THE DELIVERY OF CIVIL JUSTICE
MANAGING THE PROCESS

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This thesis explores, dissects and examines the delivery of civil justice in Scotland, in particular within the Court of Session before 31 May 2000. The development of judicial supervision of litigating practice, both in Scotland and other common law jurisdictions, is evaluated against the backdrop of historical events. Current political and economic pressures combine to spotlight a public service where unmonitored, unsupervised and uncontrolled demands congest court timetables and drain both the public purse and clients queuing for judicial resolution.

A comparison between the aims and realities of a civil litigation system highlights the dichotomy between legal principles and market principles. An analysis of the gap between the aims and realities brings into focus the different perspectives and roles of the practitioner, the judiciary and the government.

Historical analysis reveals that a pattern of reform initiatives, instigated regularly to protect development of a distinctive system of law, is identifiable throughout the history of the Court of Session. The absorption of piecemeal reform is also traced. Identification of current complaints, namely undue delay, unnecessary expense and complexities updates the historical analysis.

The responsibility for underlying defects within the system focuses on a solution which is gradually impregnating common law legal systems throughout the world – judicial supervision of the pace and preparation of actions so that the gold threads of fairness and justice interweave all stages of process. These attributes are evaluated against a backdrop of criticism of the interventionist role by the traditionally passive adjudicators, altering power structures in the litigation market.

In-depth analysis of caseflow management by judges in the Scottish Commercial Court shows that early intervention results in earlier resolution, giving clients and representatives a focus for preparation and settlement negotiations. However a follow-up study reveals a slight slowing down of initial successes. It is suggested that increasing judicial powers to impose sanctions on representatives as well as clients, and judicial commitment to use them, may stem the gradual intrusion of traditional working practices.

A comparison with American, Australian and English systems suggests that Scotland is falling behind a trend to increase transparency and accountability into legal process. However these other jurisdictions are now moving into areas of constitutional difficulty, where the independence of the judge who intervenes to create a cost-effective resolution service has come under scrutiny. Nevertheless, this thesis suggests that there is no constitutional dilemma if the judiciary institute caseflow management reform for reasons of justice and fairness which are enshrined in Scots legal principle.

Although there appears to be agreement that a review of the civil justice system is required, breaking a cycle of blame involves a reconciliation of perspectives which have defeated piecemeal reform. And although it is acknowledged that current extraneous factors have interrupted and added to the flow of court business in Scotland, lack of data, foresight and planning of civil justice procedure perpetuates a traditional system which is arguably pricing itself out of the market. Complacency is the bondage, transparency is the key.

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This thesis has been composed by the candidate, and is based on the candidate's own research.

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<td>List of Practice Directions issued in England - Caseflow Management</td>
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<td>9.7</td>
<td>Financial Times Article – The Gentle Touch – A.D.R.</td>
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<td>9.10</td>
<td>Allocation of Tracks - England</td>
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Acknowledgements

Support, assistance and encouragement to complete this work flowed from many sources, not the least of which was my own family.

Professor Robert Black Q.C. taught me by example the patience, generosity and good manners required from a supervisor who is adept at stretching time to accommodate loquacious students. His light but firm hold of the reins gave me both the support and the space to develop this explorative thesis. I am most grateful.

Within the Supreme Court, my thanks also go to the Lord President, the Rt. Hon. the Lord Rodger of Earlsferry, for permission to undertake research. The Commercial judges in particular were extremely supportive of my forage into their area, giving unprecedented access to data without intervention in the research process. Their Clerks of Court and the Keeper of the Rolls gave generously of their time to provide additional information, for which I am grateful.

My thanks to Mrs. Maxwell and Mr. Patrick Hodge Q.C. for allowing me access to an unpublished manuscript prepared by the late Mr. David Maxwell which guided me through the historical developments of the Court of Session.

Information was also generously provided by the Legal Services Ombudsman, the Legal Adviser at the Scottish Consumer Council and Deputy Chairman of the Citizens’ Advice Bureau. Additionally, were it not for the respondents to the questionnaires – solicitors, counsel and clients - this thesis may have been purely theoretical and therefore one-dimensional, so my gratitude encompasses those who gave me pragmatic insights into litigating practice in Scotland.

With regard to other jurisdictions, my thanks go to Professors Peter Sallmann and Ted Wright for their guidance, material and comments on Australian developments, and their views on court management in general. Professors Ross Cranston and Michael Zander, and Adrian Zuckerman, provided a plethora of unpublished material and informative views on litigating practice in England. I am most grateful also to Senior Master Turner for providing a judicial insight into the new procedural reforms in England.

The reader may observe that Lord Cooper, a late Lord President of the Court of Session, is oft-quoted. I found his views straightforward, inspirational and equally valid half a century after deliberation, well worthy of fresh exposure.

"The paramount duty of a court of law and of all who participate in its decisions is a duty owed not to the legal theorist, nor to the of text-books, nor to the legal profession, but to the litigant. The primary object... is the rendering of a service to the community."¹

¹ The Rt. Hon. Lord Cooper, Defects in the British Judicial Machine (1952-54) 2 Journal of the Society of Public Law Teachers 91
### DEFINITIONS

<table>
<thead>
<tr>
<th>Term</th>
<th>Definition</th>
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</thead>
<tbody>
<tr>
<td>Adjective law</td>
<td>Covers evidence, procedure and pleading, matters of practice, the enforcement of decrees and related topics. Differentiated from 'substantive law' since the latter is the 'right' and the former is the 'remedy'. ¹</td>
</tr>
<tr>
<td>Adjustment</td>
<td>Alteration of written pleadings before the Record is closed.</td>
</tr>
<tr>
<td>A.D.R.</td>
<td>Alternative dispute resolution, including negotiation, mediation, conciliation, arbitration, generally by bodies outwith the litigation system, or early neutral evaluation by legal professional. Sometimes re-defined as 'appropriate dispute resolution'.</td>
</tr>
<tr>
<td>Adversarial system</td>
<td>The jurisprudential network of laws, rules and procedures characterised by opposing parties who contend against each other for a result favourable to themselves. In such a system the judge acts as an independent magistrate rather than a prosecutor, distinguished from Inquisitorial system. ² A procedural system involving active and unhindered parties contesting with each other to put forth a case before an independent decision-making body. ³</td>
</tr>
<tr>
<td>Adversary</td>
<td>Adverse party, antagonist, competitor, contendor, contestant, corival, disputant, dissentient, enemy, foe, litigant, opponent, opposer, opposing party, oppositionist, oppugnant, resister, rival. ⁴</td>
</tr>
<tr>
<td>Adversarial proceeding</td>
<td>One having opposing parties, contested, as distinguished from an ex parte hearing or proceeding. One of which the party seeking relief has given legal notice to the other party and afforded the latter an opportunity to contest it. ⁵</td>
</tr>
<tr>
<td>Amendment</td>
<td>Alteration of written pleadings by a party after the Record is closed, with permission of the court.</td>
</tr>
<tr>
<td>Avizandum</td>
<td>Time taken by judge after completion of Proof to issue a final decision.</td>
</tr>
<tr>
<td>Caseflow management</td>
<td>Control, generally by the judiciary or registrars, by way of management of the progress of cases proceeding through court process.</td>
</tr>
<tr>
<td>Case management</td>
<td>Control by way of management of presentation of cases proceeding through court process - covering constitution, scope and subject matter. ⁶</td>
</tr>
<tr>
<td>Civil justice</td>
<td>The whole area of what is comprised in civil procedural law, divided into three parts - the institutional, professional and procedural. ⁷ The entire system of administration of justice in civil matters. ⁸</td>
</tr>
<tr>
<td>Civil procedure</td>
<td>The body of law governing the methods and practices used in civil litigation. ⁹</td>
</tr>
<tr>
<td>Common law</td>
<td>“Whole of legal rules and doctrines which are not derived from enactments.”¹⁰ “Anglo-American system of law, as contrasted with civil law systems, deriving solely from the law of Rome (but note the considerable influence of Roman law in the formative period of modern Scots law)”¹¹</td>
</tr>
<tr>
<td>Court of Session</td>
<td>The supreme court in Scotland for civil actions, situated in Edinburgh.</td>
</tr>
<tr>
<td>Defences</td>
<td>Defender’s answers to the pursuer’s summons.</td>
</tr>
<tr>
<td>Defender</td>
<td>Individual, company or association being sued.</td>
</tr>
</tbody>
</table>

⁴ W. C. Burton, Legal Thesaurus 2nd ed (1992)
⁵ Black’s Law Dictionary (1990) ibid.
⁶ The distinction between caseflow management and case management is evolving, particularly in Australia where the legal profession showed early resistance to loss of autonomy, Prof. T. Wright, Civil Justice Reform in Australia (1998) Bellagio Conference paper (unpublished)
¹⁰ Lord Cooper, Scottish Legal Tradition (1981 ed) 71
¹¹ D. M. Walker (1992) ibid. 49, 60, 70, 194
<table>
<thead>
<tr>
<th>Ex Proprio Motu</th>
<th>Court acting on its own initiative</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ex tempore judgment</td>
<td>Immediate judgment given in court</td>
</tr>
<tr>
<td>Injustice</td>
<td>“By the spectacle of established justice in any one shape, injustice in every other shape is promoted by habit, those at whose expense it is committed are lulled into acquiescence under it, but the spectacle of this acquiescence, the authors of the baleful habit are encouraged to persevere in it.”¹²</td>
</tr>
<tr>
<td>Inner House</td>
<td>Two divisions within the Court of Session dealing mainly with appeals from Outer House judgments, with the possibility of an ad hoc Extra Division</td>
</tr>
<tr>
<td>Inquisitorial legal system</td>
<td>A system of proof-taking used in civil law whereby the judge conducts the trial, determines what questions to ask and defines the scope and extent of the inquiry. Prevails in most continental European countries, Japan, Central and South America.¹³</td>
</tr>
<tr>
<td>Interlocutor</td>
<td>Order pronounced by the court, written into process</td>
</tr>
<tr>
<td>Justice</td>
<td>Fair and proper administration of laws. Distributive Justice – justice owed by a community to its members, including the fair disbursement of common advantages and sharing of common burdens.¹⁴ Substantive justice – justice fairly administered according to rules of substantive law, regardless of any procedural errors not affecting the litigant’s substantive rights.¹⁵</td>
</tr>
<tr>
<td>Dictionary</td>
<td>Justice is the circumstance which gives the greatest happiness to the greatest number of people. “The interest of the community is comprised of all interests of the individuals of which it is composed. Therefore the happiness of the community will be increased if the total of all the pleasures of all its members is augmented to a greater extent than their pairs.”¹⁶</td>
</tr>
<tr>
<td>Bentham</td>
<td>“Justice, when it is ascribed not to laws but to persons, consists in the conformity of one’s action to law.”¹⁷</td>
</tr>
<tr>
<td>Erskine Judge</td>
<td>“The life of the law is justice, not truth. Justice is an act of faith” (the human element lends it subjectivity).¹⁸</td>
</tr>
<tr>
<td>Legal system</td>
<td>“The body of principles and doctrines which determine personal status and relations, which regulate the acquisition and enjoyment of property and its transfer between the living or its transmission from the dead, which define and control contractual and other obligations and which provide for the enforcement of rights and the remedying of wrongs.”¹⁹</td>
</tr>
<tr>
<td>Mirror action</td>
<td>Action where the pursuer is sued by the defender over the same issues in dispute</td>
</tr>
<tr>
<td>Outer House</td>
<td>Judges sitting alone in the Court of Session hear the majority of first instance work (appeal to the Inner House)</td>
</tr>
<tr>
<td>Process</td>
<td>Filed documents for each case held by the General Department of the Court of Session</td>
</tr>
<tr>
<td>Proof</td>
<td>Hearing of evidence by judge culminating in adjudication</td>
</tr>
<tr>
<td>Pursuer</td>
<td>Person, company or association initiating an action</td>
</tr>
<tr>
<td>Record</td>
<td>The combination of pursuer’s pleadings with defender’s answers and explanations. The Record is open for adjustment by either party until closed by the judge, after which amendments may be made with permission of the court.</td>
</tr>
<tr>
<td>Senator of the College of Justice</td>
<td>Judge appointed to the bench in the Court of Session</td>
</tr>
</tbody>
</table>

¹⁶ J. Bentham, An Introduction to the Principles of Morals and Legislation, Chapter 1(2)
¹⁷ J. Erskine, Institute of the Law of Scotland (1773) 3
¹⁹ Lord President Cooper, Scottish Legal Tradition (1981 ed) 67
<table>
<thead>
<tr>
<th>Settlement</th>
<th>Inter-party agreement outwith the litigation system</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sist</td>
<td>Leave of absence from court procedure, granted on request of parties</td>
</tr>
<tr>
<td>Substantive law</td>
<td>Defines the rights and claims, liberties and privileges, duties and liabilities of persons, differentiated from 'adjective law'²⁰</td>
</tr>
<tr>
<td>Summons</td>
<td>Pursuer’s written contentions which initiate an action in the Court of Session (Initial Writ in sheriff courts)</td>
</tr>
<tr>
<td>Written pleadings</td>
<td>Written statement of parties’ factual and legal basis of claim and defence</td>
</tr>
</tbody>
</table>

²⁰ D. M. Walker, (1992) op.cit.72
THE MARKET for CIVIL JUSTICE

"Unless a system of law and legal administration is maintained in a state of high efficiency and allowed to develop freely in harmony with its own distinctive principles and methods, the rule of law in that country will inevitably languish, and it will be the ordinary citizen who will be the victim."

Delivery of a Product

Fundamentally civil justice is a product, a commodity as well as a service. Efficient delivery of this product resonates across private and public rights, affecting the number of cases which provide the substantive basis for a coherent system of law. As Lord Mackay of Clashfern stated

"It is a primary responsibility of good government to provide a civil justice system which maintains and advances the rule of law and furnishes the means to secure legal rights and enforce legal duties."

Both Lord Cooper and Lord Mackay acknowledge that adjudication nourishes and shapes the rule of law, but Judge Edward suggests that it is only the most "determined litigants" who are "the true instigators of judicial activism. They are the stuff of which the living law is made." The fact that 95% of court cases settle before adjudication means that the development of substantive law is based purely on 5% of the litigants

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who initially turn to courts for a reasoned decision. Is this because the product or its delivery are flawed?

Whether there should be perfect craftsmanship of this product or a 'market-friendly' compromise is the nub of continual conflict between economic and legal sciences. In the field of civil justice, the self-employed craftsman (the lawyer) focuses on the need for time to perfect the product. His adjudicator (the judge), promoted from the ranks, expects professional dexterity. The service provider (the Executive branch of government) demands a cost-effective public service. The client expects all of these - but quickly. Lack of regular inspection and accountability as the product is formed creates a cycle of blame. Lack of communication and trust between these sectors reflects and supports the repeated impotence of any one branch to breach this cycle.

Cyclical Blame

- The legal craftsman has for centuries relied on notions of professional ethics and integrity to validate claims for his time and fees. In response to criticism he blames the judiciary generally for inadequate control of excesses, the service provider for reduced public resources, the client for inadequate instructions, and his opponent for flawed responses.

- The adjudicator is divorced from preparatory work, but may be retrospectively critical of the legal craftsman's performance. He is also frustrated by tactical use of judicial time - by the legal professional who makes unnecessary bookings, by the

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2 Product and commodity are closely linked in meaning; however in this context a product is used to imply a process outcome, whereas a commodity is viewed as a item for purchase/sale or exchange
discussing Case 152/84 Marshall [1986] ECR 723 - a Health Authority employee spent 13 years of her life to achieve a decision which changed the retirement age of women in the U.K. to 65 years. "It is the maddening, perverse, unreasonable litigant who disrupts the smooth progress of public business and calls upon the judge to intervene."
client who uses court time strategically, and by the service provider who controls the conflicting demands on his time and determines resources.

- The service provider, subject to internal and external competition for fiscal resources, blames the legal craftsman for creating higher standards than necessary, insinuating a level of profiteering. The independence of the judiciary generally\(^5\) shelters them from overt criticism from this sector. As for the client, caution dictates that the service provider must sustain a fine balance between adequately servicing the market and creating a cultural shift towards excessive and overwhelming demand.\(^6\)

- The client criticises the legal craftsman for over-servicing and under-communicating. He criticises the service provider for restrictive access to the final product (resolution) and for imposing restrictive financial thresholds. He blames the opponent for exploitation of the system's procedural complexities and flaws, and the legal profession for delays and costs. What the client basically does not realise is the dominance of the working conventions within a litigation system which sustain perceived inefficiencies.

This thesis supports seven deductions, all of which acknowledge that court resolution is both a public service — a system to apply reasoned legal principles to private disputes — and a product:

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\(^5\) Lord McCluskey, When Crowd Pleasing Replaces Consistency, Scotland on Sunday, 6 February 2000.

\(^6\) Dr. Furedi, University of Kent — alluding to the growth of a “complaints culture” quoted in Britain Blighted by £6 billion Culture of Blame and Compensation. The Times 19 April 1999.
DEDUCTIONS

- The civil litigation system in Scotland is in crisis, but assigned low priority.
- While legal rights and factors of economic growth have measurably increased in Scotland, recourse to courts has decreased, echoing previous criticisms that the court may be of declining relevance to individuals.
- Diminished relevance of a court system encourages a culture of self-help, damaging the stability of a developing body of law.
- Lack of control during process affects the quality of the product (justice) and masks abuse of private and public resources.
- The judiciary are ideally qualified and placed to forensically analyse and clinically supervise the quality of the service.
- Without judicial commitment and leadership inertia sustains the cycle of blame.
- A major re-evaluation of civil litigation provides the data to justify change.

The Basis for the Deductions

Declining relevance?

The last major re-organisation of the Court of Session in 1933 emanated from a Royal Commission’s practical and thorough investigation into court procedures in 1927.\(^7\) Addressing criticisms that delays and expense in the Court of Session were leading to a decline in business,\(^8\) the Commission compared civil court workloads with unemployment figures,\(^9\) attempting to establish whether general fluctuations in litigation were "accidental", followed "cycles of activity in trade and industry" or matched "the

\(^7\) Royal Commission on the Court of Session and the Office of Sheriff Principal (1927) Cmnd 2801 Lord Clyde Chairman (The 1927 Royal Commission Report) Chapter 1 p. 24
\(^8\) "Criticisms which also bear a strong resemblance to those which were presented before the Law Commission of 1868" The 1927 Royal Commission Report ibid. 13
The conclusion was that although the total volume of litigation tended to diminish in times of prosperity (low unemployment), sheriff court work diminished more during these spells, but tended to increase in bad times (high unemployment). On the other hand business in the Court of Session was assumed to increase in times of prosperity when larger concerns naturally gravitated towards it with cases of higher value and important commercial principles. These larger business concerns were also considered capable of sustaining actions longer in the Court of Session in an economic downturn.

However, basing the analysis on unemployment trends was criticised as too simplistic and therefore inadequate to explain the virtually static caseload of the Court of Session over a 50 year period.\textsuperscript{11} It was argued at the time that the enormous increase in the population and development of trade over the same period actually implied an ‘alarming’ decrease of 50% of potential business.\textsuperscript{12}

<table>
<thead>
<tr>
<th>Increases</th>
<th>1875</th>
<th>1925</th>
</tr>
</thead>
<tbody>
<tr>
<td>Population</td>
<td>3.5 million</td>
<td>5 million</td>
</tr>
<tr>
<td>Exports (Glasgow and Leith)</td>
<td>15.5 million</td>
<td>60 million</td>
</tr>
<tr>
<td>Heritable property values - 4 main towns</td>
<td>£5 million (1895)</td>
<td>£17 million</td>
</tr>
</tbody>
</table>

It was suggested that either the Scots were becoming a nation of pacifists or the supreme court was of declining relevance in resolving disputes, a trend encouraged by the expanding jurisdiction of the sheriff courts.\textsuperscript{13}

By following the philosophy behind the Commission’s investigations, and extending the measurement criteria, it is possible to calculate whether current levels of court business parallel the growth or decline in population, unemployment, trade and industry, housing,

\textsuperscript{9} As a measure of economic stability
\textsuperscript{10} The 1927 Royal Commission Report op.cit.17-18
\textsuperscript{11} Report on Court of Session Procedure, anon 1927 SLT (News) 66
\textsuperscript{12} Report on the Court of Session Procedure (1927) op.cit.66
\textsuperscript{13} The 1927 Royal Commission Report op.cit.93; Sheriff Court Act 1907 from 1 January 1908 extended sheriff court jurisdiction into separation, aliment, declarators, heritable rights and title, limited jury trial
disposable income and general national prosperity. If there is a correlation, what does it mean? If there is an unexplainable reduction in litigation, or lack of growth, can the conclusion be drawn that the courts - in particular the Court of Session - is of declining relevance in resolving civil disputes? Is access curtailed by costs and delays? Is the body of law being weakened by the peripheralisation of the court in the market-place?

No doubt the growth of statutory boards and tribunals has deflected a percentage of cases from court. Currently the government plans to extend the growth of less formal adjudicative and conciliatory bodies in a ‘market economy’ of dispute resolution, while acknowledging the strategic requirement for a public body of law.

- "The government would encourage greater use of arbitration and alternative methods of dispute resolution......
- The courts are only one component part in what is not only a domestic but a global market for dispute resolution......"14
- "I suggest that there is virtue in the sectorisation and hence expertise of tribunals"15

On one interpretation, creating new avenues for dispute resolution side-steps the systemic issues and problems of delivering legal resolution. On another interpretation, the creation and sustenance of more ‘user-friendly’ and cheaper alternatives acknowledges the need for a market shift - which reinforces the hypothesis that the court system is of declining relevance. In other words, there is a fundamental conflict between production of legal principles, through a steady flow of supreme court decisions, and market principles, which has never been reconciled. Before drawing any conclusions, however, it is important to highlight any differences between actual and potential sources of court business over the past 25 years.

14 Mr. Henry McLeish, Minister for Home Affairs, Consultation Paper Access to Justice Beyond the Year 2000, July 1998
Civil Judicial Statistics are held in a basic form – the number of court cases initiated and closed. From Chart 1 we can note that over the last 25 years numbers of actions initiated in all Scottish courts normally varied between 135,000 to 190,000, representing swings of up to 30% of workload (figures 1 and 2). While civil caseload diminished in the second part of the 1970s, the 1980s were more ‘buoyant’, with numbers peaking in 1991, just as global recession impacted on international economic stability at a macro and micro level. What is highlighted is the sudden diminution of caseload from the early 1990s, repeating the troughs of 1978 to 1982. Are there economic reasons for the decline? Is there loss of faith in the civil justice system?

Chart 2 represents the swing between different court systems in Scotland over the same period. The mass exodus of divorce cases in 1985 from the Court of Session to sheriff court jurisdiction explains the sudden trimming down of the supreme court caseload at that time.

Within the sheriff court system, Chart 3 sets out the movement of litigation between a variety of procedures. In 1976 the Small Debt Court was abolished to make way for a more formalised Summary Cause procedure. The use of the latter track is reflected in the drop in cases initiated on the Ordinary Roll. Similarly the introduction of a new Small Claims procedure 12 years later in 1988 is reflected in the simultaneous fall of Summary Causes.

What is clear from Chart 3 is that the trough from 1978 to 1982 can be explained by fluctuations in Summary Cause litigation – while the Ordinary Roll has steadily increased in volume until recently. Clearly all sheriff court procedural tracks are now in decline, the current trend originating from the beginning of the 1990s. Apart from 1985

16 Note: recession affects national economic factors, such as interest rates and concomitantly suppresses entrepreneurial endeavour. Court action normally begins within three or four years of the causal event.
the Court of Session has not been subject to such obviously wild fluctuations, (dealing
with a much lower caseload) but the downward trend is still identifiable. The
percentage caseload movement from year to year (notwithstanding different volume of
business) shows this trend quite clearly. Comparing factors of economic growth with
court caseloads, are the patterns symbiotic, parallel or random?

Figure 1

Percentage Rise and Fall of Caseload in Court of Session (Outer House) 1972-1997

Figure 2

Percentage Rise and Fall of Caseloads in the Sheriff Courts 1972-1997
Indicators of Economic Growth

(a) Gross Domestic Product

One indicator of economic stability is the Gross Domestic Product (GDP), which measures the value of trade output (Figure 3). Over the last 30 years in Scotland there has been a steady increase in the value of trade from £3 billion in 1966 to £54 billion in 1996 at factor cost.\(^{17}\)

![Chart: Scottish GDP at Factor Cost 1972 - 1997](image)

Figure 3

Extracting the rate of inflation from the GDP\(^{18}\) gives a clearer picture of the growth in output from trade and industry over the past 25 years (Figure 4).

![Chart: GDP at Factor Cost, Inflation Excluded](image)

Figure 4

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\(^{17}\) Source: Office for National Statistics HMSO, consecutive years, and Scottish Economic Planning Department, Scottish Office, Scottish Abstract of Statistics HMSO, consecutive years

\(^{18}\) By dividing the GDP by the Retail Price Index for the same years
Although the growth trend has generally been below the UK average of 2% per annum, the value of economic activity has risen steadily. Interestingly though, economic commentators suggest that GDP figures are “likely to overstate both the level and growth of incomes” due to an increasing high dependence on external ownership within Scottish trade and industry.19 This not only suggests that income leaks out of the Scottish economy to foreign investors, but also suggests cross-jurisdictional competition within the international litigation ‘market’. The influence of other geographical and cultural loyalties could be one explanation for a gradual movement away from Scottish courts as civil dispute centres. If so, this may imply a quiet but significant drain on potential development of Scots law.

(b) Balance of Payments

The balance of payments measures the annual national surplus or deficit in earnings between a country’s exports and imports – between what it sells and what it buys from the outside world. Scottish data reflect a sharp decline in the balance of payments in the late 1980s, in line with world recessionary crises20 (Figure 5).

If the suppositions of the 1927 Royal Commission are to be upheld, there should be a coincidental increase in sheriff court cases, while the Court of Session caseload remains relatively unaffected. These movements are readily identifiable in Chart 2. This is one confirmation of the Commission’s conclusion that sheriff court cases increase in bad times, but larger concerns, who are assumed to gravitate towards the Court of Session, can sustain cases longer through economic decline because of access to resources. This conclusion is particularly relevant to restructuring the exclusive jurisdictions of the courts according to the claim value.21 No data is held on types of litigants appearing on

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21 Lord Advocate Lord Hardie issued a Consultation Paper July 1998 (Proposals to Increase Jurisdiction Limits in the Sheriff Courts, including Privative Jurisdiction), setting out a range of jurisdictional limits by claim value, in sheriff courts and Court of Session. By May 2000 the proposal to redefine jurisdictional
any of the different court tracks in Scotland. Lack of data may explain why policy changes have not yet taken place.

Economic decline has also been attributed to “a failure of indigenous entrepreneurship”, gradually replaced by external ownership. Traditional heavy industries, slow to modernise processes and machinery, gradually lost competitive viability. Political encouragement of new business, which recently focused on attracting Foreign Direct Investment (FDI), particularly in electronics industries, is reflected in the recovery of the balance of payments. This has two important effects on the potential litigation market in Scotland. Not only do new areas of law require development, but international contracts give foreign investors a choice of litigation centre. Market confidence in the credibility of the resolution process is therefore paramount. The new innovative Commercial Court in Scotland is a step towards creating market confidence in the changing business community (Chapters 6-9).

limits are at Committee stage within the Scottish Parliament, with implementation speculatively forecast in Spring 2001. It is proposed that Sheriff Courts will have exclusive jurisdiction in claims under £5,000.


23 Scottish Economic Bulletin, The Scottish Office (1998) 16 The trade surplus in Class 30 – office machinery and computers industry - is “consistent with the trade pattern of a developed economy” notwithstanding the overall deficit which “largely reflects the financial deficit…identified elsewhere”.

Figure 5
(c) Retail Price Index

The Retail Price Index (RPI)\(^{24}\) measures the underlying rate of inflation by calculating annual differences in cost in a nominal range of items. Scottish data show that after a period of relative stability, prices rose dramatically from the mid-1970s (after decimalisation in 1971) to the late 1990s (figure 6). Such a sudden upsurge may explain a corresponding increase in debt recovery through the sheriff courts (see Chapter 2), particularly at the ‘cheaper end of the market’ – the rapid and disproportionate increase in small claims.\(^{25}\) The steady rise of the RPI during the 1990s masks differences in inflation between services and goods.\(^{26}\) While domestic employment levels\(^{27}\) and labour costs are rising for services, the growing importation of cheaper foreign goods suppresses internal production. A fall in local manufacturing means that potential areas of litigation are lost, while employment disputes are diverted to Employment Tribunals.

![Retail Price Index Scotland 1948 - 1998](image)

\(^{24}\) Before 1948 called “the Cost of Living Index”; Percentage change is usually referred to as ‘the rate of inflation’ Government Statistical Service Retail Prices 1914–1990, Central Statistical Office, HMSO

\(^{25}\) Debt Recovery (1980) 53-54 - over 90% pursuers were utility companies and firms; Royal Commission on Legal Services in Scotland (1980) cmnd 7846 (The Hughes Commission) 176-177; Small Claims in the Sheriff Court in Scotland 1991 6 courts - 92% large businesses and public utilities

\(^{26}\) G. Tily, Macro-Economics Analyst, Office for National Statistics, Economic Update (1999) Cost of goods is decreasing due to cheaper foreign imports, the cost of services is increasing due to higher employment costs and higher interest rates on borrowings.
(d) Rates of Unemployment

Unemployment peaked during the 1980s during the recession, following the U.K. pattern. The 1927 Royal Commission took this statistic as a strong indicator of the health of the Scottish economy, judging that the sheriff courts were busier during high unemployment periods, whereas the reverse was true in the Court of Session. This is supported by the latest information which shows that during the period of higher unemployment in the 1980s sheriff court business increased, although the coincidental shift of divorce cases from the Court of Session in 1985 warps any analysis within the latter jurisdiction.

![Rates of unemployment in Scotland as a Percentage of Workforce 1971 - 1997](chart)

Figure 7

(e) Population

The national population represents a pool of potential litigants. The rapid growth identified at the beginning of the century (see page 2) did not continue after 1925.

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Population of Scotland 1950 to 1997 (000's)

<table>
<thead>
<tr>
<th>Year</th>
<th>Population</th>
<th>Year</th>
<th>Population</th>
<th>Year</th>
<th>Population</th>
</tr>
</thead>
<tbody>
<tr>
<td>1950</td>
<td>5168</td>
<td>1966</td>
<td>5201</td>
<td>1982</td>
<td>5145</td>
</tr>
<tr>
<td>1951</td>
<td>5102</td>
<td>1967</td>
<td>5198</td>
<td>1983</td>
<td>5136</td>
</tr>
<tr>
<td>1952</td>
<td>5101</td>
<td>1968</td>
<td>5200</td>
<td>1984</td>
<td>5123</td>
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However, the slowing down of population growth camouflages a demographic shift over the last few decades - a lower birth rate has neutralised the effect of increased longevity within the population. Recent labour statistics show that in the last decade in particular there has been a steady increase in the percentage of persons of working age in employment, and personal disposable income has risen from 1989.28 An increase in employment and purchasing power affects litigation potential, but arguably at the cheaper end of the market. Since 1991 both small claims jurisdictions, dominated by utility companies recovering debts, have witnessed a diminution of caseload. This also supports the 1927 Commission’s theory that in times of relative ‘prosperity’ sheriff court cases decline.

The cost of litigating in complex procedural pathways still acts as a brake on demand. In an increasingly rights-conscious society the creation of cheaper and easier access to the courts may encourage the number of claims to rise, particularly if unemployment increases. But unless Legal Aid limits are raised, the more expensive cases will be
regulated by ‘deep-pocket’ litigants who can afford to sustain actions – larger commercial concerns and those who receive support from Legal Aid, insurance companies, trade associations and trade unions.

**Housing**

One of the most significant economic factors which may have influenced both opportunity and attitude towards litigation (as well as political orientation) is the shift in housing policy and strategy instituted by the Conservative government in 1979. Privatisation of local authority housing by sale to existing tenants created a new market for dispute resolution with higher personal and financial stakes invested in ownership (figure 8). Consequential claims can arise in several areas of law – contract, property, inheritance, judicial review, tax and delict. A decline in private tenancy agreements between 1976 and 1991 reduced high dependence on private landlords to a steady 7% - a marked shift from 90% tenancy arrangements at the beginning of the century. Within the UK, Scotland has the largest proportion of housing stock (30%) remaining in public authority hands. Between 1996 and 2010 it is estimated that there will be 10% increase in housing. Coupled with easier access to mortgage finance, the continuous ‘off-loading’ of public assets to individuals, local housing companies and housing associations affects the courts’ future market.

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29 Owner occupation has grown by 25% over last 20 years - One-quarter of Scottish owner occupancy is the result of the ‘Right to Buy’ programme introduced 1980 (compared to one-tenth in England)
31 Scottish Abstract of Statistics (1998) internet site
32 ‘New Housing Partnerships’ policy announced by the Scottish Office in 1998; Prof. D. Macleman, Scottish Homes Board Member, (public authority quango) Housing and Regeneration presentation 4 March 1999
Effect of Scottish Economic Factors on Court Business

What was identified in Chart 2 was a fluctuation of caseload in the sheriff courts which appeared from Chart 3 to be distorted by a high proportion of Summary Causes and Small Claims. These seemed to coincide with peaks of unemployment. Sheriff court Ordinary Causes steadily rose from 1977, swelling more quickly once the effects of inflation and a recession, reflected in Balance of Payment figures, began to impinge on individual and commercial interests. Housing policy may have added to this upsurge, but lack of statistical data on court work makes detailed analysis difficult. Only in the last decade has the caseload begun to fall across all sheriff court jurisdictions, in line with financial recovery. The submissions of the 1927 Commission are therefore corroborated. The 1927 assertion that litigants who gravitate towards the Court of Session are more able to sustain cases through periods of economic instability, also appears to be corroborated. The proposition that workload rises in the Court of Session in times of prosperity has not been sustained.

Even if these conclusions had been adequate to explain fluctuations in court work, they would still be insufficient to explain why there has been no steady growth of business
over 25 years in line with the widening of the potential litigation market. Both internal and external factors affect access.

(i) **External Factors**

Referring back to criticisms of the 1927 Commission, it was argued at the time that the upsurge in the Scottish economy - increased trade output, home ownership and population - actually represented an 'alarming' decrease of 50% of potential court business (see page 2). Likewise, over the past 25 years it has been shown that the value of trade output rose, home ownership increased and both the percentage of persons of working age in employment and personal disposable income followed a demographic shift. This is particularly true during the last decade, which surprisingly parallels a decline in litigation (figure 9).

![Factors of Economic Growth](image)

Although the Commission produced explanations for apparent static levels of work in the Court of Session, it is difficult to accept that the growth of a nation's wealth correlates with a decline in litigation. There appears to be an unexplainable decrease in litigation despite economic, social and industrial expansion. Either the Scots have become a nation of pacifists, as once suggested, or, as seems more likely, the court
system is of declining relevance in resolving civil disputes, as suggested by political promotion of more ‘user-friendly’ alternatives.

The rise in Foreign Direct Investment also creates a new area of competition, a perspective which is not unknown to Scottish courts. In response to criticisms from the Scottish business community over delays and expense in the supreme court, and to halt the loss of actions to other jurisdictions, to the detriment of Scots law, a fast-track Commercial Court was initiated in Scotland in 1994. The workload of this court is increasing, in direct contrast to all other tracks. Addressing market needs therefore, allied to judicial commitment to step behind strategic posturing, has created a pocket of success within the Court of Session, but, as will be shown, this success is in danger of being eroded by traditional working conventions while the remainder of the system supports the status quo.34

(ii) Internal factors

Civil work is becoming marginalised as the ‘Cinderella’ of the court system. Judges in the Court of Session also adjudicate over serious crimes in the High Court of Justiciary on circuit, and form the final criminal appeal court for Scotland. A steep rise in serious criminal cases affects the allocation of civil court time. Where there are competing demands, civil work is given lower priority. Concomitant delays may explain the diminution of supreme court civil work.

The number of judicial days required for criminal cases (often drugs-related) doubled within a decade,35 (figure 10) and forced the Court of Session to offload a large proportion of civil work to the sheriff courts in 1985.36

34 see Chapters 6 to 9
33 Scottish Parliamentary debate 25 November 1999 Col 909 “There has been an international explosion of drugs-related cases”; Crimes recorded by police in 1971 – 181,000, recorded in 1997 – 421,000
36 Sheriff Court concurrent jurisdiction divorces 1st May 1984 Divorce Jurisdiction Court Fees and Legal Aid Act 198 Report on Use of Judicial Time in the Superior Court (the Maxwell Report) (1986) 40
Criminal work continues to impinge on time available for civil cases. The number of High Court trials trebled over the past 25 years.

The continuous high demand for 'criminal time' (figure 11) not only prompted an inquiry into the use of judicial resources in 1986 (see Chapter 4), but also a re-evaluation
of prosecution policy to reduce trials, and a preliminary sift of all appeals to the High Court.\(^{37}\)

To augment the judicial pool, retired judges have been employed intermittently from 1985\(^{38}\) and temporary judges from 1991.\(^{39}\) The continued use of the latter group was recently threatened,\(^{40}\) but was re-established after a short break,\(^{41}\) and there is a growing reliance on their availability.\(^{42}\) Increased judicial resources follows the marked rise in criminal workload (see Appendix 1\(^{43}\)). However, restricted analysis of civil time in 1986 showed that an average of 40% was wasted through late cancellations.\(^{44}\) There has been no available data on the use of civil time for the following 14 years, although Lord Cullen’s Review in 1995 indicated that a high proportion of ‘ghost’ bookings continue to clog court timetables, causing delays for other litigants (Chapter 5).

Since the civil caseload in the Court of Session was reduced by 60% in 1985, approximately 4,000 to 6,000 actions are initiated annually.\(^{45}\) The civil ‘clear-up rate’ (disposal) has been steady, even increasing in later years, but it is evident from the following graph that a backlog of unfinished cases must be accumulating (figure 12).

\(^{37}\) Scottish Office Statistical Bulletin (1999) From 1987 to 1997 there was a decrease in appeals dismissed, but an increase in abandoned appeals, wasting the allocation of judicial time; an average 45% were abandoned annually.

\(^{38}\) Law Reform Miscellaneous Provisions (Scotland) Act 1985 s.22

\(^{39}\) Law Reform Miscellaneous Provisions (Scotland) Act 1990 s. 35(3)

\(^{40}\) On devolution the Scotland Act 1998 partially incorporated the European Convention on Human Rights – from 20 May 1998 the Lord Advocate and from 1 July 1998 the Scottish Parliament and Scottish Executive must exercise power in a way consistent with the Convention [Scotland Act 1998 s.129(2)]

\(^{41}\) The question was whether a temporary judge was an independent judge in the objective sense. Clancy v Caird 10 December 1999 Report to the Inner House by T. G. Coutts QC (Temporary Judge) p.7

\(^{42}\) Clancy v Caird 2 April 2000 Inner House Extra Division.

\(^{43}\) List of Supreme Court judges sitting on the bench from 1933 to 1999

\(^{44}\) The Maxwell Report (1986) op.cit. 41. Analysis of judicial time allocated and used in November and December 1985

\(^{45}\) Civil Judicial Statistics. This represents an average of 10 to 12 new civil cases per Advocate per year if the workload was evenly distributed.
Since there is no audit of the supreme court’s caseload, there is no clear indication of the age of civil cases, nor the numbers which settle, nor the stage of resolution. Delay is therefore unquantifiable. Lack of data protects the status quo. The declining caseload may be a relief to those working with restricted resources, but if potential business is walking away from the courts, a culture of self-help is encouraged. This new development has been confirmed by recent submissions to the Scottish Parliament’s Justice and Home Affairs Committee.46 Where there is a choice, as in the foreign business sector, it may be exercised to the detriment of Scots law.47

Instead of servicing the market, the expense and delays of complex procedural alternatives are actually useful in regulating the court’s workload. There is therefore little internal incentive to react to periodic criticisms and judicial reports, since there is a fear that increasing the efficiency of the courts may open floodgates and swamp a heavily strained system. The problems within the current system are known and accommodated on a day to day basis. New procedures seriously disturb the status quo

46 Report of Justice and Home Affairs Committee Meeting 11 January 2000 “The majority of private debtors don’t use the courts, but make private arrangements. There is a 44% decline of commercial business avoiding courts”

and disrupt the flow of work in an already over-stretched environment. This thesis will also show that new and isolated procedures may have unexpected consequences. Continuity of judge and increased judicial commitment are key factors in faster resolution. But the traditional work ethic is difficult to change in isolated pockets. Consensual judicial commitment to wholesale reform is paramount. Reform otherwise is cosmetic and short-lived.48

Continuity cannot be guaranteed while judges are deployed as a priority on criminal circuit. The increasing criminal workload, the addition of devolution and human rights issues requiring quick resolution, and the sudden depletion of the judicial pool, means that judicial resources are strained. Court of Session civil work will be subject to increased delay. Pressure to offload all civil first instance work to the sheriff courts will be reinforced, following an argument that the supreme court should become relevant to the public only at a more esoteric level.49 However, marginalising civil litigation, particularly within the supreme court, weakens the source of developing law. Lord Hardie recently reiterated his predecessor’s view that a decision from the supreme court provides strong guidance to the lower courts.50 The status of the court also provides a strong backdrop for settlement negotiations. Interviews with both the legal profession and clients reflect confidence in the superiority of adjudication in the supreme court. Judicial comments reflect confidence in the superiority of presentation in the supreme court. It seems though that first instance civil work may gradually be squeezed out. The development of Scots law may be weakened by peripheralisation within the court system which reverberates on market choice.

48 see Chapters 3, 4 and 9 There is historical evidence that piecemeal and experimental reform has been repeatedly absorbed into established working practices.
49 Acting as an appeal court and constitutional court in deciding devolution and human rights issues.
Political and Legislative Intervention

The First Minister of the new Scottish Executive supports the distinctiveness of Scots law

"Law is the reflection of the spirit of the people and so long as the Scots are conscious that they are a people they must preserve their law." 51

Preserving and strengthening the development of Scots law means addressing the relevance of court resolution to the public. One of the first acts of the new Parliament in 1998 was the establishment of a Scottish Executive Justice Department, headed by a Minister for Justice "to deliver better co-ordination...... of policy on civil and criminal law." 52 However the Department’s Justice and Home Affairs Committee has mainly concentrated inquiries into criminal matters. Correspondence with the chairperson confirms that reform of civil justice is currently a low priority issue, despite representations to the committee that part of the problem with civil justice has been ad hoc reform. 53

The Chairman of the Scottish Law Commission, one of the most voluble judicial critics of defects within the system, called for a radical review and overhaul of the litigation service in 1995, 54 the response to which was a local judicial inquiry into the administration of Outer House business. 55 A wider review has not taken place.

51 Lord Cooper as quoted by the First Minister 8 July 1999 Law Society of Scotland Conference
52 First Minister Mr. Donald Dewar MSP Law Society of Scotland Conference 8 July 1999
53 Scottish Consumer Council, Deirdre Hutton, Official Report of Meeting of Justice and Home Affairs Committee 11 January 2000, (in the Chair Deputy-Convener Gordon Jackson)
The lack of political enthusiasm for a wide-ranging review of civil litigation reflects the lack of enthusiasm within the judiciary and legal profession to acknowledge and investigate the scale of the crisis and overhaul a system increasingly pressured by its own inefficiencies.

The repetition and recurrence of problems may suggest that the deficiencies of high cost and delay are the price which society and individuals pay for perfect products - if these are in fact what are produced. If these are not what are produced, it is an uncontrolled sector of public service. Instead of reinforcing and developing legal rights, courts have become very expensive settlement centres, open to a diminishing number of clients.56

"If the Scottish legal system cannot adequately serve the interests of all Scots and all of Scotland then it does not deserve to survive as a separate system."57

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56 The Hon. Lord Cooper in 1954 criticised the complexity and slowness of Court of Session procedure, suggesting that cheapness and simplicity might often be preferable to expensive technical perfection. Defects in the British Judicial Machine (1952-54) 2 Journal of the Society of Public Law Teachers 91
Chapter 1

Chart 1.1

Total Court Actions Initiated in Scotland 1972 to 1997

Number of Actions Initiated

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Chapter 1

Scottish Actions Initiated in the Sheriff Court 1927 - 1997

Number of Actions Initiated


Years

0 20000 40000 60000 80000 100000 120000 140000 160000

Small Claims
Summary Causes
Small Debt Court
Sheriff Court Ordinary
THE AIMS and REALITIES of LITIGATION

"Our law cannot stand still if it is to remain an acceptable rule of conduct amid rapidly changing human relationships. It must doubtless bring original thought to bear on its new problems; but original thought can be a dangerous and dubious guide and may lead different minds to surprisingly divergent and not always equitable solutions unless it is brought to the test of fundamental principle."  

The Dichotomy - Legal Principles and Market Principles

What 'fundamental principles' underpin public centres of dispute resolution, and do these evolve through or drive reform initiatives?

Civil justice systems throughout the common law world are currently converging on a seemingly consensual movement of radical reform. General debate which addresses unmet needs for access to justice within each legal system, and the constraints placed on that system by cost-effective strategies of a modern public service, reveal threads of tension which interweave a tapestry of constraints and demands, balancing competing legal principles with market principles. Sir Jack Jacob has stated

"Like truth, civil justice has many facets - cultural, historical, moral, social, economic and administrative as well as legal and others besides." 4

2 Unmet need was defined by the Royal Commission on Legal Services in Scotland (1980) Cmd.7846 (The Hughes Commission) as geographical and psychological inaccessibility, public inhibition, lack of knowledge of rights and procedures, and the availability of alternatives at p.21
Therein lies the dichotomous pull between two governing forces - law and economics. Legal principles evolve within a social context, not in isolation. They are an end result of these different facets - not an entity. Therefore the resolution of disputes through application of the law reflects and is driven by economic and social pressures.

To presume that one view can be examined in isolation is to deny the fabric of a complex society. A comparison between the aims of a civil justice system and the needs and expectations of those affected by it - individuals, commerce, society, the legal profession, administrators and government - reveals complete disjunction between the utopian ideal of an open-ended demand-led system, built on an edifice of legal principle, and constrained adjective realities of a public service which have been likened because of deficiencies to

"not only a wart on the face of the administration of justice, but a cancer eating at the heart of it".6

Lord Cullen reinforced the notion of fluidity required from legal systems in a recent Scottish reform report.7 He acknowledged that there is a perpetual need not only to address problems which form the gulf between idealism and reality, but also a perpetual need to seek improvements.8

The uniqueness of the Scottish legal system, preserved by the Treaty of Union 1707,9 is a source of national identity and pride, and has been jealously guarded.10 There

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7 Review of Business of the Outer House of the Court of Session (1995) (the Cullen Review)
8 The Cullen Review ibid. 47 para 6.15
9 An Act for the Union of the Two Kingdoms of England and Scotland 1706 6 Anne c.11 Art.XVIII "No alteration be made in laws which concern private right except for the evident utility of the subjects within Scotland"
10 The Cullen Review ibid. 7 para 2.9; Prof. R. Black (1982) op.cit.45; Prof. T.B. Smith Strange Gods: The Crisis of Scots Law as a Civilian System "We must not go a-whoring after strange gods"
has been no automatic adoption of other jurisdictions’ reform strategies. In fact, history has shown that there is an antipathy towards some simply because of their source.\(^{11}\)

The current English court reform programme (see Chapter 9), recommended in part for Scotland by the Cullen Review in 1995, seems to have been rejected by the Scottish supreme court judiciary, at least for the time being. However, the fact that a "\textit{quiet but enormously significant revolution}"\(^{12}\) is taking place throughout the common law world gives credence to the fine balance between both 'access' and 'efficiency' strategies in modern, competitive and cost-conscious societies.\(^{13}\) The legal edifice is constantly evolving to mirror the culture, traditions, history and underlying assumptions of the people it serves.\(^{14}\) This sculpting process is influenced by a range of different forces.

Proposals by the Scottish Office\(^{15}\) point to a marked enthusiasm for controlling excessive drains on the public purse.\(^{16}\) Effective targeting of resources now includes the encouragement of community-based alternatives to court resolution, and restructuring the legal aid system\(^{17}\) (see Chapters 1 and 10). Also the modern customer-oriented ethos of 'client care'\(^{18}\) acknowledges that a legal system does and

\(^{11}\) Prof. T. B. Smith, Civil Jury Trials in Scotland - an Assessment (1964) 40 Virginia Law Review 1076
\(^{12}\) Prof. P. Sallmann, Managing the Business of Australian Higher Courts (1992) 2 Journal of Judicial Administration 89
\(^{13}\) Lord McCluskey (1990) ibid. 178; Independent on Sunday 17 September 1995 “If you don’t like it I’ll see you in court”
\(^{14}\) Prof. D. Edward (1986) Society of Solicitors in the Supreme Court of Scotland (SSC) referred to by Lord President Hope in From Maastricht to Saltmarket (1992) SSC Biennial Lecture 5
\(^{15}\) Since parliamentary devolution the Scottish Office is renamed the Scottish Executive
\(^{16}\) Mr. D. McLeish, as Home Affairs Minister Scotland (Pre-devolution) Access to Justice - Beyond the Year 2000, June 1998, 3 (Government internet site)
\(^{17}\) Mr. D. McLeish ibid. It is intended that increased civil legal aid will be available from cost savings in the revamped criminal legal aid system.
\(^{18}\) Announced 9 February 2000 a joint Cabinet and H.M. Treasury initiative - a new consumer-focus for public service, the key being to become more responsive to consumers’ needs, introducing ‘Learning Labs’ as pilot schemes to take account of views of front-line staff and “to suspend the rules that stifle innovation” (government internet site); Davis, Christensen et al The Client as Consumer (1998) 148 New Law Journal 832
should exist to serve the public.\textsuperscript{19}

The publication of Citizen Charter standards by the government in 1991 was aimed at modernising all public services in response to the needs of the people who use them. While individual Court Charters are published for England, Wales and Northern Ireland, in November 1991 the Scottish Lord Advocate published the Justice Charter for Scotland (see Appendix 2.1), covering a wide range of court, prison and police services. As far as litigation is concerned, the emphasis is on accessibility - "\textit{court procedures should not be needlessly complicated and should take account of users' needs}".

From October 1998 the U.K. Cabinet Office has been promoting a new charter programme 'Service First' which awards Charter Marks, aimed at encouraging improved service delivery across the public sector as part of 'Better Government' initiative. Principles of efficient public service, "\textit{highlighting the importance of accessibility, co-operation and innovation,}"\textsuperscript{20} underpin recent initiatives which set standards of

- **Responsiveness** by research on public views of services, "\textit{creating a new legal basis to underpin people's rights to know about public services}" through publication of performance within key public services
- **Quality** by development and publication of new charters to improve quality and consistency, also using new best practice guides and networks
- **Effectiveness** by promulgating criteria for Charter standards
- **Working Across Sectors** by promoting effective partnership with local government and voluntary sectors to facilitate use of public services; consultation and evaluation of effectiveness

\textsuperscript{20} Service First - The New Charter Programme. The Cabinet Office 1998 Executive Summary (Cabinet Office internet site)
A broader U.K. White Paper was published in March 1999,\textsuperscript{21} complicated by the devolved legislative competency of the new Scottish Parliament from 6 May 1999. However the impetus for increased openness and accountability in the Scottish public sector was re-affirmed in a Concordat between the Cabinet Office and Scottish Administration,\textsuperscript{22} which formalised a framework of co-operation and mutual commitment to the U.K. 'Modernising Government' campaign. The charter programme is now incorporated into Scottish administration.\textsuperscript{23} Since the goal is to "make services that are easier to use for the individual and that fit the way people live their lives today,"\textsuperscript{24} political expediency\textsuperscript{25} is one important driving factor in reshaping a public resolution service – although the 1991 Scottish Justice Charter has not been updated.

Another political force for change is the current movement towards increased access to information held by a wide range of public bodies,\textsuperscript{26} which combines new levels of scrutiny and accountability with a presumption of openness. However, experiences in other jurisdictions where there have been attempts to break through established organisational culture to give access to information have been "depressing."\textsuperscript{27} It remains to be seen whether the new Freedom of Information Bill is rhetorical or useful in giving "a better view of our justice system to the public",\textsuperscript{28} adding pressure to address deficiencies within the court systems.

\textsuperscript{21} Modernising Government March 1999 Cmd.4310, aimed at creating incentives and financial rewards for public servants in order to encourage a new focus on efficient service

\textsuperscript{22} In line with principles set out in Memorandum of Understanding between the Cabinet Office and the Scottish Administration; Concordat para 25 "The Charter Mark award scheme continues as a U.K. wide scheme"

\textsuperscript{23} The First Charter Mark awards, presented on 23 August 1999 in Scotland, are aimed at "encouraging excellence in public service" Minister for Finance Mr. J. McConnell, MSP, Press release (Government internet site)

\textsuperscript{24} P. Kilfoyle, Public Services Minister, A Guide to Quality Schemes for the Public Sector (1999) 1


\textsuperscript{27} P. Gallie, MSP, Justice and Home Affairs Committee Official Report of Meeting 6 16 February 2000 Col.794, discussing Canadian experiences in creating a culture of openness and accountability.

\textsuperscript{28} P. Gallie meeting 16 February ibid. Col.992
A key source of procedural reform lies within the court system itself. In Scotland Court of Session judges have wide statutory power to reform, regulate and prescribe court procedure and practice, not only within the sheriff courts through the Sheriff Court Rules Council, but also within the Court of Session. In the latter jurisdiction and within their remit, resources are to be allocated

"with a view to securing that causes coming before the Court may be heard and determined with as little delay as is possible, and to the simplification of procedure, and the reduction of expense in causes before the court."  

Whether reform is initiated by politicians or directly by the supreme court, a lack of cohesion and co-ordination of underlying principle sustains the disjunction between idealism and reality, and defeats a common purpose – efficient and effective service within the community. In a pincer-movement of reform, the needs and expectations of the public and politicians will doubtless colour the agenda for change. The legal profession will influence reforms in practice. But it is the judiciary who are pivotal in reconciling disjunction between the aims and realities which threaten effective service.

Lord Cullen’s 1995 Review of Outer House administration followed a view seemingly prevalent across the common law world - that judicial supervision of court procedures exposes expensive, wasteful and dilatory practices. In other jurisdictions reform has also been a judge-led attempt to bridge the gulf between the acknowledged aims and the more intangible unmet needs and expectations. There have been continuous attempts to wrest control of the pace and cost of litigation from

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29 Court of Session Act 1988 c.36 s.5, Power to regulate by Act of Sederunt (delegated legislation) stems from Acts of the Scottish Parliaments (APS) II 371 c.10, 1540 c.93
30 Court of Session Act 1988 c.36 s.6
31 see page 1
32 Mr. Justice D. A. Ipp, Reforms to the Adversarial Process in Civil Litigation (1995) 69 Australian Law Journal 707 There is "a strong move led by the judiciary in each country to extend the judicial power of intervention"
33 Evaluating needs is a balance between subjective and objective elements, and needs is a relative concept Prof. M. Zander Legal Services for the Community (1978) 274, referred to by A. A. Paterson et al in The Legal System of Scotland (1999) 284
parties, and thereby address deficiencies of complexity, delay, expense, inequality and lack of informed choice.\textsuperscript{34} It has been argued that a proposal to restructure process involves refinement of adversarial legal principles, around which the entire legal profession has been trained and organised for centuries.\textsuperscript{35} The profession's defence of the adversarial ethos has at times been interpreted as conceptual, protecting vested interests, notwithstanding a duty to protect individual client's interests.

The dichotomous pull between legal and market principles converges on individual rights to an unconstrained search for and presentation of truth and the current emphasis on 'doing justice'\textsuperscript{36} between the parties\textsuperscript{37} and within the wider community. Increasingly, finite resources (both private and public) define and constrain access to complex procedures. For example, Lord Woolf M.R. recently endorsed estimates that 50% of the population cannot afford to pursue claims for medical negligence.\textsuperscript{38} He argued that although it is of high constitutional importance to facilitate the public's access to the court system,\textsuperscript{39} this access is denied by the machinery within the system:

"All too often the system creates procedural obstacles which inhibit (the litigants) ability to attain justice"\textsuperscript{40}

Providing 'quality' justice therefore involves simplification of process and the

\textsuperscript{34} The Hughes Commission (1980) op.cit. 21 and 203 para 14.2
\textsuperscript{36} The Cullen Review op.cit. 3 para 1.5; Access to Justice Interim Report, Chairman Lord Woolf (The Woolf Report) (1995)214; Lord Gill (1995) op.cit. 131
\textsuperscript{37} Fairness and equality of access throughout an adversarial process
\textsuperscript{38} Lord Woolf of Barnes, M.R. Justice After the Millenium, Presidential Address to The Holdsworth Club (1997) 4 - over 90% of damages for medical negligence are pursued with legal aid assistance, under half the population are eligible for Legal Aid, therefore 50% of medical negligence claimants are denied access to justice.
\textsuperscript{39} It is a primary responsibility of good government to provide a civil justice system which maintains and advances the rule of law and furnishes the means to secure legal rights and enforce legal duties. Lord Woolf (1997) ibid. 72
\textsuperscript{40} Lord Woolf (1997) ibid. 4
promotion of proportionality between costs and claim values,\textsuperscript{41} with judges taking the central role in bridging the gulf between aims and reality, balancing speed and resources with economy and accuracy.\textsuperscript{42} Translated into legal practice, it involves a fundamental shift of administrative responsibility from litigants to courts in an attempt to limit the procedural complexities, time and costs involved. These are not new concepts in Scotland, and in particular were repeatedly addressed and actively promoted by the Grant Committee in 1967\textsuperscript{43}, the Kincraig Committee 1979,\textsuperscript{44} the Hughes Commission in 1980,\textsuperscript{45} the Maxwell Committee in 1986,\textsuperscript{46} and the Cullen Review in 1995 (see Chapter 4).

**Aims of a Civil Justice System**

Lord Hope defined a civil justice system as

\[\text{"that vast arena in which disputes of fact and law between individuals, corporate bodies and state are resolved."}\textsuperscript{47}

This definition reflects an underlying assumption that the primary purpose of the

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\textsuperscript{43} The Sheriff Court, Report by the Committee chaired by the Rt. Hon Lord Grant Cmnd 3248 (the Grant Report) (1967) 10 para 28 - the committee stated that the key to their remit was “changes to secure more speedy, economical and satisfactory dispatch of civil and criminal business”

\textsuperscript{44} Kincraig Consultative Document on the Report of Procedure in the Court of Session in Personal Injury Litigation (1979) chaired by Lord Kincraig (the Kincraig Report) The remit focused on expeditious and economic disposal, the need for simplification and the court control over the conduct of the parties p.16 “the court ought in the interest of the parties to exercise a stricter control over the proceedings, and timing of them, with a view to cutting out unnecessary delays” 16

\textsuperscript{45} The Hughes Commission (1980) op. cit. 206 para 14.9 “A pre-trial review might be suitable for all or at least a wider range of actions”, 205 para 14.7 “the solution may be for the court to take a more active role in controlling conduct of the case than traditional in our brand of adversarial procedure.”


\textsuperscript{47} Lord President Hope (1992) op.cit. 7
system is the peaceful and effective resolution of conflicts within an adjudicative process, securing legal rights and enforcing legal duties. Resolving disputes has been defined as a cardinal function of the State. Closer analysis reveals the diverse civic roles fulfilled through the courts:

- to set down a rule of law available to all
- to facilitate and promote negotiation and settlement
- to create precedents for resolution in the shadow of adjudication
- to publicise and apply key legal and political values and norms
- to modify behaviour with punitive costs
- to act as a brake on powerful interests
- to raise standards of care, for example industrial safety
- to introduce a greater awareness of legality in public administration
- to act as a debt-collecting agency

Lord Mackay of Clashfern set out the standards which a civil justice system should

50 Sir Thomas Bingham (1994) op.cit. 5
51 Sir Thomas Bingham (1994) op. cit. 5
52 Pilgrims Process - Defended Actions in Sheriffs Ordinary Court (1995) Scottish Office Central Research Unit (CRU); The Woolf Report (1995) op.cit. 5 para 7(a) "the philosophy of litigation should be primarily to encourage early settlement of disputes"; The Cullen Review (1995) op.cit. 8 para 3.38 "The fact that these (settled) cases were the subject of court procedure no doubt contributed to their disposal"; Personal Injury Litigation in the Scottish Courts (1995) 51 para 7.29
54 Professor Owen Fiss, Against Settlement (1984) 93 Yale Law Journal 1085
55 C. Glasser (1993) op. cit. 308
58 Lord Woolf of Barnes, M.R. (1997) op.cit..2 The example given is the raising of industrial safety standards improved through personal injury claims at work.
59 Lord Hope (1992) op.cit. 31
provide - all of course on a cost-effective basis.

- impartiality
- compulsion
- finality
- potential for certainty

These ideals create the blueprint for quality justice. The underlying presumption is that access is indiscriminate, and freedom to consume is a dimension of justice. However the reality is that access, which is a fundamental right of citizenship, is restricted to a diminishing number of individuals - those who qualify for legal aid, are funded by insurance companies or unions, or those who search out speculative fee representatives. The fall in Scottish court caseloads over the past few decades may reflect the diminishing number of litigants who can afford to invest an inestimable amount of money and time in a complex system of procedural paths and diversions which can be used to create and sustain procedural obstacles. For instance, the Scots principle of giving fair notice of a case to the opposing party involves reciprocal adjustment and amendment of pleadings, intending to clarify and distil the issues in dispute. In reality, these facilities can be used to prolong and wear down opponents, at times adding complexities which are not central to the case, and also creating "clever pleading points".65 Legal principles which are intended to protect legal rights, potentially have opposite effects to those intended, if unmonitored. The fact that the judges cannot take the initiative in policing abuses contributes to continued abuse. As Sir Thomas Bingham said

65 Lord Gill (1995) op. cit.134; See Chapter 4 - comments by Lord President Rodger, Lord Cullen, Lord Gill, Lord Morton of Shuna and Lord Prosser
"It is no use having the best jurisprudence in the world if those who need it cannot afford to tap into it."

and

"It is no use offering high quality goods in the shop window if the hungry cannot afford to buy." 66

The Realities of the Civil Justice System

Few cases actually reach trial,67 although, as Twining states, our civil processes are based on

"a statistically-skewed court-centred thinking and discourse .......deeply ingrained in our legal culture".68

We must therefore question whether the current legal machinery provides the services required by its clients.

- Are the decreasing caseloads a result of inefficiencies of the system which create barriers to adjudication?
- Is there a lack of 'market reality' in the failure to recognise unmet needs and a lack of information which detracts from informed choices?69
- Is court process hijacked by litigants merely as a bargaining tool in negotiation with no intention to reach trial?
- Is delay inherent and functional within the system, serving the interests of many litigants, their representatives and the administrators of court business?
- Are delays and expense impervious to reform?

66 Sir T. Bingham (1994) op. cit.
67 Royal Commission on Civil Liability and Compensation for Personal Injury (1978) Cmnd 7054 (the Pearson Commission) - 17% of writs issues resulted in proof; Pilgrims Process (1995) op. cit. 10 para.3.10 - of 1209 defended actions 5% were adjudicated; Personal Injury in Scottish Courts (1995) op. cit. Table 3 p.30 - 5.1% adjudicated in Sheriff Court, 2.9% Court of Session Ordinary Procedure and 3.1% Optional Procedure; The Cullen Review (1995) op.cit. 18 para. 3.38 - 5.7% reached proof
These questions unearth multiple problems within a monopolistic system which has no reason to consult clients' needs until confronted with high levels of dissatisfaction in an increasingly competitive and financially-constrained market.\(^{70}\) The growth of an Alternative Dispute Resolution (A.D.R.) movement can be seen as a further challenge to the legal monopoly. However, until reforms impinge on daily working practices there seems to be little incentive to contemplate market reality. This means that generally clients' expectations are rising faster than client care initiatives,\(^{71}\) which is perhaps not surprising given that 40% of Scottish lawyers are sole practitioners in a highly regulated profession. Time, as well as finance, is in short supply.

To save the law becoming

"an esoteric cult monopolised by a professional oligarchy"

Lord Justice General Cooper believed that it should be

"saved from over-refinement by being constantly brought into contact with everyday common sense." \(^{72}\)

In other words, the legal machinery should not be run solely for those working within the system, but take account of the views and needs of community it serves. The Legal Services Ombudsman consistently promotes a more open and consultative approach to client care and information, but equally consistently expresses concern over resistance to change.\(^{73}\)  Given that 34% of complaints against the legal

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\(^{69}\) The Hughes Commission (1980) op.cit. 21  
\(^{70}\) The Times 24.November 1995; C. Glasser, The Legal Profession in the 1990s - Images of Change (1990) 10 Legal Studies 4  
\(^{71}\) Interview with Legal Services Ombudsman February 19 1999  
\(^{72}\) Trial by Jury in Scotland: Is there a Case for Reform? Lord Cooper's Selected Papers, 2nd edition (1957) 59  
\(^{73}\) Scottish Legal Services Ombudsman Annual Report 1997. and news conferences 14 May 1998 and 8 June 1999 in which he expressed a need for his office to review all complaints received by the Law Society of Scotland and the Faculty of Advocates
profession are based on ‘lack of communication’ it seems that there may be an unwillingness in some quarters to address the gap between expectations and reality - an unwillingness which colours the public’s perception of the profession, fuels criticisms of vested interests, and affects public confidence in the civil justice system.

Identifying a Gap in Service Provision

What are litigants’ realistic expectations - a Rolls Royce adjudicative system or an early analysis of a problem with informal appropriate resolution? There is surprising evidence from a study involving over 1000 recent litigants.

- 8% want a full trial
- 23% prefer to sit around a table with an expert making the final decision
- 53% prefer to have a round-table discussion, making the decision themselves

From this ‘market survey’ it does seem that some of the ostensible aims of the system differ from the aspirations of clients. There is evidence from the same source that public confidence in court process is dented by experience – it was found to be cumbersome, slow, complex, and vulnerable to manipulation. These results not only reveal unmet needs but also fundamentally mismatched needs, as Twining observed. Approximately 5% of cases reach full trial, corresponding, it would seem, to clients’ intentions.

There seems to be a "dearth of information" on the views of Scottish litigants. The Civil Judicial Statistics currently provide only throughput ('turnover') statistics which do not lend themselves to meaningful analysis. The Scottish Executive Central Research Unit periodically commissions studies on aspects of legal services.

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75 National Consumer Council/BBC Law in Action Survey May (1995) 26 Over 8,000 telephone calls were made to trace a sample of 1019 litigants involved in a court case within the previous three years.
76 NCC/BBC survey (1995) op.cit.32 - the system was perceived as: outdated (73% of respondents), slow (77%), complicated (74%), and easy to manipulate (73%)
The Scottish Consumer Council, Law Society of Scotland, and Scottish Legal Aid Board have also carried out their own research. Independent Commissions and Committees gather information. The accumulation of data is therefore piecemeal and specific to the remit. The lack of objectively co-ordinated empirical data on the legal system, ignoring a recommendation by the Hughes Commission in 1980, leaves a gap for anecdotal evidence which is necessarily coloured by differing perspectives and stereotypical prejudice. There is therefore no consensus for change. There is no co-ordinated effort to evaluate the needs of the community the system serves. There is no common knowledge of the gap between the aims and realities of this public service.

Addressing the Gap between Aims and Realities

A prevalent theme pervades reports and surveys, both in Scotland and in other common law jurisdictions - that the civil litigation process has become slow, unwieldy, expensive, and fraught with delays which prejudice a right to justice. With minimal government support, the growth of the A.D.R. movement represents ad hoc informal attempts to address litigants' unmet needs but has not been widely promoted in Scotland. Also, while a litigant seeks 'individualised' justice, society requires the certainty and consistency of published boundaries of behaviour. A.D.R. is therefore criticised as a privatisation of fundamental rights which sets out no precedents, leading to a gradual erosion of law which serves the wider

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78 Hughes Report (1980) op.cit. Chapter 20
80 The Hughes Commission (1980) op.cit. para 14.7; The Pearson Commission (1978) op.cit. 37 "the adversarial approach emphasises rather than reduces the areas of conflict."
81 Justice D. A. Ipp (1995) op.cit. 707 "Most of the problems are caused by the failure to adapt aspects of the adversarial process to modern conditions. Changes to the legal system which do not affect that process will be cosmetic only."
82 The Woolf Report (1995) op.cit. para 18.1 "I have concluded that the unrestrained adversarial culture of the present system is to a large extent responsible for the culture of the present system not conforming with principles identified in the Report"
83 Lord Mackay of Clashfern (1994) op.cit. 73-4 "This demand (for ADR) is created by problems which people perceive in the current system"; Sir Alan Peacock, Costs of Justice: Economic Aspects (1994) 43 Hume Occasional Paper 25
84 W. Twining (1993) op.cit. 383-5 on Bentham's Scotch Reform (v Works 35)
The Hughes Commission argued that since government created a plethora of rights, particularly since the War, it has a moral responsibility to facilitate the exercise of these rights and obligations.\textsuperscript{85} However, it has been observed that it is only the most determined litigants who create precedents for the rest of the community by tenaciously pursuing a claim to judgement.\textsuperscript{86} The high settlement rate, short of adjudication (95\%) means that procedural tactics not only facilitate settlements, but also sift and filter court work to a distillation of cases which roughly match available resources. Courts in effect provide a backdrop for settlement. The rationalisation of settlement behaviour has never been examined in Scotland,\textsuperscript{87} although Lord Hope acknowledged that

\begin{quote}
"the rule of law...affects a wide range of disputes about rights, duties and obligations which may need to be resolved by the court"\textsuperscript{88}
\end{quote}

Since it has been shown through pertinent research that there is dissatisfaction with the litigation process, that few cases reach adjudication, and alternatives are given relatively little co-ordinated support it seems that twenty years after the Hughes Commission reported, we may still say that there is

\begin{quote}
"a wide gap between the needs of large sections of the public for legal services and their ability to satisfy these needs".\textsuperscript{89}
\end{quote}

Informing and impacting on this gap are the conflicting agendas of both the users and providers of legal services - litigants, representatives, administrators, the judiciary and government. Structural, philosophical and financial changes affect all their perspectives, and radical reform of the mechanics of civil litigation is seen in...
some quarters as a challenge\textsuperscript{90} for those who are "resilient and adaptable"\textsuperscript{91} enough to accept "a new spirit of realism" and address market demands.\textsuperscript{92}

In other quarters, there is scepticism of the success of any fundamental reforms\textsuperscript{93} given the ingrained legal culture and working practices which support the status quo,\textsuperscript{94} irrespective of clients' needs. Arguably it is only radical reform, swept in by a potent combination of consumer demand, political clout, judicial support, financial constraints and the introduction of quicker and cheaper options which may influence that culture.\textsuperscript{95} The history of the failure of previous reforms shows that piecemeal amendment encourages sabotage,\textsuperscript{96} and the traditional status quo survives. Radical and wholesale reform which strikes at the underlying ethos of a system to sweep aside comfortable conventions has a greater impact. Which is more effective in the long term - the surgeon's blade or the continual hacking of a blunt knife? The contemporary English reforms (see Chapter 9) represent a radical break with established tradition from April 1999. In a sense it is a gamble although the irreversible nature of the reforms creates an opportunity for all parties to refocus and mould the legal machinery to be more responsive to a modern economic culture.

**Individual Litigants**

As far as the individual litigant is concerned, what does he or she expect from a legal

\textsuperscript{89} The Hughes Commission (1980) op.cit. 9 para 1.37
\textsuperscript{90} Lord Gill (1995) op.cit.133 "A resourceful and imaginative profession will always adapt to serve the system well"
\textsuperscript{91} The Challenge of Realism, Aspect (1996) 41 Journal of the Law Society of Scotland 1
\textsuperscript{92} Morton Fraser Milligan, Keeping the Client Happy (1996) 41 Journal of the Law Society of Scotland.23
\textsuperscript{95} Sir Jack Jacob (1987) op.cit 284 “The technicalities and complexities of the law have arisen and still hold sway not because they respond to the needs of justice but precisely because they have been for ages and still are acceptable practices irrespective of whether they serve the cause of justice.”
\textsuperscript{97} R. Elliot, Civil Procedure: Will Woolf Work 1995 SLT (News) 264 “The traditional approach of the English legal establishment faced with radical reform is to welcome it in general terms, but to frustrate and undermine it in practice with a plethora of limitations, exceptions and special situations until there is little left of the original process.”
system? It is usually assumed (mistakenly as we have seen) that individuals primarily initiate a claim with the goal of adjudication in mind.\textsuperscript{97} It is assumed that adjudication is hampered or thwarted by structural and procedural barriers causing the twin evils of cost and delay.\textsuperscript{98} There is therefore a great deal of weight placed on 'court efficiency' to create quicker and thereby cheaper access to judgement.

Other studies provide evidence that people are actually more concerned with the fairness of the process than about delays\textsuperscript{99} which can at times be advantageous to litigants (see Chapters 4 and 5). Scottish research\textsuperscript{100} also indicated that effective handling and the attitudes of advisers were more important to litigants than costs and contact time. Australian research\textsuperscript{101} showed a higher correlation between satisfaction and informed expectations than with delay. Conflicting reports highlight the importance of the judicial process gathering information from the community it serves.

"If...transformation is to be successfully achieved there must be brought to the task not only the wisdom and experience of the professional expert with his innate respect for stability and tradition but also the constructive criticism of the lay citizen, in whose efficient service every legal system must find its sole justification."\textsuperscript{102}

The search for viable performance indicators to measure success or client satisfaction with the standard of service is a source of ongoing debate.\textsuperscript{103} However, there is remarkable consistency of dissatisfaction with protracted and costly legal services in

\begin{footnotesize}
\textsuperscript{97} C. Glasser (1993) op.cit. 310  
\textsuperscript{98} W. Twining (1993) op.cit. 384  
\textsuperscript{99} Prof. M. Zander, Cases and Materials on the English Legal System (1993) 118  
\textsuperscript{100} Legal Studies Research Findings No.1 Legal Services in Scotland (1992) 10  
\textsuperscript{101} T. Matruglio, Plaintiffs and the Process of Litigation: An Analysis of the Perceptions of Plaintiffs Following their Experience of Litigation (1994) Civil Justice Research Centre 62 para 6.2  
\textsuperscript{102} Trial by Jury in Scotland: Is there a case for Reform? Lord Cooper Selected Papers (1957) 58  
\textsuperscript{103} Sir Alan Peacock (1994) op.cit.26; N. Lacey, Government as Manager, Citizen as Consumer. (1994) 57 Modern Law Review 554 arguing that measurable performance indicators are the ultimate test of democratic accountability; The Grant Committee (1967) op.cit.147 "There are no recognised standards of performance"; Prof. J. Resnik, Managerial Judges: The Potential Costs (1985) 45
\end{footnotesize}
studies ranging across jurisdictions, creating a "crisis of confidence."\textsuperscript{104} Compounding this dissatisfaction may be a difference between what the system is ultimately geared to providing - typically financial compensation - and what the client is seeking.\textsuperscript{105} In the recent survey, the main resolutions sought were:

- 32\% of litigants claimed they were seeking compensation
- 24\% wished to prevent recurrence of a problem
- 5\% wanted an apology
- 5\% wanted to publicly apportion blame

When offered multiple choice, their needs were:

- 40\% compensation
- 50\% prevention
- 17\% apology
- 10\% blame.

Recent research into the handling of complaints against solicitors\textsuperscript{106} mirror these divergent needs. When complainants to the Law Society of Scotland were questioned in depth on their expectations, the following results were noted:

\begin{itemize}
\item Standards designed to measure achievement in other fields cannot be transferred into the courtroom.\textsuperscript{721}
\item Public Attitudes To the Law Profession in Scotland (1979) Law Society of Scotland (1979) 6; Access to Justice Report, Change and Accountability in the Justice System (1994) 4 Journal of Judicial Administration 65 at 68
\item NCC/BBC Law in Action Survey (1995) op. cit. 20 and 23
\item S. O'Neil, P. Ribiero, Scottish Consumer Council, Complaints About Solicitors (1998)
\end{itemize}
Complaints to the Law Society of Scotland by Clients in 1997

<table>
<thead>
<tr>
<th>Outcome Sought</th>
<th>Percentage Requiring Outcome</th>
<th>Outcome Achieved</th>
</tr>
</thead>
<tbody>
<tr>
<td>Restitution</td>
<td>39%</td>
<td>unreported</td>
</tr>
<tr>
<td>Financial compensation</td>
<td>39%</td>
<td>16%</td>
</tr>
<tr>
<td>Apology</td>
<td>38%</td>
<td>12%</td>
</tr>
<tr>
<td>Disciplinary action</td>
<td>38%</td>
<td>8%</td>
</tr>
<tr>
<td>Fees Reduced or Refunded</td>
<td>37%</td>
<td>14% reduced</td>
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<tr>
<td></td>
<td></td>
<td>8% refunded</td>
</tr>
<tr>
<td>Explanation</td>
<td>32%</td>
<td>10%</td>
</tr>
<tr>
<td>Prevention of recurrence</td>
<td>17%</td>
<td>unreported</td>
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</tbody>
</table>

It seems therefore that clients’ needs within a dispute resolution process extend beyond what a court is set up to provide. A.D.R. would seem to be a viable and cheaper alternative, providing a more informal arena to discuss apologies and give reassurances. The Lord President of the Court of Session has already accepted that this trend should not automatically be discouraged. Although the Law Society of Scotland promotes alternatives through the organisation of C.A.L.M. courses for solicitors, set fee structures for that service reinforce the more formal and complex adjudicative court process. Government proposals to extend legal aid to Community Legal Centres while limiting recoverable costs from the Scottish Legal Aid Board (see Chapter 4) may provide sponsored avenues for informal dispute resolution. However the slow start to a Mediation Project run by the Citizens’ Advice Bureau, and the collapse of the Scottish branch of the commercially-organised Centre for Dispute Resolution indicate a reluctance within the community to depart from the might of legal prerogatives and professionalism.

107 Scottish Consumer Council research (1998) op.cit. 51-2 (Note: 23% complaints were not upheld, 56% were unhappy with the outcome, 45% were very unhappy)

108 Lord Rodger of Earlsferry, Opening remarks at The David Hume Institute Conference The Reform of Civil Justice 1 June 1998
Commercial Expectations

As far as the businesses are concerned, there is an increasing demand for legal and financial certainty.\textsuperscript{110} Lord Mackay of Clashfern noted a growing tendency towards commercial fee bargaining and competitive tenders,\textsuperscript{112} which reflect "a definite shift in power to the client."\textsuperscript{113} As far as the business community is concerned, legal fees are the same as any costs to the business, causing disenchantment with the hourly rate system of payment traditionally charged by the legal profession, and any protraction of the litigation process.\textsuperscript{114} Commercial and repeat users are therefore increasingly jaundiced\textsuperscript{115} by the perceived deficiencies of the system and disruption to their working practices. They must inevitably balance the disadvantages of litigation with advantages of settlement on a cost/benefit ratio.\textsuperscript{116}

A culture of negotiation already exists at all levels of commerce and industry. Trade Associations, Federations and Chambers of Commerce report that generally "companies seek to avoid litigation and differences are resolved without formality".\textsuperscript{117} In England commercial firms have access to a CBI-sponsored conciliation process (CEDR), the London City Disputes Panel and the London County Court Mediation Project. The Commercial Court in London remits approximately 30\% of their cases to alternative dispute resolution, with little 'flowback' to the Court. The Director of CEDR acknowledges that litigation is a reflex response to disputes but this organisation is building a track record for quick and cheap resolutions,\textsuperscript{118} benefiting greatly from the overflow from the English

\textsuperscript{109} Supported by European Union funding which is renewable on an annual basis - interview with Deputy Chairman, Citizens' Advice Bureau Scotland 8 August 1999
\textsuperscript{111} Lord Woolf’s Address to the English Bar Conference 30 September 1995
\textsuperscript{112} Lord Mackay of Clashfern (1994) op.cit. 56
\textsuperscript{113} Financial Times 25\textsuperscript{th} January 1994
\textsuperscript{114} Financial Times 25\textsuperscript{th} January 1994
\textsuperscript{115} Lord Woolf’s Address to the English Law Society Conference 7\textsuperscript{th} October 1995 Civil Justice - What Needs to be Changed
\textsuperscript{116} B. Clark, Civil Justice and ADR (1995) SCOLAG (1995) 136; Personal Injury Study (1995) op.cit.51 para 7.29
\textsuperscript{117} See Appendix 1.2 for list of associations questioned by the writer
\textsuperscript{118} K. Mackie, Chairman of CEDR (Centre for Dispute Resolution), Alternatives to Justice, Costs of Justice (1994) Hume Occasional Paper 43
Commercial Court. However, as noted previously, an attempt to replicate this success with a CEDR branch in Glasgow has been unsuccessful. Centralised alternatives to commercial litigation are sparse in Scotland.

Speed is of the essence in competitive markets. Larger enterprises have the flexibility to test the efficiency of different jurisdictions. Different legal systems therefore become caught up in a ‘competition’ for legal business, and many innovative court procedures have been driven by the commercial community.\(^{119}\) The specialist track for commercial actions in the Scottish supreme court are fashioned to provide quick, consistent and efficient adjudication through proactive judicial management.\(^{120}\) (see Chapters 6-8). This forum is available to a specific band of actions "of a commercial or business nature".\(^{121}\) Currently therefore the needs of commercial interests are prioritised, arguably creating imbalanced access in a fragmented system.

Studies consistently show that businesses also dominate the litigation process in the lower courts,\(^{122}\) leading to the conclusion that the lower courts are used primarily for debt collection. This is borne out by Scottish research\(^{123}\) on the Sheriff Court's Summary Cause Rules which were introduced in 1976 following the Grant Committee's recommendations, and Small Claims actions from 1988 following the Hughes Commission Report. These procedures were originally aimed at increasing access for individuals who could represent themselves. Subsequent evidence shows that large firms and utility companies dominate these simplified procedures while

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\(^{120}\) J. McNeill, QC Commercial Actions in the Court of Session (1995) 5 Civil Practice Bulletin 2
\(^{121}\) Rules of Court of Session 1994 ch.17, r. 47.1
\(^{122}\) National Consumer Council, Justice Out of Reach (1970) throughout 6 County Courts 90% summons were initiated by firms or utility boards, 9% by individuals Study repeated in 1980 - 87% initiated by firms, 10.9% by individuals; M. Cain, Where are the Disputes A Study of a First Instance Civil Court in the UK (1983) 122; Touche Ross A Study of Debt Enforcement Procedures (1986) 8, 20 county courts - 67% of debt cases were initiated by companies against individuals; F. Harris, Dispute Processing and the Courts in Rural Areas Ph.D. Thesis, University of Exeter (1994) 97-98 Penzance County Court during 1980 - predominantly use by firms to sue individuals, noted by Prof. R. Cranston in Background Report to Access to Justice (1995) op.cit. 81
\(^{123}\) Debt Recovery (1980) op.cit.53-4 over 90% pursuers were utility companies and firms; The Hughes Commission (1980) op.cit. 176-177; Small Claims in the Sheriff Court in Scotland (1991) op.cit. study covering 6 courts - 92% large businesses and public utilities were pursuers
individuals remain largely in ignorance of their availability.\textsuperscript{124} The same findings are replicated across other jurisdictions where professionally-represented creditors are known to use small claims courts as State-subsidised debt collection agencies.\textsuperscript{125} Both Scottish and English research confirm that the act of raising an action may be a spur to settlement or repayment arrangements, stimulating resolution of disputes cheaply and efficiently for businesses. Within these jurisdictions an unrepresented defender is ill-equipped to compete,\textsuperscript{126} may be worn down and eclipsed by commercial opponents who repeatedly use the courts. An in-house Court Adviser is provided for unrepresented litigants in Edinburgh sheriff court by the Citizens’ Advice Bureau,\textsuperscript{127} but there is no assistance within the Court of Session, the assumption being that most clients are legally represented.

The Lord Advocate’s recent proposals\textsuperscript{128} to revise the financial jurisdictional limits for Small Claims and Summary Causes will increase commercial access to low-value fast-track procedures, and may alter litigating/settlement patterns in the lower courts. A higher percentage of small-value cases will be restricted to sheriff courts, freeing up supreme court time.\textsuperscript{129}

The Role of the Court

Although the legal system is structured to provide adjudication there is evidence that litigation is used as part of a negotiation and settlement process.\textsuperscript{130} Within adversarial legal systems the "procedural firefighting" observed by many judges,\textsuperscript{131}

\begin{itemize}
  \item \textsuperscript{124} The Hughes Commission (1980) op.cit. 175-6
  \item \textsuperscript{125} A. A. Paterson (1999) op.cit. 40-3
  \item \textsuperscript{126} H. Genn and Y. Genn The Effectiveness of Representation at Tribunals (1989) 241
  \item \textsuperscript{127} Financed on an annual basis by funding from the European Commission
  \item \textsuperscript{128} A Consultation Paper on Proposed New Rules for Summary Cause and Small Claim in the Sheriff Court, The Lord Advocate’s Office July 1998. The Justice Minister’s news release 12 August 1999 confirmed the claim limit for Small Claims may be increased from £750 to £1,500, and Summary Causes from £1,500 to £5,000, the latter figure also being the level of claim exclusive to the sheriff courts.
  \item \textsuperscript{129} By May 2000 the Lord Advocate’s proposals are at Committee Stage within the parliamentary process, with implementation expected by Spring 2001.
  \item \textsuperscript{130} Pilgrims Process (1995) op.cit. 38 para. 3.16; Personal Injury Study (1995) op.cit.51 para 7.29; The Woolf Report (1995) op.cit. 5 para 7(a); Genn, Prof.H., Hard Bargaining (1987) 1-10
  \item \textsuperscript{131} Lord Gill (1995) op.cit.131
\end{itemize}
and likened to a contest of strength between two armed champions,\textsuperscript{132} forms part of an elaborate settlement subculture.\textsuperscript{133} Late settlements in particular are held to be the primary source of delay and inefficient use of judicial time,\textsuperscript{134} disordering administrative timetables with concomitant costs and disruption to other litigants. Nevertheless there is a view that settlements ensure courts are not overloaded with requests for proof\textsuperscript{135} and providing opportunities for settlement forms part of the court's function of dispute resolution.\textsuperscript{136} The small number of adjudications could therefore be interpreted as a measurement of the court's success in their secondary settlement role.

However, describing non-adjudicated disposals as 'settlements' divorces the courts from investigating the consequences of 'procedural firefighting'. Lord Davidson\textsuperscript{137} has stated that procedural law reform can have "an effect no less profound" than substantive law reform, and there is both anecdotal and empirical evidence to show that procedural rules are used to prolong and complicate litigation.\textsuperscript{138} However, very little clarity can be achieved while there is no information or analysis on cases which leave the system prior to trial. It is research in this area which may show the legal system exactly where it succeeds or fails the litigants, and where efficiency-strategies will be beneficial.

How much of the ‘procedural firefighting’ is inconsequential rhetoric?  How many 'settlements' are fair or are forced?  How many litigants withdraw through sheer financial, psychological and physical exhaustion?  In common with many legal

\textsuperscript{132} The Trial Management Conference (1984) 23 No 4 The Judge's Journal 4 at 6
\textsuperscript{133} J. Herbert Jacob, The Structure and Rules in Judicial Progress, Justice in America ((1978) 200
\textsuperscript{134} The Maxwell Report (1986) op.cit. para 6.46; Lord Morton of Shuna (1995) op.cit.2
\textsuperscript{135} G. Davis, S. Cretney, J. Collins, Simple Quarrels (1994) 267
\textsuperscript{136} The Cullen Review (1995) op.cit.18 para 3.38
\textsuperscript{137} Lord Davidson (1992) op.cit. 131
\textsuperscript{138} The Kincraig Report (1979) op.cit.10 “Enquiry into the issue can be postponed unduly by the need to dispose of preliminary pleas” ; The Hughes Commission (1980) op.cit. para I4.7; Pilgrims Process (1995) op.cit. 39% closed records were amended, 17% debates were fixed but 2% heard (the majority discharged on the day), 49% sisted (5% sisted for adjustments); Personal Injury Study (1995) op.cit. para 7.34 “protraction is inimical to the interests of the pursuers and contributes to overburdening of court procedures”; The Woolf Report (1995) op.cit.27 para 6; The Cullen Review (1995) op.cit. para 3.6 - frequency of late lodgement of documents, para 3.11 - 70% diversions
systems before judicial intervention was accepted, we have very little information on the outcome of legal services. In Scotland it is even difficult to know when a litigant leaves the process,\textsuperscript{139} never mind why.

From the efficiency viewpoint also, lack of empirical data on settlements leaves a gap for anecdotal views which may detract from consensus. The court’s critical role in bridging the gap between aims and realities therefore involves initiatives to assess the breadth of that gap. For example, the Civil Justice Research Centre in New South Wales has begun to systematically study settlement patterns to provide information on the likely stages of case disposal.\textsuperscript{140} This is to assist the evaluation of caseflow management procedures which are aimed at encouraging early settlement, increasing court efficiency and reducing unnecessary delay and costs.\textsuperscript{141}

The Practitioner’s Role

Since a high proportion of costs are attributable to lawyers, generally charging an hourly rate,\textsuperscript{142} the legal profession are vulnerable to accusations that "late settlements equal rich lawyers"\textsuperscript{143} and "eleventh-hour settlements can keep lawyers going for two to three years".\textsuperscript{144} Both Kincraig\textsuperscript{145} and Grant\textsuperscript{146} reports referred to an "obvious lack of urgency" on the part of the profession. A recent Scottish Personal Injury Study\textsuperscript{147} corroborated these views and suggested that judges condone a culture of tardiness by repeatedly allowing extensions of time which coincidentally suit administration of busy courts. However, the contemporary Sheriff Court study to procedure roll were unnecessary, para. 3.18 – 135 out of the sample of 300 cases were subject to at least one amendment.

\textsuperscript{139} Personal Injury Study (1995) op.cit. 29 and 33
\textsuperscript{140} J. Baker, Who Settles and Why? (1994) Civil Justice Research Centre (CJRC)
\textsuperscript{141} J. Baker CJRC (1994) ibid .36 para. 4.5 The researchers suggest that there are measurable factors which relate characteristics of a case to stages of settlement
\textsuperscript{142} Scottish Legal Aid Annual Report (1994 -5) 5 - solicitors’ fees accounted for 71.7% of civil legal aid total of £21,648,002 compared to 70.7% of £11,9084,394 in 1990/91. The number of accounts received increased by approximately 25%, and case costs were the main reason for the significant rise in overall cost of legal aid
\textsuperscript{143} B. Clark (1995) SCOLAG op.cit.136
\textsuperscript{144} The Independent 12 October 1994 Taking the Heat Out of Settling Disputes
\textsuperscript{145} The Kincraig Report (1979) op.cit.16
\textsuperscript{146} The Grant Report (1967) op.cit.487 para 147
showed that judicial reluctance to refuse continuations for adjustment and amendment were also rooted in notions of fairness.

"Becoming tough on adjustment may penalise the client rather than the solicitor in many cases." 148

Bentham maintained that the complexities and expense of procedures and confusing technical rules of evidence were in fact "sustained mainly by sinister interests of lawyers and judges". It seems therefore that the accusation of vested interests is not a new one.149 A combination of Lord Cullen's references to increased case costs at a time when fee scales were static (para 3.3 and 3.7), the "practice of mutual indulgence between parties' agents" (para 3.6) and "unnecessary deferrals" (para 3.18), echo Kincraig in 1979 and the two recent Scottish studies. But whether this combination is attributable to premeditated financial manipulation by the profession, heavy caseloads or protracted working conventions is difficult to assess within a self-regulated system.150

Approximately 4,000 new civil cases are available to 400 Advocates per annum. Interviews with Faculty members point to an unequal distribution of work within this narrow band which compounds delays and late preparation for those with heavy workloads and encourages the creation of fee-building opportunities for those with a lighter caseload.

Taking the vagaries of human nature into account, the lack of impetus from the profession is arguably self-perpetuating. Since there are few final adjudications there is little motivation under the present system for any branch of the legal profession to waste precious preparation time on cases which may settle of their own volition.

147 Personal Injury Study (1995) op.cit, 52 para. 7.35
148 Pilgrim’s Process (1995) op. cit.13 para 3.27 researchers reported anecdotal evidence from Sheriff - Concern was shown about closing the Record before parties agreed they had finished adjustments.
149 Twining (1993)op.cit. 383 referred to Bentham’s Theory of Judicial Organisation and Adjective Law
Without early preparation there is no informed basis for settlement until the door of the court is in sight. Late settlements are therefore inherent to a system which does not compel, or at least encourage and reward, early preparation.

Compulsion, which runs against the professional grain, is difficult to execute. Both Lord Woolf and Lord Cullen pointedly emphasised that the ethos of cooperation and commitment are fundamental to the success of proposed reforms, confirmed by a recent warning from within the profession:

"The new system can only work if it has widespread support and goodwill of the majority of lawyers."\(^{153}\)

It has been pointed out however that

"Practitioners are not noted for their radicalism when it comes to reform of court procedure"\(^{154}\)

It has also been noted that a Bar which is isolated from commercial realities, with status and a secured monopoly, retards change, and there needs to be a major cultural shift from within the profession to respond to the market's needs.\(^{156}\) There is a fear that incentives for intransigence and "entrenched attitudes and spoiling tactics"\(^{157}\) may survive or restrict the pace of change, as the history of previous reforms can confirm. Additionally, it is noted that "lawyers are cool or hostile to large-scale law reform on principle" as familiar law is eroded and there is an extra

\(^{151}\) Lord Woolf's address to the Toronto Bar Association 6 September 1996 "Rules encourage change, but not enough to achieve it alone - change is needed also to the legal culture."

\(^{152}\) The Cullen Review (1995) op.cit.8 para 2.12

\(^{153}\) The Times 15 August 1995 This is not Justice for All - 2 lawyers, one from Scotland, one from England, commenting on the Woolf Report


\(^{155}\) C. Glasser (1993) op.cit..321

\(^{156}\) J. Taylor, MP, Parliamentary Secretary, Lord Chancellor's Department, An MP Mumbles (1995)

\(^{157}\) The Lawyer 24 October 1995, Issues on the Woolf Report
burden of learning. Close observers therefore argue that reform may be thwarted by self-interest rather than embraced by civic duty, and must therefore be resolutely policed by information technology and firmly applied sanctions. Two recent overseas studies conclude that it is possible to change an established legal culture, but only where there is commitment from within the system to change. This is echoed in Scottish commercial actions where the court has piloted a system of judicial supervision in co-operation with parties’ representatives (see Chapters 6-8).

Lord Woolf believes that the publication of Protocols, guidelines governing pre-litigation behaviour, will be highly influential in changing the legal culture in England and Wales. Allocation of court time there is dependent upon the state of preparedness by parties. In Scotland the Cullen review did not encroach into pre-litigation conduct, and since this review’s recommendations have not been implemented, there is no hint that the Scottish judges will follow English initiatives to police case preparation even before litigation papers are lodged in court.

However, to support a new spirit of co-operation Lord Cullen recommended the publication of guidelines as a precursor of increased accountability within the profession. This recommendation has also not been adopted. Scotland therefore retains a level of professional accountability promulgated in 1876. Counsel still have unfettered control of each case and are immune from claims of negligence. The cloak of immunity extends to a solicitor acting under counsel’s instructions, and is

158 Lord Davidson (1992) op.cit. 132
159 J. Goerdt et al Examining Court Delay, National Center for State Courts (1989)
J. Goerdt et al Re-examining the Pace of Litigation in 35 Urban Trial Courts (1991)
160 Published with the second part of his investigation: Access to Justice, Final Report (1996)
161 Lord Woolf’s Address to the Toronto Bar Association (1995) op.cit. By April 2000 there were two Protocols – for Clinical Negligence and for Personal Injury actions; The Cullen Review (1995) op.cit. 79 para. 10.16
162 Batchelor v Pattison & Mackersy (1876) 3 R 914 per Lord President Inglis (The Advocate’s)
“right is to conduct the cause without any regard to the wishes of his client, so long as his mandate is unreckoned, and what he does bona fide according to his own judgment will bind his client, and will not expose him to any action for what he has done, even if the client’s interests are thereby prejudiced.”
163 Batchelor v Pattison and Mackersy ibid, per Lord President Inglis “...undoubted special rule that when the conduct of a cause is in the hands of counsel, the agent is bound to act according to his directions, and will not be answerable to his client for what he does bona fide in obedience to such directions.”
triggered by counsel’s Written Opinion, a common ‘safe harbour’ practice according to interviewees.

Self-regulated discipline therefore polices the ethics of the Bar and agents in Scotland, but a key finding of this research is that the judiciary have no sanctions which impinge directly on representatives in the Court of Session. The reluctance to penalise clients for dilatory presentation of a case in court undoubtedly leaves a lacuna for procedural abuse. Conversely a forgiving attitude means that ‘in the interests of justice’ a client’s right to legal resolution is not frustrated by minor technical breaches. However continuous judicial frustration the level of abuse is evident (see Chapter 3):

“\[When a time is fixed by the Lord Ordinary it is rarely if ever regarded as in the least degree a peremptory order. When it elapses the cause is enrolled...some apology is stated, and time enlarged, and this often happens repeatedly. From such irregularities spring much waste of time and attention of the judge, a great deal of frivolous delay in the conduct of the cause, frequent unnecessary attendance of counsel and agents....and an addition far from being inconsiderable to the expense of a lawsuit.\]”\(^{164}\)

“What can the court do to prevent amendment of the pleadings after amendment, requests for continuations and postponements, and all the other expedients which increase the expense, gravely delay the despatch of business, dislocate the judicial arrangements, are unquestionably inimical to the proper administration of justice? Short of professional misconduct and a report to the Discipline Committee we are literally powerless.”\(^{165}\)

“No doubt that to a significant extent actions are still being appointed to the Procedure Roll where there is no good reason for this.” (para 3.11) “The

\(^{164}\) Writers to the Signet, Pamphlet Report of the Committee considering 1824 Bill and 1825 Act for the Better Regulating the Forms of Process in the Courts of Law in Scotland (1824)
scale of amendments or attempted amendments strongly suggests that the
revisal of pleadings was unnecessarily deferred...parties placed undue
reliance on their ability to amend...despite being more costly’’ (para 3.18)
“At present the progress of an ordinary action is affected to a significant
extent by the conduct of the parties.’’ (para 3.30) ‘The court has no
general power to dismiss actions or to disallow defences.’’

In addition to judicial supervision, the legal profession face external challenges to its
“balance on the tightrope between market and State” Structural alterations to
the profession initiated by government policy widens the consumers’ choice.
Combined with restrictions of legal aid and increases in court fees the government
is asserting greater control as a regulator and consumer of legal services. This
creates added strain on the independent pursuit of justice against a backdrop of finite
resources, requiring cost-effective efficiency strategies from a public service which is
traditionally unrestricted. In theory access is indiscriminate - the doors of the Ritz
remain open to all - but in fact the number of citizens appearing in court is
diminishing at a time when demand is increasing, and the profession is over¬
manned.

The Government’s Role

Effects of a civil justice system are not limited to the outcome of individual cases.
Public health funds, insurance costs and consumer prices are affected directly or
indirectly by civil litigation. Civil justice reform should therefore be a priority

165 Lord Justice-General Cooper, Defects in the British Judicial Machine (1952-54) 2 Journal of the
Society of Public Teachers of Law 96
166 The Cullen Review (1995) op.cit. para 3.37
167 R. Abel, Between Market and State: The Legal Profession in Turmoil (1989) 52 Modern Law
Review 285
168 The Scotsman 11 November 1995 Reporting on Scottish Consumer Council comments on
Licensing of non-legal conveyancing and testamentary executives; Proposals to set up Community
Legal Centres; Proposals to discriminate access to courts by claim threshold
169 I. Dunbar (1994) op. cit.116 Reduction in Legal Aid eligibility from April 1993, increase in Sheriff
Court Fees from January 1994 “the government is creating a hypermarket justice system”
171 M. Galanter et al. How to Improve Civil Justice Policy (1994) 77 Judicature
policy issue. The government's dual role is to promote resolution of civil disputes while decreasing financial demands. "The days of free-flowing public expenditure are gone for ever." Legal aid becomes a tool for modernising civil justice.

"We aim to improve access to justice by making better use of the existing legal aid budget and ensuring value for money for the taxpayer and the customer".

The implication that courts are expensive dispute resolution centres introduces the notion of a tiered system of justice, sidelining the rule of law. Cost-efficient alternatives to court are enticing.

- "Value for money is a key issue."
- "Methods of dispute resolution should be proportionate to the importance of the problem and courts should only be involved where it is unavoidable."
- "In principle the Government would wish to encourage negotiated settlements of all disputes rather than recourse to court".

By the encouragement of Charter standards the government aims to place responsibility on courts and the legal profession to bring their own houses into efficient and effective order. The same underlying policy considerations are detected throughout all service industries. While acknowledging that courts operate in a demand-led environment, the Strategy Statement of the executive agency, the Scottish Court Service, asserts:

172 Lord Chancellor Irvine. Keynote Address to Solicitors' Annual Conference 18 October 1997
173 Mr. D. McLeish, Minister for Home Affairs, Conference speech Reforms to Scotland's Civil Legal Aid, 27 March 1998
175 N. Lacey (1994) op.cit.555; Prof. I. Willock, Efficiency, Economy and the Citizens' Charter (1993) SCOLAG 74
176 Simmons and Simmons Survey for Lord Woolf's Inquiry in 1995 of 35 large commercial firms concluded that commercial companies who are sophisticated and knowledgeable court users remain sceptical that there is sufficient political commitment to drive the reforms successfully into practice.
177 Government Executive Agency from 3 April 1995, accountable in different capacities to the Justice Minister and the Lord Advocate
"Our purpose is to help secure ready access to justice for the people of Scotland, delivering a high quality service to all who use the courts. Our principal task is to provide the administration, organisation and technical services required to support the judiciary in the delivery of justice."

Demand for court time is therefore growing, although civil case numbers are falling. An expansion in criminal business and increasing complexity of issues means that court sitting days increased by 25% over 7 years. Reform strategies must therefore maintain a delicate balance between prioritising resource allocations, which are under significant pressure, and acceptable service to the client.

Lord Cullen followed the widespread view that initial capital investment in information technology is critical to management and supervision of predictable workloads. But is the finance available? The Government’s line is clear. In England the Lord Chancellor stated that no extra resources were required to support case management, relying on revamped administrative control of caseloads to generate its own economies. This attitude is reflected in a recent Scottish Office statement that the provision of community legal services in Scotland will be funded from savings elsewhere in the system. However, while discussing the Cullen proposals in 1995 Lord President Hope conceded that extra resources are initially paramount to implement the framework for a radical overhaul. This latter view is strongly supported by respondents to Lord Woolf’s Interim Report.

178 In 1996 supreme court sitting days had increased 25% since 1989, 11% for the sheriff courts. - Scottish Court Service Corporate Plan for 1997/98 to 1999/2000
179 The Cullen Review (1995) op.cit. 75 paras.10.2 - 10.4
180 The Gazette 92/30 Lord Mackay - A Lord Challenged
181 Lord Mackay of Clashfern (1994) op.cit.41 “It is vitally important that resources provided in the judicial system are reasonably used” ; The Woolf Report (1995) op.cit.95 para. 14.1
182 Minister of Home Affairs, March 1998 Conference op.cit. It was anticipated that savings in criminal legal aid achieved through a Public Defender system, would release funds to support expansion in civil legal aid.
183 The Scotsman 17 January 1996 op.cit.
184 Response of Association of English District Judges - embracing the concept of caseflow management, "but resources to implement are vital to success", submission to the Woolf Inquiry Team 1995; Simmons and Simmons survey (1995) op.cit.9 "considerable funding and resources will be necessary for the technology"
professional commitment and public awareness may not be enough to attain the high ideals. The car may be perfect, the customer happy, but no money to buy the fuel means the whole purpose is lost.

**Fundamental Problems and Solutions**

What is it that can magically ease the tensions within a complex system and achieve the goals of such diverse expectations and needs? There can be no palliative cure while the underlying problem is not recognised. Legal theorists have reported the history of past dilemmas, and reforms. All the above problems occur throughout the common law world. In Chapter 3 the author points to a pattern of reform throughout the centuries in Scotland. Solutions have been isolated to each jurisdiction and piecemeal within it, hampered also by partial implementation. However, throughout these jurisdictions over the last three decades there has been a gradual convergence of criticism of the adversarial ethos which underpins each system, trapping professional and client in a Rolls Royce process, and calling into question the integrity of the players. Running parallel with these criticisms A.D.R. does seem to offer Utopia - a quicker, cheaper and less formal route to settlements at a time of unprecedented dissatisfaction, diminishing finance and

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185 Bentham's list of "evils" - frustration of well-grounded claims, allowance of ill-grounded claims, expense, vexation, delay, precipitation, complication (ii) Works 19, Bowring ed. in Twining (1993) op.cit.383
186 Sir Jack I. H. Jacob (1987) op.cit.250 "Changes already accomplished have not achieved their objective."
191 The Woolf Report (1995) op.cit.27 para 5 "exploitation of the rule is endemic...spin out the proceedings...tactics to intimidate the weaker party"; para 31 "In a culture of delay it may even be in the interest of the opposing side's legal advisers to be indulgent to each other's misdemeanours"; The Cullen Review (1995) op.cit. 10 para 3.8 identified "mutual indulgence between agents"
192 Lord Mackay of Clashfern (1994) op.cit. 70
customised alternatives. This is therefore a crucial period in the evolution of a unique legal process to evaluate and address needs of the society it serves. It is time to look at “the defects which blemish and impair the true values which underlie our system.”

The traditional adversarial process vests the main responsibility for initiation and conduct in the parties. The role of the judge has been one of passive adjudicator over issues selected by litigants’ representatives and presented at their instigation. Parties therefore have control of the momentum of the administration of justice. This has led to criticisms that civil procedural rules can be used as tactical weapons to complicate and protract litigation, ratcheting up costs past the financial and psychological point where a settlement is forced or the action abandoned. Allowing a limitless search for truth masks a tension between traditional and modern notions of justice. The modern interpretation embraces distributive as well as substantive justice and expands to accommodate different dimensions of fairness and proportionate costs, which redefines the traditional judicial role.

Judicial Management as a Cure

In 1906 Roscoe Pound pointed out that judges were hemmed in by procedural rules.
and handicapped by their role as umpires in their search for truth and justice. However, in each jurisdiction it has been the judges who are carry out evaluations and propose reforms, healthily tempered by critical analyses of academics and practitioners. The "quiet but significant revolution" alluded to earlier heralds a move away from passivity to a systematic managerial approach.\textsuperscript{200} It involves a radical transfer of responsibility for the pace of litigation away from the parties to the courts, and judges in particular.

As defined in an Ontario Report,\textsuperscript{201} caseflow management involves the setting of a predetermined timetable supported by supervision throughout the process. The aim is to minimise delays, encourage early settlement and thereby reduce concomitant costs, sidestepping the tactical strategies of "defensive lawyering".\textsuperscript{202} There is also an assumption that supervision leads to greater access to justice,\textsuperscript{203} and promotes the public interest and confidence by improving efficiency.

The radical alteration to a jealously guarded traditional system and established working practices is not without its critics. However there has been widespread support, acknowledged by critics,\textsuperscript{204} for the thrust of the English Woolf Report, preceded by a new Practice Direction\textsuperscript{205} testing the ethos of the reforms, and structured pilot studies on caseflow management principles.\textsuperscript{206} The English legal profession, consumers associations and commercial groups have voiced their approval in principle,\textsuperscript{207} but academic\textsuperscript{208} criticisms cover a range of misgivings.

\textsuperscript{200} The Cullen Review (1995) op.cit. 47 para. 6.15
\textsuperscript{201} Case Flow Management: An Assessment of the Ontario Pilot Project in the Ontario Court of Justice (1993) 4, Ministry of the Attorney General, Ontario
\textsuperscript{203} The Sackville Report (1994) op.cit. 17.6
\textsuperscript{204} Prof. M. Zander, Essays on the Woolf Report (1995) 45 New Law Journal. 1866 “so far most of the reaction to the Woolf proposals has been very positive”
\textsuperscript{205} Practice Direction (Civil Litigation: Case Management) (1995) 1 Weekly Law Reports 262
\textsuperscript{206} Medical Negligence Practice Note 4 1996. The List is supervised by Judge Foster
\textsuperscript{207} The Lawyer 24 October 1995 Issues: Professional bodies and lawyers welcome the proposals; Berryman Report on Insurance Company views (unpublished submission to Lord Woolf); Experts on Trial, Solicitors Journal (1995) 705 “most of Lord Woolf’s proposals are highly desirable”; Personal Injuries Bar Association submission to Lord Woolf “We find favour with much of the report and we unanimously welcome the proposals for sensitive and informed case management”
which have been aired and addressed in jurisdictions already working caseflow management systems. (see Chapter 5)

The Federal Judicial Center in U.S.\textsuperscript{209} states that by early judicial intervention, firm scheduling and overseeing of discovery, "the average disposition time of cases in federal courts has been cut in half." Justice Ipp, supervising a caseflow management system in Western Australia, concludes that there is a considerable body of research to indicate that the Australian experience is similar. A study of 1500 trials within 9 American courts found that

"the degree of judicial management of the trial process is the single most important factor distinguishing courts in which comparable cases are tried more quickly than elsewhere." \textsuperscript{210}

There is evidence, therefore, that court supervision expedites cases although, as the Grant Committee warned, "speed can be the enemy of justice."\textsuperscript{211} Professor Resnik\textsuperscript{212} points out there is no quantitative mechanism to assess and compare quality of outcomes. But a controlled study by the American Bar Association in 1984 concluded that a combination of judicial supervision and simplified rules dramatically reduced the average time from filing to disposition from 16 to 5 months with fewer motions, less discovery and reduced workloads. Interviews revealed no perceived loss of quality.\textsuperscript{213} Lord Woolf also placed great importance on simplification of rules,\textsuperscript{214} alongside judicial supervision. Both these criteria were reflected in Lord Cullen's remit.

\begin{itemize}
\item \textsuperscript{209} Reported by Hon.Justice Ipp (1995) op.cit.722
\item \textsuperscript{210} D. Ipes, The Lengths Courts Go to Try a Case - and Possible Remedies (1988) 12 State Court Journal 4, referred to by Prof. R. Cranston, Background Report (1995) op.cit 54
\item \textsuperscript{211} The Grant Report (1967) op.cit. 21
\item \textsuperscript{212} Referred to by Hon.Justice Ipp (1995) op.cit. 723
\item \textsuperscript{213} Attacking Litigation Costs and Delay - Final Report of the Action Commission to Reduce Court Costs and Delay American Bar Association
\end{itemize}
Judicial Management in Scotland

It may have seemed from the recommendations of the Cullen review that Scotland was poised to follow a fashionable trend, but judicial management was not a new concept in this country. Early judicial control, close supervision of disclosure and early preparation has been alluded to in every major Scottish inquiry into court procedure since the War. (see Chapter 4) Basic principles of judicial management are already in place, in varying degrees, in the

- Optional Procedure for Personal Injuries in the Court of Session,
- Ordinary Cause Rules in the Sheriff Court
- Commercial Cause Rules in the Court of Session

The 1995 Scottish study on Personal Injury actions noted that the Optional procedure was quicker than other tracks, although proofs were protracted through lack of opportunities to adjust written pleadings. However, no differences could be distinguished in the quality of outcomes.

The sheriff courts, working a diluted form of judicial management since 1 January 1994 (see Chapter 4), are imbued with specific administrative problems, in particular a heavy criminal workload. The results of two comparative studies undertaken before and after implementation of the new rules, highlight specific obstacles to efficient supervision. Allocation of daily workload to judges was basically random, prompting individual adaptations by two of the busiest sheriff courts. These

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215 Average number of weeks from initiation to disposal 47 within the sheriff courts. Within the Court of Session - Optional procedure for personal injuries 36 weeks, Ordinary Procedure 89 weeks (all compare favourably with Lord Woolf's finding of 163 weeks in London)
216 Personal Injury Study (1995) op.cit.51 para.7.34
217 In Glasgow and Edinburgh
problems were initially compounded by reliance on a high proportion of temporary Sheriffs, leading to criticisms of inconsistent approaches, discontinuity of supervision and uncertainty.\textsuperscript{218} Since these studies were published, temporary sheriffs have been removed by a sidestep,\textsuperscript{219} and, after stabilising and retrenching resources,\textsuperscript{220} further research which excludes this distorting variable will more accurately reflect the working of caseflow management principles in practice.

Much also depends on the interpretation by the judge of the rules and his role in their implementation. Two studies undertaken by the author indicates that prompt and extensive preparation induced by the attention of the Commercial judges is rewarded with continuity, consistency and certainty for the clients at a greatly expedited rate.\textsuperscript{221} It could be argued that these results either reflect a view that "increased judicial power leads to an increase in lawyer's professional standards,"\textsuperscript{222} or reflect the seniority of representatives appearing before such a well-informed judge.\textsuperscript{223} But as far as the clients are concerned, it seems that the common-sense approach of the judges has won the approval of a competitive market where speed is of the essence. (see Chapters 6-8)

At this point, however, it is important to note that in all three studies, the practice of sissing\textsuperscript{224} was identified as one of the main causes of protracted litigation and does not disappear with caseflow management. While the threat of court action and delaying strategies may arguably be functional constituents of bargaining and settlement, these schemes are exposed more clearly with case management. Sisting, however, is a device which enables parties to opt out of imposed timetables and deadlines - to

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{218} Pilgrims Process Sheriff Court Study (1995) op.cit. 26 para. 5.22
\item \textsuperscript{219} Starr and Chalmers v Procurator Fiscal of Linlithgow - 11 November 1999 126 temporary sheriffs, appointed by the Lord Advocate (a member of the Executive since 20 May 1999) on one-year extendable contracts were not considered 'independent' under the European Convention on Human Rights (Scottish courts internet site), see Starr v Ruxton 2000 SLT 42
\item \textsuperscript{220} Appointment of full-time 'floating' Sheriffs to replace the Temporary appointees who were removed from office literally overnight, resulting in a build-up of criminal and civil cases.
\item \textsuperscript{221} J. McNeill (1995) op.cit..2
\item \textsuperscript{222} Sir Richard Eggleston, What is Wrong with the Adversary System (1975) 49 Australian Law Journal 431
\item \textsuperscript{223} Lord Penrose (1995) op.cit.4
\item \textsuperscript{224} Withdrawal from court process by one or both parties
\end{itemize}
\end{footnotesize}
leave by the back door. It seems that one consequence of court supervision has been the removal of cases from the litigation process (see Chapter 4). Until courts have power to recall parties, sitting usurps the aims of caseflow management, and coincidentally enables some practitioners to sustain a heavy, and profitable, workload.

The Role of Sanctions

The lack of sanctions which directly impinge on representatives, even under intensive management means that the administration of the Commercial Court is still complicated by late preparation and late settlements, though to a far lesser degree than other Scottish tracks. As there is no double-booking of judicial time in the Commercial Court, disruptions caused by late settlements have a even greater impact on the efficient use of judicial resources than on the Ordinary Cause Roll where overbooking is the norm.

Lord Cullen already acknowledged that non-compliance with court orders can “frustrate the functioning of the system” and proposed a more rigorous application of sanctions,225 without suggesting what form they might take. Although the judiciary have powers to alter procedural rules, sanctions which police the boundaries of these rules require legislative power.

Some previous sanctions have been lost in the mists of history. From 1429 Advocates and Forespeakers had to swear that the cause they presented was just, good and true, and that no delaying tactics would be used for the purpose of hindering a case.226 The oath could competently be put at any stage of the process before proof or decree.227 But by 1764 this Act was considered obsolete. Mr. McQueen, Advocate, “was not obliged to swear in jure, that he thought his client had a good cause”228 (see Appendix 2.2). In Scotland expenses may be awarded

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225 The Cullen Review (1995) op.cit.16-8 para. 3.30
226 1429 Acta Parliamentorum Regis Jacobi Primi c.16 “Ut lis tardetur dilatio nulla petetur”
227 Stair Institutes of the Law of Scotland.iv.41,7
228 20 December 1764 McQueen v. Decisions of the Court of Session Supp V 902 By coincidence a “Mr. McQueen” was elevated to the bench in the same year, becoming Lord Braxfield
against solicitors for lodgment of unsustainable and frivolous defences, failure to attend court, and abuse of court procedure in order to delay entitlement. There is a contemporary analogy in Rule 11 of the U.S. Federal Court Rules which imposes a duty on lawyers to guarantee the quality of the claim they are representing, bound by penal sanctions against them personally and vicariously against their firm (Appendix 2.3). In Scotland there is no such rule covering counsel, although consideration of penal sanctions against counsel and legal representatives for late preparation, late cancellation and abuse of process has both an historical and contemporary base.

**Convergence of Aims and Expectations**

Lord Hardie, as Lord Advocate, anticipated that the quickened pace of change under a new Scottish Parliament would involve more scrutiny of our legal system in the deliverance of its ideals. An efficiently run system, which offers fundamental rights to the public benefits not only the wider community but also the profession by ultimately improving their conditions of practice and alleviating the strain of a damaged public image. But there are those who warn of the social and economic dangers of increasing access to congested courts and the encouragement of a litigious society. It is suggested that consumerism and a mistrust of authority may lead to an exaggerated demand for court services. This is corroborated by reports that from April 1995 a government scheme has had to replace private insurance cover for hospital trusts since "claims are rising - the public has got the idea of suing". In-house claims managers are employed to filter and vet allegations, attempting an early assessment of what the patient wants and requires.

These litigious trends are not supported so far by judicial statistics in either Scotland

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229 Stewart v Stewart 1984 SLT (Sh.Ct.) 58 per Sheriff Ireland. Also improper for a solicitor to raise an action which has no reasonable expectation of success (X v A and B 1936 SC 225) or raise a misguided action (Blyth v Watson 1987 SLT 616)
230 see footnotes 162 and 163
231 Lord Advocate, Biennial Lecture to Society of Solicitors to the Supreme Courts 6 November 1998
232 The Scotsman 31 August 1995 Top Judge Hits Out at Court System (Lord Gill)
233 The Independent on Sunday, 17 September 1995, If You Don't Like it I'll See You in Court
234 Doctors in the Dock, The Economist, 10 August 1995 23
235 Medical Claims Clinic, The Gazette, 1 November 1995 26
or England. Practitioners point out that fears of an epidemic are exaggerated, but academic assessment suggests that if demand increases it will be contained within a more efficient and controlled regime, and that demand would not overcome improvements if guidelines are strictly monitored. It is therefore unsustainable that barriers of inefficiencies, expense and delay are allowed to remain in order to shape the workload to match resources. This is questionable conduct, particularly as experts in procedural law remind the legal community that the legal machinery exists for the public, not the reverse.

Non-legal associations and Law Centres already cover areas largely neglected by the legal profession, including welfare and housing. Additionally, there are problems which could be more appropriately dealt with by informal adjudication. Optional alternatives are therefore not necessarily competition for, but an adjunct to legal services.

The most potent threat to a consensual code of conduct (the rule of law) would be wholesale move away from courts, encouraging a network of informal schemes which may be cheaper in the short term for Treasury, but more difficult to control as a fragmented system. An audit of these schemes in Scotland is planned, but has not yet taken place.

Within court systems, judicial caseflow management is an attempt not only to dismantle perceived barriers to access by the public but also to cope with inherent problems with which the system is currently handicapped. The administrative changes to an adversarial ethos, which has braced and sculpted the underlying

236 The Scotsman, Letter from Lawrence Lumsden, Practitioner, Robin Thompson and Partners
237 A. A. Zuckerman (1995) op.cit.174-7
238 Sir Jack Jacob (1987) op.cit.1
239 Lord Mackay of Clashfern (1994) op.cit.67 “We need a system under which (the complexities of human problems and the law) may be addressed without engaging unnecessarily in the full panoply of services which the legal system provides, but which enables those who require to rise to some specific level of advice and competence of service to do so relatively easily.”; G. Cutts, Multi-Door Courthouse (1985) (Prof Sander introduced Multi-door Court House concept derived in part from Lon Fuller 1971 - matching the forum to the fuss - different disputes lend themselves to being resolved by different processes. Prof. Sander advocates early analysis at intake points to match the problem with a process. This is a pilot scheme supported by the American Bar Association.
240 M. Upton, ADR in Perspective, 1993 Scots Law Times (News) 75
assumptions of legal process for centuries, is not a rash move, but a determined, principled and considered attempt by some of the system's professional decision-makers to dismantle and restructure an inefficient system which frustrates litigants, representatives, judges, administrators and supporting bodies. By directing an earlier focus on the issues and restricting unfair procedural advantages and stalling mechanisms, the dual roles of adjudication and settlement can be more openly monitored and policed.

It is at least arguable that the current aim should be to expose and untangle diverse demands in a more open, accountable and managed system. There are no guarantees for continued success in a process vulnerable to so many independent variables. In England the Lord Chancellor overcame initial misgivings to establish a Civil Justice Council to co-ordinate the implementation of reforms under the chairmanship of Vice-Chancellor Sir Richard Scott. Responsibility for legal affairs in Scotland straddles three different offices, a fragmentation criticised in the past as leading to a duplication of effort, waste of time, confusion of responsibility and difficulties at ministerial level of getting clear cut decisions. In 1999 the three offices issued separate proposals for reform of the justice system. While the responsibility for Scotland’s legal system is fragmented, change may be piecemeal and under-utilise resources. What has been advocated repeatedly in Scotland, is the establishment of an overarching body with responsibility for legal affairs to co-

242 Prof. D. Edward (1986) op.cit.7
243 The Cullen Review (1995) op.cit.47 para 6.13 “Overall the description given by the Faculty conveys the impression that under case management the court could act without reference to principle and in an arbitrary fashion. For my part I have no wish to consider any system which is ingrained with that characteristic.”
244 A. A. Zuckerman (1995) op.cit.181
246 Lord Woolf of Barnes M.R. (1997) op.cit. 6
248 Legal Action February 1996 5
249 One was the Secretary of State, now responsibility has passed to the Justice Minister, Lord Advocate and Lord President of the Court of Session (see Chapter 4 for details)
251 Minister of State - changes to legal aid provision and scheme for community legal centres; Lord Advocate - alterations to court jurisdiction limits; Lord President consultation on rule changes
ordinate, monitor, advise, communicate and support the implementation and review of civil justice machinery. One of the first acts of the new Scottish Parliament in 1999 was the creation of a Ministry for Justice, and the appointment of the Deputy First Minister as Justice Minister. However, within the first year there has been no call for a civil justice review.

The Right to Access

Under the incorporation of the European Convention on Human Rights, the right to effective access to a court is fundamental:

"In the determination of his civil rights and obligations...to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

Restrictive interpretation of Article 6(1) cannot be justified. The purposive interpretation of a right to a fair hearing requires that a litigant

(a) has real and effective access to a court
(b) has notice of the time and place of proceedings
(c) has a real opportunity to present the case sought to be made and
(d) is given a reasoned decision

Can the Scottish legal system fulfil this contract, especially as "there is no particular

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253 20 May 1999 for Lord Advocate’s areas of responsibility, 1 July 1999 for Scottish Parliament, and Scottish Executive, 1 October 1999 for Local and Public Authorities
254 Includes pending negligence claims Pressos Compania SA v Belgium (1995) 21 EHRR 301
255 Legal Aid is specifically protected for criminal trials -Art 6 (3) may be implied for civil cases if it constitutes a necessary part of the general right to a fair hearing Airey v Ireland (1979) 2 EHRR 305
256 Darnell v UK (1993) 18 EHRR 205 The Court’s interpretation encompasses time taken to reach trial, and includes time waiting for appeal to be heard
257 European Convention on Human Rights Article 6 (1)
258 Moreira de Azevedo v Portugal (1990) 13 EHRR 721
blueprint from which to work."\textsuperscript{260} and as a 1970 Scottish study initially revealed

"A picture of a legal profession...wedged between pressure from every section of the public to reform the law on one side, and an absence of either reliable channels to do so, or adequate resources fully to meet the responsibility on the other."\textsuperscript{261}

Over 30 years later pressure within the legal profession has increased through internal\textsuperscript{262} and external\textsuperscript{263} competition. Market strategies and performance targets increasingly regulate public services. As we have seen within the legal profession this is translated into more rigorous criteria for Legal Aid and proposals for alternative dispute resolution centres. Political control is budget-driven. Lawyer control is increasingly commerce-driven. Court control, within restructured resources, is driven by legal principles. It is argued that a co-ordinated reconciliation of market and legal principles should be directed towards common aim – an efficiently-working domestic legal system which creates market confidence.

"In judging the adequacy of an existing legal principle or method of practice the pragmatic test of whether it works is no bad test, provided the test is applied not merely by reference to the convenience of the lawyer and the law courts, but also by reference to the satisfaction of the client." \textsuperscript{264}

\textsuperscript{260} Lord Advocate 6 November 1998 op.cit.
\textsuperscript{261} Public Attitudes Survey (1970) op.cit.40
\textsuperscript{262} Partial fusion of the profession, providing rights of audience in the Supreme to Solicitor-Advocates
\textsuperscript{263} Law Reform Miscellaneous Provisions (Scotland) Act 1990 c.40 ss.24-30
\textsuperscript{264} Professional monopoly is further eroded by the revival of the Scottish Conveyancing and Executry Services Board in 1995
\textsuperscript{264} Lord Cooper's Selected Papers (1957) op.cit.148
THE EVOLUTION of a ROYAL COURT

"The formal and proper objects of law are the rights of men
The proper object is the right itself, the order of jurisprudence threefold:

1. in constitution and nature of rights
2. in conveyance or translation from one person to another
3. in their cognition which comprehends the trial, decision and execution of
every man’s right by the legal remedies."

Viscount Stair 1681

In civilised societies the State superintends uniform rules of conduct. Conventionally therefore the provision of civil justice flows from the State – original jurisdiction granted in Scotland from the Kings and Scottish Parliament. The Scottish legal system is completely distinctive, surviving the amalgamation with England and Wales in 1707 and benefiting from two ostensibly opposing legal traditions – the Anglo-Saxon and Continental. Within this unique system the process for resolving civil disputes has been sculpted over the centuries by waves of reform, seemingly haphazard, but consistently responding to constitutional, political and economic developments. Through seemingly isolated historical events, the provision of this public service has been an evolutionary process. Elements of our current procedure can be traced in embryonic form throughout the centuries, and a retrospective analysis not only captures the evocation of each era, but stirs images of a continual struggle to provide universal remedies as a corollary of social developments. Despite earlier frustrated attempts, the establishment of a permanent and independent body of professional judges in 1532 was the first Scottish

supreme court to sustain consistent application of rules for civil dispute resolution in the ‘Court of Session’.

Reform of the processes for administering justice emanates not only from the State, but modified responsibility was delegated to the judiciary from the institution of the College of Justice\textsuperscript{2} to shape procedures and practices in response to perceived defects within the system. What has become clear is that in every century this power has proved inadequate for full-scale reform. Lack of time, or inclination, and limitation of judicial power have forced statutory intervention on a regular basis.

A pattern emerges. Over centuries experimental procedures are devised to explore new routes to access and effectiveness. Two main outcomes befall new procedures. Either they fall into disuse, subsumed by established practice, or caseloads increase and a backlog of work builds up overwhelming the original arrangements and resources. In other words, innovations become victims of their own success. Informed clients search for alternatives to an overloaded system, court cases decrease, the development of Scots law is threatened, and reform is on the agenda again. Reforming court procedure is therefore a continuous vacillating process, but as communication becomes smoother and alternatives to court process form into a synchronised industry, the demands become more strident and more sophisticated.

The emergence and development of procedures within the Scottish court system was always, and continues to be, driven and affected by an uneasy tension between commitment, resources and the will to address persistent complaints of inadequate service – inefficiencies, delays, costs and restricted access. These complaints echo down the centuries, following in the undulating wake of social history, marked by conspicuous periods of rapid industrial development and improvident conflicts and wars.

\textsuperscript{2} 1540 c.93 APS II 371 c.10 delegated power to the Court of Session to pass Acts of Sederunt regulating court procedure. College of Justice to remain perpetually for the administration of justice to all the lieges of this realm. gives and grants to the President, Vice-President and the Senators, power to make such
Early records of dispute resolution are fragmentary, sources existing in Scotland from as late as the 12th century. It appears from these origins that the establishment of a supreme court in Scotland was repeatedly essayed both to create greater public access to a central decision-making process and to alleviate the King and his Parliament from the irregular but distracting burden of judicial work. These Royal attempts to create a separate court were repeatedly frustrated until the establishment of the Court of Session in 1532, finally emerging from the confluence of historical accident and coincidence.³ The importance of civil justice as an instrument of law and order is reflected in the speed with which more than one King used the reformation of the administration of justice in Scotland to control the country by establishing law and order, in some cases within days of ascending to the throne. An historical analysis traces the evolutionary path, vacillating between rigidity and flexibility, and surprisingly uncovers the birth and demise of judicial caseflow management in Scotland in early 19th century.

Early Dispute Resolution

During the 12th century the King and Parliament were guardians of the common law, but there was no departmental machinery for civil justice. David I (1124-1153) held Assize—a supreme feudal court to give authoritative declaration to feudal law. This Assize later devolved into Parliament and took the form of irregular meetings of King and Council, forming the blueprint for the administration of justice for the next four centuries.⁴ Procedure was initiated by brieves issued by the King or his Chancellor, authenticated by royal seal and passed to a lower justiciar or sheriff ‘to do justice’. This

⁴ D. Maxwell, The Court of Session: An Account of the Origins and Development of the Supreme Civil Court in Scotland (unpublished and undated manuscript) p.28
source gradually replaced the more barbaric trial by ordeal and combat, the threat of which was possibly still used to pressurise disputants into settlements.  

Different Kings interpreted their protective role in different ways. King William the Lion (1165-1214) personally acted as a judge of the first instance, ordaining that

"the poor and the weak" and those "destitute of care and protection from all others are in the care and protection of the King."  

Although there were many lawyers working in the 12th and 13th centuries, mostly churchmen practising gratuitously as a sideline, early forms of arbitration by a ‘rapporteur’ or ‘amicable compositor’ were used to facilitate settlements. Hunter argues that these less systematic procedures were encouraged between kin groups because of the relative poverty of the Scottish Crown and pointed out that clannish reliance stiffened resistance to English rule.

14th Century

Civil justice evolved during the reign of Robert the Bruce (1306-1329) into a hierarchical system of courts, originating with the King and his officers, delegated in part to Justiciars and Chamberlain on circuit, Sheriffs as local royal representatives and Bailies in burghs. Parliament was run privately as the Great Council of the King. Equality before the law was reinforced by statute – justice was to be done

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5 Prof. H. MacQueen Desuetude, the Cessante Maxim and Trial by Combat in Scots Law (1986) 7 Journal of Legal History 90, quoting G. Neilson Trial by Combat (1890); Prof. H. MacQueen, Common Law and Feudal Society in Medieval Scotland (1993) Edinburgh University Press 33; 3 Reg Maj. c.10 I 625 “Battle competent between buyer and his warrant”: 4 Reg Maj. c.48 I 639 Defenders had a choice between combat or Assize, and to wager before they made oath; Frag. Coll. c.7 I 735 “Debts above 1s. 4d. cannot be proved by witnesses but only by writ under seal or by battle.”
6 APS I 324 c.30
7 Lord Cooper, Curiosities of Medieval Scots Law, Selected Papers (1957) 94
"to rich and poor according to ancient laws and freedoms used and wont." 9

The following reign of his son, David II (1329-1371), was interrupted by 12 years imprisonment in England. In his absence, political events overtook judicial business. Due to pressure of parliamentary business on his return, the King was forced to delegate unfinished judicial work in 1341. Two ‘Auditors’ were appointed to hear and dispose of complaints not concluded at the end of the Parliamentary session. By 1368 the burden on the King and his Council had become insupportable,10 resulting in inadequate service to the public. The 1369 Parliament therefore chose a committee of 27 men – 6 clergy, 14 barons and 7 burgesses to

"deliberate" on the things concerning common justice videlicet falsed dooms,12 applications and complaints (questiones and querelaes) which ought to be determined by Parliament."13

This has been referred to as the first attempt to provide a separate supreme court in Scotland, but was short lived. Within two years the first Stuart King, Robert III (1371-1390) had succeeded to the Scottish throne. Preferring to govern through his ‘Secret Council’, he was hesitant to summon Parliament. His successor Robert III (1390-1406) showed similar reluctance, although in 1399 the General Council ordained that the King should hold Parliament annually for three years so that subjects could be “servit of the law”.14 It remains a matter for curiosity how much ‘justice’ was meted out since there was a volume of statute at this time governing essoinzes (excuses) for non-appearance. Perhaps the wait encouraged settlement.

9 APS 1318 c.31467
10 Ivory’s Form of Process Before the Court of Session, The New Jury Court and the Commission of Teinds (1815) Vol. 1, p.25
11 By using the term ‘deliberate’ Parliament’s prerogative was retained as a forum to ‘determine’ disputes
12 To appeal a judge-ordinary’s decision, the appellant had to state “that doome is fals sinkand and rotten in the self and thereto a borgh” (surety). This surety was required to ensure that the complainant would proceed with the appeal
13 APS 1369 I 597 The Essoinzes Act
14 1399 APS I 573
15th Century

In 1400 Parliament also laid an obligation on the King’s Lieutenant and royal officers to "hear querelas of ecclesiastics, widows, orphans and pupils" — those sections of society perceived as requiring most protection. But in essence King and Council were disinterested judicial players. Restricting their work as a reviewing body, a compulsio was added to the briefs at this time, compelling the Judge-Ordinaries to exert themselves further

"so that we may not by reason of your failure hear any further just complaint".

The growth of the Court of Session took root in the revival of royal authority by King James I who succeeded to the throne in 1406. He was imprisoned in England for 18 years, during which time Parliament did not sit, the Judge-Ordinaries did not perform attentively and civil justice was neglected. During his incarceration James had observed the effectiveness of the English system of justice in central and local courts. He immediately initiated a zealous programme of reform when he returned to Scotland to encounter an 18-year backlog of cases. Within a week of being crowned at Scone in 1424, his first Act of Parliament was aimed at quickly restoring the administration of civil justice and the rule of law. The first meeting of his Council had been inundated with actions of spuilzie (violent ejection from property), distracting the King from parliamentary business. He initiated a series of Commissions to revise and consolidate Scottish laws into an orderly codifying repository, but this was not achieved in his lifetime.

15 1401 APS I S.576
16 Maxwell manuscript op.cit. 30
17 Maxwell manuscript op.cit. 33
18 The Rt. Hon T. M. Cooper, Lord Advocate, Regiam Majestatem and the Auld Lawes, p.70, An Introductory Survey of the Sources and Literature of Scots Law (1936) op.cit.
For convenience he distanced himself from the bulk of first instance work, ordering litigants to appear before existing judges. Apart from residual privileged causes, Parliament was to be the last resort of pleas and processes:

"As anent Bills of complaint which may not be determined by the Parliament for divers causes belonging to the common profit of the realm be executed and determined by the judges and officers of the courts to whom they pertain of the law, either Justiciar, Chamberlain, Sheriffs, Bailies of Burghs, Barons or spiritual judges (Judge-Ordinaries) if it effered to them, to whom, all and sundry, the King shall give strait commandment ..... that as well as to the poor as to the rich, without fraud or favour, they do full law and justice....and if the judge refused to do the law evenly the party complaining shall have recourse to the King who shall see such judges rigorously punished as an example to all others."19

The King’s benevolence included the first recorded encouragement to take on pro bono work,20 and early form of legal aid:

"If there be any poor creature for fault of cunning or dispenses that cannot or may not follow his cause, the King, for the love of God, shall ordaine the judge before whom the cause should be determined to purvey and get a leal and wise Advocate to follow such poor creature’s causes."21

The following year (1425) James I finally delegated full judicial power to an independent supreme court ‘The Session’, financed by dues from the losing parties. On a regular basis the King’s Chancellor and “certain discreete persons of the three estaiteis” deputised for the King three times a year, in places nominated by him, to:

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19 1424 c.24 APS II 8, Stair op.cit. iv.1 The Authority of Lords of the Council and Session
20 A. J. G. Mackay, Manual of the Practice of the Court of Session (1877) Vol.1, pp.102-3 Procurators or forespeakers were an early forerunner of today’s Advocate; Reg.Maj. iii 13-16, iv 39
21 1424 c.24
"Examine, conclude and finally determine all and sundry complaints, causes and quarrels that may be determined before the King and his Council, the which persons shall have their expenses of the parties found at fault and of the fines or other ways as be pleasing on our sovereign Lord the King."22

This avoided the inconvenience of complainants ‘chasing’ justice by having to follow the peripatetic King’s Council. The meetings of Session were scheduled to take place in September, January and June, leaving Parliament to conduct the business of government. It was another attempt at a permanent and independent court, ultimately relying on 27 Lords of Session from the three estates, split equally into three divisions, one division being assigned to each centre for forty days.23 However, in 1437, possibly due to his reforming zeal, James I was assassinated, throwing Scotland into another unstable regency period under the Earl of Douglas. James II was aged six. Sessions were curtailed, reduced to two sittings a year.24 It was eleven years before three full Sessions were restored, sitting for forty days in each city - Edinburgh, Perth and Aberdeen.25 Litigants had a choice between action before the Lords of Session or Judge-Ordinary,26 with no appeal to King or Parliament.27

Following an unfortunate second regency period,28 Session sittings again became irregular, and although records are scarce, it is clear that by 1465 a considerable backlog had built up, until finally this peripatetic system was deemed abandoned in 1468.29

Ivory refers to a “gradual erosion of its effectiveness” with judges changing by rotation

22 APS II 11, c.10 1425 c.65, The Lords of Session Act 1425 c.19; D. Balfour A Handbook of Court of Session Practice (1891) 24
23 APS II 47, 1
24 APS II 32, 1438 c.1
25 1457 c.61 APS II 47; Stair op.cit.iv,1,8, Mackay (1877) op.cit.110
26 1457 c.2, 1457 c.61
27 APS II 48 1457 c.3
28 James II died in an accident aged 29 when his son James III was 8.
29 Stair op.cit. iv. II.15
every 40 days, affecting the regularity and consistency of decisions by those officiating “at their own benevolence” and “awin coistes”. 30

Due to their inadequacies, judicial business had to revert to the King and his Lords of Council and Committee of Lords Auditors of Causes and Complaints. 31 Within a year it was clear that the burden of judicial work was again overwhelming the King, and in 1459 Parliament had to transfer the bulk of the workload back. “Any party complaining in any part of the realm” were first to go to the Judge-Ordinary of temporary lands to ask for justice, and only if this failed, or they were refused, to turn to King and Council. 32 In order to discourage frivolous claims, and to meet the rising cost of administration of justice, an unsuccessful party was ordained to pay the Lords of Council an ‘unlaw’ (a fine) of 40 shillings, and modified expenses to the successful litigant. 33

By 1478 the Lords of Council, who were already developing as a reviewing body, were also receiving an overflow of cases from the Lord Auditors. Repeated Acts had failed to induce the Judge-Ordinaries to provide unbiased service to the public. They also had recourse to the King, 34 creating a double-tier justice system. Royal patience evaporated, and jurisdictional limits were set out, with the King and Council retaining only what was considered to be the most important cases. All civil actions were to be called before the Judge-Ordinary in the first instance, apart from

“Actions pertaining in special to our sovereign Lord, actions and complaints made by kirkmen, widows, orphans and pupils, actions of strangers of other

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30 Ivory’s Forms of Process (1815) op.cit.35
31 Active as a court while Parliament sat. In 1470 the technical distinction was lost. Maxwell manuscript op.cit. 40-45
32 APS II 94 c.s; 1569 c.26; 1471 c.41; 1474 c.11; 1475 c.62; 1487 c.105; 1503 c.58
33 APS II 100, 1471 c.11
34 APS II 94, 1469 c.2; APS II 100, 1471 c.9; APS 108, 1475 c.11; APS 177, 1487 c.10

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realms (merchants) and complaints made upon officers for fault of execution of their office, or where the officers are parties themselves."

This experiment lasted only a year before it was decided that judicial ineptitude was once again causing delays. However, on the early demise of the King, the country again was threatened by instability and lawlessness. When his successor, James IV, ascended at 15 years of age, retrenching and re-establishing justice with a Council as before, this marked the beginning of a period of peaceful development and consolidation. The King remained in the capital Edinburgh, focused on the administration of civil justice. Maxwell points out that Scotland began to prosper under a firmer rule of law, also reflected in a new spirit throughout Europe.

Under more balanced and regular organisation, what evolved was a gradual transfer by Parliament to a Council of original jurisdiction, avoiding congestion and over-centralisation. Lords Ordinary were appointed and delegated to take evidence, disposing of incidental applications, redirecting minor cases from Royal jurisdiction and initiating a separation of fora. An experiment to extend access 'to the lieges' by combining civil actions with criminal circuits saw James IV and his Council taking a hands-on approach to keep pressure on judges, travelling throughout Scotland to clear off an accumulation of causes "driving the ayres as never driven before". Although initially successful this experimental phase degenerated into travelling chaos when actions which began in Inverness followed the King to Elgin, and on to Aberdeen, Dundee, Cupar, Stirling and finally Edinburgh. Combined with the irregular meetings of Parliament – 1488, 1496, 1504 and 1509 – there was an overwhelming need to organise judicial work within a sedentary court using terms and sessions, imitating the 'Auld Sessions' of 1425.

35 APS II 177, 1487 c.105
36 APS II 183, 1488 c.27
37 Maxwell manuscript op.cit. 49-56
In 1489 Parliament elected 16 Lords Spiritual and Temporal to the Council of the King for the administration of justice, consisting of 3 prelates, 6 barons, a Chancellor, Secretary, Clerk of Register and other officers of State.\(^{39}\) Sittings were to take place three times a year.\(^{40}\) While the King and Council dispensed justice wherever they were situated, the new court, which included Lords Auditors of Complaints, devolved into Lords of Council and Session seated in a central court in Edinburgh.

From 1490 onwards this court was a distinct department of central government. Session records were more strictly kept and in 1496 Acts of Sederunt were recorded under the names of the Lords Auditors, seemingly acting as Lords of Council and Session.\(^{41}\) Systematic enrolment and distribution of causes were organised by Clerks of Departments so that not all cases were called on one day. One or more judges were deputed to take evidence,\(^{42}\) expanding to a body of four who gradually undertook more responsibility, and reported back to the whole body when unable to reach a decision.\(^{43}\) The procedure in these individual lists was predominantly oral, the only writing being contained in an initial writ and decree.\(^{44}\) The cause was initiated by summons from the Chancellor's office or prepared by Clerks of Signet, a framework which remained for four centuries until 1933.

To uphold the standards of a professional bench, the Education Act of 1496\(^{45}\) was passed. Barons and freeholders were to put their heirs to schools and universities of art and law in anticipation of their employment as judges, also expanding the substructure of sheriffs and judges “so that the poor need not seek redress for every small injury from Lords Auditors.”\(^{46}\)

\(^{38}\) W. C. Dickinson, The Administration of Justice in Medieval Scotland (1926) Aberdeen University Review xxxiv, 338-351 \\
\(^{39}\) APS II 220, 1489 c.11 \\
\(^{40}\) October, January and May as the Auld Session APS II 226, 1491 c.16 \\
\(^{41}\) Maxwell manuscript op.cit.53 \\
\(^{42}\) ADC 1 115, 1495, the font of the Outer House of the Court of Session \\
\(^{43}\) ADC II 250 1498 \\
\(^{44}\) Maxwell manuscript op.cit.61 \\
\(^{45}\) ADC II 238 1496 c.3
For the Scots lawyer, although there will have been moments of recognition throughout the early stages of this chapter, by now he or she should already be on familiar territory – and may only be wondering why there was a 40-year gap before the formal institution of the Court of Session, our supreme court.

16th Century

The new Sessions, combined with irregular meetings of King and Council, were still considered inadequate to meet the continuous needs of the public.47 The preamble to an Act in 1493 forcefully points to a confusion of summons at each Session, the frustration and inadequacy of the terms and improbability of dispatch with the Session

"And thereby poor folk have been delayed and deferred from year to year through the which they wanted justice."

The King therefore instituted permanent ‘Dailie Counsales’ to augment the central court:

"Ane counsale chosin by the Kingis hienes which sail sit continually in Edinburgh, or where the King makes residence or where it pleases him...to decide all manner of summonses in civil matters, complaints and causes daily as they sail happen to occur, and shall have the same power as the Lordis of Session."48

This same Parliament also appointed 19 Lords to occasional Session, but it is clear that a growing demand for daily justice was overwhelming the administration of the courts. By 1511 urgent privileged causes were given priority because of delays – matters pertaining to

46 Book of the Old Edinburgh Club xi (1922) 87
47 Stair op.cit. iv.3.3 "Because Session was not appointed to sit constantly a Daily Council was erected"
"King and Strangers, actions of recent spuilzie...and...other matters as the lordis sale think expedient and ordane."\(^{49}\)

In a move away from a ‘market-place’ atmosphere when the courts were swamped by crowds, access to the Sessions became restricted to participating parties only. Over 30 years therefore a framework for focused application of law and order was being constructed, and continuously refined, responding to criticisms and commercial priorities.

The whole development was cruelly interrupted by the devastating Battle of Flodden in 1513. Not only was the King killed, but Scotland lost 12 Earls, 15 Lords (heading almost all the important families) and over 10,000 Scots. The sudden loss of a strong hierarchy, combined with yet another absentee regency,\(^{50}\) resulted in an outbreak of uncontrolled disorder. Many lost property and possessions, a corollary of which was an unsustainable strain on Sessions, the Daily Council and the inexperienced Judge-Ordinaries. Session business deteriorated into turmoil and delay. The necessity and opportunity arose for a special department, a deputed Council, to dispense civil justice alone.\(^{51}\)

For an extended period Parliament sidelined civil judicial administration for the affairs of government during a period of political consolidation. In 1526 they formed a combined Daily Council and Session, composed of eight persons, equally spiritual and temporal \textit{"adjoit to sitt continualis apoun the Sessioune with the Lordis of the Secret Counsale and Ministeries of Court"} in Edinburgh.\(^{52}\) By the following year this had expanded to a composite body of Lords,\(^{53}\) specialising in judicial work. With depleted

\(^{49}\) APS II 249 c.2 1503 c.58; R. K. Hannay (1936) op.cit.398
\(^{47}\) ACD PA \textit{"strangers"} refers to the importance of commercial trade with other countries
\(^{50}\) The two-year old King James V was taken to be raised in England
\(^{51}\) R. K. Hannay Judicial Administration and Justiciary (1936) op.cit.399
\(^{52}\) ADC PA 238
\(^{53}\) Eleven of whom became Senators of the College of Justice in 1532
resources, exchequer business was prioritised and delegated Lords began to sit in a separate Tolbooth for two days a week to deliver fast-track specialist resolutions. They were remunerated initially from a small share of the ‘unlaw’ from unsuccessful parties. By the next year the weight of ordinary civil cases fell on 14 prelates and temporal Lords sitting daily with the Chancellor:

“Sworne to determyne and decyde in all actiouns coming before thaim eftir thair cunning and knowledge.”

For at least a century governments had attempted to control law and order by directing civil administration, while striving to discharge their judicial burden to a delegated professional forum. The oscillation of caseloads between Parliaments, Councils and Sessions could well have continued for another further decade but for a convergence of historical coincidence.

After the Battle of Flodden and James V’s long minority in England, the King returned in penury to find that a depleted Treasury had been squandered further by maladministration and domestic intrigue. Anxious to gather finance he was advised by Chancellor Dunbar to seek an advantageous marriage with a relation of Pope Clement VII. Unfortunately research has not revealed the lady’s reason for refusing his offer, nor the subsequent refusal of his second choice, a Belgian princess. His Secretary, Thomas Erskine, who had been a student at Pavia University in Italy, then carried a plea to the Pope for money to replenish Scottish defences. This was summarily refused, but when the appeal mutated into a request for finance to set up a College of Justice in Scotland, the Pope issued a Bull to all Scottish prelates ordaining them to contribute £10,000 per annum. This ‘Great Tax’ caused violent controversy, but the Church’s influence in judicial matters would be sustained. Treasury accounts, however, reveal that out of a

54 ADC PA 340
55 Reviving a proposal of the King’s Regent, the Duke of Albany, made eight years earlier A. J. G. Mackay (1877) op.cit.29
re-negotiated lump sum payment of £72,000 only £1,400 per annum was used for a court of civil justice, the remainder being spent on refurbishing royal palaces.

In May 1532 the second Act of the new Parliament instituted a permanent College of Justice, modeled on the court system in Pavia (not Paris as generally assumed):

"Because our soverane is maist desyrous to have ane permanent ordoure of Justice for the universale wele of all his liegis and thairfor tendis to institute ane college of cunning and wise men both of the spiritual and temporal Estate for the doing and administracione of justice in all civil actiouns and thairfor to the number of xiii persons half spirituale half temporall with ane president, the quilkis persoues sall be auctorizat in this present parliament to sitt and decide upon all actiouns civile and none utheris to have vot with thaim onto the tyme that the said college may be instituted at mar lasar and thir persouens to be sworne to minister justice equaly to all persouens in sic causis as sall happen to cum before thaim with sic uther rewlis and statutis as sall pleise the kingis grace to mak and geif to thaim for ordouring of the samin."

Of the 15 named judges, 14 had been in Session the previous year, 11 had 5 years experience. Continuity and stability were secured for the first professional body of judges sitting at pre-determined times. However, the College did not achieve full independence from the monarchy until much later, as the King retained the power to appoint up to four 'extra-ordinary' lay judges to the bench, appeasing Council members who were deprived of power and had been

"hesitant to entrust lands and fortunes to men without feudal eminence and responsibility"

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56 R. K. Hannay, Judicial Administration in Session and Justiciary (1936) op.cit. 401
57 Maxwell manuscript op. cit.69-70
58 APS II 335 c.2
59 D. Balfour, A Handbook of Court of Session Practice (1891) 53
Otherwise external influence and interference was specifically excluded. The independence of judges was warranted and sealed by the words “nane utharis to have vote with thaim”.  

The Court of Session was initiated as a civil court. No criminal cases were originally brought before their Lordships. The “haill fifteen” sat as a collegiate bench from Tuesday to Saturday for 5 hours daily, beginning at 8 a.m. Advocates and procurators addressed their Lordships, then were dismissed while discussion and voting took place, returning only to hear pronunciation of interlocutors (orders). To speed up the hearing of evidence, three judges sat by rotation in an Outer Tolbooth for two days a week to take evidence from witnesses and report back to the full bench, an early version of the current Outer House which hears the majority of first instance work.

The erection of the College of Justice distinguished jurisdiction between the Privy Council and Court of Session, cutting the remnants of royal connections. But there were even more immediate differences from prior attempts at an independent sedentary body. For the first time judges were made responsible for shaping their own procedures, provided they were ratified by the King, using

"Sik rules, statutes and ordinances as sall be thought be them expedient to be observid and keipid, in their manner and ordour of proceeding at all times."  

The King immediately pressed them to exercise their arbitrary powers to nominate three advocates from the existing eight then appearing, to deal with disputes of the poor, although the allusion to ‘infestation’ reveals a degree of Royal distaste:

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60 1762 c.10 Geo. I,  
61 Maxwell manuscript op.cit.69  
62 Stair op.cit. iv.2.4  
63 R. Laing, Institute of Session (Edinburgh University manuscript f.1) 403  
64 R. K. Hannay, (1936) op.cit. 401  
65 1537 c.43; 1537 c.44
"Forasmuch as we are daily infested by the complaints of divers our poor lieges pursuing for justice....that a man of good conscience to that effect be chosen by you." 68

A ‘Poors Roll’ was initiated in 1534 after the judges received another letter from the King advising them that “poor miserable persons” should have more hasty expedition of justice than others “because they had no substance”. The Lords assigned Friday for calling these actions, and rules could be dispensed with in appropriate circumstances. For poor pursuers in particular procedure could be peremptory, and dilatory defences were allowed. It was obvious the emphasis was on speed at the lowest cost – and the reader is left wondering about the quality of justice meted out.69

It was obvious that initially the King’s influence was direct and powerful, but when the institution of the College was confirmed by Parliament in 1540 increased powers were granted to the bench to control expediency. The judges were now omnicompetent ‘Senators of the College of Justice’.

"An attour gavis and grantis to the president, vice-president and senators power to mak sic actis statutis and ordinancis as they sall think expedient for ordouring of process and haisty expeditioun of justice."70

Unfortunately two years after revolutionising civil administration in order to establish a strong rule of law, the King died, leaving a one-week old infant, Mary Queen of Scots. Appointments to the bench by subsequent Regents were severely criticised, compounded by complaints from the Senators themselves over inadequate court

68 Eight were named, although ten were allowed by the 1532 Act
67 Act of Sederunt 2 March 1534
68 Maxwell manuscript op.cit.71
69 Recorded in separate books for court business Acta Dominorum Concilii et Sessionis 1537 c.32 ss.14,109
70 APS II 371 c.10, 1540 c.93, ratified 1542 (by James V), 1543 (Mary Queen of Scots), 1581 (James VI)
accommodation and limited and uncertain judicial endowment. Threatening to remit the court to St. Andrews in what was virtually a 'go-slow', 71 a bottleneck of claims built up. Summary trials were established to expedite the determination of long-pending causes, 72 while Parliament attempted to enforce payment promised by the Prelates. 73 Over the next few decades additional sources of income had to be solicited to cover the Senators' 'pensionis' and improve their attendance. From the beginning they had been exempted from paying taxes, 74 but still only received one-fifth of the English judicial recompense.

The Senators were beginning to take control of their caseload, reinforcing resistance to the King's influence. The ability to control the workflow of civil cases became even more crucial from 1572 when the Senators' jurisdiction expanded to incorporate criminal justice. To discourage a new wave of court business, the old system of collecting ‘unlaw’ (fines) from the losing party was revived, ostensibly justified because

"The maist part of the liegis of this realme are becumin wilful, obstinate and malitious pleyaris."

Losers were to pay not only the expenses of the successful party, but also one shilling in every pound and five pounds Scots (40 pence sterling in today's terms) where decreet was in facto. 75 Sessions increased to six days a week, 76 organised around periods of sowing and harvesting because of the strong Scottish agricultural economy. Cutting the Royal apron strings was a problematic issue:

71 ADC PA 548 Senators "concludit nocht to remane without thai gett payment for thar labouris"
72 as today's Summary Trials Maxwell manuscript op.cit.p.70
73 APS II 476 c.15, ADC PA 584
74 From institution in 1532 until 1641
75 APS III 447 c.24 (sentence silver abolished in 1641 APS V 412 c.202)
76 APS III 41, 1567 c. 52, Maxwell manuscript op.cit.82
"Justice is often frustrated by the issue of privy writing by the King and Council to the Lords of Session desiring them not to proceed in certain civil causes. The Lords are ordered to proceed notwithstanding any charges to the contrary."77

At this time Advocates supplied one-third of the judicial bench, in contrast to the current exclusivity.78 However there was a growing dependence on the Bar’s representations in court, if sanctioned by the Senators. Fined for unpunctuality in 1560, by 1575 they also paid a forfeit for needlessly employing the full bench of judges on one particular case which could have been delegated to a single judge79 Increasing in number over 50 years from the original 8 to around 70 in the 1580’s, and organised under a Dean of Faculty, they were closely involved in the instruction and teaching of laws. To protect their monopoly in teaching they objected to an endowment from the College of Justice to the University creating a doctor of laws.80

To return to the wider picture, after a lengthy incarceration and her death in England, Mary Queen of Scots was succeeded by James VI in 1587. So far as the courts were concerned, he also took an interventionist interest in the distribution of justice and attempted to assert royal prerogative over judges, personally demanding dismissal of a case in 1599.81 All but one of the judges defied his assumed supremacy, in a courageous battle for judicial independence:

"Whereat the King raged marvellously and was in great anger with the Lords of Session."82

77 1579 c. 37 III 152, repeated 1641 V 654b
78 From 1532 to 1605 – one-third of senators had been advocates. After 1605 APS VI 380 senators had to have been practising advocates
79 Act of Sederunt 12 February 1575
80 History of the University of Edinburgh 1583-1993 pp.1-16. The College of Justice was asked to make an endowment to a doctor of laws. Some advocates objected, there were less than 70 of them, the majority of whom were unemployed and they considered that there was "fully as much law in Edinburgh already as there was silver to pay for it" Maxwell manuscript op.cit.115, W.C. Dickinson, The Advocates’ Protest Against the Institution of a Chair of Law at the University of Edinburgh, Scottish Historical Review (1926) xxiii, 205-212, particularly 209
81 Bruce v Hamilton 1599
The King threatened to reverse their ‘objectionable’ decision by appealing to “all the judges in the world” but this did not take place. However, by calculated nominations to the Bench the King still attempted to influence the Court. By 1603 he lost interest in direct control when he was crowned King James VI of Scotland and I of England, travelling with his Parliament to take up residence in London.

17th Century

Although King James governed mainly through his Privy Council in London, the Scottish supreme court was developing independently into an organised system. Sir John Skene’s Short Forms of Process (1609) and Habakkuk Bisset’s Roliment of Courts (1622) represented a move towards codifying civil procedure in Scotland.

The succeeding King, Charles I, attempted to continue his predecessor’s autocratic rule through his personal Council. By 1628, three years after accession, his Privy Council set up a Commission to review and clarify the laws of Scotland because:

“The customs and conseuetude of the said Kingdom are in many things so obscure and uncertain that the same has need to be explained and cleared.”

There seems to be no record of the report of this Commission or the following Commission in 1630. In the meantime the Senators retained internal control of the “multitude of affairs and for the more speedy dispatch of justice” by instructing Advocates to be present “by the 9 a.m. bell” under penalty for failure. Those judges would could not outpace a 30-minute hour-glass which marked the beginning of their time on the bench were also fined.

82 Lord Cooper’s Selected Papers (1957) op.cit.116
83 Lord Normand, Address to International Law Association Conference 1954 SLT (News) 154-155
84 RPC II 365, IV 137, V 9 11, 32
85 J. Spotiswoode, Forms of Process quoted in Maxwell manuscript op.cit.368
86 Act of Sederunt 7 July 1647. The penalty was ‘a dollar’ paid for ‘dilatoriness’
87 Act of Sederunt 15 November 1649 their Lordships were fined 12 pence for lateness
Cases were allocated according to classification:

<table>
<thead>
<tr>
<th>Day</th>
<th>Classification</th>
</tr>
</thead>
<tbody>
<tr>
<td>Monday</td>
<td>Reductions and transfers</td>
</tr>
<tr>
<td>Tuesday</td>
<td>Recent spuilzies, removings and advocates</td>
</tr>
<tr>
<td>Wednesday</td>
<td>Causes of ministers and scholars</td>
</tr>
<tr>
<td>Fridays</td>
<td>Causes of the King, strangers and the poor</td>
</tr>
<tr>
<td>Saturdays</td>
<td>Causes of Prelates, Lords of Session and Advocates</td>
</tr>
</tbody>
</table>

However frustrated political attempts to control Scottish administration from over the border eventually resulted in a separation of the executive, legislative and judicial departments of government. Lords of Council separated from Session, which subsequently transformed to wholly temporal judges.\(^88\)

Political dominance of Scotland was a priority after the union of the Crowns, to be achieved by might if not by negotiation. Cromwell's army, after defeating the Scots at Dunbar and Worcester, assumed government of Scotland, first as a Commonwealth, and later as a Protectorate. For two years civil justice through the supreme court halted,\(^89\) before Cromwell appointed seven Commissioners for the administration of justice, the majority of whom were Englishmen with no experience of Scots law.\(^90\) Walker argues that this policy was intended to interrupt and undermine the power of the Scottish nobility,\(^91\) by allowing actions against a class of persons previously protected by the friendships with individual judges. For eight years the Commissioners sat as a collegiate body, replacing the judges, paid from the public treasury which was charged £3,000 annually for the administration of justice.\(^92\) Gradually the assimilation of English experiences widened the horizons and contacts of the Scottish Court. In particular one of the Commissioners, Viscount Stair, was later to be called 'the architect

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88 APS V 297 c.53, 1640 c.26
89 The court's last sitting 28 February 1650 "Now there's an end to ane auld sang" said the Lord President
90 Nicknamed "Cromwell's kinless loons" by President Gilmour as they were estranged from family and friends, R. D. Chalmers, Traditions of Edinburgh (1947) 121
92 1652 VI ii 777b, 751b, increased to £4,000 in 1653 VI ii 779b
of Scots law', synthesising and absorbing earlier developments with his experience as a Commissioner during the Protectorate.

In contrast to Scotland, which had survived a tumultuous few decades, feeble government, a vulnerable bench and seditious magnates, England was considered a more secure economic and political power, with a highly developed system of jurisprudence. It has been suggested that the Commissioners were a "marked improvement on their predecessors" who had been accused of arbitrary favouritism. Certainly the interruption led to a re-orientation in legal thinking and while the Institutional Writers Balfour, Craig and Hope had worked towards its foundation, it is Viscount Stair who is attributed with the erection of a new legal edifice.

 Shortly after Cromwell’s death Parliament restored absolute monarchy and Charles II ruled Scotland through a Privy Council, with a restricted royal prerogative over matters of State, public peace, riots and dispossessions. The College of Justice was revived with new nominations, and their privileges were extended to Advocates, Clerks and other members “for their encouragement to serve the country in their respective stations.”

Because of the disarray, a Royal Commission was constituted in 1669 to investigate methods of increasing access to Court while decreasing costs and delays to meet the needs of a growing economy. Judicial discretion had governed the calling and dispatch of cases to privileged associates and friends, causing confusion, disorder and abuse of process. Alleged incompetence and bias brought Session into disrepute.

"Calling and hearing of causes were to be regulated....the meanest and most unfavourable person in the nation not to be postponed or delayed; so that none

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93 R. D. Chalmers (1947) ibid.122
94 1661 c.250 VII 240
95 R. Chalmers (1947) op. cit.122
have reason to complain that they get not equal hearing and dispatch in justice as they are ready and call for it."98

The consequent Courts Act in 167299 not only established a High Court of Justiciary under six judges of the Court of Session, it set out the structure for timetabling of cases in order of lodgment, with separate Books of Enrolment to be held by an independent Keeper. Spurred into action, judges used their own powers to organise their business for quicker dispatch. They in turn had their own incentives. The roll of business was published daily on the court walls, which had a prodigious effect on judicial productivity:

"It excites the Lords to extraordinary diligence, yet triples the toils they took before".

In rotation they heard cases at first instance for a week in the Outer House of Parliament Hall. However a week was too short to conclude a case, and continuations caused a backlog to build. The hours of sitting were extended to cope.100

Yet again the King’s interference in the Court’s business threatened judicial independence, with drastic consequences:

"The use of old and obsolete laws by James VII, on weak and frivolous pretences was one of the reasons for which the Estates declare the throne vacant."101

"Interference with judges in the administration of justice and making their commission dependent on the will of the sovereign is declared illegal in the Claim of Right."102

97 Maxwell manuscript op.cit 120-125
98 1670 16 Parl.2 Sess.3 ch.11; Stair op.cit. iv.2.4
99 APS VIII, 80 c.40, 1672 c.16
100 Act of Sederunt July 1673 – from 8 a.m. in the Outer House
101 Claim of Right 1689 IX, 34a
102 Claim of Right 1689 IX, 38b, 39b
The power of the law was moving beyond majestic office. This was the time of the rise of distinctive Scottish legal writing – Practicks, Decisions and Digests which reflected the Scots participation in the Reception and Institutional phases of European civil traditions.103 Viscount Stair’s Institutions of the Law of Scotland represented cohesive codification of indigenous law, strengthening the Scottish legal system before the political amalgamation of Scotland and England in the Acts of Union 1707.

18th Century

Unification had begun in 1603 with the union of the royal houses and the movement of the King’s Council from Edinburgh to London. Alliance was completed as we know it by the union of parliaments in 1707. Disputes between England and Scotland in previous centuries were widely based – on religion, economics, politics and foreign policy. Warring continued even after the Hanoverian royal line was established in 1701. But by the beginning of the 18th century relationships had deteriorated dramatically. Under the English Alien Act 1705 Scotsmen were treated as aliens in England, and conflict was intensified by an expert embargo. Commissioners negotiated through this constitutional crisis, and treaties of agreement were passed separately in 1706 by the Scottish and English Parliaments. Under the Acts of Union 1707104 England and Scotland were united. Vitally, Articles 18 and 19 defined and preserved the retention of the Scottish legal system.

Article 18 declared that the laws concerning regulation of trade, custom and excises were the same throughout Great Britain, while all other laws of Scotland remained in force as before, subject to alteration by the U.K. Parliament. Although laws concerning public rights and civil government were to be made the same throughout the UK, there

103 Balfour’s Practicks, Sir John Skene editor/publisher of Regiam Majestatem, both educated at Wittenburg, Thomas Craig, Jus Feudale (comparative European/Scottish research), Hope’s Practicks (Lord Advocate to Charles I).
104 APS XI 405 c.7 1707 c.7
was a guarantee that laws concerning private rights were not to be altered "except for the evident utility of the subjects within Scotland."

Article 19 declared that the Court of Session and Court of Justiciary were to remain as constituted, with the same authority, procedures and privileges as before. Distinctiveness was protected. Apparently autonomy was intended: "no causes were cognoscible by the Courts of Chancery, Queen’s Bench, Common Please, or any other court in Westminster Hall". But ambiguous phraseology meant that the appellate jurisdiction for Scottish civil cases was superseded by the High Court of Parliament in the House of Lords, representing the Sovereign and Council in Parliament. With no Scottish judges in the House of Lords until 1867, civil appeals from Scotland were initially decided by English judges with different experience, background and knowledge base. In addition, Article 19 allowed modifications of Scottish courts by the Westminster parliament, power which was exercised regularly in the early 19th century to promote reform in the Scottish supreme court.

During the 18th century commercial enterprise was developing, a corollary of which was the emergence of a clear body of substantive law. However, the stabilisation of procedures did not match the growth of litigation. As the volume increased, decisions proportionately declined and a backlog of cases again built up. Session times eventually had to be extended, but in general the constitution of the Court of Session, which included a multiplicity of specialist ‘Lists’ exercising separate jurisdiction, an

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105 Earl of Roseberry v Pirie 1708, Stair Memorial Encyclopedia Vol 6, 801
106 Lord Cooper, Scottish Legal Tradition (1991 edition) 70-72. English law has had a great deal of influence in Scotland down the centuries, but so also has the European civilian tradition. Lord Cooper argued that the union with England did not put an end to these developments, although it put it under some strain when Scottish lawyers moved away from continental systems. Areas of substantive law which already existed in 1707 tended to remain distinct from English law, while areas which have arisen since have converged – for example, Intellectual Property and European harmonisation law. What is clear is that the Scottish rules of civil procedure have been assimilated from both traditions, reflected in handbooks on court procedures and forms of process published from this period. "It has been well said that the fabric of mature Scots law was variegated as a tartan" Lord Cooper
107 Ivory’s Forms of Process (1815) op.cit.16
109 1751 24 Geo. II c.23 ss.4-12
arrangement which was not conducive to speed. Much oral work was also being committed to writing and their Lordships found their paper-oriented workloads oppressive. William Forbes plaintively write about procedure in 1713:

"Since informations and bills were allowed to be printed (they) become an incredible fatigue to the Lords, who, after toiling all day in hearing causes, are obliged to shut themselves up to peruse and consider a multiplicity of papers at night, and therefore often to want the necessary relaxation due to nature, which visibly shortens their days."  

The arrangement of the full collegiate bench was a cumbersome machine for decision-making, with consensus difficult to reach on a multitude of issues. Increased reliance was placed on the delegated authority of Lord Ordinaries in the Outer Tolbooth, making decisions in straightforward actions and reporting the more complex cases to the Inner House. This was virtually a judicial sift, resulting in the "Senate in the Inner House having nothing to do but give them the finishing stroke." However a Lord Ordinary’s decision could re-appear before him on appeal, with two further opportunities to reclaim to the full bench, biting into available judicial time.

Once more the government’s attention was distracted from the regulation of the court system, this time by the Jacobite rebellions of 1715 and 1745. The King’s influence was receding with the abolition of his power to nominate ‘extra-ordinary’ judges. His representative office in Scotland, the Chancellor, also disappeared on the death of the last holder, the Earl of Seafield. While caseloads grew, therefore, it was the Senators who promoted and effected law reform through Acts of Sederunt and the use of sanctions. To filter out groundless cases every bill was signed by an Advocate,

112 W. Forbes op. cit. quoted in Walker (1996) op.cit.591
113 in 1723 - 4 appointments were extinguished by exhaustion (by retiral and death)
114 in 1730
verifying it as a just cause.116 An Advocate, Clerk, Agent or other officer of Session “tripping in matters committed to his trust” was threatened with fines and possible ejection.117 However by the second half of the 18th century it was adjudged that excesses had not been curtailed and the burden of business was becoming intolerable for the judges:

- Each Lord Ordinary was apparently allotted insufficient time (64 hours) in the Outer House, bearing the brunt of first instance cases, but there were frequent remits for full-bench opinions
- Individual judges read and considered approximately 30,000 quarto pages in the Inner House and 15,000 in the Outer House
- Full-bench decisions were slow due to discordant views and elaborate discussions118

Piecemeal modifications were considered inadequate, and a new Lord President, Lord Dundas, apparently inherited a dispirited bench. He was described as a “high spirited and lively man” and by dint of personality was credited with reducing a two-year backlog of cases in his first three months in office. He did this by adhering to a few plain rules, enforcing strict discipline and “without giving offence to such of his brethern as were fondest of hearing them speak” – although some may have been surprised by having an hour-glass shaken as they spoke.119 Lord Dundas also extended the court day by an extra two hours, and was applauded as “the most efficient and useful President that had appeared since the Revolution”120

116 From 1429 c.125 advocates had to take an oath of verification (calumny) but this act was found obsolete in McQueen V 1764
117 By 1787 fines for failure to observe rules and orders of the court were distributed to the poor Act of Sederunt 11 August 1787
118 Edinburgh Review Vol IX, 469
119 R. Chalmers (1947) op. cit.125
120 J. Ramsay, Scotland and Scotsmen in the 18th Century (1888) 336-337
As with action under the Kings, direct and energetic application and strong personal motivation engendered initially phenomenal results. However the growth of industrial society and internal practices quickly outpaced reforms.

Lord Dundas, supported by senior judge Lord Loughborough, suggested that a smaller bench would be more efficient, allowing for quicker debate and decisions. Concomitantly, it was suggested that reducing the bench could result in the salary increases which the government had just refused to approve.121 The reduction was vehemently opposed by many, including Advocate James Boswell, as infringing rights under the Acts of Union.122 Salaries were subsequently increased by 30%,123 and the “Diminishing Bill” was defeated. However the uproar focused Parliament on the need to adapt the legal machinery to a more prosperous and litigious society. A rise in cases and increase in dilatory practices combined to submerge the court under the weight of written and oral pleadings. Within the last 30 years of the century numbers enrolling in the Outer House had more than doubled,124 exacerbated by a gradual desertion of Stair’s strict principles of court practice – that each action should commence with a precise and articulate statement of the whole allegations and facts and propositions in law upon which the conclusions were founded.125

The following preamble to an Act of Sederunt captures the essence of judicial frustration at this time:

“The Lords of Council and Session having taken into their consideration the unnecessary delays and expense occasioned by the proceedings in the Bill-Chamber and more particularly the great abuse arising from the number of bills

121 Judges in Scotland were paid £700 per annum, compared to the judicial salary in England £2,400
N.Phillipson, The Scottish Whigs and the Reform of the Court of Session 1785 – 1830 (1990) 66
123 Salaries of Judges (Scotland) Act 1786 27 Geo.II c.46
124 Report of the Commissioners on Court of Session Procedure (1824) quoted by N.Phillipson (1990) op.cit.231
125 Stair op.cit. iv.49
of suspension...and also...the manifold delays and obstructions to the course of justice in the Outer House by the advocates for the parties not being prepared to argue the causes before the Ordinaries."\textsuperscript{126}

Sir Walter Scott confirmed the source of frequent complaints:

"I have one myself, a gangling plea that my father left me, and his father afore left to him. Its about our backyard; ye'll may be have heard of it in the Parliament House, it's a well-kenn'd plea, it's e'n four times in afore the fifteen, and deil onything the wisest o' them could make o't but just to send it out again to the Outer House. O, it's a beautiful thing to see how long and how carefully justice is considered in this country!"\textsuperscript{127}

19\textsuperscript{th} Century

A new industrial age prompted a complete overhaul of court constitution and procedures. The population had almost doubled from 1.8 million to 3.3 million within 50 years. Manufacturing and the economy were burgeoning. The threat of a Napoleonic invasion receded, and prosperous times were forecast. But the legal machinery was not in a position to respond quickly to commercial needs.

The bench had been allowed to decrease naturally to 13. Under increasing pressure they turned to internal housekeeping to identify unnecessary drains on resources. In particular they identified that the fact that written pleadings were loose and uncertain was instrumental in swallowing excessive amounts of time and money. Parties were lodging new facts and documents up to the very last stage of a cause.\textsuperscript{128}

\begin{footnotes}
\item[126] Act of Sederunt 11 August 1787
\item[127] Hutchinson v McKitchinson Antiquary Vol I, 20; A. J. G. Mackay Vol.1 (1877) op.cit.30, Edinburgh Review ix op.cit.472
\end{footnotes}
"Much matter has been introduced foreign to the points at issue by which means these states have swelled to an enormous bulk, occasioned much unnecessary expense to the parties, and much needless trouble to the Court, and observing that this evil chiefly proceeded from the careless and improper manner which states have been prepared..."129

Their Lordships seemed unable to control dilatory practices. The machinery for legislative reform overtook judicial inertia in a series of Royal Commissions and Acts prompted by Westminster during the first half of the 19th century. This was the time of the industrial revolution, when exponential commercial growth made speed of dispute resolution vital to enterprise, expansion and competition. The Scottish courts were considered inept:

"As a merchant I aver that the speedy return of our capital with whatever gains it may have produced is the greatest source of profit. Where, therefore, debtors are refractory, it is of the most material commercial importance to have courts of law where not only justice, but speedy justice may be obtained. Many of my neighbours in the city have actually refused to have dealings with Scotland for no other reason than because there is such delay in obtaining justice from the courts."130

New political leaders proposed radical reform. Lord Granville had resolutions passed in the House of Lords promoting a preliminary bill to remodel the Scottish court system into three chambers with concurrent jurisdiction, conform to the English system. A change of government saw the Bill fall, but the debate surrounding the ‘anglicisation of the Scottish courts’ was a catalyst for change.

128 P. Halkerston, Pamphlet Relative to the Procedure in the Inner House, Outer House and Bill Chamber and Jury Court (1827)
129 Act of Sederunt 11 March 1800 established Proofs by Commission
In 1808 a Royal Commission was appointed\textsuperscript{131} to examine defects within the system and comment on the introduction of Jury Trials for civil cases, similar to the English scheme. Setting aside any decision on jury trials, the Commission recommended other constitutional changes.\textsuperscript{132} The Court of Session was to be divided into two chambers, with co-extensive powers, privileges and jurisdictions. Six Lords Ordinary (and the Lord President) were to comprise the First Division, five Lords Ordinary (and the Lord Justice Clerk) comprised the Second Division. The number of Lords Ordinary seconded to the Outer House was increased, a quorum of nine judges being required to pass Acts of Sederunt.

The Commission acknowledged that the greatest difficulty was caused within the court by late development of cases through an admixture of law and fact, which consumed great amounts of time and money. Their recommendation, to find a means to induce parties to declare the factual basis of their claims at an early stage, found root in an Act of Sederunt which set out regulations for securing correct statements, sanctioned and enforced by Statute.\textsuperscript{133} However Professor Bell (also an Institutional Writer and Principal Clerk of Session) called these “palliative measures” reflecting general criticism at the time that while there was no machinery for separating fact from law, the rules of correct pleadings were disregarded and injunctions disobeyed.\textsuperscript{134}

Although the 1808 Act speedily cleared the accumulating backlog of cases,\textsuperscript{135} it was decided that there was still too much of a burden on judges dealing with business in both Outer House and Inner House. This workload contributed to delay. From this time until 1933 Parliament assumed responsibility for procedure in the Court of Session.\textsuperscript{136}

\begin{itemize}
\item[130] Caledonian Mercury 27 June 1808, Isle of Man, \textit{London Merchant} quoted N. Phillipson (1990) op.cit.60
\item[131] 48 Geo.3 c.151 –30 Commissioners, Chairman Lord Eldon, Secretary Walter Scott, Clerk of Session
\item[132] Final Report of Commissioners, Parliamentary Papers (1808) ix, Court of Session Act 50 Geo.3 c.112
\item[133] Act of Sederunt February 1810, 1810 58 Geo.III c.12, 1813 58 Geo.c.64
\item[134] Prof. G. J. Bell, Examinations of the Objects Stated Against the Bill (1824) 39 Law Tracts II
\item[135] Ivory (1815) op.cit.21
\item[136] Passing almost 30 statutes from 1808 to 1933 prescribing procedures to be followed in the Court of Session
\end{itemize}
Statutory intervention in 1810 and 1813 was required to complete the re-constitution of the Court.\textsuperscript{137} Five Lords Ordinary were permanently relieved of Inner House duties.\textsuperscript{138} Established judges objected to a perceived downgrading of their status, but Ivory points to "an extraordinary line of fatalities on the bench" facilitating more positive appointments.\textsuperscript{139} Appeals were prohibited for claims under £25. Restructuring however did not speed up administration.\textsuperscript{140} No-one had successfully addressed the source of key faults – the working practices within the system.

Criticism continued to draw the attention of the House of Lords who had been inundated with a disproportionate number of appeals from the Court of Session.\textsuperscript{141} Lack of knowledge of Scots law and procedure within the English bench ensured that "the duty of deciding such cases was more extremely painful and required infinite labour".\textsuperscript{142} It was argued that almost every case of importance or those with dissenting opinions was carried to the House of Lords, virtually acting as a second Inner House. Frequent reversal of decisions encouraged litigants disappointed in Scotland to appeal to Westminster.\textsuperscript{143} Lack of procedural control in Scotland therefore had a considerable impact in London, and reform became a political priority. A Royal Commission into Court Procedure in Scotland spawned a series of detailed reports.

Amid a cacophony of criticisms, in 1815\textsuperscript{144} a separate Jury Court was set up within the Court of Session for trial of issues of fact by jury. This was intended as a four-year experimental pilot under the Lord Chief-Commissioner and two judges of the Court of

\textsuperscript{137} 50 Geo. III c.12, (Act 1813 53 Geo. III c.64 settled details extending the work of the Outer House)
\textsuperscript{138} Three from 1st Division, two from 2\textsuperscript{nd} Division 1810 50 Geo.III c.112 s.29
\textsuperscript{139} Ivory (1815) op.cit. It was three years before sufficient new appointments fulfilled statutory obligations
\textsuperscript{140} N. Phillipson (1990) op.cit.127
\textsuperscript{141} 151 appeals out of a total of 225 originated in Scotland; splitting into Divisions had multiplied appeals
\textsuperscript{142} Lord Chancellor, quoted by Prof. T.B. Smith, Short Commentary on the Law of Scotland (1962) 52
\textsuperscript{143} A. Swinton, Pamphlet - Thoughts on the Report (of the Committee Considering the Bill of 1824 and Act for the Better Regulating the Forms of Process in the Courts of Law in Scotland) (1824) Law Tracts II
\textsuperscript{144} 55 Geo. III c.42, known as 'Lord Eldon’s Act' (repealed in 1830 by 1 Wm.iv .c.69)
Session. It was enlarged in 1815 and 1825 before incorporation into the Court of Session in 1830. The jury court was originally created to compensate for the lack of control over voluminous pleadings and inadequate and late preparation of cases, but was fiercely criticised by the Scottish profession as a "alien importation of English common law" and dismissed by others as a "lukewarm experiment".

Notwithstanding early resistance, results were initially successful, obviously promoted by the tenacious personality of the Lord Chief-Commissioner, Lord Adam, who apparently possessed "indefatigable zeal, great ability and uniform suavity of manners and affability of disposition". Gradually, however, the process became a victim of its own success and was overloaded with a disproportionate amount of business. Proposals to universally extend its procedures throughout the Court of Session prompted a report from the Writers to the Signet, revealing difficulties which are timeless:

"We are not unaware that some of the learned judges who now sit in the Inner House, having spent a large portion of their lives in other habits of judicial procedure, might find it irksome and laborious, and even in some instances difficult to accommodate themselves to a new system."

Two further Commissions in 1823 and 1824 resulted in the Judicature Act of 1825. Although there were no overall structural changes, the powers of the Lords Ordinary were extended to superintendence of causes appearing before them – judicial caseflow management. Within an adversarial system, where parties previously had autonomous

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145 59 Geo. III c.15, Act of Sederunt 20 November 1825 Lord Chief-Commissioner William Adam, Lords Pitmilly, Gilles, Mackenzie, Cringletie
146 Lord Cooper, Selected Papers (1957) op.cit. 61
147 A.J. G. Mackay Vol.1 (1877) op.cit.43
148 Report of the Committee of the Society of Writers to the Signet appointed to consider the Bill (1824) 10 Law Tracts II
149 Report of the Committee Considering the Bill 1824 and Act for the Better Regulating the Forms of Process in the Courts of Law in Scotland (1824) s.22 Fol.23
147 Report submitted by Writers to the Signet (1824) op.cit.16
control over the pace and presentation of their disclosures, this early attempt at management was a revolutionary departure from established principles and practice. The object was to truncate an "exuberance of narrative...mingled together in a most inconvenient manner"\textsuperscript{152} which had "spawned a laxity of judgments and ill-digested decisions".

The Report of the Commissioners recommended that at an early stage cases should be allocated to specific judges for superintendence and interlocutory orders. At a first hearing it was intended that the Lord Ordinary should obtain a full disclosure of respective averments in point of fact and pleas to be deduced from them.\textsuperscript{153} Only after his Lordship was satisfied that parties had made the necessary preparations and disclosures upon which they were to found their case, would he allow a debate to be fixed. At the cost of debate he had discretion to propel a process

"in what he considers a proper course...commonly without the aid from the parties, or rather in spite of their attempts to wrest it aside."\textsuperscript{154}

However, the Commissioners recognised that there were ostensibly insoluble problems with procedural control by a judge:

"When a time is fixed by the Lord Ordinary, it is rarely if ever regarded as in the least degree a peremptory order. When it elapses the cause is enrolled, some apology is stated and the time enlarged, and this often happens repeatedly. From such irregularities spring much waste of the time and attention of the judge, a great deal of frivolous delay in conduct of the cause, frequent

\textsuperscript{151} 1825 6 Geo IV c.120
\textsuperscript{152} Report of the 1824 Committee (1824) op.cit. S.22, Fol.23
\textsuperscript{153} Report of the 1824 Committee op.cit. pp. 4 and 21
\textsuperscript{154} Report of the 1824 Committee op.cit.28
unnecessary attendances of counsel and agents,...and an additional cost far from being inconsiderable to the expense of a lawsuit." 155

While the proposals were at the Bill stage, different branches of the legal profession submitted criticisms and comments. There was a general consensus that the old machinery was not equal to the pace of new business, but disagreement over which reforms would be of most benefit. These comments are still valid today and are mirrored 170 years later in the latest procedure review in 1995. 156

Déjà vu – 19th century judicial management of caseflow

"No man acquainted with affairs can doubt that nine-tenths of the ordinary business of courts of justice may best be settled verbally under the control of a judge" 157

It was suggested that full disclosure should be ordered in the summons and defences, not deferred until a first appearance before the Lord Ordinary. 158 But experience on the bench showed that

"Parties and their agents are extremely backward, partly from design and partly from dilatoriness, to come out with the facts of their case and they not infrequently make variations in their story in each successive paper." 159

This was certainly not the first judicial pronouncement that rules were thwarted in practice by personal motivation and vested interests. The same judge encapsulated centuries of judicial observations:

155 Report of the 1824 Committee op.cit.42
157 A. Mundell, Prompt Remarks of A. Mundell to the Rt. Hon. The Earl of Liverpool, Prime Minister, (1824) Law Tracts II
158 Prof. G. J. Bell (1824) op.cit.99
159 Letter to the Lord President from a Member of the College of Justice (1824) 4 Law Tracts II
"Many regulations have also been made to compel parties to make early production of the writings on which they found, but all hitherto without effect. Unless some efficient measures are laid down and enforced, there is not merely a risk but a certainty that the forms which I have proposed for preparing these papers will not be observed."

The judge had suggested that an Auditor of Processes should be appointed to revise preliminary papers, reject, strike out or amend parts not conformable to prescribed forms. He also recommended the court to consider discouraging frivolous appeals with costs. The reactions to his submissions are not recorded, but his recommendations were not adopted. With 170 year's further experience, even with stricter rules for written pleadings, the lack of audit and the lack of enforcement in practice continues to dislocate administration, causing undue delays and unnecessary expense. (see Chapter 4).

Judicial intervention was not a popular move, particularly when one commentator pointed out the effect on vested interests and the risk of diminution of profit to practitioners by the introduction of economy, precision and dispatch. Experience in the Jury Court showed that more money had to be expended at an earlier stage, concomitant with early disclosure. However it was also shown that the final costs were advantageous to clients, although prejudicial to the profession. A small comparative study of taxed expenses showed that an older procedure – proof by commission, was more expensive for litigants but more rewarding to the profession than Jury Court

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160 Also suggested by Lord Cooper, Defects in the British Judicial Machine, (1952-4) 2 Journal of the Society of Public Law Teachers 96 "The parties' advisers have a financial interest in making the litigation a slow and as complicated as possible" Lord Cooper called this the "subconscious effect"


162 Sir A. Muir Mackenzie, Letter to the Lauded Proprietors of Scotland (1824) Law Tracts II. Vested interests – "preferring evils of expense and tediousness to the dangers which may be substituted" p.12
Agents apparently discouraged resort to the latter court with unjust and exaggerated estimates of expenses. It was suggested that practitioners imputed all the faults and inconveniences to the Jury Court which were attributable to their own inexperience and insufficiency. Under the new procedure accountability exposed dilatory practices, opening the whole legal profession, who resisted its adoption, to opportunism at the expense of efficiency.

(Client) “in the ancient course might be encouraged to proceed for years, with expense proportioned to an annual means of supply and fed with hope, and at the expiration of a tedious process, to discover that he has not the means to pay for appeal, and never had hope of success.”

Arguments over the judicial role in an adversarial system were focused in a Report on the new proposals by the Faculty of Advocates, asserting that the passive office of a judge should remain “to decide the cause which the parties present to him”. This was condemned by Professor Bell, who supported judicial superintendence of the pleading process. He noted that Jury Trials had already been held up as a vehicle for restoring the jurisprudence of Stair, forcing the separation of fact from law on a profession which hid behind years of vagueness and unaccountability.

“Perhaps more injustice and oppression is committed by the undue protraction of litigation in consequence of vague, wavering, unsettled, ever-changing statements of fact in a system like the Scottish than, upon the whole, by erroneous judgments. And nothing is more certain, than that want of due care

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163 Report of the 1824 Committee, Appendix – The Faculty had complained that the Jury Court had shown that judicial management caused more expense – but over an 18 month period Proof by Commission costs totalled £11,171, with the average per case £177. Jury Court costs were £7,108, the average being £112
164 Sir A. Muir Mackenzie (1824) op.cit.17
165 Sir A. Muir Mackenzie (1824) op.cit.19
166 Report on the Scots Judicature Bill; Objections to the Bill and Suggestions by a Committee of the Faculty of Procurators before the High Court (The Report of the Faculty of Advocates) (1824) 6, Law Tracts
in the preliminary process so as to bring out the true substantial question for judgment, is the greater cause of protracted proceedings.167

In the new procedure, it was anticipated that simple cases would require two hearings before a judge, with parties prepared to exhaust the pleas in the case fairly, "benefiting through consultation and deliberative advice from the start."168 Complex cases might require radical correction of the preparation, supported by costs against negligence or evasion "to make the Bar ashamed of giving to it the least degree of countenance."

The Faculty of Advocates objected to supervision by a judge who could not know all the details of a case as well as the parties. It was also alleged that it was more expedient and less expensive to leave conduct with the parties themselves.169 However, Professor Bell's view was that "the Bar objects to everything like the close sifting of a cause." He attacked them on the grounds of vested interests:

"Advocates seem to be perpetually in alarm lest parties should be compelled to meet each other early on peremptory grounds."170

He held that judicial supervision reflected a judge's extended duty to the general public:

"No function of the judicial officer is more important...it requires all the skill, knowledge and discrimination of a master in law. From the exertions of a judge so qualified, the public will receive incalculable benefit."171

However, the Faculty of Advocates indicated a preference for the 1810 Act of Sederunt which was originally brought in to encourage more distinctive pleadings and early foreclosure. Professor Bell pointed out that these rules had proved ineffective in

167 Prof. G. J. Bell (1824) op.cit.47-49
168 Prof. G. J. Bell (1824) op.cit.74
169 Report by Faculty of Advocates (1824) op.cit..2-20
170 Prof. G. J. Bell (1824) op.cit.90
practice because of insufficient preparation by the parties. The Faculty’s pleas for retaining the prevailing autonomy therefore fell on stony ground.

Radical change was forced on the profession by the 1825 Act. Instead of mixing fact and law together, the pleadings were organised into separate and distinct categories. After setting out the facts upon which they meant to found, the ‘Record’ was closed, and no new facts were allowed. It was adjudged that the profession had shown that they could not be relied on to conform with 1810 rules without supervision. It was anticipated that under the new system of judicial caseflow management:

"The whole cause will be exhausted in the pleadings and any orders will be directed to the substantial points in contest. Unsatisfactory papers making their appearance daily will be utterly discountenanced."\(^{172}\)

When papers were timetabled to be lodged, the expectation was that orders would be complied with. However, adherence to the rules was highly dependent upon the sustained energies of the judges taking a strict line with parties.

In 1825 Lord President Hope, on moving the court to pass the corollary Act of Sederunt,\(^{173}\) registered a determination to mark "a new era in the administration of justice", with this warning for the Bench:

"Nothing but an absolute conviction that no departure from form will be overlooked will ever induce either clients or practitioners to observe that strict attention and accuracy which the law now requires in the preparation of a cause"

\(^{171}\) Prof. G. J. Bell (1824) op.cit.78
\(^{172}\) Prof. G. J. Bell (1824) op.cit.87
\(^{173}\) Act of Sederunt 11 September 1825
“Where deviations take place in the Outer House the Lords Ordinary must instantly check them. This may occasion hardship to parties and regret to your Lordships, but a stern adherence to this rule will....soon bring (and nothing else will ever bring) form of process into that correct and precise shape which the legislature requires.” 174

In anticipation of the increased workload, seven junior judges were relieved from Inner House duties, and empowered as Lords Ordinary to examine the correctness of explicit summons and defences, with discretion to dismiss or ordain further pleadings or disclosures, allow a final adjustment and call parties for explanation and examination.175 Given that the parties had opportunity, on cause shown, to expand their cause, the Writers to the Signet supported in principle the move towards judicial scrutiny176:

“To follow out the Scottish system with any hope of practical utility, it is indispensable to have the immediate skilful and active superintendence of a judge who is master of the science, and who can direct in all cases the pleadings....the whole substantial matter of the contest, out of which the issues of questions of law may subsequently be drawn.”177

A report from the Faculty of Advocates disclosed vehement opposition to any form of external control and accountability. Their report was censured as an attempt to delay progress of the Bill in Parliament and to defeat reform by numerous and minute criticisms, including spurious projections of “augmented expense and protracted tediousness”.178

174 The Rt. Hon Charles Hope, Lord President, on moving the court to pass Acts of Sederunt for the Settled Regulation of the Forms of Process in the Courts of Law in Scotland (1825) reported in 1934 SLT (News) 173-175
175 1825 6 Geo. iv c.120 ss 6-19 Report of the 1824 Committee called for superintendence up to trial p.4
176 Report of the Writers to the Signet (1824) op.cit.42
177 Prof. G. J. Bell (1824) op.cit.83 commenting on Report of the Writers to the Signet (1824)
178 Prof. G. J. Bell (1824) op.cit.126
"No man acquainted with affairs can doubt that nine-tenths of the ordinary business of courts of justice may best be settled verbally under the control of a judge." ¹⁷⁹

Professor Bell reports that the courts regained a form of control of substantive grounds of action although professional representatives were often offended by judicial criticisms. Older and more established members were disinclined to begin "a new apprenticeship". New legislation forced a pragmatic internal revolution in which it was thought that a return to the more efficient jurisprudence and philosophy of Stair justified judicial intervention – the end justified the means.

The Bar continued to struggle against change, one representative describing 17 years of judicial supervision in Jury Trials as "universally distasteful", his evidence being that the greater proportion of cases were the subject of compromise "from mutual want of confidence in the tribunal." ¹⁸⁰ Others saw the increased settlement rates as a measure of success of a scheme which forced parties into early disclosure.¹⁸¹ The Bar, however, suggested that the "tediousness of ancient form of process" was preferable and "more adapted to the slow, quiet cautiousness of the proverbial character of the (Scottish) nation",¹⁸² an ideology still held by the Faculty in 1995.¹⁸³

It was noted though that early achievements with case supervision in the Jury Court had been overtaken in practice. After 13 years in operation it was already dealing with one-fifth of court business. Lord President Hope pointed to practices which had evolved with the system. Cases became voluminous. The length of speeches by counsel were considered out of all proportion to the complexity of the cause in an effort to influence

¹⁷⁹ Prof. G. J. Bell (1824) op.cit.99
¹⁸⁰ Jury Trial in Scotland, Letter to the Lord High Chancellor by Bar member (1832) Law Tracts IV
¹⁸¹ Interestingly a similar change in settlement pattern can be identified under judicial supervision in the current Commercial Court (see Chapter 8). The threat of early exposure unveils those actions initiated solely for tactical reasons.
¹⁸² Letter to Lord High Chancellor by Member of the Bar (1832) op.cit.2 Law Tracts IV
¹⁸³ Submission to the Cullen Review by the Faculty of Advocates (1995) op.cit.4-5
juries. Lord Hope pointed to a lack of amendment which was leading to prolixity. Judges in 1828 were sitting well into the afternoon. Clients’ demands for the Jury Court increased. Pressure of work in that specialist area, and the diminishing workloads in the Outer House eventually led to its incorporation into mainstream business in 1830 in a consolidation of process. Its importance as a vehicle to separate facts from legal issues diminished, finally be “whittled down by legislation and practice”.

Amalgamation of separate court lists was a key move towards maximising resources, particularly as the full complement of judges was reduced to 13 and all acted as Lords Commissioner of the Court of Justiciary and Barons of the Court of Exchequer. As well as Jury Court business, Admiralty and Commissary cases were also incorporated at this time. However, although new procedures had generated more effective use of diminishing court resources, they had apparently not fulfilled their second objective. They had not halted the decline in court business. Despite unprecedented commercial and industrial growth, increased population and more efficient transport and communication systems, reflected in an increase within the legal profession, it appeared that litigants were not using the Court of Session.

Business in the Outer House 1794 –1845

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of Outer House Cases</th>
<th>Writers to the Signet</th>
</tr>
</thead>
<tbody>
<tr>
<td>1794 – 1798</td>
<td>2631 (average per annum)</td>
<td>223</td>
</tr>
<tr>
<td>1806 – 1810</td>
<td>2594</td>
<td>311</td>
</tr>
<tr>
<td>1821 – 1825</td>
<td>2143</td>
<td>446</td>
</tr>
<tr>
<td>1826 – 1830</td>
<td>1998</td>
<td>658</td>
</tr>
<tr>
<td>1831</td>
<td>1945</td>
<td></td>
</tr>
<tr>
<td>1843</td>
<td>1524</td>
<td></td>
</tr>
<tr>
<td>1845</td>
<td>1385</td>
<td></td>
</tr>
</tbody>
</table>

NB: Caseload dropped 30% in 36 years between 1794 – 1830, and 47% over a 50 year period

184 Act of Sederunt 11 July 1828
185 1 Wm.iv.c.69 Admiralty, Commissary and Jury Courts were abolished and business transferred to Court of Session jurisdiction. The complement of judges was reduced to 13.
186 Prof. T B .Smith, Civil Jury Trial: A Scottish Assessment (1964) 50 Virginia Law Review 1086
187 1839 c.36 s.1, 1887 c.35 s.44
The great results anticipated from earlier reforms had not materialised.\textsuperscript{189} Two further Acts widely remodeled and regulated procedure within the Court of Session.\textsuperscript{190} The mode of procedure and forms of pleading were altered, sittings of court were extended, and time given to lodge defences was shortened. Parties now had almost unlimited power of amending the Records so as to bring out the real questions in issue between them.\textsuperscript{191}

A new form of summons was designed to separate matters of fact in articulate condensation from annexed note of pleas-in-law.\textsuperscript{192} This development extended the ethos of the 1810 Act of Sederunt, supported by the Faculty\textsuperscript{193} despite being swept aside in practice by a previous generation of Advocates. In 1810 there had been an attempt to co-join the summons and defences in a Record, subject to adjustment. The finality of the Record was reinforced in 1825 and 1850 when parties were required to attend the Lord Ordinary in chambers with counsel to complete their adjustments and close the Record. Thereafter the Lord Ordinary was empowered to "allow or require...such adjustments or amendments as seemed proper".\textsuperscript{194} Some degree of control over preparation of pleadings was returning to parties, within defined boundaries. Presentation was still supervised, but the extent of the Lord Ordinary's general discretion was undefined.\textsuperscript{195} Periods allowed for lodging papers or for closing the Record could be prorogated only once on special cause shown.\textsuperscript{196} The 1850 Act also established allowance of amendments of a Record up to the end of the cause. Proof on commission returned for certain causes in 1850, but by 1866, to cut subsequent delay.

\begin{footnotesize}
\begin{enumerate}
\item<188> Records began in 1794, Parliamentary Returns 1 Wm. iv.c.69, C.F Shand, The Practice of the Court of Session (1858) Part I Chap I, sec III
\item<189> Prof. T. B. Smith (1964) op.cit.1076
\item<190> 1850 13 and 14 Vict. c.36, 1868 31 and 32 Vict. c.100
\item<191> 1868 31 and 32 Vict. c.100 s.29
\item<192> 1850 13 and 14 Vict. c.36 s.1
\item<193> Act of Sederunt 7 February 1810 - "It is highly expedient that the real nature of the action, facts and pleas-in-law should contain certain known and fixed papers to judges who should see within a short compass the real nature of the action."
\item<194> 1850 s.11
\item<195> 1868 s.27(4) judicial discretion was affected by generality of repeal s.107
\item<196> 1850 s.iv
\end{enumerate}
\end{footnotesize}
and costs the procedure changed to a diet of proof before a Lord Ordinary and a shorthand writer, based on the new form of pleadings.

Returning to Autonomy

The latter half of the 19th century was a time of increased prosperity and peaceful industrial development, reflected in the consolidation of land and mercantile law. Business was returning to the courts. With the increased workload court sittings were further extended, and provision made for an Extra Division in the Inner House. Revisal of pleadings was not considered a matter of right at this time, but was allowed only by the Lord Ordinary on cause shown. Amendment was allowed to correct an error or defect “as may be necessary for the purpose of determining the material questions in controversy”. In reducing its supervision of case preparation, the judiciary were returning specific responsibility through the new pleadings system to the parties.

The adjustment and amendment procedures, devised so that parties could develop their case on paper, retain their pivotal importance in the presentation of Scottish causes. Changes instituted at this time meant that written pleadings became the medium to expose and narrow contentious issues within one document. However their elevated importance to the theory of court resolution has unfortunately been tainted as vehicles for extending, complicating and protracting case preparation, until today when the exploitation of the freedom to adjust and amend the pleadings is at times considered a source of disruptive abuse. (see Chapters 4 and 5) There is no doubt of the initial success of the innovations. Along with the Evidence Act of 1866, the 1850 and 1868 Acts had cut down the massive amount of paperwork and oral arguments which had long been a feature of litigation. Streamlining preparation had “greatly expedited the

197 Maxwell manuscript op.cit.196-198
198 1868 ss. 4-8
199 1868 ss. 25-29
200 Lord Cooper (1952-54) op.cit.96
decision of suits and in some degree diminished their expense." Later Lord Cooper noted that any type of case in this period occupied one-third of the time and a fraction of the cost of a case in the 1950s.

Up to the close of the century the Court settled into a less troubled pattern of business. However once again social and commercial conditions dramatically altered economic conditions and the courts had to respond to changing work patterns. There had been a progressive relaxation of the court system which was considered too rigid for modern conditions, and this gradually eroded early success in curtailing excessive delays. To provide a more inform basis for subsequent policy decision the collection of judicial statistics began.

**Early 20th Century**

Until the Great War began in 1914, the early part of this century continued in peace and increasing prosperity. Activity in industry and commerce was reflected in the types of cases appearing in the courts. For example, the growth of heavy industry and shipbuilding led to a new form of social insurance in 1906 under a Workmen’s Compensation Scheme. The litigation system was forced into adapting to new calls on its services. The jurisdiction of the sheriff courts was extended in 1907 to a wider class of cases. During the First World War 74,000 Scots were killed and twice as many wounded, impoverishing the nation of human and financial resources. Industries

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201 1866 20 and 30 Vict. c.112
202 A J. G. Mackay (1877) Vol 1 op.cit. pp.29-30, referring to Lord Bankton iv. 7.7
203 Lord Cooper (1952-54) op.cit. 93
204 Maxwell manuscript op.cit. 205
205 Lord Cockburn’s Journal, 8 November 1848 – his Lordship had decried the fact that the courts had no data to judge their future policy – mentioned in Report of the Royal Commission on the Court of Session and the office of Sheriff Principal with Summary of Evidence (1927) Cmnd 2801, p.16
206 Maxwell manuscript op.cit.197-198
207 Separation and aliment, declarators, heritable right and title, restricted jury trials. Debt recovery Court was abolished. Debts over £20 became summary actions, under £20 became a small debt action. In the Court of Session the Senators passed a codifying Act of Sedemnt in 1913, incorporating all their previous Acts which had regulated administration in Court since 1532.
changed from heavy to more innovative applied science. Scotland, in common with the rest of the Western world, began its most active and inventive period in industry, commerce and trade, refined by political and social changes. The courts struggled to keep pace.

A Royal Commission was set up in 1926 under the chairmanship of Lord Clyde to inquire into the constitution, jurisdiction and administration of the Court of Session "in order to secure the more speedy, economical and satisfactory dispatch of business".

The Commissioners noted that the criticisms of the Court of Session and its methods bore a strong resemblance to those presented in 1868. Delay and expense had again crept in, and it was concluded that this was responsible for the decrease in the volume of business. Work was tending to drift to more accessible sheriff courts with its re-organised and expanded jurisdiction from 1908. But apart from this trend it was noticed that there had been a marked decrease in all pre-war litigation.

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Number of Actions Per Year</th>
<th>Decrease in Numbers</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sheriff Courts (Ordinary procedure)</td>
<td>8,481 11,307 7,693</td>
<td>-32%</td>
</tr>
<tr>
<td>Inner House and Outer House</td>
<td>4,159 3,735 3,297</td>
<td>-21%</td>
</tr>
</tbody>
</table>

The courts were competing for business. (see Chapters 1 and 4) Increasingly legislation had delegated powers of resolution to government departments, boards and tribunals which encroached on former legal territory. The development of arbitration, stressed to the Law Commission in 1868, promised speedier and cheaper alternative resolution, although the lack of published precedents afforded no long-term saving to the business community. The aggregation of industrial groups based in

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208 Report of the 1927 Commission op.cit.13
209 Report of the 1927 Commission op.cit.27
London and the South also enticed litigants to the English courts. An element of 'forum shopping' therefore injected an air of competition into the Court.

Over a period of 15 months the Royal Commission took evidence from interested parties and sifted through suggestions for reform.\textsuperscript{210} The Scottish Law Agent Society, for instance, proposed that the sheriff courts should become the courts of first instance; the Outer House should be abolished, retaining the supreme court for appeals only. Both the Town Council of Aberdeen and the Glasgow Corporation recommended decentralising the supreme court into three geographical jurisdictions. Their suggestions for dismemberment were rejected. Apart from financial considerations, the collegiate qualities of a centralised court, settled by the Kings were to be protected for the maintenance of a distinctive system of jurisprudence. The supreme court was also efficacious as a training ground for Advocates who evolved into judges. Decentralisation would damage the quality of judicial services.\textsuperscript{211} What was accepted by the Commission was a total reconstruction and modernisation of procedures, and creation of distinctive and centralised administrative roles. Their recommendations were for

- The pursuer's right to mark a case for a specific Lord Ordinary or Division (initiated in 1808)\textsuperscript{212} was not considered an efficient use of judicial resources and in the interests of equality and distribution of court business should cease.\textsuperscript{213} Freedom of choice caused imbalances in the distribution of work, backlogs and delay. Discretionary power of the Lord President to intervene for expediency from 1857\textsuperscript{214} had not led to equal distribution of business. Also certain preferences had

\textsuperscript{210} 1926 Scots Law Times (News), Reports on the evidence presented to the Commission - April 17, 24, May 1, 22, 29, June 5; 1927 Scots Law Times (News) March 19, April 2, 23, May 7, 21, June 4, 18; 1933 Scots Law Times (News) April 1, 8
\textsuperscript{211} Report of the 1927 Commission op.cit.32
\textsuperscript{212} 1808 c.151 s.9
\textsuperscript{213} Report of the 1927 Commission op.cit.59 There should be a free interchange of duty - discussed in 1926 SLT (News) 125 (5 June)
\textsuperscript{214} 1857 c.56 s.1
manifested, and as the interlocutors of a Lord Ordinary were considered final from 1825\textsuperscript{215} his partiality could be questioned.

- Allocation of judicial time should be co-ordinated from a central unified office under a Principal Clerk and Roll-keeper. This was the beginning of a judicial ‘pool’ from which resources are distributed.
- The distinction between Inner House and Outer House judges should be broken down with a free interchange of duty. (page 39)
- A separate Bill Chamber for causes of diligence, advocation and suspension should be abolished for simplicity and economy (page 50)
- Judges should have unrestricted powers to regulate forms of process and procedure, and a Rules Council should be formed.
- Court sittings were extended from 29 to 33 weeks.
- The Lord President had power to direct three judges to sit as an Extra Division.
- It was recognised that delay was an anathema to the business community, and arbitration had been found to be “expensive, somewhat casual and uncertain” (p.68)

An arbitral forum within the Court was rejected. Simplified court procedures with unlimited judicial discretion to dispense with ordinary procedure was a priority. A Commercial and Admiralty List should be formed, similar to the recently-formed Commercial Court in England (pages 68-70)

- A fixed timetable for stages of adjustment was suggested, balancing rigid adherence with full deliberations, since the Commissioners reported that “the necessary revision and adjustment is a fruitful source of delay; and this delay is the one serious defect in the Scottish system of written pleadings” (page 78)
- Continuations should be strictly controlled by judicial firmness (page 79)
- Disposal of uncontested motions could be by judicial discretion extempore to save the cost of appearances.

\textsuperscript{215} 1825 c.120 ss.17, 21 Every interlocutor of Lord Ordinary is final in the Outer House, subject to review of the Inner House
Parties in smaller cases (£50 maximum claim value) could choose a fast-track Summary Trial procedure, nominating a Lord Ordinary for final determination. Procedural rules would be discretionary, with an emphasis placed on expedition.

Block fees for preparation of proof by agents and brief fees for counsel should be introduced. It was anticipated that a reduction in fees, far from prejudicing the profession, could promote an influx of new business, rewarding all concerned.

It was seven years before the recommendations resulted in the Administration of Justice Act 1933, closely followed by the first edition of the Rules of Court in 1934, the work of the new Rules Council. The Court of Session was also empowered to regulate procedure in the sheriff courts by Acts of Sederunt, as recommended by the Sheriff Court Rules Council. The Court’s power to regulate and prescribe procedure and practice, restricted in 1868, was finally extended and restored, giving judges flexibility to amend rules in the light of practical experience and rapidly changing social conditions.

The Second World War caused unprecedented disruption. Court sittings and the number of judges varied in line with available resources. Approximately 40,000 Scots lost their lives, and the post-war period marked the rise of social welfare provision. The upsurge of public and administrative law altered the relationship of the State to individuals and led to certain areas of dispute resolution being augmented by tribunals, with resort to the Court by stated case on points of law. These new channels resulted in a consolidation and amendment of the Rules of Court in 1948, although the basic internal structure remained as set in 1933.

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216 Administration of Justice (Scotland) Act 1933 c.41 ss. 34 and 35 Sheriff Court Rules Council; s.18 Court of Session Rules Council
217 1939 c.41
218 Maxwell manuscript op.cit.153 Tribunals and Inquiries Act 1958 c.66
Court business doubled in the post-war period. The population increased, new statutes and orders flourished. The weight of precedents grew and prompted a plea to reduce congruent law reports and co-ordinate judicial opinion.\textsuperscript{219} By 1965 the amalgam of alternative procedures compelled publication of revised Rules of Court, consolidating previous amendments founded on experience. The principal innovations over this period were aimed at simplicity and economy.

Reform continues during the second half of the 20\textsuperscript{th} century, responding to new and very different demands (see Chapter 4). But it becomes apparent that lack of accountability and application of sanctions allow the same criticisms to be repeated down the centuries. It is ironic that in a highly complex technological age, where speed of change is dramatic, and new rights are created daily, that the machinery and ethos for efficiently processing those rights are still crippled by problems and practices which are centuries old, and judges seem powerless to correct.\textsuperscript{220}

"What is the value of a system of substantive law which is scientifically and philosophically perfect if the machinery for its practical application is obsolete and inefficient?" \textsuperscript{221}

\textsuperscript{219} Lord Cooper (1952-54) op.cit.95 The average length of judicial opinions had more than doubled between 1887 and 1953  
\textsuperscript{220} Lord Cooper (1952-54) op.cit.96  
\textsuperscript{221} Lord Cooper (1952-54) op.cit.99
Chapter 4

REFORM - AN EVER-SPINNING WHEEL

"Changes already accomplished have not achieved their objectives of producing a satisfactory system of civil justice which fulfils its aspiration to be an instrument of social justice or to meet the needs of modern society." ¹

Why?

Reinventing The Wheel

The previous chapter demonstrates that court reform is a continuous process. Lord Cullen's 1995 review of the administration of the Outer House of the Court of Session is the latest published report on the Scottish litigation system which exposes and reiterates the same deficiencies in court procedural practices. In his opinion these deficiencies contribute not only towards unnecessary delay and undue expense for litigants, but also towards inefficient and wasteful administration. Although his recommendations were hailed as radical and revolutionary, the faults he publicly aired were not fresh discoveries, either in Scotland or in other legal systems. Many have had a succession of commissions, committees and working parties involved in a "restless and endless search"² for ways to simplify, shorten and harmonise procedures, save expense and use public resources efficiently.

Lord Cullen's review, however, was the first in Scotland to set out a planned judicial attack on the structural ambience which governs the pace of litigation and feeds the deficiencies of the system. Continuing the pattern of reform aired in Chapter 3, 20th century reviews have repeatedly included the recommendation that judges take some form of responsibility for caseflow management, mainly to police procedural

abuses ‘at the coalface’. However previous reforms have only been instrumental shaping procedure on an ad hoc basis. Routine working practices have survived and accommodated these changes. The fact that Lord Cullen once again rehearsed the same problems forcefully shows that mere rule-changing is not enough. Piecemeal reform and “cherrypicking” has not disturbed underlying problems which are embedded in an adversarial system, bound by traditional roles, and unmonitored for centuries.

Lord Cullen’s recommendations for reform also mirrored contemporary English proposals that judges should interrupt the parties’ monopoly of court process, by monitoring, evaluating and constraining unfettered demands for judicial time. The English bench, under the Lord Chancellor’s direction, stepped into the abyss of a new ethos of court management in April 1999, four years after Lord Woolf’s review of English procedures. Four years after the publication of the Cullen review the Scottish bench, under their own cognisance, have retreated to a more restrained position. Lord Cullen’s interventionist proposals did not meet with general support. As individuals Scottish judges may appear to follow the steps of their predecessors in condemning wasteful procedures while as a collegiate body rejecting the additional mantle of case governance which may absorb high levels of scarce resources and conflict with judicial impartiality. Their independence from a quasi-political role is protected. Arguably their cautious approach may also reflect a suspicion that case governance is not as time and cost-efficient as proponents would have them believe, and that costs and delays are naturally inherent in methodical and forensic process. However Lord Cullen focused on areas causing the twin evils of undue delay and unnecessary expense, and there seems to be very little scope to argue that inefficiencies within the system should not be constantly examined and monitored.

**Problems within the Litigation Process**

Acknowledged problems lie within the following areas:

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3 English and Welsh procedures
(i) Undue delay
(ii) Unnecessary expense
(iii) Inefficiency
(iv) Late settlements
(v) Written pleadings in practice

(i) Undue Delay

Delay is a relative notion, depending on individual perspective. But what is undue delay? One person’s undue delay may be another’s careful pursuit of justice. Presumably the concept is relative to expectations, and therefore cannot be measured. The American Bar Association’s definition provides a guideline -

"Any elapse of time beyond that necessary and reasonable to prepare and conclude a particular case"

Interpretation of Article 6(1) of the European Convention on Human Rights indicates that "unreasonable delay” includes not only the time taken to resolve disputes, but is extended to incorporate appeal procedures.

One strong view is that justice delayed is justice denied, although there is also wide acknowledgement that “speed can be the enemy of justice.” Using the analogy of an orchestra playing at double speed, Sir Alan Peacock, for instance, has pointed out that accelerating a process may in fact destroy the product. The boundary between acceptable inherent delay and undue delay may therefore be blurred, and vulnerable to personal, internal and external influences. Extremes are obvious:

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6 Task Force on Delay Reduction Standards 1984 and 1992 American Bar Association para 2.50-2.52
7 Darnell v United Kingdom 1993 18 EHRR 205
8 The Sheriff Court, Report by the Committee, Chairman The Rt. Hon Lord Grant (1967) Cmnd 3248 (the Grant Report) 21
• At "piepowder" courts in medieval times cases had to be disposed of "before the tide had thrice ebbed and flowed."  

Whereas at the other end of the spectrum

• Lord Chancellor Eldon reserved his judgment in one case for 20 years.  

It is repeatedly acknowledged that it is usually in one party's interests to delay the airing of evidence, regardless of the predictability of outcome. Time is therefore a strategic weapon in the subjugation of an opponent, which

• allows the defender continued access to finance (particularly tempting if the judicial rate of interest is comparatively lower than current investment rates)

• compounds financial inequalities between opposing parties

• promotes unfair settlements through financial and emotional exhaustion

• provides billing incentives for professionals paid by time and court attendance

However, delay also has positive benefits. An elapse of time may

• enable medical conditions to stabilise (in personal injury cases)

• provide a cooling-off period for negotiations

• allow time for expert reports to be submitted

10 Pie powder derives from 'pied poudre' (dusty feet) which referred to travelling merchants
11 W. J. V. Windeyer Lectures on Legal History (1957) 176
12 Earl of Radnor v Shafto 11 Vestr Jun 447 1805 32 ER 1165
13 Macrae v Reid & Malik Ltd. 1961 SLT 94 Lord Justice Clerk Thomson at 96
14 Judicial interest rate is currently 8%, above the current short-term investment rate, but comparable with longer-term investment returns
15 Claim initiated in July 1992 by lung cancer victim, legal aid refused his widow on the criterion of reasonableness see McTear v Scottish Legal Aid Board 1994 SLT 108, when the pursuer continued the case as a speculative action the opponents applied for caution for expenses to cover heavy costs of research and preparation of defence - motion and appeal refused "in the interests of justice" McTear v Imperial Tobacco 1996 SC 514-552
16 Professor Hazel Genn Hard Bargaining: Out of Court Settlements in Personal Injury Actions (1987)
- allow for careful investigation and considered decisions
- smooth lawyer work-patterns to ensure a steady flow of work

Policing delay therefore involves a subjective balancing act. The English Cantley Committee in 1979 concluded that delay which enabled settlements was not undue; and interfering with a natural agreement process would add unacceptable costs. Within two decades, this view has been overtaken by the Woolf reforms. Objective criteria are now promoted.

Lord Woolf’s investigation relied on research into delays in court which are confusingly contradictory, but one particularly large study comparing faster, average and slower processing times over 30 U.S. federal courts concluded that the working practices of lawyers and judges was the most influential factor - that the local legal culture governed progress of cases. This appears to mirror opinions in our own jurisdiction. The Grant Committee in 1967 recognised that solicitors were more willing than clients to accept delays, and actions were disposed of as quickly as solicitors wished.

Identification of Delay

Notwithstanding the heterogeneous types of actions and litigants bringing business to the courts, breaking down the litigation process into fixed timetables has been promoted as fundamental to creating comparative standards of performance. This concept has been used intermittently in Scotland to identify time taken of unlimited hourly remuneration paid regardless of outcome. "It is therefore imperative that we abandon this system"

21 The Grant Report (1967) op.cit. 143 para 487 - The committee concluded there was a lack of sense of urgency among sheriffs, court staff and solicitors in progressing actions - a local legal culture which contributed to delay in processing
22 The Grant Report (1967) op.cit. para 489
• from a potentially litigious event to the initiation of an action
• to lodge defences
• to complete written pleadings
• by court administration to allocate hearings and Proofs or jury trials
• from initiation of a claim to disposal by settlement or Proof
• for a sist (withdrawal of an action from court)

and may be extended under Article 6 (1) of the European Convention on Human Rights to include time taken

• for a judicial opinion to be issued
• for appeal court to reach a decision

Unfortunately regular data-gathering on standard performance is not undertaken in Scotland. An extensive analysis by type of action, class of litigant, claim value, court order, jurisdiction, law firm, counsel and judge would illuminate pockets and patterns of delay. Few if any jurisdictions undertake retrospective statistical analyses, while those who have instituted caseflow management systems over the past three decades measure and promote their successes by time standard goals. There is evidence, however, that delay reduction programmes in the United States, Canada and Australia were instigated to deal with backlogs of cases far in excess of experience in the U.K., and Scotland in particular.

Recent Scottish studies show that the average time to disposal varies by jurisdiction and procedure (Chart 1). Further investigation (see Chapter 5) seems to indicate that the differences conform to styles of management. While Ordinary Roll procedure in

24 Darnell v United Kingdom 1993 18 EHRR 205
25 Kakalik, J. et al, Evaluation of the Implementation of Civil Justice Reform Act 1990 (1997) Rand Institute; American Bar Association time standard is for 90% of civil cases disposed of within one year, all within two years
26 For example in New South Wales Common Law Division the average time to resolution was 12 years, T. Matruglio, J. Baker, An Implementation Evaluation of Differential Case Management (1995)5
the Outer House of the Court of Session is by far the slowest track in Scotland, on average it is twice as fast as the High Court in England. Lord Woolf found that the average length of a case is 163 weeks in London and 189 weeks elsewhere in England. In Scotland, the corresponding average in the Outer House of the Court of Session is 89 weeks. The urgency behind the English reforms is therefore muted in Scotland when average times are considered. Although these figures mask the range of time taken, they introduce a measure of perspective to the objective notion of undue delay.27

The range of disposal time varies within Scotland (Chart 2). Actions appearing on the Ordinary Roll of the Outer House extend beyond other procedures. Faster tracks reflect different forms of control mechanisms, and the incidence of sitting, which has contributed dramatically to time differentials (see Chapter 5).

Arguably delay within a court system is the outcome of five main factors which repeatedly defy rule changes:

- unnecessary booking of court time
- late cancellation of court and judicial time causing a backlog of cases for allocation
- sitting (withdrawal from court process by parties)
- late and/or hasty preparation, resulting in repeated adjustments and amendments
- lack of impetus, instigated or at least condoned by "mutual indulgence between parties' agents".

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27 Woolf Interim Report (1995) op.cit.13 para 35 "These figures are unacceptable in relation to the great generality of cases"
28 Review of the Business of Administration of the Outer House (the Cullen Review) (1995) - data gathered on 300 defended cases which had been disposed of during 1995
29 In the Sheriff Courts although the average was 48 weeks in 1992, the spread of disposals stretched between 3 to 274 weeks, Pilgrims Process, Defended Actions in the Sheriffs Ordinary Court (1995) 2 (1995 Sheriff Court study)
32 Cullen Review (1995) op.cit. para 3.6
The Rules of the Court of Session traditionally set out a basic timetable for processing an action through the system. However, few cases closely follow the statutory pathway. For example, in the most recent survey undertaken by Lord Cullen, he reported that cases took an average of 38 weeks to a Closed Record although the statutory timetable is 15 weeks.\(^{33}\)

Delay is not only endemic; it is apparently systemic. Although there is no regular audit of processes, Scottish Civil Judicial Statistics indicate that, over an extensive 30 year period at least, more cases were initiated in court than concluded in any given year. Tables 1 and 2 illustrate the build-up of unresolved cases over the past 10 years, which create queues for “cafeteria-style” justice in the Court of Session (Table 1) and the sheriff courts (Table 2).

\(^{33}\) Cullen Review (1995) op.cit. para 3.7
(ii) Unnecessary Expense

There is no doubt that the cost of civil litigation is rising, both for clients and for government as a provider\textsuperscript{35} and user\textsuperscript{36} of this public service. Discussion about unnecessary expense centres on the cost-effectiveness of procedures, again from different perspectives. This is a key political contention, particularly from 1979, since public service expenditure has been continuously constrained by cost-effective market strategies.\textsuperscript{37}

For the government “cost-effective” means providing the best service for the least budgetary output. Chart 3 shows the financial commitments anticipated by the Scottish Office in the fiscal year 1999-2000. The administration of justice within the court system is allocated 0.35% of the total budget commitment. Since the level of court fees have not kept pace with the retail price index, civil justice is a heavily subsidised public service, with the Scottish Court Service reporting an income of £15.9 million against an expenditure of £51 million in 1998.\textsuperscript{38} Although budgets are increasingly restricted, Exchequer contributions such as £47.9 million in 1997 are intended to fund an accountable civil justice system, monitored by performance targets for areas which are currently within the control of court administration (see Appendix 4.1).

While cost-effective administration is a key element of government control, it is arguable that examining, analysing and monitoring the quality outcome, checking costs, delays and inefficiencies which create procedural barriers, is a corollary of the Scottish Court Service’s mission statement:

\begin{itemize}
\item Sir Alan Peacock (1994) op.cit. 22-5
\item Through the Scottish Court Service – an Executive government agency
\item Through the Scottish Legal Aid Board
\item Lord Rodger of Earlsferry, as Lord Advocate, A Civil System in Motion, Costs of Justice (1994) Hume Occasional Paper No.43 p.9
\item Scottish Court Service Annual Report and Accounts (1997-98) 30 Net costs reduced from 1996-97 when income was £13.56m, and expenditure £64.5m.
\end{itemize}
"In discharging its responsibilities to the Secretary of State for Scotland for the speedy, efficient and cost-effective administration of the Supreme Courts and Sheriff Courts, the Scottish Court Service has the following aim -

to help secure ready access to justice for the people of Scotland" 39

Double-subsidy exists from the government for parties who qualify for government-assistance through civil legal aid, which totalled £43.1million in 1997/1998. The criminal legal aid budget reflects the cost of defence by private lawyers, although a Public Defender system has recently been piloted in an attempt to control costs of criminal cases. Criminal budgets are therefore tightly supervised. In civil litigation both pursuers and defenders are represented privately by the legal profession, and both can apply for funding from the Scottish Legal Aid Board. From Chart 4 it is clear that over the past 10 years the most dramatic leap in government subsidy of civil legal aid took place from 1990 to 1994 – rising from £15.7million to £30.2million, an increase of 92% in 4 years 40 rising more slowly to £34.3 million, in 1997. This is an overall increase of 121% within 10 years, well above the rate of inflation.

Although number of civil cases passing through the court system is decreasing in all Scottish tracks, an increase in defended divorces, for which court appearance is mandatory, 41 has elevated demand for public funding. The Scottish Legal Aid Board also suggest that the huge increase in such a short time reflects recently changed eligibility criteria, with smaller cases turning away from litigation, replaced by more complex claims. 42

For the Scottish Legal Aid Board "cost-effectiveness" therefore means that, as the largest purchaser of legal services in Scotland, it must actively seek

39 Scottish Court Service (1997-98) op.cit.1
40 Scottish Legal Aid Annual Report (1994-95)
41 Scotsman 3rd June 1996 £20m of legal aid in 1995 was granted for divorce and separation
42 Scottish Legal Aid Board 3rd June 1996 - telephone interview
“quality and value for money from solicitors and advocates as suppliers of that service,”43

also using performance targets to control in-house administration. Although Scottish Court Service has no specific remit to control the quality of legal service, the Legal Aid Board has begun its own programme of reform to curtail excessive demands. Recently the Board reduced the fees of two Counsel by 40%, criticising them as excessive, although the remuneration claimed was defended in open court by the Dean of the Faculty of Advocates.44 The knock-on effect is that this has acted as a warning shot across the bows of the Faculty - four other advocates immediately renegotiated their fees. Plans to extend the current Legal Aid Code of Practice and widen registration to include civil as well as criminal lawyers were included in a package of reforms initiated by the then Minister of State,45 and supported by the Board.

**For clients** “cost-effective” means costs proportionate with successful outcome. Within the U.K. the indemnity rule ‘winner takes all’46 means that litigants become embroiled in ‘investing’ in court procedures on a cost-benefit analysis. This involves calculating the risk of losing balanced against personal finance and individual determination to continue. Civil legal aid is based on the Scottish Legal Aid Board’s assessment that a claimant has “probabilis causa litigandi” (in other words a strong case) and that it is reasonable that he should receive aid.47 Eligibility is further constrained by an assessment of disposable capital and disposable income.48 In recent years these financial thresholds have been conditional upon personal savings and income (column A). Applicants are required to make a proportionate contribution to costs above the particular threshold (column B).49

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45 Mr. H. McLeish, Access to Justice - Beyond the Year 2000 March 1998; The Legal Aid Board Corporate Plan 1998-2001 p.11
46 The losing party reimburses the costs of the successful party, unless the losing party is funded by legal aid, where no costs are recoverable.
47 Civil Legal Aid (Scotland) Regulations 1996 (S.I. 1996 No. 2444) ss.10-14
48 Legal Aid (Scotland) Act 1986 s.15, s.17
49 Normally experts are limited to one medical expert and one non-medical in reparation cases (must be sanctioned by the Legal Aid Board) (1998) Scottish Legal Aid Board Handbook A:29
Clients who are ineligible for Legal Aid must rely on alternative sources of funding, such as

- a Compensure Scheme of the Law Society of Scotland, an insurance scheme to cover costs of losing a case\textsuperscript{50}
- legal expenses insurance\textsuperscript{51}
- speculative fee representation\textsuperscript{52}
- financial support from insurance company or trade union\textsuperscript{53}
- block fee by agreement with legal representative
- personal or commercial finance (loan)

It is the last source of funding which directly relates to access to an adjudicative decision. As far as the client is concerned, the largest component of litigation costs is professional fees, followed by experts’ fees.\textsuperscript{54} Cutting out unnecessary expense therefore involves judges in curtailing excessive fee opportunities, similar to the Legal Aid Board. The role is particularly crucial where there is an obvious imbalance in funds.

As neither the Accountant of the Court nor the Scottish Court Service publish data on professional fees, and parties regard costs as confidential, cumulative data on the expense of litigation is not immediately transparent. The only indication of case costs in Scotland must therefore be gleaned from the Scottish Legal Aid Board,

\begin{tabular}{|c|c|c|c|c|}
\hline
Year & Disposable Capital Threshold & Disposable Income Threshold \\
& Eligibility for Legal Aid (A) & Contributions by Claimants (B) & Eligibility for Legal Aid (A) & Contributions by Claimants (B) \\
\hline
1997-99 & £8,560 & £3,000 & £8,370 p.a. & £2,563 p.a. \\
1996-97 & £6,750 & & £8,158 p.a. & £2,498 p.a. \\
\hline
\end{tabular}

\textsuperscript{50} This scheme can be used even after an action has commenced
\textsuperscript{51} Currently around 6% of U.K. actions
\textsuperscript{57} (see Appendix 4.2 for rule which allows an agreed fee uplift for successful outcomes)
\textsuperscript{53} There is no published information on the levels of financial support provided
although, in 1997, they represented only 20% of cases in the Outer House of the Court of Session and 37% in the sheriff courts.  

For clients outwith the restraints of the legal aid system there is no check on case costs. They are in an uninformed position of trust. Identification of unnecessary expense is therefore a veiled enigma, dependent upon legal advice. Within the Court of Session counsel are masters of procedure, and the only restraint on hourly fees is an occasional hint from judges that they are aware that over-servicing takes place. Lord Gill has stated that procedural firefighting provides fee opportunities and questioned whether fees are paid for unproductive and avoidable procedural steps. Lord Cullen pointed out that case costs in the Court of Session have risen dramatically, well above the rate of inflation. While the level of chargeable fees has not increased since 1992, the average cost per case has almost doubled over the same period, in all Scottish fora. Lord Cullen has attributed high costs to protracted processing, highlighting also the proportion of court time which is booked and cancelled at the last moment, a practice also identifiable in the sheriff courts. 

Increased case costs are the main reason for a significant rise in the legal aid budget. Chart 5 shows the movement in average costs within the Court of Session and sheriff courts from 1980 to 1997. Although the average cost has risen 446% in the sheriff courts, this has been completely overshadowed by a 1484% increase in the Court of Session. Even over the past 7 years the contrast in cost increases is apparent - 128% in the sheriff court and 144% in the Court of Session. As caseloads decrease, costs per case are rising, alluding to subtle changes in procedural practice. For instance, an increase in the proportion of actions for which defences are lodged has been noted in the Court of Session. This pattern is not reflected in the sheriff courts where 73% of the cases settle undefended. The difference between fora

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54 Corroborated by an American study of 3000 cases, involving 10,000 interviews; D. Trubek et.al. The Costs of Ordinary Litigation (1983) University of Chicago Law Review 72
55 Calculated from data available in 1997 Civil Judicial Statistics and 1997 Scottish Legal Aid Board Annual Report
57 Scottish Legal Aid Board Annual Reports 1991 to 1995. In the sheriff courts during court year 1990-91 the average cost was £639.59 rising to £1,025.44 in 1994-95, In Court of Session 1991-92 average was £2,566.75 rising in 1994-95 to £4,120
identifies at least one area in the Court of Session where procedural practice has changed, coincidentally sustaining work levels. There is no supreme court database from which to monitor changing behavioural patterns apart from the low proportion of cases being regulated by the Legal Aid Board. And in 1997 there were strong public accusations aimed at the legal profession "fiddling the legal aid system."

"through schemes or practices geared more towards earning maximum in fees than providing the best service which has the best interests of the clients at heart."

Attributing these criticisms between branches of the legal profession is problematic. However, Chart 6 provides a basis for analysis by illustrating the proportionate allocation of legal aid costs over the past 30 years. In 1997 solicitors’ fees accounted for approximately 67% of civil payments, counsel’s fees for 9% and general outlays for 23%. Solicitors’ fees have been undulating steadily upwards from 61% to 72% of payments made over this period, while counsels’ proportion have only recently begun to rise from the doldrums of the 1980s. The differences may be explained by the expansion of divorce jurisdiction to the sheriff courts in 1985; in 1997 the bulk of legal aid applications from sheriff courts were for family and matrimonial actions (72%).

The number of clients submitting applications for legal aid also reflects the mass exodus of divorce cases from the Court of Session to the sheriff courts in 1985 (Chart 7). It would seem logical to conclude that while solicitors have undertaken the bulk of the increase in divorce actions in the sheriff court, comparing static fee levels with increased costs in the Court of Session does point to augmented use of procedures in this forum which may create unnecessary expense for government, Legal Aid Board and client.

58 Booking a debate was sometimes a ‘knee-jerk’ reaction (1995) Sheriff Court study op.cit.21
59 The Scotsman 2 April 1997 “spinning out cases to squeeze the taxpayer” and “pleading not guilty up to trial”
60 Ian Middleton, Director of Audit and Investigations, Scottish Legal Aid Board, The Scotsman 2 April 1997
"No doubt ... to a significant extent actions are still being appointed ... where there is no good reason for this"  

It does seem, therefore, that both Lord Cullen and the Scottish Legal Aid Board may be providing the evidence to support Lord Gill's observations on fee-building.

Zuckerman argues that legal aid has actually altered the pattern of cost resistance, and points to the coincidence of State funding and the increase in legal representatives' income over the same period of time. He reasons that while lawyers are paid on an hourly basis, legal aid represents a massive inflationary subsidy since there are no incentives to economise if the client receives legal aid.

For privately-funded clients in particular costs are potentially an operative brake on demand, creating inequality of access. Commitment to litigation, which influences the negotiation process, encourages an 'investment' mentality, and offers considerable scope for superfluous procedures to those 'deep pocket' opponents who can afford to prolong the litigation process until the other party is weakened by financial exhaustion. Zuckerman also claims that while adversarial legal systems promote accuracy at the expense of economy, they create incentives for complexity over a range of disputes. These views would seem to confirm that unnecessary expense is both systemic and endemic.

The impact of costs on access to justice and settlement decisions has been examined more in the United States than in the U.K. A smaller study undertaken in 1986 for the English Civil Justice Review found that a considerable amount of funding was saved by settlement at the door of the court rather than continuing to trial - savings on average were 52% in the County Courts and 66% in the Royal Court of Justice.

61 10.6% of legal aid cases in the Court of Session were for family/matrimonial actions, the bulk, 43%, were for reparation actions.
62 The Cullen Review (1995) op.cit. para 3.11 - 82 sent to the Procedure Roll, only 23 heard - 70% diversion was therefore unnecessary "No doubt ... to a significant extent actions are still being appointed ... where there is no good reason for this"
63 A. A. S. Zuckerman, (1995) op.cit.180-81
The largest costs related to preparation for trial, providing the impetus for ‘court-door’ syndrome. This was confirmed by an Australian study of personal injury actions which had settled at a pre-trial conference, saving 75% of the costs of going to trial. The same study found that using professionals specialising in personal injury work resulted in cost-savings. Pressure to settle at this point was also found to be influenced by an “asymmetry of information”. ‘Repeat players’ combined their financial advantage with experience of court process and atmosphere to create an imbalance in power over individuals or ‘one-shot players’ who were more fully reliant on legal advice. If the legal advisor has a vested interest in sustaining the action, the one-shot player is vulnerable, exposed to unfair settlement offers, particularly at the last minute.

High costs compound the risks involved in litigation and are a powerful barrier to access, particularly in an indemnity system. Uncertainties over costs compound the unease of the less experienced participant, and lead the practised player to write off ‘nuisance-value’ claims before access to the litigation process can ratchet up the costs. High costs are therefore a brake on demand.

The 1994 Australian Access to Justice Report recommended that clients be given information about fees to be charged, together with a standard form costs agreement. The Scottish Legal Services Ombudsman has repeatedly called for more transparency on costs, but this has been resisted as impractical by the Law Society of Scotland. Advance notification does mean that clients are included in an informed choice although Prof. Calabresi has argued that costs could be controlled by simplifying procedures. He reasons that this would be equivalent to granting legal aid to the widening band of those with financial limitations but who remain above the discriminatory financial thresholds – in his opinion the lower middle

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64 J. Garrett et.al, Civil Justice Review Study of Personal Injury Litigation, (1986)32
65 P. Williams et.al. The Cost of Litigation before Intermediate Courts in Australia (1992) Australian Institute of Judicial Administration 75
66 P. Williams (1992) ibid.77
67 Litigants who use the courts on a regular basis, and therefore more experienced with court procedures, for instance insurance companies, banks, solicitors
68 Access to Justice Advisory Committee, Commonwealth of Australia (1994) para 5.35 Chairman Hon. Justice Sackville (the Sackville Report)
classes. This theory, though, ignores professional incentives to complicate and protract process, which leaves the client vulnerable. The trend in other jurisdictions is therefore to keep the client better informed on feeing and court process. These are seen as key elements in curbing open-ended use of court facilities which attract unnecessary expense.

(iii) Efficient Use of Court Resources

The most efficient use of resources translates into fully utilised, predictable and productive time. Of course this is utopia. Internal mechanisms for the allocation of court administrative time can be charted and monitored by performance targets. For example the allocation target set by the Lord President for Proofs on the Ordinary Roll in the supreme court (lasting 4 days or less) is 19 term weeks from the date the Proof is allowed. Allocation of longer Proofs are unmonitored, and no performance target is set for the administration department.

Over the same period within the sheriff courts the overall average waiting period is shorter - 10 weeks, ranging from 5 to 15 weeks.

**Performances against Key Targets in 1996-97, 1997-98**

<table>
<thead>
<tr>
<th></th>
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<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Court of Session diets allocated within period</td>
<td>85%</td>
<td>93%</td>
<td>90%</td>
<td>94%</td>
</tr>
<tr>
<td>Sheriff court waiting period targets</td>
<td>90%</td>
<td>95%</td>
<td>95%</td>
<td>98%</td>
</tr>
<tr>
<td>Staff, accommodation and administration costs per court day Court of Session</td>
<td>£1,020</td>
<td>£1,013</td>
<td>£1,010</td>
<td>£1,010</td>
</tr>
<tr>
<td>Costs of civil business recovered through fees</td>
<td>80%</td>
<td>80%</td>
<td>90%</td>
<td>90%</td>
</tr>
</tbody>
</table>

Predicting the effective use of resources within these targets is an uncertain and precarious task. The Keeper of the Rolls allocates judicial time in the Court of

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70 The Sackville Report (1994) ibid. and interview with Californian Supreme Court Judge, and interview with the Attorney-General of Victoria, Australia
71 Scottish Court Service (SCS) Annual Report and Accounts (1997-98) 33 (excluding vacation periods)
72 SCS Report (1997-98) ibid. 26
73 SCS Report (1997-98) ibid. 31
Session on a first-come first-served basis, balancing the demands of external commitments and criminal workload with civil business between all supreme court judges.\textsuperscript{74} Since accused persons must appear for trial within specific time limits,\textsuperscript{75} criminal cases are generally prioritised. Preparation and presentation by Crown prosecutors are constrained by these deadlines. Balancing the allocation of time can be severely disrupted by late settlements.

(iv)  \textbf{Late Settlements}

In common with other legal systems, approximately 90\% to 95\% of cases settle within the Scottish litigation system, generally just prior to appearance in court (see Chapter 5). The right to an out-of-court settlement is a client’s inalienable right, but the pattern of settlements has become pivotal to smooth legal process. The courts do not have the resources to cope with the administrative demand for a high percentage of Proofs. Settlements are therefore beneficial to the court, and interference with established patterns of behaviour prompt fears of the administration being overwhelmed by demand.

The fact that 45 Proofs are regularly booked for a contingent of 5-6 judges on a weekly basis points to the furious negotiations which take place at the doors of the court. Time may be wasted in court corridors, experts and witnesses are inconvenienced, and parties incur the cost of retaining their group until a judge is free. If court time is over-subscribed, the client is turned away. There is no formal compensation procedure, although gratuitous payments have been made in the past.\textsuperscript{76}

From a judge’s point of view his unallocated time may be used on other case work, or may be wasted. However, for a litigant using the process as a bargaining tool, late settlements can be used to engineer more realistic offers for a pursuer, or reduce

\textsuperscript{74} One is seconded part-time to the Scottish Law Commission  The full-time bench may be augmented as necessary from a pool of retired or temporary judges
\textsuperscript{75} Criminal Procedure (Scotland) Act c.46, s.65 Trial must commence within 12 months of first appearance on petition; accused in custody must be indicted within 80 days s.65 (4)(a) and trial commenced within 110 days s.65 (4)(b)
\textsuperscript{76} (1995) Civil Practice Bulletin 5
a compromise offer for a defender,\textsuperscript{77} with the collapse of the case. As Lord Woolf pointed out, it is always in one party’s interest to prevaricate, and skills of brinkmanship are polished right up to the court door.\textsuperscript{78} There is wide acknowledgement that the door of the court focuses the mind (perhaps in the same way as instruments of torture in the 12\textsuperscript{th} and 13\textsuperscript{th} centuries). It is for these reasons that parties in the past have resisted and defied attempts to promote early settlement. Caseflow management principles, which are aimed at earlier preparation and earlier settlement lie counter to adversarial practice and party autonomy. In fact the promotion of caseflow management principles runs parallel with criticism of abuses throughout the history of the Court, gathering impetus when openness and accountability are widely promoted.

Preparation and development of civil cases is as yet monitored by the court from initiation through to trial in either the Court of Session or sheriff courts. This is the discrete territory of parties. Under this ‘laissez-faire’ system court administration must absorb and accommodate the increasing impact of settlements at the door of the court. Judicial time is overbooked - up to nine times availability.\textsuperscript{79} Late settlements mean that delays and costs may be unnecessarily incurred when diets are discharged too late to re-allocate judicial and administrative resources. Efficiency is predicated on a fluid workflow which is a guesstimate, balancing late settlements with judicial resources.

While some may argue that the court’s role is the vindication of individual rights, and the court is not entitled to investigate the quality of settlements, it seems astonishing that the court neither monitors nor holds cumulative data on patterns of withdrawal from process. Correlative analyses between procedural behaviour and incentives and disincentives to settle are unexplored.\textsuperscript{80} Rules of procedure create a

\textsuperscript{78} H. Witcomb, The Game of Brinkmanship (1989) 141 New Law Journal 392
\textsuperscript{79} Interview with Keeper of the Rolls 2 May 1996 - 45 Proofs are regularly set to begin every Tuesday although between 5 to 6 judges are generally available
\textsuperscript{80} Prof. B. Main, A. Park, Pre-Trial Settlement: Who’s for Two-way Offers? (1999) A review of the use of cost-shifting devices to encourage pre-trial settlement (ie offers and tenders); M. Cappalletti (1979) op.cit. 43-49
backdrop for substantive legal principles, but are not tested for efficacy in adjective service. The court is therefore accepting that cases float along until either party yields or adjudication takes place. To place performance standards on such a service is akin to building barriers across a river without measuring its depth, width, flow or deviations. Identification of diversions from proper practice would seem to be fundamental, but is not undertaken.

(v) **Written Pleadings**

In Scotland traditional written pleadings set out the disputed facts in articulate condescendence and pleas-in-law in a formulaic style, combining the pursuer’s Summons and his opponent’s Defences into an Open Record. After a period of adjustment by either party, the final outcome is a Closed Record, which may be further amended with permission of the court. The form of Summons dates from 1850 “preserving the phraseology characteristic of an older day.”

Written pleadings in Scotland are intended not only to expose the relevancy of a case in law, but also to give fair notice of an opponent’s case in fact.

“It is a fundamental rule of our pleadings that a party is not entitled to establish a case against his opponent of which the other has not received fair notice upon the Record. It follows that a defender cannot be held liable on a ground which is not included in the averments made against him by the pursuer.”

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81 "A concise note of of the legal propositions on which the action is based" Mackay, Manual 194 quoted by R. W. Millar, Civil Pleading in Scotland (1930) 30 Michigan Law Review 545 at 556
82 ‘Summons’ in the Court of Session, ‘Initial Writ’ in the Sheriff Court
83 Court of Session Act 1868 s.29 to cut down prolixity of oral arguments by amendment of Records to bring out the real questions at issue; improvements initially led to greater dispatch Bankton iv.7.7
84 13 and 14 Vict. c.36 s.1 schedule A
85 R. W. Millar (1930) ibid. 556
86 Morrison Associated Companies Ltd v James Rome & Sons Ltd. 1964 SC 160 Lord Guthrie at 190
Through adjustment and amendment, pleadings should become a succinct precis of the case, and form the basis of admissibility at Proof in Scotland.\(^8^7\) It is important, therefore, that all prospective points are included. Late amendments in theory jeopardise the case,\(^8^8\) although judges have allowed last minute amendment (for example, on the day of Proof) "in the interests of justice"\(^8^9\) However it seems that the process has slackened into a vehicle for diversionary and expensive tactics. The judicial warning that

"the present Rules of Court as to amendment were intended to get rid of rigidity and formality......they were not intended as a cloak for laziness, ignorance and incompetence."\(^9^0\)

was reiterated by Lord Cullen who observed that parties increasingly place "undue reliance on their ability to amend...despite being more costly."\(^9^1\)

Macphail states that the function of our system of written pleadings is

"to ascertain and demonstrate with precision the matters on which the parties differ and those on which they agree"\(^9^2\)

This view is predicated on the understanding that

"our whole system of pleading and disposal of cases upon preliminary pleas must depend upon each party stating with candour what are the material facts upon which he relies and admitting the facts stated by his opponent which he knows to be true"\(^9^3\)

\(^8^7\) Parker v Lanarkshire Health Board 1996 SCLR 57 Ex Div. per Lord McCluskey
\(^8^8\) The Cullen Review (1995) 14 para 3.19
\(^8^9\) Thomson v Glasgow Corporation 1962 SLT Lord Thomson at 246
\(^9^0\) Thomson v Glasgow Corporation 1962 SLT 246
\(^9^1\) The Cullen Review (1995) op. cit. para 3.18
\(^9^3\) Ellon Castle Estates Ltd. v MacDonald 1975 SLT (Notes) 66 per Lord Stewart
However, sharp criticism from leading judges indicate that, in practice, pleadings submitted to the court are at times too long, too complicated, inept, include matters of evidential detail, and have become a instrument for fee-building.94

Lord Rodger of Earlsferry

"The vast majority of cases settle on a basis which has nothing to do with the comparatively minor issue which often absorbs both time and attention in the process of adjustment."95

Lord Gill

"I can only express my impatience with the tiresomely clever pleading points taken in debates."96

Lord Morton of Shuna

"Unfortunately written pleadings appear to be drafted to make matters deliberately obscure and on occasions verge on dishonesty."97

Lord Cullen

"For many actions the system is over-elaborate and as a consequence is productive of undue delay and unnecessary expense."98

Lord Prosser

"Pleadings of the type currently used in the ordinary court procedure are frequently and indeed normally ill suited to their true function, failing to put essentials in sharp focus, and often putting in sharp focus inessential matters of detail which then become the subject of pointless procedural scrutiny."99

Every review of Scottish civil procedure has applauded the theory of the traditional system of written pleadings, acclaimed by English observers from 1912 to 1995100.

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94 Lord Morton of Shuna, Procedural Reform in the Court of Session (1995) Civil Practice Bulletin 2; Lord Gill (1995) op.cit.132
95 Lord Rodger of Earlsferry (Currently Lord President) (1994) op.cit. 9
96 Lord Gill (Currently the Chairman of the Scottish Law Commission) (1995) op.cit.132 at 134
97 Lord Morton of Shuna, (1995) op.cit. 2
98 (Currently Lord Justice-Clerk) The Cullen Review (1995) op.cit. para 3.27
99 (In the Inner House) ERDC Construction Ltd v HM Love & Co. 1996 SC 523, Lord Prosser at 532; 1997 SLT 175
However they also condemned their use in practice as an institutionalised medium for abuse of time and money.

**Judicial Power to Control Process**

The speed of technological change in the second half of this century is mirrored by the number and urgency of investigations into effective and efficient dispute resolution which will not overwhelm the available resources. The recommendations of post-war reviews have apparently been repeatedly ignored or accepted in principle but partially implemented.

Complaints of costs, delays and elaborate procedures continue to parallel English reviews. The promise of previous reforms has not materialised. For example, in Scotland the Summary Trial procedure was introduced by the Administration of Justice Act in 1933\(^1\) as a fast-track option to ordinary procedure, offering economy, expedition and finality. Parties may still petition a Lord Ordinary of their choice to act as a judicial arbiter. Two decades later the process had "rusted into almost complete disuse and idleness".\(^2\) Six decades later it is almost extinct. Litigants and their representatives do not naturally gravitate to optional tracks where there is a form of continuous supervision. The fast-track Optional Procedure for personal injuries is also infrequently used, conceivably because speed is achieved by curtailing adjustment of written pleadings. The judiciary's continuing search illustrates their impotence in policing professional practice while Ordinary procedure is uncontrolled. Lord Cullen attributes this flaw to a limited ability to sanction representatives or parties for non-compliance with the rules,\(^3\) recognised by previous judicial generations (see Chapter 3).

It may be that the strongest control mechanism disappeared in the plethora of post-war public welfare provisions which included a civil legal aid scheme to widen

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\(^{101}\) Administration of Justice Act 1933 s.10 re-enacted Court of Session Act 1988 s.27, although there is no right to appeal, S.26(3) 1988 trial shall be disposed of with as little delay as possible

\(^{102}\) A Cinderella of Process 1954 SLT (News) 9 (anon)

\(^{103}\) The Cullen Review (1995) op.cit. para 3.30
access to the courts to those who could not afford to establish their legal rights. While recognising that public good prevailed, Lord Cooper at the time suggested that the corollary was the diminution of the court’s power to control unjustifiable delay and improper use of process by adverse awards of costs. Forecasting Zuckerman’s observation that legal aid introduced an inflationary factor into court costs, Lord Cooper reasoned that parties’ advisers would be influenced thereafter by “the subconscious effect” of financial interest in making the litigation as slow and as complicated as possible.

“What can the court do to prevent amendment of the pleadings after amendment, requests for continuations and postponements, and all the other expedients which increase the expense, greatly delay the despatch of business, dislocate the judicial arrangements and are unquestionably inimical to the proper administration of justice? Short of professional misconduct and a report to the Discipline Committee, we are literally powerless.”

The lack of judicial power to curtail excesses ‘at the coal-face’ is therefore fundamental to the faults which have resisted reform since the Second World War. The incentives to continue laissez-faire attitudes are too strong and the disincentives too few. A pattern of resistance becomes identifiable across at all levels of court business.

Re-inventing the Wheel

1. The Grant Committee 1967

Responding to an outcry over delays in the sheriff courts in the 1960s, the Grant Committee was formed to make recommendations to “secure speedy and efficient disposal of cases.” Four years later they reported that court procedure was

104 Lord Justice-General Cooper, Defects in the British Judicial Machine (1952-4) 2 Journal of the Society of Public Teachers of Law 96 (Address to Society)
105 The Grant Report (1967) op.cit.145 para 483
notably slow and apparently tortuous.\textsuperscript{106} In looking for evidence of strain within the process they pointed out that sheriffs had power to close the Record, but had often found it difficult to exercise their power of closure.\textsuperscript{107} This attitude remains today (see Chapter 8). One major area of delay in the 1960's was the time parties spent adjusting their written pleadings on the Adjustment Roll and extended periods between allocation and hearing of Proof.\textsuperscript{108}

The Grant Committee concluded that there was no typical cause of delay which applied equally at all times to all courts and to all types of businesses, but drew a generalised conclusion that there was a lack of sense of urgency from sheriffs, court staff and solicitors.\textsuperscript{109} They pointed out that there were no recognised standards of performance. To a very large extent there was no specific responsibility to identify problems and to seek answers to them. Procedural progress was very much in the hands of the parties, resulting in delays. The Committee therefore recommended increased court control by the establishment of timetables within which court business ought normally to be dispatched. This main proposal did not reach fruition.

Their secondary proposal, that caseload volume should be reduced, was implemented. Following their recommendations, the Summary Cause Rules were promulgated in 1976\textsuperscript{110} to provide efficient and cheap access for the public for low-value claims. There was to be no system of written pleadings, therefore no lengthy adjustments, no recording of evidence and lay representation was anticipated. However a Debt Recovery Survey 1980\textsuperscript{111} found that the rules were inaccessible to most lay persons, being so complex that legal representation was necessary. Consequently costs were disproportionate to claims and 90% of pursuers were utility companies. By 1980 the Hughes Commission\textsuperscript{112} found that there was little

\textsuperscript{106} The Grant Report (1967) op.cit. 21 para 60
\textsuperscript{107} The Grant Report (1967) op.cit. 12-13 Preferring to allow parties full rein to respond to opponent's contentions
\textsuperscript{108} The Grant Report (1967) op.cit. 13
\textsuperscript{109} The Grant Report (1967) op.cit. para 487
\textsuperscript{110} Act of Sederunt, Summary Cause Rules (Sheriff Court) 1976 Sheriff Courts (Scotland) Act 1971 ss.35-38
\textsuperscript{111} Debt Recovery (1980) 43, Scottish Office Central Research Unit
\textsuperscript{112} Royal Commission on Legal Services in Scotland (1980) 175 Cmnd 7846 (The Hughes Report)
encouragement for individual litigants to use the new fast track process, and the court had subsequently become little more than a debt collection agency.

2. The Pearson Commission and Kincraig Committee 1979

In 1978 the Pearson Commission received criticisms about court procedure governing personal injury actions and invited a Scottish Committee under Lord Kincraig to investigate and consider reforms.

The Pearson Commission's initial investigations showed that in Scotland the average waiting periods were:

- Date of injury to resolution in the Court of Session: 50 months
- Date of injury to resolution in the sheriff courts: 36 months
- Date of injury to issuing a writ or summons (the longest delay): 26 months
- Period between issuing writ to fixing Proof: 12 months
- Period between fixing Proof to resolution: 6 months
- Period for adjustments (contributed by Kincraig Committee): 4 months

The Commission concluded that while delays were evident, it was the lawyers who controlled the pace of litigation. According to their research, most actions were disposed of as quickly as solicitors wished, and they were more willing than their clients to accept delays. This confirmed the underlying conclusion of the Grant Committee 12 years previously.

The Kincraig Committee's remit was to recommend for personal injury actions

"a more expeditious and economic disposal of such litigation, having regard to the desirability in such cases of simplifying proceedings and giving the court more control over the conduct of the proceedings."

\[113\] Royal Commission on Civil Liability and Compensation for Personal Injuries (1978) Cmnd 7054 (The Pearson Report)
Although the committee was criticised for the narrow base of its research,\textsuperscript{115} the conclusion confirmed Grant and Pearson recommendations for increased judicial supervision to control abusive behaviour.\textsuperscript{116} The outcome was the Optional Procedure for Personal Injury, a radical departure in Scots law which curtailed a party’s right to adjudge and amend written pleadings. In other words this was a policy specifically aimed at trimming down opportunities to delay and add expense.

This fundamental shift of emphasis led to an outcry over the loss of early debates on the relevancy of a case. However, the Kincraig committee had found that the majority of debates fixed were not heard\textsuperscript{117} and concluded that

\begin{quote}
"Enquiry into issues can be postponed unduly by the need to dispose of preliminary pleas.\textsuperscript{118}"
\end{quote}

Court timetabling was an erratic exercise due to late cancellation of hearings. The Kincraig Committee concurred with the Grant Committee and Pearson Commission in blaming much of the delays on legal representatives

\begin{quote}
"failing to bring a sense of urgency into the conduct of the action, allowing opponents to do likewise,"\textsuperscript{119}
\end{quote}

a seemingly ingrained practice, confirmed by Lord Cullen in 1995:

\begin{quote}
"I consider that in the majority of cases this is due to the practice of mutual indulgence between parties’ agents."\textsuperscript{120}
\end{quote}

\textsuperscript{114} The Pearson Report (1978) op.cit.489
\textsuperscript{115} Consultative Document on Report on Procedure in Court of Session in Personal Injury Litigation A study of 15 cases and limited views of the Law Society and Faculty of Advocates 1979 SLT (News) 297
\textsuperscript{116} The Report on Procedure in Court of Session in Personal Injury Litigation, chaired by Lord Kincraig (the Kincraig Report ) (1979) 16
\textsuperscript{117} A practice which the Cullen Review and the Sheriff Court studies in 1995 and 1997 confirm
\textsuperscript{118} The Kincraig Report (1979) ibid.10
\textsuperscript{119} The Kincraig Report (1979) ibid.16
\textsuperscript{120} The Cullen Review (1995) op.cit.10 para 3.8
The Kincraig Committee rationalised that separating disputes on liability and quantum and the use of abbreviated pleadings would engender an early focus on issues, avoid prejudice by surprise, limit the scope of inquiry, and cure late settlement problems for the court system. The new Optional Procedure was implemented\(^ {121}\) replacing full pleadings with a simplified statement of fact and brief legal grounds for the claim. It was intended that brief defences should include legal grounds for dismissal, with no automatic right to adjustment unless the court was convinced it was justified by the difficulty and complexity of the case. Counsel were expected to be prepared to answer questions relevant to expeditious disposal at the first diet roll and inter-party agreement on procedure was no longer automatically approved. Although case process has speeded up, this specialist procedure has not fulfilled all its early promise, heavily criticised by the Bar.\(^ {122}\)

A recent study\(^ {123}\) of personal injury actions across five Scottish tracks compared the average length of a case from issue of writ or summons to resolution was:

<table>
<thead>
<tr>
<th>Time</th>
<th>Procedure/Location</th>
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<tbody>
<tr>
<td>36 weeks</td>
<td>Optional Procedure in the Court of Session</td>
</tr>
<tr>
<td>50 weeks</td>
<td>Sheriff courts</td>
</tr>
<tr>
<td>72 weeks</td>
<td>Court of Session Ordinary roll</td>
</tr>
</tbody>
</table>

Adjustments over the same period took an average of:

<table>
<thead>
<tr>
<th>Time</th>
<th>Procedure/Location</th>
</tr>
</thead>
<tbody>
<tr>
<td>2.4 weeks</td>
<td>Optional procedure (4 cases of a sample of 96)</td>
</tr>
<tr>
<td>26 weeks</td>
<td>Sheriff courts</td>
</tr>
<tr>
<td>43 weeks</td>
<td>Court of Session Ordinary roll(^ {124})</td>
</tr>
</tbody>
</table>

Cutting the adjustment period does mean that the optional procedure is faster, but may also reflect the relative simplicity of cases, and commitment to a distilled

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\(^{121}\) Court of Session (Scotland) Act of Sederunt (Rules of Court Amendment No.1) (Optional Procedure in Certain Actions of Reparation) 1985 SI No.227

\(^{122}\) Faculty of Advocates Submission to the Cullen Review: Reform of Court of Session Practice (1995) The new procedure is "not seen by most practitioners as generally superior way of proceeding" (Bar criticisms were: Inadequate notice of opponent’s case, absence of focus, inability to examine or test relevancy - causing representatives to assemble and lead more evidence than necessary)


\(^{124}\) Court of Session Ordinary Roll statistics included vacation periods at this time
process. There are no cost comparisons, and both academics and practitioners have argued that measuring court performance in weeks is no indication of quality of justice.

What the procedure has not cured as anticipated is the culture of late settlements. It has actually increased the incidence of last minute agreements. A higher number of cases are allocated court time for Proof, while actual adjudications are just as low as other procedures.

<table>
<thead>
<tr>
<th>Court Track</th>
<th>Proofs Heard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal Injury Actions</td>
<td></td>
</tr>
<tr>
<td>Sheriff court</td>
<td>5.1%</td>
</tr>
<tr>
<td>Court of Session Ordinary roll</td>
<td>2.9%</td>
</tr>
<tr>
<td>Court of Session Optional procedure</td>
<td>3.1%</td>
</tr>
</tbody>
</table>

This means that more judicial time is booked when adjustments and amendments are curtailed. Although stages of settlement were fairly consistent throughout process in the sheriff courts, within the Court of Session there was a marked differential between tracks:

<table>
<thead>
<tr>
<th>Court track</th>
<th>(Late) Settlements Between Proof Fixed and Heard</th>
</tr>
</thead>
<tbody>
<tr>
<td>Personal Injury Actions</td>
<td></td>
</tr>
<tr>
<td>Court of Session Ordinary roll</td>
<td>42%</td>
</tr>
<tr>
<td>Court of Session Optional procedure</td>
<td>56%</td>
</tr>
</tbody>
</table>

The conclusion is that litigants raise actions earlier under the Optional procedure and move through the processes more quickly, but the majority leave at the last stage, reflecting a high number of 'court-door' settlements. It seems therefore that moving more quickly through the process does not facilitate early settlement, but it is the imminence of Proof itself which concentrates the mind of both the practitioner and the party. This confirms the English and Australian studies that the costs of Proof are a deterrent, and the consistency across different jurisdictions of those reaching Proof, regardless of how they got there, indicates that Proof may not be the ultimate goal in litigation, but the ultimate threat.
Using the experience of the Optional procedure, creating a climate for early disclosures and early attempts at court control have not cured the weaknesses which dog the system. Adjustment of pleadings was seen to be the largest contributor to length of disposals in the other two tracks, but curtailing this facility under Optional procedure has also resulted in Proofs becoming protracted. The Personal Injuries study concluded and confirmed the profession's view that although there was scope to bring additional cases under the Optional procedure, adjustments allow parties not only to assess the relative merits of a case, give fair notice to the opposition, and perfect the trial agenda, but also precipitate offers on a cost-effective analysis. This allows for the flow of business in busy courts. Truncated procedures may not therefore be suitable for all types of cases. Lord McCluskey questioned this view in McNeill v Roche Products when he stated

"the case illustrates how the sensible use of the Optional procedure allows for a much speedier despatch of litigation without any prejudice to the interests of the litigants."

Practitioners however are wary of abbreviating the pleadings process, perceiving a threat to the Scottish plea to relevancy of a case before investigation of facts begins. In many instances they also prepare their own informal Records, costs of which are passed on to clients. Sections of the profession and judiciary are also concerned that fair notice is not always given in the pleadings, and simplification and swiftness restricts the time for investigation and disclosure.

125 Personal Injuries Study (1995) op.cit.31-32 paras. 5.12-5.15
126 L. Shand, Parallels and Pitfalls Encountered Under the Court of Session Optional Procedure, Personal Injuries Study (1995) op.cit.51 para.32
127 Personal Injuries Study (1995) op.cit.52 para.7.35
128 McNeill v Roche Products 1989 SLT 498 at 507
The Hughes Commission was the first and last review body this century to evaluate the role of the legal services and the legal profession in Scotland.\textsuperscript{131} The Commission accepted representations that civil litigation procedures were "unduly cumbersome, slow and costly."\textsuperscript{132} A general overarching review was recommended but the Court of Session's residual powers to reform procedures had been used in a patchwork of piecemeal reform under secondary legislation.\textsuperscript{133}

The Commission's solution to problems caused by late settlements echoed, once more, the recommendations of previous reports

"giving the court a more active role in controlling conduct of the case than traditional in our brand of adversarial procedure."\textsuperscript{134}

There were also recommendations for

- a new tier of judicial officer to deal with procedural matters
- a legal services advisory committee to guide a new Minister of Legal Affairs
- empirical research upon which to base policy decisions
- initiation of pre-trial reviews

None of these recommendations was adopted although almost 20 years later a Ministry of Justice was formed, advised by a Justice and Home Affairs Committee.

The main recommendation for firmer judicial control was subsumed under a series of piecemeal reforms. In recognition of the failure of Summary Cause Rules to provide access to justice for individual litigants, a new Small Claims procedure was

\textsuperscript{130} P. S. Reid, A Study of Optional Procedure in the Court of Session (1994) 83 (unpublished MBA)
\textsuperscript{131} The Hughes Report (1980) op.cit. paralleled with the Benson Commission in England and Wales Cmnd 7648 (1979)
\textsuperscript{132} The Hughes Report (1980) op.cit.203 para.14.2
\textsuperscript{133} Court of Session Act 1988 s.5 Power to regulate procedure by Act of Sederunt
\textsuperscript{134} The Hughes Report (1980) op.cit. 205
initiated\textsuperscript{135} for claims under £750. Later research in 1991 taking account of 6 courts,\textsuperscript{136} showed that of the 74,000 cases raised in the first year 90\% were payment actions, 92\% were raised by large companies, were not disputed, so no hearing was required. Out of the 74,000, only 46 were appealed. By 1991 the upper limit of £750 was considered too low, there was no legal aid, and personal injuries were erroneously included.\textsuperscript{137} In an alien environment, which showed some resistance to informality, it was argued that the ordinary citizen, for whom the procedures were devised, was intimidated and legal representation was still necessary. With no legal aid available the cost outweighed the value of claims.

The recent study of personal injury actions also covered both Small Claims and Summary Cause Rules.\textsuperscript{138} Most claims were raised at each jurisdiction’s financial limit which led the researchers to conclude that raising the definitive limits would not widen access to the public. They reasoned that the bulk of claims would move to the new limit without altering the structural faults.

Notwithstanding this study’s conclusions, within three years the Lord Advocate issued a consultation paper\textsuperscript{139} on proposals to extend the privative jurisdiction of sheriff court cases in order to widen local access to Summary Causes, Small Claims and Ordinary Causes in the sheriff courts (see Chart 8 for changing caseloads). Following the Grant, Hughes and the Cullen reports, moving large numbers of clients around the litigation system is a noted response to Committees’ proposals for increased judicial control - restructuring the workload rather than addressing deficiencies, dragging the faults around the system. Can judicial management make a difference?

\textsuperscript{136} Small Claims in the Sheriff Court in Scotland (1991) Central Research Unit
\textsuperscript{137} Small Claims study (1991) ibid.
\textsuperscript{138} Personal Injury study (1995) op. cit.
\textsuperscript{139} Consultation Paper, Proposals to Increase Jurisdiction Limits in the Sheriff Court (including privative jurisdiction limit) June (1998) Scottish Courts Administration GMK 03840, Implementation of new limits \textquoteleft probably April 2001\textquoteright (SCA response to writer’s enquiry 26 April 2000)
4. **Sheriff Court Reform 1994**

In April 1991 the Sheriff Court Rules Council responded to representations for reform from sheriffs, solicitors, court staff and members of the public.\(^{140}\) Court workloads were increasing, prompting an assessment of the effectiveness of existing procedures and fresh consideration of the clarity of the rules. The best features of the Court of Session were also to be examined. A review was undertaken with the intention of making proposals to reduce delay, cost and complexity\(^{141}\) in sheriff court procedures. The Rules Council’s five policy aims for new ordinary cause procedure were published:

- Cases should call in court only when necessary
- the number of callings should be kept to a minimum
- the rules should prescribe periods for completion of various stages
- the control and management of cases should be vested in the court
- the procedures of the Court of Session and Sheriff Court should be harmonised wherever possible.

The Rules Council recommended a twin tracking system of Standard Procedure and Additional Procedure for cases differentiated by difficulty and complexity of issues.\(^{142}\) The standard procedure was based on the general framework of the Court of Session Optional procedure,\(^{143}\) the difference being the standard track in the sheriff court was mandatory, not dependent upon party choice.

Full written pleadings were allowed, and there was to be a short adjustment opportunity prior to the initial Options Roll Hearing before a sheriff with wide discretionary ‘interventionist’ powers. It seems therefore that criticisms of the Optional procedure had been heeded, and the reins loosened slightly to accommodate

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\(^{141}\) Sheriff Court Report (1991) ibid.2 para 1.4
\(^{142}\) Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 SI 1993 No.1956 (S.223) implemented 1 January 1994 with new fee scales
\(^{143}\) Sheriff Court Report (1991) ibid.4 para 2.2
adjustments. With a slight twist of emphasis, strict timetables were set down to control the pace of litigation and bring coherence and certainty to an overburdened system which deals with 90% of all civil litigation claims\textsuperscript{144} and a high proportion of criminal actions.

A major research study was undertaken in 1993/4 prior to implementation of the new rules,\textsuperscript{145} and a follow-up evaluation was published in 1997.\textsuperscript{146} Despite training towards proactive intervention, and lectures organised through the Rules Council, divergent shrieval approaches\textsuperscript{147} are allegedly creating an aura of uncertainty.\textsuperscript{148} Once again there are indications of delays at adjustment stage, and by curtailing preparation time one Scottish solicitor pointed out that the log jam moved to the Proof stage, as with Optional procedures.\textsuperscript{149} It may be that these are just teething problems and isolated incidents, but the conventions and practices which were disclosed in the pre-implementation research continue to underpin and perhaps undermine the new rules. Parties’ response to strict timetabling has resulted in high levels of sitting, particularly before the first meeting with a judge at an Options Hearing.\textsuperscript{150}

Continuity and consistency in the sheriff courts were already threatened by systemic obstructions which cannot easily be addressed, particularly by piecemeal reform. These are a heavy workload of criminal cases which are given timetabling priority,\textsuperscript{151} and included widespread use of temporary sheriffs during both study periods, for the most part called in on a daily basis.\textsuperscript{152} Over all the cases in a sample of 1206 defended actions, the number of sheriffs per case ranged from 1 to 20, the average

\textsuperscript{144} In 1985 the exclusive jurisdiction of Court of Session in divorce actions was abolished
\textsuperscript{145} 1995 Sheriff Court study
\textsuperscript{146} E. Samuel, R. Bell, Defended Ordinary Actions in the Sheriff Court: Implementing OCR. 93 (1997) (1997 Sheriff Court study)
\textsuperscript{147} Sheriff Johnston, Options Hearings - Glasgow (1995) 1 Civil Practice Bulletin 5
\textsuperscript{148} DTZ Debenham Thorpe (1995) GWD 60352 dismissed for late lodgement of Record (one day before Options Hearing) but see Burtonport 1994 SCLR 844 - lodgement on day of Options Hearing allowed - indicating a more liberal view of the Sheriff’s dispensing power.
\textsuperscript{149} The Times 15 August 1995 This is Not Justice for All - Scottish solicitor’s view.
\textsuperscript{150} 1997 Sheriff Court study op.cit. - 49% of Options Hearings are discharged by motion to sist
\textsuperscript{151} Because of 110 day and 80 day deadlines for criminal cases to appear, they dominate the timetables
\textsuperscript{152} In 1989 there were 114 temporary sheriffs (39 were advocates, the remainder were solicitors), and 94 permanent sheriffs 1993 SLT (News) 352. Before abolition in November 1999 there was a total of 126 temporary sheriffs.
being 5, the most common 2, and more than 6 in 20% of the cases. How many were temporary appointees is not recorded. However, views expressed to interviewers reveal that advantage could be taken of a temporary sheriff whose working practice was coloured by completion of the workload for the day. The recent demise of this office results in initial chaos for court administration, but in the longer term an opportunity is created to retrieve consistency of approach through an emphasis on training and professional workshops.

In the first sheriff court study the view was also expressed that in general all sheriffs were under pressure to allow continuations, and were aware that

"becoming tough on adjustment may penalise the client rather than the solicitor in many cases."

This view echoes findings of the Kincraig Committee in 1979 and Lord Cullen in 1995, recognising that dilatory preparation lies more at the door of the profession than the client, but the sanction affects the client, not the practitioner. The pattern of results has a ring of familiarity, almost bordering on inevitability.

Comments from the practitioners, sheriffs and sheriff principals who were interviewed revealed a consensual view that parties were reluctant to focus sufficiently timeously, and the rules as applied were open to abuse, particularly by busy lawyers juggling heavy caseloads. They also revealed that booking debates was sometimes a reflex action (especially when instructions were unknown), strategic (with no intention to appear), and sometimes served as a warning to the opponent that pleadings were in need of amendment. This also confirms previous research, which leaves lawyers who are remunerated on a time basis open to insinuations of incompetence and fee building, and may make them deeply suspicious of changes which affect their working practices.

153 Starr & Chalmers v P.F. of Linlithgow 11 November 1999, see Starr v Ruxton 2000 SLT 42
154 "There is an understandable reluctance on the part of the court to insist on rigid compliance for fear of causing prejudice to one or other parties." Kincraig Report (1979) op.cit. 16
155 Lord Morton of Shuna (1995) op.cit. 3; Lord Gill (1995) op.cit. 132
Further analysis in Chapter 8 indicates that the timing of control is crucial. But there is also a large unidentified cultural change for any judge who prefers to walk the more traditional path, is sceptical of a new interventionist role, reliant on practitioners’ presentations, and is not committed to detailed preparation and analysis until Proof is taking place.

5. The Cullen Review 1995

Earlier studies provide irrefutable evidence that rules in themselves do not guarantee strict compliance. Sanctions in themselves do not guarantee consistent application. Lord Cullen’s research study updated and reinforced consistent patterns of litigating behaviour.¹⁵⁶

Fresh data was extracted from a sample of 300 recently resolved cases
- adjustments took place on average over 38 weeks
- 333 motions were enrolled for late lodgement of summons, defences and records
- diversions to the procedure roll were cancelled 70% of the time
- amendments were lodged for 135 out of the 300 sample, despite the fact they could ‘imperil the Proof’.

The Review concluded that not only was there a culture of late preparation, there were also unnecessary diversions and a learned reliance on the indulgence of both the opposing representative and the court to allow continuous and late revision of pleadings.

Lord Cullen repeated concerns that late settlements were the main cause of delay in disposals, resulting in wasted preparation, wasted administrative resources and unnecessary attendance in court.¹⁵⁷ As in previous studies, a low number of cases actually reached Proof - 5.7%. Of the cases which settled, 30% settled in the last

¹⁵⁶ The Cullen Review (1995) op.cit. 10-13 paras 3.6-3.14
¹⁵⁷ The Cullen Review (1995) op.cit. 18-19 paras 3.38-3.41
week, and for personal injury cases this increased to 34.9%. These findings confirm once again the ethos of the court door syndrome. Lord Cullen concluded:

"There is a clear need for measures to encourage early settlement in a way which is not achieved under the present system."

Two previous Practice Notes aimed at encouraging early preparation and disclosure, failed to achieve their purpose and were abandoned, in one case because "it was not achieving more settlements." It seems therefore that judicial reform is still aimed primarily at eliminating the chaotic aftermath of late settlements, while the litigants and their representatives jealously guard the civil right to unconstrained access to all the procedural tools available in court-based dispute resolution.

An adversarial ethos which leaves unfettered control of the pace and scope with the parties gives them the power to do so, and it is this power which the profession perceive to be under attack by caseflow management principles. It is the last and largest piece in the jigsaw of court reform and will not be realised easily based on previous experiences in Scotland. There have been suggestions, however, that the case for instituting court control of pre-trial progress is quite simply that however clear and apt the rules may be, some litigants and their lawyers will not abide by them unless the rules are policed and not just refereed. Lord Cullen’s recommendations were therefore not only aimed at changing the rules yet again, but changing the control system after their implementation. He recommended changing the traditional judicial role of passivity to a more active participative and regulatory approach. He was not, however, jumping into the unknown.

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158 The Cullen Review (1995) op.cit. 19 para. 3.41
159 The Cullen Review (1995) op.cit. 19 para. 3.41
160 Practice Note 2 1991 - information on arguments submitted prior to appearance on the procedure roll
161 Practice Note 3 1991 - experimental pre-Proof By Order hearing for Proofs fixed over 5 days
162 The Cullen Review (1995) op.cit. 20 para. 3.48
6. Lord Coulsfield’s Working Party

Professor Zander suggested that ideally changes should be implemented experimentally in a few courts to assess the impact of innovation. It can surely be no coincidence that Lord Cullen’s recommendations came at a time when one Outer House judge (and two part-time) were actively pursuing and testing out judicial caseflow management principles in a small pocket of the Court of Session. Lord Coulsfield’s Working Party in 1993 had endorsed previous criticisms of court procedure. Consultation with the business community showed that in a fast-moving competitive age commerce required speedy resolution of disputes at limited costs, within comprehensible rules, benefiting from a degree of specialised knowledge. Acknowledging past failures to police new procedures, the Working Party warned

"We are satisfied the changes in the rules are unlikely to make a real difference to the progress and disposal of commercial business unless they are accompanied by significant changes in the organisation of court business, the attitude of all parties, including the judiciary, to the conduct of the proceedings and the allocation and organisation of the time of the judges."164

Three chapters in this thesis are devoted to an evaluation of caseflow management procedures in the Commercial Court, which is actually a specialist list, including the views of solicitors, counsel and the judiciary involved. Parallels with contemporary reforms in the sheriff court are identified, illuminating patterns of behaviour which are both consistent and constant. Experimental procedures are designed to break traditional attitudes. Can the hurdles to full-scale reform be overcome?

163 Prof. M. Zander, 145 (1995) op.cit..154
The Hurdles

(i) Internal Structural Hurdles

What judicial management calls for is a philosophical and practical revolution in a small jurisdiction which has clung with pride to the principled Roman law tradition of an adversarial culture.\(^{165}\) It has been argued that if the rules were followed there would be no need for caseflow management; that our system of written pleadings, for instance, is the jewel in the Scottish legal crown. It is true that in theory one document summarises a case, gives fair notice to each party, avers the relevancy of a case in law before investigation into facts, and focuses the issues for debate.\(^{166}\) Master Turner in England has rightly admired and envied the theory behind the system.\(^{167}\) But it seems from the few research studies undertaken in Scotland that in practice deviations from the ideal have prompted constant calls for reform and have repeatedly resisted change.

Although the details and principled base of our procedural rules are unique, we share a common problem world-wide - theory does not now match reality. The one factor which seems to unite different jurisdictions with different rules is the adversarial ethos which is based on party control of the legal process. The main thrust of Lord Cullen’s recommendations closely match other jurisdictions’ solutions (see Chapter 9) which also necessitate a paradigm shift away from traditional principles with a concomitant jarring of sensibilities and equilibrium. Some see this as a direct move away from the protection of an adversarial culture,\(^{168}\) towards a more European inquisitorial system, which is also dogged by long delays and high costs. Others see the changes required as a long-needed adaptation of the adversarial culture to modern commercial and political needs,\(^{169}\) unblocking access to justice.\(^{170}\) It should be

\(^{165}\) Thomson v Glasgow Corporation 1962 SC (HL) 36
\(^{166}\) Prof. R. Black, An Introduction to Written Pleading (1982) Law Society of Scotland Education 11
\(^{167}\) Master R. Turner (1995) op.cit. 5
\(^{168}\) Faculty of Advocates submission to the Cullen Review (1995) op.cit.5 quoted in Lord Cullen’s Review (1995) op.cit.46 para. 6.11
\(^{169}\) The Cullen Review (1995) op.cit. 46 para. 6.11
noted, however, that other jurisdictions have embraced caseflow management procedures to deal with delays which are well beyond our range, and there is a view in Scotland that tighter control by sanctions would be enough. However Lord Cullen disagreed that sufficient sanctions existed which would discourage wasteful practices, and recommended stringent measures to control and curtail unnecessary procedural diversion, adapting but not overriding adversarial principles.

Implementation of radical changes face not only the intransigence of critical practitioners, but also the inertia brought on by cynicism and entrenched practices of those who have adapted and survived previous attempts at reform. There is recognition that the court’s powers are largely constrained by the attitudes of the parties, therefore success is allied to co-operation. Three months after issuing his Interim Report on civil litigation in England, Lord Woolf also acknowledged that although new rules may encourage change, they may not achieve it alone.

His views are echoed by Lord Gill who encouraged the profession to embrace and shape reform towards a common ideal. In a smaller jurisdiction with close relationships, the co-operation of the profession is paramount, and radical reforms which threaten the autonomy of practitioners need sensitive implementation. Lord Cullen also acknowledged that a constructive attitude on the part of practitioners and judges is essential. As changes in the organisation of the legal profession are both a consequence and cause of revision of civil procedural processes, will the attitudes be constructive enough?

171 Faculty of Advocates Submission to Lord Cullen (1995) op.cit.4
172 The Cullen Review (1995) op.cit. 57 para. 6.43 - Lord Cullen recommend compliance should be monitored by court staff; para. 7.7 - power to find counsel or solicitor-advocate personally liable to opposing party, and specific fees not to be charged to client.
175 Lord Gill (1995) op.cit. 132
Radical reform must also jump external hurdles. In 1992 Lord President Hope pointed out that the whole structure of the system revolves around the assumption that a judge performs a limited role, and there would have to be an immense investment in reorganisation, retraining and re-equipping before it could be changed. In 1996 Lord Hope reiterated this point when he publicly canvassed for extra resources on the day the Cullen Report was published. However implementation of reforms are governed by the prevalent financial and political climate, and judicial resources are controlled by government seeking value-for-money.

Court administration, funding and policy are provided through executive government agencies. Scottish Court Service anticipated an increase of 15% in the workload of the Sheriff and High Courts from 1995 to 1998, and a budget cut of £3million. In a cost-capping era therefore, the government is attracted to measures which bring control, efficiency and economy to a previously unmanaged system, but only if they do not require large injections of funds. The adversary system, which gives parties unfettered control of the litigation process, is therefore subjugated to the wider public interest - an efficient and economic publicly funded service. Lord Mackay, as Lord Chancellor, stated that changes to the English civil justice system could be achieved without an injection of resources. Lord Irvine, the following Lord Chancellor, has also indicated that there was no ‘new money for problems’.
Both have stated that internal structural changes are necessary to cut the cost of litigation and increase public access to justice. Both main political parties therefore actively supported caseflow management as the ‘new approach’\textsuperscript{185} to effective and economic administration, but without the substantial financial investment which Lord Hope stated was essential. Lord McCluskey has warned that the weakness of far too many reform proposals is that they cost too much or are motivated by desire to save money rather than improve service,\textsuperscript{186} and Lord Cullen’s proposals were evaluated against that background. Reliance on the profession to restructure itself after centuries of autonomy may be misplaced, given previous resistance to reform in this area. There are no guaranteed cost-savings in caseflow management for the government.

**Patterns of Change**

By following the history of past reforms it is obvious that Scotland has moved in a piecemeal fashion towards management principles over the past few decades, but with varying success (see Chapter 5). The aims, solutions and implementation of previous endeavours give an indication of underlying problems which will inform and affect future reform within the courts. They also highlight a debate over the efficacy of piecemeal or overarching reform, and question whether changes to procedural rules alone can successfully address the weaknesses exposed. Primarily, of course, the likelihood of change in Scotland is governed by the expectations, goals and attitudes of the home players, and government commitment at a time when the courts must prepare for an influx judicial business flowing from the Scottish Parliament and the incorporation of the European Convention on Human Rights.

**Climate for Change**

Lawyers are not in general noted for their radicalism when it comes to reform of court procedures.\textsuperscript{187} Familiar law is eroded by reforms and an extra burden is placed

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\textsuperscript{185} Lord Irvine of Lairg (1996) op.cit.172

\textsuperscript{186} Lord McCluskey, Errors and Omissions - Address to Gleneagles Conference (1990) 35 Journal of the Law Society of Scotland 128

\textsuperscript{187} Editorial (1995) 4 Civil Practice Bulletin 2
on them to learn new schemes. Difficulties in bringing about procedural reform are also observed in other jurisdictions. In New South Wales where caseflow management has been practised for the past decade, it was found that eroding a familiar and necessary part of lawyers' monopoly tended to produce a resistance to change. There was no incentive to

"leave familiar paths and undertake a struggle with new problems until inefficiency reached a point where the monopoly was under serious threat."  

New practices and game rules also come at a time when a U.K. in-house survey reveals that the legal profession is demoralised and disillusioned; 80% of lawyer respondents said they were looking for other jobs, and 40% regretted entering the profession. A majority claimed they were highly stressed, particularly beyond the age of 45, and were barely coping with heavy caseloads.

In Scotland the profession has doubled over the last 20 years ("to put it bluntly we are overmanned") and suffering from practice restrictions in a competitive and diminishing market. With aspects of the Scottish market opening up to non-professionals, business-targeting by English firms, and recent strategic commercial partnerships, competition is a live issue. The appointment of a Public Defender's Office to represent criminal legal aid clients constricts another business outlet. Further erosion by an increase in Alternative Dispute Resolution will reduce traditional areas. However, Scottish Parliamentary business and Human Rights legislation will provide new avenues for legal expertise. Technological advances also spawn new areas of dispute (see Extract)

190 The Lawyer 7 May 1996
191 The Challenges of Realism, Aspects (1996) 41 Journal of the Law Society of Scotland 1
192 Licenced Conveyancers
193 CA Magazine May 1996 p.11; Simon Bain Business Editor, Scotland on Sunday - Dorman Jeffrey joined with Arthur Anderson Accountants to offer wider range of services
The commercial climate is therefore both depressing and encouraging. In a fast-moving and highly communicative market place, traditional working practices are threatened. Fewer people are granted civil legal aid although expenditure is actually rising. In 1997 lawyers' fees of £5million comprised the bulk of £5.4 million increase in costs, while access to courts was reduced. Compounded by arguments of inferior quality of representation this means that lack of control - either by the bench or politicians, is unsustainable. Unless changes are made, the profession will become the chief victim of reforms.

There can be no doubt that attitudes which have been so ingrained that they were repeating themselves over and over will continue to inform fresh challenges. In 1953 Lord President Cooper questioned how long the courts could sustain procedures which were criticised both by the bench and public as costly, tardy and over-elaborate. There is half a century of evidence to support his comments afresh. Lack of information sustains the status quo. Applauding the principles which underpin Scottish civil procedure, he acknowledged the seemingly unbridgeable gap between principle and practice which continues to elude innovative reforms.

"Provided that time and expense are no object, (they) produce in skilled hands as perfect a result as ingenuity and toil can devise. But are we giving the public what they want? If (a litigant) wishes to cross from Granton to Burntisland, must we offer to charter a Cunard Liner for his use?" 194

194 Lord Cooper's Selected Papers (1957) The Future of the Legal Profession 153
Chapter 4

Chart 4.1

Average Number of Weeks to Disposal in Different Jurisdictions

Studies

- Commercial Court Study 2
- Commercial Court Study 1
- Procedure Ongoing
- Study 2
- Study 1
- Ordinary Roll
- Study 1
- Study 2
- Criminal Review
- Commercial Court
- Woolf Final Report
- Woolf Interim Report

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<td>36</td>
</tr>
<tr>
<td>Study 2</td>
<td>41</td>
</tr>
<tr>
<td>Study 1</td>
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<td>100</td>
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<td>Woolf Interim Report</td>
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Weeks to completion

Chart 4.2

Rate of disposal - Court of Session - Optional Procedure for Personal Injuries 1995, Cullen Review


Optional Procedure P.lnj

Commercial Study 2

Commercial Study 1

Outer House

Weeks

Percentage of Cases
Percentage of Funds Allocated


Scottish Budget Estimates 1999-2000 (Percentage allocated per area)

Chapter 4
Chapter 4.4

Cost of Legal Aid Payments in Scotland 1977 - 1997
Chapter 4.5

Average Cost per Case Funded by Scottish Legal Aid Board 1980-1997

Average Cost per Case in Sheriff Court
Average Cost per Case in Court of Session
Proportionate Allocation of Legal Aid Costs in Scotland 1964 - 1997
Solictors' and Counsel's Fees and Outlays (Percentage)
Applications to Scottish Legal Aid Board 1951-1954
1964-1997

Number of Applications for Legal Aid

Years


0 5000 10000 15000 20000 25000 30000 35000 40000

Applications Sheriff Court
Applications Court of Session
Chapter 4.8

Scottish Court Actions Initiated 1972 - 1997 by Jurisdiction
CHAPTER 5

JUDICIAL CASEFLOW MANAGEMENT

Kill or Cure?

"I do not myself think that the present, quite unacceptable, cost of legal proceedings will be substantially reduced until the judge is assigned to the case on the issues of proceedings....To a much greater extent than at present the judge, rather than the parties' advisers, would become the manager of the proceedings and the engine of progress. More would devolve on him, and much would depend on his diligence, fairness and professional ability." 1

Sir Thomas Bingham's ambition

"to do right to all manner of people, not just the legally aided and the very rich." 2

incorporates centuries of frustration with a role which reduces judges to impotent observers of defects in the litigation process. While the English judiciary are currently feeling the power of the reins for the first time, the Scottish bench remain passengers in an expensive but sturdy purpose-built coach. Whether they are all contented to remain in that role is a moot point. Intermittent judicial comments indicate that some judges are poised on the abyss of change, while others are determinedly silent. Although the Lord President acknowledges that "the best way to achieve change is for the court to initiate it", 3 lack of movement towards caseflow management in the supreme court is an

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2 Sir Thomas Bingham (1994) ibid 16
3 The Rt. Hon. the Lord Rodger of Earlsferry, Lord President of the Court of Session 1 June 1998, Opening
indication that there is no consensus to expand the judicial role in order to police a more accountable system.

Addressing Defects in the Litigation Process

Underlying defects in a public service can be tackled in three ways

1. by consumer demand
2. by government intervention
3. by professionals within the service

1. Consumers As noted in Chapter 4, the consumer who can access litigation services is invariably in a position of dependency regarding control of the pace and costs of resolution. The primary decisions to be made by clients revolve around settlement and investment of further resources, both of which, although bound up with personal determination, are predicated on advice from legal professionals. Complaints are dealt with within both branches of the profession before they may be addressed to the Legal Services Ombudsman. The ombudsman has the power of suggestion rather than the power of correction. As there is no centralised complaints service, defective practice is unquantified and there is no consensus for change.

2. Government In England, government authority and governance of the legal process converges in the Lord Chancellor’s Department. Control of court resources is both a political and pragmatic reform. The current radical overhaul of English court procedures, initiated by Lord Chancellor Lord Mackay of Clashfern implemented the findings of a far-reaching review of legal process by Lord Woolf in 1995. The review ran parallel to a separate investigation into legal aid reform. The succeeding Lord Chancellor, Lord Irvine of Lairg, called for an examination into the efficacy of Lord

Address at The Reform of Civil Justice Seminar, Edinburgh, The David Hume Institute.
Woolf's recommendations, and has combined the results of these branches of investigation into a package of reforms (see Chapter 9).

In Scotland, there are many branches to reform which run parallel to each other, but remain under separate authority. In 1998 the Scottish Ministers' proposals for reform of dispute resolution services partially mirrored those of the Lord Chancellor's department, covering a review of legal aid, promotion of Community Legal Centres and A.D.R. as an alternatives to court service. The Lord Advocate's authority extended to management of court resources and differential access to Scottish courts, alterations to which are currently under consideration. The implementation of Lord Cullen's internal review of the supreme court administration in 1995 would have completed the reform package in Scotland with the judiciary policing professional court practice. Since a Ministry of Justice was formed in 1998 there has been no government review of civil justice procedures.

3. Internal Review Two Scottish Institutional Writers point to one particular consequence of the Court of Session's general power (nobile officium) to act as a court of equity. Scottish judges have residual powers to order procedure, although an older Civilian form of witness examination by judges no longer exists.

"Whereas inferior judges never exercise their office but at the suite of the litigants, the judges of the Court of Session may, in their inquiries into facts, direct things to be done or steps to be taken, which neither are nor can be

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4 Sir Peter Middleton (former Treasury Secretary) Review of Civil Justice and Legal Aid, Report to the Lord Chancellor, September 1997
5 Mr. D. McLeish, Home Affairs Minister Scotland (Pre-devolution) Access to Justice - Beyond the Year 2000, June 1998, Post-devolution these areas are now governed by the Justice Minister's department.
7 Viscount Stair, Institutions of the Law of Scotland Book iv. 44.9 Description of how parties on oath were to be judicially examined, until Evidence (Scotland) Act 1853; by 1693 this took place in the presence of parties and advocates – Stair ibid. iv.44.10-12, iv.46.19, iv.43.16, iv.28.7 until Evidence (Scotland) Act 1853
demanded [by the parties] as a point of right".

There is no visible evidence of supreme court judges exercising their ad hoc interventionist powers to police the defects within the system. Self-regulation in this respect has not yet occurred, although it is the judges, experienced ex-practitioners, working within the system on a daily basis, who are best placed to institute and sustain meaningful reform. Lack of cohesive policy has contributed to fragmentary reform of a service while complaining about unnecessary delay and undue expense, as well as inefficient and wasteful administration.

Justice Ipp in Western Australia, an advocate of court regulation, has noted the dangers of professional and judicial reserve. After 100 years of "stunning social, political, technological and demographic change" and "relatively few significant changes to the legal system", he advised that remedial changes to the adversarial system through caseflow management were considered vital by many judges and court administrators. Scotland is similarly situated. Lord Gill has called Scottish civil justice "a relic of a vanished age". Notwithstanding 20th century innovations in Scottish social and commercial sectors, and massive technological advances into on-line communication services, the last major legal reforms were initiated 150 years ago and the current court administration conforms to structural alterations made in 1933.

Justice Ipp also warns

"Unless reforms of this kind are made, other changes, which may be less palatable to those directly involved in the legal profession are likely to be imposed by persons who are not lawyers and who lack a deep understanding of

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8 John Erskine, An Institute of the Law of Scotland (1812)1.3.22, mirrored in Bankton, An Institute of the Law of Scotland Vol.2 (1752) 517
9 The Cullen Review (1995) op.cit. 18-19 paras.3.38-3.41
This has also begun to occur in Scotland. By encouraging a structured system of alternatives to court, discriminatory access to a multi-layered system of justice is promoted (see Chapter 1). The relevance of legal principles is diminished. Heavy reliance on a self-regulated profession is reduced, and a monopoly is threatened. Re-routing consumer access may or may not arrest unnecessary leakages from the public purse, but, as Roscoe Pound recognised in 1906, courts uphold social values. The very existence of the working machinery encourages spontaneous performance of obligations. High settlement patterns, noted across international boundaries, show that adjudications are peripheral rather than instrumental in providing legal resolution. Parties actually negotiate around the system, tapping into public resources without scrutiny or audit. Ironically in Scotland as numbers of litigants decrease, demands on resources increase. More actions are currently defended, and together with a marked trend of prolongation into time-consuming appeals, force the court service into crisis overload. A demand-led system turns courts into reactive but powerless resource-centres, who understand but forgive and accept late lodgements, ghost bookings, and endless technical (but at times strategic and unnecessary) skirmishing (see Chapter 4).

It is the judges who are undoubtedly key players in shaping parties’ attitudes, expectations and behaviour. Their acceptance and forgiveness of procedural lapses ‘in the interests of justice’ depend upon their perception of their role and a recognition that timetables which are fixed by court rules are the tracks along which all litigation proceeds. In other jurisdictions these are recognised as public tracks in which delays

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12 Justice Ipp (1995) op.cit. 821
13 Dean R. Pound, The Causes of Popular Dissatisfaction with the Administration of Justice (1906) 20 American Bar Association Report 395 at 405
caused by one litigant reverberates on others awaiting court time.\(^\text{16}\) ‘Interests of justice’ is a term currently defined in Scotland in a close individualised sense, but may conceivably be re-defined in a wider context, trespassing into debate over judicial independence.

The scarcity of public resources clearly has not been a matter for judicial concern, but lack of superintendence over the diligence and skill with which dispute resolution is operated tarnishes the image and integrity of the entire legal system. Since the Scottish sheriff courts implemented a form of judicial caseflow management in 1994, sheriffs have embraced their new role within this wider context,\(^\text{17}\) some admittedly with more enthusiasm than others.\(^\text{18}\) In the Court of Session, however, the judicial role has, with limited exception (see Chapters 6-8), remained within the ambit of Thomson v Glasgow Corporation, when Lord Justice Clerk Thomson defined the duty of the judge as that of a passive adjudicator, similar to a referee at a boxing match, awarding points to each party in turn.\(^\text{19}\)

### The Judge and Justice

The Hon. Justice Ipp questions whether ‘justice’ can be met within such a severe structure as Lord Thomson described in 1962.

> "There is an inherent dichotomy of duty to find out the truth and to remain a passive spectator until judgment, and the power of the judge to find the truth is limited by the parties’ ability and desire to lay all relevant facts before him - that

\(^{16}\) Ashmore v Corporation of Lloyds [1992] 1 WLR 446 per Lord Templeman at 453 see footnotes 28/29

\(^{17}\) DTZ Debenham Thorpe v Henderson Transport Services 1995 SLT 553 Failure to lodge a record timeously led to dismissal of action by Sheriff. (per Lord President Hope at 556 "delays are contrary to the public interest"), approved dicta of Sheriff Principal MacLeod in Morran v Glasgow Council of Tenants Association 1995 SLT (Sh Ct) 46 and Sheriff Principal Risk in Mahoney v Officer 1995 SLT (Sh Ct) 49

\(^{18}\) Colvin v Montgomery Preservations Ltd 1995 SLT (Sh Ct) 15 per Sheriff Principal MacLeod

\(^{19}\) Thomson v Glasgow Corporation 1962 SLT 244
may result in the judge administering the law as distinct from justice."

"A legal system that is content for the judge to resolve disputes without attempting, within the bounds of fairness and available resources, to ascertain the truth, is a system that is fettered by a rigid formalistic structure, inherently inimical to the consistent achievement of justice." 20

He is reasoning that adjudication which is predicated on imperfect evidence 21 affects the quality of justice delivered.

In 1962 Lord Thomson, who had been Lord Justice Clerk for 16 years in the Second Division of the Inner House, 22 was no doubt aware of the conflicts inherent in the traditional judicial role, and would obviously have disagreed with Justice Ipp's modern interpretation:

"Judges sometimes flatter themselves by thinking that their function is the ascertainment of truth. This is so only in a very limited sense. Our system of administering justice in civil affairs proceeds on the footing that each side, working at arms length, selects its own evidence." 23

Conflicting viewpoints were also apparent within the Inner House. The Lord President, heading the First Division, derided the notion that litigation should degenerate into a game of skill and ingenuity:

"The object of a litigation is to enable the court to ascertain the truth, not to give

20 Justice Ipp (1995) op cit 714
21 Air Canada v Secretary of State for Trade and Industry [1983] AC 94, per Lord Diplock at 438
22 Installed as Lord Justice Clerk on 14 October 1947, continuing until his death 15 April 1962. Lord Thomson also had two years' experience as Lord Advocate.
23 Thomson v Glasgow Corporation op.cit. per Lord Justice Clerk Thomson at 246
either scope, or indeed encouragement to tactical manoeuvring." 24

Lord Guthrie’s dissenting judgement also supported the need for fairness of method in ascertaining truth. 25 Divergent opinions on fundamental concepts of truth, justice and the judicial role were therefore apparent in 1962, including the Lord President, the Lord Justice Clerk and senior judges. It is Lord Thomson’s view, however, which is repeatedly cited in support of the traditional status quo, while the others lie buried.

Sir Thomas Bingham would call Lord Thomson’s view of the adversarial system “the luxurious approach”, 26 which the Hon. Justice Lightman argued was also in vogue in England until the end of the 1980s. 27 But by at least 1992 the House of Lords had markedly diverged away from the stance taken by Lord Thomson, following changes in style and structure of professional life and public service. Party autonomy and judicial passivity clash with increasing demands for budgeted resources and social justice.

"Litigants are not entitled to the uncontrolled use of the trial judge's time. Other litigants wait their turn. Litigants are only entitled to so much of the trial judge's time as is necessary for the proper determination of the relevant issues." 28

The judicial role within this paradigm is tempered by constraints of economy and expedition, and the judge is elevated to management level:

"The control of the proceedings rests with the judge and not with the plaintiff. An expectation that the trial would proceed to a conclusion upon the evidence to

24 Duke of Argyll v Duchess of Argyll 1962 SC 140 per Lord President Clyde at 152
25 Duke of Argyll v Duchess of Argyll ibid per Lord Guthrie at 153
26 Thermawear v Linton 17 October 1995 unreported
28 Ashmore v Corporation of Lloyds [1992] 1 WLR 446 per Lord Roskill at 448
be adduced is not a legitimate expectation. The only legitimate expectation of any plaintiff is to receive justice." 29

It is by no means certain that Lord Thomson’s strong views in 1962 continue to be representative of the current Scottish supreme court bench either, or that his views sit comfortably with the conclusions of subsequent Scottish reform committees and commissions who undertook empirical and qualitative investigations. However, what has been accepted and implemented in practice is selective, indicating a reluctance to alter the core structure in any but peripheral matters. All committees investigating procedural reform have recommended that the judicial role should be restructured:

- The Grant Committee (chaired by Lord Thomson’s eventual successor) recommended in 1967 that the court should “control timetables for the disposal of court business...fixed administratively and enforced with due regard to what is possible in a particular case”. This main proposal was not adopted in practice. 30

- The Kincraig Committee in 1979 concluded that “to avoid undue expense and unnecessary delays the court should have more control over the progress of the action” An optional track for personal injury actions was devised in 1985 in the supreme court aiming to truncate procedure by condensing the timetable for written pleadings. This option has not blossomed to its promised potential (see Chapters 4, 8)

- The Hughes Commission in 1980 recommended that the “court should have a more active role in controlling conduct of the case than traditional in our branch of the adversarial procedure.” 31 This proposal was not carried through.

29 Ashmore v Corporation of Lloyds op.cit. per Lord Templeman at 453-454
30 Sheriff Court Report by the Committee, The Rt. Hon Lord Grant (1967) Cmnd 3248 (the Grant Report)
• The Sheriff Court Rules Committee in 1991 recommended that "control and management of cases should be vested in the court." Sheriff courts implemented a diluted form of caseflow management in 1994. Parties meet a sheriff at an Options Hearing to discuss future procedure, a system subsequently found to be problematic due to interruptions to judicial continuity. (see Chapter 8)

• Lord Coulsfield’s Working Party in 1993 recommended the use of a specialist judge for cases of a ‘commercial or business nature’, using caseflow management strategies to "balance speed with a thorough examination of the issues". in order to resolve "familiar problems with Court of Session procedure".32 A continuous judicial management system has gradually expanded to include one full-time and four part-time supreme court judges in active caseflow management, cutting time to resolution by 75%. (see Chapters 6-8)

• As far as the other procedures in the Outer House of the Court of Session are concerned, in 1995 Lord Cullen again found that "the weakness of the existing procedural system demonstrates the absence of overall control and effective means of forestalling developments which can lead to undue delay and unnecessary expense."33 His main recommendations - different levels of judicial management and pre-trial reviews - have not been carried through. (see Appendix 5.1)

There is an obvious disparity and lack of harmony between recommendations and acceptance of judicial caseflow management in Scotland. While investigative committees highlight the overarching need for control and accountability, and an initial move has been made in the sheriff courts, there is, as yet, no scheme which attracts consensual judicial support for all cases appearing before the supreme court. As an omnicompetent collegiate body, independent of political constraints, the impetus must

31 Royal Commission on Legal Services in Scotland (1980) Cmnd 7846 (the Hughes Report)
come from within, from those who implement the rules which are both challenging and demanding of judicial time and expertise. The Lord President does not accept that there are direct parallels with the English problems of heavy litigation, a view which is borne out by research, and therefore he has not accepted the need to imitate the massive upheavals instigated by Lord Woolf. Since judicial commitment and leadership have been found to be key factors in successful management in other jurisdictions, the lack of judicial impetus in Scotland, in all but key specialist areas, is fatal to the committees’ recommendations. There can be no compulsion.

In Australia it has been noted that the acceptance and adoption of the trend towards judicial management was dependent upon individual stances of leading judges and policymakers and the extent to which they have been able to influence their brethren. In Scotland some obviously embrace the principles of caseflow management, and others appear as yet unconvinced of its privileged status, particularly for all types of cases. The trend towards specialist pilot schemes may continue as adjuncts to Ordinary Roll procedure, although experience in the Commercial Court (see Chapter 8) shows that Ordinary working practices begin to encroach and undermine experimental schemes.

**Judicial Caseflow Management**

"Caseflow management is a comprehensive system of management of the time and events in a lawsuit as it proceeds through the justice system from initiation to resolution. The two essential components of case management systems are the setting of a timetable for predetermined events and the supervision of the progress of the lawsuit through its timetable."  

33 The Cullen Review (1995) op.cit.  
Supervision of the process may either take the form of ad hoc meetings with judges (as the sheriff courts) or allocation of specific cases to a specific judge (as in the Commercial Court). It is intended to facilitate more and earlier resolutions, creating significant savings to the parties and to court resources. These savings are ostensibly realised through reductions in time and concomittantly the expensive services required - principally trials with their heavy demand on judicial time, professional fees, witnesses and experts, which generally result in heavy costs to clients.

| In short, the goal of caseflow management is to achieve earlier and cost-effective resolutions in more cases through effective and efficient court process |

There is a multiplicity of techniques and systems which have been adopted for managing cases and the flow of cases. Individual adaptations to local conditions has meant that choosing the ‘best-fit’ is “clearly much more an art than a science at the present time”. 37

In England Lord Woolf believes

“It is the court providing a forum in which the lawyers and the judge can work out the most satisfactory way a case can be dealt with and the judge then supervising the progress to trial in accordance with that programme. What the judge will prevent is parties not fulfilling their responsibilities, acting unfairly to a weaker party or acting unreasonably.” 38

The trend towards continuous supervision of pre-trial procedure, invoking the initiative of the judge as a director of process and acting as a conduit for communication between

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the parties, was rooted over 50 years ago in the United States.\textsuperscript{39} Within an adversarial system, caseflow management is a compromise between open-ended access to procedures and a monitoring system, allowing reasonable access while attempting to eliminate the worst deviations. In other words, parties must, for the first time in adversarial history, justify requests, actions and behaviour. The term ‘case management’ is subjective and highly emotive, questioning propriety over the dispute, but should not mean that the judge becomes the investigator, the inquisitor or the presenter of evidence as in European inquisitorial systems. The new term which has evolved is “caseflow” management which emphasises the facilitating role the judge can fulfil. Objectively, it is ‘process management’ and should mean that party autonomy is qualified by the judge’s experience, both as a former practitioner and, since becoming a judge, in policing parties’ use of procedures.

**Forms of Caseflow Management**

Throughout the plethora of material on caseflow management, there is no consensus on successful forms, techniques and practice. It is an evolutionary process, subjective to each legal system. The search for the ‘best fit’ continues throughout America, Canada, Australia, New Zealand, Scandinavia, and the Far East, supporting the conclusion that there is no panacea - no model which guarantees success.

The first question to address is - *what is the outcome which is being sought - what are the goals?* The answers across jurisdictions form a gridlock of tension between individual incentives to adhere to or breach the rules and judicial commitment to promote accountability.

\textsuperscript{38} Medics. Lawyers and The Courts: Samuel Gee Lecture to Royal College of Physicians 13 May 1997

\textsuperscript{39} Abridged Report of the Commission in Pretrial Procedure to the Judicial Conference of the District of Columbia 4 Fed R.Serv.(1941) 1015
Goals of Caseflow Management

- reducing delay and costs for all players
- increasing efficiency and effectiveness
- creating predictability
- creating accountability
- planning resources

These goals do not lie comfortably with free-range of incentives to protract and complicate litigation. Even from court’s point of view these goals may be mutually exclusive. Techniques employed to reduce delay may increase costs. Strategies to force accountability may swamp resources. Strict adherence to the policy behind the rules may cause delays and resource complications if the appeal procedure is triggered.\(^{40}\) The largest and most recent American study (over 94 courts, spanning 5 years),\(^{41}\) does in fact recommend an optimum package of reforms. Other jurisdictions’ experiments with distinctive types of management highlight areas of success and concerns which have unexpectedly arisen.

An earlier study involving 18 American courts attempted to identify factors which were associated with faster and slower case processing. The first-in first-served approach (named ‘laissez-faire’) dominated slowest courts, particularly those who

\[\text{“exercised virtually no control over the pace of litigation and have little or no knowledge about the relative complexity of different cases prior to the point of trial readiness”}\]^42

\(^{40}\) Strathclyde Business Park (Management) Ltd. v Cochrane 1995 SLT (Sh Ct) 69, Sheriff Principal Cox: Expedition is not achieved if dismissal due to strict interpretation of the rules results in copious appeals, thereby creating a "snakes and ladders board from which all the ladders had been removed"


\(^{42}\) B. Mahoney, Changing Times in Trial Courts (1988) 75
This describes the current administration of the Scottish supreme court.

The American researchers found the following facts to be related to the pace of litigation

- the stage of court intervention
- strict adjournment policy
- assurance of firm hearing dates
- established information systems
- attitude and expectations of legal representatives

These core factors underpin the four main types of court control

(a) Judicial Docket

Early allocation of each case to a particular judge to encourage and continuously police early disclosure of evidence, narrowing issues in dispute and promoting early settlement. Pre-trial conferences are generally programmed into a supervised timetable. Rule 16 of the United States Federal Rules encapsulates this ethos.\(^\text{43}\)

(b) Differential Caseflow Management

Cases of different complexity and claim values are allocated to different tracks, related to different time management and disclosure programmes. There is explicit recognition that the speed and method of case disposition depend on actual resources and management requirements of a case, not the order filed.\(^\text{44}\)

\(^{43}\) Federal Judicial Center, Elements of Case Management (1991) see Appendix 5.2 for Rule 16

\(^{44}\) J. Bakke, M. Solomon, Case Differentiation: An Approach to Individualised Case Management (1989) 73 No.1 Judicature 17-18
The Brookings Institution in 1989 suggested 3 tracks:

1. simple or expedited cases requiring little or no intervention prior to trial, resolved relatively quickly
2. complex cases, with a need for early and intense judicial involvement
3. standard cases outwith the above categories

The National Center for State Courts in America construed differential caseflow management as an enhancement of the existing scheduling system, although the appointment of a Director with authority over civil schedules was considered vital for programme success.

This procedural style has been adopted in many American States following the Civil Justice Reform Act of 1990 (see Chapter 9). Lord Woolf also recommended individualised tracks, producing empirical data to show the costs of many cases were disproportionate to claim values and the complexity of procedures used to resolve the disputes. The Common Law Division of New South Wales also adopted the Brookings Institution’s categories, but the theory has not entirely matched practice where the legal profession strongly objected to judicial control of timetable (see Chapter 9).

(c) Time Standards and Goals

In 1984 the American National Conference of State Trial Judges compiled targets for completion of process within State courts. Reasonable time limits are set, after consultation with counsel, to maintain momentum towards target goals.

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46 National Center for State Courts, Study of Differential Case Management (1990)
Annex III Survey of Litigation Costs by Prof. H. Genn
• 90% of civil actions should be completed within 12 months of initiation
• 98% within 18 months
• 100% within two years

By 1 June 1992 all State courts adopted time standards under the Trial Delay and Reduction Act 1991, supported by the American Bar Association’s Task Force on Delay Reduction.48 (see Appendix 5.3 for example of timetable)

(d) Specific Programmes

Where there is no managerial system, some jurisdictions have devised specific programmes to deal with a backlog of business, caused by late cancellations and delays. Individual drives in the supreme courts in Western Australia and New South Wales, for example, indicate that cases which slide into a black hole of inertia may settle very quickly after the judicial spotlight is cast on their process.49 Effective court intervention may be as light as a prompt.

Caseflow management is therefore a generic term, covering different mechanisms of control, specific to each jurisdiction. The common aim is to balance meaningful allocation of resources, ease access to a public right, and maintain a sustainable level of party autonomy within the adversarial system. However, changes to a service which is tightly bound by its own professional and legal principles leads to a confusion of established roles. In England Lord Justice Henry, Chairman of the Judicial Studies Board, acknowledges that current civil reform proposals there entail a whole culture change, with judges being taught that the delivery of verdicts will be only part of their job.

48 American Bar Association, Standards Relating to Trial Courts (1992)
The Hon. Justice Rogers, Managerial or Interventionist Judge (1993) 3 Journal of Judicial Administration 210-219
“Instead of sitting as umpires, judges will be more proactive and managerial.

“Forty years ago....as long as the judge got the answer right, (he) had done his bit. Forget that the answer had taken years and the parties were bankrupt.

“For the first time judges will be knocking heads together, pushing the pace of litigation and controlling costs.” 50

These views change the judicial focus from substantive to distributive justice. How can judges achieve this within an adversarial system where parties have controlled the selection, pace, preparation and presentation of evidence? While American courts in the 1980s were avidly involved in experimental pilot schemes and empirical studies, Professor Judith Resnik focused on the effect of changes on established roles, and in particular judges as managers, switching from passivity to proactivity

“No longer a detached oracle, the judge becomes a consort of the litigants” 51

The Role of the Judge

“The inevitable interim between the discovery of social needs and demands and the provision of legislative remedies to meet them presents judges with opportunity (indeed, it imposes on them the duty) of filling the need and meeting the demand in accordance with their notion of what is just.” 52

Upon installation in Scotland, a supreme court judge swears

Administration 301-320
50 The Times 9 December 1997
51 Prof. J. Resnik, Managerial Judges (1982) 96 Harvard Law Review 376 at 391

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"to do right to all manner of people after the laws and usages of this realm, without fear or favour, affection or ill-will"\textsuperscript{53}

He or she therefore promises independent, unbiased, impartial and reasoned application, interpretation and development of the law and legal principles, regardless of the status of the litigant. The privilege bestows discretionary powers in the delivery of contemporary notions of justice. However, critics of caseflow management, which alters the perspective of the judge’s role transforming him into a key communicator and coordinator,\textsuperscript{54} have pointed to concerns which may threaten the integrity of the judicial oath. It is against the backdrop of these criticisms and concerns that this thesis evaluates caseflow management in the Court of Session’s Commercial Court.

**Criticisms of Judicial Role in Caseflow Management**

The alteration of power structures within a decision-making process throws up fresh conflicts, some of which have only become apparent in operation. Professor Scott points to the considerable management challenge involved in meeting a demand for certainty and standardisation and an operational need for flexibility and innovation.\textsuperscript{55} The hypothesis that techniques employed to reduce costs must logically cut delays is crucial to the success of caseflow management planning, but this outcome is by no means certain.

Professor Resnik’s initial criticisms of the clash between the traditional and new roles came on the eve of a proposed extension of Federal judicial powers from control of
discovery to full pre-trial case management in 1982.\textsuperscript{56}

Pointing to a consistent lack of unfiltered data to support proponents of the new system,\textsuperscript{57} she questioned the efficacy of managerial judging and exposed potentially dangerous side-effect – in particular, the erosion of traditional safeguards against abuse of power, and the threat to fair and impartial resolution.

According to Professor Resnik, the wide discretion involved in managerial judging presented opportunities for judges to use their own techniques, goals and values in an attempt to promote speed over deliberation - undercutting quality for quantity. Through observation, she believed that many procedural decisions, taken during informal discussions with parties, opened the following traps:

- strict rules of evidence could be bypassed, with no opportunity available for formal objection
- timetable decisions could be established without written justification
- informal private decisions could not be appealed
- judges’ own agendas and personal prestige could introduce a measure of competition between judges on the speed and number of disposals achieved
- close supervision of preparation and encouragement to settle coloured judicial impartiality
- judicial discretion opened new areas of uncertainty and bias
- there was a risk that judges would act on information before all the facts were known
- information received at ex parte hearings would inevitably filter into adjudication
- there were no explicit norms or standards to guide judges in their new roles
- weaker parties or representatives might capitulate and comply with judicial pressure against their own wishes

\textsuperscript{56} Federal Rules of Civil Procedure - Rule 16 (see Appendix 5.2)

\textsuperscript{57} Prof. J. Resnik (1982) op.cit. 421
As safeguards Professor Resnik proposed that

- notes of all meetings should be on record
- reasoned decisions should be circulated
- all decisions should be open to appeal
- a manual of acceptable rules and techniques should be devised
- to preserve impartiality, a new judge should manage each stage of process
- court personnel should be trained to share the management role
- alternative dispute resolution centres should be set up by government as replacements, filters or supplements to courts

Within four years Professor Resnik's views were criticised as overly-pessimistic. The potential for arbitrariness had been increasingly exposed to

"institutional safeguards...the self-consciousness of judges, vigilance and assertiveness of advocates, probing suspicions of journalists and fastidious carping of scholars" \cite{59}

- in other words professional, academic and public scrutiny. More meetings were taking place in open court, decisions were open to appeal and judges involved in settlement negotiations did not adjudicate at trial. \cite{60} However, the debate over fairness to individual litigants by condensation of case preparation has rumbled on, the justification for continuing supervision being its resonance on other clients awaiting court time. \cite{61}

There is no doubt that procedural decisions, whether made by counsel or judge, are not

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\textsuperscript{58} Prof. E. D. Elliott, Managerial Judging and the Evolution of Procedure (1986) 53 University of Chicago Law Review 306
\textsuperscript{59} P. H. Shuck, (1986) op.cit.361
\textsuperscript{60} T. Church, Old and New Conventional Wisdom of Court Delay (1992) 7 Justice System Journal 395
\textsuperscript{61} J. O. Newam, Rethinking Fairness: Perspectives on the Litigation Process (1985) 94 Yale Law Journal 1643; Sir Thomas Bingham (1994) op.cit. 8
\end{flushleft}
neutral, affecting the shape of the playing field and terms of settlement. There has been some agreement that complex procedural rules actually create incentives for prolonging preparation and indulging excessive exploration of issues. Some commentators argue that incentives for parties to overplay a procedural game has created the demand for caseflow management. On the other hand, critics argue that managerial judging spawns its own satellite demands on time and costs. Shortening the legal process might also invite ‘front-loading’ of costs, which could create fresh barriers for those who are not in a position to fund a concentrated process. Inequality of access to court process may therefore be reinforced, even increased, by efficient judicial management.

Professor Elliott has argued that the cumulative cost-benefits arising from procedural management not only outweigh the potentially residual threat of judicial arbitrariness, but also changing the judicial role positively affects three cost-sensitive factors (discussed in Chapter 4):

1. Service to client where the principal has little information on process, there is a strong incentive for agents to under or over-prepare and supply services, without benefiting the client

2. Equal access expense and delay already create tools for tactical manipulation by opponents

3. Social justice availability of public funds creates incentives to consume

From these observations arise key questions – can a change to the judicial role be

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62 Prof. I. R. Scott, (1995) op.cit. 23
64 Professor Elliott (1986) op.cit.330-331
achieved? Can judges identify and control over-zealous strategies which caused delays and costs; if so, can they efficiently target effective sanctions at the real perpetrators? The fundamental weakness of caseflow management by sanction or a threat of sanction, would seem to be that tailoring procedure to individual cases requires distinctive flexibility which opens the trap-door to wider judicial discretion, the influence of personality, uncertainty and inconsistency.

Critics highlighted the influence of individual differences in judicial personality, background, philosophy, work habits, energy levels and experience which informed their commitment to evolutionary role. Some Federal Court judges were labelled “highly individualistic” and “idiosyncratic”65 while others preferred to interpret the ambient overarching Federal Rule 1 (“The Rules shall be construed and administered to secure the just, speedy and inexpensive determination of every action”)66 in a more traditional manner. It has also been suggested that conventional deference to judicial status could reinforce judicial subjectivity, increasing concerns over the explicit manipulation of parties by agenda-setting judges or implicit leverage “internalised without discussion”.67 Forecasting the potential for intimidation of “timid and inexperienced” counsel to the detriment of a client’s case, debate in England recently turned to the adequacy of the judicial bench to take on an interventionist role.69

While these weaknesses were also identified in America, the role of managerial judges was evolving from its original purpose - a channel to narrow issues for trial - to unblocking communication between parties and actively promoting settlements.70 Taking the role of ‘devil’s advocate’ was much more interventionist than originally

66 Federal Rules of Civil Procedure, Rule 1
67 P. H. Schuck, (1986) op.cit. 359-361
69 M. Beckman (1995) ibid 1702 commenting on the disparate quality of counsel who accept elevation to the bench “not good enough to risk Silk” “love of status” “lazy” “need financial security of a pension”
70 P. H. Schuck, (1986) op.cit. 356
intended, re-routing investment of judicial expertise from

(a) adjudicator of the merits of a case, through to
(b) arbiter of the last resort, and then on to
(c) the role of quasi-mediator

The new perspective increased concerns that judges who became closely involved in private settlement negotiations could not be perceived as impartial and unbiased at adjudication. But there was some evidence that judicial involvement in settlements, however it worked, was acceptable to lawyers, judges and clients:

"When the judge initiates settlement discussions parties are relieved of appearing to weaken, retaining bargaining power."72

Implications of Judicial Intervention for the Adversarial System

Although the move towards judicial involvement falls short of the Continental inquisitorial legal systems, where not only case preparation but examination of witnesses are controlled by the judge (the advocate’s role being limited mainly to preparation of a written dossier),73 one real fear of caseflow management revolves around the notion that the legal system is being pulled towards the European model which is historically based on entirely different cultures, career structures, codes of procedure and legal principles. Sir Jack Jacob acknowledges the advantages of the established British judicial role

"The passive role ....... greatly enhances the standing, influence and authority of the judiciary at all levels and may well account for the high respect and esteem

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71 J. Herbert Jacob, Judges in America (1978) 94
72 What Lawyers Want From Judges in the Settlement Arena (1985) 196 FRD 85
73 P. Devlin, The Judge in the Adversary System. (1979) 54
in which they are held, as well as their comparatively small numbers." 74

while deprecating the excessive technical manoeuvres and low standards of practice which this traditional function allows. He argues that the adversarial system is based on mythical assumptions of equal resources, skill, competence and expertise, without suggesting that the inquisitorial system addresses these problems. But by pointing to a move away from lengthy oral presentation, the fears of a denuded Bar are heightened. The Vice-Chancellor’s Practice Direction in 1995, which promoted pre-trial lodgement of written material as evidence-in-chief,75 could support the apprehension that the English system may be sliding towards the inquisitorial model.76 Alternatively it could be argued that England is following the U.S. and Canadian supreme courts and the European Court of Justice who, through restraints of court-time, all depend more on written than oral work. Parliamentary debate in Scotland is similarly restricted, but in court there seems to be no such threat to oral presentation,77 despite a keen interest in matching accountability to resources within the existing adversarial system.78

As one leading jurist pointed out, legal structures slowly modify and evolve new functions.79 The trend towards caseflow management in common law jurisdictions therefore represents part of this natural order, initiated by judges, generally spearheaded by forceful personalities, but with no acknowledged master-plan of the end-result. Rather it is a journey without a map and without an end. And it is the end-result which the critics imagine, fear and vehemently oppose. The benefits in practice have been found to overshadow prophesies of doom,80 to some degree because these prophesies were voiced:

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77 Although it was mooted for the Commercial Court by the Coulsfield Committee.
78 Lord Rodger of Earlsferry (1998) op.cit. address
79 O. W. Holmes Jr., The Common Law (1963) 31-32
"The intensity of the debate has subsided as results have underlined the salutary
effect of the managerial judge".81

However, the caution of the Scottish bench in rejecting the Cullen recommendations for
caseflow management in the Outer House reflects either the prudence of a jurisdiction
which requires more deliberative proof of the end-result or the instinct of a College of
Justice which views its role as protecting established legal principles and the status of
the Bar, its own training ground. There seems little doubt, however, that rigid support
for the status quo in the face of acknowledged crises (see Chapter 4) is already reflected
in falling caseloads and government-sponsored attempts to resolve disputes by other
means. (see Chapter 1) Intransigence and indecision may damage the development of
law in Scotland, particularly when public and business confidence are paramount.82
Lack of judicial application to procedural reform seems therefore to be short-sighted.
Lack of commitment to caseflow management as the vehicle for reform however, is
more pragmatic and introspective than dismissive.

The Pragmatics of Caseflow Management - Application of Theory

Since the "fastidious carping of scholars" is considered to be an institutional safeguard
against abuse of power, Professor Zander, the most ardent British critic of managerial
judging, has provided an incisive base for debate in much the same way as Professor
Resnik in the early 1980s in America. He freely admits to being 'the Cassandra' of the
English movement towards caseflow management, which he has attacked as unworkable
in practice, even counter-productive,83 and the product of wish-fulfilment.84 The main

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82 Devolution in Scotland from 6 May 1999 opens new opportunities
Civil Justice Quarterly 208 at 209
pillars of his criticism are that

- judicial resources would be wasted unnecessarily - 95% of cases already settle without interference
- a small proportion of cases might need management - these could not be easily identified
- clients are not interested in efficiency or delays - satisfaction comes from expectations and perceptions of fairness and dignity being met
- implementation would be costly with no guarantee of improvement
- speeding process could pre-empt settlement negotiations
- radical proposals are based on unsubstantiated opinions

Professor Zander’s conclusions are noticeably based on selective interpretation of a vast amount of research reports, and professional, academic and judicial papers which, after due discussion of possible pitfalls, recommended caseflow management. He admits that practitioners have not objected to Lord Woolf’s hypothesis that undue delay is common and partially attributable to the legal profession’s use of the adversary system.

"Neither the Bar nor the Law Society has raised a peep of protest" 85

Selectively quoting from a recent extensive American study, it has been pointed out by an experienced American researcher in this area that he ignores the fact that it is now widely acknowledged that the research methodology was “inherently flawed” and widely drafted legislation facilitated only “marginal” changes in existing caseflow management systems. 86 However Professor Zander’s assertion that more research needs to be undertaken on the causes of ‘undue’ delay is unquestionable. Further analysis of

85 Prof. M. Zander (1997) op.cit.210
the latest study’s raw data could provide more fruitful information for policymakers. (see Chapter 9).

It is also difficult to argue with his assertion that Lord Woolf has over-estimated compliance with strict time limits, particularly those cases using a 30-week Fast Track procedure. And it is true that the use of automatic sanctions for non-performance has already spawned satellite litigation\(^87\) in England, clogging up appeal courts.\(^88\) The inherent inability to conform to timetables has also been demonstrated in New South Wales supreme court where parties experienced difficulties with time-limits, and half the caseload of the Common Law Division was sidelined to a “Not Ready List”\(^89\) after the first year. In Scotland Lord Cullen’s Review also revealed a cultural reluctance to adhere to timescales - in a sample of 300 cases 423 motions were lodged for late defences, open records, closed records and amendments.\(^90\) It seems therefore that management by sanction, even if it does target the culpable party, cannot guarantee compliance, and regular audits of open files to identify problem areas, such as delay, rely heavily on administrative resources both within courts and lawyers’ offices.

The availability of court manpower resources is a key factor in judicial involvement. Professor Zander’s assertions - that 95% of cases settle without management, that the remainder cannot be detected early, and that the costs of management outweigh any marginal benefits - are of particular interest to a jurisdiction contemplating reform but which is also constrained by numbers and budgets. Is it worth the disruption? The court must look both at the effective and efficient use of resources.

\(^87\) Freudiana Holdings Ltd. Re, CA The Times 4 December 1995; Bannister v SGB plc Court of Appeal, England, 25 April; 1997; Order 17 rule 11 County Court Rules allowed automatic striking out after 15 months inaction.

\(^88\) Prof. M. Zander (1997) op cit.212-213

(a) Effective Use of Resources

Professor Zander seems to be unconcerned with the cause and effect of the litigation process on the clients' decisions to settle, and the quality of justice it provides, whether this is by adjudication or settlement (see Chapter 2). Some argue that settlement or compromise is actually a denial of justice, although courts could not cope with a high level of adjudication that this implies. As previously noted litigation procedures affect settlement negotiations. A former Chairman of the Scottish Law Commission recently acknowledged that procedural law can have "an effect no less profound" than substantive law. And Lord Templeman's statement that "the only legitimate expectation of any plaintiff is to receive justice" encompasses procedural as well as substantive justice. Extending the ethos of Donoghue v Stevenson beyond policy considerations, the court, as a manufacturer of decisions and opinions, as supplier of the commodity 'justice', may even be thought to have a legal duty of care to the consumer of its services, a duty of filling the need and meeting the demand in accordance with their notions of what is just.

"You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour... persons who are so closely and directly affected by [your] act that [you] ought reasonably to have them in contemplation as being so affected when [you are] directing [your] mind to the acts or omissions which are called into question".

This circuitous argument suggests that judges do have a duty to ensure that their

90 The Cullen Review (1995) op.cit. paras 3.18-3.21
92 Prof. I. R. Scott (1995) op.cit.22
93 Lord Davidson, (1991) op.cit.131
95 Donoghue v Stevenson 1932 S.C (HL) 31 per Lord Atkin at 44
administrative machinery is not adversely impeding just outcomes. Their residual power to alter procedure in the Court of Session by Acts of Sederunt reinforces this argument. Presumably that duty covers settlements as well as adjudications. To date there is very little empirical data on patterns of settlement which vary with a range of factors including the parties involved, type of case, claim value, impact on prospective litigators, judicial interest rate, and the attitudes and standing of legal representatives. Professor Genn’s recent study suggests that unpredictable costs and delays force settlements by emotional, physical and financial exhaustion, although in-house policies of major institutional litigants seem to reflect a propensity towards early settlement of low-value claims.

Pressure to settle is heightened by prospective appearance in court – "the ‘court door syndrome’" - which focuses parties’ minds on the weaknesses and strengths of their case and the cost/benefit ratio of proceeding to proof. Professor Genn also discusses the "hard bargaining" which takes place between parties and lawyers in the shadow of the courts, with hopes raised that financial offers will increase in value as court-time approaches. Settlement therefore becomes a game of brinkmanship, of bluff and counter-bluff until the adversaries are cloaked up ready for battle.

Lord Cullen seemed to have no doubt that it is the imminence of proof which brings a realistic prospect of settlement. Appearance at a substantive hearing also seems to be a decisive factor, reflected in patterns of settlement which are higher just before a Procedure Roll hearing (13%) or Proof (51%) (see Chart 1). Although early inter-party negotiation could be interpreted as weakness by an opponent, there is also evidence that parties’ representatives are not committed to preparation until just before a court

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96 Court of Session Act 1988 s.5 "Power to regulate procedure. by act of sederunt"
98 KPMG Peat Marwick, Study on Causes of Delay in the High Court and County Courts Final Report (1994) 26
99 The Cullen Review (1995) op.cit. para 3.41
appearance.\textsuperscript{100} (see Chapter 8). This means that court timetables are clogged by appointments which are not utilised - wasted resources as far as the court is concerned, but powerful bargaining tools for adversaries.

For substantive issues\textsuperscript{101} during the financial year April 1995 to March 1996 court records expose the extent of this under-utilisation

<table>
<thead>
<tr>
<th>Type of Hearing Booked</th>
<th>Percentage of Hearings Fixed Which Take Place\textsuperscript{102}</th>
</tr>
</thead>
<tbody>
<tr>
<td>Procedure Roll</td>
<td>19</td>
</tr>
<tr>
<td>Civil Jury Trials</td>
<td>22</td>
</tr>
<tr>
<td>Proofs</td>
<td>11</td>
</tr>
<tr>
<td>Judicial Review</td>
<td>28</td>
</tr>
<tr>
<td>Civil Appeals</td>
<td>80</td>
</tr>
</tbody>
</table>

Being deprived of the freedom to book ad hoc hearings will alter settlement strategies in a highly unpredictable manner. But the high incidence of discharged hearings across jurisdictions may be a strong indicator that court time is booked before a realistic prospect of settlement is explored.\textsuperscript{103} Lack of control leads to an ineffective use of resources.

(b) Efficient Use of Court Resources

As far as the courts are concerned, it is the inability to predict the \textit{timing} of settlements

\textsuperscript{100} Report of the Review Body on Use of Judicial Time in Superior Court (the Maxwell Review) (1986) para 6.58
\textsuperscript{101} Not including normal motions on roll, by order hearings and by-order adjustments
\textsuperscript{102} Interview with Keeper 6th May 1996: Procedure roll 1041 hearings fixed 200 heard; civil juries 48 fixed 11 heard; proofs 1717 fixed 190 heard; judicial review 180 fixed 51 heard; civil appeals 186 fixed 150 heard
\textsuperscript{103} S. Morris, D. Headrick, E. Samuel, Pilgrim’s Process Defended Ordinary Actions in the Sheriff Courts, (1995) para. 4.22 - 269 debates fixed, 27 heard, 78\% discharged on the day; Cullen Review (1995) op.cit. para.3.11 Court of Session 82 cases on Procedure Roll 70\% cancelled
which overwhelms both administrative and judicial resources. Commercial actions are monitored and timetabled through an individualised computer system, controlled by the Commercial judges and nominated court clerks. The remainder of the workload of the Court of Session is the responsibility of the Administration Department, timetabled through the Keeper of the Rolls. His role is pivotal in balancing work with resources.

As we have already seen (see Chapter 4), in 1985 supreme court resources were freed up by granting concurrent jurisdiction for divorces to the sheriff courts, but the gap in the superior court was quickly filled by criminal work and longer proofs, and there are reports that the sheriff courts are "creaking at the seams."\(^{104}\)

At the same time, in response to Lord President Emslie’s request to the government for three extra judges, one was appointed. Lord Emslie was granted discretion to call upon retired judges\(^{105}\) and a review body was set up to investigate the use of judicial resources. In 1986 the Maxwell Report, based on a two-month survey of workload, indicated that only 60% of judicial time was utilised, although a backlog of civil business was building up.\(^{106}\) Unpredictable late settlements, and the Bar’s over-estimates of time required, wasted court time since it could not be reallocated on short notice.\(^{107}\)

Instead of interrupting party control the supreme court followed the Maxwell recommendation to "carefully overload the court rolls" two and a half times the availability of judicial time to compensate for last minute withdrawals.\(^{108}\) But the culture of late settlement has grown so fast it has caused a bottleneck at the door of the court. On a weekly basis the Keeper acts as a resource manager,\(^{109}\) balancing judicial

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\(^{104}\) The Scotsman, letter from practising solicitor 6 September 1995

\(^{105}\) Law Reform Miscellaneous Provisions (Scotland) Act 1985 s.22 (2 were eligible at that time)

\(^{106}\) The Maxwell Review (1986) op.cit. paras 2.28-2.30

\(^{107}\) The Maxwell Review (1986) op.cit. para 6.41

\(^{108}\) The Maxwell Review (1986) op.cit. paras 6.39 and 6.43

\(^{109}\) Interview with the Keeper of the Rolls 2nd May 1996
availability against the competing demands of criminal, appeal and civil work. In 1996, for example, from a pool of 27 judges, he regularly allocated 9 judges to appeals, with between 9 to 13 required for criminal work on a weekly basis. The remainder were available for civil work in theory, but may already have been engaged in completing ongoing criminal trials, special inquiries, and Commercial actions. On Tuesday mornings between 40 to 45 civil proofs were booked in against a regular residue of 4 to 7 judges. The Keeper continues to accommodate late settlements by overbooking between 8 and 9 times judicial availability. With two new sources of business, court time may be increasing, but no official data is published.

The Maxwell Committee had also pointed to a dramatic and sustained increase of High Court criminal indictments, particularly related to drug-trafficking offences. The time-lapse between allocation of a court date and the hearing was three times more than the committee considered reasonable. As a consequence administrative target dates were set for allocation of proofs after Records were closed (see Chapter 4 for current targets). By 1995 Lord Cullen reported that up to September 1995 83% of diets were allocated within target (20 term weeks), and the remainder within a further 4 weeks. This is close to the 3 to 4 months which Lord Maxwell thought reasonable in 1986. The only flaw in this success story is that trials which are estimated by professional representatives to last over 4 days (one court week) are not covered by set targets, but are set in conjunction with the parties, lawyer, counsel and administration diaries. Long civil proofs can therefore languish and grow stale for up to a year before being included in the judicial timetable, while increasing criminal demands overtake resources.

No data on the number of longer proofs are available, but to assist predictable workflow

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110 From 1990 the Lord President may also call on temporary judges, generally for limited purposes to cope primarily with the increasing criminal workload.

111 The Maxwell Review (1986) op. cit. para 8.17 (in 1983 27 out of 449 High Court trials were drugs-related, increasing in 1995 to 247 out of 824 workload)

112 The Maxwell Review (1986) op. cit. para 2.30 Time-lapse between closing record and date assigned for hearing was 15 months for non-consistorial proofs, and 9 months for defended consistorial proofs.
and curtail over-exhuberant estimates of time required, the Lord President’s Notice of 7 March 1990 was a plea to the profession to provide accurate information as existing submissions were considered to be

"so wildly at variance with eventual duration as to imply that no thought was given to the original estimates ...causing unacceptable delays in commencement of proof"\textsuperscript{114}

In 1995 Lord Cullen echoed this complaint

*In practice the information as to likely duration - which is of critical importance - is frequently unreliable"*\textsuperscript{115}

It seems, therefore, that the corollary of passivity is the accommodation of indifferent behaviour which borders on abuse of public resources. Adversarial legal principles, which are based on party autonomy in procedural matters, mask and protect deficiencies in practice. However managerial judging, which allegedly curtails procedural abuses, may undermine the independence and perceived impartiality of both the judiciary and the Bar, who have a direct duty to the court. Both independence and impartiality interweave the cultural concept of adversariality, particularly in Scotland. Here we reach the convergence of criticism and commendation, a contest which has obviously not yet been resolved in Scotland, although the Cullen Review provided a platform for debate.

**Caseflow Management in the Supreme Court**

Immediately prior to publication of Lord Woolf’s Interim Report which recommended caseflow management for the English courts, the previous Lord President in Scotland,

\textsuperscript{113} The Cullen Review (1995) op.cit. 13 para 3.17
\textsuperscript{114} Practice Note 7 March 1990
\textsuperscript{115} The Cullen Review (1995) op.cit. para 3.16
Lord Hope of Craighead, invited Lord Cullen\textsuperscript{116} to undertake a review of court business in the Outer House of the Court of Session. Since sheriff court rules were realigned in 1994 to caseflow management principles (see Chapter 8), Lord Cullen’s remit was limited to the way business in the Outer House was administered, conducted and allocated. He was given leave to suggest alterations to procedures, pleadings, staffing and administration to

- simplify procedure and expedite progress
- bring a greater degree of judicial control and management
- minimise late settlement, and its adverse effects
- use judicial time to its best advantage\textsuperscript{117}

From the remit it is obvious that caseflow management was under serious consideration for all first instance work, and his report was aimed at evaluating firstly the justification for and secondly the efficacy of caseflow management. As previously noted, earlier studies provided corroborative evidence that the mere existence of rules did not guarantee strict compliance. Sanctions in themselves did not guarantee consistent application. Lord Cullen’s report provided further evidence of consistent patterns of flawed litigating behaviour,\textsuperscript{118} showing that some rules were honoured more in the breach than in the observance.\textsuperscript{119} Not only did he detect a culture of late preparation, he denounced unnecessary diversions and a learned reliance by practitioners on the indulgence of their opponent and the bench - particularly for continuous and late revisal of pleadings.\textsuperscript{120} He concluded that as there was a “clear need for measures to

\textsuperscript{116} Appointed Lord Justice Clerk 15 January 1997 by succeeding Lord President, Lord Rodger of Earlsferry
\textsuperscript{117} (1995) 40 Journal of the Law Society of Scotland 217
\textsuperscript{118} The Cullen Review (1995) op.cit. paras 3.6-3.14
\textsuperscript{119} The Cullen Review (1995) op.cit. para 3.42 - Rule of Court 27.1 (documents in pleadings to be lodged) Rule of Court 36.3 (productions lodged 28 days before diet “in practice it is common for this rule not to be complied with”)
\textsuperscript{120} The Cullen Review (1995) op.cit. para 3.18 “The scale of amendments or attempted amendments strongly suggests that the revisal of pleadings was unnecessarily deferred...parties placed undue reliance on their ability to amend...despite being more costly.”
encourage early settlement in a way which is not achieved under the present system.”

“I recommend case management hearings in all actions following the adjustment period, for the purpose of seeking, consistently with doing justice between the parties, the expeditious progress of the action and the avoidance of unnecessary expense.”

Within his focused remit, he was obviously aware of previous criticisms of managerial judging, particularly the effect on the autonomy of parties in the early preparation of their case. Since the Scottish Bar and bench are a small and therefore a close community, he emphasised the vital importance of a co-operative approach by practitioners and judges. Lord Cullen noted a clear divergence of views in the submissions to his review from the Faculty of Advocates and the Law Society, indicating that while one branch was diametrically opposed to managerial judging the other took the view that defended proceedings should be the subject of proactive judicial management.

Objections to caseflow management in the Court of Session submitted to Lord Cullen by the Faculty of Advocates

1. The adversarial system and judicial passivity already functioned reasonably well... where the litigant was generally represented by counsel
2. Parties and advisers were best placed to know what was in the parties’ interests and to manage their case

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121 The Cullen Review (1995) op.cit. para 3.41
122 The Cullen Review (1995) op.cit. para 1.5
123 The Cullen Review (1995) op.cit. para 6.6
124 The Cullen Review (1995) op.cit. para 6.15 “There is no question, so far as I am concerned, of moving away from the adversarial system”.
125 The Cullen Review (1995) op.cit. para 2.10
126 The Cullen Review (1995) op.cit. para 6.11 reporting on Submission by the Faculty Committee on the Courts
3. Judicial intervention might damage the function and effectiveness of the Bar
4. Proactivity might conflict with perceived judicial impartiality
5. More judges might be required, with legally qualified assistants
6. The intermingling of civil and criminal duties would create difficulties
7. The Scottish people would prefer to retain the status quo
8. Appearance on the Motion Roll is a good training ground for junior members of the profession

These objections unquestionably mirror submissions to the 1824 Commission on court reform from the same branch of the profession, when judicial management of process was also advocated. Arguing at that time that the parties and profession were in better informed positions to initiate procedures, the Faculty fought to retain the passive judicial role, which was "to decide the cause which the parties present to him." The views expressed then were that it was more expedient and less expensive to leave conduct with the parties themselves, and that the existing structure suited the Scottish cautious character. This rationale attracted an incisive critique by Professor Bell, a renowned Institutional Writer in Scotland, which suggested that vested interests motivated fatalistic forecasts for judicial supervision (see Chapter 2).

It is apparent from the Resnik/Elliott debate in the 1980s that these fears have not receded, although practice has shown that an awareness of the pitfalls minimises the

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127 The Cullen Review (1995) op.cit. para 6.14
129 Memorandum by The Faculty Committee on the Courts the Cullen Review (1995) 4 para 4(c)
130 Memorandum by The Faculty Committee (1995) ibid 17
131 Report on Bill for Better Regulating Forms of Process before the Courts of Law in Scotland (1824)
132 A Short Review of Publications and Reports (anon) Law Tracts Vol.II (1824) Submission by Faculty of Advocates 6
133 Submission by Faculty of Advocates (1824) ibid 2-20; Jury Trial in Scotland Letter to the Lord High Chancellor from Bar members (1832) complaining of the speed of disposals in the Jury Trial court and the "startling contrast of the rapidity of its terminations to the tediousness of the ancient form of process, more adapted to the slow and quiet cautiousness proverbial as the character of the nation" 2
134 "Advocates seem to be perpetually in alarm lest parties should be compelled to meet each other early on peremptory grounds." Prof. G. J. Bell, Examination of the Objections Stated Against the Bill (1824)
impact of judicial discretion. However, those who benefit most from freedom of choice within a self-employed monopolistic service will inevitably and defensively guard autonomous privilege, and it is appropriate to recognise personal and financial vulnerability behind the vociferous objections. These fears can only be confirmed and reinforced by early reports from the English Bar that within one year of the Woolf reforms a crisis is apparent in traditional workflow, with larger law firms impinging on the Bar’s territory, seriously affecting established incomes, career development and pupillages.\(^{135}\)

**Professional Responsibility**

Sir Jack Jacob acknowledges that adversariality transforms opponents into forensic combatants.\(^{136}\) The professional role of counsel does not take account of the court’s administrative needs in representing his or her client in the presentation of the case - somewhat reminiscent of champions in an adversarial battle, at one time the basis for dispute resolution in Scotland:

\[
A \text{ defender may defend himself either by combat or by the great assize, but having made his choice, he cannot detract; } \text{ he may wage combat either by himself or by deputy; wads to be found in the justiciar's hands by both parties; essoigns permitted after waging combat; the pursuer must have a champion, he himself cannot fight.}\(^{137}\)
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Six centuries later, Lord Justice Clerk Thomson replicates this view

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\(^{90}\) Legal Weekly 30 March 2000 p.28 Last Orders at the Bar? The Bar Council report - “the Access to Justice Act has thrown a spanner into the works” and p.42 A Bar to the Profession? Bar Vocation Course (BVC) costs average £7,000, but have risen to £12,000 in year 2000

\(^{135}\) Sir Jack Jacob (1987) op cit 15

\(^{136}\) Fragmenta Collecta 6 c.28, 1 746 Acts of the Parliaments of Scotland
"In general, once there has been inquiry, each party can be expected to commit itself wholeheartedly to the contest, manoeuvre its forces and uncover its batteries. Each party is guided by professional advisers whose duty it is to do their best, by the exercise of diligence, skill and judgment, to win the fight, by demolishing the enemy and deploying their own resources in the most telling way according to the exigencies of the struggle. The judge is there to see that the struggle is conducted according to the rules and to decide the winner."\textsuperscript{138}

Lord Denning in 1977 reinforced the counsel’s role as combatant:

"In litigation as in war, if one side makes a mistake the other can take advantage of it. No holds are barred."\textsuperscript{139}

These judicial boundaries of behaviour therefore reinforce the ethos of a battle between adversaries inspired by the adrenalin rush of victory. The goal is not co-operation but gaining the advantage and winning by skill, ingenuity and experience, which, for the client, makes the choice of counsel crucial. Is this a solid basis to provide justice?

Lord Thomson’s views also echo the earlier notion of an uncontrolled choice of weapons. However, in presentation of evidence counsel’s duty to the court is preeminent, covering full disclosure of conflicting authorities,\textsuperscript{140} truthfulness\textsuperscript{141} and professional integrity -

"If during the dependence of a cause an advocate discovers that it is unjust or calumnous he ought to desert it, in consequence of his oath at his admission and

\textsuperscript{138} Thomson v Glasgow Corporation 1962 SLT 244 at 246
\textsuperscript{139} Burmah Oil Co. v Gov. & Co. of Bank of England [1977] 1 WLR 473
\textsuperscript{140} The Glebe Sugar Refining Company Ltd v Greenock Harbour Trustees 1921 SLT 26 per the Lord Chancellor at 27, Logan v Presbytery of Dumbarton 1995 SLT 1228 per Lord Osborne
\textsuperscript{141} Stewart v Stewart 1984 SLT 58; Guide to Professional Conduct of Advocates (1988) paras.9.2.1, 9.2.2.3
Although counsel’s presentation is binding on the client, there is no special contract governing discharge of duties. The over-riding obligation of counsel is to the court, which arguably forms the basis for his or her immunity from suit. Professional preparation and presentation therefore walk a fine line between conflicting obligations to the client and the court. Judicial intervention brings the confrontation closer to the edge, dependent on individual judgement of counsel and “notwithstanding that the client may wish to chase every rabbit down its burrow.” Some commentators would add - and notwithstanding the pressure of personal incentives to protract and increase litigating procedures. The Court of Appeal in England has already extended the boundaries of professional responsibility to include “doing all in the advocate’s power to facilitate the economic and expeditious administration of justice.” There is no such agenda in Scotland, although Lord Cullen had recommended that the court should have power to find counsel or solicitor-advocates liable to another party for expenses, and should disallow fees for conduct which is so unreasonable as to amount to an abuse of process.

Sir Jack Jacob has suggested that many inherent failings are “manifested in practice more often than is generally realised”. In England therefore more strident forces curtail the adversarial system, as some judges openly question the relevance of aspects of the system which impede them in achieving justice. It seems therefore that the adversarial ethos allows unfettered opportunities to exercise procedural dexterity to

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142 In point of conscience and justice to his character.

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143 Bankton IV.iii.13; Guide to Professional Conduct of Advocates (1988) op.cit. 9.5.1 - an advocate signs pleadings and “accepts personal responsibility to the court for their contents.”
144 Batchelor v Pattison & Mackersy (1876) 3 R 914 per Lord President Inglis; Wallace-Baird v James 1916 SLT 138 per Lord Anderson
145 Giannavelli v Wraith (1988) 165 CLR 543 per Mason C.J. at p.556
personal advantage. Counsel are in a privileged position to choose procedural tactics, but contact with the client is restricted to preserve their independence. Solicitors are more directly in touch with a client’s needs and personal circumstances, arguably evidenced by their positive response to Lord Cullen’s review and positive support for caseflow management in questionnaire returns (see Chapter 7). Running offices as a business as well as a profession arguably leads to a more business-like approach to management of work, more experience with target dates and more familiarity with the notion of being accountable to clients.

It is only the integrity and professionalism of the Bar (and a diminishing number of Solicitor-advocates appearing in the Court of Session)\(^{149}\) which filter and regulate the quality of preparation. However senior judges have at times noted in their written judgements inconsistent and censurable preparation (see Chapter 4), an example of which is:

> “Now unfortunately written pleadings appear to be drafted to make matters deliberately obscure and on occasions to verge on dishonesty...... Why should the court have its time wasted at a considerable cost to the litigant by forcing proof of matters which are not in dispute”\(^{150}\)

This remark was made despite an obligation on advocates to accept responsibility to the court for the contents of pleadings they have signed.\(^{151}\)

**Influence of the Local Legal Culture**

Any form of judicial intervention in a jurisdiction which is currently directed by Lord

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\(^{149}\) Solicitor-advocates have rights of audience in the Court of Session under the Law Reform Miscellaneous Provisions (Scotland) Act 1990 ss.24-30

\(^{150}\) Lord Morton of Shuna, Procedural Reform in the Court of Session, (1995) 1 Civil Practice Bulletin 2

\(^{151}\) Guide to Professional Conduct of Advocates (1988) op.cit. para. 9.5.1
Thomson’s edict in 1962, and Lord President Inglis’ opinion of counsel’s duties and immunities in 1876,\textsuperscript{152} prompts fears of a movement towards the inquisitorial system (in which arguably Scotland dabbled at the time of Viscount Stair\textsuperscript{153}). As a qualification of the adversarial system, caseflow management is in reality an attack on the existing power structures within court. Practices which have permeated through centuries evolve through indoctrinated working conventions whose source cannot always be identified in rules of court - the local legal culture.

A pivotal early American study\textsuperscript{154} has shown that speed of resolution and the backlog of cases are determined in a large part by established expectations, practices and informal rules of behaviour of judges and lawyers - the local legal culture.\textsuperscript{155} Commenting on the "extraordinary resistance of delay to remedies based on resources or procedures" they concluded that court systems become adapted to a given pace and the backlog of pending cases. Increasing the number of judges or decreasing the number of cases did not influence speed or productivity. These were only influenced by court control of case progress. Continued analyses addressed the concerns about managerial judging which had been expressed by Professor Resnik.\textsuperscript{156} Safeguards against perceived partiality, bias and early partially-informed decisions were subsequently incorporated in State and District management plans. Attitudes were challenged, but the findings in other jurisdictions who faced similar problems offer hope - though at a cost.

**Caseflow Management and Costs**

Re-examination of early delay reduction programmes concluded that delay strategies

\textsuperscript{152} Batchelor v Pattison & Mackersy (1876) 3 R 914 per Lord President Inglis

\textsuperscript{153} J.M.J. Chorus, The Judge’s Role in the Conduct of Civil Proceedings Peter Chiene Memorial Lecture 28 May 1990

\textsuperscript{154} T. Church, A. Carlson, J. Lee and T. Tan Justice Delayed: The Pace of Litigation in Urban Trial Courts National Center for State Courts (1978)

\textsuperscript{155} T. Church et.al (1978) 34

\textsuperscript{156} T. Church, Old and New Conventional Wisdom of Court Delay (1982); D. Steelman, History of Delay Reduction and Delay Prevention Efforts in American Courts National Center for State Courts, paper presented in Dublin to Supreme Court Judges, December 1996
consumed additional resources - for both court and client.\textsuperscript{157} The latest Rand Institute study confirms that the assumed symbiotic relationship between delay reduction and decrease in costs is not proved.\textsuperscript{158} The Report concluded that 95\% of party costs were uncontrollable, driven by complexity and the stakes involved, as well as by parties themselves. The earlier the supervision commenced, the lower the median time to disposal, but lawyers continued their old work habits and added more hours in a shorter time.\textsuperscript{159} Since costs of litigation (predominantly professional fees) are private, it has been difficult for every jurisdiction to evaluate the financial (de)merits of caseflow management. The Rand Institute study of 12,000 case histories roughly measured costs by the number of lawyer hours involved in each case. They concluded that only a combination of two management factors reduced time to disposal - curtailing ‘discovery’ (reduction of 10\%) and reducing lawyer hours (reduction of 25\%).\textsuperscript{160}

The researchers speculated that a specific package of strategies therefore has a high probability of reducing time without negatively affecting litigation costs or parties’ perception of fairness:

- Early case supervision
- Early setting of a trial schedule
- Shortened time for discovery
- Attendance of litigants at settlement conferences

In an Issues Paper on Costs published through Lord Woolf’s office, Zuckerman suggests that caseflow management is the key to the proportionate use of procedure, its cost and complexity, importance and value. But he confirms Lord Cullen’s opinion that cost

\textsuperscript{157} B. Mahoney, J. Goerdt, C. Lomvardias, G. Gallas, Re-examining the Pace of Litigation in 36 Urban Trial Courts (1991)
\textsuperscript{158} Prof. M. Zander (1997) op.cit. p.219
\textsuperscript{159} J. Kakalik, Rand Institute, Executive Summary of Evaluation of Civil Justice Reform Act 1990, published July 1997 on the Rand internet site.
\textsuperscript{160} Shortening the time for discovery reduced time to disposition by 10\% and lawyer hours by 25\%.
reduction under judicial management is crucially dependent on the co-operation of the profession.

"If the lawyer’s input [at the case management conference] is obscure, ambivalent and complicated, the court would have to invest a great deal of effort in knocking the pleadings into shape."161

This prophesy has been noted in the development of the Commercial Court in Scotland (Chapters 6-8). Dr. Zuckerman argues that the new approach imposes a heavy burden on parties’ lawyers in preparing for judicial examination and may be just as expensive as the present system. Negotiating an agreed list of issues on an hourly basis is reminiscent of continuous drafting of pleadings. However he concluded that closer judicial control of litigation would create opportunities for a new approach “which could reverse the present trend of spiralling costs.”162

One suggestion was budget-setting in advance, tied to judicial assessment of conduct at the finish of the case.163 In Scotland the ideology of pre-set budgets was broached in 1998 by the Minister of State via the Legal Aid Board, for criminal cases. Dr. Zuckerman does argue that a regime of costs constraint in civil cases could well lead to the evolution of cost-effective practices, as in other areas of the economy. He reasons that predictability will encourage litigation and the growth of a litigation expenses insurance industry. Under this system, lawyers would not be without work and the increased numbers would be under a managed environment.164 The news is therefore depressing and encouraging for the profession. In a diminishing and highly competitive market, with firms overstaffed, caseflow management seems to create opportunities to revitalise the legal market and combine efficiency, expediency and certainty for the

162 A. A. Zuckerman (1996) op.cit.
163 A. A. Zuckerman (1996) op.cit.
164 Interview with Master Turner, Queens Bench Division 14th December 1995.
clients who are, after all, the means to fund the system. However, revitalising the litigation market may swamp the administrative facilities of the courts.

Role of Information Technology

Both the Scottish and English Reports were attracted by information technology systems to guide, monitor and inform the implementation of caseflow management principles. Preparations are in hand already. The technology for change is slowly being developed and amalgamated. A project team at the Court of Session is developing a case tracking system, an adaptation of the Commercial Court system, supported by Scottish Court Services. The judiciary have been introduced to the benefits of new technology. Some have lap-tops, and a sentencing database is currently online. Judicial opinions are placed on the internet within two hours of publication. Once the information technology is fully developed in court for civil business, it is anticipated that pressure will be applied to the government to provide resources to expand further.

Adapting the Adversarial System

An enormous amount of strategic planning is required to devise techniques and systems, and will lead to a substantial additional workload for courts, judges and practitioners. Some will have difficulty in adapting to the philosophical jarring of sensibilities and intense work commitment at the outset. However, the news from other jurisdictions is that changes in attitudes and perceptions which have accompanied this process have been extremely significant, and there has been an impact in reducing delay.

Caseflow management is a compromise devised to eliminate the worst deviations from best practice, but may bring its own devils. Expectations are remoulded, and research in

167 Prof. P. Sallmann, Life Beyond Caseflow Management (1993) 3 Journal of Judicial Administration 43
other jurisdictions (see Chapter 9) shows that courts are not always able to translate ideals into practice. Professor Zander is correct that there is an element of wishfulfilment involved in sustaining major changes in established behaviour or relationships between judges and lawyers. However, continuous investigations in America by highly experienced researchers in this area identified the most common elements in several successful caseflow management programmes (see Appendix 5.4 for extended information). 168

- judicial commitment and leadership
- consultation with the legal profession
- court supervision of case progress
- explicit targets, standards and goals
- credible trial dates
- control of court adjournments
- monitoring with information systems

Lord Cullen recognised that a number of these factors were critical to the acceptance of caseflow management in the Outer House

- *Wholehearted understanding and co-operation of both branches of the legal profession*
- *Clear commitment by the judges to the role involved and policy*
- *Adequate preparation and judicial time to read papers*
- *Orders additional to the rules, backed up by an appropriate range of possible sanctions.* 169

169 The Cullen Review (1995) op.cit.50-51 paras 6.26-6.30
Caseflow management exposes working practices and conventions hidden behind the rules. This is what Lord Cullen was attacking, not the rules themselves. He had no intention of leaving justice or the adversarial system behind and rejected the implication that he or the Scottish courts would

"act without reference to principle and in an arbitrary fashion."\textsuperscript{170}

But moving on has to be a considered consensual movement or risk fragmentation of valued traditions.

Judicial attitudes are crucial in spearheading effective and efficient dispute resolution in the courts. Scottish judges relish their independence from the political arena. Avoiding a policy-making function is based on the philosophy that insulation from controversy requires that you yourself do not invite it.\textsuperscript{171} However the judiciary, along with other public institutions working within the new Scottish political machinery, will inevitably come under closer government and media scrutiny, arguably stimulating a crucial breach in their corporate silence.\textsuperscript{172}

Commenting on successful practices in America, the 5-year study concluded:

"The judiciary's ability to ensure widespread implementation of these promising practices is the key to achieving the positive effects we observed."\textsuperscript{173}

It has been suggested that over-allegiance to traditional methods can create substantial

\textsuperscript{170} The Cullen Review (1995) op.cit 47. para 6.13


\textsuperscript{172} H. Cunningham, The Role of the Judiciary in a Modern Democracy Judicial Conference of Australia Symposium 8-9 November 1997, Australia Law Reform Commission internet site

\textsuperscript{173} J. Kakalik (1997) op.cit.
barriers to effective resolution.\textsuperscript{174} However, Professor Resnik, reinforced by Dr. Zuckerman, two of the most experienced academic commentators in this area, gives this cautious warning:

"Procedural innovation may force lawyers to develop new techniques of obfuscation and avoidance, skills presumably well developed by the Bar."\textsuperscript{175}

This may be the key reason why, in a small jurisdiction such as Scotland, the supreme court bench have not embraced the Cullen Review. In 1995 the Bar produced the same strong arguments against judicial caseflow management as in 1825. The disruption caused by non-co-operation, protecting traditional methods could be worse than the 'cure', creating a new playing field where the judge becomes as much the focus of attack as the opponent. Caseflow management is therefore an act of faith and determination, dependent entirely on judicial commitment to enter the adversarial arena.

\textsuperscript{174} F. E. McGovern, Towards a Functional Approach for Managing Complex Litigation (1986) 53 University of Chicago Law Review 491
\textsuperscript{175} Prof. Resnik (1982) op.cit.423
Chart 5.1

Stages of Disposal in Outer House, Court of Session
Cullen Review 1995 Sample 300 cases

Stage of Disposal

- After Defences: 12 cases
- Before Record Closed: 21 cases
- Procedure Roll: 80 cases
- Between Procedure Roll/Proof: 127 cases
- Morning of oral Proof: 53 cases
- After Proof: 7 cases

Number of Cases
CASEFLOW MANAGEMENT in the
COMMERCIAL COURT
Evaluating the Evolution

Although quick, simple and inexpensive dispute resolution for all lies at the heart of legislative intent, one class of litigation has in particular been regularly subjected to experimental schemes ahead of mainstream reform. National and international confidence in an efficient commercial court and its litigation procedure buttresses the stability and financial strength of an indigenous market. Court reform in this sector becomes an important subset of business regulation.¹

Paradoxically the court is also subject to its own market forces. Commercial clients almost invariably have a choice of forum. There is an element of competition between jurisdictions for cases with which to build, sustain and develop native legal jurisprudence. Throughput and volume of cases can also be used to justify the allocation of public resources.² The sustenance of a healthy independent Bar is a fruitful reservoir of potential judges. The demands of a peripatetic business sector which, in a ‘technological age’ creates potentially fresh sources of litigation and jurisprudence, therefore engage courts in regular re-evaluations of service.

Speedy resolution is essential to competitive markets. Although the Bar guard traditional legal principles, caseflow management, which aims to leapfrog over traditional conventions and accepted principles to quickly reach the essence of a dispute,

² Although there is an argument that justice is ‘a pearl beyond price’
would seem ideally suited to a commercial client, given the pressure of transacting in a competitive arena. In 1927 –

"Nothing is more distasteful to businessmen than delay; they are always prepared to make some concessions or take some risk to ensure a quick deal; they are impatient of legal form and technicalities and of the strict rules of evidence." 

translates in 1996 into

"Getting the job finished or getting the money in overrides ego trips through the courts."

In Scotland a separate list for commercial cases began with the 1927 Royal Commission seeking to respond to criticisms and adapt Court of Session practice to a rapidly developing society. The Commission consulted widely, taking evidence from a range of parties over a 16 month period. Criticisms of the Court of Session and its organisational structure apparently bore "a strong resemblance to those which were presented before the Law Commission of 1868". Contrary to expectations, business in the courts was declining. In fact, over the previous 150 years of litigation there had been no apparent expansion despite the growth of population and development of trade and industry. (see Chapter 1) The Commissioners concluded that delays and expense in court were not only responsible for falling case numbers across all fora, but were also

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3 Report of the Commission on the Court of Session and the Office of Sheriff Principal with Summary of Evidence Vol 1 (1927) Chairman Lord President Clyde Cmd 2801 at 68 (Royal Commission 1927)
4 Keeping Construction Out of Court Chartered Institute of Building LawNet 12 February 1996 quoting a Scottish construction firm’s view
5 The evolution of the Commercial court is set out in Appendix 6.1
6 Royal Commission (1927) op.cit.13
causing litigants to drift away from the Court of Session to the sheriff courts after that jurisdiction was expanded in 1907.7

<table>
<thead>
<tr>
<th>Year</th>
<th>Sheriff Court Number of Cases Initiated</th>
<th>Court of Session Number of Cases Initiated</th>
</tr>
</thead>
<tbody>
<tr>
<td>1907</td>
<td>8,481</td>
<td>4,159</td>
</tr>
<tr>
<td>1908</td>
<td>11,307</td>
<td>3,735</td>
</tr>
<tr>
<td>1914</td>
<td>7,693</td>
<td>3,294</td>
</tr>
</tbody>
</table>

Statutory tribunals and arbitration were also encroaching on former legal territory, the increasing pace of modern life led to greater impatience of delays and costs of litigation, and respect for legal decision was pushed aside by commercial demand for quick and cheap results. The Commission was obviously concerned by the trend towards informal dispute resolution, arguing that legal decisions of the supreme court built up a code for future disputes to be settled without expense, while arbitration was informal, private and ad hoc, repeated at a cumulative cost to business.8 Changes in other jurisdictions also inspired competitive rejuvenation of court procedures. Supported by a newly-formed Commercial Court in the Kings Bench Division in England, mercantile and industrial activity was increasingly London-centred, and sustained by an aggregate of groups based in the South.

The Scottish Commissioners embarked on a revitalisation programme, initiating complete reconstruction of court administration and structure under the banner of ‘progressive evolution’9:

- The separate Bill Chamber was to be abolished
- Inner House was to remain as a Court of Appeal except for special Stated cases10

7 Sheriff Courts Act 1907 extended jurisdiction to separation and aliment, declarator, heritable right and title
8 Royal Commission (1927) op.cit.26
9 Royal Commission (1927) op.cit.48
10 Initiated by Court of Session Act 1868 s 63.
- Right to choose a specific Lord Ordinary was to cease, along with choice of Division on appeal\textsuperscript{11}
- Summary trials were to be initiated for fast track cheap and simple resolution
- Court sittings were to extend the Session from 29 to 33 weeks
- Central administrative department was to be formed to distribute work
- Re-classification and allocation of cases were to be organised
- Rules Council was to be set up re-establishing full court power to regulate procedure\textsuperscript{12}
- Special jury sittings were abolished
- Distinctions between Inner House and Outer House judges were to be broken down
- Commercial and Admiralty list was to be initiated

Accepting the importance of quick commercial resolutions, the Commission considered but discarded a proposal to establish an Arbitral Court within the Outer House, incorporating a facility to summon technical assessors alongside the arbitral judge. Arbitration had been stressed to the Law Commission in 1868 as speedier and cheaper, but in 1927 the Commissioners concluded that "expediting court procedure and cheapening resort to the Court of Session" was the more appropriate route. As will be noted later, caseflow management in the modern Commercial Court reflects the spirit of arbitration within a judicial framework.

**Early Days for Commercial Cases**

Commercial cases arising out of "the ordinary transactions of merchants and traders", were merged with the High Court of Admiralty in the Court of Session in 1830\textsuperscript{13} but no

\textsuperscript{11} Originated from 48 Geo III c 151 s.9, and 1 and 2 Vic. c.118, S. 1-4.
\textsuperscript{12} Royal Commission (1927) op.cit.58-59 Court of Session Act 1868, 31 and 32 Vic c 100 s. 106 recognised powers of the Court to alter rules by Act of Sederunt, but there was no power to modify earlier statutes, evidence was received that rigidity of powers restricted initiatives regarding form and procedure
\textsuperscript{13} II Geo IV and I Wm IV c. 69 s.21
special abbreviated procedure applied to this body of cases. The emergence of the Commercial Court in England however, prompted the 1927 Commission to promote fast track disposal for the business community in Scotland. A separate cause list was drawn up as part of the overall reforms, with no specific judge assigned, using "methods and forms simple and direct, as rapid and inexpensive as consistent with a sound legal decision." \(^{14}\)

Judicial control and wide discretion were obviously considered essential to efficient service:

"We think the judge in the Outer House should have unlimited control of the procedure with powers to dispense with exact observance of any of the ordinary rules and order such special procedure as may, in the circumstances presented to him, best conduce to simplicity and despatch." \(^{15}\)

Legislation in 1933 effected far-reaching structural changes to court procedures, including the creation of a specialist jurisdiction of Commercial and Admiralty causes,\(^{16}\) creating a level of judicial power and legal competency which radically diverted from traditional procedure and conventions:

- power to dispense with formal pleadings
- power to assist in rapid preparation of cases for trial
- power to order particulars at any stage and make a Minute part of the Record without formal amendment
- power to require a party to admit or deny important statements of fact made by his opponent
- power to penalise an unwarranted denial with expenses incurred by the opponent

\(^{14}\) Royal Commission (1927) op.cit.68
\(^{15}\) Royal Commission (1927) op.cit.70
• power at any stage to order production of documents in the hands of either party
• power to require an affidavit by solicitor(s) stating that production was complete

This separation from the general Ordinary Roll was undertaken

"with a view to securing that causes coming before the Court may be heard and determined with as little delay as is possible, and to the simplifying of procedure and reduction of expense in causes before the Court."

s.17 1933

These aims and principles are echoed in each successive report on Scottish court procedures, culminating in Lord Cullen’s Review of the Business of the Outer House of the Court of Session in 1995. (see Chapters 4 and 5)

In 1934 an Act of Sederunt brought in a comprehensive codification of the Scottish Rules of Court, the overall intention being

"to make the whole resources of the Court - judicial as well as clerical - available as elastically and promptly as possible for the despatch of any business in any department of the Court's work as soon as it is ready for disposal"18

As far as the Commercial and Admiralty Roll was concerned, the primary choice of procedure remained with parties. The 1934 Rules stipulated that if parties were agreed at the closing of the Record that a cause should be put on the list of commercial causes "the Lord Ordinary shall so direct" (Rule 14). Unlike the current procedure, inter-party agreement was a pre-requisite of being able to use the Commercial Roll. Once committed to this specialised track, the judge had the power to:

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16 The Administration of Justice (Scotland) Act 1933 s.6(5) and s. 17
17 Act of Sederunt (Statutory Rules and Orders) 1934/772 (1934 Rules)
“make such order as the court thinks fit for the speedy determination of the question in dispute between the parties” (Rule 16)

The new Commercial List was not a popular choice for many years. Parties did not jointly choose to take advantage of the faster and cheaper court facility, the corollary being increased judicial power which dented the independence of parties.

Subsequent Rules of the Court of Session in 1948 and 1965 retained the separate Roll, but with one major exception. In 1934 there had been an attempt to control not only the speed of process, but also costs. An award of expenses against an unsuccessful party was limited to £25 (Rule 14(b)), with the addition of judicial expenses if proof was allowed and evidence taken. Reclaiming expenses were limited to £50. Only a private agreement with a client superseded these limits. However, by 1948 the limitation of expenses had disappeared from the Rules and has never resurfaced.

Following on from the 1965 Rules of Court, intermittent changes were made to the commercial cause list, with the object of enticing representatives and clients to choose a procedure which had been devised solely as a commercial service. An embryonic form of the current accelerated procedure was initiated in 1978. The agreement of both parties was not required for transfer to the list. Prior to closing the Record, for the first time the pursuer could enrol a motion for the cause to be put on the list of Commercial causes (Rule 2(ii)). This facility ran concurrent with parties' agreement to transfer to the list, with leave of the judge (Rule 2(iii)).

Although the 1927 Commission had rejected the notion of an Arbitral Court, from 1980 the Court of Session provided an adjunct to legal process. In disputes “of a commercial

18 1934 Rules ibid.p.5
19 Act of Sederunt (Rules of Court Amendment No. 4) (Commercial Causes) 1978/690
20 Within 7 days of the summons calling
21 Within 14 days after the Record was closed
character” and in “commercial agreements” parties could nominate a judge to act as Arbiter.22 The Lord President’s permission had to be obtained. A certain reluctance to commit judicial resources for several weeks at a time meant that arbitral services could be offered only in vacation periods, or by retired judges. Arguably this reluctance may also be detected in the costs set:

| £1,350 on appointment as Arbiter and £1,350 per day, or part day23 |

It is noteworthy that the Court anticipated arbitrations lasting weeks.24 This outlay contrasts remarkably with the current court fee charged for access to the same person acting as Judge in the process of litigation.

| £13 per half hour of court time or part thereof - a maximum of £156 per day per party25 |

Perhaps it is not surprising therefore that within the first nine years of operation only one arbitration took place (under Lord Jauncey), with one settling before Lord Ross.26

In 1984 a Rules Review Group was set up to streamline the 1965 Rules of Court. In 1988, following a report by the Scottish Law Commission, Court of Session procedures were altered, representing a consolidation of legislation and removal of minor non-controversial anomalies.27 Specialist rolls were limited to Consistorial causes, Exchequer causes, Petitions, Summary trials and the hearing of Special Cases.28

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22 Law Reform Miscellaneous Provisions (Scotland) Act 1980 s.17 c.55
23 Statutory Instrument 1993 No. 3125 effective 11 January 1994
25 Court of Session Fees Amendment Order 1994
26 Lord Ross (1989) op.cit.8
28 1988 Rules 19-27
Commercial list was untouched, but later in the same year the evolution of this specialist area continued.29

In 1988 the initial definition of a commercial cause was altered to clarify the boundary between Admiralty and Commercial actions, the latter being prominently marked and allocated to a specific roll. Recognising that little use had been made of prior Commercial lists, there was a concerted attempt to facilitate access to four nominated judges.30 Within 14 days of defences being lodged a By Order hearing was to be allocated. Motions requiring counsel were to be dealt with at the hearing. Judicial control was still advocated as prerequisite to "the speedy determination of the question in dispute between the parties."31 The court was confident of its ability to act expeditiously, as in judicial review and interdict cases, and anticipated that the average commercial case would take 6 months to complete.32 It is only with the modern rules in 1994 that this ambition has to a large extent been realised. In 1988, the court had the power to withdraw the cause from this specialist roll where it was considered inappropriate, a power which was initially discontinued in the modern rules, while judicial control was increased in every other respect.

In 1990 the definition of a "commercial cause" was further expanded to allow a wider variety of cases access to an accelerated procedure.33 This last Act of Sederunt concluded piecemeal reform of rules intending to nourish and justify a faster court service to a diminishing number of commercial participants. Previous rules had not encouraged new business. Parties repeatedly chose either to litigate on the Ordinary roll, in the sheriff courts or to search out alternatives to court resolution. The rules had changed, but attitudes and conventions had not, and the court had somehow not fulfilled

29 Act of Sederunt (Rules of Court of Session Amendment No. 4) (Commercial Actions) 1988/1521 altering Rules of Court 148 to 151
30 Lord Ross (1989) op.cit. 6
31 Act of Sederunt 1988/1521 ibid. Rule 151(4)(a)
32 Lord Ross (1989) op.cit.6
33 Act of Sederunt (Rules of Court of Session Amendment No. 5) (Miscellaneous) 1990/2118
the optimistic promise of previous reforms. There had been no overall supervision of the Commercial list. A lack of administrative commitment to prioritise judicial resources led to inconsistent allocation of judges, interrupting continuous supervision of parties’ responses to previous judicial orders. There is a striking similarity between these circumstances and the current rules in the sheriff courts. Judges on the Commercial list had power to direct procedure at a specific point in time, but not to direct case preparation consistently on a continuous basis for the Commercial list. Innovations over a 60 year period were therefore more optimistic than feasible and the status quo was undisturbed.

**The Dawn of a New Era**

By 1993 the Lord President responded to fresh criticisms from the business community that despite the intermittent changes in the rules, court procedures were still unduly protracted, cumbersome, expensive and unsuitable for resolution of their disputes - censure which was reflected in wider public views submitted to the Cullen Review of Outer House administration in 1995. Yet again, concern was articulated that irrelevant, inappropriate and outdated services would lead to an upsurge in alternative services, to the detriment of the development of Scots law in this area.

A Working Party was set up under Lord Coulsfield

"to examine the existing practice....to consider any changes which may be desirable in order to improve the handling of such cases and to make this more expeditious and more convenient to litigants." 34

Responses to a consultation exercise emphasised the importance of speed, limitation of cost, judicial expertise and comprehensible proceedings. The Working Party acknowledged that the object of all civil procedure was to maintain a fair balance between speed in progressing towards a decision and thorough examination of the issues to secure a correct and authoritative result. But in the absence of general reform, and noting clients’ reluctance to bring commercial litigation into the Scottish supreme court, it was felt that both for law and business there should be a procedure which was “respected and trusted” and this would not be accomplished without radical change. This pragmatic approach was also a reaction against the encroachment of High Court criminal business into civil time, some of which, it was perceived, perhaps did not require a High Court judge. The Working Party stated:

“For our part we are convinced that it is crucial to the survival of Scots law as a coherent developed system that the Scottish courts should deal properly, both at first instance and appeal, with civil cases.”

Finally there was recognition that changing the Rules of Court made no real difference to progress and disposal - unless

“accompanied by significant changes in the organisation of court business, the attitude of all parties, including the judiciary, to the conduct of the proceedings and the allocation and organisation of the time of the judges.”

For the first time also the Court acknowledged that commitment to reform affected its credibility, implying a need for a partnership of co-operation towards quicker resolution.

36 The Coulsfield Working Party Report (1993) op.cit.4
"It is necessary to see that the organisation and management of commercial causes in the Court of Session displays as much commitment to the proper and consistent handling of such cases as will be expected of litigants." 39

The fact that a specialist roll already existed, serving a specialist sector meant that commercial work was viewed as a semi-autonomous area, an ideal experimental scheme ahead of Lord Cullen’s Review. It was not anticipated that there would be enough business to create a separate court as in England,40 but running a commercial cause procedure within the ambit of an “essentially adversarial”41 system guarded the traditional omnicompetence and independence of the judiciary. A pilot-scheme for caseflow management could be set up with little prejudice to other civil business and the ever-increasing criminal workload which continuously threatened to swamp the civil system.42

Before drafting rules which firmly placed the judge in a supervisory capacity for the duration of a case (a judicial docket system), the aims and aspiration of the Working Party set the parameters for a radical shift away from traditional process. Essential components were thought to be:

1. Priority allocation of commercial cases to a full-time commercial judge
2. Ad hoc support from a specialist group of commercial judges
3. The same judge dealing with all stages of a particular case, or at least all preliminary and procedural stages
4. Material lodged in advance, giving sufficient judicial time to study it
5. Court commitment to efficient administration

38 The Coulsfield Working Party Report (1993) op.cit.8
40 Although the term ‘Commercial Court’ is used for ease of reference
42 The Coulsfield Working Party Report (1993) op.cit.15
6. Short, simple and non-technical written pleadings with no pleas taken to the relevancy
7. A movement away from dependence on oral presentation
8. A realistic approach to setting time limits, not readily extended
9. The total length of time in court reduced
10. Costs from delay and repeated adjournments eliminated
11. Sanctions to be available, but more significant emphasis on co-operation rather than compulsion
12. A user committee to review the rules in operation and be a channel for comments
13. Information technology to provide research information
14. Publication of an information booklet for users

Evaluations of judicial caseflow management within the Commercial Court in this thesis include an assessment of how these essential components developed in practice. The term ‘case’ management is distinguished from ‘caseflow’ management to clarify the judicial position as one of facilitator rather than director of process.

Although the total length of time to resolution was expected to diminish, the demands of the procedure were anticipated to be heavy on parties and advisors. As far as cost was concerned, it was understood that the proposals were unlikely to reduce the expense of litigation in all cases. Both these predictions have been fulfilled in practice although there has been no separate fee-scale for the more intensive judicial involvement. Professional fees (including expert reports) remain the most expensive aspect of commercial litigation, but the Working Party had warned:

"Work necessary to put through commercial cases quickly and efficiently will have to be paid for." 43

In a sense it was to be a Rolls-Royce service, allowing the Scottish supreme court to deal with important questions affecting the economic life of Scotland - rivalling service in other jurisdictions. While expedition was fundamental, the initial pilot scheme did not include some settlement strategies which would have diverted the focus away from adjudication by the court. For example, the following ideas were rejected:

- Court-annexed mediation or A.D.R. was thought to be useful and desirable, but it was not considered a priority at an early stage of development.
- A proposal to introduce interim judicial opinions, to give parties an early indication of judicial views ('the way the wind was blowing') was rejected as pre-empting adjudication before all facts were known.
- Mandatory attendance of parties at early hearings was considered unnecessary.

It was anticipated that the new system would evolve naturally benefiting from experience and practice. On 20 September 1994, at the beginning of the next legal year, the recommendations of the Working Party were incorporated into the Rules of Court. Chapter 47 replaced previous commercial procedure. Practice Note No.12 was issued at the same time to provide a guide to the ethos behind rules which undoubtedly stretched established boundaries of judicial discretion. Publication of a short introductory guide was circulated to the top 500 commercial organisations in Scotland. And judicial caseflow management arrived at the supreme court on an experimental basis. The key difference from all other reforms has been the specific allocation of nominated judges, providing consistency and continuity of process.

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44 Act of Sederunt (Rules of Court of Session Amendment No.1) (Commercial Actions) 1994/1443 see Appendix 6.2
45 see Appendix 6.3
46 see Appendix 6.4
A Short Summary of the Rules

While the full section of the Rules of Court appears in the Appendix, together with the pertinent Practice Directions, a quick summary may help to provide a broad overview of the extent of judicial discretion.

An action “arising out of or concerned with any transaction or dispute of a commercial or business nature” (Rule 47.1) may be initiated on the Commercial Roll by an election of the pursuer (Rule 47.3(1)) or may be transferred on to the Roll by any party at any time (Rule 47.10(1)). The summons in a commercial action is an abbreviated synopsis of pertinent factual and legal circumstances, accompanied by a schedule listing documents founded on or incorporated into the summons. (Rule 47.3(1)). Defences are similarly truncated, departing from established principles of written pleadings (Rule 47.6).

The Commercial judge determines dates and times of hearings (Rule 47.8(1)), the first of which is generally a Preliminary Hearing within 14 days of defences being lodged (Rule 47.8(2)). This stage is generally followed by a Procedural Hearing which determines the framework for substantive disposal. Withdrawal from the procedure was initially only at the instance of the parties, by agreement (Rule 47.9(1)(b)), or on the motion of one party, having regard to

(i) the likely need for detailed pleadings to enable justice to be done between the parties
(ii) the length of time required for preparation of the action
(iii) any other relevant circumstances (Rule 47.9(1)(a))

As the Court became busier, however, withdrawal could be initiated by the judge, opening an ‘overflow’ route into Ordinary procedure.
Judicial control is exercised robustly at the Preliminary Hearing stage. This hearing is perceived as critical to the early identification of the factual and legal issues in dispute. After discussion with parties the judge under 47.11(1)

(a) **shall** determine whether, and to what extent and manner, further specification of claim and defences should be provided

(b) **may** making an order requiring:

(i) detailed written pleadings

(ii) statement of facts, either general or restricted to particular issues

(iii) amendment of pleadings

(iv) disclosure of witnesses and documents, with authority to recover same

(v) lodgement or exchange of documents relating to the action within a specified period

(vi) lodgement and circulation of a list of witnesses

(vii) lodgement of skilled person’s reports or witness statements

(viii) lodgement of affidavits concerned with the issues

(ix) progression to the next stage

(c) **may** fix the period for compliance

(d) **may** continue the Preliminary hearing to another appointment

(e) **may** make such other order as he thinks fit for speedy determination

The purpose of a Procedural Hearing, which follows the preliminary stage, is to determine preparation for debate or proof. Rule 47.3 contains a list of mandatory lodgements to be submitted at least 3 days prior to a hearing, including

(a) a written statement of proposals for further procedure on

(i) whether the party seeks debate or proof
(ii) the proposed issues for debate or proof

(b) a list of witnesses with identification of matters within their evidence

c) reports of skilled persons

d) for debates - a note of arguments, legal propositions and reference to principal authorities and statutory provisions founded upon

e) copies of the above to be sent to all parties

At this hearing the judge has discretionary powers to supervise preparation for proof or debate, establish the issues in dispute and the form of their resolution. The intention of Rule 47.12(2) is that after consultation with representatives he will determine whether

(a) the action is to be appointed to debate or proof
(b) to order written arguments on questions of law
(c) proof should be by oral evidence, documents or affidavits
(d) proof is unnecessary on any issue
(e) there should be consultation between skilled persons to facilitate agreement
(f) to appoint a court expert to examine reports of skilled persons or other evidence
(g) to remit to a person of skill
(h) proof of authenticity of document or other matters should be dispensed with
(i) to determine the action on written submissions, if invited to do so by all parties
(j) to order continuation to a date to be appointed by him

Under 47.15 at any time before final judgement the judge may put out an action for hearing for further procedure and may make "such order as he thinks fit". But the widest and most useful judicial discretionary tool is Rule 47.5

"The procedure in a commercial action shall be as the commercial judge shall order or direct."
This is the fullest power which judges can have over preparation, confirmed by the first Practice Note:

"The procedure in and progress of commercial action is under the direct control of the commercial judge. He will be proactive" (paragraph 5)

The New Commercial Cause Rules - Cracking the Nut

From their inception, it was clear that some legal representatives embraced the new rules with vigour, obviously detecting the marketability of fresh approaches. Others were either resistant or quietly pessimistic, and sceptical of the court's ability to encourage early disclosure and co-operation between parties in a resolutely traditional system. There was little general consultation with the legal profession prior to implementation, and the credibility of the new ethos was highly dependent upon judicial interpretation of the new role.

Early reports by legal representatives using the procedures indicated that the ambitions of the Coulsfield Working Party were being executed, attributable in no small measure to the highly-motivated full-time managerial judge who had assisted in drafting the Rules. However, it was noted that clients needed to be educated that the corollary of speedy resolution was immediate input, front-loaded preparation, adherence to realistic timetables, and early disclosure which sieved out spurious and dilatory tactics. Initial advice filtered through to the legal profession from colleagues that they should assume

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that the judge had read all papers, should be thoroughly prepared and candid and should be ready to adopt a different style of advocacy.\(^5\)

Within the first three months the nominated judge acknowledged that judicial intervention made "considerable demands on litigants and practitioners alike" as the Coulsfield committee had anticipated. He also reported that he had experienced a range of attitudes, from "quiet enthusiasm to implacable opposition".\(^5\) It was clear that the procedure could and would evolve in practice, responding to parties' attitudes, acceptance of and conformity to judicial control. However, it was anticipated from the beginning that wider policy issues would prevail over the intransigent behaviour of individuals.

One and a half years after the implementation of the new procedure the Lord President allowed the present writer access to all Commercial Roll process folders. Observations of management hearings were also undertaken, and notes on 215 hearings accumulated for analysis. The nominated judge and his Depute Clerk of Court provided additional data as requested, and resolved ambiguities. The judge was meticulous in offering no personal comment on individual cases, on the procedure and on data gathered, in order to facilitate objective analysis by the writer.

A statistical report was compiled from the information gathered. The sample period was from inception of the new Roll on 20 September 1994 to April 1996. During this time 214 cases appeared on the new Commercial Roll. Of the total, 189 process folders (88%) were examined and data extracted. Within this database 9 cases were in the process of initiation and were not included in the final results - 180 (84%) of the Commercial Actions were therefore analysed, statistically a highly significant

\(\text{James McNeill (1995) op.cit.3; L.A. Patterson and Stephen Woolman, Perils and Pitfalls of the New Rules, Mary Hunter Associates Conference 24 April 1995}
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\(\text{The Hon. Lord Penrose, Commercial Actions - First Thoughts (1995) Civil Practice Bulletin 5}
\)
representation of the rules in practice. The research report is reproduced in Appendix 6.5.1 and forms the basis of the initial analysis of the new rules in practice.

After three years the nominated judge returned to Ordinary Roll work, as the Coulsfield committee had anticipated. Continuing the openness of the initial period, the succeeding judge allowed the writer access to all interlocutors printed in the consecutive 18 month period. The second study sample comprised 249 cases, representing almost the full caseload within the period. The second research report is reproduced in Appendix 6.5.2, and represents the evolution of caseflow management in practice.

The following comments are based on the full and detailed analysis of empirical data in Appendix 6.5.1 and comparison between the two study periods in Appendix 6.5.2. Comments should be read in conjunction with these analyses.

In Practice with Caseflow Management

Beginning with the conclusions, several key factors can be noted from the two studies:

- Disposal time has been radically reduced
- Settlements occur at an earlier stage, but in some cases only after several meetings with the judge
- A more co-operative approach is encouraged and has been observed
- Predicting which Proofs will take place is an inherently difficult part of court process, but excessive overbooking has been reduced
- Increased judicial toleration of late amendments, disclosures and lodgements ‘in the interests of justice’ usurps the credibility of directive orders
- Administration of the list is strained by the rising caseload and other court duties undertaken by Clerks of Court
- High settlement rates are universal; courts are negotiation centres
Late cancellation of hearings is also universal
The local legal culture gradually pervades any new procedure
Commitment of the judicial and administrative team is a decisive factor
The specialist roll is resource-efficient if the Ordinary Roll absorbs unused judicial Commercial time
Ongoing data-gathering is essential to inform evolutionary policy changes

The Commercial Court in Practice

1. The Preliminary Hearing

The informal seating arrangements at the initial half-hour hearing with the judge, 14 days after defences are lodged, belies the serious discussion of the issues in dispute and the directions considered necessary to resolve them. Counsel and solicitors sit around a table within the well of the court facing the Commercial judge and his Depute Clerk. A lap-top computer is used to access all Commercial judges' timetables and publish interlocutors on the day of a hearing.

Being “within four feet of the eyes of a judge” who has studied case papers in advance and is experienced and skilful in asking pertinent questions on issues within, and sometimes behind, the summons and defences, means that representatives must be fully prepared and competent to commit their client.

By addressing questions relating to fair and adequate notice and the relevancy of claims at Preliminary Hearings, substantive issues can be discussed and disposed of at this early

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52 Practice Note No. 12 1994 para 11(1)
53 James McNeill (1995) op.cit.3
stage, reflected in the high settlement rate at this stage. Subversion or delay of Proof on substantive issues, and Debates based on textual criticism and technicalities of ordinary written pleadings, is avoided completely. Judicial pressure to expose and narrow issues in dispute contrasts remarkably with other Scottish jurisdictions. For example, a recent case involving a £5,000 loan meandered through the sheriff court system, was appealed to Sheriff Principal and to the Inner House which established (by 2:1 majority) that defences which consisted of "bare denial" were relevant, and returned it to the sheriff court for further procedure. There are no 'bare denial' in the Commercial Court, which refuses to become embroiled in procedural strategies, and has power to expose and explore them. Defenders cannot use silence to block claims against them.

The Court also does not condone the initiation of actions merely as leverage for negotiation or settlement of disputes, or for commercial tactics. Parties must invest a substantial amount of resources early, as the managerial court works on the presumption that commercial litigants are in pursuit of quick substantive justice, that they are prepared to co-operate to that end, and that there is no ulterior motive behind the initiation of a legal claim.

The unrelenting focus on the reality of claims from the beginning is reflected in the flexibility and innovation of 'directive' orders which are tailored to individual circumstances. Three examples illustrate the elasticity of the process:

- In an action for implement and payment connected with assignation of a commercial lease, where the defender was within days of being disbanded as a local government office, the interlocutor reflects the urgency of resolution of initial issues:

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54 Guide circulated to 500 commercial organisations September 1994 Rules for Commercial Actions in the Court of Session p.3
55 Gray v Boyd 1996 SLT 50 at 63 and 66 (Lord Morrison dissenting at 68 stated that lack of candour made the defences irrelevant as the pursuer did not have adequate notice)
“appoints parties to advise the court by (date given 4 days hence) whether or not the assignation has been dealt with; appoints the defenders to advise the pursuers within 14 days...the extent to which they accept in whole or in part any liability for the heads of claim contained in the schedule; appoints the pursuers to provide to the defenders within 4 weeks such further specification as necessary to fully instruct their claims and to lodge all vouchers, etc. to support them”

- In a dispute over a partnership lease, after a history of perceived intransigence by the defenders:

  “order defenders within 7 days of this date to admit or deny and to lodge any documentation showing the truth or otherwise of the proposition of fact narrated by the pursuer in number 14 of process.”

- Spotlighting strengths and weaknesses means that parties can be directed, after discussion and inter-party agreement, towards an amendment of their case. In an action of count reckoning and payment, after dissolution of a legal partnership through retirement:

  “14 days to adjust pleadings insofar as thought necessary to focus the issues relating to the validity, terms, interpretation, effect and circumstances relating to the dissolution agreement; exchange all documents in 21 days; if possible lodge an agreed bundle of documents”

Caseflow management therefore represents a continuous judicial sift, filtering out issues which can be identified, explored, agreed and dismissed rather than accumulated into a

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56 Marlows (Scotland) Ltd. v Central Regional Council 25 March 1996 - speed was a factor as the defender, a Local Authority was about to be subsumed in a government re-organisation scheme
57 City and County Investments (Scotland Ltd. v Ballantyne & Copeland & ors. 12 September 1995
58 D. I. Fergus v C.I. Duncan & Ors. 15 January 1996
reservoir for potential argument and/or exploitation over the history of a case or at Proof. It should theoretically result in quicker resolutions and shorter Proofs.

The Coulsfield Working Party anticipated that significant and substantial issues would be decided at relatively informal hearings early in each case. Both research studies (see Appendix 6.5) certainly show a fairly substantial settlement rate before and at the Preliminary Hearing stage - 75% of all settlements within the first 18 months and 58% within the succeeding period. *Chart 1* shows the pattern of judicial disposals and settlements. It is obvious, however, that there has been a slippage in the second period, when 25% of settlements took place at Preliminary Hearings (20% at a much later stage – prior to Proof). This contrasts sharply with the first 18 month period in which 46% of settlements took place at the Preliminary Hearing stage.

Although the number of clients using the Commercial Court has grown, the decrease in early settlements may either indicate an increase in intransigent behaviour and less cooperative attitudes or a less than vigorous approach in directive management. Either way it means that a higher percentage of cases are in the system for a longer period, potentially requiring more court and lawyer time. The first nominated judge stated from the beginning that the efficient disposal of business at preliminary stages would be one indication of the judge’s success in directing preparation of parties.59 By this measure then, it may be concluded that the Commercial Court was more efficient at disposal, and particularly at encouraging settlement, during this preliminary stage in the first 18 months. Further evidence is required to detect reasons for the anomaly.

The Preliminary Hearing stage was designed to span a fairly short but intensive period of time, framed within individualised and realistic timetables.60 The Working Party recognised that more than one hearing might be required for more complex cases. The

60 Rule 47.11(3) Practice Note 11(2)
nominated judge later suggested that the number of hearings required might indicate the degree of resistance to the procedure. The research shows that there were 2.7 hearings per case in the first period, compared to 2.8 in the second. However, Chart 2 shows that behind these averages a higher proportion of cases had two or three Preliminary Hearings (51%) in the second period compared to the first period (40%). More cases were continued for more hearings in the second period although the Working Party originally recognised that continuity of judicial management was dependent upon control of repeated appearances. Within the second period continuity has been affected - mixed judicial involvement in cases has doubled from 11% to 23% of the caseload. The increasing number of cases will have been a contributory factor, but not the complete answer. It is appropriate to question whether the aims set out by the Working Party were unrealistic or unenforceable. And if so, why.

Control of realistic timetables, and of repeated appearances at Preliminary Hearings, were seen to be contingent upon the judge receiving accurate and timely information, and strict application of the rule by the judge, bolstered by the use of sanctions. Over both study periods, observations in court revealed that all Commercial judges specifically negotiated a tailored timetable with counsel and law firms involved, and the following are typical endings to a hearing:

"Is four weeks enough?"

"Do you need more time?"

"Is that a reasonable framework - can you work with that?"

"Better take an extra two weeks/month to make sure you have enough time to prepare"

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61 Lord Penrose, SCIA Conference (1996) op.cit. para 9.07

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The assumption is, therefore, that timetables were considered realistic when agreed in court. However, observation also revealed an increase in late exchange of information and lodgements, including late unmarked adjustments passed to the judge in contravention of directory orders. This trend is particularly concerning if subsequent directions and orders had to be postponed due to incomplete preparation, non-compliance, non-co-operation or inability to conform to timetables. In Study 1, 85% of Preliminary Hearings resulted in ‘directive’ interlocutory orders being issued, 15% reflecting continuations without orders. In the second period this changed to 67% directive orders and 33% continuations without order. The decrease in published directions in the second period\textsuperscript{63} corresponds to an increase in the number of hearings.

If the continuations are a ‘checking’ or control mechanism then the Coulsfield committee’s prophesy that repeated appearances would affect judicial continuity was accurate, and the question of sanctions for late lodgements may require to be addressed.\textsuperscript{64} A chain reaction is set off. Too forgiving an attitude means that the credibility of judicial control and management is gradually eroded by a learned reliance on the acceptance of late material. Late material means that the judge cannot be fully prepared to give directions. Late material and lack of directions may lead to repeat appearances. And repeat appearances destroy the golden thread of judicial continuity in a case. With continuity interrupted, the average time to disposal is extended,\textsuperscript{65} as illustrated by Chart 3. Therefore the toleration of too many minor misdemeanours at the intensive preliminary stage (i.e. late lodgements), coupled with an increasing caseload, may eventually subsume the initial successes, leading to the diminution of speedy and early resolution, clogging the timetables with unrealised Proofs. Evidence of it already appears in the second 18-month period, where 20% of cases settled at the last stage, freeing 131 court days which had been booked for Proof, in some cases too late to be reallocated to any other Commercial business.

\textsuperscript{63} Appendix 6.5.2 para 5.4
\textsuperscript{64} Coulsfield Working Party Report 10
\textsuperscript{65} Appendix 6.5.2 paras. 4.3 and 7.8
The sanction of expenses against a party has been used intermittently, generally for repeated intransigent behaviour. Although the Coulsfield report stressed the importance of management through co-operation rather than coercion, the trend towards late lodgements, and increased continuations are two indications that the parties are regaining control of the flow of information. In the wider interest of justice it may be necessary to consider whether any such infringement of the rules or interlocutors should attract at least an automatic fine, published in the interlocutor, targeted at presenting counsel initially if fault cannot immediately be apportioned, reclaimable by negotiation from the law firm or client.

An alternative solution might be to allow more time for defences to be lodged and/or more time for inter-party discussion before the first Preliminary Hearing. However the overriding consideration has been expedition. And with an average of 27 and 34 weeks to disposal in the respective periods, expedition has certainly been achieved. By comparison the Commercial Court in England averages 100 weeks to completion,66 and because of heavy caseloads, London judges now have power to re-route cases to private Alternative Dispute Resolution (A.D.R.) centres.67 Within the first year of operation 30% of their caseload was siphoned off, the majority of whom did not return to court. However, the main A.D.R. organisation in England (CEDR)68 has been unable to sustain enough work in Scotland, and re-routing to private organisations does not develop the body of Scots law. It would seem more beneficial to litigants and court to address problems of inefficiency or tardy preparation as they appear rather than allowing court time to be gradually congested by unnecessary repeat hearings.

67 Practice Direction, Queen’s Bench Division, Commercial Court 1 All ER [1997] 379
68 Centre for Dispute Resolution (CEDR) a C.B.I. sponsored organisation
2. The Procedural Hearing

The kernel of the whole system lies in Rule 47.12 (2) governing the stage in procedure where technical arrangements for Debate or Proof are fully discussed, and the judge directs the method of disposal. To do this the judge has to be in a fully-informed position. Rule 47.3 stipulates the mandatory lodgements required three days prior to the hearing, since the Coulsfield committee judged on past experience of By Order Hearings that merely asking parties to appear to discuss proposals at this stage would not be productive. The judge presumes that all preliminary or preparatory work is done, and parties are ready to seriously discuss procedure for substantive disposal.

The Coulsfield committee expected that by the time of this second stage the parties’ positions would have been ascertained and identified, and that once a case had passed beyond the Procedural Hearing it would not settle. Chart 1 shows that this latter expectation was unrealistic - settlements do take place after this point. It was also presumed that one hearing would be sufficient to plan for substantive resolution. Repeat appearances were to be discouraged, although, similar to Preliminary Hearings, it was anticipated that

"some cases would test the commitment to deal with all issues at a single diet."  

Chart 4 indicates that although a similar proportion of cases had Procedural Hearings in both study periods (23% and 25%), the actual number of hearings almost doubled. In part this was due to 27 cases requiring more than one hearing. However the repeat appearances did not seem to prompt more resolutions, but were necessary to complete preparation - in other words ‘testing the commitment’ of parties. It is suggested that

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69 James McNeill (1995) op.cit.3
70 Lord Penrose (1996) SCIA Conference op.cit. para 10.01
71 Lord Penrose (1996) SCIA Conference op.cit. para 9.03
this is further evidence of the magnetic drift towards traditional working practice. The undernoted are not atypical interlocutors, based on one particular case:

26 February (appointing a Procedural Hearing 21 March)
“...Appoints parties to lodge the documents referred to in Rule 47.12 no later than 18 March”

21 March
“...Allows the pursuer’s Note of Argument and Note for further proposals to be received late at the Bar of the Court...further continues the Procedural Hearing until 25 April .... apponts the defenders to lodge, no later than 22 April 1997 (1) a Statement as to the precise basis of their claim for retention together with a detailed list of authorities (2) their proposals for any form of limited proof and list of witnesses, identifying the matters to which each witness will speak, and if they maintain proposals for a debate, of new a precise note of their proposals in that respect: appoints the pursuers of new to lodge no later than 22 April their proposals for any form of limited proof and list of witnesses, identifying the matters to which each witness will speak...”

25 April
“allows the pursuers and defenders late adjustments intimated at the Bar of the Court....allows the pursuers Note of Argument to be amended at the Bar of the Court...”

24 June
At commencement of a two-day Proof-before-Answer, the defender’s inventory of productions was tendered and accepted at the Bar of the Court.\(^{72}\)

\(^{72}\) Edinburgh Grain Ltd v Marshalls Food Group Ltd CA140/96 - date of disposal 15 October
It does seem therefore that late preparation and lodgement, as found on the Ordinary Roll, is difficult to erase. But it is more consistently visible and noted.

To maintain expedition, postponement of Procedural Hearings was intended to be only on special cause shown, with parties required to give 7 days notice to the court.\textsuperscript{73} In fact 26 Procedural Hearings were discharged without appearance on the date appointed, and 5 others with due notice.\textsuperscript{74} Interlocutors show that these postponements were "of consent of parties" pointing to the same culture of mutual indulgence Lord Cullen found on the Ordinary Roll.

3. \textbf{Debate}

The standard Rules of Court apply in the conduct of Debates.\textsuperscript{75} Technical issues of law may be resolved as a priority, in some cases avoiding detailed pleading. However there is twist to standard preparation and practice, as the initial Guide indicates:

\textit{"Parties should expect judges will be familiar with documentary material and will intervene to discourage irrelevancy and time-wasting"}\textsuperscript{76}

The judge has grown with the case and fully realises the reasons for calling the Debate without explanation from counsel, particularly since Notes of Argument should be lodged in advance of the hearing.\textsuperscript{77} The only control mechanism parties have is retention of Notes of Argument until the actual hearing.

\textsuperscript{73} Rule 47.11(4)
\textsuperscript{74} Appendix 6.5.2, Table 20
\textsuperscript{75} Chapter 28, Court of Session Rules and Commercial Rule 47.12(2)(a) and (b) and 47.13
\textsuperscript{76} Rules for Commercial Actions in the Court of Session September 1994 p.3
\textsuperscript{77} Rule 47.12(2)(b)
Double the number of debates were fixed in the second period, and a higher proportion were discharged,\(^78\) 60% of those on the day allocated for hearing.

<table>
<thead>
<tr>
<th></th>
<th>Number of Debates Fixed</th>
<th>Percentage Discharged</th>
</tr>
</thead>
<tbody>
<tr>
<td>Study 1</td>
<td>31</td>
<td>22%</td>
</tr>
<tr>
<td>Study 2</td>
<td>63</td>
<td>50%</td>
</tr>
</tbody>
</table>

Once again the behavioural pattern is becoming reminiscent of Ordinary procedure where approximately 70% of Procedure Roll hearings are discharged, referred to by Lord Cullen as an unnecessary diversion, representing “an informal sist of process,”\(^79\) causing wasted administrative and judicial time and delays. However Chart 5 shows that the allocation of Commercial Debates was relatively quick, with waiting periods peaking at 4 weeks and 7 weeks. As noted, disposal times were not generally extended significantly by the hearing.

Since Debates are not fixed without justification to the Commercial Court, what we may be witnessing is either the art of brinkmanship as a professional strategy or court-door syndrome where realism overtakes a client’s intransigent view. Chart 1 reflects an increase in settlements clustered around Debates. Partial agreement (or capitulation) is evident also in the number of amendments to pleadings received. It therefore seems to be part of natural litigating behaviour that substantive hearings are booked as negotiating tools. Realising the judge is well informed partially affects this behaviour, but does not eradicate it, or reduce it substantially. In other words it is inevitable and caseflow management, particularly within a traditional adversarial system, does not fully control it.

Since court fees are paid retrospectively, and clients are always free to consider settlement, there is no financial or psychological disincentive to book court time. What

\(^{78}\) Appendix 6.5.2 para 5.8

could be penalised are the number of late lodgements of Notes of Arguments, the preparatory tools which Lord Cullen suggested were crucial in exposing legal arguments well in advance of Debate.80

4. Proof

Similar behaviour in respect of Proofs is also evident, where 65% are discharged, half of these on the first day allocated. Although a similar percentage of cases proceeded to Proof in both studies, the increase in caseload in the second period meant that timetables were strained by treble the Proof days required in the second period.81 Pressure on court time was further compounded by four cases being allocated long hearings,82 abnormally long compared to other caseflow management jurisdictions. Since there is no overbooking of the Commercial court’s roll, the impact on timetabling can be significant. In the second period judicial continuity was also interrupted on several occasions, where the Commercial judge presiding over preliminary preparatory stages was not available for an early Proof. As expedition is the goal of the new procedure, Proof in these circumstances was allocated to another Commercial judge. In other jurisdictions problems have arisen with a break in continuity when judges at trial have disagreed with the preparatory supervision of a judicial colleague, but this is not evident in Scotland, a small jurisdiction where Commercial judges regularly confer. In some instances mixed involvement of judges has been considered to bring a fresh mind to the proceedings83 or thought advantageous because of another judge’s particular area of expertise.84

The waiting interval before Proof hearings has been consistently low.

80 The Cullen Review (1995) op. cit. para 3.11
81 Study 1 - 135 Proof days; Study 2 - 465 Proof days
82 Appendix 6.5.2 para 5.11 - bookings of 16, 24 and 38 days.
83 North East Ice & Cold Storage v J. Third and A. Third 22 March 1996
84Michael Davies v RMS International 18 March offered restricted proof or full proof before answer on employment law.
• Allocation of hearings has been extremely prompt, with the average interval being 11 calendar weeks in the first study period and 14 weeks in the second, compared to 31 weeks on the Ordinary Roll.85

• The Scottish Court Service target dates for allocation of Proofs lasting 4 days or under is currently set by the Lord President at 19 term weeks. Commercial Proofs of the same duration (49%) were allocated within an average of 11 calendar weeks.

As noted, late discharge of Proof has resulted in 131 days being lost without warning to the court.86 These represent days irreclaimable by other Commercial litigants. The judge has wasted considerable private preparation time. Within a wider court system, the Commercial judges become available to the Ordinary Roll or criminal business. The results of administrative inefficiencies in the Commercial Court is absorbed by other work, and judicial resources are therefore not entirely wasted. If the Commercial Court stood aloof from other procedure, these lost days might be termed ‘unproductive’. The alternative interpretation is that they have been productive in a sense since they have generally produced a disposal (settlement), saving court sitting time. The temptation for the Commercial judge is to overbook Commercial Proofs in anticipation of a proportion of settlements, but this is the same solution which has grown into crisis proportions on the Ordinary Roll. Court time there is now overbooked eight or nine times availability to compensate for the extensive number of late settlements.87

Since the Commercial Court seems to be drifting towards more late settlements, freeing up judicial time, the Ordinary Roll can become dependent upon Commercial judges becoming available. Pre-empting this gradual dependence, it would seem more efficient to tackle the problem of late settlements within the caseflow management

85 The Cullen Review (1995) op.cit. sample of 300 defended actions disposed of in 1995
86 Appendix 6.5.2 para 8.6
system where judicial continuity is a main marketing attribute. Solutions for discussion could be

- More forceful direction in narrowing issues at Preliminary hearings
- The allocation of shorter proofs
- Re-routing to A.D.R. (with an intermediary reporting back to court before Proof is allocated)
- Early neutral evaluation by senior member of the Bar (report back to court)
- Interim judicial opinion reconsidered
- Settlement-type conference, including the clients either as participants or observers

It could be argued that there are insufficient judicial resources for the latter solution, which may only add another level of procedure and expense, and this is true while unused Commercial time is required for Ordinary business. However, if the Commercial Court was an autonomous unit it would be a worthwhile consideration in attempting to recoup at least the majority of 131 days which are lost without warning. Gambling with judicial time at an earlier stage to save time later is speculative, and while released time tensions are eased elsewhere in the court system, there is little impetus to find independent solutions for the Commercial Court. However, for the client who has had to prepare for Proof, including attendance by witnesses and experts, earlier alternatives could represent a considerable saving of finance, time and manpower.

Court fees for Proof are £156 per party per day, or £624 each for a 4-day Proof. As with other hearings, payment is retrospective for time used, not allocated. There is no financial or psychological disincentive to book spurious judicial time. Advance

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87 A Review of the Use of Judicial Time in the Court of Session (1986) chairman Lord Maxwell (the Maxwell Review) - recommended overbooking 2 ½ times judges’ availability to cut down waiting periods
payments or penalties, ideas which were rejected for the Ordinary Roll in 1995,\(^{88}\) may not influence any strategic policy of Commercial clients, and might place the Scottish Court Service in a contractual position to guarantee a hearing or pay out compensation. At an early stage the Commercial judges were calling miscellaneous By Order hearings to confirm preparation and parties' intention to proceed to Proof. In some cases they seemed to intuitively detect an imminent settlement\(^{89}\) and encouraged both legal representatives to discuss negotiation and settlement with their clients. However, this would always be accompanied by a request not to bring details of negotiations to the notice of the judge, conserving his perceived impartiality at Proof.\(^{90}\) Some of the 20% of settlements between allocation and hearing of Proof in the second period may be a result of these extra hearings and judicial encouragement, but this is difficult to quantify.

5. **By Order Hearings**

These extra hearings were allocated under Rule 47.15 where the judge may put out for hearing for further procedure at his own instance or on party's motion. The second study period witnessed a rise in the number of these hearings, generally booked between Debate and Proof. In some instances they were called after legal representatives intimated that time was required for negotiation.\(^{91}\) By Order Hearings were used as a convenient checking device to ensure that parties did not drift apart without serious commitment to settlement. This practice was reduced since it began to eat into judicial availability. The number of cases involved in By Order Hearings rose from 14% of the sample in the first study to 32% in the second, and the total number of hearings rose from 43 to 191. However time lags between intimation of settlement and a joint minute

\(^{88}\) The Cullen Review (1995) op.cit. para 7.4  
\(^{89}\) as in R. L.Forbes v G. G. Armstrong 28 March 1996  
\(^{90}\) as in Adam Smith v Spencer Printing Ltd. 18 March 1996, Brodie Engineering v Sea Truck Shipping 22 March 1996  
\(^{91}\) Hully Kirkwood Engineering v Shooshanian Engineering Associates; Alltruck plc v Colour Powder Ltd.; R.Law v M.Scott; P. O'Callaghan v Pinnacle Insurance Ltd.
being lodged indicated that there was justification for continued judicial interest\textsuperscript{92} to concentrate the focus.

The Coulsfield Committee recognised that increasing appearances to check progress would adversely affect judicial continuity, and the increase in mixed judicial involvement found in the same period as these increased hearings, indicates that this concern was justified.

\textbf{Management by Hearings}

\textit{Chart 6} shows the pattern of judicial management across different types of hearings in both study periods. It is obvious that a higher percentage of ‘directive’ Preliminary Hearings took place in Study 1. It is suggested that the chart graphically illustrates the effect of reducing directive orders at the beginning of procedures. The miscellaneous reasons behind By Order Hearings, Motion Hearings and Unstarred Motions increased.\textsuperscript{93} The number of hearings rose disproportionately higher than the caseload would lead us to expect in the second study in all but Preliminary Hearings.\textsuperscript{94} This is also evident from the average number of hearings per case across these categories.\textsuperscript{95}

\textbf{Average Number of Hearings or Orders per Case}

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|c|}
\hline
 & Preliminary Hearings & Preliminary Hearings & Procedural Hearings & By Order Hearings & Motion Roll Hearings & Unstarred Motions & Ex Proprio Motu Orders \\
 & Directive & Continuation & & & & & \\
\hline
Study 1 & 2.3 & 2.1 & 1.2 & 1.6 & 1.2 & 2.1 & 1 \\
Study 2 & 2.1 & 1.5 & 1.8 & 2.4 & 1.6 & 1.8 & 1.7 \\
\hline
\end{tabular}
\end{table}

\textsuperscript{92} As in G. M. Gibson v A. Napier & ors. Proof discharged on the allocated day to discuss settlement, joint minute lodged 5 months later. Also Vermac Ltd v Eric Brown Co. Ltd. sisted ex proprio motu on day of Preliminary Hearing for negotiations – 5 months later the joint minute was lodged.

\textsuperscript{93} Appendix 6.5.2 para 6.1 - 6.4

\textsuperscript{94} Appendix 6.5.2 Table 16
Reasons suggested in Appendix 6.5.2 for proportionately more cases experiencing proportionately more hearings and orders are:

- resistance to caseflow management, which prompts more appearances
- lack of co-operation - between parties, and between parties and court
- increased experience of agents and counsel of rules and practice
- mutual indulgence
- fee building
- interruptions to judicial continuity
- pressure of increased workload
- decrease in early direction

which in total imply a slippage towards standard practice - the local legal culture

**Continuity of Management and Style**

Within the first study period, the nominated judge continuously supervised 83% of the caseload. This slipped to 53% in the following period, with his successor taking over 17%. *Chart 7* not only illustrates the increase in mixed judicial involvement from 11% to 23%, but also emphasises the continuity of management over a high proportion of cases. Judicial continuity promotes consistency of analysis, interpretation and application of the rules. The judge grows with the case, avoiding repetition of background detail which wastes unnecessary court time, and therefore expense. Personal notes,\(^\text{96}\) and recollection of previous meetings and agreements, support this golden thread of consistency. It was to be hoped that this would result in shorter proofs, and in all but four cases this was the result. Lack of continuity may also be exploited tactically by some parties to load extra time and expense. However, subjective styles

\(^{95}\) Appendix 6.5.2 Table 17 and para 6.6
\(^{96}\) Russell v Health Collins Haldane 22 March 1996 By Order
of management can be introduced, and it has been recognised that under caseflow management parties may be influenced to settle or be more forthcoming if allocated to a particularly vigorous judge. However, given the disparate caseloads and complexity of issues any comparison between judges’ speed of disposal would be anomalous at this stage.

Fulfilling the Promise of the Coulsfield Report

Lord Coulsfield’s Working Party set out the aspirations for the new procedure. Have they been met?

1. **Priority allocation of Commercial cases to a full-time judge**

This has been met. Under previous incarnations of this specialist roll, the rules were subsumed to practice. The Keeper of the Rolls controlled all judicial timetables, and allocation was ad hoc from a judicial pool. Pressure of Ordinary and criminal business out-ranked Commercial priority. However, under the new procedure judicial diaries are accessed by the Commercial Clerk of Court using a lap-top computer at each hearing. Interlocutors are written during the hearing, checked and signed by the judge and communicated to representatives daily. Parties’ representatives are expected to attend hearings with their personal diaries so that the next meeting is agreed with the judge, along with the timetable for preparation.

As can be seen from **Chart 7**, continuity of the full-time judge has been maintained, more so in the first period, although the second study includes a hand-over period between nominated judges. What we can say is that expertise has been maintained.

2. **Ad hoc support provided by a specialist group of Commercial judges**
The nominated part-time judges are consistently involved in supporting their full-time colleague as required, increasing from two to four over the second period. Their timetables are noted in the Commercial diary system. As they are also available for criminal and Inner House work, allocated by the Keeper of the Rolls, priorities must be agreed, and at times negotiated between the Commercial judge and the Administrative department. Judicial time is therefore booked by two departments on a first-come first-served basis, at times creating tension due to the heavy criminal workload. The trend towards additional hearings in the second period therefore had potential repercussions on general administration.

3. **The same judge to deal with all stages of a particular case, or at least all Preliminary and Procedural stages**

Although there was a high degree of judicial continuity in the first period, there was slippage in the second period. Mixed judicial involvement doubled. Mostly these divergences have been for substantive hearings. Therefore the early stages of most cases have benefited from judicial continuity. However mixed judicial involvement was one important factor in the extension in the average time to disposal from 34 to 54 weeks.

4. **Material to be lodged in advance, giving sufficient judicial time to study it**

This is where the system has fallen behind the aims, since both interlocutors and observations in court disclose the prevalence of late compliance with orders - for example, a tri-party 1½ hour Procedural Hearing where no party had lodged documents in advance, disregarding compliance with previous orders.97 Continuing with the hearing if the judge has not had sight of papers places him at a disadvantage and blocks timetables unnecessarily - for example where a second Note of Adjustment and

97 Micro Leisure Ltd v County Properties and Developments Ltd & or. 17 July 1998
supplementary Note of Argument were not lodged before a continued Procedural Hearing, judicial time was extended from ½ hour booked to 1½ hours. Management becomes particularly difficult where both parties are recalcitrant - "I mark my concern by making neither able to recover against the other the expenses of today's proceedings." 99

5. Court commitment to efficient administration

The ambitions of the Committee have been fulfilled. The administration is run as a semi-autonomous unit, supported since inception by five trained Depute Clerks who sit with their judges in court and deal with clerical administration. However, their overlapping general duties at times conflict with focus on Commercial work. Depute Clerks are increasingly involved in criminal circuits or internal projects. In the first period, one Depute Clerk dominated the administrative support, whereas in the second period three support the judges on a priority basis, with two trained as back-up and used intermittently. The breach in continuity of supporting clerk has interrupted the flow of administrative back-up.

It was noted that written communications with legal representatives had decreased as the workload and number of judges increased. The second exercise uncovered cases which had 'fallen asleep' or been sisted, directly opposed to what was allowed in the first period, extending disposal time. Time for administrative monitoring by Depute Clerks increasingly competed with serving in the Commercial Court and other court duties. Commercially it seemed like false economy to use expensive personnel for detailed clerical work, and this has not been addressed. However continuity of Depute

98 Cosar Ltd v UPS Ltd 25 June 1998
99 Gibson v Napier 20 October 1997 Continued Preliminary Hearing, adjustments lodged at Bar of the Court and indistinguishable from existing text, no note of proposals from either party as ordered.
100 Appendix 6.5.2 para 2.2
101 Appendix 6.5.2 para 8.8 sisting in the second period extended time on the court roll well beyond the average disposal time of 34 weeks
Clerk has at times been interrupted for a tour on criminal circuit and other mainstream projects. In the second study it proved more difficult to identify cases which had become ‘inactive’.

Judicial commitment to efficient administration is tenacious, at times quite distinctive, prompting conflict with individual counsel:

- 18th March - Proof was fixed to commence on 9th July. On 2nd May the Court refused pursuer’s motion to discharge Proof due to non-availability of agent and senior counsel

"This is a privileged treatment extended to those who are prepared to accord to the rigours of the system and the process has a minimum of features. If the court is prepared to make prior time available, its responsibility is to the public to see it is used to the best advantage and to the benefit of commercial litigants generally. It cannot be prejudiced by individual counsel."\(^{102}\)

Time spent at avizandum is also short, the average waiting time being 3 ½ weeks for Debate and 7 weeks for Proof.\(^{103}\) According to the questionnaires returned by clients, these intervals compare favourably with experience of other court tracks.

6. **Short simple and non-technical written pleadings with no pleas to the relevancy**

Written pleadings are the backbone of Ordinary procedure, but have not been elevated to the dominant role in the Commercial court. The court is flexible in its encouragement and acceptance of varied presentations. Schematic design drawings,\(^{104}\) spreadsheets\(^{105}\)

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\(^{102}\) Gray & Ors v Clark & Ors 2 May 1996 Proof was eventually postponed when counsel returned and doubled the estimated time required for the substantive hearing

\(^{103}\) Appendix 6.5.2. paras 5.9 and 5.15

\(^{104}\) Fyfe Contractors v Scottish Hydro Electric plc 9 January 1996
and analytical schedules of claims and responses for complex dilapidations disputes and have been used for clarity. Statements of facts, summaries of issues, statements of account and specification of parties’ positions have also been requested for clearer focus. Recently, however, there have been anecdotal suggestions of a return to pleadings reminiscent of standard practice on the Ordinary Roll.

A major contribution to expedition has been the allowance of adjustments and amendments of pleadings alongside procedural development, contrasting with the Ordinary Roll where process can be arrested until these stages are complete. Traditionally time to adjust or amend pleadings may constitute a major delaying tactic on the Ordinary Roll. On the Commercial Roll there are very few instances of adjustments and amendments being refused as the process continues. However in the second period the practice of adjourning hearings to allow a period for adjustment has been identified.

7. Movement away from dependence on oral presentation

This has not been the outcome. Although a Proof by Affidavit was undertaken in one case, and threatened in another, substantive presentation is the same as for Ordinary business.

105 John Smith v Sunblest Bakeries
106 Taylor Woodrow Property Ltd v Strathclyde Regional Council 26 September 1995
107 SunAir v Caledonian 8 August 1995
108 Royal Bank of Scotland plc v David Hunter & Ors 14 December 1995
110 Thomson v Rennie 8 August 1995
111 as in A. M. Hunter v T Moffat and A. Moffat 30 June 1998 Lord Hamilton “I thought a lot of verbage and repetition was included”
112 as in Robert Thomson & Ors (Trustees) v Stephen Rennie 8 August 1995, Royal Bank of Scotland plc v David Hunter & Ors 14 December 1995
113 as George Crolla v The Prudential Assurance Co. Ltd. 11 March 1996 Defender’s adjustments refused
114 as in BXL Plastics Ltd v Campsie Spring Scotland Ltd and Robert Barry & Co. v T.& J.Doyle
115 Governor and Company of Bank of Scotland v Messrs. MacLeod Paxton Woolard & Co. & Ors 10 November 1995, Lord Coulsfield’s opinion of 16 February 1996 Pursuer and defender reached an understanding that dispute was over issues of law rather than fact.
8. *A realistic approach to setting time limits, and not readily extended*

Negotiation and agreement between parties and judge is part of the system, although clashes have occasionally occurred over availability of counsel. If both parties agree that they are not ready or prepared to proceed, the judge concurs with continuations. Time limits have been extended on cause shown on a regular basis. Continuations have been allowed at hearings, or more informally through the Depute Clerk when a hearing has been discharged. In this circumstance an interlocutor is produced ex proprio motu.

Chart 8 illustrates the number of hearings discharged within the second study period. Although a large proportion were accompanied by allowance of a continued hearing, a reasonable evaluation of the Court’s *readiness to extend time limits* cannot be made from interlocutors. Observations in court indicated that there was a different approach taken by each judge, generally tailored to individual circumstances. Five hearings, for example, were continued because defenders’ agents had withdrawn. If both parties are agreed, or one is unrepresented, the judge has little choice.

<table>
<thead>
<tr>
<th>Hearing</th>
<th>Preliminary</th>
<th>Procedural</th>
<th>Debate</th>
<th>By Order</th>
<th>Proof</th>
</tr>
</thead>
<tbody>
<tr>
<td>Total discharged</td>
<td>74</td>
<td>31</td>
<td>25</td>
<td>48</td>
<td>47</td>
</tr>
<tr>
<td>Discharged for Continuation</td>
<td>33</td>
<td>20</td>
<td>3</td>
<td>35</td>
<td>8</td>
</tr>
</tbody>
</table>

What is obvious from further analysis is that some parties built up a history of discharging hearings,116 arguably retaining control of progress.
9. **Total length of time in court reduced**

This has been the most successful aspect of the procedure. The average length of time to disposal in the Commercial Court is less than half (almost one-third) of the time on the Ordinary Roll,\(^\text{117}\) even with the additional burden of increased caseload and hearings. This, with the continuity of the judge, has been a consistently remarkable achievement, attributable to judicial commitment to the ethos of the new rules. There has been slippage during the second period (adding 7 weeks to the average) but it remains an extremely fast-track procedure. The speed of resolution is based not so much on complexity of issues, but the co-operative approach of parties within an adversarial system.

10. **Costs from delay and repeated adjournments eliminated**

Access to data relating to costs has proved difficult since these are part of private negotiations. The increase in the number of hearings and unstarrred motions will undoubtedly reflect an increase in lawyer fees for preparation. It may even prompt insinuations of fee-building. Judges do not hold information on clients' costs which area not involved in taxation. However there were repeated judicial warnings *to “act responsibly”* if a relatively small sum was involved.\(^\text{118}\) A recent English Practice Direction lifts the veil from inter-party costs, revealing professional fees charged at each interlocutory hearing. Judges in England can make a summary assessment of costs at the conclusion of the hearing. It is intended that application will be extended:

\(^{116}\) Case CA 45/96 (2 Preliminary and 7 By Order Hearings discharged); Case 69/96 (3 Preliminary, 5 Procedural); Case 81/96 (1 Procedural, 1 Debate, 2 By Order); Case 26/97 (1 Debate, 4 By Order)

\(^{117}\) The Cullen Review (1995) op.cit. sample of 300 disposals – average time to completion was 89 weeks if 9 anomalously long cases are excluded

\(^{118}\) as in Brodie Engineering v Sea Truck Shipping 22 March 1996. Baird & Stevenson v Stirling Stone management Ltd. 10 March 1996
“In the meantime the restriction (to interlocutory hearings) should not be taken as any discouragement to judges who wish to exercise their power to assess costs in cases not falling within the scope of this Practice Direction”.  

Since these new rules have been in use, there is anecdotal evidence that English judges have been surprised by the level of fees charged, some of which have been disallowed. This is probably the most weighty weapon available to judges working a caseflow management system – supervision of fees charged by legal representatives. However, judicial management of costs can open up an appeal level creating a new level of court work. In Scotland professional fees are guarded, with some commercial firms presuming that the level of fee charged is equated with quality of representation which includes a level of tactical skill.

11. Sanctions available, but more significant reliance on encouragement, assistance, co-operation rather than compulsion

Sanctions in Rule 47.16 are discretionary. The judge may refuse to extend the compliance period, dismiss or partially dismiss an action or counterclaim, grant decree or partial decree or award expenses. All four sanctions have been used intermittently, but only for repeatedly obtrusive behaviour. Observations revealed consistent judicial encouragement for parties to co-operate with each other, and with the court - at times with little effect.

The increase in late lodgements and compliance indicates that penalties against legal professionals should be re-considered. The same sanctions are available on the Ordinary Roll. But it is suggested that the different type of behaviour expected should be

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119 Costs Practice Direction, Lord Chief Justice and Vice-Chancellor 1 February 1999, effective 1 March 1999
120 as in George Crolla v The Prudential Assurance Co. Ltd. 11 March 1996 Defender’s late adjustments refused - they had been given three opportunities to amend, the last interval being 6 weeks.
supported by automatic and/or more forceful sanctions. When the judge could not remit a case off the Commercial roll of his own volition, he could not exclude from process intransigent unco-operative parties who abused the opportunity of a fast track process. At times, however, tangible judicial frustration broke a deadlock:

- After repeated requests for the first and second defenders’ law firm to set out full answers in pleadings

  "There is very little I can do but put a plea that litigants to act responsibly...take the message back to your firm that it will not do....We need a positive contribution....If I can increase the interest and expenses I might, but it may be outwith the scope of my power".

A break of two hours was arranged, by which time the first and second defender conceded causation and proof was restricted to quantum. Pleas were adjusted and agreed at the hearing.121

12. **A User Committee established to review the rules in operation, to be used as a channel for comments**

Since it was recognised that the new procedure would evolve in practice, a committee was established in 1994, benefiting from experience of judges, counsel, agents and commerce. It is a lively and genuinely interested group, gleaning issues of concern from colleagues, but not widely advertised.

13. **Information technology to provide research information**

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121 Russell v Health Collins Haldane 22 March 1996 By Order
Although the I.T. system supports the timetabling of judicial time, several problems have arisen within the system and upgrading has added complications, currently restricting the level of research.

15. *Publication of an information booklet for users*

A booklet was sent to 500 Scottish commercial companies at the beginning of the pilot scheme in 1994. Since 1998 information published on the internet has provided parties, legal advisers and students with access to the rules and judicial decisions. However there has been no active promotion of the procedure. In particular there is no Guide to judicial interpretation of the rules, the importance of which grows with the number of judges and administrators involved. It may be argued that the golden threads of continuity, consistency and certainty should be woven into a more visible and accountable structure. The expectations of clients and representatives require to be shaped. A constantly up-dated Guide provides the framework for both judicial and professional boundaries of behaviour, demarcating the extent of judicial discretion and tolerance.

According to practitioners, the Commercial Court can be an arduous (some same ferocious) arena. But the new system may need more teeth to continue to capitalise on early success, and to sustain the speedy justice system which currently serves fast, sophisticated and competitive business interests.\(^{122}\)

\(^{122}\) Chart 9
Chapter 6

Chart 6.2

Number of Preliminary Hearings per Case

Cases Study 1

Cases Study 2

Number of Cases

Preliminary Hearings per Case - Study 1 and Study 2
Comparison of Disposals at Three-Month Intervals - Study 1 and Study 2
Procedural Hearings per Case - Study 1 and Study 2

Number of Hearings per Case

- Study 1
- Study 2
Chapter 6

Chart 6.5

Time from Allocation of Debate to Hearing

Number of Weeks Between Allocation and Debate

Number of Cases
Commercial Actions - Types of Hearings - Study 1 and Study 2

- Study 1 %
- Study 2 %

- Preliminary Directive
- Preliminary Continuation
- By Order Hearings
- Motion Motions
- Ex-Proprio Motu
- Unstarred Motions

Chart 6.6

Chapter 6

Percentage of Hearings

0 10 20 30 40 50 60
Scottish Commercial Actions - Judicial Community Study 1 and Study 2

Chart 6.7

Lord Penrose: 83%
Lord Hamilton: 53%
Lord Coulsfield: 77%
Lord MacSweeney: 23%
Mixed Judicial Involvement: 6%
Judges: 11%
CASEFLOW MANAGEMENT in the
COMMERCIAL COURT

New Game, New Masters, New Moves

In Chapter 5 the ambitions, fears and theoretical prophesies for caseflow management were set out. What are the realities?

The Scottish Commercial Court houses the most intensive form of caseflow management – the judicial docket – where there is management over the developmental stages of a case to adjudication, generally by the same judge. The system was begun as an ambitious pilot project in 1994 when Lord Woolf’s recent examination of the English civil process was conceived. It has benefited from the sustained enthusiasm of a small number of judges in the Court of Session where it remains as an optional procedure. Breaking the traditional mould has inevitably caused clashes, contests and casualties but there have also been concessions.

Styles of management inform the practical response to new rules. An analysis involving empirical data¹ and direct observation of hearings in open court show the effect the new rules have had on different aspects of litigating practice:

1. The overall aim of management

2. Judicial discretionary power:
   (a) influencing development of a case
   (b) experts

¹ Appendices 6.5.1 and 6.5.2
(c) disclosure
(d) remaining on the roll
(e) controlling focus
(f) effect on the client

3. Pressurising the opponent
   (a) using the judge
   (b) disclosure
   (c) tactical innovations
   (d) negative and positive advantage

4. Mutual indulgence
5. Continuity of counsel
6. Settlement negotiations
7. Ghost bookings
8. Judicial guidance or pressure
9. Procedural lay-by
10. Balancing costs with expediency
11. Written pleadings in the Commercial Court
12. Lodgments into court
13. Witness Summaries

Styles of Management

Grafted into an adversarial jurisdiction, the adversary in the Commercial Court has at times been the judge. He has continuous responsibility not only for balancing access, expedition, equality and fairness between individual parties, but also a duty to the public at large in repudiating unnecessary work and abuse of process. As the judge grows with the case, expensive time is not wasted rehearsing historical facts at every hearing, and a more informed base for judicial opinion emerges after observing the litigation as a
The traditional judicial role of guarding and developing legal principle is therefore augmented by a far wider discretion to evaluate ongoing litigating behaviour.

In a judicial docket system the judge’s background, personality, agenda, intellectual virility and stamina become additional independent variables in the subculture of procedural manoeuvring which underpins a new fashion in litigating practice. The judge becomes an obstacle to unfettered autonomy, in some cases a target. In Scotland he is protected from personal slander by the ancient crime of ‘murmuring judges’, but his reputation reaches out to shape expectations in the court room.

Studies have been undertaken on the impact of judicial personality on decision making. From 1984 the California Center for Judicial Education has organised courses on styles of judicial fact-finding and decision-making. Objective measurement of the cognitive and judgmental functions of 1,340 American judges have so far been analysed, identifying broad personality traits which repeatedly impact on judicial decision-making. Several different types are distinguishable, and although most judges reflected a composite mixture, 62% fell between:

- Controlling executive types, organisational leaders who expect as much from others as they expect from themselves, are equally harsh on all, impatient with procrastination
- Listeners, those who listen more, are as tough as the above, but never seem that way as they communicate their consideration for others

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2 Judicial Opinion North East Ice & Cold Storage Co. Ltd. v A. Third 23 February 1998 Lord Penrose
3 Stemming from Judges Act 1540 c.22 (repealed) HMA v Robertson 1870 42 Scottish Jurist 356 - one month imprisonment and £50 fine for slanderously criticising Sheriff in letters to the Home Secretary and Lord Chancellor (see also Stair Memorial Encyclopedia Vol 5 para 667 and Vol 7 para 546
4 J. W. Kennedy Jnr, Presiding Judge San Bernadino County Trial Courts, Personality Type and Judicial Decision Making (1998) 37 The Judges’ Journal 5-10
5 The motive behind the information-gathering was to enlighten the judiciary on “the extent to which their own biases affect their evaluations of the lawyer and ultimately the lawyer’s case.”
6 The Myers-Briggs Type Inventory (MBTI) scheme - psychometric test categories. Preferences for Extroversion or introversion; Sensing or intuition; Thinking or feeling; Judging or perceiving
• Reformers, productive contributors to change, at times unrealistic planners

• Leaders of mass movements, inspiring others to join in

Over the course of the first four years, observations and notes were made at Commercial Court hearings, indicating that styles of management differed between four judges observed. The flexibility and informality of the rules allowed each judge to adapt his response not only to procedural requirements, but also to different levels of perceived resistance and co-operation of clients, experts, agents and counsel individually involved. Resistance met with resistance, but judicial acceptance of explanations and excuses was subjective. Some judges exerted a tight grip while others exercised more latitude. While all aim at gaining the co-operation of parties, thresholds of tolerance differed when both listening to and directing parties.

While one judge could display a particularly intimidating front on a regular basis, as and when perceived necessary to nudge parties along, other attitudes were reminiscent of a slow burn rather than a quick fuse. Preparation, punctuality and decisiveness were more precise with some, although it is obvious that all worked unsocial hours, giving up weekends and evenings to preparation. Experienced representatives openly anticipated a judge’s reputation for forensic analysis and incisive questioning, quicker to exploit more traditional (as opposed to pioneering) outlooks. One particular judge’s interrogation has breached a wall of silence on several occasions where repeated questioning, supported by the strength of his personality, has forced answers from evasive parties. Another judge, a quieter personality, appears to have experienced more noncompliance with deadlines. A third judge tends to become involved in discussions, appearing to take the role of an advisory senior counsel, at times ‘tutoring’ parties through complex legal territory and factual analysis, whereas the fourth judge

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7 The Commercial Court deals with urgent work only for 8 weeks, otherwise there is no vacation period. To take account of extra workload hearings can be arranged outwith 10am – 4pm court hours. Only recently have the occasional ‘writing-up’ days been included in the calendar.

8 John G. Russell (Scotland) Ltd v Heath Collins Haldane Ltd. 22 March 1996 Lord Penrose; Stirling Aquatic Technologies Ltd v Folksam Ornessidg Saktforsakring 3 March 1997 Lord Penrose; Shetland Marine Salmon Fisheries v Patrick Brogan Lord Penrose (details within this Chapter)
tends to write more explicit interlocutors with decisive strategies mapped out. The four judges therefore enter the arena in different guises and individual perspectives - as master, umpire, executive director or chairman.

One judge began with incisive questions, and over the course of both study periods was increasingly observed interrupting counsel’s presentation to comment, correct and give his views. By contrast another’s hearings were generally notable for their lack of commentary and long silences. While the former advised counsel what the opponent’s reaction could be to a proposed course of action, mapping out a possible game plan, the latter generally listened to one and then the other alternately with little comment before summing up and giving his views at the end. This meant that the former took a more interactive role in shaping decisions in shorter hearings while the latter allowed parties to talk their way through to each other, which led to half hour bookings repeatedly over-running time. More continuations also occurred with the latter.

The third judge’s approach was integrative, advising parties of their options through balance of conversation, more akin to a meeting between senior counsel. It is arguable that two of the judges involved had a higher personal investment in making a success of the system and the rules which had been drafted by them. In this circumstance it could be argued that their management strategies might reflect a wider agenda in making a success of the radical changes required in attitudes and behaviour as well as upholding the rules. Since the first study period (the fastest) was dominated by one judge, the influence of the four styles was more obvious in the second period, although the second empirical analysis is qualified by the increased mix of judges involved in individual cases.
Continuity Between Judges

The extent to which the judges became involved in early discussion of evidence differed. However, due to the collegiate nature of their remit and geographical proximity in adjoining court rooms (and chambers), inconsistency of procedural directions in mixed cases was not apparent. The two successive full-time judges dominated the bulk of work. Consultation between judges was obvious. Only in one action did a judge voice the view that issues for preliminary proof should be formulated outwith the summons, while another considered that it was more difficult to read the case from the summons and two notes of procedure.

What is clear from observations, corroborated by the following extracts, is that judicial management cut time to resolution dramatically. While the most determined parties were in turn guided, advised, persuaded, threatened and cajoled, ultimate control remained within their grasp. Obtuse and cosmetic submissions waste time and money, but seem to be the natural order of competitive combat. There were many examples which showed that adversarial principles survived - parties do ultimately have control of the pace of their case, although one counsel who had built up a reputation for non-conformity, correctly anticipated a bruising encounter with the judge, remarking prior to the hearing “at times I feel pursued”.

The Common Judicial Aim

The judge’s role is to establish a structural and logical framework into which factual and legal issues may be ordered. Parties were repeatedly advised to “take a commercial view” of the resolution of their dispute, particularly where a new phase of factual

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9 Bradford & Bingley Building Society v Thorntons plc 17 July 1998 Lord Hamilton. Discussion of evidence before fixing debate for which no immediate time was available.
10 R. Curry Ltd. v Johnson Control Systems Ltd 25 February 1997 Lord Hamilton
11 3 March 1997
The investigation would be expensive. The ultimate aim of the court is "complete candour" which is not to be interpreted "just short of openness".

Complexity is no bar to judicial management, but there are limits to the resources which can be bled from the court system by some multi-party cases. One defender successfully argued that the combination of complex factual issues, lengthy reports required from three types of experts, detailed investigations and written pleadings justified in a multi-party professional negligence case was not suitable for the Roll. But an objection to transfer an action on the grounds that "an incremental approach" to the development of written pleadings and disclosure was necessary was dismissed. In the latter case, it subsequently transpired that objecting counsel was having difficulty getting instructions. Once this fact was made known to the judge, allowance was made for this underlying destabilising circumstance which might have remained concealed on the Ordinary Roll with counsel using delaying tactics to cover up for the lack of instructions.

Judicial Discretionary Pressure

The Rules of Court allow the Commercial judge latitude to govern litigating behaviour which none of his other contemporaries on the bench enjoy. Apart from Rules 47.11 and 47.12 which set out his discretionary options, he is awarded considerable latitude by

Rule of Court 47.5

"The procedure in a commercial action shall be such as The commercial judge shall order or direct" AND

Practice Note No. 12 1994

"The procedure in, and progress of, a commercial action is under the direct control of the commercial judge. He will be proactive"

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12 Baird & Stevenson Ltd v Stirling Stone Management Ltd 27 January 1997 Lord Penrose
13 G. Crolla v Prudential Assurance 17 March 1997 Lord Penrose
14 PIK Facilities v Scott Wilson Kilpatrick & Partners 28 March 1996 Lord Penrose "Because of the sheer complexity, I have no confidence I would be able to manage the case"
Although the hope remains eternal that parties will co-operate in informal exchange of information, judicial muscles may be flexed on an ad hoc basis to facilitate the early disgorgement of facts while they are aware of market sensitivity over specific disclosure.\(^\text{16}\) The danger of using judicial pressure for procedural matters, which the rules allow, lies in their interplay with substantive issues. The judge must take care that in using his discretionary powers to direct procedure he does not control substantive evidence by directing specific investigation and thereby controlling the issues in dispute. This is an anathema to underlying adversarial principles. Some argue that limiting adjustments, amendments and timetabling preparation is equivalent to controlling substantive evidence anyway. But the boundary is most in danger of being breached when judicial experience forecasts areas of dispute\(^\text{17}\) or suggests that there are gaps in evidential facts already provided,\(^\text{18}\) eager to cut out "unnecessary meanderings".\(^\text{19}\) Forestalling wastage of time and expense on appeal points, judicial withdrawal from decision-making over substantive issues in dispute has been meticulous:

\[
\begin{itemize}
  \item "I want detailed answers now for fair notice...... but ......I am concerned – the more I press for answers, the more I am provoking new questions...There is a risk of my taking over, which is not the idea at all." \(^\text{20}\)
  \item Early in the history of the procedure, when counsel for the defenders requested a judicial guidance on the limit, breadth and format of evidence, such suggestions were discussed, and time was given to consider and discuss them with clients.
\end{itemize}
\]

\(^{15}\) Ireland Alloys Ltd. v R. Dingwall & Ors. 17 February 1997 Lord Hamilton

\(^{16}\) Sterling Energy Equities Ltd v Scottish Hydro Electric plc 2 May 1996 Lord Penrose

\(^{17}\) North Anderson Cars (Perth) Ltd v Dalgleish 24 February 1997 Lord Penrose

\(^{18}\) "What is the period specified, is the loss accrued evenly or flow, does it take account of the whole activity" Simmers Ltd v Canadian Imperial Bank of Commerce 11 March 1996 Lord Penrose; "Where is the architect’s certificate...? Surely it will decide the case." Lord Penrose; "There are bound to be sketches and annotations." Baxter Clark & Paul v Tulloch Construction Group Ltd. 17 July 1998 Lord Penrose

\(^{19}\) Pearce Signs Scotland Ltd v Optical Express Central Ltd. 6 July 1998 Lord Macfadyen

\(^{20}\) Lecol Engineering v Lincoln (UK) Ltd. 13 January 1997 Lord Penrose
However the judge declined to "become to deeply involved – I don’t have enough information".21

This is typical behaviour of the judge - to suggest expedients for inter-party discussion and decision, at times using more strong language than at others, but never to issue orders or make the ultimate choice.

Influencing Development

The early classification of legal issues in dispute by the judge is potentially problematic, particularly when opponents do not co-operate, either with each other22 or with the court.23 Judicial insistence on identifying core issues shapes the procedural pathway,24 but intervention is particularly tempting if it is suspected that parties are not applying their acumen to court procedure but using it as a backdrop to negotiations.25 In one instance a continuation was allowed without intervening orders, although the judge’s early opinion on the issue, was divulged.

Over time and with different judges, the type, quality and availability of evidence is increasingly discussed at Preliminary26 and Procedural27 hearings, occasionally lengthening hearing time to double28 or triple29 the time allocated, affecting subsequent

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21 Hiram Walker & Sons Inc, v The Drambuie Liqueur Co. Ltd. 24 March 1997 Lord Penrose
22 Royal Bank of Scotland v & ors 4 March 1996 10 representatives differed in their views, Lord Penrose asked for views on isolating a specific core issue “I feel that guidance of the parties is needed”
23 M. Hutchison v G. McBain & Ors and R. P. McLeod v G. McBain & Ors. Lord Penrose twice asked for defender’s position on what he considered to be the core legal issue
24 Edinburgh Grain Ltd v Marshalls Food Group Ltd 21 March 1997 Lord Hamilton’s criticism of pleadings – confusing, uncertain and unsatisfactory. “there should be adjustment of defender’s plea”
25 Edinburgh Grain Ltd ibid “Court has responsibility for legal issues in the case...I am not inclined to go on until we have an appropriate baseline”
26 Carl Bro Ltd., v Bellrock Construction (Scotland) Ltd. 17 February 1997 Lord Hamilton; R. S. Brown v Libris Computing Ltd. 26 February 1997 Lord Hamilton; Konsberg Simrad Ltd. v Fugro Gooteam Ltd. 22 June 1998 Lord Hamilton
27 Edinburgh Grain Ltd. v Marshalls Food Group Ltd 21 March 1997 Lord Hamilton, Defender requested a debate but judge stated clarification of facts were required. “I suspect we will not get to the legal position until we get to the factual position – let me understand, apart from the legal argument, what is the defender’s position in relation to the rest of the case?”
28 MRS Hamilton Ltd v Keeper of the Registers 1 July 1998 Lord Hamilton
parties. Some judges do not want to become involved in details prior to a substantive hearing, interested more in whether “complete disgorgement” has taken place

Managing a multi-party case, pulling together the scope of issues, the judge ordered lodgment of a joint agreement and witness summaries, and gave directions for procedure, but refused to discuss the issues “I don’t want to get into details now… It’s not worth my while.”

Others have entered into the arena to assist parties and further procedural decisions.

This type of intervention flags up a dangerous trap for the judge when judicial muscle is not exercised distinctively and decisively over procedural issues – the danger of being drawn into substantive issues, approaching the quagmire of perceived partiality, which Professor Resnik highlighted as the greatest pitfall of caseflow management. In some instances it is the individual judge’s interpretation of his role and his integrity which balances him on the tightrope between procedural and substantive involvement.

Cases of interim interdict necessarily involve more discussion of substantive issues:

In a dispute over the limits of a servitude right of access to a supermarket, the judge was sceptical of apparent “cosmetic measures” which a party had taken in deference to a previous interlocutory order, but as a holding mechanism, leaving access in tact prior to a quick debate on legal issues, he acknowledged that “this week has served

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29 Cosar Ltd v UPS Ltd. 25 June 1998 Lord Hamilton
30 Shorrock Ltd v Tarmac Construction Ltd & Ors 24 February 1997 Lord Penrose; De Montfort Insurance Co. plc v Robert McNeill & Ors 24 September 1996 Lord Penrose ordered 4 weeks to admit or deny specific substantive points “I don’t need to know until your reappearance but others do”
31 3rd March 1997 2 pm Lord Penrose
32 Shorrock Ltd. v Tarmac Construction Ltd & Ors 24 February 1997 Lord Penrose
33 Classic House Development Ltd v GD Lodge & Partners 22 June 1998 Lord Macfadyen discussing clarification of issues and pursuer’s hypothesis questioned; 5 October 1998 2pm Lord Macfadyen’s opinion on irrelevant issues when defending counsel changed.
34 R. S. Brown v Libris Computer Ltd 26 February 1997 Lord Hamilton
35 see Chapter 5
the purpose I intended”. The open scepticism surely flagged up for counsel the way the wind was blowing.36

Experts

Regularly action dates are provided to engender a focus for preparation,37 and check progress.38 Timetables, which are set in consultation with representatives,39 have to have “a reasonable prospect of success”;40 particularly where experts are concerned. The difficulty of accommodating experts into timetables is offset against material prejudice to parties if they are not available. However requests to extend the established timetable and interrupt judicial continuity solely to accommodate expert testimony must be fully justified. Judicial interrogation of counsel during one extended hearing revealed that he was being asked either to transfer the Proof to another judge or postpone it for six months to accommodate expert testimony which counsel had not obtained prior to booking Proof. “I am appalled that you have reached this stage and you have no statement.” The backlash is measured against alternatives available. In this case affidavit evidence or a joint minute on regulatory practice were considered viable alternatives - “You will make it work within the framework.”41

Flexibility can be built into timetables where there is deemed justification. Some parties have even been able to request extensions of dates for compliance or hearings through informal contact with the judge’s Clerk.42 This means that Proof diets are not

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36 George Sharkey & Ors v Kwik-Save Stores Ltd. 24 September 1996 Lord Penrose
37 Franborough Properties Ltd v Scottish Enterprise 27 January 1997 Lord Penrose
38 Alfred Stewart Properties Ltd v Richmond Homes (Scotland) Ltd. 6 July 1998 Lord Macfadyen
39 W. J. Murphy v Marc O’Polo Clothing (UK) Ltd. 22 June 1998 Lord Macfadyen “bearing in mind the work expected. I am open to persuasion on time”………“how does the defender feel?”
40 Co-operative Wholesale Society Ltd v Scottish Pride Ltd. 10 March 1996 Lord Penrose; Pearce Signs Scotland Ltd v Optical Express Central Ltd. Lord Macfadyen
41 Hiram Walker & Sons Inc v The Drambuie Liqueur Co. Ltd. 29 September 1996 Judge Csuggested affidavit evidence, the opposing party suggested a joint minute on regulatory practice.
42 George Crolla v Purdential Assurance 17 March 1997 Lord Penrose
granted if the judge agrees that more preparation work is required to clearly identify in dispute.43

Affidavit Evidence

Using lodgment of affidavits to replace oral evidence is a useful mechanism to cut time and expense, although little used in reality, reflecting different judicial opinions of their usefulness and viability. However, if parties appeared to have difficulty in committing to their position, the threat of a judicial order for affidavit evidence to be lodged simultaneously by each party has been used to unblock communication and fracture counter-productive attitudes.44 Where an ambivalent ‘stand-off’ between opponents was suspected, with neither willing to disclose material, the ordering of affidavit evidence from both sides on the same day could short-circuit procedural posturing.45

However, when counsel suggested the use of affidavit evidence in order to deal with mechanical evidence, this was postponed until further preparatory work was complete, because of the possibility of incurring expense and “a great deal of time and trouble”.46 One other judicial view was that affidavits were extreme measures, going beyond precognitions, and destroyed the spontaneity and assessment of evidence at proof.47 Few cases used affidavits to lodge agreed matters of fact,48 although the possibility was regularly discussed. Affidavits therefore were arguably of more use to the judge in exerting pressure to disclose evidence and there was some resistance to replacing oral testimony with paper submissions.

43 J. K. Turner v Norwich Union Fire Insurance Society Ltd. 4 March 1996 Lord Penrose; Baird & Stevenson v Stirling Stone Management Ltd. 27 March 1997 Lord Penrose
44 Simmers Ltd v Canadian Imperial Bank of Commerce 11 March 1996 Lord Penrose
45 British Aerospace v PIK Facilities Ltd. 26 April 1996 Lord Coulsfield
46 20 January 1997 Lord Penrose
47 20 January 1997 Lord Penrose
48 Strathclyde Joint Police Board v Prestwick International Airport 27 March 1997 Lord Penrose

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Disclosure

Building the framework for disclosure, a co-operative and informal approach to recovery of documents was preferred. Prevarication wasted time, money and resources. Lengthy and expensive formal specification and commissions, upon which Ordinary Roll parties rely, are held in reserve, at times as threats against half-hearted or diffident compliance. However, repeated failure to foreclose discovery and respond to informal requests and interlocutory orders for documents can lead to exasperation of the opponent and the judge, extra appearances and constant court attention to sustain pressure.

“There must be openness and frankness and full documentary disclosure on issues parties are going to pursue. Using a huge amount of clients’ money and court time is bordering on abuse of process to approach disclosure in this way.”

Squaring up to judicial muscle by challenging his power to dismiss an action for non-co-operation over disclosure has not been successful.

By encouraging parties to divulge information, an attempt can also be made to pressure experts, through agents, with a judicial deadline, particularly where multiple experts or small sums are involved, and even more so when it is suspected that the litigation is spurious exercise designed as a backdrop to negotiations. Where target dates depend on expert reports, parties have been involved in discussing realistic deadlines, and the

49 J. Paul v A. L. Ogilvie 24 February 1997 Lord Penrose
50 Century (Homes) Ltd v Blackadder Reid Johnston & Ors 3 March 1997 Lord Penrose - counsel acknowledged to his colleague that judicial pressure resulted in a shorter procedure time than usual
51 Lecol Engineering Ltd v Lincoln (UK) Ltd. 24 March 1997 Lord Penrose
52 Shetland Marine Salmon Fisheries v P. Brogan 3 March 1997 Lord Penrose Parties were reminded of his specialist powers under ROC 47.11 (1)(b)(iv) & (v), 47.16(b), supported by the all-embracing rule 47.5
53 Co-operative Wholesale Society Ltd. v Scottish Pride Ltd. 10 March 1996 Lord Penrose
54 John Smith v Sunblest Bakeries Ltd 18 March 1996 Lord Penrose
55 Pearce Signs Scotland Ltd v Optical Express Central Ltd. 6 July 1998 Lord Macfadyen
decision to include obligatory dates for exchange and lodgement of material through interlocutory orders.\textsuperscript{56}

\textbf{Remaining on the Roll}

Although not all representatives seemed to be aware of the extent of judicial powers, regular threats to propel recalcitrant parties to the Ordinary Roll \textit{“to adjust to your hearts’ content”}\textsuperscript{57} were virtually empty threats since the judge was fully aware that initially he had no power under the new version of the rules to remit a case out of the Commercial Court. He had to wait for (or suggest that) at least one party lodge a motion to transfer out.\textsuperscript{58} This was a particular source of judicial frustration, although it ensured that the Commercial judges could not pick and choose the most interesting cases and co-operative parties, skewing the success of the management project. The choice remained with parties, and some cling to the Commercial procedure despite the heaviest hints to do otherwise:

\begin{quote}
\textit{“If there is a lack of candour in the factual basis of either parties this is a waste of time ...why are you here?”}\textsuperscript{59}
\end{quote}

However the judge cannot retain a case against both parties’ wishes. When one insisted on leaving litigation for arbitration, even though the judge considered there was an intermediary legal issue, he had no option but to sist the action.\textsuperscript{60}

\textsuperscript{56} 17 March 10.30 am Lord Penrose  
\textsuperscript{57} North East Ice & Cold Storage v J. Third and A. Third 13 January 1997 Lord Penrose  
\textsuperscript{58} Rule of Court 47.9 (1)(a) or (b)  
\textsuperscript{59} North East Ice & Cold Storage v J. Third and A. Third 13 January 1997 Lord Penrose  
\textsuperscript{60} Drake & Skull v City of Glasgow Corporation 8 July 1996 Lord Penrose
Controlling Focus

Flexible response by the court to individual needs is the key to Commercial procedure. Where progress has slowed up but both parties have flagged up several debate points, the offer of a quick one-day debate, within 17 days, has rejuvenated the focus - "if it helps the case it is worthwhile." However, at times a period for reflection is thought beneficial, particularly after there has been a full discussion of procedural choices, including instructions to weigh the benefits of multiple representation against potential common interest.

The Effect on Clients

Legal representatives bear the brunt of judicial frustration, although it is recognised that clients' instructions may conflict with efficient resolution. Bringing related actions together is a common suggestion, short-circuiting the exploitation of optional jurisdictions "to float processes around in different parts of the court system." Representatives have been advised to "take parties in hand" or bring them into court to listen to the judge's views of their exhuberant litigating behaviour.

The most efficient use of judicial time is dependent upon lodgment of papers in advance. Judicial management can be obstructed by withholding information until a hearing.

61 Prentice v Scottish Power 8 July 1996 Lord Penrose
62 De Montfort Insurance Co. plc v Robert McNeil & Ors 24 September 1996. Lord Penrose Transfer on to the Commercial roll - 5 defenders, 7 representatives were present at the hearing. Lord Macfadyen wished to establish if there was a common interest
63 Profab Engineers & Contractors v Seacabs Norge A/S 20 October 1997 Lord Hamilton; Judicial opinion North East Ice & Cold Storage Co. Ltd. 23 February 1998 Lord Penrose "Selective disclosure...has been nothing short of reprehensible...it is clear that the pursuers were deliberately obstructive"
64 North East Ice & Cold Storage v J. Third and A. Third 22 March 1996 Lord Penrose
65 J. Fraioli v B. Thomson 17 March 1997 Lord Penrose "It is absolutely essential all issues should be brought together and considered"
66 J. Fraioli v B. Thomson 17 March 1997 Lord Penrose
67 Gibson v Napier 20 October 1997 Lord Hamilton Updated pleadings and Note of proposed procedure intimated to opponent but not lodged, and defender unprepared to respond to questions "I mark my concern by making neither able to recover against the other the expenses of today's proceedings"
The judge has to work blind, reliant on parties to inform him if adjustments and amendments clarify and focus issues, and/or postpone judicial decisions for another hearing. Observations show that extra hearings were caused by parties withholding information requested and required for management decisions, thereby reclaiming procedural control.

"How do you expect progress if you are ignoring interlocutory orders? It is hopeless sitting over the weekend and deciding on procedure if no proposals are lodged. Come back when you have complied and I have had an opportunity to look at them in advance." 70

The observations are borne out in the empirical findings of the second study period.

Pressurising the Opponent

Using the Judge

Opponents may attempt to use the judge as a conduit to gain information and to progress the case, but there is a price to be paid for enlisting his aid - the information highway runs both ways.

"If you want my help, you must realise there is openness and frankness in the Commercial court." 73

69 17 February 12 noon Lord Hamilton
70 Gibson v Napier 20 October 1997 Lord Hamilton
71 Ireland Alloys Ltd v R. B. Dingwall & ors 21 March 1997 Lord Hamilton
72 Profab Engineers & Contractors v Seacabs Norge A/S 20 October 1997 Lord Hamilton Pursuer requested court orders to expedite procedure, focus issues and detail the statements required, although the judge criticised the pursuer's disclosures to date
73 Lecol Engineering v Lincoln (UK) Ltd. 13 January 1997 Lord Penrose
When a party asks for clarification of written pleadings at a hearing in order to pre-empt "a debate point" judicial interrogation of his opponent means that considerable time and expense may be saved and tactical advantage of semantic ambiguity can be explored and defeated.\textsuperscript{74} Filtering requests through the judge may therefore expose the weaknesses of an opponent’s case\textsuperscript{75} - weaknesses which can be addressed early on and not remain hidden through years of adjustments and amendments.

 Disclosure

The practice of withholding information from each other until the last moment is also discouraged –

\begin{quote}
"It is a disaster lodging material one week before a hearing and the other side has no time to respond."
\end{quote}

Attempts to gain advantage by withholding documents until after an opponent’s papers are lodged has been questioned and disapproved in the Commercial Court, although it remains unfettered practice on the Ordinary Roll.\textsuperscript{77}

Tactical Innovation

At times parties have been particularly inventive in forestalling early resolution. Where mirror actions were combined for hearings (the pursuer and defender reverse roles in a second related action) difficulties were created when one party wished to reclaim a opinion issued in one action the related case was amended. In \textit{New Hearts v}

\begin{footnotes}
\item[74] Costain v O’Rourke 8 July 1996 Lord Penrose
Edinburgh Grain Ltd v Marshall Food Group Ltd. 26 February 1997 Lord Hamilton
\item[75] British Aerospace v PIK Facilities Ltd. 26 April 1996 Lord Coulsfield Allegations of obscure and ambivalent summaries and motion for defender to lead at proof led them to suspect that the pursuers had little evidence
\item[76] Franborough Properties Ltd v Scottish Enterprise Lord Penrose 27 January 1997
\item[77] Shetland Marine Salmon Fisheries v P Brogan 3\textsuperscript{rd} March 1997 Lord Penrose
\end{footnotes}
Cosmopolitan a discussion over the legitimacy of judicial leave to appeal a summary decree revealed that all related actions would "go into limbo" to await a decision by the Inner House,\(^7\) causing a delay which the opposing party was anxious to avoid. After discussion with the judge and one day's reflection, however, the decision was not reclaimed, but the losing party twice followed delivery of payment made in response to the summary decree by simultaneous arrestment on the dependence of the related actions. At a further hearing this tactical move to keep pressure on the opponent was discussed and blocked, and a record made for penalisation by expenses at the end of litigation.\(^7\)

Experienced counsel have also at times been inventive in forestalling judicial involvement while maintaining pressure on opponents. At one interim interdict hearing settlement discussions were supported by a qualified undertaking given by a party, terminable on seven days notice. Although the judge commented that the qualification was "somewhat heavy-handed" he did not interfere in the settlement process.\(^8\)

On the other hand, the judge may act as a bridge to circumvent tactical withdrawal. When one party threatened to go into sequestration in order to avoid the litigation, the trustee in sequestration was allowed to step directly 'into his shoes' with the consent of the opponent, thereby avoiding extra delay or expense.\(^9\) Previous work was not lost.

**Negative and Positive Advantage**

"The flexibility of the procedure is more like a test of stamina,"\(^10\) and there is both negative and positive advantage to be gained within the new rules. Some representatives work against the system to gain advantage from negative behaviour. For example, the most effective way to pre-empt the judge being used as a conduit is to lodge documents

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\(^7\) 28 March 1996 Lord Penrose

\(^8\) New Hearts Ltd v Cosmopolitan Ltd. 23 April 1996 Lord Penrose

\(^9\) Britel Fund Trustees v Wilson Distributors (Scotland) Ltd. 14 March 1997 Lord Penrose

\(^9\) Scottish Metropolitan v Reid 11 March 1996 Lord Penrose
only at the Bar after intimating them to the opponent; the most effective way to pre-empt the opponent is not to lodge papers at all – or late. The most effective way to retain control is to interrupt continuity and consistency of judicial supervision. On the other hand experienced representatives who are well prepared, organised and come to court with a ‘shopping list’ of needs gain the initiative and the positive advantages of working with the system. Over time some have built a reputation for their thoroughness while others are regular transgressors. This is pure behavioural psychology. Although there is no overt favouritism, and no specialist Bar, those who work with the system additionally benefit from a relatively calm passage, arguably building a rapport which assists their client. From observation, this does not seem to be dependent on individual cases, representatives, firms or the perspective of pursuer or defender, but rather on the individual representative’s attitude and perceived commitment to the new court.

**Mutual Indulgence**

There have been noted instances where counsel have agreed to support each other before addressing the judge. Mutual indulgence oils the wheels of a collegiate body, but may be to the detriment of smooth process, and is exposed when a managing judge is well informed, prepared and motivated to inquire why reports were lodged a day before a hearing while parties’ had held them for six weeks. “Lost in the post”, “gremlins in the system” and “problems with file-flitting” have been offered as explanations why a judge has not been given information either before or during a hearing.

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82 Counsel - R. Curry Ltd v Johnson Control Systems Ltd. 25 February 1997
83 Profab Engineers & contractors v Seacabs Norge A/S 20 October 1997 Lord Hamilton
84 MRS Hamilton Ltd v Keeper of the Registers 1 July 1998 Lord Hamilton
85 Albion Drilling Services v Clingston Ltd 6 July 1998 Lord Macfadyen, experienced representatives led the discussion, with the Lord Macfadyen able to take a chairman’s co-ordinating role
86 Highland & Universal v Safeway plc 4 February 1997 Lord Penrose
87 Baird & Stevenson Ltd v Stirling Stone Management Ltd 27 January 1997 Lord Penrose., pursuer had held them for 4 weeks, defender for 2 weeks

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In one action, statements for further procedure, a list of witnesses and issues to which they would speak were not lodged although parties insisted they were "both at one on further procedure," exposing one attempt to pre-empt management decisions. Although inter-party consultation and informal agreements on further procedure were generally encouraged, they were not accepted as substitutes for written clarification of issues lodged in advance, particularly where proof had already been agreed. Drifting towards open-ended Proof was not allowed.

"It is of some importance for parties to identify precisely the material terms they say existed": 89

Many representatives were taken aback from the outset by the thoroughness of judicial superintendence of interlocutory orders. For example, direct contact between the Scottish Legal Aid Board and the judge’s Clerk of Court revealed that although parties had been ordered to "apply forthwith" to the Board, the judge was aware if they did not do so, 90 imparting transparency to standard excuses used on the Ordinary Roll. The increased caseload and administration required in the busier Commercial Court makes these checks and balances difficult to maintain although with increased mix of judicial involvement the administrative checks are even more important.

It is not unknown for counsel to shield each other against judicial criticism. 91 Pre-court agreement between parties, for example to postpone a hearing for counsel availability, 92

88 Somervail Computer Services Ltd v The Referendum Party Ltd. 18 March 1997 Lord Hamilton - Parties requested a three-day proof before the material terms of the dispute were exposed
89 R. Curry Ltd. v Johnson Control Systems Ltd. 25 February 1997 Lord Hamilton
90 Lujo Properties Ltd v M. I. Green & Ors 20 December 1996 Lord Penrose "If.....fails to submit a legal aid application or if the application is delayed or unsuccessful I would be obliged if you would notify me before that date"
91 Profab Engineers & Contractors v Seacabs Norge A/S 20 October 1997 Lord Hamilton "My colleague is doing what he can—it is difficult for him to get instructions”.
92 Shoprite Group plc v KwikSave Stores ltd. 27 September 1996 Lord Penrose
or to request time for investigation, specification and adjustment,93 is the foundation of collegiate reciprocity. Mutual indulgence is a natural phenomenon which oils the wheels of court practice.

**Continuity of Counsel**

Commercial time is guaranteed priority booking. Counsel are expected to come to court with diaries in order to fix future dates and times for hearings. Most recognise the benefits of precise hearings, and give precedence to commercial cause bookings.94 Where changes are requested by counsel, prejudice and inconvenience to opponents and the court throw into relief the different priorities and perspectives of those involved. When one party specifically chooses the procedure for speed, delays in last minute rescheduling caused by an opponent’s mistaken diary entry force the court to evaluate its own powers to demand replacement of long-standing counsel. Since there was only a short interval between hearings in one particular case,95 it was postponed to accommodate counsel - “however much I wish to expedite, I cannot prejudice parties.”96 Where a hearing has been booked well in advance, however, counsel are expected to conform to timetables, but can frustrate them with alternative strategies.

One of the most severe tests of court power took place in a multi-party action97 which had already lumbered past fifteen adjustments and amendments, eleven judges and five hearings within two years before being transferred to the Commercial Roll. After three Preliminary hearings, establishing that pleadings were almost complete, and aiming to curtail further protraction by amendments, the judge set up a procedural timetable and

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93 R. Gaffney & Son v The Bank of Scotland 18 March 1997 Counsel, prior to the judge entering the courtroom - “The court is always reluctant to accept willy-nilly intimations, but we will just have to sound like we both need them.”
94 R. Curry Ltd v Johnson Control Systems Ltd. 25 February 1997 Lord Hamilton
95 “Under no circumstances would I have fixed a diet on Monday for the following Friday but for the assurances of the parties this was acceptable” Lord Penrose
96 Farnborough Properties Ltd v Scottish Enterprise 25 April 1996 Lord Penrose – re-arranged for 31 May debate “In my day if one had a clash of commitments colleagues benefited, if it happens again instruct another on strengths and weaknesses of argument” Offending counsel was later elevated to the bench.
fixed with representatives an eight-day proof within four months. The fact that the pursuer’s agent was on holiday was considered peripheral as presentation was by properly instructed counsel. Although interlocutory orders may be reclaimed within two weeks of publication, it was two months before the pursuer, after lodging “a volume of documents” the evening before a motion roll hearing, unsuccessfully argued that prejudice caused by the absence of one counsel, the agent and one witness was sufficient to postpone proof. With the court diary booked for five months ahead, the judge interpreted the latest move as resistance to the underlying ethos of the new procedures. Supported by the opponent’s evaluation of the case, he held that a client’s preference for specific counsel was “irrelevant” and the nominated witness could be accommodated by commission and diligence.

“This is a privileged treatment extended to those who are prepared to accord to the rigours of the system and the process has a minimum of features. The main one is that the court is prepared to make fixed diets available rather than having you stand in a queue on Tuesday and accepting the system operated by the Keeper. If the court is prepared to make prior time available its responsibility is to the public to see it is used to the best advantage and to the benefit of commercial litigants generally.”

The following week a further attempt to postpone the proof for a further 5 months was successful. Counsel returned with a re-estimate of court time doubling the number of days (from eight to sixteen) required for the substantive hearing.

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97 D. Gray & Ors v A. Clark & Ors. First adjustment on Ordinary roll 12 May 1993
98 Gray v Clark 18 March 1996 Lord Penrose
99 Gray v Clark 2 May 1996 Lord Penrose. Representative acceded that ‘prejudice’ could incorporate inconvenience and impossibility of specific counsel attending
100 Gray v Clark 2 May 1996 Lord Penrose – pursuer was asked if there was a particular advantage to the specific counsel but replied “it would be invidious of me to say – my clients may have that view”.
101 The judge later decided to read the summary of the witness’s evidence before firming up that decision, but the summary had not been prepared and the dates of his availability were unknown
102 Gray v Clark 2 May 1996 Lord Penrose
103 Gray v Clark 13 May 1996 Lord Penrose – extended proof re-booked 29 October was discharged again after 4 months on pursuer’s motion for a debate. The case eventually settled.
It has been recognised that insistence on preferred counsel can conflict with fixed timetables and judicial availability, threatening efficient administration of the court. However, in an action where both parties had been granted an urgent and expeditious debate on a narrow legal issue within three weeks of their joint request, a further request to reschedule after two weeks for counsel availability enforced postponement for another three months in the judge’s busy schedule, but not without note being made:

“This is a straightforward argument. It is very difficult to see why there should be difficulty in selecting counsel.”

Balancing expediency with court time makes it difficult to take account of personal counsel preferences or even established professional relationships leading to particular counsel for particular classes of case. There are grave difficulties accommodating multiple representation with expedition, and it is helpful when the diaries of substitutes enter the equation.

Settlement Negotiations

When counsel informed the judge that settlement was imminent, there was a distinct judicial withdrawal from involvement in details of negotiation. In only one case and following discussion with counsel in chambers, a settlement took place within 10 minutes, although it was obvious from counsel’s pre-court discussions that parties had been teetering on the edge of settlement.

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104 Shoprite Group plc v KwikSave Stores Ltd 27 September 1996 Lord Penrose
105 North East Ice & Cold Storage v A. & J. Third 29 June 1998 Lord Macfadyen
106 Anderson v Dunedin Fund Managers 4 March 1996 Lord Penrose; Adam Smith v Spencer Printing 18 March 1996 Lord Penrose; Pearce Signs Scotland Ltd v Optical Express Central Ltd. 6 July 1998 Lord Macfadyen
107 Highland & Universal v Safeway plc 4 February 1997 Lord Penrose
Once the judge was informed that parties required ‘time out’ for settlement and negotiations, the practice grew of continuing hearings or granting By Order hearings to check progress and maintain focus, but this was eventually curbed as a luxury which neither a busy court nor client could afford. The second study period reflects cases which remained on the Roll as ‘live cases’ although settlement had been achieved without the court being informed. In the first period these cases were monitored by the Clerk of Court, eliminating them from the Commercial Roll when advised of settlement. At times it appeared obvious that the call from the Clerk was a prompt to complete settlement. This practice has gradually disappeared, leading to an increase of ‘dead wood’ lying on the Commercial Roll, distorting statistical data on ‘live’ cases held on the computer programme. Allowing cases to drift into oblivion, waiting for a client to prompt an enquiry, seems to reflect practice on the Ordinary Roll.

If settlement negotiation eventually foundered, clients could reactivate the Commercial Court’s superintendence of the implementation of settlement agreements.  

**Ghost Bookings**

Where substantive hearings are required, difficult decisions have had to be taken whether to wait for a window of time in the preparation judge’s timetable or transfer to another Commercial judge. As the workload of the Commercial Court rose, the availability of part-time senior judges became problematic, and the running of the roll became almost entirely dependent upon the full-time judge. Representatives seeking a debate in October 1996 were informed that one part-time judge was not available for two terms, another had no spare time. Parties agreed to continue with the full-time judge to a debate within ten weeks, with the proviso that cancellation of his major bookings could open up earlier opportunities. In fact the increased availability of part-time judges alleviated this problem until the increase in the number of hearings and Proofs,
both noted in Chapter 6, overtook the extra resources. There are hints that the practice of double booking court time is discretely and tenuously mooted now that the Commercial Court ties up a disproportionate amount of the supreme court budget for the caseload.

One theme which continued throughout both study periods was the judges’ reluctance to fix Proofs without firm assurance from representatives that the hearing would proceed, particularly in larger cases. This is because the court allocates its time on a fully committed basis. Spurious or tactical bookings therefore eat into precious court time. ‘Reselling’ Proof time released by late cancellation proved difficult. Without a judicial pool of Ordinary work to fall back on, committing long stretches of scarce resources to ambivalent parties was a precarious venture, a gamble in which some parties had staked nothing and the benefit of continued pressure outweighed the costs of booking the substantive hearing. The court however emptied its pockets for nothing. As the number of late settlements increased in the second period, the commitment of Proof time increased, tempting the court to consider double booking judicial time, a practice which has been a ‘slippery slope’ in the Outer House since 1986.117

Regularly parties were closely questioned on their intention of going to Proof or whether they were merely using the court as a focus for negotiation. The accompanying judicial comment was sometimes made that if the opportunity for settlement was given and not

110 Babcock Rosyth Defence Ltd v Grootcon (UK) Ltd 7 October 1996 Lord Penrose
111 Strathclyde Police Board v Glasgow Prestwick International Airport 1 July 1998 Lord Hamilton for debate
112 J. K. Turner v Norwich Union Fire Insurance Society Ltd. 4 March 1996 Lord Penrose – provisional booking while awaiting an expert report
113 Royal Bank v Hunter & Ors 4 March 1996 Lord Penrose 10 representatives present at Procedural Hearing
114 Lecol Engineering Ltd v Lincoln (UK) Ltd. 24 February 1997 Lord Penrose
115 PIK Facilities Ltd v The Secretary of State for Defence 3 March 1997 Lord Penrose; 22 June 1998
116 see Chapter 6 - more cases are sent to proof, longer proofs are being allocated, a higher percentage of which are discharged.
117 As noted in Chapters 4 and 5 – the Maxwell Committee recommended overbooking judicial time two and a half times availability in 1986 – this has grown to nine times availability.
taken, the court would be slower to award expenses. Fixing Proof as a tactical measure or to put pressure on the other side was therefore actively discouraged.

The judges are aware that most commercial parties will realistically look for the most cost-effective resolution of their dispute, but understand that particular clients may shy away from the publicity generated by a full Proof hearing. Judges must therefore rely on agents reinforcing an air of realism into the booking of Proofs that are expected to take place. However retaining a hearing date as a settlement tool is still a commercial reality, which some have argued that judges have no actual power to influence.

"The Commercial procedure is precisely set up in the hope that these sort of things are avoided, but nothing on earth will stop people changing their minds at the door of the court."

An informal judicial pragmatic reminder by the judge of the amount of preparation work involved was useful in nudging representatives into potential settlement prospects. In one lengthy action when both parties admitted that prospects of settlement would be enhanced by an allocation of a Proof date, the judge responded by ordaining parties to lodge within four weeks all documents, witness summaries and reasonable estimates of time required.

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118 Adam Smith Ltd v Spencer Printing Group Ltd 18 March 1996 Lord Penrose 2pm 3rd March 1997 Lord Penrose
119 Highland & Universal v Safeways 7 October 1996 Lord Penrose
120 A. J. Taplin v D. S. Paterson 27 March 1997 Lord Penrose “Experience suggests people will run away from confrontation in this type of case if they can. I would like them to be faced up to this sooner rather than later.”
121 A. Simmers Ltd v Canadian Imperial Bank 27 January 1997 Lord Penrose - parties informed the court clerk of negotiations 15 minutes before the hearing. “This will stop us having to stutter for a while” A continuation was granted
122 John Smith v Sunblest Bakeries Ltd. 1 October 1996 Lord Coulsfield
123 Lecol Engineering Ltd v Lincoln (UK) Ltd. Lord Penrose “The court will have to assume that Proof is going ahead and you will be under pressure working during the holidays”
124 Lujo Properties Ltd v Green 24 February 1997 Lord Penrose
"If you ask for Proof you can have it, but you will be ready for it within a month."

Once the judge left the courtroom representatives were galvanised into conferring "to see what is on the table" and the case settled. Counsel might have learned from this encounter that admitting the tactical advantages of booking Proof has an unexpected consequence. The Commercial Court cannot afford to indulge this luxury.

Guiding Procedure

Judicial guidance over procedure is a finely balanced act, but the amount of assistance, guidance, suggestions and pressure exerted by the judge is defined by his own interpretation of his role. The effect of judicial intervention is different in each case. What one party may regard as helpful suggestions or guidance others may interpret as unwarranted pressure. It is recognised that only the Commercial Roll gives specific power for the judge to act against parties wishes, while on the Ordinary Roll the defenders are entitled to put pursuers to proof even on bare written denials of the pursuer’s case. This means that on the Commercial Roll, particularly if procedure can not be agreed between representatives, the judge is free to order strategies for the most efficient disposal of isolated issues or all issues. Separating ‘guidance’ from ‘pressure’ is therefore problematic.

External expedients, such as joint experts or independent assessors, have been suggested by the judge in disputes over dilapidation of leased premises as a means of injecting "common sense and experience", leaving it to parties to decide if the dispute justifies the extra expense. However the depth to which the court can become involved in guiding further procedure is controversial. Problems arose when one

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125 The Sullom Voe oil tanker spillage
126 B.P. v Chevron Shipping Lord Penrose quoting Gray v Boyd 1996 SLT 60
127 Pearce Signs Scotland Ltd v Optical Express Central Ltd. Lord Macfadyen 6 July 1998
128 Franborough Properties Ltd v Scottish Enterprise Lord Penrose 27 January 1997 Lord Penrose
agreed assessor was the court expert. His early report supported one party's contentions, alienating the opponent from further "biased" procedure. Clients who were present in court were consulted and "reluctantly" agreed to fixing a Proof, indicating that pressure intermingled with guidance. This circumstance was never repeated.

Judicial input allows parties the benefit of his expertise, but in framing and editing a Reporter's remit in one case he dictated requirements, admittedly with an eye on the whole process:

"Don't give him a job he can't do and don't give him something which will be defeated by procedural points".  

Although this appears to be highly interventionist, parties had agreed to draft the joint remit at the court door, and engaged the judge's assistance.

Joint experts are encouraged to talk to each other, with the proviso that care is taken "not to muddy the waters without taking parties forward." Judges are aware of imbalance in litigants resources where experts are concerned when it affects the time allowed for access, disclosure and analysis of information. Where one party was particularly anxious to make progress for commercial reasons, the judge responded by suggesting that experts jointly reveal the basis of their thinking and produce a joint statement of issues rather than lodging copious reports for a full-scale Proof.

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129 Miller Construction Ltd. v Trent Concrete Cladding Ltd 14 October 1996. Lord Penrose The pursuer's objection to the lodgment of the report was not upheld, since the activating interlocutor was marked "of consent".
129 Baird & Stevenson Ltd v Stirling Stone Management Ltd. 8 July 1996 Lord Penrose.
134 Unigate (U.K) Ltd v Scottish Pride Ltd. The defenders in particular were anxious to make progress due to their market position, impending consolidation and subjection to bids.
The court may suggest names of experts, or a ‘man of skill’, but since problems arose over the perceived partiality of one court-based expert, the judge merely assist by suggesting a joint minute of agreement on nominations for a ‘man of skill’ and his remit.

Although the judge has no managerial powers once a trial has started, the structural packaging of a complex multi-week proof may be suggested. Parties have been advised to sit around a table and discuss practical solutions to presentation, with candour. “It is quite clear that counsel are not talking to each other.” Also an interim opinion by way of early debate can be seen as “an opportunity to open out and give my worries in preparation of a case.”

Continuations to allow one party to respond to last minute adjustments and productions were actively discouraged in the first study period – “how long have you had to put your case candidly and squarely?”, But rather than refusing to accept them, the timetable for future compliance was tightened more forcefully, particularly where there had been a history of copious adjustments and “an indecent number of Preliminary hearings”. Since this judicial comment was made the practice of continuations caused by late adjustments has increased.

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135 Miller Construction Ltd. v Trent Concrete Cladding Ltd 14 October 1996 Lord Penrose
136 Carmichael v Stirling Stone Group 20 October 1997 Lord Hamilton Ordered in 2 weeks, short continuation
137 Hiram Walker & Sons Inc v The Drambuie Liqueur Co. Ltd. 24 March 1997 Lord Penrose
139 New Hearts Ltd v Cosmopolitan Ltd 13 January and 7 March 1996 Lord Penrose
140 Lecol Engineering Ltd v Lincoln (UK) Ltd 24 March 1997 “All I face is shifting sand” - Lord Penrose
141 Lecol ibid 28 days to lodge all documentary material bearing upon the issues between them constituting, evidencing or relating to the subject matter of the action or correspondence or similar documents relating to it on which they intended to rely, 42 days to adjust respective pleadings up to next continued hearing.
While it is still preferred to test the relevancy of a case in debate before factual inquiry, an over-abundance of debatable points must be justified, prompting discussion on structural strategies for efficient disposal. Once again, although the judge makes suggestions for structural organisation, the ultimate decision is passed to representatives, generally extending time to lodge extra notes of arguments and preparation. The court has learned from one experience that allowing parties to move towards substantive hearings without clarifying issues leads to continuations which “are blatantly in breach of rules”.

**Procedural Laybys**

Once a case had been initiated on the Commercial Roll progress was monitored, and a full history built up on the supporting computer system. To maintain efficient disposal, there has been a reluctance to allow cases to be side-tracked from active preparation.

- Sisting per se was actively discouraged in the first study period. Parties were allowed specified continuation periods, with the pressure of continued court surveillance. As the judicial timetables filled up, and other judges entered the system, the practice of granting sists re-emerged, as the second empirical study testifies. Sisting for Legal Aid was still discouraged, since the Commercial Court was aware that the Legal Aid Board worked within tight target dates. Sisting for arbitration and negotiation and settlement was allowed without further judicial intervention. Some cases may therefore go quietly to sleep, and this was an administrative problem. However, it was far less likely than on the Ordinary Roll. After a particularly grueling Preliminary Hearing, where several areas of preparation were criticised and the judge observed a disruptive interval before instructing an

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142 Hambros Bank v Lloyds Bank plc 17 March 1997 Lord Penrose
143 De Montfort Insurance v Jeffrey Dickson 3 March 1997 Lord Penrose
144 Pearce Signs Scotland Ltd v Optical Express Central Ltd 6 July 1998 Lord Macfadyen referring to a commercial case in which five Procedural hearings were booked in order to clarify issues for debate
145 Ross v Davy 26 March 1996 Lord Penrose, case raised for years before transfer, both asked for sist to recover information and reduce areas in dispute – granted 6 weeks.
146 36 cases were sisted, lengthening the time to resolution. Appendix 6.5.2 para 8.8 Table 20
expert, he asked parties how they would have run the case as an Ordinary action. The reply was revealing - "we would have asked for a sist" – it is a procedural lay-by which is used to allow parties and/or their representatives to catch breath.

- Generally the flow of process is not interrupted by interim awards of expenses before resolution, since control is disrupted and time lost when a file is passed to the Auditor of the Court for interim taxation.

- There has also been judicial reluctance to deal with cases on the Commercial Roll in which there were criminal implications, particularly those involving imputations of fraud. In one action the judge offered to organise an exploratory hearing before him on the Ordinary Roll before agreeing to deal with it as a Commercial action. Other parties were given further time to complete preparations. In Guido Farnoli v G. A. Bonus plc specification relating to two fires at the same business premises was refused since it involved the pursuer responding to allegations of fraud over one fire. A reclaiming motion was abandoned, but might have been removed to the Ordinary Roll if an Inner House decision had not supported the judge’s decision to refuse specification in these circumstances.

### Balancing Costs with Expediency

From the inception of the new rules, it was anticipated that court appearances and documentary material were to be kept to the minimum necessary to focus issues. The judge was conscious that

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147 Pearce Signs Scotland Ltd. v Optical Express Central Ltd. 6 July 1998 Lord Macfadyen
148 New Hearts Ltd v Cosmopolitan Ltd. 23 April 1996 Lord Penrose
Proof abandoned
150 Britel Fund Trustees v Wilson Distributors (Scotland) Ltd. 14 March 1997 Lord Penrose - defender’s motion transfer on to Commercial roll for speedy resolution, but allegations of fraud were detected in defences
151 Century 21 Homes Ltd v Blackadder Reid Johnstone 8 July 1996 Lord Penrose - imputing fraud and professional misconduct
“appearance equals money and it is essential you spend time on real work rather than entertaining me”. 153

Where the disputed amount has been narrowed, 154 or the sum sued for is relatively small, the parties are requested to aim for “the absolute minimum of procedure and costs”. 155 For example, when one party was a trustee in sequestration a quick check that funds would be available for creditors after litigation led to an extension of time for preparation “rather than ordering costly procedures”. 156

Within the system “the court does not have to be blind to practical realities.” 157 The management maxim in the Commercial Court is “the more that can be agreed, the more unnecessary expense is saved”. 158 Agreement is used to balance cost with expediency and disclosure. Warnings to “take a long cool look” before deciding on expensive procedures bring realism to management and preparation ordered. 159 The need for “responsible behaviour” in low value cases generally results in a period for further investigation and encouragement for informal recovery of documents, rather than indulge in expensive ‘fishing expeditions’. 160

“I cannot lead you but encourage you to relate the value to the issues – the next stage will soon eat up the amount in dispute”. 161

152 Reclaiming motion was abandoned
153 Sterling Equities Ltd v Scottish Hydro Electric plc 2 May 1996 Lord Penrose
154 John Smith v Sunblest Bakeries Ltd. 18 March 1996 Lord Penrose
155 Baird & Stevenson Ltd v Stirling Stone Management Ltd. 11 March 1996 Lord Penrose
156 Scottish Metropolitan v Reid 11 March 1996 Lord Penrose
157 Simmers Ltd v Canadian Imperial Bank of Commerce 11 March 1996 Lord Penrose; S. Roy v M. R. Pearlman Ltd. 30 June 1998 Lord Hamilton – checking the difference in financial terms between interpretation and further procedure
158 J. D. Laurie v A. S. Greig 21 March 1997 Lord Hamilton
159 Hill Samuel Asset Management Group Ltd. v J. Montgomery 17 July 1998 Lord Macfadyen
160 J. Fraioli v B. Thomson 17 March 1997 Lord Penrose
161 Brodie Engineering v Sea Truck Shipping 22 March 1996 Lord Penrose
When an argument for arbitration was under discussion other expensive procedures (for example a counterclaim) was temporarily discouraged. However, the court did not respond positively to a plea for a reduction in normal Court of Session rate of expenses for relatively simple cases. In guiding procedural decisions it is clear that the court is not blind to practical realities, monitoring expensive preparations and advising representatives to resist unwarranted diversions.

Written Pleadings

"Each party in commercial litigation has to make a full and frank disclosure to the court, and should not simply respond to the other side. Parties must play by the rules." 

This overarching ethos means that parties use of written pleadings is constantly focused on simplifying and condensing the case into the real issues in dispute. Disclosure is monitored. The progress of actions on the Ordinary Roll is subordinate to scrupulous (some say unscrupulous) adjustment and amendment of written pleadings to flag up legal relevancy and provide fair notice of all legal and factual aspects of contention. The role of pleadings in the Commercial Court is that

"they need not be central, and niggly amendments need not be a cause of concern...they don’t need to be comprehensive so long as issues are exposed"

The underlying plan is that the Commercial Court should be "less concerned with precise form of pleadings than exchange of information". However, full and fair notice of complaints was still insisted upon. These attitudes create a difficult

162 Gill Farms & Ano v B. Shand 17 March 1997 Lord Penrose
163 Black v Graysim, Altaf v Graysim Holdings (Scotland) Ltd. 18 March 1996 Lord Penrose
164 George Crolla v Purdential Assurance 11 March 1996 Lord Penrose
165 Gray v Clark 18 March 1996 Lord Penrose
166 Scottish Power Plc v Trafalgar House Construction Ltd. 25 February 1997 Lord Penrose
167 A. J. Taplin v D. S. Paterson 3 March 1997 Lord Penrose
tightrope for some to walk without formal published guidance,168 particularly for those clients and representatives who do not appear regularly in the Commercial Court and are more used to the Ordinary procedure.

The aim is that progress should not be interrupted for technical adjustments169 which could even be formally postponed until after specific investigations – for example, the inclusion of expert reports.170 However, process can always be interrupted by the judge if he detects lack of fair notice, whether in pleadings or statements of claim.171 The situation is therefore ambiguous as far as practitioners are concerned, since there remains a lacuna in precise definition of written presentation. While these ambiguities allow maximum flexibility in judicial discretion to shape procedure to individual circumstances, it also strengthens and extends Rule 47.5 to give the judge the power to undermine preparation which is not in his style. The lacuna is therefore a danger area for bias to creep in, dependent upon the integrity of the bench to guard their impartiality fastidiously. There is no suggestion that they do not do so in this procedure, but it is submitted that there is a danger of mis-perception where boundaries are flexible and there is no published guidelines of practice. The Inner House has since noted that using judicial integrity to safeguard the boundary of impartiality is questionable.172

The Commercial judges were free to point out ambiguities,173 technical errors174 and contradictions175 in pleadings, particularly if they considered issues were not precise,176

168 New Hearts Ltd v Cosmopolitan Properties Ltd. 8 March 1996 Lord Penrose
169 Baxter Clark & Paul v Tulloch Construction Group Ltd. 17 July 1998 Lord Macfadyen
170 Baird & Stevenson v Stirling Stone Management Ltd. 8 July 1996 Lord Penrose
171 Simmers Ltd v Canadian Imperial Bank of Commercial 11 March 1996 Lord Penrose “unless the defender can see a ballpark figure, he may be entitled to say no more expenditure before the expense of proof”
172 Caird v Clancy Inner House (Extra Division) 2 April 2000, Lords Sutherland, Coulsfield and Penrose, see opinion of Lord Penrose Scottish Courts internet site
173 Edinburgh Grain Ltd v Marshalls Food Group Ltd. 21 March 1997 Lord Hamilton
174 A. M. Hunter v T. Moffat and A. Moffat 30 June 1998 Lord Hamilton
175 Retail Design v The Guinea Pig Group 4 March 1996 Lord Penrose agreed with defender’s criticism of pleadings “define the contract at the precise point and the consensus in idem”
176 Mercedes Benze Finance Ltd v Clydesdale Bank plc 18 March 1996 Lord Penrose;
and consequently considered that the process (and court timetables) might be vulnerable to substantial and unnecessary testimony at Proof. Commercial judges also disapproved of “allowing issues to evolve through pleadings”, focusing instead on a timetabled framework for disclosure of information, using the pleadings to support rather than lead the agenda for Proof. If a party was obstructive when the judge pointedly asked for clarification on specific legal issues, counsel was warned “it is not fair at pleadings stage to keep something up your sleeve.” However, to facilitate clarity, the judge could be tempted to assist in purging irrelevant issues which are blurring the focus of the dispute. How far might he go in facilitating clarity? The boundary was been tested. Under intensive judicial scrutiny, defendants argued (from a position which they admitted at the time “was not as focused as it could be”) that they had a right to put pursuers to proof on brief averments as on the Ordinary Roll but they were summarily reminded that demands for Proof on inadequately focused pleadings would fall on deaf ears in the Commercial Court. They reassessed their position over a two hour break and conceded liability. Rather than meandering on to an expensive Proof, reality overtook ambition, blocking tactical use of written pleadings.

To agree a clear basis for progress, pleadings could be augmented by spreadsheets, setting out in tabular form any items agreed and not agreed. Itemised lists,

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Ireland Alloys Ltd v R. B. Dingwall & ors 21 March 1997 Lord Hamilton; S. Roy v M. R. Pearlman Ltd. 30 June 1998 Lord Hamilton “Am I right in thinking the Pursuer has not responded to specific averments?”

177 Baird & Stevenson Ltd. v Stirling Stone (Management) Ltd. 27 March 1997 Lord Penrose expert testimony might be required to give detailed explanations and arguments on ambiguous statements incorporated into pleadings

178 Baxter Clark & Paul v Tulloch Construction Group Ltd. 17 July 1998 Lord Penrose

179 John Smith v Sunblest Bakers Ltd 18 March 1996 Lord Penrose

180 Marlows (Scotland) Ltd v Central Regional Council 25 March 1996 Lord Penrose, sifting out amounts not in dispute; 5 October 1998 2pm Lord Macfadyen opinion on irrelevant issues giving 2 weeks to “purge” them

181 Gray v Boyd 1996 SLT 60

182 John G. Russell (Scotland) Ltd v Heath Collins Haldane Ltd. 22 March 1996 Lord Penrose. The case settled, proof on quantum being discharged on the day booked. Counsel indicated late instructions from the first and second defenders’ insurers

183 Taylor Woodrow v Strathclyde Regional Council 28 March 1996 Lord Penrose

184 Pearce Signs Scotland Ltd v Optical Express Central Ltd Judge 6 July 1998 A
schematic drawings,\textsuperscript{185} illustrative maps,\textsuperscript{186} and a schedule of differences\textsuperscript{187} have all been suggested as methods to succinctly spotlight the areas of contention, in preference to extended complex written pleadings. The judge might assist on the logistics of disclosure and presentation, but at times has been wary of proposals provided by one party in which he traced tactical strategies.\textsuperscript{188}

Nearing Proof, as the number of foundation documents increased, supporters of traditional pleadings saw the spread of issues over several documents as potentially hazardous\textsuperscript{189} and a disadvantage of the Commercial Court. In one extreme case the pursuers had deposited 40 boxes of documents without "specifying, defining and clarifying issues"\textsuperscript{190} in the pleadings. The judge intervened for clarity, showing that in a judicial docket system, where the judge grows with the case and continuously polices fair notice and relevancy,\textsuperscript{191} his outlook and intervention is more flexible, adapting the basic documents to individual circumstances. Pleadings can be matched with specification requirements,\textsuperscript{192} but may also be sidelined to concentrate parties on full documentary disclosure.\textsuperscript{193} In one circumstance the judge decided that "re-doing pleadings would be a disastrous approach",\textsuperscript{194} and in another that parties "do not need a single document now – we have good witness summaries."\textsuperscript{195} But in others he preferred

\textsuperscript{185} Fyfe Contractors Ltd v Scottish Hydro Electric plc Lord Penrose
\textsuperscript{186} Alfred Stewart Properties Ltd. v Richmond Homes (Scotland) Ltd. 6 July 1998 Lord Macfadyen
\textsuperscript{187} R. S. Brown v Libris Computer Ltd. 26 February 1997 Lord Hamilton
\textsuperscript{188} Hiram Walker & Sons Inc v The Drambuie Liqueur Co. Ltd. 24 March 1997 Lord Penrose
\textsuperscript{189} Church Commissioners for England v Scot UK Co. Ltd. 30 June 1998 Lord Hamilton
\textsuperscript{190} George Sharkey & Ors v 4-Save Stores Ltd. 26 September 1996 Lord Penrose; Albion Drilling Services v Clingston Ltd 6 July 1998 Lord Macfadyen
\textsuperscript{191} Albion Drilling Service Ltd v Clingston Ltd. 6 July 1998 Lord Macfadyen
\textsuperscript{192} Church Commissioners ibid - the pursuer also complained that pleadings on specific areas were not addressed
\textsuperscript{193} Church Commissioners ibid the judge intervened for clarity, and questioned counsel "to see the precise nature of the defect and damage in pursuer's pleadings"
\textsuperscript{194} Pearce Signs Scotland Ltd v Optical Express Central Ltd. 6 July 1998 Lord Macfadyen
\textsuperscript{195} J. D. Laurie v A. S. Greig 21 March 1997 Lord Hamilton
to focus all issues in one document. The reasoning behind the decision not to publish guidelines springs from the very flexibility which the system offers. The fear is that guidelines would fetter this flexibility.

In the Commercial Court the judge has the power to monitor and thereby shape written presentation, and this has been done by suggestion rather than force. The lack of predictable baseline shifts the onus of control from parties to judge and expands the pre-Proof preparation from pleadings to include statements, summaries, affidavits and notes of argument. The Inner House has supported the view that pleadings are not the only core documents to be used at Proof. Dismissal on technicalities and textual criticism is thereby cured, and the interests of justice lie with the judge rather than being controlled by the whims of parties.

As with adjustments, inhibiting progress by continuously requesting amendments is discouraged - "this has the appearance of being your best effort" - but these are generally accepted when presented within the prescribed timetable. Counsel retain the right to bring forward new evidence. Only on a few occasions has a particularly tough line been taken in refusing late compliance with orders to adjust. However in the Commercial Court a return to established practice has been observed. Increasingly adjustments and amendments have been two of the vehicles used to frustrate the continuity of management and speedy resolution, also part of the trend towards late lodgments.

196 R. Curry Ltd v Johnson Control Systems Ltd. 25 February 1997 Lord Hamilton
197 Highland & Universal Properties Ltd v Safeway Properties Ltd. 13 June 1996 2nd Division opinion
199 Shanks v Royal Bank of Scotland, 11 March 1996 Lord Penrose 14 days were allowed “assuming this will put an end to it”
200 Forbes v Armstrong 28 March 1996 Counsel - “the view on this side of the Bar is if we discover something we will seek to bring it forward”
201 George Crolla v Prudential Assurance 11 March 1996 Lord Penrose Adjustments were refused
Lodgments into Court

The most worrying aspect of the new system is the increasing impact of late lodgment of documents into court.

"This system cannot work unless the court has documents in advance."\(^{202}\)

Pre-hearing preparation by the judge is curtailed, and increasingly pre-empted. Late lodgments are one way in which parties can retain control of the pace of their case.

From the early days it was recognised that lack of sanctions created problems. Detailing a timetable for disclosure, the judge stated "I insist upon it, but I have no punitive powers"\(^{203}\). Warning shots were fired regularly at parties, particularly when documentary material was lodged at the Bar.\(^{204}\) In one lengthy action, dogged by late and copious productions, parties were warned that further productions in the weeks leading to Proof would be accepted only in the most extreme circumstances, and taxation of fees could have been be affected.\(^{205}\) In another case persistently tardy compliance led another judge to threaten parties with potential penalties after extensive adjustments had been "lost in the post", wasting the month allowed for both parties to adjust their case, and rendering the hearing abortive.

"Useful progress depends upon the time required and people adhering to it."\(^{206}\)

As counsel pointed out in a case, to present 'germane' but late productions on the first day of a multi-party proof is "wholly contrary to the spirit of commercial actions".\(^{207}\)

\(^{202}\) R. S. Brown v Libris Computer Ltd. 26 February 1997 Lord Hamilton  Twice late adjustments were intimated to opponent but not lodged
\(^{203}\) R. S. Brown ibid
\(^{204}\) Franborough Properties Ltd v Scottish Enterprise Lord Penrose 27 January 1997
\(^{205}\) Lujo Properties Ltd v Green 24 February 1997 Lord Penrose
\(^{206}\) Profab Engineers & Contractors v Seacabs Norge A/S 20 October 1997 Lord Hamilton
\(^{207}\) Pursuer's counsel J. G. Wylie & ano v G. W. Armour & Ors 8 October 1996
The judge also noted that the affected averments had formerly been ‘not known and not admitted’ in defences. As a test of judicial discretion for balancing expediency with the interests of justice in the new court this particular event has yet to be bettered. While indicating disapproval, the judge refused “to do anything to create opportunities for reclaiming or risk substantial injustice” and allowed parties time to retrench their positions and re-work estimates. The judge, then, may object, but if germane and in the interest of justice, the practice of accepting late lodgments is continued from the Ordinary Roll into the Commercial Court. The judge has little choice and few sanctions.

The confidence of parties in being allowed to lodge late documents at a hearing seems to be increasing. Even when a continuation was granted for both parties to adjust pleadings, a further four weeks was requested on the due date when extensive adjustments, which were “difficult to absorb”, were only passed across to the judge at the Bar, contravening the previous interlocutor. One party involved was also forced to apologise for “forgetting” to lodge additional specific documents. Judicial questioning of counsel revealed that despite the time already given, focus on issues had not been advanced, by the latest extensive adjustments, and counsel could give no assurance of further clarification by the next continued hearing.

Prior to another Procedural Hearing, in contravention to a previous interlocutory order, notes of adjustment and of argument had been passed between parties but not given to the judge. The adjustments resulted in an opponent changing the basis of his claim without warning, introducing new issues at the Bar which caused the judge some surprise.

At another Procedural Hearing involving three parties, no procedural documents were lodged in advance, again contravening a previous interlocutory order. Counsel had

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208 Somervail Computer Services Ltd v The Referendum Party Ltd. 18 March 1997 Lord Hamilton
209 17 February 1997 12 noon Lord Hamilton; R. S. Brown v Libris Computing Ltd. 26 February 1997 Lord Hamilton
210 Cosar Ltd. v UPS Ltd 25 June 1998 Lord Hamilton
discussed between them changing the preparation of agreed procedure from Proof-
before- Answer to a Debate without informing the judge. Judicial questioning also
revealed that counsel were not familiar with an expert’s report which the judge had been
prepared to discuss at that hearing. Judicial preparation time had been wasted. It
was a clear breach of interlocutory orders.

With no sanction other than judicial displeasure parties therefore retain traditional
control. The knock-on effect is an increase in continued hearings to allow parties time
to respond to late exchanges and lodgments. Therefore the conclusion is that the lack
of direct sanction for late lodgment, regardless of its pertinence, allows traditional
practice to encroach into the Commercial Court.

**Witness Summaries**

Early on it was recognised that witness statements “were a disaster”, exposing
parties to onerous and semantic cross-examination at proof. Only a few times is this
judged advantageous. Certainly the English experience of using witness statements to
cut down oral testimony has been problematic for witnesses in that regard. As a
corollary of this, detailed professional drafts of witness statements, attempting to
anticipate every conceivable question, has lead to comments over ‘deforestation’ in
England.

Although the rules allow for the use of witness statements, the Scottish Commercial
Court prefers witness summaries. These have been compared to affidavit evidence,

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211 Micro Leisure Ltd v County Properties & Development Ltd & Ano. 17 July 1998 Lord Hamilton
212 Green Tyre Co. v Ross & Bonnyman Ltd. 18 March 1997 Lord Hamilton
213 allowed under Rule 47.11(1)(a)(vii)
214 Simmers v Canadian Imperial Bank 11 March 1996 Lord Penrose
216 Baxter Clark & Paull v Mulloch Construction Group Ltd. 17 July 1998 Lord Penrose “given the
    nature of people we are dealing with”
217 Allowed under Rule 47.12(1)(b) Procedural hearings
avoiding the two main traps uncovered in the English system.\footnote{218}{20 January 1997 Lord Penrose} There is no need for detailed cross-examination on semantic points and no need for a professional gloss to be added to the matters to which a witness may speak. However, their purpose is "neither a precognition nor affidavit but an indication of the scope of expected witness evidence, giving a fair indication to the opponent."\footnote{219}{Gordon Anderson v Dunedin Fund Managers 4 March 1996} Nevertheless, some counsel have complained that a few summaries have been "brief to the point of obscurity, leading to a lack of fair notice,"\footnote{220} echoing the ambiguous interpretation of 'abbreviated' pleadings noted earlier. The lack of published guidelines in this area also means that parties may interpret the requirement for witness summaries fairly indiscriminately.

**Conclusion**

With five judges now appearing in the Commercial Court, three of whom are made available for large tranches of time, it is a distinctive caseflow management unit, attracting a wide variety of cases and clients. As the court becomes busier, it is important for the credibility of procedures that it is not seen to be a victim of its own success. The efficiency of court administration is part of the publicity machine which also shapes expectations. Initially Court Clerks who shadow their judges in court had to deal with the administration of the caseload, which was at times overwhelming organisation, since the Commercial office was not manned full-time, particularly in the second period, and the checks and reminders of the initial period had all but ceased. Regular data evaluations require to be made to inform and justify policy changes and to arrest slippage into the local legal culture. The Commercial Court is an alien implant embedded into a strongly traditional environment.

The success of caseflow management is highly dependent not only upon judicial interpretation of the rules, but also upon their style of management in court. Written rules govern complex behaviour. Reforming behaviour cannot solely be achieved by
rewriting the rules. The judicial role is pivotal to police the rules and shape patterns of behaviour. Reforms which do not identify and take account of the interplay of differing perspectives and motives are in danger of being one-dimensional, irrelevant, abstract and unrealistic.

Breaking a traditional mould had to be headed by a strong personality willing to make unpopular decisions. Over time this stance is an exhausting process since the dynamics change case by case, day by day and sometimes hearing by hearing. A particular style of dynamic management is evident in other successful jurisdictions.221

Whether the personality type is extrovert or introvert may or may not actually be relevant to style. But ongoing commitment to decisiveness and the fortitude to maintain it are required, as from the practitioner’s point of view, representation is all about esoterically distinguishing and leaping barriers for the benefit of the client’s case - and for personal satisfaction. Anything which blocks that goal - be it precedent, rules, colleague or judge - is an adversary.

In the Court of Session it seems that adversariality is the norm, co-operation towards a common goal is not. For determined adversaries, caseflow management therefore entices or forces a square peg down a round hole – and can be a painful experience for all involved. But through caseflow management the Commercial Court fulfils its initial promise – speedy resolution in a highly competitive marketplace.

220 Pursuer in British Aerospace v PIK Facilities Ltd. 26 April 1996
221 For example, the Hon. Justice Ipp, Supreme Court of Western Australia
TO CONTROL OR NOT TO CONTROL

That is the Leading Question

It is ironic that a small jurisdiction of 5.5 million population should have a wide multiple choice of litigating procedures. The disparity between procedures is growing. While the lower courts have introduced measures to manage their civil case load, the supreme court maintains a strictly traditional approach to guard established legal principle and the status quo. Despite an intention that systems in the Court of Session and sheriff courts should move towards harmonisation, they are in fact diverging, even within their own territories. From 1994 civil cases in the sheriff courts are subject to a basic system of caseflow management, adapted and developed since then by individual Sheriffs Principal. On the other hand the Court of Session has not yet embraced a new scheme to control litigating practice, preferring to experiment in piecemeal fashion. In the past the collegiate nature of the Court of Session militated in favour of the traditional approach:

2 Practice Note issued on July 29 1999 by Sheriff Principal Bowen, Sherifffdom of Glasgow and Strathkelvin sets up a separate Commercial list at Glasgow Sheriff Court, operating from February 2000 (continuity of judges, preliminary hearings, interventionist approach, akin to the Commercial Court in Edinburgh) see Editorial, (1999) 4 Civil Practice Bulletin 1; Sheriff J. Taylor, (2000) 1 Civil Practice Bulletin 2
4 Sheriff I. Macphail, Research and Reform in Scotland: The Sheriff Court, address to The Reform of Civil Justice Seminar held by The David Hume Institute 1 June 1998- Edinburgh Sheriff Court has developed a system to provide continuity of judge for 8 weeks although the average time to completion is approximately 41 weeks
• The Bar have persistently resisted innovations which challenge the monopoly and autonomy of self-employed status.5

• The judicial bench are appointed from the Bar.6 Although the experience of entrants is changing, only a small percentage have professional management experience, or have worked extensively within a solicitor’s office environment before entering the Faculty of Advocates. A closeted professional background contributes to reciprocal reinforcement of traditional outlook.

• The Bar has argued that their work as independent practitioners builds into the judicial character an independence of mind,7 and a clinical detachment necessary for impartial forensic analysis. A large pool of omnicompetent independent judges, makes consensus in favour of radical reform difficult to achieve.

• The administrative department of the court service, rather than judges, are instrumental in managing, co-ordinating and directing daily court business, guarding the independence of the judiciary and the strict separation of powers.

• The workload is unpredictable. The high criminal workload, appeals (from the Outer House and sheriff courts) and prospective constitutional judgments8 take precedence over civil work. Innovative changes to civil procedure, such as caseflow management, have grave resource implications, as they are dependent upon co-operation of parties. Since more civil actions are being defended, for whatever reason, the co-operation of parties is not a reliable premise for change.

The judiciary in the Court of Session rejected Lord Cullen’s 1995 recommendations for mainstream caseflow management in 1996. Scotland is left in the anomalous position

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5 (a) Faculty of Advocates Response to the Consultation Paper by the Secretary of State for Scotland: The Legal Profession in Scotland (1989) - appointment of Solicitor-Advocates with rights of audience and entry to judicial office in the Court of Session pp.24,32; (b) Memorandum by The Faculty Committee on the Courts for The Hon. Lord Cullen’s Inquiry on Reform of the Court of Session Practice (1995) 4; (c) Chapter 4.

6 Sheriffs Principal, Sheriffs and Solicitors may be appointed - Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 c.40 s.35 and Schedule 4

7 Faculty of Advocates Response (1989) ibid.36 para 4.7
of 90% of civil work being subject to judicial scrutiny in the lower courts, while the supreme court, apart from Commercial causes, retains its traditional outlook. Comparisons between these fora serve to highlight the success of the Commercial Court, which one Sheriff Principal has decided to emulate on his own initiative. At the same time a recent study of practice under the new rules in sheriff courts corroborates a pattern of litigating behaviour similar to that observed in the Commercial Court. New rules spawn new behaviour. The purpose of this chapter is to raise awareness of the local legal culture, and convey the views of those who impact on court strategies. What do the different users think of court control?

**Comparative Research in Scotland**

1. In May 1995 the Lord President invited Lord Cullen to undertake a review of the business of the Outer House of the Court of Session in Scotland. In December 1995 the Report was published, incorporating an analysis of 300 defended actions disposed of during 1995. Civil Judicial Statistics published for that year show that 3,763 General Department actions were initiated in the Outer House, and 2,685 were disposed of. There is no official breakdown of how many were defended, the average length of actions, how many settled and at which stage they settled. It is therefore not possible to state how statistically significant or representative Lord Cullen's sample was of defended actions.

A closer examination of the Cullen sample revealed that 75% were personal injury actions, including 19% using the fast-track Optional Procedure for personal injuries. Civil Judicial Statistics show that in 1995 49% of causes initiated were personal injury

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8 The Court of Session is required to adjudicate on the legislative competency of the new Scottish Parliament and adjudicate on human rights cases following the European Convention on Human Rights
9 Sheriff Principal E. Bowen, Q.C. Sheriffdom of Glasgow and Strathkelvin (see footnote 2) The Sheriff Court Rules Council ratified the innovation retrospectively; J. N. McCormick, Courting Commercial Litigation - Whether Commercial Court Procedures Could with Benefit be Adapted to Provide a Relevant Forum for the Resolution of Commercial Disputes in the Sheriff Court (1999) (unpublished)
actions, including 6% under Optional procedure. The Cullen sample was therefore not representative of the type of litigation appearing before the Outer House in 1995 and it is arguable that the results may be skewed because of this. However due to the scarcity of statistical information in Scotland, the raw data which was extracted from the 300 processes which were disposed of in 1995 provides a nominal basis for comparison with other recent research.

2. In 1995 the Scottish Office Central Research Unit funded a study of defended personal injury actions across five jurisdictions in Scotland. The report\textsuperscript{10} uncovered discrepancies between sheriff court figures and the official Civil Judicial Statistics.\textsuperscript{11} Although they had aimed for a 20% sample in the three tracks (Ordinary, Optional and sheriff court Ordinary procedures), not all process data was ultimately available to them.\textsuperscript{12} However their raw data incorporated the only other recent statistics available on the Court of Session court processes and has been used for comparison with the writer’s research and the Cullen Review statistics.

3. The Scottish Office Central Research Office also funded a more generalised study of Sheriff Court procedure in 1994.\textsuperscript{13} Data was collected on 1,206 defended actions over 5 courts from July 1991 to July 1993. During the study period 54,974 ordinary actions were initiated, 10,036 (18%) of which were defended. The sample of 1,206 therefore represented 12% of defended ordinary actions.

4. After implementation of new caseflow management rules in the sheriff courts in 1994, a second evaluative study was undertaken of procedural practice, based on data

\textsuperscript{10} Personal Injury Litigation in the Scottish Courts: A Descriptive Analysis (1995), Central Research Unit (Personal Injury Study)
\textsuperscript{11} A circumstance confirmed by a subsequent study in 1997.
\textsuperscript{12} Court of Session Ordinary Causes - sample size 209 (17% of caseload)
  Court of Session Optional Procedure 96 (17%)
  Sheriff Court Ordinary cause (old rules) 156 actions
\textsuperscript{13} S. Morris, D. Headrick, Pilgrim’s Process? Defended Actions in the Sheriff’s Ordinary Court (1995) Central Research Unit (Sheriff Court Study 1995)
collected between May 1995 and August 1996 and in January 1997.\textsuperscript{14} The results of this comparative study (1,185 cases initiated in the same courts as the first sheriff court study) are coloured by a large proportion of ongoing cases in the second sample.

5. This writer's research covered two consecutive studies of Commercial cause rules, as set out in Chapter 7.\textsuperscript{15}

Comparisons between jurisdictions using the above piecemeal survey material are necessarily limited to the common data researched. The lack of empirical data is the largest failing of the Scottish court system at the moment. There has been no overall research criteria or common remit in Scotland, and each study is an historical snapshot of specific procedural paths and specific research agendas. However there are common trends which are identifiable across all studies and jurisdictions. These are

- high settlement rates, the corollary being the low number of Proofs finally heard
- over-allocation of Debates, Procedure Roll hearings and Proofs
- late settlements prior to hearing
- numerous extensions to adjust pleadings
- numerous amendments after closing the record
- prolongation of time to disposal by sists

The results of the Commercial study concur with the incidence of high settlement rates during court processes, which reinforces the theory that courts are used as settlement centres. To some degree there has been some evidence of over-allocation of hearings in the Commercial Court but to a far lesser extent than other procedural paths. Disposal time in the Commercial Court is radically reduced and settlements do occur at an earlier stage. Fewer Proofs are therefore allocated, and fewer late settlements take place.

\textsuperscript{14} E. Samuel, R. Bell, Defended Ordinary Actions in the Sheriff Court: Implementing O.C.R. (93) (1997) Central Research Unit (Sheriff Court Study 1997)
\textsuperscript{15} Commercial Court Study 1 1996 and Study 2 1997
Adjustments, amendments of pleadings and sists are carefully monitored so that the impetus of the process is continued. In this litigation highway there are fewer procedural laybys.

**Statistical Comparisons**

(i) **The Cullen Review**

The sample consisted of 300 actions disposed of on the Ordinary Roll during 1995. While 94.3% were settled, 5.7% were judicially resolved. *Chart 1* shows the stages of settlement compared to judicial resolution of defended actions. While most settlements took place on the pathway to Proof few cases were judicially determined until Proof.

*Chart 2* indicates the pattern of settlements. It is clear that the majority of settlements (58%) took place after a Proof date had been fixed, 28% within the week before the hearing. Since court time is booked on a first come first served basis, late discharge of Proof due to settlement, as Lord Cullen pointed out, is one of the main causes of delay which inconveniences and increases costs for the administration, judges, representatives, witnesses and other parties waiting for court dates.\(^\text{16}\)

The second largest incidence of settlements was after appointment to the Procedure Roll but before hearing took place(15% of actions). The disparity was referred to as "*an informal sist of process*" which again wasted both administrative and judicial time, causing unnecessary delay to other litigants.\(^\text{17}\)

*Chart 3* shows the duration of cases in 50 week intervals

\[
\begin{array}{cc}
20\% & \text{settled within the} & 1^{\text{st}} \text{ year} \\
\end{array}
\]


\(^\text{17}\) The Cullen Review (1995) op.cit. para 3.11
Judicial disposals extended over 4 years (approximately) but over half (59%) were completed by the second year. The time difference between settlement and judicial disposal rates may be specific to the types and complexity of individual cases, but it is submitted that the expectation of a judicial hearing has an effect on the speed of resolution. The corollary of that is that cases may drift into longevity if there is no judicial focus.

**Chart 4** compares disposal times found by Lord Cullen's Review and the Commercial actions studies. Within the first 50 weeks, 20% of the Outer House actions had been disposed of, compared with 94% of Commercial actions in Study 1 and 78% in Study 2. It is clear therefore that the interventionist approach practised by the Commercial judge speeds up disposal. The average length on the Commercial Roll was 26.6 weeks in Study 1 and 34 weeks in Study 2, compared to 89 weeks found by Lord Cullen (discounting 9 anomalously long cases).

**Widening the Comparison**

(ii) **Personal Injury Study 1995**

Speedier disposal is also found under the Optional Procedure for personal injuries, a simplified elective fast track devised for the Court of Session by the Kincraig Committee in 1979.¹⁸ Short statements of fact, limited adjustment of pleadings, and early disclosure of witnesses and documents were intended to curtail elaborate embellishment

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of straightforward personal injury claims.\textsuperscript{19} The emphasis is on simplification of presentation and procedure. By comparison, personal injury actions on the Ordinary Roll in the Court of Session and under the pre-1994 rules in the sheriff courts revealed the impact of laissez-faire attitudes on expedition (\textit{Chart 5}). Cases using the Optional Procedure are resolved more quickly

\begin{center}

\textbf{Personal Injury Actions Across Three Jurisdiction}

\ \begin{tabular}{|l|c|}
\hline
Optional Procedure & 87\% disposals within 1\textsuperscript{st} year \\
Sheriff Courts (pre-1994 rules) & 65\% “ \\
Court of Session Ordinary Roll & 44\% “ \\
\hline
\end{tabular}

\end{center}

The research team suggested that that the difference in duration between tracks may have been influenced by the restricted adjustment of pleadings and the occurrence of fewer sists in the Optional procedure.\textsuperscript{20} Cases were sisted longest in the Court of Session. It may also be that the simpler cases chose the Optional procedure and the more complex actions gravitated towards the less restricted Ordinary procedure.

\textit{Chart 6} compares rates of disposal within the Court of Session. The Ordinary Roll (Cullen Review) Optional Procedure (Personal Injuries Study) and Commercial causes (Studies 1 and 2 in 1996 and 1997) are set out. The pattern alone graphically illustrates the speed of disposal under Optional and Commercial Cause procedures. But it is also clear from the second Commercial study, now the procedure is bedded down, that the rate of early disposals is slowing down slightly. As discussed in Chapter 7 this may be because of volume of workload, changes in management style, or because it is beginning to be influenced by the overarching traditional system in the Court of Session. However it is still on average twice or three times as fast as the Ordinary Roll.

\textsuperscript{19} Rules of the Court of Session ss 188(E) – 188(P) introduced 24 September 1985 SI 1985 No.227, amended by SI 1990 No. 2118

\textsuperscript{20} Personal Injury Study (1995) op.cit. para 7.26
What do the fastest tracks have in common? It cannot only be simplicity which governs speed of resolution, as is often attributed to the Optional Procedure. Many Commercial actions are extremely complex. The interventionist role of the Commercial judge might counterbalance the impact of complexity since he is instrumental in unwrapping layers of procedural foreplay to reach earlier disclosure of facts and issues. It would seem that abbreviated pleadings and fewer and shorter sists are obvious common factors. But that cannot be the full explanation, and more evidence is required.

(iii) Sheriff Court Studies

Two wide-ranging samples of actions were analysed before and after implementation of the new rules. New procedural timetables prescribe periods within which adjustments have to be completed. At the end of the adjustment period, an Options Hearing is intended to take the form of a case management hearing at which the sheriff directs further action and allocates a Proof date. The results of the second study in 1997 show that while control through one management hearing mid-way through process was somewhat optimistic, delays and callings in court have been reduced. The influence of conflicting objectives is discussed later.

With the introduction of an interim case management hearing, the average time to completion dropped from 47 weeks to 41, although a much larger number of actions sisted under the new rules and the final average could be extended. The large number of sists caused a distortion in comparisons between the two studies, and a follow-up study will be undertaken to provide a more accurate assessment of the new rules in practice.

Chart 7 shows the initial 1997 sheriff court results mirror the pattern of resolution found in the first Commercial study, while the second Commercial study indicates extended resolution periods. Again, these figures may be distorted by the large number of sists in the sheriff court, making the span of resolutions overly-optimistic.
Factors Influencing Resolution

Do the stages of disposal throw any light on factors governing resolution? The Personal Injury study had identified only three stages of withdrawal from the adjudicative process, but it was possible to analyse the Cullen Review and Commercial statistics in further detail. The Personal Injury researchers noted that more cases settled before defences were lodged in the sheriff courts (37%), and there was a persistent pattern of withdrawal throughout this procedural path. However the most frequent occurrence of withdrawals in the Court of Session (both Ordinary Roll and Optional Procedure) were after a diet had been fixed.\(^{21}\) The highest proportion of actions remaining within the court process until Proof was under the Optional procedure (58%).

The above withdrawal pattern for Court of Session Ordinary actions is corroborated by the Cullen Review. Most settlements took place just before a Procedure Roll or between Procedure Roll and Proof, particularised to the week before and morning of Proof.

By contrast, the first Commercial study showed a high proportion of settlements (75%) took place during the Preliminary Hearing stage. The second highest point of settlement was before defences were lodged (13%). After the Preliminary stage there was consistent withdrawal on the pathway to Proof. (Chart 8) In the second study, 58% of settlements took place at the Preliminary stage, 19% before defences were lodged. It is submitted that sustaining an action until the eve of a court appearance where issues are discussed is a procedural ploy. The threat of an appearance promotes settlement.

- The majority of settlements take place on the Ordinary Roll prior to Procedure Roll hearings and Proof where matters of law and fact may be argued.

\(^{21}\) Personal Injury Study (1995) op.cit para 5:12
At Commercial Preliminary Hearings, where most settlements take place, emphasis is placed on early disclosure and open discussion both with the judge and opponent on the disputed issues.

Commercial actions in Study 1 were settled at an earlier stage and within a shorter timespan than any other jurisdiction. The second Commercial study still compares favourably with the Ordinary Roll. Both indicate that the very fact that a judge will be supervising, and most likely adjudicating the examination of issues is a significant factor in promoting early resolution or settlements.

Resolution by eventual adjudication is certainly not attained or even sought by many litigants. There is irrefutable consistency across all Scottish studies and jurisdictions that a very low proportion of litigants reach Proof – between 3 and 5%. Litigation is a settlement process. Even the very act of raising an action obviously promotes resolution in some cases. But presentation before a judge seems to be the most highly decisive factor in settlement. This is why caseflow management has reached speedier resolution with complex cases, not only in the Scottish Commercial Court, but also in other jurisdictions. Sustaining the success has however been problematic.

Looking to the experience in other countries (see Chapter 9) there is clear evidence that opening case files before a judge prompts settlements. In 1990 an expedited list was drawn up in Western Australia to deal with litigants requesting urgent adjudication, based on procedure used for the Commercial lists in London and in other Australian jurisdictions. Admission to the list was through a discretionary judicial sift. Procedure was based on flexible caseflow management principles of early and intensive judicial intervention coupled with special costs and mediation orders. Standards and goals were set and the appeal court supported the early decisions. Few did not settle, including complex commercial cases. Over a 15 month period 150 cases were admitted to the list, 80% of which were disposed of within 4 months, the majority at the earliest stage. This
evidence seems to corroborate the findings of the Commercial Cause studies in Scotland that

Early determined intervention coupled with continuous monitoring speeds up resolution, irrespective of complexity.

However if judicial control is known to be intermittent, this can have a profound effect on parties’ behaviour. The sheriff court study revealed that 46% of Options Hearings were discharged prior to calling, 79% of those due to sisting. They concluded that parties effectively “stopped the procedural clock ticking”\(^2\) rather than confront a judge. The parties could retreat for breathing space, and in the sheriff courts this temporary withdrawal is not monitored.\(^3\) Unrestrained withdrawal does not happen in the Commercial Court, where the judge is generally party to any decision to ‘stop the procedural clock’, and has the flexibility of individualised timetables. Where sheriffs attempted to take control by stricter approaches to adjustment, parties showed an even greater propensity to sist, causing late discharge of Options Hearings, with serious resource implications for the courts’ capacity to programme business.\(^4\) It seems therefore that if judicial control can be avoided it is, as in the sheriff courts prior to an Options Hearing; if not settlement is a serious option as at the Preliminary Hearing stage in the Commercial Court or on the Court of Session Ordinary roll prior to a substantive hearing. Actual court appearance compels a make, break or brake decision.

**Efficient Court Administration**

One measure of administrative success which the Maxwell Review explored in 1986 was the speed of allocating Proof dates. As discussed in previous Chapters the

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\(^2\) Sheriff Court Study (1997) op.cit. para 3.39

\(^3\) Hamilton Sheriff Court has tried to limit the length of sists, but there is debate over whether they have power to do so.

\(^4\) Sheriff Court Study (1997) op.cit. paras 3.33 and 3.42
Committee found that allocation was three times slower than considered reasonable.\textsuperscript{25} Double booking was recommended on the Ordinary Roll, and administrative target dates were set (currently 20 term weeks for 4-day Proofs). Up to September 1995 83\% of these shorter diets were allocated within target, and the remainder within a further 4 weeks.\textsuperscript{26} This is close to the 3 to 4 months Lord Maxwell thought reasonable. However, Proofs lasting over four days are exempted from performance targets, fixed at the convenience of court and preferred counsel. The Cullen Review sample showed that the average wait for a Proof was actually 31 weeks, although still 9 weeks faster than the Woolf Report revealed for London in 1996. By contrast, clients in the Commercial Court waited on average 11 weeks in the first study period, and 14 weeks in the second period. (\textit{Chart 9}).

The fact that the overall Commercial caseload is smaller is relevant to different waiting periods, but proportionately more Proofs are allocated per judge in the Commercial Court than in the Outer House.\textsuperscript{27} There are three main reasons for the speedy turnaround offered by the Commercial Court:

1. Proof will only be allocated when the judge is satisfied that the case is pared down to the real issues in dispute and that there is an argument requiring adjudication. This continuous judicial sift reduces the need for evidence on peripheral issues, shortening adjudicative time.

2. The Commercial Court has some input into estimates for Proof time. On the Ordinary Roll the Keeper of the Rolls allocates judicial time according to counsel’s estimates of time required, which have been criticised as severely

\textsuperscript{25} Report of the Review Body on Use of Judicial Time in Superior Court (1986) para 2.30 Time-lapse between closing record and date assigned for hearing was 15 months for non-consistorial Proofs, and 9 months for defended consistorial Proofs. (The Maxwell Review)

\textsuperscript{26} The Cullen Review (1995) op.cit.13 para 3.17
flawed. In the Commercial Court, counsel and agent must justify to a judge who has grown with the case the amount of Proof days required, even if final adjudication is passed to another Commercial judge. Only in the second sample were four extra-long Proofs allowed.

3. Because of early settlements a much lower percentage of the caseload is allocated a Proof in the Commercial Court (Chart 10). Early settlements flow from early preparation, a point raised by the Maxwell Review in 1986. This correlation is borne out by practitioners in the Commercial Court “It may mean a lot of front-loaded preparation, but at least it makes you put your head down and work.”

This admission from within the legal profession is the key phrase which embraces both the disadvantages and advantages of caseflow management.

**Demanding Court Time**

As previously noted, across all research studies there seems to be an irrefutable consistency in the very low proportion of litigants who reach actual Proof. The differences between Proofs fixed and heard, highlighted by Chart 10, show the actual extent of late withdrawals from different Scottish jurisdictions - after Proof is allocated. Whereas three studies indicate sheriff courts consistently fixing Proof for one-third of their caseload, in the Court of Session more than half are allocated Proof time,

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27 Commercial Study 2 (1997) - 74 Proofs were allocated between 3 judges = 25 Proofs per judge. In the Cullen Review 167 cases were allocated Proof theoretically between 18 Outer House judges = 9 Proofs per judge.

28 The Maxwell Review (1986) op.cit para.6.4, The Committee criticised the lack of application of counsel to estimates of time required; Lord President’s Practice Note 7 March 1990 time booked was “so wildly at variance with eventual duration as to imply that no thought was given to the original estimates [were] causing unacceptable delays in commencement of Proof”; The Cullen Review (1995) op.cit. para 3.16 “in practice the information as to likely duration - which is of critical importance - is frequently unreliable

29 Two of 16 days, one of 24 days, one of 38 days

30 The Maxwell Review (1986) op.cit. para 6.58
irrespective of track and notwithstanding the higher volume of civil work in the lower courts.

Why are a higher percentage of Proofs fixed in the Court of Session, regardless of track? The different outcome might arguably reflect the types of case and clients who gravitate towards the supreme court, but this is not borne out by comparison with the Commercial Court. It might point to the influence of an independent Bar whose full-time training and concentration on oral and written skills arguably contribute to the complexity of arguments, ultimately prolonging adversarially. The difference might actually be a measure of a higher standard of representation in the supreme court. This could explain the defensive attitude of the Bar against a ‘dumbing down’ of their independent adversarial role. Alternatively, differences in allocation of Proofs could corroborate judicial frustration with late application and preparation in the higher court, which is seemingly not undertaken in a large proportion of cases until the eve of Proof.

This circular argument is interrupted by the Commercial Court which reflects the pattern of bookings in the sheriff court, although heavily reliant on representation by the Bar (Chart 11). While the commercial nature of the case may influence early negotiations, it is submitted that the interventionist role of the judge dilutes adversarial foreplay, leading to a lower percentage of extended Proofs. Whether we can attribute this to ‘caseflow management’ or to any judicial interrogation will affect decisions to extend judicial caseflow management to the Outer House. Some argue that there is judicial authority to curtail excesses already, but it lies unused. Lord Cullen refuted this. In the 1995 Cullen Review sample, while an average of 4 adjustments to each case added between 2 to 34 weeks to process (Chart 12), the indulgence of amendments to 45% of the sample (Chart 13), ranging between 4 and 102 weeks, indicates that the judiciary,

31 Counsel interview 3 March 1997
32 Faculty of Advocates Response to the Consultation Paper by the Secretary of State for Scotland: The Legal Profession in Scotland (1989) op.cit. paras 3.5.1-3.5.8 and 3.2.6 “The marked inferiority in general of pleadings in the sheriff court is a matter of frequent comment by senior judges.”
33 See footnotes 27 and 29 above
trained in meticulous written pleading, concur in and condone what Lord Cullen called "over-elaboration of pleading detail".\textsuperscript{34} Perfection is therefore rewarded and encouraged. The Faculty of Advocates is already conscious that a change of approach to amendments is required, supported by "additional incentives and compulsors".\textsuperscript{35}

If stricter supervision is required, continuing judicial control seems to be a key factor in curtailing excesses, supported by additional incentives and compulsitors. Experience of the new procedures in the sheriff courts shows that one opportunity to interrogate and direct parties is insufficient. Sheriffs found that curbing adjustments\textsuperscript{36} led to an increased reliance on amendments, which were also allegedly used to sabotage court control.\textsuperscript{37} Some courts allowed an extra week, outwith the rules, to adjust pleadings in order to arrest slippage into the amendment procedure.\textsuperscript{38} Amendments were found to have effectively sidetracked cases to a procedural roll, and circumvented directions agreed and set out at earlier Options Hearings. Difficulties caused by problems with sheriffal continuity in the larger sheriff courts led one court to limit amendments after the Options Hearing.\textsuperscript{39} Some sheriffs would welcome a judicial docket system, recognising the restraint place on efficient administration by breaking the continuity:

"If I want to be a case manager then I want my own cases back and I'll do it at my convenience and that of parties."\textsuperscript{40}

\textsuperscript{34} The Cullen Review (1995) op.cit. para 3.18 "The scale of amendments ... strongly suggests that the revisal of pleadings was unnecessarily deferred. Parties placed undue reliance on their ability to amend, despite being more costly"

\textsuperscript{35} Memorandum by the Faculty Committee on the Courts for Lord Cullen's Inquiry (1995) op.cit.10 Suggestion was made for a By Order Pleadings Review Hearing after the adjustment period in order to check further work required (note the similarity to the Options Hearings in the sheriff courts)

\textsuperscript{36} Sheriff Court Study (1997) op.cit. para 3.38

\textsuperscript{37} Sheriff Court Study (1997) op.cit. paras 4.74-4.77

\textsuperscript{38} Sheriff Court Study (1997) op.cit. paras 4.121-4.126

\textsuperscript{39} Edinburgh Sheriff Court

\textsuperscript{40} Sheriff Court Study (1997) op.cit. para 4.77
Instead of 'assembly line' justice, Glasgow Sheriff Court is independently attempting to replicate the benefits of continuity found in the Commercial Court where the judge becomes familiar not only with the facts of the case but also litigating behaviour. Edinburgh Sheriff Court has devised two alternating short-term judicial dockets lasting 8 weeks, notwithstanding the average civil case continued for 41 weeks.\textsuperscript{41} The benefits of continuity are discussed further into the Chapter.

**Wasting Court Time**

Although courts are subject to performance targets, efficiency and productivity are dogged by external factors - late cancellations which waste judicial and administrative time. This is seemingly common to all Scottish jurisdictions, curtailed somewhat in the Commercial Court.

In the 1997 sheriff court survey 5,193 hearings were booked, 31\% of which were discharged, half of those on unopposed motion (pointing to mutual indulgence between parties). The researchers argued that although callings into court were reduced statistically, in practical terms the high proportion of cancellations still represented unnecessary bookings and administrative work for the courts.\textsuperscript{42} The later the warning the court received, the less likelihood of reallocation being viable. For parties, spurious bookings focus negotiation without personal investment, and, as such, is prevalent behaviour. Since court dues are retrospective, the current cost does not discourage over-allocation, and the freedom to litigate is the crux of the adversarial process.

The 1996 sheriff court study reported that 90\% of Debates were discharged, 78\% of them on the day. With the introduction of caseflow management fewer Debates were

\textsuperscript{41} Sheriff I. Macphail (1998) op.cit. The average may be longer when ongoing cases finish.

\textsuperscript{42} Sheriff Court Study (1997) op.cit. para 4.6
fixed; 20% of cases benefited from lodgement of advance Notes of Argument. 43 Decisions to progress to a hearing were subject to interpretation of the shrieval role.

"Perhaps you had better look at your pleadings before debate." 44

However, notwithstanding the decrease in Debates, 86% were still discharged, 84% of those on the day fixed for the hearing. In the same courts, 75% of Proofs were also not discharged until called in court. Intermittent intervention at Options Hearings had not changed working cultures. Late cancellations wasted resources. It has even been argued that the new structure provides an incentive to wait until the due date to discharge a motions hearing since appearance was chargeable to the client. 45 This practice was therefore a fee-earner. It was only when Options Hearings were being cancelled for a sist that greater use was made of written motions 46 rather than a court appearance, avoiding any close questioning by the judge as to why a sist was necessary.

Practice in the Court of Session mirrors the pattern of redundant allocation of court time. The Cullen Review noted that 70% of diversions to the Procedure Roll in the Outer House were unnecessary, arguably used as an "informal sist of process." 47 Over the sample of 300 cases, 2163 Motions were enrolled, 232 being starred for appearance of counsel, 67 of which were subsequently dropped. As far as Proof diets were concerned, 85 were discharged with little warning, in addition to 71 earlier cancellations. 48

The practice of making spurious bookings is ingrained into the legal culture. Just as it has not been controlled in the sheriff courts, it has not been eradicated in the Court of Session. In a caseflow management system preparation time is also wasted, since the
judge studies papers in the presumption of a hearing taking place, and works unsocial hours to do so. Table 19 in Appendix 6.5.2 indicates the extent of the malaise even within the judicial docket system. In 1995 72% of Commercial Proofs were discharged, 80% in 1996, dropping to 55% in 1997. Chart 10 reflects the increase in Commercial Proofs being heard. As for Debates, 35% took place in 1995, increasing to 54% in 1996 and 51% in 1997, again reflecting a rise in substantive hearings. Study 2 established that the majority of Commercial Debates and Proofs discharged on the day, with 25% of settlements taking place just before or at Proof. If parties insist on a hearing, they may book it, but at little cost to either party if it is later cancelled. Can court fee structures be used to avert this practice?

At the inception of the new sheriff court rules, advance payment was required when booking Debates or Proofs, but parties seemed reluctant to abandon a hearing, even when settlement had taken place. Payment was non-returnable and a motion on the day attracted an additional fee.\(^49\) In fact, extra diets were built into process by some sheriff courts to check advance payment and that parties intended to proceed. Although working against policy objectives of keeping hearings to a minimum, it was looked on as a pragmatic 'breathing space' since courts had discovered that pre-payment had led to increased sitting.\(^50\) From 1 April 1996 payment for substantive hearings became retrospective as in the Court of Session.\(^51\) Controlling timetables by feeing is therefore a double-edged sword. Under either system there is no disincentive for booking a spurious hearing, leading to sheriff courts adapting their management strategies outwith the rules. While one court called extra diets another introduced ‘Proof Allocation Sheets’ to be completed by parties when they were ready to be set down for Proof, with the result that fewer disruptions occurred with ghost bookings. However, control returned to parties as it was virtually a court-sanctioned informal sist. Since early pre-

\(^{49}\) Sheriff Court Study (1997) op. cit. para 5.29
\(^{50}\) Sheriff Court Study (1997) op. cit. paras 5.30-5.31
\(^{51}\) Sheriff Court Fees Amendment Order SI 628 1 April 1996
Proof settlements free up precious court time, it may be that the following alternatives should be considered:

- Pre-trial meetings between counsel, agents and clients, with or without judicial attendance may screen out settlements, but may equally be used to intimidate the opposition. Additionally at several By Order Commercial Court hearings parties have insisted on their intention to proceed, at times only days in advance of Proof, only to withdraw on the morning.

- A judicial sift of process papers before Proof is allocated, perhaps coupled with discussion with representatives, may bring realism to settlement prospects. But this is resource intensive, arguably encouraging amendments which revamp a case for Proof. Professional advice is not always heeded by clients intent on their day in court. The impartiality of the judge may be questioned, and a different trial judge could disagree with his colleague’s prior opinion or management.

- Court-sponsored Early Neutral Evaluation (E.N.E.) by a senior member of the Bar gives parties a clinical pre-Proof assessment of weaknesses and strengths, encouraging negotiation and settlement. A sealed evaluation report lodged in process could influence judicial award of expenses if one party continues to insist on booking Proof time where there is clear liability. This may mean additional expense for those who proceed, but will save others the costs of Proof. Payment for one consultation could be made by the parties direct to the Evaluator, who would gain invaluable judicial training while retaining a partial caseload. All members of the Bar could benefit, although impartiality of the ‘poacher turned gamekeeper’ should be guarded.

52 Assessment of quantum may be more problematic and therefore contentious
Within sheriff courts and the Court of Session, mandatory notification of pre-trial settlements, arguably involving financial penalties for settlement on the day against legal professionals.\textsuperscript{53}

**Continuity of Control**

Both in the sheriff courts and in the Commercial Court, keeping parties focused on directed paths has had an effect on the number of diets. Within the sheriff courts the intention to vest control in the court has been shown to conflict with the objective of keeping hearings to a minimum.

In the sheriff courts parties have strategically withdrawn from unwanted shrieval attention. It was intended that procedural directions, including a Proof date, were to be given at an Options Hearing after the adjustment period had closed. Of those who reached this hearing, almost half required a second hearing, with some cases going on to a third diet. There seemed to be a lacuna in the rules whereby fixing a Proof date at an Options Hearing conflicted with time for settlement negotiation, and some courts responded by allowing a continued diet\textsuperscript{54} as opposed to sisting.\textsuperscript{55} New rolls appeared in four of the five sheriff courts studied, variously called Miscellaneous Procedure Roll, Procedure Roll, New Procedure Roll or were unnamed. These peremptory diets were individual adaptations outwith the rules, although no formal authority existed and informal agreement between Sheriffs Principal was denied.\textsuperscript{56}

Parties were also involved in 953 miscellaneous hearings on written motions, covering 76\% of cases; 40\% being called at least once. The researchers found that overall more

\textsuperscript{53} Sheriff Court Study (1997) op.cit. para 5.57 “Why can’t agents pick up the phone and tell the sheriff clerk that X has settled against Y and the sheriff need not read the papers?” Sheriff’s comment.

\textsuperscript{54} Sheriff Court Study (1997) op.cit. para 4.59

\textsuperscript{55} Sheriff Court Study (1997) op.cit. para 4.26 “If there is a possibility of reconciliation, I sist......In my view a rigid timetable should not interrupt any process of healing” Sheriff
cases called than was warranted. To retain control, some sheriffs were more proactive than others, using discretionary powers to call parties in for discussion when unopposed motions were lodged (for example, a minute of amendment). The aim was to focus parties’ minds earlier on the need for Proof.\textsuperscript{57} Sheriffs have no statutory power to call parties into court otherwise, but those who allocated continuation diets to check conformity were within the quickest courts. Researchers concluded that conflict of policy objectives evoked inconsistent shrieval response, with the bulk of parties preferring to sist rather than submit to scrutiny.\textsuperscript{58}

In the Commercial Court, however, sists are rare, timetables are negotiable, and adjustments and amendments of pleadings are generally integrated into the process as it flows rather than interrupt it. In the second Commercial study, however, an increase in continued hearings was noted. It became obvious that parties were beginning to use adjustments and amendments in an attempt to hijack judicial control by three main methods:

(a) by not passing them to opponents within the agreed timescale, breaching interlocutory orders
(b) by not lodging minutes as ordered in advance
(c) by offering new amendments at the bar

These practices resulted in extra time being needed for judicial scrutiny and for opponents’ answers. Continuity of supervision curtailed these slippages, although mixed judicial involvement and individual forbearance were exploited on occasion.\textsuperscript{59}

It is submitted that over-reliance on amendment procedure, as Lord Cullen pointed out, is one source of delay, the corollary of which is late settlement. An element of mutual

\textsuperscript{56} Smart v Tullis Russell 18 June 1996 per Sheriff Principal Macguire; Sheriff Court Study (1997) op.cit. paras 4.47-4.40
\textsuperscript{57} Sheriff Court Study (1997) op.cit. para 4.13
\textsuperscript{58} Sheriff Court Study (1997) op.cit. paras 4.57-4.60
indulgence, noted in all Scottish tracks\textsuperscript{60} means that representatives will not police the opposition's behaviour. It is within judicial power to curtail excesses, but substantive justice takes precedence over procedural speed.

Consistency of judicial approach is paramount, since ad hoc scrutiny does not discourage divergent behaviour, splintering the system and undermining the ethos of court control. In a fragmented system, parties can choose the track least disruptive to their case. By choosing a procedure, such as the Commercial Court, parties are voluntarily relinquishing partial control in return for an exact timetable and quicker resolution – in the Court of Session an average of one year quicker. Where there is no choice of track and the pace is partially controlled, as in the sheriff courts, a large proportion of parties find a way to circumvent the rules, saving an average of six weeks to resolution.

\textbf{Chart 14} bars out the new sheriff court findings\textsuperscript{61} that a high proportion of actions are sisted in sheriff court, higher than the Outer House. Sists represent an interruption to management, and there appears to be a gap in the court’s power to recall actions which have lain dormant for any period of time. If there is a lacuna in the rules, it encourages inertia, requiring judicial authority to demand lodgment of up-dated information at timely intervals. Ideally administrative supervision of court rolls through information technology could also be used to facilitate public access to basic details of process, giving clients the information to keep pressure on legal professionals. There is some doubt whether clients do know that their cases have been formally sisted.\textsuperscript{62}

A judicial docket system, coupled with information flowing directly from court to client through a public information system, sustains focus on the objectives – service to the client. Since litigation is a subsidised public service, the Executive is entitled to monitor

\begin{flushleft}
\textsuperscript{59} Chapter 7  \\
\textsuperscript{60} The Cullen Review (1995) op.cit. para 3.6; Sheriff Court Study (1997) op.cit. para 5.54. Few moved for decree by default over late lodgment by the opponent  \\
\textsuperscript{61} Sheriff Court Study (1997) op.cit. para 4.20 57\% were sisted, compared to 49\% in previous study
\end{flushleft}
excesses. Forecasting wastage of limited resources involves utilising those resources differently. Empirical data, together with the views of those who demand and waste these resources, should inform policy changes.

**Perspectives and Views of Court Players**

Solicitors, counsel and clients respond in different ways to litigation rules, coloured by their own agendas and perspectives. Over the two Commercial study periods, responses to questionnaires\(^{63}\) were received from:

- 20 law firms in Edinburgh who represented their own clients in the Court of Session or acted as agents for other practices
- 45 senior and junior counsel within the Court of Session and solicitor-advocates with rights of audience in that jurisdiction
- 40 clients of the Commercial court

Follow-up interviews in each category supplemented and extended written responses.

**The Legal Profession’s Views**

Respondents reflected wide experience of different types of cases and Scottish jurisdictions, serving a large proportion of commercial clients as well as individual litigants.

<table>
<thead>
<tr>
<th>Branch of Legal Profession</th>
<th>Commercial Client Workload</th>
</tr>
</thead>
<tbody>
<tr>
<td>Solicitor-Advocates</td>
<td>78%</td>
</tr>
<tr>
<td>Law Firms</td>
<td>65%</td>
</tr>
<tr>
<td>Queen’s Counsel</td>
<td>62%</td>
</tr>
<tr>
<td>Advocates</td>
<td>52%</td>
</tr>
</tbody>
</table>

\(^{62}\) Sheriff Court Study (1997) op.cit. paras. 4.38-443

\(^{63}\) see Appendix 8 for sample questionnaires
Most law firms regularly represented the same clients, and judged that they had been chosen by personal recommendation as well as by reputation, with choice of counsel mainly dependent upon established relationships within the profession.

Choosing the Procedural Track

All were asked to evaluate factors governing the choice of court – cost, speed, convenience and clients’ wishes. Advocates and Queen’s Counsel conceded that the choice was made by solicitors in approximately 50% of actions. Law firms reported that reliability, quality, certainty and the higher calibre of representation and judges positively influenced their decision to litigate in the supreme court. The benefits flowing from the craftsmanship of the Bar seeped through - though at a cost. Solicitor-advocates took into account cost and speed of different procedures. On the other hand, for advocates and, more particularly Queen’s Counsel, neither cost nor speed were decisive factors. In fact the latter considered cost almost irrelevant (1%), while convenience was rated highly (26%), understandable views in any monopolistic self-employed profession or service. The more distant relationship with the client, aimed at giving counsel objectivity and independence, also serves to reinforce the alienation from the client’s agenda.

Speed was a decisive factor for many law firms, but all classes of representative rated client input of low significance in the choice of court. It was clear from subsequent interviews that in many cases options of procedural track are not discussed with clients, precedence given to convenience of the profession. Does this attitude actually explain the high incidence of sitting in sheriff courts? Interviews supported previous research - sitting, is an antidote to court control, sometimes more convenient for the profession and busy courts than the client,64 as it eases workflow pressures. In some instances

64 Sheriff Court Study (1997) op.cit. paras 4.38-443
clients are even unaware that their process is closed as ‘inactive’. The length of sists for ‘negotiation and settlement’ or ‘legal aid’ gives credence to the suspicion that undemanding clients may unwittingly be badly serviced. This convenient sidetrack allows some firms and individuals to accumulate high caseloads. In a caseflow management system the demands of continuous deadlines permit a wider distribution of work.

**Discussing Negotiation and Settlement**

Representatives were also asked about when they discussed negotiation and settlement with clients. It was obvious that the bulk of lawyers addressed this option earlier than advocates or Queen’s Counsel who are not generally instructed until the pleadings required drafting and generally have little direct contact with clients. However, there was less emphasis placed on negotiation at the close of the record, when pleadings had been adjusted. If the theory of written pleading system was fulfilled, the factual and legal disclosure of issues in dispute would present an ideal foundation for settlement discussions. However, many solicitors and counsel talked of a “lack of information” available at this stage, leading to amendments and discharged Procedure Roll hearings. This led to a reliance on judicial approval to develop and prepare processes “up to the morning of Proof”, when the most vigorous emphasis was placed on settlement and negotiation. However, the reliance was strongest for advocates, and more particularly Queen’s Counsel, who expected unfettered control. As for manipulative tactics one firm admitted that settlement at the door of the court was a standard objective:

“It is very much a tradition of the firm that we put maximum energy into a creative strategy for achieving ‘out of full Proof’ solutions”.

**Factors Inducing Settlement**
Solicitors’ responses corroborated empirical evidence that 90-9% of cases settled. Factors which induced a decision to settle were explored. While the importance of the imminence of a court hearing was confirmed, the most generalised response was that settlement took place when there could be a realistic assessment of the strengths of a case generally after investigation and pleadings were ‘complete’, based on a risk-cost analysis.

Senior counsel revealed that a realistic settlement could not be reached until a defender had substantial information, which was almost never made available until just before Proof. The conclusion must follow that allowing continuous and unfettered development of the case effectively closes the door to earlier settlements. The Commercial Court has shown that early disclosure does lead to earlier settlements. The burden of giving evidence, pressure to beat a defender’s tender, and desire for amicable resolution are all balanced against perceived weak points. The risks of adverse awards of expenses in a ‘loser-pays-all’ system were continuously assessed against prospects of success, but only in the later stages was this considered a realistic assessment.

Sources of Frustration

Solicitors were asked about a typical source of frustration with the litigating process for (a) their clients and (b) themselves. The firms claimed that for clients, delay was the most common complaint, particularly delay in reaching Proof. The ability to cause delay without any effective sanction against the perpetrator was a source of concern, but only two firms reported that their clients were frustrated by prohibitive costs, sometimes not fully recoverable, even if they were successful. As for the practitioners, delays were frustrating, but more frustration was reserved for opponents’ brinkmanship tactics, lack of co-operation and unwillingness to discuss cases. Inconsistent judicial attitudes were also noted. While lawyers complained of exceptionally detailed written pleadings,
others noted a failure of pursuers adequately to aver their case at an early enough stage, with amendment procedures limiting opportunities for defenders to extricate themselves early from a ‘bad case’. Once again it became obvious that some parties use the amendment procedures to add delay and obfuscation rather than clarity.

**Unnecessary Delays**

Practitioners were questioned more closely on causes of ‘unnecessary’ delays. As clients’ priorities did not always favour progress, and could not be dissuaded from unrealistic expectations. Lack of instructions or clear information from clients caused delay. However, the opponent was a much clearer target for complaints. Failure to respond effectively and timeously increased the time required for reciprocal responses, and hampered quantification of claims. Holding on to experts’ reports, in particular, hindering negotiation, was a widely-held complaint.

Clearly a high proportion of work was prepared on the eve of deadlines. although some blamed court administration for delays. Others admitted that their own follow-up systems regularly failed, and adjournments were regularly requested because of work pressures and insufficient time to prepare. Late preparation obviously caused tension with daily business. Proponents of caseflow management, on the other hand, report that efficiency drives in court eventually have a domino effect on efficiency drives in lawyers’ offices. To a great extent the firmness of the court shapes expectations and work patterns throughout litigating practice. When the court does not take the lead, there is no common goal. Several interviewees confirmed that approaching the opposing party for settlement discussion might weaken the bargaining position. With the judge acting as intermediary and director, the initiative advantage of parties is preserved.

However, it was judged that lack of judicial resources, particularly when it affected time to appeal, was frustrating for practitioners and clients looking for speedy resolution.
Over-allocation in the Outer House caused queues for diets of Proof, and booking all cases for 10 a.m. on Tuesdays added to a chaotic and tense atmosphere when settlement offers were negotiated. By contrast, guaranteed time in the Commercial Court was especially welcomed. Senior lawyers and representatives were encouraged to attend, introducing high profile business to the court.

Unnecessary Expense

Clients were generally blamed by the profession for sustaining dogmatic attitudes and not providing full packages of information and instructions at an early stage. Opponents contributed to 'unnecessary' expense by refusing to co-operate or at worst communicate with their professional colleagues. Some firms were thought to discourage sensible negotiation, sometimes calling for an unrealistic number of reports, tending to pressurise and exhaust insecure clients. Lack of judicial resources also added to costs by splitting the need to split longer hearings, even adding "serious expense" if a substantive hearing could not take place:

"If no judge is available, and we have to wait until the afternoon, then the client has to pay our fees and counsel's."

Three practitioners admitted that their own workload contributed to 'unnecessary' expense, but one volunteered that this was not passed on to the client.

Using Procedural Rules – Tactics

65 There is no empirical data on fairness of settlements, since this is private and subjective
All lawyers were of the opinion that their opponents used procedural rules tactically, opined with varying degrees of vehemence. Two admitted that all practitioners did, usually by *delaying matters to their advantage*”

**Written Pleadings**

Since written pleadings had been widely criticised in practice, and taking account of opportunities and insinuations of fee-building, representatives and agents were asked to compare how much the present pleading system in different Scottish jurisdictions assisted them to

- (a) focus issues
- (b) facilitate settlement
- (c) expedite progress and
- (d) reduce costs

The jurisdictions compared were:

<table>
<thead>
<tr>
<th>Court</th>
<th>Procedure</th>
<th>Type of Written Pleadings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sheriff Court</td>
<td>Ordinary Causes</td>
<td>Full written pleadings</td>
</tr>
<tr>
<td>Court of Session</td>
<td>Optional Procedure Personal Injury</td>
<td>Abbreviated pleadings</td>
</tr>
<tr>
<td>Court of Session</td>
<td>Ordinary Procedure</td>
<td>Full pleadings</td>
</tr>
<tr>
<td>Court of Session</td>
<td>Commercial Court</td>
<td>Simple, non-technical pleadings, augmented as required by statements</td>
</tr>
</tbody>
</table>

Advocates and Queen’s Counsel showed a distinct preference for traditional full written pleadings in order to focus issues, facilitating settlement and reducing costs, though expedition was the least anticipated outcome. These views support empirical data and reflect basic Faculty training in attention to detail.

All branches thought that fuller written pleadings facilitated settlement. Empirical data did not support this conviction, since 55% were sent to Proof after the pleadings should
theoretically have been complete, and representatives did not emphasise negotiation and settlement after the records was closed. The high incidence of late amendments and court-door settlements leaves the profession open to criticism of over-servicing and vested interests, where inefficient practice attracts repetitive feeing opportunities. However, abbreviated pleadings, with little adjustment opportunity under Optional Procedure for Personal Injuries, sent 58% to Proof and court-door settlements were equally high. It is questionable therefore whether the credit for settlement lies with the practice of written pleadings in any form. This view has also been made by Lord Rodger of Earlsferry when Lord Advocate (currently Lord President of the Court of Session):

"The vast majority of cases settle on a basis which has nothing to do with the comparatively minor issue which often absorbs both time and attention in the process of adjustment."66

All branches of the profession accepted that the Commercial system assisted expedition - "It very definitely does" - with 50% acknowledging the positive benefit in focusing issues, comparatively increasing costs. However, it seems that "loose wording" and "ambiguous statements" coupled with intensive judicial inquiry at every hearing spawned fresh investigative work (as Professor Resnik had pointed out). Some representatives expressed nervousness over receiving adequate fair notice of an opponent’s case, notwithstanding judicial confidence in alternative methods of disclosure. It seemed to be a control issue – whoever controls amendments controls the procedure. Some blamed the judges for condoning abuse:

"We know where we are with full written pleadings – at least the theory of it. I just wish abuses were not tolerated on the Ordinary Roll."

Practitioners using abbreviated pleadings under Optional Procedure were also concerned with lack of fair notice and disclosure of evidence, but here the pleadings were thought to contribute to reduced costs, probably due not only to restriction of adjustments, but also restriction of experts. This explains why Optional Procedure attracts cases where less investigation and preparation are deemed necessary, but does not explain the extensive allocation of Proof diets if these are simple cases. What is being witnessed is a propensity to push preparation and decision-making to the last minute prior to a judicial hearing.

Solicitors were asked for their views on Lord Cullen’s recommendations for

(i) Abbreviated pleadings
(ii) Earlier and wider disclosure
(iii) Pursuer’s offer to tender
(iv) Case management hearings and pre-trial reviews
(v) Early starts to hearings and judicial continuity

Most respondents were in favour of using abbreviated pleadings, with comments ranging from “excellent” to “with suspicion”. The suggestion of a case management hearing to be held after defences were lodged seemed to provide a solution for one firm who considered it a poor idea while the onus remained on the pursuer. Another firm forecast frustration for defenders who would be open to ambush. Not surprisingly therefore a recommendation for earlier and wider disclosure was supported, although several suggested that the idea was unrealistic without timetables to work to. It seems therefore that an over-arching control mechanism would be welcomed as a focus for preparation.

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68 One pilot model was operative for 59 days before withdrawal as overly punitive (see Chapter 4)
The idea of a ‘Pursuer’s Offer to Tender’ was welcomed by most respondents. Only two disagreed with the principle. As discussed in Chapter 4, it seems that the majority of solicitors considered the concept a useful tool for promoting settlements, but the punitive aspects of the first attempt to introduce this facility (attributed to faulty draftsmanship) led to withdrawal of the rule shortly after implementation.

Only one respondent was against the introduction of case management hearings and pre-trial reviews and one was sceptical of adequate funding. The rest were supportive, bearing out positive responses at interview:

“This is long overdue, but it would need to be a great deal more far-reaching than Options Hearings in the sheriff court. Issues should be identified soon after defences were lodged and not pre-trial”

“Good if put into effect like Lord Penrose does in the Commercial Court”

The greatest scepticism was reserved for the likelihood of re-organisation of court business to ensure an early start and judicial continuity. All would welcome the introduction of new systems:

“This alone would solve most of the present problems, particularly the early start. At present any Proof takes at least one day more than should be needed with consequent increase in costs”

But the comment “I will believe it when I see it” reflects the flavour of other responses.

Solicitors were also asked for their views on

(i) Sanctions
(ii) Advantages of judicial caseflow management
(iii) Disadvantages of judicial caseflow management
(iv) Fixed timetables
(v) Encouragement of alternative dispute resolution
(vi) Court appointed experts

Although one thought present sanctions were adequate if the calibre of judges prevailed, awards of expenses were advocated as the most effective penalty, particularly for blatant or repeated breaches. Three suggested dismissal of the case. It was clear that the onus was on the judge to initiate sanctions. Four respondents supported personal liability against agents and counsel for the most serious breaches, although two others considered judicial reprimands extremely effective.

*Solicitors are under huge pressure and should not be penalised for errors as a result of mistake or oversight.*

Most expected that judicial caseflow management would produce speed, clarity, ultimately benefiting client confidence. It was anticipated that procedural delaying tactics would be more visible, particularly with judicial continuity. Focus, momentum and fairness were predicted, which were extremely upbeat accolades for a system which would "prevent incompetence" the key to the way judicial hearings alter perspectives and behaviour.

"The threat of having to address a judge is much more effective in concentrating the mind than a diary entry."

Costs and lack of flexibility were perceived as drawbacks of judicial caseflow management. "Rushing to judgement" was feared, along with the risk of undue judicial intervention and proprietorship slipping away from parties.
"It can result in matters being dealt with too quickly when both parties are content with a more relaxed approach, either to allow information-gathering or to enable parties to instruct counsel of their choice."

The threat of a judge ‘taking over’ a case was the greatest cause of anxiety. This was seen as a cost for the benefit of speed and clarity. In the Commercial Court judicial intervention is dependent upon perceived co-operation. Time limits are discussed as a matter of form with representatives. Judicial forbearance however is subjective, with judicial personality governing the amount of guidance given to parties.

When asked if it was realistic to expect cases to run to a fixed timetable, there was a strongly perceived need for individual flexibility. Although momentum was important, rigidity was blamed for the under-employment of the Optional Procedure for personal injuries. "There should be a general rule which should allow for exceptions." This does not make for confident prediction of a co-operative approach. And since lawyers make their living out of ‘exceptions’, fixed timetables can generate fresh opportunities for argument and appeal.

Alternative Dispute Resolution (A.D.R.) was generally accepted as beneficial in principle but was not generally encouraged - “this does not seem to have captured the imagination of the practitioner”. Most wanted to keep control of negotiations by personally encouraging their clients to adopt a common sense and realistic approach. Two did not favour A.D.R., with others requiring information on costs before considering commitment to new schemes.

As far as court-appointed experts were concerned, all of the respondents would prefer to use their own, some for client confidence. Three expressed willingness to co-operate with court orders, but suspicions over experts’ partiality inhibited others.
"I would not trust a court-appointed expert who would be anxious not to offend so as to ensure the next appointment."

When asked about barriers to cost-effective and quick litigation, the opposition was again a clear target for blame. However lack of judicial time and difficulties in finding appropriate experts were known to contribute to delays. Experts' and counsels' fees were criticised, as was the lack of availability of specific counsel, leading to the assumption that there is a network of relationships between several counsel and agents.

**Views of Users of the Commercial Court**

To look at the same procedures from different perspectives gives a fuller picture of pragmatic approaches to the rules. Representatives in that court and clients were each questioned.

Many clients regarded litigation as a last-resort resolution in commercial disputes, particularly if there was an on-going relationship, but responses were received from clients with varying experience of court procedures. Most respondents were highly experienced litigators. Questionnaire responses were augmented by interviews.

**Choosing the Procedural Track**

It was confirmed by clients that overwhelmingly the legal profession chose the procedure, with only three clients reporting that their company executive made the final choice. Nine had been advised against using the Commercial fast-track procedure in other actions. Only one firm had opposed their inclusion on the Roll since it was a "complicated construction contract dispute with many claims and counterclaims" (the action was later abandoned by the party who had initially opted for the Commercial procedure).
In choosing the Commercial Court, it was clear that advice from the legal profession on the positive aspects of a fast-track procedure played a significant role in the choice:

- **Speed** was perceived to be the main driver for the majority of parties, although some were jaded by experience.

- **Judicial expertise** was a deciding factor "to bring about early resolution of long running and apparently ‘insoluble’ dispute before a judge with knowledge in a particular area.”

- **Cost** was a positive factor for 20% of respondents, particularly when an early resolution was urgently required.

**Preparation Involved**

Early preparation was the prime objective of the rules. Many of the representatives who stated that more work was required, qualified their response by adding "substantially", "much more", "significantly heavier", and "considerable". Most recognised that the preparation had been justified, manageable, and advantageous. One advocate stated that considerable increase in his pre-hearing preparation was the one factor which permitted satisfactory use of abbreviated pleadings. Additionally, representatives thought that practice in the Commercial Court was beginning to influence ordinary procedure as the benefits became known.

Most clients of course did not feel competent to comment on the amount of professional preparation involved, but had a general understanding that the groundwork had to be more thorough from the outset due to "accelerated demands". Two clients who had extensive experience of sheriff courts appreciated that calling times between sittings was
less. Another was extremely relieved and grateful that his prior sheriff court experience—

"an endless process of adjustments, amendments, and delaying tactics, inflicted for adverse publicity by a competitor without the least prospect of legal success, and settled just prior to Debate"—

was not allowed to be repeated in the Commercial Court. This client speculated that the growing reputation of this court would discourage spurious actions. The increase in cases settling between initiation and calling in the second Commercial study gives credence to this comment. 69

Preliminary Hearings

A high proportion of clients questioned (70%) had either attended hearings themselves or been represented by senior company management in court, many from the Preliminary Hearing stage. Marginally more pursuers than defenders attended. The size of the firm did not appear to affect their presence. Most were extremely positive about the way Preliminary Hearings were conducted.

"An enormous improvement on other procedures, providing less scope for abuse of legal process"

A request for critical comments revealed that two respondents would have preferred the judge to have been "more robust" in his intervention, frustrated that opponents were not questioned early on decisive evidential points. Queen’s Counsel, however, noticed that Preliminary Hearings were useful for "tending to draw out a defender’s position". Solicitor-advocates in general agreed that Preliminary Hearings had been useful in

69 Commercial Study 2 Appendix 6.5.2 para 4.4
creating an early focus, flushing out issues for joint discussion (reflected in early settlements at this juncture), but commented on the drift back towards traditional written pleadings. Although individual counsel were concerned with the amount of judicial input, overall it was helpful to receive continuous judicial feedback “and be given an opportunity to air problems and concerns”.

Procedural Hearings

Clients however showed some impatience at the Procedural stage where preparation for substantive hearings was discussed. Although positively “clear and straightforward” judicial views could prompt settlement, some opponents still continued to prevaricate rather than negotiate. Representatives acknowledged that there was little difference in preparation for Debate or Proof from that on the Ordinary Roll, but a few stated that preparation depended on the supervising judge. Appearing before one particular judge in complex case increased preparation.

Flexibility and Informality

Some caseflow management systems run to fixed timetables, matching the case to the procedures, assuming that most are ‘routine’, but the judicial docket system in the Commercial Court matches procedure to each case allowing for individual differences in disputes, clients and representatives. This means that flexibility and informality are key issues. Almost all representatives stated that these attributes were apparent and beneficial, dependant upon the judge. Creating an atmosphere for early focus was of particular benefit in straightforward cases, and this may explain the high incidence of settlements at or before the Preliminary Hearing stage. Clients also noticed the informality and flexibility, but there different views were expressed by larger and smaller firms. Larger companies looked for even more flexibility, while smaller operators were still inhibited by formality and “legalese”.

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Judicial Discretion

Since there was wide scope for judicial discretion, parties were asked to evaluate the effect of judicial intervention on costs, delays, substantive issues, settlements and appeals. Both representatives and clients were impressed with the speed and encouragement to reach consensus. On the positive side, practitioners found preliminary rulings were useful, cases moved on faster, generally settled and issues were better focused than in other procedures. At times at least part-resolution followed judicial comments, and parties were alerted early on to "the way the wind was blowing". Time-wasting tactics and procedural wrangles were minimised, and the court commanded respect. The majority of clients were positively impressed with the effect on costs, delays and decisions to settle, which were evaluated as far outweighing negative comments. Judicial discretion had influenced two clients' decision to appeal.

On the negative side there were two firms who were frustrated with perceived over-indulgence by the judge and time "wasted on legal arguments". One firm had calculated that 500 man hours were lost in progressing their case over two years. It was recognised, however, that some delays were outwith the control of the court, particularly expert opinion which was sometimes difficult to obtain quickly. Representatives appreciated that "procrastinators" could be pressured, but also recognised that there was a danger that the judge could make decisions on a limited perception of issues. Several comments reflected an unwelcome shift of control, although substantive issues could still emerge at Proof. Other criticisms, which were expressed by legal representatives included:

- sometimes procedure was difficult to predict, making advice to clients difficult
- there was no crisis point
- at times the judge controlled procedure to the exclusion of the parties
- traditional pleadings were better than judicial "interference"
Frustrations with the Commercial Court

When asked about frustrations with the Commercial Court, the majority of clients expressed satisfaction, but this question prompted others to list individual frustrations with the pace and presentation of their case. Most of the perceived drawbacks highlighted a disjunction between their commercial goals and the principles of legal argument. Both litigant and court would benefit from better communication to foster common realistic expectations.

Representatives’ frustration with the court revolved around diminished autonomy. It was obvious that they considered one particular judge to be more volatile than the others. Established game strategies were displaced. “Judicial capriciousness” and “odd judicial asides” at times caused confusion, affecting predictability. The view was expressed that parties were not necessarily in control of their litigation, a view which was not supported by observation and empirical study. But it was clear that intransigents were there under sufferance, with several building a reputation for sluggish compliance.

Advantages of the Commercial Court

Overwhelmingly speedy resolution was the most advantageous outcome for clients and “providing a forum for the parties to be made to talk” limited the scope for abuse. All practitioners agreed with the point about speed, combined with the business-like atmosphere of the court and administrative back-up. Judicial expertise was of paramount importance to counsel, and the calibre of judges resulted in them being able to filter out matters which did not require Proof. Issues of law could be discussed and dealt with from the pleadings while the process continued. It was the common sense approach which was most beneficial, forcing the opponent to face reality.
Disadvantages of the Commercial Court

When it came to disadvantages clients and representatives diverged. The majority of client respondents stated that there were none, but five noted individual drawbacks. One was delighted with a quick decision, but at substantial cost and causing high personal stress. The largest firm noted that tight timetables were suitable where both parties wanted a resolution, but could also prevent negotiation and railroad a party into litigation. This might explain why the second Commercial study showed increased practice of continuations based on incomplete preparation. Forcing the pace pre-empts either deviant behaviour or earlier settlements. The decision to follow either is based on factors external to court control.

Suggestions for Change

Multiple suggestions exposed divergent attitudes and perspectives which interplay with the judicial role. Suggestions from solicitor-advocates (a diminishing number of whom appear in the Commercial Court) reflected more direct contact with and accountability to clients.

Clients had a more pragmatic approach to their goal, untrammelled by legal principles which safeguard wider public interest. For example, the fact that substantive hearings took a traditional form was seen by some clients as alien to the ethos of the Commercial Court rules. A suggestion that disclosure before initiation should be encouraged as practised in England.70

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70 Medical Negligence Practice Note No. 49 1996 Judge Foster’s judicial docket system. Pursuer has an obligation to give three month’s warning in writing to defender before initiating an action.
Counsel were more concerned with the manner of attaining the goal of resolution rather than the time or cost involved. This reflects not only the understanding of the wider context which embraces protection of legal principles, but also the background, training and detachment from investigative work which justifies the independence of counsel and full-time application to oral and written pleading. Judicial control of preparation is a blow to the integrity of this independence. Counsel’s independence is designed to engender equality and fairness of representation, justifying the ethos of the profession. When the adjudicator enters the arena, the integrity of their independence is slighted and autonomy interrupted.

Endemic to the views expressed to this author was an acceptance of faults within system, requiring more effective control by sanctions. It is interesting to note support across all branches of the profession for more forceful policing of time limits. In general, though, the prayer was for pressure to be applied to opponents while resisting suggestions that their own workload needed to be controlled.

Overall it appeared that clients were impressed with the initial impact of the Commercial Court, and wanted to build on these. Senior counsel, however, moved in the opposite direction by advocating retention of the status quo of the Outer House. Time limits were considered necessary to give a focus for preparations. But the demand for increased elasticity and ‘exceptions’ has the potential to increase the number of court appearances and costs. Conformity to a court order is wholly dependent upon the expectation that some form of sanction is hanging like a sword of Damocles. Other jurisdictions have found that firm policing and consistency of approach must support any policy changes. The number of adjustments, amendments and discharged hearings which are automatically tolerated and excused indicate that not all who occupy the

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71 Faculty of Advocates Response to the Secretary of State’s Consultation Paper (1989) op.cit. paras 3.2.8 and 3.2.9 “Those who plead in court should not have been involved in the investigation of the evidence” “Such detachment is essential to the proper performance of an advocate’s professional duty to the courts”.
supreme court bench are ready to firmly police divergences. The rejection of Lord Cullen’s Review for caseflow management in the supreme court is an indication that there is, as yet, no consensual base to move forward. Disharmony and disjunction must remain until the foundation is there.

It is ironic that a small jurisdiction of 5.5 million population should have a wide multiple choice of litigating procedures. The disparity between procedures is growing. The sheriff courts are variously adapting their approach to improve service to the client. The lack of impetus to control procedural abuses in the supreme court protects the status quo, protects the Bar, protects the adversarial role of passive adjudicator – the established principle governing procedure and the myriad of working conventions which have taken root around it. But it also means that pragmatically judges do not resolve disputes. They float above them, until 95% of litigants settle on the way to adjudication. Coincidentally this is a convenient outcome for an under-resourced court.

72 See Chapter 9
Chapter 8

Chart 8.1

Cullen Review on Outer House Administration - Stages of Disposal - 300 Case Sample
<table>
<thead>
<tr>
<th>Stages of Settlement</th>
<th>Number of Cases Settled</th>
</tr>
</thead>
<tbody>
<tr>
<td>After defences</td>
<td>12</td>
</tr>
<tr>
<td>Preliminary Hearing</td>
<td>2</td>
</tr>
<tr>
<td>Adjustment Roll</td>
<td>14</td>
</tr>
<tr>
<td>Optional Diet/Continued Diet</td>
<td>3</td>
</tr>
<tr>
<td>After Closing Record</td>
<td>28</td>
</tr>
<tr>
<td>After By Order Adjustment</td>
<td>3</td>
</tr>
<tr>
<td>After Appointing Procedure Roll</td>
<td>38</td>
</tr>
<tr>
<td>After Procedure Roll Discharged</td>
<td>8</td>
</tr>
<tr>
<td>After Procedure Roll</td>
<td>1</td>
</tr>
<tr>
<td>After Proof Allowed</td>
<td>7</td>
</tr>
<tr>
<td>After Issues Allowed</td>
<td>1</td>
</tr>
<tr>
<td>After Proof/Jury Trial discharged</td>
<td>10</td>
</tr>
<tr>
<td>Over one week before Proof/Jury</td>
<td>71</td>
</tr>
<tr>
<td>1 weeks before Proof</td>
<td>36</td>
</tr>
<tr>
<td>On morning of Proof</td>
<td>45</td>
</tr>
<tr>
<td>During Proof</td>
<td>4</td>
</tr>
</tbody>
</table>
300 Case Sample - Settlements and Judicial Disposals
Cullen Review, Outer House Administration 1995 - Weeks to Disposal

Chapter 8.3
Chapter 8

Chart 8.4

Percentage of Disposals in Court of Session in 50 Week Intervals

Cullen Review

Outer House

Two Commercial Court Studies

0-50

51-100

101-150

151-200

201-250

251-300

301-350

351-400

401-450

451-500

501-550

551-600

601-650

651-700

701-750

751-800

801-850

851-900

901-950

951-1000

1001-1050

1051-1100

1101-1150

1151-1200

1201-1250

1251-1300

1301-1350

1351-1400

1401-1450

1451-1500

1501-1550

1551-1600

1601-1650

1651-1700

1701-1750

1751-1800

1801-1850

1851-1900

1901-1950

1951-2000

2001-2050

2051-2100

2101-2150

2151-2200

2201-2250

2251-2300

2301-2350

2351-2400

2401-2450

2451-2500

2501-2550

2551-2600

2601-2650

2651-2700

2701-2750

2751-2800

2801-2850

2851-2900

2901-2950

2951-3000

3001-3050

3051-3100

3101-3150

3151-3200

3201-3250

3251-3300

3301-3350

3351-3400

3401-3450

3451-3500

3501-3550

3551-3600

3601-3650

3651-3700

3701-3750

3751-3800

3801-3850

3851-3900

3901-3950

3951-4000

4001-4050

4051-4100

4101-4150

4151-4200

4201-4250

4251-4300

4301-4350

4351-4400

4401-4450

4451-4500

4501-4550

4551-4600

4601-4650

0.3

1

1.7

3

8

21.3

1.7

0.3

21

19

21.3

11

19

43.7

89

78
Rate of Disposal - Court Session - Optional Procedures for Personal Injuries 1995, Cullen Review

Sheriff Court 1997
Commercial 1
Commercial 2

Weeks to Disposal

Commercial 1
Commercial 2
Sheriff Court 1997

Time to Disposal - Sheriff Court Study 1997 Commercial Causes 1996 and 1997

Chapter 8
Chart 8.8

Percentage of Disposals

Stages of Disposal - Three Scottish Studies

Commercial Causes Survey 1996
Cullen Review 1995
Personal Injury Study 1995
Chapter 8.9

Comparison Chart

8.9 - Speed of Allocation of Proof - English and Scottish Studies

Commercial Causes 1997

Scottish Court Service Annual Reports 1995-1997

Pearson Commission 1968

Cullen Review 1985

Woolf Report 1996

Number of Weeks = Efficiency of Court in Allocating Proofs
Chapter 8.10

Comparison Between Jurisdictions - Proofs Fixed and Heard = Late Settlements
For example, 38 Advocates represented one Commercial case each.
Chart 8.13

Cullen Review 1995 - Number of Amendments and Duration in Weeks

Number of Amendments and Period of Amendment in Weeks
Chapter 9

CONFLUENCE AND CONGRUENCE IN CIVIL JUSTICE

Universal Problems and Solutions

Confluence of Dilemmas

It may be argued that to take an insular view of recurring problems would be short-sighted, bordering on negligent in a public service sector. Widening the research on civil justice to other legal systems uncovers common threads which transcend geographical, cultural and philosophical boundaries - consistent complaints of excessive costs, delays, inefficiencies, late settlements, heavy criminal workloads, resource restrictions and professional resistance to change. Across jurisdictions, and over parallel periods of great industrial and social evolution, there is an identifiable pattern of rationalisation between economic and procedural aspects of civil justice. Interaction between court procedures and the costs of litigating are continuously investigated to uncover barriers which impede the application of justice.

Lord Woolf, M.R. attributed faults and distortion of rules in England and Wales to the combative atmosphere of an adversarial legal system,1 echoing an early American view that self-interest undermines any aspiration towards a common good, a common ideal, a common goal:

1 The Rt. Hon. Lord Woolf, Access to Justice Interim Report (1995) paras 7.4, 10.22, 18.1, 26.3, 29.15, 107.22, 109.26, 130.42, 142.29, 150.3, and 151.7. For example - para.18.1 – "I have concluded that the unrestrained adversarial culture of the present system is to a large extent responsible for" (the present system not conforming with principles identified in the Report)
"The idea that procedure must of necessity be wholly contentious disfigures our judicial administration at every point.... If the law is a mere game, neither the players who take part in it nor the public who witness it can be expected to yield to its spirit when their interests are served by evading it."

However, the failings already noted are not exclusive to adversarial common law jurisdictions. European inquisitorial procedures, where the competency and power of the judge are far greater, do not produce a blueprint for success, imbued with different reasons for prolongation and expense. It has been noted, however, that as the English system appears to veer towards inquisitorial techniques, the French system looks to learn from the adversarial dependence on lawyer preparation. Current discussion in France actually centres on a convergence of European systems towards a more 'Anglo-

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2 Dean Roscoe Pound, The Causes of Popular Dissatisfaction with the Administration of Justice (1906) 29 American Bar Association Report 395 “And this is doubly true in a time which requires all institutions to be economically efficient.” The American Bar Association Conference discussed these warnings briefly, which have since been attributed more respect
3 J. Godard, Fact Finding: A French Perspective “The judge has the power to order all forms of investigation within the limits of the claims of the parties.” p.59 “In fact because the juges de la mise en etat are overworked, the president refers the case to a third, or even a fourth conference to avoid the investation by a judge.” p.62 The Option of Litigation in Europe, U.K. (1993) 14 Comparative Law Series; J. A. Jolowicz, The Woolf Report and the Adversary System (1996) 15 Civil Justice Quarterly 205 Judge of the Chamber to which the case assigned controls the ‘instruction’ – “everything which must be done in preparation of the case for audience”...He is in a strong position to ensure timely performance by the parties of their procedural obligations”
4 Hon. J. M. Coulon, Reflexions et Propositions Sur La Procedure Civile, Paris Collection des rapports officiels (the Coulon Report); S. Chiarloni, Some Paradoxical Aspects of Continental Supreme Courts, University of Turin (1995) Institute of Advanced Legal Studies Bulletin 7-12, particularly 10
7 A. Garapon (1998) ibid
Saxon model’ for efficient administration. It seems therefore that there is a movement towards learning from other jurisdictions despite methodological polarisation.

"Adversarial and inquisitorial systems have borrowed extensively from each other, so legal systems now have many similar features."\(^9\)

Trailing in the wake of commercial globalisation, court reformers are also communicating more closely.\(^10\) Australian courts have trawled American studies and reviewed Canadian programmes to inform and justify their individual reform strategies. Some of the current reforms proposed by Lord Woolf and the Lord Chancellor can be traced to pilot programmes spread across the common law world. The pre-devolution Scottish Office Home Department consultation papers mirror English proposals.\(^11\)

This increasing colonisation of reform initiatives reflects a new era of communication in civil justice. Can it be coincidence that concerns over judicial independence, accountability and the separation of powers are being hotly debated (within their own cultural context) over four continents at the same time? Or does this debate spring from a refocusing of judicial activity away from adjudication to early settlement, promoting socio-economic ideals?

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\(^8\) President Jacque Chirac, L’Ecole Nationale de la Magistrature, Charente (newspaper report) 8 October 1999
\(^9\) Australian Law Reform Commission Discussion Paper 62
\(^10\) Lord Woolf, Paris (1997) ibid. "We have more in common than divides us....arrangements are being made at a high level between the members of the civil courts of our two countries"; Sir Anthony Mason, Chief Justice of Australia "Legislative reforms and courts are developing and refining in response to conditions and circumstances of each country...but the trend is towards similarity rather than distinctiveness"
\(^11\) Mr. Henry McLeish in Consultation Paper on Community Legal Centres and Legal Aid (1998) supported options for Alternative Dispute Resolution.
Heightened awareness and communication means jurisdictions learn from the successes and failures of others as well as their own. Early indigenous experiments with court rules, all highly dependent upon party co-operation and judicial sanctions, repeatedly failed to fulfil their local promise. However, some early American successes enhanced cross-fertilisation of ideas across jurisdictions at both political and judicial levels, at a time when the cost-efficiency ethos was politically injected into all public services. The theory of judicial caseflow management is slowly permeating through common law jurisdictions. It has become a global solution to global problems, leaving individual jurisdictions to plunder the melting pot of ideals and techniques which are most suited to their culture.

Compounding the complex nature of litigation, successes are short-lived, and perfection is hypothetical, driving some jurisdictions into an ‘evaluation industry’ for better and more reliable information. One of the main reasons it is so difficult for successes to be replicated outside of their local context is the influence of localised judicial discretion. The rules are overt, but the force and style with they are applied are instinctive. What is consistently clear, though, is that creating solutions causes unforeseen problems. It is critical that an analysis of successful techniques also takes account of complications and pitfalls experienced elsewhere while recognising national differences.

Reforms have been adopted and adapted into many adversarial systems, but this chapter concentrates on three which are at different stages of development. Caseflow management has grown into adulthood in America, but it is still in its infancy in Australia. England has just given birth to managerial judging, while the seeds have been planted in Scotland. Each has lessons for the other.

13 For example, the Evershed Committee in England
14 Canada, New Zealand, Singapore
America – Land of the Free?

"Speedy justice is a thing unknown; and any justice, without delays almost ruinous, is most rare." 15

According to informed American sources, the imperative for speedy adjudication originated with this statement, 16 reinforced by Dean Pound’s unwelcome criticisms 60 years later. 17 However, it was not until 1937 that American Federal Courts accepted responsibility for "just, speedy and inexpensive determination of every action." 18 Although recent commentators suggest that this declaration was initially precatory, 19 by 1938 the Federal Rules of Civil Procedure included a structured framework for court supervision of pre-trial discovery, supplanting it in 1982 by more extended pre-trial management. 20 From these beginnings Professor Erasmus 21 traces the growth of judicial management in America:

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16 Published around the same time as Charles Dickens referred to ‘ruinous delays’ within the English legal system (in Bleak House, Jarndyce v Jarndyce); D. Steelman, The History of Delay Reduction and Delay Prevention Efforts in American Courts, National Center for State Courts, Paper presented at Four Courts, Dublin 16 November 1996, p.2
17 Dean Roscoe Pound (1906 op. cit.395; abridged version (1971) American Bar Association Journal 348
18 Federal Rules of Civil Procedure, Rule 1
20 Federal Civil Rules of Procedure, Rule 16 (see Appendix 9.1)
Judicial Management in America

<table>
<thead>
<tr>
<th>Year</th>
<th>Event</th>
</tr>
</thead>
<tbody>
<tr>
<td>1938</td>
<td>Minimum standards of judicial administration adopted by American Bar Association</td>
</tr>
<tr>
<td>1948</td>
<td>Pre-trial Committee of the Judicial Conference pioneered judicial pre-trial control</td>
</tr>
<tr>
<td>1960</td>
<td>First seminar held for newly appointed Federal judges</td>
</tr>
<tr>
<td>1963</td>
<td>National College of State Trial Judges established</td>
</tr>
<tr>
<td>1968</td>
<td>Federal Judicial Center established</td>
</tr>
<tr>
<td>1970</td>
<td>Institute for Court Management formed by American Bar Association</td>
</tr>
<tr>
<td>1970</td>
<td>Institute of Judicial Administration and American Judicature Society – training for Court managers</td>
</tr>
<tr>
<td>1972</td>
<td>National Center for State Courts established</td>
</tr>
</tbody>
</table>

Early studies commissioned by these organisations, independent of courts’ peremptory data-gathering, attempted to identify key elements of litigating behaviour which could be controlled by court rules. From raw beginnings contrary results confused policymakers, although retrospective analysis provides a degree of consensus. Professor Cranston, however, recently warned that government-sponsorship of the research organisations may colour initial publications, and this should be borne in mind.

One of the earliest studies of the U.S. District Courts distinguished particular characteristics in speedier and highly productive courts. The common aim had been to refocus practitioners on efficient preparation in order to strike at two conflicting goals:

(a) to minimise client costs and time involved
(b) to maximise judicial time

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22 National organisation of U.S. legal profession, currently 370,000 members which does not have the power to discipline practitioners or enforce rules, but produces models and guidelines for the profession and sponsors the Task Force on Reduction of Litigation Cost and Delay created in 1984 to promote fair and efficient litigation, currently investigating the relationship between court delay and cost.
23 Established by Congressional statute 1967 at the request of U.S. Judicial Conference to conduct and promote research, training and efficient operation of Federal court organisation
24 Was Head of Law at the London School of Economics, now Solicitor-General at Westminster
26 S. Flanders, Case Management, Federal Judicial Center (1979), based on data 1974-1975
The common characteristics of the successful courts were identified:

- Automatic procedure was invoked at the start, pleadings were strictly monitored, early disclosure was encouraged and a trial promptly allocated
- Judicial involvement was minimised until disclosure was complete, and conferences were delegated to magistrates
- Judges were highly selective in initiating settlement negotiations
- Few written opinions were prepared for publication, and
- Sittings were in open court

At the same time, the first national study of 21 State courts concluded that both speedy resolution and backlog could not be simplistically related to a court’s size, caseload or trial rate. Importantly, this study concluded that increasing judicial resources did not cure inherent shortcomings. Church identified the overwhelming influence of the local legal culture on speedy resolution - established expectations, practices and informal rules of behaviour. Court systems became adapted to a given pace of work - a work ethic - absorbed by judges as well as practitioners and court clerks. Judges were key determinants, and it was their attitude rather than caseload which affected productivity.

"To achieve an accelerated pace of litigation in a court the crucial element is concern on the part of judges with the problem of court delay and a firm commitment to do something about it."28

Subsequent research29 supported these two studies, and early court intervention was selectively piloted. The results were widely disseminated through workshops to judges

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27 T. Church et al., Justice Delayed: The Pace of Litigation in Urban Trial Courts (1978) National Center for State Courts and National Conference of Metropolitan Courts, 54
28 T. Church et al (1978) ibid.83
29 D. Heubauer, Managing the Pace of Justice: An Evaluation of Court Delay-Reduction Programs (1981)
and court administrators. A follow-up to the Church study\textsuperscript{30} evaluated systemic techniques of court control:

- Developing time standards for different stages
- Monitoring answers to pleadings
- Identifying cases suitable for A.D.R.
- Developing realistic trial-setting policies
- Applying firm continuance policy
- Giving special attention to older cases
- Developing a useful information system

Analysis confirmed that settlement rates were sensitive to credibility of court control. The local legal culture did respond to revised expectations. This is similar to what has been noted in the Scottish Commercial Court, where degrees of compliance match the perceived credibility of control. The second Church study also found that as trial dates were more certain, a surge of settlements took place, and pending caseloads in two control areas dropped by 36\% and 12\% respectively. Importantly the researchers observed that monitoring and prioritising older cases for disposition was the first stage towards caseflow management, notably increasing rates of resolution. This suggests a very easy and effective way to control the age of cases,\textsuperscript{31} and ease court practitioners into new mind-sets, picked up in the late 1980s by many Australian courts, but not adopted by the Woolf reforms.

As noted earlier, judicial powers in the American Federal courts increased from control of discovery to full pre-trial caseflow management by 1982, with severe sanctions against representatives for non-compliance.\textsuperscript{32} Church reviewed the research studies,\textsuperscript{30-32}

\textsuperscript{30} L. Sipes et al., Reducing Trial Court Delay (1981) National Center for State Courts and National Conference of Metropolitan Courts
\textsuperscript{31} L. Sipes (1981) op.cit. pp 3-5 and 6-19
\textsuperscript{32} Federal Rules of Civil Procedure - Rule 16 1982 (see Appendix 9.1)
again challenging previous assumptions that speed was influenced by rule-changes or the ratio of judicial resources to workload. Adding more judges did not increase ‘productivity’. Once again, researchers converged on the effect of informal relationships, working conventions and practices on the progression of dispute resolution, and concluded:

"Control through a comprehensive case management program, if based on a long-term commitment by the court to change practitioner expectations about the pace of litigation, would have potential for success".  

Within two years the National Conference of State Trial judges adopted the American Bar Association’s revised minimum standards in State courts. Measurable stages for pre-trial directions had been devised to balance the development of cases with delay attributable to court or counsel. Importantly, a common definition of ‘unacceptable delay’ was finally agreed and published:

"From commencement of litigation to the conclusion whether by trial or settlement, any elapsed time other than reasonably required for pleadings, discovery and court events, is unacceptable and should be eliminated."  

From 1984 the minimum standards were:

- 90% of general civil cases were to be settled or concluded within 12 months
- 98% within 18 months
- 100% within 24 months.

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33 T. Church, et al., Old and New Conventional Wisdom of Court Delay (1982) 7 No.3 Justice System 395
34 American Bar Association Delay Reduction Standards 1984 Sections 2.50 and 2.52
Following Church’s evaluation, different management techniques were assessed against the background of concerns over the increased discretionary powers of managerial judging.35 A new round of research focused on 18 urban courts in 1985,36 supporting previous conclusions that delay was controllable, and not dependent upon the size of court or caseloads. Key concepts of caseflow management – early and continuous court control and reliance on trial dates – were strongly correlated with early disposition. Importantly these concepts survived synthesis into the local culture.

In the late 1980’s the rise of drug-related cases caused a crisis for urban courts. The U.S. Justice Department funded two further national studies which corroborated previous conclusions.37 Early judicial control and strict compliance with time goals resulted in shorter disposition time, notwithstanding increased criminal caseloads.38

There seems no doubt therefore that delays can be cut with commitment and application, but at what cost? The earliest experiments were based on the presumption that cutting delays would curtail expensive use of litigating procedures, condensing discovery and limiting feeing opportunities.39 With experience this theoretical ideology has been challenged.

The most recent and most far-reaching American study by the Rand Institute for Civil Justice,40 evaluated the implementation of the Civil Justice Reform Act 1990 across 94 Federal District Courts. The interplay of control techniques and caseflow management

35 Prof. J. Resnik, Managerial Judges (1982) 96 Harvard Law Review 374 (see Chapters 5 and 7)
38 See Appendix 9.2 for summary of five of the most successful American courts studied
40 The Brookings Institution formed a Task Force on Civil Justice Reform in 1988, chaired by Senator Biden, staffed by Rand Institute researchers and Senate Judiciary Committee staff. Their recommendations led directly to the Civil Justice Reform Act 1990
principles were assessed to provide definitive, systematic and comprehensive scientific data for policymakers.41

The Institute’s studies covered

- early judicial management
- monitoring and control of complex cases
- voluntary and co-operative discovery methods
- early resolution of discovery disputes
- matching management to case type
- referral, where appropriate, to A.D.R. schemes.

The conclusions imploded on the American civil justice system, damaging the credibility of the effectiveness of caseflow management which had been built up over the previous 25 years. The impact of a negative outcome reverberated around the common law world. Some strategies had reduced delay, but costs were high. The researchers concluded that a package of the most efficient techniques could reduce time by 30%, but 95% of litigation costs were uncontrollable by the court. Costs were driven by complexity and the stakes involved, both controlled by litigants. Complicating these results, the authors criticised the loose wording of the Act, which allowed judges to continue with established caseflow management procedures – at least 85% reported that the act had made “no difference” to their individual management style - their work ethic.

These results have implications for the English reforms. The wide discretionary wording of the English Access to Justice Act 1998 also allows for great flexibility, but opens a similar trap-door to judicial subjectivity. Commentators on the American results

41 J. Kakalik, An Evaluation of Case Management under the Civil Justice Reform Act; Implementation of the Civil Justice Reform Act; Summary – Just, Speedy and Inexpensive? An Evaluation of Judicial Case Management under the 1990 Civil Justice Reform Act (1997). The study base was 12,000 case histories,
subsequently confirmed that a fundamental factor which affected the pilot’s outcome - judges apparently regarded the Act as congressional infringement on their constitutional independence,\textsuperscript{42} requiring them to promote speed and efficiency over notions of justice.\textsuperscript{43}

"Because the Federal courts are committed to ensuring ‘just’ as well as ‘speedy and inexpensive’ determination of civil actions,\textsuperscript{44} efforts to improve case management must take into account the potential impact of new procedures on the quality of justice rendered."\textsuperscript{45}

This flags up how uncomfortably close caseflow management takes judges to the verge of politics, balancing public accountability against independence. With the Rand experiment it was judged that disparate judicial commitment to the ethos behind the Act tainted the outcome and scientific analysis.

An leading researcher, with many years experience in the field, acknowledged that the initiating Act was "inherently flawed", allowing subjective interpretation.\textsuperscript{46} His reassurance was aimed at minimising the negative and paralysing outcome (used by Professor Zander\textsuperscript{47} to show that the ambitions of caseflow management outranked reality) on the new English reform programme:

\begin{itemize}
  \item survey responses from 3,000 judges, 10,000 lawyers, 5,000 litigants, judges’ time sheets, court records and district plans
  \item Was Rand Right? American Bar Association and University of Alabama School of Law Conference March 1997 reported by J. Gibeaut (1997) American Bar Association Journal
  \item Rand Report (1997) op.cit. 34
  \item Federal Rules of Civil Procedure, Rule 1
  \item Final Report to Congress by the Judicial Conference of the U.S. on the Civil Justice Reform Act 1990, Part V, published on U.S. courts internet website: July 1997 (for synopsis of Final Report see Appendix 9.5)
  \item S. Flanders, Case Management: Failure in America? Success in England and Wales? (1999) 18 Civil Justice Quarterly 309
\end{itemize}
"I was distressed to find that an improbable sequence of events in my country was distorting an important debate across the Atlantic..."

"The vast research engine created [by the Act] relied upon by Professor Zander, realises the social scientist's favorite childish truism: You ask a stupid question, you get a stupid answer."

Most Federal courts had already been using caseflow management techniques, and were dogged by heavy criminal dockets and vacancies on the bench, all variables which Rand did not take into account. However, within its limited remit, Rand corroborated previous studies in finding that early judicial management reduced time to disposition – delays could be cut. However lawyers continued their old work habits, adding more hours in a shorter period. Costs were not controlled.

These same criteria underpin the new English procedural rules and Lord Woolf's Reports where 'proportionality' between costs and claim is used to restrict the amount of preparation envisaged. The implication is that the English new Fast Track, which truncates process to 30 weeks pre-trial may not control expense. One projected outcome could be that increased preparation over a shorter period would increase costs, cutting access to justice for clients, particularly those using smaller legal firms whose cash-flow cannot absorb high up-front costs.

To find a cost-efficient formula for success, the American researchers reasoned that there had to be a 'trade-off' between time to disposition and lawyer hours employed. While some techniques had a limited role in reducing litigation costs, a package of caseflow management techniques did have a substantial and predictable effect on time and costs:

48 Chief Judge T. J. Griesa, Southern District of New York in Manhattan (one court which was investigated by Rand), American Bar Association March 1997 conference op.cit.
Management from the earliest stage (increased lawyer hours)
Trial schedule set early
Time for discovery reduced (decreased lawyer hours)
Litigants required at settlement conference

Fresh guidelines were quickly redrafted for Federal courts, mandating pre-trial disclosure of relevant information, limiting open-ended investigation. Further independent analysis, augmenting the Rand data, shows that restraining formal discovery increases lawyer-hours spent in ‘informal’ discovery which is beyond court management. Cost control therefore remains with lawyers. Court control is surmountable. This has serious implications for the Woolf reforms where justifying the number and extent of expert reports and evidence is considered fundamental to cutting costs and delays.

Some practitioners question whether there is a generic litigation crisis at all, arguing that high-cost complaints are almost exclusive to corporate businesses, who monopolise larger (and more expensive) legal firms. Further American research also indicated that larger legal firms charge consistently higher fees, independent of complexity of issues or the financial stakes involved. The Rand study certainly interrupted the growing credibility of caseflow management, but the particular experimental study was quickly distinguished as flawed by researchers with more long-standing experience in the field.

A new study of State court initiatives was published shortly after the Rand conclusions. This evaluation drew on the authors’ extended previous research background, and developed the list of characteristics common to courts which had effectively dealt with costs and delay. Although the initiatives were gauged to have been similarly thrust upon

49 Federal Civil Procedure Rule 26(a)(1) from 1993 see Appendix 9.3; The Mandatory Disclosure Survey: Federal Rule 26(1)(a) after One Year, April 1996 American Bar Association Section of Litigation; State rules were drafted by the Court Delay Reduction Committee, National Conference of State Trial Judges, Judicial Division of the ABA 1997
51 L. A. Salibra ibid.21
a reluctant judiciary by the legislature,\textsuperscript{53} comparatively remarkable success was reported compared to the Rand study.\textsuperscript{54} The distinctively less successful Federal Courts had been left to interpret initial guidelines themselves, whereas Californian State professionals had an inter-active support system to guide, monitor and maintain momentum, which affected the commitment and collaboration within the system. It must not be forgotten, however, that many American State court judges attain office by public election every three years whereas those in the Federal Court have lifetime appointments ‘on good behaviour’. The perceived effect on judicial independence cannot be discounted. In the more successful State courts, researchers noted:

- A striking difference between the judicial leadership and commitment of the California and Federal judges. “Almost all of the examples of programs that succeeded in state courts involved a very strong component of judicial leadership.”
- There was a lack of clear standards and goals in the Federal pilot courts compared to state courts.
- State courts were significantly targeted by education and training during both programme design and implementation.
- Judges, administrators and Bar benefited from promotion of a common goal, the bonus being increased ‘camaraderie’ which oiled the wheels of daily administration.
- Continuing communication and feedback between different professionals during implementation was valuable for ‘fine-tuning’ programmes and maintaining momentum.

The positive outcome from ongoing commitment, interactive support, feedback and communication, is anticipated by Lord Woolf in England. The American evaluation, substantiating the authors’ prior research, reinforced characteristics repeatedly reported.

\textsuperscript{53} Trial Court Delay Reduction Act 1986 (see Appendix 9.4.2)
by other American courts which report successful caseflow management programmes, two of which are detailed further in Appendix 9.4.

**Seven Characteristics of Successful Caseflow Management**

- Judicial commitment and leadership
- Court consultation with the Bar
- Court supervision of case progress
- Time standards and goals
- Monitoring and information systems
- Credible trial dates
- Court control of continuances

A judicial report to Congress on the Rand results (see Appendix 9.5) endorsed the drive to reduce delays in Federal courts, but opposed the establishment of a standardised time to trial. Since there was no consensual interpretation of the results, has been a call for further evaluation when litigants, lawyers and judges gain more experience of techniques adopted. The Rand study did not fully addressed other influential factors:

- The possible impact of reforms on small law firms, solo practitioners and those using contingent fee arrangements on access to justice for low-income litigants or small claims
- The impact of front-loading costs for all lawyers and litigants under accelerated programmes
- The effects of the Act on different case types

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55 D. C. Steelman (1996) Dublin op.cit.; Courts - Dayton Ohio, Detroit Michigan, Wayne County, Phoenix Arizona, Fairfax Virginia – for last court see Appendix 9.4.1
Future directions in America highlight the elusiveness of sustained court control. In some areas it is difficult to see what pilot programmes can achieve, since some courts were considered to have already cut delays to the barest minimum that "quality of justice" was deemed to allow. Collaborative research is planned to expand the body of current knowledge accumulated on delays and costs, into post-adjudicative enforcement and criminal case management, which now falls within the definition of efficient dispute resolution. Within this ‘evaluation industry’ it is acknowledged that socio-economics governs litigating behaviour but there is no reliable data on actual costs and feeing practices, previously confidential and veiled from public scrutiny. American judges and researchers see all these as key areas to expose the way practice moulds use of court procedure rather than the other way around.

Other jurisdictions add their own gems to this treasure-trove of information.

**Australia – Twists on a Theme**

Up to the late 1980s individual Australian jurisdictions had developed reform strategies in a fragmented manner. Picking up the threads of American experiments, several jurisdictions were attracted to the theory of caseflow management, promoted by post-recession political expediency to address complaints about the legal system. Once

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56 Judicial Conference Report to Congress (1997) op.cit. Part III para 19
57 Judicial Conference Report to Congress (1997) op.cit. Median time from filing to disposition in district courts is approximately 8 months, fairly constant over the past 6 years. Part IV p.46, also quoting from a previous Rand study "when federal district courts were considered as a whole, delay was about the same in 1986 as it was in 1971" Federal Court Management Statistics (1995) 75
58 U.S. and Canadian Working Group, sponsored by American Bar Association’s Judicial Division Lawyers’ Conference Task Force on the Reduction of Litigation Cost and Delay, the Justice Management Institute, the National Judicial College and the National Center for State Courts. D. Somerlot and B. Mahoney head the research initiative.
59 The Hon. Mr. Justice Sackville, Case Management: The Australian Experience, Paper presented at Dublin Conference 15 November 1996
again excessive cost and delay were attributed to failings within a traditional adversarial approach which

"....does little or nothing to encourage matters to be brought on for trial and maintain supervision over litigants who choose delay rather than active preparation for disposition or settlement."\(^{61}\)

Judges who were already involved in court governance (South Australia), hit the ground running. Accountability for delays, expense and efficiency were familiar concepts. Others were further back on the starting grid, distanced from court administrative responsibilities (New South Wales).

Many courts were overloaded with backlogs stretching back many years, had no effective statistical information, no appreciation for time standards and no management plan.\(^{62}\) Within the last two decades, the momentum for judicial management has spread throughout Australian territories and courts, promoted by "half a dozen or so prominent (and formidable) judges".\(^{63}\) The collective strength of a small group to push forward substantive reform is apparent in England also. The Australian judges had been responding to a similarly perceived litigation explosion, growth of substantive rights, and burgeoning increases in the legal profession. The rate of judicial appointments was apparently inadequate\(^{64}\) to deal with the increased work.

As in American literature, the same few academic names are repeated throughout Australian research. The Australian Institute of Judicial Administration (A.I.J.A),

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\(^{61}\) The Hon. Mr. Justice Sackville, (1996) op.cit.


\(^{63}\) Prof. T. Wright, Director, Justice Research Centre, New South Wales, Civil Justice Reform in Australia - Bellagio Conference paper provided by Prof. Wright (undated)
established in 1976\(^6\) to assist in the identification of problems and solutions with judicial administration, was expanded in 1987\(^6\) to disseminate its research into training programmes, conferences and seminars.\(^6\) These inter-state and international conferences, and the A.I.J.A’s quarterly journal\(^6\) have provided useful platforms for the judiciary themselves to promote and inform anecdotal debate on caseflow management. Changing focus has had a great effect on traditional judicial passivity.

"I suspect that the arrival of caseflow management on the judicial administration scene has played a key role in making judges more aware of judicial administration issues than in the past, and in encouraging many of them to become actively involved in judicial administration initiatives in their own courts." \(^6\)

Foreseeing the need for empirical data, the Law Foundation of New South Wales funded an independent Civil Justice Research Centre in 1989 under the same directorship as the A.I.J.A.\(^7\) Over the past decade it has produced a prodigious amount of factual information to provide objective empirical research for courts and policy-makers.\(^7\)

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\(^6\) Under the directorship of Professor Peter Sallmann Q.C. who was subsequently appointed Director of the 1997-2000 Civil Justice Review Project in Victoria, Australia, succeeded by Prof. T. Wright

\(^6\) Areas include the structure, organisation, financing and management of courts and court systems, procedures to expedite processing and manage workloads, appointment, tenure, independence and accountability of judicial officers, and education programmes to improve work performance of the judicial system personnel.

\(^6\) Journal of Judicial Administration


\(^6\) Prof. P. Sallmann, see footnote 66

\(^7\) Research is Based on: (a) Courts - factors associated with court delay, statistical overview of litigation, court management techniques, usage of court services (b) Lawyers and Litigants- access to justice, the public’s view of the civil justice system (c) ADR - the range of procedures and user satisfaction (d) Cost of litigation - court expenditure, legal costs to litigants.
The structure and jurisdiction of Australian Federal, State, County and District courts are complex and overlapping. In 1993 Professor Sallmann noted that since the Federal Family Court pioneered caseflow management in 1985, the adoption of techniques and principles has spread randomly through various court strata and states in Australia. The Australian Chief Justice recently confirmed a continued disparate response to management strategies. There is no integrative national litigation service, and no national ‘trial standards’ as devised by the American Bar Association.

In 1993 a government-sponsored Access to Justice Advisory Committee was set up to review and revise fragmented plans into a cohesive “Action Plan” for the Australian legal system, including regulation of the legal profession, legal aid, alternative dispute resolution and court reforms. The Sackville Report recommended the judicial role should be expanded from “passive aloof adjudicators” to a managerial role in court governance. Courts were encouraged to develop their own charters, creating frameworks to increase accountability, identify and address deficiencies systematically and provide a more informed basis for allocation of resources. Many of the Sackville recommendations were overtaken by a change of government, and the common focus was lost. However, in 1994 a small working group on courts administration began work on performance targets and expenditure within Australian courts, which prompted several key supreme court judges to publish papers on the faults within an adversarial system which could be addressed by judicial caseflow management.

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72 Prof. P. Sallmann (1993) op.cit.143. Techniques spread via the New South Wales Supreme Court, South Australian Supreme and District Courts, the County Court of Australia
74 Chaired by The Hon. Mr. Justice Sackville (the Sackville Report) published in 1994
76 J. Giddings, Worth Waiting for Justice Reform, Brisbane Legal Action, April 1996 p.8
77 Set up by the Council of Australian Governments – an intra-state political convention
78 Prof. T. Wright, Bellagio conference paper op.cit.
The following year the Australian Law Reform Commission (A.L.R.C.) instituted a wide-ranging review of the advantages and disadvantages of an adversarial system and its effect on three forms of federal proceedings — the Federal Court of Australia, Family Court of Australia and a fast-track alternative the Administrative Appeals Tribunal. Issues Papers and Background Papers were circulated for consultation over a three-year period. Empirical analysis of 4,000 cases and interviews provided the backdrop for 566 page discussion paper issued in August 1999, actively supporting “better and more active judicial management of case processes.”

The Federal Court of Australia had evolved its early management strategies into an individual docket system. Currently each judge has responsibility for management of a case throughout its court life, as in the Scottish Commercial Court. The A.L.R.C. have endorsed the effectiveness of this system in which 50% of cases were resolved within 7 months and 85% within 20 months. High volume courts with insufficient judges to warrant a judicial docket system depend heavily on registrars attached to particular judges. However, the Commission held that the consensual view from consultations and submissions was that earlier settlements were the direct result of continuous, judicial supervision, which reinforced cost-efficient preparation and compliance with court directions.

“Experience suggests that the greater authority that the judicial officer presiding over case management is perceived to possess the more effective is the case

79 Initiated November 1995, with remit adjusted by the succeeding Attorney-General in September 1997
80 ALRC Discussion Papers available on Law Commission’s internet site
82 Background Papers December 1996 - Federal jurisdiction, Alternative or assisted dispute resolution, Judicial and case management, The unrepresented party and civil litigation practice and procedure
83 ALRC Discussion Paper 62 op.cit. para 9.23
management. Accordingly, the involvement of judges in pre-trial case management...ought to be encouraged. >84

It seems that supervision of court process is not enough – success is influenced by status as well as commitment. The use of Registrars, appointed by the Executive, is also challengeable under the European Convention on Human Rights on the independence and impartiality of the decision-maker.85

Issues emerged in the Federal Court which are also featured in this writer’s research:

- Known trouble spots such as defective pleadings, excessive documentary investigation (discovery) and “tactical games by lawyers”86 are more quickly exposed by judicial continuity.

- A judicial docket system is not as susceptible to settlements at the door of the court as other tracks, although the Scottish study indicates that any late settlement may cause deferral of other cases where judicial resources are scarce.

- A higher percentage of cases go to trial in a judicial docket system.87 A higher settlement rate on other tracks was interpreted as reflecting litigants’ frustration with court process.88 If we accept that adjudication represents ‘justice’ then we may conclude that there is wider access to justice in a judicial docket system.

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84 Submission to ALRC by Law Society of Western Australia (No.78)
85 Starr and Chalmers v Procurator Fiscal of Linlithgow - 11 November 1999, Scottish Courts website Appointment of Temporary Sheriffs by the Lord Advocate as a member of the Executive breached Article 6(1) of the Convention see Starr v Ruxton 2000 SLT 42
86 Review of the Federal Justice System, ALRC Discussion Paper No 62 op.cit. 2
87 Family Court – 95% settled as in Scottish Ordinary procedures, 65% settled in the Federal Court, see Chapter 8 Chart 10, Table 19 Appendix 6.5.2 11% reached trial in Scottish Commercial Court
88 The Commission reported that a “significant numbers of litigants and lawyers indicated that parties are settling their cases because of their frustration, when what they really wanted was a fast track to a decision by a judicial officer.” Lawyers reported that the system was “just bullying clients into settling.” ALRC Discussion Paper Review pp.2,4
• This means that in judicial docket systems there have been occasional difficulties in getting a hearing before a busy judge. In the Australian Federal Court, judges are allocated an average of 80 matters, and are just as susceptible to competing demands as the Scottish Commercial Court. Continuity can therefore be interrupted. The Commission recommended a review of listing practices to co-ordinate judicial commitments.

• The Commission also noted that variable caseflow management practices evolved with individual judicial styles and practices, and this has also been observed in the Commercial Court. The A.L.R.C. recommends that procedural guides be provided and revised regularly, a point made earlier (see Chapter 8)

• Uniform standard practice for ‘routine’ cases leads to rigid practices and poor compliance with directions and orders. This is also seen in the Scottish sheriff courts, compounded by the use of temporary judges, and is a warning for any other standardised track which defines the bulk of cases as ‘routine’, fitting the case to a procedure instead of a docket system where the procedure is fitted to the case.

• Lack of continuity adds frustration, time and costs as parties have to repeat the history of their case at each appearance. This is a problem which faces the sheriff courts since caseflow management directions at Options Hearings are undermined by a miscellany of judges as the case is amended. In this way the increased reliance on temporary sheriffs in Scotland up to 1999 was considered a factor in increasing delays.

• Judicial management compels more rigorous case preparation at an earlier stage, but shifts extra costs back to courts for increased judicial input.  

89 ALRC Discussion Paper 62 op.cit. para 9.23
Most importantly, however, Australian practitioners noted unintentional consequences of administrative attempts to engineer cost-effective outcomes. This confirms what are considered to be the more reliable conclusions of the American Rand study. Caseflow management can generate a subculture of preparation. Formal limitations, such as discovery-management or court-appointed experts, lead to an increase in informal partisan investigations. Simplification of pleadings at times delays settlement because of the limited availability of information. While activist judges storm through the more obvious dilatory tactics, it is the sidewinds which can defeat the original purpose and high ideals of caseflow management - to control excessive costs and delays. Continuous evaluative monitoring becomes an essential component of efficient administration to limit the effects of unexpected and disruptive deviations.

After a three-year investigation, consultation and research exercise, the Commission concluded that modification by caseflow management had at least tempered alarmist views of an 'adversarial-induced' crisis. There was no compulsitor to adopt an inquisitorial model of justice. But preliminary findings firmly supported judicial intervention in order to curtail excessive and abusive litigating practices. The Commission powerfully endorsed the individual docket system provided by the Federal Court of Australia.

"Closer judicial supervision of cases is one of the keys to dealing with major problems in the federal civil justice system."\(^9\)

In addition to increased judicial management of expert evidence, the Commission also recommended external areas for change, setting up committees to instigate and supervise


\(^1\) Prof. D. Weisbrot, Media release, President ALRC 20 August 1999
• clear more comprehensive national standards on professional ethics
• model standards for legal education and training
• greater consumer information and guidelines on reasonable lawyer fees
• scale of costs to be used as benchmarks for recoverable court costs
• national co-ordination of legal aid as a federal government priority
• an independent Judicial Commission to set out a code of conduct and investigate complaints against federal judges, magistrates and tribunal members

While the Federal courts are ‘fine-tuning’ their caseflow management procedures to increase judicial supervision, the majority of other trial courts initially streamlined their caseloads, facing up to an accumulation of inadequacies in court administration. Many have launched offensives on older cases and introduced various forms of A.D.R. schemes to cope with backlogs. Some schemes use court officers without charging, others appoint outside judges at parties’ expense. Some courts use case appraisal (Early Neutral Evaluation) whereas others limit discovery to those issues directly relevant to adjudication, or facilitate opponents’ access to documents.

Of the six Australian States headed by a supreme court, New South Wales is the most populous, and began its caseflow management programme from a very traditional base in the 1980s. At that time there was no information on the state of court lists or the age of caseloads. Squeezed by a perceived decline in public confidence and increasing budgetary pressure judges set up a Delay Reduction Committee in 1988 to reduce a backlog of cases and devised a workable control system in the Common Law Division.

92 5.7 million in 1997 compared to Scotland 5.5 million
93 13,500 solicitors, 1,800 barristers are licensed to practice (ratio 7.5:1), compared to 8,000 solicitors and 500 advocates in Scotland (ratio 16:1)
94 The Hon. Justice L. T. Olsen, Civil Caseflow Management in the Supreme Court of South Australia (1993) 3 Journal of Judicial Administration 3
96 Chief Judge at Common Law and 19 judges, dealing with criminal work (as a priority) personal injury and professional negligence claims. Two masters assist, with registrars for administrative support.
Meetings between representatives and registrars to check pre-trial status were initiated to cut delays and create a focus for case preparation.

A government-sponsored report used Mahoney’s American research to promote judicial caseflow management principles. Elementary controls initially reduced a backlog of older cases, but a consecutive series of three Practice Notes within a four-year period reflects increasing judicial determination to influence both the timing and preparation of cases in court. The experience in New South Wales provides salutory lessons and illuminates common pitfalls. Judges and administrators did not pull the practitioners with them. As the court erected more control mechanisms, parties found new ways to circumvent them.

The first Practice Note was aimed at gleaning information from practitioners at two different stages, checking that settlement prospects had been fully explored, checking that trial time was required, and siphoning off appropriate cases to arbitration. However, as concerns continued over “insufficient preparation”, a further Practice Note introduced a system of pre-trial hearings before a Registrar to sift out simple cases, re-route appropriate cases to arbitration and facilitate cross-party exchange of information. Additional attempts were undertaken to reduce the Division’s caseload, but parties’ co-operation eluded court control in practice. From 1994, another

98 Practice Note 59, New South Wales Common Law Division issued 28 February 1990
99 Callovers – for prospects for settlement or trial, Issues;
Listing Conference – to check settlement prospects had been explored and trial preparation was on track
100 The Hon. Mr. Justice J Wood and W. Soden, The Supreme Court of New South Wales, Conference Paper, Australian Institute of Judicial Administration, 6 December 1991
101 Practice Note 58: Active Case Management, Common Law Division, New South Wales issued
102 By ‘Special Sittings’ in 1992 and 1993, culling older cases, and increasing the jurisdictional limit of the lower District Court – CJRC Report (1995) op.cit.14
Practice Note,\textsuperscript{104} openly designed to meet the needs of the court, brought in a regimented timetable of preparation, differentiating cases by complexity:

\textbf{New South Wales Supreme Court Common Law Division}

\textbf{Differential Caseflow Management Practice Note 81:}

\textit{Effective 31 January 1994}

![Diagram of caseflow management process]

Constraints by time standards and goals, which were considered key to American caseflow management principles, were vociferously opposed by Australian

\textsuperscript{104} Practice Note 81 Differential Case Management, Common Law Division, New South Wales, issued 31 January 1994. Court caseload as at January 1995, one year after operation: On Not Ready List – 50\%, Awaiting allocation of status conference or track 15\%, In a case management track 26\%, Finalised 8\%
practitioners.105 Judges and administrators attempted to control the working pace of the traditional monopoly.106 After one year in operation, an evaluation study established that the majority of parties had not filed papers on time, half the cases remained on a “Not Ready” list, and that the court did not control adjournments as fully as intended.107 There still remained an unsatisfactory quality of information in some files, although judges reported that the considerable opposition during the development of the regime had lessened during the first year. After a further year the director of the Civil Justice Centre adjudged the system a failure.108

Prior to implementation, the legal profession had argued that a new form of caseflow management was unnecessary, reasoning that it would be counter-productive, place additional burdens on solicitors and increase the cost of litigation.109 They also asserted that litigants and legal representatives, with fuller knowledge of the context of a case, were the best judges of the speed at which a case should progress. These arguments are consistently reproduced by practitioners in every jurisdiction when movement towards court management is discussed.110 In New South Wales the reforms did not overcome this implacable opposition. Some commentators point to a fundamental flaw in the New South Wales regime. It was imposed on the legal profession, after limited consultation, rather than constructed with them into a workable common goal

“Changes to a caseflow management system will undoubtedly meet resistance from the organised Bar unless representatives have participated in planning... involving...a substantial number of lawyers along with the judge..."

105 CJRC Report (1995) op.cit.19-23
106 “The Law Society and Bar Association, were opposed to the detail of it and resolved to oppose its introduction.” CJRC Report (1995) op.cit.18
107 CJRC Study (1995) 27% of status conferences were continued (intention was one conference per case), 25% were adjourned for other purposes, 46% of final conferences were adjourned (intention was one per case).
108 Prof. T. Wright, Bellagio conference paper (1996) op.cit.
109 These criticisms were submitted to the ALRC, although overwhelmed by consensual support for caseflow management Discussion Paper 62 op.cit. paras 9.21-9.23
110 They have also been noted in responses to the writer’s questionnaire to Scottish practitioners.
and administrators on task forces responsible for developing monitoring and evaluating caseflow reform."  

After a year in practice, interviews revealed that the programme had not produced as many problems for the profession as they had anticipated. After interviews, the researchers reasoned that the profession became aware of benefits in practice and new ways were found to circumvent a potentially threatening adversary (the system). Judges found that, in addition to the seven American principles, the foundation for successful implementation must include:

- adequate judicial resources
- continued judicial support of the programme
- maintenance of programme momentum
- solicitor compliance and application of sanctions

The inability to control the number of hearings and late lodgment of documents corroborates other jurisdictional studies, including this author's research in the Scottish Commercial Court and the sheriff court study. It seems that even under the most intensive glare of the judges, there are underlying patterns of litigating behaviour which are beyond external control, regardless of national or cultural boundaries. As noted in the more successful American courts, the balance between controlling the number of requested adjournments by vigilant enforcement of the rules and the ease of allowing extensions colour realistic expectations of the profession. It is the judicial tolerance threshold which seems to dictate the pace of change.

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111 D. Solomon, "the architect of caseflow management" quoted in CJRC Report (1995) op.cit. 23
112 The Hon. Mr. Justice Sackville (1996) op.cit.
113 Fairfax State Court, Virginia (see Appendix 9.4.1)
114 B. C. Cairns (1994) op.cit.50-70, Practice in South Australia at 65
Further lessons from Australia reinforced earlier American studies that without being drawn into the adversarial process too deeply, courts can clear older cases to allow ongoing business to be managed much more efficiently than under the demand-led traditional system. In the short term reviewing and prioritising workloads has given management strategies a boost without antagonising the legal profession.

The County Court in Victoria began a delay-reduction campaign in June 1995. The average waiting time for trial was 16 to 21 months, although an administrative trawl uncovered 10 year old cases. Settlements had declined, interlocutory and discovery applications were common, over-used and abused. Remedial action was deemed a priority. Older commercial cases were singled out to fix early trial dates or encourage mediation. Within a year most had been resolved. By January 1996 civil actions were separated into four lists according to type of action. The central change was the appointment of a List Judge to monitor progress, control directive hearings and fix trial dates. This provided parties with a focus for preparation and a backdrop for negotiation. Court interest revitalised lines of communication. Within a relatively short time the great majority of older cases had been settled or allocated quick trial hearings.

In Western Australia an Expedited List was instituted to deal with the "malaise of litigation delays". Justice Ipp believed that delays prejudiced the quality of justice and organised a short-term special track for urgent civil cases, expanding successes in the established specialist Commercial Cause List. Wide judicial discretion was used to tailor orders and hearings to individual cases, supported by sanctions (removal from the list and costs orders). Written submissions were lodged before a hearing, with a final hearing prior to trial. Judicial management mirrors the Scottish Commercial court, with

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115 The Hon. Mr. Justice Sackville (1996) op.cit.
116 Damages List, Business List, Work Cover List (work-related injuries or illnesses), Long Case List (only by court order for complex actions requiring 10 days or more for trial, pursuer to initiate).
few exceptions. The major exception was considered to be the most effective tool - judicial power to order parties to attend mediation, preferably with their experts. Few cases did not settle. Justice Ipp reported

"The mediation provisions have proved extremely popular and some parties attempt to gain admission to the expedited list solely to be able to take advantage of them."  

This technique to slim down a heavy caseload has been adopted by the English Commercial Court since 1996, achieving similarly high settlement rates with external A.D.R. schemes. Justice Ipp confirmed that success depended on consistent and strict application of the rules, and admitted that the system would not have worked without co-operation from the profession. The Bar and Law Society had both been consulted and were part of a monitoring committee, the judge attributed a successful outcome to the co-operation which was "forthcoming to a large degree".

Australian judges seem to have quickly learned from American experience that a more co-operative rather than authoritarian approach engenders compliance.

"Control" is rejected in favour of 'supervision' to avoid any implication that a dictatorial approach by the court is advocated. Court supervision of case progress does not supplant attorney responsibilities. Instead, it should create a system of joint responsibilities wherein the perspectives and judgement of each can be applied in an appropriate manner to decisions concerning the progress of individual cases and the caseload as a whole.  

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118 The Scottish Commercial judge initially could not remove a cause from the list (see Chapter 10); Oral presentation was reduced to half by use of written submissions as evidence in chief in Western Australia.
119 Mr. Justice D. A. Ipp, (1992) ibid.216
The tenet of the current English reforms arguably reflects a more dictatorial approach, founded in Lord Woolf's assumption that the adversarial system protects abusive practice, a view not shared by Senior Master Turner, a member of Lord Woolf's advisory body.

Some judges have embraced caseflow management with more enthusiasm than others, and individual personalities still continue to randomly influence development of techniques and strategies across Australia. However, the dissemination of information and empirical data through the two main institutes means that since the idea was first broached, the pace of change has rapidly accelerated. Intervention means increased activity, particularly for the bench. Professor Sallmann now takes almost a nostalgic view of passive judging which is a warning to all jurisdictions on the threshold of massive reforms:

"The vigour and extent of the recent changes provides a stark contrast to the many years of calm and inactivity which preceded them." 122

Concerted campaigns have had a large impact on reducing delays throughout Australia and may temporarily enhance management statistics. Most courts have also enthusiastically embraced court-annexed mediation or other A.D.R. schemes which, like the English Commercial Court, further skew evaluative data. Professor Resnik pointed to the critical ambiguity which lies at the heart of a public service supporting, at times compelling, filtration to private alternatives to its own procedures. 123 She questioned whether these schemes are devised to benefit busy courts or to increase client options. The experience of the English court, which siphons off 30% of its caseload to

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121 Senior Master Turner, Middleton – the Cloud with a Silver Lining (1997) 147 New Law Journal 1728
122 Prof. P. Sallmann, Where are We Heading with Court Governance (1994) 4 Journal of Judicial Administration 3

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private schemes, indicates that it is convenient for both. However, in their anxiety to induce better ‘clear-up’ rates, the Australian judiciary have not been drawn towards American-style involvement in settlement conferences, and there is no plan to develop down this avenue.\(^{124}\) Compared to the ‘new-wave’ English interpretation of interventionism, disparate Australian systems evolve and revolve around modification of adversarial norms. The legal profession have resisted and undermined schemes which are imposed upon them and which were considered to transfer too much initiative to the judge. There appears to be consensual view forming that judicial activism should be aligned with “a system of joint responsibilities”, a lesson learned from over 30 years of experience with caseflow management in America.\(^{125}\)

**England –Mid-Channel Madness or Fair Winds of Change ?**

Currently the Lord Chancellor’s Department is involved in fundamental reform of court process, recently combined with a radical plan to remodel the entire legal aid system. The English courts have been facing similar crises over the past decades, searching for procedures which reduce costs, delays and enhance earlier preparation and settlement. Their problems are on a different scale from the Scottish system, servicing a population of 55 million compared with 5 million in Scotland, and a Bar of 9,000 in private practice, two-thirds of whom are based in London, compared to approximately 400 counsel in Scotland.\(^{126}\) However, the pattern of scepticism and intransigence towards procedural changes is remarkably similar.

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\(^{123}\) Prof. J. Resnik, Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication (1995) 10 Ohio State Journal on Dispute Resolution 211
\(^{124}\) ALRC Discussion Paper 62 op.cit. para. 9.19
\(^{125}\) ALRC Discussion Paper 62 op.cit. para. 9.21
\(^{126}\) Scottish Law Directory 1999
The English Evershed Committee in 1953 was an embryonic effort to reconcile adversarial procedures with pressure on litigants to move expeditiously. This early attempt was later acknowledged as a failure in implementation since control of procedure was left in the hands of the parties. Forty years later Lord Woolf is advocating similar reform, but transferring control of the pace to the judiciary. Against a backdrop of apparent professional and commercial support for the aims of the Woolf Report, academic opinion was divided over its implementation. Judicial skills, structural barriers and the implacable opposition of the legal profession were recognised as crucial variables which could affect successful outcomes.

In 1994 Lord Woolf was invited to review the rules and procedures of the civil courts in England and Wales, clearing the dust from 60 Reports produced over the previous century. Running parallel to a separate review of the legal aid system, his remit was to make recommendations to

- Improve access to justice
- Reduce the cost of litigation
- Reduce the complexity of the rules
- Modernise terminology
- Remove unnecessary distinctions of practice and procedure

It was clear from his remit that judicial caseflow management had been discussed at the highest level, and was the broadly expected outcome. Previous recommendations for

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127 Recommending robust summons for directions involving Masters to consider pleadings, give Orders and Directions
128 Interviews: (a) Master Turner of the Queens Bench Division (b) Professor Zander, London School of Economics, both 14 December 1995
133 Commissioned in April 1994 by Lord Mackay of Clashfern
judicial control had dissipated in a morass of working conventions. In his Interim Report in 1995 Lord Woolf, supported by a small judicial and academic team, launched a clear and exhaustive analysis of problems within the English civil justice system which had resisted previous reforms, and set out a broad agenda for change. Taking account of an extensive consultation process, his recommendations in his Final Report provided a detailed base for an action plan.

According to Lord Woolf the legal edifice had grown around the framework of the adversarial ethos which traditionally gave low priority to expense, delay, compromise and fairness. Consistently applied sanctions were advocated to shape expectations and attitudes, otherwise there was a risk of the aims being thwarted by incentives to prolong and complicate process. The history of the exchange of witness statements in England, brought in as part of a ‘cards on top of the table’ movement by the English Civil Justice Review, was well documented as an example of a control device which had an opposite effect to the one intended. Drafts and redrafts, apparently ‘massaged’ by representatives, became evidence-in-chief at trial, opening a new fee-earning industry, with costs and time in court increased not reduced. For this reason they were not acceptable to Lord Cullen. Even where the Scottish Commercial Cause Rules allow witness statements, the Commercial judge used his discretionary powers to forestall manipulative tactics by requesting witness summaries, generally accompanied by a warning that they should contain only a broad outline of witness evidence. (see Chapter 8).

135 Woolf Interim Report (1995) op.cit. paras 7.3, 7.4, 10.22, 18.1, 26.3, 29.15,142.29, 150.3
137 Rules of the Supreme Court 1991 Order 18 rule 1A - to allow judges and each party to see the strength of evidence, to promote settlements - but these measures were found to lead to increased costs without increasing settlements - Woolf Interim Report (1995) op.cit.pp.175-177
138 Practice Direction (Civil Litigation: Case Management) 1995 1WLR 262
Lord Woolf showed that previous reforms had been absorbed into the existing structure and the powers of the court had fallen behind the more sophisticated and aggressive tactics of litigants. In response he instigated reform machinery which restructures the entire litigating process.

Between the two Woolf Reports and their implementation a change of government led to the appointment of a new Lord Chancellor. As a member of the new Cabinet, he ordered an objective assessment of the Woolf reforms, including an evaluation of their interaction with the legal aid system in England and Wales. Allied to legal aid reforms and feeing system, the Lord Chancellor has supported proactive judicial intervention and supervision of case preparation which is more extensive and co-ordinated than previous reforms. Judicial management will stretch from the birth to death of a case - from pre-court preparation to appeal and enforcement procedures. The tenet of this ‘new era of justice’ has been captured by the government’s ‘New Labour’ modernisation policies, arguably influenced by pro-European politics. Court reform has become part of a wider political agenda.

In England the ancient office of Lord Chancellor, whose fusion of powers is said to provide a flexible buffer and bridge between legislative, executive and judicial responsibilities, may be further strained by future reform, in particular by the Human Rights Act 1998. Directing judges to manage cases ‘proportionately’ by taking

139 Sir Peter Middleton, former head civil servant of the Treasury, reported to the Lord Chancellor within three months in September 1997
140 G. Hoon MP (Minister of State at the Lord Chancellor’s Department) Greater Professionalisation of Court Clerks “integral to the Government’s modernisation programme” Speech 31 August 1998
141 Lord Woolf (1997) Paris op.cit. “We have more in common than divides us....arrangements are being made at a high level between the members of the civil courts of our two countries”
142 “I believe that far from undermining either the executive or the judiciary, this combination of roles requires the Lord Chancellor to be particularly sensible of the perspective of each one” Quoted by Lord Steyn, The Weakest and Least Dangerous Department of Government, (1997) Public Law 84-95
143 McGemmell v U.K. (Application no. 28488/95 European Court of Human Rights) fusion of responsibility in Guernsey was acknowledged by the Commission as raising ‘complex issues of law and fact’ under Article 6(1) of the Convention. Human Rights Act will be incorporated into domestic law 2 October 2000 – Lord Chancellor’s Key Address to the Annual Conference at the Bar, 9 October 1999
account of court resources and parties’ pre-court behaviour, flies even closer to the heated debate of perceived judicial independence and impartiality.\textsuperscript{144} The appointment of the Vice-Chancellor of the supreme court as Head of Civil Justice\textsuperscript{145} and Vice-Chairman of the Civil Justice Council,\textsuperscript{146} and Lord Woolf as Master of the Rolls\textsuperscript{147} and Chairman of the Civil Justice Council, sustains continuity and control at the helm within a small circle of personalities, adding fuel to the fire of debate.

"In my case the great benefit that flows from my being Master of the Rolls is that my office enables me to play a part in the process which is now taking place in implementing the reforms which I recommended in my report.\textsuperscript{148}\"

There are, however, some threads of dissent which expose potential areas of conflict between political and judicial control. The Lord Chancellor intended to draft all Practice Directions, but this was opposed and a small judicial team was set up to draft and co-ordinate the vast amount of delegated legislation deemed necessary to flesh out the rules.\textsuperscript{149} Also the Vice-Chancellor was opposed to the executive policy of recovering 100\% of court costs from court fees.\textsuperscript{150} Fundamental conflict over control will inevitably colour the evolution of the new system.

\textsuperscript{144} A fusion of legislative executive and judicial competence. The Cabinet Office List of Ministerial Responsibilities October 1998, published on the internet site. The Lord Chancellor is a member of the Cabinet (executive), a member of the House of Lords (legislature) and is head of the judiciary in England and Wales, and may sit in (judicial) Privy Council meetings.
\textsuperscript{145} From July 1996
\textsuperscript{146} The Council’s remit is to continue the focus on reform of civil justice system, review, advise, refer proposals and suggest research - Inaugural meeting of Council 20 March 1998 "The Civil Justice Council (CJC) is the first body of its kind. Never before has a body been set up, comprising members with such a wide range of interest in all parts of the civil justice system, to advise the Lord Chancellor on ensuring that the system is fair, accessible and efficient." Lord Woolf, opening the first meeting.
\textsuperscript{147} President of Court of Appeal, advisor to Lord Chancellor on public records, Lord Woolf was appointed on 21 May 1996. The Master of the Rolls is second only to Lord Chief Justice Bingham
\textsuperscript{148} Lord Woolf (1997) Paris op.cit., The Times 2 February 1999 quoted Lord Woolf- “The Court of Appeal has a central role to play in ensuring access to justice reform.... to stop infestation of problems”
\textsuperscript{149} Senior Master Turner (1997) op.cit.1729; Team working under Master Leslie, appointed April 1997
Lord Woolf's independent philosophy, identified on the first page of his first report, is enshrined in the rules, and will colour interpretation. 'Overriding Objectives' lie at the heart of his intention to facilitate access to justice and refocus on basic principles of a civil justice system.

**English Civil Procedure Rules**

**The Overriding Objectives**

Effective 26 April 1999

**Rule 1.1** The Overriding Objectives

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases *justly*.

(2) Dealing with the cases justly includes, so far as is practicable –

(a) ensuring that the parties are on an equal footing;

(b) saving expense;

(c) dealing with the case in ways which are proportionate –

(i) to the amount of money involved;

(ii) to the importance of the case;

(iii) to the complexity of the issues;

(iv) to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly;

(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases.

**Rule 1.2** The court must seek to give effect to the overriding objective when it –

(a) exercises any power given to it by the Rules; or

(b) interprets any rule

**Rule 1.3** The parties are required to help the court to further the overriding objective

**Rule 1.4** (1) The court must further the overriding objective by actively managing cases

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Lord Woolf’s Basic Principles of a Civil Justice System

* Just results
* Fairness
* Proportionate costs
* Reasonable speed
* Understandable rules
* Responsiveness to needs
* Certainty
* Systems effectively resourced and organised

To meet these basic principles, judges as well as litigants and the legal profession are drawn into strategic planning of cases and caseloads.152 The profession has been warned that the Objectives are not “a set of pious aspirations”.153 They are widely drafted to provide the maximum support for wide judicial discretion. Since it is “a new procedural code” old authorities are no longer binding,154 leaving the Court of Appeal, presided over by Lord Woolf, free to create new precedents – in other words to ‘reinvent the wheel’. This means that in the litigation power game the ‘deck’ is initially stacked in favour of the judges, just as it was in the Scottish Commercial Court where the initial judge had been involved in drafting the Rules, giving him the agenda-setting role. Combined with the strength of his determination to make a success of the procedure, time to resolution was cut by more than two-thirds. However in England interpretation of loosely worded legislation and the plethora or Practice Directions and guidelines being published as the system develop also gives judges additional power to redraw the

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152 see Rule 1(3) and Rule 1(4)
153 The White Book - new book of civil procedure rules paras 1.3.1 et seq and para 2.3.3
154 Ricardo Biguzzi v Rank Leisure plc 26 July 1999 unreported pre CPR cases governing ‘abuse of process’ and ‘wholesale disregard of court rules’ are not binding or persuasive. Court of Appeal, leading judgement Lord Woolf Civil Procedure Rules are a "self-contained code" and "earlier authorities are no longer of any relevance once CPR applies".
boundaries of the acceptable legal culture, with little encouragement for parties to go to appeal.

Inevitably, the courts will initially be involved with many definitive issues. It seems entirely plausible that "judicial reform is not for the short-winded". It will be up to individual judges at first instance to interpret the new code, based on training by the Judicial Studies Board in two-day seminars on the ethos behind the rules, but as the Court of Appeal is presided over by Lord Woolf, consistency in purposive interpretation is all but guaranteed at appeal level. The intention is that if court interest is activated or even anticipated, dispute resolution will be controlled from beginning to end.

Lord Woolf appears to be codifying civil procedure in England and Wales. If he is not 'Europeanising' it he is at least taking it, in his own words, "mid-Channel". It remains to be seen whether the 'side-winds' of intransigence will blow him off course. He originally intended that

"We should not abandon our adversarial and oral tradition in England and Wales in favour of an inquisitorial system" and would follow

"other common law jurisdictions whose traditions are similar to our own".

But in an effort to cure inherent problems, which he attributes to adversariality, he has turned the power pyramid upside down, giving judges responsibility they have never experienced before. This is intentional. Studies consistently and conspicuously reveal that the local legal culture dominates litigation and seeps through partially-implemented reform strategies. The Woolf reforms are the strongest and most interventionist rules

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155 Maltez v Lewis, The Times 4 May 1999 Neuberger, J. Civil Procedure Rules Part l.r.1(1), (2) and (3) The list is not mutually exclusive and contradictions may be envisaged. In this case inequality of status of opposing counsel and disproportionate costs did not override a party's right to choose the representative
short of the inquisitorial system, designed to break faults of the legal culture. But will they work as intended? The history of automatic striking out of inactive county court cases, \(^\text{159}\) and wasted costs orders \(^\text{160}\) spawned satellite litigation, flooding appeal courts. Discretionary rules open up similar appeal opportunities, which have been shown to cause delay and expense in inquisitorial systems. \(^\text{161}\) Despite Lord Woolf’s position as Master of the Rolls, a flood of cases may move a bottleneck to a different position - the Court of Appeal. From October 2000 the use of judicial discretion may also be challenged under Article 6(1) of the European Convention on Human Rights. Ironically, the cure, if wrongly applied, may also be the poison.

To filter out groundless and easily-resolved simple cases, relieving congestion, the emphasis was initially placed on encouraging settlement outwith court. \(^\text{162}\) Litigation was to be a last-stop option, a trial even regarded as a failure. \(^\text{163}\) A programme of consultation documents, working parties and research papers co-ordinated by the Lord Chancellor’s department, developed the Woolf reports’ recommendations. The Lord Chancellor set up a research unit in April 1997 \(^\text{164}\) to gather ongoing baseline data as reforms were implemented, and evaluate policy changes. Following Sir Peter Middleton’s report in September 1997, the momentum for change was revitalised. The programme machinery was set in action, taking account of experience and criticism within U.K. and abroad. \(^\text{165}\)

\(^{158}\) Woolf Interim Report (1995) op.cit. para 29.15 \\
\(^{160}\) Supreme Court Act 1981 s. 51(6) and S.51(7). It is necessary to show that costs had been incurred as a result of improper, unreasonable or negligent action or omission on the part of the solicitors R v M [1996] 1 F.L.R. 750; Re: Freudiana Holdings Ltd. CA The Times, December 4 1995 “Wasted costs orders are an imperfect means of curbing excess by the legal profession” \\
\(^{161}\) see footnote 5 \\
\(^{162}\) Resolving Dispute Without Going to Court, Lord Chancellor’s Department (Lord Mackay of Clashfern) (1996) available free from County courts and libraries, set out alternatives to litigation \\
\(^{163}\) Senior Master Turner, First Steps in Mediation, Resolutions (1997) 18 CEDR Bulletin \\
\(^{164}\) Launched 3 April 1997 Annual Research Conference of the Socio-Legal Studies Association, Cardiff
To minimise disruption and overcome professional intransigence, a key aspect has been the ‘partnership approach’ to the production of workable rules. Consultation papers on every aspect have allowed the widest possible trawl of opinions, and this process continues beyond original deadlines.\textsuperscript{166} Although a detailed comparative exercise might reveal how much the draft rules were refined by consultation, circulation of consultation papers reflected the breadth of interest:

- over a period of 4 months 16,000 copies of the draft rules and pre-action protocols were circulated
- in one month the Lord Chancellor’s internet page with draft rules and practice directions recorded 1,000 hits per week \textsuperscript{167}

As the Final Report was published, the first consultation paper was circulated proposing a single rules committee to co-ordinate a unified procedural code.\textsuperscript{168} The Civil Procedure Rules (C.P.R.) will eventually replace the Rules of the Supreme Court and the County Court Rules, creating a unified entry into the justice system. While the overriding objectives apply to any live case, transitional arrangements phase in aspects of the new rules in older actions. Currently the new rules do not apply to enforcement of judgments or to judicial review proceedings, and the Commercial Court has produced a guide which explains how their specialist procedures are assimilated into the main body of rules.\textsuperscript{169} The Patents Court and Technology and Construction Court retain their

\textsuperscript{166} Two subsequent Court of Appeal Practice Directions follow publication of very detailed one on 19 April 1999; Controlling Costs – Consultation Paper issued May 1999, for comments by 25 June 1999 – interim measures to control costs until a fixed costs system is developed for Fast Track cases
\textsuperscript{167} Implementing Civil Justice Reform – Progress Report, Lord Chancellor’s Department November 1998
\textsuperscript{168} June 1996
\textsuperscript{169} During the transition period, existing rules are preserved as a schedule to the CPR.
established procedures. The concept of a unified code has already been eroded at the edges.170

A core package of the new rules was published in January 1999, effective from 26 April 1999. By 30 November 1999 nine amendments had been issued. The Rules themselves have been widely drafted to allow maximum judicial discretion. Flexibility is also promoted by the use of Practice Directions, currently being issued by a cohesive group to flesh out the rules in practice.171 At a crucial meeting in April 1997 Master Leslie and two High Court service staff were appointed to devise a new full set of Practice Directions, responsible to the Vice-Chancellor.172 The Chief Master and Senior Masters of the Queens Bench and Chancery Divisions have compiled a single set of Practice Directions alongside Master Leslie’s team. A consolidated list of 64 Practice Directions issued by 23 April 1999 (see Appendix 9.6) indicates the extent of delegation and timetables involved.173 The process of developing and adapting rules to practice is therefore an ongoing process.174

Implementation is gradual, not only because of the length and breadth of consultation, but also to accommodate practical application.175 Changing the litigation landscape rather than modifying procedural pathways has been a calculated and courageous gamble, dependent not only upon co-operation but also upon the confluence of resources, training and technical support.

170 Also on a case by case basis – Practice Direction 29 para 10.1 is amended so that multi-track trials do not have to take place at civil trial centres; Practice Direction 44 new sub-paragraph 4.4(2) summary assessment of costs will now include mortgagees costs in mortgage possession claims, abiding by principles in Gamba Holdings (UK) v Minories Finance Ltd (No.2)[1993] Ch.171 xxxvii Blackstone's Civil Procedure Rules 1999
171 Certain judges in the High Court have inherent power to regulate their own procedure – the Lord Chief Justice regulates the Queens Bench Division, Vice-Chancellor the Chancery Division, President the Family Division (the latter two are responsible to the Head of Civil Justice)
173 Published on 23 April 1999 at 1 WLR 1124; [1999] 3 All ER 380
174 Practice Direction (Court of Appeal) (Civil Division)) published 28 May 1999 1 WLR 1027-1049 and [1999] 2 All ER 490
“This is a comprehensive package to support the concept behind the recommendations. But it is not going to happen overnight. We have to put in place training and technology, and changes to the Legal Aid system to coincide with these. Practitioners are to be included in training to benefit the system – it all fits together, and we must work out a programme on the basis of resources available. There is the potential for huge economies. A better service will be provided for the same amount of money.” 

When first published, the legal profession officially reserved judgment, arguing that success would depend on practical aspects of implementation - resources, training and technical support - being available. This was acknowledged early on:

“The need for resources is vital or steps cannot be taken towards implementation, or worse, reforms are not properly implemented. Partial implementation would be a shambles.”

(i) Resources

The profession were reassured that funding by Private Finance Initiative was available, and new information technology (I.T.) programmes had been commissioned. A small team, established by the Lord Chancellor, was aware that major IT programmes required substantial investment of finance, skills and management time. However, development and resources did not fully materialised and the system has been

175 IT Strategy Development Group Consultation document, 18 September 1998; P. Sweet, Concerns Raised as Woolf Report [is] Published (1996) 140 Solicitors Journal 727
178 The Civil Justice IT Strategy Development Group headed by the Minister of State in the Lord Chancellor’s Department Geoff Hoon MP - required to produce a 5 to 15 year strategy the same month the rules were implemented, April 1999
implemented with little IT support, against Lord Woolf’s recommendations, and the advice and experience of every caseflow management jurisdiction. Full technical support for caseflow management is expected to be in place within the first year. However, this early period will be a testing time for manual systems and administration, augmented by 60 additional staff in county courts. The credibility of case tracking will inform parties’ attitudes to court orders and co-operation, weakened by the established ‘local legal culture’.

(ii) Training

It is indisputable that training judges is essential for effective implementation of reforms, although some already have management skills to build on. Circuit, High Court and Queen’s Bench judges are generally ex-barristers, trained in skills of advocacy, while District judges are ex-solicitors, with fundamental experience in regulating workloads. Masters come from variable backgrounds. It is the Masters and District judges who are the backbone of the new system, acting as procedural judges and in teams to promote continuity of supervision on circuit. The Judicial Studies Board began caseflow management training for the whole judiciary in 1997, although resource implications were immediately apparent. It was calculated that the Board had between 6 to 8 months to train between 800 to 1000 judges, and that caseflow management training was the equivalent of losing one judge for a continuous period of 20 years. The outcome of two-day seminars is currently being tested, but as previously noted the vast amount of judicial discretion, bolstered by the ‘Overriding Objectives’, allows a wide variety of

179 Senior Master Turner An Address at Parliament House 24 May 1999. District Judges and Masters have been given lap-top computers, but little training
184 Calculated by LJ Henry, Chairman of the Judicial Studies Board at the request of Sir Richard Scott
subjective interpretation, and training is taking place before all the rules are known, despite a warning by Senior Master Turner in 1997:

It is unrealistic to imagine that we can train judges until we have the final version of the Rules/Practice Directions/Protocols in place.\textsuperscript{185}

A joint training programme for judges, barristers and solicitors was originally discussed, but not carried through. The profession have relied heavily on internet website publications, sporadic seminars, conferences and in-house programmes to keep them informed.

(iii) Technical Support

As far as financial support is concerned, an additional £2 million was made available to civil courts in November 1998 to prepare for implementation, £1.5 million of which was allocated to additional temporary staff and overtime, and £0.5 million for 1300 extra sitting days for District judges. Lord Woolf seems to believe that the new system will eventually be self-financing,\textsuperscript{186} Sir Richard, who subsequently became Head of Civil Justice, disagreed with a strategic policy which treated dispute resolution as a commodity. "This is regrettable, and I oppose this". Divergent policy aims and leadership objectives fracture the common goal.

The combination of false starts meant that two months before implementation, practitioners were concerned at "being asked to occupy a half-finished house."\textsuperscript{187} The impression was that the reform machinery was budget-driven and propelled by political

\textsuperscript{186} Lord Woolf, (1996) Oxford seminar
expediency, overtaking preparations and training timetables.\textsuperscript{188} Two months prior to fundamental upheaval across every court in England and Wales, Ministerial debate was still taking place. However practitioners realised that change was inevitable, and that those who were prepared to learn and work with the developing system would have a tactical advantage over opponents who were intransigent. Consultation papers and working parties continue to inform (and some times temper) procedural innovations.

**Changing the Adversarial Ethos in England**

The most significant changes to judicial powers are

(a) encouragement to settle  
(b) offers to settle  
(c) caseflow management  
(d) judicial costs orders

(a) **Settlement**

(i) Working on the assumption that settlement of disputes or individual issues is influenced by conciliatory rather than combative attitudes\textsuperscript{189}, the rules aim to encourage this, supported by a new costs regime.

“It is the theme of my Report that an adversarial system should not be unduly combative.”  

[Communication is linked to co-operation which is linked to costs.]\textsuperscript{190}

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\textsuperscript{188} Senior Master, Queens Bench Division, one of five assessors on Lord Woolf's initial Inquiry Team.  
\textsuperscript{189} Lord Chancellor's Key Address to Annual Conference at the Bar, 9 October 1999 referring to Lord Alexander's analogy of changing lawyers from hired guns into healing hands  
\textsuperscript{190} Woolf Interim Report (1995) op.cit. para 151.7
Even assessed costs of a winning party can be influenced by litigating behaviour.\textsuperscript{191} The judge must take into account the conduct of the parties (even before initiation of an action in court), and the reasonableness of the issues raised.

(ii) Court power to sist (stay) an action, on its own initiative,\textsuperscript{192} prodding parties towards mediation or other A.D.R. option, is not a new phenomenon in England, and follows U.S. judge-driven mediations.\textsuperscript{193} The Official Referees Court,\textsuperscript{194} Court of Appeal and the Commercial Court in London have all encouraged the use of ADR.\textsuperscript{195} However, assuming settlement by mediation can cut costs and delays and preserve commercial relationships reputations,\textsuperscript{196} the English Commercial Court has recently been more forceful, adjourning 30\% of their cases to alternative centres,\textsuperscript{197} at times against both parties’ wishes.\textsuperscript{198} Lawyers, and some judges,\textsuperscript{199} have expressed concern over pressure to use alternatives, but experience has shown that most of the commercial cases using this route did not return to court. Both lawyers and mediators at a recent

\textsuperscript{191} Costs Practice Direction [1999] 1 All ER 670 issued by Lord Bingham for Queen’s Bench Division and Sir Richard Scott for Chancery Division 1 February 1999. Aimed to encourage greater use of RSC Ord 62 r 7(4)(b) and CCR Ord 38, rr3(3D) and 19(3) – discretionary power to assess summarily the amount of costs to be paid inter-party.

\textsuperscript{192} CPR 26.4 Practice Direction 26. Stay for 4 weeks at the outset – negotiable if justified. Court to give directions after that.

\textsuperscript{193} C. Cervenak, D. Fairman and E McClintock, Leaping the Bar: Overcoming Legal Opposition to ADR in the Developing World, American Bar Association, Section of Dispute Resolution (1998)

\textsuperscript{194} Now named Technology and Construction Court

\textsuperscript{195} Official Referees Court 1990 first court direction on ADR, Commercial Court 1993 Practice Direction – encouraging use of ADR, Court of Appeal 1995 Practice Direction – ways of identifying cases for mediation reported in Financial Times article in Appendix 9.7; Technology and Construction Court October 1998 (was Official Referees Court) for heavy construction cases suitable for mediation

\textsuperscript{196} Financial Times article “The Gentle Touch” see Appendix 9.7

\textsuperscript{197} Practice Statement (Commercial Cases: Alternative Dispute Resolution) No.2 Q.B.D., 1996 1 WLR 1024; Mediation in the Commercial Courts – One Year Later, D. Shapiro, Resolutions Issue No. 17, CEDR Bulletin. A high percentage were resolved by the Centre for Dispute Resolution (CEDR) in London, a CBI-sponsored initiative started in 1990 by Karl Mackie

\textsuperscript{198} Justice Colman, when Head of Commercial Court, reported Resolutions 17 (1997) p. 5; Justice Tuckey, succeeding Head of Commercial Court, The Value and Practice of Commercial Court ‘Mandated’ Mediation CEDR Seminar, London 17 March 1998 (see Appendix 9.8)

\textsuperscript{199} Lord Mustill in Channel Tunnel Group Ltd v Balfour Beatty [1993] 1 All ER 664 “The powerful warnings against encroaching on the parties’ agreement to have their commercial differences decided by their chosen tribunals….. should be honoured by the courts”
conference indicated that an increasing number of clients now anticipated A.D.R. court orders - judicial reputation for tenacity has prompted compliance.\textsuperscript{200}

This result has been a powerful incentive for the Executive to extend the strategy to other courts. Recent research confirms that voluntary initiatives\textsuperscript{201} have not proved attractive to clients,\textsuperscript{202} requiring judicial power to block unnecessary meanderings. While it does not involve the judge in settlement negotiations, the implications can reverberate on judicial decision-making. Originally, the Lord Chancellor planned that costs and penalties would be used against unco-operative attitudes to alternative schemes, but this proposal was not supported and enacted, relying heavily on individual judicial discretion to use ADR.

(iii) Pre-action Protocols are the most invasive aspect of the new rules, extending judicial scrutiny into pre-litigating behaviour.\textsuperscript{203} The policy, taken from Queensland Australia, is aimed at early settlement prior to initiation, creating a code of standard pre-court behaviour and preparation. By encouraging free exchange of information between parties, and ‘meaningful’ pre-court negotiation, spurious or vexations actions are sifted out, freeing up court time. Standard forms and questionnaires makes it easier for parties to obtain information upon which to base reasonable offers to settle.

If a case proceeds, compliance with the protocol is checked through an Allocation Questionnaire which must be completed before both court time and track are booked.

\textsuperscript{200} see Appendix 9.8 for fuller report of CEDR conference 17 March 1998
\textsuperscript{201} From May 1996 Central London County Court ran a pilot mediation scheme for cases under £3,000 Judge Butter QC presiding; 3 hours were allocated from 4.30 pm to 7.30 pm, per case, costs were recoverable through legal aid.
\textsuperscript{202} Professor Hazel Genn has undertaken research. Her initial findings are that take-up has been slow (5%), CEDR conference (1998) op.cit.; Medical Negligence Practice Note No.4 1996 Master Foster reported that no party agreed to mediate. Senior Master Turner Resolution (1997) op.cit.
\textsuperscript{203} Woolf Final Report (1996) op.cit. 107
Although Working Groups of experts and practitioners have drafted the protocols, monitoring pre-court preparation by judges bites fiercely into adversarial principles, (see Appendix 9.9). In this way the profession have been instrumental in drawing up codes and statements of best practice which empower the court to regulate reasonable expectations of behaviour. Failure to adhere to the terms of pre-action protocols will affect discretionary awards of costs and time for compliance. Further, in a case not specifically covered by a protocol, litigants will be required to abide by the spirit of co-operation in anticipation of wider implementation in due course.

A protocol which is already being used for the resolution of clinical disputes, a working model for other areas, includes precedent letters, applications for production of medical records and a timetable for responding to claims. A protocol for personal injury actions is mainly aimed at fast track claims under £15,000. Others which are in the course of preparation cover construction disputes, road traffic accidents, professional negligence, solicitors' negligence, debt and experts, the latter being one of the most contentious reforms.

Effectively an investment of time, work and expense will be incurred prior to raising an action. Documents will have to be traced, quantum assessed and witnesses identified and possibly precognosed. Both the legal profession and clients (particularly commercial) will have to tailor their own working practices and organisation to produce

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\text{204 Personal Injury Protocol – drafted by a committee of lawyers, insurers and civil servants on the basis of "joint wisdom and co-operation" Lord Chancellor, Address to the Association of Personal Injury Lawyers 7 May 1998}
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\text{205 Practice Direction Protocol para 2.3 – faulty party may pay costs; court will take compliance into account under CPR 3.1(4) and (5) and 3.9(1)(e); CPR 44.3(4) and (5) costs orders takes account of all circumstances of the case, including pre-litigation behaviour; CPR 3.8 lack of compliance of any order attracts an automatic sanction, granting relief under CPR 3.9 which takes account of pre-litigating behaviour. Blackstone’s Guide to the Civil Procedure Rules 2nd ed. C. Plant (1999) 1194}
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\text{206 Practice Direction Protocol para 4 – the court will expect the parties, even in cases not covered by any approved protocol, to act reasonably in exchanging information and documents, generally to try to avoid the necessity for the start of proceedings.}
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information and negotiate before beginning an action, at times merely as a bargaining tool.

The Lord Chancellor’s Department interprets a 25% reduction in county court cases issued in the first four months to pre-action behavioural changes, lending credibility to the use of protocols.208 An alternative interpretation could be that practitioners and clients are still familiarising themselves with the new litigation landscape.

(b) Offers to settle and Payments into court (Part 36)

Offers and payments into court are also designed to encourage serious settlement negotiations, and are given added bite by costs and financial consequences. Defendants involved in money claims in England must follow up a settlement offer by making a payment into court, a ‘Part 36 payment’, which is "without prejudice except as to costs".209 If the claimant is successful, but is awarded less than the original offer he will generally be liable for the defendant’s costs from the acceptance date. A claimant can also make a ‘Part 36 Offer’ to settle, and if he recovers at least that amount, the court may add interest to the award and indemnity costs up to 10% over base rate.210

Offers into court may be used before proceedings are issued,211 as part of the pre-action protocol requirement that parties consider a month’s stay to attempt settlement. It is

208 D. Lock, Parliamentary Secretary, Lord Chancellor’s Department, Presentation to Annual General Meeting of Motor Accident Solicitors’ Society, 15 October 1999
209 Civil Procedure Rule (CPR) 36
210 It will be possible to make Part 36 offers related to issues rather than money amounts: e.g. an offer to accept liability up to 50%. In that event a payment into court will not be required on the part of a defendant.
211 CPR 36.10
clear from Lord Bonomy’s recent opinion that the Scottish courts are re-considering similar incentives which previously failed, but the impetus seems to have withered.212

(c) Caseflow management

From the beginning, Lord Woolf was convinced that different cases required proportionately different levels of judicial attention. This is borne out by the Australian Law Reform Commission.

"The clear view of the Commission’s consultations ... was that it was essential in case management to differentiate particular cases or case types"

In England, the judge has wide duties and powers under the new rules, explicitly set out in Rule 1.4. They must "actively manage cases". Rule 1.4(2) illustrates 12 routes to achieve this, radically altering the judicial role from passivity to activity – some may say hyperactivity

**English Civil Procedure Rules**

**Duty of the Court to Manage Cases Rule 1.4**

Effective 26 April 1999

(1) The court must further the overriding objectives by actively managing cases

(2) Active management includes -

(a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
(b) identifying the issues at an early stage;
(c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
(d) deciding the order in which issues are to be resolved;
(e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;

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212 Taylor v Marshalls Food Group 1998 GWD 24-1188
(f) helping the parties to settle the whole or part of the case;
(g) fixing timetables or otherwise controlling the progress of the case;
(h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
(i) dealing with as many aspects of the case as it can on the same occasion;
(j) dealing with the case without the parties needing to attend at court;
(k) making use of technology; and
(l) giving directions to ensure that the trial of a case proceeds quickly and efficiently.

Lord Woolf’s Final Report identified the key players in caseflow management as ‘procedural judges’, mainly District Judges (in County Court cases) and Masters (in the Royal Courts of Justice). Next to the overriding objectives, rule 1.4(1) represents the most fundamental shift of power. To readdress problems of costs which were shown to be disproportionate to a large number claims, defended actions will be allocated to one of three tracks, differentiated by value of claim and restrictions placed on procedure and recoverable costs:

<table>
<thead>
<tr>
<th>Track</th>
<th>Claim value</th>
<th>Restrictions on Procedure and Costs</th>
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<tbody>
<tr>
<td>Small Claims</td>
<td>Up to £5000</td>
<td>No expert evidence</td>
</tr>
<tr>
<td></td>
<td>Personal injury</td>
<td>Limited costs recoverable</td>
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<td></td>
<td>cases up to £1000</td>
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<tr>
<td>Fast Track</td>
<td>£5000 - £15000</td>
<td>Trial under one day, within 30 weeks of initiating, oral and expert</td>
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<td></td>
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<td>evidence limited to two fields, one expert per field. Fixed costs.</td>
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<td>Court powers to limit issues to be addressed and adduced at trial,</td>
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<td></td>
<td></td>
<td>using the overriding objectives216</td>
</tr>
<tr>
<td>Multi-Track</td>
<td>Over £15,000</td>
<td>Also for complex cases and actions where trials anticipated to last</td>
</tr>
<tr>
<td></td>
<td></td>
<td>over one day</td>
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213 Woolf Final Report (1996) op.cit. Chapter 1 para 4
214 CPR 2.4 allows flexibility to use any judicial officer nominated, Practice Direction 29 para 3.10 sets out normal responsibility – Masters in Royal Courts of Justice, district judges in district registry, and either district or circuit judges in county court cases.
215 Woolf Final Report (1996) op.cit. Appendix III on Costs – Empirical research by Prof. H. Genn for the Woolf Inquiry – analysis of 2184 cases sent to taxation (winning party’s costs only) Costs of claims under £12,500 were consistently more than 100% of the claim for all case types. For Commercial cases costs for the same band were 174% of the claim value.
216 CPR 32.1. Power is limited only by the objectives of cases being dealt with justly and fairly
Fast track cases will follow a standard and regulated timetable to a trial hearing within 30 weeks, with fixed costs.\textsuperscript{217} The Multi-track also begins from an ethos of proportionality, but is akin to a judicial docket system employing a team of procedural judges, at four different types of discretionary hearings – allocation hearings,\textsuperscript{218} case management conferences, pre-trial reviews and listing hearings (see Appendix 9.10). Directions and timetables will be tailored to parties’ needs.\textsuperscript{219} The potential drain on court resources requires a tight control of judicial and party compliance, particularly since Multi-track cases will be dealt with at different civil trial centres. These tracks are allocated by the procedural judges on receipt of Allocation Questionnaires, requiring lawyers to submit, in standard format, detailed information about progress, preparation for trial, likely length and costs breakdown.\textsuperscript{220} Two practice directions\textsuperscript{221} expand judicial powers to

- disallow postponements of trial through lack of compliance
- exercise power to enable a trial to take place on date(s) allocated
- assess steps required to prepare for trial, with sanctions for non-compliance
- split issues which are ready for trial, with costs for continuations irrecoverable
- allocate inevitable postponements within the shortest time, with detailed directions
- order attendance by party and representative if postponement is inevitable

It is anticipated that the courts will be less forgiving of non-compliance, and a plea of ‘prejudice’ to an innocent party will not mean automatic absolution. However, judicial support for such a radical change of culture remains untested. Along with other notable sanctions, and given Lord Woolf’s interest in co-operation, it is probable that they will

\textsuperscript{217} Amounts currently under review
\textsuperscript{218} CPR 26.5 (4)
\textsuperscript{219} D. Lock (1999) op.cit.
\textsuperscript{220} Practice Direction 43 para 4.5(1)
\textsuperscript{221} Practice Direction 28 para 5.4 (fast track), Practice Direction 29 para 7.4 (multi-track) whether breach is of CPR or Practice Direction
influence early submission by flagging up the court’s determination to succeed. Credibility requires, however, that judges are seen to flex their judicial muscle, at least initially. Since forgiving attitudes were notably prevalent and therefore appear to have been the judicial ‘norm’ before April, it is questionable whether initial strictness can be sustained. Already there is “*growing evidence of some local practice creeping back in to some courts or groups of courts*”\(^{222}\)

At a case management conference, the court can override any directions agreed between the parties and impose its own, with reasonableness being the main yardstick. In an appeal court judgement\(^{223}\) Lord Woolf has made it clear that tactical skirmishes on subsidiary issues will not be tolerated, and so far as possible the courts will try to decide all interlocutory issues at a single case management conference. Given the empirical data and experience in other jurisdictions, particularly the Rand study and the writer’s research, this seems more optimistic than realistic. Judicial scrutiny can generate further hearings and orders.

If the judges do succeed in "managing" litigation the court will scythe through unmeritorious claims at an earlier stage, clearing the way for bona fide actions to reach trial much more quickly than they do at present. This has been the experience of the Scottish Commercial court, although the local legal culture has begun to erode early successes of dynamic management. There is no doubt that better organised practitioners will gain the advantage, particularly in the first year.

(d) **Control of Expert Evidence**

Lord Woolf saw the proliferation of experts as a "*litigation support industry*" and a dangerously uncontrolled cause of disproportionate costs. He sought to give judges

\(^{222}\) D. Lock (1999) op.cit.

\(^{223}\) McPhilemy v Times Newspapers Ltd. and ors.
power to restrict quantity, timing and breadth of expert testimony\textsuperscript{224} to that which was "reasonably required".\textsuperscript{225} A new section in the rules sets out the new general principle that both parties and judges should gauge whether single experts would be sufficient, encouraging a co-operative approach to investigation and report. Expert evidence is not to be admitted unless written instructions are attached to the report, with court given power to order tests, examinations, reports and private joint meetings. The expert is expected to adhere to an over-riding duty to the court in deference to the client:

\begin{quote}
"It is the duty of an expert to help the court on matters within his expertise and
This duty overrides any obligation to the person from whom he has received
instructions or by whom he is paid."\textsuperscript{226}
\end{quote}

Restrictive court timetables "caused uproar",\textsuperscript{227} and a Practice Direction explicitly setting out experts’ duties to the court was quickly infringed.\textsuperscript{228} The Court of Appeal has established that under the new rules judges have a right to control expert evidence, and to disallow factual evidence if an expert does not comply with this Practice Direction.\textsuperscript{229} From other studies (Rand in particular) we can predict the growth of a subculture of preparation and anticipate skirmishes which will increase judicial decision-making and appeals.

\textsuperscript{224} Woolf Final Report (1996) op. cit.137
\textsuperscript{225} CPR 35.1 "Expert evidence shall be restricted to that which is reasonably required to resolve the proceedings"
\textsuperscript{226} CPR 35.3 (1) and (2) and Practice Direction 35 - Duties of court expert
\textsuperscript{227} Expert Witnesses - Woolf Reform Deadlines Cause Uproar – Suzanne Burn, Secretary of the Law Society’s Civil Litigation Committee, (1998) 142 Solicitors Journal 1024
\textsuperscript{228} Knight v Sage Group plc 28 April 1999 unreported – substantial personal injury case, defendants objected to order for joint instruction for a single expert, but Court of Appeal ordered that at the next hearing the judge should confirm that the defendant was complying and co-operating
\textsuperscript{229} Stevens v Gillies 27 August 1999 unreported - the expert refused to sign a joint memorandum, departing from Practice Direction 35
(e) Control of Costs

What was left out of the Woolf Report were costs rules, but the foundation for changing costs and the indemnity fee basis was set out. Consultation on controlling costs began a month after the new rules were published. Working from the premise that "accurate pricing before the event is increasingly what the market wants" the Lord Chancellor promotes increased transparency in legal service, measured against a common standard –

"Will it be in the best interest of clients as a whole?"

Since Lord Woolf found that costs were wildly disproportionate to claims, transparency is paramount, alerting clients as early as possible to financial commitment in order to promote settlement discussion and expose unnecessary feeing. This follows the American Bar Association’s professional conduct rules which stipulate that the "lawyer’s fee shall be reasonable" and:

"When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation."
In England, costs will no longer be submitted for taxation but will be subject to a ‘detailed assessment’ by a ‘costs judge’. That assessment will be part of a jigsaw of reforms controlling fees and tactical behaviour.

If one party fails to adhere to any rule, practice direction or pre-action protocol, he may be required, if a claimant, to give security for costs, and, if a defendant, to give security up to the amount of the claim against him. Controlling the number of appeals per case also introduces proportionality into process.

In anticipation of the new reforms a Costs Practice Direction, effective from 1 March 1999, extended individual judicial scrutiny of the costs of one-day interlocutory hearings. To promote proportionality, transparency and certainty, a summary of costs involved was to be lodged prior to every interlocutory hearing “to allow judges to gain some experience in assessing costs in short and simple cases”. Every disbursement is scrutinised, including counsel’s fees, solicitor’s profit costs (number of hours, rate per hour, grade of fee-earner). Senior Master Turner subsequently reported that for the first time judges have been exposed to a “surprising” level of fees charged for the most simple tasks, and have effected reductions where fees appear excessive. This is a radical departure from evaluation by a Taxing Master after completion of a case.

Following consultation, this system is being extended. All judges now have wide powers of summary assessment of costs, with payments required within 14 days of incurrence. The judges will be able to take into account the whole circumstances of

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235 CPR 43, Practice Direction 43 para 1.8
236 CPR 43.2(1)(b) costs judge means a taxing master of the Supreme Court, assessments also made by costs officer which means a costs judge, district judge, or authorised court officer
237 Practice Direction Court of Appeal (Civil Division) 10 April 1999 para 2.19.1; Piglowski v Piglowski 1999 The Times 25 June 1999.
238 Costs: Summary Assessment) [1991] 1 WLR 420; issued by Vice-Chancellor was Ord 62 Rule 7(4)(b) of Rules of Supreme Court 1965 and Order 38 Rule 3 (3D) and Rule 19(3) of County Court Rules 1981
239 Senior Master Turner, Address at Parliament House, Edinburgh 24 May 1999
240 Practice Direction 44 para 4.4 (2)
241 CPR 43 and 44, Practice Directions 43 and 44, Rule 47
the case, conduct of parties offers or payments into court, conduct before proceedings and compliance with pre-action protocols. The court may also, at any stage, order a party to file an estimate of costs, allied to "the likely effects of giving or not giving a particular case management direction which the court is considering".

A new client care practice rule obliges solicitors to give clients clear advance information about legal costs. This anticipates the outcome of the latest Costs Consultation Paper which proposed that solicitors should provide evidence to the court, at allocation stage of a multi-track case, that the client has been fully informed of the basis of inclusive charges and the hourly rate involved, and in fast track cases given a final estimate of costs at the listing stage, setting the maximum recoverable costs inter and intra-party. The impact on client and lawyer relationships will be dissonant, limiting costs recoverable until a full fixed costs system is introduced. Clients are also to be informed of wasted costs orders and breaches, driving a further wedge between client and professional adviser.

The Wider Picture in England:

The reform of civil process in England is part of a package of reforms aimed at widening access to justice. Targeting of scarce public resources is forcing a tandem review and reform of civil justice and legal aid. What has been developed since are a series of interventionist techniques to meet Lord Woolf's visionary aims and expand access to justice, and also to check the government's budget commitments. The introduction of

\[242\] CPR 44.5(3) conduct of the parties includes efforts made to try to resolve the dispute

\[243\] Practice Direction 43 para 4.3; Practice Direction 44 para 4.4 (2);

\[244\] English Law Society Rule 15 September 1999 (1999) Legal Action (1999) 4

\[245\] Woolf Final Report (1996) op. cit. Chapter 5 para 17, estimates of costs and control by judge so costs will not be used for tactical advantage

\[246\] Lord Chancellor's (October 1997) op. cit., Costs Consultation Paper May 1999 op.cit. paras 8 and 15

\[247\] Woolf Final Report (1996) op.cit. Chapter 6 para 8

\[248\] Woolf Final Report (1996) op.cit. Chapter 6 para 14

\[249\] 40% of the criminal legal aid budget goes to 1% of cases – Lord Chancellor (October 1999) op.cit.
Conditional Fee Agreements\textsuperscript{250} for all civil cases has been encouraged,\textsuperscript{251} transferring the risk of litigation to lawyers,\textsuperscript{252} and privatising costs rather than encouraging a subsidisation of a "public social service".\textsuperscript{253}

In remodelling the legal aid system,\textsuperscript{254} the Lord Chancellor has been criticised for removal of legal aid for civil money claims, including personal injury cases, sideslipping cases and clients to the mercy of conditional fee franchisors.\textsuperscript{255} This creates a tension between a ‘payment by results’ culture and the overriding objectives, but emphasises that litigation should be a last resort. New markets have opened up and at least three firms advertise daily for potential claimants on prime-time television, selling lists of names to legal firms for a monthly fee.\textsuperscript{256} Becoming involved in litigation through this market is an investment risk for practitioners, and since Lord Woolf promotes a ‘downward pressure’ on costs, lower fees for success may discourage development of conditional fee agreements.\textsuperscript{257}

From specific research the Legal Aid Board has become aware that cost-efficiency rests not only on judicial management but also on specialist expertise of practitioners. As a pilot scheme the Board set up a Clinical Negligence Panel in 1998. By August 1999

\textsuperscript{250} Legal fees are recoverable from winning claim, Losing party required to pay uplift on successful party’s lawyer’s fees, premiums for insurance against losing, and costs orders. See Conditional Fee Agreements Order 1998 SI 1998/1806 (Programmed extension of conditional fees since July 1995 covers claims for personal injury (including clinical negligence) insolvency, and human rights. Since 30 July 1998 this has expanded to cover defamation, commercial, intellectual property, contentious probate, landlord and tenant, professional negligence, civil liberty and employment.)

\textsuperscript{251} Lord Woolf, Second Reading of Access to Justice Bill in House of Lords 14 December 1998

\textsuperscript{252} Consultation Paper on Conditional Fees: Sharing the Risks of Litigation

\textsuperscript{253} Lord Chancellor (October 1999) op.cit.

\textsuperscript{254} Modernising Justice White Paper on Legal Aid Reform December 1998 Published at same time as Access to Justice Bill (1999) Legal Action - Legal Aid Board to be replaced by Legal Services Commission, controlling a Community Legal Service with a fixed fund and overall budget for family and civil cases, resources allocated according to ‘national and regional priorities’. Tied to task force quality criteria. Consultation Paper by Legal Aid Board: The Funding Code – a new Approach to Legal Aid

\textsuperscript{255} Access to Justice Bill (1999) Legal Action 4

\textsuperscript{256} Claims Direct 0900 448863 – 24 hour answer legal advice on personal injury claims - company advertising on day-time television that it will underwrite the total cost of litigation on a no-win no-fee basis; National Accident Helpline – similar advertising campaign and service - internet site

\textsuperscript{257} Blackstone’s Guide to Civil Procedure Rules (1999) op.cit. 32
only franchisees and ‘temporary contract holders’ are supported by Legal Aid, integrated
with a new Quality Mark scheme by 2000. A Quality Task Force is developing
standards for every category of case, and investigating viable alternatives to a more
strictly regulated legal aid system. It seems therefore that the Woolf reforms created a
vehicle for controlling Executive budgets as well as widening and improving access to
justice.

Court management in England now involves the judiciary in supervision of court time
and process, and extensive interventionism in preparation and presentation of cases. In
the past, “entrenched attitudes and spoiling tactics” - in other words, the local legal
culture - survived procedural innovations and restricted the pace of change. The
speed of the current English modernisation programme questions whether the Woolf
reforms have been used to re-orientate the profession and sophisticated court players
towards efficient preparation or disorientate them to destroy the local legal culture. The
proliferation of reform amendments, practice directions and forms, coupled with
consultation papers and protocols, leads to initial uncertainty and confusion for
practitioners who are juggling heavy caseloads alongside the profound cultural changes
which impact on daily administration.

“Although the general principles behind the new reforms have been known for
some time, the profession has had little time to prepare for the details of the new
procedure, which will be rigorously applied from inception.”

In England, the rules have not just been altered – they have been re-written. And their
context is being reconstructed around them. The danger is that the fusion of the Lord
Chancellor’s role can blur judicial boundaries by giving the judges a double agenda -

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258 Consultation Paper issued August 1999
259 Issues, The Lawyer 24th October 1995
260 Civil Procedure Rules Blackstones, 1999 p.xxxix
efficient use of court resources and better service to the client - which recently challenged the American Federal judges commitment to reform.261

**Confluence of Objectives**

From a court’s point of view, both American and Australian experiences have shown that managerial judging makes heavy demands on judges and the court system. With concerted efforts, time to resolution can be cut for the majority of cases. But caseflow management techniques can conflict. Setting timetable deadlines and monitoring compliance through judicial hearings is resource-intensive. This fundamental flaw is apparent in American and Australian jurisdictions, and also reflected in the Scottish sheriff court system and Commercial court. In the American Federal Courts, some judges prefer to delegate pre-trial supervision to magistrate judges.262 In Australian courts, Registrars prepare pre-trial work and in England Masters supervise interlocutory stages. In Scotland not only is there no sub-judicial assistance, the establishment was severely depleted overnight.263

Additionally, from a client’s point of view, reducing delay may also conflict with settlement prospects. Practitioners have warned that the acceleration of costs involved in early preparation induces some clients into poorer settlements or abandonment of claims.264

There is overwhelming evidence that continuity of supervision by one judge maximises scrutiny and minimises delaying tactics. The Woolf reforms have compromised the

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261 FRCP rule 1 – just, speedy and efficient organisation; The Lord Chancellor has already been blocked from framing Practice Directions.


263 Starr & Chalmers v Procurator Fiscal, Linlithgow - 11 November 1999 see Starr v Ruxton 2000 SLT 42 - 126 ‘temporary’ sheriffs appointed by the Lord Advocate on one-year extendable contracts are not ‘independent’ judges under the European Convention on Human Rights
pure judicial docket system with the use of procedural teams at Civil Trial Centres, since dockets are too resource-intensive for court budgets. However, although the discontinuance of temporary sheriffs in Scotland will be catastrophic in the short term, in the longer term it paves the way for fundamental reforms and a framework for continuous scrutiny. It does appear that some Sheriffs and Sheriffs Principal have seen the benefits of continuity, initiating their own local adaptations of dockets.

From the client’s point of view evidence from established judicial docket systems (in America and Scotland) shows that a higher percentage go forward to adjudication, representing wider access to justice. Promoting settlement becomes even more crucial, shifting judicial focus from trial to settlement, forcing courts to seek alternatives to rescue them from the results of their own success.

The recent development of Court Charters in England and Scotland reflect a new undercurrent of political influence, while the overarching principles of Lord Woolf’s reforms replicate justice ideals. Caseflow management pulls these strands together and invites a gradual infusion of accountability within court administration, the political arm of court reform. In managed jurisdictions this has fuelled the debate over judicial independence.265 The uneasy alliance not only blurs the separation of politics from impartial and independent rule of law, but impairs commitment. The move towards caseflow management should be motivated only to provide justice and therefore should be a judicial move, not a political one.

264 The Times August 1995 This is Not Justice for All
Figure 1
New South Wales Supreme Court Common Law Division
Differential Case Management Practice Note 81 : 31 January 1994

- Statement of Claim
  - Not Ready List
    - Called up after 12 months
  - Differential Case Management Documents
    - Elected Standard Track
      - Certificate of Compliance
        - Not Filed
          - Default Conference
        - Filed
          - Individual Track
            - Status Conference
              - Special track
                - individual directions allocated to trial judge for supervision status conference held as required
              - Individual Track
                - individual directions
      - Final Conference

Case Status as at January 1995
- Not Ready List 50%
- Awaiting Status conference/track allocation 15%
- In a case management track 26%
- Finalised 8%
1.1 The Overriding Objectives

(1) These Rules are a new procedural code with the overriding objective of enabling the court to deal with cases *justly*.

(2) Dealing with a case justly includes, so far as is practicable -
   (a) ensuring that the parties are on an equal footing;
   (b) saving expense;
   (c) dealing with the case in ways which are proportionate -
      (i) to the amount of money involved;
      (ii) to the importance of the case;
      (iii) to the complexity of the issues;
      (iv) to the financial position of each party;
   (d) ensuring that it is dealt with expeditiously and fairly;
   (e) allotting to it an appropriate share of the court’s resources, while taking into account the need to allot resources to other cases.

1.2 The court must seek to give effect to the overriding objective when it –
   (a) exercises any power given to it by the Rules; or
   (b) interprets any rule

1.3 The parties are required to help the court to further the overriding objective

1.4 (1) The court must further the overriding objective by actively managing cases
Rule 1.4

(1) The court must further the overriding objective by actively managing cases

(2) Active case management includes –
   (a) encouraging the parties to co-operate with each other in the conduct of the proceedings;
   (b) identifying the issues at an early stage;
   (c) deciding promptly which issues need full investigation and trial and accordingly disposing summarily of the others;
   (d) deciding the order in which issues are to be resolved;
   (e) encouraging the parties to use an alternative dispute resolution procedure if the court considers that appropriate and facilitating the use of such procedure;
   (f) helping the parties to settle the whole or part of the case;
   (g) fixing timetables or otherwise controlling the progress of the case;
   (h) considering whether the likely benefits of taking a particular step justify the cost of taking it;
   (i) dealing with as many aspects of the case as it can on the same occasion;
   (j) dealing with the case without the parties needing to attend at court;
   (k) making use of technology; and
   (l) giving directions to ensure that the trial of a case proceeds quickly and efficiently
CONCLUSION

Stakeholders and Partnerships

Civil justice reform takes place in a political environment. Politicians are involved in a wider public debate over access to justice and the cost of legal services. Within this environment Scottish supreme court judges have authority over a constituent of civil justice - civil process reform. Through the centuries this authority has been exercised intermittently and with varying success, and not always prompted by the judiciary themselves. The fact that rule-changing is a fluid occupation, undertaken in response to social and economic developments, reflects the need for the process to be continuously sculpted – generally in response to perceived crises.

The fact that there are other crises on the legal horizon has deflected the court’s attention away from Lord Cullen’s Review of the Outer House and his recommendations for judicial supervision of process. But is lack of time or focus the full answer?

Professor Wright has noted\(^1\) five standard arguments against law reform which extend beyond jurisdictional differences:

1. There is no problem
2. There is a problem, but it is not this
3. We do not know enough about the problems
4. The reform won’t work
5. The reform will make things worse

\(^1\) Prof. T. Wright, Director of Justice Research Centre Sydney, Professorial Fellow, Centre for Court Policy and Administration, Civil Justice Reform in Australia (1996) Bellagio Conference Paper (unpublished)
This writer respectfully submits that in Scotland:

1. There is a problem
2. The problem has been partially exposed
3. We need more information about the problem – particularly from stakeholders
4. With commitment, judicial caseflow management is a viable starting point
5. Caseflow management improves service to the client, ultimately benefiting the legal profession and Scots law, serving the community.

There is a Problem

In an age of fast-developing markets, the competitive spirit which underpins micro and macro globalisation inevitably reaches the door of the courts. Competition prompts a new era of client-awareness and accountability, altering perspectives on service across all professions. Strict adherence to the perfection of substantive justice without addressing the effects of imperfect distributive justice creates the potential for disjunction between legal principles and market principles, affecting the development of Scots law. Therefore a denial of a problem is a disservice to the community. Lord Cullen’s review from within in 1995 established yet again that the gap between the aims of civil justice and ‘laissez-faire’ realities in the supreme court confines the court administration to crisis management. Two subsequent judicial investigations (unpublished) confirmed Lord Cullen’s views. Senior judges have also pointed out areas for concern, but there is still no policing mechanism. On the surface it appears unsustainable that barriers of inefficiency, expense and delay are allowed to remain in order to accommodate workflow and the working conventions. The solidarity of establishment condones abuses of process, and that is a problem in itself. The tail is being allowed to wag the dog.

2 Those with a vested interest in civil process reform – clients, representative organisations, the ombudsman, judges, agents, counsel, administrators, public bodies and politicians
The Problem has been Partially Exposed

This thesis, in addition to recent research studies undertaken in Scotland, represents the beginning of an exposition of faults within the legal system. In a sense it is a taster, teasing out issues for discussion and debate. Working parties, commissions and committees investigating in this area have repeatedly shown that efficiency and effectiveness are being coloured by pockets of bad practice. Historical analysis indicates that it has ever been so. Delay, expense, over- and under-servicing are endemic and systemic in a reactive system which does not investigate or sanction

- Unnecessary booking of court time
- Late cancellations
- Late lodgements
- Continuations of hearings
- Inadequate preparation and presentation
- Mutual indulgence between lawyers

The other side of the problem is that policing these faults may spawn new deviations. Rules do not change behaviour patterns; energies and skills are deflected elsewhere. Sisting or the need for continued hearings are responses to court control, and both impact on timetables and resources. Both indicate that exposure of faults does not necessarily precede viable solutions. History indicates that apparently viable solutions can be subsumed by their own success or be splintered by the working conventions which support the accepted equilibrium.

We Need More Information about the Problems

Identifying the goals of civil justice is the basis for reform of civil process. Articulating a modern vision of civil process is the starting point for an evaluation of its faults. Fifty years ago Lord Cooper suggested that
“There should be an intensive study, not just of substantive law, but adjective law – exposing the weaknesses of the present system, forcing upon the attention of the public the best of the improved expedients which have been adopted in other countries and inculcating into the legal profession a sense of urgency and a livelier spirit of responsibility in the discharge of their function.”

Almost 30 years later, the Hughes Commission pointed to a dearth of available information. Another 20 years further on the scarcity of data is still reflected in the Civil Judicial Statistics, which show annual ‘throughput’ only and no coherent information on cases and procedures from which to form policy.

In Scotland approximately 5% of litigants reach adjudication. That is basically all that is known. There is no audit of the age or composition of the court’s caseload and no information on the views of those who have a stake in the litigation process. The problems are unquantified, and there is no common body of knowledge. Justice is indeed working blind. Rule changes and policy changes are therefore based on anecdotal experience, dependent to a large extent upon the remit and agenda of reform committees and their chairmen.

Within this system, evaluation of reform measures permeate the consciousness after several years. There is little data upon which to respond quickly to unforeseen consequences of reform. For instance the Optional Procedure for personal injuries was widely criticised almost from its inception 15 years ago, but remains unchanged. The fact that 58% using this track are allocated Proof time, 55% of which is unrealised, points to the continued unrestrained impact on court timetables.

Not only is there no audit, there is no measure and evaluation of work. Lack of information on factors which influence settlement behaviour seriously undermines strategies to promote early resolution and inject some predictability into resource
management. Although late settlements seriously disrupt allocation of court resources and ghost bookings block timetables, there is no data on stages of settlement and relationship to types of litigant, case, court, representation or finance. Who settles – why, when, how?

Another major area where there is no transparency concerns the costs of litigation. There has been no Woolf-type investigation into private areas of finance, although cost is commonly assumed to be a deciding factor in initiating, continuing and concluding actions in court.

Quality control of court process is badly affected by the lack of information. Although Lord Cullen pointed to a requirement for firmer sanctions, without analysis it is difficult to devise sanctions which impinge on the real perpetrators of abuse. This leaves judges isolated, legal representatives vulnerable to criticism and clients vulnerable to bad practice.

Data provides the core for consensus, but when the consensus is not to gather data, we return to the first argument against law reform – there is no problem. Ignorance allows the status quo to continue.

**Caseflow Management is a Viable Start**

No other reform measures have controlled undue delay, unnecessary expense and wasteful administrative resources. Reliance on professional integrity alone has proved inadequate. Laissez-faire administration condones these faults. Experience in other jurisdictions indicates that judicial supervision of process produces quantifiably positive results without affecting clients’ perceptions of fairness. This is corroborated by research in the Commercial Court in Scotland. Management of process by judges cuts time to resolution and produces earlier settlements. But as predicted by Professor Resnik, new games produce new behavioural patterns, and these require to be

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3 Lord Justice General Cooper, Defects in the British Judicial Machine, (1952-54) 2 Journal of the
continuously identified, monitored, evaluated and reconciled. This spawns an audit process as an adjunct of judicial supervision, to ensure that the established working culture does not invade innovative procedures. The commitment of administrative support becomes as equally important as judicial commitment in supervising process. However, in a jurisdiction which does not place high value on data-gathering, commitment to change is challenged in the longer term.

Fundamental to the success of caseflow management is ongoing judicial commitment and leadership. Standards are set and expectations are shaped. This has been pointed out frequently in other jurisdictions, and is reflected in the early successes of the Scottish Commercial Court. What has also become apparent is the benefit from continuity of specialist judge and dedicated clerk. Interruptions to continuity for criminal circuit work (for which both clerks and judges receive increased expenses) inevitably reverberate on the efficiency of the management scheme.

What has become apparent also is that caseflow management has been initiated and sustained in every jurisdiction by visionary judges who exhibit the personality and strength of character to ‘swim against the tide’ and weather waves of unpopularity. Inviting, persuading, encouraging, cajoling and ordering parties to co-operate towards early disclosure lies contrary to a whole ethos, edifice, reciprocity and fee structure which reward extended manipulation of process. Continuous conflict between new aims and realities can test both judicial tenacity and commitment, affecting the application of available sanctions to shape expectations. Caseflow management alters the judicial lifestyle, reminiscent of earlier experiences:

"Since informations and bills were allowed to be printed (they) become an incredible fatigue to the Lords, who, after toiling all day in hearing causes, are obliged to shut themselves up to peruse and consider a multiplicity of papers at night, and thereby often to want the necessary relaxation due to nature, which visibly shortens their days."  

Society of Public Law Teachers 98

The flaw in this writer’s thesis lies in the failure to evaluate the costs of caseflow management. There was no access to private data. The RAND research hypothesis is that 95% of the expense of litigation cannot be controlled by courts. Quickening the resolution process resulted in lawyers adding more hours within a shorter time-span. Anecdotal evidence exists that some Scottish practitioners bill clients a full day’s appearance for a half-hour hearing in the Commercial Court. If costs are not policed by judges, caseflow management may provide fresh opportunities to add expense and over-service clients, particularly in an experimental Rolls Royce service which attracts an undeserved reputation for expense. In England this defect has been recognised and for the first time judges have power to curtail excessive feeing practice. Only time will tell if judicial retraining programmes can influence the use of this power and modify the forgiving attitudes previously exhibited over wasted costs orders.

Caseflow management is a viable starting point for court reform. It is a judicial sifting process which exposes recalcitrant behaviour and irrefutably results in earlier resolutions for a comparatively high percentage of cases. Earlier settlements mean that fewer cases remain within the court system, although ironically both the resistance to judicial supervision and the success of the procedure have the potential overtake court resources. The partnership between judicial supervision and use of sanctions is therefore a careful balancing act, practised on a daily basis. Careful monitoring and audits of procedure, costs and preparation are compulsory adjuncts to maximise benefits to clients and to court.

**Caseflow Management’s Wider Benefits**

A negative response would be that caseflow management makes things worse. However, several factors which appear to be inherent in court process can be embraced by judicial supervision:

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5 Anon (1999) 4 Civil Practice Bulletin 3
• Litigation is a sophisticated settlement process
• The threat of court appearance promotes settlement.
• Judicial intervention speeds up disposal.

Several potentially disruptive factors are not erased though, and may usurp efficient supervision:

• The goal of legal resolution is substantive perfection, which allows parties to continually sculpt preparation with repeated adjustments and amendments.
• The culture of spurious bookings is ingrained into the legal culture.
• Late settlements cannot be eradicated
• Suits prolong process, and may suit lawyers more than clients

It is the judges who set out the boundaries of acceptable behaviour and standards of preparation. This is the philosophy behind Lord Woolf’s Pre-Action Protocols, which throws into relief the untrammelled party autonomy of the Scottish supreme court. The move towards caseflow management in the sheriff courts also highlights the lack of focus and perhaps worse – a lack of interest - within the supreme court.

Bentham defined justice as a utilitarian concept - that which gives the greatest happiness to the greatest number of people. This concept extends the limits of the Scottish judicial oath beyond the 5% of litigants who reach adjudication to the 95% who do not. Distributive justice therefore embraces adjective as well as substantive law6 and has been reflected since the institution of the court in judicial power to devise simplified procedures to control undue delay, unnecessary expense.7 For this reason judges should be actively evaluating caseloads and addressing inefficiencies.

6 “The object of a litigation is to enable the court to ascertain the truth, not to give either scope, or indeed encouragement to tactical manoeuvring” Duke of Argyll v Duchess of Argyll 1962 SC 140 per Lord President Clyde at 152, supported by Lord Guthrie at 153 - accepting there should be fairness of method in ascertaining the truth.
7 The judicial remit to alter procedures: “with a view to securing that causes coming before the Court may be heard and determined with as little delay as is possible, and to the simplifying of procedure and the reduction of expense in causes before the Court.” Court of Session Act 1988 c.36 s.6
Private business needs an efficient public sector. In highly competitive and increasingly sophisticated markets there is a growing shift in interest among the indigenous client base to beyond Scotland and Scots law. Forum shopping means that law firms will try to ensure that where there is a choice of jurisdiction litigation takes place in the system which is most favourable to the client. The government’s encouragement of Foreign Direct Investment in Scotland creates new areas of competition for litigation business. The Scottish Commercial Court was set up specifically by the Coulsfield Working Party to be attractive to the litigating market, recognising that delays and expense would eventually lead to a decline in cases, to the detriment of the development of Scots law in this area. The success of this track is reflected in its rising workload while over the same period of time applications to the Outer House have declined.

Caseflow management cuts delay and exposes dilatory excuses - improving service to the client. It does not cure endemic problems, but it appears to reduce them, introducing the notion of predictability to process. The Commercial Court indicates that this is achieved for the majority of cases by a partnership between judge and representative, by co-operation rather than coercion. This is the true aim of caseflow management within an adversarial system - not the sudden switch to a dictatorial regime:

"Court supervision of case progress does not supplant [lawyer] responsibilities. Instead it should create a system of joint responsibilities wherein the perspectives and judgement of each can be applied in an appropriate manner to decisions concerning the progress of individual cases and the caseload as a whole."  

The threat of viable sanctions, however, and their strict application when necessary, underpins the co-operative mind-set by sustaining the credibility of agreed management directions. In a diminishing and highly competitive profession, caseflow

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8 Peter Jones, Economics commentator, Scottish Business Insider April 2000 p.16
9 Clifford Chance, International Forum Shopping Lex issue 3 Spring 1999
management seems to create opportunities to revitalise the Scottish legal market. Scots law is nourished with a flurry of new cases, benefiting the wider community.

The Rejection of Lord Cullen’s Recommendations

Lord Cullen’s Review of the Outer House was a landmark report, suggesting that judges should take responsibility for distributive justice. The Executive supported his proposals, but the judiciary took a more cautious view. There are a few factors which may have influenced what must be a consensual decision

- Criminal circuit duties would interrupt continuity and the criminal workload continues to dominate timetables.
- There was (and still is) no data upon which to base changes – as anecdotal evidence is fragmentary and subjective, it is divisive rather than conclusive.
- There is no sense of crisis and no Woolf-type visionary committed to, and vociferously promoting, reform
- The Cullen Review was initiated by one Lord President, concurrent with wider English investigations, but was dropped during the term of his successor.
- It may be that the lifestyle changes, involving extra-curricular preparation, are not acceptable to the full bench.
- Since the Faculty of Advocates have repeatedly rejected any form of control of process or changes to the adversarial structure, it is reasonable to suggest that this attitude may have permeated the collegiate bench to some degree
- Judicial management requires dedicated administrative support, curtailing access to circuit duties
- The current administrative system suffers severely from congestion but this does not impinge on the judges’ daily responsibilities. Late settlements may even create pockets of time, and facilitate the writing of opinions.

11 An implementation business plan was approved and finance arranged
Since judicial commitment and leadership are paramount, the lack of consensus from the bench stifles innovative reform. As guardians and producers of justice, the lack of change in the face of external and internal criticisms implies that the five standard arguments against law reform have not been resolved.

1. There is no problem
2. There is a problem, but it is not this
3. We do not know enough about the problems
4. The reform won’t work
5. The reform will make things worse

**Fresh Beginnings**

Other jurisdictions have indicated one route to more efficient and effective court administration. When judicial management is reconsidered in Scotland, which history shows is only a matter of time, another mix of judges on the bench may consider the following points:

- The supreme court was begun as a civil court of first instance, but is now dominated by Crown Office demands for judicial criminal time. Restructuring civil workloads and employing temporary and retired judges has encouraged this trend. An alternative solution would be to restructure criminal workload (and sentencing policy) to put the supreme court back on to its original track. A purely civil division would refocus the priorities of government, judges, counsel and practitioners on servicing the client.

- The Commercial Court is a fresh beginning. Interviews with court users show that it has provided an acceptable basis for change. With firmer sanctions it may provide the basis for a split between civil and criminal judiciary, with dedicated judges and dedicated administrative support.
• Articulation of a modern vision of civil justice provides the basis to measure the aims against empirical reality. A wholesale review of procedures, involving the views of clients, practitioners and judges gives an informed base for depoliticisation of court reform, allowing viable alternatives to be openly debated.

• The current caseload is unknown and there are no data or analyses of the workflow. The argument that court personnel are too busy to undertake this basic exercise is indefensible.12

• The public have little direct information on their case progress through the court system. Several jurisdictions provide access to court-held data, and it is not unreasonable that clients should have independent access to their own records, as in the medical field. In a narrower sense this access allows clients to monitor and question their professional advisers on a fully-informed basis.13 In a wider sense, the Freedom of Information Act will open up access to a Pandora’s Box.

It is the judges who are pivotal to court reform programmes – as poachers turned gamekeepers their experience is invaluable. They have the duty and the power, but also need the attitude and the commitment to forge partnerships between stakeholders towards the common goal:

"The paramount duty of a court of law and of all who participate in its decisions is a duty owed not to the legal theorist, nor to the writer of textbooks, nor to the legal profession, but to the litigant. The primary object...is the rendering of a service to the community." 14

12 Particularly since only a skeletal representation of the executive are in situ at the courts, with the remainder deciding policy and civil service employment issues at a separate headquarters
13 Scottish reform committees (Grant, Kincraig, Hughes) concluded that legal practitioners who control and dictate the pace and expense of litigation. This is confirmed by recent research studies (Sheriff Court studies 1995 and 1997 and Personal Injury Study 1995).
14 The Rt. Hon. Lord Cooper (1952-54) op.cit.91
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THE DELIVERY OF CIVIL JUSTICE
MANAGING THE PROCESS
APPENDIX

Rachel Wadia

Ph.D. Thesis
University of Edinburgh
2001
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(Title 'Lord' Assumed)

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ret = retired
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Names in italics = Appointed to the bench from Position of Lord Advocate
ret = retired
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Names in italics = Appointed to the bench from Position of Lord Advocate
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| **Lord Justice Clerk**            |            |
| 1949: Mackay                      | 1950: Mackay  | 1951: Mackay  | 1952: Mackay  |
| 1949: Jamieson                    | 1950: Jamieson | 1951: Jamieson | 1952: Jamieson died 31.5.52 |

| **Lords Ordinary**                |            |
| 1949: Guthrie from 25.1.49        | 1950: Guthrie | 1951: Guthrie | 1952: Hill Watson from 20.6.52 |

(Title 'Lord' Assumed)

| **Retired Judges**                |            |
|                                  |            |

| **Temporary Judges**              |            |
|                                  |            |

| **Lord Advocate**                 |            |
| **Solicitor-General**             |            |
| **Dean of Faculty**               |            |

Names in italics = Appointed to the bench from Position of Lord Advocate
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(Title 'Lord' Assumed)

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| **Lord Advocate**       | J. Clyde      | J. Clyde      | J. Clyde/W. Milligan | W. Milligan   |
| **Solicitor-General**   | W. Milligan   | W. Milligan   | W. Milligan/W. Grant | W. Grant      |
| **Dean of Faculty**     | J. Cameron    | J. Cameron    | J. Cameron/W. Guest | W. Guest      |

Names in italics = Appointed to the bench from Position of Lord Advocate  
ret = retired
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<td>Blades</td>
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(Title 'Lord' Assumed)

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(Title 'Lord' Assumed)

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| **Temporary Judges** |              |              |              |
|                      |              |              |              |
|                      |              |              |              |

| **Lord Advocate**    | W. Grant     | W. Grant     | W. Grant/I. Shearer |
|                      | D. Anderson  | D. Anderson  | D. Anderson     |
| **Dean of Faculty**  | W. Fraser    | W. Fraser    | W. Fraser       |

Names in italics = Appointed to the bench from Position of Lord Advocate  
ret = retired
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<tr>
<td>Grant Mackintosh ret. 30.9.64</td>
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<td>Walker</td>
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<td><strong>Lords Ordinary</strong></td>
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<tr>
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Names in italics = Appointed to the bench from Position of Lord Advocate  
ret = retired
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*First Chairman of Scottish Law Commission (SLC)*

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Names in italics = Appointed to the bench from Position of Lord Advocate  
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Retired Judges

Temporary Judges

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Names in italics = Appointed to the bench from Position of Lord Advocate
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Names in italics = Appointed to the bench from Position of Lord Advocate

ret = retired
### Court of Session Judges 1933 - 1999

#### APPENDIX 1

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ret = retired
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- Names in italics = Appointed to the bench from Position of Lord Advocate
- ret = retired
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<tr>
<td></td>
<td>Hamilton</td>
<td>Nimmo-Smith from 9.1.97</td>
<td>Nimmo-Smith</td>
</tr>
<tr>
<td></td>
<td>Dawson</td>
<td>Philip from 16.10.96</td>
<td>Philip</td>
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<tr>
<td></td>
<td>Macfadyen</td>
<td>Kingarth from 9.1.97</td>
<td>Kingarth</td>
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<tr>
<td></td>
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<td>Rodger from 22.11.95</td>
<td>Bondy from 10.1.97</td>
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<td></td>
<td></td>
<td>Cosgrove (Lady) 12.7.96</td>
<td>Eassie from 16.1.97</td>
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<tr>
<td><strong>Retired Judges</strong></td>
<td>Brand</td>
<td>Cowie</td>
<td>Cowie</td>
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<tr>
<td></td>
<td>Cowie</td>
<td>Murray</td>
<td>Murray</td>
</tr>
<tr>
<td></td>
<td>Mayfield</td>
<td>Allanbridge</td>
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</tr>
<tr>
<td></td>
<td>Murray</td>
<td>Morison</td>
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</tr>
<tr>
<td></td>
<td>Allanbridge</td>
<td>Weir</td>
<td>Weir</td>
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<tr>
<td><strong>Temporary Judges</strong></td>
<td>Horsburgh</td>
<td>Horsburgh</td>
<td>Gordon</td>
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<tr>
<td></td>
<td>McEwan</td>
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<td>Horsburgh</td>
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<tr>
<td></td>
<td>Aronson</td>
<td>Coutts</td>
<td>McEwan</td>
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<td>Coutts</td>
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<tr>
<td><strong>Lord Advocate</strong></td>
<td>A. Rodger/D. Mackay</td>
<td>D. Mackay/A. Hardie</td>
<td>A. Hardie</td>
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<tr>
<td><strong>Solicitor-General</strong></td>
<td>D. Mackay/P. Cullen</td>
<td>P. Cullen/C. Boyd</td>
<td>C. Boyd</td>
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<tr>
<td><strong>Dean of Faculty</strong></td>
<td>A. Hardie</td>
<td>A. Hardie/G. Emslie</td>
<td>G. Emslie</td>
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</tbody>
</table>

Names in italics = Appointed to the bench from Position of Lord Advocate  
ret = retired
<table>
<thead>
<tr>
<th>Role</th>
<th>Names</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lord President</td>
<td>Rodger, Sutherland, Prosser, Caplan</td>
</tr>
<tr>
<td>Lord Justice Clerk</td>
<td>Cullen, McCluskey ret. 31.12.99, Kirkwood, Coulisfield</td>
</tr>
<tr>
<td>Lords Ordinary</td>
<td>Milligan, Cameron, Marnoch, MacLean, Penrose, Osborne, Abernethy, Johnston, Gill (SLC)</td>
</tr>
<tr>
<td>(Title 'Lord' Assumed)</td>
<td>Hamilton, Dawson, Macfadyen, Cosgrove, Nimmo-Smith, Phhilib, Kingarth, Bonomy, Eassie, Reed from 24.9.98</td>
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<tr>
<td>Retired Judges</td>
<td>Cowie, Allanbridge, Morison, Weir</td>
</tr>
<tr>
<td>Temporary Judges</td>
<td>Coutts, McEwan</td>
</tr>
<tr>
<td>Lord Advocate</td>
<td>A. Hardie</td>
</tr>
<tr>
<td>Solicitor-General</td>
<td>C. Boyd</td>
</tr>
<tr>
<td>Dean of Faculty</td>
<td>G. Emslie</td>
</tr>
</tbody>
</table>

Names in italics = Appointed to the bench from Position of Lord Advocate
ret = retired
EXTRACT from JUSTICE CHARTER
November 1991

"While we believe that Scotland's distinctive justice system generally serves you well, we recognise that there is room for continuing improvement. Our aim is to raise the standard of service throughout the country up to and beyond the best presently available"

"Making sure that your legitimate rights and expectations are properly observed is our task"

"The Justice Chart is not the last word on the subject. It is our starting point in the drive for further improvements. This process will continue throughout the 1990s."

Secretary of State for Scotland: Mr. Ian Lang
Lord Advocate: Lord Fraser of Carmyllie

p. 10  "Adequate time must be allowed for proper preparation of cases. But justice delayed can too easily become justice denied. We are looking for ways to reduce unnecessary delays in the courts."
OATH OF CALUMNY

1429 c.16 Acta parliamentorum Regis Jacobi Primi

Advocates and forespeakers in temporal Courts sall sweare
Throw the consent of the hail Parliament it is statute and ordained that Advocates and forespeakers in Temporal courts and alswa the parties that they pleade for, fig they be present, in all causes that they pleade, in the beginning or he be heard in the cause, he sall sweare, that the cause be trowis is gud and leill, that he sall pleade. And gif the principal partie be absent the Advocate sall sweare in the saule of him, after as is conteined in thir meters.

Illud juretur, quod lis sibi justa videtur
Et si queretur verum, non inficietur
Nil promittetur nec falso probabilio detur
Ut lis tardetur dilatio nulla petetur.

Must swear - that the case appears to be just
If truth sought it will not be corrupted
False evidence will not be given
No delaying tactics will be used to prolong the case

Act of Sederunt Concerning Oaths of Calumny 13th January 1692

... that in case any party require ane oath of calumny upon any alleadgance proponed and found relevant for him, that he may require the party, against whom the same is to be proven to depone, whether he does not know the same to be true, so that he should not put the proponer to the necessity to prove the same, and if the party against whom any point or alleadgance is to be proven, require the oath of calumny of the party proposing the same, the terms shall be that he may inquire whether he knows the thing that he proposes is not true, so that it were calumnious for him to insist therein.”

Oath of calumny may competently be put at any stage of the process, before the cause concluded by proof or decree circumducing the same (Stair’s Institutions iv.41,7) even after proof led if it be defective Graham v Logie 22 Dec 1699 M.9382. The oath may be required, not only in relation the averments in the libel and defences, but also as to those contained in the subsequent pleadings (Stair, iv.44,15) The oath has the effect of barring the party from insisting on any part of his libel or defence he admits to be false. If he refuses to give it, he is holden as confessed and decree may be given against him, as if the averments had been proved.

1764 Dec 20th McQueen V Advocates no longer have to swear the oath:

The Court found that the old Act of James I, appointing a lawyer to take an oath of calumny, was obsolete; Mr. McQueen (Advocate) was not obliged to swear in jure that he thought his client had a good cause. Decisions of the Court of Session Supp V 902 Mp Brown, Advocate, Edinburgh, W & C. Tait 1827

N.B. A ‘Mr. McQueen’ was elevated to the Supreme Court bench 13 December 1776 as Lord Braxfield.
U.S. Federal Rules of Civil Procedure
Rule 11

Signing of Pleadings, Motions and Other Papers;
Sanctions

Every pleading, motion and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney’s individual name, and whose address shall be stated. A party who is not represented by an attorney shall sign the party’s pleading, motion or other paper and state the party’s address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer’s knowledge, information and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

If a pleading, motion or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the amount of the reasonable expenses incurred because of the filing of the pleading, motion or other paper, including a reasonable attorney’s fee.
## SCOTTISH COURT SERVICE
### Targets and Performance Measures 1997 - 1998

#### Administrative Targets of the Supreme Court and Performance Achieved

<table>
<thead>
<tr>
<th>Target</th>
<th>% Achieved</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prepare summons, petitions, English custody orders, default notices, calling up notices and appeals from inferior Courts within 1 working day of their acceptance</td>
<td>99</td>
</tr>
<tr>
<td>Prepare for presentation to the court decrees of divorce within 5 working days of: (1) expiry of the period of notice in simplified procedure and (2) lodging of minute for decree in ordinary procedure</td>
<td>100</td>
</tr>
<tr>
<td>Notify solicitors of returned citations and custody reports on the date of receipt</td>
<td>100</td>
</tr>
<tr>
<td>Issue all extract decrees of divorce on the first working day competent, and issue all other extract decrees within 5 working days of request</td>
<td>98</td>
</tr>
<tr>
<td>Secure accurate and timeous publication of the Rolls of Court and deliver to practitioners in Edinburgh the weekly and daily Rolls of Court on the day of publication</td>
<td>100</td>
</tr>
<tr>
<td>Extend and issue opinions by the Criminal Appeal Court within 14 days of ex tempore delivery in open court</td>
<td>68</td>
</tr>
<tr>
<td>Intimate disposal of appeals under solemn criminal procedure within 1 working day of determination by the Court</td>
<td>95</td>
</tr>
<tr>
<td>Intimate disposal of appeals under summary criminal procedure within 5 working days of determination by the Court</td>
<td>88</td>
</tr>
<tr>
<td>Prepare applications for leave to appeal, and appeals against refusal of leave, within 1 working day from the date of receipt of Summary Appeal papers, or the Judges’ Report in Solemn Appeals</td>
<td>76</td>
</tr>
<tr>
<td>Intimate to appellants or their solicitors the decision by the single judge or by the Court within 2 working days of receipt</td>
<td>76</td>
</tr>
<tr>
<td>Issue all warrants within 2 working days from the date on which they were granted, or fall to be issued</td>
<td>100</td>
</tr>
<tr>
<td>To complete the audit of at least 95% of all Curatory Accounts within 3 months of lodgement</td>
<td>100</td>
</tr>
<tr>
<td>To complete the audit of at least 75% of all Judicial Factory Accounts within 2 months of lodgement</td>
<td>100</td>
</tr>
<tr>
<td>To issue to solicitors in the Court of Session monthly accounts within 7 days of the end of each period</td>
<td>97</td>
</tr>
<tr>
<td>To process all invoices and claims within 48 hours of receipt</td>
<td>100</td>
</tr>
<tr>
<td>To reply to all correspondence except that which requires extensive investigations, within 3 working days of receipt</td>
<td>98</td>
</tr>
<tr>
<td>Overall Achievement Rate</td>
<td>94%</td>
</tr>
</tbody>
</table>
The Secretary of State for Scotland set the following targets for assessing the performance of the Agency in 1997-98

1. That no cases shall fall as a result of the statutory time limits being breached
2. Targets for Waiting periods

   - 90% of diets allocated in the Court of Session within waiting periods set down by the Lord President
   - 70% of criminal and Justiciary appeals allocated to a roll within waiting periods set down by the Lord Justice-General

For comparison, Sheriff Court waiting periods were:

   - 80% of Sheriff Courts to report summary criminal waiting periods agreed with the Sheriffs Principal, currently 12 weeks
   - 95% of Sheriff Courts to report waiting periods between request for ordinary civil proof or debate and diet, agreed with the Sheriffs Principal, currently 12 weeks

**Supreme Courts Waiting Periods – Civil Business (in weeks)**

<table>
<thead>
<tr>
<th>Waiting Period</th>
<th>Target (weeks)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Appeals against interlocutory orders (from date of lodging)</td>
<td>2</td>
</tr>
<tr>
<td>All other appeals (from date sent to Roll)</td>
<td>18</td>
</tr>
<tr>
<td>Jury Trials (from date issues approved)</td>
<td>19</td>
</tr>
<tr>
<td>Ordinary Proofs (from date proof allowed)</td>
<td>19</td>
</tr>
</tbody>
</table>

The Law Society of Scotland
Compensure Scheme

About 3 million people a year in Britain suffer personal injury. Two-thirds apportion blame to others. A quarter of these consider making a claim for compensation.

Compensure is a new insurance scheme, aimed at absorbing the risk of making a claim for compensation in personal injury actions. It is only available from Scottish solicitors through the Law Society of Scotland in a case where the client has a written agreement with the lawyer on a ‘No Win No Fee’ basis. There is no fee payable to the solicitor if the client loses the case, but an agreed premium may be added if the client wins the case.

A policy is issued before a case is raised in court and is issued when a claim is being considered. Up to £100,000 of the claimant’s and opponent’s expenses are covered. There is no ‘excess’ to forfeit as with other insurance policies.

Not covered: medical negligence, claims relating to medicines, drugs or tobacco. If the case is abandoned before initiating a court action, experts’ reports are not covered.

Advocates’ fees are also not covered, but an advocate may undertake an accident case on a speculative basis (No Win No Fee).

Source: The Law Society of Scotland
Dial-a-Law service 0990 455 554
Solicitors (Scotland) Act 1980 Rule 61A
Inserted by
Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 c.40

Solicitors’ and Counsel’s Fees:

S. 36(1) An advocate and the person instructing him may agree, in relation to a litigation undertaken on a speculative basis, that in the event of the litigation being successful, the advocate’s fee shall be increased by such percentage as may, subject to subsection (2) below, be agreed.

(2) The percentage increase which may be agreed under subsection (1) above shall not exceed such limit as the court may, after consultation with the Dean of the Faculty of Advocates, prescribe by act of sederunt.
APPENDIX 5.1

"REVIEW of the ADMINISTRATION of BUSINESS in the OUTER HOUSE of the COURT OF SESSION"

The Hon. Lord Cullen  December 1995

Precis of Recommendations for Judicial Case Management

**Objective:**  “Caseflow management may take a variety of forms, but in essence it means the adoption by the court of a systematic managerial approach to dealing with caseloads ......differentiating between actions as to the procedural route which they should take.”

**Purpose:**
1. to address weaknesses - no planning of progress of cases  
   no system of timetabling  
   no system for considering scope of inquiry  
   no system for considering alternatives
2. to propose procedures calculated to facilitate settlement

“I recommend case management hearings in all actions following the adjustment period for the purpose of seeking, consistently with doing justice between the parties, the expeditious progress of the action and the avoidance of unnecessary expense.”

“I consider that case management should be introduced in a way which is adapted to the needs of the Outer House.”

**Type of Judicial Control**

“For ordinary actions in the Outer House, I do not favour case management....where a judge maintains control of each action by making ad hoc decisions from time to time. While this may well be appropriate to actions of a specialised type it is not in general appropriate for ordinary actions. It is too expensive in the time it demands of judges and the parties; and most actions do not require it.”  Strategy will be to use it to complement the rules and “concentrate its use at most beneficial stages”.

**Case Management Hearings**

Every action should be the subject of a case management hearing at the stage where “the mode of disposal of the action is under consideration” i.e. “under present rules
appearing on the By Order (Adjustment) Roll, unless parties have agreed as to the future procedure”. Simpler cases are to be determined by rules.

“I do not consider the need for one at the outset of every action.” Lord Cullen infers that at least all cases on the Extended Adjustment Roll would be eligible for case management - these will be cases deviating from a standard adjustment programme.

**Pre-Proof Review**

A hearing should take place for “selected cases”. “The general object is to make further orders for expeditious disposal and avoidance of unnecessary expense. as considered appropriate at this stage”. Hearings should be restricted to cases on the Extended Adjustment Roll and “any other actions which at its discretion the court, either at the Case management hearing or thereafter” appoints.

**Continuity:**

Lord Cullen is not in favour of Masters to take hearings. It may be possible for the same judge at pre-proof review to take proof in complex and important actions, but it would be too difficult to assign the same judge at Case management hearing and proof.

**Timetable:**

- No calling, time runs from signeting of the summons
- Abbreviated pleadings at outset for all, retaining pleas-in-law
- 21 days to lodge defences (explicit duty to make candid response)
- 4 weeks for Pursuer to adjust in response
- Defender can adjust only with consent of Pursuer or court
- Motion within 7 days after last date for lodging defences to transfer to the Extended Adjustment Roll on cause shown (difficulty and complexity of case). Court to make tailor-made adjustment orders.
- Record deemed closed after adjustment period
- Written intimation of list of documents/ inspection allowed (as under Optional Procedure for Personal Injuries Rule of Court 43.25)
- Lodge productions 8 weeks (not 4 weeks as R.O.C. 36.3)
- Witness lists and summaries - submitted by the end of adjustment period, (limited later)
- Skilled reports by 28 days after allowance of proof
- Limit to skilled witnesses on Extended Adjustment Roll
- Expedited decisions, brief statements of reasons

**Case Management Hearings**

To follow the end of adjustment period -
4 weeks if transferred to Extended Adjustment Roll
2 weeks if straightforward case
Preferable for hearings to be given appointed times (individual times if on Extended Adjustment Roll)
In Chambers, representatives fully informed with authority to make decisions
Continuations at the court's discretion for "good and sufficient reason"
Mondays - 2 judges on a rota basis

**Standard questionnaire** - to be exchanged and lodged in court one week before hearing indicating:

(a) procedural steps party intending to take for example:
   applications to recover documents
   amendment of pleadings or
   summary judgment which may affect progress of the action

(b) matters of fact and law at issue.
   fact - what is/is not in dispute having regard to pleadings and witness summaries
   law - to assist court in knowing how far their resolution would be likely to resolve the substance of the action

(c) how such matters can be most suitably resolved - whether by agreement, judicial
decision, or alternatives

(d) supply and lodge a note of argument regarding the preliminary plea for debate

(e) indicate the likely duration of proof or jury trial

(f) indicate time likely to be required for preparation for proof.

**Discussions/Orders at Case Management Hearing**

1. Pleadings and disclosure of evidence - court is to ensure there are no omissions for fair notice, and may supplement or vary the rules. Court may
   (i) consent to adjustment of abbreviated pleadings
   (ii) make order for specification
   (iii) order party to lodge statement of facts or witness statements for particular matters
   (iv) in personal injury/death - order defender or 3rd party to lodge schedule of assessment of value of pursuer's heads of claim (to clarify quantification dispute)
   (v) vary dates for productions, add to witness list, order to lodge experts' report, vary number of skilled witnesses
   (vi) "make any other order which in the view of the court is necessary to the justice of the case"

2. Regarding further procedure, the court may
determine if debate to be appointed (lodge note and questionnaire) The test is whether “likely to lead to disposal of whole or part of the case”. Particular scrutiny of specification before Debate

(ii) explore the manner in which the matters of fact and law at issue may most suitably be resolved.

(iii) give directions with a view to narrowing issues e.g. skilled witnesses to meet and report to court the matters agreed/disagreed.

(iv) order inquiry - proof or jury trial. Proof can be separated. Power to determine affidavit evidence and order this from specific witnesses with cross examination allowed.

(v) any other order.... ”justice of the case”.

“One of the important functions.... is to fix proof within 7 days of the hearing or continuation. Appoint actions to Pre-Proof Review - court to determine how many weeks to hearing - 6 weeks suggested. Court can appoint any case at any other time it thinks appropriate to a pre-proof review if it appeared expedient.

Pre-Proof Review Questionnaire

One week prior to hearing, parties to exchange and lodge information on
(a) steps taken to resolve dispute
(b) prospects of settlement
(c) risk of the start of progress of proof being impeded
(d) any proposals for how documents and oral evidence can be organised for expeditious progress

Hearings on Mondays

In Chambers, continuations for good and sufficient reason

Function: to consider the questionnaires, discussions and further orders for the expeditious disposal and avoidance of unnecessary expense “as considered appropriate”, i.e. checking compliance, prior agreements have been fulfilled, confirmation that action is proceeding, no foreseeable impediments, ascertaining state of preparedness and exploring further opportunities for agreement.

“In cases which seemed advantageous, discuss expediting proof evidence. Indicate presentation of documents” e.g. working bundles

Appeal:

Any interlocutor may be appealed, but only with leave of the court.
Compliance:

With Rules and dates of case management and pre-proof hearings to be monitored by court staff, not the opposing party. If no compliance, By Order hearing called before the court.

Sanctions:

Exactly the same as Commercial actions Rule of Court 47.16

Miscellaneous Recommendations

Proofs to start 10 am and continue until concluded
Judicial continuity on civil business for 6 weeks (preferably 8)
Conduct study on desirability/feasibility Outer House sitting longer during year
Motions/interlocutors - allocated to judge assigned on weekly/daily basis
Information technology - essential for hearings, to back up court responsibility for progress, and action for non-compliance
Practitioners’ guide
Court to discuss alternative means of resolving disputes
Pursuer's formal Offer to Settle
Federal Rules of Civil Procedure  

Rule 16

(a) Pretrial Conferences; Objectives  
In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or con

1. expediting the disposition of the action;
2. establishing early and continuing control so that the case will not be protracted because of lack of management;
3. discouraging wasteful pretrial activities;
4. improving the quality of the trial through more thorough preparation, and;
5. facilitating the settlement of the case

(b) Scheduling and Planning  
Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time
1. to join other parties and to amend the pleadings;
2. to file and hear motions; and
3. to complete discovery
The scheduling order also may include
4. the date or dates for conferences before trial, a final pretrial conference, and trial; and
5. any other matters appropriate in the circumstances of the case
The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of good cause.

(c) Subjects to be Discussed at Pretrial Conferences  
The participants at any conference under this rule may consider and take action with respect to
1. the formulation and simplification of the issues, including the elimination of frivolous claims or defences;
2. the necessity or desirability of amendments to the pleadings;
3. the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;
4. the avoidance of unnecessary proof and of cumulative evidence;
5. the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;
6. the advisability of referring matters to a magistrate or master
7. the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;
8. the form and substance of the pretrial order;
9. the disposition of pending motions;
10. the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; and
11. such other matters as may aid in the disposition of the action

(d) Final Pretrial Conference
Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders
After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions
If a party or party’s attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party’s attorney is substantially unprepared to participate in the conference, or if a party or party’s attorney fails to participate in good faith, the judge, upon motion or the judge’s own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37(b)(“)(B), (C),(D). In lieu of or in addition to any representing the party or both to pay the reasonable expenses incurred because of any non-compliance with this rule, including attorney’s fees, unless the judge finds that the non-compliance was substantially justified or that other circumstances make an award of expenses unjust.

Source: U.S. Supreme Court Digest Lawyers’ Edition 18 Court Rules Civil Procedure
# APPENDIX 5.3

## Supreme Court, County of Santa Cruz, California

### Trial Court Delay Reduction Time Limits Civil Code 58616

<table>
<thead>
<tr>
<th>Days Allowed</th>
<th>Action</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>60</td>
<td>File proof of service of Complaint</td>
<td>S</td>
</tr>
<tr>
<td>90 (S+R)</td>
<td>30 days after service, file Response</td>
<td>R</td>
</tr>
<tr>
<td>90 (S+R) - 105 (S+R+E)</td>
<td>15 days more for response by stipulated extension</td>
<td>E</td>
</tr>
<tr>
<td>120 (S+R+H) - 135 (S+R+E+H)</td>
<td>Anytime within 30 days after responsive pleading, file for stipulated continuation</td>
<td>H</td>
</tr>
<tr>
<td>150 (S+R+H+C) - 165 (S+R+E+H+C)</td>
<td>30 day stipulated continuation</td>
<td>C</td>
</tr>
<tr>
<td>120 (S+R) - 135 (S+R+E+H)</td>
<td>Case Management Conference Not sooner than 30 days after any of the above continuations expire</td>
<td></td>
</tr>
<tr>
<td>180 (S+R+H+C)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>195 (S+R+E+H+C)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>210</td>
<td>Referral to Arbitration/A.D.R. Not sooner than 210 days after filing</td>
<td></td>
</tr>
<tr>
<td>330</td>
<td>30 days before trial Discovery cut-off.(Civil Procedure Code 2024(a))</td>
<td></td>
</tr>
<tr>
<td>345</td>
<td>15 days before trial Discovery motion cut-off (CP 2024(a))</td>
<td></td>
</tr>
<tr>
<td>350</td>
<td>10 days before trial Expert Witness Discovery cut-off (CP 2024(d))</td>
<td></td>
</tr>
<tr>
<td>360</td>
<td>Trial</td>
<td></td>
</tr>
<tr>
<td>365</td>
<td>Time standard goal - 90% of cases filed - disposition complete</td>
<td></td>
</tr>
</tbody>
</table>
APPENDIX 5.4

Common Elements of Successful Caseflow Management Programmes

1. **Leadership and commitment** - to overcome resistance to change. It is important to accept and understand such resistance is based on
   - fear of the unknown
   - fear that change may lead to loss of status or power
   - stress from uncertainty about ability to function effectively in new environment
   - changes in nature of established relationships
   - feelings of being left out of decision making process

2. **Communications** - success is enhanced by good communication by leaders and broad consultation with practitioners and key representatives who
   - undertake to modify attitudes and expectations
   - provide information about need for change
   - help to build motivation to carry it out
   - establish broad organisational support

3. **Staff Involvement** - support staff must understand and fully participate in the management plans

4. **Caseflow management improvement plan** - before implementation
   - articulated in written plan, incorporating time standards
   - identify necessary caseflow management information
   - specific management policies and procedures
   - implementation timetable
   - preparing and reviewing drafts as a means to identify detailed problems, main tasks and key persons’ roles and responsibilities, and target dates for implementation. This is a key reference to understand what the court seeking to accomplish, when and how.

5. **Education and Training** - for both judges and court staff essential - to familiarise them with purposes and fundamental concepts of caseflow management and specific details and techniques.

6. **Information** - successful caseflow management requires information on the size and age of the pending caseload, rates at which court events are continued and rescheduled, and trends in filings and dispositions. To develop a plan for improvement it is necessary for judges to have information about
   - problems associated with the current state.
- progress towards time goals
- identify ongoing problems
- determine techniques or practices
- regular reviews of size and age of caseload, continuances and trends are vital

Fundamental Elements in Caseflow Management Solomon and Somerlot 1987 p.7-3;
Elements of Effective Caseflow Management Solomon 1973 p 30-46
Evolution of the Specialist Jurisdiction for Commercial Causes in the Court of Session

1830 Commercial actions merged with High Court of Admiralty

1933 Specialist list and procedure for Commercial and Admiralty cases

(by agreement between parties after closing of the Record)

1948 Limitation of recoverable expenses lifted

1978 Pursuer may lodge motion for transfer to the specialist list, and parties

may also transfer by agreement as before

1980 Arbitral service introduced into the Court of Session, separate from the Commercial list. Individual judges nominated by parties, with permission of Lord President

1988 Redefine ‘commercial action’ and allocation to a specialist roll with accelerated procedure. Either party nominate to join the list, ad hoc allocation of judge, no guaranteed continuity, and judge may remit off the specialist roll

1990 Expand definition of a commercial action

1994 New rules – priority allocation of judge to a specialist list for Commercial actions, with no judicial power to remit off the roll

2000 Judicial power to remit cases from the Commercial roll to the Ordinary roll
APPENDIX 6.2

RULES OF THE COURT OF SESSION 1994
as substituted by
ACT OF SEDERUNT (RULES OF THE COURT OF SESSION
AMENDMENT) (COMMERCIAL ACTIONS AND MISCELLANEOUS) 1994

CHAPTER 47
COMMERCIAL ACTIONS

Application and Interpretation of this Chapter

47.1 (1) This chapter applies to a commercial action
(2) In this chapter:
“commercial actions” means an action arising out of, or concerned with, any transaction or dispute of a commercial or business nature in which an election has been made under rule 47.3(1) or which has been transferred under rule 47.10;
“preliminary hearing” means a hearing under rule 47.11;
“procedural hearing” means a hearing under rule 47.12.

Proceedings before commercial judge

47.2 All proceedings in the Outer House in a commercial action shall be brought before a judge of the court nominated by the Lord President as a commercial judge, or where a commercial judge is not available, any other judge of the court (including the vacation judge); and “commercial judge” shall be construed accordingly.

Election of procedure for commercial actions and form of summons

47.3 (1) The pursuer may elect to adopt the procedure in this Chapter by bringing an action in which there are inserted the words “Commercial Action” immediately below the words “IN THE COURT OF SESSION” where they occur above the instance, and on the backing of the summons and any copy of it.

(2) A summons in a commercial action shall –
(a) specify, in the form of conclusions, the orders sought;
(b) identify the parties to the action and the transaction or dispute from which the action arises;
(c) summarise the circumstances out of which the action arises; and
(d) set out the grounds on which the action proceeds.

(3) There shall be appended to a summons in a commercial action a schedule listing the documents founded on or adopted as incorporated in the summons.
Disapplication of certain rules

47.4 (1) The requirement in rule 47.1(4) for a step of process to be folded lengthwise shall not apply in a commercial action.

(2) An open record shall not be made up in, and Chapter 22 (making up and closing records) shall not apply to a commercial action unless otherwise ordered by the court.

(4) The following rules shall not apply to a commercial action:-
   - rule 6.2 (fixing and allocation of diets in Outer House)
   - rule 25.1(3) (form of counterclaim)
   - rule 25.2(2) (applications of warrants for diligence in counterclaims)
   - rule 36.3 (lodging productions).

Procedure in commercial actions

47.5 Subject to the provisions of this Chapter, the procedure in a commercial action shall be such as the commercial judge shall order or direct.

Defences

47.6 (1) Defences in a commercial action shall be in the form of answers to the summons with any additional statement of facts or legal grounds on which it is intended to rely.

(2) There shall be appended to the defences in a commercial action a schedule listing the documents founded on or adopted as incorporated in the defences.

Counterclaims and third party notices

47.7 (1) A party seeking to lodge a counterclaim or to serve a third party notice shall apply by motion to do so.

(2) The commercial judge shall, on a motion to lodge a counterclaim or to serve a third party notice, make such order and give such directions as he thinks fit with regard to:
   (a) the time within which a counterclaim may be lodged or a third party notice served and any answers lodged;
   (b) where the motion is made before the preliminary hearing, a date for the preliminary hearing if it is to be a date other than the date referred to in rule 47.8 (2); and
   (c) any application for a warrant to use any form of diligence which would have been permitted under rule 13.6(c) (warrants for diligence in summons) had the warrant been sought in a summons in a separate action.

(3) Paragraphs (2) and (3) of rule 47.3 shall apply to the form of a counterclaim as they apply to the form of a summons.
Commercial Roll

47.8  (1) All proceedings in an action in which an election has been made under rule 47.3(1) or which has been transferred under rule 47.10 shall, in the Outer House, be heard and determined on the Commercial Roll on such dates and at such times as shall be fixed by the commercial judge.

(2) A commercial action shall call on the Commercial Roll for a preliminary hearing within 14 days after defences have been lodged.

(3) The appearances of a commercial action on the Commercial Roll for a hearing on a specified date shall not affect the right of any party to apply by motion at any time under these Rules.

Withdrawal of action from Commercial Roll

47.9  (1) At any time before or at the preliminary hearing, the commercial judge shall-

(a) on the motion of a party, withdraw a commercial action from the procedure in this chapter and appoint it to proceed as an ordinary action where, having regard to:

(i) the likely need for detailed pleadings to enable justice to be done between the parties

(ii) the length of time required for preparation of the action, or

(iii) any other relevant circumstances, if he is satisfied that the speedy and efficient determination of the cause would not be served by the cause being dealt with as a commercial action; and

(b) on the motion of a party with the consent of all other parties, withdraw a commercial action from the Commercial Roll and appoint it to proceed as an ordinary action.

(2) If a motion to withdraw a commercial action from the Commercial Roll made before or renewed as a preliminary hearing is refused, no subsequent motion to withdraw the action from the Commercial Roll shall be considered except on special cause shown.

Transfer of action to the Commercial Roll

47.10 (1) In an action within the meaning of rule 47.1(2) (definition of commercial action) in which the pursuer has not made an election under rule 47.3(1), any party may apply by motion at any time to have the action appointed to be a commercial action on the Commercial Roll.

(2) A motion enrolled under paragraph (1) shall be heard by the commercial judge on such a date and at such a time as the Keeper of the Rolls shall fix in consultation with the commercial judge.

1 The commercial judge had no power under the 1994 rules to remit cases off the Commercial Roll until 6 years after the implementation of the rules.
where an interlocutor is pronounced under paragraph (1) appointing an action to be a commercial action on the Commercial Roll, the action shall be put out by order for a preliminary hearing within 14 days:

(a) if defences have been lodged, after the date of that interlocutor; or
(b) if defences have not been lodged, after defences have been lodged

Preliminary Hearing

47.11 (1) Unless a commercial action is withdrawn under rule 47.9 from the Commercial Roll then, at the preliminary hearing of a commercial action in which an election has been made under rule 47.3(1), the commercial judge:

(a) shall determine whether and to what extent and in what manner further specification of the claim and defences should be provided;
(b) may make an order in respect of any of the following matters:-
   (i) detailed written pleadings to be made by a party either generally or restricted to particular issues;
   (ii) a statement of facts to be made by one or more parties either generally or restricted to particular issues;
   (iii) the allowing of an amendment by a party to his pleadings;
   (iv) disclosure of the identity of witnesses and the existence and nature of documents relating to the action or authority to recover documents either generally or specifically;
   (v) documents constituting, evidencing or relating to the subject-matter of the action or any invoices, correspondence or similar documents relating to it to be lodged in process within a specified period;
   (vi) each party to lodge in process, and send to every other party, a list of witnesses;
   (vii) reports of skilled persons or witness statements to be lodged in process;
   (viii) affidavits concerned with any of the issues in the action to be lodged in process; and
   (ix) the action to proceed to a hearing without any further preliminary procedure either in relation to the whole or any particular aspect of the action;

(c) make fix the period within which any such order shall be complied with;
(d) may continue the preliminary hearing to a date to be appointed by him; and
(e) may make such other order as he thinks fit for the speedy determination of the action.

(2) Where the commercial judge makes an order under paragraph (1)(b)(I) or (ii) or (c), he may ordain the pursuer to –

(a) make up a record; and
(b) lodge that record in process within such period as the commercial judge thinks fit.
At the conclusion of the preliminary hearing, the court shall, unless it has made an order under paragraph (1)(b) (order to proceed without a further hearing), fix a date for a procedural hearing to determine further procedure.

The date fixed under paragraph (3) for a procedural hearing shall not be extended except on special cause shown on a motion enrolled not less than 7 days before the date fixed for the procedural hearing.

Procedural Hearing

47.12 (1) Not less than 3 days before the date fixed under rule 47.11 (3) for the procedural hearing, each party shall –

(a) lodge a written statement of his proposals for further procedure which shall, inter alia state –

(i) whether he seeks to have the commercial action appointed to debate or to have the action sent to proof on the whole or any part of it; and

(ii) what the issues are which he considers should be sent to debate or proof;

(b) lodge a list of the witnesses he proposes to cite or call to give evidence, identifying the matters to which each witness will speak;

(c) lodge the reports of any skilled persons;

(d) where it is sought to have the action appointed to debate, lodge a note of argument consisting of concise numbered paragraphs stating the legal propositions on which it is proposed to submit that any preliminary plea should be sustained or repelled with reference to the principal authorities and statutory provision to be founded on; and

(e) send a copy of any such written statement, lists, reports or note of argument, as the case may be, to every other party.

(2) At the procedural hearing, the commercial judge:–

(a) shall determine whether the commercial action should be appointed to debate or sent to proof on the whole or any part of the action;

(b) where the action is appointed to debate or sent to proof, may order that written arguments on any question of law should be submitted;

(c) where the action is sent to proof, may determine whether evidence at the proof should be by oral evidence, the production of documents or affidavits on any issue;

(d) may determine, in the light of any witness statements, affidavits or reports produced, that proof is unnecessary on any issue;

(e) may direct that there should be consultation between skilled persons with a view to reaching agreement about any points held in common;

(f) without prejudice to Chapter 12 (assessors), may appoint an expert to examine, on behalf of the court, any reports of skilled persons or other evidence submitted and to report to the court within such period as the commercial judge may specify;
(g) may remit an issue to a person of skill;
(h) may direct that proof of the authenticity of a document or other formal matters may be dispensed with;
(i) if invited to do so by all parties, direct the action to be determined on the basis of written submissions, or such other material, without any oral hearing; and
(j) may continue the procedural hearing to a date to be appointed by him.

Debates
47.13 Chapter 28 (procedure roll) shall apply to a debate ordered in a commercial action under rule 47.12(2)(a) as it applies to a cause appointed to the Procedure Roll.

Lodging of productions for proof
47.14 (1) Any document not previously lodged required for any proof in a commercial action shall be lodged as a production not less than 7 days before the date fixed for the proof.

(2) No document may be lodged as a production after the date referred to in paragraph (1), even by agreement of all parties, unless the court is satisfied that any document sought to be lodged could not with reasonable diligence have been lodged in time.

Hearings for further procedure
47.15 At any time before final judgment, the commercial judge may, at his own instance or on the motion of any party, have a commercial action put out for hearing for further procedure; and the commercial judge may make such order as he thinks fit.

Failure to comply with rule or order of commercial judge
47.16 Any failure by a party to comply timeously with a provision in these Rules or any order made by the commercial judge in a commercial action shall entitle the judge, at his own instance –

(a) to refuse to extend any period of compliance with a provision in these Rules or an order of the court,
(b) to dismiss the action or counterclaim, as the case may be, in whole or in part,
(c) to grant decree in respect of all or any of the conclusions of the summons or counterclaim, as the case may be, or
(d) to make an award of expenses as he thinks fit.
APPENDIX 6.3

PRACTICE NOTE
No.12 1994

Issued 3 September 1994

Commercial Actions

1. Application and interpretation of Chapter 47: R.C.S. 1994 r.47.1

The actions to which the rules apply are intended to comprise all actions arising out of or concerned with any relationship of a commercial or business nature, whether contractual or not, and to include, but not be limited to –

- The construction of a commercial or mercantile document,
- The sale or hire purchase of goods,
- The export or import of merchandise,
- The carriage of goods by land, air or sea,
- Insurance,
- Banking,
- The provision of financial services,
- Mercantile agency
- Mercantile usage or a custom of trade,
- A building, engineering or construction contract,
- A commercial lease

Some Admiralty actions in personam, such as actions relating to or arising out of bills of lading, may also be suitable for treatment as commercial actions if they do not require the special facilities of Admiralty procedure in relation to defenders whose names are not known.

2. Commercial Judge: R.C.S. 1994, r.47.2

The commercial judge may hear and determine a commercial action when the court is in session or in vacation: R.C.S. 1994, r.10.7. Although the court is in session for about 50 weeks in the year, it is anticipated that during two weeks in April, the month of August and two weeks at Christmas and New Year, only interlocutory or incidental business will be dealt with; proofs and debates will not normally be heard during those times. The dates of these periods will be separately announced.

3. Election of procedure: R.C.S. 1994, r.47.3

(1) The initial pleadings in a commercial action are expected to be in an abbreviated form; and while they should make clear what the subject-matter of the cause is and the legal issues are, they should not be extended by lengthy recitals of contract documents, propositions of law or legal duties or similar material. Where damages are sought, a summary statement of a claim or a statement in the form of an account will normally be sufficient. Where it is sought to obtain from the court a
decision only on the construction of a document, it is permissible for the summons to contain an appropriate conclusion without a condescendence or pleas-in-law. The conclusion in such a case should specify the document the construction of which is in dispute and conclude for the construction contended for.

(2) Rule 47.3(3) is intended to require a party to produce with his summons the 'core' or essential documents to establish the contract or transaction with which the cause is concerned. Under R.C.S. 1994 r.27.1(1)(1) documents founded on or adopted as incorporated in a summons must be lodged at the time the summons is lodged for calling.

(3) When the summons is lodged for signeting, a commercial action registration form (Form CA1), copies of which are available from the General Department, must be completed, lodged in process and a copy served with the summons.

4. Disapplication of certain rules: R.C.S. 1994, r.47.4

The ordinary rules of the Rules of the court of Session 1994 apply to a commercial action to which Chapter 47 applies except in so far as specifically excluded under rule 47.4 or which are excluded by implication because of a provision in Chapter 47.

5. Procedure in commercial actions: R.C.S. 1994, r.47.5

The procedure in, and progress of, a commercial action is under the direct control of the commercial judge. He will be pro-active.

6. Defences: R.C.S. 1994, r.47.6

(1) In the first instance detailed averments are not required in the defences any more than in the summons and it is not necessary that each allegation should be admitted or denied provided that the extent of the dispute can be reasonably well identified. One of the objectives of the procedure is to make the extent of written pleadings subject to the control of the court.

(2) Under R.C.S. 1994, r.27.1(1)(b) documents founded on or adopted as incorporated in defences must be lodged at the time the defences are lodged.

(3) Defences must be lodged within 7 days after the summons is lodged for calling: R.C.S. 994, r.18.1(1)

(4) The defender’s agent must complete the commercial action registration form (Form CA1) and lodge it in process, or complete the process copy, with the information required.

7. Counterclaims and third party notices: R.C.S. 1994, r.47.7

No counterclaim or the bringing in of a third party may be pursued without an order from the commercial judge.

8. Commercial Roll: R.C.S. 1994, r.47.8

In the Outer House, an action, and all proceedings in it, in which an election has been made to adopt the procedure in Chapter 47 for commercial actions or which has been
transferred under rule 47.10 to be dealt with as a commercial action, shall be heard and determined on the Commercial Roll.

9. Withdrawal of action from Commercial Roll: R.C.S. 1994, r.47.9

The object of this rule is to enable cases which are unsuitable for the commercial procedure to be removed from the Commercial Roll, but it should be understood that the commercial procedure is not to be regarded as limited to cases which are straightforward or simple or as excluding cases which involve the investigation of difficult and complicated facts.

10. Transfer of actions to Commercial Roll: R.C.S. 1994, r.47.10

(1) An ordinary action which has not been brought as a commercial action under rule 47.3(1) may be transferred to the Commercial Roll as a commercial action on application by motion by any party (including the pursuer) to the commercial judge if it is an action within the meaning of a commercial action in rule 47.1(2).

(2) An interlocutor granting or refusing a motion to transfer an action to the Commercial Roll may be reclaimed against only with leave of the commercial judge within 14 days after the date of the interlocutor: R.C.S. 1994, 4.38.4(6)

10. Preliminary Hearing on Commercial Roll: R.C.S. 1994, r.47.11

(1) The preliminary hearing of the commercial action is not a formality. It is intended that there should be a serious discussion of the issues in the cause and the steps necessary to resolve them, and counsel or solicitors appearing at the hearing will be expected to be aware of the issues and the principal contentions on each side and to be in a position to inform the court of them. In many commercial disputes, the parties will already be well aware of what their respective contentions are and those contentions may have been set out in correspondence or, for example, in a building contract in a formal claim or similar document. The court will expect to be informed of the position I that respect and may direct that no further pleading is required.

(2) In applying rule 47.11(3), the court will expect to set realistic time-limits; but once established those time-limits will be expected to be achieved and extension will only be granted in special circumstances. This emphasises the importance of ensuring that parties at the preliminary hearing are in a position to explain fully what will be required. Since it is part of the administration of commercial causes that wherever possible a commercial action should at all stages be heard before the same judge, it is important to avoid repeated appearances of the action on the Commercial Roll. For that reason it is necessary to try to give the court accurate information in order to enable the appropriate time-limits for a particular case to be established in a manner which is both realistic and which does not prejudice the overall requirement that commercial actions should be dealt with expeditiously.

(3) The hearing of an action at a preliminary hearing will usually be heard in Chambers. Those attending may be seated and wigs and gowns need not be worn.

2 Meetings actually take place in open court
12. **Procedural hearing on Commercial Roll: R.C.S. 1994, r.47.12**

(1) The procedural hearing is also a serious hearing at which parties will be expected to be in a position to discuss realistically the issues involved in the action and the method of disposing of them. It should normally be expected that by the time of the procedural hearing the parties' positions will have been ascertained and identified and in consequence it is expected that, once a case has passed beyond the stage of a procedural hearing, it will not settle.

(2) This is one of the ways in which it is sought to meet the problem of ensuring that the judge is in a position to deal realistically with the procedure which he cannot do unless he is given information on which to proceed.

(3) Rule 47.12(2) is the kernel of the proposed procedure since it is intended to enable the court to direct what is really to happen.

(4) This hearing will also be heard in Chambers in the same way as the preliminary hearing.³

13. **Debates: R.C.S. 1994, r.47.13**

A debate in a commercial action is not heard on the Procedure Roll but on the Commercial Roll. The provisions of Chapter 28 of the R.C.S. 1994 (Procedure Roll), however, do apply to a debate in a commercial action.

14. **Lodging of productions: R.C.S. 1994, r.47.14**

Before any proof or other hearing at which documents are to be referred to, parties shall, as well as lodging their productions, prepare for the use of the court of working bundle in which the documents are arranged chronologically or in another appropriate order without multiple copies of the same document.

15. **Hearings for further procedure: R.C.S. 1994, r.47.15**

The commercial judge or a party may have a commercial action put out for a hearing other than a preliminary or procedural hearing to deal with a procedural or other matter which has arisen for which provision has not been made.

16. **Failure to comply with rule or order of commercial judge: R.C.S.1994, r.47.16**

The purpose of this rule is to provide for discipline to ensure effective supervision of case management.

³ Hearings are in open court
17. **General**

(1) Arrangements will be made to ensure that at all appearances of an action in the commercial Roll the same judge shall preside. Parties are expected to arrange that counsel or other persons have rights of audience responsible for the conduct of the case and authorised to take any necessary decision on questions of procedure should be available and shall appear at any calling in the Commercial Roll.

(2) Where any pleadings or other documents are to be adjusted, the party proposing adjustments shall do so by preparing a new copy of the document as adjusted in which the new material is indicated by under-lining, side-lining, a difference in type face or other means.

(3) An interlocutor pronounced on the Commercial Roll, other than a final interlocutor, may be reclaimed against only with leave of the commercial judge within 14 days after the date of the interlocutor: R.C.S. 1994, r.38.4(7)

18. **Transitional provisions for old commercial actions**

As the old rules under R.C.S. 1994 for commercial actions are replaced by new rules with new procedures, there will be no rules applicable to commercial actions commenced under the rules for commercial actions under the R.C.S. 1965 or the old rules under R.C.S. 1994.

Accordingly in relation to commercial actions commenced before 20th September 1994 in which a diet of proof or a diet for a hearing on the Procedure Roll has not been fixed, a notice will appear in the Rolls of Court on Thursday 29 September 19994 giving parties in each of the cases listed in the notice 28 days in which to apply to transfer such a case to the new Commercial Roll under rule 47.10. If in a particular case listed in the notice no such application is made within 28 days, the action will proceed as an ordinary action.
Rules for Commercial Actions
In The Court of Session

September 94

Permission Granted for Reproduction
In March 1994, new arrangements for the conduct of commercial litigation in the Court of Session were announced. These arrangements followed from the report of a working party which had consulted widely among commercial interests. Their purpose is to try to meet the recognised demand for a procedure which would enable such litigation to be dealt with expeditiously and without undue technicality; with an appropriate level of expertise; and in a manner consistent with fairness and the proper consideration of the issues.

The new arrangements involve departure from tradition in certain respects, and their successful implementation will make demands both on the court and on legal practitioners. So far as the court is concerned, three judges have been nominated as commercial judges, for whom commercial business will have priority. One of the three will be released from criminal business and will be available full time for commercial work. The other two will have their programme of work so arranged that one of them will always be available for commercial business if required. The rules of procedure will be adapted in such a way as to give the judges an active role in progressing the cases, and determining how the issues are to be addressed. Generally, the business of the court will be organised so as to secure that hearings proceed at the times set down for them and that they are not interrupted or postponed. These measures are relatively simple to state but their implementation will require a considerable degree of commitment on the part of the judges and the court administration.

Implementation of the proposals will also make demands on practitioners and their clients. New commercial rules have been drafted on the footing that parties should recognise that there is a joint interest in securing the efficient disposal of business and with a view to developing a co-operative approach in practice. The working party recognised that it is, if anything, even more important to encourage such an approach than to draft new formal rules of procedure. There will, of course, always be some cases in which delay or obstruction appears to be in the interest of one party, but the judges will be alert to discourage any tendency in that direction. They will also discourage undue length of pleading or argument and will seek to encourage parties to identify and focus upon the real issues between them as early as possible in the procedure.

In the exercise of their extended role, the judges will require to proceed on information given to them by the parties, for example, as to the time needed for preparation. It is very important that they should be given accurate information to enable reasonable and realistic allowances to be made: and the corollary is that the parties will be expected to adhere to what is fixed by the judge in the light of the information given to him.

This brochure explains the purposes of the rules and the spirit in which the judges intend to apply them. The overriding objective will always be to identify the procedures which are required by the particular case and the rules and practice notes should be seen as subject to that principle. Since the procedures are new, and the volume of business difficult to predict, some experiment and some variation of the rules in the light of experience may be expected.
The account of the procedure given in this brochure is brief and general. Anyone who is interested in the application of the new procedures should consult the rules and practice note.

**Commercial Actions**

A deliberate decision has been made not to try to give a precise definition of, nor provide a precise list of, the subject matter of actions in which the commercial procedure may be used. This decision may be reconsidered in the light of experience. Generally the rules have in view disputes of a business or commercial nature, in the ordinary sense of those expressions, relating to matters such as the supply or exchange of goods or services, banking, insurance and other financial services, and the carriage of goods. In the first instance, the procedure is elective, but the court has power to resolve differences of opinion between parties.

**Commencing a Commercial Action**

Commercial actions are begun by serving a summons, in the same way as ordinary actions, but there are two significant differences. Firstly, the summons is expected to be short and non-technical, and to avoid lengthy recitation of documents or elaboration of legal propositions. The pursuer is expected to make clear the subject matter of the action and the issues which he seeks to have resolved, but it is not necessary as a matter of course for him to make detailed factual averments, let alone averments on every issue which may arise. Secondly, and to an extent to balance the previous requirement, the pursuer is expected to put before the court at the earliest stage the contract, instruction, correspondence or other documentation on which the claim depends. Similarly, the defender is expected to state his position briefly and non-technically in his defences and to put before the court any documents on which he relies. An action begun as an ordinary action may be transferred to the commercial procedure, on the motion of one or both parties, if the judge agrees. If an action is so transferred, directions for further procedure will be given according to the stage which the action has already reached.

**Hearings**

Three principal stages of procedure are envisaged, namely, preliminary hearings, procedural hearings and hearings for the disposal of the action. The terminology used to describe these stages is chosen for convenience and does not imply a limitation on what can be done at each of the stages. Each of the stages is important, and at each parties will require to be represented by counsel or other persons having rights of audience, who are fully prepared, are aware of the position in the case and are able to take decisions about the matters which will be considered. Where the case involves a number of discrete issues, the judge will consider how to set about resolving those issues, and at what stage. It may well be that issues of substance will be finally disposed of at the preliminary or procedural hearings.

Subject to those comments, the main purpose of the preliminary hearing is to determine whether further notice of the parties’ cases is required and, if so, what form
it should take. The judge may order further written pleading, either generally or on a particular issue, or he may order the production of witness statements, expert reports or other documents. The judge may also order that the case should proceed direct to a proof or legal debate without any further pleading or preliminary procedure.

The purpose of the procedural hearing is to enable a decision to be made as to how the main issues in the action are to be decided. There are certain mandatory rules which apply to this hearing. The parties are required to produce, before the hearing, written proposals for the further procedure, and written notes of legal arguments to be presented, as well as witness lists and expert reports. The steps which may be taken at the procedural hearing are similar to those which may be taken at the preliminary hearing, but, in addition, the judge may appoint an expert to consider the evidence available, carry out an inspection or other investigation and report to the court on it.

The final stage is the proof or legal debate at which the case is to be decided. The procedure at this stage will be comparable to the procedure in current practice, but parties should expect that the judges will be familiar with the documentary material, such as correspondence, witness statements or reports, and will not require to be taken through it at length; and that they will intervene to discourage irrelevancy and time-wasting.

The overall purpose is to define the issues, restrict evidence and argument to what is really necessary for their determination and minimise the expenditure of time and money on the case. The judges may be expected to try to exercise their authority flexibly, according to the circumstances of the particular case.

Conclusion

The main object of the commercial procedure is to provide an efficient and cost effective method of disposing of disputes involving commercial parties. It can only succeed if parties and their representatives take the opportunity offered by the court to use the procedures constructively, and respond to the encouragement to identify issues at an early stage in a case, restrict any factual disputes to matters essential to the resolution of those issues, and comply with orders for the disclosure of documentary and other evidence and materials timeously and comprehensively. The rules and practice notes and the allocation of judicial resources are the court's response to the understanding that there is indeed a demand for a service of this kind.

Copies of the rules may be obtained from HMSO bookshops and the practice note may be obtained from the Administration Unit, Supreme Courts, Edinburgh EH1 1RQ. Any person requiring advice on the application of the rules should consult his solicitor.
COMMERCIAL CAUSE PROCEDURE

RESEARCH REPORT SEPTEMBER 1994 - APRIL 1996

Annual Caseload September 1991 to September 1996

1.1 The legal year begins in September each year. Chapter 47 of the Rules of Court governing Commercial Actions was implemented from 20th September 1994. A comparison with the three previous years' Commercial Rolls shows that there was a dramatic increase in numbers of litigants from the inception of the new procedure.

1.2 Under rule 47.3(1) a pursuer may elect to initiate the procedure, or a cause may be transferred under rule 47.10(1) by any party enrolling a motion. Initially 34% of cases on the new roll were transferred but this trend gradually reduced. In the second year only 18% were transfers from the Ordinary Roll or Sheriff Court. The comparison below and on the following page reflects the increase of new business under the new rules.

Table 1
Scottish Commercial Actions Annual Caseloads 1991-1996

<table>
<thead>
<tr>
<th></th>
<th>Transferred</th>
<th>Initiated</th>
<th>Total Caseload</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991 - 92</td>
<td></td>
<td></td>
<td>58</td>
</tr>
<tr>
<td>1992 - 93</td>
<td></td>
<td></td>
<td>42</td>
</tr>
<tr>
<td>1993 - 94</td>
<td></td>
<td></td>
<td>52</td>
</tr>
<tr>
<td>1994 - 95</td>
<td>48</td>
<td>93</td>
<td>141</td>
</tr>
<tr>
<td>1995 - 96</td>
<td>26</td>
<td>119</td>
<td>145</td>
</tr>
</tbody>
</table>

Research Sample of Commercial Actions

2.1 The study sample comprised 180 cases out of a total 214 actions initiated or transferred on to the Roll. This represents 84% of all processes; the balance were unavailable or had just begun. The sample period was from inception of the new Roll on 20 September 1994 to April 1996. Within the sample, there were 87 ongoing (live) cases; 93 actions had been disposed of. A breakdown of the sample appears in Table 2.

2.2 Although each case had a separate process folder, some were cojoined for hearings. These amalgamations included

(a) "Mirror actions" (for example Kwikfit Insurance Services v Connor CA8/95 and Connor v Kwikfit Insurance Services CA 27/95).
APPENDIX 6.5.1

(b) Actions against a common defender by different pursuers over the same disputed issues (S. Khan v Graysim Holdings Ltd. CA 11/95, G. Sarwar v Graysim Holdings Ltd. CA 14/95)

c) Related actions brought by a common pursuer against different defenders (North East Ice & Cold Storage Ltd. v J. Third CA 7/96, North East Ice & Cold Storage Ltd. v A. Third CA 6/96)

d) Inter-related actions, for certain hearings (Maus Freres v A. Hoon & Ors CA 57/95, Maus Freres v MacLeod Paxton Woolard & Co. CA 58/95 and Governor of the Bank of Scotland v Messrs MacLeod Paxton Woolard & Co. & Ors CA 59/95).

Table 2
Scottish Commercial Actions Analysis of 180 Cases in Study Sample

<table>
<thead>
<tr>
<th>Status</th>
<th>DISPOSALS</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Defended:</td>
<td>Settled</td>
<td>37</td>
</tr>
<tr>
<td></td>
<td>Judicial Disposals</td>
<td>27</td>
</tr>
<tr>
<td>Undefended:</td>
<td>Settled</td>
<td>22</td>
</tr>
<tr>
<td></td>
<td>Judicial Disposals</td>
<td>7</td>
</tr>
<tr>
<td><strong>TOTAL DISPOSALS</strong></td>
<td></td>
<td><strong>93</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th><strong>LIVE ACTIONS</strong></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Defended:</td>
<td></td>
<td>33</td>
</tr>
<tr>
<td>Undefended:</td>
<td></td>
<td>54</td>
</tr>
<tr>
<td><strong>TOTAL LIVE ACTIONS</strong></td>
<td></td>
<td><strong>87</strong></td>
</tr>
</tbody>
</table>

Litigants On the Commercial Roll

3.1 An analysis of the types of litigants using the Commercial Cause Rules was undertaken and the results showed that there was a fairly similar spread between Pursuers and Defenders within the categories. However, property companies were twice as likely to be Pursuers, and partnerships twice as likely to be Defenders. It seems from the statistics that the private business sector is using the new accelerated procedure to a far greater extent than insurance companies, public bodies, building societies and receivers/liquidators.

3.2 A comparison with the following analyses of subject matter of the actions (paragraph 4) and resolutions sought from the court (paragraph 5) provides an informative cross-reference with the types of litigants.
APPENDIX 6.5.1

Table 3
Scottish Commercial Actions - Analysis of Litigants in Study Sample

<table>
<thead>
<tr>
<th>Category of Litigant</th>
<th>Pursuers</th>
<th>Defenders</th>
<th>Pursuers</th>
<th>Defenders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limited Companies</td>
<td>83</td>
<td>75</td>
<td>46.1</td>
<td>39.7</td>
</tr>
<tr>
<td>Individuals (incl. Trustees)</td>
<td>44</td>
<td>46</td>
<td>24.4</td>
<td>24.3</td>
</tr>
<tr>
<td>Property Companies</td>
<td>23</td>
<td>11</td>
<td>12.8</td>
<td>5.8</td>
</tr>
<tr>
<td>Partnerships</td>
<td>11</td>
<td>22</td>
<td>6.1</td>
<td>11.6</td>
</tr>
<tr>
<td>Banks</td>
<td>9</td>
<td>6</td>
<td>5</td>
<td>3.2</td>
</tr>
<tr>
<td>Insurance Companies</td>
<td>3</td>
<td>8</td>
<td>1.7</td>
<td>4.2</td>
</tr>
<tr>
<td>Public Bodies</td>
<td>3</td>
<td>17</td>
<td>1.7</td>
<td>9</td>
</tr>
<tr>
<td>Building Societies</td>
<td>2</td>
<td>1</td>
<td>1.1</td>
<td>0.5</td>
</tr>
<tr>
<td>Receivers/Liquidators</td>
<td>2</td>
<td>3</td>
<td>1.1</td>
<td>1.6</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>180</strong></td>
<td><strong>189</strong></td>
<td><strong>100 %</strong></td>
<td><strong>100 %</strong></td>
</tr>
</tbody>
</table>

Definition of Commercial Action - Subject Matter

4.1 In the 1934, 1948 and 1965 Rules of Court a “commercial cause” was defined as

“any cause arising out of the ordinary transactions of merchants and traders, or relating to the construction of mercantile documents, export or import or merchandise, contracts of affreightment, charter-parties, bills of lading, insurance, banking, mercantile agency, mercantile usages, or customs of trade.”

The boundary between Commercial and Admiralty actions was blurred.

4.2 By Act of Sederunt (Rules of Court of Session Amendment No.4) (Commercial Actions) 1988/1521 the definition was altered to exclude

“contracts of affreightment, charter-parties, bills of lading” and insert “carriage of goods by land, air or sea (other than Admiralty actions)”.

4.3 By Act of Sederunt (Rules of Court of Session Amendment No.5) (Miscellaneous) 1990/2118, the definition was further altered to insert

“the sale or hire purchase of goods, a building, engineering or construction contract, a commercial lease, the provision of financial services”

4.4 Under the new rule 47.1(2) the definition of a “commercial action” was one relating to

(a) (i) the construction of a commercial or mercantile document  
(ii) the sale or hire purchase of goods
APPENDIX 6.5.1

(iii) the export or import of merchandise
(iv) the carriage of goods by land, air or sea (other than Admiralty action within the meaning of rule 46.1)
(v) insurance
(vi) banking
(vii) the provision of financial services
(viii) mercantile agency
(ix) mercantile usage or a custom of trade
(x) a building, engineering or construction contract
(xi) a commercial lease or

(b) not falling within sub-paragraph (a) but relating to a dispute of a business or commercial nature.”

The governing Practice Note No.12 1994 para 1 made it clear that there was a large element of discretion within the definition of a commercial action, and this is reflected in the analysis of the study sample.

4.5 In the 1996 print of the Rules of Court a blanket definition is provided at Rule 47.1.(2). A commercial action is now

“an action arising out of, or concerned with, any transaction or dispute of a commercial or business nature”.

It was hoped that this widened definition would encourage greater use of the specialist procedure rather than restrict the general perception of a standard commercial cause.

4.6 The treatment and incorporation of some Admiralty actions remains unclear although the Practice Note states that

“some Admiralty actions in personam, such as those relating to or arising out of bills of lading, may also be suitable for treatment as commercial actions if they do not require the special facilities of Admiralty procedure in relation to defenders whose names are unknown.” (para 1)

Following Landcatch Ltd v The International Oil Pollution Compensation Fund CA 86/95 where the defenders successfully challenged the competency of the Commercial procedure, the boundary between Admiralty and Commercial causes remains blurred.

4.7 The inclusion of actions under Petition procedure has been resisted where the specific procedure is stipulated by statute, for example S.461 of the Companies Act 1985 and S. 212 of the Insolvency Act. Where cases otherwise fall within the general definition of commercial action and the conclusions refer to some specific procedures, these have been accepted on to the commercial roll - in particular rectification of documents under S.73(2) of the Rules of Court.
4.8 The subject matter of disputes within the study sample was analysed. A wide range was apparent, although commercial agreements and leases occurred more frequently. This correlates with the high incidence of resolutions which were sought - Payment and Declarator.

Table 4
Scottish Commercial Actions Analysis of Subject Matter in Sample

<table>
<thead>
<tr>
<th>Subject Matter</th>
<th>Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial Agreement (performance)</td>
<td>48</td>
</tr>
<tr>
<td>Commercial lease</td>
<td>32</td>
</tr>
<tr>
<td>Partnership Agreement</td>
<td>22</td>
</tr>
<tr>
<td>Commercial Agreement (terms)</td>
<td>11</td>
</tr>
<tr>
<td>Commercial Miscellaneous</td>
<td>9</td>
</tr>
<tr>
<td>Construction Agreement</td>
<td>9</td>
</tr>
<tr>
<td>Breach of Missives</td>
<td>6</td>
</tr>
<tr>
<td>Dilapidations</td>
<td>6</td>
</tr>
<tr>
<td>Embezzlement</td>
<td>6</td>
</tr>
<tr>
<td>Insurance</td>
<td>5</td>
</tr>
<tr>
<td>Agency</td>
<td>5</td>
</tr>
<tr>
<td>Share Agreement</td>
<td>4</td>
</tr>
<tr>
<td>Fraud</td>
<td>3</td>
</tr>
<tr>
<td>Client Introduction</td>
<td>3</td>
</tr>
<tr>
<td>Unfair dismissal compensation</td>
<td>2</td>
</tr>
<tr>
<td>Arbitration Clause</td>
<td>2</td>
</tr>
<tr>
<td>Damages</td>
<td>2</td>
</tr>
<tr>
<td>Copyright</td>
<td>1</td>
</tr>
<tr>
<td>Commercial Warranty</td>
<td>1</td>
</tr>
<tr>
<td>Agricultural land</td>
<td>1</td>
</tr>
<tr>
<td>Lien</td>
<td>1</td>
</tr>
<tr>
<td>Title</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total Number of Cases</strong></td>
<td><strong>180</strong></td>
</tr>
</tbody>
</table>

Orders and Resolutions

5.1 Over the 180 cases in the study sample 223 orders were analysed. The resolutions sought by litigants reflected the diversity and flexibility required of the new
procedure. However Payment orders accounted for 47% of the required outcomes and Declarators 27%.

5.2 Given the wide definition of “commercial action” in rule 47.1 the resolutions sought may better reflect the general pattern of the business of the court than the examples previously reiterated in the Rules. The analysis showed:

Table 5
Scottish Commercial Actions Analysis of Orders Sought in Sample

<table>
<thead>
<tr>
<th>Orders/Resolutions Sought</th>
<th>Cases</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Payment</td>
<td>105</td>
<td>47.09%</td>
</tr>
<tr>
<td>Declarator</td>
<td>60</td>
<td>26.91%</td>
</tr>
<tr>
<td>Account Reckoning Payment</td>
<td>14</td>
<td>6.28%</td>
</tr>
<tr>
<td>Interdict</td>
<td>12</td>
<td>5.38%</td>
</tr>
<tr>
<td>Specific Implement</td>
<td>12</td>
<td>5.38%</td>
</tr>
<tr>
<td>Delivery</td>
<td>4</td>
<td>1.79%</td>
</tr>
<tr>
<td>Reduction</td>
<td>4</td>
<td>1.79%</td>
</tr>
<tr>
<td>Order</td>
<td>3</td>
<td>1.35%</td>
</tr>
<tr>
<td>Possession</td>
<td>2</td>
<td>0.90%</td>
</tr>
<tr>
<td>Arbitration</td>
<td>2</td>
<td>0.90%</td>
</tr>
<tr>
<td>Rectification</td>
<td>2</td>
<td>0.90%</td>
</tr>
<tr>
<td>Irritancy</td>
<td>1</td>
<td>0.45%</td>
</tr>
<tr>
<td>Removing</td>
<td>1</td>
<td>0.45%</td>
</tr>
<tr>
<td>Multiplepoinding</td>
<td>1</td>
<td>0.45%</td>
</tr>
<tr>
<td>Conveyance</td>
<td>1</td>
<td>0.45%</td>
</tr>
<tr>
<td>Total</td>
<td>223</td>
<td>100%</td>
</tr>
</tbody>
</table>

Live Cases In Research Sample

6.1 There were 87 actions within the study sample which were at different stages of procedure - 33 defended and 54 undefended. Some had spent time on the Ordinary Roll or appeared at the Sheriff Court before transferring to the Commercial Roll. An analysis was made of the time live cases had been on the Rolls. Comparison was made between the time spent on

(a) the combined Commercial and non-Commercial Rolls and
(b) time spent purely on the Commercial Roll.

6.2 Taking into account pre-transfer procedures

29 (33%) had been within the court system for over 12 months
7 were between 2-3 years old
2 just over 3 years
1 just over 5 years.
Eliminating pre-transfer statistics there were 15 cases (17%) which were over 12 months old. 9 were under 15 months, 6 under 18 months (the beginning of the new procedure).

37% of cases appearing on a combination of court rolls were under 6 months old; 48% of cases appearing only on the Commercial roll were under 6 months old.

Table 6
Scottish Commercial Actions Analysis of Time on Commercial Roll
87 Live Cases

<table>
<thead>
<tr>
<th>Time to Completion</th>
<th>Time on Ordinary and Commercial Rolls</th>
<th>Time on Commercial Roll After Transfer</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>All Cases</td>
<td>Defended</td>
</tr>
<tr>
<td>Up to 3 mths</td>
<td>16</td>
<td>2</td>
</tr>
<tr>
<td>3-6 mths</td>
<td>16</td>
<td>4</td>
</tr>
<tr>
<td>6-9 mths</td>
<td>12</td>
<td>1</td>
</tr>
<tr>
<td>9-12 mths</td>
<td>14</td>
<td>6</td>
</tr>
<tr>
<td>12-15 mths</td>
<td>12</td>
<td>7</td>
</tr>
<tr>
<td>15-18 mths</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>18-24 mths</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>Over 24 mths *</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>87</td>
<td>33</td>
</tr>
</tbody>
</table>

* Includes 7 cases 2 to 3 years old, 2 cases over 3 years, 1 case over 5 years

Disposals - Research Sample

There were 93 disposals within the study sample of 180; 64 were defended actions, 29 undefended. Several analyses were undertaken to distinguish

(a) length of time to disposal (on Combined Rolls and Commercial Roll alone)
(b) types of disposals - settlements or judicial disposals
(c) types of judicial disposals
(d) stages at which cases settled or were disposed of ‘judicially’

Time to resolution was calculated from the date of signeting the cause to the date of the final interlocutor. In a number of cases the actual date of settlement was earlier according to Counsels’ advice to the court.

Comparing time taken on Ordinary and Commercial Rolls (which included pre-transfer action) and time spent purely on the Commercial Roll, it was found that defended cases were concluded more quickly under the new Commercial procedure. (Table 7)
APPENDIX 6.5.1

(a) taking into account pre-transfer action, 42% of defended actions were completed within 6 months, 83% within 1 year, the remainder within 2 years.

(b) eliminating pre-transfer statistics, 58% were completed within 6 months, 91% within 1 year and the remainder within 15 months.

Table 7
Scottish Commercial Actions Analysis of Time on Commercial Roll
93 Disposed Cases

<table>
<thead>
<tr>
<th>Months to Disposal</th>
<th>All Cases</th>
<th>Defended</th>
<th>Undefended</th>
<th>All Cases</th>
<th>Defended</th>
<th>Undefended</th>
</tr>
</thead>
<tbody>
<tr>
<td>Up to 3 mths</td>
<td>21</td>
<td>4</td>
<td>17</td>
<td>29</td>
<td>12</td>
<td>17</td>
</tr>
<tr>
<td>3 - 6</td>
<td>30</td>
<td>23</td>
<td>8</td>
<td>33</td>
<td>25</td>
<td>9</td>
</tr>
<tr>
<td>6 - 9</td>
<td>16</td>
<td>13</td>
<td>3</td>
<td>17</td>
<td>13</td>
<td>3</td>
</tr>
<tr>
<td>9 - 12</td>
<td>14</td>
<td>13</td>
<td></td>
<td>8</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>12 - 15</td>
<td>3</td>
<td>3</td>
<td></td>
<td>6</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>15 - 18</td>
<td>1</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>18 - 21</td>
<td>5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>21 - 24</td>
<td>3</td>
<td>2</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Totals</strong></td>
<td><strong>93</strong></td>
<td><strong>64</strong></td>
<td><strong>29</strong></td>
<td><strong>93</strong></td>
<td><strong>64</strong></td>
<td><strong>29</strong></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Up to 3 mths</th>
<th>%</th>
<th>%</th>
<th>%</th>
<th>%</th>
<th>%</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>3 - 6</td>
<td>54.8</td>
<td>42.2</td>
<td>86.2</td>
<td>66.7</td>
<td>57.8</td>
<td>89.7</td>
</tr>
<tr>
<td>6 - 9</td>
<td>72</td>
<td>62.5</td>
<td>96.6</td>
<td>84.9</td>
<td>78.1</td>
<td>100</td>
</tr>
<tr>
<td>9 - 12</td>
<td>87.1</td>
<td>82.8</td>
<td>100</td>
<td>93.5</td>
<td>90.6</td>
<td></td>
</tr>
<tr>
<td>12 - 15</td>
<td>90.3</td>
<td>87.5</td>
<td></td>
<td>100</td>
<td>100</td>
<td></td>
</tr>
<tr>
<td>15 - 18</td>
<td>91.4</td>
<td>89.1</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>18 - 21</td>
<td>96.8</td>
<td>96.9</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>21 - 24</td>
<td>100</td>
<td>100</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
APPENDIX 6.5.1

7.4 The 93 actions which were resolved consisted of 59 (63%) extra-judicial settlements and 34 (37%) judicial resolutions. The disposal pattern is noted below.

Table 8
Scottish Commercial Actions - Analysis of 93 Disposed Cases

<table>
<thead>
<tr>
<th>Types of Disposal</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Settled</td>
<td>59</td>
</tr>
<tr>
<td>Summary Decree</td>
<td>9</td>
</tr>
<tr>
<td>Decree in Absence</td>
<td>8</td>
</tr>
<tr>
<td>Abandoned</td>
<td>4</td>
</tr>
<tr>
<td>Transferred Out</td>
<td>2</td>
</tr>
<tr>
<td>Dismissal</td>
<td>4</td>
</tr>
<tr>
<td>Absolvitor</td>
<td>2</td>
</tr>
<tr>
<td>Arbitration</td>
<td>1</td>
</tr>
<tr>
<td>Decree for P</td>
<td>2</td>
</tr>
<tr>
<td>Decree for Def</td>
<td>2</td>
</tr>
<tr>
<td>Total Case Disposals</td>
<td>93</td>
</tr>
</tbody>
</table>

7.5 The stages of disposal for two broad types of resolution are tabled below. An almost equal amount of settlements and judicial resolutions took place before the first Preliminary Hearing (29% and 26.5% respectively), but a higher proportion of cases were settled at the end of the Preliminary stage (75%) than were judicially concluded (56%). The primary object of Preliminary Hearings is early identification of the facts, evidence and issues in dispute. From the statistics, it may be surmised that early settlements are a corollary of early disclosure. The proportionately higher settlement rate continued at the Procedural Hearing stage (85% and 65%). After Debate the proportion of settlements was almost equal to the judicial disposals (90% and 88%).
APPENDIX 6.5.1

Stages of disposal were:

Table 9
Scottish Commercial Actions - Stages and Types of Resolution

<table>
<thead>
<tr>
<th>Stage of Disposal</th>
<th>Settlements</th>
<th>Judicial Disposals</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Cases</td>
<td>Stage</td>
</tr>
<tr>
<td>Before Calling</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>Before Defences</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Before 1st Preliminary Hearing</td>
<td>5</td>
<td>17</td>
</tr>
<tr>
<td>1st Preliminary Hearing</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>2nd Preliminary</td>
<td>7</td>
<td></td>
</tr>
<tr>
<td>3rd Preliminary</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>4th Preliminary</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>5th Preliminary</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>6th Preliminary</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>8th Preliminary</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>10th Preliminary</td>
<td>1</td>
<td>44</td>
</tr>
<tr>
<td>Procedural Hearing</td>
<td>4</td>
<td></td>
</tr>
<tr>
<td>After Procedural Hearing</td>
<td>2</td>
<td>50</td>
</tr>
<tr>
<td>Debate</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>After Debate before Appeal</td>
<td>1</td>
<td>53</td>
</tr>
<tr>
<td>Pre-proof</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>Proof</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td></td>
<td>59</td>
<td></td>
</tr>
</tbody>
</table>

7.6 The types of judicial disposals by stage of disposal were:

Table 10
Scottish Commercial Actions - Judicial Resolutions at Different Stages

<table>
<thead>
<tr>
<th>Stage</th>
<th>Type of Judicial Disposal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before Defences</td>
<td>8 decrees in absence, 1 transfer out</td>
</tr>
<tr>
<td>1st Preliminary Hearing</td>
<td>2 Minutes of abandonment</td>
</tr>
<tr>
<td>2nd Preliminary Hearing</td>
<td>2 Summary decrees</td>
</tr>
<tr>
<td>3rd Preliminary Hearing</td>
<td>1 transfer out, 1 to arbitration</td>
</tr>
<tr>
<td>4th Preliminary Hearing</td>
<td>2 Summary decrees</td>
</tr>
<tr>
<td>6th Preliminary Hearing</td>
<td>2 Summary decree</td>
</tr>
<tr>
<td>Procedural Hearing</td>
<td>1 Summary decree, 1 Decree for Defender, 1 Minute of abandonment</td>
</tr>
<tr>
<td>Debate</td>
<td>2 Summary decrees, 4 dismissal, 1 absolvitor, 1 Decree for Pursuer</td>
</tr>
<tr>
<td>Pre-Proof</td>
<td>1 Minute of abandonment</td>
</tr>
<tr>
<td>Proof</td>
<td>1 Decree for Pursuer, 1 Decree for Defender, 1 Absolvitor</td>
</tr>
</tbody>
</table>

| Total Judicial Disposals| 34 |

10
Comparative Analysis - Time to Disposal

8.1 A comparison was made between statistics available for other jurisdictions and in the study sample. Source documents are detailed.

8.2 Lord Woolf's Interim Report on the English civil justice system “Access to Justice” June 1995 para 35 page 13 showed that in 1994 High Court cases took an average 163 weeks from issue to trial in London and 189 weeks elsewhere in England and Wales. The corresponding average for the English County Courts was 80 weeks.

8.3 Lord Woolf’s Final Report in 1996, analysing a sample of 2104 cases, showed cases took an average of 34 months to trial. Within these statistics there were 104 cases which had appeared before the Commercial Court (with a value) taking on average 25 months, and 102 cases before the Commercial Court (with no value) taking 16 months.

8.4 A Personal Injuries Study: A Scottish Analysis was published in 1995 by the Scottish Office Central Research Unit. Within a 20% study sample of 209 personal injury actions on the Ordinary Roll, the average time from signing to disposition was 72 weeks. Within a 20% sample of 96 actions using the specialist accelerated Optional procedure within the Supreme Court, based on abbreviated pleadings and procedures, the average was 36 weeks from raising the action to disposal.

8.5 Lord Cullen’s 1995 Review of Outer House procedure included research into 300 cases in the Supreme Court. The average length of cases was 81 weeks after 24 cases of anomalous length were removed. This average increased to 89 weeks after 9 longer cases were discounted.

8.6 New South Wales Supreme Courts have been running Differential Case Management procedures since 1988. A research study has just been completed on the Commercial Division. The average length of time from filing the process to disposition was 228 days (32.6 weeks).

8.7 Scottish Commercial Roll - under the new procedure the average time from signing to disposal for all cases was 23 weeks. Defended cases resolved on average in 26.6 weeks, undefended 14 weeks. Even the most generous representation of other procedures do not compare favourably with Scottish Commercial actions for speed of disposal.
Table 11
Scottish Commercial Actions - Comparative Analysis - Duration of Cases

<table>
<thead>
<tr>
<th>Research Study</th>
<th>Weeks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Woolf Interim Report 1995</td>
<td>163</td>
</tr>
<tr>
<td>Woolf Final Report 1996 all cases</td>
<td>136</td>
</tr>
<tr>
<td>Woolf 1996 Commercial Court/value</td>
<td>100</td>
</tr>
<tr>
<td>Lord Cullen's Report</td>
<td>81</td>
</tr>
<tr>
<td>Personal Injuries Study 1995 - Ord. Roll</td>
<td>72</td>
</tr>
<tr>
<td>Woolf 1996 Commercial Court/no value</td>
<td>64</td>
</tr>
<tr>
<td>Personal Injuries Study 1995 - Optional Pr.</td>
<td>36</td>
</tr>
<tr>
<td>New South Wales Commercial Division</td>
<td>32.6</td>
</tr>
<tr>
<td>Scottish Commercial - Defended actions</td>
<td>26.6</td>
</tr>
<tr>
<td>Scottish Commercial - All cases</td>
<td>23</td>
</tr>
<tr>
<td>Scottish Commercial - Undefended actions</td>
<td>14</td>
</tr>
</tbody>
</table>

*Average 81 weeks with 24 cases removed of anomalous length
Average 89 weeks with 9 cases removed of anomalous length

Preliminary Hearings

9.1 Under Rule 47.8(1) the Commercial judge determines the dates and times for the appearances on the Commercial Roll. The first hearing is called within 14 days of defences being lodged (Rule 47.8(2)).

9.2 The first hearing is generally a Preliminary Hearing, although there have been prior motion roll appearances for the following reasons:

interim interdict, transfer on to the Commercial Roll, recall of inhibition and arrestment on the dependence, breach of interdict and sists

9.3 The Preliminary Hearing is held under Rule 47.11 and is perceived as critical to the preparation of an action for debate or proof. Generally the judge has discretion to apply a range of orders designed to identify at an early stage the factual and legal issues in dispute. Based on the abbreviated summons, defences and schedule of documents already lodged and after discussion with parties’ representatives he may:

(a) order further specification of claim or defences
(b) make an order requiring general or specific
   (i) detailed written pleadings
   (ii) statement of facts
   (iii) amendment of pleadings
   (iv) disclosure of witnesses and documents, with authority to
   (v) recover the documents
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(vi) lodgement or exchange of any documents relating to the action
(vii) within a specific period
(viii) list of witnesses
(ix) reports of skilled persons or witnesses statements
(x) affidavits
(xi) progression of the case to the next stage

The commercial judge also controls timetabling strategy, fixing the period within which any of the above orders are complied with (Rule 47.11(c)). He also "may make such other order as he thinks fit for the speedy determination of the action" (Rule 47.11(1)(e)).

9.4 It seems from 1994 annotations to Chapter 47 that it was not anticipated that all the above could be achieved in one Preliminary Hearing per case. Under rule 47.11(1)(d) the judge has discretion to continue the Preliminary hearing to a later date.

9.5 Within the study sample 401 Preliminary hearings were held for 147 cases (82%). For some appearances 11 related actions were combined (see para 3.2).

9.6 Out of 147 cases dealt with at this stage, 37 (25%) had one Preliminary Hearing. The table below and the following graph show that the majority (82%) had up to 4 hearings but 2 related cases shared 12 Preliminary hearings.

<table>
<thead>
<tr>
<th>Number of Preliminary Hearings per Case</th>
<th>Number of Cases With Hearings</th>
<th>Actual Number of Hearings *</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>37</td>
<td>34</td>
</tr>
<tr>
<td>2</td>
<td>28</td>
<td>28</td>
</tr>
<tr>
<td>3</td>
<td>32</td>
<td>31</td>
</tr>
<tr>
<td>4</td>
<td>23</td>
<td>19</td>
</tr>
<tr>
<td>5</td>
<td>13</td>
<td>13</td>
</tr>
<tr>
<td>6</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>7</td>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>8</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>12</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Total:</td>
<td>147</td>
<td>136</td>
</tr>
</tbody>
</table>

* 11 related cases were dealt with together at Preliminary hearings (paras.9.3, 2.2)

9.7 Of the 401 Preliminary hearings held, 60 were marked as continuations only in the court’s interlocutor, with no specific directory orders. From observation of the court in practice it was noticed that a bland interlocutor did not necessarily reflect the amount
APPENDIX 6.5.1

of discussion and agreement for future action. In some cases it reflected the parties’ co-operative approach to the procedure.

9.8 Of the 401 hearings 341 were actively directory, detailing orders and target dates for parties’ preparation.

Procedural Hearings

10.1 Once the Preliminary stage is passed, the commercial judge may fix a date for the next stage, generally a Procedural hearing to determine further preparation for debate or proof. Rule 47.12 incorporates a list of mandatory lodgments which must be submitted at least 3 days prior to the hearing, including

(a) a written statement of proposals for further procedure on
   (i) whether the party seeks debate or proof
   (ii) the issues for debate or proof
(b) a list of witnesses, with identification of their evidence
(c) reports of any skilled person
(d) if a debate is required, a note of argument stating legal propositions on
   which a preliminary plea is to be based.
(e) copies sent of the above to all parties

10.2 The judge has discretionary powers to supervise the preparation for proof or debate, establish what issues are to be decided and the form of their resolution. The intention of Rule 47.12.(2) is that after consultation with representatives he will determine

(a) whether the action is to be appointed to either process
(b) order written arguments on questions of law
(c) whether any proof should be by oral evidence, documents or affidavits
   (d) whether proof is unnecessary on any issue
(e) that there should be consultation
(f) the appointment of a court expert
(g) authenticity of a document or formal matters are dispensed with
(h) with party consent that an oral hearing is not required

The judge also has discretion to continue the Procedural hearing to a future date.

10.3 Annotation under the Rules indicate that more than one Procedural hearing was not originally anticipated. Within the study sample, 44 cases (30%) were dealt with at this stage. The table below and the following graph show that the majority of these actions (84%) did have 1 hearing, 9% had 2 hearings and the remaining 3 cases required either 3 or 4 hearings. Three related cases were combined for hearings (para. 3.2).
Table 13
Scottish Commercial Actions - Number of Procedural Hearings

<table>
<thead>
<tr>
<th>Number of Procedural Hearings</th>
<th>Number of Cases With Hearings</th>
<th>Actual Number of Hearings *</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>37</td>
<td>34</td>
</tr>
<tr>
<td>2</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>3</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>4</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>44</td>
<td>41</td>
</tr>
</tbody>
</table>

* 3 related cases were dealt with together at Preliminary hearings (paras.2.2 and 10.3)

Debates and Proofs, Hearings and Motions

11.1 Debates and Proofs or Proofs-Before-Answer are conducted in the same manner as Ordinary actions on the Procedure Roll (rule 47.13). The timetabling of appearances is controlled by the Commercial judge after consultation with representatives. The settlement data indicates however that some cases settled between allocation and the actual hearings resulting in cancelled diets.

11.2 Within the study sample 31 Debates were fixed, and 24 were heard. The average time between allocation and hearing was just over 6 weeks, the majority peaking at 4 weeks (8 cases) and 7 weeks (7 cases). The shortest interval was 1 week, the longest 23 weeks.

Table 14
Scottish Commercial Actions - Debates
Intervals between Allocation and Hearings

<table>
<thead>
<tr>
<th>Allocation of Debates Weeks</th>
<th>Number of Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>3</td>
<td>3</td>
</tr>
<tr>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>5</td>
<td>1</td>
</tr>
<tr>
<td>7</td>
<td>7</td>
</tr>
<tr>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>9</td>
<td>4</td>
</tr>
<tr>
<td>11</td>
<td>1</td>
</tr>
<tr>
<td>14</td>
<td>1</td>
</tr>
<tr>
<td>23</td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>31</td>
</tr>
</tbody>
</table>
11.3 Within the study sample, 21 Proofs or Proofs-before-Answer were allocated to 25 cases; 4 were related actions and were combined (para. 2.2).

11.4 The average time between allocation and hearing was 11 weeks. The average number of days allocated to proof was 5, ranging from 2 to 8. Due to settlement prior to the hearing, only 6 Proofs were heard within the study period, 2 were reallocated to later dates and 13 discharged (6 on the day).

By Order Hearings

11.5 Under rule 47.15 at any time before final judgment the Commercial judge may at his own instance or on the motion of any party, put out a case for a hearing on further procedure. He may “make such order as he thinks fit”. Within the study period 43 By Order Hearings took place at different stages noted below. The majority were held between Debate and allocated Proof to reaffirm, prepare and organise the presentation of the Proof.

<table>
<thead>
<tr>
<th>Table 15</th>
<th>Scottish Commercial Actions - By Order Hearings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Stage Allocated</td>
<td>Number of Cases</td>
</tr>
<tr>
<td>Preliminary</td>
<td>3</td>
</tr>
<tr>
<td>Post-Procedural</td>
<td>6</td>
</tr>
<tr>
<td>Debate</td>
<td>3</td>
</tr>
<tr>
<td>Post-Debate</td>
<td>17</td>
</tr>
<tr>
<td>Pre-Proof</td>
<td>9</td>
</tr>
<tr>
<td>Proof</td>
<td>4</td>
</tr>
<tr>
<td>Reclaiming</td>
<td>1</td>
</tr>
</tbody>
</table>

Motion Interlocutors

11.6 The Commercial judge issued 110 interlocutors on Motions, 49 after a Hearing. 16 of the hearings were on the transfer to the Commercial Roll from either the Ordinary Roll of the Supreme Court or a Sheriff Court; 6 were on amendments required to either the summons or defences. The remainder of the 49 were for diverse reasons - late productions, application for commission and diligence, expenses, sist, recall of inhibition and arrestment on the dependence, interim interdict, breach of interdict, caution, discharge of proof, and reclaim.

11.7 The majority of interlocutors on Motions without hearings were for discharge of a prospective hearing and allowance of late amendments and productions. The original intention was that motions would be incorporated into standard Commercial Roll
hearings. This has been done in addition to the 110 interlocutors issued separately, reflecting the flexibility of the court to tailor the rules in practice to the clients’ needs.

**Ex Proprio Motu Interlocutors**

11.8 The Court may of its own cognisance or at the instigation of the parties make an *ex proprio motu* order. This is the pronouncement of an interlocutor without the appearance of representatives. Within the sample, 41 *ex proprio motu* orders were made. The majority of these, marked “of consent”, were noted as continuations of the action pending settlement negotiations, or prorogation of hearing dates. Of the total, 27 were made at Preliminary Hearing stage. The orders were agreed between the parties, liaising through the Commercial judge’s Clerk of Court.

**Correspondence with the Court**

11.9 The judge’s Clerk of Court uses computer technology to store and up-date information on commercial actions and diarises judicial availability. From this base it has been possible to run an informal follow-up system which is particular to the Commercial Roll. From the process folders it was noted that 18 letters had been sent by the Clerk to parties’ representatives in order to maintain the impetus of the procedure. The letters were sent for the following reasons:

<table>
<thead>
<tr>
<th>Reason for Correspondence</th>
<th>Number of Letters in Each Category</th>
</tr>
</thead>
<tbody>
<tr>
<td>Case was signeted but not yet presented for calling</td>
<td>10</td>
</tr>
<tr>
<td>No defences had been received</td>
<td>4</td>
</tr>
<tr>
<td>Recalled after lengthy continuation for negotiation</td>
<td>3</td>
</tr>
<tr>
<td>Agents withdrawal, new representation required</td>
<td>1</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>18</strong></td>
</tr>
</tbody>
</table>

11.10 It was also noted from process folders that 14 letters were received by the court from representatives informing the judge that the case had settled or informing him of case progress.

11.11 Representatives also have access to the judge’s Clerk by telephone and fax for advice on court procedures, liaison with other parties, and administrative arrangements. An answer machine is left on while the Clerk sits within the court and calls returned on a daily basis.
Judicial Activity

12.1 It became clear that the most intensive judicial involvement was at the Preliminary Hearing stage. As noted previously (para. 7.6) the primary objective of Preliminary Hearings is early identification of the facts, evidence and issues in dispute; 75% of cases which settled did so during or at the end of this stage. The pattern correlates positively with the investment of judicial time.

Table 17
Scottish Commercial Actions - Forms of Judicial Activity

<table>
<thead>
<tr>
<th>Category of Hearing/Order</th>
<th>Numbers per Category</th>
<th>Number of Cases Involved</th>
<th>Percentage of Study Sample (180 cases)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preliminary Hearing (Directory)</td>
<td>341</td>
<td>147</td>
<td>81.7</td>
</tr>
<tr>
<td>Preliminary Hearing (Continuation)</td>
<td>60</td>
<td>28</td>
<td>15.6</td>
</tr>
<tr>
<td>Procedural Hearing</td>
<td>52</td>
<td>44</td>
<td>28.9</td>
</tr>
<tr>
<td>By Order Hearing</td>
<td>43</td>
<td>26</td>
<td>14.4</td>
</tr>
<tr>
<td>Motion Roll Hearing</td>
<td>49</td>
<td>39</td>
<td>21.7</td>
</tr>
<tr>
<td>Ex Proprio Motu Interlocutors</td>
<td>41</td>
<td>40</td>
<td>16.7</td>
</tr>
<tr>
<td>Motion Interlocutors, no Hearing</td>
<td>61</td>
<td>29</td>
<td>16.1</td>
</tr>
<tr>
<td>Debate</td>
<td>24</td>
<td>22</td>
<td>12.2</td>
</tr>
<tr>
<td>Proof</td>
<td>6</td>
<td>6</td>
<td>0.3</td>
</tr>
<tr>
<td>Correspondence: from court</td>
<td>18 letters</td>
<td>{29}</td>
<td>{16.1}</td>
</tr>
<tr>
<td>to court</td>
<td>14 letters</td>
<td>{}</td>
<td>{}</td>
</tr>
</tbody>
</table>

Allocation of Proofs

13.1 As noted previously the Commercial judge has complete discretion to set the pace of the litigation process after consultation in court with parties’ representatives. His Clerk of Court sits with the judge and parties in the well of the court using a lap-top computer to allocate a specific date and time for the next appearance. The Clerk also prepares interlocutors. Most Preliminary and By Order hearings are allocated half an hour of judicial time, Procedural hearings up to one hour. With regard to Debates or Proofs the Commercial judge sets aside a number of court days after discussion with Counsel on time required for presentation.

13.2 A comparative analysis was undertaken on the average number of weeks between allocation and the hearing of Proofs in different reports. These are tabled below.

13.3 In 1978 the Royal Commission on Civil Liability and Compensation for Personal Injury (Cmd 7846), Lord Pearson reported that the average time between fixing proof and disposal was 6 months.
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13.4 The smaller Scottish **Kincraig Committee** on Procedure in the Court of Session in Personal Injuries Litigation (1979) reviewed 15 cases, showing an average interval of 24 to 56 weeks.

13.5 The 1986 **Report of the Review Body on the Use of Judicial Time in the Superior Courts** chaired by Lord Maxwell indicated that delays between closing the Record to Proof were at least three times greater than the minimum reasonable interval of 3 to 4 months (para 2.9).

13.6 **Lord Cullen’s Review 1995** referred to this optimal target (para 3.17 p.13) and reported that currently the Keeper of the Rolls is allocating 83% of Proofs up to 4 days within 20 term weeks. Proofs requiring over 4 days are allocated according to judicial and counsel availability and are not policed by performance targets. Out of a sample of 300 cases in the Cullen Review, 167 (56%) were allocated proof diets, the average period to the hearing was 31 weeks.

13.7 **The Scottish Court Service Annual Report 1996** shows that the average delay between fixing ordinary proofs to a hearing during the year ending March 1996 was 20 weeks (p.44). It is assumed that this refers to proofs booked for 4 days or under. Those requiring more than 4 days are not subject to a supervised performance target.

13.8 Within the **Commercial Roll** study sample 21 were allocated with an average interval of 11 weeks to the hearing. The number of days allocated varied between 2 and 8, with an average of 5 days. Widening the data to include all cases dealt with within the sample period, 25 proofs were allocated and the average interval remained 11 weeks.

13.9 In the **Woolf Interim Report “Access to Justice” 1995** the average time from setting down to Proof was 40 weeks in London, an improvement from 1985/86 of 27 months found by the English Civil Justice Review in 1988.

### Table 18
Comparative Analysis - Average time between Allocation and Proof

<table>
<thead>
<tr>
<th>Statistical Source</th>
<th>Average Interval (Weeks)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Woolf Interim Report 1995</td>
<td>40</td>
</tr>
<tr>
<td>Cullen Report 1995</td>
<td>31</td>
</tr>
<tr>
<td>Pearson Commission 1978</td>
<td>26</td>
</tr>
<tr>
<td>Scottish Court Service Annual Report 1996</td>
<td>20</td>
</tr>
<tr>
<td>Scottish Commercial Actions Sample</td>
<td>11</td>
</tr>
</tbody>
</table>

**Continuity of Judicial Supervision**

14.1 The Coulsfield Working Party anticipated that the same judge should preside over all stages of a case, or at least the Preliminary and Procedural stages (para 7.2 p14). This philosophy is reflected in rule 47.2 and the corresponding Practice Note para 17(1).
APPENDIX 6.5.1

14.2 The nominated Supreme Court judge dealing with commercial cases on a priority basis for the first three years was Lord Penrose. His part-time support within the study period was from Lords Coulsfield and Cullen. Latterly Lord Cameron was available to replace Lord Cullen. The Supreme Court Rolls in January 1997 announced Lord Hamilton would take over as the new commercial judge. The handover took place gradually over two court terms. Their Lordships sit in adjacent courts. Lord Penrose’s Clerk of Court transferred to Lord Hamilton and Lord Coulsfield’s Clerk transferred to Lord Penrose. Continuity has been seen to be a key issue. All but the differences in personal styles of management have been eliminated, but the underlying philosophy of the rules remains. Study 2 (Appendix 6.5.2) continues the research.

14.3 The table below shows that within the study sample 87% of cases had hearings. Lord Penrose dealt exclusively with 83% of these actions and Lord Coulsfield exclusively with 6%. In the 17 cases where there was mixed judicial involvement, Lord Penrose presided over 66 out of the 97 hearings concerned (68%).

<table>
<thead>
<tr>
<th>Judge Presiding</th>
<th>Number of Cases</th>
<th>Percentage of Sample</th>
<th>Percentage of Hearings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lord Penrose exclusively</td>
<td>129</td>
<td>71.7</td>
<td>82.7</td>
</tr>
<tr>
<td>Lord Coulsfield exclusively</td>
<td>10</td>
<td>5.6</td>
<td>6.4</td>
</tr>
<tr>
<td>Lords Penrose/Coulsfield</td>
<td>10</td>
<td>5/6</td>
<td>6.4</td>
</tr>
<tr>
<td>Lords Penrose/Cullen</td>
<td>4</td>
<td>2.2</td>
<td>2.6</td>
</tr>
<tr>
<td>Lords Penrose/Coulsfield/Cullen</td>
<td>3</td>
<td>1.7</td>
<td>1.9</td>
</tr>
<tr>
<td>Total</td>
<td>156</td>
<td>86.8</td>
<td>100</td>
</tr>
</tbody>
</table>

(b) 97 Hearings - Mixed Judicial Supervision

<table>
<thead>
<tr>
<th>Judge Presiding</th>
<th>Number of Hearings</th>
<th>Percentage of Hearings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lord Cullen</td>
<td>9</td>
<td>9.3</td>
</tr>
<tr>
<td>Lord Coulsfield</td>
<td>22</td>
<td>22.7</td>
</tr>
<tr>
<td>Lord Penrose</td>
<td>66</td>
<td>68</td>
</tr>
</tbody>
</table>

14.4 During the study period, Lord Penrose issued 45 Opinions, 35 on Commercial Actions. Lord Coulsfield issued 4 Commercial opinions and Lord Cullen 1.

Professional Representation - Continuity and Specialism

15.1 The Commercial court expects that at all times representatives are fully prepared and in a position to participate in informed discussions on the factual and legal issues of their case. Continuity of representation is therefore important to maintain the impetus of the procedure and serve the client efficiently. However the Court has on occasion
been reluctant to postpone hearings due to unavailability of counsel particularly when the hearings have been timetabled weeks in advance.

15.2 An analysis was made of pursuers’ representation to identify any pattern of continuity. Since there were at times more than one defender it was difficult to determine from the process folders the representation of each defender at each hearing. For accuracy the analysis focussed on pursuers. Of the 156 cases with hearings 102 pursuers (65%) had the same representative appearing for them throughout. The results are tabled below.

Table 20  
Continuity of Pursuers’ Representation

<table>
<thead>
<tr>
<th>Number of Representatives Appearing per case</th>
<th>Number of Cases</th>
<th>Percentage of 156 Cases with Hearings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>102</td>
<td>65.4</td>
</tr>
<tr>
<td>2</td>
<td>38</td>
<td>24.4</td>
</tr>
<tr>
<td>3</td>
<td>13</td>
<td>8.3</td>
</tr>
<tr>
<td>4</td>
<td>2</td>
<td>1.3</td>
</tr>
<tr>
<td>5</td>
<td>1</td>
<td>0.6</td>
</tr>
<tr>
<td>Total</td>
<td>156</td>
<td>100</td>
</tr>
</tbody>
</table>

15.3 Early preparation is considered to be critical to the new procedure and the rules and hearings are designed to encourage this. This underlying philosophy had led to speculation that there would be an overwhelming involvement of solicitor-advocates in this area since they would normally see and prepare a case at an earlier stage than advocates. Analysis of process folders showed that there were 159 representatives involved in commercial actions - 15% solicitor-advocates, 20% Queen’s Counsel, and 65% advocates. Their caseloads were 16%, 25% and 59% respectively and this data is tabulated below.

15.4 Since there were multiple representations in certain cases, the total number of appearances was 493 - 250 for pursuers, 243 for defenders. The breakdown between pursuers and defenders is incorporated into the table below.

Table 21  
Scottish Commercial Actions - Appearances on the Commercial Roll

<table>
<thead>
<tr>
<th>Data</th>
<th>Solicitor-Advocates</th>
<th>Q.C.s</th>
<th>Advocates</th>
</tr>
</thead>
<tbody>
<tr>
<td>Numbers Appearing</td>
<td>24 (15%)</td>
<td>32 (20%)</td>
<td>103 (65%)</td>
</tr>
<tr>
<td>Cases Involved in</td>
<td>79 (16%)</td>
<td>122 (25%)</td>
<td>292 (59%)</td>
</tr>
<tr>
<td>- Pursuers</td>
<td>42</td>
<td>62</td>
<td>146</td>
</tr>
<tr>
<td>- Defenders</td>
<td>37</td>
<td>60</td>
<td>146</td>
</tr>
</tbody>
</table>
APPENDIX 6.5.1

15.5 Of the 24 solicitor-advocates 5 appeared for pursuers and defenders, 9 for defenders only, 10 for pursuers. Of the 32 Queen’s Counsel 20 appeared for pursuers and defenders, 9 for defenders only, 3 for pursuers.

15.6 The processes were examined to determine whether the new procedure in a specialised area had lead to a specialist Bar, that is a small cluster of representatives appearing for a large number of cases. In the study sample the majority (58%) of the representatives dealt with one or two cases on the Commercial Roll. However, there were 2 solicitor-advocates, 1 Queen’s counsel, and 3 advocates who had made appearances for more than 14 cases. The range of representation is tabled below.

Table 22
Scottish Commercial Actions - Appearances on the Commercial Roll

<table>
<thead>
<tr>
<th>No. of Cases</th>
<th>Solicitor/Advocate</th>
<th>QC</th>
<th>Advocate</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>14</td>
<td>10</td>
<td>38</td>
<td>62</td>
</tr>
<tr>
<td>2</td>
<td>4</td>
<td>2</td>
<td>24</td>
<td>30</td>
</tr>
<tr>
<td>3</td>
<td>2</td>
<td>6</td>
<td>13</td>
<td>21</td>
</tr>
<tr>
<td>4</td>
<td></td>
<td>3</td>
<td>12</td>
<td>15</td>
</tr>
<tr>
<td>5</td>
<td></td>
<td>6</td>
<td>6</td>
<td>12</td>
</tr>
<tr>
<td>6</td>
<td></td>
<td>1</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>7</td>
<td>1</td>
<td></td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>8</td>
<td></td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>9</td>
<td></td>
<td>2</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>10</td>
<td>1</td>
<td>2</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>11</td>
<td></td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>15</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>17</td>
<td></td>
<td>1</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>19</td>
<td>1</td>
<td></td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>Total</td>
<td>24</td>
<td>32</td>
<td>103</td>
<td>159</td>
</tr>
</tbody>
</table>

Agents Using the Commercial Roll

18.1 Solicitors’ firms using the Commercial Roll were also analysed. From the process folders, all 180 files had agents’ names noted for pursuers, 176 for defender; in 23 files no defenders’ agents were noted.

18.2 There were 63 agents handling commercial cases in court. Between them they represented 356 litigants. Of the total of 63, 8 represented only pursuers, 12 only defenders. Although 5 firms had prepared over 15 cases each for this procedure, the majority (75%) had prepared 6 cases or under. The table below indicates the caseloads of the firms.
Table 23
Scottish Commercial Actions - Agents Using the Commercial Roll

<table>
<thead>
<tr>
<th>Number of Cases Prepared</th>
<th>Number of Firms Preparing Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>11</td>
</tr>
<tr>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>4</td>
<td>7</td>
</tr>
<tr>
<td>5</td>
<td>5</td>
</tr>
<tr>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>7</td>
<td>3</td>
</tr>
<tr>
<td>8</td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>2</td>
</tr>
<tr>
<td>10</td>
<td>1</td>
</tr>
<tr>
<td>11</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>2</td>
</tr>
<tr>
<td>13</td>
<td>2</td>
</tr>
<tr>
<td>14</td>
<td></td>
</tr>
<tr>
<td>15</td>
<td>1</td>
</tr>
<tr>
<td>16</td>
<td>1</td>
</tr>
<tr>
<td>17</td>
<td></td>
</tr>
<tr>
<td>18</td>
<td>1</td>
</tr>
<tr>
<td>19</td>
<td>1</td>
</tr>
<tr>
<td>20</td>
<td></td>
</tr>
<tr>
<td>21</td>
<td>1</td>
</tr>
<tr>
<td>22</td>
<td></td>
</tr>
<tr>
<td>23</td>
<td>1</td>
</tr>
</tbody>
</table>

For example: 11 firms represented one case in the Commercial court
1 firm represented 23 cases

16.3 The pattern of representation for the 5 firms preparing more than 15 cases each was noted:

Table 24
Scottish Commercial Actions - Caseload Distribution
Five Firms Appearing Most Frequently on Commercial Roll

<table>
<thead>
<tr>
<th>Firm</th>
<th>Appearing for Pursuer</th>
<th>Appearing for Defender</th>
<th>Total Caseload of each Firm</th>
</tr>
</thead>
<tbody>
<tr>
<td>A</td>
<td>8</td>
<td>7</td>
<td>15</td>
</tr>
<tr>
<td>B</td>
<td>6</td>
<td>10</td>
<td>16</td>
</tr>
<tr>
<td>C</td>
<td>11</td>
<td>7</td>
<td>18</td>
</tr>
<tr>
<td>D</td>
<td>16</td>
<td>3</td>
<td>19</td>
</tr>
<tr>
<td>E</td>
<td>13</td>
<td>8</td>
<td>21</td>
</tr>
<tr>
<td>F</td>
<td>8</td>
<td>15</td>
<td>23</td>
</tr>
</tbody>
</table>
COMMERCIAL CAUSE PROCEDURE
RESEARCH REPORT APRIL 1996 - SEPTEMBER 1997

Annual Caseload September 1991 to September 1997

1.1 Study 1 (September 1994 to April 1996) was extended by Study 2 (April 1996 to September 1997) to complete a 3-year empirical evaluation of the new Commercial Cause Rules. The annual caseload continued to rise. It was anticipated that the initial high transfer rate from Sheriff Courts and the Ordinary Roll of the Court of Session would decline, but this did not in fact happen. Elections to transfer under Rule 47.10(1) continue at a steady rate, a measure of the credibility of the new procedure and preferences of parties.

Table 1

<table>
<thead>
<tr>
<th>September</th>
<th>Transferred</th>
<th>Initiated</th>
<th>Total Caseload</th>
</tr>
</thead>
<tbody>
<tr>
<td>1991-92</td>
<td></td>
<td></td>
<td>58</td>
</tr>
<tr>
<td>1992-93</td>
<td></td>
<td></td>
<td>42</td>
</tr>
<tr>
<td>1993-94</td>
<td></td>
<td></td>
<td>52</td>
</tr>
<tr>
<td>1994-95</td>
<td>48</td>
<td>93</td>
<td>141</td>
</tr>
<tr>
<td>1995-96</td>
<td>26</td>
<td>119</td>
<td>145</td>
</tr>
<tr>
<td>1996-97</td>
<td>28</td>
<td>139</td>
<td>167</td>
</tr>
<tr>
<td>1997-98</td>
<td>43</td>
<td>154</td>
<td>197</td>
</tr>
<tr>
<td>1998-99</td>
<td>25</td>
<td>170</td>
<td>195</td>
</tr>
</tbody>
</table>

Research Sample - Study 2

2.1 The second study sample ran consecutively to the first. The empirical data were extracted from interlocutory orders which the court produced for each case commencing within the successive 18 month period. Additional information was provided by the Depute Clerks to the Commercial Court in an attempt to replicate the fullest base for analysis. Apart from three cases on which there were no data, the second sample represents the full caseload of the Commercial court within the period. It is therefore a highly statistically significant sample.

2.2 In attempting to differentiate cases which were ongoing from those which had been disposed of, one problem immediately became apparent from the historical publication of interlocutors. A proportion of cases had not been the subject of court action for lengthy periods, apparently ‘falling asleep’ without parties informing the court of their status. These cases included sists, actions initiated but not called, and those which had previously indicated that settlement was imminent and therefore were not subject to court attention. After an investigative exercise by the Commercial Depute Clerk, 30 cases were taken off the court rolls on 5 June 1999, presumed settled. The analysis of disposals and live actions in the two Study samples corrects the anomalous exit date, replacing it with the date upon which court action ceased.
Table 2
Scottish Commercial Actions Analysis of Cases in Study 1 and Study 2

<table>
<thead>
<tr>
<th>Outcome</th>
<th>Cases Study 1</th>
<th>Cases Study 2</th>
<th>Study 1 %</th>
<th>Study 2 %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Judicial Disposals (including remits to the Ordinary Roll)</td>
<td>34</td>
<td>41</td>
<td>19</td>
<td>17</td>
</tr>
<tr>
<td>Settlements</td>
<td>59</td>
<td>153</td>
<td>33</td>
<td>62</td>
</tr>
<tr>
<td>Live Actions</td>
<td>87</td>
<td>52</td>
<td>48</td>
<td>21</td>
</tr>
<tr>
<td>Total Caseloads Examined</td>
<td>180</td>
<td>246</td>
<td>100 %</td>
<td>100 %</td>
</tr>
</tbody>
</table>

2.3 Although the proportion of judicial disposals was relatively consistent within both samples, a higher percentage of settlements was evident in the second Study.

Litigants on the Commercial Roll

3.1 An analysis of litigants was undertaken in both Studies.

Table 3
Scottish Commercial Actions - Litigants Study 1 and Study 2

<table>
<thead>
<tr>
<th>Litigant</th>
<th>Pursuer Study 1</th>
<th>Defender Study 1</th>
<th>Pursuer Study 2</th>
<th>Defender Study 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Limited Companies</td>
<td>83</td>
<td>75</td>
<td>109</td>
<td>110</td>
</tr>
<tr>
<td>Individuals</td>
<td>46</td>
<td>49</td>
<td>58</td>
<td>50</td>
</tr>
<tr>
<td>Property Companies</td>
<td>23</td>
<td>11</td>
<td>35</td>
<td>28</td>
</tr>
<tr>
<td>Partnerships</td>
<td>11</td>
<td>22</td>
<td>13</td>
<td>20</td>
</tr>
<tr>
<td>Public Bodies</td>
<td>3</td>
<td>17</td>
<td>10</td>
<td>18</td>
</tr>
<tr>
<td>Banks/Building Societies</td>
<td>11</td>
<td>7</td>
<td>8</td>
<td>5</td>
</tr>
<tr>
<td>Insurance Companies</td>
<td>3</td>
<td>8</td>
<td>8</td>
<td>9</td>
</tr>
<tr>
<td>Football Clubs</td>
<td>2</td>
<td>3</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

3.2 Once again the spread between Pursuers and Defenders was fairly similar within categories of litigant. Following the pattern of Study 1, partnerships appeared more often as defenders than pursuers. The move by public bodies and insurance companies towards the Commercial procedure as pursuers is noticeable. A new category for football clubs indicates a widening appeal of the new process.

Resolutions

4.1 Did the speed of resolution continue in the second 18-month period? To reflect the true disposal rate it was necessary to assume that cases taken off the court rolls in June 1999 had actually concluded at the time parties indicated that settlement was taking place.
Table 4
Scottish Commercial Actions - Analysis of Time of Commercial Roll

<table>
<thead>
<tr>
<th>Disposals within 3 months</th>
<th>Case Numbers Study 1</th>
<th>Case Numbers Study 2</th>
<th>Study 1 %</th>
<th>Study 2 %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Under 3 months</td>
<td>29</td>
<td>52</td>
<td>31</td>
<td>27</td>
</tr>
<tr>
<td>3-6 months</td>
<td>33</td>
<td>32</td>
<td>67</td>
<td>43</td>
</tr>
<tr>
<td>6-9 months</td>
<td>17</td>
<td>37</td>
<td>85</td>
<td>63</td>
</tr>
<tr>
<td>9-12 months</td>
<td>8</td>
<td>30</td>
<td>94</td>
<td>78</td>
</tr>
<tr>
<td>12-15 months</td>
<td>6</td>
<td>12</td>
<td>100</td>
<td>84</td>
</tr>
<tr>
<td>15-18 months</td>
<td>10</td>
<td></td>
<td></td>
<td>89</td>
</tr>
<tr>
<td>18-21 months</td>
<td>13</td>
<td></td>
<td></td>
<td>95</td>
</tr>
<tr>
<td>21-24 months</td>
<td>4</td>
<td></td>
<td></td>
<td>97</td>
</tr>
<tr>
<td>24-27 months</td>
<td>1</td>
<td></td>
<td></td>
<td>98</td>
</tr>
<tr>
<td>27-30 months</td>
<td>1</td>
<td></td>
<td></td>
<td>99</td>
</tr>
<tr>
<td>30-33 months</td>
<td>2</td>
<td></td>
<td></td>
<td>100</td>
</tr>
</tbody>
</table>

Within the first 18-month period 100% of disposals took place within 15 months, compared to 84% in the second sample. The slowing down of the range of disposals may be explained in a number of ways - by

- an increase in complex cases and issues within the second period
- the effect of the increasing workload on the resources available
- a fissure of resistance to judicial management through experience of counsel and parties
- a natural gravitation over time to established working practices
- an increase in late settlements which block available court time
- changes in judicial supervision
- the initial vigour of an experimental scheme, which dissipated slightly

Table 5
Average Time to Disposal Across Jurisdictions

<table>
<thead>
<tr>
<th>Comparative Studies</th>
<th>Average - Weeks to Disposal</th>
</tr>
</thead>
<tbody>
<tr>
<td>Woolf Interim Report Access to Justice 1995</td>
<td>163</td>
</tr>
<tr>
<td>Woolf Final Report 1996</td>
<td>136</td>
</tr>
<tr>
<td>Woolf Final Report 1996 - Commercial Court</td>
<td>100</td>
</tr>
<tr>
<td>Lord Cullen’s Review of Outer House 1995</td>
<td>89</td>
</tr>
<tr>
<td>Personal Injuries Study Scotland 1995 - Ordinary Roll</td>
<td>72</td>
</tr>
<tr>
<td>Sheriff Court Study 1997</td>
<td>41</td>
</tr>
<tr>
<td>Personal Injuries Study 1995 - Optional Procedure</td>
<td>36</td>
</tr>
<tr>
<td>Scottish Commercial Cause Procedure Study 1</td>
<td>26.6</td>
</tr>
<tr>
<td>Scottish Commercial Cause Procedure Study 2</td>
<td>34</td>
</tr>
</tbody>
</table>
Stages of Disposal

4.4 The initial Study revealed a high settlement pattern at an early stage, and this is compared to the findings within the second sample.

Table 6
Scottish Commercial Actions - Stages of Resolution - Study 1 and Study 2

<table>
<thead>
<tr>
<th>Stage</th>
<th>Study 1 Judicial Disposals</th>
<th>Study 2 Judicial Disposals</th>
<th>Study 1 Settlements</th>
<th>Study 2 Settlements</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before Calling</td>
<td>10</td>
<td>28</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Before Defences</td>
<td>8</td>
<td>2</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>Before 1st Preliminary hearing</td>
<td>1</td>
<td>6</td>
<td>5</td>
<td>22</td>
</tr>
<tr>
<td>1st Preliminary</td>
<td>2</td>
<td>2</td>
<td>7</td>
<td>12</td>
</tr>
<tr>
<td>2nd</td>
<td>2</td>
<td>8</td>
<td>7</td>
<td>11</td>
</tr>
<tr>
<td>3rd</td>
<td>2</td>
<td>3</td>
<td>3</td>
<td>9</td>
</tr>
<tr>
<td>4th</td>
<td>2</td>
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<td>5</td>
<td>3</td>
</tr>
<tr>
<td>5th</td>
<td>2</td>
<td>1</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>6th</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7th</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8th</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>10th</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Procedural hearing</td>
<td>3</td>
<td>2</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>After Procedural</td>
<td>1</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Before Debate</td>
<td></td>
<td></td>
<td></td>
<td>12</td>
</tr>
<tr>
<td>Debate</td>
<td>8</td>
<td>6</td>
<td>2</td>
<td>5</td>
</tr>
<tr>
<td>By Order</td>
<td>2</td>
<td>2</td>
<td>1</td>
<td>3</td>
</tr>
<tr>
<td>Before Proof</td>
<td>1</td>
<td>3</td>
<td>3</td>
<td>28</td>
</tr>
<tr>
<td>Proof</td>
<td>3</td>
<td>8</td>
<td>3</td>
<td>7</td>
</tr>
<tr>
<td>Total Cases</td>
<td>34</td>
<td>41</td>
<td>59</td>
<td>153</td>
</tr>
</tbody>
</table>

4.5 Condensing the table into more manageable format and converting case numbers to comparative percentages, the different patterns of resolution indicate a tendency towards later settlements compared to Study 1. Despite this slippage, it is still noticeable in the second Study that by the end of the Preliminary Hearing stage the majority of cases (58%) had settled.

Table 7
Scottish Commercial Actions - Stages of Resolution - Study 1 and Study 2

<table>
<thead>
<tr>
<th>Stage of Resolution</th>
<th>Study 1 All Disposals %</th>
<th>Study 2 All Disposals %</th>
<th>Study 1 Settlements %</th>
<th>Study 2 Settlements %</th>
</tr>
</thead>
<tbody>
<tr>
<td>Before Preliminary</td>
<td>28</td>
<td>30</td>
<td>29½ 75</td>
<td>33½ 58</td>
</tr>
<tr>
<td>Preliminary</td>
<td>40</td>
<td>27</td>
<td>46)</td>
<td>25)</td>
</tr>
<tr>
<td>Procedural</td>
<td>10</td>
<td>6</td>
<td>10</td>
<td>5</td>
</tr>
<tr>
<td>Debate</td>
<td>11</td>
<td>12</td>
<td>3</td>
<td>11</td>
</tr>
<tr>
<td>Pre-Proof</td>
<td>5</td>
<td>17</td>
<td>7</td>
<td>20</td>
</tr>
<tr>
<td>Proof</td>
<td>6</td>
<td>8</td>
<td>5</td>
<td>5</td>
</tr>
</tbody>
</table>
4.6 Although a higher proportion of cases were settled within Study 2, despite the increased caseload, actions were sustained by court resources for a longer period and to a later stage than in Study 1. This may indicate a less vigorous approach to directive management at the Preliminary Hearing stage or a diminution of co-operation between all parties.

4.7 Judicial resolutions indicated an increase in remits to the Ordinary Roll

**Table 8**

**Scottish Commercial Actions - Types of Judicial Resolution**

<table>
<thead>
<tr>
<th>Resolution</th>
<th>Study 1</th>
<th>Study 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Summary decree</td>
<td>9</td>
<td>6</td>
</tr>
<tr>
<td>Decree in Absence</td>
<td>8</td>
<td>6</td>
</tr>
<tr>
<td>Decree for Defender</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Dismissal</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>Decree for Pursuer</td>
<td>2</td>
<td>11</td>
</tr>
<tr>
<td>Remit to Ordinary Roll</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>Arbitration</td>
<td>1</td>
<td></td>
</tr>
</tbody>
</table>

**Preliminary Hearings**

5.1 Within the second study period 183 cases attended 512 Preliminary hearings, an average of 2.8 hearings per case, ranging between 1 and 8 hearings per case. This was compared to the first study period - 147 cases attended 401 hearings, an average of 2.7 Preliminary hearings per case, ranging between 1 and 12 hearings.

**Table 8**

**Scottish Commercial Actions - Preliminary Hearings Study 1 and Study 2**

<table>
<thead>
<tr>
<th>Preliminary Hearings held per Case</th>
<th>Number of Cases Study 1</th>
<th>Number of Cases Study 2</th>
<th>Percentage of Cases Study 1 (%)</th>
<th>Percentage of Cases Study 2 (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>37</td>
<td>38</td>
<td>25</td>
<td>21</td>
</tr>
<tr>
<td>2</td>
<td>28</td>
<td>50</td>
<td>19</td>
<td>27*</td>
</tr>
<tr>
<td>3</td>
<td>32</td>
<td>44</td>
<td>21</td>
<td>24*</td>
</tr>
<tr>
<td>4</td>
<td>23</td>
<td>26</td>
<td>15</td>
<td>14</td>
</tr>
<tr>
<td>5</td>
<td>18</td>
<td>12</td>
<td>12</td>
<td>7</td>
</tr>
<tr>
<td>6</td>
<td>6</td>
<td>8</td>
<td>4</td>
<td>4</td>
</tr>
<tr>
<td>7</td>
<td>3</td>
<td>2</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>8</td>
<td>3</td>
<td>2</td>
<td>2</td>
<td>1</td>
</tr>
<tr>
<td>9</td>
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<tr>
<td>10</td>
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<tr>
<td>11</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>2</td>
<td></td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Total cases</td>
<td>147 cases</td>
<td>183 cases</td>
<td>101%</td>
<td>99%</td>
</tr>
<tr>
<td>Total Prelim hearings</td>
<td>401 hearings</td>
<td>512 hearings</td>
<td></td>
<td></td>
</tr>
<tr>
<td>N.B. Total Study size</td>
<td>180 cases</td>
<td>246 cases</td>
<td>81% had Preliminary</td>
<td>74% had Preliminary</td>
</tr>
</tbody>
</table>
The increase in the number of hearings, affecting the resources of both the parties and Court, was not only due to the larger sample investigated. The increased workload was compounded by the tendency to hold more Preliminary Hearings per case in the second period. However, projecting the base of Preliminary Hearings in Study 1 to a base comparative with Study 2 indicates that, all being equal, 499 Preliminary hearings could have been anticipated, 13 hearings less than actually occurred. Therefore, correcting for different caseloads, the number of Preliminary Hearings increased insignificantly per case as far as the Court was concerned over the previous period - under 3%.

5.2 What is noticeable is the comparative drop in those cases having even one Preliminary Hearing (from 25% down to 21%). Referring back to Table 6 it becomes apparent that the higher rate of settlement before calling (rising from 10 cases to 28 cases) and before the first Preliminary Hearing (from 17 rising to 51), had a significant impact on the number of initial Preliminary Hearings required. If the same proportion of the Study 1 sample undergoing Preliminary Hearings (81%) had been replicated, 43 additional hearings could have been expected in Study 2. The fact that a larger proportion settled at a very early stage saved court time.

Within the second 18-month period therefore, raising an action in the Commercial Court has affected parties’ decisions to settle, without court time being booked or taken up.

5.3 Equally notable is the proportionate rise in cases progressing through two or three Preliminary hearings (respectively from 19% up to 27%, and 21% up to 24%). This means that in

| Study 1 | 40% | had | 2 or 3 Preliminary Hearings whereas in |
| Study 2 | 51% | had | 2 or 3 Preliminary Hearings |

This may indicate a change in behaviour on the part of the litigants, representatives, the court, or the interplay of all three in a new game of group dynamics through experience. A check was made to see if behavioural patterns were mirrored in the breakdown of two types of Preliminary hearing.

5.4 Types of Preliminary Hearing - Study 2

(a) Continued Preliminary Hearings: Interlocutors revealed that 111 cases had 169 “Continued Preliminary Hearings” with no specific published orders. This represented an average of 1.5 continuation hearings per case, ranging between 1 and 4 hearings. As noted in Study 1, understanding between parties and judges were not always reflected in formal interlocutory orders. However, judicial notes taken contemporaneously promoted consistent application and adherence to agreements made in open court. Substantive notes were also taken by agents at each hearing.

(b) Directive Preliminary Hearings: For 161 cases, 343 hearings also resulted in directive interlocutors, detailing orders and target dates for parties’ disclosure and preparation. These dates were observed to be set with the agreement of all parties, in conjunction with judicial timetables and representatives’ diaries. The outcome was an average of 2.1 directive Preliminary hearings per case, ranging between 1 and 6 directive hearings per case.

1 401/147 x 183 =499
Table 9
Scottish Commercial Actions - Study 2 Preliminary Hearings

<table>
<thead>
<tr>
<th>Number of Hearings Experienced</th>
<th>Cases with Directive Hearings</th>
<th>Cases with Continued Hearings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>59</td>
<td>70</td>
</tr>
<tr>
<td>2</td>
<td>46</td>
<td>26</td>
</tr>
<tr>
<td>3</td>
<td>39</td>
<td>13</td>
</tr>
<tr>
<td>4</td>
<td>11</td>
<td>2</td>
</tr>
<tr>
<td>5</td>
<td>5</td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>7</td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td>161 cases at 343 hearings</td>
<td>111 cases at 169 hearings</td>
</tr>
</tbody>
</table>

5.5 Behavioural changes: Over the second period a substantially lower proportion of Preliminary hearings resulted in directive interlocutors.

- Study 1 85% of hearings were directive, 15% were continuations
- Study 2 67% of hearings were directive, 33% were continuations

The diminution of published directions and the allowance of more ‘continuations’ could reflect
- an increase in informal agreements to co-operate
- rapport between experienced representatives and a one-docket judge
- adaptive style of judicial management over time
- mixed judicial involvement in the history of case
- incomplete preparation or compliance by representatives
- late exchange and lodgement of documents and information
- an increase in informal agreements to cancel and postpone hearings
- learned reliance on judicial acceptance of delays in preparation
- incongruence of speed with required disclosure
- a exploratory drift towards traditional party autonomy

The increase in cases with 2 or 3 Preliminary Hearings (para 5.3) may indicate that lack of published decisive orders encouraged, or at least did not discourage, repetitive appearances, although this conclusion is speculative and therefore contentious. It may equally be indicative of normal behaviour, when the adrenaline of the initial study period had abated.

**Procedural Hearings**

5.6 Within the study sample, 25% of cases (62) were dealt with at 114 Procedural hearings, an average of 1.8 hearings per case. As with Study 1, the majority of cases dealt with at this stage had 1 hearing, but a substantially larger amount had 2 Procedural hearings. Two cases shared 9 ‘Procedural’ hearings although it is conceded that the successive interlocutors may be wrongly marked due to changes in administrative staff.
Table 9
Scottish Commercial Actions - Procedural Hearings - Study 1 and Study 2

<table>
<thead>
<tr>
<th>Number of Hearings Experienced</th>
<th>Study 1 Procedural Hearings</th>
<th>Study 2 Procedural Hearings</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>34 (83%)</td>
<td>35 (56%)</td>
</tr>
<tr>
<td>2</td>
<td>4 (10%)</td>
<td>19* (31%)</td>
</tr>
<tr>
<td>3</td>
<td>2</td>
<td>3</td>
</tr>
<tr>
<td>4</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>6</td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Totals</td>
<td>41 cases at 62 hearings</td>
<td>62 cases at 114 hearings</td>
</tr>
<tr>
<td>Average hearing per case</td>
<td>1.5</td>
<td>1.8</td>
</tr>
<tr>
<td>Percentage of Study Sample</td>
<td>23% had Procedural hearings</td>
<td>25% had Procedural hearings</td>
</tr>
</tbody>
</table>

5.6 The number of hearings almost doubled in the second period, although cases affected did not increase proportionately. The rising workload resulted from more Procedural hearings per case, significantly 22% more than could have been anticipated from the previous Study.²

5.7 The increase in Procedural hearings arguably corroborates the slippages noted with Preliminary hearings. Extending the number of hearings per case undoubtedly contributed to the slowing down of the range of disposals (para 4.2) and the longer average time to completion (para 4.3, Table 5).

5.8 The extra hearings per case did not seem to contribute to a higher proportion of settlements or judicial resolutions:

By Procedural Stage

<table>
<thead>
<tr>
<th>Study 1</th>
<th>Study 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>78% of disposals</td>
<td>63% disposals</td>
</tr>
<tr>
<td>85% of settlements</td>
<td>68% settlements</td>
</tr>
</tbody>
</table>

Debates

5.9 Double the number of debates were fixed in the second period although a higher proportion were discharged. The average interval between allocation and hearing was 7 weeks, comparable to the previous period. The range was between 1 and 8 weeks, peaking at similar intervals.

² 62/41 x 62 = 93 could have been anticipated if both samples were proportionately consistent
Table 10
Scottish Commercial Actions - Weeks to Allocation of Debates Study 1 and 2

<table>
<thead>
<tr>
<th>Interval Between Allocation and Hearing</th>
<th>Hearings Allocated Study 1</th>
<th>Hearings Allocated Study 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>2</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>4</td>
<td>8</td>
<td>2</td>
</tr>
<tr>
<td>5</td>
<td>1</td>
<td>5</td>
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<tr>
<td>6</td>
<td></td>
<td>1</td>
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<tr>
<td>7</td>
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<td>5</td>
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<tr>
<td>8</td>
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</tr>
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<td>12</td>
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</tr>
<tr>
<td>13</td>
<td></td>
<td>5</td>
</tr>
<tr>
<td>14</td>
<td>1</td>
<td>4</td>
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<tr>
<td>15</td>
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<td></td>
</tr>
<tr>
<td>16</td>
<td></td>
<td>2</td>
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<tr>
<td>17</td>
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<td>3</td>
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<tr>
<td>18</td>
<td></td>
<td>2</td>
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<tr>
<td>19</td>
<td></td>
<td>3</td>
</tr>
<tr>
<td>20</td>
<td></td>
<td>1</td>
</tr>
<tr>
<td>23</td>
<td>1</td>
<td>4</td>
</tr>
<tr>
<td>Total Debates Fixed</td>
<td>31 Debates</td>
<td>63 Debates</td>
</tr>
<tr>
<td>Discharged hearings</td>
<td>6 = 22%</td>
<td>32 = 50%</td>
</tr>
</tbody>
</table>

5.10 For those cases which proceeded to a hearing, the average time at Avizandum, before publication of judicial opinion, was three and a half weeks. Looking at rates of disposal, cases were not consistently extended by Debate hearings or periods at Avizandum. The longest case - 154 weeks to resolution - was allocated a Debate within 4 weeks of the previous hearing, and at Avizandum for 2 weeks.

Proofs / Proofs Before Answer

5.11 **Proofs Allocated:** Within the second study sample 74 Proofs were allocated, 47 of which (64%) were discharged before the hearing, compared to 25 allocated in the first sample, 60% of which were discharged.

5.12 **Days Allocated:** Not only did the number of Proofs increase, but more extensive hearings were allocated in Study 2. In particular, four cases were allocated hearings of 16, 24 and 38 days. Twelve cases were allocated 8-day Proofs. If Proofs had not been discharged court time would have more than trebled in this category, heavily impinging on the resources of litigants and courts.
Table 11
Scottish Commercial Actions - Allocation of Proof Study 1 and Study 2

<table>
<thead>
<tr>
<th>Proof Days Allocated</th>
<th>Number of Cases Allocated Proofs Study 1</th>
<th>Number of Cases Allocated Proofs Study 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 days</td>
<td>2</td>
<td>9</td>
</tr>
<tr>
<td>3 days</td>
<td>1</td>
<td>13</td>
</tr>
<tr>
<td>4 days</td>
<td>9</td>
<td>14</td>
</tr>
<tr>
<td>5 days</td>
<td>2</td>
<td>4</td>
</tr>
<tr>
<td>6 days</td>
<td>5</td>
<td>9</td>
</tr>
<tr>
<td>7 days</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>8 days</td>
<td>3</td>
<td>12</td>
</tr>
<tr>
<td>9 days</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>10 days</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>11 days</td>
<td>1</td>
<td>5</td>
</tr>
<tr>
<td>16 days</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>24 days</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>38 days</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>Total Proofs</td>
<td>25</td>
<td>74</td>
</tr>
<tr>
<td>Proof Days allocated</td>
<td>135</td>
<td>465</td>
</tr>
</tbody>
</table>

5.13 In Study 1, 135 Proof days were allocated for 25 cases, an average of 5.5 days. In Study 2, 465 Proof days were allocated for 74 days, an average of 6 days.

Excluding 4 extended hearings (16, 16, 24, and 38 days) the average number of days allocated was 5.3 per proof in Study 2, favourably comparable with the first period.

5.14 Almost 50% of cases in Study 2 were allocated Proofs lasting 4 days or under, with the majority lasting under 8 days, a trend which continues from the first period.

Table 12
Scottish Commercial Actions - Proof Days Allocated Study 2

<table>
<thead>
<tr>
<th>Number of Cases</th>
<th>Percentage of Cases</th>
<th>Proof Days Allocated</th>
</tr>
</thead>
<tbody>
<tr>
<td>36</td>
<td>49</td>
<td>4 days or under</td>
</tr>
<tr>
<td>27</td>
<td>36</td>
<td>5 - 8 days</td>
</tr>
<tr>
<td>7</td>
<td>9</td>
<td>9 - 12 days</td>
</tr>
<tr>
<td>2</td>
<td>3</td>
<td>16 days</td>
</tr>
<tr>
<td>1</td>
<td>1</td>
<td>24 days</td>
</tr>
<tr>
<td>1</td>
<td>1</td>
<td>38 days</td>
</tr>
</tbody>
</table>

5.15 Weeks to Allocation: The quicker allocation of Proofs compared to other court rolls was a marked feature of the Commercial Court in Study 1. An 11-week average was well within the 20-week target period set by Scottish Court Service for Proofs on the Ordinary Roll lasting 4 days or less. It compares even more favourably with the average allocation time for all Proofs in the Supreme Court, which the Cullen Review showed was 31 weeks.
In Study 2 an average of 14 weeks to a Proof hearing was noted, although the potential caseload had in fact more than trebled within the sample (para 5.12). Very likely this is due to the growing practice to allocation Proof to a different judge rather than lose momentum. Mixed judicial involvement in this respect was therefore justified - speedy resolution was considered paramount. Using the target parameters set by Scottish Court Service, Commercial Proofs lasting 4 days or under were allocated court time within an 11-week average in Study 2. Given the larger number of Proofs heard in Study 2, the timescale was consistently controlled.

5.16 Avizandum: The average length of time at Avizandum for 16 cases was 7 weeks, ranging from 2.5 to 16 weeks.

By Order Hearings

5.17 More extensive use was made of By Order Hearings in the second period.

- In Study 1 26 cases had 43 hearings, 14% of 1st sample
- In Study 2 79 cases had 110 hearings, 32% of 2nd sample

Table 13
Scottish Commercial Actions - By Order Hearings Study 1 and Study 2

<table>
<thead>
<tr>
<th>Number of By Order Hearings per Case</th>
<th>Number of Cases Study 1</th>
<th>Number of Hearings Study 1</th>
<th>Number of Cases Study 2</th>
<th>Number of Hearings Study 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>16</td>
<td>16</td>
<td>31</td>
<td>31</td>
</tr>
<tr>
<td>2</td>
<td>4</td>
<td>8</td>
<td>18</td>
<td>36</td>
</tr>
<tr>
<td>3</td>
<td>5</td>
<td>15</td>
<td>16</td>
<td>48</td>
</tr>
<tr>
<td>4</td>
<td>1</td>
<td>4</td>
<td>5</td>
<td>20</td>
</tr>
<tr>
<td>5</td>
<td>2</td>
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<tr>
<td>8</td>
<td>1</td>
<td>1</td>
<td>1</td>
<td>8</td>
</tr>
<tr>
<td>Totals</td>
<td>26</td>
<td>43</td>
<td>79</td>
<td>191</td>
</tr>
<tr>
<td>Study Sample</td>
<td>180</td>
<td>246</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Percentage of Sample</td>
<td>14%</td>
<td>32%</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Some hearings marked as By Order may have been erroneously named, as they appeared from interlocutors to be directive at a preliminary stage. Since new judges became involved with new Depute Clerks of Court, it is possible that some hearings were misnamed. But as in the first period, the majority of By Order hearings took place between Debate and Proof, used for the most part as a pre-proof review to check preparation for and commitment to Proof. A high settlement rate is shown at this time (20% para 4.5), compared to the first Study (7%).

Motion Roll

5.18 The number of Motion Roll hearings requiring attendance also greatly increased during the second study period, attributable to a higher proportion of parties requesting court time.
In Study 1 49 hearings were held for 27 cases - 15 % of the 1st sample
In Study 2 140 hearings were held for 86 cases - 35 % of the 2nd sample

Motion roll hearings are called at the instigation of parties, and further investigation revealed disparate reasons behind the appearances.

5.19 The number of interlocutors issued in response to Motions without hearings also changed - 268 were issued for 147 cases. This compares to 61 interlocutors issued in response to 29 unstarrd motions in the first period. The increase in what are virtually uncontested requests for court order requires further investigation, but the decrease in Preliminary hearings, particularly Continued Preliminary Hearings, may indicate inter-party and court agreement to discharge or postpone hearings without appearance. The rise in uncontested motions may indicate an ethos of mutual indulgence between representatives, indicated by Lord Cullen in the 1995 review of the Ordinary Roll. Further analysis of the motions will be required.

Ex Proprio Motu Interlocutors

5.20 The use of these interlocutors increased, but the proportion of the sample using them decreased.

<table>
<thead>
<tr>
<th>Study</th>
<th>No. Interlocutors</th>
<th>No. Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Study 1</td>
<td>41</td>
<td>55 cases</td>
</tr>
<tr>
<td>Study 2</td>
<td>92</td>
<td>68 cases</td>
</tr>
</tbody>
</table>

They were used mainly for the discharge of hearings, continuations and late lodgement of documents at all stages.

Judicial Activity

6.1 To establish any change in the pattern of judicial management the number of cases in each category of hearings was analysed in both study periods.

Table 14
Scottish Commercial Actions - Cases Involved in Hearings and Orders - Study 2

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>59</td>
<td>70</td>
<td>35</td>
<td>31</td>
<td>57</td>
<td>84</td>
<td>40</td>
</tr>
<tr>
<td>2</td>
<td>46</td>
<td>26</td>
<td>19</td>
<td>18</td>
<td>18</td>
<td>29</td>
<td>20</td>
</tr>
<tr>
<td>3</td>
<td>39</td>
<td>13</td>
<td>3</td>
<td>16</td>
<td>4</td>
<td>18</td>
<td>5</td>
</tr>
<tr>
<td>4</td>
<td>11</td>
<td>2</td>
<td>2</td>
<td>5</td>
<td>3</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>5</td>
<td>5</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>6</td>
<td>1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>7</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>8</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total cases Study 2</td>
<td>161</td>
<td>111</td>
<td>62</td>
<td>79</td>
<td>86</td>
<td>147</td>
<td>68</td>
</tr>
<tr>
<td>Total cases Study 1</td>
<td>147</td>
<td>28</td>
<td>44</td>
<td>26</td>
<td>39</td>
<td>29</td>
<td>40</td>
</tr>
<tr>
<td>Differences</td>
<td>+ 9.5 %</td>
<td>+ 296 %</td>
<td>+ 41 %</td>
<td>+ 204 %</td>
<td>+ 120 %</td>
<td>+ 407 %</td>
<td>+ 70 %</td>
</tr>
</tbody>
</table>

* For example, 59 cases had 1 Preliminary Directive hearing, 46 cases had 2 Preliminary Directive hearings
6.2 The sample size increased 36% from 180 in Study 1 to 246 in Study 2. Proportionately more cases were therefore allocated Hearings and subject to interlocutory orders in the second period. The exception to this trend was Directive Preliminary Hearings which were proportionately less than in the initial study period. As noted previously (para 4.2) explanations require further research.

6.3 The mix of hearings and orders was investigated to ascertain
(a) if the increase in case numbers was the sole cause of increased caseload overall
(b) a different pattern of management by hearings was detectable

Table 15
Scottish Commercial Actions - Hearings and Orders - Study 2

<table>
<thead>
<tr>
<th>Number of Hearings per Case</th>
<th>Preliminary Directive Hearings</th>
<th>Preliminary Continuation Hearings</th>
<th>Procedural Hearings</th>
<th>By Order Hearings</th>
<th>Motion Roll Hearings</th>
<th>Unstarred Motions</th>
<th>Ex Propio Motu Orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>59</td>
<td>70</td>
<td>35</td>
<td>31</td>
<td>57</td>
<td>84</td>
<td>40</td>
</tr>
<tr>
<td>2</td>
<td>92</td>
<td>52</td>
<td>38</td>
<td>36</td>
<td>36</td>
<td>58</td>
<td>40</td>
</tr>
<tr>
<td>3</td>
<td>117</td>
<td>39</td>
<td>9</td>
<td>48</td>
<td>12</td>
<td>54</td>
<td>15</td>
</tr>
<tr>
<td>4</td>
<td>44</td>
<td>8</td>
<td>8</td>
<td>20</td>
<td>12</td>
<td>36</td>
<td>9</td>
</tr>
<tr>
<td>5</td>
<td>25</td>
<td></td>
<td>6</td>
<td>24</td>
<td>6</td>
<td>6</td>
<td>5</td>
</tr>
<tr>
<td>6</td>
<td>6</td>
<td>6</td>
<td>24</td>
<td>6</td>
<td>6</td>
<td>6</td>
<td>6</td>
</tr>
<tr>
<td>7</td>
<td>14</td>
<td>7</td>
<td>14</td>
<td>14</td>
<td>14</td>
<td>14</td>
<td>14</td>
</tr>
<tr>
<td>8</td>
<td>8</td>
<td></td>
<td>8</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>9</td>
<td>18</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Hearings/Orders Study 2</td>
<td>343</td>
<td>169</td>
<td>114</td>
<td>191</td>
<td>140</td>
<td>268</td>
<td>114</td>
</tr>
<tr>
<td>Hearings/Orders Study 1</td>
<td>341</td>
<td>60</td>
<td>52</td>
<td>43</td>
<td>49</td>
<td>61</td>
<td>41</td>
</tr>
</tbody>
</table>

6.3 It is apparent that the mix of judicial hearings and orders has also altered over time. The increase in By Order hearings may partially be explained as mis-named Preliminary hearings when new administrative staff were trained. However, the increase in sample size (up 36% from 180 to 249 cases) cannot fully explain the increase in all types of hearings and orders in the second study period.

Table 16
Differences Between Studies 1 and 2 - Hearings/Orders and Case Numbers

<table>
<thead>
<tr>
<th>Differences Between Study 1 and Study 2</th>
<th>Preliminary Directive Hearings</th>
<th>Preliminary Continuation Hearings</th>
<th>Procedural Hearings</th>
<th>By Order Hearings</th>
<th>Motion Roll Hearings</th>
<th>Unstarred Motions</th>
<th>Ex Propio Motu Orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hearings/Orders</td>
<td>- 0.59%</td>
<td>+181 %</td>
<td>+ 54 %</td>
<td>+ 344 %</td>
<td>+186 %</td>
<td>+ 339 %</td>
<td>+ 178 %</td>
</tr>
<tr>
<td>Cases</td>
<td>+ 9.5 %</td>
<td>+ 296 %</td>
<td>+ 41 %</td>
<td>+ 204 %</td>
<td>+120 %</td>
<td>+ 407 %</td>
<td>+ 70 %</td>
</tr>
</tbody>
</table>
6.4 The increase in cases in each category also cannot fully explain the differences between Study 1 and Study 2. The conclusion is that proportionately more cases experienced proportionately more hearings and orders in the second sample. Does this indicate:

- resistance to caseflow management requiring more appearances
- lack of co-operation – with each other and court
- increased experience of agents and counsel
- mutual indulgence in lodging unopposed unstarred motions
- fee-building
- weakening judicial continuity
- the pressure of increased workload, particularly extra proofs
- decrease in early directions - slackening of positive control
- slippage towards the standard practice of party autonomy – the local legal culture

6.5 Hearings and Orders per case were compared.

**Table 17**

Scottish Commercial Actions – Hearings per Case – Study 1 and Study 2

<table>
<thead>
<tr>
<th>Hearings and Cases</th>
<th>Preliminary Directive Hearings</th>
<th>Preliminary Continuation Hearings</th>
<th>Procedural Hearings</th>
<th>By Order Hearings</th>
<th>Motion Roll Hearings</th>
<th>Unstarred Motions</th>
<th>Ex Propio Motu Orders</th>
</tr>
</thead>
<tbody>
<tr>
<td>Study 2 Hearings</td>
<td>343</td>
<td>169</td>
<td>114</td>
<td>191</td>
<td>140</td>
<td>268</td>
<td>114</td>
</tr>
<tr>
<td>Study 2 Cases</td>
<td>161</td>
<td>111</td>
<td>62</td>
<td>79</td>
<td>86</td>
<td>147</td>
<td>68</td>
</tr>
<tr>
<td>Hearings per Case</td>
<td>2.1</td>
<td>1.5</td>
<td>1.8</td>
<td>2.4</td>
<td>1.6</td>
<td>1.8</td>
<td>1.7</td>
</tr>
<tr>
<td>Study 2</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Study 1 Hearings</td>
<td>341</td>
<td>60</td>
<td>52</td>
<td>43</td>
<td>49</td>
<td>61</td>
<td>41</td>
</tr>
<tr>
<td>Study 1 Cases</td>
<td>147</td>
<td>28</td>
<td>44</td>
<td>26</td>
<td>39</td>
<td>29</td>
<td>40</td>
</tr>
<tr>
<td>Hearings per Case</td>
<td>2.3</td>
<td>2.1</td>
<td>1.2</td>
<td>1.6</td>
<td>1.2</td>
<td>2.1</td>
<td>1</td>
</tr>
<tr>
<td>Study 1</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

6.6 Preliminary Hearings and Unstarred Motions were the only types in which a lower number per case was found in the second period. The collateral increase in By Order averages may be further evidence that some hearings may have been mis-named. By taking an average of hearings per case across the three anomalous categories we can see that number of hearings per case is steady over both Studies. Therefore the anomalies shown could merely be explained by administrative errors in categorising different hearings. Further investigation is required to ascertain the prevalence of misnamed hearings.
6.7 The average rose for both Procedural Hearings (from 1.2 to 1.8) and Starred Motion Roll hearings (from 1.2 to 1.6). The possible reasons are marked in paragraph 6.4.

6.8 Although the number of Unstarred Motions also rose dramatically in the second period, the average per case dropped, indicating that the increase in cases could comfortably account for the number of motions within the period.

6.9 It should be noted also that the smaller number of cases in some categories in Study 1 could have distorted predictable outcome, and it is only when the rules are bedded into established practice that more reliable and realistic behavioural patterns are detected.

**Judicial Continuity**

7.1 Over the second 18-month Study period the nominated full-time judge for Commercial causes remained Lord Penrose, with support during the study period from Lord Coulsfield, Lord Hamilton and Lord Macfadyen.

7.2 Lord Hamilton’s involvement gradually increased during the second period, anticipating his appointment as full-time judge on Commercial causes three years after commencement of the new procedure. Lord Penrose remained as one of the part-time judges after three years.

7.3 During the hand-over period, Lord Penrose’s Depute Clerk of Court assisted Lord Hamilton. Subsequently three Depute Clerks were trained to assist Commercial judges as required, although other court duties have also been undertaken.

7.4 Judicial exclusivity throughout the lifetime of a court case is a fundamental concept in the judicial docket type of caseflow management. Continuity promotes consistency of analysis, interpretation and application of the rules. Additionally the judge ‘grows with the case’ avoiding repetition of background detail which wastes unnecessary court time, and therefore expense. Personal judicial notes and recollection of previous meetings support the gold thread of consistency. Lack of continuity may be exploited tactically by some parties to add delay and expense to proceedings.

7.5 In Study 1, the majority of cases (83%) were exclusively supervised by the full time judge, who also superintended 68% of other hearings. In the second period 77% of cases were supervised exclusively by one of four Commercial judges. This means that the golden thread of consistency was present in the majority of cases, although four styles of management underpinned the discretionary nomination of hearings and directive orders. This may be an explanation for the disparate mix of hearings between the two samples.

7.6 The full-time judge exclusively dealt with 53% of cases and was involved in 13% of others. As Study 2 covered a transitional period, it is notable that his successor dealt with 17% cases exclusively and was involved in 19% of others. The experience and expertise was continued, although styles of management were inevitably subjective.
Table 18
Scottish Commercial Actions - Judicial Continuity – Study 1 and Study 2

<table>
<thead>
<tr>
<th>Judge for Duration of Case</th>
<th>Study 2</th>
<th>Study 1</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Percentage of Cases Exclusive Judge</td>
<td>Percentage of Cases Exclusive Judge</td>
</tr>
<tr>
<td>Lord Penrose</td>
<td>53.2 %</td>
<td>82.7 %</td>
</tr>
<tr>
<td>Lord Hamilton</td>
<td>17.3 %</td>
<td></td>
</tr>
<tr>
<td>Lord Coulspfield</td>
<td>4.8 %</td>
<td>6.4 %</td>
</tr>
<tr>
<td>Lord Macfadyen</td>
<td>1.7 %</td>
<td></td>
</tr>
<tr>
<td>Mixed Judicial Involvement</td>
<td>22.9 %</td>
<td>10.9 %</td>
</tr>
</tbody>
</table>

7.7 From the above it is clear that by the end of Study 2 the increasing workload of the Commercial Court (both case numbers and hearings) impacted on judicial continuity – 23% of cases were subject to mixed judicial and administrative involvement. It was observed that cases passed to other Commercial judges to save waiting for court time when a judge’s timetable could not accommodate an early hearing. However, lack of familiarity and mix of judicial styles may have been a factor in the conclusion drawn earlier that proportionately more cases experienced proportionately more hearings and orders in the second sample (para. 6.4).

7.8 The average time to disposal for cases which had been subject to mixed judicial involvement was 54 weeks, well in excess of the overall average of 34 weeks (see para 4.3 Table 5). It is clear therefore that mixed judicial involvement slowed down resolution and may have contributed to extra hearings and orders.

7.9 It should be noted that even this extended disposal time in the Scottish Commercial Court is still twice times as fast as the Commercial Court in London (100 weeks), and much faster than the Ordinary Roll in the Court of Session. It does not compare as favourably with the results of a Sheriff Court study in 1997 (47 weeks) although cases which had been sisted were excluded from that study sample, distorting the comparative base.

Booking Court Time – Discharged Hearings

8.1 The court week is divided into 15-minute slots, combinations of which are allocated by negotiation and agreement. The Commercial judges’ diaries are computerised and networked, accessible to Commercial Depute Clerks during the course of a hearing. Apart from sists, no party leaves the Commercial court without a definite time and date agreed and appointed for their next hearing. There is no time wasted queuing in court corridors waiting for a judge to become available. Consequently senior legal and commercial representatives attend the Commercial court.

8.2 Court timetables for the Ordinary Roll in the Court of Session are overbooked eight times judicial availability to compensate for late discharge of hearings. Since the credibility of the Commercial court depends, in part, on the ability to allocate specific time efficiently and dependably, there is no overbooking. Consequently the disruption of discharged hearings is more profound than on the Ordinary Roll. Late cancellations represent wasted opportunities for other clients. While Commercial judges can revert to the main judicial
pool, in an extended caseflow management system, judicial time would be lost. However, if late discharge is due to settlement, lost time may still be diagnosed as 'productive'.

8.3 To ascertain the severity of disruption, an analysis of cancelled hearings was undertaken – by type of hearing, amount of warning given and reason. Statistics produced internally by the Depute Clerks indicate that the problem is a continuing concern, particularly for Proofs and Debates. Judicial days are allocated, only to be wasted at the last minute.

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Proofs discharged</td>
<td>72%</td>
<td>80%</td>
<td>55%</td>
</tr>
<tr>
<td>Debates discharged</td>
<td>35%</td>
<td>53%</td>
<td>51%</td>
</tr>
</tbody>
</table>

8.4 Hearings can be discharged without court appearance by agreement of all parties, with or without the enrolment of a formal motion (Ex Proprio Motu) or by uncontested Motion of one party (Unstarred Motion). Although court time is wasted if this is done at a late stage, there is no court fee chargeable. Court fees are paid retrospectively, as on the Ordinary Roll, and therefore there is no financial investment in keeping the court informed. Professional fees are presumably charged for preparation work.

8.5 In the second study period a high proportion of cancellations were by Ex Proprio Motu interlocutors, some by Unstarred Motions.

<table>
<thead>
<tr>
<th>Table 19</th>
<th>Scottish Commercial Actions – Discharged Hearings, Study 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>Hearing Discharged</td>
<td>Ex Proprio Motu in Advance of Hearing</td>
</tr>
<tr>
<td></td>
<td>No. Discharged</td>
</tr>
<tr>
<td>Preliminary</td>
<td>11</td>
</tr>
<tr>
<td>Procedural</td>
<td>5</td>
</tr>
<tr>
<td>Debate</td>
<td>2</td>
</tr>
<tr>
<td>By Order</td>
<td>11</td>
</tr>
<tr>
<td>Proof</td>
<td>15</td>
</tr>
<tr>
<td>Total discharged</td>
<td>44</td>
</tr>
</tbody>
</table>

* 13 discharged on the day **16 discharged on the day

8.5 The majority of clients (73%) gave the Commercial court very little notice of withdrawal, leaving the court with no option but to issue an interlocutor on the day a hearing was scheduled. This was particularly evident for Preliminary and By Order hearings, generally for a continuation. It is obvious therefore that parties and/or representatives agreed to postpone a high proportion of these hearings, and the court had to concur. It seems that an element of mutual indulgence is involved.

8.6 The majority of discharges for Debates and Proofs were during an appearance on the day scheduled – 131 Proof days were lost without warning, among them two booked for 20 and 38 days. There can only be speculation as to how many of these hearings were initially attended by clients, witnesses and experts. Although it is recognised that parties can become involved in a strategy of brinkmanship, undoubtedly court-door syndrome - the triumph of realism over ambition - promotes some settlements at the point of no return, the day the Proof
is about to commence. Table 7 shows that 25% of settlements took place just before or at Proof. Even with intensive judicial involvement and, at times, heavy hints, there seems to be little that a court can do to bring about this psychological shift in the minds of litigants without becoming actively involved in American-style Settlement Conferences.

Table 20
Scottish Commercial Actions – Notice Before Discharging Hearings, Study 2

<table>
<thead>
<tr>
<th>Notice Given to Court</th>
<th>Preliminary Hearing</th>
<th>Procedural Hearing</th>
<th>Debate</th>
<th>By Order Hearing</th>
<th>Proof</th>
<th>Totals</th>
</tr>
</thead>
<tbody>
<tr>
<td>On the day</td>
<td>62</td>
<td>26</td>
<td>21</td>
<td>36</td>
<td>19</td>
<td>164</td>
</tr>
<tr>
<td>Less than 1 week</td>
<td>1</td>
<td>1</td>
<td>3</td>
<td>5</td>
<td>3</td>
<td>13</td>
</tr>
<tr>
<td>1 week</td>
<td>5</td>
<td>2</td>
<td>1</td>
<td>5</td>
<td>4</td>
<td>17</td>
</tr>
<tr>
<td>2 weeks</td>
<td>4</td>
<td>2</td>
<td>1</td>
<td>7</td>
<td>14</td>
<td></td>
</tr>
<tr>
<td>3 weeks</td>
<td>1</td>
<td>1</td>
<td>2</td>
<td>4</td>
<td></td>
<td></td>
</tr>
<tr>
<td>4 weeks</td>
<td>1</td>
<td></td>
<td>1</td>
<td>2</td>
<td></td>
<td></td>
</tr>
<tr>
<td>5 weeks</td>
<td></td>
<td></td>
<td></td>
<td>3</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>6 weeks</td>
<td></td>
<td></td>
<td></td>
<td>3</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>7 weeks</td>
<td></td>
<td></td>
<td></td>
<td>3</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>8 weeks</td>
<td></td>
<td></td>
<td></td>
<td>1</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>14 weeks</td>
<td></td>
<td></td>
<td></td>
<td>2</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Before date allocated</td>
<td></td>
<td></td>
<td></td>
<td>2</td>
<td>2</td>
<td></td>
</tr>
<tr>
<td>Total hearings</td>
<td>74</td>
<td>31</td>
<td>25</td>
<td>48</td>
<td>47</td>
<td>225</td>
</tr>
</tbody>
</table>

|                |                |                |        |                  |       |
| Total hearings discharged |                |                |        |                  |       |

8.7 Although a similar percentage of Proofs were cancelled in both study periods (60% and 64%), the higher numbers involved in Study 2 (from 25 to 74) inflated the displacement effect on judicial timetables, causally linked to mixed judicial supervision to retain momentum (para5.15). More time was booked out than was used, affecting judicial continuity. Speculatively, more consistent supervision might have been achieved if:

(a) more notice of cancellation could have been given or
(b) shorter proofs could have been allocated or
(c) clients could have been brought to an early decision-point, either through a settlement conference, an interim judicial opinion, or early neutral evaluation by a senior member of the Bar.

Sists

8.8 During the first 18 month period very few cases were sisted and periodic contact was made between the court and representatives. Sisting was a larger feature in the second 18 month period – 36 cases, 17 of which were unresolved at the end of the Study, 19 of which were complete. The rising caseload also meant that administrative contact between court and representative became more difficult. Sisting extended the time on the court roll well beyond the average of 34 weeks to disposal, and was undoubtedly responsible for extending this statistical average.
Table 20
Scottish Commercial Actions – Sists Study 2

<table>
<thead>
<tr>
<th>Category</th>
<th>Number of Cases Sisted</th>
<th>Average Length of Case</th>
<th>Average Length of Sist</th>
<th>Range of Sists Weeks</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>Weeks</td>
<td>Weeks</td>
<td></td>
</tr>
<tr>
<td>Live Cases</td>
<td>17</td>
<td>92</td>
<td>59</td>
<td>31 - 95</td>
</tr>
<tr>
<td>Resolved</td>
<td>19</td>
<td>53</td>
<td>26</td>
<td>7 - 52</td>
</tr>
<tr>
<td>All cases</td>
<td>36</td>
<td>71</td>
<td>43</td>
<td>7 - 95</td>
</tr>
</tbody>
</table>

8.9 A high proportion of sists were allowed for negotiation and settlement, particularly obvious in the category ‘resolved cases’. When both parties agree that negotiation time is right, the Commercial court concurs and the action withdraws into the private domain. In some instances, as on the Ordinary Roll, this also represents ‘breathing space’ for all parties. However, by allowing open-ended sists there is a danger that some cases will drift without focus, which is directly contrary to case management principles.

8.10 In the first period, a time limit was generally agreed before contact with court was to be resumed. This does not seem to have happened as much in the second period – at least 9 cases sisted for more than a year for ‘negotiation and settlement’. One case sisted on 20 November 1996 ‘pending a planning application’ and is still live.

8.11 A larger proportion of the live cases were sisted for arbitration, and this appeared to extend litigation beyond the average for those who sisted for negotiation.

Table 22
Scottish Commercial Actions – Reasons for Sists – Study 1 and Study 2

<table>
<thead>
<tr>
<th>Reasons for Sist</th>
<th>Live Cases</th>
<th>Resolved Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>Further investigations required</td>
<td>1</td>
<td>2</td>
</tr>
<tr>
<td>Arbitration</td>
<td>6</td>
<td>2</td>
</tr>
<tr>
<td>Negotiation and settlement</td>
<td>7</td>
<td>16</td>
</tr>
<tr>
<td>Valuation by Actuary</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Planning application</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Outcome of another case</td>
<td></td>
<td>1</td>
</tr>
</tbody>
</table>

Further Research

There is undoubtedly a changing behavioural pattern in the development of this caseflow management system. Any procedural system does and should evolve over time. This can be due to direct policy decisions in the light of experience or informal shifts which are not so obvious on a day to day basis. Court control should therefore not only encompass individual management of cases but also data-gathering to monitor and direct evolutionary development of the system.

The speed of disposal remains faster than any other jurisdiction found so far. Although the average disposal slowed by 8 weeks in the second period, this may represent a more settled modus operandi. However, the rising workload, number of hearings, increasing mix of judicial involvement and late cancellation of court time are unequivocally linked to later settlement patterns, higher average and range of disposal times and length of sists allowed.
The rising workload can be an indication of the success of the new procedure, but the disproportionately higher number of hearings compared to the first period is a more worrying trend. Hearings may be spawning new reasons to attend court. This may contribute to earlier resolution, but is intensive in judicial and professional resources. The complexity of cases and issues between the two study periods has been consistent. The explanation for variations must focus on other factors.

Further research requires to be undertaken to investigate the attitudinal and administrative changes influencing the litigating behaviour noted, which is reminiscent of practice on the Ordinary Roll, as criticised recently by the Cullen Review (see Chapter 8).

The findings of this research do seem to warn of a slippage towards the traditional practice of party autonomy – the local legal culture. Within a controlled specialist roll, which now has a proven track record of success in promoting early settlements and resolutions, there appears to be evidence to conclude that sanctions against dilatory practices are inadequate or incorrectly targeted. Observations in court indicate that lack of compliance leads to repetitive orders and hearings. Professional fees are based on preparation and appearances. Court fees, which are in fact a minor aspect of total litigation costs, do not discourage appearances. If the court has inadequate penalties for late or non-compliance, the credibility of directive orders is weakened – it becomes a ‘tiger with no teeth’, dependent upon judicial strength and personality to influence compliance with orders. As some clients and representatives become more experienced in the procedures, and more judges handle the caseload, this influence is inevitably diluted.

Future research requires to investigate the cost differences, including professional fees, between cases in the two study periods and between Ordinary and Commercial actions.

Also the opinions and experience of the judges, counsel, law firms and clients who use the system iare fundamental – as are the views of those who do not.

Questions to Address

- Is there resistance to caseflow management in principle and in practice
- Are parties conforming to court orders timeously
- What are the barriers to co-operation – between parties, agents and court
- Is there a difference in interpretation of the judicial role
- Are differences in judicial approach being exploited
- Does the organisational structure match the rising caseload
- Does the type of case, litigant or claim value influence court control or disposal
- Would increased judicial resources solve or create more problems
- Should Alternative Dispute Resolution be encouraged by the court
- Have sanctions been effective or can alternatives alter behaviour patterns

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Blinisated</td>
<td>58</td>
<td>42</td>
<td>52</td>
<td>48</td>
<td>63</td>
<td>141</td>
<td>145</td>
<td>167</td>
</tr>
<tr>
<td>Transferred</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>179</td>
<td>165</td>
</tr>
<tr>
<td>Total Caseload</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>197</td>
<td>197</td>
</tr>
</tbody>
</table>

Number of Actions
Comparison - Category of Litigants - Study 1 and Study 2
Comparison of Disposals at Three-Month Intervals - Study 1 and Study 2

Chart A3

Appendix 6.5.2
Appendix 6.5.2

Chart A4

Comparison of Outcomes - Study 1 and Study 2

Outcomes

- Settled
- Summary Decree
- Decree in Absence
- Abandoned
- Decree for Defender
- Dismissal
- Decree for Pursuer
- Transferred out
- Arbitration

Number of Cases

0 20 40 60 80 100 120 140 160

- 1st Study
- 2nd Study
Appendix 6.5.2

Chart A5

Allocation of Proof Days - Study 1 and Study 2

<table>
<thead>
<tr>
<th>Number of Days Allocated</th>
<th>Number of Cases Study 1</th>
<th>Number of Cases Study 2</th>
</tr>
</thead>
<tbody>
<tr>
<td>0</td>
<td>11</td>
<td>7</td>
</tr>
<tr>
<td>1</td>
<td>2</td>
<td>8</td>
</tr>
<tr>
<td>2</td>
<td>3</td>
<td>6</td>
</tr>
<tr>
<td>3</td>
<td>4</td>
<td>5</td>
</tr>
<tr>
<td>4</td>
<td>5</td>
<td>4</td>
</tr>
<tr>
<td>5</td>
<td>6</td>
<td>3</td>
</tr>
<tr>
<td>6</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>7</td>
<td>8</td>
<td>1</td>
</tr>
<tr>
<td>8</td>
<td>9</td>
<td>0</td>
</tr>
<tr>
<td>9</td>
<td>10</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>11</td>
<td></td>
</tr>
<tr>
<td>11</td>
<td>16</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>38</td>
<td></td>
</tr>
<tr>
<td>13</td>
<td></td>
<td></td>
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<tr>
<td>14</td>
<td></td>
<td></td>
</tr>
<tr>
<td>15</td>
<td></td>
<td></td>
</tr>
<tr>
<td>16</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
In April 1996 80 questionnaires were posted to Edinburgh firms who appeared from the Scottish Law Directory to practice civil procedure across a range of civil jurisdictions. Firms who practised in the Court of Session under the Commercial Cause Rules were ascertained, with permission, from process files. 25% of the sample replied - 5% felt they did not undertake enough civil litigation to complete the questionnaire. Of the 20% who responded positively, 62% forms were completed by a Partner of the firm (2 heading their civil litigation department, 1 managing, 1 senior), the remainder were completed by 2 Associate Solicitors, 1 Assistant Solicitor and 3 unnamed representatives.

Size of Firms Responding:

<table>
<thead>
<tr>
<th>Partners in Firm</th>
<th>Number of Firms</th>
</tr>
</thead>
<tbody>
<tr>
<td>27</td>
<td>1</td>
</tr>
<tr>
<td>14</td>
<td>1</td>
</tr>
<tr>
<td>12</td>
<td>2</td>
</tr>
<tr>
<td>11</td>
<td>2</td>
</tr>
<tr>
<td>8</td>
<td>1</td>
</tr>
<tr>
<td>6</td>
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<td>4</td>
<td>1</td>
</tr>
<tr>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>2</td>
<td>2</td>
</tr>
</tbody>
</table>

Total number of respondents including 2 anonymous firms = 16 = 20% of sample

Questionnaire to Court Representatives
Solicitor-Advocates with Rights of Audience in the Court of Session
Advocates and Queen’s Counsel
March 1997

The questionnaire was circulated to junior and senior counsel with the permission of the Dean of the Faculty of Advocates. All solicitor-advocates with rights of audience in the Court of Session were also canvassed. A total of 450 questionnaires were distributed. The response was .

Commercial Court Clients’ Questionnaire
July 1998

Out of a total of 450 questionnaires sent to clients of the Commercial Court in Scotland, 38 were completed and returned. A rather disappointing result in numbers, but many respondents were experienced litigators, and obviously had valuable positive and negative points to contribute.

Size of Companies

Respondents represented companies ranging from one-man operations to 8,000 employees, the breakdown of which was:

<table>
<thead>
<tr>
<th>Number of Employees</th>
<th>Number of Companies</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-10 employees</td>
<td>14</td>
</tr>
<tr>
<td>11 - 100 employees</td>
<td>12</td>
</tr>
</tbody>
</table>
101 - 200 employees 4
750 employees 1
1200 1
2000 1
3400 1
5500 1
6000 2
8000 1

Only 5 out of the 38 were completed at subsidiary offices, the remainder at headquarters

**Types of Businesses Represented**

<table>
<thead>
<tr>
<th>Types of Business</th>
<th>Firms</th>
</tr>
</thead>
<tbody>
<tr>
<td>Finance</td>
<td>7</td>
</tr>
<tr>
<td>Construction</td>
<td>6</td>
</tr>
<tr>
<td>Industrial</td>
<td>3</td>
</tr>
<tr>
<td>Law</td>
<td>3</td>
</tr>
<tr>
<td>Trade</td>
<td>3</td>
</tr>
<tr>
<td>Property Services</td>
<td>2</td>
</tr>
<tr>
<td>Accountancy</td>
<td>2</td>
</tr>
<tr>
<td>Specialist Contractor</td>
<td>2</td>
</tr>
<tr>
<td>Insurance</td>
<td>2</td>
</tr>
<tr>
<td>Fishing/Farming</td>
<td>2</td>
</tr>
<tr>
<td>Consulting Engineers</td>
<td>1</td>
</tr>
<tr>
<td>Government agency</td>
<td>1</td>
</tr>
<tr>
<td>Public House</td>
<td>1</td>
</tr>
<tr>
<td>Bank/Building Society</td>
<td>1</td>
</tr>
<tr>
<td>Education Trust</td>
<td>1</td>
</tr>
<tr>
<td>Individual</td>
<td>1</td>
</tr>
</tbody>
</table>

Apart from one respondent, all questionnaires were completed by senior management - Managing Director, Chairman, Partner etc.

**Numbers of Court Actions**

'Repeat players' in the court system were mainly the larger companies, but not exclusively. The most frequent litigators were finance and insurance companies.

<table>
<thead>
<tr>
<th>Size of Firm (by no. of employees)</th>
<th>Sheriff Court Cases</th>
<th>Court of Session Cases</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>60</td>
<td>15</td>
</tr>
<tr>
<td>90</td>
<td>50-100 as Pursuer</td>
<td>25/50 as Defender</td>
</tr>
<tr>
<td></td>
<td>c 1000 Defender</td>
<td>c750 as Defender</td>
</tr>
<tr>
<td>120</td>
<td>10</td>
<td>4</td>
</tr>
<tr>
<td>130</td>
<td>9</td>
<td>5</td>
</tr>
<tr>
<td>1200</td>
<td>-</td>
<td>10</td>
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<tr>
<td>3400</td>
<td>25</td>
<td>25</td>
</tr>
<tr>
<td>5500</td>
<td>-</td>
<td>6-10</td>
</tr>
<tr>
<td>6000</td>
<td>20</td>
<td>6</td>
</tr>
<tr>
<td>8000</td>
<td>6-8</td>
<td>3</td>
</tr>
</tbody>
</table>
SCOTTISH CIVIL COURT PROCEDURE

Please answer as many questions as you can. Your answers will be kept confidential and will only be seen by 1 researcher and 1 supervisor at Edinburgh University. However, it would assist us in following up any matters that may require clarification if you could write your name and/or status and telephone number. We would appreciate you exercising this option in our favour of course!

Name: 
Status: 
Company: 
Telephone: 

ABOUT YOURSELF/ YOUR FIRM:
1. What types of cases do you typically handle?
   (a) personal injury litigation
   (b) reparation
   (c) matrimonial
   (d) criminal
   (e) commercial
   (f) social security/welfare
   (g) debt/financial problems
   (h) employment
   (i) property
   (j) finance and investment
   (k) other (please specify)

2. Do you undertake legal aided cases? What proportion?

3. Would you represent a client on a speculative fee basis?

4. Roughly what proportion of work is carried out
   - for individuals in connection with their personal affairs
   - for business or commercial clients

5. Do you typically act for -
   - the Pursuer
   - the Defender
   - either

6. Do you regularly represent the same clients?

8. Do you know how your clients chose you?

9. What governs the choice of court or procedure you use? Please use percentages to indicate importance
   - cost
   - speed
   - convenience
   - client wishes
   - other (please specify)

10. How much emphasis is placed on negotiation and settlement at different stages?
    - before writ/summons
    - before Record closed
    - before the Proof

11. What is a typical source of frustration with the litigation process
12. Many studies show that a very small proportion of litigation cases reach proof. How many of your clients withdraw because of:
   - settlement  
   - abandonment

9. What are the typical deciding factors in
   - settlement
   - abandonment

10. Can you rank the following attributes in order of importance to your client
   - settlement
   - adjudication
   - expedition
   - economy
   - compulsion
   - finality
   - judicial fairness
   - supervision of disclosures
   - court supervision of timetables

11. Do you feel that any of your cases were unnecessarily delayed by the following, and how?
   - your client
   - your opponent
   - court administration
   - your own workload

13. Do you feel there was unnecessary expense incurred by the following, and how?
   - your client
   - your opponent
   - court administration
APPENDIX 8.1

- your own workload

14. Do you feel your opponents use the procedural rules tactically?

15. For comparative research how much does the present pleading system assist you to:

<table>
<thead>
<tr>
<th>Procedures</th>
<th>Focus on Issues</th>
<th>Facilitate Settlement</th>
<th>Expedite Progress</th>
<th>Reduce Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sheriff Court OCR</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Optional for Personal Injuries

Court of Session
- Ordinary

Court of Session
- Commercial Actions

(Please use percentages to indicate level of assistance/usefulness, adding comments if desired)

16. How do you view Lord Cullen’s recent recommendations for
   - abbreviated pleadings

   - earlier and wider disclosure

   - pursuer’s offer to tender

   - the introduction of case management hearings and pre-trial reviews

   - re-organisation of court administration to ensure early start and continuity of judge
7. What sanctions do you think are appropriate for breaches of procedural rules?

18. What do you feel are the advantages of judicial case management?

19. What do you feel are the disadvantages of judicial case management?

20. Is it realistic to expect cases to run to a fixed timetable?

21. Should Alternative Dispute Resolution be encouraged?

22. Would you rely entirely on a court-appointed expert, or continue to use your own?

23. What prevents a case being dealt with cost-effectively? And quickly?

24. How can the obstacles of cost and delay be overcome?

Please add any general comments overleaf/
INTRODUCTION

In 1996 Lord President Hope permitted a research evaluation of the new procedure for Commercial Actions. Lord President Rodger has sanctioned its continuance. The research project is sponsored by W.Green legal publishers. After analysing 88% of the cases appearing within an 18 month period an initial report has been prepared. A two-part article has been published in the Scots Law Times this month. Notwithstanding your busy workload we seek your co-operation in completing the evaluation of a radical new procedure particularly in the shadow of the Cullen Review recommendations for judicial case management. The development of procedural rules will affect the working practices of all concerned. Please take the opportunity to contribute your views.

Please answer as many questions as you can. It would assist us if you would indicate your status within the court. If you would like to contribute further and are prepared to be interviewed by the researcher please add your name also. The identity of those providing information to the researcher will not be divulged. Thank you.

Please return the completed document in the envelope provided either to Mr. I. Armstrong, Faculty of Advocates or post directly to the researcher at University by 14th March 1997.

ABOUT YOURSELF:

1. Solicitor-Advocate
   Advocate
   Queen’s Counsel

2. Roughly what proportion of your work is carried out for individuals %
   for business clients %

3. Do you typically act for
   the Pursuer
   the Defender
   either

CIVIL COURT PROCEDURES

4. What governs the choice of court or procedure you use. Please use independent percentages to indicate the importance of:

   Cost %
   Speed %
   Convenience %
   Client choice %
   Solicitor choice %

5. With regard to cases on the Ordinary Roll of the Court of Session, how much emphasis is placed on Negotiation and Settlement at different stages?

   Before writ/summons %
   Before Record closed %
   Before the Proof %

W. Greens Research Student 1 Rachel Wadia, University of Edinburgh
6. What are the deciding factors in achieving settlement?

COMMERCIAL ACTIONS PROCEDURE

7. Have you been involved in cases under the new Commercial Actions Rules?
   How many?
   What proportion of your workload? %
   At what stage were you involved?

8. Which Commercial judge or judges have you appeared before?

9. What is your opinion of the amount of pre-hearing preparation required for Commercial procedure compared to Ordinary Procedure and Optional Procedure for Personal Injuries.

10. Do you think the use of abbreviated pleadings in Commercial Actions is advantageous? Why?

11. How much does the present system of written pleading system in the following three types of procedures assist you to focus on issues, facilitate settlement, expedite progress or reduce costs?

   Please use the five point evaluation scale of written pleadings:
   1. hinders
   2. has no effect
   3. helps a little
   4. is of general help
   5. is of considerable help
   6. is of crucial importance

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Focus on Issues</th>
<th>Facilitate Settlement</th>
<th>Expedite Progress</th>
<th>Reduce Costs</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commercial Actions</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Optional Procedure</td>
<td></td>
<td></td>
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<td></td>
</tr>
<tr>
<td>Ordinary Actions</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

12. At Preliminary Hearings the Commercial judge determines whether and to what extent and in what manner further specification of the claim and defences should be provided. What is your experience and opinion of the rules in action at this stage?

W. Greens Research Student

Rachel Wadia, University of Edinburgh
13. At Procedural Hearings the Commercial judge directs the preparation for debate or proof. What is your experience and opinion of the rules in action at this stage?

14. Is your preparation for the conduct and presentation of debates and proofs different in Commercial Actions?

15. The Commercial Actions procedure is designed to be less formal and more flexible than Ordinary procedure. Does this accord with your experience? If so, is it beneficial?

16. The new Rules allow a wide judicial discretion in directing the progress of the action. What affect has this had on procedural and substantive issues?

17. Were there any frustrations with the procedure?

18. What are the main advantages of the Commercial Actions procedure?

19. What are the main disadvantages?

20. Do you have any suggestions for change?

21. Have you had clients’ response to the new procedure?

JUDICIAL CASE MANAGEMENT

W. Greens Research Student 3 Rachel Wadia, University of Edinburgh
22. How do you view Lord Cullen’s recent recommendations for:
- abbreviated pleadings
- earlier and wider disclosure
- pursuer’s offer to tender
- introduction of case management hearings and pre-trial reviews
- re-organisation of court administration to ensure early start and continuity of judge
- pre-proof hearings in complex cases

23. What sanctions do you think are appropriate for breaches of procedural rules?

24. What do you feel are the advantages of judicial case management?

25. What do you feel are the disadvantages of judicial case management?

26. In your experience is it realistic to expect cases to run to a fixed timetable?

27. What is your opinion of the use of Alternative Dispute Resolution?

28. What prevents cases being dealt with - cost effectively
- quickly
29. How can any obstacles of cost and delay be overcome?

GENERAL

30. Do you feel that any of your cases were unnecessarily delayed or unnecessary expense was incurred by the following, and how?
   - your client
   - your opponent
   - the administration of court business
   - your own workload

31. Do you feel your opponents use the procedural rules tactically?

32. Should there be an obligation on parties to
   (a) answer all specific averments made by their opponents?
   (b) disclose experts’ reports on demand
   (c) exchange witness summaries on demand

Please add any general comments and indicate if you would like to make yourself available for a short interview at a time convenient to yourself.

Thank you.

W. Greens Research Student

5

Rachel Wadia, University of Edinburgh
Section A: ABOUT YOUR FIRM

Number of employees

This is the firm’s

Type of business:

- Bank/Building Society
- Development Agency
- Finance
- Industrial
- Insurance
- Law
- Media
- Professional Institute
- Property Services
- Trade
- Individual litigant
- Other (please state)

Position in the firm of person completing the questionnaire

Section B: LITIGATION AND YOUR FIRM

How many Scottish court actions has your firm been involved since September 1994? (number if possible)

<table>
<thead>
<tr>
<th></th>
<th>As Pursuer</th>
<th>As Defender</th>
</tr>
</thead>
<tbody>
<tr>
<td>Sheriff Court</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Court of Session</td>
<td>(see Q.6)</td>
<td></td>
</tr>
</tbody>
</table>

Which different procedural tracks have you experienced within the Court of Session since September 1994?

(please tick those applicable, numbers would be useful)

<table>
<thead>
<tr>
<th>COURT OF SESSION PROCEDURES</th>
<th>As Pursuer</th>
<th>As Defender</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ordinary Roll</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Optional Procedure for Personal Injuries</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Commercial Cause Procedure (see Section C)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Judicial Review</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Appeal court</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Section C: COMMERCIAL CAUSE PROCEDURE

Commercial Cause Procedure may be used for an action which is “of a business or commercial nature”. If you have been a Pursuer in this category of action and not used the Commercial court, can you indicate why? (Choice of)
APPENDIX 8.3

(time unaware of the choice)

Advice to use another procedure

Option it was not suitable (see Q. 8)

(please state)

Your perception was that it was unsuitable, what factors made it so?

(please tick all or any and feel free to expand)

Yes

Load on company employee(s)

Load on legal advisers

Tables

Special control of procedure

Directions

Yes in processing Appeals

What alternatives do you use to resolve your commercial disputes, and why? (Please feel free to expand)

Approximately how many Commercial cases has your firm been involved?

As a Pursuer

As a Defender

What was the outcome? (please tick, and give number of cases if appropriate)

<table>
<thead>
<tr>
<th></th>
<th>Won</th>
<th>Lost</th>
<th>Appealed</th>
<th>Appealed Abandoned (See Q 12)</th>
<th>Settled</th>
<th>Stage Settled (see Q 13)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pursuer</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Defender</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

If an Appeal was abandoned, can you state why?

If settlement was reached, can you state why the case(s) settled at a particular stage?

Who chose to use this procedure? (please tick as appropriate)

Other party(ies) (see Q 15, 16)

In-house legal representative

Non-legal executive

External legal firm

Counsel

Other

Why was the Commercial procedure chosen?
(please tick most appropriate reasons and expand if necessary)

Other party (ies) chose (see Q 16)
- Cost
- Speed
- Outside legal advice
- Convenience/access
- Legal expertise
- Judicial expertise
- Other (please state)

Another party chose the Commercial procedure, did you oppose their choice?  
Yes [ ] No [ ]
why?

Did a member of your own firm/yourself present any of the hearings? (see Q 18)  
Yes [ ] No [ ]
why - which hearings, which representative? And why?

<table>
<thead>
<tr>
<th>In-house legal representative</th>
<th>Other (please state)</th>
<th>Comments</th>
</tr>
</thead>
<tbody>
<tr>
<td>Preliminary hearing</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Dural hearing</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(please state)</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Preliminary Hearings the Commercial judge seeks to focus the real dispute between the parties. What is your experience and your opinion of the rules in action at this stage?

Procedural Hearings the Commercial judge decides the manner in which the dispute is to be resolved. What is your experience and your opinion of the rules in action at this stage?

Your preparation for the conduct and presentation of cases under the Commercial Cause procedure different from procedures you have experienced? In what way?

The Commercial Cause Procedure is designed to be less formal and more flexible than the Ordinary procedure. Is this accord with your experience? If so, was this beneficial?

New Rules allow wide judicial discretion in directing the progress of the action. Has this had an effect on:
APPENDIX 8.3

<table>
<thead>
<tr>
<th>substantive issues</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>company man-hours</td>
<td></td>
</tr>
<tr>
<td>decision to settle</td>
<td></td>
</tr>
<tr>
<td>decision to appeal</td>
<td></td>
</tr>
</tbody>
</table>

Are there any frustrations with the procedure?

What do you see as the main advantages of the new Commercial Cause Procedure?

What do you see as the main disadvantages of the new Commercial Cause Procedure?

Do you have suggestions for change?

In circumstances arise, will you choose to use the Commercial Cause Procedure again? Please give reasons.

Does your company use Information Technology (IT)?

Which of following on-line IT links/services would you consider useful to your firm?

(please tick and rank usefulness)

<table>
<thead>
<tr>
<th>N.B. This question assumes that data would be available on client's Own Case only</th>
<th>Tick</th>
<th>Rank</th>
</tr>
</thead>
<tbody>
<tr>
<td>ed case timetables</td>
<td></td>
<td></td>
</tr>
<tr>
<td>orders and interlocutors</td>
<td></td>
<td></td>
</tr>
<tr>
<td>e notes, guidelines and judicial opinions</td>
<td></td>
<td></td>
</tr>
<tr>
<td>edition of documentation to the court in electronic form (ie CD ROM, floppy disk)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>please specify</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

You aware that a Commercial Cause Consultative Committee was established in 1995? Yes ☐ No ☐

Information may be obtained from the Secretary of the Committee at the Court of Session

I like a copy of the final analysis ☐ Addressee:
Of a total of 450 questionnaires sent to clients of the Commercial court in Scotland, 38 were completed and returned. A rather disappointing result in numbers, but many respondents were experienced litigators, and usually had valuable positive and negative points to contribute. Since I had not observed many commercial litigators visiting the court, I was surprised by the high percentage of respondents who had attended hearings. Most of the drawbacks and suggestions for change clearly stemmed from a lack of understanding of the principles of legal adjudication, as well as the design and policing of an innovative range of procedures. Both litigator and court would benefit from better communication to foster common realistic expectations.

of Companies

Respondents represented companies ranging from one-man operations to 8,000 employees, the breakdown of which was:

<table>
<thead>
<tr>
<th>Number of Employees</th>
<th>Number of Companies</th>
</tr>
</thead>
<tbody>
<tr>
<td>1-10 employees</td>
<td>14</td>
</tr>
<tr>
<td>11 - 100 employees</td>
<td>12</td>
</tr>
<tr>
<td>101 - 200 employees</td>
<td>4</td>
</tr>
<tr>
<td>750 employees</td>
<td>1</td>
</tr>
<tr>
<td>1200</td>
<td>1</td>
</tr>
<tr>
<td>2000</td>
<td>1</td>
</tr>
<tr>
<td>3400</td>
<td>1</td>
</tr>
<tr>
<td>5500</td>
<td>1</td>
</tr>
<tr>
<td>6000</td>
<td>2</td>
</tr>
<tr>
<td>8000</td>
<td>1</td>
</tr>
</tbody>
</table>

Out of the 38 questionnaires were completed at subsidiary offices, the remainder at headquarters.

of Businesses Represented

<table>
<thead>
<tr>
<th>Firms</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Finance</td>
<td>7</td>
</tr>
<tr>
<td>Construction</td>
<td>6</td>
</tr>
<tr>
<td>Industrial</td>
<td>3</td>
</tr>
<tr>
<td>Law</td>
<td>3</td>
</tr>
<tr>
<td>Trade</td>
<td>3</td>
</tr>
<tr>
<td>Property Services</td>
<td>2</td>
</tr>
<tr>
<td>Accountancy</td>
<td>2</td>
</tr>
<tr>
<td>Specialist Contractor</td>
<td>2</td>
</tr>
<tr>
<td>Insurance</td>
<td>2</td>
</tr>
<tr>
<td>Fishing/Farming</td>
<td>2</td>
</tr>
<tr>
<td>Consulting Engineers</td>
<td>1</td>
</tr>
<tr>
<td>Government agency</td>
<td>1</td>
</tr>
<tr>
<td>Public House</td>
<td>1</td>
</tr>
<tr>
<td>Bank/Building Society</td>
<td>1</td>
</tr>
<tr>
<td>Education Trust</td>
<td>1</td>
</tr>
<tr>
<td>Individual</td>
<td>1</td>
</tr>
</tbody>
</table>

Apart from one respondent, all questionnaires were completed by senior management - Managing Director, Chairman, Partner etc.
Numbers of Court Actions

‘Repeat players’ in the court system were mainly the larger companies, but not exclusively. The most frequent litigators were finance and insurance companies.

<table>
<thead>
<tr>
<th>Size of firm (by no. of employees)</th>
<th>Sheriff Court Cases as Pursuer</th>
<th>Court of Session Cases as Defender</th>
</tr>
</thead>
<tbody>
<tr>
<td>2</td>
<td>60</td>
<td>25/50 as Defender c 1000 as Defender</td>
</tr>
<tr>
<td>90</td>
<td>10</td>
<td>750 as Defender c 1000 as Defender</td>
</tr>
<tr>
<td>120</td>
<td>9</td>
<td></td>
</tr>
<tr>
<td>130</td>
<td>-</td>
<td></td>
</tr>
<tr>
<td>1200</td>
<td>25</td>
<td>25</td>
</tr>
<tr>
<td>3400</td>
<td>20</td>
<td>6-10</td>
</tr>
<tr>
<td>5500</td>
<td>6</td>
<td></td>
</tr>
<tr>
<td>6000</td>
<td>6-8</td>
<td></td>
</tr>
</tbody>
</table>

Nine respondents had received legal advice not to use the Commercial procedure for some actions. The reasons given for the unsuitability were

- As advised by legal agent 2
- Timetables 2
- Delays and sanctions
- Judicial control
- Costs
- Workload on employees

Alternatives to Litigation

Many stated that they regarded litigation as a last-resort resolution in commercial disputes, particularly if there was an on-going relationship. The alternatives used are listed below in order of preference

- negotiation (the majority)
- arbitration
- threat of court action
- persistent letters and visits
- ADR
- ombudsman
- trade body
- offer of tender

One of the largest companies saw ADR clauses likely to become more popular in the future. One firm chose the Scottish Commercial procedure in preference to the English court which was considered “too slow, costly and manipulative by a belligerent defender”.

APPENDIX 8.3
Number of Commercial Actions

- 20 firms experienced the new Commercial cause rules once
- 31 firms had appeared only as Pursuers or as Defenders
- the remainder had experienced the commercial procedure from both perspectives

<table>
<thead>
<tr>
<th>Number of Actions Experienced</th>
<th>As Pursuer only</th>
<th>As Defender only</th>
</tr>
</thead>
<tbody>
<tr>
<td>1 action</td>
<td>12 firms</td>
<td>8 firms</td>
</tr>
<tr>
<td>2 actions</td>
<td>4 firms</td>
<td>2 firms</td>
</tr>
<tr>
<td>3 actions</td>
<td>2 firms</td>
<td>1 firm</td>
</tr>
<tr>
<td>5 actions</td>
<td>1 firm</td>
<td></td>
</tr>
<tr>
<td>6 actions</td>
<td>1 firm</td>
<td></td>
</tr>
</tbody>
</table>

Mixed Experience - Both Pursuers and Defenders

<table>
<thead>
<tr>
<th>Firm</th>
<th>As Pursuer</th>
<th>As Defender</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>1 as</td>
<td>1 as</td>
</tr>
<tr>
<td>2</td>
<td>5 as</td>
<td>1 as</td>
</tr>
<tr>
<td>3</td>
<td>2 as</td>
<td>2 as</td>
</tr>
<tr>
<td>4</td>
<td>1 as</td>
<td>1 as</td>
</tr>
<tr>
<td>5</td>
<td>3-5 as</td>
<td>3-5 as</td>
</tr>
<tr>
<td>6</td>
<td>6 as</td>
<td>1 as</td>
</tr>
<tr>
<td>7</td>
<td>1 as</td>
<td>1 as</td>
</tr>
</tbody>
</table>

Chose the Procedure?

Whelmingly legal professionals are responsible for referring cases to the Commercial roll, with only 3 reporting that their Executive made the decision.

Cases were on the roll as a result of their opponent’s initiative, but only 1 defender opposed this in a complicated construction contract dispute with many claims and counterclaims” (the pursuer subsequently abandoned the action).

<table>
<thead>
<tr>
<th>Decision made by</th>
<th>Firms</th>
</tr>
</thead>
<tbody>
<tr>
<td>External legal firm</td>
<td>12</td>
</tr>
<tr>
<td>External legal firm/Counsel</td>
<td>4</td>
</tr>
<tr>
<td>Counsel</td>
<td>2</td>
</tr>
<tr>
<td>In-house legal representative</td>
<td>5</td>
</tr>
<tr>
<td>Other party</td>
<td>7</td>
</tr>
<tr>
<td>Firm’s executive</td>
<td>3</td>
</tr>
<tr>
<td>Not reported</td>
<td>5</td>
</tr>
</tbody>
</table>

Was the Commercial Procedure Chosen?

Respondents completed this section, but it was clear that advice from the legal profession on the positive aspects of a fast-track procedure played a significant role in the choice.
D was perceived to be the main driver for the majority of parties, although some recorded their frustration to the pace of litigation further into the questionnaire.

SPECIAL EXPERTISE was also a deciding factor ‘to bring about early resolution of long running and inevitably ‘insoluble’ dispute before a judge with knowledge in a particular area’

It was a positive factor for 4 respondents, particularly where an early resolution was urgent.

3. AL EXPERTISE was also a deciding factor “to bring about early resolution of long running and ‘insoluble’ dispute before a judge with knowledge in a particular area” was a positive factor for 4 respondents, particularly where an early resolution was urgent.

Attendance in Court

A high proportion of respondents (70%) had either attended hearings themselves or been represented by management in court, many from the Preliminary Hearing stage. This degree of interest may also be measured in the motivation to complete the questionnaire. Marginally, more pursuers than defenders were at in court, but the size of firm was no indicator of their interest in actual proceedings.

Reasons for attendance, where given, ranged widely:

<table>
<thead>
<tr>
<th>Reason for Attendance</th>
<th>Number of Employees</th>
</tr>
</thead>
<tbody>
<tr>
<td>To see what was happening</td>
<td>3</td>
</tr>
<tr>
<td>To ensure Counsel got it right!</td>
<td>23</td>
</tr>
<tr>
<td>For interest and feedback if required</td>
<td>5</td>
</tr>
<tr>
<td>To ascertain court’s attitude (a Debate)</td>
<td>2,000</td>
</tr>
<tr>
<td>To hear evidence of expert witnesses (Procedural Hearing)</td>
<td>20</td>
</tr>
<tr>
<td>To watch witnesses give their evidence (Proof)</td>
<td>8,000</td>
</tr>
</tbody>
</table>

4. Experience of Preliminary Hearings

The majority of views were extremely positive, typically

“an enormous improvement on other procedures, providing less scope for abuse of legal process” (large financial organisation with multiple experience of litigation, including 3 actions in the Commercial court)

Over negative factors were noted in individual cases

“the judge was too tolerant of ill-prepared defenders who abused the process” (Pursuer in 1 Commercial case who “found the whole Scottish process unnecessarily alien and traditional compared to the English and American jurisdictions that I am familiar with”. This client did not attend court hearings).

“we were not allowed sufficient time to discuss all relevant contractual matters and were disappointed that the judge did not insist on the defender offering more accurate replies” (a specialist contractor with 2 Commercial cases, using arbitration with S.B.C.C. as an alternative to litigation).

“frequently helpful in determining real issues, but one drawback is that frequently the judge appears to have decided issues before a hearing, evidence or submissions” (large construction firm, 4 Commercial cases, attended a Debate “to ascertain the court’s attitude”)

“judge not robust enough - prepared to allow too much delay” (1 Commercial case, defender, who did not attend hearings)
One client (who had come to court to listen to expert witnesses' evidence) pointed out that the court's good attempts to restrict issues were very dependent on and hampered by "exceptionally costly" expert witnesses, particularly where they could not agree.

Another client commented that "the personality of the judge seems to be significant".

**Value of Procedural Hearings**

Stage was flagged up as an important and early decision-point in the progression of an action - "In our here is little caselaw, so if issues are addressed at an early stage, it helps in formulating our policy and s" (a government agency).

Though there were many positive benefits

"clear and straightforward"

"to date decisions have been balanced and realistic" (most frequent litigator)

A of impatience over the time taken seemed to be reflected in quite a few answers, with some litigants for more robustness on the part of the judge.

One pursuer who had acknowledged that the Preliminary hearing system "gets parties to focus on the problems", reported at the Procedural stage that "defenders were still trying delaying tactics and the judge lets them get away with it to a certain extent".

Another pursuer noted that although the judge had established liability under contract in their favour, there was a delay in ordering settlement of the account.

However, the organisation which was particularly keen for a speedy decision to halt spiralling costs was delighted that the judge's views on "how he thought the parties should settle to avoid further delay" prompted settlement at this stage.

While one commented that "judges seem keen to make progress quickly" another pursuer complained that it took 4 hearings before proof on the fundamental issue (arbitration clause) was organised.

**Preparation Different for Commercial Actions?**

Clients were not in a position to comment on the amount of professional preparation involved, but had a l understanding that the groundwork had to be more thorough and better prepared from the outset, due to rated demands". One Chairman of a smaller company, who saw litigation as a last resort option, isly spoke from the heart

"There is only one way to prepare - for the worst, and accordingly the best"

Pursuers with experience of Sheriff Court procedures noted that the calling times between sittings was less normal than in other courts.
was extremely grateful that his prior Sheriff Court experience of an “endless process of adjustments, delays, delaying tactics, inflicted for adverse publicity by a competitor without the least prospect of legal success, and settled just prior to Debate” was not allowed to be repeated in the Commercial court:

“I suspect that under the Commercial Cause Rules that this case would have been thrown out at a very early stage, or more probably never raised”.

the Commercial Cause procedure more Informal and more Flexible?

was a general consensus that both attributes were visible. However, it was interesting to note that the companies and heavier litigators noted less formality in the procedures, but no more flexibility, while for smaller operators the procedure was flexible, but still “too formal” and hampered by “legalese”.

ceived Effect of Judicial Discretion

respondents to this question noted multiple benefits. In particular the heavy litigators, who had experience in different courts, did not support the hypothesis that pro-active management led to increased costs for the

<table>
<thead>
<tr>
<th>of Judicial Discretion on:</th>
<th>Positive Effect</th>
<th>Negative Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Man Hours</td>
<td>11</td>
<td>3</td>
</tr>
<tr>
<td>TVI</td>
<td>11</td>
<td>4</td>
</tr>
<tr>
<td>Intuitive Issues</td>
<td>8</td>
<td>1</td>
</tr>
<tr>
<td>Any Man Hours</td>
<td>7</td>
<td>2</td>
</tr>
<tr>
<td>on to Settle</td>
<td>8</td>
<td></td>
</tr>
<tr>
<td>on to Appeal</td>
<td></td>
<td>2</td>
</tr>
</tbody>
</table>

he negative side, a client who had been pursuing a debt since December 1995, with over 500 man-hours expended to date, was frustrated with delays perceived to be caused by the court’s indulgence in formalities and lies. This was corroborated by a smaller firm who normally “tried everything to avoid instruction of barristers and court action”.

nowledged that some delays were outwith the control of the court, particular expert opinion which times difficult to obtain quickly, and compounded in one case by the “expert’s inadequate understanding issues”.

ations with the Commercial Cause Procedure

ough 11 clients stated they had not been frustrated with the procedures, asking this question seemed to set a list of individual grievances. These are listed below, rather than making an attempt at generalisinginent remarks.

lay - both unavoidable and avoidable, as noted in previous answers attempt to shorten proof complete inability of advisors on both sides to accurately assess time required for proof -other party managed to gain postponement of 1 hearing, but only for 6 weeks receipt that late replacement of an advocate was used to postpone and delay progress ne-wasting - avoidable legal argument which did nothing to resolve the issue
lese 'mumbo-jumbo' between lawyers and judge

e allowed to produce defences

costs and length of time

eptional costs for expert witnesses, not effectively reducing points in issue

counsel not being prepared, procedures being too long and formal ("parties should just sit

e and slog it out with the judge in presence")

hes on, and no further forward

mature decisions by judges

ast as protracted as the ordinary roll

antages

whelmingly, speedy resolution was the most advantageous outcome for those cases which had resolved.
of the larger companies, with more experience of litigation, added that the new procedures “removed the
for abuse”, and one pursuer (6 employees) appreciated that it provided “a forum for the parties to be
to talk”

empt to focus on issues at an early stage was also welcomed, although it was felt that “the judge should
re proactive in limiting continuations”. This suggestion may be considered apposite in the light of a
ning by the largest company involved that “as a court becomes more popular with litigants, it tends to slow
procedure”.

user who had complained both about being involved in a long-running payment dispute, and also the
nt of time the QC was allowed to argue legal points, suggested that “the system is nearly right, but should
iewed to streamline the manner of presentation of evidence and discussion”. It may be that there was
hy between this client and the one who welcomed “the more active role taken by the judge in directly
ning the two counsel involved”.

antages

ants stated that there were no disadvantages, 17 did not note a remark, and the remainder commented as
s:

The smaller firm using the Commercial roll for the judicial expertise, was “delighted” with winning a
quick decision, but incurred substantial legal costs and suffered considerable personal stress; there was also a substantial impact on third party relationships.

The largest operator noted that tight timetables were suitable where both parties wanted a resolution, but
could also prevent negotiation and railroad a party into litigation.

Two companies complained that delaying tactics were being tolerated, particularly by defenders,
although a defender complained that some of the timescales were unrealistic from a defender’s point of

There were comments that the procedures will still too long, too formal and too legalistic, and a lack of
technical expertise on the bench “led to the (frequently unnecessary) appointment of a technical expert”

One of the most frequent users of the Commercial court also warned that “the views of the judge at the
outset and before any debate or evidence may be difficult to change”.
Questions for Change

The largest company suggested an optional ADR facility, with a 28 day break in the timetable, as the Commercial Court in London.

In direct contrast with other clients’ previous comments, one large firm, acting as pursuer in 3 Commercial actions, suggested that the timetabling should be tighter. And one client who complained of advocates’ delaying tactics suggested that the timetables set out by the judge should be enforced.

Several smaller companies, with multiple-action experience in the Commercial court, indicated an alienation from formal procedures, veering their suggestions towards more active participation in the resolution process, and “more open and understanding debates”. One requested a procedure closer to the Small Claims court for particular commercial cases. Another suggested that it would be better for a judge to sit with a business layperson when hearing a case, as “the rules of strict evidence, along with particular views of the judge, does not allow genuine pursuers to obtain commercial justice”. A small company, who had appeared both as Defender and Pursuer, suggested “immediate questioning of both parties against their submissions and answers to cut down time in court”.

More judges were required, increased specialisation, and more proactivity in limiting the continuations of hearings.

It was suggested that printed matter should be available to both Pursuers and Defenders in advance of the decision to route to the Commercial court.

Finally, one litigant, who obviously had to give evidence personally, pointed to the need to organise good recording, as he had to stand for two hours in the witness box.

1 the Commercial Procedure be Chosen Again?

Only one client (100 employees), said “no”. He did not give reasons for this attitude, but stated his case was a complicated construction contract of claims and counterclaims and had spent 18 months on the roll. He had observed the proceedings through to debate, after which the pursuer abandoned the action.

Another litigant (50 employees) would use the procedure again “reluctantly”. He had commented that the judge was not robust enough, allowed too much delay and should be more proactive in limiting continuations of hearings.

1 nation Technology at Work

10 companies did not have the benefit of Information Technology at their workplace.

1 nation Technology Links to Court Data

Companies expressed interest in receiving information from the court.

- Practice Notes, Guidelines and Judicial Opinions (12 firms)
- Projected Case Timetables (10)
- Court Orders and Interlocutors (8)

The response to an option of passing documentation to the court in
electronic form was more circumspect, with one firm requiring
reassurance on adequate safeguards.

It would seem that there is a requirement for information and guides on the court procedures, at least to explain the legal formalities at different stages, pre-empting misunderstandings and unrealistic expectations. Miscommunication may be at the source of some of the above complaints.

**Occupancy of the Commercial Cause Consultative Committee**

38 out of the 38 respondents knew about the Commercial Cause Consultative Committee’s existence. It seemed from the tenet of the replies that the legal profession is responsible for the flow of business through the Commercial court, and that there is ignorance in the commercial community of the services which court offers.
Dear Sir,

Dispute Resolution Services in Scotland

I hope you will be able to assist me with information regarding the above. I am a Ph.D. law student at the University of Edinburgh, and have been studying court services in Scotland. Notice that caseloads have been dropping over the past few years, I am wondering whether potential clients are turning to other forms of dispute resolution.

Would you please be able to provide me with any information which you hold on your members in this area? I realise that some data will be confidential and therefore inaccessible. However if you carry statistical data on the trends of dispute resolution, particularly over the last decade, I would be grateful to receive and collate them to form a wider picture.

If you wish to add your opinion for the decrease in litigation, I should be pleased to benefit from the experiences of yourself and your members.

Yours sincerely
APPENDIX 9.1

U.S. Federal Rules of Civil Procedure
Rule 16

PreTrial Conference; Scheduling; Management

(a) PreTrial Conferences; Objectives

In any action, the court may in its discretion direct the attorneys for the parties and any unrepresented parties to appear before it for a conference or conferences before trial for such purpose as

(1) expediting the disposition of the action;
(2) establishing early and continuing control so that the case will not be protracted because of lack of management;
(3) discouraging wasteful pretrial activities;
(4) improving the quality of the trial through more thorough preparation, and;
(5) facilitating settlement of the case.

(b) Scheduling and Planning

Except in categories of actions exempted by district court rule as inappropriate, the judge, or a magistrate when authorized by district court rule, shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time

(1) to join other parties and to amend the pleadings;
(2) to file and hear motions;
(3) to complete discovery.

The scheduling order may also include

(4) the date or dates for conferences before trial, a final pretrial conference, and trial; and
(5) any other matters appropriate in the circumstances of the case.

The order shall issue as soon as practicable but in no event more than 120 days after filing of the complaint. A schedule shall not be modified except by leave of the judge or a magistrate when authorized by district court rule upon a showing of a good cause.

(c) Subjects to be Discussed at Pretrial Conferences

The participants at any conference under this rule may consider and take action with respect to
(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defences;
(2) the necessity or desirability of amendments to the pleadings;
(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;
(4) the avoidance of unnecessary proof and of cumulative evidence;
(5) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the ate or dates for further conferences and for trial;
(6) the advisability of referring matters to a magistrate or master;
(7) the possibility of settlement or the use of extra-judicial procedures to resolve the dispute;
(8) the form and substance of the pretrial order;
(9) the disposition of pending motions
(10) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems; and
(11) such other matters as may aid in the disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.

(d) Final Pretrial Conference

Any final pretrial conference shall be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(e) Pretrial Orders

After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference shall be modified only to prevent manifest injustice.

(f) Sanctions

If a party or party’s attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party’s attorney is substantially unprepared to participate in the conference, or if a party or party’s attorney fails to participate in good faith, the judge, upon motion or the judge’s own initiative, may make such orders which regard thereto as are just, and among
other s any of the orders provided in Rule 37(b)(2)(B), (C), (D)*. In lieu or in addition to any other sanction the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any non-compliance with this rule, including the attorney’s fees, unless the judge finds that the non-compliance was substantially justified or that other circumstances make an award of expenses unjust.

* Rule 37(b)(2)(B)  An order refusing to allow the disobedient party to support or oppose designated claims or defences or prohibiting that party from introducing designated matters in evidence

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination

US Supreme Court Digest, Lawyers' Edition, Vol 18 Court Rules Civil Procedure
### Six Most Successful American State Courts

<table>
<thead>
<tr>
<th>Type of Case Management</th>
<th>Other Needed Reasonably Current (June 1985)</th>
<th>Averaged Days from Filing to Disposition (By Court)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Backlog</td>
<td>1975</td>
<td>Dayton (Ohio)</td>
</tr>
<tr>
<td>Current</td>
<td>1979</td>
<td>Wichita (Kansas)</td>
</tr>
<tr>
<td>Crash Programme, With</td>
<td></td>
<td>Phoenix (Arizona)</td>
</tr>
<tr>
<td>Random Assignment</td>
<td></td>
<td>Fairfax (Virginia)</td>
</tr>
<tr>
<td>Differential Case</td>
<td></td>
<td>Wayne (County)</td>
</tr>
<tr>
<td>Management</td>
<td></td>
<td>Detroit (Michigan)</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Minneman (Ohio)</td>
</tr>
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**Court Average Days from Filing to Disposition Introduced Case Management Type of Case Management**

<table>
<thead>
<tr>
<th>Court</th>
<th>Average Days from Filing to Disposition</th>
<th>Type of Case Management</th>
<th>Introduced Case Management</th>
<th>Other Needed Reasonably Current (June 1985)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Dayton (Ohio)</td>
<td>1979</td>
<td>Current</td>
<td>Random Assignment</td>
<td>Backlog</td>
</tr>
<tr>
<td>Wichita (Kansas)</td>
<td>1985</td>
<td>Crash Programme, With</td>
<td>Random Assignment</td>
<td>Backlog</td>
</tr>
<tr>
<td>Phoenix (Arizona)</td>
<td>1987</td>
<td>Current</td>
<td>Differential Case Management</td>
<td>Other Needed Reasonably Current (June 1985)</td>
</tr>
<tr>
<td>Fairfax (Virginia)</td>
<td>1986</td>
<td>Current</td>
<td>Differential Case Management</td>
<td>Other Needed Reasonably Current (June 1985)</td>
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<tr>
<td>Wayne (County)</td>
<td>1987</td>
<td>Current</td>
<td>Differential Case Management</td>
<td>Other Needed Reasonably Current (June 1985)</td>
</tr>
<tr>
<td>Detroit (Michigan)</td>
<td>1987</td>
<td>Current</td>
<td>Differential Case Management</td>
<td>Other Needed Reasonably Current (June 1985)</td>
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<tr>
<td>Minneman (Ohio)</td>
<td>1988</td>
<td>Current</td>
<td>Differential Case Management</td>
<td>Other Needed Reasonably Current (June 1985)</td>
</tr>
</tbody>
</table>

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APPENDIX 9.3

U.S. Federal Rules of Civil Procedure
Rule 26

(a) Required Disclosures: Methods to Discover Additional Matter:

(1) Initial Disclosures
   Except to the extent otherwise stipulated or directed by order or local rule, a
   Party shall, without awaiting a discovery request, provide to other parties
   (name address and telephone etc.)

US Supreme Court Digest, Lawyers' Edition, Vol 18 Court Rules Civil Procedure
Circuit Court,
Fairfax Virginia, U.S.A.
Report July 1996

Fairfax, Virginia 740,000 population (include Washington)
Average time from filing a case to disposition:
1980 292 days
1987 275 days
1989 reported dramatic increases from filing to assigning trial dates.


  court monitoring  50 days after filing (status, service and answer)
  status conference  100 days after filing - judge sets on track
                    Track 1 (simple) master calendar 30 days discovery,
                    trial 18 months after filing

1994 Early neutral evaluation introduced by senior bar members to review with counsel
        45 days before trial date (high percentage of cases settled)

1995 and 1996 - size and age of caseload returned to 1980 level, despite volume increasing.

Advice from Judges:

It is important to involve lawyers. Relations between bar and bench improved as a result of court-initiated collaboration

In many States the average time from filing to trial is 3-5 years
Fairfax Circuit Court, servicing a large urban area, reduced the average to 12 months
Circuit Court - 15 judges = 21,000 cases per annum

Differentiated Docket Control

<table>
<thead>
<tr>
<th>Steps</th>
<th>Court action</th>
</tr>
</thead>
<tbody>
<tr>
<td>Suit filed</td>
<td>marked and calendared</td>
</tr>
<tr>
<td>Responsive pleading (defences) received</td>
<td>set for Status Conference</td>
</tr>
<tr>
<td>(or maximum 45 days)</td>
<td>Notice sent to lawyers</td>
</tr>
</tbody>
</table>

STATUS CONFERENCE:
Firm dates are the key to control
Meeting of counsel and judge (or judge’s law clerk)  8.30 am in chambers
Attorney’s appearance mandatory
To discuss and set firm trial date
discovery cut-off date
hearing dates for dispositive motions
date to designate experts and disclose basis of opinions
times for filing exhibits, and exchanging jury instructions
date for Settlement Conference

Note: The court will NOT grant continuances generally. Lawyers can mutually agree to extend discovery, but at their own risk

DISPOSITIVE MOTIONS

These work on the assumption lawyers generally know they are susceptible to resolution by motion to dismiss or summary judgement - they must set motion dates for hearing as early as possible - for briefing the dispositive motions and oral argument.

"Experience clearly shows that if lawyers know that the dates set in the pretrial order are real and that the date certain set for trial is firm, they generally will prepare their case for trial."

The judges have adopted a no-continuance policy and published it in the local bar association journal.

The following are not considered cause for continuance:

- Discovery not completed
- Expert on holiday, not available
- Parties close to settlement, need a few more days
- Preparing for summary judgement motion
- Lawyers on vacation
- Resignation or transfer of lead counsel in multi-lawyer firm
- Elective medical care - client or witness
- Client on vacation or business trip

REASONS TO GRANT CONTINUANCE
- Sudden medical condition & hospitalisation - counsel, party or key witness
- Death in immediate family of counsel

INITIAL PROBLEMS WITH STATUS CONFERENCE ORDERS:
Timely disclosure of experts - lawyers ignored or forgot to file statements. Judges consistently granted motion to exclude testimony. Harsh, but negligence, but within judicial discretion.
If quality of disclosure criticised - court can order supplement (expense by moving party)

SETTLEMENT CONFERENCE
Usually take place between 4 to 6 weeks before trial, after the discovery cut-off date.
Settlement judge is not trial judge
Lawyers prepare confidential settlement statement before conference (not exchanged)
(concise summary of case, strengths, weaknesses, damages, jury verdict range and
settlement demand)
All parties meet to establish ground rules
Judge meets individual attorneys one to one, shares views, facilitates assessment
Attorney's option - client can be brought back to judge to remove unrealistic
expectations, judge gives his views on the settlement.

"Even if the case does not settle, many times further discussions ensue, or the issues
for trial are narrowed by stipulation."

Source: Court internet site
## Supreme Court, County of Santa Cruz, California

**Trial Court Delay Reduction Time Limits**  Civil Code 58616

<table>
<thead>
<tr>
<th>Days Allowed</th>
<th>Action</th>
<th>Code</th>
</tr>
</thead>
<tbody>
<tr>
<td>60</td>
<td>File proof of service of Complaint</td>
<td>S</td>
</tr>
<tr>
<td>90 (S+R)</td>
<td>30 days after service, file Response</td>
<td>R</td>
</tr>
<tr>
<td>90 (S+R) - 105 (S+R+E)</td>
<td>15 days more for response by stipulated extension</td>
<td>E</td>
</tr>
<tr>
<td>120 (S+R+H) - 135 (S+R+E+H)</td>
<td>Anytime within 30 days after responsive pleading, file for stipulated continuation</td>
<td>H</td>
</tr>
<tr>
<td>150 (S+R+H+C) - 165 (S+R+E+H+C)</td>
<td>30 day stipulated continuation</td>
<td>C</td>
</tr>
<tr>
<td>120 (S+R) - 135 (S+R+E+H) - 180 (S+R+H+C) - 195 (S+R+E+H+C)</td>
<td>Case Management Conference Not sooner than 30 days after any of the above continuations expire</td>
<td></td>
</tr>
<tr>
<td>210</td>
<td>Referral to Arbitration/A.D.R. Not sooner than 210 days after filing</td>
<td></td>
</tr>
<tr>
<td>330</td>
<td>30 days before trial Discovery cut-off.(Civil Procedure Code 2024(a))</td>
<td></td>
</tr>
<tr>
<td>345</td>
<td>15 days before trial Discovery motion cut-off (CP 2024(a))</td>
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<tr>
<td>350</td>
<td>10 days before trial Expert Witness Discovery cut-off (CP 2024(d))</td>
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</tr>
<tr>
<td>360</td>
<td>Trial</td>
<td></td>
</tr>
<tr>
<td>365</td>
<td>Time standard goal - 90% of cases filed - disposition complete</td>
<td></td>
</tr>
</tbody>
</table>
Final Report to Congress by Judicial Conference of the U.S.
on the Rand Study into the Civil Justice Reform Act 1990

Under the Civil Justice Reform Act 1990 the Judicial Conference was required to review the pilot court programs and assess whether other districts should be required to implement all the case management principles and guidelines tested in the pilot programs. In preparing this report, the Conference reviewed:

(a) an independent evaluation by the RAND Corporation of the CJRA principles, guidelines, and techniques applied in the pilot courts;
(b) a Federal Judicial Center evaluation of the differentiated case management and ADR demonstration programs; and
(c) the experiences of all 94 district courts in implementing their CJRA cost and delay reduction plans.

Although the judiciary adopted most of the principles, guidelines and techniques in the Act, the Judicial Conference did not support expansion of the Act’s case management principles and guidelines to other courts as a total package.

Evaluation of the Programme. – The pilot programme did not appear to have significant impact on cost or delay reduction - courts were already following most of the Act’s principles, guidelines and techniques, and costs driven by outside factors. But Rand found an ‘optimum package’, therefore:

- The CJRA Advisory Group Process should continue - to assess dockets and make recommendations
- setting early and firm trial dates and shorter discovery periods and in complex civil cases should be encouraged
- the effective use of magistrate judges should be encouraged (substituting district judges on non-dispositive pretrial activities)
- Role of Chief Judge in case management should be increased
- Intercircuit and intracircuit judicial assignments should be encouraged to promote efficient case management (temporary judges to reduce backlogs in order to set early and firm trial dates)
- Education regarding efficient case management extended to the entire legal community
- Use of electronic technologies in the District Courts, where appropriate should be encouraged (save time and cost)

Recommendations regarding Principles and Guidelines of The Act

- Differential treatment to reduce cost and delay is endorsed
- early case management as provided in Federal Rules of Civil Procedure 16(b) is endorsed (trial date and discovery)
APPENDIX 9.5

• Use of Discovery Management plan FRCP 16 and 26(f) endorsed
• additional information regarding the voluntary exchange of information is recommended FRCP 26(a) nationally applied
• Counsel meeting to confer before filing motions on Discovery disputes with the Court is endorsed
• Appropriate forms of ADR are encouraged - continue experimentation, including non-binding arbitration. Enhance ADR by rule changes to FRCP 16?
• Submission of Joint Discovery plans at Initial Pretrial Conference FRCP 27(f)
• Representative with power to bind parties to be present at all pre-trial conferences FRCP 16(c) endorsed
• Requests for discovery extensions or postponement of trial to be signed by the Attorney and the Party making the request is not endorsed
• Use of Early Neutral Evaluation endorsed
• Representatives at all Settlement Conferences with power to bind parties
• Effective use of magistrate judges encouraged - accessibility of judicial officers to supervise pretrial activities

Conclusion

The process of implementing the Act raised the consciousness of both bench and bar, facilitating actions that achieve the goal of speedier, less expensive civil proceedings and in the broader sense improve the efficiency and effectiveness of the entire civil justice system.
APPENDIX 9.6

PRACTICE DIRECTION (CIVIL LITIGATION PROCEDURE)
23 April 1999
(Effective 26 April 1999)

(Queen’s Bench Masters’ Practice Directions and Queen’s Bench Practice Directions to apply – Civil Procedure Rules 1998 (S.I. 1998 No. 3132 (L.17))

The practice directions listed in the schedule apply to civil litigation in the Queen’s Bench Division and the Chancery Division of the High Court and to litigation in county courts other than family proceedings. Some of the practice directions apply to appeals to the Court of Appeal.

The practice directions are made (I) by the Lord Chief Justice as president of the Queen’s Bench Division; (i) by the Master of the Rolls as president of the Civil Division of the Court of Appeal; (iii) by the Vice-Chancellor, on behalf of the Lord Chancellor, pursuant to section 5 of the Civil Procedure Act 1997.

The practice directions listed in the schedule will come into effect on 26 April 1999 and replace the previous practice directions relating to civil litigation in the Queen’s Bench Division and the Chancery Division of the High Court and to litigation in county courts other than family proceedings. However, the Queen’s Bench Masters Practice Directions and Practice 1999, Vol.2, sections 2A and 2C, pp. 155-183, 258-31(3) are in the course of revision and will, except to the extent that they are inconsistent with the Civil Procedure Rules 1998 and the practice directions listed in the schedule, continue to apply for the time being.

Signed: Lord Bingham of Cornhill, C.J.
Lord Woolf M.R.
Sir Richard Scott V.-C.

Schedule Practice Directions, supplementing the Civil Procedure Rules 1998:

- Court Offices
- Allocation of cases to levels of judiciary
- Striking out a statement of case
- Forms
- Court documents
- Service
- How to start proceedings – the claim form
- Consumer Credit Act claim
- Production centre
- Claims for the recovery of taxes
- Alternative procedure for claims
- How to make claims in schedule rules and other claims
- Acknowledgement of service
Default judgment
Admissions
Defence and Reply
Statements of case
Amendments to statements of case
Further information
Addition and substitution of parties
Counterclaims and other Part 20 claims
Children and patients
Statements of truth
Applications
The summary disposal of claims
Interim injunctions
Interim payments
Accounts and inquiries
Case management – Preliminary stage: Allocation and Reallocation
Small Claims track
The Fast Track
The Multi-track
Transfer
Disclosure and Inspection
Written Evidence
Civil Evidence Act 1995
Depositions and court attendance by witnesses
Fees for examiners
Experts and assessors
Offers to settle and payments into court
Miscellaneous provisions about payments into court
Miscellaneous provisions relating to hearings
Accounts, inquiries, etc.
Judgements and Orders
Structured settlements
Provisional damages
Change of solicitor
Practice Direction about costs
Contentious probate proceedings
Applications under Companies Act 1985 and the Insurance Companies Act 1982
Technology and Construction Court
Commercial Court
Patents, etc.
Admiralty
Arbitrations
Mercantile Courts and Business Lists
Transitional Arrangements
Practice Directions to supplement Schedules 1 and 2 to the Civil Procedure Rules 1998:

Service out of the jurisdiction RSC Ord 11
Sale etc of land by order of the court: Conveyancing counsel of the court RSC Ord 31
Committal Applications RSC Ord 52 and Ord 29 of the County Court Rules 1981
Applications for Judicial Review RSC Ord 53
Applications for writ of habeas corpus RSC Ord 5

Other practice directions:

Practice Direction (Court of Appeal (Civil Division)) [1999] 1 WLR 1027, into effect 19 April 1999
Protocols (Civil Procedure pp. 799-827)
Insolvency proceedings
Directors disqualification proceedings
The use of the Welsh language in cases in the civil courts in Wales
Chancery Division: Practice Directions (Sections C and D of the Chancery Guide)

Source: The Weekly Law Reports 4 June 1999

[1990] 2 WLR 1124
FINANCIAL TIMES

The gentle touch

Business is coming round to mediation, says Robert Rice

At first it was simply ignored, then it was regarded as eccentric, dangerous even. Now it has become impossible to find anyone who had ever opposed it. Such has been the shift in attitude towards alternative dispute resolution (ADR) techniques, such as mediation, and to the Centre for Dispute Resolution, the UK's main provider of ADR since it was founded six years ago, according to Professor Karl Mackie, the centre's chief executive.

"We were told it was not relevant to England and the English legal profession, but I believe we are winning the war," he told the biennial alternative dispute resolution conference run by the centre and the Confederation of British Industry. Support for that view came from Lord Bingham, the Lord Chief Justice. He said it was "disputing that there is so great a disparity between the volume of debate and discussion" of alternative techniques, and "the limited evidence of disputes being resolved" by such methods. The atmosphere was changing and much of the credit for that should go to the centre, the Lord Chief Justice said. Many lawyers were still sceptical, and while the centre continued to cut and shape it was "putting, recourse to ADR will be patchy and inadequate". That was why it was important that the courts were now pointing the way, he said. The first court direction on the technique was issued in early 1990 by the Official Referees Court, which deals with construction disputes. That was followed by a Commercial Court practice direction at the end of 1993 indicating that the judges were keen to encourage parties in disputes to consider alternative ways of resolving disputes, and by a practice direction from the Court of Appeal in the summer of 1995. This set out ways of better identifying cases that could be settled by mediation. Then early this year, the Commercial Court judges produced a report which concluded that the settlement of actions in this way could save costs, cut delays in resolving disputes and preserve existing commercial relationships and market reputations. As a result, the judges resolved to take a more proactive stance at the first pre-trial hearing, requesting parties to consider mediation. In the six weeks that the Commercial Court has been operating this policy, orders have been made for between 25 per cent and 30 per cent of cases, according to Mr Justice Colman, head of the Commercial Court. A typical order would be that the case would not be scheduled or "set down" for trial unless the parties had considered mediation, and explained to the court in writing what they had attempted. In addition, a pilot mediation scheme was started during the summer at the Central London County Court for cases involving claims of more than £3,000. The scheme is voluntary and parties which opt for it pay £25. So far 30 cases have been referred to mediation, and a report of October a fast-track programme was initiated in the Patents County Court for use in intellectual property disputes, particularly those involving small and medium sized enterprises. With Lord Woolf's emphasis of the civil justice envisaging a central role for alternative methods of resolving disputes to tackle the costs and delays which dog the civil justice system, Lord Bingham said it was clear that this was the "end of the beginning" for alternative dispute resolution in the UK. But what does business make of it? The conference heard ringing endorsements of mediation from, among others, Roper International, which had settled a £15m international construction dispute following a five-day mediation, saving at least £250,000 in costs, and from Tencaco North Sea UK, where the centre had helped the negotiation of a £44,500 petroleum contract dispute. The business case for mediation was put by Lord Alexander QC, chairman of National Westminster Bank. Lord Alexander, a former chairman of the Bar, said that in spite of the efforts of the courts and the Judges, and the recognition in the Woolf report that civil justice needs to be streamlined, he doubted whether the legal profession had yet wholeheartedly accepted that there must be radical change. Clearly there were some disputes, such as those brought merely to inconvenience or embarrassed a company, or cases where there were four or five parties involved, which were unsuitable. But lawyers should be engaged in resolving disputes with the minimum of cost and trauma. "They do encourage settlement but they don't appreciate the extent to which businesses groan when they get litigation lawyers involved," he said. "What needs to be stressed early on is that the law is designed to resolve problems with the least animosity and as speedily and economically as possible." This approach should be the lawyer's equivalent of the Hippocratic oath. The NatWest group's experiences of alternative ways of resolving disputes had been good, he said. In one case involving a hire-purchase transaction with a corporate customer, the dispute had been settled by mediation in less than a day. NatWest's in-house lawyers had estimated the costs of going to trial at £150,000 on each side. By using mediation they calculated they had saved at least £40,000 in costs - a figure close to the average reported saving of £4,200 for each case referred to the centre. In addition there was a substantial amount of managed time and the advantage of avoiding the distraction and lost opportunities which litigation can cause are often more of a burden than the legal fees. The total potential savings must be enormous," he said.

But if business were honest, it would admit that it was not yet making full use of mediation. The next stage was for companies to ensure that management was committed to exploring and exploiting the new techniques. A starting point would be to take a step back from any preoccupation with particular cases and look at the company's general policy for resolving disputes.

Businesses might consider a "disputes audit", similar to an environmental audit. This would provide an appropriate evidence of the way disputes are resolved and help to set out clearer guidelines on which cases are capable of alternative resolution. Businesses should also try harder to avoid disputes. The use of plain English in contracts could help reduce disputes which result from misunderstandings. They should recognise the important role that other bodies could play in dispute resolution too. In the financial world the Banking Ombudsman, the Take Over Panel and the City Disputes Panel were all examples of cost-effective bodies which provide practical and speedy solutions to contentious issues. The Financial Law Panel was also helping to bring greater certainty into the law governing the financial markets, so reducing the danger of confusion and disputes. Lord Alexander said he had much to do to ensure it worked co-operatively to ensure that problem-solving was not an unnecessary drag on the economy. But the conference was well placed for all those who saw merit in alternative dispute resolution techniques. And the best proof of its value was that it cut costs.
APPENDIX 9.8

Centre for Dispute Resolution (CEDR) SEMINAR
London  17 March 1998

The Value and Practice of Commercial Court ‘Mandated’ Mediation

Attendees - approximately 120 delegates, including 30+ judges of the High Court, County Court and Commercial Court; Sir Richard Scott, visitors from Finland, New York and Scotland.

Commentary on Seminar

- The 1996 English Commercial Court’s ADR Practice Direction seems to be a mutually beneficial instrument for a busy Court and mediation organisations; 30% of actions are siphoned off to ADR centres, most are never seen by the court again. However, there is no empirical evidence only anecdotal that it is ‘successful’.

- CEDR claim that the average saving per mediated case is £44,500 compared to litigation costs, but I have as yet seen no firm evidence for this. Specific statistical information was requested, but not forthcoming.

- Training for mediation is surprisingly short. Professor Genn’s current study on the London County Court Pilot scheme, analysing over 550 cases points to a distinct variation in the standards of mediators and the effect on substantive outcomes.

- CEDR fully acknowledges that it has benefited greatly from the new Practice Note, and will therefore take a keen interest in developments in Scotland. CEDR Glasgow experienced a very slow start and eventually folded through lack of support.

- Other professional bodies are taking note of new market opportunities which mediation provides. The Institute of Accountants in England and Wales is promoting CEDR seminars for this reason. The danger is that if not controlled in some way by the court, ADR may become a cut price alternative, with the increasing risks attached to amateurs doing a professional’s job. Professor Genn observed that time constraints were leading some mediators to evaluate rather than facilitate. Outwith the courts, this is a service which is at best policed only by voluntary codes of conduct. Is this enough?

- It was interesting to note that the (alleged) intransigence of judges in making ADR orders against parties’ wishes is pre-empting compliance.

- Timing of ADR orders is still a contentious issue. This is usually at Summons for Directions, generally taking place a year after the action begins in court. It seems that for all players involved this was felt to be very late in the preparation, although very few took advantage of the flexibility to request orders at other times.

- The theory of judicial bias in Early Neutral Evaluation has not really been tested - only two cases have been treated in this way. It may be that if litigants attend hearings early, judicial views are already obvious (I am referring to one client’s response to our own recent questionnaire). It was interesting to note the judge’s
comment that because both cases settled at ENE, judicial writing-up time was saved.

The boundary between ‘mandatory’ ADR orders and those imposed against parties’ wishes is definitely blurred. No guidance was given on where the boundary lay.

Synopsis of Conference and Additional Remarks from Seminar Papers

Introduction:
Mr. Bill Marsh, Director of ADR Services at CEDR, introduced the presentations. At their last meeting there had been a discussion on how to get parties to the table. The Commercial Court in London had taken an increasingly robust approach over the last 18 months, using an new Practice Note to refer cases to ADR. This seminar was a forum for judges, clients and mediators to meet and discuss the outcome.

3 past cases were profiled - all had been referred by the Commercial Court to ADR and used CEDR. One solicitor and one mediator involved in each case provided their perspectives.

CASE 1

Lawyer Case commenced in July 1997 in Court. Defender transferred it to Commercial Court. In September the judge granted a 10 week stay to seek mediation. In October, CEDR was appointed. There was a short window of opportunity as the client had to go overseas during the 10 week period. In November the mediation took place, and was successful.

Parties felt that the case was reasonably straightforward, therefore had no great objection to the mediation order in principle for reasons of speed and cost. Lawyers felt that 10 weeks stay was long enough - more than adequate for that case. Clients were initially reluctant but had based their misgivings on their previous experience of compulsory arbitration in Europe, which they had found to be “worse than litigation”. The clients were reassured.

Mediation lasted from 10 am to 3pm. It was basically a “horse trade” situation, resulting in 2 to 3 sessions with the mediator before parties were left alone. The mediation brought things to a head.

Lessons to be learned: It definitely helped to have the client who had thought about litigation in detail in advance. It helped to have parties present who were involved in the original agreement in dispute and subject to pressure because of that. Also a very short lead time was advantageous, with no great irrelevancies admitted. A finite period was very beneficial, cutting down time wasted.

The judge thought that it was useful not to give too long a stay to focus parties, although time allocated could always be extended. The lawyer considered that this case was very suitable for mediation due to the importance of cost and involvement of single parties, but in the future this lawyer thought it would be better to ask the court to be mindful of parties’ wishes if they are strongly in favour of litigation.
Mediator’s View: One party was represented by the senior executive originally involved, together with his in-house lawyer; the other party was represented by the solicitor (above) together with his client.

His view was that it was a neat and tidy case
- written submissions by parties had been read in advance
- there were short presentations
- short discussions were initiated, moving on to a private process
- there were some initial discussions on legal issues which swiftly moved to ‘positional bargaining’ (horse trading)
- there was no obvious way the relationship would be continuous
- at one point they looked deadlocked, but parties were left in the room together for 10 minutes- a deal was agreed between them
- a one-page manuscript agreement was signed in situ

Assessment
1. Bringing together relevant people with authority to settle and providing the impetus created a forum for settlement
2. The primary role of a mediator is to keep the case rolling - otherwise he/she is not important as such
3. Parties were not there against their wishes, although there had been a court order. It was regarded as a handy opportunity to get rid of expensive litigation.
4. The surroundings helped - they were extremely unfriendly, cold and uncomfortable.
5. Mediator reported directly to CEDR and had suggested writing to the judge with a report. This mediator was interested to know if judges wanted feedback. The cases must seem to ‘disappear’.

Question: Would be interested to know - if there had been no intervention, would clients have found their way to mediation?
Answer: (By lawyer) We might have suggested it somewhere along the line, but doubted it.

Question: How much court time and expense were saved?
Answer: Half a day mediation was involved as opposed to 2 to 3 day trial. Cost was £10,000-£15,000 total, as opposed to around £50,000 each through the court.

CASE 2

Lawyer for Defendant (Underwriting agency) (Sole practitioner represented Pursuer)
1992 case commenced; 1993 interlocutory ‘skirmishes’; 1994 transferred to Commercial Court; sisted until 1996; October 1996 Summons for Directions - ordered to ADR and undertake discovery. Mediation took place over 1 day in February 1997 and case settled

Neither solicitor was averse to ADR. The advantage was that because the court imposed the order neither side was showing weakness by suggestion ADR. They were happy for an intermediary bridge.
The mediation was remarkably friendly, particularly since the Pursuer was in a ‘stake-all’ situation (using his house to fund action), therefore he was very personally involved with the outcome. There were concerns prior to litigation that clients think insurance companies are going to pay at some point and sustain the action until that point. There was not a huge discussion of law - clients were coming to do a deal. The Defendant was happy to get it off the books.

The disadvantage was that the underwriters ended up paying more than they would have done under litigation. They had a suspicion that the pursuer would have disappeared if pushed through expensive litigation procedures. They also thought that if the mediation had been unsuccessful it would have doubled the length of trial from 4 to 8 days. In acting for insurers, the lawyer felt greatly advantaged by having a Director with him. He saw a need for party autonomy.

Lessons: After a long day the need to get home kicked in. The mediation was scheduled for one day, the pace to settle at the end increased, which to a certain extent was good, but the paying party felt the pressure of “auction fever”. He would advise clients in the future that they should not get sucked in to bargaining at this point. He also felt that the mediator tended to speak directly to the client.

Recommendations to court: The direction was given at Summons for Directions stage where witness statements and expert reports were also ordered. The parties were told the case would not be put down for trial unless ADR failed. This was the wrong order. If witness statements and expert reports had been prepared, most of the work had been done, therefore the logical conclusion would be to run it through trial. He thought parties could use mediation to rehearse the case and redo witness statements without the luxury of cross-examining. His preference would have been to put aside the orders and go to ADR first.

Mediator’s View:
The venue was a luxury hotel in Bristol. The mediator was ably assisted by a mediation pupil with extensive knowledge of law which proved invaluable. This was his first court-mandated case after the Commercial Court’s policy change. In advance he had two concerns
(1) parties had not volunteered for the process - the great tenet of CEDR which gives the mediator something to build on
(2) the nature of the ADR order - leave for trial was refused until ADR was explored and exhausted - but did parties want trial and would they therefore use mediation as a token gesture to stall and logjam the process?

He found both parties were actually willing to co-operate in settling the dispute. What was encouraging in other cases since was the growing number of parties requesting ADR without the court order.

Two noteworthy points in this case: there seemed to be
(a) a strong sense of relief that there was another way to sort out the dispute - neither wanted trial. Both wanted a settlement without the uncertainty and lottery of going forward in litigation. and
(b) time was wasted - mediation took place 4 years after dispute began, with 15 months hiatus in prosecution followed by the usual machinations. In the end there was nothing which couldn’t have been settled earlier.
In conclusion, this mediator said he was not sure he understood the basis upon which the cases were judged suitable for an ADR order - what was the proper use of discretionary instinct? Was it by the elephant test (would know one if he saw one)? Every case which had been referred to him was suitable, and he did not personally believe a voluntary system works. There were endless reasons not to go to mediation, although he felt mediation should not be built in as an automatic part of court procedure as in the U.S. Did lawyers see this as a token barrier to a lucrative trial?

Impact of Practice Note: This has broken the logjam to ADR and made the profession accept it more readily. It has blown away the stigma of party 'weakness'. The fact that the primary motive in the Practice Note is to cut cost and delay is also a valuable tool for mediators, who can use a return to court as a threat.

Question: Is there a concern that one party could use the mediation as a general fishing expedition?
Answer (by lawyer): It could be used as a forum to test arguments, to see what could be found out, like U.S. depositions

CASE 3

Lawyer from Eversheds: He was a founder member of CEDR and keen to promote it if appropriate, but did recognise that some cases needed the steel of courts to protect rights - eg intellectual property. The threat of litigation was also a driver. This lawyer tried to settle disputes primarily and admitted he was not a litigator. This case was about reacquisition/revaluation of shares.

4 years ago settlement proposals were rejected, initiatives failed and there was a seemingly bridgeless gap. There was a significant commitment to winning on both sides, neither party was listening to each other and costs were rising. The Master ordered mediation. This case would not have used it without the court order.

The mediation lasted 12 hours, with parties left on their own intermittently. There was no solution as yet, but the process towards bridging the gap had started. The mediator brought a fresh perspective by pointing out that winning was peripheral and explored the cost/benefits of settling. He brought the case to a colder, logistical framework. The case still had not concluded but a formula was emerging which would ensure each wins.

The clients had mixed feelings. They were pleased to get rid of some of the expenses but other settlement attempts had failed. It was good that they were told to go. The clients actually tried to leave before the end, and parties had to have a tremendous trust in the mediator who left them alone for long periods in between short breaks of mediation. It was an expensive action, in view of the preparation work done, each having spent £25,000 each. But it would have been ten times that in litigation. It would also have been good to have mediation two years ago. The client was clearly in favour of mediation now because it cut out witness expense. Contrary to the other case, it was very good to have a decision maker there who had not signed the deal and had no emotional baggage invested in winning.

Mediator's View
It was immediately apparent that there was no direct communication between the parties. Settlement came through an unusual formula. Recent experience shows that mediation is actually an intervening process, but this mediator found it difficult to work to fixed periods. He queried how much faster they could move clients along. Parties needed time. In this particular case he had been asked to retain a monitoring role to maintain agreement.

Because ADR was court-mandated, parties could retain antipathy while having meaningful discussions. The level of representation (very senior Board member) was the key to settlement. The court had a role in requiring/suggesting parties who are present at mediation should be very senior; not just lawyers.

He did not know the time which had elapsed between the court order and this mediation, but had seen a vast range in other cases from 2 weeks to 10 months.

**Justice Tuckey**

Justice Tuckey has taken over from Justice Colman as head of Commercial List

At this conference he was asked to give the judge's perception and experience of the court-initiated ADR Practice Note. The Court’s basic philosophy was explained in the Guide to the Commercial Court. ADR was aimed at "appropriate" cases and he endorsed the view that no court should compel parties to undertake this procedure in every case.

What was an "appropriate" case?
- disputed amount was not worth the litigating costs (surprising how many)
- continuing commercial relationship was important
- judicial instinct (used elephant example), even in the face of stiff opposition from parties (quite a few)
- answers provided on questionnaire - have you discussed ADR with clients, might some ADR prove useful, have you or clients explored possibility of settlement. Very often court has received "no, no, no" answers. Even worse were "possibly, possibly, possibly"

If there are three "no"s, it is usual to ask if they have first-hand experience of ADR (usually the answer is another no). Judge can rout around if this is helpful, but there are hopeless cases too - eg allegations of fraud.

When is the best time? Normally orders are given at Summons for Directions. This may be late in process, when expense has been incurred, but the Practice Direction leaves it open to send it off at any stage, if appropriate. Not many have been sent off earlier to date, but it is proposed that new rules will make clear that ADR should be considered earlier than now.

On what terms are orders made? Should they be mandated? They can be couched in "menacing terms". The judicial view was
- parties must take serious steps as advised to resolve the dispute using ADR, court can suspend interlocutory steps (up to 3 months usually)
- if not settled, parties must inform court of the steps taken and why this failed
parties have to make sort of attempt - some are unwilling but there have been results

Judges would like to hear of successes - normally they are only told of those who failed. With regard to process, the order is general, but experience shows

(a) if parties cannot agree on a mediator, court can impose one
(b) feet dragging does happen, but usually parties try to do something
(c) Justice Tuckey has no objection to ordering a client to be present

Success: There are no hard statistics, but at the end of this year the court will evaluate how many orders it has made and how many returned. Justice Tuckey’s impression is that very many more settled because of the ADR process than not, and he would encourage the continuation of orders. As to whether cases would settle anyway, he did not know the answer.

Question: (Barrister) Could the process be reversed - automatic directions after beginning an action, including mandated ADR, unless cause shown it should not go to mediation? Could there be a list of typical cases which were not suitable for ADR which should go directly to litigation?

Answer: Justice Tuckey - I could retire! Better to interrupt case for ADR if called for. That follows the intention of the Woolf proposals.

Sir Richard Scott: Provision in the new rules to recommend to parties ADR should take place but there are no rules to shut out litigation. This is a constitutional point - citizens are entitled to use civil courts. There will be no mandatory system

Official Referees court representative: We are a long way behind the Commercial Court, with no mandatory procedure, but we fix a trial date early. One month from start there is a Summons for Directions. Mediation had been suggested in one case with continuation directions - 1 month adjournment. Official Referees were mindful of Woolf activity. Parties contacted CEDR for mediation timetable and came back for court control - is this revolutionary? He suggested it could be considered on a wider scale.

Justice Tuckey: Often get one or two parties desperate for ADR, others argue and judges have decided to impose it against intransigence, some against all parties’ wishes.

Question: Lord Woolf’s rules have more teeth. Can penalties for unreasonable behaviour and refusal be adopted? How are Commercial rules dealing with this?

Justice Tuckey: We have floated the suggestion of costs, but no orders are made.

Sir Richard Scott: The Rules Committee has not decided on sanctions. Penal rates of interest were proposed in some circumstances, but this is not being adopted. There will be no more sanction than hostile orders for costs for obstruction of flow of dispute.
Question: Are there any constitutional questions in the current Commercial Court practice?

Sir Richard Scott: This is not a mandated system - judges impose a stay while heavily encouraging mediation - there is no constitutional issue.

Question: how long are the stays? Range from 2 weeks to 9 months, but no data.

Question: (From Deloitte & Touche) Commercial court offers more than mediation - any feedback?

Answer (Justice Tuckey) Early Neutral Evaluation by judges has not been widely taken up. Two have been done. They were found to be useful, the judges did not give long judgements enmeshed in detail. Took one/two days. Evaluation effectively resulted in the case settling. One other option is Expert Evaluation.

Question: Is there any liaison with arbitrators?
Answer: CEDR has an international arbitration involvement, practised on the Continent.

Chair of A.D.R. from the New York Bar
We have undertaken 6,000 arbitrations, and have a 2 1/2 year old mediation programme. In New York:
1. 5 year experiment - mandatory mediation programme. One out of 20 cases were plucked at random (some excluded) and subjected to at least 4 hours mediation.
2. mediator was selected for the parties
3. 80% resolved; in the remainder the issues were narrowed
4. it was said earlier that fraud cases were not appropriate for ADR, but most in New York involved fraud - mediation was used to resolve broken bonds of trust.

From Floor: Courts must balance mandatory mediation with parties wishes, and educate the legal profession on advantages of mediation.

CEDR comments - the Practice Direction combined with CEDR intensive training gave an incentive to the profession to be educated through the College of Law and the Bar. The Bar Association were promoting their own mediation scheme.

KARL MACKIE Summary: What the court and CEDR are noticing increasingly are pre-emptive strikes - expectations are changing the mindset and issues are narrowed. ADR can help parties think more systematically. The conjunction of Court and ADR organisations has caused a major shift in ADR theory towards refinements in practice. Now the need was to seriously consider how to select cases which were suitable for ADR. Economic dynamics of litigation should be under review in every commercial enterprise. Further debate and study were essential to guide the way forward.
APPENDIX 9.8

ADR and CEDR

STATISTICS

Since inception in 1990 CEDR has been involved in over 1000 cases
CEDR deals with up to 15 cases a month
Success rate: approximately 90%
Claims: £200 to £200 million
Mediators: 550+ participants have attended mediator training programmes
3000 participants in CEDR seminars
30% of cases in Commercial Court go to mediation, 90% do not return - no data
CEDR feedback from 3 conferences - half of participants set “how to get parties to the
table” as their most pressing need.

Future CEDR research - secondee from major law firm will study the experience and
impact on clients and settlements. How is the system working? Refinements will
be identified to improve current system.
(March 1998 - offer by The David Hume Institute to collaborate on client views in
Scotland)

GROWTH OF ADR

1990 first court direction on ADR in the Official Referees Court
1993 Practice Direction in Commercial Court (encouraging ADR), but no judicial
involvement
1995 Court of Appeal Practice Direction - ways of identifying cases for mediation
1996 Commercial Court judges’ report - settlements by ADR could save costs, cut
delays and preserve existing commercial relationships and market reputations - led
to new Practice Note allowing remits to ADR and Early Neutral Evaluation, the
latter with judge. Typically a case are not be set down for trial unless parties have
considered mediation and explained in writing what they have attempted
1996 Central London County Court for all cases over £3,000 - in the first year
30 October 1996 - fast-track programme in Patents County Court aimed at small and
medium sized enterprises (no feedback as yet)
Lord Woolf’s Access to Justice Report encourages use of ADR - Draft Civil
Proceedings Rules 1.1 - 1.3
City Disputes Panel
Schemes set up by CEDR for the Department of Health, Building Employers
Confederation, Computing Services and Software Associations, the Institute of
Grocery Distribution and some leading insurance/financial services companies.
Other forms of Dispute Resolution:
Banking Ombudsman, Take-over Panel, City Disputes Panel, Financial Law Panel.

LEGAL PROFESSION: In the US Judge-driven mediations which appealed to
corporate clients in America overcame the initial resistance of lawyers. CEDR’s
first 7 years reflected a slow growth industry until the court became involved. But
the development may be caught in hiatus. Larger corporate clients (Nat West
Bank Lord Alexander) doubts if legal profession wholeheartedly accepted need for
radical change. Lawyers did encourage settlement, but “did not appreciate the
extent to which businesses groan when they get litigation lawyers involved.”
COSTS: In-house lawyers estimated costs of trial are far more than mediation. The average reported saving is £44,500 for each case referred to the centre. Total costs must include the distraction and lost opportunities which litigation can cause.

CLIENTS: Not yet making full use of mediation. Lord Alexander’s view is that there is a lack of management commitment and no general audits of companies’ general policy for resolving disputes. Empirical evidence of the way disputes are resolved will help to set out clearer guidelines on which cases are capable of ADR. Corporations must ensure that problem-solving was not an unnecessary drag on economic growth.

Standard Chartered Bank view (regular user) - Commercial businesses need to change corporate culture to manage litigation and mediation - mediation allows businesses to take back control of a dispute, resulting in financial and other benefits

CEDR TRAINING:

Mediator Training course  5/6 days  
Conciliator Training course  2 days  
Summer School  5 days (30% overseas delegates)  
ADR Users Guide  1 day  
The Lawyers role in ADR  2 days  
ADR users Surgery  half or 1 day (follow-up on Users Guide)

Corporate Courses:  
Avoiding Business Disputes  1 day  
Creative Problem Solving  2 days  
Effective Business Negotiation  1-4 days  
Communication Skills in Business  1 day  
Complaints Handling  1 or 2 days  
Negotiating your way out of conflict half or 1 day  
The Manager as mediator  1 day  

How to succeed as an in-house lawyer  flexible time-scales  
From lawyer to manager  
Managing Corporate legal services  
ADR for in-house legal advisors  
Creativity for in-house lawyers  

MARKETING  
As well as mediator training, CEDR run courses for businessmen on ADR as an alternative to litigation and arbitration. “ADR training for tomorrow’s solicitor”  
In-house lawyers are targeted

CEDR says ADR is slowly becoming part of business landscape in England  
Other professions are encouraged, promoting market creativity  
Woolf Proposals Rules 1.1 - 1.3 - encourage ADR  
Championing by courts has promoted new opportunities  
Fresh opportunities are developing - eg Millenium Bug.
Henry MacLeish (Scottish Office) on 27 March 1998) referred to research on successful family mediation schemes in Scotland, and stated that ADR schemes should be sought for non-family cases which were supported by legal aid.

The selection of CEDR by the Department of Environment, Transport and Regions as one of a few an Adjudication Nomination Bodies will increase numbers, as members of the construction industry will gain an automatic right to adjudication.

CURRENT DEVELOPMENTS

Accountancy Magazine 4 September 1997
Senior corporate executive reported losing approx 5% of annual turnover (£50 million loss) through unmanaged conflicts
Survey of 2000 largest US corporations by Cornell University / Price Waterhouse - 90% firms perception was mediation was a cost-saving device
It was reported that ADR is more often used if firms recently undertook downsizing initiatives because of cost-pressures.

Current View: Accountants should become aware of various strategies and techniques which were available to manage conflict more effectively, not only for the benefit of their clients, but for their own business generation opportunities.
Institute of Chartered Accountants advise that their profession need to widen their remits as formal roles are diminishing, and expand into business development consultancy with more targeted and specialist functions. Discussions have been held with CEDR for guidelines for Expert Determination and Mediation. - encouraging ADR clauses in appointment contracts. Through “In Business” magazine (reaches 40,000 Financial Directors, Company Secretaries and academics) the ICA is promoting ADR to its members.

Within the same article - an Arthur Andersen litigation executive feels ADR is unlikely to be a big money spinner for the profession. However, he warned that CAs should be aware of its appropriate use. Do they have a duty of care to inform clients of the possibility? He thought accountants would make excellent mediators - they are already involved with clients, have a deeper understanding of their problems, they are at home with figures, and are experts at finding commercially sound solutions. ADR reinforced their role as providers of business solutions - ie market creativity.

Law Society Gazette 19.11.97: Court imposed ADR order on De Lorean case.
Arthur Andersen reported that it worked, using “shuttle diplomacy” which was court-induced. The success in the face of party intransigence now means that the De Lorean example is widely quoted as proof that mediation can break barriers which litigation can’t - reduced costs, short time scale and working relationships are left intact. If both parties are CEDR members the initial approaches (usually inter-lawyer by telephone) eases the path to ADR.

ADR awareness and usage is promoted by CEDRs User’s Guide to commercial litigators and the international summer school.
APPENDIX 9.8

ADR and COURTS

Greece 1995 Legislation (2298) - encouraging parties to settle pre-court profession were unprepared for change, therefore 1997 Refinement (2479) - for all cases filed after 16 September 1999 above a claim value of £17,500 parties will have to prove mediation or an alternative was actively pursued.

Singapore 16 August 1997 Singapore Mediation Centre opened in association with the Society of Law. Keynote address given by Chief Justice Yong Pung How (requested papers)

England - Master Turner attended a CEDR seminar 1997, initially as a sceptic, and commented on future developments
1. courts must assess cases at a very early stage and then actively encourage ADR
2. they must learn to spot from papers what parties are actually seeking
3. lawyers must be educated to seek the aims of both parties, and regard trial in court as a failure

Awareness was limited at the moment - the new Medical Negligence list had one flaw - no-one agrees to mediate. There were two schemes run by Oxford and Yorkshire NHS trusts.

CENTRAL LONDON COUNTY COURT
From May 1996, parties invited to use mediation after defences are lodged. 3 hours are allocated - from 4.30 to 7.30 pm Cost £25 nominal fee per party. 5 mediation organisations involved. Before discovery or exchange of witness statements Legal Aid made available.

Professor Hazel Genn Research - initial findings: Take-up has been slow
125 cases mediated and studied, out of 4,000+ eligible claims
typical case contractual dispute £5,000 - £10,000, each party own costs
Legal Aid there has been no take-up on the Legal Aid Board’s recent offer of payment for mediation in the County Court.
Personal Injury largest number of actions in the Court - but 3 cases mediated (in U.S. there is a high mediation rate in this area, but UK insurers still to perceive the benefit)
Settlements 61% at mediation (lower than CEDR’s statistic 90%)
10% shortly thereafter (causal link)
Parties’ Response majority approved of process, particularly the lack of legal technicality and opportunity to participate personally. General perception of reasonable fairness was combined with an acknowledgement that litigation costs more.
BUT 3 hour time limit was disliked. The shortage of time was impacting on mediation styles
Solicitors Preparation needed was unknown, but the system provided considerable opportunity to contribute to outcome

Mediator Professor Genn observed variable qualities of mediation. The criterion were an understanding of law, experience, a range of personal skills and flexible use of strategies. Current pressure should be for high professional standards

Observations Mediators were involved more in evaluating than facilitating - pressing for settlement in 3 hours, showing signs of proving themselves as mediators.

Medical Negligence Practice Direction 1996 - Fast Track, One judge
Linda Mulcahy, University of North London is appraising this pilot scheme
- take up poor - extending for 1 year.
- dissatisfied claimants - their objectives were: apology, reassurance of reform, explanation - all higher than monetary compensation. 70% dissatisfied under old rules

Now more satisfied with mediation process - but extra training was required for complex fields. CEDR is offering training to NHS Trust Managers
Pre-Action Protocols

Existing Protocols at November 1999
- Personal Injury claims up to £15,000
- Clinical Negligence

Pre-Action Behaviour where no Protocol has been issued:
"the court will expect the parties, in accordance with the overriding objectives...to act reasonably in exchanging information and documents relevant to the claim and generally in trying to avoid the necessity for the start of proceedings." Practice Direction Protocols para 4

Objectives of pre-action protocols
- more pre-action contact between parties
- better exchange of information
- better pre-action investigation
- parties in better position to settle cases fairly
- reduces litigation, or alternatively sets up timetable for litigation

Personal Injury Protocol:
- Specimen letter of claim
- Defendant identify insurer within 21 days
- Defendant/insurer to have 3 months to investigate
- Reply and enclosed documents relevant to issues
- Non-exhaustive list of documents likely to be relevant to different types of claim
- Plaintiff submit schedule of special damages
- Draft letter of instruction for joint expert

Clinical Negligence Protocol:
- specimen letter requesting medical records from claimant
- reply within 40 days or explain why longer
- template contents of letter of claim – defendant’s response
- acknowledge receipt within 14 days
- reply within 3 months
- suggested contents for response

Non-compliance with Protocol:
- require party or representative to attend court CPR c.1(2)(c)
- court directions, take into account compliance with relevant protocol CPR 3.1(4)
- costs order if no compliance with practice direction or relevant protocol CPR 3.1(5)
- application for relief from any sanction, court will take into consideration compliance with orders, rules, practice directions and protocol.

Summary Assessment of Costs
At any hearing of less than one day, costs orders may be made, having regard to conduct of parties, including pre-action conduct and pre-action protocols CPR 44.3

Allied to Pre-action Disclosure Order CPR 31.6
Pre-Action Protocol for the Resolution of Clinical Disputes
Illustrative Flowchart

Patient suffers adverse outcome – discussion with healthcare provider

Patient dissatisfied
Requests written explanation

Professional Reports outcome to Clinical Director

Patient dissatisfied,
consults solicitor and options discussed

Medical director/complaints team investigate – obtain records/interview staff and provide explanation

Solicitor requests records

Investigations continue, records provided

40 days

Solicitor instructs expert who advises on potential breach of duty

Healthcare provider instructs solicitors and takes advice from in-house expert who advises no breach of duty, claim refuted

3 months

Solicitor patient prepares letter of claim and sends to healthcare provider

Proceedings issued and served
A Settlement

Do you wish there to be a one month stay to attempt to settle the case?

B Track

Which track to you consider is most suitable for your case

<table>
<thead>
<tr>
<th>Small</th>
<th>Fast</th>
<th>Multitrack</th>
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If you think your case is eligible for a specialist list say which
If you have indicated a track which would not be the normal track for the case please give information for your choice.

C Pre-Action Protocols

Have you complied with the pre-action protocol applicable to your claim?
If yes, please say which protocol
If no, please explain to what extent and for what reason it has not been complied with

D Applications

If you have not already sent the court an application for summary judgment do you intend to do so?
If you have not already issued a claim in the case against someone not yet a party, do you intend to apply for the court’s permission to do so?
In either case, if Yes, please give details.

E Witnesses of fact

As far as you know at this stage, what witnesses of fact do you intend to call at the hearing: Witness name and Witness to which facts requested

F Experts’ evidence

Do you wish to use expert evidence at the hearing?
Have you already copied any experts’ report(s) to the other party(ies)?
Please list the experts whose evidence you think you will use. Experts’ names and field of expertise requested.
Will you and the other party use the same expert(s)?
If not, please explain why not.
Do you want your expert(s) to give evidence orally at the hearing or at the trial?
If yes, give the reasons why you think oral evidence is necessary.
G Location of Trial

Is there any reason your case needs to be heard at a particular court? If yes, give reasons (e.g. particular facilities required, convenience of witnesses, etc.) And specify the court.

H Representation and estimate of hearing/trial time

Do you expect to be represented by a solicitor or counsel at the hearing trial? How long do you estimate it will take to put your case to the court at this hearing/trial? (days, hours, minutes) If there are days which you, your representative, expert or an essential witness will not be able to attend court, give details.

I Costs (only relates to costs incurred by legal representatives)

What is your estimate of costs incurred to date? What do you estimate the overall costs are likely to be?

J Other information

Have you attached documents you wish the judge to take into account when allocating the case? Have they been served on the other parties? If no, say when Have the other parties agreed their content? Have you attached a list of directions you think appropriate for the management of your case? Are they agreed with the other parties? Are there any other facts which might affect the timetable the court will set? If so, please state.

Signed by: [Counsel] [Solicitor] [for the] [Claimant] [Defendant] Dated