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Journal

Journal of the Law Society of Scotland

Volume 66 Number 5 – May 2021

Health check

We interview President-elect Ken Dalling about how the Society, and the profession, are faring after a year of the pandemic emergency

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Not proven on trial

I write as Scotland waits to find out the makeup of its next Government, and what that may mean for our constitutional future.

Amid the campaign hubbub about referendums and recovery, however, some other issues did surface. One that became something of a bandwagon was the future of the not proven verdict.

This curious feature of our criminal trials (which has been shown, contrary to supposition, not to have been the original Scottish acquittal verdict) sharply divides opinion. It also generates much misunderstanding. Opponents attack it as used by juries as a get-out from facing up to whether to convict, and blame it in particular for the low conviction rate in rape and analogous offences – though it has featured notoriously in other cases also. Defence lawyers claim, very plausibly, that its use indicates a doubt such that the only proper alternative is a not guilty verdict, even if a jury might hesitate to apply that term to the accused – yet the 2019 jury research report concluded that removing not proven might result in more guilty verdicts.

It has to be said, however, that the status quo is difficult to defend. Juries are told they have the choice of three verdicts, but are not allowed to have the two acquittal verdicts explained, except that they both have the same effect. It is not surprising that the 2019 research also found a level of confusion, for example that some jurors believe that not proven leaves open the possibility of a retrial.

Hence some senior voices within the profession also regard the present position as indefensible, such as the recently retired Lord Uist, who has written that the existence of two acquittal verdicts is "indefensible in logic and in common sense". And hence the continuing campaign to abolish not proven, reflected in varying party election promises to do so or at least to review its future.

So change may be coming. But are there alternatives? A minority view, perhaps the legal purist position, is to have the two verdicts, proven or not proven. That, I suspect, would not resonate so readily with juries, who should at least have little difficulty with the concept of guilty/not guilty. But I am initially attracted to one suggestion I saw recently, that we adopt the two verdicts of "proven guilty" and "not proven guilty". That might help juries to focus on the correct legal approach, while providing two clear alternatives.

Some might question whether it would sit with the presumption of innocence. That, however, is also a criticism of the present position. The alternative of course is guilty and not guilty, which brings us back to where we came in. We do not live in a perfect world.

Contributors

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

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Jennifer Maciver is a legal director and head of Family Law at Gillespie Macandrew

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THE JOURNAL OF THE LAW SOCIETY OF SCOTLAND
VOL.66 NO.5 – MAY 2021

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In practice

ONLINE INSIGHT

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

Foot off the pedal

After building and then losing a legal practice with a high energy but flawed business model, Graham Sykes tells how he has found a better and less pressured way, putting service before volume.

COVID challenges and tomorrow's lawyers

The long version of Michael Randall's article on the difficulties COVID-19 has posed for students, and how potential employers in the profession should view people who may have gained from their experience.

Trans rights in the workplace: a matter of respect

Simon Mayberry believes that in order to ensure that trans rights are properly respected in the workplace, employers should proactively work to create a culture of respect, and not just rely on a policy.

Caravan sites: a case for COVID rates relief?

David Pedley argues that the regulations allowing relief from non-domestic rates due to COVID-19 are defective, in relieving some caravan site operators of rates on caravans they do not own.

OPINION

Julia McPartlin

The SSBA was born from recent experience of local bars working together. It can make a difference through its close contact with solicitors on the ground and being subject to fewer constraints than the Law Society of Scotland

The Scottish Solicitors Bar Association (SSBA) launched on 7 April 2021. Since then we have had a stream of applications to join. The aim of the SSBA is to represent and promote the interests of criminal defence practitioners across Scotland.

The majority of defence practitioners are engaged in legal aid work. Practitioners have suffered from years of underfunding, resulting in many young people leaving the profession and firms struggling to make ends meet. The steady decline in legal aid funding has been exacerbated by the COVID-19 lockdown and the associated reduction in cases being processed by the courts. The pandemic has also raised concerns such as COVID safety at court and police stations.

I recently finished my two year term as Edinburgh Bar Association (EBA) President. I could never have envisaged the challenges we would face in the last year. If there is any positive to take from the experience, it is the benefit of increased communication with other practitioners and faculties across the country. During lockdown, an inter-faculty WhatsApp group was set up. It sounds simple, but it was invaluable in providing a quick and easy way to compare what was happening in my own sheriffdom with other areas. This allowed for common problems and potential solutions to be identified.

I also benefited from increased communication with the heads of the Glasgow Bar Association (GBA) and the Aberdeen Bar Association (ABA). This culminated with the EBA, GBA and a number of other faculties agreeing to boycott the St Andrew's Day holiday custody court in protest at the failure of the Scottish Government to support the profession adequately. The ABA added its voice by publishing an open letter to *The Herald* in support of our cause. Within a week, a meeting with the Cabinet Secretary for Justice, Humza Yousaf, was organised. Ultimately, the Scottish Government committed to increasing legal aid fees by 10% over two years. I appreciate that the increase is far from enough, but it represents an acknowledgment by those in Government that there is a need for greater funding (compare that with the conclusions of Martyn Evans' review of legal aid).

The experience of the last year has shown the benefit of closer cooperation between local bar associations. The constitution of the SSBA ensures that there are two representatives from each sheriffdom in Scotland on our executive committee. Those representatives will be nominated by local bar associations. In essence, the SSBA is an umbrella body to facilitate greater communication and cooperation between bar associations. The creation of the SSBA has been funded by donations from local faculties. We hope to bolster the position of individual associations by identifying common areas of concern.

The SSBA acknowledges the hard work and commitment of the Law Society of Scotland (LSS), in particular our President, Amanda Miller, and the Legal Aid Committee negotiating team. We are all fighting for the same cause. Indeed, a number of our executive committee members are also involved in work for the LSS. So why do we need the SSBA as well? I hope that the SSBA can assist the LSS. Our members are at the coal face; we see what is happening each day at court. We recognise that busy practitioners often find it easier to have a quick chat with their local representative than to make formal complaints. We are uniquely placed to gauge the mood of our members by being present in agents' rooms across Scotland. It is our hope that we can communicate that experience to the LSS.

Perhaps the most important reason for forming the SSBA is that we are not constrained by regulations in the same way as the LSS. We are able to say and do things that the LSS cannot. The joint action on St Andrew's Day is a good example of that. It is our hope that the LSS can refer to the formation of the SSBA as an indication of how serious members are about defending the profession. After all, we are stronger when we work together.

Julia McPartlin is President of the Scottish Solicitors Bar Association

Membership of the SSBA is free and open to all practitioners in private practice in Scotland and to students/recent graduates of Scots law. To join, please email thessba21@gmail.com

CORRESPONDENCE

MSPs win, citizens lose

The Scottish Parliament is normally dissolved six weeks in advance of an election, but in view of a possible recall to endorse further measures during the pandemic, it continued in existence under a "campaign recess". The Parliament's website said that "Instead of dissolution, from 25 March the Parliament will be in recess until [5 May 2021]... Having a recess instead of dissolution means... MSPs continue in their role".

No one could apparently misunderstand that. However, when I asked my MSP to query the legality of the Scottish Government's directions for closure of caravan sites between 2 and 26 April I was amazed to be told that all parliamentary questions had been suspended until 7 May – by which time the damage was done. When I asked the Parliament's Public Information & Resources office which of these two conflicting accounts was accurate, I was even more amazed to be told that "both versions you have quoted are correct... as your MSP... explained, no written questions can be lodged".

The reality is therefore that MSPs voted themselves six extra weeks on full pay for doing no work, but the Parliament's website covered this up.

Did anyone anticipate, when powers were devolved to the Scottish Parliament in 1998, that these would include the right to put the whole population under house arrest? This is primarily the responsibility of the UK Parliament, which blindly gave additional powers to the Scottish Parliament beyond the original scope of devolution (see "Coronavirus legislation and the devolution settlement", Fred Mackintosh QC, *Scottish Legal News*, 8 June 2020). The courts are still available to those with the energy and the money, the latest success being the overturning of the imposed closure of churches (*Philip v Scottish Ministers* [2021] CSOH 32), but the two Governments between them have totally betrayed direct democratic accountability.

David Pedley,
Port William, Dumfries & Galloway

Appeal over a paper trail

My name is Al Ross. I'm a postgraduate student with the University of the Highlands & Islands. My Masters dissertation is going to be based around the Letter Books of Bailie John Steuart, a merchant in Inverness from 1715 to 1752.

I have for the last 15 months been trying to track them down, and discovered a portion in the Highland Archive covering the period 1735 to 1752. However I'm still looking for the first 20 years.

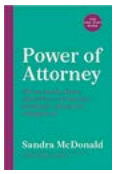
From a retired solicitor in Haddington, and via their local archive, there is a familial connection with a family called the Hay-Newtons who were based in East Lothian. His firm passed that connection to another firm in Edinburgh but he was unable to recall their name.

My reason in contacting your goodselves is to ask if a request could go out to your members to see if one of them might know the whereabouts of the remaining Letter Books. I acknowledge it's a rather unusual request, but I'm trying to run down every possibility.

Al Ross, Edgemoor Cottage,
55 Upper Bayble, Isle of Lewis HS2 0QG (e: 11005108@uhi.ac.uk)

BOOK REVIEWS

Power of Attorney: The One-Stop Guide



SANDRA McDONALD
PUBLISHER: SOUVENIR PRESS
ISBN: 978-1788164634; PRICE: £11.99

This is not a technical book for lawyers, and should be neither read nor reviewed as such. That said, chapter 7 on "Supporting decision-making and respecting rights, will and preferences", is required reading for all practising lawyers.

The dominant impression for any reader of its 328 pages – in an easy, almost conversational style yet packed with so much information, practical guidance and thoughtful wisdom – is: what a huge gap it fills! Sandra McDonald served for 14 years as "the" Public Guardian, accumulating vast experience of all the questions and issues raised with her Office. On the first page she encapsulates all the "tales of woe" from attorneys encountering unexpected obstructions and difficulties. On the second she tells of her father's developing dementia. She was his attorney. She was struck that she "had none of the issues that, in my professional life, I was still hearing so many complaints about". Why? Because: "I was empowered: I knew what I could and couldn't do as attorney... and how to assert my authority". The mission of her book is to empower every attorney to achieve the same.

The relevance and accessibility of the book are hugely enhanced by the multiple "real-life" examples; and the fundamentally caring ethos of an author who at heart remains a trained nurse.

Adrian Ward
For a full review see bit.ly/3tqXrso

Retained EU Law: A Practical Guide

ELEONOR DUHS AND INDIRA RAO
PUBLISHER: THE LAW SOCIETY OF ENGLAND & WALES
ISBN: 978-1784461645; PRICE: £65

"This new area of law will not be temporary, nor will it get simpler. This is an invaluable practical guide."
Read the review by Charles Clark at bit.ly/3tqXrso

A Lonely Man

CHRIS POWER
(FABER AND FABER: £14.99; E-BOOK £5.57)

"The narrative... lingers in the memory: the 'spooks and phantoms' of the Russian state where 'if you don't play Putin's game you lose everything'."
This month's leisure selection is at bit.ly/3tqXrso
The book review editor is David J Dickson

BLOG OF THE MONTH

blacklettercommunications.co.uk

"Ignore online reviews at your peril" is the title of this blog by commentator Neil Rose, writing under a different guise from his *Legal Futures* but reporting on a webinar it held.

Though legal firms may want to take issue with such reviews, Rose's contributors believe in taking the rough with the smooth and using them positively. "Reviews are here to stay. You can no longer ignore them and can't sue over every one you don't like," he sums up.

To find this blog, go to bit.ly/2Spyi4B

Let them eat cake – but whose?

What was the legal story of the month, if column inches and social media posts are the test? Surely the titanic tussle between those two sweetie-encrusted lepidopteran larvae, Colin the Caterpillar and his shady *doppelgänger* Cuthbert.

Wherever the scales of justice may ultimately tilt, Aldi's Cuthbert, the cheeky lookalike to Marks & Spencer's trademarked Colin, has won the evolution contest in the social media habitat, harnessing the Twitter birdie to the cause of persuading us that the world of cute-faced chocolate cakes is all innocent fun.

A purported court artist's impression shows a diminutive Cuthbert perched on the dock between two security guards. Another tweet shows prison bars over the clear window in the packaging. Searching #FreeCuthbert suggests this one will run for a good while yet. Even the RSPB got in on the act, posting a photo showing a suspiciously Cuthbert-faced crawler out in the wild.

As commentator David Allan Green has observed, being able to attack is not the same as it being a good idea to attack.

PROFILE

Fiona Menzies

Fiona Menzies is the Law Society of Scotland's new member engagement manager

1 Tell us about your career to date?

A career in law appealed because of the opportunities to work in different fields. My first degree was in languages and management and gave me transferable skills that set me up well. After completing the accelerated LLB and DPLP, I trained at a high street firm in the Stirling area and then took a position in Glasgow, working on a variety of property, private client and family work. I moved to the Scottish Arbitration Centre and was business and development manager for three and a half years. I joined the Society last month.

2 What interested you in working at the Society?

The role of member engagement manager really appealed as I was keen to utilise both my skills from private practice and those from my wider work in business. It was a really attractive prospect to work for the body representing my own profession and to be part of understanding and serving the needs of our members.

3 Have your perceptions about the Society changed since you started?

Even though I've only been here for a few weeks, I am already starting to discover the range and variety of work that is done here, especially in its work as a representative body. It's also been great to learn about the work around wellbeing, and its charity work.

4 What would be your top tip for new members of the profession?

Take as many opportunities as you can to learn, communicate and network. You will find lots of people out there willing to support you and share their experience. Get involved with the Society and the opportunities we offer young lawyers, and make sure to prioritise your wellbeing too.

Go to bit.ly/3tqXrso for the full interview

WORLD WIDE WEIRD

① Not your prince

An Indian lawyer was duped by a fake online account into believing Prince Harry had promised to marry her, to the extent of seeking an international arrest warrant to get him to fulfil the vow.
bit.ly/3nRKExW

② Plot that thickens

Authorities in China are investigating how a group of elderly tourists were sold a sightseeing tour, only to be taken to a cemetery where they were given a sales pitch.
bit.ly/3tn6hxx

③ A tooth for a...

An Australian who lost his left leg to a great white shark has been given an exemption from rules banning possession of parts of a protected species, so he can keep a tooth it left wedged in his surfboard.
bbc.in/3eZCYFQ

TECH OF THE MONTH

Kitche

iOS, free

Concerned that you let good food go to waste? Kitche gives you recipe ideas after scanning your supermarket receipts and reminds you of what you might have forgotten about in the fridge. It can tell you what you still have at home even when you're out.

PRESIDENT

Amanda Millar

My final message underlines the Society's continuing collaborative work, points up the headlines from an historic year, and pays tribute to the immense work done by members and the Society's staff in response to unprecedented challenges

So ... it's May and I remain the President of your Law Society of Scotland for one more month. We may even have the result of the Scottish Parliament election by the time you read this.

Since I last wrote here we have continued with the work for members and the public, as we have done throughout the pandemic. Last month saw the launch of the Scottish Solicitors Bar Association, and we had an open and constructive meeting with their President Julia McPartlin and other members of their executive committee. Over the last year we have had a particularly collaborative relationship and positive engagement with the Edinburgh, Glasgow and Aberdeen Bar Associations, and I and Society colleagues look forward to that continuing at an across-Scotland level.

On the issue of court recovery, our Vice President attended a round table with various justice stakeholders, where we built on our requests to be included on the Criminal Justice Board, having recently achieved membership of the Advisory Group which challenges and informs the Board. I had followed this up from the first Recover, Renew, Transform round table chaired by the Cabinet Secretary for Justice by writing to him prior to the Parliament's recess. The Vice President also wrote to the Scottish Government after the round table event, and we will continue to pursue this to bring a variety of areas of relevant direct experience of practice issues and client impacts, whether accused, vulnerable person or complainer, to the Board.

Historic year

In June 2020 in my first Journal column I wrote of my desire to face the many challenges with openness, compassion and consideration; and that I would work to protect fundamental rights, ensure our profession reflects the society that it serves, promote wellbeing and stand up for and to challenge.

Whether I have done that will be for others to judge.

It has however been an historic year. We have worked through a global pandemic. The first openly LGBTI+ President in the Society's 72 year history. The biggest increase in legal aid fees across the board for a generation. The launch of the first profession wide wellbeing strategy.

In other news, there have been repeated challenges to the use of defamatory language against those in the legal profession for meeting their professional responsibilities, and multiple statements about the importance of the #RuleOfLaw and preservation of #HumanRights, all much closer to home than I imagined would be the case when I stood for election in 2018. There have also been the international conferences learning from the experiences of others in the use of technology, the new work environment, and the engagements closer to home with members and stakeholders on how to #Sustain #Maintain and #BuildBackBetter.

Rising to the challenge

The work of Law Society colleagues and member volunteers is always immense, and this year has been beyond exceptional to allow delivery of outcomes never imagined while still responding with expertise, speed and professionalism to the many demands of actions and consultations.

In these exceptional and unprecedented circumstances the work of the profession in the interest of their clients, whether they be the state, big, small or medium business, or the individual (robust, vulnerable, traumatised or otherwise voiceless), has been a sight to behold.

The impact of the last year has been significant for all, whether healthwise, emotionally, economically, all or otherwise. The world has changed forever, but we must continue to approach the potential advantages of urgent, significant change with an open mind to ensure we don't disrespect the losses so many have endured. Your resilience, adaptability and motivation for the work, your profession and place in society have been amazing.

Thank you all for that you have done, deliberately or otherwise, supporting me in my time as your President.

There is #MuchStillToDo, but I know Ken Dalling and the Law Society team are #OnIt.

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

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

ADDLESHAW GODDARD, Edinburgh, Glasgow, Aberdeen and UK-wide, has promoted **Jan Gruter** (Corporate & Commercial, Glasgow), to partner as part of a UK promotions round.

ANDERSON STRATHERN, Edinburgh, Glasgow, Haddington and Lerwick, has appointed **Max Scharbert** as a director in its Corporate practice. Qualified in German, English and Scots law, he joins from ROONEY NIMMO.

Anderson Strathern has appointed accredited agricultural law specialist **Linsey Barclay-Smith** as a partner in its Rural Land & Business team. She joins from MORTON FRASER.

BALFOUR+MANSON, Edinburgh and Aberdeen, has appointed **Carolyn Jackson**, who joins from NEWLAW SCOTLAND, as an associate in the Litigation division; **Martin Lavery**, who joins from McCLURES, as a solicitor in Private Client; and **Will Wallace**, who joins from McCASH & HUNTER, as a solicitor in Residential Property.

BRODIES LLP, Edinburgh, Glasgow, Aberdeen and Dingwall, has named nine new partners along with 23 other promotions. **Mark Meiklejohn** (Banking & Finance), solicitor advocate **Craig Watt**, and **Hayley Robertson** and **Nick Marshall** (both Personal & Family) are promoted to partner. They are joined by lateral hires **Allan Cairns** and **Colin Keenan** (both Real Estate), and **Gareth Hale** (Litigation), all formerly with DENTONS, and **Martin Ewan** and **David Millar** (both Corporate), who join from PINSENT MASONS. **Shirley Li-Ting** is promoted to legal director in Banking & Finance, and **Fiona Dromgoole** to managing associate in Real Estate, both in Glasgow. Advancing to senior associate are **Graham Imrie** (Real Estate, Aberdeen), **Duncan Cathie** (Corporate & Commercial, Glasgow), **Bob Langridge** (Corporate & Commercial, Edinburgh), **Monica Connolly, Fehmida Hanif** and **Laura Fell** (all Litigation, Edinburgh), **Claire Rice** (Litigation, Glasgow), **Jessica Flowerdew** (Personal & Family, Edinburgh), and **Peter Brading** (Banking & Finance, Edinburgh). Newly promoted associates are **Guy Grant** (Real Estate, Edinburgh), **Kirsty MacAulay** (Real Estate, Glasgow), **Laura Lawson** (Corporate & Commercial, Aberdeen), **Kirsty Cooper** (Corporate & Commercial, Edinburgh), **Christina Barr, Clare Kelly, Melissa Mavor, David Nelson** and **Douglas Waddell** (all Litigation, Edinburgh), **Craig Donnelly** and **Katy Angus** (both Litigation, Glasgow), and **Edith Calvert** (Banking & Finance, Aberdeen).

BURNESS PAULL, Edinburgh, Glasgow and Aberdeen, has appointed **Emma Smith**, HR business partner for Dispute Resolution, to the newly created, full time role of inclusion and wellbeing manager.

CLYDE & CO, Edinburgh, Glasgow and globally, has promoted insurance litigator **Sarah Crewes** to partner in its Edinburgh office as part of its 2021 promotions round.

CMS, Edinburgh, Glasgow, Aberdeen and globally, has announced five partner promotions in Scotland as part of a global round: **Catriona Aldridge** (Employment, Edinburgh), **Claire Wallis** (Real Estate, Edinburgh), **Mike McColl** (Real Estate, Glasgow), **Christopher Dickson** (Construction, Glasgow), and **Neeraj Thomas** (Intellectual Property, Glasgow).

COWAN & CO, Glasgow announce the retiral of their senior partner, Allan Cowan, from 1 June 2021. He will continue to be associated with the firm on a part time basis as a consultant. **Helen McWilliams** has been assumed as a partner in the firm, joining **Gerald McWilliams**.

ESSON & ABERDEIN launched on 26 April 2021 as part of the MORAY GROUP. It is led by **Joni Esson**, formerly with STRONACHS, and **Rob Aberdein**, founder of the Moray Group. Its office is at 66 Queens Road, Aberdeen AB15 4YE (t: 01224 606210; f: 01224 606211; w: www.essonaberdein.com). **Julie Hamill** has been appointed a senior associate.

JONES WHYTE LLP, Glasgow, has taken over the goodwill, work in progress and certain assets of McCLURE SOLICITORS, Glasgow and Greenock, which is now in administration. All 84 partners and staff have transferred to Jones Whyte. The former McClure Solicitors 13 satellite offices, 11 of them in England, will close.

LANARKSHIRE COMMUNITY LAW CENTRE, Airdrie, has appointed its assistant solicitor **Nicola Rylatt** as principal solicitor.

LINDSAYS, Edinburgh, Glasgow and Dundee, has promoted **Rachel Holt** to associate in the Personal Injury team in the Edinburgh office, and appointed **Leann Brown**, who joins from MILLER HENDRY, as an associate in the Dundee Private Client team.

McKEE CAMPBELL MORRISON has been launched by **Alan McKee, Stacy Campbell, Maureen Matheson** and **Fraser Morrison** (managing director), all former directors of MACDONALD HENDERSON. The firm is based at The Hatrack, 144 St Vincent Street, Glasgow G2 5LG (t: 0141 488 3680; f: 0203 318 4190; w: mcmsolicitors.co.uk). **Victoria Lawson** has joined the firm as conveyancing executive.

MACROBERTS, Glasgow, Edinburgh and Dundee, has promoted Corporate senior associate **Gary Baines**, based in the Glasgow office, to partner with effect from 1 May 2021.

MORTON FRASER, Edinburgh and Glasgow, has appointed **Yvonne Brady** to the specially created role of head of strategy for Restructuring and Insolvency, with effect from 12 April 2021. She joins from SHEPHERD & WEDDERBURN.

MTM DEFENCE LAWYERS, Falkirk and Edinburgh, has appointed **Andrew Seggie** as a senior solicitor. He joins from FINNIESTON FRANCHI & McWILLIAMS.

Four partner promotions, along with two legal directors, have been announced by SHEPHERD & WEDDERBURN, Edinburgh, Glasgow, Aberdeen and London. The four partner promotions are: **Nigel Sievwright** and **Fraser Grant** (Property & Infrastructure), **Matt Phillip** (Commercial Disputes), and **Kevin Clancy** (Health & Safety/ Regulatory). They are joined by the promotion to legal director of **Vikki Henderson** (Commercial Property) and **Peter Alderdice** (Banking & Finance), all with effect from 1 May 2021.

SLATER & GORDON, Edinburgh and globally, has promoted **Sarah McWhirter**, head of the Edinburgh Medical Negligence team, to principal lawyer.

WARNERS SOLICITORS, Edinburgh, has promoted **Jim Maclachlan** to partner with effect from 1 May 2021.

The Heartbeat of Your Practice

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How do you keep your law firm's culture alive in the "new normal"?

The traditional legal office used to be the breeding ground for your business culture. That's all changed.

As we get to grips with the new reality of remote working, law firms face the challenge of maintaining their culture and values.

There is a number of key issues to address: impact, procedures, communication and management.

Address the impact.

Workplace change is something that usually requires careful management. But, let's face it, the change has already happened.

Take a long hard look at how this has impacted your team. Many will have taken to remote working like ducks to water - no more arduous commutes or balancing work, life and parental responsibilities. On the flip side of the coin, many may be struggling without a structure to their days, or a lack of appropriate home office space or even the isolation home working can bring.

To address these issues, you'll need to provide your team with the tools to do the job - PC equipment that suits the home environment, new team-building approaches and new ways of social interaction.

Virtual Office Procedures.

So much has changed that many tried and tested procedures will no longer be relevant. You probably have an existing office manual or document of similar type. Rip it up and start again!

This is your opportunity to set new guidelines about what is expected from staff in a remote working environment. Some - like expected weekly contribution to workload - will be obvious, but others, such as client call handling, may require careful consensus and a fair degree of testing.

Communication.

Communication is the heartbeat of your business culture. The tools for the job like email, a good telephony system that works in a home environment, Webex and Teams are only part of the package.

The other part is your availability policy. It used to be easy to button-hole a colleague in the office. Now, you may need clearer lines of communication. Your old open-door policy needs to morph into a virtual open-door policy.

Your plan for communication should be inclusive. It should cover contact between all staff and management. Perhaps formal, weekly, online meetings at different levels are the order of the day. So too are Informal catchups with staff. It's all about encouraging open communication at all levels by setting an example yourself.

Management and Monitoring.

Many see remote working as an opportunity for staff to take a more laissez-faire outlook, with work playing second fiddle to other things. That shouldn't be the case and you have tools at your disposal to ensure it doesn't happen.

I recently spoke to a client who told me that his practice management software had really come into its own since lockdown. He uses it to keep tabs on matter progress, billing and work in progress - for his entire team.

A combination of all of these factors will help you transform your business culture in a chameleon-like way - allowing you to meet the new challenges and significantly assisting when it comes to the difficult issue of onboarding new staff.

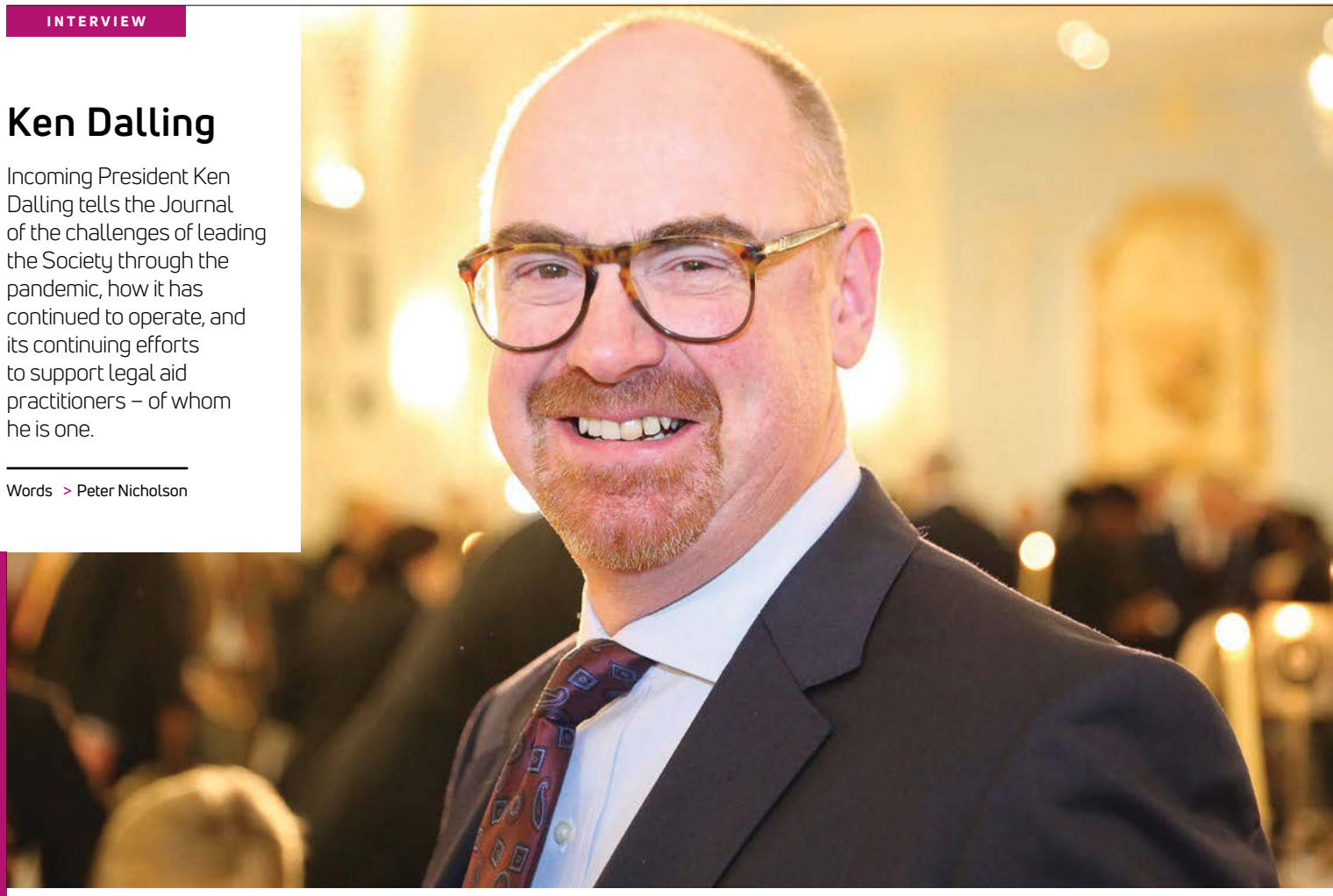
Welcome to the new Culture Club.

To find out more about how virtual office legal software can help your firm, contact us on 0345 2020 578 or innovate@lawware.co.uk. Mike O'Donnell, LawWare Ltd.

Ken Dalling

Incoming President Ken Dalling tells the Journal of the challenges of leading the Society through the pandemic, how it has continued to operate, and its continuing efforts to support legal aid practitioners – of whom he is one.

Words > Peter Nicholson



Recovery phase?

"It would have been handy if we were doing it in less challenging times, but life is a challenge and hopefully rising to meet the challenge is what keeps us all going."

Ken Dalling, about to take office as Law Society of Scotland President for 2021-22, recognises the scale of the task ahead. But as a criminal defence legal aid solicitor who has run his own Stirling firm since 1992, he is no stranger to facing adversity. Nor is he slow to speak his mind: after the 3% increase in legal aid rates was finally granted two years ago, he wrote about the struggle for fair treatment (Journal, May 2019, 25), concluding that ministers had reached the view that "to ignore the need for action would be not only politically unjustifiable but personally embarrassing".

In fact it was the Society's legal aid negotiating team that paved Dalling's route to Council. "Oliver Adair brought myself and others in on the basis that we weren't the normal Society faces and there was a concern that the Society needed to be seen as listening to voices outside the tent." Then when Stirling Council member Ian Angus retired, Dalling was asked to consider standing. He is now into his fourth full term.

Though a defence solicitor since he qualified, Dalling had an all-round training in his home town of Airdrie with Bell Russell, "one of the old established town firms that did everything for everybody". And it was family friend Dan Russell of that firm who was one of the main influences on his choosing the law: "a really nice guy, very competent, the kind of person you could rely on, a problem solver. Knowing as little as you do while still at school of what may lie ahead, I thought whatever he does I could maybe try that".

Since joining Council he has broadened his experience, moving on from legal aid to the Professional Practice Committee, Guarantee Fund (now Client Protection Fund, which he latterly convened), the Anti-Money Laundering Committee, also taking charge when it was set up, and, three years ago, the Society's board. All that along with various working groups – legal aid and other – and the Senior Solicitor Advocate Accreditation Committee.

Crisis role

Becoming an office bearer at the height of the COVID-19 pandemic was, however, in a different league. "It certainly wasn't what I expected! But I've thoroughly enjoyed supporting Amanda [Millar] and having John Mulholland as Past President in support of both of us. There has been a lot of firefighting to be done, in a very difficult time for the profession generally and for individual practitioners and firms."

Dalling admits to being "a bit daunted" at becoming President, but "thankfully, I'm not doing it on my own". He looks forward to the support of his Vice President Murray Etherington, Amanda Millar as Past President, and the Society's senior leadership, "a great team of very enthusiastic people". He adds: "I continue to be impressed all the time by the quality and enthusiasm of all the Society's staff, and also I may say the volunteer committee members, both lay and solicitors."

A year ago the Society pushed through budget cuts to deliver a 20% cut in the practising certificate fee, to help support the profession through the pandemic. How has that affected the way it operates and what it can provide for members?

"That's been a very interesting process, but it has been a matter of cutting your cloak according to your cloth. There have been efficiency and cost savings by people working remotely. I don't see that as something that is particularly desirable or healthy to maintain in the longer run, but it hopefully will improve efficiency seeing people able to achieve a better work-life balance.

"It was right that we wondered at that early stage what the Society could do to support the profession at a difficult time, and budgeted accordingly. As things have turned out the Society's finances have been perhaps stronger than we expected, because the profession has been more resilient than we feared it might." Hence support will be maintained in the next practice year to the extent of a 10% reduction on the pre-COVID PC fee, "and that has been carefully budgeted for in order to make sure that everything the Society would otherwise be doing for its members, and everything its members would be expecting the Society to do, will still be available".

That comes despite the additional pressures as the likes of digital conveyancing and virtual court hearings shot to the top of the agenda. "The work has hugely added to the demands on the Society," Dalling confirms, "but our view has always been that better things happen when the Society is engaged in these processes than when it is not allowed to sit at the table. Sometimes the Society can bring a perspective which may otherwise not be at the top of the menu for some of our stakeholders – albeit I hate that term!"

Staying engaged

Will the experience of lockdown bring permanent changes in the way the Society itself works? "I think that's inevitable. I think they will be changes for the better. But we have to be conscious that human interaction has a value of its own, and the feeling I get from across the Society staff is the vast majority will be keen to get back to working in a social environment rather than a remote one." Blended working is likely to become the norm, as it is with Council and committee meetings.

As for interaction with members, "I think if anything the necessary adopting of technology has given a real chance for the wider membership to engage with the Society more than they used to. Amanda reports that her virtual tour of Scotland has engaged far more people than would ever be likely in reality, because of course it's a very efficient way for members to engage."

The Society has also been tracking the impact of the pandemic on solicitors, "in the context of what we called our COVID Resilience Group, to try and meet every week to hear members' concerns and feed them into our engagement with the Government, with courts and others", Dalling explains. "We certainly have not wanted any individual members or sectors of the membership to be left feeling isolated or out of touch simply because the physical office is closed."

How, then, does the Society assess the profession's state of health, as optimism grows over the recovery from COVID? The answer depends more on the practice sector than the size or location of the firm. "We know property in particular is on a boom. I would like to think that the high street firms who are heavily involved in property and private client work will be doing as well as they might otherwise have; hopefully the corporate life of Scotland is continuing to prosper, and the larger firms are able to service that. The concerns are at the sharp end of both criminal defence and family representation."

Still awaiting delivery

Acknowledging Dalling's direct interest, is the situation of legal aid practitioners the most serious issue facing the Society at present?

"It is certainly one of the most serious. The Cabinet Secretary engaged with Amanda, myself, Lorna and indeed with the bar associations of Edinburgh, Glasgow and Aberdeen very effectively and to a positive outcome in terms of the initial increases that have been approved for legal aid fees, but fees are so far behind it almost doesn't pass the laugh test. It is a huge surprise to me that the criminal bar in particular, but the civil bar as well, has been resilient to the extent it has continued to operate at the woeful levels of remuneration compared with where they previously were, and they've never been good. I hope that the good faith shown by the Cabinet Secretary will be maintained by whoever is in post after the election, and that they will see the strength in investing in a legal aid system which delivers dividends for individual members and for society as a whole."

Legal aid solicitors are fully aware that the money so far offered as emergency support to individual firms comes nowhere near the £9 million initially indicated as the resilience fund. But what more can the Society do to get the Government to deliver?

Pressure continues, Dalling reports, and the Government is believed to be examining how the scheme delivered against anticipated targets, and what new scheme could be proposed to deliver what was held out. "We will continue to engage, to protest the strength of the argument: it doesn't weaken because it's repeated, and I don't think any responsible Government would want to be in post and see the demise of sections of the legal profession, particularly those who are so closely attached to delivering access to justice."

More broadly, "We have continued to say that the underfunding of legal aid has been over the period of a generation. There is a long way to go, and there are huge concerns both about the likely impact on the health of the profession but also inevitably on access to justice – where is the next generation of criminal defenders coming from? Because at the moment it doesn't seem to be attracting the bright young people out of university. And that's a real shame."

Be there for others

Beyond simply meeting these pressing problems, what does Dalling hope to see the Society achieve over the coming year?

"I have no particular agenda. I hope that doesn't sound unfocused, because it's not." Having supported quite a number of Presidents while on Council, not always without challenge, he adds: "I care about doing the right thing, about getting it right, not just because somebody else thinks so but because I believe so. The Society is there to support its members. I hope it has done that through COVID. I think we have done that over my term on Council. If there has been anything with which I disagreed, I have made it known and either have been persuaded or I have persuaded others. It's difficult to set aims other than to say that our main aim is to be there for the needs of our fellow solicitors and to ensure that the public interest is protected in terms of fair and proportionate regulation."

Legal education: a reply

Replying to Derek Auchie's article published in February, Craig Anderson and Andrew Steven believe that his proposed transactional approach to teaching law would not in itself provide a proper grounding

Like most other things, law teaching has been significantly affected by the COVID-19 pandemic. In this regard the article "Legal education: discontent with content" (Journal, February 2021, 16) by Derek Auchie, Professor of Dispute Process Law at the University of Aberdeen, is timely. He is right to seek a debate on how law teaching may be improved in the future.

Within certain limits, including the Law Society of Scotland's required syllabus, there should not be a mindset that things should automatically return to how they were before. As law teachers at two other Scottish universities we welcome the opportunity to contribute to this discussion. We do so from the standpoint of being specialists in property law.

The "transactional" approach in outline

In his article, Professor Auchie expresses concern at the amount of detail which Scottish undergraduate law students are expected to learn. He argues that it would be better to move to a more "transactional" approach to legal education. As we understand it, this means learning law through the medium of concrete legal transactions, that is to say "the mechanisms within which the law is applied".

Thus, the law of contract would be studied by following a specific contract through all its stages, from initial negotiations to interpretation and enforcement of its terms. Criminal law would be taught through the study of specific criminal charges. The aim is "to learn the principles *and* the application of the law through transactions".

At the same time, the actual quantity of law studied would be significantly reduced. Indeed, Auchie goes as far as to suggest that black letter law might even be compressed at ordinary level into the first year of the LLB, followed by a second year in which subjects are studied in a dispute resolution context. There would be no need to teach "all basic legal subjects to all students". In summary, the study of legal technique is much more important than the study of legal rules.

We have sympathy with some of these views. Certainly, if we as law teachers were producing graduates with no notion of how the law works in practice, we would deserve criticism. Again, it is self-evident that there is far too much law for the LLB degree to do more than scratch the surface. There is therefore a debate to be had about what we include and how it is taught. Nonetheless, we are not persuaded that Professor Auchie's proposals, if implemented, would represent an improvement in legal education in this country.

Appropriateness for all subjects

A preliminary point is that the transactional approach works better with some subjects than others. It is less easy perhaps to see legal system, public law or legal theory being taught in this way. By contrast, the law of contract, as Auchie discusses, is a natural fit. Use is already made of this sort of approach in suitable circumstances, and we wonder if he overestimates the extent to which current teaching approaches are radically different from what is envisaged.

For example, in the contract law course at Edinburgh Law School, Professor Hector MacQueen perhaps unsurprisingly takes the same structure to the subject as his *MacQueen and Thomson on Contract Law in Scotland* (5th ed, 2020). Thus he considers formation, before moving on to content, performance and then breach. This is the same "life cycle" approach as Auchie suggests, albeit he proposes this should be done under reference to a specific example of a contract which students would be given.

"Our principal objection is that it would fail to give students a sufficient conceptual underpinning... We disagree... that conceptual issues are more relevant to academics"

A similar approach is also currently taken in property law in both of the authors' institutions where, for example, missives of sale, the content of a disposition, and land registration are taught in that order, with reference being made to the Scottish Standard Clauses and ScotLIS. Nonetheless, we believe that there are dangers in wholesale adoption of Auchie's proposal.

gunnercooke

A new type of law firm to challenge Scottish market

Award-winning challenger law firm gunnercooke has opened new offices in Edinburgh and Glasgow as it launches gunnercooke Scotland this month.

Gunnercooke will be the first fee share firm in the Scottish legal market, but what does this mean in practice and why are so many lawyers making the move?

The firm was set up in 2010 with the aim of improving the way legal and professional services are delivered to clients, and helping lawyers, consultants and advisors design their own lives.

Today gunnercooke is a full service corporate and commercial firm with more than 250 senior partners practising throughout the UK. Many of the industry's top lawyers from international firms are now choosing to make the move to a new way of working, often joining alongside their own trusted teams. Simon Etchells is the firm's first recruit in Scotland, moving from Dentons in Glasgow and bringing 35 years' experience in real estate law.

The firm is passionate about client services and proud to maintain a market leading NPS score, rated by clients as +90, against an industry average of +19. An 18,000 strong client base includes large corporate names such as Johnson Matthey, BAE Systems, Jet2 and Santander.

Experienced lawyers

gunnercooke comprises solely senior lawyers. Each partner has a minimum of 10,000 hours practising experience, acting as trusted advisors to their clients and, where possible, offering certainty of fees from the outset.

Design your own practice, the way you want to run it

Lawyers join as self-employed consultants, free to design and develop their own practice and working arrangements. They keep the majority of the fees they make, with a proportion being paid to the firm to access a comprehensive support infrastructure.

One of the biggest draws for these lawyers is the freedom and flexibility to run their practice in their own way, set their own targets, work when, where and how they want to, with whoever they choose. Partners often talk about being freed from the constraints, targets, timesheets and politics of a traditional law firm, so they can focus on doing what they have trained to do – practise law.

A world-class infrastructure

gunnercooke aims to provide a world-class support service to its lawyers. They offer everything from PI cover, billing and finance, admin, IT and technology services, through to marketing, branding, pitch and proposal support, internal networking, development and business coaching.

Teamwork and collaboration

There is sometimes a misconception that a fee share model is for lawyers who want to work alone, but this couldn't be further from the truth. gunnercooke thrives on driving collaboration across its internal market and lawyers are remunerated for cross-referrals.

This has ensured that the culture is second to none – the team strongly believe that whilst the market is evolving and new models will arrive, their culture is the one thing that can't be copied.

The successes so far have meant growth is happening quickly. Last year the firm opened an office in Birmingham, adding to its Manchester, London and Leeds bases, and as well as gunnercooke Scotland, gunnercooke Germany has launched. The business has further plans for international expansion in what is set to be an exciting few years.

The model will undoubtably be a shake up to the market in Scotland. gunnercooke is launching a recruitment programme to find some of the country's best lawyers who are ready to make their next bold career move.

If you would like to find out more on a confidential basis, gunnercooke would be delighted to have a conversation about what your practice could look like. Please get in touch with Sarah Goulbourne, or visit **www.gunnercooke.com/join-us/**

Theory and practice

Our principal objection is that it would fail to give students a sufficient conceptual underpinning of subjects. We disagree with the apparent assertion that conceptual issues are more relevant to academics and law reform bodies. As an aside, when one of us was a Law Commissioner practical issues were often intertwined with conceptual ones. For example, there are diverging views amongst agricultural and commercial practitioners over the implications of a lease being extinguished by the doctrine of confusion if the tenant buys the land.

Professor Auchie suggests that it is only essential for the basic principles to be taught. Expecting students to know particular detail beyond that is unnecessary. Of course, this is a question of scale. We think the danger here is of metaphorically skipping across the top of a subject. Thus, presumably in the sale of land example above there would be little focus on conceptually important rules such as s 86 of the Land Registration etc (Scotland) Act 2012, on the basis that few transactions engage these. The *nemo plus* (or *nemo dat*) rule, we would assume, is so fundamental that it would be taught, but there may be no time for the exceptions to it, of which s 86 is one.

"A transactional approach risks producing lawyers who are very good at filling in forms..., but who have little real understanding of what they are doing"

At a wider level, a transactional approach risks producing lawyers who are very good at filling in forms (something on which the Diploma in Professional Legal Practice rightly focuses), but who have little real understanding of what they are doing, and who falter if a difficult point of law arises. Our fundamental point is made in the title to a book produced as a tribute to one of our own teachers: A J M Steven, R G Anderson and J MacLeod (eds), *Nothing so Practical as a Good Theory: Festschrift for George L Gretton* (2017).

Difficult issues

Auchie's claim that perhaps only 1% of legal practice involves difficult legal issues is debatable. Even if it is correct, it does not follow that the balance in legal education should be the same. Much of just about any job is routine in nature. Goalkeepers spend most of the match standing in the penalty area, waiting to be called into action, but they undergo countless hours of training on how to save a shot. It often makes sense to focus attention on things that are difficult to master.

There is of course no getting away from the fact that law is complex. Any difficult body of knowledge can only be understood through focused, in-depth engagement. For example, although difficult issues of *mens rea* rarely arise in criminal practice, what kind of criminal lawyer would not recognise such an issue when it does arise? It is hard to see how the necessary understanding could ever be acquired in a piecemeal fashion as issues happened to arise in particular cases, as opposed to focused consideration of *mens rea* itself.

It is true of course that much of what is learned in law school is forgotten by the time the student emerges into practice. The brain can only retain a finite amount of information. However, that does not mean the effort was useless. A person trying to build physical strength does not have to remember every press-up in order to benefit from it. In much the same way, engagement with legal material builds the necessary mental muscles.

We agree that where difficult points arise, it is possible to look things up. Not all issues are covered in legal literature, though, and the Scottish legal profession has not always been even as well off for literature as it is now. There is even a risk that Professor Auchie's proposals could reduce the number of people able to write the law books of the future, because of a lack of exposure to sufficient detail at undergraduate level.

Moving forward

We would not therefore support a move towards the transactional approach which is envisaged. This is not because we are complacent, or some form of legal luddites. In recent years both of us have written new ordinary level property law textbooks because we felt there was a clear need for this. We each frequently teach cases using Google Streetview, which allows students to see the locus.

We accept that we need to monitor the level of detail that we impart, taking account of changes in practice and society. For example, negotiable instruments have now been dropped from the commercial law course because of their increasing disuse due to digitalisation. This was possible because the Law Society of Scotland removed them from its syllabus, and therefore the Society too has a role here. The possibilities of linkages between courses justify consideration, but we think there are risks of superficiality when teaching more than one thing at the one time.

On a wider level, Professor Auchie also questions whether we should return to live lectures once health restrictions allow, or keep to pre-recorded materials. While attitudes to this vary, we both see great value in live large group teaching, even if this is online. It offers the opportunity for engagement between teacher and student. The sea (or pond at 9am on a Friday) of faces in a lecture theatre will react if the lesson is not comprehensible, and a different form of explanation can then be tried.

At its best a live lecture can entertain and inspire. Those who go on to study subjects at a deeper level, including for a doctorate, often do so because the subject was expounded in an engaging way at ordinary level. In our experience at least, this is more difficult in a podcast. We are not convinced that only having small group live teaching is as good, and as Auchie accepts, there are clear human resourcing issues here.

He closes his article by expressing the hope of "starting a broad conversation on whether, and if so how, we can improve on educating future professionals in law". We welcome this. After all, we have a shared aim here, of having legal education in Scotland be the best it can be. We accordingly offer these comments in the same spirit.

Craig Anderson is a lecturer in law at Robert Gordon University;

Andrew Steven is Professor of Property Law at the University of Edinburgh

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Many people worry about what may happen to their pet if they are unable to care for them through illness, a change in circumstance, or even if they pass away. You can provide your clients with peace of mind by informing them about the Scottish SPCA's free Forever Care service.

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COVID challenges and tomorrow's lawyers

Adviser Michael Randall explores the difficulties COVID-19 has posed for students, and discusses how potential employers in the profession should view people who may have gained from their experience

As we approach the end of a full year of online teaching, it is important that we collectively take stock of the challenges students have faced as they look to proceed towards the legal profession.

University and the profession are not wholly distinct from one another. If we collectively fail to understand these challenges, positive changes cannot be introduced. It is very easy to write off the adversity that students have faced in the last year as the result of COVID. My overall observation, though, is that COVID has not created as many new challenges as you might think. What it has actually done is magnify existing problems, and we need to change our approach to support overall, not just as a temporary response.

I am in a unique position at Strathclyde Law School, where I have held the administrative roles of senior tutor (overseeing our pastoral care provision across all undergraduate cohorts) and honours coordinator (which also has a pastoral care element). In these roles, I frequently speak to students who have serious personal circumstances concerns, and I want to give an overview of the content of those conversations, with the hope that this contributes to the discussion about pastoral support in the profession.

I am not a trained counsellor, but in my role I have acted as a sounding board for student concerns. Over time, I have spotted trends and patterns, and have noticed that, while there has been an increase in students wanting to access support during COVID, particularly after Christmas 2020, the underlying challenges that students have faced remain relatively unchanged.

Prior concerns and COVID effects

Supporting students is something I care about greatly – I could write far more in explaining the examples cited. I tend to communicate with the more urgent and complicated cases and therefore do not intend to give specific case studies, but equally know that there will be many other students who do not feel comfortable in speaking out, and I want to change that mentality. Yet I have not had a meeting where, when the student explained their circumstances, I have thought that the student's conditions were their fault. Possible exceptions might be plagiarism (dealt with by others in the Law School), or involvement in a criminal act (which I have not come across).

It is not the student's fault if they experience a physical or mental health problem, particularly if due to harm caused by another person. COVID may have increased a feeling of isolation, or delays in treatment and reticence to speak to a GP, but the baseline susceptibility has not changed. It is naive to think that students were not experiencing anxiety and depression pre-COVID, and it is a major step to speak to the University Disability & Wellbeing Service for professional counselling. The coping strategy previously may have been daily conversations in person with peers, but this has not been possible, and we have a first year contingent who have never really met each other and built up those connections.

Students with care commitments for a family member experiencing physical or mental health difficulties, or who are balancing study alongside childcare, would have demands on their time regardless. COVID may increase concerns regarding shielding. Reduced access to childcare, and home schooling (including of younger siblings), would also make demands on time, but such demands would have affected these students pre-COVID too. In terms of other time commitments, many students work part-time to meet living costs. We cannot criticise students for keeping a basic standard of living. However, furlough and redundancies have made it harder to keep in good favour with a paymaster in order to build a financial buffer, whether for redundancy or to dedicate more time to study in honours year.

Magnified disparities

The switch to online teaching has exacerbated some existing disparities. There was an increased demand across the university for students to be able to access content digitally. However, this demand (along with difficulty for library staff in being able to get on campus) meant there were delays. For any students who are visually impaired, or need core content presented in a particular format, there would have been an impact – again a concern outwith COVID that has been magnified because of COVID.

Teaching online has also led to variations between staff in how content is recorded and made available. Students have had to adapt to this, and cope with staff having to familiarise themselves with ways of providing material, either as pre-recorded content, which offered flexibility if students could not be on a computer at a set time, or live recordings which offered a fixed time slot and a lower administrative burden, but also Zoom fatigue and temperamental staff internet connections. While there were some positives (students being able to ask questions in a private message), there was less of a rapport built. Once classes finished, that was it, so debates were curtailed and there was no room to ask a quick question at the end of the session.

The requirement to sit exams at home also highlighted inequities, since every student's circumstances would be different. Not every student had equal access to a laptop (some relied on library computers or a shared household laptop), or internet. The decision was ultimately taken for exams to have a nominal duration, completed over 72 hours, with the idea that students would be able to find time during that window. However, some interpreted this as spending the full three days on a paper, increasing anxiety accordingly.

The format of take home exams meant the School's Student Affairs Committee (which oversees plagiarism and poor academic practice) required to issue guidance on acceptable practice. This affected the group chats on which we relied this year to help foster a student community: many students left these chats for fear of the exam being discussed there once the paper had been released, which further isolated them from their peers.

Students who required to work in the library, for a quiet place because of a lack of space at home, or for research, particularly for honours dissertations, found the opening hours shortened, including in comparison to other Scottish universities, owing to wider non-compliance with COVID guidance by some library users.

Seeking support has consequences?

None of these circumstances are the fault of students and, while we try and provide a supportive environment with dedicated administrative roles and professional university support services and policies, that can only go so far. Where this is of particular interest for the profession is that one of the barriers students face is a self-internalised pressure that if they ask for support, this will be viewed negatively when they seek to enter the profession.

A response to reading the above might be to argue that if the circumstances are so serious, a student should pause their studies and seek time out. However, discussing voluntary suspension always comes across as telling a student they are not able to do something. The term implies a negative, not a positive. A frequent response I have heard in meetings is that potential employers will look at a student's degree start and award dates, notice that they took longer to complete, and count it against them. One thing I would like to see moving forward is for employers to recognise proactively that taking voluntary suspension shows a level of maturity, and to respect that it does not reflect on the student's ability and potential value as an employee. They should also be mindful that the reasons may relate to a sensitive issue.

"The profession, like the universities, has sought to adopt policies and strategies to manage through the pandemic, but they must act as a catalyst for sustained change"

Comparisons and the competitive market

At a recent careers event hosted by our Strathclyde Student Law Society, I was asked what the best part of my job was. I get to speak to intelligent, hardworking and talented young people daily, and it is a little bit like discovering a band or artist before they are signed by a major label. However, students do compare themselves to others, both in academic performance and career progression. This is disheartening, because the result is that I have had numerous meetings with students where they either do not apply for an opportunity because they think they are not good enough, or they undersell themselves, not through modesty, but lack of confidence.

For example, if a student's friend is offered a traineeship and they are not, the perception automatically is that the student must be worse, as opposed to being perhaps equally capable or having their own strengths. If one of your peers is on 15,000 words for their dissertation project and you are on 5,000, that must mean you are behind – however, the 15,000 may simply be a collection of observations from the literature that lacks the required critical argument. In other words, they are not comparable.

Everyone recognises they are entering a competitive job market, and these career concerns were a problem pre-COVID. If we create a narrative where a student's potential is purely determined on a "Top-Trumps"-esque grading system, we may be penalising students for circumstances that are not their fault. Furthermore, we will be overlooking a talent pool that could be a positive addition to firms. The students I speak to have struggled, but they are still here. They are determined and resilient, which would be great qualities to possess in a professional setting. The chances are that they would be committed employees, actively listen to clients and ultimately demonstrate empathy.

These are only the students who have approached me for support. There will be many others who have not, and the transition into the working environment will be intimidating, but they will not have the same structure in place for support compared to university. These students will soon be colleagues who will need assistance, but equally can offer experience and insight from their own struggles to help others as well.

I do not want this piece to read overly negatively, and COVID has led to some positive developments for professional activities – for example, webinars, conferences, and mooting are now more accessible than they ever have been. The profession, like the universities, has sought to adopt policies and strategies to manage through the pandemic, and these are positive, but they must act as a catalyst for sustained change. My concern is that if we do not start to think about how we structure and demonstrate access to support in that transition from university to employment, we will ultimately be failing a group of hardworking and talented individuals by penalising them for scenarios which are not their fault.

Dr Michael Randall
is a teaching associate in the Law School, University of Strathclyde
A fuller version of this article is in this issue under "Online exclusives"

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Transforming the client experience online – then and now

Think how much communication has changed in the last 20 years – or even just the last year. Then realise how client expectations will have changed as well. Are you ready?

Digital communication tools and mobile apps are changing how lawyers work, communicate, win business, and retain business. In 2021, how can lawyers and law firms remain relevant to their audience, an audience almost permanently connected online?

The pace of change is so rapid that it can be easy to think that things have always been as they are now – we are used to relentless technological change, but it wasn't always this way. To understand how to communicate online today, it is important to understand the way the online communication landscape has evolved, and what is now valued and rewarded.

Dateline: the year 2001

As another busy day looking after clients draws to a close, the opportunity might arise for you to make a few important calls you missed. You sit back, slide open your Nokia 8855 and dial. Anyone calling your office will just hear a constantly engaged tone – it's 5.45pm, your secretary is gone for the day – and instant communication apps are more than a decade away. You try to call a client to provide an update before day's end, but they're busy – it's nearly dinner time, inconvenient – so you close shop, jump into your silver 3 series BMW and head home. The client tries to call back at 6.15pm, but you let it ring out – you don't really talk to clients out of hours, could take too long, not convenient for you – so you're out of touch from everyone now for at least the next 15 hours.

The next morning the client calls you back - its 10am, you're obviously busy and can't take the call. Email is available, but dictating or even typing up the email yourself is taking time away from money-making cases – email automation is a pipe dream – so you reluctantly ignore it. The day goes on and you are busy being busy, fee earning, doing what you can to protect the business and make money.

The client on the other hand feels ignored. A few weeks earlier, the same thing happened. The client called to see how things were going. No response. The jarring experience begins as the client starts to frustratingly mutter to a friend about how difficult you are to get a hold of. But of course, "My lawyer wouldn't be ignoring me... again... would they?" Anxiety starts to eat at the client. Faith in your firm is dwindling with every passing minute. And that all important referral is slipping away.

Revolution lies ahead

In the year 2001, digital communication truly was in its infancy – the whole experience, both in terms of getting online and communicating online, was clunky, difficult, and often exasperating. Clearly though, once refined, and improved, revolution lies ahead. Think of where we are today, and the ways smartphones have changed daily life – from anywhere you

can now wirelessly access information on unprecedented levels through multiple devices. Changed days indeed.

The digital world, even in 2001, clearly presented an immense opportunity. Great prizes lay in store for those individuals or businesses who managed to refine and improve the online user experience.

So, what does this all mean?

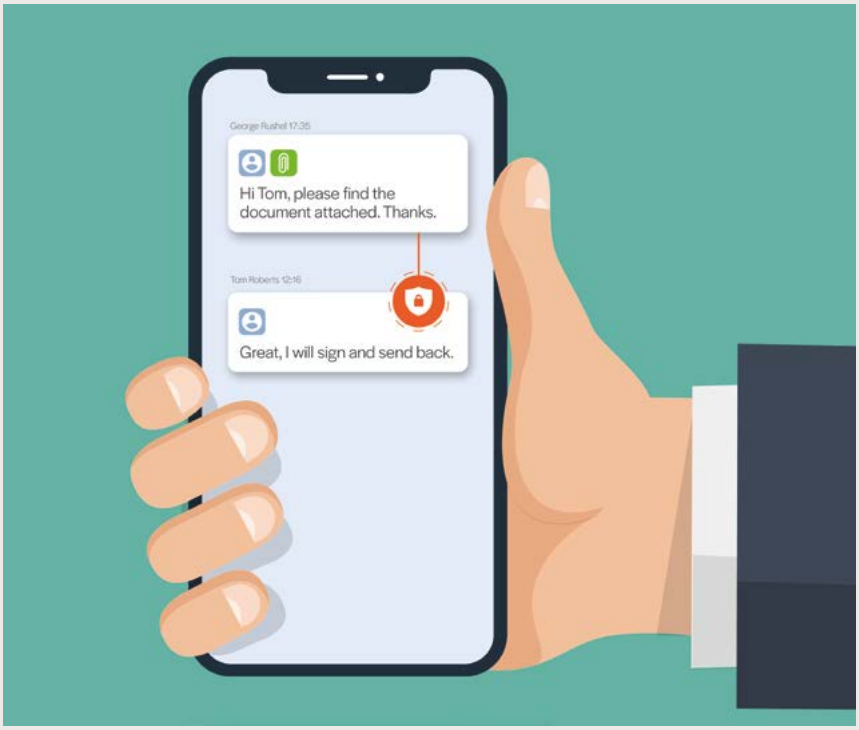
Thinking back to the year 2001 and contrasting it with the position today, it is clear to see that communication in the world has changed. We all expect quality information immediately. We want this information provided to us in a structured way and from people with authority that we respect – and that is where software providers, like Denovo, and communication tools, like the Link App, have triumphed. Our every move has been focused on making it easy for lawyers to manage their matters efficiently through automation and communicate with valuable information. The technology gives authority to the law firm and rewards the client with the information they want when they need it.

Failure to embrace change

It is no longer the year 2001. Failure to embrace change can lead to the demise of onetime incredibly successful businesses, a perfect example being Nokia (remember that phone you used to use?). With the arrival of the internet, other mobile companies started understanding how data, not voice, was the future of communication. Nokia didn't grasp the concept of software and kept focusing on hardware, because the management feared to alienate current users if they changed too much. Nokia's mistake was the fact that they didn't want to lead the drastic change in user experience. This caused Nokia to develop a mess of an operating system with a bad user experience that just wasn't a fit on the market. In 2008 Nokia finally made the decision to compete with Android, but it was too late. Their products weren't competitive enough.

Clients expect instant communication

People's use of day-to-day tech has increased and will continue to, which is why clients come to expect communications with their firm to be efficient, instant, and regular. After all, that's what they're used to. When lawyer to client communication is going smoothly, there is a lot of pressure eased on both sides.



To improve client satisfaction in law firms, the introduction of smart communication tools must be made a priority for lawyers; particularly keeping their clients in the loop on their case.

Remember, it won't be lost on most clients that you are a busy lawyer, trying to do the best you can to get everything done. It's not easy. Sometimes getting back to clients when *they* want isn't possible. Calls and emails are missed and that's only natural. But technology can help, and Denovo's integration with the Link App was created to do just that.

With many cases to manage and clients to update, it's tremendously difficult to provide a consistently outstanding client experience. But with the Link App, you can boost your productivity, gain time, and remain in control of your client communications. The platform includes instant messaging, document sharing, case notifications, secure storage, and more. Basically, everything a lawyer needs to remove that jarring experience we mentioned earlier.

The future is now

We all face a battle to remain relevant, and change must be embraced. Law firms and lawyers who are agile of thought and action will continue to prosper. Digital platforms like CaseLoad and the Link App are your gateway to transform your client's experience. A necessity in today's market as customers look to communicate with and assess you.

If you aren't talking to clients in a way that they value online, you may one day be pulling down the shutters for the final time – dramatic indeed, but Nokia would have thought the same not so many years ago.

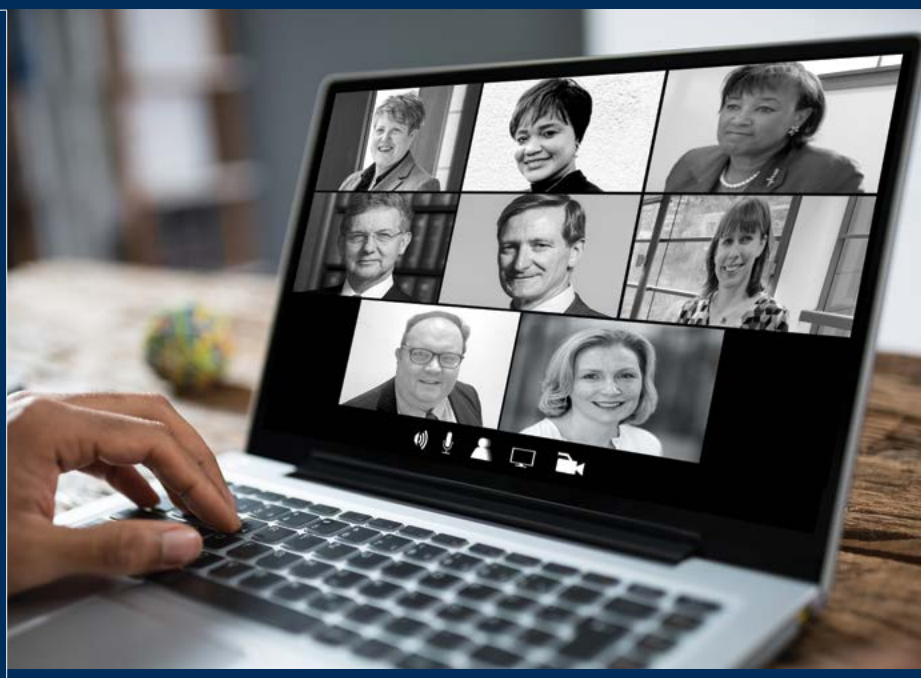
Update to the year 2021...

Your electric car waits outside as you make an appearance from your office at a virtual meeting you've had with your client, all their documents are stored in the cloud on CaseLoad, your smartphone pings a notification from the Link App and tells you that your client is ready to sign, you hit a single button to acknowledge the message and the documents can then be sent securely to be e-signed by the client. The fee goes through and a few weeks later you see the 5 star review appear on Google.

It may have seemed like a comical fantasy even a year ago, never mind 20 years ago! But look how far we've come. If you want to avoid being "a Nokia", then you need to embrace the future as now.

To find out more about our integration with the Link App and how Denovo can help you attract, service and retain more business for your law firm, please email info@denovobi.com or call us on 0141 331 5290

High tech, high powered



The Society's first virtual annual conference took full advantage of the scope offered by the format, presenting an impressive range of quality content, Peter Nicholson reports

Technically excellent, and packed with quality content.

Having watched the Society's 2021 annual conference take shape over recent months, and the gaps in the programme slowly fill, the way it finally unfolded must have come as a huge relief to the organising CPD team. Any selection of highlights can barely do it justice, but it is worth picking some out.

Equality first

Equality issues featured strongly on the first and last days of the conference.

President Amanda Millar opened proceedings with a typically forthright address in support of diversity and inclusion – rebutting those who had told her she ought to be focusing on other concerns at the present time. You must be true to yourself, she asserted, and the importance of the Society's equality work had been shown in recent times. She cited the 2019 survey undertaken with SeeMe on attitudes to mental health; its use of social media to feature people with different backgrounds, and a campaign for school pupils with the same aim; its celebration of Pride, Black History Month, and religious festivals; and its new racial inclusion group.

Promoting her #MuchStillToDo message was exhausting, but she was not going to let up. It is only by all working together that we will deliver a profession that includes everybody and represents all those we would serve, she concluded.

Justice across borders

If we were in any doubt about the need for continued action, it would have been dispelled by the Friday morning keynote addresses. First, racial equality and human rights activist Debora Kayembe, something of whose story we related last month, shared some more about her personal journey, from the Congo to England as a refugee and then to Scotland. Although the Society had "opened the door" to allowing her to practise in Scotland, there had been no mentoring or other support available. Asked whether it was right that it should not be too easy to qualify, she replied that assessing you as fit to practise was a different thing from personal or financial support: "It is very expensive to qualify, and takes time." She contrasted the more inclusive process to be admitted in the USA.

The need to combat racism was a recurring theme in her remarks. It is the first thing she would wish to achieve as rector of Edinburgh University; she named it along with climate change when asked what inspires current students; and it featured when she was asked which particular aspects of human rights were in danger of being eroded. Freedom of speech, she answered – because racists are using it to diminish others. Everyone is claiming the right to free speech for their own advantage, rather than in the interests of society, or peace and justice. The right to protest was also at risk.

Kayembe was followed by a powerful address from Baroness Scotland, English QC and Secretary General of the Commonwealth. Taking the theme of our interdependent and interconnected world, she highlighted how the Commonwealth had developed as an equal partnership of nations "out of a spirit and thirst for equality and justice". This emphasis on equality had been promoted by the Queen and the late Duke of Edinburgh ever since the 1950s, a time when "very few were talking about the equality of races".

Describing its operation today as a "network of networks", Scotland described the cooperation that had taken place during the pandemic – including justice systems, which had shown "remarkable resilience in maintaining levels of functioning". Technology had brought profound changes; some might have difficulty with these, especially if representing themselves, but it had the potential to improve quality and efficiency, increase transparency, and reduce opportunities for corruption.

The Commonwealth secretariat "takes the view that an ethical and inclusive approach to the technology is key", she continued. "It must be inclusive rather than exacerbate inequalities, ensure access to justice for all, and secure lasting and positive change."

She concluded: "There is so much we can do as lawyers to lay the foundations to build back better." If lawyers equip themselves to use the digital tools, "This is our moment to conceive a more just world and breathe life into it."

Judges as lawmakers

Further topical content was delivered later that day by Lord Hodge, Deputy President of the UK Supreme Court, who

chose to "revisit the scope for judicial lawmaking", in particular through judicial review.

It is an important feature of our constitution: the separation of powers calls for "clear eyed regulation of the role of each branch", and the principle that the executive should be subject to the rule of law is of ancient origin, in Scotland as in England.

Reviewing the development of the case law, Hodge emphasised the necessary limitations on the judicial role: avoiding judgments on the merits of policy decisions; and developing the law incrementally, not by radical departures.

Yes, tensions can arise from time to time between the courts and Government or Parliament, but they are not a constant, and are "unavoidable in a healthy democracy". The idea of a breakdown between the two is grossly exaggerated. Any concerns over the exercise of judicial powers should be tempered by recognition of this reality, and Parliament "will want to approach with great caution" any enhanced ouster provisions (something currently being put forward by Government).

Word of the day, and perhaps the week, had to be "smeddum" (a good Scots word for spirit, or mettle) – Hodge's answer to the question, what one quality above all does a Supreme Court judge require?

Brexit: the aftermath

If Dominic Grieve is to be believed, the Government will pull back from changing the law on judicial review. The former Attorney General was in fine form in his address on the Wednesday, with a revealing account of the politics at the heart of the Brexit process through to 2019, including his eventual rebellion against his party, which began with his unease over the Henry VIII clauses in the Withdrawal Act.

Without becoming too political, it is worth noting his observations that the UK has always operated on the basis of consensus, and there are bound to be "damaging repercussions" if you do something like Brexit against majority opinion in (in this instance) Scotland and Northern Ireland; that once you initiate a revolution, it can go off in a direction that people don't expect; that the Trade and Cooperation Agreement must only be the start of a discussion about what the future relationship with the EU will be; and that sovereignty is "an old myth with new myths piled on top": the UK has signed up to about 800 treaties with binding arbitration provisions.

In the panel session that followed, Christine O'Neill QC of Brodies observed that we are "certainly not in a place where the law is more straightforward than before", and that commercial reality is that clients are making their own risk assessments where what is now required in order to trade is unclear.

It was at this point that Grieve offered the views, first, that the European Convention on Human Rights is safe in the UK: leaving it would create "another layer of divorce from the EU"; and also that the Government will not succeed in changing the law on judicial review. He then floated the thought that if European jurisdictions succeed in picking up dispute resolution work that used to come to the UK, English law could become "internationalised but no longer practised" – like the Code of Justinian, it would be taken into other systems and then modified at will. It has, he added, already happened in New York.

"There is so much we can do as lawyers to lay the foundations to build back better." If lawyers equip themselves to use the digital tools, "This is our moment to conceive a more just world and breathe life into it."

From the panels

Despite the spreading of the programme over a week, there were still clashes of breakout sessions and it is impossible to cover all the excellent presentations in a single article.

Technology featured strongly. Criminal practitioners Krista Johnston and Stuart Munro discussed the pros and cons of remote hearings, largely agreeing that we need to find the right place to draw the line (and it would be worth researching jurors' experience, Munro suggested). Johnston added that virtual prison visits had been a "revelation", though not suitable in every situation, and both agreed that electronic bundles of documentary evidence ought to replace paper entirely.

On the conveyancing front, a panel including Keeper Jennifer Henderson agreed that the hastily introduced digital applications to Registers of Scotland were an advance that is here to stay; indeed testing (with solicitors, of course) is now taking place on the next level, creating deeds within the system, which could eliminate the need for checking by Registers. Ann Stewart raised the question whether the conveyancing monopoly still has value, suggesting that it lay in title examination and client support: "We should be freed up to concentrate on the things that only a human can do."

There was business support as well. Consultant Scott Foster explored the parallels with the credit crunch recession – firms carry much less debt now, partly through more efficient fee collection. He also explained how to make a persuasive funding application to your bank. Short version: show you know your business and understand the management information, and be ready for questions.

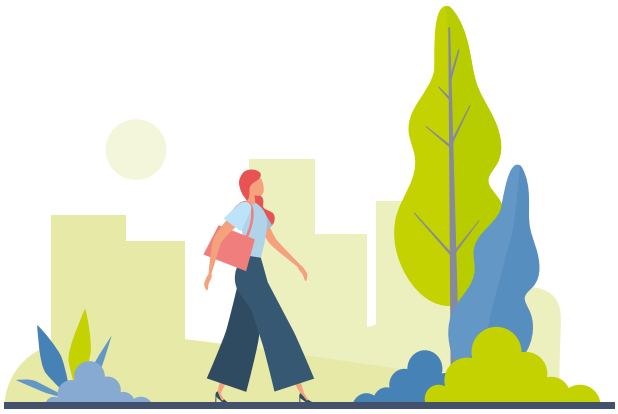
That followed a panel session on the economy, in which the CBI's Tracy Black flagged up the current opportunities for Scotland in tackling the climate change challenge – but we need to get business, Government and regulators working together, "harness the money", and get rid of red tape – it takes too long to get projects off the ground. Our "world class" university sector, allied with post-pandemic healthcare, is another area to target.

Final impressions

How to sum up the week? It inevitably lacked the networking side and the exhibitor displays, but contained far more than the traditional full day could have, and attendees were able to choose their days (is it possible for the future to offer further flexibility in selecting sessions?). There appeared to be few technical hitches, and sessions notably ran to time. Most speakers, and questioners, even remembered to unmute!

Closing the conference, Lorna Jack said she was "incredibly proud" of the Society for hosting it, after the months of planning, and managing the technology. It had felt like a collaborative event: "Zoom meetings have become almost second nature, but it's been great to see so many people participating."

Take a break, make it nature



To mark Mental Health Awareness Week this month, LawCare invites you to reclaim your lunchbreak and recharge in nature, with all round benefits for health and productivity

Many of us have lost our connection with nature, spending most of our time indoors, at home, in an office or in a car. Sometimes even having a lunchbreak seems luxurious – most of us bolt food down at our desks so as not to miss a minute of the working day.

However, as humans we aren't meant to spend so much time indoors. Our ancestors were hunter-gatherers spending most of their time outdoors amongst trees, by water, studying plants and animals, in all seasons and weather. Could our health and wellbeing be compromised because we spend less time outdoors? There are many powerful reasons why we should down tools and step outside once a day, so in this month of Mental Health Awareness Week, try and use your lunchbreak to get outside.

Help your productivity

We often think we don't have time to take a proper break during the working day, but having a break outside can make all the difference to your productivity and give you perspective on a work issue. Researchers found that time spent in nature can renew our attention spans when they are flagging after a hard day's work or an extended period staring at a screen – this is known as attention restoration therapy (ART). This is supported by research from the University of Madrid and Norwegian University of Life Sciences that found that seeing natural landscapes can speed up recovery from stress or mental fatigue.

Reduce anxiety and stress

Being anxious, stressed or depressed can mean you don't want to go outside, preferring to hunker down indoors. Whilst this may be your natural instinct, going outside and being with nature can reduce your anxiety and stress. There is scientific evidence that we feel calmer when we look at trees, for example: this is known as biophilia.

Forest bathing, or Shinrin-Yoku, the Japanese practice of spending time slowly and quietly in forests, is proven to lower the stress hormones of cortisol and adrenalin, suppress the fight or flight instinct, lower blood pressure, boost the immune system, and improve sleep. Not only that, but the activity of white blood cells known as natural killer (NK) cells increases when humans spend time in woods. You don't have to visit a wood or forest every day – these biochemical benefits last for up to a month.

In addition there is evidence that exercise outside can be more effective than antidepressants for those with mild to moderate depression, and research from the University of Exeter showed that the presence of birds in a landscape can help to lift depression. It is also well known that time spent with animals, or gardening, has a positive impact on your mental health.

Elizabeth Rimmer is chief executive of LawCare

Effects on the brain

There are several physiological and neurological changes that take place when we go outside which can boost the happiness chemicals in our brain. Serotonin is a compound that carries signals between nerve cells in our brain, and there is a link between the levels of serotonin in our brain and our mood. Time spent in the natural world, and particularly in sunlight, triggers an increase in serotonin. Exploring a new environment outside, and foraging, collecting shells, leaves or berries, releases dopamine which helps regulate movement, attention, learning, and emotional responses. Cold water swimming is shown to boost serotonin, oxytocin (the love hormone), and endorphins, which reduces pain, relieves stress, and enhances pleasure. It also helps to control our fight or flight instinct.

Nature and mindfulness

Meditation, or mindfulness, is proven to reduce stress; however some find it hard to get to grips with. Nature offers many ways to be mindful without even realising, whether it's birdwatching in your garden, watching a sunrise or sunset, looking at a bee buzz round a flower, stargazing at night or listening to the sound of the sea. These are all ways to help you be calm and still and focus on the present moment, which can help you maintain good mental health and wellbeing and keep stress at bay.

Where to find support

LawCare provides emotional support to all legal professionals, support staff and their concerned family members. You can call our confidential helpline on 0800 279 6888, email us at support@lawcare.org.uk, or access online chat and other resources, including Mental Health Awareness Week materials, at www.lawcare.org.uk

Resources and useful links

- Book: *Wild Remedy* by Emma Mitchell
- Book: *The Natural Health Service* by Isabel Harman
- Mental Health Foundation: Thriving with Nature
- Mind – how nature benefits mental health
- Nature for Health and Wellbeing: The Wildlife Trusts; Scottish Wildlife Trust
- RHS: How gardening can help mental health and wellbeing
- Thrive: the gardening for health charity
- Forestry Commission: Forests for Wellbeing; Forestry and Land Scotland
- Mindfulness in Law Group

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COVID, lost income and child maintenance

Changes in income due to the pandemic may have clients asking about the implications for child maintenance payments. Jennifer Maciver sets out the considerations, and the need for early action

Many people have experienced significant changes to their income and circumstances as a result of the COVID-19 pandemic. That in turn can impact the amount of maintenance separated parents are due to pay or receive. Most commonly we have seen reduced income due to furlough or unemployment, but some self-employed parents have also been forced to stop trading due to the lockdown rules. The question then is how that change impacts on the amount of child maintenance payable, if at all, and the recoverability of any arrears that may accumulate as a result.

At the point the pandemic hit us in March 2020, 56% of separated families with children had a child maintenance arrangement. That can take one of two forms.

- The first is a statutory arrangement where the Child Maintenance Service ("CMS") has made an assessment of the amount payable. The parents may then take responsibility for payment ("direct pay"), or CMS may manage the payments ("collect and pay"), but both are based on the CMS assessment. This accounted for 18% of families in 2019-20.
- The second is a family based arrangement where they have agreed the amount without CMS input and payment is made directly between them. A further 38% of families had this type of arrangement.
- The remaining 44% of separated families had no formal arrangement.

If there has been a change in the paying parents' financial circumstances, the first step is always to ascertain whether they have a CMS arrangement or a family based arrangement. It's common for parents to be confused by this, generally because they will often use the CMS calculator as the basis of the family based arrangement and so think of the child maintenance as being set by CMS. It is, however, a crucial differentiation when it comes to assessing the correct approach to any review.

Paying parents: CMS assessment

What is the basis of the CMS assessment?

For those with a CMS assessment, the starting point to working out whether a change can be sought is to look at the basis for the current assessment. When the Child Support Agency rebranded as CMS, one of the key changes was to move to a system whereby CMS obtains information about the paying parent's income directly from HMRC. Where the paying parent is employed, this will be their PAYE information, and for self-employed parents HMRC will provide their most recent tax return.

In normal circumstances, there is an automatic annual review on the anniversary of the case starting. For the majority of people there will only be minor fluctuations in their income, usually related to an annual salary review, and the changes would be picked up and incorporated once a year. While the system isn't perfect and there is an inherent lag in income changes working their way through to the maintenance payment, when balanced against the cost of more regular reviews and the simplicity of using HMRC-provided information, it has proven to work reasonably well.

However, anyone who has seen a major drop in income, has been made redundant or has seen their business fail or grind to a halt due to COVID could find themselves facing a situation where they can't wait for the annual review date to roll round, or even if they could, an annual review wouldn't immediately help them because the review will use the figures in the previous year's (largely pre-COVID) tax return.

When can a paying parent apply for a review?

A paying parent's remedy is to request a review on the basis that their current income has changed. In order to qualify they need to demonstrate their income has changed by 25% or more from the date of the last assessment. Employed people require to produce their most recent payslips to show their reduced income. Anyone who has been on furlough, and so likely to have been receiving 80% of their salary, will

therefore not automatically qualify for a reduction in child maintenance payments unless they have also lost overtime or other payments.

For self-employed people the situation is more complicated. They will require to have their accounts for the year ending 5 April 2021 prepared now, which is significantly earlier than normal given the tax return isn't due to be lodged until January 2022. Unless and until those accounts are prepared, CMS will work on the basis of the previous tax return, which probably won't help. If the business has ceased trading, the situation is different, in that CMS should assess their income at nil.

Another option for employed and self-employed parents who have seen their income reduce is to make an application for benefits. The Government made changes that were intended to make it easier for self-employed people to make an application for universal credit, so this is worth exploring. The key upside in this context is that anyone in receipt of universal credit should automatically be moved to a child maintenance assessment of £7 per week flat rate.

What about arrears?

The date of intimation to CMS of a change in income is crucial. Even if a parent unquestionably sees a dramatic drop in income, that will not be taken into account until CMS is informed. CMS cannot normally backdate any change, and arrears will accrue until the change is intimated to it. It follows that any paying parent in this situation should ensure they inform CMS as soon as possible. CMS can be slow in processing things and it may take a while to action, but when it does, it will use the date of intimation.

Paying parents: family based arrangements

How can a paying parent suggest a review?

For those with a family based arrangement the situation is different. If there is a minute of agreement regulating the payments, the terms of that contract will prevail, subject to the usual limitation that the parties can make an application to CMS after one year.

What about arrears?

Arrears will continue to accrue unless and until steps are taken to formally review the amount in the way set out in the contract, or a CMS application is made, albeit that application would be complicated by the fact that the starting point for the assessment would be the historic financial information held by HMRC.

Receiving parents

The key message for receiving parents is that if they are faced with a situation where the paying parent is intimating a drop in income and unilaterally reducing or stopping payments, or threatening to, having a formal child maintenance calculation in place is crucial. That's because a parent's liability to pay child maintenance through CMS only starts when the other parent's application is intimated to CMS, which can create a problem for receiving parents whose arrangements are not regulated by contract or where no application has been made. As already noted, CMS will not backdate any assessment, therefore receiving parents whose informal payments have stopped or reduced should apply for an assessment sooner rather than later (incurring a one-off application fee of £20).

If they are on a direct pay arrangement and the paying parent has stopped paying, it is possible to request a change to collect and pay (a small fee applies). CMS can be reluctant to enforce arrears which have accumulated before the switch, as it can be difficult for it to know whether the maintenance was paid or not. Again, it's better to act sooner rather than later.

Jennifer Maciver is a legal director and head of Family Law at Gillespie Macandrew

If the paying parent makes an application to CMS for a review, the receiving parent will be notified of any decision to change the amount payable. They have 30 days from the date of the notification letter to object. If they object, CMS will review the decision, and if after that the receiving parent still isn't happy they can appeal to the First-tier Tribunal.

Grounds for variation

In practice the CMS system relies on the receiving parent challenging decisions. If they don't, CMS will generally accept the information provided by the paying parent at face value. In this scenario the receiving parent would apply for a variation themselves, using all the information they have to point CMS in the right direction. An example of this would be if the paying parent says they have ceased trading since COVID struck, but the receiving parent disputes that because they have seen local adverts from the business.

We may also see a self-employed paying parent stop paying themselves an income if takings are down, but keep paying their new partner in full. This could lead to a challenge on the ground of diversion of income. Unearned income also provides a ground for variation and allows CMS to take account of income from rental properties, investments and dividends. This may be seen more commonly in the current environment where more people are living off their assets.

Finally, a variation can be sought on the basis of earned income in circumstances where a person is paying the flat rate of £7 a week because they are in receipt of a welfare benefit, but are also receiving income from employment, self-employment or a pension.

Practice points for family lawyers

Clients should be advised that CMS relies heavily on information provided by HMRC. That can lead to inequitable assessments, particularly in the current climate. Short time limits apply to variations and appeals, so be sure to explore the issue as soon as you become instructed. While there may not always be grounds for a variation, they should be checked for in every case.

Law Society of Scotland member benefits 2021

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BYOD and remote working: a new threat

Employees using insecure personal devices while homeworking are a source of serious weakness leaving law firms open to cyberattack

The past year has seen many firms successfully navigate the new world of remote working. However, the rush to establish a distributed workforce, combined with changing working patterns and employee behaviour, means that many of those firms are facing an increased risk of cyberattack. As a consequence we have seen a worrying increase in cases of email account takeover and ransomware attacks.

Common security concerns stemming from remote working now include:

- data leaking through endpoints;
- users connecting with unmanaged devices;
- maintaining compliance with regulatory requirements;
- remote access to core business apps;
- loss of visibility over user activity.

All these problems actually fall under one umbrella: the dissolution of the traditional perimeter. Many employees are now working outside the security protection that their office networks would usually provide. There is no better example than employees using personal devices to do their job.

BYOD and remote working

The concept of Bring Your Own Device (BYOD) has existed for many years now within an office environment. It is common to see employees using their own smartphone for work purposes, for example. However, an alarming lack of control and visibility exists with employees using their personal devices for working at home.

The rapid shift to remote working meant some employees had to make do with using their unsecured personal devices in the absence of company-issued devices. Even today, employees are working on home PCs or laptops that may also be used by others, including their children. Elsewhere, we've seen employees entering their passwords for important enterprise systems, which are syncing with their children's tablets or other family-used devices.

These unsecured smartphones, laptops and mobile devices are often the most vulnerable endpoints or entry points to firms' networks and enterprise systems. Risks include data leakage, users downloading unsafe apps or content, lost or stolen devices, unauthorised access to data and systems, and risk of malware infections.

Research by the Ponemon Institute highlights how BYOD has decreased organisations' security posture. Sixty-seven per cent of security pros say remote workers' use of their own mobile devices such as tablets and smartphones to access business-critical applications and IT infrastructure has decreased their organisations' security posture.

The problem is compounded when almost a third of respondents say their organisations do not require remote workers to use authentication methods, and only 35% say they require multi-factor authentication (MFA).

It is worth noting that it is not just traditional work devices like mobile phones or laptops that pose a security risk. New figures commissioned by the Government show almost half (49%) of UK residents have purchased at least one smart device since the start of the coronavirus pandemic. These smart watches, TVs and cameras sit on the same home wireless network as those work devices and also remain vulnerable to cyberattacks.

Technology, people and processes

With the perimeter falling away, firms are looking to technology solutions, alongside policy, governance and training to mitigate the security risks.

From a tech standpoint, firms need to ensure authentication and device management is in place – it is important that remote workers using their own devices have enabled basic security features such as the PIN, fingerprint or facial ID feature. MFA is an important tool for stopping traditional credential harvesting methods and should be extended as far as possible.

Going further, more firms are embracing the concept of "zero trust". This model means that no user or system, either inside or outside the cloud, is trusted until they have been verified. The concept can be applied to technologies, devices and employees' work practices. Verifying users is achieved through technologies like MFA, identity access management (IAM), encryption and permissions systems.

As well as mitigating the risks to the services and data being accessed, firms should consider the risk to client data being processed or residing on personal devices. This will vary considerably according to which BYOD approach they have deployed and how it is configured.

Aside from looking to technology to help mitigate risk, one of the most important things a firm can do is to educate employees and maintain their awareness to cyber threats. So, any solution should be introduced alongside ongoing security awareness training, and formal policies introduced that lay out the procedures for working from home from a cybersecurity standpoint.

Many firms tell us they are likely to continue increased levels of remote work in the future. Visibility and management across the newly distributed workforces will be crucial. This means firms must tackle the problem of BYOD and look to technology and processes that can provide visibility and greater security for employees when working remotely.

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All in a month's work

Appeal decisions on what constitutes a consumer contract for jurisdiction purposes, taking the views of a child, challenges to findings in fact, and unless orders in simple procedure, are among the variety in this month's civil court roundup

Civil Court

LINDSAY FOULIS, SHERIFF AT PERTH

Jurisdiction

The issue before the Sheriff Appeal Court in *Heriot-Watt University v Schlamp* [2021] SAC (Civ) 12 (22 February 2021) was whether the contract which formed the subject matter of the action was a consumer contract and thus the defender required to be sued in the country of his domicile, as opposed to the court covering the place of performance of the obligation in question. Referring to authority, the court observed that only contracts for the purpose of satisfying an individual's own needs in terms of private consumption fell within the provisions designed to protect a consumer. What fell within the ambit of "consumer contract" had to be strictly defined, as it amounted to a derogation from the general rules regarding jurisdiction.

Further, in the instance of a mixed contract, namely one where there was both private use and use as part of a trade or profession, so long as the latter was negligible or marginal, the contract remained a consumer one. The burden of establishing that the contract was a consumer one lay with the party contending that was the position, with the opponent having the right to lead evidence to counter that contention. In addition, while a relationship might initially constitute a consumer one, that status could change if the relationship altered with the professional or trade use becoming predominant.

The court observed generally that if a plea of no jurisdiction was tabled, it had to be dealt with first before the court could move on to the merits of any dispute. Further, provided an action commenced before the end of the transitional period, the relevant EU regulations would still apply.

Pleadings

In delivering his opinion in *Grier v Lord Advocate* [2021] CSOH 18; 2021 SLT 371, Lord Tyre made certain observations regarding written pleadings. Pleading practices had moved on from the decision in *Eadie Cairns v Programmed Maintenance Painting Ltd* 1987 SLT 777, especially in commercial actions. Lengthy pleadings were discouraged in such actions, with adoption of documents being authorised as an alternative. However, fair notice still required to be given of the facts relied on and the evidence to be led. His Lordship further observed that whilst the length and complexity of the pleadings was perhaps inevitable, as the pleadings were to be regarded as "a movie and not a snapshot", the complexity did make it difficult for a court to discern the critical aspects of each party's case. Both observations are worth noting. In the sheriff court in certain actions pleadings can often become lengthy.

Ope exceptionis

In *Eastern Motor Co Ltd v Grassick* [2021] CSOH 5; 2021 SLT 340; 2021 SCLR 81 Lord Tyre observed that a clear distinction had to be drawn between resisting *ope exceptionis* the enforcement of a decision, the validity of which was subject to challenge, and seeking to reduce that decision. A defence founded on the plea of *ope exceptionis* did not require a separate action for reduction.

Judicial knowledge

Although this observation is made in the criminal appeal of *Procurator Fiscal, Glasgow v Ward* [2021] HCJAC 20 (4 March 2021), it is worthwhile noting in the context of civil disputes. The court adopted the observation that the ambit of judicial knowledge covers facts which are common knowledge, either in the sense that every well informed person knows them or that they are generally accepted by informed persons and can be ascertained by consulting appropriate works of reference.

Appeals

In the recent decision of the Second Division in *McCulloch v Forth Valley Health Board* [2021] CSIH 21 (1 April 2021), Lady Dorrian, in delivering the opinion of the court, observed regarding appeals in which findings in fact are challenged, referring to *S v S* 2015 SC 513, that regard had to be had to the limitations of the appeal process in that such findings could only be successfully challenged if they were incapable of being reasonably explained or justified.

She continued that when dealing with inferences drawn from primary fact, the appellate court had greater freedom. Such inferences could be reassessed. However, care had to be taken in reversing evaluative decisions made at first instance, in respect of which the court would apply ordinary standards of logic and common sense.

In relation to expert evidence, the appellate court might be as well placed as the judge at first instance to assess the logic and sustainability of the approach adopted by such a witness. The court could also interfere in relation to errors made regarding questions of law, including the application of law to the facts or in instances where the reasons given were insufficient to justify the decision reached.

Family actions

The issue regarding taking the views of a child was considered by the Inner House in *M v C* [2021] CSIH 14; 2021 SLT 359. Lord Malcolm, in delivering the opinion of the division, determined that the overarching consideration was the welfare of a child. Therefore if something could be done, such as taking the views of a child, but only at the cost of serious harm to that child, it could not be said that it was a practicable course of action to take. However, it would rarely be correct to conclude that taking the views of a child would cause such harm. Vague concerns that inappropriate information might be communicated were not enough. Such matters could be guarded against.

If children were of sufficient age and maturity to form and express a view, their views had to be heard unless there were weighty adverse welfare considerations of sufficient gravity to displace the default position. Careful thought as to how these views could be ascertained would often provide a solution to these concerns. The court would have to be able to justify the proposition that welfare issues were of such weight as to render the taking of such views impracticable.

To conclude, if a court is required to treat the best interests of a child as paramount and also to do something concerning a child if it is practicable, there is little difficulty in construing that statutory provision in a manner which allows the court not to do something *ex facie* practicable, if it violates the need to treat the welfare of the child as paramount.

Expenses

Perhaps hardly earth shattering, and also stating what may often happen in practice,

Update

Since the last article, *SW v Chesnutt Skeoch Ltd* (March article) has been reported at 2021 SLT 276, *M v DG's Exr* (March) at 2021 SLT (Sh Ct) 87, *Parachute Regiment Charity v Hughes' Exr (No 2)* (March) at 2021 SLT (Sh Ct) 91, *K v G* (March) at 2021 SLT (Sh Ct) 107, *Widdowson's Exrx v Liberty Insurance Ltd* (March) at 2021 SCLR 111, and *Keatings v Advocate General for Scotland* (September 2020) at 2021 SCLR 138.

but in relation to certification of a cause as suitable for the employment of counsel Sheriff Drummond observed in *Skene v Braveheart Hotels Ltd* [2021] SC DUN 25 (13 April 2021) that although the proceedings were not legally complex or difficult, the claim was of importance, involving a neighbour dispute regarding access. Further, as the opponent had employed counsel, it was desirable to follow suit to avoid the opponent gaining an advantage.

Recusal

In a family action, *AB v CD* [2021] SC GLW 011 (22 February 2021), Sheriff Mackie in Glasgow was asked to recuse himself from further involvement. The sheriff refused to do so. He observed that the task of a judge in family cases was not easy. The judge was required to be interventionist, managing the litigation and identifying key issues and relevant evidence. The judge also required to avoid adjudication at a preliminary stage. This should only be undertaken after conducting a fair judicial process. There was accordingly a significant difference between inviting a party to consider their position at a preliminary stage, which was permitted and encouraged, and summarily deciding the point then and there without a fair and balanced hearing. The matter was further complicated by the desirability for judicial continuity in such proceedings to deal with issues which might arise as a consequence of changing dynamics. Lack of such continuity could do damage.

Claims for historic abuse

Lord Woolman in *A v XY Ltd* [2021] CSOH 21; 2021 SLT 399 considered the operation of the Limitation (Childhood Abuse) (Scotland) Act 2017, and in particular the provisions which introduced s 17D into the Prescription and Limitation (Scotland) Act 1973. The defenders would clearly suffer substantial prejudice if the action proceeded. There was potential liability in circumstances in which for years there had been no liability. Further, the claim was for a substantial sum of money.

However, a comprehensive portfolio of documents had been prepared by the pursuer. Key witnesses were available. The defender had also had notice of events only four years after the incident. It was unusual to have full records available in such cases; the fact that some school records had been destroyed might equally hinder both parties. It was not argued that there could not be a fair hearing. There was insurance cover. The pursuer had an interest in securing justice. The conduct complained of was extremely serious and involved a breach of trust and premeditation. The pursuer had been vulnerable. The consequences for her had been lifelong. Lord Woolman allowed the action to proceed.

Simple procedure

In the decision of Sheriff Principal Murray in *Blair v Baird* [2021] SAC (Civ) 13, a decree granted for failure to comply with an unless order was overturned on the basis that the court process did not verify that the unless order was sent to the defender. Sheriff Principal Murray indicated that if an unless order is made in the absence of the party to whom it is addressed, the order should include a direction that it is to be formally served by recorded delivery or sheriff officer. If the party is outwith Scotland, the provisions of part 19 of the Simple Procedure Rules should be followed.

Family

FIONA SASAN, PARTNER, MORTON FRASER LLP

The issue of contingent liabilities and how those reflect on the valuation of company shares was again considered in *LWT v GPT* [2021] CSOH 6. The husband (H) and wife (W) met in 2003. W had acquired franchise interest in P companies with investment from a third party (J). Pre-marriage, two P companies owned two franchise outlets, with shares owned between W and J. H became involved in the management of P prior to the parties' marriage in 2005. By their separation in April 2019 there were 14 separate P companies, all held between W and J.

W became increasingly less involved when the parties had children, and by the separation H was managing and operating P autonomously. All the businesses were successful and grew during H's stewardship. Two further companies were incorporated, a property company (S), whose shares were owned between H and J, and a new franchise company (C). S and C received intercompany loans from P. Bank borrowing and a rent due by C had been guaranteed and secured against P. As at the relevant date, shares in C had no value. H did not seek transfer of W's shares in, or sale of, C. W wanted P to be released from securities and C's operating losses.

Experts for each gave evidence on how to account for bank liabilities and the intercompany loans. W argued that they would all impact the valuation of P as the court could only assume that they would trigger full liability to the bank, given C had no value and could not repay the loans. At the relevant date no willing seller or willing buyer would ignore them or discount the extent of the exposure.

H's expert gave evidence that neither the purchaser nor seller of P would concede or succeed outright on the issue of these contingent liabilities when assessing the price. Money would likely be placed in an escrow account to ascertain if the debts crystallised. Neither expert was willing to offer a view on what the sum so placed might have been at the relevant date, or to calculate how the matter might otherwise be compromised.

Sale after proof

Lady Wise concluded that as at the relevant date the value, and so that of S and C, would not be reduced by any portion of the contingent liabilities or indeed the intercompany loans. Most, if not all, sums due in terms of those potential liabilities (and the intercompany loans) would be placed in an escrow account to deal with the risk that some or all might not crystallise. Lady Wise commented that her approach accorded with the general rule that contingent liabilities do not normally reduce the net value of a company either in general commercial valuation or in proceedings of this type (*Liquidator of the Ben Line Steamers, Noter* 2011 SLT 535; *Sweeney v Sweeney* 2004 SC 372). Had the companies been sold as at the relevant date, the total value of the relevant interests held by the parties, all of which were matrimonial property, would have been at a fixed sum with a proportion separated out and held in an escrow account.

While the case was at avizandum, C was sold to the franchisor with the consequent full release of P from the bank contingent liabilities, but no funds were available to repay the intercompany loans.

H then sought to amend, proposing to introduce averments about the sale, and subsequently a joint minute was received detailing the terms of the sale and its impact.

Lady Wise concluded that it could be appropriate to use hindsight in relation to a business asset as a crosscheck on a relevant date valuation already carried out. C was an item of matrimonial property in which both parties continued to have an interest at proof and in which both were involved as recipients of the sale price following proof. The contentious issue was the impact of the liabilities on the value of the companies in which only W was a shareholder, although it impacted also on H's interest in S. Lady Wise thought it would be wholly artificial to ignore what had occurred recently when sense checking that the decision not just on valuation, but on overall division of matrimonial property, was the right one. She had concluded there was no significant difference between the decision in principle that she had already reached in relation to the contingent liabilities, as on sale of C none of these had in fact required to crystallise. Despite C being valued at nil, a deal had been done whereby the company was relieved of the contingent liabilities to the bank. No damages became due and no bank liabilities crystallised. The only matter about which there was a consequence was intercompany loans which could not be repaid. As these were always in a different category to the contingent liabilities because they were included as assets of P, it was clear that they were now unlikely to be repaid and required to be taken into account.

She concluded that the non-payment of intercompany loans affected W's net resources but not the share valuations. This would be relevant only to the division of matrimonial property.

Balancing factors

Lady Wise considered it would be too extreme to disregard the two pre-marriage P companies for their value entirely. Under the principle in s 9(1)(d) of the Family Law (Scotland) Act 1985, account could be taken not just of the period of the marriage but also the earlier cohabitation. This argument, which would justify a substantial additional capital sum to H, was then balanced against W's arguments that raising the capital to pay H would incur a very substantial tax liability and the non-repayment of the intercompany loans. Transferring H's shares in S to W, Lady Wise awarded H a capital sum of £2,937,175, which included a notional award of £450,000 to account of the pre-marriage P companies, pared back to £300,000 to reflect W's arguments about tax and the intercompany loans non-repayment.

Employment

CLAIRE NISBET,
ASSOCIATE, DENTONS UK & MIDDLE EAST LLP

"The pandemic has acted as both a disruptor and an accelerant" (*A Road Map for 2021-2022*, Employment Tribunals, 31 March 2021).

When reading this publication, issued as a joint message from the Presidents of the Employment Tribunals for England & Wales and Scotland, I was struck by, and welcome, the forward-thinking approach taken. Amongst other things, the message acknowledges the unexpected efficiencies of the new ways of working we have all had to get used to; comments that we should not turn our back on the innovations some of us have been forced into grappling with; and proposes that technology is the "servant of justice, not its master".

In terms of practicalities, the tribunals will introduce a new case management system which should be more efficient and reliable than previous systems. We are told that this will assist with remote working in future. In the coming months, we can expect flexible cross-deployment of the tribunals' judiciary between the two jurisdictions for the first time. Further, it is no longer possible, due to the inflated caseload, to have final hearings exclusively face to face. The Presidents state that video technology will remain an essential feature of employment hearings while the caseload challenge persists. We are to expect this to continue for at least two years.

As readers might expect, this is not to the satisfaction of all users of the tribunals ("divergent views" are also held by employment judges and lay members). As the senior managers of many employers are concluding (more below), the leadership of the tribunals has determined that the better approach to hearings is to recognise that a mixture of platforms (remote, hybrid and in-person) is likely to be the best one.

Calculating pension loss

The second publication from the Employment Tribunals in recent weeks (15 March) is the third revision of the fourth edition of the tribunals' *Principles for Compensating Pension Loss*. With the full version coming in at a whopping 186 pages, you might be relieved to hear that this is accompanied by a concise roundup, the *Basic Guide to Compensation for Pension Loss*. Both documents will no doubt be useful to those of us dealing with quantifying pension loss as a head of claim.

The main *Principles* document takes us through some preliminary issues, including a summary of the *Gourley* principle, derived from a 1955 case. This is the origin of the rule that, when identifying an award of compensation, the tribunal's approach to tax should not put the claimant in either a better or worse financial position than if the dismissal had not occurred. A helpful illustration of grossing-up is given. The preliminary issues chapter is followed by sections on the state pension scheme, defined contribution (DC) and defined benefit (DB) schemes, as well as case management. The appendices contain useful worked examples, plus a summary of main public sector defined benefit pension schemes.

Calculating compensation for a claimant with a defined contribution pension scheme is helpfully illustrated in the shorter guidance document. It gives a list of the information you are likely to need to carry out the calculation, such as the percentage rate at which the employer contributed (this will be key); the percentage rate at which the claimant contributed; whether the scheme contained any other benefits such as survivor or dependant benefits in the event of the claimant's death; the age at which the claimant can draw a pension from the scheme; and the current value of the pension pot. A claimant will also need details of any new pension scheme they have entered.

We are reminded that, due to the potential value of a DB scheme, pension loss calculations can be crucial to the overall claim and should not be an afterthought. A list of information which should be obtained as early as possible is set out in the guidance. This includes the type of DB scheme; the claimant's likely retirement age; and the claimant's projected pension income if they had continued to work in their previous job until retirement.

Vento bands

Last but not least, *Presidential Guidance on Injury to Feelings and Psychiatric Injury* was issued on 26 March. This applies to claims presented on or after 6 April 2021. The new Vento bands are: a lower band of £900 to £9,100 (less serious cases); a middle band of £9,100 to £27,400 (cases that do not merit an award in the upper band); and an upper band of £27,400 to £45,600 (the most serious cases), with the most exceptional cases capable of exceeding £45,600.

Human Rights

ANNA O'NEIL
TRAINEE SOLICITOR,
ANDERSON STRATHERN LLP

In *D v Persons Unknown* [2021] EWHC 157 (QB), the two claimants sought lifetime anonymity injunctions to protect them against

identification as the murderers of a vulnerable adult, Angela Wrightson. Aged 13 and 14 when the offence was committed, they were convicted as children and remain in custody as adults. The claimants' identities have remained protected from the public by the Children and Young Persons Act 1933, s 39 anonymity orders, which have been maintained since 11 December 2014. Due to the protections in place, the claimants have been referred to as "D" and "F".

Court's considerations

The court was asked to consider whether the claimants' circumstances were exceptional so as to merit application of the *Venables v News Group Papers Ltd* [2019] EWHC 494 (Fam) jurisdiction. In order to do so, ECHR articles 2, 3 and 8 had to be engaged without (in the case of article 8) an interfering balance from article 10. Evidence led suggested that a risk of physical harm by other inmates as well as members of the public was present. This included threats via comments made on social media platforms. However the existence of online threats was not considered to engage article 2 or 3. The case of *RXG v Ministry of Justice* [2020] QB 703 outlined the courts' position, being that social media threats are generally considered insufficient to amount to a credible threat of violence, and thus fail to engage the *Osman* duty (*Osman v United Kingdom* (2000) 29 EHRR 245).

While the claimants failed to establish a credible threat to their safety by third parties, the position differed in relation to self-inflicted harm. Both claimants had a history of mental health problems, and one a history of self-harm and suicidal thoughts, and this was sufficient to establish a real risk of self-harm and suicide. Articles 2 and 3 were engaged in this instance. Revealing the identity of one would have led to the quick uncovering of the other, due to "jigsaw identification".

In considering article 8 rights, the court adopted the approach established in *RXG*, and considered relevant (i) the ages of the claimants at the time of the offence; (ii) the anonymity protections in place thus far; (iii) the likely impact of identity disclosure on their mental and physical health; and finally (iv) any detrimental impact towards rehabilitation prospects. Set against these considerations was the weight to be afforded to article 10. There was clear public interest for reporting trials in full and identifying those charged with criminal offences. There was an additional public interest element in understanding how children aged 13 and 14 could commit violent crimes. Notably, both claimants were named at trial, and while protected by s 39 orders, there was a presumption that these would expire on their reaching adulthood.

Regardless, the court held that there was a real risk of serious harm to the claimants with articles 2 and 3 engaged. There was no scope to balance article 10 against these rights. In any event there was a further direct interference with their article 8 rights, which outweighed considerations under article 10. On this basis, the court granted permanent injunctions in favour of both claimants.

Comment

The significance of this case is that the claimants successfully invoked the jurisdiction established in *Venables* and *RXG*, in obtaining lifelong *contra mundum* reporting restrictions. The *Venables* jurisdiction has only been applied four times prior to *RXG*, highlighting the high threshold for success. It should be noted that the terms of the injunction were not absolute and did provide for review in the event of a material change in circumstances.

Whilst this is an English authority, there is a significant likelihood that Scottish courts would take account of similar factors when faced with granting an anonymity order. J

IN FOCUS

...the point is to change it

Brian Dempsey's monthly survey of legal-related consultations

Automated vehicles

The Department of Transport seeks views on new rules in the Highway Code to cover the safe use of automated vehicles on Britain's motorways. See www.gov.uk/government/consultations/safe-use-rules-for-automated-vehicles-av

Respond by 28 May via the above web page.

Offshore tax income

HM Revenue & Customs has issued a discussion document on using HMRC data to help taxpayers get offshore tax right, raising taxpayer awareness and reducing errors. See www.gov.uk/government/consultations/discussion-document-helping-taxpayers-get-offshore-tax-right

Respond by 15 June via the above web page.

International tax debt

HMRC has also issued a discussion document on preventing and collecting international tax debt. See https://www.gov.uk/government/consultations/discussion-document-preventing-and-collecting-international-tax-debt

Respond by 15 June via the above web page.

Occupational pension risks and opportunities

The Department for Work & Pensions is consulting on the effectiveness of occupational pension scheme trustees' current policies and practices in relation to social factors. It seeks to assess how trustees understand "social" factors and how they seek to integrate considerations of financially material social factors into their investment and stewardship activities. See www.gov.uk/government/consultations/consideration-of-social-risks-and-opportunities-by-occupational-pension-schemes

Respond by 16 June via the above web page.

Low pay rates

The Low Pay Commission seeks evidence on the effects of the national living wage ("NLW") and national minimum wage, to inform their recommendations on the 2022 rates. On 1 April 2021, the NLW increased from £8.72 to £8.91 and the age threshold was reduced from 25 to 23. The recommendations will be guided by the UK Government's target for the rate to reach two thirds of median earnings by 2024, taking economic conditions into account. See www.gov.uk/government/consultations/low-pay-commission-consultation-2021

Respond by 18 June via the above web page.

... and finally

As noted last month, the Scottish Government seeks views on its undertaking to legislate to pardon miners convicted for matters related to the 1984-85 strike (see consult.gov.scot/safer-communities/miners-strike-pardon/ and **respond by 4 June**), and on regulations for preparation, content, submission and registration of local place plans under the amended Town and Country Planning (Scotland) Act 1997 (see consult.gov.scot/local-government-and-communities/local-place-plan-regulations/ and **respond by 25 June**).

Pensions

COLIN GREIG,
PARTNER, DWF LLP

Savers have been warned to remain vigilant and protect their pensions, as figures from the national reporting centre for fraud and cyber crime ("Action Fraud") reveal that £1.8 million has already been lost to pension fraud this year. Whilst Action Fraud reports a steady fall in pension scam reports (from 1,788 in 2014 to 358 in 2020), worryingly in the first three months of 2021, 107 reports of pension fraud have been made (an increase of almost 45% on the same period in 2020).

Self-help

Action Fraud has reminded savers of some simple steps they can take to protect themselves. Those include:

- Reject unexpected pension opportunities, such as free pension reviews or investment opportunities involving their pension, whether made via email, social media, text, or over the phone.
- Research who they are dealing with before changing their pension arrangements – checking the FCA Register, or calling the FCA on 0800 111 6768 to see if the firm is authorised by the FCA.
- Not to be rushed or pressured into making any decision about their pension – consider getting impartial information and advice from a financial adviser authorised by the FCA to help them make the best decision for their own personal circumstances.
- Be suspicious if they are contacted out of the blue about an investment opportunity – seek advice from trusted friends, family members or an independent professional advice service before making a significant financial decision, especially when it involves their pension pot. Even genuine investment schemes can be high risk.
- Be ScamSmart, and visit the ScamSmart website to learn how to protect themselves from pension scams.

Revised Code of Best Practice

Complementing this, the Pension Scams Industry Group ("PSIG") has issued a new version 2.2 of *Combating Pension Scams: A Code of Best Practice*, effective from 1 April 2021, which includes:

- a Practitioner Guide which sets out due diligence steps that should be taken in assessing scam risks;
- a Technical Guide which details the rationale, legislative and regulatory requirements in relation to pension transfers; and
- a resource pack containing materials that can assist with carrying out the due diligence process.

The code has been updated to take account of a host of regulatory and legislative developments, case law, Pensions Ombudsman determinations and intelligence collected by regulatory bodies, including TPR's Pledge to Combat Pension Scams initiative, the FCA's updates to its ScamSmart site, made in response to the pandemic, and the regulations expected to be made under the Pension Schemes Act 2021 in relation to transfers.

Further legislative support

With the 2021 Act having received Royal Assent, the Pensions Minister has also now given a broad indication of the timetable for next steps (largely seasonal), including from early autumn 2021 consultation on draft regulations intended to combat scams. Those regulations will place new conditions on a member's statutory right to transfer their pension rights to another scheme, and will aim to enable scheme trustees to refuse a transfer in the event of a major "red flag" being raised.

These new conditions are expected to relate to both the destination of the transfers, enabling prevention of transfers to schemes that do not have the right authorisation, and cases where the member has not supplied the evidence of, say, employment or residency. In the latter case it is anticipated members may require to provide to the trustees or managers of the occupational pension scheme they want to transfer their pension savings out of, evidence or information about their employment link to the receiving pension scheme or their residency overseas. For example, to demonstrate a genuine link with the employer of the receiving scheme, it is expected the scheme member may be required to provide payslips and bank statements over a three month period. The employer in such cases may also be required to provide a statement to the effect that they employ the member and participate in the receiving scheme.

Importantly, those new conditions can also include other red flags, such as who else is involved in a transfer. If those red flags are apparent, the regulations are expected to enable the trustees to refuse to transfer, and if the red flag is significant, direct the member to guidance or information that they must take prior to being allowed to transfer. Trustees will need to undertake due diligence to establish whether or not those conditions are met. The new conditions will seek to put trustees in the driving seat in relation to permitting transfers to proceed.

Staying one step ahead

These initiatives should together assist in combatting scams. However, the Pensions Minister has highlighted that the current legislative process has its deficiencies and has called for broader powers, in order to avoid the lengthy legislative process required to combat scams once they are identified. One would hope that there may be some accommodation of that with adequate safeguards in place.

ALLAN PANTHERA

"We're solicitors, not salespeople..."

The recovery from COVID, and an increasingly competitive marketplace, bring personal responsibility for business development into sharper focus

Let's massage the ego briefly – as a legal professional you tend to be confident, highly educated, analytical, organised, astute, and of integrity.

You're hardworking, creative, compassionate, an excellent communicator, resilient, knowledgeable, assertive when required, of sound judgment, logical and persuasive. And of course, many more.

In fact, you share every attribute with a seasoned business development professional. The horror!

However, let's not be scared of that or belittle business development (BD); rather, look at why it is necessary these days to embrace your shared skillset and effectively deploy it, for not only your firm's benefit but also your own.

And let's be clear too – "sales" and "BD" are different activities, with "consultative selling" the trendy alternative. Simply put, sales is emotionless and transactional, whereas BD is about nurturing and cultivating valuable relationships.

The "new normal"

A phrase which may now appear tired but which, unfortunately, is true. Long before COVID, though, challenger law firms were innovating, utilising technology and creating new business models to compete with the established way of doing things. COVID, with its remote working demands and revenue impacts, has only brought these changes to the attention of slower moving practices and those which had become complacent.

Many firms do not have a business growth strategy, or know where to start in order to keep moving with the times: they are standing still, caught in the headlights.

It is a situation compounded by homeworking, leaving people across the organisation feeling detached and disconnected, when the industry is accustomed to office working and the sense of togetherness it brings.

And that is why it is imperative that your business and your staff know how to survive and thrive.

From fee earners long in the tooth, to newly qualified practitioners, to BD staff you may already have – each individual should receive support in developing and deploying BD skills: not only to do their job in the new normal, but to elevate themselves professionally.

So, why me?

New and junior lawyers: True, you didn't go to university and qualify as a solicitor to bother about BD or whether you're bringing in enough fees. And you certainly didn't receive any courses on BD in the degree or diploma, or even as a trainee. But as you know, it's a competitive environment out there and if you want to change firms, harbour ambitions for promotion to partner, or want to try setting up your own firm in the future, the BD skills you develop now, combined with the relationships, contacts and clients you cultivate over the years, will be critical to your personal brand and success.

Experienced lawyers and partners: You may be savvier about BD work and its importance, as you've become more commercially aware of how the business is run over the years. But is there more you could be doing to differentiate, cement stability and success, and ensure a stable future for the practice and everyone it employs? Are you certain your pool of clients will stay with you long term, keep referring, or will they too become more switch-savvy and tempted by the exciting new firms who are modelling their business success on "client experiences"?

In-house BD staff: If a firm is fortunate enough to have these, it's half the battle, but if they come and go more than your solicitors then you're taking two steps forward and one back. Plus, when was the last time they had their skills refreshed?

Outsourced BD support: Yes, that exists, and is often much more impactful and better value for money!

You said I have a BD skillset; what next?

Apply your existing skills specifically for the purposes of BD. For example, learning how to spot a business opportunity and progress it in a manner which you and the prospect are completely comfortable with is key; coming across as "salesy" or pushy is obviously to be avoided.

Ongoing learning and development to maintain confidence, and creating a business growth strategy for practice owners, are critical for success too.

You may have been taught the law, but it's unlikely you know about BD. Taking personal responsibility now, in the new normal, will pay dividends long into the future.

Next steps...

Interested in learning more about how Allan Panthera can help improve you, your staff and your firm with BD and business growth skills and expertise? Email info@allanpanthera.com or call 0131 358 4353 to discover the benefits of our bespoke solutions that set you up for success.

Data beyond Brexit

A roundup of recent data protection developments covering data transfers now that the UK is outside EU law, anonymisation guidance, and renewed scrutiny of the adtech industry

Data Protection

ROSS NICOL, PARTNER, AND MUNEEB GILL, ASSOCIATE, DENTONS UK & MIDDLE EAST LLP

In this roundup we discuss (1) the recent memorandum of understanding between the Department for Digital, Culture, Media & Sport ("DCMS") and the Information Commissioner's Office, which sets out the ICO's role in future UK adequacy assessments; (2) the ICO's announcement that it will update its guidance on anonymisation; (3) the practical implications of the *Schrems II* judgment on organisations wishing to use standard contractual clauses ("SCCs") to transfer data outside the UK; and (4) the ICO's ongoing investigation into the adtech industry, which was temporarily paused due to the COVID-19 pandemic.

1. ICO role in adequacy assessments

Prior to 1 January 2021 (and the end of the Brexit transition period), the European Commission had the power to make "adequacy decisions" in favour of non-EU countries that were deemed to have a level of data protection that was equivalent to that in the EU under the GDPR. UK organisations could freely transfer personal data to these "adequate" countries without the need to implement an international transfer safeguard under GDPR (which for most organisations usually meant entering into Commission-approved SCCs with the non-EU data recipient).

Post-Brexit, the Data Protection Act 2018 now empowers the Secretary of State for the DCMS to make UK "adequacy regulations" in favour of non-UK countries that are considered to have a level of data protection equivalent to that in the UK. Before making these regulations, the Secretary of State must consult with the ICO. While the UK has already adopted the European Commission's existing list of adequacy decisions for the purposes of post-Brexit data transfers out of the UK, the Secretary of State will be responsible for expanding this list in future. The ICO and DCMS have now agreed a memorandum of understanding ("MoU") that sets out the ICO's roles and responsibilities in relation to future UK adequacy assessments by the Secretary of State.

The MoU breaks down the DCMS's adequacy assessment process into four key stages, and sets out the ICO's role in relation to each:

Part 1, gatekeeping, involves deciding whether or not to start an adequacy assessment in respect of a third country: the ICO's role is to provide advice to DCMS on the third country's data protection laws and practices.

Part 2, assessment, is the process of assessing the level of data protection in the third country: again, the ICO's role is to provide advice to DCMS on the third country's data protection laws and practices (e.g. the role and effectiveness of the country's regulator).

Part 3, recommendation, involves the DCMS team making a recommendation to the Secretary of State, who decides whether to make a finding of adequacy in respect of that third country: the ICO will provide a response on the draft conclusions of the DCMS's assessment of the third country, so this can be factored in to the recommendation to the Secretary of State and ultimately into their decision making.

Part 4, procedural, is the final phase, during which the relevant UK adequacy regulations are created, laid before Parliament and the ICO's opinion is published: the ICO will provide advice and/or an opinion to Parliament.

Whilst the MoU defines the scope and extent of the ICO's involvement in the adequacy assessment process, the Secretary of State is not bound by the ICO's opinions and recommendations.

2. ICO guidance on anonymisation

The UK GDPR only applies to personal data (i.e. information from which a person can be identified). The practical consequence is that if data is anonymised – so that an individual can no longer be identified from it – it is no longer subject to these rules.

From a data protection perspective, anonymising data raises a number of difficult issues. Chief amongst these is the question of what level of "de-identification" has to be achieved in order for information to be considered anonymised under data protection law. This can be a complex assessment, and often involves making a judgment call on the *likelihood* or *possibility* of an individual still being identified – which creates the risk of subjective and divergent approaches from one organisation to the next.

The ICO's current guidance on anonymisation

was published in line with the Data Protection Act 1998, now replaced by the 2018 Act. Some data protection practitioners have expressed dissatisfaction that the guidance is lacking as it does not provide enough clarity on how to assess the degree of "de-identification" necessary to achieve anonymisation. This is not helped by the fact that, per the guidance, the assessment is to include consideration of "other information" that is available (e.g. in public), or that may become available in future – an unpredictable and sometimes unfeasible task.

However, help may be on the way. In a recent statement on its blog (19 March 2021), the ICO announced that it will be updating its guidance. This will include the spectrum of identifiability to be considered, and managing re-identification risk (covering concepts such as the "reasonably likely" and "motivated intruder" tests). Given the passage of time since the current guidance was published, and advancements in technology and data management practices, the updated guidance will also include guidance on privacy enhancing technologies and technological solutions for anonymisation. This is a welcome announcement from the ICO, and one that will hopefully bring more clarity to this often complex issue.

3. Standard contractual clauses

On 16 July 2020, the Court of Justice of the European Union handed down its eagerly anticipated judgment in the *Schrems II* case, which invalidated the EU-US Privacy Shield and set out additional requirements that must be satisfied when using SCCs to make international transfers of personal data outside the EU. The judgment requires that companies undertake additional diligence when relying on SCCs, to ensure that there is nothing under local laws in the receiving country that undermines the protections afforded in the SCCs. This is most relevant where there is potential for access to the personal data by public authorities (e.g. law enforcement and intelligence agencies). Where this is the case, the judgment requires that "supplementary measures" are put in place to provide additional safeguards.

The European Data Protection Board (EDPB) has published draft guidance on the necessary supplementary measures. While the UK is no longer part of the EU, this guidance remains relevant as the *Schrems II* judgment is, strictly speaking, applicable in the UK. The ICO has stated on its website, however, that it will publish UK guidance on supplementary measures in due course.

Given the complexity and divergence in data protection laws from country to country, the assessment to be carried out when using SCCs will likely be a complicated exercise for the majority of organisations – and one that will likely require specialist input. However, the EDPB guidance sets out a number of useful steps that organisations can take to assess what supplementary measures should be adopted when using SCCs to transfer data abroad.

1. Know your transfers: You should map out the data that you are transferring to a third country, and ensure the data transferred are limited to what is necessary to achieve the purposes of the transfer.

2. Assess the effectiveness of SCCs: You should assess whether there is anything in the law or practice of the third country that would make the protection afforded in the SCCs ineffective. This assessment should primarily be focused on legislation in the third country that impacts on the data being transferred under the SCCs (e.g. local laws that allow access to personal data or surveillance by law enforcement authorities and public bodies).

"The [Schrems II] judgment requires that companies undertake additional diligence when relying on SCCs"

3. Identify and adopt supplementary measures: Where your assessment reveals that the effectiveness of the SCCs will be impinged on by the laws and practices of the third country, you must identify and adopt appropriate supplementary measures to address this risk. The measures adopted should be in the context of your specific transfer, and the risks you have identified in the third country's laws and practices.

A non-exhaustive list of supplementary measures is included in the EDPB guidance. These include **technical measures** (e.g. encrypting the data at rest and in transit, or using pseudonymisation), additional **contractual measures** (e.g. contractually obliging the data recipient to use specific technical measures, or to challenge any request or order for access to data by a public authority or law enforcement agency), and **organisational measures** (e.g. requiring the data recipient to implement internal policies for the management and transfer of personal data, or to adopt strict and granular restrictions on data access and confidentiality within its organisation on a need-to-know basis).

It is important to note that there may be circumstances where there are no supplementary measures that will ensure an appropriate level of data protection, and in these circumstances the transfer should not be made, or where it is already being made it should be suspended or terminated (and any data already transferred should be returned or destroyed).

4. Procedural steps for adopting supplementary measures: You should take any formal procedural steps that are necessary to adopt the supplementary measures. For example, the supplementary measures must not reduce the protections afforded in the SCCs, and where they modify or contradict the terms of the SCCs, they must be approved by a supervisory authority (the ICO in the UK).

5. Re-evaluate at appropriate intervals: You should re-evaluate at appropriate intervals the level of data protection afforded to the data you have transferred, including monitoring developments in the third country to identify any changes that might impact on your initial risk assessment.

4. Adtech: ICO's investigation

On 22 January, the ICO issued a statement confirming the resumption of its investigation into real time bidding ("RTB") and the adtech industry, which was paused in May 2020 to allow the ICO to prioritise activities responding to the COVID-19 pandemic. RTB is the process through which a website publisher auctions off advertising space on their website to advertisers that want to target the particular audience who will visit that site. This allows the ads that people are shown on a website to be specifically selected for them. This process often involves hundreds of companies, and is completed in a matter of milliseconds.

In June 2019, the ICO issued a report on its investigation into adtech and RTB, which outlined its concerns in relation to the industry's compliance with data protection and e-privacy laws. In particular, the ICO was of the view that the creation and sharing of personal data profiles about people, and the scale on which this was happening, was "disproportionate, intrusive and unfair, particularly when people are often unaware it is happening". The ICO also found that sensitive data (e.g. about a person's health) were being used without people's consent.

The ICO's continuing investigation will include a series of audits on data management platforms (for which assessment notices will be issued to specific companies in the coming months), and will also review the role of data broking, which plays an important part in the RTB process.

The ICO has advised that organisations operating in the adtech industry should assess how they process personal data "as a matter of urgency" – a possible early indication that heavier regulatory oversight and enforcement action in this area are likely to follow.

The Potter's tale

The spotlight this month falls on a lawyer best known through her social media persona "In-house Potter", a name reflecting her Staffordshire roots, and whose favourite anecdote concerns a chance meeting with Jimmy Carr

In-house

EMMA LILLEY, LEGAL COUNSEL (UK & I), SD WORX

Tell us about your journey into the legal profession?

I studied the LLB at Staffordshire University. My A-level results weren't up to scratch so I first had to complete a foundation year at Staffs – a way to get access to the traditional three-year degree. I took a gap year in 2012-13, meaning it took me five years to graduate. Thankfully it all worked out in the end.

I trained at WEX Europe Services, which is a fuel card business. My main office was in Crewe, although I did get to travel to different European cities as part of the job.

I won't lie – both were challenging, especially my training contract as I studied the LPC [Legal Practice Course] MSc at the same time. The way I structured it, though, has really benefitted my career, so I'm happy with the decisions I made.

What was it about working in-house that attracted you?

Business decisions and the assessment of risk have always interested me more than the legal facts. I also wasn't drawn to the traditional way of practising, so discovering in-house was a major win for me.

I would much prefer to be integrated into one business and have a seat around the table as a team member and legal adviser, rather than having multiple clients with different business aims. That's just personal preference, though; the alternatives have their own benefits. My interests were much better placed in-house.

I just wish I'd realised it was possible to train in-house earlier – it would have saved me a lot of stress and heartache!

As part of your in-house traineeship, you were seconded to private practice for three months. How did you find that experience and what did you learn?

Although it was for a short period, my secondment provided the experience I needed to become a better in-house lawyer. Experiencing legal services from within a law firm really helped me to understand the industry and add some of the pieces to the puzzle during my training.

It was also my first experience of working with people more junior than me, and I learned to understand the hierarchy in private practice and how delegation works in that environment.

I'm so glad that I had the experience of working in a firm. Looking at legal services from a different perspective has helped me when instructing and managing external counsel, something that in-house lawyers are likely to do as part of their role.

You are now the sole legal counsel (UK&I) at SD Worx, a leading European provider of payroll and HR services. Do you find being the sole lawyer in your organisation tough at times?

It's tough in the sense that I put a lot of pressure on myself to do the best for my colleagues, but I am supported by a strong, international team who are well established. On more occasions than not, there is something in my inbox that I have not dealt with before and it is my job not only to figure it out, but also to provide sound legal advice that can relied on at the highest level. If I thought about that too much I'd let the pressure get to me!

In those circumstances, I remind myself that I've been in this position many times before. I conquered it then, so why not now? As a qualified lawyer, you are armed with the skills you need to overcome tough matters, whether that is the skill of finding a solution yourself, or the skill of knowing who and how to ask for advice. Relying on those skills in a pressured environment is key.

Is the in-house sector well represented in terms of equality and diversity? Are there any improvements the legal profession could make in these areas?

In-house in England & Wales is more diverse than private practice, but there is still a lot of work to be done.

Recent studies have unveiled prejudice against different groups, with the Bar Standards Board's findings that white, male barristers earn more than their female and ethnic minorities counterparts being just one example.

There are many great initiatives happening which should be celebrated. It is important though to put emphasis on preventing problems from happening, in addition to how organisations should deal with them when they do. One idea may be to use the recruitment process to bring out any biases (unconscious or not) as a way of assessing any issues prior to them infiltrating an organisation's culture down the line.

I published a list of 49 ways to increase diversity in the legal profession which you can read at inhousepotter.com/blog.

How have attitudes in the legal profession changed since you started out?

I see many lawyers putting themselves out there and showing their personalities on social media more than they used to. I am a huge advocate for this and hope it continues long after we are through the pandemic.

I feel that the profession is more accepting of lawyers acting this way, and there are also many examples of alternative law firms that are thriving through doing so. I too certainly feel more confident sharing more of my life online, but feel there is still some stigma around it. Thankfully, this stigma fades a little more with every post and I am here for it!

What tips do you have for students looking for in-house training contracts?

Don't underestimate the power of paralegal experience, especially as now, in England & Wales, it can count towards your training for becoming qualified under the new SQE route.

The 18 months I spent as a paralegal have paid dividends in more ways than one, examples being having six months knocked off my training contract as "time to count", and allowing me to take on more senior roles early on in my career.

Emma Lilley

In-house training contracts are often awarded internally. Limited public job openings have the effect of students thinking that they aren't out there. I can completely understand this, but it is not the case. A paralegal role may be your way in, just as it was for me.

What advice would you give to lawyers who are considering making a move in-house? What makes a good in-house lawyer?

Providing legal advice to clients from within a law firm does not mean that you know what they want from an in-house lawyer. Yes, you will have more of a steer on how they'd like advice delivered through instructions and dialogue, but lawyers looking to make the move shouldn't rely on this knowledge alone.

Different expectations are placed on a lawyer appointed by the business you are advising. It is important to appreciate this from an early stage and recognise that every colleague will expect a different service from you. Emotional intelligence is crucial in-house, and relying on this will really elevate your position within the business.

"I would much prefer to be integrated into one business and have a seat around the table as a team member and legal adviser"

You founded "In-house Potter". How did you come up with the name? Tell us about this work and what you hope to achieve?

In-house Potter is a nod to my roots. I am keen to evidence that anyone can overcome stereotypes in the profession, and that you don't have to change who you are to become successful in law.

Many of us face barriers in different ways. Unfortunately, many of these barriers are nothing to do with us as individuals, but the way we are perceived by the industry in general.

I grew up and studied in Stoke-on-Trent, which is known for its pottery industry. The "Potteries" is used interchangeably for "Stoke", just as "Potter" is for "Stokie". It was important for me to include this nod within my branding, as, not only am I proud of how far I have come, I wanted to show that you don't have to be from a well-established city bursting with law firms to be a lawyer.

Despite degrading comments from others regarding choices I have made, I carry my Stokie accent with pride in the knowledge that I haven't let the views of others affect my career choices. I am passionate about helping others to do the same.

You can watch my IGTV [Instagram], which explains my experience in more detail.

Where can people find out more about In-house Potter?

I am most active on Instagram @inhousepotter. I also have a blog (www.inhousepotter.com), and you can find me on Clubhouse and LinkedIn.

My direct messages are always open. I'd love for you to say "hello".

What is your most unusual/ interesting study experience?

Imagine a stressed LPC student, head in her hands one morning at Starbucks, Manchester Piccadilly Station, prior to her advocacy assessment. In walks Jimmy Carr, one of the most charismatic, engaging personalities just wanting to get his coffee fix.

The red-eyed student (yes, that's me), acting on instinct with no time to think about it, walks up to Jimmy and manages to squeak a "hello" and ask for some advice: "Do you have any confidence tips please?"

Don't ask me how, in the same moment of doubting I could go ahead with my exam, I had the bravery to approach Jimmy Carr with this question. But am I so glad I did – the advice he gave to me over coffee was absolutely incredible and I could never thank him enough. I went on to smash my exam.

Every time I tell that story I don't quite believe it myself, but I promise you, it's true!

Finally, what do you love about your job and what do you love doing when the working day is done?

I love that I have the freedom to be creative in delivering legal advice. I also work with a fantastic team who believe in one vision, which we work on together to ensure that it flows through to the legal work we do.

My work colleagues are probably fed up hearing about this, but after work I'll likely be planning my home renovation – check my Instagram for home office updates!

Questions put by Hope Craig, In-house Lawyers' Committee member

Further PC fee cut for 2020-21

The practising certificate fee for 2021-22 will be cut by 10% compared to the pre-pandemic level, the Law Society of Scotland has proposed.

The AGM on 27 May will be invited to approve the fee, which will put the cost midway between the £680 that applied in 2019-20 and the £565 rate for the current year, set due to the 20% cut made as part of the Society's emergency support for the profession during the pandemic.

The accounts fee paid by law firm partners will also be 10% less than pre-pandemic, compared with 20% last year.

Writing to members, Presient Amanda Millar said: "While lockdown restrictions are easing, we know that the journey to economic recovery is only just beginning. As your professional body, the Law Society is determined to continue to help and support you and your fellow solicitors as we move beyond the pandemic."

She added: "Offering a second year of reduced fees will allow us to continue to support the profession financially and still deliver on our two-year strategy to lead legal excellence through and beyond the pandemic."

Crucial hearings should stay in-person: UK bars

"In-person" court hearings should be recognised as the default "for any hearing that is potentially dispositive of all or part of a case", according to the four professional bodies representing UK and Irish barristers and advocates.

In a joint statement available at advocates.org.uk, the Faculty of Advocates, the Bar Councils of England & Wales and of Northern Ireland, and the Bar of Ireland, say that while they support the continued use of technology in the courts, "The universal sentiment across the four bars is that remote hearings deliver a markedly inferior experience."

From experience during the COVID-19 lockdown, they add, "the use of remote hearings to deal with short or uncontroversial procedural business is unobjectionable, and indeed to be welcomed in many cases, even after the current crisis has passed.

"However, we all take the view that careful consideration is needed before any decision is taken to employ remote hearings more widely, once COVID-19 is behind us. There are, in our mutual experience, multiple and multi-faceted disadvantages with such hearings, when compared to the usual in-person hearings that have delivered justice for centuries."

SOLAS: update on a virtual year

To say that for the past year we have lived through unprecedented times would be something of an understatement. Although not operating as business as usual, we did manage with only slight time delays to complete the 2019-20 course session and begin the 2020-21 course session along with relative examinations.

For many years SOLAS, the Society of Law Accountants in Scotland, has delivered its evening courses on a classroom basis. Being similar to many other educational courses, when the pandemic hit we were faced with the difficult choice of whether to simply cancel or try and put in place an alternative method of delivery which was fair to both student and lecturer. We were also anxious not to in any way diminish the value of the SOLAS professional qualification.

After careful consideration it was decided that we should proceed on the basis of live two-hour classes using the GoTo Meeting platform. The question of sitting the actual examination "from home" appeared at first to be less straightforward. Fortunately, by using the same platform, with the students opening their examination papers from a specially sealed envelope in front of an on-screen invigilator, we were able as far as possible to ensure that the usual examination conditions were being adhered to. Again in front of the invigilator, on completion of the examination the student was instructed to seal their completed paper.

Overall, we are delighted to say that all went well, with 31 students passing all three examinations during 2020, including five who gained distinction in all subjects. That gave these students the opportunity, if they wished and if they met the criteria, to apply for membership of SOLAS, which allows them to use the professional qualification SLA. More than two thirds of students applied and were approved for membership in February 2021.

Lecturers along with their students were invited to give their feedback, which in the main has been very encouraging. In particular the students were very positive, with many saying that it fitted in well with family/home life and avoided additional travelling through the winter months. Taking the foregoing into account, courses for the present time will be delivered in the same manner.

Enrolment for session 2021-22 will commence at the end of May, with courses running from August to April. Further information is available at www.solas.org.uk or by contacting Dorothy Nicholson at administrator@solas.org.uk

Notifications

ENTRANCE CERTIFICATES ISSUED DURING MARCH/APRIL 2021

BURNS, Emma
DE ABREU, Emmanuel Alejandro Figueira
DOCHERTY, Jacqueline
DOUGALL, Iona Elizabeth
EVANS, David Robert Patrick
HOGGAN-RADU, Damian
KEDDARI, Tom Ugo Samy
LEDGER, Connor Peter Philip
McKIE, Kaitlin Minnes
MORRISON, Taylor
SANTOS, Valtemes
VALENTINE, Briege
ZDRAVKOVA, Yoana Plamenova

APPLICATIONS FOR ADMISSION MARCH/APRIL 2021

ARMSTRONG, Lewis William
BELL, Natalia Jade
BROWN, Craig
BRUCE, Felicity Serena
CAMPBELL, Claire Louise
CHRISTENSEN, Josephine Hartmann
CORRIGALL, David Peter
CRAIG, Laura Margaret
EADIE, Charles Wesley
ELLIS, Rebecca Elizabeth
FEKETE, Irén
GARDINER, Ruth Margaret
HENDRY, Katie
ILLAND, Erin Esther
LAVERY, Calum Euan
LIPTON, Faye Elizabeth
MATTHEWS, Caroline Mary
McARDLE, Laura Amber
McFARLANE, James Stephen Hugh
MILLS, Grant George
MULLIGAN, Poppy Elisabeth
REID, Zeenat Yasmeen
SOMERVILLE, Molly Wendy
STEVEN, Lorren Georgia
WILSON, Hannah Elizabeth

PUBLIC POLICY HIGHLIGHTS

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

Plastic products

The Criminal Law and Environmental Law Committees submitted a response to a Scottish Government consultation on draft Environmental Protection (Single-use Plastic Products and Oxo-degradable Plastic Products) (Scotland) Regulations 2021.

These regulations propose market restrictions on some single-use plastic items and all oxo-degradable products, in line with article 5 of the EU Single-Use Plastics Directive (EU) 2019/904. The response noted a number of concerns in relation to the proposed criminal offences and sanctions, including the proportionality of the approach. The need for guidance was highlighted, as well as the financial and resource implications for enforcement and for those facing enforcement. The possibility of civil sanctions, similarly to other environmental contexts, was noted. Transitional and coming into force arrangements taking account of the impacts of COVID-19 would also be needed.

Human Rights Act review

Following the round table organised by the Society and chaired by Sir Peter Gross, chair of the Independent Human Rights Act Review, on 29 March, the Constitutional Law Committee submitted supplementary evidence to the review, picking up on some of the themes discussed.

These included consideration of the powers of courts or tribunals to vary retrospective decisions, such as those set out in the Scotland Act 1998, s 102, and the need to avoid creating unintended consequences if considering amendments to the Human Rights Act, primarily based on policy considerations. The committee also expressed the view that s 19 of that Act should be amended to require a minister who makes a statement of Convention compliance to give reasons for that statement.

Members of the IHRAR Panel are participating in a series of public events across the UK, including the University of Glasgow on 18 May (tbc).

Reform of judicial review

The report of the Independent Review of Administrative Law was followed by a Ministry of Justice consultation, which also considers the powers conferred by s 102 of the Scotland Act; in this case, whether they should be used as a precedent to set out in legislation the criteria for courts to decide whether to issue a suspended quashing order, or whether courts should instead be given discretion to do so. In its response, the Constitutional Law Committee stated that it was not for it to suggest what remedies the courts of England & Wales should apply, but pointed out various issues that had arisen in practice relating to s 102, which indicated the drawbacks of being prescriptive over allowing discretion to be used on a case-by-case basis.

The committee also restated its position in its response to the review, that the proposals (where they impact the devolved jurisdictions) should be limited to England & Wales, due to the differing nature of judicial review in Scotland.

Minimum pension age

The Pensions Law Committee responded to an HM Treasury consultation on implementing changes to the minimum pension age, with additional input from the Equalities and Employment Law Committees. This is the minimum age at which most pension savers can access their pensions without incurring an unauthorised payments tax charge (unless taking their pension due to ill health). The Government intends to legislate to increase this from age 55 to 57 on 6 April 2028, and sought views on the proposed protection regime.

National security and investment

The aim of the National Security and Investment Act 2021, given Royal Assent on 29 April, is to reform how inward investment in the UK is investigated to ensure hostile governments or other entities do not use this to undermine the UK's national security.

Following consideration by the Banking, Company & Insolvency Committee, the Society proposed an amendment at report stage in the House of Lords highlighting the different treatment between Scottish and English share pledges, and concerns that the legislation as proposed could impact on the ability of Scottish businesses to obtain finance. Although it was not passed, the Government gave an undertaking to monitor the impact of the legislation, which has been confirmed in a letter to the President.

ACCREDITED PARALEGALS

Company secretarial
ALEXINE DICKSON,
Burness Paull

Residential conveyancing
ARLENE RICHARDSON,
Russel + Aitken LLP

OBITUARIES

COLIN THOMAS McCRAE (retired solicitor), Aberdeen
On 25 May 2020, Colin Thomas McCrae, formerly partner of the firm Gray & Gray, Peterhead.
AGE: 88
ADMITTED: 1974

PETER McDOWALL MURRAY, Newton Stewart
On 24 February 2021, Peter McDowall Murray, formerly partner of the firm A B & A Matthews, Newton Stewart and latterly partner of the firm Matthews Legal Ltd, Newton Stewart.
AGE: 73
ADMITTED: 1972

MICHAEL STEVEN CUNNINGHAM, Aberdeen
On 28 March 2021, Michael Steven Cunningham, formerly partner of the firm Hutcheon Rattray & Co and Ledingham Chalmers, and latterly consultant with the firm James & George Collie LLP, Aberdeen.
AGE: 53
ADMITTED: 1994

Seeking the In-house Rising Star

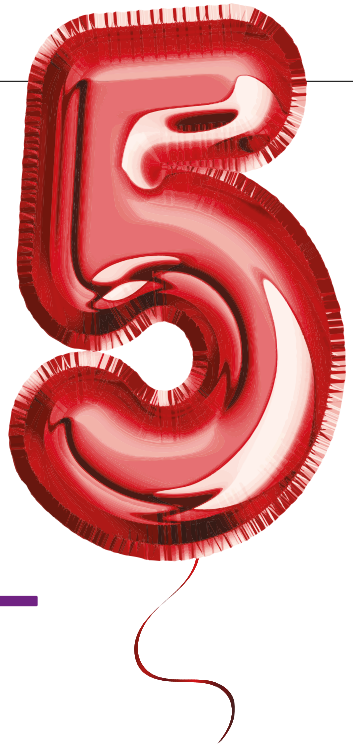
Nominations are invited for the 2021 Law Society of Scotland In-house Rising Star award. The award, now in its ninth year, recognises the outstanding achievement of a newly qualified Scottish solicitor or trainee working in-house.

Nominees must be Scottish in-house trainees or in-house solicitors with up to five years' post-qualification experience. Nominations will be judged by members of the In-house Lawyers' Committee and key individuals working with the in-house lawyer community.

The winner will be announced on 16 June at the online In-house Annual Conference.

Nomination forms can be accessed on the in-house page of the Society's website. The deadline for nominations is **5pm on Friday, 21 May 2021**.

Catherine Corr, a member of the In-House Lawyers' Committee and one of the judging panel, said: "Many of our newly qualified colleagues will have had to adapt to working remotely without the usual workplace support networks and I encourage all my in-house colleagues to recognise their hard work by nominating their legal stars of this extraordinary year."



Lawscot Foundation – five years on

The Society's charity dedicated to improving access to the profession has reached its fifth birthday. Lawscot Foundation's Heather McKendrick, and some of its students and sponsors, chart its progress and the difference it has made

The Lawscot Foundation was set up by the Law Society of Scotland in 2016. The aim? To enable the brightest and best students to qualify in law, regardless of financial circumstances.

Despite there being no fees for most students in Scotland, Scottish pupils from the least advantaged backgrounds are the least likely in the UK to attend higher education. We wanted, in some small way, to help change that.

To make a real difference, we needed to provide practical help and support. Lawscot Foundation offers suitable applicants a bursary, mentoring and networking opportunities.

Research by the Poverty Alliance found that bursaries, scholarships and grants are the most effective intervention to increase access to higher education. As a result, the Foundation committed to issuing a meaningful grant to every successful applicant throughout their studies: £12,500 in total for those completing the four-year degree and the Diploma.

Our students tell us the grant helps meet the costs of rent, books, materials and travel. For many, it also helps reduce the hours they work while studying, creating a more level playing field with their peers.

The research also noted that availability of grants and bursaries leads to outcomes including improved attainment in higher education, and improved qualification completion. Our students' overall retention rate is 97% – far higher than the average.

Equally important are the mentoring support and career development opportunities we offer. Indeed, the students rated these on a par with the bursary. Each student is paired with a solicitor or advocate mentor, along with a student buddy. Mentors are trained in practical skills to support our students on a range of topics, from budgeting help to careers advice.

We are also delighted to have a number of sponsor firms and organisations that have provided many career development and networking opportunities, along with financial support. Their involvement has ensured we can support more students each year and offer them unique and exciting opportunities. We now support 29 LLB students, across nine Scottish universities, and the first seven will graduate this year – a big milestone for us!

What of the next five years? We hope to increase our fundraising: since we launched, we've supported 10% of the applications received and we want to increase this figure. The applications are, without exception, impressive and sobering and it is very difficult for the trustees to decide who to support. We would also like to broaden our mentoring, provide work experience and internships, all making the playing field as level as we can.

The Foundation can only continue if we receive donations – from individuals, firms and organisations. If every Scottish solicitor donated £10 a year, we could support an additional 40 students and make a huge contribution to a fairer and more diverse profession.

Please contact us to find out more about getting involved. Here's to the next five years and a diverse and talented next generation of lawyers.

w: www.lawscotfoundation.org.uk
e: heathermckendrick@lawscot.org.uk

The students

Declan Dundas, final year student, University of Dundee

Lawscot Foundation has supported me in a multitude of ways – primarily financial support, mentoring, and networking opportunities. A lot of my success at university can be attributed to the Foundation, as it removed many barriers to studying law.

I am from what is described as a "socioeconomically disadvantaged area", which for many has been a significant barrier. Support from the Foundation has meant that I haven't had to worry about affording class and study materials, an incredible burden for many from similar backgrounds.

Moving out of the family home is financially onerous, and the Foundation enabled me to do this and attend my preferred university. It also meant I didn't have to get a job during term time, and could fully focus on my studies.

In addition to the financial support, we are paired with a mentor, who you meet regularly to discuss how your studies are going and who offers advice and support where possible. One effect of socioeconomic disadvantage is not knowing people in the profession who can

The sponsors

The Royal Bank of Scotland

RBS has supported the Lawscot Foundation as a Platinum sponsor from its inception. Its aims and objectives resonated strongly with us. In trying to promote fair access and opportunities for the less advantaged and removing barriers to entry to the profession, we recognised the Foundation as aligned with our own values and purpose as a bank.

Supporting the Foundation has also allowed us to role model behaviours that we expect from law firms supporting the bank: to get behind progressive ideas to positively effect change in the profession and benefit the lives of future lawyers.

give practical insights and advice – I attribute a lot of my success to having a mentor I could rely on when university got tough.

There are also many networking opportunities. Through the Foundation, I have met a variety of people in the profession – solicitors, in-house solicitors, advocates and judges. This has given me insights into the profession, which can help choose a career path.

The opportunities and the support have been instrumental in my LLB studies and I wouldn't be where I am today without the generosity of the Foundation and its supporters.

Jordan Scott, final year student, University of Dundee

My time at university started with ambitious applications for a course I lacked the qualifications for. After completing summer school at Dundee, however, I was offered a place on the English and Scots Dual Qualifying LLB, which gave very attractive prospects. Though ecstatic to be moving away from home, I was sceptical how I would manage both financially and career-wise, as I knew no one in the industry. These worries were eased when my school careers adviser directed me to the Lawscot Foundation.

It seemed a great initiative, so I applied and was awarded a place. At that point I didn't fully understand the extent of the support. The financial and mentoring support has meant I have not had to worry about buying books, rent or limiting my university experience; I have been able to speak with my mentor about any worries, get insights into her university and professional experience and, ultimately, build a relationship with someone active in the law.

But the Foundation does much more. It has allowed us to experience different legal settings first-hand, helping us decide what career is right for us. It has allowed us to network and make contacts that we would not otherwise have. It has, importantly, introduced us to other students with the same worries and ambitions.

The hardest parts of my degree have been eased by the Foundation's support, putting me on an even playing field with my peers. I can now fully appreciate what the Foundation has done for me, and how it is supporting me in my next endeavour of securing a traineeship.

Megan Allan, third year student, Glasgow Caledonian University

Lawscot Foundation has helped change my life. It came at a time when I needed it most – having left school at age 16 with little support behind me, and the first in my family to go to university. It seemed very daunting.

However, my life experiences – care experienced, bereaved of a parent at a young age, bullied, living with a single parent on a low income, and homelessness – have given me the drive, determination and resilience to succeed, and achieve my dream career in law. The Foundation has allowed me to get on the ladder and for that I am immensely grateful.

Starting the LLB at age 17 was hard, but the support of a student mentor and qualified solicitor helped massively, discussing both small queries and the "big picture". For example, I had never been taught to reference, so I panicked when my first assignment came up. My student mentor was able to keep me right. I found we had much in common, and it was nice to see someone like him as a Diploma student – a target to reach.

The Foundation's networking and work experience opportunities are unique. I applied for work experience at MTM Defence Solicitors, open only to Foundation students. This involved a CV application and the most intense interview I have ever experienced, which has given me invaluable skills I can apply in future. I was chosen, and the experience is one I will never forget.

The bursary has helped to relieve a lot of financial stress, allowing me to become financially independent and stable enough to pay rent, live comfortably and obtain equipment and books. An enormous weight has been lifted off my shoulders, which I am endlessly thankful for. I owe everything to the Foundation for helping towards enabling my dreams to come true.

Our relationship with the Foundation has grown during our involvement, with our lawyers mentoring the students and sitting on the fundraising committee, strengthening our relationship with the Foundation and providing valuable experience for our own lawyers.

We have been delighted to learn how the students have benefitted from the opportunities created, and congratulate the Society on launching the Foundation. We wish it continued success and every student a long and happy career.

Nick Scott, managing partner, Brodies LLP

We recognise the skills, experience and perspective that a diverse and representative workforce delivers, and the value it brings for our clients, firm and colleagues. The pool of talent across Scotland is full, but the number of opportunities less so. That is where initiatives like Lawscot Foundation play a fundamental role, creating possibilities for individuals with academic talent and potential, and facilitating relationships with the firms and people within our sector who can open doors and provide mentorship.

Collectively, the legal profession has a responsibility to our sector and to those beginning their careers, to do what we can to provide learning and development opportunities – and ensure that those opportunities are known far and wide. We recognise there is more we can all do to improve access to the opportunities we create. Collaboration across the sector, and continuing to work with organisations such as the Foundation, are some of the ways we all can achieve that.

Lawscot Foundation in numbers

- **8** of our **29** students act/have acted as young carers
- **16** live in the most deprived area postcodes in Scotland
- **8** spent time in care/homeless shelter
- **14** attended low progression schools
- **12** firms/organisations sponsor us, representing 65% of our total income: Pinsent Masons (Kirk Murdoch Scholarship), the Royal Bank of Scotland (NatWest), Dickson Minto, the Faculty of Advocates, Shepherd & Wedderburn, Brodies, Turcan Connell, Lockton, Burness Paull, BP, the Scottish Council of Law Reporting, and CMS UK.
- **100%** of any donation goes straight to providing grants to students.

RISK MANAGEMENT

Access issues in conveyancing

Kenneth Law of Lockton looks at what lessons recent claims concerning access rights can offer the profession – a key one being that solicitors should never simply assume that access rights exist

When accepting instructions to act in the purchase of a property, a solicitor, above all else, contracts to obtain a "good and marketable" title for their client. If the solicitor fails in doing so, it will be relatively straightforward for the client to demonstrate a breach of professional duty.

Whilst the title to most properties will be "good", the key to a "marketable" title is access. Simply put, whilst a property with access issues will usually retain some value, that value is likely to be far less than a similar property on the market that enjoys the necessary right of access.

Lead Master Policy Insurers, RSA, have encountered all sorts of access related claims over the years. Our experience tells us that the prospects of resolving claims of this nature often depend rather more on the attitude of neighbouring third parties than on the ability of insurers to mount a robust legal defence of the solicitor's actions.

The basics

The claims of this type that we encounter do not tend to involve any particularly complicated mistakes or misunderstandings by the solicitor. Rather, it is most often the basics that have been missed: a lack of attention to detail when considering the access rights, a failure to understand what is or is not included in the title or a failure to check with the client that what is included in the title is what they have been shown when viewing the property.

Remember that clients will almost invariably have visited the property whereas a solicitor rarely would, so it is crucial to consult with the client and make sure that the title matches their expectations, particularly in relation to access.

A long walk home

The clients had found just what they were looking for: a farm building that had been converted into a rustic, residential property in a semi-rural location that ticked all the boxes for the next stage of their lives. They instructed a solicitor to make an offer on the property, which was accepted. The purchase progressed and completed without issue. Or, so it seemed.

Shortly after their entry to the property, the clients were visited by a neighbour who claimed ownership of the driveway and parking area that had been marketed with the property. The dreaded term "ransom strip" was even mentioned. On making enquiries, it unfortunately transpired that the neighbour was correct in his assertions.

" The nearest on-street parking was more than a mile away. Hardly ideal for the weekly shop, and think of the poor pizza delivery driver!"

To make matters worse, the property was situated on a single track road and the nearest on-street parking was more than a mile away. Hardly ideal for the weekly shop, and think of the poor pizza delivery driver!

With the neighbour holding all the cards, options for the clients were limited. Either negotiate with the neighbour (from a position of extreme weakness) or explore remodelling the property to resolve the access issues.

A claim for diminution in value followed and insurers had no option but to settle this high value claim on best possible terms.

The best case scenario

In circumstances extremely similar to the above case, another altogether simpler resolution was found. However, this was not down to any skilful claims handling on the part of RSA. Rather, it arose purely as a result of the good will of a neighbour.

The solicitor was instructed to purchase a property on behalf of their client where, after completion, it transpired that there were access issues. It was identified that the clients' new neighbour could help, and happily, she just happened to be a relative of the couple who had sold the property to the clients.

This reasonable neighbour, with no ulterior motive, agreed to a transfer of the relevant strip of land. All she asked for in return was that her nominal legal fees for facilitating the transfer were covered.

A happy ending on that occasion, but unfortunately far from the norm.

Neighbours at war

A couple of elderly sisters had always talked of retiring to the countryside together as neighbours. They found the perfect spot in the picturesque grounds of an old guest house and purchased two plots of land for development.

After the clients purchased their plots but before planning approval was obtained, ownership of the guest house changed hands. As a result of that change of ownership, it was discovered that the necessary servitude rights of access and for the supply of services had not been obtained for the two plots. Contrary to the positive outcome achieved above, the new owner of the guest house has been far from accommodating with regard to the sisters' plight.

Many years have now passed and the bitter fight for access goes on. The owner of the guest house shows no sign of backing down, and what was the sisters' retirement dream has turned into a nightmare.

Never, ever, assume

It is not just in the world of residential conveyancing that a lack of the relevant access rights can cause major issues.

The clients had identified the extension of a large, out of town, leisure and retail park as an ideal opportunity to grow their business. They ran a successful family restaurant in the area and saw one of the units that had become available as the perfect location for them to

expand their loyal customer base. Now, in circumstances like this, it is natural to expect that a right of access to the unit, across the main car park, would exist. Wrong. As nonsensical as it seems, the clients were left with a property within the development that they and their customers had no way of accessing.

As business owners, the unit was practically worthless to them without the necessary access rights.

The Master Policy therefore had to pick up the bill for negotiating access rights with a number of difficult owners and tenants within the development, many of whom were restaurant owners themselves, with a clear vested interest in avoiding the potential for competition opening on their doorstep.

Landlocked

It has been a common sight in recent years for sports clubs to sell their dilapidated old stadiums, usually to residential or commercial developers. Commonly, the proceeds of said sale are then used to finance the building of new, purpose-built stadia with designs of taking the club on to "the next level".

In just such a scenario, issues arose as a result of the way in which the proposed sale was to be structured. This was to be in two stages. It was proposed that the car park servicing the rugby stadium would be sold in the first instance and that the sale of the stadium itself would shortly follow.

However, while the sale of the car park completed as planned, the sale of the stadium did not. The solicitors acting for the clients did not foresee these difficulties and failed to retain access rights across the site of the old car park to the stadium.

A substantial claim was pursued against the solicitor for the costs of acquiring an alternative right of access. It was also claimed that the clients required to borrow funds due to the financial difficulties directly arising from the solicitor's alleged negligence and the lack of access to the stadium.

What can we learn?

A (non-exhaustive) list of tips arising from the above examples would include:

- Always check with clients that the area being sold in terms of the titles and plans matches the property they have visited and are expecting to buy, including the location of any access routes, and document in the file that you have done so.
- Report to the client on any restrictions or maintenance obligations that apply to the access rights you identify, and make sure that they are both current and validly created.
- Insist on the seller obtaining a roads report from the local authority to find out the location and extent of adopted roads, rather than relying on a reference in the property enquiry certificate.
- Check any plans report carefully to see just how the deed plan will be delineated on the cadastral map, and check for any gaps from the public road. Raise any concerns with your client or the seller as appropriate.
- Use ScotLIS to identify and check the extent of neighbouring registered titles.
- Pay particular attention when titles are being split that all necessary access rights are retained or created as necessary.
- Where there is any doubt about access rights, consider requesting a warranty from the seller in the missives or defective title indemnity insurance.

It pays to take the time to make sure that clear and documented access rights exist which will satisfy the client's needs.

Checking and reporting on them is an essential part of the conveyancing process, and any failure to obtain them will be a difficult claim to defend. The outcome of such a dispute is likely to depend on the attitude of others and can seldom be influenced by the disadvantaged clients, their solicitors, or insurers.

There is no substitute for a good solicitor's attention to detail.

Kenneth Law is risk manager in the Master Policy team at Lockton

LEGAL TECHNOLOGISTS

Pushing the tech frontier

The Society's accredited legal technologists have their own members' group to share problems and seek solutions. The Journal was invited to report on a round table held in April

Legal technologists are unique among the Society's specialist accreditations in having a regular forum to exchange issues and knowledge. Your not quite so techie editor was invited to listen in on the group's most recent meeting and share some of what took place.

Much of the discussion centred on practical problems that are causing real issues, whether or not they match the priorities of the software developers. First up was the ability to share large files in a safe environment.

This arises because of the size of documentation now found in areas including building contracts with their technical schedules, M&A, and distribution agreements. But a commonly used platform won't take technical schedules, and has a file size cap, so how do you digitally sign something that big? Some litigators too would like a "deal room" with collaborative space for counsel, solicitors and experts to share material.

"What was big data is not big data any more," observed Alan Stuart, who heads his own practice. "You can easily get terabytes of data being stored for long periods."

Despite extensive trials, no one in the group had found a satisfactory solution, and the issue is exacerbated with more people working from home. "We're trying to find a way that doesn't involve circulating a CD or USB drive, but it will probably have to come back to that," Sam Moore of Burness Paull reported.

Like herding contracts

A separate issue, raised by Andrew Mowlam of Sky, is contract life cycle management. This became acute during the lockdown when everyone started checking their termination rights. "There's no such thing as a one size fits all tool," he concluded. "Some vendors will tell you that, but trying to do this is really difficult. What it comes down to is a big structured database but the contracts themselves are not structured data."

Group members despaired at trying to get less IT-minded colleagues to follow protocols that might make the task easier – "People naturally want to get contracts in as quickly as possible and that doesn't always lend itself to following any process," Andre Boyle of Millar & Bryce commented – and that still leaves the problem of how to deal with legacy contracts following a merger. Further complications arise if you have issues of rights management and licensing, and international territories.

"We have that issue," agreed Zoe Fowlie at Vialex. "We haven't found the perfect solution either. We would really benefit from something. We've done a similar thing recently with natural language processing and machine learning to try and get through bulks of contracts. There's an ongoing view element that needs to be captured. It's a tricky one."

Here members felt the providers had the ability to come up with a solution, but weren't sufficiently interested. Moore suggested it would need the merger of a software giant with one of the smaller, cutting-edge developers, but until then the consensus appeared to be that you might need to invest (heavily) in a bespoke system.

"A lot of the products haven't been built with a view to integrating with other products," Stuart added. "Often they haven't thought of why people would want to. This whole idea of bundling and integration of all these products is becoming much more important."

This was an area where Paul Mosson, director of Member Services and Engagement, suggested the Society could attempt to press for action through the LawscotTech collaborative group.

Feedback time

Jill Sinclair of DWF was keen to hear feedback from the profession on how the court systems for virtual hearings are working, now they have been in place for a little while. In fact this is to be reported at a special one day conference hosted by the Judicial Institute on 10 May, which the Journal will cover next month.

The Society in turn was interested in the group's views on the value of the legal technologist specialist accreditation badge.

There are now 10 members, about two thirds of the number who have applied. We were told that unsuccessful applicants tend not yet to have the necessary depth and breadth of experience, but if they continue on their current path will probably achieve that. Some already have strong legal project management skills, and there was discussion about the accreditation that would best suit them – there is an ongoing discussion with some practitioners about the case for a legal project management certification.

Members clearly welcomed the forum as an opportunity for sharing – the few who missed the meeting did so with regret – and the Society is willing to take up with the relevant external bodies any issues reported.

The final suggestion, also greeted with approval, was that the group might engage in some pro bono technical support-type activity. Watch this space.

For more information on the legal technologist accreditation, go to the specialisms section of the Society's website

What's the core?

Engagement, satisfaction and morale: all depend on the values we hold dear, Stephen Gold believes

Such larks in the boardroom. The plodding behemoth Aberdeen Standard is to be known henceforth as "Abrdn". "Rbsh!" cries a bemused public. Much derision too in the world of football, following the announcement of plans by 12 leading clubs to form a European Super League, from which they can never be relegated: "Own goal!" "Net zeroes!" "Kick 'em out!" Connoisseurs of terrible football puns have had a field day (sorry). The only "super" element turned out to be the supersonic speed at which this wizard wheeze zoomed from launch to oblivion, imploding in a toxic miasma of greed and betrayal.

Abrdn and the "Dirty Dozen" clubs could hardly be more different, but the ordure heaped on them has a common cause: a perception that they betrayed their basic values. Despite previous catastrophes, most recently in 2008, financial institutions are seen as bastions of stability. It is fine to be innovative, but not gimmicky. In football, take away jeopardy and you are left with a meaningless exhibition. As one Liverpool fan said in disgust, "They want to turn us into the Harlem Globetrotters".

What do these episodes teach us about values? First, they matter a great deal, to staff and customers alike. Secondly, they are easy to proclaim; much harder to live up to. Take, for example this impressive list: Communication. Respect. Integrity. Excellence. They sound great. Who wouldn't want to work for, or buy from, such an enlightened organisation? Maybe they resemble your own firm's values, the ones your specially appointed subcommittee spent so much time writing, debating, and revising. They are the corporate values of Enron, and as it turned out, they were a sick joke. The world of law is not immune: Integrity. Collaboration. Inclusivity. Respect. Performance. These are the published values of a recent recipient of Roll on Friday's Golden Turd Award for worst law firm employer.

The road to core values

The focus on corporate values really took off in 1994, when Jim Collins and Jerry Porras published *Built to Last*, which made the case that many of the best companies adhered to a set of principles called core values, which are inherent and sacrosanct; they can never be compromised, either for convenience or short-term economic gain. As author Paul Lencioni wrote over 20 years ago in *Harvard Business Review*, "this provoked managers to stampede to off-site meetings in order to conjure core values of their own. The values fad swept through corporate America like chickenpox through a kindergarten".

Today, as culture wars blaze all around us, with the behaviour of companies and individuals under constant, brutal scrutiny, no one would describe them as a fad. Well articulated and executed, they may bestow competitive advantage. Fail to live up to them, and trust and value are destroyed.

In general, core values help to answer these three questions:

What are we going to contribute? What contribution are we going to make to business development, management, training and mentoring, collaboration with colleagues?

How are we going to behave? Are we lone wolves, or team players? How hard will we work? Are we committed to service excellence? Really? Are we diligent about timekeeping, billing and stewarding the firm's resources? Are we available and accessible?

What is our character? Do we act with integrity, keep promises, put the clients first, the firm second, and our own interest third? Are we committed to leaving a legacy for those who come after us?

A potent set of core values provides an objective standard against which our conduct and performance will be judged. To that extent, it can be a boon to the firm's leadership.

But it's a tool with two edges, because it keeps leaders' behaviour constantly in the spotlight. For example, espouse collaboration as a core value, then act autocratically, and the result is a demotivated and cynical workforce.

Precisely because core values are not just cuddly nice-to-haves and matter so much, the leadership must be deeply involved in creating them from the start. Nor is this something to be rushed. Self-examination is likely to throw up difficult questions which will take time and serious thinking to work through. It is not something to be delegated, and canvassing the whole firm to achieve consensus is also a mistake. It's for leaders to be clear about the values they believe should be core. Once they have been formulated, by all means ask for comment before they are formally adopted, but that is the right order. Remember, the original statement of core values is the Ten Commandments. So far as is known, before God gave them to Moses, He didn't decide to hold an off-site.

Stephen Gold was the founder and senior partner of Golds, a multi-award-winning law firm which grew from a sole practice to become a UK leader in its sectors. He is now a consultant, non-exec and trusted adviser to leading firms nationwide and internationally.
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THE ETERNAL OPTIMIST

That "glow and tingle" feeling

How do you guarantee repeat business in the modern world?

Over the last year it seems to me that much of the country has coped with lockdown by purchasing "stuff" online. Money saved from being unable to eat out, go to the gym or on holiday appears to be being spent instead on everything from house makeovers to new cars and Peloton exercise bikes.

Over the years I've occasionally indulged in such purchases, often followed by buyer's remorse as the items seldom lived up to expectations, or failed to resolve whatever woe I was trying to compensate for. There are of course exceptions and every once in a while I found something that made me truly happy (at least for a bit). I call these my "glow and tingle purchases", and they are why I return to those vendors over and again. Why was I so happy with them? The reason is simple: they exceeded my expectations in some meaningful way. These are the products and services I evangelically tell my family and friends about and encourage them to use.

It reminds me of some advice I received many years ago from the late Scott Galt in relation to my own practice. "Clients who receive poor service might not come back to you. Those that receive good service might return, but it is only those who are left with that 'glow and tingle' feeling that are guaranteed to instruct you again." Now, we will all recall situations where we know we haven't performed at our best but the client still returned, for reasons best known to them. Clients we have done a good job for, though, only "might" return? That for me was a real lightbulb moment. I always thought if I did a good job, that would be enough to bind them to me forever.

On reflection it makes sense, though. They received what they paid for, no more, no less. Like any other transaction, if we get what we expected for the agreed price, while that may encourage us to return to that vendor, it is far from guaranteed and I am sure you can think of many examples in your own life where you have subsequently elected to shop around. Can you imagine saying to friends: "I had a fair meal at a fair price; you really must try it?"

In a service industry like law the position is particularly difficult, as so much depends on the customer "experience", more so at times than even the result. Everything may be carried out professionally with the best outcome for the client, yet issues like slow communication or poorly managed expectations can lead to clients questioning whether or not, in their eyes, they received what they paid for. More complaints and lost clients arise from delays in returning calls, or misunderstood communications, than almost any other area; they remain among the most common sources of complaints to the SLCC, and yet communication is what we as solicitors are supposed to do well. Like all issues, though, being aware of them is half the battle in resolving them.

So the question I am left with is, how do we add that glow and tingle feeling to our own clients' experience? There is no one answer, but for those of you who don't do it already, perhaps the best people to ask are the clients themselves. All feedback, but particularly where it is negative, will provide clear guidance on where you can improve. The recurring question for us all, I believe is, how do we continue to add value to our clients' experience? Whether it is more telephone time, different charging structures, or simpler letters or documents, if we can leave clients with that glow and tingle feeling at the end of their transaction, not only will we be guaranteed their future business but we will have found ourselves a constant stream of fabulous advocates for our firms.

If any of the topics that I cover resonate with you or there is a particular issue that you'd like raised, please contact me at stephen.vallance@hmconnect.co.uk

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

FROM THE ARCHIVES

50 years ago

From "Professional Indemnity Insurance", May 1971: "With the desirability of continuity of insurance in mind the Council in consultation with their Insurance Advisers... endeavoured to arrange a stable market with a large Scottish insurance company... This, however, has proved virtually impossible for various reasons... The Council of the Society has still under consideration the possibility of the Society operating its own scheme but this is a major task and would require legislation. One difficult problem is that no such scheme could be undertaken without satisfactory re-insurance being arranged."

25 years ago

From "Labour and Civil Justice" (address by Lord Irvine of Lairg QC), May 1996: "Most important of all, however, is the Woolf Report in England and the Cullen Report in Scotland. Each is essential reading for practitioners. Both are radical, far-reaching and think the formerly unthinkable. Central to both is the proposition that there must be a fundamental shift in the responsibility for the management of civil litigation from litigants and their legal advisers to the courts... I have no doubt that this is the way forward."

ASK ASH

Grounded – no work travel!

I miss the travel part of my job, which may have gone for good

Dear Ash,

Prior to the pandemic hitting, my role involved frequent travel both to London and abroad. Although I didn't always enjoy being away from home, I am now really missing the variation and lifestyle this part of my role afforded me. Unfortunately, our firm is now looking to minimise such travel in future despite the potential relaxation of restrictions. I'm therefore feeling down at the thought of being confined to one permanent place of work, and at the realisation that this could well be how things are in the future.

Ash replies:

A degree of travel was, prior to the pandemic, a normal expectation for most jobs, even if this just meant the obligatory commute to work. It seems you were fortunate in having a degree of variety built into your role with potentially more glamorous travel in addition.

However, with the greater focus on environmental issues, such travel was already inevitably being pushed to be reviewed by employers; and it would seem that the pandemic has merely helped to speed up this review and highlighted the benefits of being able to work online from home, without the need to hop on a plane.

The lasting legacy from this pandemic is likely to include greater flexibility in terms of working practices, as we have all managed to demonstrate that, certainly for office based work, we don't need to be in the office physically in order to work effectively. Therefore try to focus on some of the positive implications of this new era too, especially as it seems that staying local may still be the safer, healthier option for the time being.

PROFILE:

Krista Johnston

Our latest solicitor advocate profiled to mark 30 years of the law, hopes more women will join her in criminal defence

A friend, prosecuting in Kirkcaldy Sheriff Court turned to me and said, "You should apply to be a solicitor advocate." She was a colleague I greatly respected and I suppose I was flattered that she thought I might be so capable. Perhaps she detected my long held desire to practise in the highest courts. I admired many of the counsel and solicitor advocates that I instructed and I aspired to be among them. It was time to be brave.

I applied in 2006. Sitting a written exam after such a break from studying was daunting, but the course was excellent fun. Although short, it taught me a great deal. It also allowed me to meet others who became firm friends, bonded over shared experiences of new challenges.

One of the great attractions was to play a significant role in the theatre of the highest criminal courts. I wanted to be the one actually asking the questions or presenting the argument. Being a solicitor advocate means I can still enjoy the camaraderie of the sheriff courts and of my colleagues at Martin Johnston & Socha. We have been in business together for over 20 years and I am very proud of how we as a firm have grown and developed.

Being a sheriff court solicitor is a very different job from solicitor advocate. It is hard representing many clients over numerous different cases every day in court, while juggling custody appearances, police station attendances and office appointments. I admire all those who do it so seamlessly.

All change? Not quite

Over the 14 years since I qualified as a solicitor advocate, I have seen a lot of change in the High and appellate courts. I cut my teeth on sentence appeals before judges such as Lord Johnston, sadly now deceased. I argued summary conviction appeals from the depths of the extremely intimidating well of the Appeal Court in Parliament House. Now, the Sheriff Appeal Court sits, and in COVID times, appeals are conducted by Webex. It is less intimidating speaking from the "well" of my spare room.

Change has galloped towards us in other ways. At least 80% of my instructions are now for rapes, sexual abuse, domestic violence. Much of the debate in agents' rooms centres around what one is allowed to ask a vulnerable witness. Section 275 is a complex minefield. Evidence is routinely taken on commission from the newly decked out suite at Atlantic Quay. Written questions for cross examination are often requested, and joint investigative interviews, which formerly were only really useful as prior inconsistent statements, regularly become the evidence of the witness, by statute. Changed days indeed; much of it overdue and welcome.

Perhaps what has not changed is the low number of women among defence criminal solicitor advocates. With some notable exceptions (and I don't mean me), it remains the case that by far the majority who routinely appear are men. I was very pleased to be accredited in 2020 with the status of senior solicitor advocate, but sad that there are no other women in criminal defence who are. There seem to me to be so many excellent female solicitors out there. Women defence lawyers are pleasingly now very prevalent in the lower courts, and I hope this heralds a similar future for the High Court – and not just for the Crown.

Writing this has reminded me that I should thank my friend from Kirkcaldy Sheriff Court. I have had the best highs and lows of my career defending in the High Court. I hope change does not erode the role of advocacy and adversary that I love so much. I was never into extreme sports, but the theatre of the court still serves amply well to raise my pulse.

APPRECIATION

James Alastair Taylor

21 February 1951-9 March 2021

James Taylor, former Sheriff Principal of Glasgow & Strathkelvin, had a varied and successful legal career and made a significant contribution to the improvement and modernisation of Scotland's courts.

James was born in Inverness and raised in Nairn, where his father was bank manager. The town and its people always remained close to his heart. He attended Nairn Academy, where as well as accumulating academic prizes he acquired a lifelong passion for golf, at one time playing off scratch.

He completed a BSc in chemistry at the University of Aberdeen, before changing paths and studying and graduating in law. A music enthusiast, he had a particular if unlikely penchant for Motown and Northern Soul, which he put to good use to self-fund his LLB, setting up the James Taylor Travelling Disco and becoming a well known figure to the gilded youth of Aberdeen.

After graduation, he was apprenticed in the city at Brander & Cruikshank, practised at Lefevre & Co, and became a partner at AC Morrison & Richards. By then he had covered the whole spectrum of high street legal work, before specialising in commercial work.

It was this broad experience which gave him the insight into human nature in its variety of legal relationships, which was to prove invaluable in later years. He believed law was for the people, and that those who did not know their rights, or could not exercise them, had in effect none.

In 1988, the Government set up an inquiry into the *Piper Alpha* disaster. McGrigor Donald was instructed, and James, who had joined its Glasgow Commercial Litigation department only the previous year (he would become partner after a year, then head of Litigation) leapt at the opportunity.

With his enormous capacity for detail, his reputation was established as someone who could handle complex, longrunning cases. He subsequently acted in the *Ocean Odyssey* fatal accident inquiry, the inquiry into the removal of children from Orkney, and the inquiry into the Dunblane Primary School tragedy.

In 1993 he became one of Scotland's first solicitor advocates, appearing regularly in the higher civil courts. Five years later he was appointed sheriff in Edinburgh, before becoming the commercial sheriff in Glasgow in 1999. His contribution to the success of what was then, for the sheriff court, very much a novelty, cannot be emphasised strongly enough.

In 2005, he was appointed sheriff principal, introducing case management into the dispensation of justice far beyond commercial cases. He gained an LLD in 2013 from the University of Glasgow and was a visiting professor at the University of Strathclyde. But his most significant contribution to public life was yet to come.

The criminal courts had just undergone an exhaustive review of procedure by Lord Bonomy when the then Lord Justice Clerk, Brian Gill, was charged with planning root and branch reform of the civil courts. James was part of a close-knit advisory "Board of Four", and his voice was a strong influence in Lord Gill's 2009 *Scottish Civil Courts Review*, which became the Courts Reform (Scotland) Act 2014.

But architectural reform meant nothing to him unless the question of legal costs was addressed. "Access to justice" was a meaningless shibboleth unless it meant access to the courts. And the economics of litigation meant that access to the courts was available only to the rich, or to the very poor under an increasingly beleaguered legal aid scheme.

His wide-ranging intelligence and eclectic reading caused him to identify the law as the archetypical "asymmetrical market". Institutional "repeat players" such as insurers enjoyed systemic advantage over "one shotters", consumers whose only brush with civil law was likely to be the matter in hand.

In his *Review of Expenses in Civil Litigation* (2013), James proposed radical changes to the costs regime, and increased transparency and fairness. It is a legal *tour de force*, which together with the Gill reforms in which he played an integral part, is shaping and transforming the whole Scottish legal landscape.

Retiring as sheriff principal in 2011, he devoted the following years to completing his review, appearing in 2018 before the Scottish Parliament Justice Committee, which was considering legislation to implement his work. His intervening absence from public life had diminished neither his charm nor his forensic skills. His proposals were passed virtually unaltered in the Civil Litigation (Expenses and Group Proceedings) (Scotland) Act 2018.

In 2013 he and Lesley retired to Nairn, but in a cruel twist of fate he was soon diagnosed with prostate cancer, an illness he bore with courage, resilience and stoical good humour. Despite the valiant efforts of the Urology Unit at The Royal Marsden, London, he finally succumbed peacefully in March, with Lesley at his side.

James, who is survived by Lesley, sons Andrew and Robbie, and grandchildren Angus and Calum, was a man who wore his honours and his learning lightly, possessed of self-confidence but quite without arrogance. He had a strong religious faith, too, and between 2004 and 2012 he was a director of, and volunteer day helper at, the Lodging House Mission, a Glasgow Christian community dedicated to the homeless, the vulnerable and the excluded. Just as in his professional life, James was committed to faith in action.

Ronald E Conway

Classifieds

MR BRUCE MALCOLM MUDIE - Would any solicitor or other person holding or having knowledge of a Will by the late Mr Bruce Malcolm Mudie, resided at 18 Westfield Gardens, Westhill, AB32 6WX and who died on 26th January 2021 please contact Rosina M Dolan, at Wright, Johnston & Mackenzie LLP, 302 St Vincent Street, Glasgow, G2 5RZ, Tel: 0141 248 3434.

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