil society groups, community practitioners, and researchers. The Law Commission in England & Wales is currently working to develop a set of criteria for victim group inclusion.

The legal model

Scots law does away with the dual system of legislation that England & Wales employ, simplifying the way in which all hate crimes can be prosecuted and recorded. It is also different to Northern Ireland in that its current legislation (and the new consolidating bill) requires that it is "libelled in an indictment, or specified in a complaint, that an offence is aggravated by prejudice". As well as being stated in open court, the aggravation, if proved, is recorded on conviction in a way that shows the offence is aggravated by prejudice.

This is unlike England & Wales, and Northern Ireland, where offences motivated by (or which demonstrate) sexual orientation, disability or (E&W only) transgender hostility, will *not* be labelled as prejudice-based at trial and will *not* be officially recorded by the courts as a prejudice-based offence. Both the review in Northern Ireland and the Law Commission review in England & Wales should carefully consider the value of prosecuting and labelling any offence as an "aggravated" crime (where there is evidence of hostility), in the way that Scots law does (referred to as the "hybrid" approach by Goodall

and Walters, *Legislating to Address Hate Crimes against the LGBT Community in the Commonwealth*, Equality & Justice Alliance (2019)). Previous research (*Hate Crime and the Legal Process*, University of Sussex, 2017) has shown that evidence of "hostility" is often filtered out of the criminal process where it does not make up part of the substantive offence being prosecuted. The dual system of substantive offences and sentencing provision found in England & Wales can also lead to confusion amongst legal practitioners, with fewer professionals being aware that the sentencing laws exist.

Despite the Scottish bill providing for much needed simplicity in the law, it has conversely chosen to maintain the somewhat archaic criminal law language of "ill will and malice", clearly dismissing Bracadale's assertion that "to a layperson a phrase such as 'demonstrating hostility' is more easily understood than 'evincing malice and ill will'". In some respects this may be a good move. The University of Sussex study found considerable problems with the application of "hostility" based offences in England & Wales, leading to many disablist offences falling outside the scope of the legislation. However, the legal test of proving "ill will or malice" may prove equally inhibitive in successfully pursuing any age-based hate crimes.

Bracadale notes that most cases of victimisation of older people involve the targeting of victims based on their perceived vulnerability. Cases involving actual hatred or hostility will be few. Yet, as we have seen in relation to disability hate crime cases, it will be very difficult to distinguish between cases involving intentional "ill will or malice" towards a victim's characteristic and those which involve targeting based on their perception of vulnerability, which may or may not be linked to prejudiced attitudes. Cases that involve a perceived vulnerability are likely to fall outside of both lay and professional interpretations of "ill will and malice", therefore hate crime laws are unlikely to be successfully applied.

If the law remains on the statute books without being applied in practice, it risks exacerbating the sense amongst concerned groups that the authorities are not sufficiently protecting them from targeted abuse. The University of Sussex study recommendation to consider modifying the legal test to include a discriminatory model, or even combined model, whereby a hate crime can be proved where it is committed "by reason" of someone's characteristics was rejected, as Bracadale had concerns that this would be too broad. We argue however that this is a missed opportunity to ensure that all types of hate crime, especially age and disability aggravated crimes, can be effectively proved in court.

"Stirring up hatred" offences

The "stirring up" offences, too, have been criticised for being hierarchical, both in terms of what characteristics are covered and the legal tests used to prove different types of hatred.

Currently, only stirring up of racial hatred can be prosecuted as a specific offence in Scotland (religious hatred having been repealed under the Offensive Behaviour at Football and Threatening Communications (Repeal) (Scotland) Act 2018). While a greater level of parity is created here by including seven characteristics as potential forms of hatred, the legal test for proving racial hatred will be different to the other six. It will be possible to commit the stirring up of racial hatred by communicating insulting, as well as threatening and abusive material, while all other types of hatred can only be committed by threatening and abusive material.

Bracadale had argued that the word "insulting" should be deleted from the racial hatred provisions, ensuring that all types of stirring up of hatred offences used the same wording. However, the bill maintains this wording. We remain unconvinced that there is sufficient evidence that Parliament should treat racial hatred using a different standard to other forms of hatred that are likely to be stirred up in society. After all, the same freedom of expression provisions apply to all forms of speech, and the defence that the use of language was reasonable in the circumstances will equally apply.

While critics of the bill have expressed concerns that the new law would criminalise people who objected to Government policies such as the reform of the Gender Recognition Act, we see very little reason to believe this would occur in reality. Similar concerns were raised in England & Wales when religious and sexual orientation hatred were added to the law in 2006 and 2008 respectively. Yet few cases have ever been successfully prosecuted, due primarily to the law's emphasis on freedom of expression. Considering the careful phrasing of the proposed law (including the requirement of threatening and abusive language), and the fact that such provisions used across Europe have been found to be lawful under human rights treaties (European Court of Human Rights, Factsheet – Hate speech (March 2020)), we share the Government's view that the bill "strikes the right balance, protecting those who fall victim to crime because of the prejudice of others while also protecting the freedom of thought and expression of all citizens".

Summary: unclear boundaries

Policymakers in Northern Ireland, and England & Wales, will no doubt be paying close attention to the approach taken in Scotland. The reformed law may also be relevant for Ireland, where the Department of Justice & Equality is currently reviewing the outdated Incitement to Hatred Act 1989. The Scottish bill provides for a much needed consolidation that offers greater parity in protection for victims of hate crime. While this simplicity should help to improve the effective application of hate crime legislation, it remains unclear which characteristics *should* be included in hate crime law. Without carefully defined criteria for inclusion, "hate crime" as a category of law risks becoming too nebulous.

Beyond the who, is the how. While the Scottish bill strikes the right balance between protecting victims and protecting the freedom of thought and expression, it has missed opportunities to modify a legal test that includes archaic language, and which we believe is not fit for purpose for *all* types of hate crime.

Dr Piotr Godzisz, Birmingham City University and **Professor Mark Walters,** University of Sussex

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COVID-19: the quest for contractual equity

COVID-19 has disrupted many commercial contractual relations, but dispute resolution must recognise an evolving backdrop of court closures, "breathing space" and payment holidays, as well as emerging dispute resolution processes. Malcolm Gunnyeon and Fiona Caldow report on some current developments

Contractual certainty has long been regarded as a fundamental component of our legal landscape. Businesses plan (and price) on the basis that the contractual terms they sign up to will ultimately be enforceable, if need be through court action. However, the backdrop against which contract terms are enforced is rapidly evolving in response to the widespread disruption caused by COVID-19. Recent practical and legislative developments have had a dramatic impact on the ability to enforce contract terms and are necessitating a new approach to resolving disputes.

The courts – adjournments and backlogs

A major practical hurdle to enforcing contract terms arose as soon as lockdown began. The Scottish courts adjourned all civil business, except the most urgent of cases. The courts are now progressing some cases remotely, but hearings that require witness evidence remain adjourned, and backlogs have inevitably led to significant delays for those cases the courts allow to progress remotely.

Our experience of remote hearings has been very positive and we hope to see many more cases progress by way of videoconferencing and teleconferencing facilities in the coming months, while social distancing measures remain in place. However, we anticipate that the impact of the disruption will lead to delays in civil cases lasting into next year. Unless a case is particularly urgent (for example, where an interim order is sought), the courts are unlikely to provide a route to resolving disputes swiftly any time soon.

Government intervention

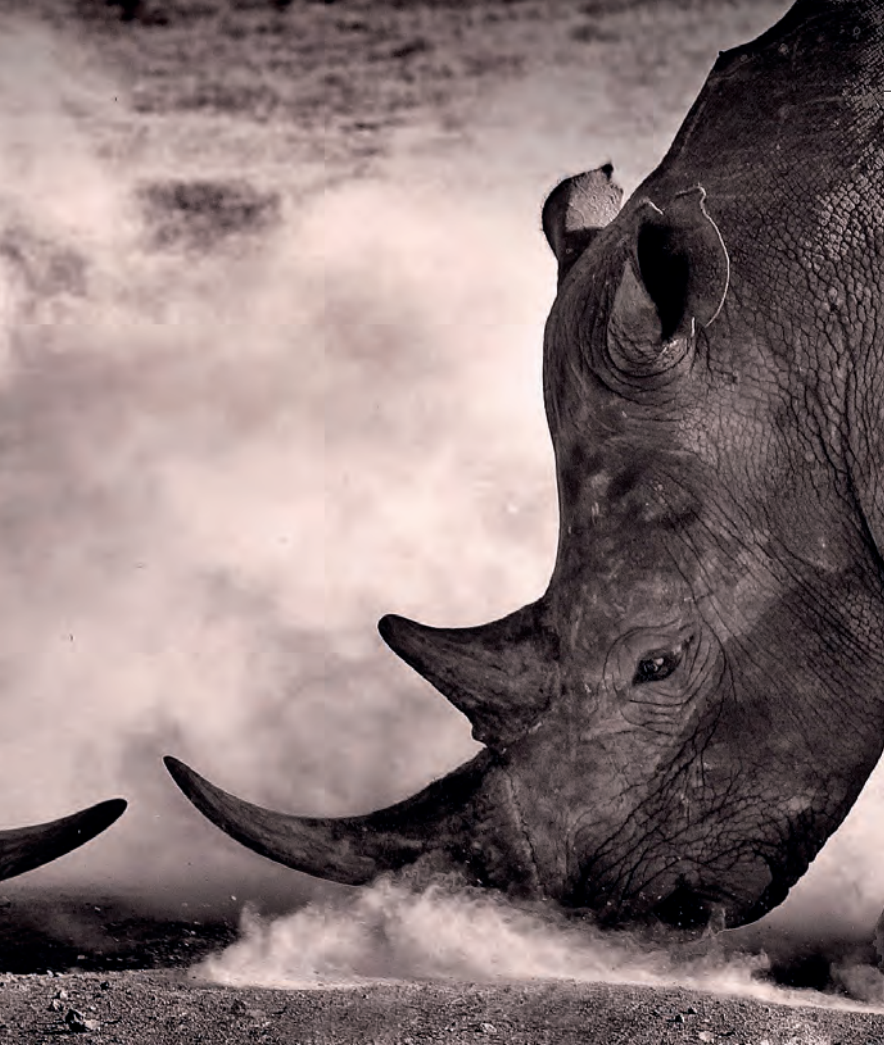
The UK Government is taking an interventionist approach in order to help businesses avoid insolvency and continue trading during this difficult time. On 7 May, guidance was issued calling for "responsible and fair" behaviour in the enforcement of contract terms where the performance of a contract is materially impacted by COVID-19. The Cabinet Office's *Guidance on responsible contractual behaviour in the performance and enforcement of contracts impacted by the COVID-19 emergency* does not have the force of law; rather parties are being encouraged to follow it "for their collective benefit and for the long-term benefit of the UK economy". The Cabinet Office guidance does not apply in the devolved administrations, but is of interest across the UK.

"Calls for the law to respond with equitable solutions suggest we could be on the cusp of a period of judicial creativity"

The guidance strongly encourages parties towards the amicable resolution of contractual difficulties and disputes. It asks parties to be "reasonable and proportionate in responding to performance issues and enforcing contracts (including dealing with any disputes), acting in a spirit of cooperation and aiming to achieve practical, just and equitable contractual outcomes". While the guidance states that it does not override specific contract terms, it contains a list of particular examples of circumstances where responsible and fair behaviour is sought, including making payment demands; responding to *force majeure* or frustration claims; calling up securities; initiating or continuing an insolvency process; claiming breach of contract; and enforcing default/termination provisions.

Published on 20 May, the UK Government's Corporate Insolvency and Governance Bill is a further significant intervention because it dramatically affects the remedies available to creditors. The bill is expected to become law by July, with some provisions having retrospective effect. The key provisions extend to Scotland. The explanatory notes describe the overarching objective of the bill as being to "provide businesses with the flexibility and breathing space they need to continue trading during this difficult time".

The central proposal in the bill is a moratorium process to enable companies to apply for a payment holiday, initially for 20 business days (but extendable) and overseen by a monitor who will be a licensed insolvency practitioner. The purpose of a company applying for a moratorium would be to facilitate its rescue, via a company voluntary arrangement, a restructuring plan of the type also introduced by the bill, or a new injection of funds. The effects of the moratorium on creditors of the company are extensive, and include a prohibition on commencing court action (unless leave of the court is obtained, noting that leave is not to be granted for the enforcement of debts), on enforcing security, and on the



exercise by a landlord of a right of irritancy without permission of the court.

Other proposals in the bill restrict the remedies available to creditors of all companies:

• While not prohibiting the serving of statutory demands, the bill deprives them of utility by providing that statutory demands served between 1 March and 30 June 2020 cannot form the basis of a winding-up petition.

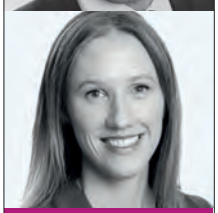
• The bill also temporarily prohibits a winding-up order from being made in respect of a company on the grounds that it is unable to pay its debts, where the inability to pay is the result of COVID-19.

• It suspends termination clauses operable on insolvency in contracts for the supply of goods or services, meaning that suppliers can be required to continue to supply, even in the event of significant outstanding payments.

Judicial activism?

Emerging calls for the law to respond to the disruption to contractual performance with equitable solutions suggest that we could perhaps be on the cusp of a period of judicial creativity. The British Institute of Commercial & Comparative Law issued a concept note titled *Breathing space – a Concept Note on the effect of the pandemic on commercial contracts*, noting the exceptional nature of current circumstances and need for debate on the "necessary contribution of the law to safeguard commercial activity, minimise disruption to supply chains, and ameliorate the adverse effects of a 'plethora of defaults'".

The concept note encourages a conciliatory approach to resolving contractual disputes: "In many jurisdictions, procedural rules already encourage conciliation – can these be developed further to give a breathing space? The onus at least in the first instance would be for the continuance of a viable contract rather than bringing it to an immediate end." So far, uncontroversial.



Malcolm Gunnyeon is a partner and **Fiona Caldow** a practice development lawyer in Dentons' Dispute Resolution team

The concept note goes on to consider how existing legal principles could be applied by the courts to arrive at equitable solutions. The note points out that "as well as the scope of the doctrine of frustration, rules as to the implication of terms and the debate as to long-term relational contracts may be relevant... Another approach would be through the doctrine of unjustified enrichment, the question being whether, without declaring their contract at an end, the relations of the parties can be equitably readjusted by the court so that the one will not be unintentionally enriched at the expense of the other".

Innovation by the judiciary, relying on development of the law of frustration, the implication of terms, relational contracts (this is a reference to the development of the principle of good faith in the English courts), or unjustified enrichment, in order to arrive at equitable outcomes, is more controversial. Recent Supreme Court decisions have, rightly in the authors' view, rejected calls to arrive at equitable solutions at the expense of contractual certainty. A theme common to the recent landmark Supreme Court decisions in the field of contract law is the need to respect the terms of the bargain struck between parties: see *Arnold v Britton* [2015] UKSC 36 (concerning contract interpretation), *Marks & Spencer v BNP Paribas Securities Services Trust Company (Jersey)* [2015] UKSC 72 (concerning implied terms), and the conjoined decision in the cases of *Cavendish Square Holding BV v El Makdessi* and *ParkingEye v Beavis* [2015] UKSC 67 (concerning penalty clauses).

Judicial innovation in cases arising out of exceptional circumstances to arrive at equitable solutions is likely to create unhelpful precedents. Intervention to address unfair outcomes legitimately belongs in Government legislation, as we see with the Corporate Insolvency and Governance Bill.

The way forward

The manner in which businesses and their legal advisers approach contractual disputes is one of the many processes that has to adapt to the current disruption. Enforcement options are limited and, where they are available, are unlikely to result in rapid resolution. Deferring resolution until social distancing measures are at an end and the courts have cleared the backlog of cases will rarely be satisfactory, doing little to resolve underlying issues or the economic or mental stress that has been caused.

Current circumstances have prompted a surge in interest in remote mediation, which can be a quick and low cost method of resolving contractual difficulties. The use of videoconferencing technology allows the physical set-up of a mediation to be recreated, with parties "meeting" their legal advisers in a breakout "room" beforehand, and the flexibility to switch between plenary sessions and the mediator joining parties in their breakout rooms, much in the same way as an in-person mediation.

There is room for creativity in the mediation process. We recently acted on behalf of a client in a "blind bidding" mediation, where parties put forward their settlement proposals in three bidding rounds, with a match resulting in successful settlement. Now, more than ever, the inability to perform contractual obligations is arising from circumstances outside of parties' control. Remote mediation presents an opportunity to work through those difficulties, preserve relationships and reach a resolution, enabling businesses to move forward and address the other pressing challenges they are currently facing.

Protecting those small places

A proportionate and informed legislative response to the COVID-19 crisis – and the period beyond – has to be based on human rights principles, and that requires scrutiny and collaboration, Seonaid Stevenson-McCabe argues

In the midst of a global pandemic, it is natural to feel concerned by the challenges that lie ahead. As governments wrestle with the nuances of lockdown policies and strive to find long-term solutions to this crisis, many of us are experiencing these concerns on a very personal level.

Eleanor Roosevelt, when reflecting on the Universal Declaration of Human Rights, noted that human rights begin "in small places, close to home – so close and so small that they cannot be seen on any maps of the world. Yet they are the world of the individual person; the neighbourhood he lives in; the school or college he attends; the factory, farm, or office where he works".

This has perhaps never felt more pertinent. We are in a worldwide crisis, but for many of us, we are concerned about our individual worlds: our families, our friends, our homes, our livelihoods. How do we protect these small places, close to home, during a global pandemic?

Scrutiny initiatives

I suggest that we must begin by ensuring rights-based scrutiny of government actions. Governments must, of course, respond rapidly to the crisis. However, it is important that this swift response is based on human rights principles.

In this sense, it was positive to see the Scottish Parliament's Equalities & Human Rights Committee launch an inquiry into the impact of COVID-19 in late April. As the inquiry was launched, the committee convener, Ruth Maguire MSP, stated: "The purpose of this inquiry is to ensure that hard-fought rights are uppermost in decision makers' minds when responding to this crisis." Similarly, the UK Joint Select Committee on Human Rights has launched an inquiry into the implications of the pandemic, and is accepting evidence until 22 July. Ensuring scrutiny of Government action at this time is crucial in terms of protecting our rights. Civil society organisations in particular are well placed to provide expert insight while ensuring the Government is held to account.

In response to the Scottish inquiry, Human Rights Consortium Scotland has co-ordinated the response of 30 civil society organisations and highlighted their shared concerns. It was noted in their submission that: "Various healthcare, social care and ethical guidance notes published do not contain anything explicit or detailed about the equalities and human rights issues raised by the pandemic."

To ensure human rights compliance and transparency, the Consortium called on the Government and other public bodies to carry out and publish their equality and human rights impact assessments in relation to COVID-19 decision-making. The Consortium emphasised that the assessments should be intersectional, taking account of how particular groups in society are impacted. Engaging with equality and human rights assessments at an early stage of policy-making, and publishing these findings online, can help ensure human rights really are "uppermost in decision makers' minds" when responding to the crisis.

Jury trials: a case in point

The importance of engaging with key stakeholders has perhaps most clearly been demonstrated in relation to the proposals concerning jury trials in Scotland. While the Scottish Government initially proposed to allow trials on indictment to be conducted by the court sitting without a jury, this was met with serious concern from many in the legal profession. At the time, the Faculty of Advocates' Scottish Criminal Bar Association suggested that the proposal "not only affects the rights of any accused person charged with serious offences; but equally affects the rights of every citizen in Scotland". In its briefing for MSPs on the bill, the Law Society of Scotland made clear that it did not support the proposals and stated that the potential for a case backlog as a result of the crisis was not sufficient reason for this departure from jury trials.

In light of these concerns, the Scottish Government withdrew the relevant section of the bill and committed instead to a consultation process. Since then, a discussion paper has been published which set out options for progressing serious criminal cases during this time. Separately, a short-term working group to consider the practicalities of recommencing jury trials, led by Lady Dorrian, has been established.

This period of consultation has allowed diverse stakeholders to share their concerns. Organisations supporting victims of crime suggested that the opportunity to permit jury-less trials may have been "prematurely dismissed". Concerns were raised by Rape Crisis Scotland, concerning the need to avoid cases collapsing and complainers being required to give evidence again. It also voiced concerns about the impact of prosecutorial delay in cases involving children. Referring to the judgment of Lord Reed in *HM Advocate v P* 2001 SLT 924, it recalled that "prolonged delay in bringing a case to trial may also have seriously harmful effects upon a child complainer, especially (as in the present case) in a case of alleged rape".

The discussions which have taken place since the withdrawal of the proposals highlight the importance of stakeholder engagement and scrutiny of emergency legislation. There is no precedent for this crisis, and it is undeniably challenging. It is therefore vital that reforms are considered carefully and opposing views are explored. By engaging with stakeholders with diverse perspectives, the Government can ensure that decisions are informed and nuanced. This considered, collaborative approach is all the more important in times of crisis, ensuring that our responses remain proportionate and seek to balance the rights of all involved.

Endemic inequality

As we begin to move towards the next phase of the pandemic response, it is also important to

consider how we protect human rights as part of our longer-term recovery strategy. The UN has noted that, while the virus does not discriminate, its impacts do, and that "longstanding inequalities and unequal underlying determinants of health are leaving particular individuals and groups disproportionately impacted by the virus". When we emerge from this crisis, we have a unique opportunity to consider how we want to rebuild our society and tackle these inequalities.

To focus on one example where inequality is endemic, as a practising solicitor I worked with migrant and refugee clients. I saw how damaging the UK's "hostile environment" approach to immigration policy was. Our immigration system separates families, locks individuals in a cycle of poverty, and marginalises the most vulnerable. I was therefore relieved, albeit surprised, in recent weeks to learn that migrant NHS workers will no longer be required to pay the immigration health surcharge, a fee of £400 per year paid by the majority of migrants to the UK. While details are yet to be confirmed, it is clear that many people felt a sense of shame that those caring for us were required to pay this fee to use the NHS.

"We have a unique opportunity to consider how we want to rebuild our society and tackle inequalities"

However, there remains much to be done to reform our immigration system. As noted by the Human Rights Consortium Scotland, while "human rights apply regardless of immigration status", individuals in the asylum system have just over £5 to live on per day. Equally, it appears the immigration health surcharge will continue to apply to migrants who do not work for the NHS. As we emerge from this crisis, we need to assess how we tackle the inequalities that were built into our society prior to the pandemic and which will undeniably have been exacerbated by the crisis.

The Scottish Human Rights Commission has also outlined the need for future budgeting and spending to take full account of human rights. In a report published in April, the Commission recognised the disproportionate impact of the pandemic on particular groups and emphasised the need to ensure that our economic recovery "tackles this inequality, rather than exacerbating it". Recommendations include a focus on public engagement in budgeting decisions, including providing more opportunities for the public and civil society to take part in budget scrutiny.

Ultimately, human rights principles should be seen as a tool to guide us. Examining our responses through the lens of human rights ensures that no one is left behind. To protect those "small places, close to home", we need to ensure effective scrutiny of Government actions while planning for a future which places human rights at the centre of our decision-making.

Seonaid Stevenson-McCabe is a solicitor and lecturer in law at Glasgow Caledonian University. She is the co-founder of RebLaw Scotland, a movement exploring how law can be used as a tool for social justice. These views are her own and do not represent any organisation.

That remote feeling

COVID-19 is bringing big changes in the way summary criminal business is conducted, but are we losing something of value in the push to go remote for public health reasons? Clare Russell has some concerns

As any criminal court practitioner would attest, an ordinary day prior to the Government's lockdown on 23 March would have been filled with bustling courtrooms, cell block and police station consultations, and the not infrequent embrace or handshake from a client struggling to deal with the variety of emotions that appearing in a criminal court brings.

However, the COVID-19 pandemic has resulted in long-discussed changes arriving in our criminal courts more swiftly than anticipated. Practitioners' days are now unrecognisable, with human interaction all but removed in an attempt to minimise the risk to judiciary, staff, the bar, and all who interact with the justice system. This article will consider the difficulties facing practitioners at present due to the practices and procedures that have been introduced to allow the continued administration of justice, albeit at a much reduced level.

With social distancing likely to remain for the foreseeable future, virtual assistance will be crucial in allowing court business to resume, and we now have an opportunity to consider how best to do this by learning from past issues, present experiences and employing the best technology available. We can then consolidate this system for use when the pandemic is over. In the absence as yet of any indications as to how jury trials will resume in the High Court, let alone in crowded sheriff court buildings, the article will focus on how summary business might change to accommodate this new normal.

Limits of the technology

At time of writing, criminal court business in Scotland is mostly limited to urgent and essential custody hearings, such as applications to extend custody time limits and urgent bail hearings. The Coronavirus (Scotland) Act 2020, which came into force on 7 April, resulted in some practitioners being dragged kicking and screaming into a new digital world, faced with custody hearings being dealt with (as far as possible) by electronic means. The Act allows court hearings to take place without the physical attendance of a person required to attend, who must then appear "by electronic means". Such hearings can take place from any of the 10 hub courts; but what problems does this present?

Videolink technology in courtrooms is not new, having been introduced to allow vulnerable witnesses to give evidence. However, that technology has proven to be notoriously unreliable and unsatisfactory, with recurring issues such as regular loss of video or sound. Yet, even if these problems were ironed out, practical limitations with the use of electronic links will remain.

For example, currently only four videolinked criminal hearings can take place per courtroom per hour. These 15-minute slots do not allow for problems with the technology, or more human problems such as obtaining instructions from an upset and confused client who requires support and assessment, the time needed for the negotiations frequently required with the procurator fiscal (PF), or the necessary assistance of an interpreter, which inevitably slows a hearing down. Those of us who have used remote hearings, whether by video or telephone, find them to be more of a mental strain and tiring on the eyes than first thought. This inevitably means that hearings take longer, and frequent breaks are necessary.

Even if everything was streamlined to perfection, one has to remember that ultimately a criminal practitioner's job, suited and gowned, is to communicate a client's position to the court. However, it is not just what we communicate, but how we communicate it. Videolinks often create a barrier and alter the perception of what is being said, and communication therefore breaks down, with many possible repercussions, such as a party appearing to disengage with the process (more likely out of frustration with the link than with the process itself), emotions being misinterpreted, and unspoken signs going unnoticed.

Further issues

For a number of years now, criminal practitioners have utilised videolink facilities to consult with clients in custody. Due to the recent public health guidelines, a problem has arisen when consulting with counsel. In ordinary circumstances, consultations would take place in person. However, this no longer being safe or practical, the possibility of three-way videoconference calls (solicitor, counsel and prisoner) on the solicitor to prisoner link was investigated.

It has been reported that such calls "were tested but were unsuccessful". This has resulted in a number of situations where the link has been utilised but with counsel videolinking in on a third device which requires to be held to the screen being used by the solicitor. Clearly this is not a satisfactory way to carry out consultations, and will require to be addressed should social distancing measures remain in place for a prolonged period.

While most criminal practitioners would undoubtedly prefer to appear personally to represent a client, we are all very conscious of the impact of any delay on the individuals involved in a case. It could therefore be considered good news that further national guidance provides that sheriff courts can now consider and dispose of cases through paper submissions where no trial is needed. This applies where "the solicitor for the accused and the prosecutor have agreed both the plea(s) to be recorded and the facts on which the plea(s) proceeds and are each of the opinion that

the proceedings may be capable of determination in the absence of the accused or the solicitor for the accused".

However, submissions on paper remove one of the very things at the heart of our legal system: oral advocacy. The ability to respond to the mood of the court, to pause if necessary, to answer any questions that a sheriff may have, to have a sheriff look your client in the eye as you explain how they found themselves in the dock: that dynamic interaction is undeniably important, and should not be overlooked moving forward.

It could also be argued that a positive change has been made to the service of indictments. The new process allows service electronically over the CJSM disclosure website. In tandem with this, the PF's office has advised that an email will be sent, with a follow-up phone call to ensure that there have been no technical difficulties with the service. Criminal firms have been encouraged to confirm whether they are willing to accept such service, and if service is declined, a hard copy will be served personally in the usual way. Of course, digital service eliminates the need for constables to attend at an office, thus reducing unnecessary contact for practitioners working during the pandemic. However, it is potentially open to challenge, if a technical error causes service via the disclosure website to fail and the follow-up protocols are not properly carried out or recorded.

Out of court

Out of the courtroom, criminal practitioners have also found themselves facing challenging situations. Funding is understandably an issue at the forefront of many of our minds. Early in the crisis the Scottish Legal Aid Board made some helpful changes. These included dispensing with the need for an applicant to sign a criminal legal aid form, and in some cases with the need to provide vouching. Further changes resulted in the ability to lodge interim accounts in both summary and solemn cases.

More recently, following growing concern in the profession, the Government allowed the Board to include representation by way of written exchanges, for the duration of the COVID-19 restrictions only, in ABWOR applications. Ancillary to this, consideration is being given to removing the half fee restriction where a solicitor with a pre-existing relationship with the client instructs the duty solicitor to tender a plea of not guilty on an agency basis. In practice this would allow the duty solicitor to cover all new custody cases on behalf of colleagues, thus reducing the number of solicitors in courtrooms without those colleagues being punished financially.

Police station interviews have also given many pause for thought, with Police Scotland advising that it is the responsibility of employers of non-police personnel to provide them with suitable personal protective equipment (PPE) – though the majority of solicitors will not have or be able to access their own PPE. The Law Society of Scotland maintains that solicitors' health and safety "should be their primary concern", and "there is no requirement to attend for a police interview if, in line with current NHS and Scottish Government guidance, they feel it is unsafe for them to do so". While this is sound advice, in reality, when you have an inconsolable, confused or vulnerable client in custody requesting a face-to-face consultation or presence at interview, it is all too easy to put your own health concerns to one side in a bid to alleviate any difficulties a client may be experiencing.

Questions ahead

"Change is the law of life," said President John F Kennedy, and while we are living in unprecedented times, thought has to be given to what the Scottish legal system will look like once lockdown is lifted. Like any other profession, criminal court practitioners are anxious to return to work, but we wish our health concerns to be allayed by a safe working environment. The interests of justice must not, however, be sacrificed to additional health protection measures, or the necessary additional costs in running an efficient COVID-19-secure court system.

With the limited court business currently taking place, it is clear that there will be a significant backlog once the courts begin to run at increasing capacity. This is obviously concerning, and at present there does not seem to be any clear guidance as to how that backlog will be dealt with. One suggestion mooted is that courts previously closed due to costcutting measures could be reopened. New courts may also be able to play a part by allowing hearings to be streamlined by electronic means.

The Inverness Justice Centre had a very understated opening the week lockdown commenced, and thus far has not had an opportunity to show its full potential. However, on 12 May an Inverness commercial case before Sheriff Principal Derek Pyle provided the first opportunity to test virtual hearings in Scotland's sheriff courts, via the court's new video platform. It has been reported that it was a positive experience for all involved, but we must remember that is not representative of how criminal (or any contested) hearings could take place, and as one limited experiment it must not be used to do away with active representation before a court.

This is especially true in the current circumstances where no criminal cases have even been tried under this model. While we should be openminded, prepared to embrace new technology and ready to navigate what will be a decidedly more virtual legal landscape once lockdown is lifted, we need to be wary that this crisis is not used as a Trojan horse to drive through changes which are primarily cost driven and have the effect of undermining the role of criminal practitioners in the delivery of visible justice in a public forum.

Clare Russell is a criminal defence solicitor in Inverness

Work ON your business, not just IN it

Let's get our businesses ready for growth post-lockdown and create new ways of working that will be pandemic-proof

Let's face it... you've been punched in the face.

With approximately 44% of UK businesses now operating a skeleton structure and 20% shutting down completely, it might seem like now is the time to just knuckle down, because (1) you have fewer staff to do the work (furlough, etc) and you need to do it yourself; and (2) you're simply trying your best to get through this and out the other end bruised rather than battered. However, lawyers are smart and the ones we have been speaking to see an opportunity to get their businesses ready for when things start to get back to normal, whatever guise that takes.

The gift of time

We have all been given the gift of time. Did we earn it? No. Did we expect it? No. Should we use it to blow apart the deep-rooted approach of "If it ain't broke don't fix it" and get our business ready to grow post-lockdown? Absolutely, YES! Let's create new ways of working that will be pandemic-proof in these areas.

To build a growth business, you must work *on* your business, not just *in* it.

How to work ON your business

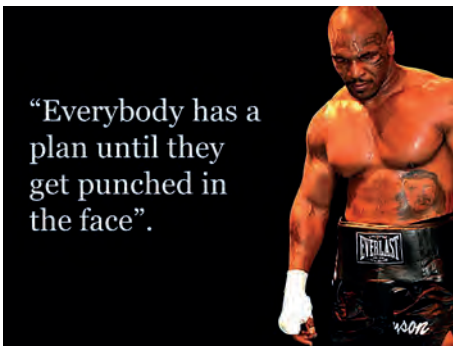
Getting started...

It would be plain silly to try and tackle projects in every area at once. If you try – and we've known one or two firms who set out to – nothing gets finished because there's no focus. In fact, you end up in total chaos.

To compound the problem, you work according to your personal preferences and habits. You do the things you're comfortable with and probably avoid areas you don't understand (most business owners avoid technology, accounts and dealing with problem staff, for example). So, where do you focus for growth?

What our partners say

One of our key partners, Graeme McKinstry, Director of McKinstry Practice Management said: "There is no space here for a full-scale, empirical management analysis of the material differences. For ease and convenience, in this article 'IN' is the lawyer in you... 'ON' is the business owner you are.



"The consequences of COVID-19 are already horrendous for businesses, and its direct and indirect impacts on legal practices are incalculable. However, during lockdown you have an unprecedented opportunity now, with space and time like never before which is not interrupted by 'IN' activities, to work on 'ON' activities."

Graeme outlined a 10-point plan to maximise your 'ON' approach:

1. Attitude: Recognise now that change for all is essential and no longer an optional extra. The status quo won't cut it post-lockdown.

2. Action: Prepare a consultation with key colleagues, because buy-in is important. Outline various plans, each of which starts with a blank sheet of paper.

3. Finance (WiP): A typical guide is that a law practice may have between three and four months' of work in progress that is simply work done but not charged. Now is an ideal opportunity to convert those files into fees. This is an easy quick fix and will help cash flow.

4. Budget: Plan ahead and work to a strategy. The budgeting approach can be either incremental, simply by adding or subtracting an appropriate proportion of each cost, or alternatively the more empirical approach of zero-based budgeting.

5. Fee structure: Not all work is suitable for each approach and it is perhaps time to tailor the fee approach to the type of work you do.

6. People: Carry out your HR audit. Who do you employ? What do they do? Are there better options, e.g. sharing or outsourcing some facilities like cashroom, reception, etc?

7. Premises: Are they fit for purpose? Too big? In the wrong place? Sublet? Co-operative?

8. Marketing: Use your existing client base to explore. Technology, like CaseLoad's CRM from Denovo, will help to identify your clients by age, location or work type.

9. External marketing: Leave nothing untouched, and at least explore and analyse the benefits of social media, website, radio, press and email marketing.

10. Business model: Will your model be fit for purpose looking to the future? Are you too big? Too small? Too specialised? Too general? Is the market too local? Do you retain the skills to develop the practice for the future?

#In this together

We have worked with the likes of The McKinstry Company and many others to help them take the pulse of their business, as well as analyse all aspects of their firm data, to allow them to make data-driven, informed decisions.

Every symptom needs a unique solution

It doesn't matter what your problem is – time or marketing, cash flow or staffing, service or technology problems – gowth can only restart when you diagnose your barrier for growth and then build a solid action plan to address it.

Utilising software, like CaseLoad, is simple, uncomplicated and cost-effective. And it will get your business growing faster.

To read the full insight article and learn more about how to grow your business using CaseLoad, visit denovobi.com/insights-hub. If you would like to know more about how to begin a partnership with Denovo, email info@denovobi.com or call us on 0141 331 5290.

Licensed premises and the road to "normal"

Licensed premises have been hit hard by the COVID-19 lockdown, and will continue to face difficulties even as it is lifted. Frances Ennis considers what steps might be available to operators, and their advisers

On 20 March this year, all cafés, bars, pubs and restaurants were closed as part of measures to prevent the spread of COVID-19. The closure of hotels followed shortly after. The sector was the first in the firing line and, by Minister Fergus Ewing's own admission, will be the one to shut the door behind it. All this for a sector which, in the last decade, has been at the sharp end of a total overhaul of licensing legislation, seemingly disproportionately high business rates, tourism tax and Brexit.

It's not just direct premises closure that affects these businesses; the misery is circular. The failure – in some cases, overnight – of travel agencies and suppliers, to name but a few, has already caused the demise of some well-known hotels. That story will be repeated throughout the country in premises of all descriptions.

And so it's not just lawyers with liquor licensing experience who need to be live to the issues that clients in this sector face. The success or failure of a business with an alcohol licence will affect clients of all shapes and sizes: landlords, banks, pension trustees and investors, manufacturers and, inevitably for some, insolvency practitioners. It is an issue which affects clients, and therefore lawyers, in all sectors.

The early days of lockdown

Once the initial shock of lockdown was over, restaurants and licensed premises did what they have always done. They met the challenges head on, through innovation and adaptation. This sector is known for its resilience. Many of you will have benefited from your local café or restaurant's expansion into takeaway during lockdown.

However, while many in the industry benefited from the Government's financial support schemes, others, for example those with a rateable value of over £51,000, and who therefore do not qualify for rates relief, will struggle to survive over the coming months. There have also been reports of many being turned down for hardship and other grants. The struggle is compounded for the tourism sector, one of the most significant contributors to Scotland's economy, which will likely miss the entire summer season.

Routemap out of lockdown

At the time of writing, we are at the start of phase 1 of the easing of lockdown. The landscape – assuming we all behave ourselves – looks a bit like this for the trade:

Phase 1 of four phases began on 28 May, with the Government saying it will "no longer discourage" takeaway and drive-through food outlets (putting aside the fact that many licensing boards and licensing standards officers have played a critical role in supporting local restaurants and cafés transform their businesses to a takeaway model during lockdown). But that's it, so far as licensed premises go.

The glimmer of hope for the licensed trade begins in phase 2, starting 18 June. Pubs and restaurants will be able to trade in open outdoor spaces, provided physical distancing and increased hygiene are adhered to. Outdoor markets will also be allowed where appropriate management of numbers is in place. Robust risk assessment and local authority cooperation will be critical for these clients.

As with everything regulatory, what is desirable in theory isn't always possible in practice. There are a number of hurdles to overcome if a client wants to convert its business to take advantage of the allowances in phase 2. First, the premises licence must already have an external area "permission", i.e. it must already be delineated in the layout plan of the premises licence. If not, the most practical solution in the current situation is an application(s) to the local licensing board for an occasional licence. Many licensing boards have a six-week lead-in time for processing these types of applications, which would clearly have to be relaxed if this was to work.

Secondly, planning consent may well be required for additional space. Currently, consent is only granted for 28 days and there is the inevitable processing timescale and cost involved. All of these would need to be relaxed if this is to be workable in practice. Lastly, a tables and chairs permit is required for those wishing to put street furniture on a public pavement. Again, these permits do not always come cheaply, and require, for good reason, risk assessment statements. When time and money are of the essence, the relaxation of some of these points must apply.

Schedule 5 to the Coronavirus (Scotland) Act 2020 goes some way to acknowledging the need for flexibility by, for example, relaxing previous statutory timescales and restrictions and allowing for virtual licensing board hearings during the current crisis.

The outdoor operation will be good news for those with enough land – or money – to make it work. However, it will come as little consolation to, for example, already struggling city centre restaurants, or local independent cafés with at most half a dozen external covers. They will need to tough it out until phase 3, due to begin on 9 July. In that phase, pubs and restaurants can open in indoor spaces, subject to physical distancing. With the reopening of places of worship in that phase will come the reinstatement of marriage ceremonies, which coincides with relaxation on restrictions on accommodation providers such as hotels (it is worth noting that holiday accommodation services can currently take remote bookings for a future date). The wheels will *begin* to turn...

Staffing issues during and after lockdown

Despite the lockdown, it's business as usual for licensed premises in terms of statutory and regulatory compliance. Personal licence training and renewal applications still require to be completed, and on time. The deadlines for these have been publicly extended by many licensing boards, with others showing similar levels of pragmatism on the ground.

Operationally, these premises will need to think long and hard about the logistics of reopening. The COVID-19/Brexit double whammy will almost inevitably mean depleted staff. That in turn will impact on the number of on-site personal licence holders, which could then potentially affect the availability of the required designated premises manager on the premises.

Implementing social distancing

As we've seen, none of these businesses can operate, either on an outdoor or indoor model, unless they implement social distancing measures, including the two-metre minimum contained in the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020. Therein lies another huge practical challenge. The footprint of some premises simply won't allow that. For those that have the physical space, it has been suggested that across the board, capacity might be reduced by up to 80%. That is simply not sustainable. At the time of writing, the Government is coming under increasing pressure to revise this to one metre, which is the distance referred to by the World Health Organization, not least because it refers to WHO criteria elsewhere in its guidance.

But with challenge comes opportunity, particularly in the tech world. Customers accessing menus via QR codes on their tables or apps on their phones would cut out the need for a physical menu. But what about other hard surfaces – bread baskets, bottles of ketchup…? Will a bottle of hand sanitiser be the new normal next to your salt and pepper shakers? Temperature checks at the door and revised seating layouts are also being trialled. Whether any of these measures are realistic will depend on an operator's resource, both physical and financial. But it will also depend on the nature of the operation and its target audience. A high capacity, high turnover model will struggle with some of these measures. Equally, a small, high end restaurant may prefer to close its doors temporarily to having its clientèle quaffing Chateau Lafite behind perspex visors.

Phase 4

Phase 4 will apparently see a return to the new normal (whatever that may be!), subject to compliance with public health guidelines. This will include mass gatherings. Again though, that is subject to public health and social distancing considerations. The resumption of mass gatherings will also bring challenges under civic government licensing.

Formal reviews will take place at least every three weeks, and the Scottish Government has been at pains to say that dates are not set in stone and will be amended as appropriate.

Stakeholder collaboration

As we've seen, key to the success of operators will be co-operation at local authority level. Practically speaking, that must involve the prioritisation of "urgent" applications which can either be dealt with under delegated powers or can be waved through unless controversial, in much the same way as was often done with personal licence applications during transition from the old to the current Licensing (Scotland) Act. Although dealing with their own pressures, licensing boards have shown themselves to be flexible and pragmatic, prioritising urgent applications, often through written submissions.

The future

The future remains uncertain. But at least we are starting to talk about one. Beyond the logistics of how to trade, the big concern for those businesses able to survive the crisis will be how quickly consumer confidence will return. That will depend on operators being able to show that they can manage premises safely. But that cannot be done in isolation; it requires both financial support and regulatory flexibility. After all, the end of lockdown and the return of business as usual are two very different things.

Frances Ennis
is head of Litigation & Regulation, Bellwether Green

PI cases: behind the headlines

The latest Scottish civil justice statistics provide some interesting trends and breakdowns for personal injuries actions, and tend to discount the notion of a growing "claims culture", Catherine Hart believes

Every year, the Scottish Government publishes the latest civil justice statistics for Scotland. The figures for 2018-19 were issued in April 2020. Where possible, the report provides comparative figures from 2009-10 onwards. The information set out provides a useful picture of the trends in civil litigation across the country. For the purposes of the report, the year runs from April to March.

Overall, the figures show a reduction in civil court actions raised in the various courts across Scotland over the past decade. In 2009-10, a total of 117,839 actions were initiated, whereas only 72,107 were raised in 2018-19, a reduction of 39%. The report refers to "the long-term downward trend in court business levels over the last 10 years".

In terms of actions disposed of, the figures are down by exactly the same percentage, from 109,187 in 2009-10 to 66,153 in 2018-19.

The reducing levels of civil business are reflected in most case types, but the most significant decreases were recorded for debt actions, which remain the most common type of action in the Scottish civil courts, making up 40% of all cases. Debt action numbers were down by 20% in 2018-19 when compared to the figures for the previous year.

The Court of Session has undoubtedly seen the most significant change in the level of new business. Whereas 6,102 actions were initiated there in 2009-10, that figure was down at 2,275 for 2018-19, a drop of 63%.

Against that backdrop, this article will focus on the statistics for personal injury actions and what these suggest about the trends in this type of litigation.

Court of Session changes

By way of context, personal injury actions can be raised in the Court of Session, the local sheriff courts and, following its introduction in September 2015, the All Scotland Personal Injury Court (ASPIC), which is based in Edinburgh. Like the Court of Session, ASPIC has jurisdiction to deal with actions from across Scotland.

At the same time as ASPIC opened for business, another significant change took place. Before September 2015, where the sum sued was over £5,000 an action could be raised in either the sheriff court or the Court of Session. However, that figure was increased significantly with effect from 22 September 2015, with the result that only actions for £100,000 and over can now be raised in the Court of Session. This means that much of the former business of that court is now being dealt with at sheriff court level, either in a local sheriff court or in ASPIC.

Looking at the general picture in relation to personal injury actions across the courts, while the total number of actions raised in 2009 was 9,766, the figure was 6% lower in 2019 at 9,146. This is, of course, a significantly smaller reduction than has been seen in litigation rates as a whole.

"A picture is emerging of where personal injury actions are raised, with ASPIC the court of choice for accidents at work and asbestos-related cases"

The number of personal injury actions initiated in the Court of Session in 2018-19 was 527. Looking back at the figures published for 2009-10, just under 3,500 personal injury actions were raised there and indeed those actions made up 76% of the total number of actions raised in the Court of Session.

In 2014-15, the year before ASPIC was established, 3,015 personal injury actions were raised in the Court of Session, so it seems clear that both the introduction of ASPIC and the increase in the level of the sheriff courts' exclusive jurisdiction have been responsible for a significant reduction in personal injury business in the Court of Session. Personal injury actions now only account for just over 23% of the Court of Session's business.

Across the sheriff courts

Turning to ASPIC, the number of actions initiated there has increased from 1,143 in the first year to 3,591 in 2018-19, a 9% increase on the figure for the year before. The rise in actions disposed of, from 172 in 2015-16 to 2,962 in 2018-19, is of course to be expected, as business makes its way through the system. ASPIC now deals with nearly 40% of all personal injury cases in Scotland.

Local sheriff courts have generally seen a substantial reduction in civil business, from 111,737 cases initiated in 2009-10 to 66,241 in 2018-19, a drop of 41%. This may seem surprising given the increase in privative jurisdiction, which might have suggested that the sheriff court would experience a surge in civil business. However, litigation rates in the sheriff courts have been dropping since 2009-10, and in 2014-15, the year before the increase in privative jurisdiction and the introduction of ASPIC, the total number of actions raised in the sheriff courts was 71,605.

Although personal injury actions can still be raised in local sheriff courts, it was expected that the numbers would be affected by the option to raise in ASPIC instead. In 2009-10, the total number of personal injury actions initiated in the sheriff courts was 6,436 (under both the ordinary cause and summary cause procedures), and in 2014-15, the year before ASPIC was set up, the total was 6,195, whereas in 2018-19 that figure had dropped to 5,028.

So while there has clearly been a reduction in the number of personal injury cases raised in local sheriff courts, the reduction is perhaps not as significant as might have been expected, which seems to suggest that solicitors are still keen to raise in local courts, perhaps for reasons of convenience.

The split of business across the three courts demonstrates that the majority of personal injury actions are raised in local sheriff courts, which deal with around 54% of that business, with around 40% of actions raised in ASPIC and the remaining 6% in the Court of Session.

On that basis, the principal source of business for ASPIC seems to be actions that would previously have been raised in the Court of Session.

Personal injury actions by type

The report also provides a helpful breakdown by type of personal injury cases initiated and disposed of across the various courts.

There has been an increase in claims arising from road traffic accidents (RTAs), although this is not as significant as might be expected. In 2009-10, 4,635 RTA cases were initiated and in 2018-19 the number was 5,462, a rise of 18%. Although the 2018-19 figure showed a very slight drop on the level for the previous year, RTA claims continue to be the most common type of personal injury action and the figures demonstrate that around three in five personal injury cases raised related to RTAs. Of the personal injury actions raised in local sheriff courts in 2018-19, 87% were RTA cases.

There has been a drop of 15% in actions for damages arising from accidents at work since 2009-10, when the number raised was 1,844, to 1,568 in 2018-19, which was a minimal increase on the year before. Of these claims, 83% were raised in ASPIC and, overall, this category of claim represented just under a fifth of the total number of personal injury actions raised in 2018-19.

Although numbers are relatively small in comparison to other areas, there has been a significant rise in clinical negligence cases – 189 in 2009 rising to 342 in 2018-19, an increase of just over 80%. This represents a 62% reduction on the number of clinical negligence actions raised in 2017-18. However, the figures for this type of action have fluctuated over the past decade and the most recent figure is more in keeping with the general level, whereas the number of actions raised in 2017-18 (901) was very much out of step with the overall levels in the previous decade.

Asbestos litigation is another area in which there has been growth, with 638 actions initiated in 2018-19, nearly 20% more than in 2009-10 and an increase of 12% on the 2017-18 figure.

The final category in the breakdown by case type is "other", which includes fatal cases. This category has seen a drop of 56%, from 2,557 in 2009-10 to 1,136 in 2018-19.

No "claims culture"

Overall, the number of personal injury actions raised in Scottish courts in the last 10 years has been between 8,000 and 10,000, with the exception of 2011-12 when the number fell below 8,000.

Several years on from the reforms already discussed, a picture is emerging of where personal injury actions are being raised, with much of this business being dealt with in local courts, and ASPIC emerging as the court of choice for accidents at work and asbestos-related cases, with over 80% of those cases being raised there. The personal injury business of the Court of Session has reduced significantly, and the latest figures show a spread of actions raised there, with around 105-120 actions in each of the main types of business (RTA; accident at work; asbestos; clinical negligence). RTA actions are very much the focus of the personal injury cases raised in local sheriff courts.

The downward trend in litigation in general since 2009-10 is reflected in the number of personal injury actions raised, which in 2018-19 was down by 6% compared to the figure for 2009-10. There was also a 3% drop when compared to the figure for 2017-18.

Although it is regularly suggested that Scotland is developing a "claims culture", the figures do not support this argument and clearly demonstrate a reduction in litigation, both overall and in relation to personal injury actions. While it is certainly the case that not every claim will result in court proceedings being raised, with settlements being reached without the need for litigation, the figures confound the idea that personal injury claims are on the rise, certainly when it comes to litigated cases.

Catherine Hart is a professional support lawyer and partner with Digby Brown

Sex crimes: the cases continue

Despite the lockdown, some important decisions have been handed down by the Criminal Appeal Court covering several aspects of sexual offence cases, as well as bail applications where an extended period has been spent on remand

Criminal Court

FRANK CROWE,
SHERIFF AT EDINBURGH

Lockdown law

A lot has, or hasn't, happened since lockdown on 23 March 2020 and the Health Protection (Coronavirus) (Restrictions) (Scotland) Regulations 2020 and associated legislation coming into force on 26 March. Ten hub courts have been sitting to deal with custodies – sometimes long into the evening – and most civil business has been in suspended animation. The courts are there if you want to plead guilty, but there have been a few appeal cases heard and reported, which has kept me in business.

I write ahead of the starting date for the Scottish Government's routemap, but I see that reopening courts and tribunal buildings, playing golf and going to the tip are included in phase 1, so that would see me pretty much back to normal and away from prolonged spells over a hot stove conjuring up vegetarian meals for the family.

A short term working group has been established, led by the Lord Justice Clerk, tasked with restarting jury trials. It will look at how physical and practical constraints might be overcome, and how far jury size will make it easier to apply social distancing. We did go down to seven person juries during World War 2, with five votes needed for guilty. My feeling was that quite a backlog of solemn cases built up before lockdown, since when further valuable time has been lost. All hands will be at the judicial pump from August, so it will be interesting to see how matters are taken forward.

Meantime there are a few important decisions to report, mostly in the context of sexual offences but also about the ultra-topical subject of bail.

Dockets; reasonable belief

These two thorny issues in rape cases arose in *RKS v HM Advocate* [2020] HCJAC 19 (22 May 2020). The appellant went to trial on charges of assaulting his partner on occasions between June 2013 and February 2017 in Glasgow, where they lived, and raping her in February 2017. A docket in the indictment narrated that between 2011 and 2013 the appellant engaged in sexual activity with the complainer in England when she was 14 and 15 years old.

At the conclusion of the Crown case the assault charge was withdrawn. The appellant was convicted of rape. The complainer said in evidence that they had met when she was 14 and the appellant 27. Shortly afterwards they began a sexual relationship. Two years later the appellant moved to Glasgow and asked the complainer to join him when she left school on her 16th birthday. They lived together between 2013 and 2017 and married in 2015. A son was born that year. No objection was taken to this evidence.

The complainer further stated that the relationship was volatile. Arguments came to a head after they attended a family party on 19 February 2017. She became distressed and after contacting her half-sister expressing suicidal ideation, her family arranged to travel from Somerset to collect her and the child. The rape took place on 21 February and at one point the appellant tried to strangle her. After her family took her away later that day, her half-sister noticed bruises on her neck. The complainer simply said they were caused by the appellant strangling her. When the appellant kept up a barrage of phone calls and texts, she sought police advice about harassment and disclosed the rape.

The appellant denied intercourse prior to the complainer moving to Glasgow, denied this move had been at his instigation and said the intercourse charged as rape had been at the complainer's request to make up with him after an argument.

On appeal it was contended, first, that the trial judge erred in directing the jury that they could take into account the narrative in the docket. By that point, intercourse when the complainer was 14 or 15 could not be said to be part of the same series of offences as the rape. While it was relevant how the couple came to know one another, the evidence was no longer relevant to the remaining charge, rape. The judge's failure to direct the jury to ignore it resulted in the jury taking into account an irrelevant and highly prejudicial matter.

The second ground concerned which elements of the charge required to be corroborated. The complainer gave evidence of a forcible rape and the appellant's position was consent. It was argued that contrary to dicta in *Graham v HM Advocate* 2017 SCCR 497, reasonable belief was a live issue in every case libelling contravention of s 1 of the Sexual Offences (Scotland) Act 2009, just as honest belief would be in every case prosecuted at common law. The judge's direction to the

effect that absence of reasonable belief did not require corroboration was wrong in law. Lack of reasonable belief was one of the three essential elements of s 1 rape. Previous authority was wrongly decided in suggesting that no direction on absence of reasonable belief was required unless it was a live issue.

The Crown highlighted that no objection had been taken to the docket at the outset, and the complainer had spoken to intercourse without her consent and through force. Evidence of distress and evidence of injury corroborated her account.

Their Lordships agreed, and in relation to the second ground of appeal referred to *Doris v HM Advocate* 1996 SCCR 854, Lord Justice General Hope at 857, and *Blyth v HM Advocate* 2005 SCCR 710, Lord Justice General Cullen at para 10: "While it is no doubt correct as a proposition of law that the crime of rape is not committed if the man believes that the woman is consenting, a direction to that effect where the Crown case is that sexual intercourse was obtained by force is unnecessary."

The moral here is that if you don't like the docket, objection should be taken prior to trial and not after the evidence has been led. Notwithstanding the "new" definition of rape, if there is evidence of force, absence of reasonable belief is not necessarily an issue.

Moorov and beyond

PGT v HM Advocate [2020] HCJAC 14 (2 April 2020) considered a three charge indictment involving two complainers. Two charges consisted of sodomy and indecent assault on the appellant's nephew when he was 12 or 13 years of age between March 1997 and March 1999, and indecent assault in March 2000. The third alleged rape by the appellant on his wife during 2006.

The first complainer had been given alcohol prior to the incidents, and had also been drinking at a family party prior to the second incident. After both incidents the appellant threatened to tell the boy's parents about his behaviour unless he co-operated.

The appellant's wife said they had returned home after a social event; the appellant was drunk. She had wanted to go to sleep but he raped her. He then told the complainer not to tell her parents or sister. She had not disclosed the incident until 2017.

A no case to answer was repelled, the judge holding there were a number of points of similarity: the offences took place in the appellant's home; both major incidents involved forced penile penetration; both complainers were vulnerable; each was a relative of the appellant; both crimes involved removal of lower clothing and were committed in a bedroom with no one else present; the appellant took steps to ensure the complainers told no one else; the complainers, and also the appellant, had been under the influence of alcohol. The time gaps were not so lengthy that compelling or extraordinary similarities were needed.

The court had no difficulty holding the trial judge had been correct; the similarities were such that it could not be said that on no possible view could the jury draw the appropriate inference.

It was further contended that the credibility of a complainer in a mutual corroboration case should be tested within a single silo, no matter how many complainers made allegations of a similar nature. The court considered the assessment of such facts a matter involving a practical application of the jury's combined intelligence and experience. Referring to *Adam v HM Advocate* [2020] HCJAC 5, their Lordships highlighted the difference from general similar fact evidence which was not generally admissible if all it did was prove a general propensity on the part of an accused to commit a specific type of crime. The appeal was refused.

Another old chestnut: s 275

SJ v HM Advocate [2020] HCJAC 18 (28 April 2020) is the latest in the plethora of appeals about s 275 of the Criminal Procedure (Scotland) Act 1995, the "shield" legislation to protect complainers from being questioned about their sexual history. This case is notable for the partially dissenting judgment by Lord Malcolm in a very thorough and thoughtful opinion.

In almost all rape cases these days the parties are known to each other to some extent, and brief evidence of any friendship/relationship/context is necessary for the jury to understand the case.

The accused faced trial on charges of sexual assault and rape under the 2009 Act, and a related charge of attempting to pervert the course of justice by disposing of his mobile phone. The sexual offences were alleged to have occurred on the night of 11 and 12 January 2019.

The s 275 application sought to lead evidence of:

(a) The accused and complainer attempting to book into a hotel on 1 January 2019. The couple were told there were no rooms available but were seen kissing and cuddling in the reception area. It was said they took a taxi to the complainer's mother's house where they had consensual intercourse. The complainer's position was that she had been very drunk after a New Year party and woke up at home fully clothed the next morning. She did not have intercourse.

(b) The complainer and accused consensually kissing and touching each other over their clothing in the livingroom at her home at the time of the allegations in charge 1.

(c) The complainer having consensual intercourse with another man on 12 January, shortly after the alleged offences.

The issues at trial for which the evidence was considered relevant were the complainer's credibility and reliability, the accused's defence of consent, and an alternative explanation for the complainer's distress. It was asserted that the complainer said on 12 January that she had not had a previous sexual relationship with the accused; and that she denied any other recent sexual relationship but following her complaint and examination by a doctor, DNA from an unknown male was recovered, whom she named in a supplementary statement in September 2019.

The preliminary hearing judge allowed evidence to be heard in respect of paragraph (b) but refused the other requests.

At the appeal hearing the Crown indicated that the complainer had intercourse with another man a day of two prior to 11/12 January, and that it did not propose to lead evidence about the events of 1 January, or that the complainer had shown no interest in the accused sexually and had spurned his advances. It was prepared to agree 10 pieces of evidence about how long the couple had known one another, without going into any

sexual details. In light of this the application was amended, restricted to going to the hotel and kissing and cuddling on 1 January, and a narration that the complainer had given a false answer at medical examination on 13 January.

The court was of the view that evidence that the relationship between the complainer and accused had included prior amorous or consensual sexual behaviour of a limited kind was not relevant, especially since the events of 1 January were at some distance from the main charges. As regards the medical examination, the reasons paragraph had not been amended and in light of the new information that intercourse with the other man had taken place beforehand on another occasion, it was held to be irrelevant. The application was refused.

Bail during lockdown?

Part 4 of sched 4 to the Coronavirus (Scotland) Act 2020 *inter alia* suspends the 140 day solemn time limit for up to six months from 26 March 2020. Bail appeals have been dealt with for many accused persons on remand on a change of circumstances, due to the suspension of the courts except for limited business and the uncertainty when trials, especially jury trials, may take place.

Against that background the case of *JD and BK v HM Advocate* [2020] HCJAC 15 (3 April 2020) was heard. The appellants, who had appeared on indictment in the High Court, were charged with stouthrief, namely entering the complainer's house, placing a knife at his throat and robbing him. They had been remanded in custody on 22 July 2019 with an initial time bar of 18 November. At a preliminary hearing on 14 November they intimated their readiness to proceed to trial, which was fixed for 25 March 2020 with the time bar being extended unopposed until 2 April.

On 27 March trial was postponed in light of the COVID-19 pandemic. A new preliminary hearing was fixed for 19 June and the time limit extended until that date. Bail was sought as the appellants had been on remand for a significant period. Both had significant records including previous convictions for theft, assault, robbery and housebreaking.

Refusing the appeals, Lord Carloway set out the following criteria where bail ought not to be granted:

• The accused is charged with a serious offence which, if he were to be convicted would be likely to attract a substantial custodial sentence.

• The nature of the accused's record, or other circumstances, indicates that if at liberty he would be likely to commit further violent offences (including sexual and domestic abuse) and/or obstruct the course of justice.

The assessment of the judge at first instance "should not lightly be interfered with by the appellate courts".

Corporate

STEPHEN COTTON, PARTNER, WRIGHT, JOHNSTON & MACKENZIE LLP

The Supreme Court provided two judgments on 1 April 2020 clarifying the law in relation to vicarious liability, *WM Morrison Supermarkets v Various Claimants* [2020] UKSC 12 and *Barclays Bank v Various Claimants* [2020] UKSC 13. Perhaps the key learning tip is to read both judgments given they, particularly the *Morrisons* decision, give us both (1) an entertaining history of the concept (including why having an affair with the partner of an armed police officer is not the smartest move you can make), but also (2) some clear 21st century limiters on the potential for employers to find themselves on the hook for an employee, in the language of *Joel v Morison* (1834) 6 C & P 501 at 503, "going on a frolic of his own".

As Lady Hale notes in *Barclays*, there are two requirements before vicarious liability can be established. "The first is a relationship between the two persons which makes it proper for the law to make the one pay for the fault of the other. Historically, and leaving aside relationships such as agency and partnership, that was limited to the relationship between employer and employee, but that has now been somewhat broadened. That is the subject matter of this case. The second is the connection between that relationship and the tortfeasor's wrongdoing. Historically, the tort had to be committed in the course or within the scope of... employment, but that too has now been somewhat broadened. That is the subject matter of the *Morrisons* case."

Morrisons

An earlier briefing (Journal, December 2018, 29) covered the earlier rulings in the *Morrisons* case which found the employers liable for data breaches deliberately committed by a disgruntled employee. The Supreme Court has not only overturned the earlier rulings but, in doing so, has also provided guidance in relation to the second aspect of vicarious liability.

In short, the public disclosure of the data was not so closely connected with the task of transmitting the payroll data to the auditors that it could properly and fairly be regarded as made while acting in the ordinary course of employment. A personal vendetta perpetrated by an employee would not *normally* entail vicarious liability for the employer. Furthermore, the "close connection" test (*Dubai Aluminium Co Ltd v Salaam* [2003] 2 AC 366) was not satisfied.

The ruling is also of particular note in relation to how, if at all, the common law concept of vicarious liability might be affected by statutory data protection and data breaches where employees, and contractors, act as independent data controllers. The court did not have to rule on the detail here (because it had already decided there was no vicarious liability) but, usefully, indicated that imposing statutory liability on a data controller such as the employee was not inconsistent with the co-existence of vicarious liability under common law. The court concluded it was irrelevant that a data controller's statutory liability under the DPA concerns, in essence, a lack of reasonable care, while vicarious liability for the conduct of an employee requires no proof of fault.

Barclays

The case involved a group litigation against the bank in relation to numerous allegations of sexual assault perpetrated by a (now deceased) self-employed general medical practitioner who, at the house where he was operating his own business, assessed and examined prospective Barclays employees. In a unanimous decision, Lady Hale delivered the lead judgment and overturned the Court of Appeal's decision.

The key issue was whether or not the doctor's business was being carried on "on his own account" or whether there was a

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Cohabitation

The Scottish Law Commission has extended the deadline for comments on its discussion paper reviewing the cohabitation provisions in ss 25 to 29 of the Family Law (Scotland) Act 2006. See www.scotlawcom.gov.uk/publications/discussion-papers-and-consultative-memoranda/2010-present/
Respond by 30 June via the above web page.

Regulating cosmetic procedures

The Scottish Government has extended the deadline on its consultation seeking views on how to ensure that people who carry out non-surgical cosmetic procedures such as lip enhancement or dermal fillers, are competent and appropriately trained. Currently anyone can carry out such procedures in entirely unregulated premises. See www.gov.scot/publications/consultation-regulation-independent-healthcare/
Respond by 30 June via the above web page.

Extending hate crime

The Scottish Parliament's Justice Committee has launched a call for views on the Government's Hate Crime and Public Order (Scotland) Bill (see lead feature in this issue). The bill would create a new offence of "stirring up hatred" against persons on the basis of various protected characteristics, and may be amended to include "variations in sex characteristics" so as to include non-binary "intersex" persons. See www.parliament.scot/parliamentarybusiness/CurrentCommittees/115036.aspx
Respond by 24 July via the above web page.

Carer's leave

With added relevance given the current COVID-19 crisis, the UK Department for Business, Energy & Industrial Strategy seeks views on a proposal to give employees a right to one week of unpaid leave each year to provide care. See www.gov.uk/government/consultations/carers-leave
Respond by 3 August via the above web page.

Impact of COVID-19

As noted last month, Holyrood's Equalities & Human Rights Committee is closely monitoring the impact of COVID-19 emergency powers on equalities and human rights in areas including mental health provisions, school pupils with additional support needs, social security and socio-economic impacts, rurality and criminal justice. See yourviews.parliament.scot/ehrc/impact-covid-19-pandemic-equalities-human-rights/
Respond at any time up to 1 January 2021.

... and finally

Also as noted last month, the Just Transition Commission seeks views on socioeconomic justice in light of the Climate Change (Emissions Reduction Targets) (Scotland) Act 2019 (see consult.gov.scot/just-transition-commission/just-transition-commission-call-for-evidence/ and **respond by 30 June**).

relationship "akin to employment". If the doctor was carrying on his own independent business then it was unnecessary to consider the five tests detailed in previous case law (see *Various Claimants v Catholic Child Welfare Society* [2012] UKSC 56).

Here, the facts demonstrated the doctor had been in business in his own account. Consequently the bank was not vicariously liable for his assaults. The court recognised the allegations of very serious harm having been caused but, in these particular circumstances, considered the doctor not to be an employee. Amongst other factors the bank paid a fee for each report (there was no retainer arrangement), the doctor had his own insurance, could refuse to do a requested examination if he chose, and conducted examinations for a range of other clients.

As an aside, Lady Hale also gave helpful guidance in relation to the concept of "independent contractors" and s 230(3) of the Employment Rights Act 1996 (and the definition of a "worker"). In short, although the s 230(3) definition could be useful in relation to ascertaining who is a true independent contractor *from an employment point of view*, it is not helpful in relation to ascertaining vicarious liability because of the differing reasons behind the development of the two concepts.

Intellectual property

ALISON BRYCE,
PARTNER, DENTONS UK
& MIDDLE EAST LLP

With everything that is going on at the moment, it is easy to forget that a world existed before lockdown. However, there has been a recent development in trade mark law that should pull our attention away from the Government's daily briefings, if only for a few minutes.

The five year relevant period

Donald Trump recently lost a battle over his branded merchandise at his Scottish golfing resorts. A company based in Luxembourg raised a challenge against the "Trump" mark in relation to classes such as clothing, footwear, furniture and alcoholic drinks. They argued that for the required continuous five-year period the mark had not been put to "genuine use". A trade mark may be challenged and revoked after five years if it has not been put to genuine use in connection with the goods or services for which it is registered.

Trump provided evidence of sales of goods in the particular classes, but this only comprised six bottles of whisky, a single pair of socks, a shirt and a solitary bathrobe during the relevant period. The EUIPO concluded this evidence was not strong enough and cancelled some of the marks as the evidence was not sufficient to show genuine use. Trump's actions are common within the EU. Generally, rights holders can register broad trade marks on the basis that they cannot be attacked for non-use until five years have elapsed.

Recently, however, a case involving media and telecommunications company Sky challenged this approach. Sky has, like many others, registered some broad trade marks to protect its brand. These marks were called into question after a party they were pursuing for infringement raised a counterclaim.

Sky v SkyKick

Sky had raised an action against SkyKick, a software company, for trade mark infringement. Lengthy court proceedings concluded in the High Court in April. In the end, it was found that SkyKick had in fact infringed some of Sky's trade marks. Its marks were similar to, and being used on products and services covered by, Sky's registrations. There was also an issue that consumers might be confused between the two brands and assume SkyKick was a sub-brand of the better known Sky. However, the particular issue of infringement is not what makes this case significant.

SkyKick raised a counterclaim that in some of the areas it had allegedly infringed,

Sky did not actually offer goods or services despite having registered marks. As such, Sky should not be allowed to hold the marks in relation to such goods and services. It was suggested that these registrations were in bad faith. Interestingly, this counterclaim was raised within the five year period of protection. This issue was referred to the CJEU (*Sky plc v SkyKick UK Ltd* (C-371-18)). The question asked was: if a trade mark is registered without intention to use it, can that fact alone make the mark invalid (or partly invalid) on the basis of bad faith?

The CJEU was also asked for clarity around whether trade marks could be declared invalid on the basis that the specification lacked clarity or precision. It was suggested that Sky's mark in relation to "computer software" was too broad and potentially imprecise.

European clarity

In January, the CJEU issued its decision. The main points passed down were that a lack of clarity or precise specification of terms used to describe a mark was not a ground for invalidity by itself. However, if there was a lack of intention to use a mark for a particular good or service that it had been registered for, it could be considered to be registered in bad faith. This could then be grounds to invalidate the mark.

Considering the case in light of the CJEU's decision, the High Court found that:

- there was no evidence that Sky intended to offer any of the goods or services in certain classes in which it had applied for protection, nor was there any prospect of it doing so in future; and
- Sky had applied for broad registrations, in a number of classes, as a "purely legal weapon" and not for intended use.

As a result, the court held that some of Sky's registrations were made in bad faith and the protection Sky held was narrowed. For example, its protection for "computer software" was narrowed to apply only to software supplied as part of Sky's services, such as home entertainment, and "data storage" was limited to data storage in relation to audio-visual content. Nevertheless, not all of Sky's registrations were limited and SkyKick was found to be infringing on those that remained, such as email services.

New risk

Rights holders can be relieved that the CJEU has ruled that trade marks with broad specifications, such as "computer software", may not be vulnerable to invalidation. This case reaffirms that generally rights holders have the standard five year period to establish use unless bad faith can be established.

This case does highlight a new risk for rights holders with wide registrations. Despite its success, Sky has had its trade mark protection pared back and now may suffer reputational damage associated with acting in bad faith. The courts were already inclined to limit rights as a result of non-use, evident from the *Trump* case noted above. A party could now challenge a trade mark, provided it can demonstrate proper evidence, on the basis that it is too broad or there is no intention to make use of it. In these circumstances, it is now to be expected that protection could be narrowed by the court on a bad faith basis. This will be something for all prospective applicants to keep in mind when deciding on the scope of protection they require and how they wish to carry out enforcement actions.

Agriculture

ADÈLE NICOL, PARTNER, ANDERSON STRATHERN LLP

Tenant Farming Commissioner review

A statutory review of the functions of the Tenant Farming Commissioner (TFC) was released by the Scottish Government on 1 April. Stakeholders had been asked for their views on the TFC's functions since the inception of the role in 2017.

Stakeholders were asked for feedback on the success and effectiveness of the TFC's current functions, and to provide suggestions for other functions which they believed should be added to the TFC's role. Largely it was felt that the role was still very new, so amending the TFC's functions may not yet be appropriate.

There was however support for increased TFC involvement in contentious matters. Although the TFC currently has the power to refer points of law to the Land Court, this function has not been exercised. Increased involvement might lower costs for parties and alleviate some of the burden on the Land Court. There was also support for the TFC gaining greater punitive powers, rather than simply recommending a course of action.

There were no recommendations to remove any of the TFC's current functions at present.

In light of the responses to the survey, five recommendations are made to the Scottish ministers:

(1) to better ensure compliance with the TFC's codes, the TFC should be empowered to sanction and impose financial penalties on those in breach;

(2) to continue to deliver guidance and information, their provision should be officially added to the TFC's functions;

(3) consider extending the TFC's role to include alternative business arrangements such as joint ventures or business partnerships;

(4) the TFC might provide mediation services to parties where relationships have broken down but codes of practice have not necessarily been breached;

(5) the TFC should always be consulted in relation to land reform and agricultural tenancy matters.

COVID-19: tenants' amnesty

On 30 March the TFC, in association with industry bodies NFUS and SLE, issued advice about the implications of the coronavirus (COVID-19) situation for on-farm meetings, with particular reference to rent review and the tenants' amnesty.

Included in the advice was that landlords and tenants should postpone rent reviews due this spring unless these will be straightforward and can be concluded without face-to-face meetings, and that landlords and tenants should be reasonable about allowing the amnesty process to remain alive even after the amnesty period. The latter advice has now been superseded by legislative reform to the Land Reform (Scotland) Act 2016.

Draft regulations to extend the tenants' amnesty were submitted on 13 May to the Rural Economy & Connectivity Committee, which voted for their approval. The regulations, the Land Reform (Scotland) Act 2016 (Supplementary Provisions) (Coronavirus) Regulations 2020, come into force on 12 June and extend the date by which amnesty proceedings must be initiated by six months, until 12 December.

COVID-19: residential tenancies

While not strictly agricultural law, many farm businesses include an income stream from the letting of cottages. The Coronavirus (Scotland) Act 2020 put in place emergency legislation in various sectors, including protection of tenants in private residential tenancies.

All mandatory termination grounds become discretionary grounds, including the "no fault" ground to terminate a short assured tenancy on the basis it has reached its expiry date. The landlord must establish that a ground or grounds exist which justify an eviction, but even then the First-tier Tribunal may only issue an order for eviction if it is satisfied it is reasonable to do so.

The periods for notices to leave have been extended to:

- 28 days if the ground is that the tenant is not occupying a let property as the tenant's home;
- three months for certain grounds, including antisocial behaviour, criminal behaviour or that

the house is required by the landlord or their family for their own use;

• six months for grounds including rent arrears, the landlord or lender wants to sell, change of use or major refurbishment, or the tenant is no longer an employee.

Rent arrears must have existed for three or more consecutive months. The tribunal must be satisfied that it is reasonable to issue an eviction order. In considering whether to do so the tribunal must consider the extent to which any delay or failure is a consequence of delay or failure in the payment of housing benefit or universal credit.

The Scottish Government has put in place a loan scheme to assist landlords who are affected by loss of rent, but it is unlikely to be of assistance to any landlord who lets houses as part of a farm business.

The Energy Efficiency (Domestic Private Rented Property) (Scotland) Regulations 2020, due to come into force on 1 April 2020 to introduce a minimum band E when a house is relet, have been delayed until after the current crisis has passed.

Sport

ANDREW MAXWELL, SOLICITOR, HARPER MACLEOD LLP

Due to the pandemic there is no sport taking place and major events, like EURO 2020 and the Tokyo Olympics and Paralympics, have been postponed or cancelled. However, the world of sport has not stopped entirely. Many athletes continue to train in isolation, and anti-doping organisations (ADOs) continue to test athletes. This is of particular importance to ensure that once sport resumes, athletes and fans can be sure that competition is clean and fair.

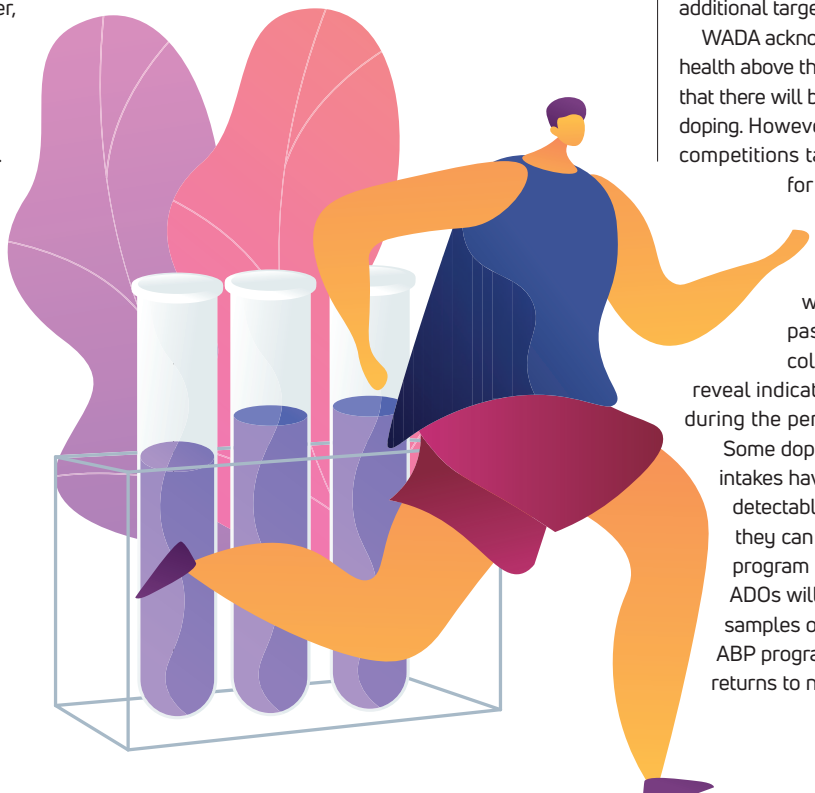
The World Anti-Doping Agency (WADA) stated that there are no plans to change existing requirements under the World Anti-Doping Program. WADA fully acknowledges the complexities of this unprecedented situation and will work to ensure that its compliance monitoring programme provides a level of flexibility based on circumstances. Deadlines for reporting, meeting ongoing requirements or completing corrective actions may be affected.

Testing during the pandemic

WADA has stated that testing will continue where no mobility or physical contact restrictions have been put in place by local authorities: thus testing may still occur any time, and anywhere. If testing can continue, ADOs need to put enhanced measures in place to protect the health of athletes and sample collection personnel. ADOs have been advised to conduct only the most critical doping controls. If testing can continue, but the situation in the country is not fully stable, ADOs will focus their testing programme on targeted athletes from high risk sports and disciplines, including those in their registered testing pool (RTP), and prioritise urgent missions.

WADA has said that athletes cannot refuse to complete a test unless there is a mandatory isolation or lockdown in place. Athletes are advised by WADA to comply with testing while following the preventative measures put in place by their ADO. If athletes refuse to be tested or do not complete the sample collection process after notification, or if they are not able (or willing) to provide a sample due to a lack of protective measures, their refusal will follow the normal results management process which affords them due process and the opportunity to justify their actions.

If athletes are concerned that they may have contracted the virus, they should prioritise their health. In an anti-doping context, they should advise the relevant ADO of their situation with their whereabouts submission or when doping control personnel notify them for testing, so that they can adjust their plans accordingly.



TUEs, whereabouts and ADO activities

As long as athletes remain subject to testing, they remain responsible for ensuring they have a valid therapeutic use exemption (TUE). If they have difficulty accessing doctors during the pandemic to secure necessary documentation to support their TUE application, they should document all actions and impediments to complying with the relevant requirements, and this will be considered on a case-by-case basis. There is the ability to request a retroactive TUE in exceptional circumstances, as described in the International Standard for Therapeutic Use Exemptions.

Unless the ADO notifies otherwise, athletes should continue to provide whereabouts information as they remain subject to testing. If they wish to share information about their health, self-isolation or mobility restrictions, which may impact doping controls, they are encouraged to share this with their whereabouts submission.

ADOs are being allowed an element of discretion to determine how their other activities will be impacted, including investigations, and results management. ADOs may look at additional ways of continuing certain activities. For example, hearings may be conducted via videoconferencing. ADOs can continue to collect and assess any information and intelligence received which may result in an investigation or target testing.

Post-COVID

WADA is closely monitoring where levels of testing have been reduced or cancelled. When the sporting landscape returns to normal, these gaps in testing may be addressed through additional targeted testing.

WADA acknowledges that placing public health above the anti-doping system means that there will be impacts on the fight against doping. However, there are significantly fewer competitions taking place. It is also important for athletes to remember that doping control samples continue to be stored for future analysis, and that with the athlete biological passport (ABP), some samples collected post-COVID-19 may reveal indications of doping that occurred during the period.

Some doping manipulations or substance intakes have longlasting effects, or remain detectable in the body long enough that they can be revealed by an efficient ABP program or specific types of analysis. ADOs will plan the collection of ABP blood samples on sports that are part of existing ABP programmes as soon as the situation returns to normal.

Lease, but not as we know it

With the retail sector in a parlous state, the traditional landlord-tenant relationship is equally under strain and new forms of lease are being tested for whether they strike an appropriate balance of interests

Property

JOHN GALLACHER, CONSULTANT, MORTON FRASER LLP

The coronavirus pandemic has exposed the fragility of the landlord and tenant relationship in the high street, if the recent collapses of a number of well known and indeed high profile retailers are anything to go by.

The focus by the UK and Scottish Governments in providing support to businesses, in the high street at least, has been centred on supporting employees of retail businesses (primarily tenants) impacted by the pandemic. In order to avoid similar collapses within the landlord community, landlords are now looking for support from the UK and Scottish Governments.

One option being considered is a type of furlough scheme for unpaid rent. This would allow landlords to continue to support their tenants as each sector gradually eases from lockdown and operates at much lower levels of activity, due to social distancing measures, lower footfall and with a higher cost base due to additional security and enhanced cleaning costs.

High street retailing is in a state of flux and has been so for some years now. The current pandemic has only brought that state of flux to the fore, but perhaps it will be the catalyst to a systemic change in the nature of the landlord and tenant relationship itself.

Leases of tomorrow

One particular aspect of that systemic change may be the lease structure. The consumer's journey today is totally different to the consumer's journey of yesteryear, yet the lease structure of today has fundamentally remained the same. Whilst alternative leasing models offer a potential solution by more properly aligning the interests of the landlords and the tenants, it is recognised that there is no one size fits all.

The International Council of Shopping Centers (ICSC) produced a research report in June 2016, *Exploring New Leasing Models in an Omni-Channel World*, which looked at the different leasing models in the US, the UK and across Europe. The ICSC report considered the contents of the alternative leasing model toolbox and found:

• **Fixed rent lease:** Rentals are fixed to the retail price index or similar rather than open market value with, in the case of shopping centres at least, a performance based top-up designed to reward the shopping centre owner for innovation of the environment which they control and which directly benefits the tenants' businesses.

• **Turnover rent lease:** This type of lease offers a degree of flexibility around the level of base rent and the turnover percentage to allow, on the face of it at least, a sharing of the risk. However, in the world of online retailing a percentage based solely on a point of sale turnover does not recognise the contribution that the physical store makes to an online sale. Retailers often refuse to share online sales data and therefore any attempt to make allowances for such contribution through adjustment of base rent or turnover percentage is no more than an approximation.

• **Factory outlet lease:** The turnover rent lease has essentially evolved into the factory outlet type of lease, which is fundamentally a turnover rent lease but often with lower base rents and higher turnover percentages. Such leases have a greater degree of flexibility around termination where turnover falls below an agreed threshold, a greater degree of control over tenant-mix and brands, and the ability to address underperformance through rightsizing/relocation or exiting by agreement, or indeed supporting the retailers through on-site events such as fashion shows. As such this model is seen as being more aligned to the interests of both landlords and tenants. However it fails, as with the turnover rent lease model, to recognise the contribution made by

the physical store to online sales.

• **Geo-fence lease:** Another evolution of the turnover rent lease/factory outlet lease where, in an attempt to address the contribution made by the physical store to online sales, online sales from a designated postcode catchment area are allocated to the physical store. Different percentage rates would be applied to different categories of sale so that click and collect, in-store ordering, etc are accounted for in assessing the physical store's contribution to the online sales.

• **Alternative performance metrics model:** This model was suggested by both landlords and tenants, and recognises not only the contribution made by the physical store to sales but also the investment and management experience of both retailers and their landlords in delivering the sales and rewards for both their efforts. In order to take steps towards that outcome, both landlords and tenants will require to collaborate with each other and agree new performance metrics to determine appropriate and workable rent metrics. That will be founded in understanding and leveraging the big data captured by both landlords and tenants.

Blurring the line

Lines between bricks and mortar retailing and online retailing are being erased as retailers integrate their online and offline businesses. The role of the physical store, rather than being marginalised, is seen as being key in the marketing and fulfilment of an online order. It is hoped that this shift to omni-channel retailing will, with the availability of big data and analytics in retailing, underpin the alternative leasing models of the future that will be required to meet the future challenges of high street retailing.

The touchpoints from the consumer's interest in an item to a completed sale are many, varied and complex, and the ability to track that journey through the capture of data is paramount to the landlords and the tenants agreeing appropriate and workable performance metrics. It must be recognised that if there is to be a step change through understanding and leveraging off of these data, there needs to be collaboration, agreement and innovation around the data whilst, at the same time, addressing the issue of privacy in how the data are captured, managed and utilised.

Where does value lie?

The Achilles' heel of alternative leasing models has been the perception (and indeed often the reality) that value is eroded. However, whilst that may be the case for some, it is not the case for all. The factory outlet centre appears to have enjoyed a measure of success over its big cousins in the shopping centres in recent years. Clearly this cannot be wholly attributed to the lease structures adopted, and there will inevitably be other forces at play, but it does demonstrate that there is life (and value) beyond the fixed rent, full repairing and insuring lease model.

Each of the available alternative leasing models, as indeed the fixed rent model, has a role to play in the landlord and tenant relationship of tomorrow. However they are not without their challenges, be it the impact on value or the inability properly to recognise the physical store's contribution to online sales or the embryonic stage of the alternative performance metrics model. The landlords and tenants of tomorrow, if they are to navigate their way out of the current fragile market, will require to adopt the most appropriate leasing structure for their property, one which is flexible and dynamic in the way it not only aligns the tenant's performance from the unit and the landlord's asset management skills but which also provides low risk with a diversified but consistent income growth.

Question of survival

Both landlords and tenants have their interests to protect and may be reluctant to engage fully with each other. However, if a step change in the landlord and tenant relationship is not achieved, the retail collapses of the recent past may continue unabated and the voids that will inevitably follow may lead to the closure of the shopping centre. That, in turn, may lead to the potential collapse of landlords unable to remedy covenant breaches associated with the drop in rental income, not least as a result of the current pandemic.

Whilst the future of retailing does not rest in the hands of the landlords and tenants alone, they have a significant role to play in shaping a sustainable environment that will allow retailing to flourish in the years ahead. However, both landlords and tenants do need to come out of the other side of the current pandemic first. What is clear is that the pace of change in e-commerce, retailing and big data analytics on consumer behaviours and patterns is unprecedented, and landlords and their tenants cannot afford for their respective businesses to be left behind in the digital stone age, pandemic or no pandemic.

"It is not the strongest of the species that survives, nor the most intelligent that survives. It is the one that is most adaptable to change." So says Charles Darwin in his *Origin of Species*.

"Landlords and their tenants cannot afford for their respective businesses to be left behind in the digital stone age, pandemic or no pandemic"

Keeping calm and carrying on

What lessons does the COVID-19 pandemic have for legal risk management from an in-house perspective? Taking stock could be a good starting point

In-house

IAN JONES, SOLICITOR AND FORMER GC

For most of us, the COVID-19 pandemic is unlike any other risk event we have ever encountered. The uncertainty about the causes of the pandemic, incomplete information, schools being shut, huge numbers of people being furloughed, and emergency powers used by peacetime Government to keep us in our homes: these seem unreal. It is strange and for some unnerving. Sadly, for some, the experience has also involved human cost: death, job loss, and economic hardship.

As lawyers, there is much for us to take on board. The pandemic is a global issue, but many questions about the "new normal" come from the "first world". We have not seen death first-hand on such a scale since 1945. Ask somebody from Asia or Africa, and their perspective will be different.

Since 2005, five out of the world's top 10 costliest natural disasters in history have occurred. We probably remember the Asian tsunami (2004) and Hurricane Katrina, but the Haitian and Sichuan earthquakes register less in the consciousness. Between 1995 and 2004 alone there were 595 global epidemics, of which 346 were in Africa and 154 in Asia.

Altered perception

Put candidly, until now, natural disasters happen to others. This is not a political point (although it is easy to see how a political point arises), but from a risk management perspective, an important one. Perception of risks informs our appetite for taking risks and how we attempt to manage those risks.

For many lawyers, risk management is a recent thing. Before, it was the preserve of specialist risk managers who seemed to spend their time preoccupied with complex mathematical models and spreadsheets. We periodically review our risk register and inevitably expand it as we think of new and more exotic risks. That has been the extent of our role.

Can we learn from the current crisis? I suggest the answer to this question is a resounding "yes". It is too early to reach conclusions, but here are observations that may help you as you think about the future legal risks to your business or clients.

Focus of planning

An immediate risk we face is we may end up in our future planning trying to resolve the pandemic, instead of focusing on the next risk. After 9/11, international risk surveys showed businesses putting terrorism and security fears at the head of their agendas. For years after the 2008 financial crash, financial market resilience was the top of the list. The resources we need to manage risk are finite and sometimes scarce. We must not be conditioned by prior events but keep an open mind. Businesses should revisit their risk planning on a holistic basis. Risks should not be weighted in favour of the one that has just occurred.

Understanding how humans react when hit by events that are low probability of incidence, but major catastrophic impact, is vital. We already do risk preparation: for example, how to avoid being charged under the Bribery Act 2010.

A lot of training has been given since the Act came into force about how we should identify potential situations for bribery and how to manage it. Much of it focuses on what the law says, rather than teaching people the right way to act if a bribe is requested. Is this really the right approach? We need to teach people about behaviour, not the finer points of law.

I imagine pre-COVID-19, most people had business continuity plans. Many have now realised that the best laid plans of mice and men often go awry. The former heavyweight champion, Mike Tyson, expressed it more savagely: "Everyone has a plan until they get punched in the mouth." It is inevitable that most plans are bent out of shape early on. Adaptability and speed of action will be required in the legal team. This requires teams to act collegially and in confusing situations when information is plain wrong or just speculation. "On the job training" is not always the best way to operate.

Do not see the shortcomings in your pandemic-related decisions as necessarily a failure. You had to make quick decisions and we get those wrong. Good risk managers are those who understand that point. Analyse the divergence from your original plans and understand why it happened. Such an exercise is a great evaluation tool.

Wood and the trees

You may have seen how many entries on the risk register are categorised as single risk events. In reality a major incident is usually a number of unrelated risks, often referred to as a perfect storm. Like storms, risk events come in waves, triggering further direct and indirect events. Those subsequent events generate further events that cause more damage. These situations are described as cascading risk events. They are something else to think about.

For planners, information is important, but you should not allow data to obscure knowledge. I am not sure that 10 weeks of daily Government news conferences are particularly effective in giving people insight. "The problems are solved, not by giving new information, but by arranging what we have known for a long time," observed Wittgenstein. You will have got lots of insight from the last 10 weeks and it would be foolish when reviewing plans not to draw on those experiences. This seems obvious, but many businesses do not carry out reviews, let alone use such findings.

Lawyers should focus on near hits ("near miss" is a misnomer) in their contracting arrangements, property, health and safety obligations, data privacy responsibilities and other legal areas that the pandemic has affected.

In-house risk online CPD

Ian Jones is currently presenting a series of in-house risk webinars for the Law Society of Scotland. The series will also be made available on demand. Find out more at ***www.lawscot.org.uk/members/cpd-training***

The real world

It is worth reflecting for one moment on a particular legal tool that has received much attention in the last three months: *force majeure*. Virtually every major law firm has issued scholarly briefings about *force majeure* and frustration. Informative, but they miss the practical point. Claiming termination for *force majeure* to replace a supplier when, due to the pandemic, there are no substitute suppliers to go to will be no help whatsoever. Many chief procurement officers who have spent years building complex supply chains, which are based on relationships, are unlikely to be impressed by the lawyer advising termination in this situation. When reviewing your contracts because of the pandemic, organisations need to understand the significant limits to contract remedies in the real world.

The pandemic has underscored the need for an ethical risk decision-making. Criticism of the UK Government for prioritising the NHS over care homes has been huge. The shocking statistics of imbalanced death rates have led to sincere moral outrage. Translated into corporate risk governance terms, the views of those who take the greatest impact of risk incidence should be considered; to ignore them opens the decision maker to potential reputation damage. For example, the horror of the Grenfell fire resulted in anger that the block was occupied by many impoverished, immigrant families living in one of the richest boroughs in the world. Some people considered that to be murder. Lawyers are often seen as the corporate conscience. Exerting influence on risk decisions through an ethical lens may save your organisation's reputation (and the economic value of its brand) one day. Good ethics is good business.

Hidden lessons

When reviewing the risk management plans, a key balance is vulnerability versus resilience. An excellent example in the legal context is the use of limitation of liability caps. In many contract negotiations, limitation caps are set in a fairly rough and ready way, by reference to the ability of an organisation to insure, or the contract value. A better measure would be the tolerance of an organisation to accept the consequences of a risk incident. Ask: "What resources will we maintain in accepting the consequences of those risks?"

This last point is thrown into sharp relief when an event, like a pandemic, results in many claims. Failing to track the aggregate value of liability caps given spells trouble. If the world stops, like it has done in certain sectors (e.g. airlines, hospitality etc), your organisation's contingent liabilities may overwhelm its resources when the claims roll in.

So now is the time to take stock for the next major shock to your organisation. It will probably not be a pandemic, but something else that people downplayed or overlooked: remember my earlier comments about perception. Lawyers should use this time to evaluate the legal controls and mitigations that they have available to them to assess fitness for purpose. Like it or not, in the age of lean organisations, "just in time" supply chains may be too high a risk and you may need to build in redundancies to ensure better resilience.

I have lived through and been involved in managing several corporate crises. The main lesson I have learnt is that the world will be just as uncertain in 2021 as in 2020. Do not start ripping up your continuity plans just yet, but use your time wisely to glean the wisdom hidden in the information you have.

In the meantime, keep calm and carry on.

Ian Jones is a solicitor and former general counsel with particular experience in risk governance, evaluation, planning and training. He also writes and teaches on subjects as diverse as ethics and mental health. *Picture © Jo Scott*

FROM THE ARCHIVES

50 years ago

From "Glasgow Bar Association Study Conference", June 1970:
"Mr Bovey, of Glasgow, moved that the practice of law should be nationalised. Mr Bovey was at pains to prove that 80 per cent of legal work has no social utility whatever and that the language and procedure used is out of date and irrelevant. His listeners much enjoyed his reference to 'granting and craving' as being more properly interpreted nowadays as 'ranting and raving.' More seriously Mr Bovey made the point that important issues and matters are not now being referred to lawyers. Issues of real political or social interest are decided by laymen or members of other professions."

25 years ago

From "The Requirements of Writing (Scotland) Act 1995", June 1995:
"The Scottish Law Commission report contained a coherent package of reforms. With the Act, many of the peculiarities of our law will disappear, along with injustices, such as those arising from notarial execution. For some, the disappearance of the familiar will cause problems, but Scots conveyancers with their usual flexibility will adjust. We have, after all, adjusted to the Matrimonial Homes (Family Protection) (Scotland) Act 1981 and non-supersession clauses. The Requirements of Writing (Scotland) Act, by comparison, should not present many problems."

"Difficult reading" in gender equality reports

Findings of round tables in which people from across the legal profession examined gender equality issues have been published by the Society.

Four reports, respectively covering the gender pay gap, flexible working, bullying and harassment, and bias, detail the findings of 15 round tables held across Scotland in the second half of 2019. Posted in the research and policy section of the Society's website, they continue the work begun in 2018 by the Society's *Profile of the Profession* research.

John Mulholland, outgoing President of the Society, said the reports made for "extremely interesting, if at times difficult, reading. They give a unique and telling insight into the experience of our members and highlight that, while progress has been made in the profession in the pursuit of gender equality, much remains to be done".

He added: "I urge everyone in the profession to read the reports and consider how they and their organisations could change to help build a more inclusive profession."

The Society's Equality & Diversity Committee will consider in depth all the suggestions made and publish its plans in the summer of 2020.

Wood is new regulation head

Rachel Wood WS has joined the Society's Senior Leadership team as the new executive director of Regulation.

With more than 25 years' post-qualifying experience, she has worked in various risk and compliance roles over the last 15 years, including as director of Risk & Knowledge at HBJ Gateley and most recently Client & Legal Project Management lead with Pinsent Masons, Edinburgh. She succeeds Phil Yelland, who has retired after 30 years at the Society.

Chief executive Lorna Jack said: "In a strong pool of candidates Rachel impressed the panel with her enthusiasm and the depth and breadth of her knowledge of regulation of the legal profession both here in Scotland and in England & Wales."

Amanda Millar and Ken Dalling

Millar, Dalling take up office

Perth-based solicitor Amanda Millar has taken up office as President of the Law Society of Scotland, with Ken Dalling of Stirling as her Vice President.

Profiled in last month's Journal, the President said it was her very great privilege to represent the solicitors' profession. "Over the last year in my role as Vice President, I have had the opportunity to get involved in a variety of important issues which affect the legal profession, from speaking at events celebrating 100 years of women in law, providing a 'non-techie' voice on the LawscotTech advisory board and more recently, as the COVID-19 crisis unfolded, working alongside John Mulholland and our huge team of volunteer committee members on emergency support measures."

She added: "I am in no doubt that becoming President at this time presents the next significant challenge of my life, but the profession has responded to the challenges that have arisen from the pandemic with admirable collegiality across all sectors in the interests of supporting clients, business, justice and human rights and I am committed to lead the Society in supporting the Scottish solicitor profession to be in the best possible shape to weather this unprecedented crisis."

The first from the LGBTQ+ community to assume the presidency, Millar said she was mindful of the significant opportunity of her position as a role model.

Four new faces join Council

Four new members are among those returned to the Society's Council following this year's elections.

In Aberdeen, Banff, Peterhead and Stonehaven, Deborah Anne Wilson is joined by new member Michael Kusznir of Raeburn Christie Clark & Wallace, Aberdeen. Jane Dickers has stood down from Council.

Four existing Council members were returned in Edinburgh: Sheila Webster, Susan Murray, Jim Stephenson and Susan Oswald. New member Christine McGregor of BayWa R.e. UK Ltd polled ahead of candidates including the fifth previous member, Colin Anderson.

Returned unopposed in Ayr, Dumfries, Kirkcudbright and Stranraer were Lauren Fowler, and new member Sharon Fyall of Pollock & McLean in Thornhill. Paul Matthews has stood down after serving on Council since 2012.

In Airdrie, Hamilton and Lanark, Paul Gostelow was successful along with new member Catherine Monaghan of Moore & Partners, Cumbernauld. Paul Nicolson has stood down from Council.

PUBLIC POLICY HIGHLIGHTS

The Society's policy committees analyse and respond to proposed changes in the law. Key areas are highlighted below. For more information see www.lawscot.org.uk/research-and-policy/

Coronavirus (Scotland) (No 2) Bill

Following the work done on the first UK and Scotland bills, the Coronavirus (Scotland) (No 2) Bill saw the Society submit consultation responses, issue briefings at each stage of the bill and give evidence to the COVID-19 Committee.

The Criminal Law, Trusts & Succession, Civil Justice, and Obligations Committees contributed to the Society's response to the call for views on the proposals. In addition to the changes proposed in the consultation, they highlighted other areas where changes could be introduced to assist during the current crisis: police station interviews; adults with incapacity; and limitation and prescription.

On police station interviews, the response put forward a suggested amendment to the term "present" in the Criminal Justice (Scotland) Act 2016 to facilitate solicitor access at the police station, ensuring social distancing or the use of technology. Similarly, it proposed that "appearance" be clarified to include attendance and/or representation by virtual or remote communication. Such clarification would be welcomed by prosecution and defence, and it would be in the interests of justice to retain it in future.

Regarding the Adults with Incapacity (Scotland) Act 2000, the response echoed the suggestions outlined by the Society's President to the Cabinet Secretary of Health and Sport, noted in last month's Journal (p 31).

Finally, it put forward recommendations on amendments to limitation and prescription. It proposed the disapplication of limitation and prescription periods for the duration of the COVID-19 situation, highlighting the benefits of doing so to debtors, consumers, creditors, the court system and the profession.

In its briefing ahead of the stage 1 debate, the Society emphasised the necessity of a "whole-of-government, whole-of-society approach, built around a comprehensive strategy to prevent infections, save lives and minimise impact". It was crucial to keep people safe in the Scottish legal system, protect the rule of law and the interests of justice, preserve access to justice and maintain the fundamental protections of our equality and human rights framework. Legislative change must be lawful, necessary, proportionate, time limited and non-discriminatory. It further highlighted the need to ensure proper scrutiny of legislation and that Government is held to appropriate account; given the compressed timetable, there should be close post-legislative scrutiny of how the Act works in practice.

At stage 2 the Society paid particular attention to amendment 8, which changes the current law to remove the requirement for a notary public, solicitor or advocate to be personally present when a person signs a document, takes an oath or makes a solemn affirmation or declaration. The Society supported this and acknowledged its gratitude to the Scottish Government for lodging it. From its own research, the COVID-19 crisis was impeding notaries fulfilling legal requirements and there was a clear public interest in allowing the personal presence rule to be relaxed.

Restarting jury trials

The consultation response acknowledged that the Society had supported the courts' closure in March 2020 to protect lives and avoid the spread of the coronavirus. In light of the recently proposed phased resumption, it emphasised the need to restart all criminal business as a priority. The focus lay with solemn business, involving a wide range of cases. Possible solutions for restarting such trials have inevitable implications for the availability of judges, and other business, both civil and criminal. Safety for all involved in the court is paramount, with measures in accordance with ongoing and emerging health advice to meet the requirements for social distancing.

The following were significant in adopting a flexible solution: accommodation for solemn trials being available; supportive technology; a motivation in both prosecution and defence to be proactive; an urgency to restart trials; monitoring and evaluation of and feedback on the solution; and maintaining jury trials, this not being the time to fundamentally change the justice system through judge-only solemn trials. The Society welcomed the announcement by Lady Dorrian that jury trials are to restart in July.

The Policy team can be contacted on any of the matters above at policy@lawscot.org.uk
Twitter: @lawscot

OBITUARIES

WILLIAM "BILL" HUNTER (retired solicitor), Ledbury
On 7 April 2020, William Hunter, formerly employed with South of Scotland Electricity Board (SSEB), Dumfries.
AGE: 97
ADMITTED: 1950

ALEXANDRA ISABEL BUICK (retired solicitor), Glasgow
On 2 May 2020, Alexandra Isabel Buick, formerly employee with Cochran Dickie & Mackenzie Ltd, Paisley and latterly associate with Adie Hunter, Glasgow.
AGE: 74
ADMITTED: 1967

GARY ROBERTSON PIRRIE, Musselburgh
On 2 May 2020, Gary Robertson Pirrie, partner of the firm Alex Mitchell & Sons, Musselburgh.
AGE: 51
ADMITTED: 1992

NOTIFICATIONS

ENTRANCE CERTIFICATES ISSUED DURING APRIL/MAY 2020
FERGUSON, Stuart Graeme
JOHNSTONE, Kate Anne
McCORMICK, Yvette Fiona
PATRICHE, Laura
REEKIE, Kirsteen Margaret Louise

Lockton's risk health check

Are you planning a review of your firm's risk management regime? If you're not sure where to start or what to prioritise, Lockton, the Society's broker, has put together a series of short questionnaires to help you evaluate your firm's processes and procedures and identify any potential areas for improvement.

The questionnaires will focus on different topics over the next few months. The first covers letters of engagement and core competencies/dabbling, and can be found at www.locktonlaw.scot/news/risk-management-healthcheck-survey-1.html

The questionnaires are entirely confidential. You do not need to submit your name or details of your firm, unless you want further assistance from Lockton. They are simply aimed at providing an introduction to risk management across some key areas of practice.

Notaries able to act remotely

Video technology can now be used to allow notaries to authenticate execution remotely, following a change to the law in the Coronavirus (Scotland) (No 2) Act 2020, relaxing the requirement for a notary to be physically present.

The Society has added updated guidance to its coronavirus information web page on applying this temporary change, under Practice updates/Notary Public – execution of document.

Trainee rates unchanged

The recommended rate of pay for trainee solicitors will be held at £19,500 for first year trainees and £22,500 for second years for the year from 1 June 2020, the Society's Council has decided.

President Amanda Millar explained: "Trainees are the future of our profession and we want to continue to ensure that they are paid fairly for the work they do. However, we fully understand the pressure that firms are under to control their costs, including salaries."

AGM REPORT

Now screening...

The Law Society of Scotland's 71st annual general meeting on 28 May was also a first – the first to be held entirely online. Peter Nicholson reports

Thanks to coronavirus, an event that might originally have been exclusive to gentlemen in three piece suits became one that could only be attended via BlueJeans – the technology chosen to support the remote presence of members around Scotland, and indeed even further afield.

With thousands potentially participating, what would the response be? Registrar David Cullen informed us that 115 had made the necessary advance registration; my screen told me 47 were linked in at the scheduled 5.30pm start time, 58 when President John Mulholland decided to proceed at 5.36, and between 60 and 64 for most of the hour and three quarters the proceedings lasted. Thirty had responded to the invitation to vote in advance.

If you remembered to register before the cutoff date, joining wasn't difficult, though the instructions might have looked a little offputting to the novice videoconferencer. With attendees having control of their own cameras (most chose not to be visible) and microphones, the main issue was having to keep microphones on mute unless you wished to speak, otherwise noise and system feedback drowned out the business.

That sorted, the President requested a roll call, which took some 15-20 minutes. What if many more had joined? The technology does track who is attending, but perhaps it was as well to make sure on such a novel occasion.

Business itself was uncontentious, though as the advance voting was not unanimous on the three resolutions (approval of accounts, appointment of auditors and practising certificate fee), a further lengthy call was taken round those

still to vote, who had to state "for, against, for", or whatever. In the event, there were only a handful of dissenters, and the 20% cut in the PC fee to £460, a key plank of the Society's COVID-19 support package, passed by 135 votes to four.

Business as usual

Otherwise business proceeded much as usual, though perhaps elements of the President's address this year were particularly heartfelt. While he had known he would have a "big job" dealing with matters including the Roberton report, representing the Society and profession in the UK and abroad, Brexit and more, John Mulholland said solicitors were now facing "a personal and professional challenge none of us could have predicted". But he was now even more impressed and inspired by those in practice, who had shown resilience and commitment.

The high regard for the Scottish profession around the world was reflected in the UK Supreme Court upholding the Court of Session in the prorogation case; and when the Lord President addressed the International Conference on Legal Regulation, hosted by the Society, he gave a "robust defence" of the present regime in Scotland and why it best protects the public. The Society was respected by Government as a "measured voice".

But it was the response to the lockdown that the President particularly praised. Across the board, the Society's teams had been at the forefront of offering practical solutions, and some committees had worked "flat out", often into the night. "I have been humbled by the response from the earliest days of the crisis," he stated.

On the Society's £2.2 million package, "Doing nothing wasn't an option... It shows the support we have always shown to members."

One other "first" got a mention – the solicitor who brought her new baby to her admission ceremony. And yes, the child had slept soundly throughout; and yes, kissing babies was now also part of the presidential duties...

Concluding with warm thanks to the Society's executive and his co-office bearers, he commended his Vice President and successor Amanda Millar: "If anyone can manage in the current circumstances, I know it's you."

Chief executive Lorna Jack said the President had shown "incredible leadership".

Normally she would be telling us of the Society's performance against its operating plan, but to have continued with that would have been failing in its duty to the profession and its clients. It was also right to pause and reconsider the next strategy plan, which had been at an advanced stage. Much had been learned about new ways of working without the need to travel; rather than slip back into old ways we should look for long term benefits.

She also reminded us of what had been achieved in the practice year (highlighted at Journal, May 2020, 42), and added her own thanks to staff and committee members for their tremendous work, with a special tribute to retiring head of Regulation, Phil Yelland.

Lawscot Foundation appeal

COVID-19 has hit the Society's education charity hard. Trustees chair Christine McLintock told the AGM that with major fundraising events like the Lex Factor Battle of the Bands, and Kiltwalk, postponed or cancelled, income to date this year would only support three or four deserving students, rather than the hoped-for eight. In its three years, 169 have applied for funding, and it would be "heartbreaking" to have to cut back. She appealed to every solicitor to donate £10; and the charity has launched an emergency "Save, Donate, Nominate" appeal to those saving money by working from home to pass on the extra cash.

See the Donate page at lawscotfoundation.org.uk

See Me, see everyone

A Society survey of attitudes on mental health in Scotland's legal sector has resulted in a three-year action plan to target key issues

As part of our Lawscot Wellbeing work, in 2019 we collaborated with See Me on a survey to give us benchmark data on the status of mental health stigma and discrimination in the legal profession. We have published the findings together with a new three-year action plan which lays out how we will work with the profession to address the main issues.

The survey, the first of its kind carried out on a sector-wide basis in Scotland, generated an excellent response. It explored themes such as attitudes and perceptions in the workplace, access to training, forms of support like reasonable adjustments, and assessing how effectively managers support their teams' mental health needs.

From the results, based on See Me's analysis of 1,242 responses, it is encouraging to find that over three-quarters of respondents (77%) want to have a better understanding of mental health problems to help them provide support, indicating a desire for training to develop confidence and skills at all levels. Respondents felt training could have a major impact on workplace culture, 62% citing training for managers and 54% training for colleagues.

There is, however, a perceived gap in manager confidence and skillsets. Only a quarter of respondents (24%) thought supervisors or line managers knew how to support staff in relation to mental health and wellbeing; 39% believed line managers understood and adopted reasonable adjustment. See Me have indicated to us that improvement in this area would make the biggest difference to workplace culture.

Another main area of focus is having conversations around mental health, including what is needed to maintain good mental health as well as being able to disclose conditions at work. Despite growing awareness, the survey highlights the need for further work to ensure that solicitors and others in the sector feel comfortable in raising issues about their mental health or discussing reasonable adjustments.

The survey found that:

- 47% felt confident about holding a conversation about reasonable adjustments;
- 46% believed opportunities for staff to have open and honest conversations about mental health would create a more positive attitude;
- 39% of respondents felt senior leaders in their organisation showed their commitment to staff mental health.

77% actively want a better understanding of mental health problems

24% are aware of stigmatising attitudes towards mental health in their organisation

24% thought line managers knew how to support staff in relation to mental health

Enabling conversations will be critical to breaking down the stigma. It is a concern that 24% of respondents had observed or were aware of stigmatising attitudes to mental health, while 23% also said they had observed or were aware of discrimination within their own organisations. Over a third (37%) would not want to speak about their mental health in work for fear of the reaction they would receive from colleagues, and 45% from fear of manager reaction; 31% felt it could impact their career prospects.

Since we launched Lawscot Wellbeing in 2018, we have run various events and campaigns to ensure mental health remains at the top of our agenda. The interest in our events during Mental Health Awareness Week 2020 is testament to the legal profession taking an active role in developing their knowledge of key issues. We ran various sessions in collaboration with Clio, from how being a lawyer can impact mental health, to building resilience in the context of career building. Three hour-long webinars are now available on our website to catch up on: see under "Recorded webinars" in the CPD and training section of the Society's website.

The action plan sets out a seven-step framework for how we will develop our work with Lawscot Wellbeing, to take a targeted approach. Our priorities include engaging with employers and the wider profession to create a more open culture, promoting mental health engagement and awareness. We will also develop the existing resources in Lawscot Wellbeing to provide a one-stop shop for anyone looking for information and support for themselves or others.

Working in law can be stressful: long hours and a heavy workload can take a toll on both physical and mental health. The survey findings emphasise the need to drive change – and, while our current circumstances could never have been predicted when we launched the survey, it is potentially even more important in light of the challenges COVID-19 presents for all of us.

Our action plan commits us to tackling stigma and discrimination in the profession, to changing workplace culture, promoting open conversation and providing the right support. In three years, we will conduct a further survey to monitor progress, with the long term objective of ensuring that everyone working in the sector can speak out about how they are feeling and seek support without worrying about potential stigma or discrimination at work.

About the survey

Open during May and June 2019, the online survey sought to gather attitudes and perceptions of solicitors, trainees, paralegals, legal technicians and all support staff working in practice units and in-house legal teams regarding mental health stigma and discrimination within the sector. See Me, Scotland's programme to end mental health stigma and discrimination, gathered and analysed the anonymous data. The full report is available on the Society's website at **bit.ly/LSSmentalhealth.**

Olivia Moore, careers development officer, Law Society of Scotland

Listening to trainee voices: COVID-19 concerns

The COVID-19 shutdown may be especially difficult for trainees, who need work allocated and supervised, and are probably worried about career prospects. Olivia Moore has been hearing their concerns and offers some suggestions for employers

Over the last few weeks I have been holding several round table events with present and future trainees, many on furlough, to answer questions, hear their concerns and offer support.

Adapting to working from home or other new practices is touching everyone in the legal profession, but at the outset of their careers and working under supervision, some impacts are felt particularly strongly by trainees.

Below I have laid out three common concerns that have been raised and offer a context to why they are relevant to so many trainees, and what employers could do to help.

Unemployment

It's clear that regardless of how far through training they are, many trainees are feeling vulnerable in terms of job security. The two-year training period is, in the end, a fixed term contract. The end of that contract is usually a source of excitement for trainees who are ready to move into qualified roles. However, in a turbulent and possibly suppressed jobs market, trainees are viewing their qualification date with increasing trepidation.

Withheld or rescinded NQ job offers could leave people at risk of unemployment, leaving some trainees worrying about the immediate financial strain that would pose, or the potential impacts on future progression. Many trainees are concerned their qualification dates may be extended. Others, particularly those on furlough, are concerned they're at greater risk of redundancy and finding themselves midway through a traineeship needing to find another role. In a busy marketplace, they worry about being overlooked as candidates who now have a CV that looks more complicated to a prospective employer.

How can employers help?

Communicating with current, future and furloughed trainees is the critical part that employers need to make sure they're getting right. Particularly when thinking about trainee concerns around redundancy or unemployment, there are a lot of Chinese whispers out there, and transparency helps slow down the rumour mill.

While it might be counterintuitive, the more employers can keep colleagues updated with information the better. People aren't going to assume everything must be fine if they don't hear from colleagues and leadership; likely, they'll fill the information void with worries and concerns.

Career prospects

Concerns about employability are shared by many current and future trainees. For those on furlough, missing seats and losing valuable experience is a key concern. For future trainees, most internship opportunities have dried up, alongside many other employment opportunities. There is a concern among students that they'll become an overlooked cohort, with the usual experience missing from their CV, or grades that are not a fair reflection of what they might have achieved in normal circumstances.

Some people may read this and think that so many concerns about career prospects among students or trainees are unwarranted. After all, careers are long and there's plenty of time to forge a path.

"Simple changes around communication can make a big impact, whether that's scheduling regular calls or establishing a clear system for receiving feedback."

This may be true, but trainee recruitment is stressful in normal circumstances. Students spend years jumping through a matrix of hoops including extracurricular activities, high grades, volunteering, legal experience and full and part time jobs to get a coveted role in a competitive market. The uncertainty caused by coronavirus adds to an already big challenge.

How can employers help?

For a long time to come, coronavirus will be evidenced on CVs and applications. Where people can't secure the legal work they want, we're encouraging students, trainees and NQs to be proactive and take opportunities to stay in employment, gain transferable skills to complement technical legal skills, volunteer, undertake relevant CPD and keep a close eye on securing a future role. In turn, employers should be more open to non-linear career paths, contract work, or people looking to transition into different areas of law. Perhaps this is a great opportunity for recruitment to become a bit more flexible and see people given breathing space to try out different things in their early careers.

Supervision

A lot of trainees have talked about the challenges of supervision from a distance, with so many working from home. Many are finding it particularly hard to ask questions they need to, or get feedback or access to work in the first place. A trainee described how they had completed a draft of a document and submitted it to their supervisor, which was then edited and submitted by someone else with no feedback to the trainee. The trainee independently went into the work file store to track

down the final version and compare it to their draft to find out what had been changed. This isn't a good example of proactive supervision.

It's arguably easier for more seasoned trainees who are more confident completing tasks, with their supervisor simply checking and approving their work. Trainees who had just moved to a new seat at the start of lockdown have also spoken of finding it difficult to access work or communicate with colleagues, without an established rapport and comfortable relationships with a new team.

How can employers help?

Small, simple changes around communication can make a big impact, whether that's scheduling regular calls or establishing a clear system for trainees getting access to work and receiving feedback. Employers need to look at how supervision works at a distance as more than a short term issue. With speculation about how social distancing might remain for many months to come, trainees could end up doing a significant portion of their traineeship working from home. If employers haven't already, they need to think seriously about how they are maintaining supervision, starting from ensuring trainees have access to the hardware they need to do their jobs, to receiving detailed feedback on meeting the PEAT2 outcomes.

The legal profession is having to wait and see how the landscape will have shifted in the next few months due to coronavirus, and while some actions could be taken now, others will come much further down the track.

At the Law Society of Scotland, we will continue to engage with trainees to capture and answer as many questions as possible, then work proactively to continue to give career support, deliver relevant events, assist supervisors and training managers and enable trainees' voices to be heard. The legal profession is extremely collegiate; hopefully all employers know this is the time for compassionate leadership and an empathetic approach.

Olivia Moore is careers development officer at the Law Society of Scotland

EILDH CONACHER

First year (second seat) trainee at a large full-service firm

I'm a first year trainee, at the time of writing in my sixth week of furlough. When the UK went into lockdown, I had been in my second seat for just two weeks.

In the run-up to lockdown, my firm was brilliant at communicating our changing processes and how this would affect individuals as we adapted to working from home. I'm not sure anything could have truly prepared any of us for this time.

The most difficult part of this experience has been the uncertainty and powerlessness I have felt. I've always had some semblance of control over my legal career: planning and executing coursework, attending law fairs and networking events. This pandemic has, however, taken my agency away. I've struggled with the uncertainty the COVID-19 crisis has created for my career. I was eager to begin my traineeship, having waited almost two years since securing my position. When I was first placed on furlough, I was certain it would mean extending my traineeship. I now understand this may not be the case (though it remains a possibility).

My time on furlough has been spent looking over old university notes, scouring the internet for free online CPD and reading through my supervisor's STEP notes (kindly lent to me). I constantly worry that I'm not doing enough to keep my legal knowledge up to standard and that my learning has been compromised; after all, there is no substitute for the practical education the traineeship offers.

I have tried to maintain a routine. This has included a daily workout, trying new recipes, and reading books that have been on the shelf for longer than I care to admit. For me, exercise and routine have proven the most effective ways to reduce the anxiety I feel.

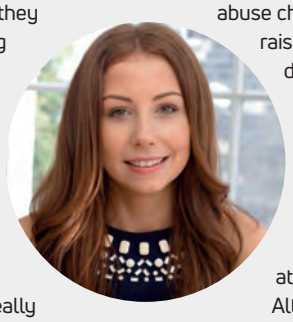
Since being on furlough, I've been well supported by my team and I continue to feel like a valued member of the firm. I have been in touch via weekly videoconferencing meetings and the HR team have reached out to ensure all trainees are OK. My firm has focused on my wellbeing above all else in this difficult time.

DIONNE BRADY

Second year trainee

I am currently a second year trainee, due to qualify at the beginning of August.

I haven't had any advice from my employer as to how I should spend my time; however, they have reassured me they are doing everything they can to ensure I will complete my traineeship, and there is also a good chance of being kept on as a NQ solicitor, which are the two main issues I was really concerned about when I was furloughed on 30 March.



I am a very active person, and while it was difficult getting into a different routine at the beginning, I feel like I'm doing even better fitness-wise than I did in my old routine. I find that exercise and getting out and about as much as I am allowed really help my mental health. I've been staying in touch with friends and family and helping them in any way I can. I also did a fundraiser for a domestic abuse charity called Refuge, raising over £270 by doing 100 squats a day for 30 days. This gave me something to focus on and took my mind off the fact I'm not working at the moment.

Although I have some level of certainty that I will be offered a job in August, I have tried to be proactive in updating my CV to reflect the work I have done as a trainee. I connected with a legal recruiter and participated in a video call along with other trainees in the same boat. Although it was hard to take at first, as we discussed the possibility of there being hardly any NQ jobs this year, I felt better knowing that I am doing what I can to prepare for that scenario. There is no better time to do it since I have so much time on my hands!

Another concern is that I've missed out on many weeks of training and court appearances that I am always learning from. I worry that I'm going to be terrible at my job if and when I do return, and will have forgotten everything! Although that sounds a bit far fetched, I've never been out of work so it's a strange feeling.

I guess I just have to carry on, think positively and prepare as much as I can for the future. I do find that talking to people helps if I am feeling low, whether that be friends, family, other trainees I know or reaching out to people on LinkedIn.

Setting out in crime

Traineeships are likely to be hard to find this year, but that is nothing new for those seeking to practise criminal law. Matthew McGovern suggests some ways to maximise your chances in that sector

There is no doubt that there are significant problems with the criminal legal aid sector. My local court is Hamilton, which is one of the busiest sheriff courts in Scotland, and yet there are only two full-time criminal lawyers under the age of 30. There is one full-time criminal trainee in Lanarkshire.

Now I could write a book on the reasons why there are so few criminal lawyers who would be eligible to join the Scottish Young Lawyers' Association (students, trainees, devils, solicitors and advocates with less than 10 years' experience), but that is for another day. The one reason that I can rule out is that young lawyers don't want to practise criminal defence.

There are plenty of law students who dream of being the next Martha Costello, or who have watched *A Few Good Men* and think they could have their "You can't handle the truth" moment in court. The problem is that there are very few criminal traineeships advertised. The purpose of this article is to give you a couple of tips and pointers about looking for a criminal traineeship, and how you can put yourself in the best possible opportunity of scaling the legal equivalent of Everest: securing such a traineeship.

The criminal market

Unlike bigger commercial firms, most criminal firms are small businesses without HR or marketing departments. We don't have an annual recruitment drive for summer placements or traineeships. When criminal traineeships are advertised, it is really important that you know the market you are wanting to enter.

Criminal law firms face unique market pressures: the increase in legal aid fees last year was the first in my lifetime! This is coupled with a significant reduction in criminal prosecutions, which will only be exacerbated by the current pandemic. Notwithstanding these problems, there is a seemingly neverending battery of legislative reforms placing increasingly unrealistic demands on criminal lawyers, who are expected to do even more for ever diminishing returns.

The financial pressures on criminal firms are considerable, and everyone in the firm – from senior partner to receptionist – has to punch above their weight for the business to be viable.

While this might sound like a challenge, it is also an opportunity for law students seeking a traineeship.

"You should spend as much time as possible at your local sheriff court as it will allow you to gain an insight into the advocacy side of the job"

Where to start

Your hunt for a criminal traineeship should begin long before the traineeship is advertised. You should contact a local criminal defence firm and enquire about work experience. This can involve either shadowing a solicitor at court or – even better – helping out in the office, which could mean everything from drafting legal aid applications and court documents to answering the phone and filing. While this might sound mundane, good administration skills as well as a willingness to multi-task and help out with the less glamorous tasks are essential in a small high street firm.

Criminal firms are usually in need of this type of help, and I think it would be much more effective to target firms as a student and ask for work experience during university than send speculative letters out to law firms when you are on the diploma (sorry to say, but these are very rarely considered by solicitors, and in my firm our secretary knows to send a polite reply saying thanks but we aren't hiring just now).

Another way to gain experience in criminal law is to attend CPD events (why not start with SYLA's Criminal Law Day later this year?), where you can meet solicitors and gain an insight into their jobs as well as network with members of the profession.

You should also spend as much time as possible at your local sheriff court, as it will allow you to gain an insight into the advocacy side of the job. It is another excellent opportunity to network with lawyers, and it gives you an "in" if you are asking for work experience.

Twitter is an excellent platform for aspiring criminal lawyers. You can follow and interact with some of the country's best known lawyers and Queen's Counsel as well as organisations such as SYLA (we tweet at @oSYLAo). You'll gain an insight into the working of criminal law, as well as experienced professionals' opinions about the latest proposed legislative reform.

A good example of this recently was the proposed suspension of jury trials in response to the lockdown and the Government's social distancing measures. Within minutes of this reform being published, leading criminal lawyers were tweeting their opposition to the proposal as well as suggesting alternatives. To his credit, the Cabinet Secretary for Justice, Humza Yousaf, engaged with a number of lawyers and ultimately this proposal was paused, and a new working group has been convened to explore alternatives.

What can set you apart from the pack

I mentioned the pressures that criminal lawyers work under, and the importance of being able to punch above your weight. One area where potential trainees could make a difference is the internet. Many criminal firms don't have a website and you could offer to create one for your firm. As a trainee, I was heavily involved in the production of our firm's website and ended up writing most of the content.

Whilst this was an arduous task, our website has become a good source of business, and every new case that comes from the website highlights its value. It is something that I have found many experienced practitioners are reluctant to invest in, as they feel it is too expensive and is outside their comfort zone.

If you are able to assist with building a website for the firm, and it gets a case a week from the website, the financial burden of employing a trainee doesn't seem that daunting for criminal firms.

This is just one example, but demonstrating commercial awareness and business development skills is invaluable to any criminal law firm. Whilst commercial awareness means something different when applying for a commercial traineeship rather than a criminal traineeship, it is no less important, and arguably more so.

Finally...

If you have a criminal traineeship interview, you'll be asked why you want to do the job. I appreciate members of the profession are never particularly enthusiastic about young law students wanting to pursue a career in criminal law, and there's no getting anyway from the downsides, but – to end on a positive – it is an incredibly rewarding job. You are often thrown into the deep end with court work and I've always enjoyed that challenge. It is a great feeling when you persuade the sheriff to grant bail to the client who expected to be remanded, or when you get your first not guilty verdict, and – at the risk of sounding sanctimonious – you play an invaluable role representing some of the most vulnerable people in our society.

I'll not pretend it isn't tough, but I don't have any regrets about specialising in criminal law and I would happily recommend it to any aspiring lawyer.

Matthew McGovern is solicitor with McGovern Reid and a committee member of the Scottish Young Lawyers' Association

SYLA is currently publishing a series of blogs from the committee which can be found at www.syla.co.uk/blog

ASK ASH

Am I invisible?

Hidden away, working from home, I feel nervous about my future

Dear Ash,

The lockdown has resulted in less interaction in my role with colleagues, and this is making me nervous about my future. Although I have been working really hard and putting in the expected hours, I am concerned that I may essentially be hidden away and not as visible to senior management; and I'm concerned that this will result in my being potentially earmarked for future redundancy. I experienced redundancy through the previous financial crisis and this is therefore making me even more nervous and anxious, but I'm not sure how to deal with these feelings.

Ash replies:

The lockdown is resulting in much widespread anxiety about current and indeed future issues, especially in regard to financial matters. Therefore you are not alone in feeling this way. Your previous experience is most likely just heightening your fears, which is understandable in the circumstances.

However, you are still attending to your work obligations and are being kept busy; therefore the work is clearly still flowing through to you and this will be clear to management too. Nevertheless, it is important that you are able to talk through any concerns with your line manager and to get some reassurance for your own piece of mind.

The current crisis has already caused much instability for many people; however, on the upside you seem to be one of the fortunate ones who still have a form of income and the ability to work from home.

Try to stay positive for now and focus on what you *do* have control over – i.e. make sure you meet work deadlines and continue to take pride in your work. You could also look to join some social Zoom meetings in order to allow you to interact with others and to feel more visible and share concerns. There is uncertainty for everyone at the moment, but there will be light at the end of the tunnel – we all just have to continue to be patient and strong. Try to take steps to improve your mental health: for example, go for a walk or talk to friends; but most of all try not to worry. Keep safe.

Send your queries to Ash

"Ash" is a solicitor who is willing to answer work-related queries from solicitors and other legal professionals, which can be put to her via the editor: peter@connectcommunications.co.uk, or mail to Suite 6b, 1 Carmichael Place, Edinburgh EH6 5PH. Confidence will be respected and any advice published will be anonymised.

Please note that letters to Ash are not received at the Law Society of Scotland. The Society offers a support service for trainees through its Education, Training & Qualifications team. Email legaleduc@lawscot.org.uk or phone 0131 226 7411 (select option 3).

RISK MANAGEMENT

When home is not your castle

On behalf of Lockton, Alan Eadie and Jamie Robb of BTO consider some risk management issues created by the current working from home regime

"It's a dangerous business, Frodo, going out of your door..." These prophetic words of Bilbo Baggins have formed the bedrock of SAGE's advice over the lockdown, and form the rationale for the majority of the UK workforce working from home.

Working from home has its advantages: lower transport costs (from bedroom to desk), better work-life balance, and spending more time with family. It also has disadvantages: higher snack intake, devoting endless hours to curating videoconference backgrounds that showcase your cool credentials, and spending more time with family.

For a profession which, historically, has not been the fastest to embrace change, the move to homeworking came as something of a shock. The old normal was not a suitable model for working in a socially and professionally distant world, and adaptations are necessary. With change come new opportunities, but also new risks.

Client verification

Of a Tuesday afternoon, whilst leafing through the latest Journal, a phone call comes through. A new client. He has a deal which needs to complete. You take all the details and, over the next few days, start the process of opening a file. Then it hits you: just who is the client?

He told you his name was Connor MacGregor, but how do you know if it was actually Connor MacGregor, and just who is Connor MacGregor? You can't meet face to face, and you can't readily get the originals of their ID. How do you verify identity?

The rules requiring sight of the client's original ID are unwavering, yet in a world where meeting clients still seems some way away, trying to match the ID to the client is not as simple as previously; and what is to be gained by seeing original client ID against a background where (a) we have not physically met the client, and (b) we have no easy means of verifying that the ID itself is authentic?

The good news is that alternative ways of satisfying the customer due diligence ("CDD") and money laundering requirements should be possible in most cases. As always, much depends on the risks of each situation and whether those can be sufficiently addressed through other means, but it is also worth remembering that there are three stages to CDD: identification of the client (information gathering), risk assessment of the client, and verification of the client (evidence gathering). If you cannot meet the client face to face, this may affect your risk assessment and may simply mean having to exercise more rigour and more caution at the third stage, verifying identity, than if you had met them face to face.

In some instances, e-verification in its own right may be sufficient, although it has to be borne in mind that this only establishes that someone of a given identity exists and not necessarily that you are dealing with that person.

Further steps

Further steps you might therefore wish to consider would be:

1. Ask the client to send you a copy of their ID documents – ideally a scan/pdf, but possibly a photo – via their phone. Having received the copy, you could ask them to hold up the documents during a videoconference call with their face also in vision (and try to keep a record of that).

2. You should then undertake an e-verification check of the document and the details contained on it. Systems which draw on multiple data sources (including official sources) are to be preferred, especially where physical ID checks are impossible or have their limitations. A single source (e.g. the electoral register) would not normally be sufficient in itself.

3. If that check produces no concerns, a final cross check might be to make a point of sending a letter to the client (without advance warning) at their given address, with the letter requiring some unique or specific form of acknowledgment to be sent back to you. A fraudster would be likely to find it difficult to intercept such communications.

4. Finally, you would then request that the client does follow this up by providing a sight of their original documents in the normal way at a later stage of the transaction but, as long as other risk factors do not raise concerns, you may be able to take the view that you are able to at least start working on the matter, on the strength of this process.

Bear in mind also that any deviation from your normal CDD practice while the current restrictions apply, may be best discussed and signed off by a supervising partner or your MLRO, on a case by case basis.

Also, the Law Society of Scotland has issued practice updates in relation to client verification and you should continue to refer to its website on these matters.

Remitting funds etc

You hold client funds. They need to be sent to another firm of solicitors. You cannot send a letter with bank account details. The only option (short of secure online client portals) is to request an email with the details. The receiving solicitor duly obliges and emails you their account details. You require to confirm independently that the bank details are correct and have not been intercepted. You pick up the phone and start to dial the firm's main office number. No good – the office is closed. You call the number on the email and the person on the other end gives you the number of their office or cashroom manager with whom to check. Don't be fooled – if the email

"In a time of uncertainty, the need for vigilance and security is paramount, not only to protect your clients, but also yourselves"

has been compromised, you could just be calling the hacker and being directed to their accomplice.

So how do you independently confirm that the details you received are legitimate?

Options might include contacting other personnel in the firm, separately and without advance warning, to seek confirmation of the firm's bank account details. The important thing is to be careful and think about whether you really are – as you must do – obtaining confirmation of bank details from at least two independent sources. Always bear in mind that sending client money to an unauthorised recipient is usually the start of a professional negligence claim from which there is seldom any defence.

This also stretches beyond monetary considerations; whether you are dealing with a client or another solicitor, it is imperative that you take all appropriate steps to ensure client data remain secure.

Conference calls

As the majority of client interaction moves online, the risk of eavesdropping, or worse, increases. For most firms, videoconferencing will mean relying on third party software. The problem with this is that the security measures for those systems are managed by third parties. There have already been news articles raising concern about the security of some of these systems. In the event that something does go wrong, there is likely little recourse against those companies. Make no mistake, if a security or data breach does occur, the client's first stop will be your firm, followed by the ICO, SLCC and/or Master Policy insurers.

Was it reasonable for you to arrange a conference call through those systems? What if there were reports that they were vulnerable to hacking? And what if you didn't tell your client who, had they known of the risk, would have preferred a phone call? These are the potential questions which you might need to answer in the event of a security breach.

That said, videoconferencing is proving a very useful communication medium in the current situation and has a real part to play in client verification, to say nothing of relationship management with your clients.

Protecting cash flow

Cash is king and remains the lifeblood of any business; all the more so where everyone's purse strings are being tightly drawn and there may be more reluctance than ever to extend credit to client organisations fighting for their own business survival.

Similarly, at a time when bad debts are on the rise and debt collection actions are likely to progress through the courts with all the haste of a lethargic garden snail, this is not the time to allow large amounts of work in progress to accumulate over the course of a transaction.

Measures to protect and preserve cash flow might be (i) more often requiring a retainer at the start of a transaction, (ii) indicating an intention to render regular interim fees, or (iii) reserving the right to deduct fees from settlement sums before any balance is remitted to the client.

If the client balks at these options, ask yourself why; and whether it is still worth taking on the work.

The solution

The easiest way of catering for any new risk management measures will be to revisit that trusty old friend, the letter of engagement.

Don't assume that your existing letter of engagement will come to your rescue in the changing environment in which we are now operating and, if you do wish to be able to resort to or rely on any of the measures outlined above, be sure that your letter of engagement is reviewed and updated to cater for them. Getting the client's agreement from the outset is key.

If there is a take home from all of this (or rather a keep home, since you'll be there already), it is this:

1. Verify, verify, verify – a voice at the end of a phone, the person typing you an email, could be anyone.

2. Let clients decide whether, and to what extent, they are content to use methods of communication beyond the usual.

3. Wherever possible and appropriate, get paid upfront.

4. Keep your clients informed of any changes in practice you are making, and any security or other risks they may present.

5. Be sure to issue fresh letters of engagement where appropriate, to reflect any new measures you wish to introduce.

Whether the current state of affairs is temporary, or whether some adaptations will survive going forward, remains to be seen. What is important is that in the "here and now", thought should be given to the new risks that remote working brings. In a time of uncertainty, the need for vigilance and security is paramount, not only to protect your clients, but also yourselves.

Update

Since preparing the above article the Coronavirus (Scotland) (No 2) Act 2020 has come into effect (from 26 May 2020). The Act introduces a number of important changes to the signing and use of electronic documents. Of particular note is part 7 of the Act, which enables notaries to make affirmations or declarations without being in the same room as the person from whom the oath is being taken.

Alan Eadie is a partner, and Jamie Robb an associate, with BTO solicitors

Home advantage

Profit, like charity, begins at home – by nurturing existing clients, says Stephen Gold

Law firms always say that existing clients are their best source of new business, but more often than not put most of their business development efforts into winning new clients.

Sales and marketing are speculative, non-chargeable and costly. It therefore matters a great deal that they are directed to where there is the best chance of a return. The people we already know, whose needs we understand, who are pleased with our service, who trust and like us, will always offer the best growth prospects. Yet creating such a bank of willing clients takes much thought and effort. Being qualified to do the work is a ticket to the game, but rarely sufficient to win.

Business: it's always personal

Successful firms create a thoughtful rolling programme to strengthen ties and put themselves in pole position for new opportunities. High on the agenda will be regular conversations between the firm's senior people and the client's decision-makers, checking out that the relationship is in good shape. Are service improvements possible? Is the firm responsive and accessible? Are its communications clear and user-friendly? Are there any rumblings of discontent?

If clients use different firms for different work, one should ask why, and listen reflectively to the answers. It is remarkable how often clients do not use a firm only because they are not aware of all the services it offers. Do not be afraid to ask the question: "What would it take to win all your work?" Whatever the reply, at the very least it will be instructive.

Firms may be nervous about appearing vulture-like, always looking to have sales conversations, but this is not the point. These occasions are for clients to talk about what's going on in their world, their ambitions and fears, business and personal. Go into them primed to listen more than talk, and you will find that relations strengthen and opportunities arise organically. They are the route to personal rapport, the glue that binds relationships more tightly than expertise. Competence alone never creates enduring loyalty. Clients need to like us, feel that we share common values, enjoy the experience of dealing with us, and being in our company.

Making more profit means more than just doing more work. Despite these straitened times, consider whether it's possible to have a smarter fee structure, or increase rates. Subject to maintaining quality, can work be done more efficiently at less cost? Is there potential for more accurate scoping, better processes, or leveraging more junior people? All over the place, partners anxious to appear busy will be hanging on to work that could and should be delegated.

"Creating a bank of willing clients takes much thought and effort. Being qualified to do the work is a ticket to the game, but rarely sufficient to win"

The thrill of the chase

It is worth asking why the search for new clients so often has priority over making more of those already inside the tent. When a new client is brought in, bells ring, backs are slapped (subject to social distancing) and corks pop. Generate the same amount of new revenue from existing clients and we are just doing our job. It is not rational to behave like this, but hunting gives a bigger rush than farming: the thrill of the chase, the allure of the shiny and new, the adrenaline of pitting our wits against the competition. Cultivating more profit from the clients we have requires different qualities: perseverance, empathy, patience, while delivering consistent excellence in the work we already do.

Firms need new clients to grow and provide fresh challenges, but in deciding where to commit our precious resources, we should be clear-eyed about the task. Incumbency is a great advantage. Instructing a new law firm involves risk, and the investment of substantial time and effort to make the relationship work. Experience shows that businesses are wide open to culling their legal panels, and squeezing better terms from them, but are mindful of Hilaire Belloc's dictum: "Always keep a hold of nurse, for fear of finding something worse."

When clients do move, often it is because they feel the relationship has gone stale, service has dropped off, or they have been taken for granted. The current crisis only emphasises how important it is strategically to cultivate the flowers in our own back yard, for defensive as well as expansionist reasons. Clients will remember how supportive or otherwise their lawyers have been. On the plus side for incumbents, they will be even more risk-averse when it comes to change, and it is currently a lot harder for aspiring new entrants to physically get in front of them. Pitching by Zoom is likely to be a deathly experience. But these advantages can easily be squandered by complacency or carelessness.

Joni Mitchell had it right: "Don't it always seem to go, that you don't know what you've got till it's gone?" Thus with our most precious relationships, and for now, much of life.

Stephen Gold was the founder and senior partner of Golds, a multi-award-winning law firm which grew from a sole practice to become a UK leader in its sectors. He is now a consultant, non-exec and trusted adviser to leading firms nationwide and internationally. e: stephen@stephengold.co.uk; t: 07968 484232; w: www.stephengold.co.uk; twitter: @thewordofgold

Liz Wilson, LLB, NP, MAR

16 November 1946 – 21 April 2020

Elizabeth May Wilson was one of Scotland's youngest solicitors, a tribunal chair and university tutor, before a remarkable career addition saw her become a professional reflexologist.

She was born in London to Scottish parents and raised and educated in Wishaw, North Lanarkshire. An outstanding pupil at Wishaw High, Liz gained her LLB degree at the University of Glasgow in 1966, aged just 19 – and too young to be a practising lawyer. She then spent a year out in America, albeit studying sociology, psychology, politics and philosophy at DePaul University, Chicago.

On her return, she became a law apprentice with Glasgow Corporation and at long last was able to enrol formally as a solicitor in October 1969. She joined H W Nimmo & Co in Wishaw before setting up her own business, then amalgamating with another Wishaw practice in 1973.

Further roles followed in the public sector as senior legal assistant and depute clerk of court for Perth Town Council, and as Perth & Kinross District Council's depute director of law and administration with special responsibility for housing and public health.

From 1983 to 1993, she and her great friend Fiona E Raitt were founding partners of Dundee law firm Wilson & Raitt, where they made their marks in sheriff court circles. The caseload revolved around family breakdowns, children's hearings and domestic violence. Between 1985 and 1990, she was appointed a safeguarder to represent children at panel hearings and at Dundee Sheriff Court.

When illness forced her to "retire" in 2016, David Cullen, Law Society of Scotland registrar, wrote: "I do thank you most sincerely for your membership of the Law Society for over 46 years. This is a remarkable achievement and one, which I hope, gives you great pride."

Liz was a part-time Appeal Tribunals chair for almost 10 years, covering child support, social security and medical law. On resigning, the Department for Constitutional Affairs thanked her for "the benefit of your experience and work on the tribunal since 1993. Your dedication to duty and your courtesy will be missed".

She was appointed a panel member of the Mental Health Tribunal for Scotland in 2004, where she was popular with her medical colleagues on panels. Her style was described as "quiet, effective and commanding". However, her sense of humour was frequently on display, which proved calming during sensitive and fraught hearings.

One appraisal found: "Liz attempts to make the tribunal process as positive an experience as possible for those involved. She made good use of humour at this hearing. The humour was appropriate and lightened the process... and [all parties] were so satisfied with the fairness of the hearing they shook hands with the panel on leaving."

When she retired from the Mental Health Tribunal in 2016, aged 69, President Dr Joseph Morrow QC wrote: "You will be greatly missed and your contribution has been appreciated by many including myself."

Although working full time, Liz continued her education throughout her life – studying business management at the University of Strathclyde and taxation at Glasgow College of Technology.

She also gained awards in food hygiene, anatomy, physiology and health at Perth College, and trained in drystone dyking – which she loved and achieved good proficiency in, as a member of a charitable trust doing projects in Angus, Fife and Perthshire.

Liz was a good tennis and golf player and, during many summers, sailed in 60ft traditional wooden boats as part of the voyage crew on the west coast to the Hebrides and St Kilda.

Other passions included the natural world (and mountains in particular), photography, seabirds and drumming.

She became a professional reflexologist in Dundee from 1992 to 2016. At the same time she was a legal panel member of the appeals service, and also a tutor at the University of Dundee for three years in solicitor-client relationships and professional ethics.

As a Buddhist, Liz visited Nepal to see projects to build schools, hospitals and temples in remote areas after making a millennium commitment to raise money for the Stupa Project for World Peace. She furthered the peace project set up by Samye Ling Monastery in the Scottish Borders with a one-month pilgrimage in Tibet. She was also a celebrant at the monastery, officiating at weddings.

Her last days at Bridge View House Nursing Home in Dundee were striking. In accordance with Tibetan Buddhist practice, Liz was wrapped in a mandala – a prayer blanket – before cremation. Manager nurse Heather Allison crocheted one, with every member of staff adding a stitch. Some members, including Joe the handyman, had to be taught how to crochet.

She is survived by five brothers and one sister. J

Iain Wilson

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