CIVIL PROCEDURE: CAN THE SCOTS LEARN FROM WOOLF?

Charles N. Stoddart

Introduction

One of the most striking differences between the respective legal systems of the British Isles is in the area of adjectival law. While the rules of evidence in both England and Scotland are similar in many respects, the procedures followed in their separate courts at all levels are very distinct. This is particularly true in relation to civil proceedings, where separate historical development, a different legal tradition and the impact of practice have combined to produce an indigenous system in each jurisdiction, largely untrammelled in each case by influences from over the Border. But court procedures in Scotland have undergone considerable reform in recent years; and the prognosis for the future is likely to be much more of the same. So the time is ripe for a look at some of the current trends in Scotland and to ask in particular whether any of the issues raised by Lord Woolf for civil justice in England and Wales are being reflected in the Scottish experience.

It has to be recognised at the outset that just as many concerns about delay, cost and unnecessary complexity in court processes are currently being expressed in Scotland as were made to the Woolf inquiry. While no similar comprehensive review covering all civil courts in Scotland has yet been set up (in spite of calls for such a review from at least one Court of Session judge)\(^1\), those individuals and bodies which have recently considered the civil procedures of both the Court of Session and the sheriff court have concluded that traditional Scottish methods have left much to be desired. Three examples illustrate this: in the Court of Session, fears that if reform was delayed a great deal of commercial work

\* Sheriff of Lothian and Borders at Edinburgh; Member, Sheriff Court Rules Council.

\(^1\) Lord Gill, at an address to the Annual Conference of the Law Society of Scotland in 1995. The full text of the address is to be found in "The Case for a Civil Justice Review", *Journal of the Law Society of Scotland* 40 (1995), 129-133.
would be lost to other jurisdictions or resolved by a process other than litigation led to the setting up in 1994 of a fast-track procedure under the tight control of a designated commercial judge; while in the sheriff court, a wholesale revision of the procedural code also took place in 1994 with the twin objectives of avoiding many unnecessary court appearances and encouraging courts to identify the real issues in dispute without arid and tortuous debates about the form of pleadings. More recently, the introduction on 1 November 1996 of Part 1 of the Children (Scotland) Act 1995 has prompted a radical re-examination of how family cases involving disputes about children are handled. The fruits of these reviews are only now becoming apparent as research information is gathered and assessed.

Such trends do not simply reflect the fact that new procedures are necessary for the resolution of new problems; each reform flowed from a recognition that traditional Scottish methods of civil procedure were no longer apt for the late twentieth century and did not always lead to just results being achieved at affordable cost in a reasonable time. Lord Woolf's review reached much the same broad conclusions; although many of the solutions which he proposed were tailored to the particular domestic practices and procedures of the English courts, the same core elements of criticism gave rise to them. Accordingly, it is proposed to consider three themes common to both jurisdictions: the requirement that a party should give written notice of his case to his opponent in advance; the need for the court to regulate the progress of the case once it is in the court system; and whether modern systems of information technology can assist in the process of reaching a decision on the matters in dispute.

1. Written Notice of the Case: to What Extent is it Actually Required?

The Traditional Scottish System of Written Pleadings

Doubtless no-one would dissent from the proposition that a party who wishes to pursue a remedy in a civil court requires to state in

3 The Ordinary Causes Rules 1993, now contained in the first schedule to the Sheriff Courts (Scotland) Act 1907.