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Journal

Journal of the Law Society of Scotland

Volume 66 Number 12 – December 2021

Zeroing in

Business is mostly booming, but a tightening job market means some are struggling: the **Journal Employment Survey 2021**

Children's Hearings in Scotland, 4th Edition

This essential title has long been the most comprehensive examination of all the rules in primary and secondary legislation relating to children's hearings in Scotland.

The book is a step-by-step procedural guide to the entire system, from the bringing of the child to an initial hearing, through procedure at the hearing itself, to potential outcomes and appeals. Our expert author, Professor Norrie, deals in detail with the mechanisms for challenging grounds of referral before the Sheriff Court, Sheriff Appeal Court and the Court of Session.

The combination of extensive coverage and academic insight alongside practical guidance on recognised situations ensures that this is the complete resource for legal practitioners, local authorities, children's reporters and panel members.

ISBN: 9780414098800
Author: Professor Kenneth McK Norrie
Paperback
£75.00
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Subscriptions
Practising Certificate (inclusive cost) £622.50; Non-Practising Members (UK and Overseas, inclusive cost) £315; Annual subscription UK £84; Overseas £108; Trainees Free

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ISSN: 0458-8711

The Journal of the Law Society of Scotland is distributed each month to more than 12,000 practising and non-practising Scottish solicitors, along with trainee solicitors, registered paralegals and non-lawyer subscribers.

Click here to see Peter's welcome message

Editor

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Look after your people

The general economy remains sluggish, but the great majority of solicitor firms seem to be back at, or ahead of, the levels of work they saw before the pandemic hit. So the Society's latest survey of how practices are faring has found.

Why should that be? In the commercial sector, life has not become any less complex, quite the reverse, so professional advisers are likely to be more in demand than ever. Also some companies are still doing well, and there are thriving startups. As for personal clients, I suspect that, sadly, the gap between the haves and the have nots has widened rather than narrowed through the pandemic, and those who produce the bulk of instructions have probably been impacted the least.

Certainly it appears also from the Journal's 2021 Employment Survey, covered in this month's lead feature, that confidence levels are rising – as are pressures of work. Fully 50% of our respondents claimed to have become more stressed over the past year, and with the job market tightening there are already those who want to recruit but find they cannot. That of course risks becoming a vicious circle if they then place undue demands on existing fee-earners, who might then seek to leave for a better balanced life elsewhere.

It is not always the firm's fault if it proves hard to attract new blood, but from comments posted to our survey it is evident that some have yet to grasp the basics of good people management. Low morale combined with one or more of poor management, what are perceived as unreasonable workloads, and pay rates that have seen little if any change, does not indicate a firm with a bright future in today's climate.

Nor will employers get away with "talking the talk" on matters such as staff wellbeing, if they do not also put in place accessible channels for anyone with a concern to feel they can have it properly heard and discussed. People soon spot it when deeds do not match words.

I don't want this all to sound too negative. There are also many solicitors who are treated well by their employers, and appreciate it. But on present trends, those who fall short had better raise their game pretty quickly if they want to be still in business in a few years' time.

This issue brings to a close another tumultuous year. What next year has in store will begin to reveal itself soon. But for now, I hope each of you is able to enjoy a decent Christmas break and share the happiness of the season. Have a good one.

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ONLINE INSIGHT

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

COP26: unpacking the Glasgow climate pact

Success, or disaster? Steven Stewart reviews what was, and was not, achieved at COP26, and the prospects now for meeting the 1.5 degree climate change target

Passivhaus – the golden ticket to net zero?

The Passivhaus Standard for housebuilding has gained prominence since COP26. What is it, and can it make a real contribution to lower emissions? Jane McMonagle and Stuart Murray explain

The court, the IPO and the judge's discretion

Graham Horsman and Keni Carmichael explore an unusual IP decision involving concurrent proceedings in the Court of Session and before the UKIPO, where the court indicated it would have declined to grant interdict despite an apprehended infringement of rights

Executor disputes and the insolvency solution

Paul McDougall explains how sequestration proceedings were deployed in one case to bring to an end a dispute between executors that was blocking progress in the administration of an estate

OPINION

Amanda Masson

The consultation on the future of court hearings has been criticised for its emphasis on remote hearings, but should we not seek a more hybrid model as many solicitors now do with their work patterns?

The Scottish Civil Justice Council consultation on virtual and in-person court hearings has now closed. The consultation sought views on draft rules about the conduct of civil hearings in the Court of Session and sheriff courts. It is fair to say that the proposed rules have evoked strong responses.

There is no doubt that the way we conduct litigation has changed drastically since the onset of the pandemic. The initial sense of chaos has abated, and to a large extent we have become used to conducting civil court hearings remotely.

A way of conducting court business which emerged as a response to a public health need is going to be adapted as part of the evolution of our modern justice system, whether we like it or not. Even the most vocal naysayers acknowledge that some degree of remote participation is inevitable.

The consultation recognises the need to consider effective participation in the justice system, maintaining the gravitas of the court, availability of technology and public safety.

It seems that the majority of court practitioners would prefer to get back into court without further ado. The Faculty of Advocates' response to the consultation is worth reading. It sets out cogently and in stark terms the reasons for the Faculty's opposition to the proposed new rules.

The paper itself anticipates the potential concerns around access to justice, the need to safeguard against potential contempt of court, public and media access, and the need for "justice to be seen to be done". Yet it sets out numerous reasons why remote hearings may serve a modern justice system well.

It is important to observe that the proposed new rules are consistent with the thrust of the Scottish Government's digital strategy. The paper *A Changing Nation: How Scotland Will Thrive in a Digital World* is thought provoking and relevant. It highlights the opportunities created by online working. It explores ways of addressing the problem of digital exclusion, including provision of devices, training, investment in strengthening broadband connections, and potential funding for access to digital services via third sector organisations. The proposed new rules on remote working also anticipate the issue of digital exclusion, and provide potential solutions in the form of exemptions to remote hearings.

Perhaps the fundamental question is whether we lawyers really want to live in a virtual reality. Just as there are concerns around how remote hearings can properly ensure access to justice for members of the public, so too are there concerns about what remote hearings mean for members of the profession. A virtual world can be a lonely place. Junior members of the profession have fewer opportunities to observe and learn from more experienced colleagues and to build a rapport with the bench. Some junior colleagues may not have a separate space in which to work at home, with no physical or psychological boundaries between home and work. The collegiate culture in which our profession thrives is diminished. Chats about challenging cases can be few and far between. Many miss the supportive framework that going to court provided.

Arguably, we do need to broaden our horizons. The system of litigation we worked with prior to the outbreak of the pandemic was not perfect, by any means. Travel to and from court, and waiting time, is inefficient and costly for both solicitors and clients. Heavy footfall in public buildings also poses a public health risk.

The proposed new rules do not seek to abolish in-person civil court hearings altogether. Exemptions are explored. There are three possibilities: (1) in-person hearings; (2) hearings by electronic means; or (3) a hybrid of the two.

Many solicitors have opted for a hybrid model of working. The court system may come to work in a similar way. Perhaps we need to strive for the best of both worlds in the conduct of civil litigation, just as many of us have in our working practices. Some of the arguments for remote working, such as better work-life balance, may seem relatively trite, but fundamentally they strike at the heart of individual and collective wellbeing. Protection of the wellbeing of the profession can only be a positive thing.

The draft rules do contain exceptions which can be invoked where an in-person hearing would be more appropriate than a remote hearing. To my mind, the draft rules anticipate and deal with the concerns around access to justice. It is for us to adapt and find ways to be able to continue to offer support, supervision and training within the court arena just as we have had to do in our offices.

Change can be daunting, but with challenges come opportunities. As someone once put it: "The secret of change is to focus all of your energy not on fighting the old, but on building the new".

Amanda Masson is a partner with Harper Macleod

VIEWPOINT

Some further comments from the Journal Employment Survey 2021 (see feature on p 12):

Overall picture at your organisation

"If you worked it out as an hourly rate on the basis of the number of extra hours I've had to work, I would be paid more working on the tills in Tesco. I would rather have less work, and some vague semblance of a work/life balance than a higher salary." *(Female solicitor, large firm)*

"We have had our flexitime temporarily (since March 2020 and counting) taken away... This means missing out on the potential for 18 additional days' leave... such benefits are part of the reason to stay with a local authority. Without those, it makes the role less attractive." *(Female solicitor, in-house – local government)*

"Very busy, positive, too much work for the number of fee earners. Unfortunately we have lost two female solicitors as the demands of working from home and childcare are too much." *(Female associate, UK/international firm)*

"Lost huge numbers of staff due to better salary at PF. Cannot find new and qualified staff." *(Female solicitor, criminal defence)*

"Recruitment difficulties causing huge spike in workload." *(Male associate, smaller firm)*

Current attitude to flexible working

"Lip service paid; in reality varies team to team." *(Female consultant, large firm)*

"Mostly we are required to work from home but some office time can be applied for." *(Male director, large firm)*

"Attendance at the office is still being discouraged (though I am doing it for wellbeing reasons)... Hopefully [freedom to choose] will be the case going forwards." *(Female solicitor, in-house, public sector)*

"They won't tell us." *(Female solicitor, in-house, local government or regional body)*

"In practice, freedom is allowed for me and certain other classes of employee. However, there is no consistency of policy, with different parts of the business making their own rules about this." *(Male solicitor, in-house, commercial sector)*

"Agile working previously but now hybrid as recognise that trust and the last year has confirmed that people can work from home and in fact, are more productive." *(Female solicitor, in-house public sector)*

Is stress a significant issue for you?

"Stress is a big problem at the moment because there has been virtually no downtime, apart from between Christmas and new year. Even then I was contacted by the office by phone and email... we have had various other people in my department signed off, and then resigning, because of stress in the last couple of months." *(Female director, large firm)*

"Stressful – previously manageable with holidays. Present situation where holidays themselves stressful and increasing workload in criminal defence particularly – with weekend courts etc – makes me concerned about ongoing ability to cope." *(Female director, civil/criminal legal aid, smaller firm)*

"Stress is constant in this job and as a sole practitioner there are few avenues to turn to for realistic assistance... there is never any consideration given to how a sole employer is meant to keep coping with the constant pressures and demands of the job" *(Female sole principal)*

"I moved away from direct transactional work because the demands – the 7 day week, the 12 hour days – eventually had a significant adverse impact on my health." *(Female PSL, UK/international firm)*

BOOK REVIEWS

A Mediator's Musings

JOHN STURROCK QC
INDEPENDENTLY PUBLISHED
ISBN: 979-8640163988; £7.99
(E-BOOK £4.99)

As the UK hunkered down in the first lockdown, John Sturrock QC published *A Mediator's Musings* (on Mediation, Negotiation, Politics and a Changing World) to pierce the gloom and give us food for thought. A recurring theme in this collection of short newspaper columns and blogs is the unifying power of sharing a meal together. This particular miscellany is more street food or tapas than formal banquet. The evident intention of some of the pieces is to be conversation starters rather than definitive pronouncements.

The lively central Mediation section presents the dynamic, tools and capabilities of resolving disputes through a skilled mediator. Confidentiality, and some prudent preservation of mediation knowhow, inevitably means that the tales cannot be told in full. Nonetheless, the vignettes are vivid and practical.

Exploration, and indeed provocation, by the use of open questions is a *leitmotiv* prompting in turn helpful musings of our own. Less successful, for this reader, are Sturrock's political think pieces, inevitably compressed and less well developed than others in the collection.

How will we accurately survey the land of "common interest" and deal with those with whom we – sometimes profoundly – disagree? These are important questions and John Sturrock's slim volume is a thoughtful resource for those keen to seek realistic answers.

Eric Robertson, advocate. For a fuller review see bit.ly/33amsAG

The Passenger

ULRICH ALEXANDER BOSCHWITZ
(PUSHKIN PRESS: £8.99; E-BOOK £6.30)

"This gripping novel... is moving... troubling... Easier to follow the crowd. Outstanding."

This month's leisure selection is at bit.ly/33amsAG
The book review editor is David J Dickson

BLOG OF THE MONTH

thesecretbarrister.com

"Harper's Law runs into immediate difficulties. Because it is a campaign born not of principle, but of a victim's dissatisfaction with a verdict in a particular case."

Celebrated blogger The Secret Barrister takes aim at the UK Justice Secretary in this post on the proposed mandatory life sentence for manslaughter of a police constable or other emergency worker, but his words, which do not miss the mark, have relevance to any populist campaign to change the law on the basis of one highly publicised case.

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

Santa's not coming to town

Will Santa come this year? Can we even tell him what we want?

These questions are being asked across the Pond, where specialist business HireSanta has reported a 120% increase in demand compared with pre-COVID times – but has fewer Santas on its books.

Sadly, the pandemic has taken its toll on the industry as Santas tend to be older, heavier men. And those still eligible, as it were, are cutting back on their commitments out of caution.

One regular said he had been booked in June and had turned down 200 jobs. Others are saying they will do Zoom if anybody asks, but won't be going out again. Yup, Amazon with reindeer this year.

On a cheerier note, check this out from YouTube for a COVID-secure yo ho ho: bit.ly/33mY8BM. Happy Christmas!

PROFILE

Anne Follin

Anne Follin worked in strategic planning at Scottish Airports and is a member of the Society's Client Protection Committee

1 Tell us about your career so far?

After a geography degree and a master's in town and regional planning, my first job was with Motherwell District Council, receiving a really good grounding in all aspects of planning. I moved to assistant planning manager for Scottish Airports, based at Glasgow, then to Edinburgh Airport as planning and development manager, and finally head of Planning for Edinburgh, Aberdeen and Glasgow. Much of my role was planning infrastructure capacity 15, 20 and 25 years ahead.

2 How did you become involved with the Society?

I took early retirement in 2010 and was keen to explore new activities which would use my general skills. I had worked with the Society's Kevin Lang at BAA and he told me about the role of lay members of the Client Protection Fund Committee. I applied and was appointed.

3 What have you found most interesting about the committee's work?

Having very little prior knowledge, I've been really impressed by the scrutiny that is applied when inspecting firms and the discussion when deciding on appropriate action. The mix of lay and solicitor members works really well, and ensures a well rounded approach.

4 What main issues do you think the Society has to address at the moment?

It has always surprised me how long the complaints process takes. It is definitely an area where reform is needed, which I've found is well recognised within the Society.

5 What one message would you give to the profession regarding the Legal Services Review?

If it ain't broke, don't fix it! I think it is perfectly possible to reform without "throwing the baby out with the bathwater". It's so important that solicitors who will be affected by the outcome of the review, respond to the consultation.

Go to bit.ly/33amsAG for the full interview.

WORLD WIDE WEIRD

① Feline trapped?

Cats are to be banned from being outside unless they're on a lead under plans by councillors in Fremantle, Western Australia, to protect wildlife and prevent cats being hit by cars.
bit.ly/3E9TTBa

② Dead or alive

Police have released a sketch of a stag they want to "speak to" about a school break-in in Barnstead, New Hampshire, which evaded capture when they arrived.
bit.ly/3d44Yga

③ Not cricket

A man has been charged in connection with selling fried grasshopper snacks – a local delicacy – to passengers aboard a Ugandan Airlines plane, alongside a second man accused of filming it.
bbc.in/3EcazYA

TECH OF THE MONTH

Night Sky

Free. Apple store

If you like looking up at the heavens when you're out and about this winter, then why not download Night Sky. It's an astronomy app that lets you hold your iPhone to the sky and double tap on a planet which can be explored in detail on your screen.

PRESIDENT

Ken Dalling

Corroboration is coming under the spotlight again as the Scottish Government takes another look at the prosecution of crime. But what has changed since the rule was preserved just a few years ago?

"So, this corroboration thing, isn't that just a trick that lawyers use to get their clients off?"

Scotland's 2021 Government has announced an ambitious plan to consider and consult on a raft of potential changes to the way in which allegations of crime are treated and prosecuted. It was inevitable that the requirement of corroboration would come under the spotlight. I know, we have been here before – remember the Carloway report and the Bonomy report – but bear with me.

In the context of a recent ministerial round table, I thought it would be instructive to check what Renton and Brown had to say on the subject of corroboration. Interestingly, there is so much more said about what corroboration doesn't require, than actually to explain the basic notion that no single witness or source of evidence will be sufficient to base a conviction for any crime or offence, unless, of course, the legislature decides otherwise. Any criminal court practitioner will be able to point to a series of Appeal Court decisions that, if not exactly diluting the need for supporting evidence, certainly innovate on the ways in which that evidence can be seen to exist.

Corroboration is a feature of probably all systems of criminal justice. Prosecutors the world over want to show the fact finders that their cases are compelling, so the more cohesive case with multiple strands of evidence all pointing in the one direction will be the ideal. Scotland, it appears, is unique in requiring it.

Delicate balance

The interests of justice involve a delicate, and sometimes difficult, balance between competing interests. On the one hand, there is the public interest in the prosecution of crime. Tied in with that are the interests of complainers and, yes, that would include those who have been the victims of crime. On the other hand, there is the interest of the accused – and given my acknowledgment of the concept of a "victim" that must surely include the interests of those wrongly accused of crime. And while I acknowledge that the public interest is served by the prosecution of crime, let's not forget that the conviction of the innocent would surely run contrary to the public interest in any civilised society.

The Supreme Court's 2010 *Cadder* decision meant that suspects could no longer be interviewed, and that confessions made by these suspects would remain inadmissible in evidence, without them having been offered access to legal advice. Consequently, Lord Carloway was tasked with considering the place of corroboration in a modern system of criminal justice. The conclusion of his report was to the effect that the requirement for corroboration was "archaic" and "holding back" Scotland's criminal justice system. Holyrood's then Justice Committee didn't agree. "Disdainful and dismissive" of a centuries old practice that had served the country well, was how the *Scotsman* reported their view on his report.

So what has changed? What is out of balance now? And what else would have to change if corroboration, as a requirement for conviction, was to go?

Frankly I don't have an answer to either of my first two questions. As for the third, although sheriffs know and juries are told that a conviction currently requires credible, reliable, corroborated evidence to a standard of proof beyond reasonable doubt, when it comes to a jury verdict, a bare majority of eight to seven will be enough for a conviction. Historically, that has been accepted as something of a balance in a system that requires corroboration, but if that requirement goes, maybe a bare majority will no longer look like proof beyond reasonable doubt.

Against our interests?

But wait, never mind the interests of justice: if corroboration was to go, would that not be good for the legal profession? Might we see an increase in prosecution numbers – and a rise in those appealing convictions because they are aggrieved at coming out on the losing side in the game of "You did it, no I didnae"? Probably, yes. So let's hope that the current Criminal Justice Committee, the Parliament and Government take seriously the arguments to keep corroboration that are clearly contrary to the self interests of the profession.

Ken Dalling is President of the Law Society of Scotland – President@lawscot.org.uk

People on the move

Intimations for the People section should be sent to peter@connectcommunications.co.uk

To advertise here, contact Elliot Whitehead on +44 7795 977708; journalsales@connectcommunications.co.uk

ALSTON LAW, Glasgow and Aberdeen, has appointed **Gillian McCluskey**, previously of MACROBERTS, as head of Litigation, based in the Glasgow office.

ANDERSON STRATHERN, Edinburgh, Glasgow, Haddington and Lerwick, has appointed **Willie Shannon** as a director at its Lerwick office. A public sector specialist, he was previously principal at the North Atlantic Fisheries College Marine Centre. Anderson Strathern has also appointed **Musab Hemsi**, an accredited specialist in employment law, as a director. He joins from LEXLEYTON.

Pic credit Dave Donaldson

Pic credit Stewart Attwood

Waqqas Ashraf, previously of PAISLEY DEFENCE LAWYERS (SCOTLAND), has founded his own firm, WA LEGAL, based in Floor 4, Room 3, 41 St Vincent Place, Glasgow G1 2ER, dealing with criminal defence and road traffic law.

BTO SOLICITORS, Glasgow and Edinburgh, is pleased to announce the promotion of **Emma Barclay** to partner within its Corporate team.

CONVEYANCING DIRECT, Glasgow, has ceased to practise. The Law Society of Scotland was appointed to access all the files and documents at the firm on 12 November 2021. At the time the business was run by Martine Bisiaux, who used the name Conveyancing Direct under licence from Graeme McCormick, the co-founder of Conveyancing Direct, who owns the business name.

DAVIDSON CHALMERS STEWART, Glasgow and Edinburgh, has announced the appointment of three new partners. **Nicola Scott** joins from BRODIES to head the Commercial Property team in Glasgow. **Arveen Arabshahi** (Corporate, Edinburgh) and **Magnus Miller** (Dispute Resolution, Edinburgh) are promoted to partner.

DENTONS, Edinburgh, Glasgow, Aberdeen and globally, has appointed **Fiona Macgregor**, solicitor advocate, as counsel in its Litigation & Dispute Resolution practice in Scotland. She joins the Glasgow office from PINSENT MASONS.

DLA PIPER, Edinburgh and globally, has appointed **Finlay Campbell** as partner in the Real Estate practice in its Edinburgh office. He joins from BRODIES.

DWF, Edinburgh, Glasgow and globally, has appointed **Caroline Colliston**, a partner and chartered tax adviser based in the Edinburgh office, as executive partner for Scotland.

FAMILY LAW MATTERS SCOTLAND, Glasgow, has appointed **Marisa Cullen**, an accredited specialist in both family and child law, as a partner in the firm. She joins from MORTON FRASER.

Carla Fraser, advocate, has joined COMPASS CHAMBERS from AMPERSAND ADVOCATES.

INCE & CO, international law firm, has opened an office in Scotland as from 19 November 2021 at Tay House, 300 Bath Street, Glasgow G2 4JR (t: 020 7481 0010). **Stefanie Johnston**, a dual qualified marine and commercial litigation lawyer previously with CLYDE & CO, has been appointed as partner and head of the office.

JAMESON+MACKAY LLP, Perth and Auchterarder, are delighted to announce the appointment of their associate **Victoria Buchanan**, an accredited personal injury specialist, as a partner with effect from 1 November 2021.

MACKINNONS SOLICITORS, Aberdeen and Aboyne, announces that **Denis Yule**, latterly consultant to the firm, has decided to retire fully, 50 years after joining the firm as an apprentice.

David McLean, advocate, has been appointed to the role of advocate depute by the Lord Advocate. He will commence his role in due course and during his time as advocate depute, will be unable to accept instructions.

Kirsty Noble has been appointed as senior underwriter and solicitor for Scotland at WESTCOR INTERNATIONAL LTD, title and indemnity insurance providers, as it opens its first Scottish office. She joined Westcor from BLACKADDERS earlier this year.

RAEBURN CHRISTIE CLARK & WALLACE, Aberdeen, Ellon, Banchory, Inverurie and Stonehaven, has made the following appointments. In Inverurie, **Kim Smart** joins from LEDINGHAM CHALMERS as associate and branch principal, supported by recently qualified solicitor **Rachael Morrison** and property consultant **Nicola Thomas**. In Banchory, **Shona Morrison** joins from AC MORRISON & RICHARDS as associate solicitor and branch principal. In Ellon, **Andrew Bruce**, previously a partner at MASSON GLENNIE, joins as an associate specialising in residential conveyancing. **Grant Mills** joins the property shop in Union Street, Aberdeen as a solicitor.

SCULLION LAW, Glasgow and Hamilton, has appointed **Judith Hutchison**, solicitor advocate to its Court department, and solicitor **Paolo Martone** to its Private Client department, focusing on estates.

THOMPSONS SOLICITORS, Glasgow, Edinburgh, Dundee and Galashiels, has promoted **Jillian Merchant**, **Claire Campbell** and **Craig Smillie** to partner, and **Deirdre Flannigan** to associate.

TLT, Glasgow, Edinburgh and UK wide, has appointed **Alyson Cowan** as an associate in non-contentious transactional construction law in its Glasgow office. She joins from MORTON FRASER.

Raeburn, Christie Clark & Wallace: from left, Shona Morrison, Bill Barclay, Andrew Bruce, managing partner Callum McDonald and Kim Smart

denovo

Made in Scotland

Engineering legal technology for the better

Over the last 300 years, Scottish scientists, engineers, and technology innovators have made discoveries and inventions that have changed our very relationship with the world around us.

Winston Churchill once said: *"Of all the small nations of this earth, perhaps only the ancient Greeks surpass the Scots in their contribution to mankind."*

That's an incredible accolade, but earned. As a small example of Scottish innovation, today, we take it for granted that surgery will be quick and pain-free, that mechanics and robotics can support the human body and that the water from our taps will be safe to clean and cook with. Yep, there's a Scot behind all of those world-changing innovations.

From the simple processes of everyday life to the cutting edge of 21st century medicine and modern tech companies like Rockstar North (think *Grand Theft Auto*) and, if we may be so bold, ourselves – Scotland remains at the heart of scientific and technological innovation. Think about it: who was the chief engineer tasked with powering the *Starship Enterprise* to split the infinitive and "to boldly go"?

We Scots definitely "give it all we've got... (Captain)!".

Denovo: our passion

OK, so we haven't been around for as long as the *Starship Enterprise*, but over the last 30 years, our team of Scottish software developers, legal case management specialists, legal accountants, cashiers, and legal technology experts at Denovo Business Intelligence have been engineering and innovating software for the legal profession, and we believe even James T Kirk would approve.

More recently, we have been working intensively to create a software platform that does four simple jobs:

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Those have been the goals since day one. That's our passion. Hearing that what we have created is actually helping make a difference in the Scottish legal community is the biggest compliment we could ever receive.

People make Scotland

Open, friendly, and helpful is how we Scots like to see ourselves, and it's built into our ethos here at Denovo. Indeed, this seems to be one of the main reasons that law firms are drawn to work with us – we're just nice, normal folk, who know their stuff and who really want to help. Our software is incredibly impressive, of course, but the compliment we get more than any other is how fantastic and supportive our team are. You see, on top of their tech skills, Denovo people innovate, listen, support, guide and advise. Some legal tech companies make much of features like digital resources, online academies and virtual content. To be honest we do that too, but we genuinely believe that human interaction is the key to our success. Law firms want to talk, to make sure this kind of software works for them, and we guarantee we'll listen and work with them to ensure it always does.

Proud to be part

Scotland is at the forefront of a future which will be forged in a digital world. It's a world in which data and digital technologies are transforming every element of our working and personal lives. Here at Denovo, we feel incredibly proud to be part of an industry that understands the importance of technological advancement in a modern society.

At Denovo, we also understand that it still needs that human connection to work, and we do that very well.

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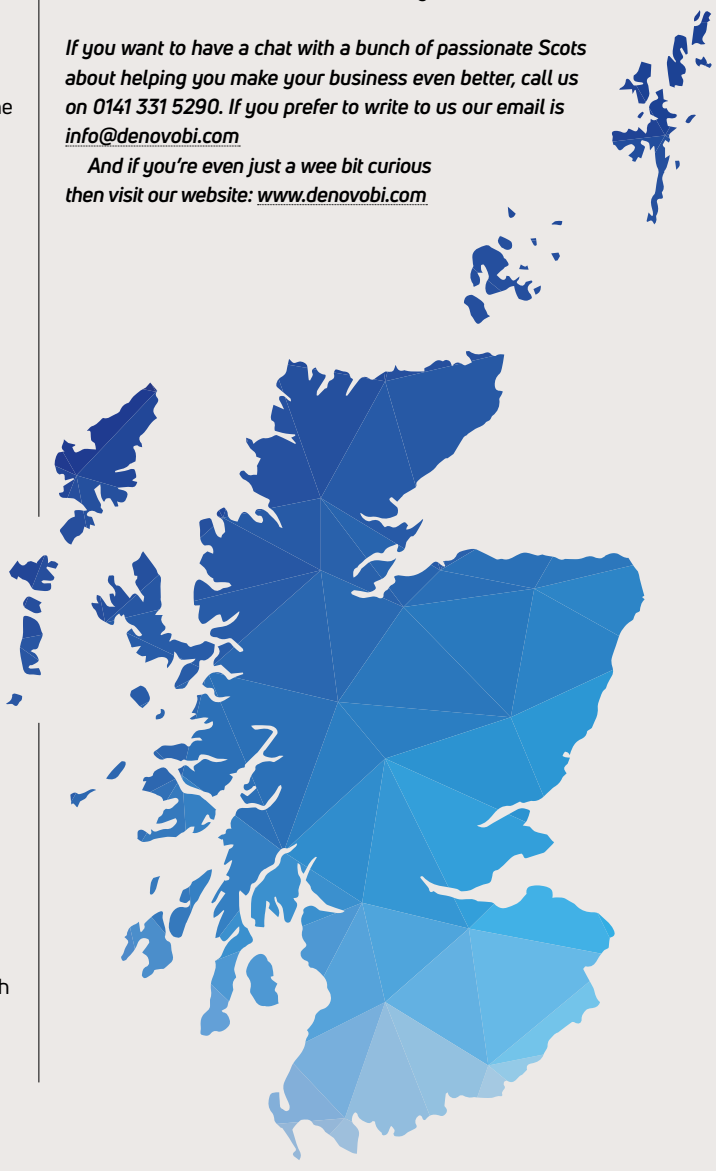

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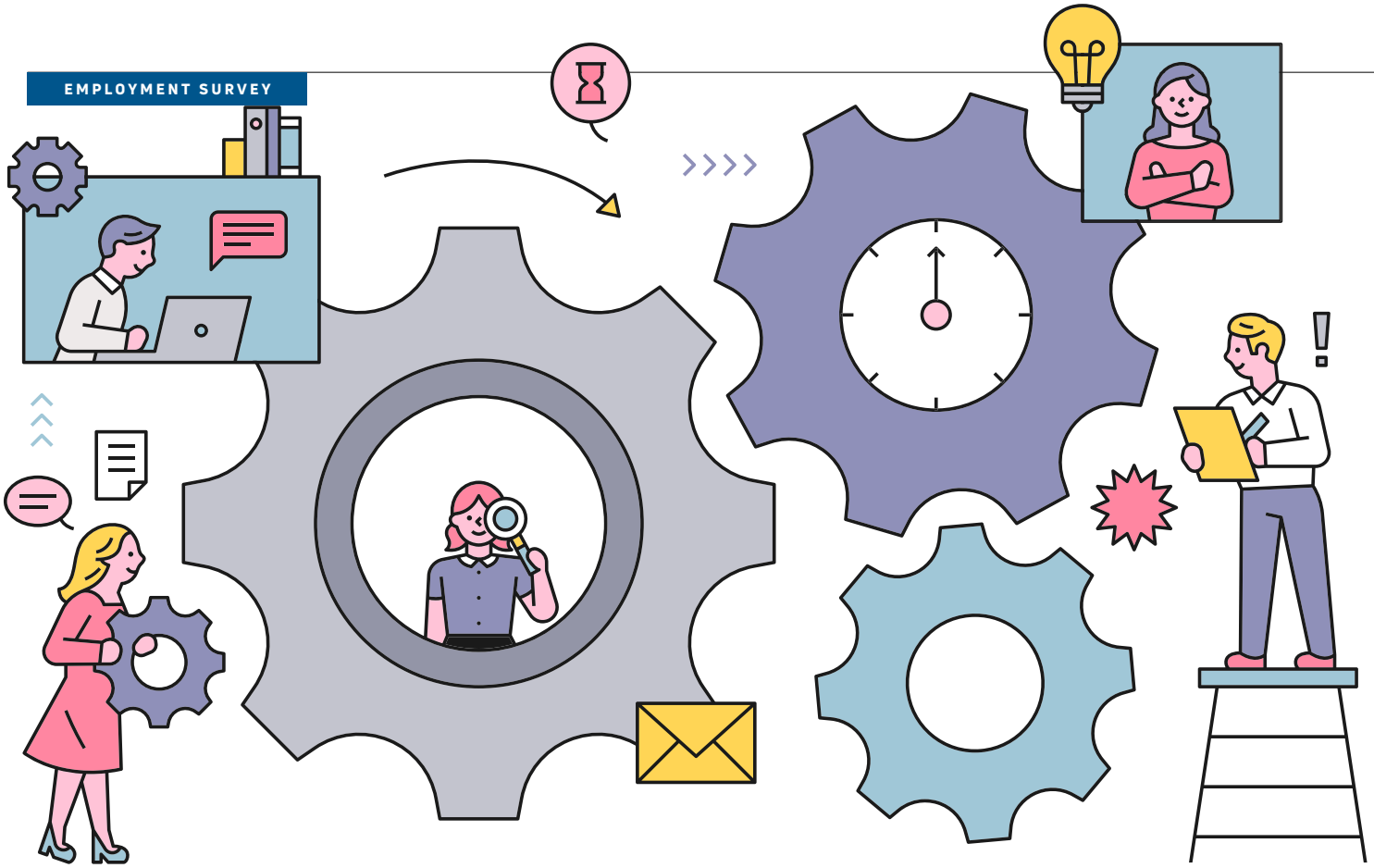


Growth pains

A buoyant sector, with that bringing its own pressures on fee-earners and demands on managers: the picture that emerges from the Journal Employment Survey 2021, as Peter Nicholson reports

Some solicitors have never been busier. Some are desperate for extra help. Some, in legal aid in particular, are simply desperate. Most would probably agree that 2021 has presented unique challenges, which will prove more than just short lived. What, then, can we learn from the Journal Employment Survey 2021?

Memories are still fresh of COVID-19 resulting in redundancies and solicitors on furlough, yet reports of being busier than ever are common – sometimes due to a struggle to recruit enough staff. Judging by survey comments, however, some firms have emerged from the restrictions with much greater credit among their fee-earners than others. Contrast "Overall I thought they dealt with the pandemic exceptionally well and really looked after their staff", with "My firm handled the reduced work/pay arrangements during the pandemic badly."

Firms that pay insufficient attention to fee-earner morale are likely to see a drain on talent, given the number of positions available elsewhere. "There have been a record number of staff leaving. A lot of unhappiness at current working conditions and low morale," was another comment. Likewise those who ask extra, perhaps much extra, of existing staff, for little additional reward, as in "My firm have made record profits but have still frozen pay in my department. Morale is at an all time low." One public sector in-house solicitor reported: "I have been offered a day off once a fortnight." All credit, then, to firms and organisations who are seen as having looked after their people well during the pandemic, or who are now appreciated for attempting to make up for any perceived unfairnesses that occurred.

Better outlook

In late November, the Society issued its own survey findings, indicating that the majority of private practices appear to have overcome the economic impact of COVID-19 (see p 15). It found that almost half (49%) now have more work than before the pandemic; 44% predict an increase over the coming year, and only 10% a decrease.

Of the respondents to the Journal survey, 23.3% believe the economic outlook for their firm or organisation has improved over the previous 12 months, slightly ahead of the 21.7% who consider it has got worse. (The remaining 55% see little change.) The gap is more like 37% to 10% in bigger firms; and the Journal figures are partly influenced by public sector employees, particularly in local government where 65% take a negative view and only a handful a positive one.

Looking ahead 12 months, there is a somewhat more optimistic view overall, as 26% expect the outlook to be better by then as against 16.8% who answered worse – helped by improving sentiment among the in-house private sector, if not the public sector.

Stress on the rise

Busy times, with or without more people, can mean more stress. The survey supports the common perception that legal practice has become more stressful since the advent of COVID-19. While the responses on whether people feel they can handle the stress of the job, or whether it presents a problem for them, show just a small shift towards the latter, fully 50% agreed that their stress levels have increased over the last 12 months: more so for women (55%, as against 42.5% of men).

Comments indicate that overwork related to staff shortages may be a significant factor; and some admit to a negative effect on their health. There are also those who believe firms "talk the talk" about mental health without actually taking necessary action; and at least one sole principal who feels unsupported in trying to cope with the constant managerial pressures.

No clear pattern emerges as to whether stress is more prevalent in any particular type, or size, of employer. But men are clearly less likely to speak to others about it: just over 60% of men, compared with 45% of women, answered either that they don't generally feel very stressed at work, or that their job is stressful but they feel

they can handle it. At the other end of the scale, nearly 17% of men, compared with 12% of women, say that stress is a problem and they don't know who to turn to.

Hybrid is in

Nearly two thirds of respondents (64%) now prefer a hybrid working pattern – partly in the office and partly from home – while just over 15% would choose always in the office and 20% always from home. The majority of employers appear to be obliging, with almost 80% of respondents saying they have the choice, albeit often within parameters. (The Society found that two thirds of private firms are implementing or continuing with hybrid arrangements.) Stricter rules continue to apply for a minority – including a number who are still required to work from home, and say they are being left in a state of uncertainty as to their employer's future policy.

Discrimination: a trend?

The latest picture as regards discrimination and harassment may present some qualified good news: 87% of respondents said they had not witnessed this in the last 12 months. That means a lower percentage did witness such treatment than in previous surveys, most recently the Society's *Profile of the Profession* in 2018. These are not directly comparable, as they recorded experiences over a longer time frame; on the other hand they found a higher percentage who believed there was a systemic problem in the profession, and who could be expected therefore to have witnessed recent instances.

But it remains the case that women are more likely to have experienced or witnessed these kinds of bad behaviour, not surprising given that discrimination based on sex or gender was the most frequently cited, taking up about half of all instances. And where there is a problem, it may involve any of the protected characteristics, occasionally in combination. Race was the second most commonly mentioned, followed by disability. It may be worth noting that discrimination and harassment are about as likely to occur in the public as in the private sector.

There were also individuals who believed they had been discriminated against as someone not working full time; as a Scot working in England; as the only male in an otherwise female team; and as a defence agent (with discrimination coming from the bench, the Government, and the court service).

Although the survey saw a lower number of more junior lawyers taking part than previously, there is no indication that those who did were any more likely to have witnessed recent discrimination or harassment than their more senior colleagues.

Table 1. Has your organisation experienced any of the following over the past 12 months?
(all sectors)

	%	change on 2020
Non-solicitor (or support) staff on furlough	44.8	-12.8
Solicitors on furlough	30.8	-12.3
Headcount growth	29.3	+1.5
Redundancies	25.5	-8.3
Pay freeze	25.5	-8
Bonuses reduced, suspended or scrapped	15.7	-10.5
Bonuses introduced or increased	11.5	+7.2
Reduced working hours/ days – voluntary	6.7	-9.2
Benefits introduced or increased	6.1	+3.5
Benefits reduced, suspended or scrapped	5.9	-1.3
Merger or takeover	5.4	+0.9
Reduced working hours/ days – compulsory	4.8	-6.6
Compulsory overtime	2.3	-0.3
Don't know	11.7	+4.3

Table 2. Salary spread, in percentages, by years' PQE: female
(full time or self-employed, all sectors)

YEARS' PQE	< £30,000	£30,000-39,999	£40,000-49,999	£50,000-59,999	£60,000-69,999	£70,000-79,999	£80,000-89,999	£90,000-99,999	>£100,000
0-10*	3.9	26.2	35.0	20.4	5.8	2.9	3.9	0	1.9*
10-20	2.4	9.8	17.1	20.7	14.6	12.2	7.3	2.4	13.4**
>20	2.4	4.9	18.3	11	22	11	4.9	8.5	17.1***

Table 3. Salary spread, in percentages, by years' PQE: male
(full time or self-employed, all sectors)

Years' PQE	< £30,000	£30,000-39,999	£40,000-49,999	£50,000-59,999	£60,000-69,999	£70,000-79,999	£80,000-89,999	£90,000-99,999	>£100,000
0-10*	2.2	13.3	22.2	24.4	17.8	11.1	0	2.2	6.6*
10-20	0	0	11.9	16.7	11.9	23.8	4.8	11.9	19.1**
>20	7.9	4.5	3.4	12.4	5.6	9	5.6	13.5	38.1***

* About 73% of both male and female respondents in this group were in the 4-10 years' PQE category. Breakdown of salaries above £100,000 is £100,000-£149,999: 1.9%F/14.3%M; £150,000-£199,999: 0%F/2.4%M; £200,000-249,999: 0%F/0%M; £250+: 0%F/2.4%M.
** Breakdown is £100,000-£149,999: 9.8%F/14.3%M; £150-£199,999: 2.4%F/2.4%M; £200-249,000: 1.2%F/0%M; £250,000+: 1.2%F/2.4%M
*** Breakdown is £100,000-£149,999: 6.1%F/16.8%M; £150-£199,999: 6.1%F/6.7%M; £200,000-249,999: 4.9%F/6.7%M; £250,000+: 0%F/7.9%M

The need for sensitivity when dealing with individuals is shown by one person complaining that despite childcare responsibilities, they had been expected to work on during the schools shutdown; and another aggrieved at having to do more to "plug the gap for people with children not being at work during business hours". Both respondents were female.

Legal aid in decline

Difficulties facing the legal aid sector have been well publicised this year, with regular reports of solicitors leaving for better paid work elsewhere. Our respondents included 6.8% at least half of whose work is legally aided, and 4% with a lesser amount, but also a further 5% who used to do legal aid work but find it no longer viable. Of those who still keep it going (35% of whom engage in criminal defence), 62% earn less than £50,000 a year, compared with 42% across the whole survey, almost as many report no change or a decrease in earnings over the past year (compared with 43% generally), and problem stress with no one at work to talk about it is more than 40% more common.

"Legal aid has ruined our business", said one partner who believes they face bankruptcy as a result of firm income being cut to a third of its previous level. "I am just waiting on the inevitable."

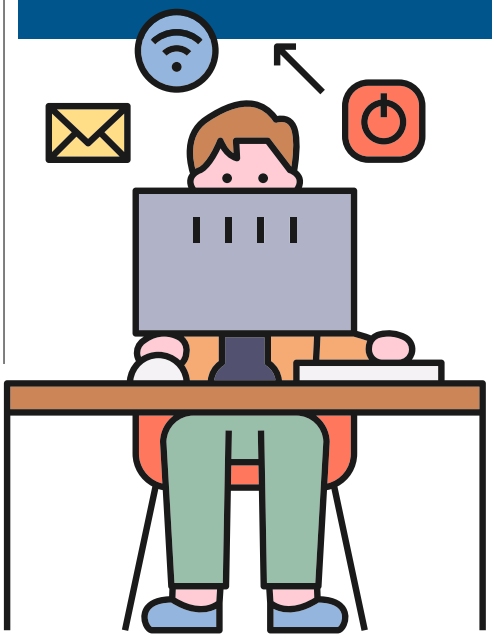
"Not had a pay rise for years and years", commented a legal aid solicitor in civil work – one who has suffered in the past from serious work-related stress.

The response

Thank you to all the 630+ respondents who took part in the survey – a little down on last year, more so among more junior lawyers, which has affected some of our presentation of the results, though without significantly affecting the trends shown.

This year's respondents break down as 34.5% male and 65% female, with a few answering otherwise or choosing not to say. Around 37% work in-house, above the figure for the profession as a whole, while 10.75% do at least some legal aid work (a further 5% find it no longer viable).

Table 4, covering the most common employee benefits in the profession, shows a similar pattern to last year, with the figures for holiday entitlement and pension provision perhaps reflecting the proportion of in-house lawyers taking part.



In-house: a changing balance

Looking at pay and career progression more generally, one statistic that stands out from our respondents is the changing proportions of in-house work as seniority increases. For those less than 10 years qualified, about 29% of both men and women respondents work in-house. At more than 20 years qualified, the figures are 23% for men but 37.4% for women – and that is only looking at those working full time or equivalent such as compressed hours. Do the reasons lie in more flexible work and holiday arrangements, in the public sector particularly, for those who also have caring responsibilities, and/or ease of returning to work after a childcare break, or the initial availability of part time work for returners?

It would be worth exploring this in the context of seeking to achieve a greater proportion of women at senior levels in private practice. There was little difference in the number of women compared with men in this PQE band employed at the levels of solicitor or senior solicitor, but 47% of men had reached the level of partner (equity or non-equity) or principal, compared with 26.5% of women. Even so, there were also more men than women (10.5% as against 6.6%) at the most senior in-house levels – general counsel/head of legal/company secretary/senior public service role. The percentage of men earning more than £100,000 a year is also more than twice as high, as tables 2 and 3 show.

Taking this survey and the Society's survey together, it can probably be said that the solicitor profession as a whole is not likely to see a downturn in work over the short to medium term. The Society also separately reported that there has been a bounceback in the number of traineeships offered, and it is evident that there is likely to be a continuing need for new blood in order to meet client needs and relieve the pressure being felt by many practitioners. At the same time, many employers still have to raise their game as regards fee-earner wellbeing, and this not just a question of money – we can cite various respondents who have improved their lives, and their health, since changing jobs.

For some more individual comments, see Viewpoints, p 6

Table 4. Which benefits do you currently receive?

(top responses, all sectors; last year's position in brackets)

1	More than 25 days' holiday per year (excluding public holidays) (1)	46.3%
2	Cycle to work scheme (3)	42.4%
3	Smartphone/tablet (2)	38.3%
4	Pension (defined benefit) (4)	34.9%
5	Training support (work related) (5)	34.3%
6	Life or health insurance, including critical illness cover (8)	31.8%
7	Ability to buy/sell annual leave (6)	31.1%
8	Private health care (7)	30.4%
9	Employee assistance (10)	24.7%
10	Cash bonus (individual performance) (9)	22.2%
11	Cash bonus (firm performance) (11)	21.4%
12	Pensions (money purchase) (12)	17.7%
13	Other assistance with transport including season ticket loan and parking permit (14)	17.3%
14	Childcare/crèche or vouchers (11)	15.7%
15=	Pension (stakeholder) (16)	12.2%
15=	Pension (other) (16)	12.2%
	No benefits	7.4%

Post-pandemic practice positives

A survey by the Society, and the latest traineeship figures, indicate a profession well on the road to recovery from the economic effects of COVID-19

The majority of private practice firms in Scotland appear to have overcome the negative economic impact of the COVID-19 pandemic, a new survey by the Law Society of Scotland has found.

The Society's third survey into the financial impact of coronavirus on Scottish private practice legal firms shows that staffing levels and workloads have largely returned to pre-pandemic levels for most firms and, in some instances, increased.

Undertaken in September 2021, 11 months on from the second survey, telephone interviews were conducted with cashroom managers at a representative sample of 136 firms in private practice (a different sample from the firms previously surveyed). Key findings include:

• Most of the small minority of firms who still had solicitors or support staff on furlough indicated their intention to have all staff return to work once the furlough scheme ended on 30 September. Only one firm was considering staff redundancy. A few were planning flexible part time working.

• The pandemic has not significantly impacted firms' recruitment plans: 59% of respondents said they intended to keep solicitor staff numbers at their existing levels over the next 12 months, while 24% plan to increase these. No firms said they would decrease solicitor staff. (The balance were defer, freeze, or don't know.) For support staff, the figures were 65% and 20% respectively.

• On trainee recruitment, almost two-thirds of firms surveyed do not plan to change their trainee numbers in the next 12 months (a majority of these firms do not normally recruit trainees). However, almost one in five plan to increase their trainee recruitment next year.

• Almost half of firms (49%) reported that their workload has increased or significantly increased compared to pre-pandemic levels. While 27% of firms reported a reduced or much reduced workload, in the previous survey half of all firms reported a reduction.

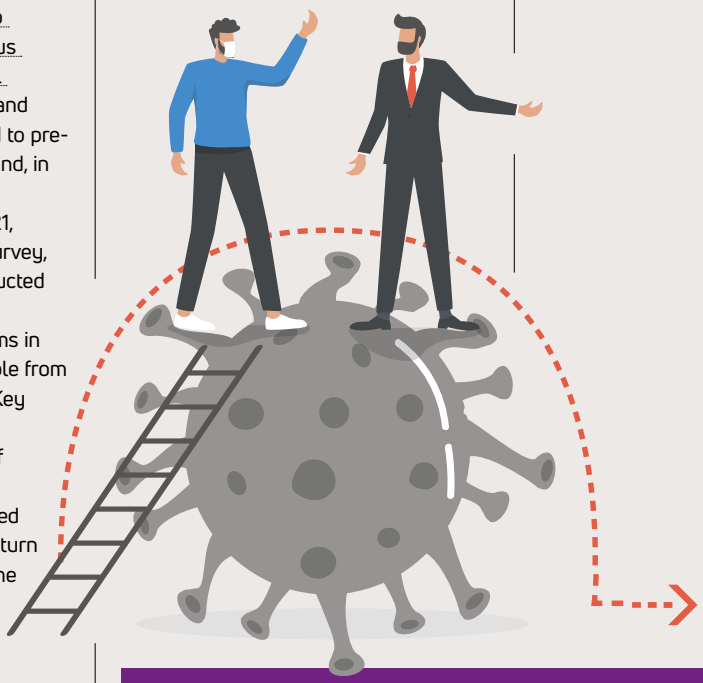
• Looking ahead, 46% expect workloads to remain the same in the coming year, and 44% predict an increase in work. Just 10% of firms predict their workloads will fall. Similar positive responses were given regarding anticipated turnover in the next 12 months (in October 2020 44% of firms predicted a fall in the coming year).

• New ways of working have embedded themselves: two thirds of firms say they will implement or continue with hybrid working arrangements, and one fifth that they will have some staff working exclusively from home. Only one firm indicated that hybrid working had not worked well, but almost a quarter were likely to discontinue (exclusive?) homeworking.

• On staff wellbeing, almost two thirds of all firms indicated they would have regular conversations with staff to help with any issues that may have arisen due to the pandemic; almost one fifth say they have a formal wellbeing strategy in place. (Of the remaining one third, some were sole practitioners.)

Ken Dalling, President of the Law Society of Scotland, commented: "While it is encouraging to hear that many firms have seen work levels increase and that they are positive about the future, we fully understand that this is not the situation that all firms are in. We will continue to do all we can to support the whole of the profession as we navigate our way out of the pandemic."

Find the survey report at bit.ly/3G46437. The report contains further data on anticipated changes (or not) in client expectations and demands, and client satisfaction.



Trainee numbers make up lost ground

Trainee numbers showed a sharp recovery in the 2020-21 practice year, when the number of traineeships begun totalled 744, significantly up on the 434 started in 2019-20, the Society has reported.

The full annual statistical report is awaited, but the Society says the increase indicates that parts of the profession are recovering from the impact of the COVID-19 pandemic, with increased activity in some practice areas. Trainee figures have also been bolstered by the number of traineeships deferred from 2020 to 2021 due to the pandemic, and by the Scottish Government's fund to support 40 legal aid traineeships, which launched in June.

The average across the last two practice years is 588 trainees a year, comparable to pre-pandemic levels.

Liz Campbell, the Society's executive director of Education, Training & Qualifications, said: "We must remain cautious about the future and what traineeship recruitment will look like, given the ongoing impact of the pandemic on the profession and wider economy.

"We know that a high number of Diploma graduates are in the traineeship market and securing a traineeship will continue to be competitive. As ever, we would urge all final year LLB students to consider the current environment when deciding their next steps, whether that is to do the Diploma or an alternative career."

In the victim's shoes

If survivors of childhood sexual abuse decide to sue for compensation, how well does the civil process support them? And how should defenders respond? The pursuer in *A v Glasgow City Council* chose to share his views with the Journal

It is unusual for the Journal to be approached by a party to a litigation, seeking to inform the legal profession about their experience. All the more so when that party is concerned to preserve their anonymity. That is what happened after judgment was issued on 13 October in *A v Glasgow City Council* [2021] CSOH 102.

After a proof on quantum, Lord Brailsford awarded A a total of £1,339,185 for sexual abuse sustained between ages 12 and 17 at the hands of a foster parent, WQ, with whom he had been placed by the council. The abuse dated from the 1980s and has had a severe and continuing impact on A's life ever since. In 2019, WQ was sentenced to 10 years in prison for crimes against A.

A wanted to talk about his experience, as this is the first case of its kind in Scotland to have resulted in an award at this level, and because "the whole process of dealing with these cases is still very embryonic and there is quite a bit of early learning that can be done, so I felt I had a bit of a responsibility to partake in that conversation and it wouldn't get lost – with the Journal it's going directly to the right audience".

A is an articulate individual who explains with clarity how the legal process affects pursuers like himself, and where he thinks it can improve. His comments should also give defender organisations – and their insurers – cause to consider the correct approach and attitude when faced with such claims.

Limiting liability?

Victims of ill-treatment often say that the first thing they want is some acknowledgment and expression of regret by the wrongdoer for the hurt caused – in short, some emotional understanding. For A, the way the council chose to respond, despite accepting vicarious liability, "galvanised" him to see the case through to a judicial award rather than settle.

Although it is now known that concerns had been raised about WQ's suitability ahead of A's placement, and social workers failed to act when A first complained about what was happening, A has yet to hear any expression of regret from the council. He places much weight on John Swinney's statement last year, when piloting the bill to introduce the redress scheme for abuse survivors, that organisations and institutions which were responsible for the harm caused should now be responsible for putting those wrongs right. "I don't think he just meant paying money and accepting liability," A asserts. The council's response, however, was simply to hand everything to its insurers, "and the way they've dealt with this, the whole way through, is about limiting liability". A strategy that appears to have backfired, as only a low offer was on the table until just before the proof, and by the time it was improved, A was "100% determined I was going to see it through even if I ended up possibly with less". He was awarded substantially more.

"I believed in the abilities of my legal team and in the robustness of the legal system. I thought the result would definitely be better, and I would rather get to that point and get less than be bullied by Glasgow City Council or their insurers, because that's what I see them as doing."

Even once the award was made, the council – which has since begun an appeal – confined its press comment to saying it would take the appropriate time to consider the judgment. "There is no acknowledgment there of the victim; there is no acknowledgment of how they dealt with me during this process; and what that does is it galvanises me. I'm absolute that the only redress I'm going to get in this situation is pounds, and therefore I will make sure I take it right to the end point."

Trials of civil procedure

Turning to the court process itself, A reveals that contrary to what many (his own advisers included) might expect, he found the civil process more difficult than the criminal.

"It look a long time to get to the criminal trial, but when we got there, two things helped. First, Victim Support are very good at their job: they take you there, show you the courtroom, tell you what's there, they're with you on the day, they look after your needs. Also the prosecutor was a perfect gentleman: he was very clear and precise about what he needed from me, and he was very understanding of vulnerability, so although, on the day, it was harrowing to go back and be in the same room as the perpetrator and go through that process, it was also a relief. It was the end result after 31 years."

"If you were to say to me which is easier, I would say the criminal side to be honest. The civil side is so long and so drawn out, it's like stretchy elastic"

With the five year civil case, despite praising the support from his legal team (Thompsons' Laura Connor, who instructed Robert Milligan QC and Jan McCall), "I found the process quite linear: civil lawyers don't tend to do anything with B until A is ticked off, and the same with C and D. Where I come from, a project management environment, I'm thinking that while I'm waiting for A to be done, I can be doing B and getting a bit of D done, in preparation for C."

In addition, there was an awful lot of repetition. "You were going through things, not once or twice but five, six, seven times with your side's psychologists, psychiatrists, your own legal team, the career specialists, this person and that, and then you have to do all the same on the other side." A believes the system should require joint expert witness assessments: "They should make it that one set of professionals does this, because we're retraumatising the person every time we do it."

He strongly supports the enabling potential of suing "no win, no fee", however; and he does have a good word for the judge, Lord Brailsford, who with the benefit (A believes) of experience as the family judge, "set the tone" for the proof and kept matters focused on the issues still in dispute. Even so, there was a six-and-a-half month wait for the judgment, also testing for A. "So if you were to say to me which is easier, I would say the criminal side, to be honest. The civil side is so long and so drawn out, it's like stretchy elastic."

Frustrations at the slow progress could threaten to boil over in dealings with his advisers. He credits Laura Connor's handling of these. "I also had my own psychotherapist, and it's very much something you need while you're going through the process because it's just something that has no light at the end of the tunnel – you don't know how long the tunnel is."

In addition, A would have liked someone to have been available, "particularly on the day before and the day of the proof. Someone I could phone and say, I'm not feeling great about this, I'm feeling quite scared and upset, quite emotional, and everything depends on my evidence. Not my solicitor – I would want her to be focused on my case. I have since told Thompsons I would have been happy to pay part of my award when it came in, if that kind of support had been there".

Valuable insight

Legal representatives, and judges, may feel they lack the training to deal with cases like A's. A recommends one book to them for insight: *The Body Keeps the Score*, by Bessel van der Kolk, a leading psychiatrist, on trauma and early trauma and the effects it has on a person's ability to function. "I think that every lawyer and every judge dealing with these cases, and even rape victims or anyone who has been through trauma and is suing on that basis, all of them should read that book." No other book he has read, or psychologist or psychiatrist he has consulted, has "articulated the effects of trauma on my physicality, my wellbeing, my emotions and my ability to function as well as this book".

He adds: "My little legacy is that when we finally get this case over the line, I am going to offer up this book: I will pay for a copy for anybody in the legal service in Scotland that wants to get involved in these cases."

Other legal avenues?

A's award is far more than he could have obtained under the Scottish Government's redress scheme, which will offer a maximum £100,000. How does he view the scheme? A is disappointed that the Government decided to introduce a waiver of the right to sue as a condition of a scheme award.

"I would never have considered it because touch wood, I'm only 50, I'm healthy and I'm in a position where I can keep going. I think the redress scheme works if you don't have the evidence, if you are very old, or you are sick, or you just emotionally could not go through it. But the maximum payment isn't even what I've been awarded just for solatium [£135,000].

"I don't think it should have had the waiver. Even if it had been like the Criminal Injuries Compensation Scheme, which I had done previously, that didn't stop me from litigating, it just means I pay that back. The redress scheme could have done that, I think."

Top of the list of his desired changes in the law, however, is to make it an offence for someone who knows that abuse is taking place – in his case, WQ's wife – to fail to report it. Having approached Scottish ministers on this, he does not accept their position that it would stop people reporting it ("It would more encourage them"), or that it could come within aiding and abetting.

A concludes by returning to the position of the council and its insurers. Only "big numbers", he believes, will make them change the way they respond to claimants – and awards in England are now rising through the millions. "I think it will only happen if they put two and two together and see that if they respond more appropriately, the victim will be less likely to stick to their ground and go after them. But in my case, I'm not interested now, I'm just interested in getting it over the line, getting payment and moving on with my life."

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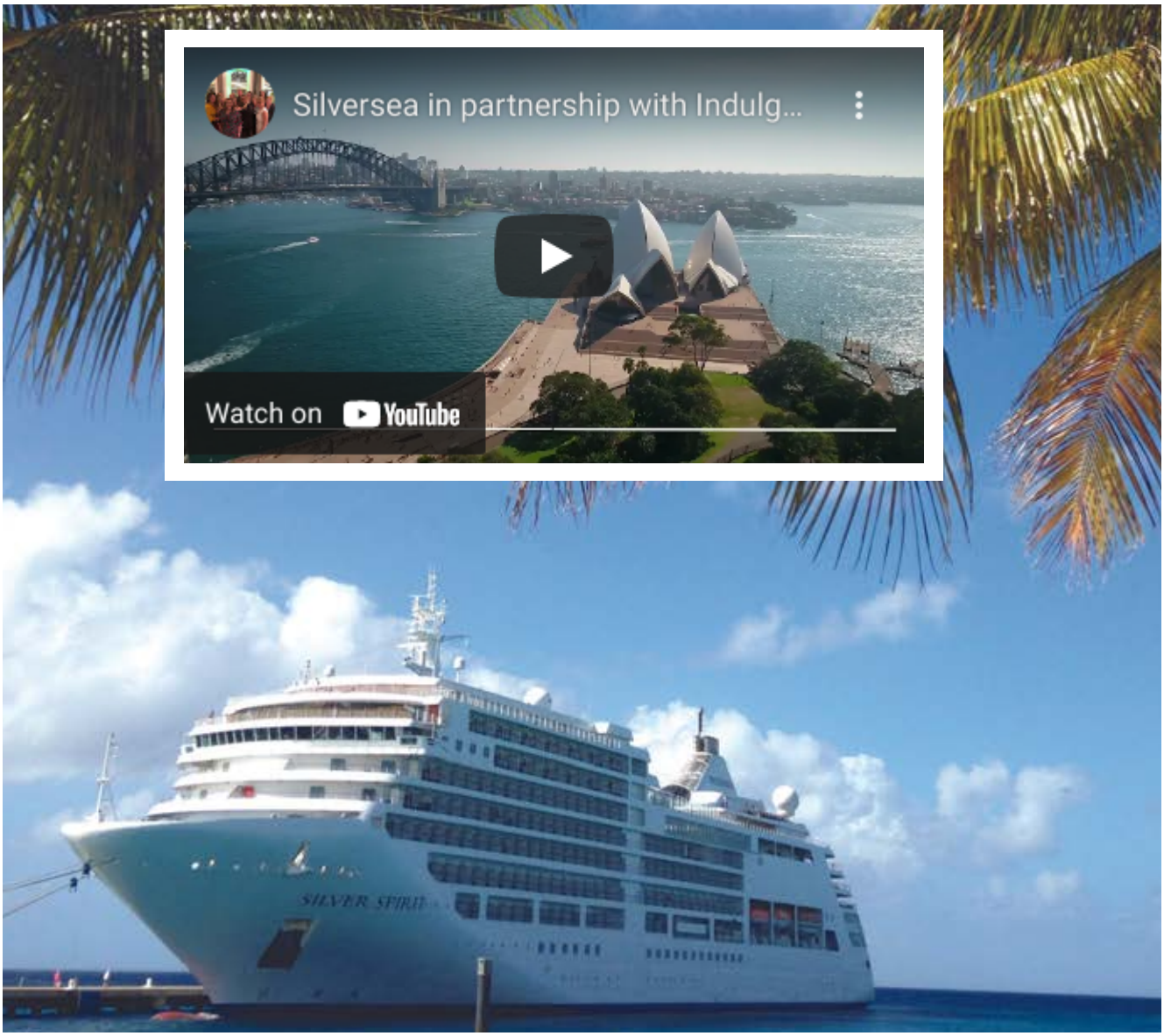

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Whether or not there's a will, there's a way

Mediation is likely to lead to better outcomes than litigation when it comes to the strong passions raised by inheritance disputes, Rachael Bicknell believes

Blood is not always thicker than water. For over a decade, inheritance disputes have been on the rise. Many experts attribute this to factors including increased property prices resulting in estates with more value to fight over; difficult economic times and the impact financial responsibilities can have on family relationships; and an aging population where legal capacity issues are more prevalent. And sometimes people die unexpectedly without updating their will or having not yet made one.

Then there is the complexity of succession planning in a modern and less traditional society. The rise of divorce rates and blended families – those brought together by new relationships, resulting in step or half siblings – and families living across jurisdictions with different succession laws, presents many more opportunities for conflict.

When it comes to disagreements over the validity or interpretation of a will, it isn't the case that the better the drafting, the less likely a dispute. That assumption ignores the significance of emotion in these kinds of conflicts. A relative who has been disinherited, particularly if contrary to their expectations, will frequently refuse to walk away from even the most tightly drafted will or trust, simply because the law may not be on their side.

Disputes in this field are not restricted to contesting a will. It is estimated that two thirds of the Scottish population have not written a will, and disputing rights on intestacy can similarly create significant family conflict. Increasingly, children are claiming their legal rights to non-property assets on the first death of a parent, often at the expense of the surviving parent. And executors can find themselves caught up in valuation disputes, or being sued on allegations of a breach of trust or duty, mismanagement of the deceased's estate or even negligence.

Strong emotions

The consensus among the speakers at the Law Society of Scotland conference on trusts, wills and executry disputes, was that litigating these claims should be avoided like the plague – they are notoriously complex, time consuming and expensive. This is, in part, explained by the central person being, uniquely, the deceased. They cannot explain or justify the reason for their wishes (unless these are expressly set out in a side letter, which appears to be unusual, even if best practice), or clarify whether they were coerced into changing their will. This can leave surviving relatives with no answers and feeling betrayed, helpless, heartbroken, angry and shocked. All in all, it is easy to see why disputes arising from the death of a family member present some of the most painful and emotionally charged conflicts that solicitors and mediators see.

For that reason alone, trusts, wills and executry disputes are very well suited to mediation. Dealing with the emotional concerns or needs is just as important as dealing with the legal positions and financial demands. Mediation can offer breakthroughs which can disentangle the emotional pain of an inheritance dispute. While mediators are under no illusion that mediation is a magic wand, it can be transformational. It can rebuild relationships between siblings or other family members. It can rehabilitate the testator's place in the family and restore what they meant during their lifetime to those in dispute.

Counting the cost

There are other reasons too. Inheritance disputes are usually factually and legally complex. They routinely involve multiple parties, multiple witnesses and expert witnesses. Evidence gathering from family members, advisers and carers can be required for significant periods. Obtaining and reviewing medical or social care records can be time consuming and expensive. For complex cases, the "litigation risk" can be very difficult to assess. Success can be far from certain, and legal costs can quickly become disproportionate or even exceed the value of the claim.

It is also not unusual for an inheritance dispute to involve multiple family members even if there is only one claim. Not only does this serve to increase costs; it increases the time it is likely to take to resolve claims in court. A litigated claim or claims can add several years to the time needed to wind up an estate. Mediation offers an opportunity to resolve claims involving multiple family members, or multiple claims between aggrieved relatives.

Then there are the monetary and non-monetary costs of litigating inheritance claims. Legal costs on both (or all) sides can run to tens if not hundreds of thousands of pounds. Mediation can bring about an end to the financial and emotional toll of a dispute by getting to the heart of the conflict at a far earlier stage.

It is rarely always about money and winning. It might be about a particular item of property which has some unknown or misunderstood sentimental value to the claimant. It might be about how one party was treated by other members of the family. It might be about sibling rivalries with each other or with a stepparent. Whatever it is, mediation affords the best chance of giving the clients the closure they need to allow them to move on, and will almost always leave them in a better place than they would be after a lengthy and costly court battle.

Rachael Bicknell is founder of Squaring Circles

Time orders: has their time come?

Alan McIntosh highlights the seemingly underused time order provisions of the Consumer Credit Act, which can prove their worth in relation to car finance agreements

Time orders under s 129 of the Consumer Credit Act 1974 have been on the UK statute book for almost 50 years.

Despite this, as far as "time to pay" remedies go, they remain significantly underutilised, and have featured less in consumer credit court cases than time to pays under the Debtors (Scotland) Act 1987. This is quite surprising, as they offer far more protections to consumers.

First, although they can only be used in relation to consumer credit agreements, time orders can be applied for not only when a creditor raises an action, but also earlier when a lender serves a default or arrears notice under the 1974 Act.

The court can also award one where it appears "just to do so", and can provide for payments by instalments of such amounts, and at such times, as it considers just and reasonable. In addition it can make ancillary orders, such as to vary interest rates (s 136) or to remedy an unfair relationship (s 140A).

However, the greatest utility in using a time order is in relation to consumer hire purchase agreements for the sale of cars. In recent years, the growth of car finance has been exponential across the UK, and it is believed that over 90% of all new and used car sales are now being financed by agreements such as PCP (personal contract purchase) plan agreements, which for the purposes of the Consumer Credit Act are hire purchase agreements. The problem with these agreements is that when a consumer defaults on them, the finance provider will often seek not only to obtain decree for the full amount owing, but also the return of the car. Time orders can prevent this.

Time orders in practice

In several cases in recent years, where I have appeared as a lay representative, I have been successful in obtaining time orders for car finance agreements and helped clients to retain possession and use of their car, while making repayments under what the court has described as a "court supervised repayment plan" where decree has not been granted.

How such applications have been structured has varied depending on the circumstances of the case. Section 129 of the 1974 Act makes it clear that the court can issue the order for "any sum owed", which in case law, historically, has been interpreted variously as meaning for the full amount owed, or only for the arrears.

Where the client's intention has been to retain possession of the car and pay off the full debt owed, the orders have been structured for the full amount.

Alan McIntosh is managing director, Advice Talks Ltd

However, where clients have never intended to own the car, an "arrears only" approach has been taken. This has been driven by s 99 and s 100 of the 1974 Act and the changing model for these car finance agreements, where under PCP, increasingly large optional sums are included at the end to help drive down the monthly instalments for consumers. When these agreements are terminated by lenders, the full amount owing becomes due, including the optional sum, which is no longer optional.

Many consumers when they enter these agreements never intend to pay these optional sums, because s 99 and s 100 allow them to terminate their hire purchase agreements voluntarily and return their car at any point, with their liability being limited to half of what is owing under the agreement (including the optional sum), less what has been paid and some additional costs for excessive usage and damage. However, when an agreement is defaulted on and terminated, the consumer loses this right and the full amount, including the optional sum, becomes payable.

But where a borrower can resume their normal contractual payments, arguably a time order can be used for the arrears only. This means that when the arrears are cleared and the borrower has paid more than half the full amount owed within the original term of the agreement, the lender is restored to a position no worse than they would have been, had the agreement not been defaulted on.

Now although s 129(2)(a) of the 1974 Act does not allow expressly for time orders to remedy monetary breaches of agreements (s 129(2)(b) does for non-monetary breaches), the court under s 136 can make an ancillary order to vary any agreement when making an order. Arguably, this could include the amount that is owed under the agreement should the car be returned to the finance provider.

Although no case I have been involved in has led to a court ruling on this point, lenders have always been pragmatic when such an approach has been taken, allowing the consumer to return the car.

Equitable outcome

The result has been an equitable one, thanks to time orders: the consumer retains possession and use of the car, while maintaining the contractual payments and repaying their arrears and ultimately being able to return the car after they have repaid half the full amount owing, while avoiding a decree.

It's hard to believe such equitable outcomes were not always within the original intentions of the drafters of the 1974 Act.

Keeping it clean

Neil Langhorn introduces Environmental Standards Scotland, the new post-Brexit regulator monitoring compliance with the law, which welcomes engagement from the profession as it develops its operations

There's a new environmental regulator in town following the UK's departure from the EU – and we're keen to promote understanding of our role, how concerns can be brought to our attention and how we plan to work with others to address shortcomings.

Environmental Standards Scotland (ESS) formally took up the powers granted to it through the UK Withdrawal from the European Union (Continuity) (Scotland) Act 2021 ("the Continuity Act") on 1 October 2021.

The new body is charged with scrutinising both compliance with, and the effectiveness of, environmental law in Scotland, now that the EU and the European Environment Agency are no longer monitoring standards and the application of the law in the UK.

ESS has been established as a non-ministerial office – independent of the Scottish Government and ministers and accountable to the Scottish Parliament. Our role encompasses any legislative provision concerned with environmental protection, and the bodies under our scrutiny include all public authorities responsible for implementing those laws in Scotland – including bodies exercising public functions on behalf of a public authority. The Scottish Government, regulators such as SEPA and Nature Scot, local authorities and health boards, and the likes of Scottish Water all therefore come under our jurisdiction.

The work of our organisation will be directed by a board, chaired by Jim Martin – no stranger to oversight roles following earlier stints as Scottish Police Complaints Commissioner and Scottish Public Service Ombudsman, and currently chair of the Scottish Legal Complaints Commission.

Getting into shape

While our new body is now officially up and running, and can begin to consider and investigate issues brought to our attention, there is still some work to do to finalise our ways of working and to identify the areas of law we will be focusing on. There is therefore an opportunity for readers of this Journal to help inform the organisation's approach and its early priorities.

We have published an Interim Strategic Plan, setting out how ESS intends to carry out its role while a final plan is prepared for submission to the Scottish Parliament for approval in 2022. We will consult formally on a proposed Strategic Plan next spring but, in the meantime, we are keen to hear from those at the sharp end of the implementation of environmental law – what works, what doesn't and how could things be improved?

As our vision, published earlier this year, makes clear, our focus is very much on working with all stakeholders to improve environmental outcomes for Scotland's communities and wildlife. We are therefore keen to hear from those involved in interpreting and implementing environmental law and standards in Scotland to shape our future work programme.

As well as our vision, we have set out a number of principles that will underpin our work and guide our approach:

- We will target our efforts and resources where we can add most value – focusing where our contribution is needed most or will make most difference.
- We will seek to resolve issues through agreement wherever possible – having recourse to our formal powers where we judge it is necessary to deliver the outcome expected.
- We will be evidence driven – seeking a wide range of inputs and expertise to inform our work and to support our decisions and advice.
- We will be open and transparent – keeping people informed about the progress of our work and providing opportunities to input to and influence it.
- We will seek opportunities to work in partnership with others – working closely with all relevant stakeholders to ensure that our collective efforts deliver benefits for environmental protection and enhancement.

Engagement plans

Over the new few months we will be attempting to put these principles into practice as we begin to engage with a wide cross-section of public authorities, NGOs, communities and businesses about the challenges they face and observe in implementing environmental law in Scotland.

We are keen to hear from anyone with concerns about compliance or effectiveness – and a simple "representation" form can be downloaded from our website to detail your concerns. These will be considered alongside evidence and data from a wide range of sources to prioritise and target our investigations and our approaches to the authorities concerned to seek improvements.

We don't yet have a shortlist of priority issues – we want that to be informed by the evidence and by feedback from our stakeholders. We can guess what some of the issues might be – and are beginning to see representations brought to us – but we want to take our time before prioritising our early analysis and investigative work. Having said that, we have already identified one issue that we intend to investigate.

Early priority

In March 2021 the European Court of Justice issued a judgment confirming that the UK (including parts of Scotland) had "systematically and persistently" failed to meet statutory limits for nitrogen dioxide for at least seven

"We don't yet have a shortlist of priority issues – we want that to be informed by the evidence and by feedback. We can guess what some of the issues might be "

Neil Langhorn is head of Strategy and Analysis at Environmental Standards Scotland

years, between 2010 and 2017. Given the significant health impacts of air pollution, and the contribution it makes to premature deaths, the ESS board determined early on that this was something they were concerned about.

While efforts to improve air quality in Scotland continue – including the recent publication of *Cleaner Air for Scotland 2* by the Scottish Government – significant questions remain as to whether air quality limit levels will be met going forward. In view of this, and taking into account the serious, longstanding and intractable nature of the failure to meet limit levels, the ESS board has taken the decision to launch an investigation into the arrangements put in place by the Government to execute compliance with statutory air quality limit levels in respect of nitrogen dioxide.

Compliance steps

Depending on what we find, and how our investigation proceeds, ESS has a range of statutory powers to help secure compliance by authorities, or to improve the effectiveness of the application of the law. These include powers to require information from public authorities (information notices), to require authorities to take steps to address failures (compliance notices), or recommending that the Scottish Government takes action to address systemic failures (improvement reports). In addition, and only where we consider that a failure or the impact of a failure is, or is likely to be, serious, we can apply for a judicial review.

However, despite granting us these formal powers the Continuity Act also makes clear that we are expected to work with authorities to try to resolve issues informally wherever possible – given that securing agreement about the improvements that should be made is likely to be more effective, efficient and timely.

This has informed the drafting of one of our principles (see above), and is written through our investigation and enforcement procedures. From the stage we first identify a potential shortcoming, through prioritisation and investigation, up to the point that we finalise our conclusions and recommendations, we will seek informal resolution with the public authority or authorities concerned. Only where we consider that this is not possible will we resort to formal enforcement action.

We're clear that there are important challenges that must be addressed if Scotland is to achieve the environmental standards and goals it has set. We are looking forward to playing our role in securing improvements to both compliance and effectiveness, and intend to work collaboratively with all those concerned about the application of environmental law in Scotland.

So if you have experiences that you would like to share – good, bad or otherwise – please do get in touch with us through our website www.environmentalstandards.scot. We'd be delighted to hear from you.

ENVIRONMENTAL
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New Year, new start?

As 2022 approaches rapidly, many lawyers are thinking about a brighter future by starting out on their own. Whether you are thinking of going solo or teaming up with colleagues, it's wise to plan carefully.

IN ASSOCIATION WITH LAWWARE

There are many benefits to running your own firm - you control of your own destiny, reap your own rewards and you can determine your own work / life balance. However, benefits bring responsibilities with them...

Always remember: you are running a business.

Life in the legal world can be hectic. It's a demanding profession and day-to-day work can mean that business performance considerations slip to the bottom of your list.

Being a great lawyer does not automatically mean you are a great business person. It's prudent to take on board the advice of professionals:

- Employ a good accountant who can take you through the key financial considerations.
- Focus on your profit and loss statement regularly.
- Enrol for some basic business management training.
- Get a firm grip on cashflow management.

Pay particular attention to cashflow. Businesses don't go bust due to a lack of profitability. They go bust because they can't pay the bills. You should know your precise cashflow position at the end of every working day.

Invoice regularly.

The art of maintaining positive cashflow is to invoice clients regularly. If you do this each month, or even more often, you are more likely to get paid on time and in full. Don't be afraid to use interim billing. Clients find it easier to afford and pay for your services in bite sized chunks – and it will keep your bank manager happy. The longer you wait before sending out the bill, the less likely you are to get paid.

To assist with this, set up systems with your bank to enable you to accept credit card payments and automatic bank transfers. This will alleviate many of the problems associated with collections.

Market yourself professionally.

Nowadays, the starting point for all promotion is your website. It's your brochure, your directory entry, your online storefront, your client care mechanism and your newsletter all rolled into one. Websites are not a one-off transaction. They require maintenance to maintain your position on Google.

That requires advice and input from web professionals who manage search engine optimisation on a daily basis and who know how to write blog articles that will generate traffic for your site.

Of course, it's not all just about e-marketing – the more traditional methods count too. Don't overlook these when developing your business plan.

Top tips.

- Contact LSoS early, they have a lot of information about how to start-up and will support you through the process.
- Contact your bank early as well, it can take a while to setup a new business bank account.

Invest in the right software.

Keeping track of profit and loss, cashflow and managing your client marketing, time recording and billing is easy with the right practice mamagement software.

It pays to opt for a PMS system where accounts and case management are integrated and you can access all the relevant financials and case information without duplication of effort.

If you are thinking of striking out on your own, good luck, take care and contact us.

0345 2020 578 or
innovate@lawware.co.uk.

Mike O'Donnell.

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OLRs: life means life

This month's criminal court roundup reflects on orders for lifelong restriction in light of a recent appeal, how an uncooperative accused did not prevent an extended sentence, and undisclosed information when a petition warrant was sought

Criminal Court

FRANK CROWE,
SHERIFF AT EDINBURGH

It has been a quieter period in the Appeal Courts, but with the new session of the Scottish Parliament underway criminal lawyers would do well to look at some of the consultation documents which have appeared.

The *Bail and Release from Custody* consultation opened on 15 November, and closes on 7 February 2022. It is to be hoped that after this further hiatus, electronic monitoring of certain bail orders can be implemented swiftly, as the present curfew arrangements are a waste of police time, other than a source for submitting problematic reports. If accused are out and about in breach of bail, or worse still committing new offences, that is one thing, but otherwise, the curfew system does not protect complainers and witnesses.

Orders for lifelong restriction

Back in the day, I seem to recall very few discretionary life sentences being imposed, especially when, as a young prosecutor, I saw some very nasty regular High Court offenders being given determinate sentences for yet another rape or serious assault.

A life sentence for 11 rapes was imposed in 1982 on the subsequently notorious Angus Sinclair, later convicted of the murder of Mary Gallagher in Springburn in 1978 and much later for his part in the World's End murders of Helen Scott and Christine Eadie in 1977.

I was present in court in 1990 when Lord Ross imposed a life sentence on Robert Black for the abduction of a young girl he seized at Stow, but fortunately was more or less caught in the act. The report described him as being very dangerous. Subsequently, he was convicted of the abduction, rape and murder of Susan Maxwell, Caroline Hogg and Sarah Harper which were committed in 1982, 1983 and 1986 respectively, and he was convicted later of the sexual assault and murder of Jennifer Cardy which took place in 1981.

Since 2006, under the oversight of the Risk Management Authority, it has been competent for a High Court judge to impose an order for lifelong restriction ("OLR") on accused convicted of serious sexual or violent offences whose liberty presents a risk to the public at large. This replaced the discretionary life sentence.

An OLR is not imposed for the crime committed but for the risk that the individual is assessed to present to the public. It is imposed following conviction, after the preparation of a detailed risk assessment report ("RAR") ordered by a High Court judge.

In 2019-20 21 RARs were instructed and in the event 14 OLRs were imposed.

Back at Journal, April 2014, 24 I looked at the case of *Ferguson v HM Advocate* [2014] HCJAC 19, where the point was made that out of 100 OLRs to date, even with those where the determinate sentence was very short, few had achieved release on parole. There was criticism that most requests for an RAR ended up in an OLR, but the recent figures do not support that.

However an OLR truly is a lifelong sentence, meaning that all individuals sentenced to an OLR will be the subject of a risk management plan ("RMP") for the rest of their life, in the same way that convicted murderers released on parole are liable to recall at a later date if their conduct gives rise for concern, not necessarily triggered by a later conviction.

There have been more than 200 OLRs made in the last 15 years. In the years 2008-09 and 2013-14 around 30 OLRs were imposed; numbers dropped back to less than half that figure, but in 2019-20 there was an increase in reports instructed and orders made. The main point to note is the cumulative figure of those remaining in custody, which is steadily rising.

Risk criteria

In *AB v HM Advocate* [2021] HCJAC 43 (8 October 2021), an appeal was taken in respect of the imposition of an OLR following the appellant's conviction on 11 charges which included serious common law assaults, abduction, threatening and abusive behaviour and stalking. The assaults were aggravated in that they involved abuse of two complainers – the appellant's partner and his ex-partner – over prolonged periods from 2012 to 2015 and 2017 to 2019.

There was a difference between the risk assessments produced by two experts, but the sentencing judge preferred the opinion of the expert who assessed the appellant as being of high risk. As is often the case, the appellant had a troubled background, and while the note of appeal suggested the appellant was not an "exceptional offender", the test as the High Court made clear is found in s 210E of the Criminal Procedure (Scotland) Act 1995. That is: "the risk criteria are that the nature of, or the circumstances of the commission of, the offence of which the convicted person has been found guilty either in themselves or as part of a pattern of behaviour are such as to demonstrate that there is a likelihood that he, if at liberty, will seriously endanger the lives, or physical or psychological wellbeing, of members of the public at large".

Extended sentences

HM Advocate v McCarthy [2016] HCJAC 46 (26 October 2021) was a successful Crown appeal after the respondent was sentenced to a total of five years' imprisonment for the attempted rape of a male, sexual assault of a second, 17-year-old, male, and taking indecent photographs of him and the possession and distribution of such photographs. The evidence of the assaults was gruesome and degrading. The respondent had a significant list of convictions. He had a drug problem and refused to co-operate with the preparation of a social work background report.

It was conceded that the sentence was lenient, though not that it was unduly lenient; but the Appeal Court thought otherwise and indicated that no accused can prevent the court from imposing an appropriate sentence by non-cooperation and a report should still be prepared. There was material available in an older risk assessment. The original sentence was quashed and a 10 year sentence substituted, being seven years in custody and an extended sentence of a further three years.

Petition warrants

What goes on in the background leading up to the sheriff granting a petition warrant is not always totally clear to the profession at large, and while the bill of suspension case, *Docherty v HM Advocate* [2021] HCJAC 45 (19 October 2021), sheds some light on this important but obscure area of procedure, it leaves a lot unsaid.

Prior to the commencement of the Human Rights Act 1998, the prosecutor was taken on trust that if they sought a petition warrant from the sheriff that appeared competent, the sheriff would grant it. This contrasts with the position when a search warrant is sought, where the decision to grant warrant is based on the receipt of information believed to be truthful which provides reasonable and proportionate grounds for taking this step.

In light of that Act, where warrants are sought in ordinary course to institute summary proceedings by seeking an arrest, some information is provided with the request which usually arrives in a transit envelope; reasons include that the accused could not be traced despite repeated efforts, is of no fixed abode, is presently on bail, police are seeking fingerprints etc.

So far as requests for petition warrants are concerned, generally the severity of the charge is such that a warrant will be granted, although the sheriff can insist on being addressed on the

reasons why. Recently, a warrant was sought for a notorious criminal who is still in prison, alleging events occurring many years ago. The fiscal clearly expected that the sheriff needed to be addressed and satisfied that the allegations had come to light recently, and in any event the accused could be "ordered in" from prison. The warrant was granted a few minutes before the accused made his appearance in court.

Court's criticisms

In *Docherty's* case he was charged in December 2020 with assault to severe injury and released by police on an undertaking to appear a fortnight after the alleged event. The undertaking was cancelled by the fiscal, but in July 2021 a petition warrant was sought and granted by the sheriff. The accused was arrested on a Saturday in August and appeared in court the following Monday when he was released on bail.

The High Court was quite rightly critical of the fact that the sheriff had not been properly advised of the background. A petition warrant is required to initiate proceedings and the crave indicates that *if necessary* the accused will be arrested, but it is left to the fiscal how to enforce the warrant.

The High Court refused to pass the bill, since there were no craves to support an argument about article 5 ECHR. The action of the fiscal in ordering the arrest of the accused was unnecessary, but did not invalidate proceedings in the matter.

One remedy if conviction follows would be that the two days spent in custody should be taken into account in sentence. I have often thought an accused should not just be entitled for the days in custody in a "seven day lie down" from committal for further examination to full committal, but the time spent from date of arrest which might run to two or three days.

Corporate

EMMA ARCARI
ASSOCIATE, WRIGHT, JOHNSTON & MACKENZIE LLP

The National Security and Investment Act 2021 ("NSIA") changes how foreign investment is dealt with in the UK. With a wide reach, retrospective application (to 12 November 2020), notification and clearance requirements, plus serious consequences if a transaction falls foul of the NSIA, investors and their advisers will require to plan the handling of their transaction carefully and immediately.

Until the NSIA is fully in force (4 January 2022), it works alongside the Enterprise Act 2002, which provides restricted rights to the Government to review transactions. A new Government organisation, the Investment Security Unit ("ISU"), will take over from the Competition & Markets Authority in this area. The new regime is more like that in the US, France and Germany in terms of screening investments, and will let the UK Government review, veto or set requirements in relation to transactions. Recent Government guidance has provided further detail on the application of the NSIA.

"The sensitive areas include communications, computing hardware, data infrastructure, energy and transport, among others"

Overview of the new regime

Notifiable acquisitions: The NSIA applies in relation to acquisitions which are caused by "trigger events". An acquisition is a notifiable acquisition where:

- it is of a right or interest in, or to a qualifying asset (including land, tangible moveable property and intellectual property) or qualifying entity (any entity other than an individual);
- the entity/asset being acquired is from, in, or has a connection to, the UK;
- the level of control acquired over the qualifying entity meets or passes a certain threshold.

Government guidance details examples of the threshold criterion as where:

- shareholding stakes or voting rights held pass certain percentages (25%, 50%, or 75%), similarly shares of capital, rights to surplus assets or on winding up (further instances are detailed in the guidance);
- voting rights can block or pass resolutions affecting the entity;
- there results an ability materially to influence entity policy, such as to appoint board members (however the material influence threshold will not apply if, e.g. such a right/interest is already held); or
- "you are able to use a qualifying asset, or direct or control its use, or you are able to do so more than you could prior to the acquisition".

This includes land and IP, and these may be based within or outside the UK (but if outside, a sufficient connection to the UK must exist).

The guidance also highlights that internal restructures/reorganisations may count as trigger events. Similarly, planned acquisitions that have not yet taken place (e.g. where there are signed heads of terms) can be called in. Should the ISU suspect the above criteria are met and national security may be at risk, the transaction can be scrutinised by the Government.

Call-in notice. NSIA applies in relation to the acquisition of rights/interests in a qualifying entity or asset, by allowing the Secretary of State to issue a "call-in notice" for a transaction which falls within the definition of a "trigger event". A recent statement made under s 3 details that the call-in power will be exercised on a case-by-case basis, but the following factors in relation to national security will be considered: the use of the target, the characteristics of the acquirer and the degree of control to be acquired over the target. The statement notes that the assessment (following the notice) is only to take place where it is reasonably suspected the acquisition could give rise to a risk to national security. The call-in power is only to be used to safeguard the UK's national security and not to promote any other objectives. Further guidance is expected.

Mandatory notification for "notifiable transactions". If the acquisition falls within any of the 17 sensitive areas of the economy (defined by regulations under s 6),

notification and approval are required, otherwise the acquisition will be void. If cleared, the Government cannot reassess the transaction, unless false or misleading information was submitted. The sensitive areas include civil nuclear, defence and military, but also communications, computing hardware, data infrastructure, energy and transport, among others.

The statement details that qualifying acquisitions of entities which undertake activities "closely linked" to those 17 areas are more likely to be called in. Loans, conditional acquisitions, futures and options are unlikely to be called in as they usually pose little risk to national security. However the guidance notes an exception where rights are exercised for the purpose of preserving or realising the security. Retrospective filing of mandatory notifications is possible, but note that the transaction will be void without Government approval. For transactions which do not qualify under the mandatory regime, a voluntary notification can be submitted to request clearance.

The consequences for failure to notify are severe, with potential criminal and civil penalties including up to 5% of an organisation's global turnover or £10 million, whichever is greater.

Effect on transactions

When planning and drafting transactional documents for a qualifying acquisition, care will need to be taken to factor for the possibility of the transaction being called in, its unwinding, or any of the other options available to the Government (e.g. restrictions on the number of shares transferred or access to commercial information). More due diligence on investors and the sector involved will be required, and there is a greater likelihood of conditional aspects of deals (e.g. in relation to any auction process or the outcome of a voluntary notification). The NSIA has a wide reach and will not only apply to M&A, corporate restructuring etc, but also in relation to land transactions and IP. Once the NSIA is in force the Government can assess acquisitions retrospectively for up to five years after completion of the relevant transaction, and up to six months after becoming aware of it if it has not been notified

Intellectual Property

ALISON BRYCE, PARTNER, DENTONS UK & MIDDLE EAST LLP

At Journal, June 2021, 32, I examined how artificial intelligence ("AI") might interplay with intellectual property laws in the UK. Much has happened since I last reported on this. Since then, we have had the *Thaler* rulings in the UK, Australia and South Africa, and the Government has launched a new AI strategy which has a particular focus on amendments to patent and copyright law. This article will look at the new AI and IP landscape in the UK, and discuss whether the new developments are enough to keep the UK ahead of the curve.

"Early indicators are that the Government is getting ready for potential changes to patent and copyright law in the AI field"

The *Thaler* case that we covered in June has since been to the Court of Appeal (*Thaler v Comptroller-General of Patents, Designs and Trade Marks* [2021] EWCA Civ 1374 (21 September 2021)), which ruled that AI cannot be the inventor of new patents. This echoes the earlier decision from the High Court. However, this decision contrasts with the recent Australian and South African court rulings that AI systems can be recognised as the inventor for patent purposes.

The Court of Appeal decision follows the current UK patent law that requires an "inventor" to be a natural person. It is interesting to note that there was a split in the judgments between two of the three judges, both leading authorities on UK patent law. Lord Justice Birss's dissenting judgment held that just because we had not come across a situation like this before, did not prevent the court from deciding how the law should be applied in a new situation. It is likely that this case will go on to reach the Supreme Court, a decision from which could expedite a change of UK legislation.

A national strategy

Also in September, we saw the publication of the Government's National AI Strategy, which considers how the UK can maintain its position as a global superpower in AI and secure its place as a research and innovation powerhouse while retaining global talent and a progressive regulatory and business environment. The strategy is based on three assumptions. First, that progress, discovery and strategic advantage in AI depends on access to people, data, compute (computing power) and finance. Secondly, that AI will become mainstream in much of the economy and action needs to be taken to ensure that every sector and region of the UK benefits from that. Finally, that the UK governance and regulatory regimes need to keep pace with the fast-changing demands of AI.

The National AI Strategy outlines the Government's plans to support the international development of AI governance by working with partners to shape approaches to AI governance under development, such as the Artificial Intelligence Act ("AI Act") proposed by the EU. If the AI Act was implemented, it would introduce specific, risk-based rules for AI into EU law. Since Brexit, the Act would no longer directly apply to the UK; however it appears that the Government may introduce reflective change via our own legislation.

How the law might change

More recently, the UK's Intellectual Property Office ("IPO") has started a consultation on AI and IP. In particular, the IPO is seeking evidence and views on both the extent to which patents and copyright should protect inventions and creative works made by AI, and measures to make it easier to use copyright protected material in AI development, supporting innovation and research.

The IPO has stated that "any measures we put in place should: encourage innovation in AI technology and promote its use for the public good; preserve the central role of intellectual property in promoting human creativity and innovation; be based on the best available economic evidence".

This consultation seeks views on a range of possible amendments to patent and copyright law. Proposals include the possibility of a new form of IP right which could protect AI devised inventions (with perhaps a stricter test of inventive step because AI may invent in ways which a human inventor would not, and

possibly a shorter term than the current 20 years that patents can be applied for). Also under review is the possibility of removing the copyright protection currently available for computer generated works; and whether UK patent law should be amended to include a human responsible for an AI system as an inventor. The consultation closes on 7 January 2022.

The *Thaler* case does follow current UK IP legislation, but whether this legislation is flexible enough to support our new AI reality is another question. With the launch of the National AI Strategy and the accompanying IPO consultation on how the copyright and patent system should deal with AI, early indicators are that the Government is getting ready for potential changes to patent and copyright law in the AI field.

Agriculture

ADÈLE NICOL, PARTNER, ANDERSON STRATHERN LLP

Decisions in two important yet unreported cases, heard together, were issued on 23 September 2021 (*Pattinson v Matheson*, record no SLC/6/20). Both cases raised identical issues under the Crofting Reform (Scotland) Act 2010, whereby the landlord of adjacent crofts challenged entries in the Crofting Register on the basis that the respondent was not the tenant of the crofts in question.

"Following detailed examination ... the court held that the respondent was not the proper tenant of the crofts and granted the application to remove the register entries"

Each croft had been tenanted by the respondent's late father, who died intestate in 2012. The respondent, the only person entitled to succeed to his father's estate, sent the landlord and Crofting Commission ("CC") a notice informing them that he had succeeded and taken over the tenancies. However, the respondent was not appointed executor dative until September 2018, after the notices had been sent.

In response, the CC provided the respondent with information in respect of what he required to do to "effect the transfer" of tenancies and register the crofts. The crofts were registered in October 2019 and the CC confirmed that the respondent as a result became the tenant. The landlord however noted that the time limits in the Succession (Scotland) Act 1964 were not adhered to, and as a result requested the CC to "declare the crofts vacant" and served corresponding notices on the respondent (intimated to the CC) to terminate both tenancies as of Martinmas 2020.

Following detailed examination of the relevant legislation and case law, the court held that the respondent was not the proper tenant of the crofts and granted the application to remove the register entries. The crux of the decision was the fact that the statutory process outlined in the 1964 Act was not followed, and therefore "since [the] whole process is predicated upon the appointment of an executor, and since it is admitted that no executor had been appointed by the time the 2014 notice was served, it follows that nothing that happened at that time avails the respondent in terms of constituting a valid transfer of the tenancies to himself".

The cases serve as a stark reminder of the vital importance of dealing with croft tenancy transfers timeously and within the time restraints set out in the legislation. It appears from these decisions that the executor retains the right to transfer the tenancy at any time, even after the 24 month period has passed, only so long as the landlord has not served a notice to terminate the tenancy. The landlord is not bound to agree to a transfer of tenancy after that period. In summary, after the 24 month period the landlord obtains a right to terminate the tenancy by statutory notice, and in the same manner, the CC could declare the croft vacant which would also prevent an executor from transferring the tenancy.

In some ways, this decision will be of comfort to executors, in that if the 24 month deadline is missed, the executor may still transfer the tenancy at any point, unless the landlord terminates prior to the transfer. The decision is being appealed.

Controlled interests in land

The arguably controversial Register of Persons Holding a Controlled Interest in Land ("RCI") will come into force on 1 April 2022. In November Registers of Scotland ("RoS") hosted its first webinar about the RCI, providing further information on what it will look like when launched, why it is being launched and who will be impacted by it. The RoS guidance is not yet complete, but more piecemeal guidance is expected to be released as we near the launch date.

Generally speaking, the RCI has been created to align RoS's records better with the Scottish Government's ambition to create more transparency in relation to who holds interests over land in Scotland and owners (and tenants of long leases) or others with "significant influence or control" over land. For the purposes of the register, owners and tenants are known as "recorded persons", whereas others who have "significant influence or control" are known as "associates"; these parties can include partnerships, trusts, unincorporated bodies and overseas legal entities. There are some exemptions for parties already subject to other transparency regimes in Scotland and the UK, such as UK companies, limited liability partnerships, charities and public authorities (among others).

Although the RCI comes into force in less than six months, there will be a six month transitionary period to allow those who have to register time to do so, prior to any penalty (likely to be a monetary fine) being imposed.

Briefings

Amalgamated Land Court

Also of significance is the recent announcement confirming that following a consultation, the Land Court and Lands Tribunal will be combined to provide a "one stop shop" for land and property cases in Scotland. Legislation to enable this is still awaited. See Journal, October 2021, 46.

Succession

YVONNE EVANS, SENIOR LECTURER, AND DUNCAN ADAM, DPLP TUTOR, UNIVERSITY OF DUNDEE

A recent decision considered informal writing and what is required to prove testamentary intent. In *Application of Cummins and Tierney (Downey's Executrices)* [2021] SC EDIN 60 (15 October 2021), it was concluded that writing on the back of an envelope containing a copy of the will did not constitute a valid codicil.

The informal writing

Mary Downey, an Irish citizen domiciled in Scotland, executed a valid, professionally-prepared will in 2012. She died in Ireland in 2019. Among her personal papers, her niece discovered an envelope containing a photocopy of her will. On the envelope, Miss Downey had handwritten the date of the will, "12/12/12", which was circled. There were then three asterisks: "*** Back of this envelope". On the reverse, she wrote: "*** 6.16 and 6.18", then, "January 2015". Underneath she wrote "Alterations" (underlined). She then wrote "brother Pat's 4" (circled), followed by "to STEPHEN (nephew)". Then she wrote "nephew Patrick's 4" (circled), followed by "to PAUL (nephew)". Underneath these words were Miss Downey's signature and "January 2015" repeated.

It was accepted that this writing would be valid in terms of the Requirements of Writing (Scotland) Act 1995, and would be treated as a codicil altering the terms of the will, provided that the testatrix had mental capacity, and testamentary intent could be shown. Miss Downey undoubtedly retained capacity.

Proving testamentary intent

Where a deed has been prepared by a solicitor and correctly subscribed, there is seldom any doubt about its purpose (if not about its effects). A challenge the court faces when presented with a document, the terms or effect of which are in doubt, is divining the intentions of the writer. In the case of testamentary writings, the court must look to the document and any available extrinsic evidence to determine what effect, if any, the document has.

It was argued that the form of the writing and its storage, i.e. writing on the back of the envelope containing the copy will, kept with her personal papers, were significant in indicating that Miss Downey intended the document to be treated as a testamentary writing. Sheriff Welsh stated that the starting point should not be to assume that this was a valid informal writing, saying that this "puts the 'informal writing' cart before the 'testamentary intent' horses". Ultimately, Sheriff Welsh was unconvinced that, on a balance of probabilities, the evidence proved that Miss Downey intended to alter her 2012 will.

Starting with the words written, the sheriff suggested that there was no operative clause, i.e. the writing did not expressly state what it was or what actions were to be taken. He contrasted this with cases where the writer clearly states that they are additional clauses to a will. In his view, the use of "Alterations" alone was not sufficient.

This is perhaps a little surprising. "Alterations", in combination with the facts that it was written on an envelope containing a copy of the will, referred (slightly erroneously) to

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Benefits debt recovery

The Government seeks views on which, if any, powers over social security related debt recovery should be transferred from the sheriff court to the First-tier Tribunal. See consult.gov.scot/social-security/devolved-social-security-benefits/

Respond by 23 December.

Legal services regulation

The Government wants "a modern, forward-looking legal services regulation framework for Scotland that will best promote competition, innovation and the public and consumer interest in an efficient, effective and independent legal sector". See consult.gov.scot/justice/legal-services-regulation-reform-in-scotland/ and Journal, November 2021, 12.

Respond by 24 December.

Landfill tax

Rather than who pays for waste being dumped in landfill sites, the question here is at what point should such disposal be taxed. An amendment is proposed to the regulations. See consult.gov.scot/taxation-and-fiscal-sustainability/scottish-landfill-tax/

Respond by 31 December.

Suicide prevention

The Scottish Government and COSLA are developing a new suicide prevention strategy for Scotland. Views are sought on all aspects of suicide prevention and mental health promotion, including the impact of COVID. See consult.gov.scot/mental-health-unit/suicide-prevention-strategy/

Respond by 7 January.

Addiction treatment

Douglas Ross MSP is submitting his proposed Right to Addiction Recovery (Scotland) Bill to consultation. It would place an obligation on Scottish ministers, health boards and others to provide access to preferred treatment options for those addicted to drugs or alcohol. See www.parliament.scot/bills-and-laws/bills/proposals-for-bills/proposed-right-to-addiction-recovery-scotland-bill

Respond by 12 January.

Tied pubs

The Tied Pubs (Scotland) Act 2021, a response to the controversy over unfair terms imposed on tenants of pubs "tied" to large pub-owning businesses. imposed a duty on Scottish ministers to develop a Scottish Pubs Code. The Government now seeks views on the content of its draft code. See consult.gov.scot/agriculture-and-rural-economy/draft-scottish-pubs-code-part-1/

Respond by 17 January.

Aviation strategy

Some might say that governments are pursuing the impossible if they hope to develop a strategy that promotes "national and international connectivity that allows us to enjoy all the economic and social benefits of air travel while [at the same time] reducing our environmental impact". See, however, consult.gov.scot/transport-scotland/aviation-strategy/

Respond by 21 January.

Onshore wind

The Government seeks views on how it can strengthen its support for onshore wind, seen as essential to meeting Scotland's net zero commitment. See consult.gov.scot/energy-and-climate-change-directorate/onshore-wind-policy-statement-refresh-2021/

Respond by 21 January.

numbered clauses and was signed and dated, might be expected to show testamentary intention to change the deed. It is not unusual for a client contemplating updating an existing will to write on their copy the changes they would like to make. It is, however, perhaps less likely that they would sign it. If they do sign it and it is not obviously a communication to another person, it is hard to see a purpose other than to attempt to imbue the document with legal effect. This decision suggests that the operative clause of any informal writing needs to denote its purpose explicitly in order to prove the writer's testamentary intention to alter the terms of an existing probative will.

Practice points

A person may instruct a solicitor to make a will and then make their own subsequent alterations or additions by informal writing, whether or not an "informal writings clause" was included in the will (Barr, Biggar, Dalgleish and Stevens, *Drafting Wills in Scotland* (2nd ed, Tottel Publishing, 2009), p 49). The inclusion of such clauses is common and there remains a place for them where, for example, a testator wishes to leave lists of various items they would like to bequeath to different people.

If an informal writings clause is to be included in a will, it is good practice to explain to a client how they should go about preparing such a writing, or perhaps even to offer to prepare it for them. It is also very important to suggest that it is stored with the will. It should be emphasised that any major changes to a will ought to be dealt with not by an informal writing but by either a codicil or a new will. J

Scottish Solicitors' Discipline Tribunal

WWW.SSDT.ORG.UK

Steven Archibald Murray

A complaint was made by the Council of the Law Society of Scotland against Steven Archibald Murray, The MMFW Partnership, Glasgow. The Tribunal found the respondent guilty of professional misconduct, *singly* in respect that (a) between 1 January 2014 and 17 July 2015 he unduly delayed in obtaining confirmation in the estate of the late RW; (b) between 8 December 2015 and 12 July 2016 he unduly delayed and/or failed to implement timeously a mandate sent by the secondary complainer's new agents seeking all papers and documents in relation to both the trust and the executry, despite repeated requests from those agents; and (c) he failed to comply with his responsibilities as client relations manager by failing to send a response to the secondary complainer in relation to her letter of complaint dated 10 February 2017; and *in cumulo* in respect that (a) between 1 January 2014 and 8 December 2015 he failed to exercise the appropriate level of skill required to deal with the administration of the said estate in that he incorrectly advised the secondary complainer that the late RW's share of the trust capital should be excluded from the application for confirmation and thereafter submitted an application for confirmation excluding said capital, whereas a capital sum of approximately £90,000 should have been included thus bringing the whole value of the estate above the threshold for inheritance tax purposes; and (b) between 1 January 2014 and 8 December 2015, he failed to exercise the appropriate level of skill required to deal with the administration of the said estate in that he incorrectly paid the late RW's share of the income from the trust to the secondary complainer's aunt, whereas said share of the trust income should have been paid to the late RW's children.

The Tribunal censured the respondent and fined him £1,000. The Tribunal accepted that there was some overlap with a previous complaint dealt with by the Tribunal in 2018. The respondent appeared to have taken significant steps to address the issues raised, had cooperated fully in the proceedings and had already made a significant payment to the secondary complainer. He had no other pending disciplinary matters. The Tribunal declined to award compensation to the secondary complainer in this case.

Leon Kondol

A complaint was made by the Council of the Law Society of Scotland against Leon Kondol, McBride Kondol & Co, Glasgow. The Tribunal found the respondent guilty of professional misconduct in respect that he provided to his client, and allowed him to retain, Crown witness statements and an independent forensic physician's report, all containing highly sensitive information, contrary to rules B1.2 and B1.14.1 of the Society's Practice Rules 2011 and articles 11 and 12 of the Code of Conduct for Criminal Work. The Tribunal censured the respondent and fined him £2,000.

The respondent was instructed in a solemn criminal matter by a client (the secondary complainer). His client was charged with, and eventually convicted of, various sexual offences committed against members of his family and one other individual. During the period of instruction, the respondent provided to the secondary complainer a number of police witness statements and a defence expert report. These documents contained highly sensitive material which included personal information relating to the witnesses and details of the alleged criminal conduct. The respondent's conduct lacked integrity and constituted professional misconduct. The Tribunal declined to make an award of compensation to the respondent's client, the secondary complainer.

Stephen Kennedy (s 42ZA appeal)

An appeal was made under s 42ZA(10) of the Solicitors (Scotland) Act 1980 by Laura Hudson, Camden South, New South Wales 2570, Australia against the determination by the Council of the Law Society of Scotland dated 11 February 2021 not to uphold a complaint of unsatisfactory professional conduct made by the appellant against Stephen Kennedy, McIntyre & Co, Fort William (the second respondent). The appeal was defended only by the first respondents.

The appeal related to two heads of complaint. In relation to the first head, the Tribunal quashed the determination of the first respondents and upheld the complaint. In relation to the second head of complaint, the Tribunal confirmed the determination of the first respondents. The Tribunal directed the second respondent to pay compensation of £500 to the appellant.

The first head of complaint related to a breach of confidentiality to a prospective client in terms of rule B1.6 of the 2011 Practice Rules. The Tribunal was concerned that at no stage did the Professional Conduct Subcommittee refer to the appellant as a prospective client. Furthermore, the only discussion in its decision referring to confidentiality related to the question of the confidentiality or security of the firm's portal. The Tribunal concluded that, on a plain reading of the decision, it was impossible to draw an inference that the committee had considered the duty of confidentiality owed to the appellant as a prospective client either under rule B1.6 or at common law. The Tribunal was satisfied that this amounted to an error of fact and law and entitled it to reconsider the complaint. The Tribunal was satisfied that the facts disclosed that the second respondent had breached his duty of confidentiality to the appellant by writing to the subject of her concerns without her instructions to do so. The Tribunal considered that the conduct had the potential to damage the reputation of the profession. The conduct would not reasonably be expected of a competent and reputable solicitor. The test for unsatisfactory conduct was met. The Tribunal therefore quashed the determination of the Professional Conduct Subcommittee in relation to this head of complaint and upheld the appeal.

The second head of complaint related to the standard of communication of the second respondent. The Tribunal found no basis to interfere with the Professional Conduct Subcommittee's decision.

Google off the hook

The Supreme Court decision in *Lloyd v Google* is a setback for those hoping to bring representative actions relating to alleged data breaches, but change could still be in the pipeline

Data protection

ROSS NICOL, PARTNER, AND MEGAN CRAIG, TRAINEE SOLICITOR, DENTONS UK & MIDDLE EAST LLP

In the much anticipated Supreme Court decision *Lloyd v Google* [2021] UKSC 50, it was held that Richard Lloyd, the former director of consumer rights group Which?, was not entitled to bring proceedings against Google on behalf of 4.4 million Apple iPhone users resident in England & Wales. The UK cyber and class action communities had been waiting for this decision as, if Lloyd had succeeded, it could have opened the floodgates for more mass action claims against tech firms for data breaches.

As it stands, the decision is big relief for Big Tech. However, it does leave consumers at a bit of a loss when it comes to having a viable route to compensation for breaches of their privacy rights. This article will discuss the decision and comment on what it means for Big Tech and consumers.

Background to the appeal

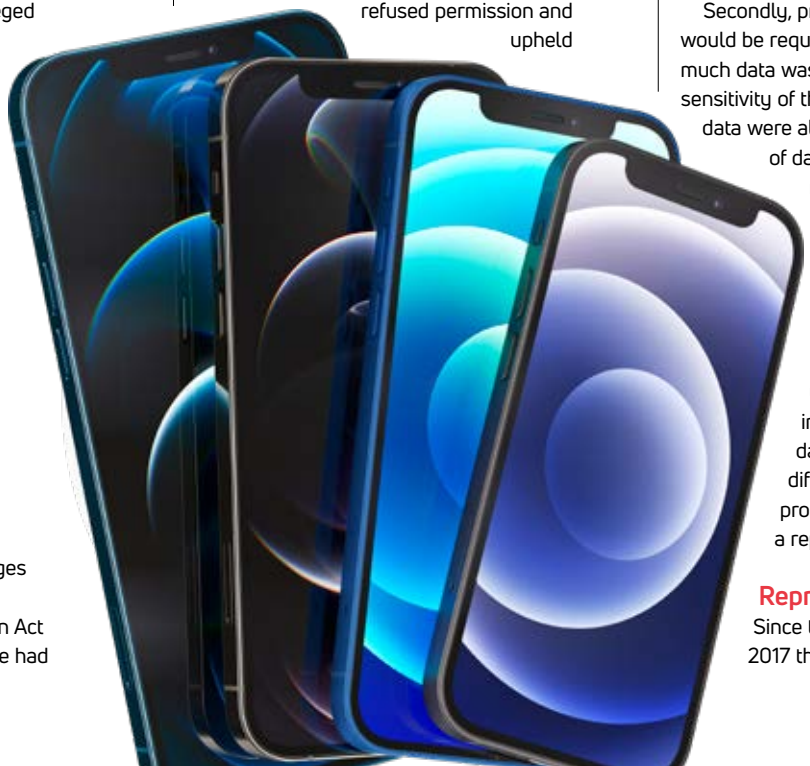
In this landmark action for data breach claims, Lloyd alleged that between 2011 and 2012 Google had unlawfully tracked the users' internet activity without their consent in breach of data protection laws. The alleged breach occurred as a result of a workaround Google developed to bypass Safari's block on all third party cookies. The alleged workaround worked by placing their "DoubleClick Ad" cookies on a user's device if users visited a website with content from Google's "DoubleClick Ad" domain. The data collected on health, race, ethnicity, sexuality and finance were allegedly used for commercial purposes, enabling advertisers to target specific groups of users based on their browsing history.

In 2017, Lloyd issued a damages claim on behalf of iPhone users under s 13 of the Data Protection Act 1998 ("DPA"), stating that Google had breached its duty as a data controller under s 4(4) of the DPA. The fact that this was brought under the data protection regime preceding the Data Protection Act 2018 and the UK GDPR is commented on below.

Lloyd sought to bring a "representative action", which allows a claim to be brought by one or more persons as representatives of others who have the "same interest" in the claim, in terms of rule 19.6 of the Civil Procedure Rules. The key issue to be highlighted here is that Lloyd claimed it would not be necessary to establish the individual circumstances of each person represented by the action. Instead, he hoped that a uniform sum of damages could be awarded for each person.

Before Lloyd could serve the claim on Google he needed permission from the court. This is because Google is a Delaware corporation and therefore Lloyd was outside its jurisdiction. Unsurprisingly, Google opposed this application on two grounds: first, that under the DPA damages cannot be awarded without proof that a breach of the requirements of the Act caused an individual to suffer financial damages or distress; and secondly, the claim was not suitable to proceed as a representative action.

The decision on whether Lloyd could serve the claim escalated through the English court system. The High Court initially refused permission and upheld Google's grounds of opposition, but the Court of Appeal overturned this and allowed the action to proceed as a representative action, also holding that damages for loss of control were recoverable even if financial loss or distress was not shown.



Nature of "damage"

On 10 November 2021, the Supreme Court had the final say. The unanimous judgment restored the High Court's decision to refuse permission to serve the proceedings on Google. Lord Leggatt gave two reasons for the Supreme Court's conclusion.

First, and perhaps most crucial if we think back to Lloyd's claim, compensation can only be awarded in terms of s 13 of the DPA where it is established that an individual has suffered "damage", meaning either financial loss or distress. Lloyd's position that the DPA allowed for compensation on the basis of non-trivial contravention of the obligations of the DPA was incorrect, as some form of damage had to be established and evidenced. Lord Leggatt found no basis in the DPA for Lloyd's claim that it was sufficient for a claimant to allege a "loss of control" over their personal data. The argument which permitted the recovery of damages on the same grounds as claims for "misuse of private information" was also rejected.

Secondly, proof of individual circumstances would be required. Questions relating to how much data was tracked and for how long, the sensitivity of the data, and the use made of the data were all relevant in the assessment of damages. These questions could not be answered on behalf of the millions of users in this representative action.

The result of these two conclusions was that it was not possible to demonstrate that the 4 million affected iPhone users all shared "the same interest". Instead, each affected data subject would have suffered different damage. As such, the proceedings could not be brought as a representative action.

Representative actions

Since this case began its journey in 2017 the landscape of data protection

has changed much, with the Data Protection Act 1998 being replaced by the UK GDPR and the Data Protection Act 2018. That being said, the judgment itself is of significance to the interpretation and development of new data protection legislation. Whether or not the wording differences between old and new would have given a different decision is not clear. It is clear from the decision in this case that separate proceedings to assess damages would have been the necessary route to take, which would normally be uneconomical. However, the judgment did reserve opinion on whether a claim could be brought that would permit some compensation to be awarded through a representative action.

The Supreme Court's decision in this case has clear knock-on effects for representative actions and group litigation. When the High Court's refusal was initially overturned by the Court of Appeal, there was much speculation on the data breach claims that might come forward. However, it is expected that many of these claims will now not come to light following the Supreme Court's decision. It is assumed that an effect of the ruling will be to reduce the prospects of success for class action-style compensation claims here in the UK, which will be welcome news for data controllers. The judgment echoes the recent Court of Appeal decision in *Jalla v Shell International Trading & Shipping Co Ltd* [2021] EWCA Civ 1389, which demonstrated the strict interpretation taken by the English courts to the requirement that the relevant claimants have "the same interest in a claim".

The Supreme Court decision is a win for data controllers who have been fearful of an onslaught of mass action claims following in the shadow of the Court of Appeal decision. However, the risk of "opt-out" style collective proceedings has not completely gone away. These can be introduced on a sector-by-sector basis. Currently, the only example we have in the UK are those which relate to breaches of competition law; however questions have been raised as to whether similar actions could be applicable to data protection. The currently ongoing review of the UK GDPR may also provide the opportunity to introduce them.

Although the risk of collective data protection actions has not gone away, the immediate threat to data controllers has subsided in the wake of this Supreme Court ruling.

Beautifully presented tedium

The artistry of those who produced the beautifully handwritten deeds of the past deserves to be preserved, however unexciting the deeds themselves

Property

MEREDITH GRAHAM SYKES

More seasoned practitioners may recall the rigmarole of pre-land registration title noting, with the sometimes unenviable task of ploughing through mouldy old dispositions, contracts of ground annual and instruments of sasine (perhaps faded xerox copies). Thankfully, this tedium is largely a thing of the past (isn't the new streamlined system wonderful?).

In many cases, however, some marvellous examples of original handwritten pre-registration deeds were to be discovered in title bundles, many of which have now been lost. During my title noting exercises, I have retained some very fine examples of penmanship notwithstanding their mindnumbingly boring content.

In the early 20th century, it became common practice for such deeds to be typed ("thank God", some may say), but many of the clerks employed to write these painstakingly reproduced parchment deeds were true artists. Today, conveyancers need only press a few buttons to create what is required, but one can only marvel at those bygone masterpieces produced in handwritten ink.

Set the scene: old legal office; rays of early sun highlighting particles of unsettled dust as the legal scribe efficiently draws nib over thick parchment; the aroma of old books, tobacco and Indian ink permeates. An ill tempered Dickensian master barks instruction not to smudge, as he glances at his gold timepiece before replacing it in the pocket of a black waistcoat covering a large stomach...

The most beautifully drafted deed I ever encountered was actually an English conveyance which I was fortunate enough to acquire in the mid-90s at an antique coffee morning in Grasmere village in the Lake District. One cannot fail to appreciate the skill involved in the creation of such art, which only years of dedication and experience could produce (see image). The style of lettering, the wax seals and the annotated coloured plan all conspire to create something more than its intended legal function, that of facilitating the creation of legal entitlement. Doubtless, such skill would have been taken for granted at the time, and so today, we should celebrate the work of these assistants.

The keyboard will soon reduce the handwriting implement to a historical curio. The fountain pen has already fallen out of favour – my grandson was astonished to discover the concept of a pen having its own reservoir of ink that could be drawn from a bottle. After gifting him one from my own collection, he sat enthralled for hours with his newfound activity.

In 1911, Kyugoro Sakata, a respected engineer from Hiroshima, Japan, was introduced for the very first time to a fountain pen as demonstrated by a British sailor who was visiting Japan at the time. He was so impressed by the design and function that he made the decision to devote his life to the development of the fountain pen. To this day, the company he founded (and named Sailor as a nod to the person who first introduced him to fountain pens) produces the finest nib in the world, the Sailor Naginata Cross Point Emperor Nib (see signature below – don't ask the price...).

While not wishing to return to the ways of pre-registration, non-computerised conveyancing, we shouldn't forget the artistry of those who created such beautiful documents, a great many of which continue to be destroyed. For those of us who remember the pain of scrutinising the contents of pre-land certificate material to ascertain whether there was anything "unduly onerous or burdensome", let us spare a thought for the artisans who had to replicate such tedium – they certainly made it easier to look at than to evaluate!

Lawyers in uniform

In this month's in-house interview, a Captain in the Army Legal Services tells of her life as part of the Armed Forces, and what those joining ALS can expect

In-house

CAPTAIN KIRSTY MATTHEWS,
ARMY LEGAL SERVICES

Can you give us a sense of the role of a lawyer within ALS? And what it may involve on any given day?

As with most areas of society, the law pervades the Army's operations, which engage a myriad legal issues on a daily, indeed hourly basis – whether that be employment and management of soldiers or conduct of military operations. There really is no such thing as a typical day: there are a number of different areas of employment each with different demands at different ranks. Every ALS officer is expected during their career to practise across three functional areas: prosecutions, advisory and operational law. Officers are assigned to posts, for two years at a time, and can move regularly and to gain wide experience. Whatever the role, we aim to provide first-class legal advice in support of the Army in barracks and on operations.

In terms of prosecutions, the Service Prosecuting Authority (SPA) is similar in function to the Crown Prosecution Service in England. It is responsible for prosecuting Service and criminal offences before the Service courts, which include, the Court Martial, the Court Martial Appeal Court, the Service Civilian Court and the Summary Appeal Court. These courts hear prosecutions of persons subject to Service law and civilians subject to Service discipline only; any issues involving concurrent jurisdiction between the Army and UK civilian authorities will normally be determined by consultation between the parties in accordance with the relevant rules.

Cases are referred to the SPA either by a suspect's commanding officer or the Service Police. Each case is considered by an ALS officer who will be responsible for deciding whether to direct for trial, appropriate charges, and preparing and presenting the case in the Service court.

ALS officers advocate in the Service courts regardless of whether they are solicitors, barristers or advocates. Lawyers qualified in Scotland are able to prosecute in the Service courts and do not need to retrain for England & Wales. ALS has many Scottish lawyers!

In the advisory branch, ALS officers advise the chain of command on a range of issues including Army policy, operational, criminal and Service law. Duties range from providing guidance, to training commanders and soldiers in all aspects of Service discipline. As for operational law, wherever in the world the Army goes, an ALS officer will likely go with them. They could be advising commanders on operational law before decisions are made, training troops on the ground on the law of armed conflict, or even overseeing captured persons and advising on human rights.

Given the potential breadth of activity even within the business area to which one may be assigned, what external advice and interaction do you have?

In addition to uniformed lawyers, there are civilian MOD lawyers with whom we work closely. In addition, we enjoy excellent working relationships with other Government departments and agencies such as the Foreign Commonwealth & Development Office (FCDO), Security Services and their legal teams, and with other armies around the world. There are opportunities to gain experience in these areas, including exchange programmes with other armed forces. For example, a few of my colleagues have had the chance to be part of the legal team in the Australian Army for 12 months.

What training and support is given to potential ALS officers?

Every person recruited will commission as an ALS officer at the rank of Captain on a short service commission (currently 12 years with a three year probation period.) They will be supported from the date they make their application by Capita and then begin their training and development from the date they commission.

Each ALS officer spends nine months training before going into their first legal role. During their first two weeks, they conduct initial training and administration at the Directorate of Army Legal Services. They then attend the Professionally Qualified Officers' course at Royal Military Academy Sandhurst for nine weeks, where they learn basic military skills including weapons handling, study infantry tactics and take on a range of tasks designed to develop their ability to lead and command. They

Who can apply?

A specialist all-officer branch of the Army's Adjutant General's Corps (AGC), the ALS is comprised of professionally qualified solicitors, barristers and advocates and runs three recruitment cycles a year (January, May, and September).

Candidates can still apply if they are a trainee solicitor or pupil barrister/advocate, but will need to be fully qualified at the point of intake. All legal backgrounds are welcome. ALS will provide bespoke legal training to all new officers. The upper age limit is generally 32, but this can be waived in exceptional circumstances, e.g. previous military experience or transferable legal experience in areas such as criminal, employment or international humanitarian law.

For those who meet ALS's criteria and are interested in applying as part of the next intake, you can forward a copy of your CV and a covering letter to Rinu.Sangha100@mod.gov.uk before 28 January 2022. The next CV deadline after this is 27 May 2022.

then undertake six weeks' legal training at the Directorate of Army Legal Services, including one week at Warminster on operational law and one week's adventure training (usually skiing, hiking or rock climbing).

On completion of their legal training, they spend three months on attachment, usually with a combat arm unit such as an infantry battalion. This is designed to give them first hand experience of life as an Army officer and an understanding of the military ethos and function of an Army unit. Previous attachments have been in Brunei, Cyprus, Germany and the Falklands.

In addition to their initial training, ALS officers receive on the job training at their respective postings and are required to attend progressive courses. For example, there are operational law courses conducted at UK universities and in Italy, Germany and the US. There is also opportunity to undertake a part-time funded LLM, and obtain Higher Rights of Advocacy (Criminal) with various providers.

Does an ALS recruit have to do physical training, and is this like any other specialist within the Army?

Yes. ALS officers are expected to maintain a minimum level of fitness. Fitness is assessed bi-annually. The assessment includes a medicine ball throw, a 100m shuttle sprint, a deadlift, pull-ups and a 2km timed run. The Army encourages its people to exercise, and almost every unit offers free gym access and gym classes, so the fitness assessment is absolutely passable.

Would you ever be expected to go to the front line or an active war zone?

Yes, as part of our operational role an ALS officer may find themselves advising in a war zone or other dangerous area of the world (see point above about advising on the ground as regards law of armed conflict and international human rights law). For example, my colleague Major Amelia Morrissey was recently deployed on a UN led mission in Mali as the Army's legal adviser in the operational sphere.

Within ALS, what is the structure as regards progression? Are there opportunities to do secondments in different areas to those to which you have been assigned?

There is a hierarchical structure ranging from Captain (entry level for ALS officers) to Major General (highest rank held by our Director), with promotion based on a combination of time served in ALS and performance. Most Captains will promote to Major after five or six years in ALS.

Secondments are very much subject to the needs of the Service. I have been seconded twice in support of the Ministry of Defence's domestic response (Op RESCRIPT – four months) and international response (Op BROADSHARE – two months) to COVID-19, which gave me an insight into the workings of the Department of Health & Social Care and Ministry of Defence Main Building respectively.

Capt Matthews at Sandhurst during Phase 1 training

What do you enjoy most about your job? And least?

I enjoy the variety and the opportunities for travel and self-development. I found my job as a civilian solicitor quite monotonous, and wanted a career that could offer me variety and excitement. You tend to be pigeonholed in civvy street with the expectation that you will focus on one area of law. In ALS, you can practise in the three functional areas and that has always kept me interested and motivated.

ALS invest in your professional development from the outset and train you so you can provide competent legal advice in each of these areas.

I also enjoy the financial and other benefits of being an Army officer, and the opportunity to participate in adventure training and sports as part of my job without affecting my leave allowance of 38 days. The starting salary of a first year Captain is £42,850 with incremental increases thereafter. In addition, there is a non-contributory pension, medical, dental and health benefits, and heavily subsidised accommodation with little or no commute. At present I am living in central London for a very reasonable cost. Other locations you could be posted as a Captain include York, and various locations in the South East and London.

The thing I enjoy least is that it is difficult to plan ahead, because ALS must always be adaptable to events in the UK and overseas and ultimately the needs of the Service.

What are the wider themes the Army is grappling with at the moment which will likely impact on your work?

The Army is continually reacting to the circumstances of the day, and its legal team need to keep pace with these. We are currently focused on the Integrated Review and Future Soldier Implementation, and how best to ensure delivery of legal advice to the future Army as it is optimised to counter the increasingly wide range of threats to the UK, its people and its interests. We need to be able to advise on activity below the threshold of armed conflict, use of artificial intelligence and cyber activity. We are engaged in matters such as conduct and behaviour at home and overseas, claims against the MOD, and the Army response to the recent inquiry in relation to Women in Service to ensure that the Army is a truly inclusive employer.

What five words would you use to describe yesterday for you?

Interesting. Varied. Worthwhile. Challenging. Energetic.

What advice would you give that you wish you had known when you were starting out?

Be patient, and do more exercise! I practised private client and civil litigation as a civilian practitioner and of course it takes time to retrain and learn a new area of law, but ALS are on hand to support you in that. As to exercise, the fitter you are when you commission, the easier you will find the physical aspects of the Professionally Qualified Course at Sandhurst, so I thoroughly recommend getting as fit as you can.

Any last thoughts for those contemplating this career?

The juice is definitely worth the squeeze. It's the only role I've ever had that develops you as a person, not just a professional, and there are so many opportunities that aren't available as a civilian within and outside the legal space. In the words of Tony Robbins, "Why live an ordinary life, when you can live an extraordinary one?"

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Graham Watson
(Earlsferry)

McGiffen named as Society chief

Diane McGiffen has been appointed as the next chief executive of the Law Society of Scotland.

She joins on 5 January from Audit Scotland, where she has worked in senior roles since it was formed in 2000, from 2010 as chief operating officer. She holds master's degrees from the University of Edinburgh (social and public policy) and the University of Glasgow (political science and government), and is studying for a doctorate from the Cranfield School of Management

She succeeds Lorna Jack, who leaves the Society this month after 13 years as chief executive.

President Ken Dalling commented: "I am delighted that Diane will become our new chief executive. She brings a wealth of experience from her time at Audit Scotland where she led on strategy, corporate plans, governance, risk and performance."

He added: "Of course, I would also like to thank our outgoing CEO, Lorna Jack, for her outstanding contribution to the Society over the last 13 years, which was rightly recognised at this year's Law Awards. She has led, inspired and transformed the organisation into one that is truly world leading."

Stephen Boyle, Auditor General for Scotland, said: "Diane leaves a tremendous legacy at Audit Scotland. Over 20 years from the early days of devolution to today, she has been integral to shaping our standards, values and practices as we have developed and delivered robust, independent public audit on behalf of the people of Scotland. We wish her all the best in her new role."

Fewer complaints in hand at SLCC

The number of complaints made to the Scottish Legal Complaints Commission was little changed in 2020-21, but fewer were accepted for investigation, according to its annual report.

In the year to 30 June 2021, 1,054 new complaints were received (1,033 concerning solicitors), up slightly from 1,036 in 2019-20, but 443 were accepted for investigation compared with 553 the previous year, and the number outstanding at year end was down from 436 to 388.

As for disposals, 196 were judged to be premature, 180 were rejected at eligibility stage, and a further 283 closed before a decision to accept or reject. Service complaints accepted for investigation totalled 271 (down from 337), conduct complaints 93 (down from 155), and hybrid complaints 79 (down from 94).

More complaints were resolved by mediation (up from 25 to 66, a success rate of 75% for mediation meetings), and a mediator assisted in a further 16 settlements (down from 20). A further 185 cases were settled during or after investigation stage (down from 201), and 131 went to determination, at which 10 were upheld in whole (down from 14), 47 in part (down from 72), and 74 not at all (down from 112).

In its accounts the SLCC reports a surplus of £533,108, largely due to a combination of higher than expected complaint levy income and lower than expected staffing costs.

Chief executive Neil Stevenson (pictured) said the SLCC had "used an agile approach to rapidly review our strategy and options around people, technology, property, and changing customer need and expectation".

Chair Jim Martin added that at the end of the year, the SLCC had been able to reduce the levy for all lawyers, and "While we need to assess incoming complaint numbers at the end of this calendar year, we are optimistic there may be further savings to pass on to at least some groups".

• The SLCC is now taking action where legal firms ignore their statutory duty to respond to its requests for client files. A contempt of court hearing is to take place over a solicitor who failed to appear when ordered; further cases are underway.

Hearings proposals premature: Society

The Scottish Civil Justice Council's consultation on rules covering the mode of attendance at civil court hearings is premature and without a solid evidence base to inform its proposals, according to the Law Society of Scotland.

Responding to the consultation, which proposes remote hearings as the default for most categories of civil business, the Society calls for a pilot scheme with a limited number of live proofs, evidential hearings and appeals in court buildings across Scotland over a 12 month period. The results would provide insight on how live proofs could be safely accommodated and identify any practical or safety issues to be addressed. The SCJC would then have a reasonable evidence base on which to propose rules and move into consultation.

Iain Nicol, convener of the Society's Civil Justice Committee, commented: "We recognise that the courts should not necessarily revert to how they operated pre-COVID. Virtual hearings have worked well for procedural business and should remain the default position going forward.

"These rules however, take a blanket approach to a nuanced situation and have been proposed in response to a transitional phase. The Scottish Government consultation on COVID recovery recognises that it is too early to make permanent changes and instead posits an extension to emergency legislation. We are therefore at a loss to understand why a similar approach would not be taken here.

"Furthermore, the rules do not take into account the views of the profession, who have expressed in no uncertain terms the desire to return to live hearings when it is safe to do so."

The full response is in the research and policy section of the Society's website.

PUBLIC POLICY HIGHLIGHTS

The Society's policy committees analyse and respond to proposed changes in the law. This month's article focuses on the response to the Scottish Government's consultation on supporting Scotland's recovery from COVID. For more information see the Society's research and policy web pages.

The Public Policy Committee considered four broad themes which set the context for its comments on coronavirus legislation applicable in Scotland and the wider UK: parliamentary scrutiny and the rule of law, respect for human rights, devolution, and other public health legislation.

Parliamentary scrutiny and rule of law

The committee noted that parliamentary scrutiny of the (UK) Coronavirus Act 2020 was limited. However, it conceded that the nature of COVID-19 and the threat it posed to the community at large proved so devastating that it was right that Parliament's response matched the level of threat. As circumstances have changed, it will be important that where future law is contemplated, there will be adequate pre-legislative consultation which takes case law into account. It is also essential that any future legislation and guidance are explained to the public in clear, unambiguous terms to avoid confusion about their effect.

Respect for human rights

The committee welcomed the publication along with the UK Coronavirus Bill of the Human Rights Memorandum from the Department for Health & Social Care. This dealt comprehensively with ECHR compliance. Similar respect for human rights was shown in the memorandums which accompanied the Scottish bills. Where the legislation engaged the ECHR, the rights engaged were qualified: they were not absolute but to be balanced with the wider interests of public safety and the protection of individual and community health.

The response encouraged public authorities which undertake coronavirus functions to ensure compliance with Convention rights, as required by the Human Rights Act 1998. The committee expected that human rights and the rule of law would be fully respected when applying the legislation. It noted that the Society had consistently highlighted provisions which it considered might have breached human rights. It is crucially important, especially in times of pandemic emergency which impact on the rights and freedoms of all citizens, that the law is applied equally and the human rights of all are respected.

Devolution

As the committee noted, the Coronavirus Act 2020 respected the devolution arrangements and the convention, recognised in the Scotland Act 1998, s 28(8), that the UK Parliament will not normally legislate with regard to matters within the legislative competence of the Scottish Parliament without the latter's consent. Many of the matters to which the 2020 Act relates are within the legislative competence of the Scottish Parliament or affect the executive competence of the Scottish ministers.

Public health legislation

The committee recommended a review of the law relating to health emergencies. It noted that legislation already exists to deal with circumstances related to pandemic disease: the Civil Contingencies Act 2004 and the Public Health (Control of Disease) Act 1984.

It highlighted that the preference of Government to employ either the coronavirus-specific legislation or Public Health Acts rather than Civil Contingencies legislation raised questions about the legislative framework which applies across the UK and its fitness to deal with future public health crises. Once there is scope for a parliamentary inquiry into the fitness of the legislative (and policy) framework, the committee envisages this being a priority for all administrations and legislatures across the UK.

In this connection, the committee suggested that the four Governments consider collaborating to create a Standing Advisory Committee on Pandemics which, under an independent chair, would comprise medical, scientific, educational, research and other experts from the four nations along with ministerial members. This body would keep under review developments in virology and epidemiology, oversee preparation for viral events including supply chains, stockpiling of medicines, development of vaccines, medical equipment and PPE, training of medical and nursing staff, preparation of educational tools to inform the public and general preparedness for future pandemics.

The committee also suggested a parliamentary group bringing together all the UK legislatures to share experience, best practice and knowledge about legislating in the pandemic, using as a model the inter-parliamentary group formed to consider Brexit.

Subordinate legislation

There is a considerable amount of coronavirus subordinate legislation across the UK: 403 UK, 208 Scottish, 265 Northern Irish and 176 Welsh statutory instruments or rules at the time of writing, covering many areas of law. It is therefore difficult for legislators, advisers, and those subject to the regulations to be clear about the law which applies. It would be helpful if the regulations could be consolidated regularly.

Finally, the committee stressed that the public health situation at the end of March 2022 remains unclear. It suggested that measures should continue beyond that stage, but not be made permanent. Equally, if there were to be a significant reduction in the risk to public health, it might be proportionate to discontinue those measures.

Council by-election opens

Due to the resignation of Council member Waqqas Ashraf, there is an opportunity for solicitors in the constituency of Greenock, Kilmarnock & Paisley to stand for Council. Nominations close at 12 noon on 20 December. Any resulting election will take place from 22 December to 10 January 2022. Solicitors who have a place of business within the constituency on the date six weeks before the opening of the election period are eligible for nomination and to vote. Details on the Society's website at www.lawscot.org.uk/join-our-council/

OBITUARIES

JAMES GORDON NICOL, Gourock
On 2 September 2021, James Gordon Nicol, formerly partner of the firms Lyons Laing, Paisley, W G Leechman & Co, Glasgow and Gordon Nicol, Greenock, and latterly employed with Paisley Defence Lawyers, Paisley. AGE: 67 ADMITTED: 1978

RONALD RANKIN THOM
(retired solicitor), Perth
On 9 November 2021, Ronald Rankin Thom, formerly partner of the firms J & J Miller and Miller Sneddon, Perth and latterly consultant of the firm Miller Hendry, Perth. AGE: 93 ADMITTED: 1952

Legal services regulation reform – have your say

The Society writes: November's Journal looked at the options presented in the Scottish Government consultation on legal services regulation reform, and the opportunities and risks these could present to the future regulation of legal services in Scotland. Individual members and firms are encouraged to submit their responses to the consultation to ensure their views can be considered.

The last significant change to the way solicitors are regulated was in 2007, when the Legal Profession and Legal Aid (Scotland) Act saw the creation of the Scottish Legal Complaints Commission.

The legislation that may follow this current consultation could be another, potentially much more radical, change to shape how legal services are regulated in Scotland. It is vital for our members to have a say in their future regulation.

We have long pressed for new, enabling legislation which would bring much needed improvements and a modern regulatory framework that is fit for purpose. A major concern about the current system is the rigid, bureaucratic and slow complaints process – something we are already working to improve with the SLCC, but we can only get so far because of the limitations of the existing legislation.

However, it is important to bear in mind that regulation is more than the complaints system, important as that is for consumer protection. It is about the route to qualification and admission, the high professional standards, the financial compliance and AML safeguards in place to protect solicitors and their clients – all of which have earned extremely high trust and satisfaction levels among the public.

How lawyers are regulated is not just of significance to the way solicitors carry out their work on behalf of their clients every day, it is key to the rule of law and the operation of a free and fair society.

There is no need to rip up the current structure which has served Scotland well. The focus must be not on *who* regulates but *how* effective regulation is carried out. We need reform to the processes, rather than fundamentally new expensive structures.

The Government is of course listening to the consumer voice, but it also recognises the high international reputation of the profession and the value that the Scottish legal profession brings to the economy.

It's important therefore that as the professionals providing legal advice and services to individuals, business and organisations across Scotland and beyond, solicitors participate in shaping the future of regulation.

The Government consultation, which closes on 24 December 2021, represents an important opportunity to have your voice heard.

Details on how to submit a response can be found at www.gov.scot/publications/legal-services-regulation-reform-scotland-consultation/
Find out more at www.lawscot.org/legalservicesreform

Public trust still high, poll finds

Nine out of 10 Scots who have sought advice from a Scottish solicitor in the last five years were happy with the service they received, while eight in 10 would recommend their solicitor to family and friends.

In independent polling carried out for the Law Society of Scotland by researchers Savanta ComRes, 84% of the adults interviewed also believe Scottish solicitors to be trustworthy, up from 81% in a similar survey in 2018.

President Ken Dalling described the finding as "a huge vote of confidence in the Scottish solicitor profession".

He commented: "Our members are expected to work to high professional standards and provide good service to their clients through some of the most important events in their lives.

"These new figures show how solicitors are doing exactly that, with over 90% of clients saying they were satisfied with the service they received. It is also encouraging to see overall levels of public trust in Scottish solicitors increasing yet further and from an already high level. The polling results provide clear evidence of the profession's excellent and well-deserved reputation."

The polling further found that just over half of all respondents, 51%, were not confident that they could afford a solicitor if they needed one.

The President observed: "We know that cost, or the perception of cost, can be a major barrier to people getting the legal services they need. This is why we have worked with firms and provided guidance on proactively publishing likely fees so clients have a clearer idea on how much they will need to pay. However, this new polling data shows how careful we all need to be when it comes to the costs of legal services. It is one of the reasons we are concerned at some of the regulatory reform options currently being considered by the Scottish Government, changes which risk increasing the costs on law firms and the prices which clients have to pay."

The full survey results are on the Society's website.

Whither goest thou?

The imperative to be strategic applies as much to our personal lives as to our businesses, says Stephen Gold

Looking at what makes a firm resilient, in last month's column, I quoted David Maister's statement of values. The first is: "We will make all decisions based on putting the clients' interest first, the firm's second and individuals' last. We do not accept people who fail to operate in this way." I went on to say that one of the hallmarks of resilient firms is that they go out of their way to look after their people. "Are these two statements consistent with one another?" asked ever-perceptive Mr Editor.

The answer is yes. I think what Maister means is that no business is sustainable if its people do not routinely put what is best for clients and the firm before their personal interest. Take a simple example: let's say, in a litigation, there is an early opportunity to settle. Settlement will net a hefty fee, and the firm could do with the cash, but it's clear that the offer falls short of what might be achieved with more time and effort. To recommend settlement in these circumstances would on one measure be in the firm's and individual solicitor's interest, but it would also be negligence and misconduct.

Or let's say it makes sense for the business as a whole to move valuable work from team A to team B. In these circumstances, everyone in team A is obliged ethically to cooperate, even though it causes them personal pain.

This rule is not quite universal: for example, nobody should be asked to sacrifice their health or their most precious relationships to the firm. There may be moments when we have to put our bodies on the line, but if they are a recurring feature, not the exception, it is time to move on, and for the firm to look hard at its culture.

Listen to your heart

This is not an academic scenario. Many join the profession full of hope, ambition and desire to do good, but end up disillusioned and burnt out. The usual suspects are long, unpredictable hours, dealing constantly with complex situations, and difficult people – whether adversaries intent on giving you a hard time, clients to whom you are at best indifferent, or colleagues with the collegiality and empathy of a brick. While all of these play a part, I think often there are subtle factors at play, which are more important.

Over the years in this column, I've emphasised the need to be strategic about how and where firms practise, to make thoughtful decisions about what kind of business they want to be and the clients they aspire to serve. It's equally important to take this approach to our careers. As a wise practitioner once said to me, "The firm has its agenda, one has one's own agenda, and the two are not necessarily the same". In the same way that it's folly for firms to do work just because "it keeps the lights on", it's vital that we make decisions about what we do and where, based on a thoughtful, honest appraisal of our personal strengths and weaknesses, what we want from our careers, and how we want to live our lives.

Of course we need to pay the bills, but our needs are also spiritual. We must feel that our lives have purpose, and that what we do has a value beyond the essentials of providing food and shelter. Indeed, it's never a bad idea to ask occasionally, "Do I want to be a lawyer at all?" The more we invest in our careers, the more we want to feel vindicated in our choices, and so we become resistant to the possibility of change. But the skills acquired practising law: analysis, research, exercising judgment, coping with complexity, negotiation, working under pressure and as part of a team, apply to countless other roles. "Always keep a hold of nurse, for fear of finding something worse", counselled Hilaire Belloc. We should never be afraid to let go and grasp new things, if that's what our heart tells us.

Thank you, and goodbye

This is the last Word of Gold. After almost nine years, I think the Society and its members deserve to hear a new voice. It's been a fantastic privilege to have this platform, and though I think it's the right time to exit, I will miss it. I'm sincerely thankful to the many people who have been so supportive of my meanderings. In particular, I want to express my deep gratitude to editor Peter Nicholson for all his support and friendship over the years, which I've appreciated probably more than he knows. He is an immensely accomplished professional, but more than that, a person of warmth, kindness and decency. The Journal is safe in his hands, and I wish both it and him, the highly successful future they both deserve.

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 trusted adviser to leading firms nationwide and internationally.
t: 07968 484232; w: www.stephengold.co.uk; twitter@thewordofgold

• The Journal is in turn grateful to Stephen for his loyal service, and his insights which we know have been appreciated by many. – Editor

Coaching: help in a fast changing world

Derek McIntyre explains how coaching – which should be clearly distinguished from mentoring – can benefit people at different stages of their career by helping them find the way to achieve personal goals

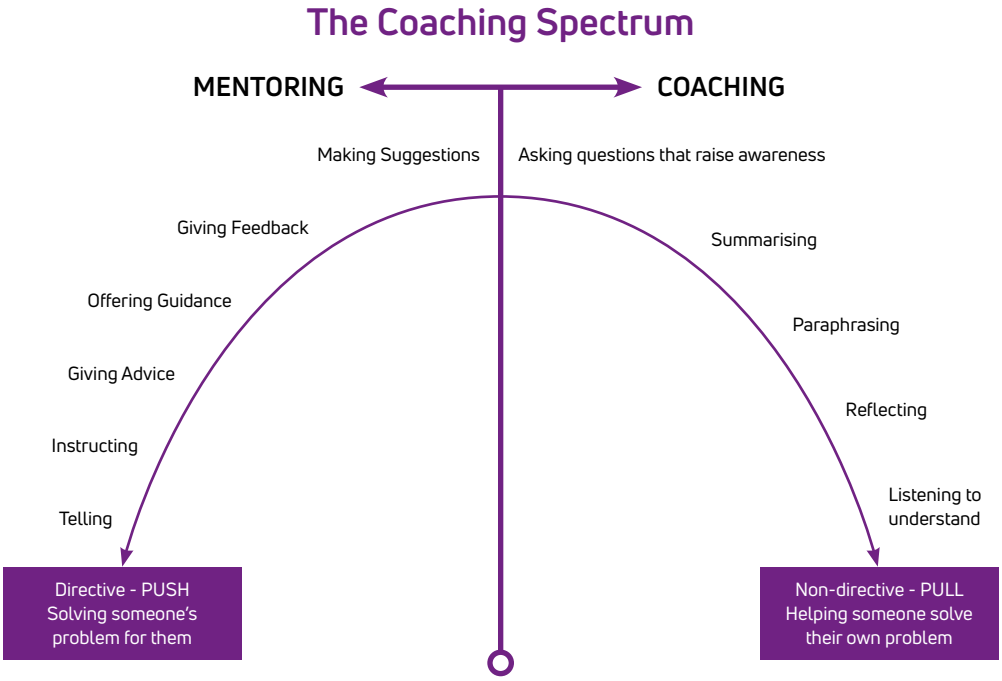
Having been coached twice in my career, I fully appreciate the benefits provided by a qualified coach. My first coaching experience was at an early stage in my career when I had lost direction and motivation, and the second time when I was about to take on a position on the board of the company I worked for. The positive outcomes, both for myself and therefore my ability to do my job better, and in the impact on those I interacted with, brought significant benefits in my career progression.

The world today, particularly for those in positions of leadership or new in their career, has never been more stressful. The speed of change is relentless; the expectations from those you serve are high, and are unlikely to diminish. How, therefore, do you as an individual keep on top of your game?

This is not about the functional aspect – legal, operations, finance, marketing, sales etc – but how you manage yourself. How do you look after your own wellbeing, and get the best from those you interact with? This is where the benefits of coaching come into their own.

Coaching helps people execute in the new reality. A qualified coach can work with an individual to ensure that they are functioning at their optimum.

Working with a coach offers an opportunity to spend productive time with a qualified person with no axe to grind, who will not judge, is totally impartial and confidential, and is ethically sound in their conduct. In this safe environment, the individual can calmly and clearly invest in themselves using the coach to reflect openly and clearly on the key goals and/or concerns they may face. That enables them, in turn, to work through these issues without being told what to do or when, but rather by sharing and then examining the issues in a manner that does not force a solution.



Coaching is not mentoring

There is often confusion around coaching and mentoring. One of the key myths about coaching is that a coach is there to give you the answers; that a coach will tell you what to do or to think; that a coach is a mentor.

The difference between the two is best illustrated in the diagram above, created by Myles Downey, founder of the School of Coaching.

It illustrates the key distinction that coaching *pulls out*, whereas mentoring *puts in*.

Timothy Gallwey, creator of the inner game coaching method, said: "Coaching is unlocking a person's potential to maximise their own performance. It is helping them to learn rather than teaching them."

Coaching has also been described as: "a facilitated, dialogue and reflective learning process that aims to grow the individual's (or team's) awareness, responsibility and choice (thinking and behavioural)".

A coach will work with their client and,

"Coaching helps people execute in the new reality. A qualified coach can work with an individual to ensure that they are functioning at their optimum"

through listening, asking relevant questions, positively challenging and helping the client to reflect, to think, perhaps using appropriate assessment tools, allow the client to work through the achievement of a goal they wish to attain. This can sometimes be a one-off session; at other times it can last over several sessions, allowing time to practise and gain insight from others where appropriate as to any changes they have noted.

Improvement through feedback

Even Bill Gates recognises the benefits of coaching: "Everyone needs a coach. It doesn't matter whether you're a basketball player, a tennis player, a gymnast, or a bridge player. We all need people who will give us feedback. That's how we improve."

So, if Bill Gates believes in coaching, who else might benefit from it? The list is endless, but some of the common reasons for coaching are: you want to become a better leader; you are questioning your career progression, feeling stuck in a groove; or you have been made aware of trait(s) that are holding you back in your career/life.

Some of the benefits to be gained are improvement in employee performance, becoming more self-aware and resilient, and a deeper personal awareness and of your impact on others. The kind of people who often welcome coaching are those who show a commitment to continuous learning and improvement, who can see high aspirations that are exciting and often lead to great things, and who sense possibilities in themselves but need some help to maximise these.

If any of the above resonates, the next stage is to find a suitable coach and to understand the process. I can only speak from my own way of working, but trust and confidence are key for both parties to get the best from each other. An important note is that a coach does not have to come from the same background, industry or culture as the client. In fact, in many cases it can help that they do not, as it can often prevent the temptation or expectation of mentoring, i.e. giving the answer – so do not dismiss someone who is "not like you" as a potential coach for that reason.

What to expect

Coaches have their favoured processes, but this is one possible sequence:

- The coach holds a brief (say 30 minute) phone call with the prospective client, to "break the ice". This helps to ease any nerves, answer basic questions and allow both sides to get to know a little about each other. It is *not* a coaching session. It primarily allows the client to ask questions and the coach to put them at their ease, explain about the process – the number and length of sessions, what is expected of both. After this, the potential client can say whether they wish to continue to the coaching session(s).
- With agreement from the client, the coach may ask for some additional information which is a little more specific. This will not bias their thinking as a coach, merely offer some insights that can then be used and referenced back to as the session(s) progress:
  - How do you think coaching might help you?
  - Why are you looking for coaching at this point?
  - What has prevented you achieving your goal in the past?
- Once all the above has been completed, the coach and client will agree dates and times for the first session, at which a deeper understanding of the goal or concern that the client has will be obtained. The sessions are driven by and for the client, but a frame of reference that is shared, if agreed, might cover:
  - checking where the client is presently: what their goal(s) is/are and what is priority to work on;
  - understanding any gaps between goal attainment and the present, and going deeper into this understanding;
  - clarifying the gaps and making sure the client is fully comfortable with the direction;
  - next, looking to the future and the potential options identified: being clear on these and choosing the best;
  - the identified options then need to be tested: what, if any, reservations are there, and how to test these;
  - with the future actions identified and tested, what steps are required: timescales are agreed.

It is important to emphasise that these steps do not happen in one session; and, to reiterate, the driver is the client. The coach is there to assist, to facilitate and to ensure that commitments from the client are met and that what are at times tough areas are recognised and worked through.

A better place

As I indicated at the beginning, having been coached twice myself the experience is eye-opening, helpful, often fun – and the end goal of emerging in a better place of understanding yourself, with a broader awareness of your capabilities and areas that may need to be recognised is amazing. As Sir John Whitmore states, the benefits of coaching are:

- improved performance and productivity;
- improved learning;
- more creative ideas;
- improved relationships;
- greater flexibility and adaptability to change;
- more effective communication.

Derek McIntyre
is director of Improve Associates Ltd, and a non-solicitor member of the Law Society of Scotland's Council

• Certification courses from the Law Society of Scotland now include "Essential Business and Leadership Skills", for which Derek McIntyre is one of the trainers

The **earlier** the better

When, and how, should claims and circumstances be intimated to Lockton? This article answers some frequently asked questions

Lockton, the appointed broker responsible for placing and managing the Master Policy, has received a number of queries from solicitors about how to intimate claims and circumstances. The following is a reprint of an article at Journal, September 2012, 40 which is essentially still valid, and is revised and updated here for convenience.

Given the tens of thousands of transactions undertaken by Scottish solicitors annually, it is reassuring that, even in today's challenging environment, there are comparatively few claims made against the profession. However, it is important to have an understanding of the claims notification process, including what and when to intimate.

What do I have to intimate to the Master Policy, and when?

In terms of the Policy, there is a requirement to advise the brokers "as soon as reasonably practical after becoming aware of circumstances which might reasonably be expected to produce a claim irrespective of the insured's views as to the validity of the claim or on receiving information of a claim".

Essentially that means that, to provide full protection to the firm, any claim or circumstance in which the firm might require the benefit of indemnity under the Policy – regardless of the firm's opinion on liability and regardless of the self-insured amount – should be promptly notified. Notification will be taken as a formal request for indemnity under the Master Policy, with the result that all the various terms and conditions will apply.

How should claims/circumstances be intimated? Is there any claim form I should use?

Intimations should be made to the brokers, Lockton, by letter or email. There is no claim form, and no particular prescribed manner of intimation, but insurers will need sight of any letter of claim, together with the firm's views on liability and quantum, if possible. It can be very helpful to set out some background to the situation, or to the transaction giving rise to the claim, in a memorandum by either the fee earner concerned or someone who has reviewed the file.

If no claim has been intimated – i.e. if the matter is being intimated as "circumstances which might give rise to a claim" – then it is helpful again to set out the background, provide some comments on liability and quantum, and explain why you consider that a claim might be made against the firm.

If a potential claim is without foundation, and I am satisfied that it can be resolved without insurer involvement, do I need to intimate it?

Even if the matter is not as yet a claim, it is still advisable to intimate the circumstances as soon as possible. "Circumstances" (as opposed to claims) do not impact on a practice's premium at all. Moreover, circumstances and claims only remain on the firm's record for premium rating purposes for five insurance years. If a circumstance were to develop into a claim three years after it was initially intimated, for example, it will only impact on the firm's premium for the two following insurance years. There is therefore a clear benefit in intimating early.

What if a claim is clearly within the self-insured amount? Can we deal with the claim ourselves?

Where a claim clearly falls within the level of any self-insured amount applying, it is likely that insurers will agree that the firm can deal with the matter. In those circumstances the insurers will still be happy to provide guidance or approve a draft letter of response if asked to do so by the firm.

Should quantum escalate and the claim exceed the self-insured amount, the firm is protected by having intimated the matter and having sought advice from insurers. There can be no danger of any issue of late notification, which could otherwise affect policy cover.

It is also helpful to remember to advise the outcome of any matter handled directly by the firm, as any payment made will count towards application of the aggregate annual self-insured amount.

Can we instruct our own solicitors?

The Master Policy provides that in addition to damages and claimants' costs, insurers will pay "all other costs and expenses incurred with their written consent".

Costs incurred without the written consent of the insurers are not therefore covered. In practice, this means that the insurers will not generally meet the fees and outlays of solicitors instructed directly by the insured firm, including under any legal defence union arrangements.

Insurers work with a panel of experienced solicitors with an excellent record in handling professional negligence claims. Having developed strong relationships with the firms and the individuals involved, insurers can

negotiate the best rates available, limiting the costs incurred on the individual claim and across the Master Policy.

Insurers also require panel solicitors to operate within an established framework of audit, quality control and limitation of costs.

Can I choose who is instructed?

Where the particular context of a claim – for example because of the subject matter, or because proceedings have been served or are imminent – means that it is necessary to instruct panel solicitors to represent the firm, insurers will discuss the appointment with you.

Does the firm need to have a claims partner?

It is helpful generally to have one individual within a firm who is assigned responsibility for Master Policy matters. Not only does that ease communication when a claim arises, it also tends to avoid intimation of new matters from falling between two or more partners' responsibilities.

Why do the insurers allocate a reserve, and how is that calculated?

In common with all other insurance arrangements, the Master Policy insurers are required to make adequate provision for any claim in respect of which indemnity is likely to be provided. It is also necessary for the lead insurers to provide information to co-insurers to enable them to make their own provision.

Reserves are calculated on the basis of "known probable cost", being neither the best nor the worst case scenario, but a realistic assessment. Insurers assess the likely final cost of any claim against the information provided, using the benefit of many years' experience in the field.

Reserves must reflect:

- the extent to which a duty of care and liability exists at law between the insured firm and the claimant;
- whether any losses are referable to any civil liability;
- the impact of any relevant case law;
- whether the claimant has contributed to the loss;
- whether any other parties have contributed to the loss;
- whether the insured practice has a right to recover from a third party;
- likely or anticipated legal costs;
- any applicable self-insured amount.

Reserves are continually reviewed during the lifetime of a claim to ensure that they are adequate to meet any obligation on the insurer without at any stage being excessive.

Any query regarding the possible effect of a reserve on the firm's future premiums should be referred to the brokers, Lockton.

I have a request here for one of our closed files. No claim has been intimated to date. What should I do?

Insurers defer to the Law Society of Scotland's advice on this point, but clearly where a client mandate is received from another firm of solicitors, this will require to be obtempered unless any lien applies in respect of unpaid fees. Even where a mandate applies, intra-office memoranda and a fee-earner's preparatory notes are not covered, so there is no requirement for these to be released. Detailed guidance on ownership and release of client files is available on the Society's website.

If, however, the file is requested on behalf of someone other than your client, or on behalf of only one client when you were acting for two (e.g. lender and borrower), careful consideration will have to be given to the ownership of the respective parts of the file and to any issues of confidentiality arising.

It is sensible always to retain a copy of whatever papers are released in response to a mandate or other request.

Should a formal claim be made against the firm, and particularly should any action be raised, specific guidance will be provided by insurers and panel solicitors. It will be appreciated that the file could in any case be obtained by the pursuer under a specification of documents.

I am retired but have been contacted by a former client who intends to make a claim for legal work I carried out on their behalf. Will I be covered by the Master Policy?

The Master Policy will respond to historic claims at the point in time when they are made, insofar as they have not prescribed or already been the subject of a successful claim. Where you were the employee or principal of a firm which is still in operation, the claim should be sent to that firm who will intimate it to Lockton. Likewise where the firm has been sold to another firm which has assumed responsibility for the historic claims record, the claim should be sent to that successor firm.

Where the firm in which you were an employee or principal is no longer in business, it is likely that the Master Policy's "run-off" provisions will apply. Run-off applies when a practice ceases trading and there is no successor practice to take on responsibility for claims arising from historic work. The Master Policy continues to provide cover in respect of claims already intimated as well as any claims that are intimated after the closure of the practice, insofar as they are related to matters dealt with by the firm prior to its closing. Run-off cover continues indefinitely as long as the Master Policy arrangement remains in force.

The limit of indemnity provided in run-off will be whatever the mandatory limit of indemnity is under the Master Policy at the time the claim is made. The self-insured amount will be the same as that applying to the firm at the time the policy goes into run-off.

Linda Moir, senior claims technician, Professional & Financial Risks Claims, RSA Insurance Group Ltd; Brian Ward, formerly of RSA (original article)

Matthew Thomson, Master Policy team at Lockton (updates and revisions)

FROM THE ARCHIVES

50 years ago

From "Island of Rockall Bill", December 1971: "The scrutineer of Parliamentary Bills is required to make his way through a mass of indigestible material, most of which is incredibly dull. Occasionally, however, he receives an unexpected reward when he comes across a piece of legislation which excites his imagination... The [single clause Island of Rockall] Bill formally incorporates the Island of Rockall into 'that part of the United Kingdom known as Scotland' as part of the District of Harris in the County of Inverness."

25 years ago

From "Thoughts at the Year End", December 1996: "Finally, we must demand, while it is still our ground and we still have the authority to demand, that the other professionals, semi-professionals, imitators, intruders or pretenders whomsoever, if they are to associate with us, must adopt standards which are, and are shown to be, at least as stringent as our professional standards... But if non-lawyers can, in truth, meet all the above standards to our satisfaction, they are welcome – they may change, but will not damage, our profession."

FAMILY

Family mediation accreditation: **a view from the panel**

The application form for accreditation as a family law mediator has been redesigned to try and avoid some common errors made by applicants

There are currently 76 family law mediators accredited by the Law Society of Scotland. Accreditation is for three years (shorter than the five year period for most specialist accreditations), after which an application for renewal is required if the applicant wishes to continue to practise.

The Family Mediation Accreditation Panel, which at present has six members, considers all new applications for accreditation and for renewal of accreditation. The members of the panel, most of whom are themselves practising family mediators, are acutely aware that among the many challenges faced by practitioners over the last couple of years has been maintaining professional accreditations and meeting training requirements. While the primary responsibility of the panel is to ensure the maintenance of standards, the approach to regulation has always been "light touch", and the panel considers it has a responsibility to carry out its duties in a way that advances the availability of mediation as an alternative method of dispute resolution.

In an effort to help applicants ensure that they provide the panel with the information needed to assess their application and to avoid unnecessary delay while further information is requested, the panel has recently redesigned the accreditation application form.

The most common issue arising with applications has been failure to provide sufficient information to allow the panel to be satisfied that the training/CPD requirements are met.

An attempt has therefore been made to focus the new form on the key requirements which must be met to allow the panel to approve an application.

For a first application, the requirements are:

- completion, within the last three years, of a foundation mediation training course lasting more than 30 hours, and a report from the mediation trainer who observed the applicant in role plays during training.

For a renewal application, the requirements are:

- that in each year of accreditation the applicant must have undertaken no less than 15 hours of continuing professional development, which must include a minimum of six hours' mediation training and a minimum of five hours' family law black letter law training (of which two hours require to be on financial provision);
- completion of one peer review in co-mediation in each year of accreditation;
- an assessment of competence report prepared by an approved assessor.

The new application form is designed to ensure that the necessary information cannot easily be omitted in error, and will hopefully assist applicants in ensuring that their applications are granted swiftly and without the need to respond to requests for further information.

The panel recognises that there will sometimes be extenuating circumstances which mean an applicant is not able to fulfil all of the requirements for accreditation or, more likely, renewal. When this happens, the panel is often able to agree with the applicant a basis on which the application can nonetheless be granted, for example by means of an undertaking that any missed training will be made up during the next period of accreditation.

The panel would welcome feedback from applicants on any aspects of the application process which it is felt could be improved.

Robert Gilmour is a partner of SKO Family Law Specialists, and a member of the Family Mediation Accreditation Panel

The Society is authorised to accredit family mediators under the Civil Evidence (Family Mediation) (Scotland) Act 1995. If you are a practising solicitor interested in being accredited as a mediator and wish to find out more, please contact the team at specialistaccreditation@lawscot.org.uk

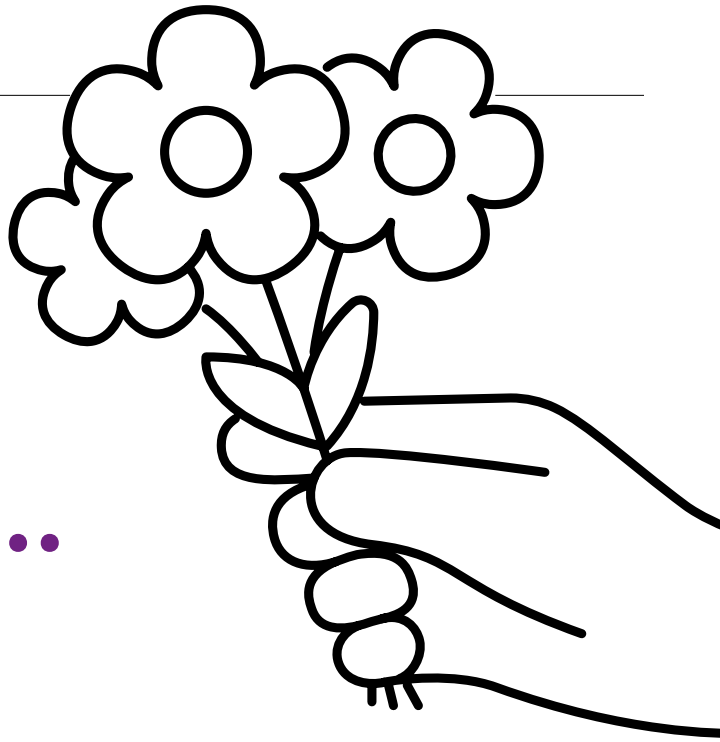
Notifications

ENTRANCE CERTIFICATES ISSUED DURING OCTOBER/ NOVEMBER 2021

CARTER, Kirsty Katie-Morag
CAVEN, Jordan
DIN, Syma Bibi
DVORAKOVA, Katerina
FAZELI, Amal
FOULKES, Kay Joanne
GALLOWAY, Rachael Amanda
GAMBALE, Genovino Armando
GILL, Shannon Margaret
GRANT, Debbie Edith
GREIG, Sophie Greig May
HOCKING, Christopher David Brynley
JAMES, Taylor Jane
JEFFREY, Danielle Alexandra
MACALLAN, Connor Paul
McCOLL, Cameron James William
McGOVERN, Thomas
MILNE, Cameron Craig
MUNRO, Jasmine Elizabeth
MURTAGH, Jemma Sarah
NUNES DE MOURA, Paulo
PENMAN, Craig
PRIMROSE-ROURKE, Kathleen Ann
SHAND, Danielle Louise
SHAND, Millie Grace
WATSON, Kirsty
YEOMAN, Andrew Kyle
YOUNG, Christy Alexandra

APPLICATIONS FOR ADMISSION OCTOBER/ NOVEMBER 2021

AMJAD, Mohammed Sohail
ANDREWS, Nikita-Hedy Velvet Kimberly Fallon
ARTHUR, Helena Elizabeth
AULD, Rebecca
BATHGATE, Colin John
BONAR, Jessica Ruth
CARSON, Rory Alexander
CHOWDHURY, Tayeeba
DRYBURGH, Elizabeth Ann
FAIRBROTHER, Hannah Elizabeth
FORREST, Stewart David James
GILLON, Caitlin Lynda
GRAY, Adelle Agnes Anne
HANNAY, Laura Anne Scanlan
HOGGAN-RADU, Damian
JACK, Atlanta Tazmin
KAUR, Kirndeep
KAVANAGH, Sarah Diana
KEMERLIS, Anargyros
LARGE, Christopher James
McCONDICHIE, Nicole Frances
MACDONALD, Loris Ellie
McFARLANE, Collette Frances
McGUINNESS, Danielle Mhairi
McKENZIE, Kirsten
MACLEAN, India Laura
McNELIS, Amy
MATTHEWS, Robert Christopher Alan
MURDOCH, Emma Louise
MURNIN, Philip Andrew
NEIL, Isla Elizabeth
PANGEVA, Slavina Stoycheva
RAFIQ, Sahira Akhtar
RICHARDSON, Sophie Elizabeth
RUSSELL, Abby Jayne
SAHEEL-IKRAM, Zenab
SINCLAIR, Isla Christina
SNEDDON, Amy Audrey
SPENCE, Alexander
STEVENSON, Scott Fraser
SUTHERLAND, Rachel Ellen
WHITTEN, Jennifer
WOLFE, Alexander Michael
WOOD, Emily Elizabeth
WRIGHT-DAVIES, Shannon Louise
YATES, Campbell James
YOUNG, Aimee Louise



Just to say thanks...

Finishing up the theme of communications, and bringing the year to an end, this month's column takes a look at the importance of a "thank you"

My mother in law has a habit of sending a thank you card for a thank you card. A nice thought but a little bit of overkill as far as I'm concerned.

I suspect that most of us had it drummed in as children that "please" and "thank you" were an essential part of communication, particularly if we were asking for something. While I have no doubt that all of us send out a thank you to our clients for entrusting their business to us, do we do it simply as a formality or is there something more meaningful that we could be engaging in? Is it possible that there might even be more thank yous required?

The initial thank you

Do we always remember that first thank you, the one that we send after the client chooses us or when they have returned to us for an additional piece of business? It's an ideal opportunity not only to make them feel appreciated and to let them know how important their business is but also an opportunity to check on a few things:

- Is there anything that you need to make your experience more comfortable? Does your client have any special needs that perhaps weren't flagged up at the initial meeting, be they cultural, language or ability related? Not just useful for avoiding any issues, and perhaps also a useful risk management strategy.
- While you are here, is there anything else that we can get for you? Most of us will try at some level to cross sell other services of the firm; many though tend to tack this on at the end. Is the beginning not the perfect opportunity to explore what else might be useful to the client? You would then have several touch points along the way to develop these or, at worst, agree a future date to come back and revisit them.

"I suspect that most of us had it drummed in as children that 'please' and 'thank you' were an essential part of communication, particularly if we were asking for something"

- Perhaps also, just to confirm why they decided to pick your firm in the first place. This is incredibly useful information to gather as you develop your marketing strategies, and to obtain a clearer picture of why clients chose you.

The middle thank you?

As transactions are progressing, perhaps an additional "thank you" might be overkill, but it is the perfect time to check in to make sure that client expectations are being met. I suspect that few in practice do this, as we work within complicated systems where clients may often be frustrated by the system rather than our services and at times may struggle to differentiate the two. It does however give firms the perfect opportunity to deal with any client issues before they escalate, and reinforces with the client that their transaction and their customer experience with us is important and valued.

The final thank you

At the end of any transaction I hope that we all do remember to say thanks, but what else could that thank you email (or letter) cover?

- How was it for you? Client feedback is the most important tool in improving your service offering. Negative feedback is most important of all, as it clearly flags up areas that could be worked on while giving you an opportunity to engage with that client to discuss their experience and to prevent any dissatisfaction from escalating.
- Is there anything else that you need? An obvious one, but another opportunity to follow up on additional services that might be of benefit to the client. A chance also to remind clients that you are their first point of contact for any legal issues: even those that you don't cover you can of course refer on.
- Feel free to refer us. Arguably it is only those clients whose expectations you have substantially exceeded who will automatically do so. Not all clients will automatically think to recommend; they might not even think that you want or need additional clients. A little reminder then might just help secure some additional opportunities.

From me, then, a very big "thank you" for reading this column throughout the year, and as always your feedback and suggestions have been appreciated and continue to be welcomed!

• From January Stephen Vallance will take turns with other contributors to cover a variety of practice related matters

Stephen Vallance works with HM Connect, the referral and support network operated by Harper Macleod

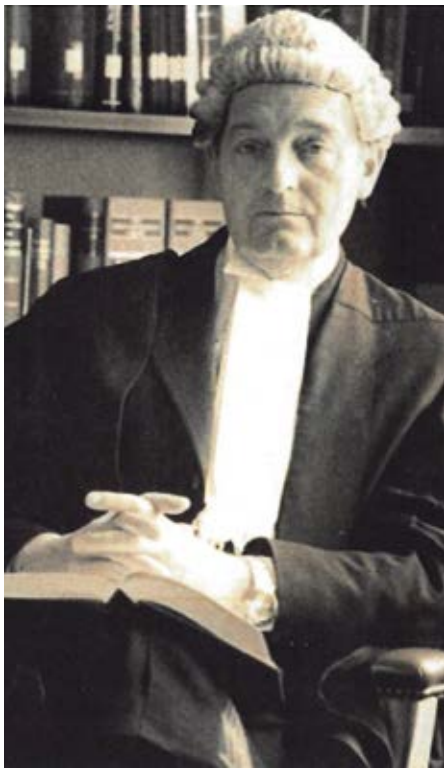
APPRECIATION

Albert Vincent Sheehan

23 August 1936-27 September 2021

The members of Falkirk & District Faculty of Solicitors were saddened at the passing of the late Sheriff Albert Vincent Sheehan. Having "floated" at Falkirk from 1981, Sheriff Sheehan was given a permanent position in 1984, and was to remain there for the next 21 years.

Not a huge fan of civil proceedings, and operating on the basis that no civil action was incapable of extrajudicial settlement, Sheriff Sheehan was in his element when it came to crime. The early 1980s were, of course, the era of the short sharp shock, a failed Government policy that seemed to linger longer around Falkirk than many other jurisdictions – for throughout his lengthy shrieval career Sheriff Sheehan was never one, as they say, to miss and hit the wall when it came to sentencing. The mere rumour that "Albert" would be presiding at the means inquiry court was enough to clear the building faster than a fire alarm. But for all his rigorous sentencing practices, as another sheriff once said of him, "Bert does seem to have the knack of sifting out the bad from the mad and the sad. You just don't want to be bad."



Of course, Sheriff Sheehan's addition to the *Stair Memorial Encyclopaedia* bears testimony to his extensive knowledge of criminal law and procedure, and to appear before him on even the most routine matter one had to come prepared for interrogation. Full of mischievous interventions and raised eyebrows, especially during pleas in mitigation, he kept defence solicitors on their toes; nonetheless, was invariably polite and in his dealings with young and inexperienced solicitors always understanding.

The feature that most appealed to the local criminal bar, though, was Sheriff Sheehan's fairness when it came to a trial, where rightly the presumption of innocence and the rule of law were always paramount. Although sometimes prone to assisting the Crown ("I'm sorry, Madam Fiscal, before you sit down, I think I must have missed the witness identifying the accused; could you confirm for my notes please?"), he actually believed in a thing called corroboration, was minded now and again to disbelieve police officers, and was encumbered by more reasonable doubts than many of his shrieval brothers and sisters.

Take the case where a random search by the police found the accused in possession of stolen property. The procurator fiscal depute defended the search, saying there was nothing unfair about it. "Is that so?" queried Sheriff Sheehan. "Then, perhaps you can explain what was *fair* about it." When the PF couldn't, he acquitted.

But if there was one group who could rely on a degree of benevolence from the bench it was army veterans. Having served militarily himself, any old soldier who wound up in the dock was always entitled to the benefit of a reasonable, or, on occasion, an unreasonable doubt. The stories of the sheriff's dealings with ex-army personnel are legendary. Like the day he ordered a policeman to pass his hat around the court in an impromptu whipround for an ex-sailor who'd served aboard *HMS Amethyst* during the Yangtze Incident, only to find himself many years later penniless and in the dock following what the procurator fiscal libelled as a drunken breach of the peace in a local bar, but which Sheriff Sheehan recategorised as "an unfortunate misunderstanding with the publican".

Then there was the time in the late 1990s when a small elderly gent appeared charged with driving without a licence or insurance,

saying that he hadn't applied for either since being demobbed in 1945. Further inquiry revealed that he had served in the 3rd Battalion of the Scots Guards and on D-Day, as a tank driver, had taken part in Operation Bluecoat, the most concentrated infantry tank action of World War 2. "Well now," said Sheriff Sheehan, with a cock of the infamous eyebrow. "Fifty years and you haven't applied for a licence yet? It's not like a Scots Guard to be forgetful. Whatever, you're admonished." Despite a complete lack of mitigation to support it, he went on to make a finding that there were "special reasons" why neither a disqualification nor even the imposition of the minimum number of penalty points was merited in the circumstances.

Though he left Falkirk to retire in 2005, Sheriff Sheehan is fondly remembered by all at the court as a sheriff who took a real interest in his community and the administration of justice locally, and as the fairest of judges who, notwithstanding the neverending political meddling in the criminal justice system, remained very much his own man.

William McIntyre, Dean, Falkirk & District Faculty of Solicitors

A broken work circle

My former office friends are never around when I am

Dear Ash,

I had a good social circle at work prior to COVID and would often go to lunch and after-work drinks with my colleagues. However, during lockdown I had little contact with certain colleagues as most, like me, were trying to juggle childcare with work commitments. Although we all are now expected to work from the office a few days per week, I don't ever really seem to be there on the same days as my friends. On a positive note I am getting through more work, but the social isolation is getting me down.

Ash replies:

Previously the primary concern we all seemed to have was about attaining a work-life balance; however, although we now seem to have more flexibility in the workplace than ever before, there are some things that have been lost as a result. The social banter and atmosphere in the office have inevitably suffered in certain workplaces, especially as workers increasingly make individual choices about their preferred days in the office. The colleagues we often saw more than our own family members have now become less consistent in our ever evolving lives.

In order to maintain such relationships, therefore, we will all inevitably require to make more effort with our colleagues. I suggest you contact your colleagues and confirm what days they will be in the office and then arrange to attend the same day too, or perhaps suggest just meeting for lunch or coffee when you are not all necessarily in the office.

Relationships at work form a crucial part of our professional lives, but are also an important factor in our mental wellbeing. It is important to prioritise time and effort for this part of your life: it will be worth it!

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@connectmedia.cc. 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).

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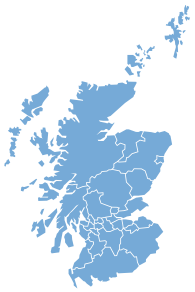

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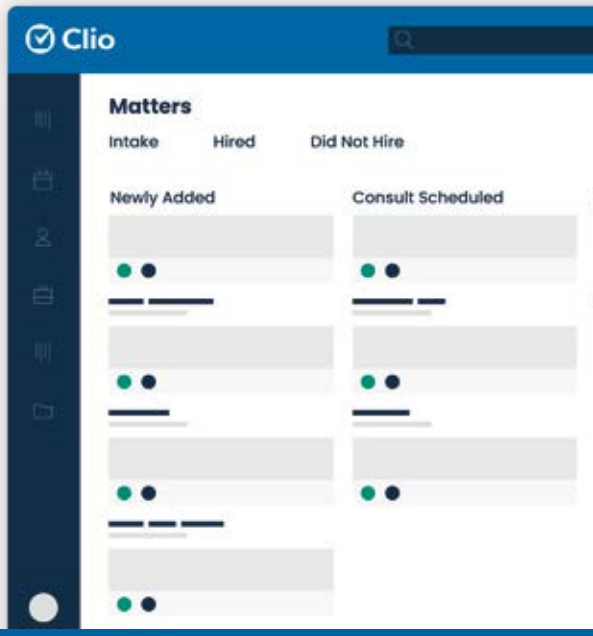

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