

THE CIVIL COURT AND THE FUTURE OF DISPUTE RESOLUTION

A review of the civil courts is being carried out at present under the chairmanship of Lord Gill, and a consultation paper is to be published shortly. I will not try to anticipate what the outcome of the review may be. Instead, I would like to offer some personal thoughts about the courts in Scotland and the resolution of disputes.

I take as my starting point the Lord President's response to a consultation paper issued last year by the Scottish Executive. The Lord President expressed the view that the primary function of the Court of Session should be that of a court of appeal and, at first instance, a court dealing with judicial review and issues of general importance or exceptional value. That view represents a change from the present position.

At present, the Court of Session is used as a first instance court for civil cases which are not of high value and do not raise any issue of general importance. In particular, it is used by the lawyers acting for trade unions for personal injury cases – in other words, accidents at work - regardless of their value or complexity. There are reasons why it makes sense for the lawyers to do that. The Court of Session deals with these cases efficiently, using a procedure based on judicial case management which, as far as I am aware, does not at present exist in the Sheriff Court.

If these cases were to be dealt with in the Sheriff Court, there would have to be an increase in its resources and a reorganisation of how it deals with such cases. It would be necessary to address the problem that some personal injury lawyers lack confidence in the Sheriff Court at present, because civil cases are liable to be allocated to sheriffs who lack experience of civil work.

The tendency to bring cases before the Court of Session regardless of their complexity or importance is not confined to personal injury cases. The same tendency affects civil cases more generally, although it has been reduced to the extent that Sheriff Courts have introduced specialist courts. If a larger proportion of civil disputes were to be

dealt with in the Sheriff Court, it would be desirable for the Sheriff Court to have a more specialised judiciary, possibly located only in major centres.

The present system results in a significant part of the resources of the Court of Session being spent on straightforward cases where modest sums are at stake, while cases which require the expertise of judges at that level have to wait their turn in the queue.

The problem of cases being heard by judges higher up the chain than is necessary is not confined to civil work. Every judge of the Court of Session is also a judge of the High Court, which deals with serious crime. Most of the judges of the Court of Session spend much the greater part of their time presiding over criminal trials in the High Court. Because criminal business has the prior claim on resources, the consequence is that civil cases cannot always be dealt with efficiently. The only exception is commercial business, and that is only because the principal commercial judge is kept free from criminal commitments, and the other part-time commercial judges are kept free of crime for half the year.

Sensible changes on the civil side cannot be effective unless there is a reduction in the volume of criminal business dealt with by Court of Session judges. But the Court has no control over its criminal workload. That depends on the number of cases which Crown Office decides to prosecute in the High Court. Since the number of serious criminal cases is increasing, the average length of trials is also increasing, and the introduction of judicial management of pre-trial procedure has further increased the call on judicial resources, a reduction in the criminal workload of Court of Session judges can only be effected by transferring some of it to judges of the Sheriff Court. In fact, some of the most experienced sheriffs already hold appointments as temporary High Court judges, and preside regularly over High Court trials. That is something which might be built on.

The fact that at present a judge of the Court of Session can expect to spend most of his time sitting on criminal trials, and much of the remainder dealing with relatively minor civil cases, may also create difficulties in recruitment. A career predominantly in the criminal courts is not an attractive prospect to most civil practitioners; but

unless civil practitioners of the highest quality apply to become judges of the Court of Session, the Bench will lose credibility, the Scottish courts will lose business, and the Scottish legal system will decline.

The need to resolve disputes in a manner that makes the best use of judicial resources has other implications. One is to encourage the use of specialist courts. The experience of the Court of Session in commercial and company law demonstrates the benefits of specialisation. In particular, the Scottish courts have to provide a credible alternative to the English Commercial Court, the Technology and Construction Court and the Companies Court. That is impossible without specialised judges.

A second implication is to encourage the use of judicial management of cases. This has proved successful in commercial cases and in other areas. It can reduce the time and expense which litigation involves, and can encourage an earlier resolution of disputes. Judicial case management could usefully be developed further.

A third implication is to encourage alternative methods of dispute resolution. The Scottish Executive has signalled its interest in exploring the possibilities of ADR. I would agree with that approach, provided ADR is deployed appropriately, and without putting inappropriate pressure on parties to use it.

In relation to some disputes there is a clear benefit in encouraging people to adopt such methods, and even in placing pressure on them to do so. For example, adjudication in the construction industry has proved to be a success. It generally meets the needs of organisations whose priority is to have disputes decided quickly, even if the resultant decision may sometimes be regarded as rough justice. It is critical to its acceptability as a compulsory procedure that the decisions can always be re-considered by a court, even if that does not often happen in practice. It may also be relevant that most of those involved in adjudication are repeat players, who can take a similar attitude towards the decisions of adjudicators to the attitude of football managers towards referees: they may be disappointed when decisions go against them, but they know that these things will tend to even out over the course of the season.

There are other disputes where people will choose to use mediation rather than a more formal and expensive procedure: for example, consumer disputes in relation to banking and insurance, or disputes between parents and local education authorities. Mediation is particularly acceptable in those sorts of areas because the consumer does not have to bear the costs involved, while the banks and insurance companies can avoid the publicity that might result from a court hearing.

Mediation can also provide a wider range of solutions than those available in litigation: for example, an apology or an explanation, or the continuation of an existing business relationship on new terms, or an agreement to do something without any existing legal obligation to do so. There are many disputes where these will be attractive possibilities, and which may therefore be suitable for mediation, although it may not be easy to identify general categories.

The hallmark of mediation is that it is a process which is voluntarily entered into by the parties in dispute, and is non-binding. So its effectiveness depends on the willingness of the parties to a particular dispute to enter into it and to accept the outcome.

I would regard it as a mistake to treat ADR and court proceedings as stark alternatives. The early stages of proceedings may not always be the best time to consider using ADR, and should not be the only opportunity. It should not be overlooked that the vast majority of cases in court are settled by negotiation. In most cases court procedure operates as a means of assisting the parties to negotiate a settlement, typically by assisting or encouraging them to focus the issues, to recover the relevant documentation, to obtain statements from the relevant witnesses and to obtain expert advice. The parties may attempt ADR after the court proceedings have reached a stage where ADR seems worth attempting, or they may be encouraged by the court to have their experts meet to try to resolve their differences, or they may be encouraged to remit the dispute to an independent expert appointed by the court. In construction disputes, for example, the same person who may be acting as a mediator or adjudicator or arbiter one week may be acting in a court case the following week as an expert witness or an assessor. Work in any of those capacities can be equally important in helping to resolve disputes.

In the Commercial Court in England there is provision for judges themselves to provide a form of ADR within the court system. It is known as “early neutral evaluation”. If it appears to the judge that an early neutral evaluation of the dispute on a without prejudice and non-binding basis is likely to be of assistance, he can offer to provide that facility himself or to arrange for another judge to do so. In our Commercial Court, early neutral evaluation consists of the judge raising a sceptical eyebrow at the preliminary hearing if an argument strikes him or her as obviously doomed to failure. A more formal system cannot be introduced at present given the manning levels of the Commercial Court, which reflect the extent to which court resources are required for criminal business.

I would be reluctant in most cases to put pressure on parties to resort to mediation in order to save court resources. To compel parties to enter into a mediation to which they objected might achieve nothing in practice except to add to the cost to be borne by the parties and postpone the time when the court determines the dispute. It also seems to me that it would not be right to require persons who wish a legal solution of their dispute to participate in a process which is far from pure in its application of legal principle. The enforcement of a person’s legal rights is a basic public service.

On the other hand, there are circumstances where it is appropriate to encourage the parties to consider mediation, and where the form of encouragement may be robust: for example, where a dispute is so intractable that it can only be resolved by the court after an expenditure of time and effort which will be wholly disproportionate.

But we can learn from experience in England, where the courts have gone much further in pressurising people to use ADR. This approach has dammed the stream of cases by which the courts used to keep the law abreast of developments in commerce. In Scotland, it has to be borne in mind that the main problem with the Scottish legal system is not that it has too many civil cases, but that it has too few, leaving it in danger of looking antiquated. The proper development of Scots law is not a concern of the parties to disputes, but it is a matter of public importance.

So far I have spoken mainly about ADR, but my principal responsibility is the Commercial Court. When I was appointed as the principal commercial and company judge, I was given the responsibility of trying to identify and address the reasons why the Court of Session seemed to be declining in popularity as a forum for commercial litigation. Court users made helpful suggestions to me about their concerns, which essentially revolved around cost and delay.

I have tried to address these in a variety of ways. The starting point has been to treat the parties' lawyers as experienced professionals who share the court's commitment to getting disputes resolved as efficiently as possible. We begin by holding a round-table discussion of the case. The judge will have studied the pleadings and productions in detail, and takes the lead in the discussion, trying to work out with the parties how best to get the dispute resolved. The judge will try to create a framework from the outset to ensure that communication is opened up between the parties, that discussions are initiated without either party being inhibited by the fear of showing weakness, and that the involvement of any experts is managed as efficiently as possible.

Having got the case on to the right track at the outset, the judge then sets down a realistic timetable for future progress, with each party being given a to-do list. The parties are encouraged to keep in touch with the court and with each other by e-mail, so that a hearing can be held whenever necessary, but only if it is necessary and will be worth the expense. Once the case is ready for any points to be decided which require to be decided by the court, importance is attached to having a hearing within a reasonable time and to having the judgment issued reasonably quickly.

This general approach appears to be working. So far this year, the number of cases being started in the Commercial Court is up on last year by 57 per cent. At the same time, the number of hearings is down by 4 per cent, which suggests that the business is being dealt with more efficiently. Apart from the numbers, the average value of the cases coming before the Commercial Court has risen, and we are attracting more cases of an international nature. Attracting work of that kind to Scotland, and retaining work here, benefits the Scottish economy and the Scottish legal system.

If Scots law and the Scottish legal profession are to thrive, it is important to ensure that the courts continue to provide an attractive service to the commercial community. Looking to the future, it seems to me that there may be a need for judges to be given greater powers to manage cases, similar to the powers already possessed by judges in some other jurisdictions, particularly in order to keep litigation in the largest cases within manageable bounds.

In conclusion, I would say that I and my colleagues on the Commercial Court recognise that the court needs to engage with the members of this Institute, and of the Scottish Branch in particular. We and the members of the Branch are performing functions which are in many ways complementary and inter-dependent. I am pleased that the chairman has suggested to me that arbitrators might sit in on hearings in the Commercial Court. My colleagues and I will be pleased to welcome members of the Branch to the Commercial Court.