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Fascinating Facts

In the late 1700s, many houses consisted of a large room with only one chair. Commonly, a long wide board folded down from the wall, and was used for dining. The “head of the household” always sat in the chair while everyone else ate sitting on the floor. Occasionally a guest, who was usually a man, would be invited to sit in this chair during a meal. To sit in the chair meant you were important and in charge. They called the one sitting in the chair the “chair man” Today in business, we use the expression or title “Chairman” or “Chairman of the Board.”

Editorial Comment by Johan Findlay

The Communications Committee of the Scottish Justices Association is delighted to present the Spring 2009 newsletter.

This is the first newsletter in the year that sees our 400th Anniversary. Kenny McAskill the Cabinet Secretary for Justice spoke at the conference held at Dunblane Hydro where the South Strathclyde Dumfries and Galloway justices met for their sheriffdom training weekend. Mr McAskill mentioned the 400th anniversary and informed us that all justices across Scotland are to be invited to a reception at Edinburgh on the afternoon of Wednesday 24th June to celebrate this event. 400 years is a very long time and we have a great deal to celebrate. Please mark the date in your diaries!

There has been a great deal of work going on over the winter across the sheriffdoms as the JPACs have been interviewing potential new justices. This has been an interesting exercise and many things have been learned which will improve the process for the next time. With training and appraisal committees also working hard there has not been much free time for the justice sitting on these committees. Only two more sheriffdoms are now left to be unified and the end of this year will see the completion of a massive programme. Scottish Courts Service are to be congratulated on a mainly smooth transfer which they have dealt with alongside the new Judiciary and Courts (Scotland) Act 2008 which brings about sweeping changes to the court service and to the judiciary of Scotland – which includes us!

I am delighted that we are able to publish an articles on this in the newsletter and I hope that you find it helpful in explaining how it will affect us.

An old friend of the justices has written a fascinating piece on the Celluloid Courts, in other words the Hollywood version!

Two justices, Philip Murray and Malcolm Macaskill attended the CMJA conference in Cape Town 5-9 October 2008 and reports by both have been published in this newsletter.

We are all about to start the appraisal programme and some justices have now experienced this first hand and it has proved to be a very positive event. Graham Coe has written an article on this which helps to explain the process and the reasons behind it.

The SJA website is kept up to date and you will find all the information you may need – minutes of meetings, articles etc. It is a very user friendly site and we are always happy to receive comments – how to improve it or ideas for anything else required.

As with the website, do please let me know if you have any ideas for the newsletter and I hope you enjoy this one. A bumper issue is underway to help celebrate the anniversary!

Johan Findlay
Editor

Judiciary and Courts (Scotland) Act 2008

The Judiciary and Courts (Scotland) Act is an important constitutional measure which will have a significant impact on the judiciary and on the administration of the courts.

The Act was passed unanimously by the Scottish Parliament in September 2008, and received the Royal Assent in October 2008.

Progressive implementation is planned for a period between Spring 2009 and Spring 2010.

Judicial independence

For the first time in Scots law, the Bill commits Ministers, MSPs and anyone with responsibilities for matters relating to the judiciary or the administration of justice to uphold the continued independence of the judiciary. This is an important constitutional protection, and should be brought into force this Spring when Scottish Ministers make a commencement order.

Lord President as Head of the Scottish Judiciary

The Act is also innovative in establishing the Lord President formally as head of the Scottish judiciary. While the Lord President has for a long time enjoyed this moral status, he has not previously had this statutory role and the duties and powers which go with it.

The Act:

- Makes the Lord President responsible for the efficient disposal of business in the Scottish courts.
- Gives the Lord President responsibility for representing the views of the Scottish judiciary to the Scottish Parliament and Scottish Ministers, and for making representations to the Parliament about matters of importance relating to the judiciary or the administration of justice.
- Makes the Lord President responsible for arrangements for the welfare, training and guidance of the judiciary.
- Requires him to establish arrangements for the investigation and determination of any matter concerning the conduct of members of the judiciary.

The Act enables appropriate delegation of responsibilities from the Lord President to judicial colleagues.

In relation to allegations of misconduct against members of the judiciary,

the Act enables the Lord President to make rules about the conduct of investigations of misconduct, sets out the disciplinary powers available to the Lord President, and establishes arrangements for independent review of the handling of complaints. It also sets out arrangements for the establishment of tribunals to consider whether a person is unfit to hold judicial office by reason of inability, neglect of duty or misbehaviour.

There is a great deal of judicially-led work in hand to establish the arrangements for the Lord President's exercise of his headship responsibilities. This includes work to define the standards of conduct expected of the judiciary, to devise new welfare arrangements for the judiciary, and to construct the new arrangements for dealing with allegations of judicial misconduct. Johan Findlay, as a member of the Judicial Council, is engaged in this work. The amount of activity necessary to put these necessary measures in place means that the anticipated timing for commencement of the full range of the Lord President functions as head of the Scottish judiciary is Spring 2010.

Judicial Appointments Board

The Act establishes the Judicial Appointments Board on a statutory basis, with responsibility for making recommendations to Scottish Ministers for appointments of judicial office holders ranging from Senators to part-time sheriffs. Scottish Government officials are currently working on the details of implementation, with a view to taking this forward as soon as possible.

Scottish Court Service

The Act provides for the establishment of the Scottish Court Service as a separate statutory body with a governing body chaired by the Lord President and with a majority of judicial members (at Senator, Sheriff Principal, Sheriff and Justice of the Peace levels). This is a change from the current situation where the SCS is an executive agency of the Scottish Government. The Act also gives the SCS responsibility for providing the property, services and staff necessary to support

the Lord President in his headship of the Scottish judiciary. It gives the SCS a duty to take account of the needs of the public and court users, and to co-operate with other justice system agencies.

Again, there is substantial work in hand to establish the new statutory body and its relationships with Government, Parliament and the judiciary. Johan Findlay is closely involved in this work as a member of the SCS's Strategic Board and of the Project Board overseeing implementation of the SCS provisions of the Act. The current plan is that the new statutory SCS should take up its full range of functions in Spring 2010, at the same time as the Lord President assumes his headship of the Scottish judiciary.

Conclusion

Taken together, the provisions of the 2008 Act are potentially an enormous force for the judiciary and the SCS to improve the administration of justice in Scotland and public confidence in justice. They create, for the first time, the opportunity for judicially-led action to provide for judicial welfare and a robust framework for ensuring public confidence in the effective means of addressing allegations of judicial misconduct. They create a means, under the Lord President, for the organisation of the judiciary in a way which best promotes the effective administration of justice. They put responsibility for the SCS's administration of the courts where it should be – under the governance of a judicially-chaired board. The combination on the Lord President of the twin roles of head of the Scottish judiciary and chairman of the SCS creates a unique opportunity, not replicated elsewhere in the UK, for the courts and their administration to be organised in a way which is fully complementary and which enables positive change to be driven forward for the benefit of the people of Scotland.

Alastair Sim

*Director of Policy & Strategy
Scottish Court Service*

The financial crisis explained in simple terms.....



Heidi is the proprietor of a bar . . In order to increase sales, she decides to allow her loyal customers - most of whom are unemployed alcoholics - to drink now but pay later. She keeps track of the drinks consumed on a ledger (thereby granting the customers loans).

Word gets around and as a result increasing numbers of customers flood into Heidi's bar.

Taking advantage of her customers' freedom from immediate payment constraints, Heidi increases her prices for wine and beer, the most-consumed beverages. Her sales volume increases massively.

A young and dynamic customer service consultant at the local bank recognizes these customer debts as valuable future assets and increases Heidi's borrowing limit.

He sees no reason for undue concern since he has the debts of the alcoholics as collateral.

At the bank's corporate headquarters, expert bankers transform these customer assets into **DRINKBONDS, ALKBONDS and PUKEBONDS**. These securities are then traded on markets worldwide.

No one really understands what these abbreviations mean and how the securities are guaranteed. Nevertheless, as their prices continuously climb, the securities become top-selling items.

One day, although the prices are still climbing, a risk manager (subsequently of course fired due his negativity) of the bank decides that slowly the time has come to demand payment of the debts incurred by the drinkers at Heidi's bar.

However they cannot pay back the debts.

Heidi cannot fulfill her loan obligations and claims bankruptcy.

DRINKBOND and **ALKBOND** drop in price by 95%. **PUKEBOND** performs better, stabilizing in price after dropping by 80%.

The suppliers of Heidi's bar, having granted her generous payment due dates and having invested in the securities are faced with a new situation. Her wine supplier claims bankruptcy, her beer supplier is taken over by a competitor.

The bank is saved by the Government following dramatic round-the-clock consultations by leaders from the governing political parties.

The funds required for this purpose are obtained by a tax levied on the non-drinkers.

Divorce Vs. Murder

An attractive, calm and respectable lady went into the pharmacy, walked up to the pharmacist, looked straight into his eyes and said, "I would like to buy some cyanide."

The pharmacist asked, "Why in the world do you need cyanide?"

The lady replied, "I need it to poison my husband."

The pharmacist's eyes got big and he exclaimed, "Lord have mercy! I can't give you cyanide to kill your husband. That's against the law! I'll lose my license! They'll throw both of us in jail! All kinds of bad things will happen. Absolutely not! You CANNOT have any cyanide!"

The lady reached into her purse and pulled out a picture of her husband in bed with the pharmacist's wife.

The pharmacist looked at the picture and replied, "Well now, that's different. You didn't tell me you had a prescription."

Women Vs. Fishing

One morning the husband returns after several hours of fishing and decides to take a nap.

Although not familiar with the lake, the wife decides to take the boat out. She motors out a short distance, anchors, and reads her book.

Along comes a Water Bailiff in his boat. He pulls up alongside the woman and says, "Good morning, Madam. What are you doing?"

'Reading a book,' she replies, (thinking, Isn't that obvious?)

'You're in a Restricted Fishing Area,' he informs her.

'I'm sorry, officer, but I'm not fishing. I'm reading.'

'Yes, but you have all the equipment. For all I know you could start at any moment. I'll have to take you in and write you up.'

'If you do that, I'll have to charge you with sexual assault,' says the woman.

'But I haven't even touched you,' says the Water Bailiff. 'That's true, but you have all the equipment. For all I know you could start at any moment.'

'Enjoy your book Madam,' and he left.

MORAL: Never argue with a woman who reads. It's likely she can also think.

Sentencing Sense

Sentencing and the JP Court

The JP Court is to a considerable extent a sentencing machine, like any criminal court. Most people who are prosecuted plead guilty, and proceed to sentence. Of those who plead not guilty, most are convicted after trial and proceed to sentence. Indeed, you can see trials as a mere means of checking that you are sentencing the right person. Indeed, further, you could say that the whole criminal process is about sentencing: that's what it's for!

Sentencing Commission and Proposals for a Sentencing Council

The Sentencing Commission, set up in 2003, produced five reports on various aspects of sentencing before demitting office in 2006. (These are available at <http://www.scottishsentencingcommission.gov.uk/publications.asp>). More recently, the Scottish Government produced consultation paper on "Sentencing Guidelines and a Scottish Sentencing Council" (available at <http://www.scotland.gov.uk/Resource/Doc/236809/0064977.pdf>.) This article does not comment directly upon any of those documents, but takes the opportunity presented by them to take a fundamental look at sentencing, as a way of clearing the mind, and forming an attitude towards the sentencing guidelines and a sentencing council which are likely to emerge. So what do we think we are we trying to achieve when we pass a sentence?

What is sentencing for?

A starting point is to ask what we think sentencing is for. One answer is simply "to punish", but that doesn't get us far, for a number of strands have to be teased out. There is no "official list" of the purposes of punishment, because they are a matter for discussion.

Discussion has been at least partly closed off in England & Wales by the Criminal Law Act 2003, s 42, which says that "Any court dealing with an offender ... must have regard to the following purposes of sentencing — (a) the punishment of offenders, (b) the reduction of crime (including its reduction by deterrence), (c) the reform and rehabilitation of offenders, (d) the protection of the public, and (e) the making of reparation by offenders to persons affected by their offences".

The Sentencing Guidelines consultation paper did not propose a similar list for Scotland, and there are some difficulties with the English example. Most obviously, if you can't pursue them all, which should you choose? Also, although some examples may contain some rather subtle distinctions, most people writing on the subject come up with similar lists. Compare, for example, the Criminal Law Act with chapter 9 of Sheriff Nicholson's "Sentencing: the law and practice in Scotland" (2nd ed 1992), and chapter 3 of Professor Ashworth's "Sentencing and Criminal Justice" (4th ed 2005).

Thus it is worth examining a sort of list of lists, comprising purposes suggested by most or all commentators, including: denunciation (or stigmatisation); retribution (or punishment); deterrence (which may be individual or collective); incapacitation (or isolation); reparation (or compensation); and rehabilitation. Let us look at each.

denunciation (or stigmatisation) – "You should not have done that!"

Denunciation doesn't appear on everybody's list of purposes of punishment, but some see it as the most fundamental of all. Sentencing, on this view, is a statement to the public at large, and to the offender, that s/he has done wrong. ("Stigmatisation" probably means much the same, except that it places the emphasis on other people's reaction to a conviction). It might be seen as most fundamental because firstly, it reflects the basic function of the criminal law, that is, declaring what are "public wrongs", wrongs which the state takes an interest in, and secondly, it is an embodiment of the principle of justice being seen to be done.

A need for denunciation is the basis of one of the principal criticisms of fiscal fines (especially in their new, enlarged, form introduced by Part 3 of the Criminal Proceedings, Etc (Reform) (Scotland) Act 2007) and of some other alternatives to prosecution. If the result of committing an offence is simply that you receive a letter from the fiscal, which nobody else knows about, and which promises that, if you pay a certain sum, there will be no further proceedings, and no criminal record, is the existence of a wrong acknowledged, is justice seen to be done? It is supposed to be embarrassing to appear in the dock, and maybe get your name in the court column of the local rag!

A difficulty with denunciation, however, is that almost any sentence a criminal court can pass denounces (absolute discharge being the obvious exception – "you leave the court without a stain on your character"), so denunciation gives no guide to the appropriate level or type of sentence. Presumably, the heavier the sentence, the greater the denunciation, but this is very vague and shades into questions of retribution.

retribution (or punishment) – "This is what you deserve!"

"Retribution" means "getting your own back" or "giving someone their just deserts". We assume that if one person does something wrong to another, that other (or the state in his or her place) is entitled to do some wrong back, because the original wrongdoer deserves it.

For many, this is what sentencing is really about. It also usefully provides a rationale for different levels of sentence, and does so in two ways. Firstly, there is "inherent seriousness". Some crimes are worse than others, some are less bad and this justifies greater or lesser penalties. Secondly, there is "culpability". Some offenders are more morally blameworthy and some are less, similarly justifying greater or lesser penalties. Indeed, this is to a large extent what pleas in mitigation are about.

"Punishment", incidentally, can mean the same as "retribution", as is probably the case in the Criminal Law Act list, but often it is employed in a much broad sense, including denunciation, retribution, deterrence, incapacitation, and possibly even reparation and rehabilitation, in other words, all sorts of sentences, so the word has to be used with care.

However, there are difficulties with retribution. It operates, essentially, through "tariffs". And even if we all agree on the relative seriousness of offences (which we probably do), and the relative culpability of the offender (which we might), any tariff is truly arbitrary. What is the "guide price" for theft by shoplifting, what is it for assault to injury (and what is it for just plain speeding), and how do we know? Is it £50, £100, £500, and what makes us choose any of those figures, or none? Further, any variations within the tariff for mitigating (or aggravating) circumstances are intuitive. Would we all closely, and always, agree how far to vary the sentence to take into account, in a shoplifting case, numerous previous convictions on one hand, or poverty on the other? In an assault to injury case, unusual viciousness on the one hand, or remorse on the other? In a speeding case, blatant disregard for safety on the one hand, and a desire to get home before the kids go to bed, on the other? There is no mathematics of proportionality, whereby we can simply add or subtract fixed, certain, amounts.

deterrence (individual or collective) – "This will make you, and maybe others, think twice about doing that again!"

Everybody knows what "deterrence" means, if only because nuclear deterrence has been a feature of most people's lives for sixty years. We can see it as scaring people out of committing crime.

But there are a couple of things about it to notice. Firstly, a sentence can seek to deter the person before the court from further crime ("individual deterrence"), or it can seek to deter others from further (or any) crime ("collective deterrence"). Secondly, unlike denunciation and retribution, it intends to be preventive. Thus, it moves away from questions of what a person has done, and what they deserve, towards questions of what they, or others, might do in the future.

Cynics point out that if a deterrent sentence does in fact deter others, it is does not matter whether the person sentenced did the crime or not. But even without cynicism, deterrence has its problems. At the individual level, a deterrent sentence might well be greater

than retribution would allow, in which case it is disproportionate in retributive terms, a heavier penalty than “just deserts” allows. It makes the person sentenced into a “whipping boy”. Are we happy with that? And at both individual and collective levels, how do you know what level of sentence will actually deter this offender, let alone an unidentified group of other people entirely? £100? £500? 60 days? It’s pure guess-work! So perhaps some apparently deterrent sentences are really denunciations. The sentencer knows that s/he doesn’t know what actually deters, but feels obliged to send out a strong message that “this is wrong!”.

incapacitation (or isolation) – “This will stop your antics for a while!”

“Incapacitation”, like deterrence, looks to prevention rather than just deserts. If a person is prevented from committing future offences, those offences won’t get committed. Thus, locking somebody up, or disqualifying them from some activity, may be intended to prevent him or her from committing certain crimes. (“Isolation” is essentially the same thing, only with the accent on the means of incapacitation, and this is presumably what the Criminal Law Act list means by “protection of the public”, since “punishment”, and “reduction of crime (including ... by deterrence)” are mentioned separately).

The chief problem with incapacitation is that, unless it is permanent (and whatever else may be said about the death penalty, it certainly incapacitates from committing further crime), the incapacitation ceases at some point. There is no obvious way of deciding how long it should continue, unless you fall back on retribution (“when he’s served his time”) or rehabilitation (“when he’s seen the error of his ways”). And there’s no reason why the date when we decide “he’s served his time” necessarily co-incides with the date by which “he’s seen the error of his ways” so they are alternatives which have to be chosen between.

Another practical problem is that incapacitation may simply not work, or indeed, may work perversely. Imprisonment may provide the opportunity for learning how to commit different sorts of crime, and disqualification from driving may simply result in the commission offences of driving while disqualified (and consequently, while uninsured as well).

reparation (or compensation) – “This will make up for some of the trouble you have caused!”

“Reparation” is currently a popular theme in sentencing, and explains the new “fiscal compensation orders” under the 2007 Act (and is closely linked to the rather vague idea of “restorative justice”). It means, of course, that the sentence of the court is intended, in some way, to make good any loss caused by the crime (though for “restorative justice”, the aim may be reconciliation of offender and victim).

The loss may be caused to an identifiable victim, such as the owner of damaged property, or someone injured by an assault. It may also be loss caused to “the community”, such as where buildings have graffiti written on them, or people are disturbed or put in fear by breaches of the peace, and this explains the new “work orders” (originally termed “community fiscal fines”) under the 2007 Act.

There are difficulties with reparation, of course. Where there is damaged property which has a market value, or which can be readily restored, it may be easy to work out a sum to compensate, or suitable work to put it right. However, insurance may complicate deciding on the right sum (was the victim insured? was there an excess? have the premiums gone up? is the victim not obliged by the insurer to try and reduce the loss by seeking compensation?). Also, any sum to compensate may turn out to be enormously greater than any likely fine, or the offender’s ability to pay (the drunken youth breaks off hundreds of pounds worth of wing-mirrors, but is a deeply remorseful first offenders, and on benefits). And where there is injury or disturbance, there is no market price so the nature and size of any work order is arbitrary, and there might be issues as to who actually benefits. Further, “restorative justice” seems to put the gravity of the sentence in the hands of the victim, and thus out of the hands of the court.

rehabilitation – “This should turn you into a more useful citizen!”

“Rehabilitation” is another readily comprehensible purpose of a sentence. Like deterrence and incapacitation, it looks to prevention. But it is much more ambitious, for it hopes, not to scare people away from crime, or to simply prevent them from committing crimes, but to make them better people, so that they don’t want to commit crimes (or at least not so often, or not so serious ones). Perhaps “restorative justice” partakes of this, too.

Making offenders better people clearly sounds worthwhile, and much effort goes into it. Naturally, however, there are problems with it. Chiefly, as with deterrence, there is the horses-for-courses problem,. How do you know what will rehabilitate? How do you know when rehabilitation is complete (or has gone as far as it can)? What happens if there is no rehabilitation at the end of the sentence (or could it be perpetual)? This points out an associated difficulty, similar to that with “restorative justice”, that is, that sentencing is in effect delegated to others.

So what, and haven’t you pointed out rather a lot of problems?

So what, indeed, and yes, there are a lot of problems, and those mentioned above are by no means the lot. There is, for example, the question of how sentences discounted for an early plea fit in. If the appropriate fine on denunciatory, retributive, deterrent, incapacitatory, reparational or rehabilitatory grounds is, say, £500, how does, say, £350 become the correct sentence?

The answer to that seems to be that discounting sentences is not an aim of sentencing at all. It is an aim of the criminal justice system as a whole to encourage guilty pleas in order to expedite cases through the criminal justice process, and this is regarded as trumping any relevant aims of sentencing.

So what do we think we are we trying to achieve when we pass a sentence?

The reason for trying to distinguishing between all these purposes is, I hope, plain enough. No sentence can fulfil all of them (as we noted in relation to the Criminal Law Act list), so someone has to choose. Retribution does not necessarily deter. Deterrence is unlikely to rehabilitate. Rehabilitation does not provide reparation. Reparation does not provide much of a denunciation.

This takes us to the central issue of judicial discretion, and the associated questions of consistency and appropriateness. When sentencing, presumably any sentencer has some or all of these purposes in mind, and decides in accordance with them. If we wish our sentences to be regarded as justifiable in terms of consistency and appropriateness, we must be able to explain in terms of these purposes how we came to the conclusion we did come to. This is not to remove discretion, nor its reliance on simple intuition, but to make their existence plain.

Probably, most of us already give some sort of explanation when sentencing. We have all said words such as: “In this case, it seems to me that, the crime was relatively minor, and the offender showed remorse. I therefore sentence at the lower end of the scale for this offence”, or “In this case, the goods stolen were of considerable value and were not recovered, a lot of damage was done in the course of the theft, and the offender has a lengthy list of previous convictions for similar offences, so the sentence will be a heavy one”.

But this is becoming more important now, because there will be a Sentencing Council, that it will issue Guidelines, and that they will affect our sentencing practice. So we should have a good look at what we do.

Robin White JP.

Senior Lecturer in Law, Dundee University.

CMJA Conference - South Africa 2008

Report by Malcolm R Macaskill JP

Two flights later, and nineteen hours after leaving home, my plane finally touched down in Cape Town. As the plane was making its final approach I could immediately see the poverty that still sadly exists in today's modern democratic South Africa. There were thousands of little huts which were home to the poor. These huts are no bigger than large garden huts or small garages. They had been constructed from salvaged materials and looked dilapidated. Despite this, I was astonished to see that many had satellite dishes attached to them.

On arriving at the airport it was evident that a lot of building work was going on. A new building was being constructed much in the same style as the Terminal 5 building in London Heathrow. I was advised that this was to accommodate the many visitors to South Africa for the 2010 World Cup. My first task was to find a taxi, something that travellers take for granted when they arrive at a major city airport. I spotted a local with a sign saying "Taxi to any hotel – leaving now" I paid my agreed fee, and I was then escorted to a minibus, my luggage duly loaded, I took my seat then the driver disappeared for about 45 minutes. He returned with three more passengers who were going to two different destinations. I soon learned two things - taxis in Cape Town are not necessarily exclusive, and "leaving now" is open to interpretation.

One of my fellow passengers, a local, was returning from a business trip to Europe and was able to give me the benefit of his local knowledge. He advised me that all of the hut accommodation around the airport was being replaced with brand new affordable social housing. His feeling was it was only being replaced because it was an embarrassment to the Government as this was the first thing tourists saw as they arrived in Cape Town. It

is expected that 10 Million visitors will arrive in Cape Town annually from 2010.

Poverty was further witnessed during my taxi ride; there were hundreds of people sleeping in the underpasses and doorways of shops and buildings along my route.

Visitors to Cape Town are immediately aware of the high levels of security everywhere they go. Armed private security officers outnumber the police by 4:1. In addition, there is a huge C.C.T.V. operation. Cape Town has one of the highest murder rates in the world. In 2007 there were 107 police officers murdered whilst on duty. This compares with 2 in the whole of the UK. In total 3000 people were murdered compared to 755 in the UK. Frightening statistics when you consider I am comparing one City with a whole Nation. (Cape Town population 3 million – UK population 60 million.)

Speaking to locals they tell me that they live in a state of constant fear and are always vigilant, and at all times they expect the worst to happen. Drugs and gang warfare are a major problem. The Russian Mafia and the Chinese Triads have flocked to Cape Town to capitalise on the lawlessness that exists in many of the black ghettos. Gangs use young children to carry out their dirty work including murder and revenge attacks. These children are paid in drugs. The most common drug is "Tic". It is often laced with bleach and rat poison. Tic is smoked in pipes and those who partake are usually affected by paranoia and violent behaviour.

Cape Town is very much a tale of two cities. In stark contrast to the slum dwellings, the mainly white affluent communities live high on the hilltops in their heavily fortified fortresses. There are many places of natural beauty including Camps Bay and Houts Bay as well as the wonderful Victoria and Alfred Waterfront. Philip and I had the pleasure of visiting all of these attractions in our leisure time.

I stayed at the conference hotel which had a marvellous view from the lift of the new

national football stadium which will host the 2010 World Cup Final. Construction is well under way and it should be completed by summer 2009. The view from my bedroom window was simply stunning; it was that of Table Mountain. I managed to take a trip to the top with Phillip and the views were quite spectacular.

The conference theme was "judicial independence with reference to the separation of powers". After some opening remarks by Chief Justice Richard Banda, President, CMJA and the Chief Justice of Swaziland, the conference was officially opened by the Honourable Chief Justice of South Africa, Justice Pius Langa who spoke at length on the conference topic and concluded by quoting Lord Scarman in the Duport case:-

(Duport Steels Ltd v SIRS (1980) HL) "The Constitutional separation of functions must be observed if judicial independence is not to be put at risk. Because if society and Parliament come to think that judicial power is to be confined by nothing other than the judge's sense of what is right, confidence in the judicial system will be replaced by fear of it becoming uncertain and arbitrary in its application. Society will then be ready for Parliament to cut the power of judges. Their power to do justice will become more restricted by law than need be or is today." ▶





View from Table Mountain over Cape Town

Various presentations and experiences were conveyed to the assembled audience on this topic over the duration of the conference. It was sadly evident that bribery corruption was the main barrier in ensuring fairness and judicial independence in many of the African nations. It was not uncommon for Judges and Magistrates to be threatened with loss of employment and cuts in wages and working conditions if they did not comply with often outrageous demands made by some politicians.

Topics under discussion included the role of regional courts in the commonwealth, gender issues for the judiciary, and regional issues of independence for the judicial officers. Whilst many of the issues discussed at the conference were irrelevant to the British justice system, it was however invaluable to learn the difficulties our colleagues experienced in trying to achieve justice and fairness throughout the Commonwealth.

The CMJA steering group organised an

excellent conference. Many speakers failed to turn up but substitutes were readily available, mainly from the attending delegates.

Each night, a gala dinner was organised with speakers who were closely associated with their respective sponsors. These dinners were disappointing as the speakers were always very political which in my view was at variance with the conference theme.

The final day of conference was an organised trip to Robben Island. From the 17th to the 20th centuries, Robben Island served as a place of banishment, isolation and imprisonment. Rebel Princes from present day Indonesia, convicts from the Cape, and defiant chiefs from the Eastern Cape were removed from society and brought to the Island in chains. The notorious prison on the Island was also used to exile political prisoners of the apartheid era between the 1960s and 1991 the most famous of which was Nelson Mandela. We were shown around by guides who were once political prisoners.

Times were tough for prisoners of the camp with hard labour being the order of the day. Prisoners were only allowed visitors once every six months. Today Robben Island is a world heritage site and museum, a poignant reminder to the newly democratic South Africa of the price some paid for its freedom.

In conclusion, while the Commonwealth system of justice was founded on the principals of British justice, it is evident that corrupt politics still has a damaging influence in many Commonwealth countries particularly to the detriment of judicial independence. I thoroughly enjoyed my trip to South Africa. Cape Town is a marvellous city well worthy of visiting. It has incredible natural beauty and affluence as well as huge poverty, crime, and social issues. I found the whole trip to be educational, enjoyable and extremely worthwhile.

Commonwealth Magistrates and Judges Association

Cape Town, South Africa. 5th to 9th October 2008

A Report by A Philip Murray JP.



Gala Dinner hosted by the law society

As I boarded my flight to London Heathrow and made myself comfortable for the first leg of my long journey to the southern hemisphere, destination Cape Town South Africa, I carried with me a recent copy of "The Scotsman". I wanted to read again an article which had both intrigued and concerned me about a major political scandal in the country I was about to fly off to.

The President of South Africa, Thabo Mbeki, had been forced to resign because of a leaked dossier which suggested he had used his political power to affect the outcome of a case against a political opponent within the courts of South Africa, thereby failing to uphold the independence which, it was claimed, was accorded to the judiciary in that country.

The conference of Commonwealth Magistrates and Judges (CMJA) which I was travelling to South Africa to attend as a representative of Justices of the Peace in Scotland was on that very topic, Judicial Independence. I intended to speak of how we in Scotland support democracy and a justice system independent of politics and government. I was aware of the irony and the sensitivity of the situation. Before boarding my flight from LHR to Cape Town I had the presence of mind to drop "The Scotsman" in the bin.

On arrival in Cape Town, albeit twelve hours late due to a delay in London, we were quickly taken to our hotel in the middle of the very

busy, modern city. By then I had already had the opportunity to renew the friendships I had made at the previous year's CMJA conference in Bermuda with a number of representatives from across the Commonwealth.

The conference began on the Sunday morning with an impressive display of the flags of the participating Commonwealth nations carried by schoolchildren. My colleague Malcolm Macaskill and I were pleased to see the Saltire amongst them. Spread out before us, in large letters, just in case of any doubt, the theme of the conference was spelled out: "Constitutional Independence for the Magistrate and Judge with reference to the Separation of Powers."

After his words of welcome as President of the CMJA, His Hon. Chief Justice Richard Banda, Chief Justice of Swaziland, set the tone for the opening discussions with his address on the issue of "Independence for the Judicial Officer". He started by quoting the words of George Washington, President of the United States of America, at a meeting of the Associate Justices of the Supreme Court in 1790.

"I have always been persuaded that stability and success of the National Government and consequently the happiness of the people of the United States would depend in a considerable degree on the interpretation and execution of its laws. In my opinion therefore, it is important that the judiciary system should not only be independent in its operations but as perfect as possible in its formation"

That statement, he continued, illustrated the important role an independent judiciary plays in a democratic society. The separation of powers he asserted, was the fundamental basis of any democratic society with reference to the Rule of Law. He acknowledged that this ▶

doctrine had not yet been universally accepted across the African continent.

The former Chief Justice of Zimbabwe, the Hon. Justice Dumbushena, developing the words of George Washington, described the Rule of Law in the following terms:

“The Rule of Law demands from the state and citizenry that they be subject to the laws and the rules which make society function in peace. Laws are necessary not only to make society function in peace but also to establish the legality of the state”.

We in the UK are fortunate to live in a country where the Government is elected democratically and also adheres to the Rules of Law. We were listening to these speakers in South Africa, on a Continent where the Rule of Law may not always exist or be as secure as it may be claimed to be.

When the conference breaks for coffee there is always a great debate amongst the delegates. For me this is perhaps the most valuable part. You are inclined to hear things you would not always be privy to at the public discussion. Some of the African delegates were not deterred from airing their views strongly, perhaps more strongly than they would have felt comfortable with at home.

When a chairman asks for questions from the floor some delegates use this platform to express their concerns about how their government stifles what they want to get across to the rest of the Judiciary. I have seen delegates put under pressure by colleagues for making remarks which they considered inappropriate in such a forum.

Some of the delegates were from countries that are no longer fully engaged with the Commonwealth. The judiciary in these countries still look to the Commonwealth for help, guidance and certainly open debate. Kenya is a good example of this. Recently the judiciary staged a walk-out in protest over government interference. Her Hon. Rosemelle Mutoka was to have been a participant in a panel discussion on Gender Issues for the Judiciary on the second day of the conference. It was generally believed that the Kenyan government had refused her request to attend.

There are still huge gender issues in many states of South Africa. I first met Judge Leona Theron from Kwa Zulu Natal in Bermuda in 2008 and now regard her as a friend. The story she told then of her struggle to get through schooling and university and become the first black female judge in her state was quite remarkable. In many countries women's opportunities have not improved to any significant extent.

At the end of Tuesday's session, we were shown a film from the Cameroon called “Sisters in Law”: It provided a great insight into what justice really is about. The film was an eye opener on the reality of what Magistrates have to do in that country: not only see justice done, but also act as social workers both to their neighbours and their enemies. The way of life was brutal - the main aim is to feed one's family a few grains of corn and water, not always clean water either.

By the third day we were looking for something lighter. We were not disappointed by the panel discussion entitled: “The Position of the Magistrate and the Members of Judicial Tribunals”. District Judge Shamim Qureshi from England headed his paper “From Stipendary Magistrate to District Judge.” Shamim was in great form; born in Pakistan and brought up in England, he used this to his advantage when it suited him best to play the devil's advocate.

Lord Mackay of Drumadoon chaired a session devoted to contributions and observations from the wider Commonwealth. This was the only formal role played by a Scot in the programme. Small group discussions, however, offered opportunities for all to participate, and I did so when I had something relevant to say.

At the end of day three we were lavishly entertained by the Law Society in their top floor, glass-sided dining room from which there is a marvellous view of Cape Town. We could see an unfinished motorway flyover and a football stadium under construction, carrying the hopes of the locals, and, just beyond the towering hotels of this lovely city, the corrugated covered houses of the majority of the population. As darkness fell we were entertained by a Marimba band with rhythms that are unique to Africa. Poverty and injustice against too many were in our minds as we were bussed the few hundred yards back to our hotel, warned not to walk on the streets of Cape Town after the hour of darkness.

The Thursday morning sunrise brought another opportunity for us to reflect on what Justice means to South Africans. We sailed across some of the coldest waters in the world to Robben Island, waters so cold and dangerous nobody could survive an attempt to swim the short distance to freedom. The waters of the meeting place of the Atlantic and Indian Oceans are not to be taken lightly.

Robben Island is now a tourist attraction and rehabilitation centre. Nelson Mandela spent most of his imprisonment there. After twenty seven years he was released to become President. It is difficult to imagine the physical toil he had to endure there and still manage to start his university for prisoners.

I became more fully aware that democracy and justice are achieved only through struggle, and, once gained, they have to be guarded carefully. That is as true in the UK as it is on the African continent. But our democracy is mature and the independent position of the judiciary is generally acknowledged and respected, and so we have a contribution to make to support developing or less secure democracies. Conferences such as those of the CMJA allow that to happen. I am grateful to have been given the opportunity to participate.



Malcolm and Philip with African Delegates

The Verdict On Celluloid Courts

The Law as fiction and the courtroom drama have long held a powerful grip on the public imagination. Every John Grisham and Scott Turow novel is an instant best seller and quickly adapted for the Cinema. Although there have been some decent British courtroom TV series, the forensic cut and thrust is usually played out cinematically below the Stars and Stripes.

People rarely if ever venture voluntarily into Court, so that their perceptions of procedure are largely based on Hollywood cinema. If they do, they are generally surprised to discover that, apart from one side or the other leaping up every minute to object and being “over ruled” it can sometimes be pretty much as they imagined because of our adversarial system. It is therefore worth considering, in terms of some of the classic landmarks of the cinema’s courtroom dramas some of these likely impressions.

Some can be swiftly dismissed, being more about the lawyers than the law particularly *Presumed Innocent* (1990) in which Harrison Ford as an assistant DA. enjoys an energetic bout of illicit coupling with a colleague on the office desk before he is charged and tried for her murder and *The Music Box* (1989) where an attorney defends her father on war crime charges.

For one of the most authentic and clever expositions of the criminal trial and procedure, one has to go back to 1959 and *Anatomy of a Murder* with James Stewart as the small town lawyer up against a slick and wily prosecutor. It is authentic because it is not a whodunit. The accused shot the victim in front of witnesses and it turns on whether the defence can introduce the prior



rape of his wife into the evidence to attempt to demonstrate the novel concept that the accused was acting on an irresistible impulse.

We see the authorities being researched and discussed, there are no flashbacks and the evidence is presented to the audience exactly as it unfolds to the jury. The judge, usually a cantankerous bit player, is interestingly played by Joseph Welsh, a real attorney who had become a national hero for helping to see off Senator Joseph McCarthy of the infamous blacklist on television

It was said that James Stewart based his performance on this small town liberal and authenticity is stretched to include his acquitted client’s failure to settle his fee. “Had an irresistible impulse to leave town” he says in a farewell note!

In *The Wrong Man*, Hitchcock’s most sombre film (he even eschewed his trademark personal appearance) the audience sees everything from suspicion, arrest, interrogation and trial from the point of view of Henry Fonda as the bewildered accused wrongly identified as a bank robber.

We watch his bewilderment and the gradual wearing down of his protestations until the discovery of the real culprit: an authentic

identification dilemma faced daily by Justices, Sheriffs and juries.

Sometimes it is the duty of the advocate to undertake the defence of a notorious killer or perceived public enemy. The portrayal of the upright liberal attorney taking on the unpopular defence is in the best traditions of some of the films based on real cases and characters. The principal protagonists in both *Compulsion* (1959) and *Inherit the Wind* (1960) played respectively by a shambling Orson Welles and a grizzled Spencer Tracy, are based upon Clarence Darrow, America’s greatest trial lawyer.

In the first he saves two upper class kids who killed in cold blood from the electric chair and in the second successfully defends a Southern schoolteacher accused of blasphemy for teaching Darwinian theory by calling his old friend the bigoted prosecutor to the stand and sadly but methodically dismantling all of his fundamentalist beliefs.

This image of the dedicated advocate in the sweaty, hostile courtroom, taking on the rednecks and bigots, such as Gregory Peck as the saintly Atticus Finch in *To kill a Mockingbird* seems a dimension with which we are less familiar until it is recalled that Judges and juries are routinely warned to have regard only to evidence and never to judge a witness by their clothes, background, accent or lifestyle.

Whereas screen juries, like real ones, merely listen and give their verdict, a notable and famous exception is of course *Twelve Angry Men* (1959) which meticulously recreates the trial as Henry Fonda introduces a reasonable doubt into the minds of each juror in turn. Ironically, Fonda is the kind of intelligent looking well dressed juror that at that time, and up until comparatively recent times in Scotland, the defence would routinely seek to exclude. Incidentally, prosecutors hate when this film is again aired on TV as it is inevitably followed by two weeks of jury “Not Provens!”

While criminal courtroom dramas are full of surprises and twists, the more low key portrayals of the civil process are often more accurate. In *Kramer v. Kramer* (1978) the battle for custody of a child is heard in a large empty courtroom, the silence intimidating the usually articulate parties. At its conclusion there is no dramatic decision but the anti climax of a written judgement, as in the genuine custody case, some time later and not in the hero’s favour.

The Verdict, (1982) although more about the rehabilitation of Paul Newman's alcoholic, ambulance chasing Boston attorney, is an excellent example of a nervy medical malpractice suit. There are authentic pre trial nerves after rejecting a tempting offer and hearing the quality of the opposition. Newman's partner tells him they have hired James Mason. "He's good" says a hung over Newman vaguely. "Good?" says his partner incredulously, "He's the Prince of ***** darkness!"

The Verdict concludes with a dramatic trial. Erin Brokovich (2000) is about the lengthy negotiation procedure in claims against a multinational company for polluting the waters of a small town, causing a high incidence of cancer among the local population. The eponymous heroine, played by Julia Roberts, is a feisty paralegal who shows the lawyers how to bring in a billion dollar settlement for which her boss awards her a two million dollar bonus. A clarion call and inspiration, no doubt, to the new and growing band of paralegals!

The mainstay of the celluloid trial is the unmasking of the real culprit whereas in reality the defence often depends upon destroying the principal witness. That is however the basis of tense court martial attacks on Jack Nicholson as the ruthless colonel in A Few Good Men (1992) and on Humphrey Bogart as the deranged ship's captain in The Caine Mutiny (1954). In the real trial a properly prepared and skilful cross examination can however be frequently as tense as these titanic movie duals.

Despite the universal appetite for legal drama, the public are rarely tempted into courts. Perhaps it is the silence and the solemnity. Having tiptoed into an empty New York courtroom to listen to a civil suit, the evidence was halted as parties and attorneys looked the visitor over. The woman judge whispered to a uniformed guard (wearing a revolver!) who came down the aisle for an explanation and inquiry about possible interest in proceedings. Having received the simple explanation of an interested Judge from abroad, only then did her Honour incline her head in welcome and hostilities recommenced.

Maybe it's easier watching Jack Nicholson and Paul Newman after all!

Nicholas Carraway

Appraisal: A Progress Report (March 2009)

In one of his final acts before moving to pastures new, the admirable Richard Wilkins produced an ambitious timetable in order to focus the thinking of the recently-appointed Justices' Appraisal Committees (JACs). Two dates now stand out:

15.12.08 first appraisals happen

13.12.10 all appraisees have been appraised once.

Although the date in December 2008 is now three months behind us and the number of appraisals completed across the country can probably still be counted in single figures, the appraisal implementation programme is still very much on target, and the goal of having all justices appraised once by December 2010 certainly appears an attainable objective.

All JACs have conducted interviews and appointed appraisers, who have received training carried out by Eglinton at various venues across the country on behalf of the Scottish Government. The satisfaction rate with these courses has been high. It remains to be seen if the numbers of appraisers appointed will be sufficient in all sheriffdoms. Some would have liked to appoint more and to restrict the annual number of appraisals for each to no more than a handful. It may be that in some parts of Scotland further recruitment of appraisers will be necessary.

Most JACs have adopted – either in full or with local amendments – the appraisal scheme produced by the design group appointed by the Scottish Government and consisting largely of justices of the peace. The document produced by Tayside Central and Fife (TCF) has been a useful model for others to share.

As the newsletter goes to press, most sheriffdoms are just taking (or have just taken) their first tentative steps towards the first batch of appraisals. All have decided that the first justices to be appraised should be the appraisers themselves, probably followed by members of the JAC and a few volunteers. One of them responded to a request this way: "Appraisals were a way of life when I was at work – both appraising and being appraised - so I don't have any problems with them. I am more than happy to be a guinea pig." It may take some time, but gradually all our justices – and especially those newly-appointed ones – will see appraisal in the same way.

Richard Wilkins spelled out the purpose of the exercise very clearly in one of the emails which he sent to justices to keep us informed of the changes which were taking place. He said, "The key purpose of the appraisal discussion will be to encourage continuous improvement in Justices' performance by encouraging them to reflect on their own performance and by enabling them to receive constructive feedback from one of their peers."

Graham W Coe, *Chairman Justices' Development Committee, SJA*

TV Crime

Crime is fascinating and a vast amount of TV viewing time is made up of crime both real and fiction, even to the extent of having entire weekends devoted to one author or genre. Book shops have huge numbers of crime books and we can even participate in Murder Weekends at hotels or have friends to dinner to solve a murder!

Justices may not have to deal with the most serious crimes but most of us do find it very interesting.

One of my own favourites is the book *Before and After* by Rosellen Brown which is the story of a family whose son is accused of murder and the book describes the turmoil of their lives during this time and for the rest of their lives. What they know and what they don't know and what they are too scared to find out.

Do you have a favourite book or film you would like to tell us about? If so, The Scottish Justice would be delighted to hear from you. Please send these to the Editor.

Association News



Derry Fleming - a tribute

It is with sadness we report the sudden death of Derry Fleming on 7 February 2009. Derry joined the SJA Executive in November 2008.

Derry sat as a Justice of the Peace in Dundee from 1992. Derry had served on the Dundee Justices Committee, and in his short time on the Scottish Justices Association Executive, he had already made worthwhile contributions. He had also recently been appointed one of the new Appraiser Justices. Our sympathies were sent to his wife and family.

Membership

On reaching 70 years of age, or resignation as a Justice of the Peace membership of the Scottish Justices Association will automatically cease. Any justice wishing to resign should inform the Sheriff Principal of the Sheriffdom. It would be helpful if the membership secretary of the Scottish Justices Association was also directly informed giving the date of resignation/retirement and a phone number for queries.

If you log-in to our web site, and go to **About the SJA/Membership/Resigning or retiring?** You will find a contact form you can use to let us know.

Celebrating 400 Years of the Justice of the Peace in Scotland

Having been in existence for 400 years now and seeing the changes over the last few years, with those under summary Justice Reform newly completed, what do YOU think the Justice of the Peace will look like in another 50 or 100 years? Will there still be justices? Send your thoughts to the Editor!

AGM and Election Schedule

The AGM has been scheduled for Saturday 31st October, again in Perth. With that date fixed, the last date for notification of changes to the constitution is 3rd October and the final agenda will be sent out on or before 10th October 2009

Do please consider standing for election – there are vacancies in some areas and it is vital that the SJA has people who are keen to work for justices across Scotland.

Election timetable will be:

Call for nominations will be sent out towards the end of July to be returned by mid August.

Voting papers sent out early September, to be returned by a date towards the end of September.

The announcement of results will be made in early October.



SJA

Chairman

Johan Findlay (SSD&G)
No 3 The Steading,
Smallholm Farm,
Hightae, Lockerbie DG11 1JY
johan@siobhan25.fsnet.co.uk

Vice Chairman

Philip Murray (L&B)
Branxholm Braes
Hawick TD9 0JT
aphilpmurray@hotmail.com

Secretary

Susan Kirkwood (GH&I)
78 Cairnfield Place
Aberdeen AB15 5NA
secretary@scottishjustices.org

Membership Secretary

Ian Smyth (NS)
Ardblair, Dalraich Road
Oban Argyll PA34 5JD
membership@scottishjustices.org

Treasurer

Brian Ritchie (NS)
Craven, 31 Cross Road
Paisley PA2 9QJ
31craven@tiscali.co.uk

Communications Committee

Ian Smyth (chair)
Malcolm Macaskill
Robin White
Rodger Neilson
Irene Kitson
Susan Brown

Development Committee

Graham Coe (chair)
Allan Clasper
Andrew Webster
David Grainger
Andy Leven

Legislation and Policy Committee

Robin White (chair)
Susan Kirkwood (secretary)

Members are drawn from the executive committee for specific topics according to their interest and expertise.