

Transatlantic Learning

A Report on the Visit of U.S.
Problem-Solving Court Judges to Scotland

by Phil Bowen

The Centre for Justice Innovation aims to improve the implementation, evaluation, and dissemination of new ideas and new practices throughout the criminal justice system in the United Kingdom.

The Centre for Justice Innovation is a project of the Center for Court Innovation, a New York-based non-profit organisation that has helped to create dozens of demonstration projects, including the award-winning Red Hook Community Justice Center.

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Introduction

In September 2012, Judge Prudenti (Chief Administrative Judge for the New York State Unified Court System), Judge D’Emic (presiding Judge at the Brooklyn Mental Health Court), and Judge Canan (the associate judge for the Superior Court in Washington, D.C.) arrived in Edinburgh. They had come at the invitation of the Scottish Government and the Judicial Studies Committee (the body in Scotland which promotes training for the judiciary both in the Supreme Court and in the Sheriff Court) to participate in a series of events¹ with Scottish Sheriffs (a term for judges in Scotland) and criminal justice and social service practitioners and policymakers. The discussions were dedicated to discussion of a radical experiment: problem-solving courts.²

Starting from humble beginnings with the drug court in Dade County, Florida in 1989, the problem-solving court movement has grown to encompass literally thousands of courts in the United States. These courts share a common outlook: that the court should be a place that helps citizens and communities address the crime that they face. These include courts that specifically tackle domestic violence, drug addiction,

mental health, alcohol abuse and, in some of its most notable successes, provide a focus for community-wide efforts to re-engage neighbourhoods with their justice system and solve the problems in their midst. That movement has since gone international – with domestic violence courts in England and Wales, community courts in Australia, and drug courts in Ireland, amongst many others. This international movement has at its heart a particular conception of the role of the court: that the courts are not solely neutral arbiters but should also seek to identify and address the factors that lead to reoffending.

There is considerable evidence³ in the U.S. that suggests that problem-solving courts reduce reoffending and improve offenders' perceptions of fairness, as well as striving to improve other outcomes, such as reducing the number of babies born addicted to drugs, improving community confidence, and aiding the resettlement of offenders from prison. Scotland has already developed two drugs courts in 2000, one in Glasgow and one in Fife, and the Scottish Government is trying to see if their spread could help tackle some of the problems that the country faces – high crime and high incarceration rates compared to her European neighbours,⁴ alcohol misuse,⁵ and drugs.⁶

And so the three American judges crossed the Atlantic to relate their experiences about how problem solving had spread in the United States. The aim of the events they attended, and of this publication, is to see what lessons Scotland can learn about the barriers to and opportunities for the growth of more problem-solving approaches in Scottish courts.

Research Question and Methodology

In association with the Scottish Government and the Judicial Studies Committee, the Centre for Justice Innovation made detailed notes of the events, held follow up interviews with several of the participants who attended. Individuals interviewed were asked to reflect on the events they attended and identify the barriers they believed existed to the further spread of problem-solving courts, to identify any existing assets that may help Scotland spread the model and any opportunities they thought Scottish Government, practitioners and judicial figures could seize to help spread the model.

Findings

Barriers to spread of problem-solving courts in Scotland

Based on records of the events and subsequent interviews with U.S. and Scottish sheriffs who had attended, the following barriers to widening the spread of problem-solving courts in Scotland were identified:

1. Does problem solving fundamentally change the role of the court and court players, especially the judge?

Adoption of problem-solving court principles undeniably ask court players to adopt different roles and participate in different activities. But perhaps for judges above all others, problem-solving courts can place special demands – whether that is in monitoring offenders’ compliance with a sentence, in rewarding and admonishing offenders under regular review or simply in engaging offenders and their families in open court to ensure they understand what is going on and have their chance to be heard. As Judge Prudenti outlined in her lecture at Strathclyde Law School, “In contrast to the more traditional view of judges as distant arbiters..., judges in problem-solving courts do take a more proactive, hands-on role.”

Some of the sheriffs interviewed expressed reservations about these implications for the role of the judge as an adjudicator. One said, “I am a skeptic [about problem-solving courts].... It’s not hugely what I want to do; it’s not what we are for.” As Judge Canan described it, it is still the case that many U.S. judges still see the job as simply “calling balls or strikes” – that is, simply ensuring court cases are conducted fairly and determining innocence or guilt. A fellow sheriff, when commenting on specialist domestic abuse courts, recognised the problem of seeming to be influenced by outside special interest groups: “The perception

out there could be that special interest groups have the ear of the judge – we need to guard against that.” This theme was picked up by Professor Eric Miller in his comments at the Judicial Studies Committee seminar. Miller expressed a commonly held concern that “boundaries blur of court players, especially that of the judge. The concern is that they are no longer an impartial, judicial arbiter.”

There was also a concern that problem solving changed the nature of a court, making it a social service provider. As one sheriff interviewed said, “I am less starry eyed about this (problem-solving courts).... From my perspective, they [offenders in drug courts] get far too many chances but more importantly, there is an inherent conflict – we are not here to look after people.” Judge Canan himself recognised the issue: “My view is that courts are not a social service institution ... it is not the judges’ job to solve all society’s ills. What we can do is try our best, with the services at our disposal, to help reduce crime with the opportunity that sentencing gives us.” He also went on to say that many of the jurisprudence issues are “concerns about process, which I do acknowledge ... but the verdict is in: these courts work.”

2. Are sheriffs ‘unqualified’ to perform problem solving?

Even if there were judicial figures in Scotland willing to participate in an expansion of problem solving, a number of people questioned whether there was sufficient training for judges to adopt problem solving. From the demands of engaging directly with the offender or developing in-depth specialist knowledge leading a multi-disciplinary team, problem-solving courts require judges to perform different tasks and draw on additional skills. As one interviewee commented, “It’s not what I trained to do.” This view that problem solving asks judges to do something new was an issue recognised by both Judges Canan and

D’Emic. Judge Canan said that he had been cautious about taking a problem-solving court on as a judge. When he was ‘volunteered’ for drug court by his boss, he initially questioned whether he was cut out for it. But both U.S. judges said, in their experience, it could greatly increase a judge’s job satisfaction and the skills needed for a future career. In her remarks, Judge Prudenti stated, “... we have repeatedly found that after spending time in training and in the courts themselves, even judges who are reluctant at first have found the experience both personally and professionally rewarding.”

However, both U.S. judges said that their experience suggested that only some judges had the skills and mindset to operate in problem-solving courts. Judge D’Emic suggested that he was well aware that certain judges may never be ‘right’ for working in a problem-solving court. The American judges also stressed that though judicial training had raised the bar for many of their colleagues, the majority of judges in the U.S. are still ‘traditional’ adjudicators and that problem solving was still a specialist role.

3. Are problem-solving courts expensive?

Even amongst those who expressed enthusiasm for the model, there was a perception that the resources simply are not available to expand the problem-solving justice model very widely. As one sheriff commented, “I was impressed by the intensity of what I heard [the U.S. judges were doing] ... but there isn’t a hope in hell that we can do it. There aren’t the resources.” One particular concern is the idea that problem-solving courts involve the supervision of offenders post sentence by the court. “That seems like it will vastly increase the time we are in court,” noted one sheriff, “How is that going to be paid for?” Another said, “There are not enough sheriffs to cover our current business. Why would we tack on luxury items like reviews [of offender progress on orders]?” Another said,

“Courts are under pressure financially- it’s already difficult to sustain ... trial dates are slipping.” Others noted that politicians could not have it both ways- “There can’t be a commitment to expanding problem solving one day, and no money tomorrow.”

When asked about this particular barrier in the U.S., Judge Canan struck a positive note. Judge Canan said, “Our experience [in Washington, D.C.] has shown is if you take a hard look at your existing resources, any organisation – whether it’s the court, probation, pretrial officers – if there’s a will there’s a way. You can reconfigure the criminal justice system in a way to make all our offices more effective. In Washington, D.C., for example, without any substantial new resources, we were able to go forward with substantial reform, making the central courthouse more community focused.”⁷ Judge D’Emic agreed: “It’s not really an extra cost – it’s the better application of existing resources already out there in the community.”

4. Is court specialisation only possible in large urban centres?

A number of sheriffs wondered whether specialising around certain problems – drugs, mental health or domestic abuse – could work only in areas with concentrated populations. As one sheriff, enthusiastic about Judge D’Emic’s Mental Health Treatment Court, said, “It’d be hard to establish one outside of Glasgow.” Another said, “The principle of specialising is attractive but the need for such courts is only readily apparent in our major cities, maybe only in Glasgow.”

This concern was repeated by other practitioners. “What we heard today was great,” said one, “but Judge Canan is from Washington, D.C. and Judge D’Emic from Brooklyn. Could we do that sort of thing in the rural communities of the Highlands and Islands for example?”⁸

Existing assets and opportunities to assist in the spread of problem-solving courts

Interviewees were also asked to think about what assets Scotland currently has, which it could draw from, and what opportunities it could exploit, which would help the spread of problem solving. The assets mentioned were:

1. Strong relationships exist among key criminal justice figures in a system with a clear remit and well defined jurisdictions:

A number of those interviewed stressed that one distinct advantage of Scotland over England and Wales is Scotland's size and its relative control over its own destiny through devolution. Judge Canan noted that there was a 'strong and close' interchange between the Scottish Government and judicial leaders which could be built upon: "It [developing problem solving] is, in part, about collaboration between the executive and judicial branches of government ... I was impressed with the Scottish government and judiciary's desire to explore problem-solving courts and to embrace the research that has demonstrated success." This point was also made by a Scottish Government official: "We can pretty much get everyone in positions of authority into one room and have a discussion."

Another interviewee suggested that "our size is to our advantage.... Developing a focus on particular neighbourhoods or problems is easier because we have relatively small areas under our control [compared to centralised courts in the U.S.]." This strength is a notable difference between Scottish courts and a court jurisdiction like New York City—in Scotland there is roughly a courthouse for every 100,000 residents, in New York City, there is one for every 1,500,000 residents. Even comparing Scotland's largest urban areas shows that the courts in Scotland serve smaller populations than the large centralised courthouses in New York.

2. There is considerable experience of and enthusiasm for problem solving amongst the judiciary:

Many of the interviewees from both the U.S. and Scotland pointed out that the Scottish judiciary are building from substantial experience of problem solving already. As one sheriff noted, "We have the experience [of problem solving] through the DTTOs [the Drug Treatment and Testing Order, an order of the court that mandates drug rehabilitation and judicial monitoring of the sentence]. We know that if we can have continuity of sentencer and the involvement of other institutions like the NHS, we already have a good practice model." Judge Canan commented on this: "The sheriffs had a great fund of knowledge about what constitutes an effective problem-solving court. They're not starting out from scratch."

Amongst those sheriffs already engaged in problem solving, there was not just a wealth of experience but also considerable pride that they are making a difference. "We should be proud of what we have achieved.... It's not pride because we are being radical but pride because we are helping a traditional institution adapt to the world in which it inhabits." Even one sheriff, a self-defined 'skeptic' said, "To one extent, all courts are problem-solving to some extent.... I was impressed by the focus and intensity," which he saw as a benefit in a system that otherwise "did little but help the people who want to change, change—and fails those who don't."

Judge Canan came away from Scotland with a strong impression of "the enthusiasm and apparent willingness to go forward—especially at the meetings with the judges, where there seemed to be great enthusiasm for exploring innovation." Judge D'Emic felt similarly: "A bunch of sheriffs came up to me and said they were ready to start tomorrow. Even without a problem-solving court *per se*, they said they were ready to take some of the concepts and apply them immediately."

Some Scottish sheriffs also thought the judicial will was there – “I think a good proportion of the judiciary are open to problem-solving courts,” said one. Another said, “It isn’t necessarily now ‘Are we keen?’ but ‘How do we move from keen to doing it?’” One cited the involvement of the Judicial Studies Committee, the organisation that trains judges, as crucial: “The very fact of having the roundtable at the Judicial Studies Committee suggests our leadership are up for this.” The notion of judicial leadership was especially mentioned by Judges Canan and D’Emic: If there was a message from the entire week, it was about the concept of judicial leadership, says Judge Canan – “For the court to take the lead in bringing the criminal justice partners together is absolutely essential.” Judge D’Emic echoed this: “The key for me is where leadership for problem solving is going to come from. We had some of the leadership from the judiciary at our seminar on Thursday, which is important. You need the highest levels of the judiciary on board to make [problem solving] an integral part of the justice system.” That point was reiterated by Judge Prudenti, who highlighted that problem solving in New York State had been largely driven by the Chief Judge of the State – “... the necessity for visionary and coordinated leadership cannot be underestimated.”

3. Problem-solving approaches at court can be built on the strength, expertise and enthusiasm of existing statutory and voluntary social service and criminal justice provision:

Judge D’Emic thought there was key advantage for sheriffs in developing problem-solving courts in Scotland over U.S. colleagues: “My sense is that a sheriff at a given court could put something together at very little cost, utilising the services that are available. That’s especially true given that there’s a National Health Service in Scotland.... You guys have a welfare state!” It was a point Judge Canan also noted – “It does

not need to be about extra resources, just the optimisation of existing resources.” Judge D’Emic was also impressed by other practitioners who he met and their enthusiasm for change – “I was completely overwhelmed by the fact that everyone I met with had no agenda other than to make the justice system work better. It wasn’t an ego driven thing; it truly felt like a service-driven system.”

There was also a strong sense that the criminal and social service field had a commitment to the notion of specialisation, whether that be around a specific problem or a specific group of offenders. One interviewee said, “The commitment to doing more for female offenders [following a report into female offenders commissioned by the Scottish Government]⁹ for example throughout Government, the practice community and judiciary is overwhelming.” Judge D’Emic noted that the idea of a mental health court seemed to strike many as particularly relevant: “...a lot of people [at the practitioner trade fair] came up to me who said they knew someone with a mental illness and felt like there was a real need for something like I was doing [with the Brooklyn Mental Health Court].” This enthusiasm for specialisation was mentioned by some of the sheriffs. One said, “The idea of a mental health court was not on my radar before. It’s a very interesting idea. In Glasgow there may be a case for such a court.”

4. Incremental problem-solving initiatives can be developed for little cost:

When thinking about the opportunities that could be seized, a number of practitioners thought that some innovation would not require additional resources. “I was really impressed to hear Judge Canan suggest that a lot of this was simply about administrative and judicial will to look at things differently, not constantly ask for more at a time of scarcity,” noted one sheriff.

Two sheriffs mentioned the idea of judicial

continuity, either around hearing particular cases or monitoring DTTOs (Drug Treatment and Testing Order). “It seems,” said one, “that continuity is an essentially administrative hurdle – it’s about the judiciary and court service aiming for a particular model rather than requiring more money.” Another said, “I think there is already a considerable amount of continuity in Glasgow but I don’t see why we shouldn’t aim to replicate it as far as possible in other jurisdictions.”

Another low-cost change that was mentioned was better information provision. One sheriff said, “What strikes me is that what the U.S. judges talked about often just seemed to be about having better information about the range of options you could sentence to. We know what social work can provide but I can’t honestly say I know about the voluntary providers in my town who I could send an offender to under a deferred sentence who might make a real difference.... That’s not really about costs – it is about the courts’ ignorance!” This idea of better information provision was picked up by another sheriff, relating it to compliance monitoring – “The police monitor offenders on bail for domestic abuse and check in on the victims – why can’t they report that to us? It would make a difference to me if I had that information.” Similarly, the same sheriff thought social services already knew a good deal about the families of offenders – “Why can’t we know more about what they know about the family circumstances of the defendants and share it? Problem solving to me is not just about judges doing it, it is about harnessing the whole team around us.”

The notion that there were little changes that could happen without extra resources was a key theme for the U.S. judges. As Judge D’Emic said, “If there are problems you think you can solve either in the system or for one offender, do it!” One simple example from Judge D’Emic’s point of view was in better management

of judicial careers through rotation: by rotating judges through problem-solving courts, more judges had come to accept and spread the model – “A simple thing, healthy for job satisfaction and job diversity but a pretty small and controllable thing to do.”

At the same time, the American judges stressed that change was gradual and that each new problem-solving court required detailed planning. Judge Canan said progress “is slow and incremental.... It’s about trial and error and not being rooted in the past approaches.”

Concluding Thoughts

What is clear after several days of meetings and numerous interviews is that if there is the intention to develop more problem-solving approaches within the Scottish court system, there is considerable judicial will to be involved in the change. There are a number of small low-cost changes that sheriffs, practitioners, and local officials could make that would help build better courts. These include greater use of sentence review powers or better information provision on the services available in communities for sentencing. While there is a division of opinion about whether problem solving ought to be further developed, there are a significant number of sheriffs who, with the right permission and skills, would be happy to give it a go. Enthusiasts for problem-solving courts still have their work cut out however – U.S. evidence for effectiveness is one thing but the case also needs to be made here in the U.K. This is particularly important given the perception (rightly or wrongly) that problem-solving courts are an expensive luxury that cannot be afforded in times of fiscal austerity. Some of the changes implied by problem-solving courts need to be looked at closely – what are the real costs and benefits of additional judicial monitoring, more intelligent case listing and a more active engagement with local neighbourhoods and community organisations?

While there are real obstacles to change, what is undeniable is that there is also a great opportunity for the Scottish Government, Scottish judicial leadership and the range of Scottish criminal justice and social service providers to embrace a new vision of a better court system – one that has a commitment to participating in wider efforts to reduce re-offending, protecting communities and aiding victims.

APPENDIX A: The Series of U.S.- Scottish Problem-Solving Events

The series of events between 26th and 28th September 2012 were:

- A half-day ‘Problem-solving justice’ session convened by the Scottish Government, with Scottish practitioners, senior managers and Scottish Government officials;
- A meeting between the Scottish Government’s Cabinet Secretary for Justice, Kenny MacAskill MSP and Judges Canan and D’Emic;
- A lecture by Judge Gail Prudenti, Chief Administrative Judge for the New York State Unified Court System, at Strathclyde University, convened by Dr. Cyrus Tata, chaired by Sheriff Tom Welsh QC, director of the Judicial Studies Committee;
- A day-long roundtable at Judicial Studies Committee, with Scottish Sheriffs, Professor Eric Miller (St Louis University), HH Judge Fletcher and Judges Canan and D’Emic, chaired by Sheriff Tom Welsh QC;
- A day-long conference on reducing re-offending organised by the Scottish government, at which Judges Canan and D’Emic presented.

APPENDIX B: What is a Problem-Solving Court

The Center for Court innovation, a not-for-profit organisation which has been at the forefront of developing problem-solving courts in the U.S., suggests that there are some governing principles which mark problem-solving courts out as different:

- *Better information:* Problem-solving courts aim to ensure that the court has a more fully rounded view of the individuals it is sentencing, taking into account their circumstances and the issues which may underlie their criminal behaviour. Moreover, problem-solving courts aim to have a more rounded picture of the communities' needs and resources, making for more creative disposals.
- *Co-production and engagement:* Problem-solving courts should strive to be part of their communities, understanding the local resources available and trying to use their powers of sentencing to restore community assets. The court should also play an active role in helping involve community groups, victims and ex-offenders in shaping the services that are delivered.
- *Collaboration:* Problem-solving courts should foster a collaborative spirit amongst criminal justice professionals, social service providers and other relevant organisations to tackle shared problems and reach for shared goals.
- *Procedural justice:* Problem-solving courts are based on the theory that people comply more with court mandates when they feel that the system has treated them fairly. The emphasis should be on clear explanations to victims and offenders of court decisions and on treating people at court as individuals.

- *Accountability:* In return for assistance to move offenders away from crime, problem-solving courts expect offenders to meet their responsibilities. Through the use of judicial monitoring, better information on compliance and graduated sanctions for failure to comply, problem-solving courts promote the principle that assistance is a two way street.
- *Outcomes:* Problem-solving courts care about whether their activities make for safer communities. The problem-solving court movement is dedicated to demonstrating its impact on social outcomes, moving the court out of being a simple adjudicator into an agent for positive change.

Evidence for effectiveness

The evidence around the effectiveness of problem-solving courts is strongest for drug courts. Successive studies (Barnoski 2003, Belenko 2003, Rempel 2005, Rossmann 2011,) have shown them to produce significant reductions in drug relapse and significant reductions in criminal behavior. Evidence on domestic violence courts is more mixed, with 10 domestic violence courts having been evaluated utilising quasi-experimental methods. Findings were that three produced significant reductions in re-arrests on most measures (Angene 2000; Gover et al. 2003; Harrell et al. 2007) with the other seven yielding mixed results, although there is significant amount of evidence that victim satisfaction can increase where offenders are closely monitored. As to community courts, there is evidence that they reduce crime (Curtis 2001), increase community confidence and increase defendants' perceptions of fairness (Frazer 2005, Frazer 2006) compared to the traditional court.

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Endnotes

- 1 See Appendix A for list of events.
- 2 See Appendix B for the Centre for Justice Innovation’s ‘Six principles of problem-solving courts.’
- 3 See Appendix B for overview of evidence for problem-solving courts.
- 4 Ranking 36 countries from the OECD for the prevalence of six major crime types (recorded crime incidents per 100,000 population), Scotland ranked as the first out of the 36 for assault, and is in the top 18 for four other major crime types. Scotland’s incarceration rate per 100,000 population is 154, similar to England and Wales (155) and Spain (152), ‘Prison statistics 2011-12: main findings,’ Scottish Government, www.scotland.gov.uk/Publications/2012/06/6972/3, 2012.
- 5 “Mental health problems cause considerable poor health in Scotland. Rates of suicide in Scotland are higher than in England and Wales” – ‘Overview of Mental Health Services,’ Audit Scotland, 2009.
- 6 ‘Scottish Crime and Justice Survey (2011/12),’ Scottish Government, www.scotland.gov.uk/Publications/2012/03/2775/6, 2012.
- 7 The Washington, D.C. court community model has recently been shown to have generated positive impact: ‘Study Shows D.C. Community Court Program Lowered Reoffending Rates’, Legal Times, <http://legaltimes.typepad.com/blt/2012/08/study-shows-dc-community-court-program-lowered-reoffending-rates.html>, 2012.
- 8 From interviews with U.S. experts, it is clear that while community courts are primarily limited to urban neighbourhoods, there are plenty of specialised courts tackling alcohol misuse, drug addiction, and domestic violence in rural communities.
- 9 ‘Commission on Women Offenders: Final Report 2012’ or ‘The Angiolini Report,’ Scottish Government, <http://www.scotland.gov.uk/About/Review/commissiononwomenoffenders/finalreport-2012>, 2012.

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