



# The Scottish Justices Association

## *The Scottish Justice – eNewsletter*

*June 2018*

### **News from the Editorial Team**

Welcome to the June edition of the '*Scottish Justice*' and we do hope that you find this an interesting a stimulating newsletter. We are very pleased to include an article from The Lord President, Lord Carloway, on the importance of giving reasons for judicial decisions. This issue is of relevance to all levels of the judiciary but has a particular importance in the JP Courts due to the number of trials heard and decisions reached.

We also have an article on the 'Moorov Doctrine' and its importance to the concept of corroboration in the Scottish Courts.

In addition, you may recall that in April this year we invited all JPs to make comment on the consultation document from the Department of Transport, on the proposals to extend the use of Fixed Penalty Notices for minor traffic offences to Scotland. A number of JPs responded directly, but a larger number provided comments to the Secretary of the SJA. Our Secretary compiled these comments and sent a formal response on behalf of the SJA. We felt it appropriate that all SJA members should see this response and we have included it in this newsletter. It has given rise to a further question and issue which is included at the end of the response, and we would welcome comments from all JPs on this topic.

Finally we have included details of the SJA 2018 AGM which will again be held in November. The Executive Committee have agreed that again this year that the the travelling expenses for up to two representatives from each Sheriffdom will be paid by the SJA, in order to encourage SJA members to attend and to ensure that there is as wide a representation as possible at the AGM.

Our first article is from The Lord President.

## **“The importance of giving reasons for judicial decisions”**

### **Lord Carloway – The Lord President**



Formulating and giving reasons for substantive decisions is a very important element in the criminal justice system. It can be time consuming, perhaps sometimes even tedious, particularly in the context of a stated case, but it is necessary. There is inherent value in providing reasons, especially for the unsuccessful party. The reasons will not only help a party to determine whether an appeal should be made, they will also add legitimacy to the decision. They will provide an objective safeguard against arbitrary decisions. If properly thought out, they will show that, even if a party disagrees with the result, the Justice of the Peace has reached a decision in a careful and rational manner. This is valuable in itself. It demonstrates to both the parties and the public that the justice system is producing reasoned determinations.

The level of detail which is required should be proportionate to the importance of the case. The key is to demonstrate an understanding of, and engagement with, the core issue which is to be resolved, and to explain why one outcome, or one witness, is preferred over another. Reasons need not be lengthy. It is far better if they are succinct and focused, provided that they are intelligible; that is that they leave the listener or reader in no doubt about what the reasons for the decision were and the material considerations which were taken into account in reaching it.

Giving oral reasons in court at the time when a decision is made has a number of advantages. It may persuade the unsuccessful party (or at least his agent) that the decision is unimpeachable. A party who understands, and can see the force in, the reasoning will be less likely to challenge it. A decision which is well reasoned and pronounced orally in open court will increase public confidence not only in the decision making process but also in the particular Justice. The process of formulating reasons may also serve to improve the quality of the decision, by promoting consistency in the Justice's approach to similar cases and by focusing his or her mind on what is relevant and what are extraneous considerations.

In the event of an appeal against conviction, there will need to be a stated case. This procedure has its detractors, but the case's form is not a random choice. It is designed to focus the minds of both the parties and the court on the facts which have been found, the evidential basis for those findings, and the questions which the appellate court is to answer. If the case is well set out and the reasons for the decision are clear, this will significantly assist the appellate courts. Whatever the merits of the decision, it is far easier to uphold one that is well reasoned than one which, whether right or wrong, is not adequately explained.

## **The Moorov Doctrine – Part 2**

### **The Case of Moorov (Samuel) v HM Advocate (1930 J.C. 68, 1930 S.L.T. 596).**

If you leave the Glasgow Central Low Level Station on Argyll Street and walk towards Jamaica Street, and immediately after the 'Highlandman's Umbrella', you will find yourself next to the Grant Arms, at 186-188 Argyll Street.

In the 1920s the premises were operated as a Draper shop by one Samuel Moorov, who had changed his name from Solomon Mazerovsky. What went on in the locus and the subsequent court cases informed and changed Scots Law.

Between 1923 and 1930 Moorov employed a number of young women in his business. Over the years he embarked on a series of behaviours which in modern times we would deem sexual harassment, ranging from 'uninvited kissing', to sexual innuendo, to exposing himself, and even sexual assault. Employment at that time was not easy to find, and over time the employees adopted a number of strategies, for example direct refusal to tolerate, to ensuring that as far as possible no females were left alone in his presence.

Eventually one woman decided to complain to the Police, and after enquiry a total of 21 charges were brought against Moorov. The charges comprised 2 charges of simple assault and 19 of indecent assault.

The crown withdrew one of the simple assault charges, and three of the indecent assault charges, and the Jury acquitted on one of the indecent assault charges. He was found guilty of the remaining charges.

He was sentenced to 4 years imprisonment, and appealed to the Court of Criminal Appeal on the grounds that firstly, he was wrongly convicted, and secondly that the sentence was unduly harsh (appeal against conviction and sentence). The argument adduced on his behalf was that for many of the charges, there was insufficient evidence, and this argument relied on a well substantiated principle in Scots Law, namely that for a criminal charge to be upheld there has to be evidence from more than one source. That is, evidence should be *corroborated*.

The famous Lawyer Baron David Hume (nephew of the philosopher) described the principle as follows: -

**“No one shall in any case be convicted on the testimony of a single witness. No matter how trivial the offence, and how high soever the credit and character of the witness, still our law is averse to rely on his single word, in any inquiry which may affect the person, liberty or fame of his neighbour; and rather than run the risk of such an error, a risk which does not hold when there is a concurrence of testimonies, it is willing that the guilty should escape”.**

For three of the assaults there was indeed corroboration, however for the remainder it was Moorov’s word against the words of his victims. This was a problem of sufficiency.

The court decided that since the first assault was some four years before the next assault, it was too far removed to be corroborative. Similarly the remaining simple assault conviction was quashed as the Court thought that the presiding judge should have directed the jury to ignore it.

The Court decided that despite the fact that for many of the charges there was only one witness, **the charges were of such a similar nature and committed over such a short period of time that in effect they could be regarded as providing mutual corroboration**, and the convictions were upheld.

(Moorov’s sentence was reduced to 12 months imprisonment.)

In the years since this case the application of *Moorov* has been extended to other crimes, and considerable revision applied to the degree of similarity of the crimes charged, and the time period over which Moorov is deemed to be of corroborative value. There is not the space to expand upon these in these pages. Nevertheless the principle that corroboration could derive from previous incidents and could be mutually supporting was a major and interesting extension of the rules of corroboration.

Should any JP be required to judge such a case, your legal advisors will be well briefed on the relevant law.

David Ferguson

## **Prosecuting Road Traffic Offences in Scotland – Fixed Penalty Notice Reform**

The following response to the Scottish Government’s consultation on proposed changes to the issuing of Fixed Penalty Notices in Scotland was sent by the Executive on behalf of the Scottish Justices Association on 8<sup>th</sup> May 2018.

‘In response to the Department of Transport’s consultation on reforming the issue of fixed penalty notices for low-level traffic offences in Scotland I am responding on behalf of the Scottish Justices Association (SJA), which represents the large majority of Justices of the

Peace in Scotland. We currently represent approximately 270 JPs in Scotland out of a total number of around 350.

The proposals as outlined in the Department's proposals would have a significant impact on the number of cases heard in the JP Courts in Scotland, accordingly the SJA Executive Committee took the decision to circulate the full consultation document to all of our members. We invited our members who wished to comment on the proposals to either provide their comments to myself, as Secretary of the SJA, in order that the SJA could compile a combined response, or alternatively to respond directly to yourself. I am aware that a number of our members have chosen this latter route and have provided comments directly to yourself, as they have been kind enough as to copy me into their responses. There have been a large number of comments from our members. In fact your proposals have provoked more responses from our members than any other recent consultation document.

As mentioned above the proposals as outlined in the Department's consultation document would significantly reduce the workload in JP Courts across the whole of Scotland, and this comes at a time of a general reduction in cases heard. Notwithstanding these concerns over the volume of cases, the SJA must confirm at the outset that it is in full support of the principle of increased efficiency and effectiveness of the Courts and the Scottish Courts and Tribunal Service (SCTS), the Crown Office and Procurator Fiscal Service (COPFS) and Police Scotland. There are however, some areas of concern and points of clarification that the SJA would like to raise; these are detailed below, and do reflect the issues and comments raised by our members

JPs in Scotland are fully aware of the existing facility for the Police to issue a Conditional Offer of Fixed Penalty for minor traffic offences. What has been difficult to establish is whether there are any clear instructions or guidelines issued to Police officers in Scotland as to the instances when such Conditional Offers can be issued. By making direct enquiries to some Police officers they have advised that they only issue the minimum number of points and the minimum fine on Conditional Offers for minor traffic offences. The SJA is very aware that a number of minor traffic offences carry a variable number of penalty points and level of fine; this would include speeding, driving without due care and consideration to other road users, or driving without a valid policy of insurance. We do believe that it would be helpful to our members to establish that Conditional Offers are limited to the minimum penalty for the offence. If this is the case then the transition from a Conditional Offer to a Fixed Penalty Notice would be generally welcomed by our members, because it would remove from the JP courts a number of cases where the accused has simply forgotten to pay the fine or has mislaid the paperwork.

If, on the other hand, this is not the case, and that the Fixed Penalty Notices as proposed, would allow variable penalty points and level of fine, then the SJA would have to express serious concerns. We do believe that this approach would deprive the accused a full opportunity to provide a comprehensive and fully considered plea in mitigation of the alleged offence. It also begs the question as to whether the Police or other agency would have full access to the accused driving record and history upon which to base an appropriate fine or number of penalty points on the licence. We do think this is a particular issue when the offence is driving without a valid policy of insurance. In court when a JP is provided with a schedule of previous convictions, analogous offences can be viewed over a longer timescale

than the four-year period that penalty points are retained on the DVLA records. In these circumstances the JP may wish to take a different perspective on the offence and apply a higher or different tariff to the offence if proved guilty. It would be helpful therefore to have greater clarity on the powers delegated to the Police for the Fixed Penalty Notice, and the level of detail available to the Police when they make reference to the Police National Computer (PNC) check for the driver's records.

We do note that a Fixed Penalty Notice cannot be issued where the accused driver would be eligible for disqualification, which is a policy which has our full support. For clarity, however, would this similarly apply to a 'new' driver who has held a licence for less than 2 years who is then given a Fixed Penalty Notice for an offence which would attract six penalty points (e.g. using a hand-held mobile 'phone), and thereby the DVLA would revoke their licence. We would hope that this would apply to ensure that the accused driver is given the full opportunity to represent themselves in court, if they choose to do so. We would assume that a Conditional Offer of a Fixed Penalty would be issued in these circumstances, but clarity would be welcome. We also assume that Conditional Offers of a Fixed Penalty will continue to be issued where the offence has been detected by use of a camera.

On these assumptions we understand that both Conditional Offers of a Fixed Penalty and Fixed Penalty Notices will continue under these proposals. We would expect however, that the Police and other agencies will prefer to use Fixed Penalty Notices rather than Conditional Offers as it significantly reduces their paperwork and potential court appearances, and it is likely that it will become their standard approach. Several JPs raised concerns that the issue of 'target numbers' of Fixed Penalty Notices will be adopted by the Police as a performance measurement. Clearly the identification and achievement of 'targets' for public sector staff is a political topic at present, but in recent years in JP courts a number of defence agents have questioned Police Officers about the imposition of 'targets' for the number of offenders charged. The Police have always steadfastly denied the existence of any targets, but it would be reassuring if the Police Scotland would ensure that the issue of Fixed Penalty Notices would never be used for performance measurement, as it not only undermines the reputation of the Police in the eyes of the public, but can also lead to false accusations and miscarriages of justice.

A number of our JPs commented on the fact that acceptance of the Fixed Penalty Notice rather than refusal to accept a Conditional Offer, transfers the onus of making a challenge to the alleged offence from the accuser to the accused. Whilst this may be viewed as against the principle of innocent until found guilty, the SJA do recognise that the accused driver does have the ability to challenge the Fixed Penalty Notice, if they feel themselves innocent of the offence. We do however feel that the Police or any other issuing agency must make explicit the means and methods whereby the accused can challenge the Fixed Penalty Notice. In the JP courts we do have a number of cases where a Conditional Offer has been accepted as a 'convenience' to allow the accused driver to continue their journey rather than as an explicit acceptance of guilt. The facility to challenge the Fixed Penalty Notice must be verbally provided at the time the Notice is issued and that the Notice should also contain full details of how it may be challenged. We would expect these cases to come to the JP court for trial.

We also noted that in the proposals the time allowed for a challenge is limited to 21 days. This obviously differs from the 28 days allowed for further action to be taken by COPFS in

the event of no response to a Conditional Offer. In addition, in the JP court the standard time allowed for the payment of any fine is 28 days. On this basis the SJA would recommend that the time allowed for a challenge to be made to any Fixed Penalty Notice to be extended to 28 days.

A further related issue, which arises frequently in the JP court, is the inability of the accused to pay the full fine imposed by a Conditional Offer within the time allowed due to financial hardship. In these instances the court appearance is simply due to inability to pay rather than any unwillingness. Clearly the court can offer deferred payment but the accused is almost always unaware that they have the ability to contact the Fines Enforcement Office to make an arrangement to pay the fine by instalments. This is most frequently encountered in cases of driving without insurance, where the level of the minimum fine is £300 and the accused is making monthly payments towards their car insurance. Whilst we would reasonably expect any motorist to be in a position to pay a modest fine (£100-£200) in full within 28 days; we would wish the option to pay a higher level fine (in excess of £200) by instalments, through direct contact with the local Fines Enforcement Office, is explicitly explained on the Fixed Penalty documentation. Otherwise the imposition of a further 50% uplift on this level of fine will only exacerbate the position on the most disadvantaged.

The topic which was of most concern to SJA members, and which generated the most comment, was the fear that the proposals would transfer the case load from the standard JP courts to the Fines Enforcement Courts due to the expected rise in non-payment of fines; in particular where the 50% uplift had been applied. Due to the number of members who raised this concern the SJA contacted the Fines Development Manager, Development and Innovation at SCTS to express our misgivings. This discussion proved very reassuring to the effect that SCTS and the existing Fines Enforcement staff were capable of handling and managing the expected increase in the number of fines. The range of administrative options available to Fines Enforcement staff, including the arrestment of wages, arrestment of bank funds, the clamping and potential seizure of vehicles, did clarify the position and confirmed that there should be a very minor impact on the number of cases being referred to the Fines Enforcement Court. It was also noted that Fines Enforcement staff did have very high collection rates for vehicle related fines. It was pointed out that Fines Enforcement staff will be assisted by the full implementation of the Digital Economy Act 2017 which will assist them in tracing and engaging with fine defaulters due to the facility to access data between government departments. We believe therefore that prior to the implementation of Fixed Penalty Notices in Scotland that the Digital Economy Act 2017 should be fully enabled.

In summation therefore, and in direct response to the question you pose, we do agree that section 54 of the Road Traffic Offenders Act 1988 should be applied to Scotland, but with the amendment that the time allowed for the accused to challenge the Fixed Penalty Notice be changed from 21 days to 28 days. The other comments raised are primarily those of clarity and guidance surrounding the implementation and operation of Fixed Penalty Notices in Scotland for minor traffic offences, and we would wish these issues to be addressed by the Police, COPFS and SCTS. In particular, we would welcome published operational guidelines from Police Scotland as to how and under what circumstances, and at what level they would issue Fixed penalty Notices.

We do have particular concerns about the use of Fixed Penalty Notices for cases of driving without insurance, both in terms of the severity of the offence if repeated, and the ability of some drivers to meet a fine in full. These cases also tend to generate the largest number of requests for Proof Hearings, where the accused is making a plea of Exceptional Hardship or of the applicability of Special Reasons. Accordingly, we do believe that cases of driving without insurance should be best handled by a full court appearance and not subject to a Fixed Penalty Notice. Indeed some of our members expressed the view that given the current level of premiums for car insurance the minimum fine of £300 is too low, and is not a disincentive for some drivers to take the risk of driving without insurance. Whilst the level of fines is not an issue in the scope of your consultation, the SJA do feel that an increase in the minimum level of fine would reinforce our view that these cases should be heard in court rather than dealt with by Fixed Penalty Notice.

The SJA also recognise the potential impact on the work of the JP courts in Scotland and the prospect of a significantly reduced number of cases being heard. We would hope that the Crown Office would recognise this as an opportunity for other offences of a relatively minor nature to be passed onto the JP courts, which would have the potential to cascade work down from other Scottish Courts and thereby further increase the efficiency and effectiveness of the courts and legal system in Scotland.’

Dennis W. Barr

Secretary SJA

Since this letter was sent to the Department of Transport several SJA members have indicated that they consider that all cases of driving without insurance should be reported to the courts and not dealt with by either a Conditional Offer of Fixed Penalty, which is the current option, or by a Fixed Penalty Notice as is proposed. The reasoning for this is based on three important considerations:-

1. Driving without insurance is in many instances a premeditated and deliberate act of law-breaking, and should not be considered in the same manner as a short term or immediate action or error of judgement such as speeding, careless driving or going through a red light.
2. The level of fine associated with a Fixed Penalty is £300, which when compared to the average cost of car insurance premiums is too low to be an effective deterrent (this is particularly true for younger drivers). Therefore cases should be taken to court where a higher fine can be imposed if this is felt appropriate given all of the circumstances.
3. The Police at the roadside can only view up to four years driving history through a PNC check. If there is a repeat of driving without insurance covering a longer period is appropriate and a sentence made according to a full review of the drivers record.

The SJA are prepared to pursue this issue further but would welcome any comments or views from our members. Could you please address any comments to [secretary@scottishjustices.org](mailto:secretary@scottishjustices.org).

## **2018 Annual General Meeting**

The SJA Executive have finalised a date and venue for the Annual General Meeting of the Association for this year. The meeting will be held on Sunday 18<sup>th</sup> November 2018 commencing at 2:00pm. The venue will again be the Golden Jubilee Hotel and Conference Centre in Clydebank.

As with last year the SJA Executive Committee wish to encourage as many members to attend the AGM and are offering to pay the travelling expenses for two representatives from each Sheriffdom who wish to come along to the meeting. To be eligible for traveling expenses to be met can you please contact the Secretary at [secretary@scottishjustices.org](mailto:secretary@scottishjustices.org), and these will be agreed on a first come basis.

The AGM will follow the Training Weekend for JPs in North Strathclyde and the SJA has benefitted in previous years from a good attendance from JPs from this Sheriffdom. We do clearly wish this representation to continue this year but we do wish to have a broad participation in the AGM and we do therefore invite and welcome JPs from across the country to attend.