

Devolution in Scotland:

New laws, new challenges, new judge led reforms

**A lecture given by The Rt Hon Lady Clark of Calton at the Legal Wales Conference,
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Introduction

Devolution, in all its many forms, is the product of political decision making but because of its constitutional and legal implications, lawyers are inevitably drawn into the process of shaping the legal framework and dealing with its day to day results. Inevitably perhaps our focus as lawyers concentrates on the particular jurisdiction in which we work.

I welcome the opportunity which you have given me today at this conference to look across jurisdictions and share our experiences. I hope you will find the developments in Scotland interesting and useful. I have already learnt much about the law and practice in Wales this morning. I look forward to the rest of the conference and formal discussions.

In my opinion it is impossible to understand devolution in Scotland without some understanding of the historical context so let me give you a very brief overview.

Some essential history

[1] The separate Acts of Union passed in 1707 by the Parliaments of the Kingdom of Scotland and the Kingdom of England, guarantee the continued existence of Scots Law as a separate legal system with its own courts that is the Court of Session and the High Court of Justiciary. Together these courts are the Supreme Court of Scotland.

[2] By 1707, Scotland had a well developed legal system different from the legal system in England and Wales. Some areas of law such as the feudal based property system; family law; trusts and succession; and criminal law were developed from common law principles which are markedly different from the law in England and Wales. Even in parts of Scots law where there are great similarities, such as contract, there are some distinctive Scottish legal principles which remain important.

[3] In many areas of law both pre and post devolution particularly where there has been statutory innovation by the UK Parliament such as immigration, tax, welfare, consumer protection, legislative provisions may apply in almost identical terms to both Scotland, England and Wales. Long before devolution, some innovative reform was introduced in UK legislation based on policies developed in Scotland which had no application in England and Wales. For example, radical changes to the Scottish juvenile justice system were made by the introduction of Children's Hearings in the Social Work (Scotland) Act 1968. This legislation changed the way in which children and young people who committed criminal offences were dealt with in Scotland. Post devolution it is still the case that some legislation passed by the UK Parliament applied and still applies only to Scotland. Many Acts of the

UK Parliament which are applicable in England and Wales have separate parts or sections to take account of differences in policies and procedure in Scotland.

[4] It is important to understand that prior to devolution, Scotland had its own legal system with most civil and criminal cases being heard in the local areas in which they originated in sheriff courts which were administered, under the direction of sheriff principals, who were responsible for justice in their local area. Appeals in both criminal and civil cases ended with the Supreme Court in Scotland albeit in civil cases there was a further right of appeal to the Judicial Committee of the House of Lords. There was also a large measure of administrative devolution under the ministerial direction of the Secretary of State for Scotland of whatever political party happened to be in power. The civil servants in Scotland and lawyers in the Scottish office played a major role in supporting that.

[5] Scotland, as you will know, also has a long history of political and constitutional debate about how Scotland should be governed and whether there should be a Scottish Parliament as part of an independent or devolved constitutional arrangement. That debate continues even after the referendum result last year in which there was no majority vote for independence.

[6] And as I am a serving judge you will understand why I do not express any views about such politically controversial matters. My aim today is to give you an overview of some of the legal developments in Scotland post devolution. As I say to the juries I charge – my task is not to persuade you one way or the other about what has happened. You are the jury today. You can make your assessment and come to your own conclusions.

The Scotland Act 1998

[7] In this lecture I am going to look at how the political and legal debate was resolved in the Scotland Act 1998 and some of the consequences, challenges and changes in the Scottish legal system.

[8] Section 1(1) of the Scotland Act 1998 makes the bold and simple declaration that “there shall be a Scottish Parliament”. In due course, after the election on 6 May 1999, the Scottish Parliament met for the first time on 12 May 1999 and was opened by Her Majesty the Queen on 1 July. The first Act of the Scottish Parliament was the Mental Health (Public Safety and Appeals) (Scotland) Act passed on 8 September 2009.

[9] Wide legislative powers and an extensive transfer of functions were devolved to the Scottish Parliament and to Scottish Ministers by the Scotland Act. The powers included a tax raising power in section 73 which permitted a percentage increase or reduction not exceeding 3% to the basic rate of tax. This power has never been exercised. The Scotland Act also made provision for future transfer of functions. This is the subject of ongoing consideration.

[10] The power to make laws known as Acts of the Scottish Parliament is restricted by section 29 of the Scotland Act which provides:

“Section 29

(1) An Act of the Scottish Parliament is not law so far as any provision of the Act is outside the legislative competence of the Parliament.”

The restrictions to legislative competence include reserved matters which are set out in Schedule 5. This includes such matters as financial, economic and monetary policy, financial services, misuse of drugs, data protection, elections, immigration and nationality,

national security, insolvency, competition, intellectual property, sea fishing, consumer protection, energy, transport, social security etc.

[11] It is also outwith competence if the legislation is incompatible with any of the convention rights as defined in the Human Rights Act 1998 or with European Community law.

[12] Various provisions in the Scotland Act attempt to ensure that legislation by the Scottish Parliament will be within competence. Section 31 provides that a member of the Scottish Executive in charge of a Bill shall on or before introduction to the Scottish Parliament, state that the Bill is within legislative competence. Under section 32, the presiding officer is given a duty to decide whether a Bill is within competence and must state his decision. The law officers that is the Advocate General, the Lord Advocate or the Attorney General may refer to the judicial committee of the Privy Council [now the Supreme Court] the question of whether a Bill or any provision of a Bill would be within the legislative competence of the Parliament by way of a reference under section 33. The Advocate General was a new UK law officer created as a result of devolution. I have included an article in the references which sets out in some detail the role and powers of the Advocate General. Section 35 provides that in certain specified circumstances the UK Secretary of State may make an order prohibiting the presiding officer from submitting the Bill for royal assent. That power is not limited to circumstances where the Bill is outwith legislative competence. It might apply, for example, to a situation where the Secretary of State has reasonable grounds to believe that the legislation would be incompatible with any international obligations or the interests of defence or national security.

Competence challenges to Scottish Parliament legislation

[13] A competency challenge may be made to any Bill or after the passage of any Act of the Scottish Parliament and is not time limited. In terms of section 102 of the Scotland Act, if a decision is made that legislation is not within competence, the court may make an order reserving or limiting any retrospective effect of the decision or may suspend the decision for any period and on any conditions to allow the defect to be corrected.

[14] When the terms of the Scotland Bill were being considered, both in the UK Parliament and in general debate, the focus tended to be on the difficulties which might arise in relation to identifying devolved and reserved matters. It was anticipated that this was an area in which there might be considerable legal dispute. Post devolution such disputes have been rare in the courts. It may be that the safeguards put in place, which I have outlined, have been successful but that to some extent is speculation.

[15] The Scottish Parliament has not been slow to legislate. To date there are in excess of 200 Acts of the Scottish Parliament. A full list and text is available on the Scottish Parliament website. For example in 2014, 19 acts were passed on subjects ranging from landfill tax, housing, debt advice, victims and witnesses, marriage and civil partnership, children and young people.

[16] In the first 10 years post devolution there were very few challenges to the legislative competence of the Acts of the Scottish Parliament. There are probably less than 10 reported cases and all of these were unsuccessful. Examples include a challenge to the first Act of the Scottish Parliament in *A v Scottish Ministers* [2001] UKPC 05 on the basis that the legislation

was not ECHR compliant under Article 5. For those interested in fox hunting I refer to *Whaley v Watson* 2000 SC 340. *DS v HM Advocate* [2007] UKPC D1 was a challenge to an amendment to the Criminal Procedure (Scotland) Act 1995 which restricted the questions of complainers in trials where an accused was charged with a sexual offence.

[17] More recently there have been a number of cases in which challenges have been made, some of which have been successful.

[18] To this date, I think the most interesting example of a challenge on the basis that the legislation is outside competence because it relates to reserved matters is *Imperial Tobacco Ltd v Lord Advocate* [2012] UKSC 61. *Imperial Tobacco* presented a petition for judicial review seeking a declarator that sections 1 and 9 of the Tobacco and Primary Medical Services (Scotland) Act 2010 were outside the legislative competence of the Scottish Parliament and therefore not law. The subject matter of the provisions challenged relate to the control of smoking in the interests of public health. The Lord Ordinary dismissed the petition. The First Division refused the reclaiming motion by *Imperial Tobacco*. *Imperial Tobacco* appealed to the Supreme Court. In very simple terms, there was a dispute as to whether or not the relevant provisions related to health, a devolved matter or other purpose of a type specified as reserved. The reserved purposes identified included “the sale and supply of goods to consumers” and “product safety”. The appeal by *Imperial Tobacco* failed. The Supreme Court was not persuaded that the purpose of the legislation fell into a reserved category.

[19] The leading judgment was given by Lord Hope, DPSC with whom the other justices agreed. Lord Hope gives an interesting summary of the case law relating to challenges to the competence of the legislation of the Scottish Parliament. He states that it is remarkable

that this is the first challenge on the ground that the legislation relates to specific reservations in Part 2 of Schedule 5 as reserved matters. Lord Hope explains in some detail the interpretative approach which he considers should be applied in such cases. The starting point is the specific provisions in the Scotland Act. Those provisions must be interpreted in the same way as any other rules that are found in UK statute. He considers the best way of ensuring that a coherent, stable and workable outcome is achieved is to adopt an approach to the meaning of a statute that is constant and predictable and this will be achieved if the legislation is construed according to the words used. He accepts that it is proper to have regard to the purpose of the Scotland Act, if help is needed as to what the words actually mean. The Supreme Court was not satisfied that the legislation related to reserved matter and concluded that there was no basis for holding that sections 1 and 9 of the 2010 Act are outside the legislative competence.

[20] Let me refer to one Act of the Scottish Parliament in which part of the Act did not survive a challenge to competence as it was held to be outside the legislative competence of the Scottish Parliament in that it was incompatible with article 1 of the First Protocol to the European Convention on Human Rights. The Act was the Agricultural Holdings (Scotland) Act 2001. The challenger was Mr Salvesen who is the owner of a farm in East Lothian which was subject to a tenancy held by a limited partnership. The challenge was to an amendment which had been introduced during the progress of the Bill and became section 72 of the Act. The amendment had retrospective effect. The aim of the amendment was apparently to address the service of dissolution notices and to prevent further steps by landlords to avoid

compliance with the new rights to tenants which were intended to be given in the legislation.

[21] This case is interesting partly because the landlord and tenant apparently settled their dispute yet the case continued. The issue whether section 72 as framed in the amendment, was incompatible with the landlord's rights under article 1 of the First Protocol, was considered to be a matter of general public importance. Mr Salvesen was unsuccessful in the Land Court. He appealed to the Inner House where he obtained leave to raise the devolution issue which was ultimately considered by the Supreme Court. The judgment of the Supreme Court was given by Lord Hope. Lord Hope was in no doubt that the difference in treatment of landlords, introduced by the amendment, had no logical justification and was unfair and disproportionate. He took a very restricted view of the incompatibility and was anxious that rights which were not affected by the incompatibility should not be interfered with. He also emphasised that the decision as to how the incompatibility is to be corrected both for the past and for the future should be left to the Scottish Parliament as guided by the Scottish Ministers following research and consultation. For that reason the Supreme Court made an order under the Scotland Act suspending the effect of the finding of incompatibility for a period to enable that process to be carried out.

[22] Thereafter Scottish Ministers exercised their powers conferred by section 12(1)(iii) of the Convention Rights (Compliance) (Scotland) Act 2001. This resulted in the Agricultural Holdings (Scotland) Act 2003 Remedial Order 2014.

[23] The issues in this case are somewhat technical but, the Supreme Court's decision does not turn upon technical issues, but on an assessment of much broader issues. Although

the Supreme Court took a robust view it was clearly anxious to limit the effects of the court's intervention and to give to the Scottish Parliament an opportunity to reconsider the issues and come to a solution which the Parliament considered on policy terms to be appropriate.

[24] An example of a challenge to legislative competency based on incompatibility with EU law is *Scotch Whiskey Association and others v The Lord Advocate and the Advocate General for Scotland* [2014] CSIH 38. This is a recent case in which there is a challenge by the petitioners to the Alcohol (Minimum Pricing) (Scotland) Act 2012 which sought to introduce minimum unit pricing in retail sales of alcoholic beverages in Scotland. This was stated by the Scotch Whisky Association to be a disproportionate restriction on free movement of goods under Article 34 Treaty of the Functioning of the European Union ("TFEU"). In the petition before the Lord Ordinary, an argument was also advanced that the introduction of minimum unit pricing would be contrary to the provisions of the Act of Union 1707. That argument was not maintained on appeal. The Inner House having considered the issues, considered that the EU Law issues were not *acte claire* and decided to make a reference and request a preliminary ruling under article 267 of the TFEU. That issue remains unresolved.

Challenges to acts of the Lord Advocate

[25] Potential challenges to Scottish Parliament legislation were anticipated. The revolution in legal thinking about challenging legislation is perhaps not so different in Scotland and in England and Wales because of the impact in the different jurisdictions of the Human Rights Act 1998. The Scotland Act however added some layers of complexity. I do not think the effect of challenges to acts of the Lord Advocate when that law officer became a Scottish Minister as a result of section 57(2) of the Scotland Act was anticipated. And it is to that subject I now turn briefly. The Scotland Act came into force some 18 months before the Human Rights Act 1998. Within a very short time devolution issues were raised both before and during criminal trials challenging many and varied acts or omissions of the Lord Advocate in the course of prosecution as being in breach of Convention rights. In the first 3 years some 1400 devolution issues were intimated to the Advocate General. Scottish lawyers demonstrated some imaginative thinking in their drafting. The most high profile challenge which was made in many cases was based on facts that the Lord Advocate appointed temporary sheriffs with a tenure period of one year which was renewable by him. It was alleged that the appointments were in breach of Article 6(1) ECHR in that such appointments of a judge by a person who was head of the prosecution service could not constitute "an independent and impartial tribunal". This claim was upheld by the Scottish Court in *Starrs v Ruxton* 2000 JC 208.

[26] The sudden loss of a large number of experienced practitioners sitting as temporary sheriffs inevitably caused timetabling and problems of delay in court business. There were

also challenges to decisions which had been made by temporary sheriffs. The word “crisis” was used a lot but after a difficult period the tenure and appointment system was reformed.

[27] Another outcome which I think was largely unforeseen is the impact of the Scotland Act on the Scottish criminal justice system.

[28] Historically and constitutionally there has been no right of appeal from the Appeal Court in Scotland in criminal cases to the House of Lords (now the Supreme Court). Such an appeal was restricted in Scotland to civil cases. Over the centuries such appeals in civil cases were very few in number perhaps less than 10 each year. Reforms such as the Appellate Jurisdiction Act 1876 and a convention that two of the law lords be appointed from lawyers qualified in Scots law, in practice judges of the Court of Session led many commentators to accept that such a system worked in practice and was beneficial in that it created a cross fertilisation of legal ideas which assisted the development of both Scots and English law. Nonetheless some commentators, including some politicians, were critical of appeals to the judicial committee of the House of Lords particularly in cases which involved Scots common law rather than statutory provisions which applied to both England and Scotland. There was general acceptance in Scotland that in criminal cases the final decision in any criminal case should rest in Scotland with the Criminal Appeal Court. Few commentators advocated an extended right of appeal to the House of Lords in criminal cases.

[29] The Scotland Act introduced new appeal provisions to the Privy Council in relation to devolution issues. The implications of these appeal provisions may or may not have been anticipated but they were somewhat startling. A steady stream of appeals to the Privy

Council in devolutions issues arising in criminal cases commenced. The end of a criminal appeal in Scotland was no longer necessarily the end of the appeal process. Some counsel metaphorically waived a devolution issue and asked to set off to London.

[30] Some appeals in relation to devolution issues raised in criminal cases created considerable controversy in Scotland. I have selected two which might be considered the most controversial. In describing them as controversial, I do not intend to pass any comment or judgement on the merits of the decision making at any level. They were controversial because they provoked controversy. Part of the controversy created in these cases was because they were decided outwith Scotland and against the unanimous decision of the judges in the Criminal Appeal Court in Scotland.

[31] The first example is *Cadder v HM Advocate* [2010] UKSC 43.

[32] The background to this is that over a period of years, many devolution issues were minuted in various Scottish courts raising the issue about whether reliance by the Lord Advocate on admissions made by a person detained and questioned by the police without access to legal advice before or during the interview was in breach of article 6 of the European Convention on Human Rights (ECHR). Such challenges were made to the long accepted practice in Scotland of police interviews of detained persons under which thousands of convictions had been obtained relying on the evidence obtained at interview. One of the challenges was considered sufficiently important to be heard by a bench of 7 judges in Scotland. This is a rare event. In *HMA v McLean* [2009] HCJAC 97, the 7 judge bench was unanimous in rejecting the defence challenge and concluded that there was no

ECHR violation. Reliance was placed on the other safeguards to secure fair trial which existed in Scottish procedure.

[33] The same issue decided in *McLean* was raised later in *Cadder*. Indeed in his opening remarks in the Supreme Court judgment, Lord Hope states that *Cadder* is, in effect, an appeal against the decision of the High Court of Justiciary in *HMA v McLean*. Lord Hope acknowledged (paragraph 56) that the issues at the heart of the case had caused considerable disruption to criminal business in Scotland. He acknowledged that the disruption was likely to impose a severe burden on an already over-burdened appeal court. Having analysed the relevant law, Lord Hope concurring with Lord Rodger concluded that *HMA v McLean* and earlier Scottish cases were no longer good law in the light of the Grand Chamber ruling in *Salduz v Turkey* (2008) 49 EHRR 421 and that they should be over-ruled. The remaining justices concurred.

[34] The legal effect of the Supreme Court decision was to allow the appeal in *Cadder* on the ground that leading and relying on the evidence of *Cadder's* interview by the police was a violation of his rights under article 6(3)(c) in conjunction with article 6(1) of the Convention. The immediate practical effect of the judgment was that the Crown abandoned approximately 867 cases including 60 serious cases. The Appeal Court struggled to deal with difficulties including a backlog of cases in which such devolution issues had been raised. One of the consequences which was feared was a "flood" of referral cases from the Scottish Criminal Case Review Commission on *Cadder* grounds leading to quashing of old convictions. This however did not happen but some 50 or so cases were referred.

[35] One of the consequences of the Supreme Court decision was that the then Justice Minister invited Lord Carloway who is now Lord Justice Clerk to undertake a review of Scots law and practice as part of a re-evaluation of the Scottish Justice system. This was carried out over a period of a year, reported on 17 November 2011 and provided a foundation for further Scottish Parliamentary legislation. One controversial proposal was to abolish the requirement of corroboration for all categories of crime.

[36] My second example relates to the Nat Fraser trial which is a notorious Scottish murder trial. In 2003, Fraser was convicted after trial of the murder of his wife, Arlene Fraser. The indictment libelled that his wife having consulted a solicitor with a view to divorce and obtaining a financial settlement, Fraser did conspire with others to defeat the ends of justice and did murder his wife and thereafter dismember and conceal her body. Part of the narration of the charge to defeat the ends of justice alleged that Fraser placed his wife's wedding, engagement and eternity ring in her house after the date of her death.

[37] The nature and extent of the publicity provoked an unsuccessful attempt to bar the trial on the ground of prejudicial publicity as reported in 2000 SCCR 412. There was also massive publicity following Fraser's conviction after his trial in 2003. Fraser appealed against the conviction and against the length of the 25 years punishment part of the life sentence. After the appeal was lodged, certain information came to the notice of the Crown Office which related to the rings found in the house and further inquiry was made about this evidence. In the appeal which was not heard until 2007, the focus was on the evidence of two police officers who spoke to the finding of the rings and whether or not the Crown had failed to disclose significant relevant information about this police evidence. In a detailed

analysis, the Appeal Court concluded that there was no miscarriage of justice as that was interpreted in Scots law. This is reported in

[38] This was a case in which there was no devolution issue minute allowed by the Appeal Court so you may wonder on what basis the case came to be considered by the Supreme Court. The procedural history was that on the morning of the hearing of the appeal on 13 November 2007, counsel for the appellant sought to lodge a very late devolution issue minute without any explanation. The Appeal Court decided that the minute could not be received, that it was too late and that no cause had been shown as to why it should be received and that the matters sought to be raised in it were adequately covered by the existing grounds of appeal.

[39] After the advising on 6 May 2008 of the unsuccessful appeal against conviction, the appellant on 25 August 2008 sought to seek leave to appeal to the Judicial Committee of the Privy Council against a refusal of the devolution issue minute. That application was considered by the Appeal Court on 31 October 2008 and was refused as incompetent. The Appeal Court was of the opinion that the appellant sought to review the merits of the decision and that this was not contemplated in the appeal provisions of Schedule 6 to the Scotland Act 1998. The appellant then lodged a petition with the Judicial Committee of the Privy Council seeking special leave under paragraph 13 of Schedule 6 to the Scotland Act 1998 to appeal against the determination by the Appeal Court of the devolution issue. On 20 May 2010, the Supreme Court which by this time had inherited the jurisdiction of the Privy Council granted Fraser's application for special leave for two reasons. The Supreme Court were of the opinion that they were not merely being asked to review the

determination of the Appeal Court. The Supreme Court considered that it was seriously arguable that the wrong legal test had been applied and granted special leave.

[40] In considering the merits of the case, Lord Hope identified the appropriate legal test as set out in *McInnes v HM Advocate* 2010 SLT 266. The test fell into two parts (1) whether the material which was withheld from the defence is material that ought to have been disclosed to it taking into account whether that material might have materially weakened the Crown case or might materially have strengthened the case for the defence. The second part of the test is directed to the consequences of the violation. The question is whether the failure by the Lord Advocate to disclose to the defence material which ought to have been disclosed is incompatible with the accused's article 6 Convention right to a fair trial. The Supreme Court considered that the statutory test applied under section 106 of the 1995 Act, which is the statutory test to be applied in Scottish criminal appeal cases, was not appropriate in an appeal in which a devolution issue arose. Lord Hope in paragraph 29 of his judgment accepted that it was a matter for the High Court of Justiciary to identify the test that is to be applied in appeals which do not raise a devolution issue. He regretted that the two courts had differences of view as to the test to be applied. Applying the two part *McInnes* test, the Supreme Court reached a different conclusion from the Appeal Court and concluded that there was a miscarriage of justice at Fraser's trial and that the appeal must be allowed. Although there was no formal dissent, Lord Brown seemed to favour remitting the whole matter back to the Appeal Court in Scotland for reconsideration of the facts applying the *McInnes* test. He accepted however the majority view of the court. In the event therefore the appeal was allowed by the Supreme Court with the consequence that the only question

for the Appeal Court to determine was whether the Lord Advocate should be granted authority to bring a new prosecution.

[41] A newly constituted Appeal Court heard submissions on this issue and granted a fresh prosecution. In May 2012 Nat Fraser was unanimously convicted after a new trial. A further appeal post-conviction was unsuccessful.

[42] The decision of the Supreme Court in *Fraser* led to the restrained comments by the Home Affairs correspondent of BBC Scotland that the First Minister Alex Salmond challenged the right of the UK Supreme Court to rule in Scottish criminal cases and that the UK court should have “no role” in Scottish criminal law. I say this was restrained as other commentators including the then Justice Minister made comments which resulted in a public row in which the constitutional authority of the Supreme Court was attacked and personal attacks were made on some of the judges. This resulted in a joint response on behalf of Scottish solicitors and advocates requesting ministers to respect the independence of the judiciary and the rule of law. Lord Hope’s comments which are interesting can be found at 2012 16 Edinburgh LR 58.

[43] These cases illustrate that in relation to the pre-existing court structure, devolution has had the result that the Scottish courts have lost some of their historical autonomy. But that must be understood in the wider context of legal change. As a result of the Scotland Act and the Human Rights Act, the Scottish courts have been given new powers to deal with challenges both to Acts of the Scottish Parliament and Acts of the UK Parliament. I think the legal landscape in the UK has changed more in the past 20 years than the last century. We have seen how the Scottish courts and the UK Supreme Court require to adjust to their new

roles but the relationship between the Scottish Parliament and the UK Supreme Court is still developing.

[44] That brings me to:

AXA General Insurance Ltd and others (appellant) v The Lord Advocate and others (respondents)
(Scotland) [2011] UKSC 46.

[45] In my opinion, this case is the most interesting illustration of the dynamics between the Supreme Court and the Scottish Parliament. I start with the House of Lords decision in *Rothwell v Chemical and Insulating Company Limited* [2007] UKHL 39. This was one of many cases dealing with the legacy of asbestos related problems. The House of Lords held that as pleural plaques cause no symptoms and did not increase susceptibility to other asbestos related diseases or shorten life expectancy, mere presence in the claimant's lungs did not constitute an injury which was capable of giving rise to a claim for damages. The decision was applied by the Lord Ordinary in the Scottish case in *Wright v Stoddard International Plc* (No 2) [2007] CSOH 173.

[46] *Rothwell* and the decision in *Wright* caused considerable dismay to many individuals who had been exposed to asbestos in the course of their working lives. As a result of well publicised campaign work, the issues were debated in the Scottish Parliament in 2007.

Ministers of the Scottish Government met with representatives of affected individuals and their lawyers. It was announced that Scottish Ministers would consider a bill to reverse the decision of *Rothwell* in Scotland, by allowing those with pleural plaques to continue to be able to raise an action for damages. Eventually a bill progressed through the Scottish

Parliament and received royal assent on 17 April 2009 as the Damages (Asbestos-related Conditions (Scotland) Act 2009).

[47] This legislation was the subject of serious criticism by insurers and their representatives who claimed that they would be substantially financially disadvantaged by the changes in the law. They sought declarator that the 2009 Act is unlawful and sought its reduction. A further legal dispute arose when various individuals who had been diagnosed with pleural plaques sought to enter the action to oppose it. The insurers failed before the Lord Ordinary and before the First Division. The individuals with pleural plaques had mixed success in that they were found to have *locus standi* at first instance but not on appeal. The insurers appealed to the Supreme Court and challenged the validity of the 2009 Act on two bases. Firstly, that it was incompatible with their rights under article 1 of protocol 1 to the Convention and therefore outside legislative competence and secondly that it was open to judicial review as an unreasonable, irrational and arbitrary exercise of the legislative authority conferred by the Scotland Act.

[48] At the heart of the insurer's case was a complaint that there was an imposition of a liability by the Scottish Parliament to indemnify which had been removed by the House of Lords in *Rothwell*. The Supreme Court held that the insurers were "victims" in the ECHR sense in that the amount of money they would be required to pay to satisfy their obligations under the insurance policies is a possession for the purposes of A1 P1. The question of whether the Act is compatible with the appellant's convention rights depends on whether the Act can be shown to pursue a legitimate aim and to be reasonably proportionate to the aims sought to be realised (paragraph 28). Lord Hope concluded at paragraph 33:

“...that the negligence of employers whose activities were concentrated in socially disadvantaged areas such as Clydebank had exposed their workforce to asbestos and all the risks associated with it for many years. The anxiety that is generated by a diagnosis of having developed pleural plaques is well documented and it had been the practice for over 20 years for such claims to be met, albeit without an admission of liability...”

He considered that:

“The Scottish Parliament were entitled to regard their predicament as a social injustice, and that its judgment that asbestos-related pleural plaques should be actionable and cannot be dismissed as unreasonable”.

He further considered that the legislation was proportionate. The interference with the insurers possessions can therefore be seen to be within the area of risk with which they engaged when they undertook to indemnify the consequences of the employers negligence.

(Paragraph 40.)

[49] He concluded (paragraph 41):

“For these reasons I would hold that the interference with the appellant’s possessions by the 2009 Act pursued a legitimate aim and that the means chosen by the Scottish Parliament are reasonably proportionate to the aims sought to be realised. It follows that the 2009 Act was not outside the legislative competence of the Parliament. Importantly the Supreme Court also recognised that the effected individuals with pleural plaques were directly affected and had the right to oppose the insurer’s attempts to reduce the legislation”.

[50] Lord Hope then went on to consider the constitutional issue whether acts of the devolved legislators are amenable to judicial review and if so on what grounds. He concluded that as a devolved Parliament, the Acts of the Scottish Parliament are amenable to the supervisory jurisdiction of the Court of Session at common law (paragraph 47). In recognising the importance of the democratic principles which led to the establishment of the Scottish Parliament, Lord Hope concluded in agreement with the judges in the Inner House of the Court of Session, that Acts of the Scottish Parliament are not subject to judicial

review at common law on the grounds of irrationality, unreasonableness or arbitrariness (paragraph 52). Nevertheless Lord Hope concluded that the rule of law required that judges must retain the power to insist that extreme legislation such as abolishing judicial review or diminishing the rule of the court in protecting the interests of the individual, required the judges to retain the power to insist that legislation of such a kind is not law which the courts will recognise.

[51] Let me move on from what has been happening in court to look at some of the changes which have been happening post-devolution outside court.

New judge led reform

[52] Shortly after the election of the Scottish Parliament, the new Scottish Executive turned its attention to reform of the judiciary and the court system. There were many initiatives and I highlight today some which have had most impact or caused most controversy. Sometimes both. From the start judges have been very involved in the process of change both as consultees and as chairman of various bodies set up to consider and implement reforms.

[53] In February 2006 the Scottish Executive published a consultation paper “Strengthening Judicial Independence in a Modern Scotland”. The consultation paper invited views and proposals to improve the justice system in specified areas which included (1) the creation of a unified judiciary presided over by the Lord President with responsibilities and powers concerning the disposal of business in both inferior and superior courts, and the training, welfare, deployment and conduct of the judiciary at all levels; (2) the provision of a statutory basis for the Judicial Appointments Board; and (3) the arrangements for the removal of judges and sheriffs.

[54] There was a positive response from the judges who welcomed the opportunity to consider the balance of powers between the various branches of government and the judiciary. In particular, the then Lord President, Lord Hamilton, responded that it was of fundamental importance to resolve the question of the future governance of the court service before considering in detail the nature of the responsibilities which should fall on the Lord President and what arrangement should be put in place to fulfil them. Following dialogue with the judges and wider public consultation, the Scottish Executive decided to

create a single judicial office with overall responsibility for the courts and for the management of the judiciary. This involved changes to the structure and management of the court service.

[55] The Judiciary and Courts (Scotland) Bill was introduced to the Scottish Parliament on 30 January 2008. The policy was to modernise the arrangements for the judiciary and the management of the court system, thereby strengthening the independence of the judiciary and bringing about improvements for those who come into contact with the courts. This included a commitment to a strong independent judiciary enshrined in principle in legislation with administrative arrangements put in place to support the judiciary. The aim was to reduce the involvement of the Scottish Government in the day to day running of the court system. Lord President Hamilton welcomed the main proposals. He considered that they would enable the Lord President to speak on behalf of the whole judiciary and assist in the efficient disposal of business in the Scottish courts in a strategic rather than a piecemeal way. He also made it plain that he regarded it as of the first importance that the senior judge in Scotland should be seen clearly as performing a judicial function. The administrative functions should not detract from his judicial role. In his evidence during the committee stages of the bill (11 March 2008 to 10 May), Lord President Hamilton accepted that in chairing the corporate body to be known as the Scottish Court Service he would be dealing with administrative not judicial functions. Nevertheless he did not accept that the Scottish Parliament should have any power to compel any judge to appear before it. Senior judges may accept an invitation to give evidence to Parliament but they should not be

compellable. Other arrangements could be put in place to deal with administrative accountability.

[56] The bill passed into law as the Judiciary and Courts (Scotland) Act 2008 and came into force in June 2009. This Act created the Scottish Courts and Tribunal Service (SCTS) as a non-ministerial department with a statutory function to provide administrative support to the Scottish Courts, devolved tribunals and the Office of the Public Guardian. The SCTS describes its purpose in its Business Plan 2015-16 as providing the people, buildings and services needed to support the judiciary, courts and tribunals. Its mission statement is “focussed on improving access to justice, reducing delay and cost within the justice system and maximising the use of technology to improve our services. ...”

[57] There have been a number of judge led reviews of civil justice at both summary and High Court level.

Criminal Justice

[58] A review group chaired by Lord Bonomy examined the operation of the High Court of Justiciary and reported in 2002. This led to significant changes in criminal procedure which included raising the sentencing power of the sheriff and jury court from 3 to 5 years, mandatory preliminary hearings, and judicial case management, changes to time limits, encouragement of early guilty pleas and the introduction of fixed trial dates. The Bonomy reforms were combined with a more transparent sentencing system encouraged by the Appeal Court. Judges were obliged to specify the discount to sentence for an early guilty plea in recognition of the utilitarian value of such pleas. This resulted in a perceptible

change and what is generally considered to be an improvement in the administration of criminal business.

[59] I have mentioned the review by Lord Carloway which followed the *Cadder* case. One of the proposals which was controversial was the proposal to abolish corroboration.

[60] The historic rule in Scots law is that essential facts must be proved by corroborated evidence. This has been described as an ancient and highly distinctive feature of Scots criminal law. Not all commentators however support this evidential rule and some considered it an impediment to justice, as in their opinion it made conviction unnecessarily difficult. Lord Carloway was appointed by Scottish Ministers to consider the issue. In the Carloway Review 2011, he recommended that the requirement for corroboration in criminal cases be abolished. This provoked much discussion in Scottish Parliamentary debates, widespread press coverage and some intemperate outbursts. Lord Bonomy, a retired judge, was appointed to carry out a review about post-corroboration safeguards. He published his final report in April 2015. He recommended that corroboration should be retained where the only evidence about essential facts was based on hearsay or confession evidence. He made other important recommendations including the audio visual recording of all formal police interviews and recommended the installation of recording facilities in police vehicles and changes to the traditional jury verdict in Scotland. During the period of controversy about corroboration, Scottish Ministers asked the Scottish Law Commission to accept a remit to consider the not proven verdict and this remit was accepted. Finally in April 2015 after delay and disagreement, the new Justice Secretary Michael Mathieson announced a decision by the Scottish Government not to proceed during the current Parliament with the proposal

to end the requirement for corroboration in criminal trials. He stated that corroboration would be considered as part of a wider package of measures during the next Parliamentary session.

Civil Justice

[61] The Civil Justice system has also been under scrutiny by the Scottish Parliament. Following the publication in 2007 of a report on Civil Justice by Lord Coulsfield, the then Scottish Minister for Justice invited the then Lord Justice Clerk Gill to conduct a review of the Scottish civil courts. The review was to cover the structure, jurisdiction, procedures and working methods of the civil courts having particular regard to the cost of litigation, the role of mediation, the development of modern methods of communication and case management and the issue of specialisation of courts or procedures.

[62] Lord Gill provided his report in October 2009. There were 206 recommendations for change representing a comprehensive programme of reform. He made serious criticisms of waste and inefficiency in the civil justice system. Kenny MacAskill, the Justice Minister in November 2010 stated “that overall the Scottish Government believe Lord Gill is right in his diagnosis and right in his description”.

[63] The fundamental shift recommended by Lord Gill is a move to a civil court system which is properly managed. Cases should be allocated to judges with the skills and experience to handle them appropriately and cost effectively, with greater control by the courts of the progress of cases. His recommendations included case allocation, case management, a reassessment of the privative jurisdiction of civil courts, giving an exclusive

competence of £100,00 in sheriff courts, a specialised personal injury court to be established as part of Edinburgh Sheriff Court. This court will have jurisdiction across Scotland and will have the power to hold civil jury trials in a new purpose built court in Edinburgh Sheriff Court with modern technology. Specialist sheriffs have been nominated. A new appellate structure which lies below the level of Supreme Court in Scotland was created. The new appeal process included the introduction of early judicial sifting to assess the merit of the case. The new sheriff appeal court is designed to hear both summary criminal and civil appeals from the Sheriff Court and is to be centrally administered. The majority of cases heard in Scotland will be heard in the sheriff court with only one level of appeal to the Sheriff Appeal Court. Further appeal in civil cases will only be granted if the appeal raises an important point of principle or practice or some other compelling reason exists. Delays in the higher courts are therefore expected to be minimised. The Court of Session as the Supreme Civil Court in Scotland is expected to be able to deal expeditiously with increasing volumes of public interest litigation. Other important changes are the introduction of a three month time limit and a requirement for permission in judicial review. There is also a requirement for permission to appeal in civil cases to the UK Supreme Court. An automatic right of appeal will no longer exist.

[64] These reforms were implemented by the Scottish Parliament mainly in delegated legislation. The Courts Reform (Scotland) Act 2014 introduced further changes including the introduction of a new type of judge – the summary sheriff, a simplified procedure for summary claims and the rewriting of Scotland’s civil procedure rules.

[65] At the same time as the practical implementation of these reforms, there has been significant and substantial work carried out to integrate the tribunal system in Scotland with the court system. This is ongoing.

[66] Part of the task of the Scottish Court Service now headed by the Lord President is to prepare the operational programming and infrastructure required to deliver the reforms including workforce planning, facilities and estate management and the design of modern information and communication technology.

[67] The changes are well under way. The Judicial Appointments Board are considering applications for new summary sheriffs. The new Sheriff Appeal Court heard its first case in a criminal appeal and civil appeals are due to commence in the new court next year.

[68] There has been some controversy. For example, the sitting of the High Court of Justiciary on circuits to hear serious criminal trials has been restricted to a small number of centres mainly in Edinburgh, Glasgow, Aberdeen and Livingston. Some sheriff courts have been closed prompting strong local opposition.

[69] As I have described, Judges in Scotland have played an active part in developing and commenting on proposals for legal reform. Judges are often asked for and give their views on proposals to reform substantive law. Since the setting up of the Scottish Law Commission 50 years ago, a serving judge has always chaired the Commission which is given the task of considering reform of the law. The remit includes both devolved and reserved matters. Special expedited procedures now exist both in the UK and the Scottish Parliaments to enable the fast tracking through the Parliaments of certain non-controversial Bills put forward by the Scottish Law Commission. There is nothing novel in Scotland or in

the UK in having judicial involvement in law reform which is not restricted merely to technical legal changes. Judges by virtue of their training and day to day experience tend to gather experience which may be useful when considering reform of the law. But in Scotland we are very aware that the pace of change and its intensity places great burdens on members of the legal profession. We are greatly indebted to the advocates and solicitors who practice in our courts for their expertise and assistance in making changes which we hope will result in a just and effective justice system.

REFERENCES

Legislation

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The Human Rights Act 1998

The Scotland Act 2012 which amends the 1998 Act and gives further powers to the Scottish Parliament following the recommendations of the Calman commission.

The Scotland Bill 2015/2016 which is progressing through the UK Parliament following the recommendations of the Smith conclusions to give further powers to the Scottish Parliament including powers over income tax, vat, welfare, oil and gas etc.

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McGowan

The difficulties which followed Calder is plainly set down when it appeared that a new type of challenge which also had the potential to affect many cases arose. Mr McGarran was detained on suspicion of housebreaking with intent to steal. He was cautioned and made no reply. He was searched and found to be in possession of a substance which he said was cannabis. He was cautioned at the police station and advised that the new rights which had been introduced following Calder in sections 15 and 15a of the 1995 Act as amended by the Criminal Procedure (Legal Assistance, Detention and Appeals) (Scotland) Act 2010 section 1(4). These rights included intimation to a solicitor and his right to have a private consultation before being questioned by the police and at any time during questioning. He was asked whether he wished to have such a consultation and answered in the negative. The challenge in the form of the devolution issue is whether without having received advice from a lawyer his refusal or waiver of his rights were convention compliant. In this case the lord advocate chose to extradite a hearing and the case was never considered by the Appeal Court in Scotland. The lord advocate made a reference direct from the sheriff court proceedings under paragraph 33 of Schedule 6 of the Scotland Act to the Supreme Court. Lord Hope in his judgment (paragraph 53) emphasised that the issue had come to the Supreme Court as a reference directed to a particular issue on which guidance was sought and not as an appeal. He considered that the questions properly to be dealt with in the trial court as it raised issues of fact. On the substantive point he considered that the jurisdiction of the Glasgow court did not support the proposition that as a rule the back to back to

legally advise questioning can only be weighed if the accused has received advice from a lawyer as to whether or not he should do so. That view was the majority view of the court. Such references are rare and potentially controversial in that the Supreme Court does not have the benefit of the senior judges from the course in Scotland. McGarren (procurator fiscal, Edinburgh) (appellant) bb (respondent) (Scotland) [2011] UKSC 54.