INSURANCE SCOTLAND GUIDE

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INTRODUCTION

This guide provides an introduction to Scottish procedural law for the benefit of claims handlers who, from time to time, are called upon to deal with Scottish cases.

We aim to provide a concise overview of the Scottish legal system, and to answer questions such as:

- How much will this cost us?
- How long will it take to process this claim through the courts?
- Can I instruct my own expert?
- Can I see medical records / GP notes?
- How much information can I have and when can I have it, to enable me to reserve as accurately and quickly as possible?

If you require further copies of this guide, or if we can help you in any other way, please contact us.

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THE PERSONAL INJURY PROTOCOLS

A Voluntary Pre-Action Protocol applies to personal injury claims with a value of up to £10,000 for incidents occurring before 28 November 2016. A new Compulsory Pre-Action Protocol is now in force for incidents occurring on or after 28 November 2016.

It is important to note that the relevant date is that of the incident or other circumstance giving rise to the claim, not when the claim is made. For a time, therefore, personal injury solicitors and insurers will need to work with both voluntary and compulsory protocols at the same time.

The protocols apply to claims for personal injury, excluding disease and clinical negligence, and in practice both sides have applied the voluntary protocol beyond the £10,000 limit. Whether they will be keen to adopt the same approach to the more stringent compulsory protocol remains to be seen.

Compulsory Pre-Action Protocol

The main features of the compulsory protocol can be summarised as follows:

- Compulsory for all claims where the incident or other circumstance giving rise to the claim occurred on or after 28 November 2016.
- It applies to claims valued at up to £25,000.
- The protocol is now contained within the Sheriff Court Rules, granting discretionary powers to enforce compliance.
- Claim forms – full and detailed letters of claim are required, and the legislation provides very detailed forms for this purpose.
- Insurers have a maximum of three months to investigate the merits of the claim and state whether liability is admitted.
- An admission of liability is binding, and the claimant must respond to any allegation of contributory negligence before raising proceedings.
- Pursuers should instruct medical reports within five weeks of an admission of liability, and disclose them within five weeks of approval by the Pursuer.
- Pursuers must thereafter submit a valuation with supporting documents ‘as soon as possible’.
- Insurers must make an offer within five weeks of receipt of the valuation.

- Pursuers must accept or reject the offer within 14 days.
- On acceptance, insurers must pay damages and costs within five weeks or interest applies.
- On rejection, pursuers must wait 14 days before raising proceedings.
- The court can sist (stay) proceedings or apply cost penalties to any party who breaches the protocol, or
- If the pursuer accepts an offer once in proceedings, that offer was made prior to litigation, and it was lodged as a tender (Part 36) prior to defences being lodged at court.

Voluntary Pre-Action Protocol

The main features of the voluntary protocol can be summarised as follows:

- It can only be entered into voluntarily, by mutual agreement, on an individual case-by-case basis.
- It is designed for claims valued at up to £10,000 but can be applied to higher value cases by mutual agreement.
- The letter of claim is a detailed letter containing sufficient information to enable the insurer to investigate and put a broad valuation on the 'risk'. It should contain:

  - a clear summary of the facts;
  - allegations of negligence;
  - breaches of common law or statutory duty;
  - an indication of any injuries and financial losses; and
  - details of any place of treatment
- Insurers should respond within 21 days, advising whether it is agreed that the case is suitable for the voluntary protocol.
- Insurers have a maximum of three months thereafter to investigate the merits of the claim and state whether liability is admitted.
- Pursuers must submit a Statement of Valuation of Claim with supporting documents if liability is admitted and usually must also instruct medical reports no later than five weeks thereafter.
- Insurers must make an offer within five weeks of receipt of the valuation.
- Cheques must pass within five weeks of any agreed settlement or receipt of a signed discharge where necessary.
- There are no specific sanctions for non-compliance, leaving parties to persuade the courts to apply costs penalties.

OTHER PRE-ACTION PROTOCOLS

Disease

A voluntary protocol for disease claims came into effect on 1 June 2008 and covers any physical or psychological complaint that has not been caused solely by a single accident or event.

This protocol follows a similar style to the personal injury protocol medical information, as well as employment history and revenue records.

There is no upper value for claims under the protocol but any admission of liability (whether or not it is subject to causation) will only be binding on insurers in cases valued at less than £10,000.

Provision is made for insurers to investigate claims for three months - a period that can be extended by mutual agreement - and insurers can pose questions to a pursuer's medical witness.

The protocol allows a 'timebar holiday', with a pursuer having a period of one year to raise proceedings from a repudiation of liability or rejection of a settlement offer - provided the original formal intimation of the claim was within the usual three-year limitation period.

Professional Risks

A protocol for professional risk claims was introduced with effect from 1 July 2007. The protocol was a welcome development given the tradition in the Scottish jurisdiction, even in professional negligence cases, of exchanging little information before litigation and ambush by the claimant when the case is in court. The protocol draws heavily on its counterpart in England and much of the wording is identical. It is important to bear in mind that this protocol is also voluntary with no statutory force.

Highlights

- A requirement on both sides to exchange expert evidence.
- A transparent fixed costs regime.
- An ability to rely on protocol correspondence when arguing questions of costs in court. This is a developing area in Scotland since, to date, courts generally have been reluctant to depart from a 'winner-takes-all' approach to costs.

Disappointments

- The protocol is targeted at claims of up to £20,000 albeit with the possibility of higher value claims being treated as protocol claims by agreement. Our experience is that claimants are not seeking regularly to use the protocol in complex and higher value claims. Its take up, even in lower value cases, has been limited.
- The requirement to consider alternate dispute resolution (ADR) is weakened by the lack of any judicial sanction if ADR is unreasonably refused.
- However, anything tat encourages early exchange of information and reasonable pre-action behaviour with an emphasis on avoiding litigation is a welcome development for professionals facing claims, and for their insurers.

THE SCOTTISH COURT SYSTEM

There are two levels of civil court in Scotland. Jurisdiction is divided between the Court of Session, based in Edinburgh, and the Sheriff Courts, in 39 towns and cities.

A claim with a value of less than £100,000 must be raised (issued) in the Sheriff Court (increased from £5,000 in September 2015). Although there is no upper limit to the value of claims that may be raised in the Sheriff Court, it is still more common for claims of significant value to be raised in the Court of Session.

Any claim with a value of £5,000 or less will be dealt with through the Sheriff Court summary cause procedure, if it involves personal injury, and the simple procedure if no injury is claimed.

The two levels of court also have different forms of procedure, governed by different rules of court. In particular, a personal injury action in the Court of Session has its own rules which were introduced in April 2003. Similar rules were introduced for personal injury actions in the Sheriff Court in November 2009.

September 2015 also saw the introduction of the All-Scotland Sheriff Personal Injury Court. Sitting in Edinburgh, it has jurisdiction across the whole of Scotland for personal injury claims worth more than £5,000, and £1,000 for accidents at work.

Additionally, there is ‘Commercial Cause’ procedure in both the Sheriff Court and Court of Session, which provides an expedited route for commercial claims and involves greater case management and control by the court.

THE COURT OF SESSION - PERSONAL INJURY

The current Personal Injury Rules apply to all personal injury actions in the Court of Session, although complex, catastrophic injury and clinical negligence cases can be removed and will be subject to more rigorous case management under the Chapter 42A Procedure.

Key features can be summarised as follows:

- An automatic timetable that specifies dates by which certain key actions must be taken
- Setting a date for a 'Proof Diet' (a trial window) 9-12 months in advance
- Simplified written pleadings
- An exchange of schedules and counter-schedules of damages with supporting documents
- A pre-trial meeting

The key differences between the rules governing an action for personal injury in the Court of Session and the English Civil Procedure Rules (CPR) are detailed below.

Disclosure

In Scotland, there is no obligatory disclosure. Parties seeking documents during the course of proceedings must apply to the court specifying the document or category of documents that they require (e.g. GP and hospital records), if these are not disclosed voluntarily. The pursuer is entitled to seek an automatic Specification of Documents (order for disclosure) at the outset of the proceedings. This will normally cover post-accident medical records and documents relating to liability. The period for enforcement is time-limited, so defenders can be required to comply within a relatively short period after service of the summons and specifications.

The Court of Session rules dictate that parties ought to provide medical reports with their Statement of Valuation of Claim. There are, however, no ramifications for failing to do so and therefore parties rarely disclose their evidence at that stage. Pre-accident medical records were not historically recoverable unless there was evidence of a pre-existing condition or continuing loss. But in **Hendry v Alexander Taylor & Sons** and **NIG Insurance**, the court

held that pre-accident medical records were recoverable because of the nature of the losses claimed by the pursuer. This was the first such recorded authority north of the border and this approach has since been approved in subsequent cases.

Disclosure in Scotland can be a cumbersome, time-consuming and bureaucratic process. Our practice is to attend to disclosure proactively so that our clients are in the strongest position possible.

Witnesses

Witness statements (or ‘precognitions’ as they are known in Scotland) remain privileged throughout an action and are not normally disclosed or exchanged. The only requirement is to identify the witnesses who will be called. This should be done up to eight weeks prior to proof (trial), by lodging (serving) a ‘List of Witnesses’, by consent and with leave of the court.

Experts

Productions (evidence), including expert reports, can be lodged (served) with the court up to eight weeks prior to trial, or later by consent of the parties or with leave of the court. Parties can also choose which expert reports they wish to rely upon and do not need to disclose any report unless they wish to put it before the court as evidence.

Even if a report is not lodged, an expert can give oral evidence that includes the content of a report that has not been disclosed, so long as the expert is listed as a witness. In practice, this means that reports and witnesses are often introduced up until the morning of the trial.

There are no joint statements by experts in Scotland. We can, of course, provide tailored advice on the selection of experts for individual cases.

Pleadings

In England, pleadings all remain as separate documents - statements of case, defence, Part 18 requests and replies. In Scotland, following the adjustment period (an automatic period for amendment without leave), parties’ pleadings are incorporated into one document called the ‘Record’. Thereafter, parties can amend their pleadings only with leave of the court.

The Court of Session rules for personal injury cases sought to avoid the need for detailed pleadings in such actions, and in many cases pleadings will be remarkably brief. In more complex cases, however, more comprehensive pleadings continue to be required.

Offers to settle

In Scotland, an offer to settle may be made by way of 'Tender' (a Part 36 offer equivalent, which has adverse cost consequences for a party failing to beat it). Unlike in England, a tender cannot be made until proceedings have been raised (issued). There has never been any requirement to make an actual payment into court, as is now the position in England.

In England, the claimant has 21 days to respond to a Part 36 offer but in Scotland, the pursuer is simply allowed a 'reasonable' period of time for acceptance. A tender can be withdrawn at any time prior to acceptance without the leave of the court.

Trials and hearings in Scotland: Proof before answer and debates

A civil trial in Scotland is known as a Proof. A Proof is a hearing on facts and evidence only. A Proof Before Answer is similar to a Proof in that there is a hearing on the facts and evidence of a case. The main difference is that parties have the opportunity after evidence is heard to engage in legal debate about the relevance of their opponent's pleaded case.

A Debate (also known as a Procedure Roll hearing in the Court of Session), is a hearing on legal arguments only and no facts and evidence are heard. The decision as to whether to fix a Proof, Proof Before Answer or Debate is made by the parties and the matter will only come before the court if they cannot agree. Accordingly, insurers, insureds and their advisers need to consider whether they wish to challenge the legal basis of a case or whether the dispute is solely one of fact and evidence.

Jury trial

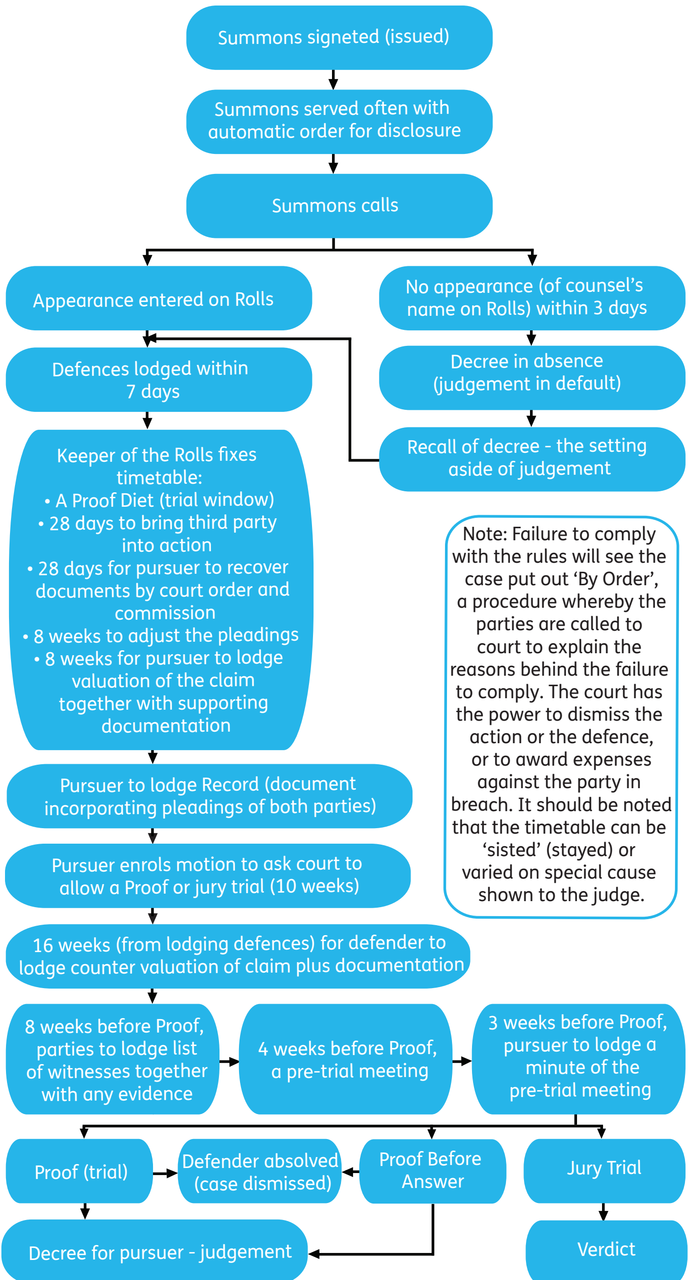
In a Court of Session personal injury action, and in the All-Scotland Sheriff Personal Injury Court, the pursuer has an automatic right to jury trial, although that is not always exercised. If the pursuer opts for jury trial, it can be resisted, but only on 'special cause' being demonstrated to the court.

The most common ground for objection is that there are complex issues involved that render the case unsuitable for consideration by a jury.

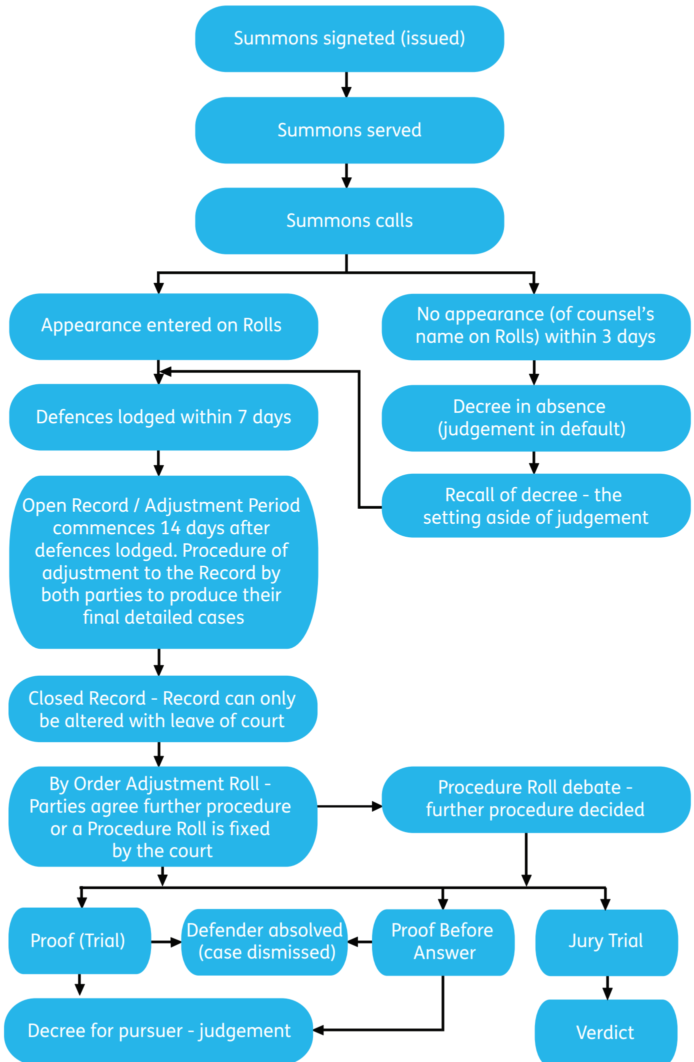
Given that juries at trial are not experienced in quantifying damages, there is an inherent risk that a jury may award significantly higher damages than a judge. Current case law establishes that a jury award will not be overturned on appeal unless it is approximately 100% more than would reasonably have been awarded by a judge at first instance. This has led to a significant increase in the damages awarded in fatal claims in particular.

It is our policy, subject to express authority from the client in a given case, always to object to jury trial even if the chances of success are low, given the risk of a jury awarding significantly more than a judge. Despite previous suggestion by the Court that calculation of future losses with reference to the Ogden tables would render a case too complex for a jury, this argument will no longer find favour and one needs to look for complicated or unusual calculations of damages, or vague assertions by a claimant in their pleaded case in order to mount a successful challenge. Each case will be judged on its own merits.

OVERVIEW OF A COURT OF SESSION PERSONAL INJURY ACTION



OVERVIEW OF A COURT OF SESSION NON-PERSONAL INJURY ACTION



THE SHERIFF COURT

The Sheriff Court operates three procedures for cases of different value:

- Simple procedure for cases valued below £5,000 (excluding personal injury claims)
- Summary cause procedure for personal injury cases valued between £3,000 and £5,000
- Ordinary cause procedure for cases valued over £5,000

As in the Court of Session, personal injury claims are subject to specific rules and procedure. This applies to cases raised under both Summary (under £5,000) and Ordinary Causes, and the key features are:

- an automatic timetable;
- setting a date for a ‘Proof Diet’ (trial window);
- simplified pleadings;
- an exchange of schedules and counter-schedules of damages; and
- a pre-Proof conference (either in person or by telephone).

More complex cases and clinical negligence cases can also proceed under the Ordinary cause procedure (with the court’s consent).

Under Ordinary procedure, an Initial Writ (Summons) is served on the defenders (defendants), who have 21 days to lodge (serve) a Notice of Intention to defend the claim. A further 14 days is allowed thereafter for defences. An automatic adjustment period of approximately eight weeks follows (during which parties can alter their pleadings without leave). An Options Hearing (Case Management Conference equivalent) then takes place approximately two weeks thereafter, at which time further procedure is determined.

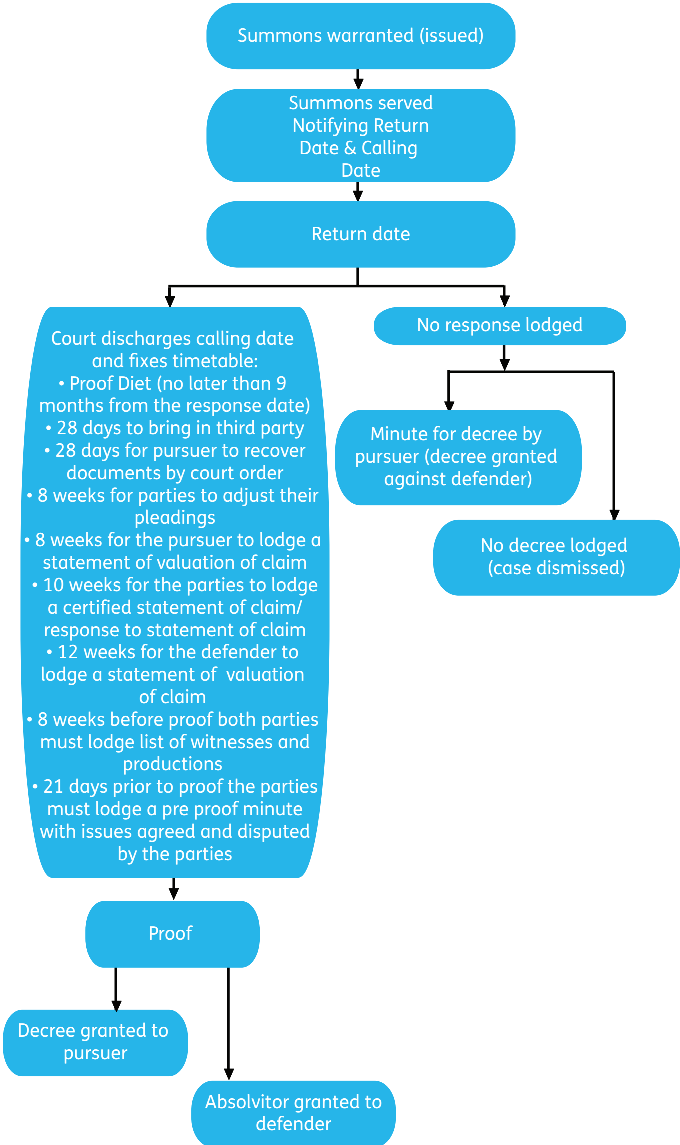
Solicitors have rights of audiences in the Sheriff Court and regularly conduct their own Proofs (trials). This is in contrast to England, where trials tend to be conducted by counsel. We have a number of Scottish solicitors who are also experienced advocates in the Sheriff Court and can defend cases to Proof (trial) without recourse to counsel. We also have several Solicitor Advocates who can conduct cases in the Court of Session.

Simple Procedure

The Sheriff Court Simple Procedure was introduced on 28 November 2016 for non-injury claims valued below £5,000. Simple Procedure for personal injury claims will arrive in early 2017. Designed to be pursued by party litigants (litigants in person) and lay representatives, the key features of Simple Procedure are as follows:

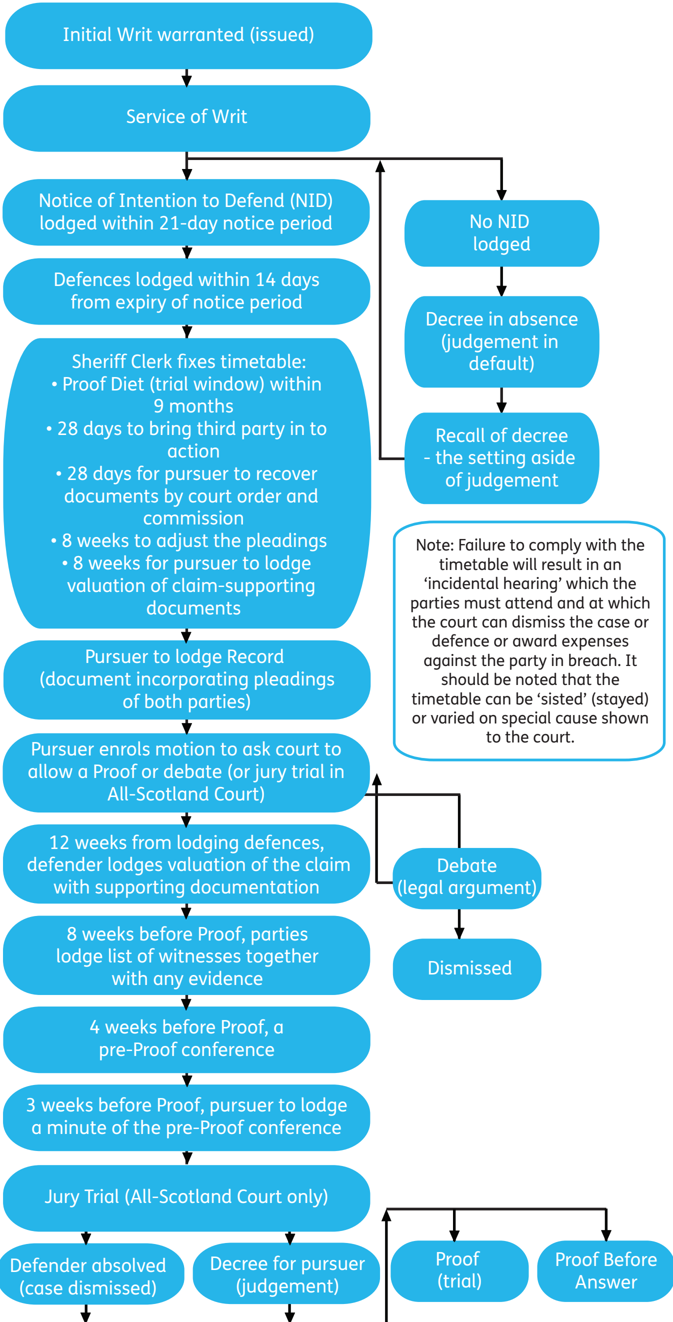
- a simple claim form;
- a simple response admitting or disputing the claim;
- written orders from the Sheriff either dismissing the case, arranging a case management discussion or a hearing, or referring the matter to ADR;
- hearings that are conducted informally, with the Sheriff assisting parties to negotiate if appropriate; and
- an integrated case management system – a portal for the submission and exchange of all documents.

OVERVIEW OF A SHERIFF COURT SUMMARY CAUSE PERSONAL INJURY ACTION

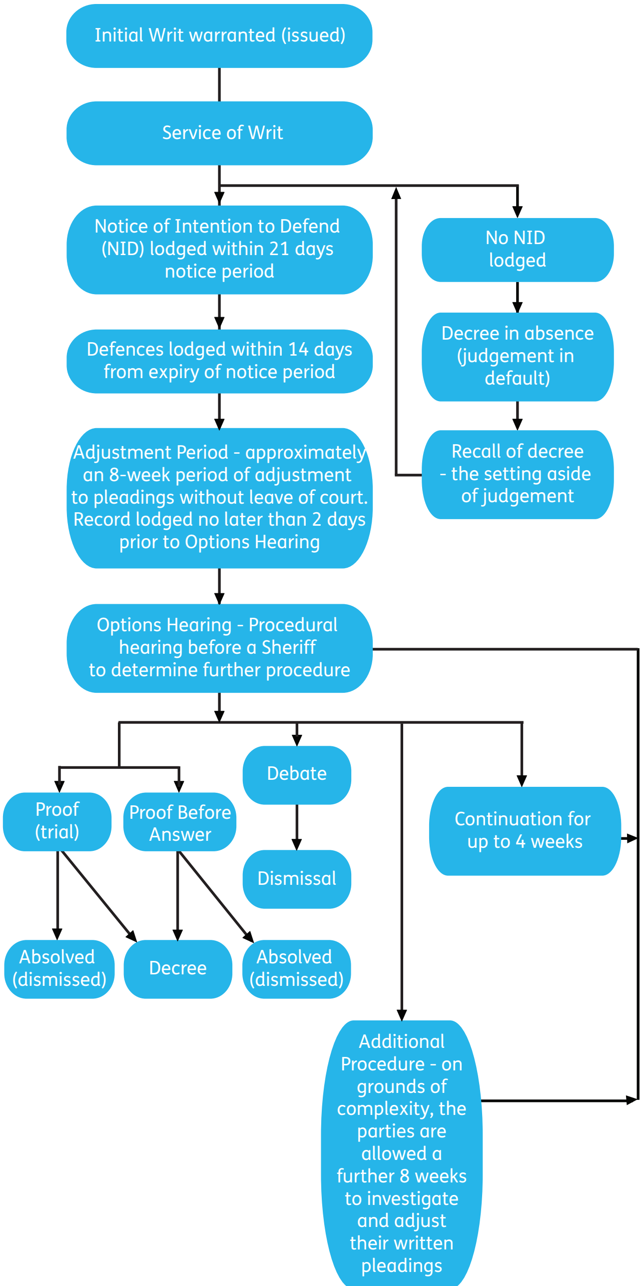


OVERVIEW OF A SHERIFF COURT PERSONAL INJURY ACTION

INCLUDING ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT



OVERVIEW OF A SHERIFF COURT ORDINARY ACTION



TIME BAR (LIMITATION)

The limitation period in Scotland for personal injury claims is three years. This is the same as in England, although proceedings must be raised and served within the three-year period.

For non-injury claims, the limitation period is five years, compared with six years in England. It is important to note that cases need to be issued and served within these deadlines.

As in England, there is scope for a court to extend the three-year limitation period in personal injury claims (Section 19(a) Prescription and Limitation (Scotland) Act 1973). As a general rule, Scottish courts have been less willing to extend primary limitation in individual cases than their English counterparts.

EXPENSES (COSTS)

As in England, costs (or in Scotland, expenses) are almost without exception recoverable by the successful party. The method of assessment of these costs, however, is different.

Pre-litigation expenses for voluntary protocol personal injury and disease claims

The protocol scale for settlements agreed from 1 January 2011 is as follows (plus VAT and reasonable disbursements):

Instruction Fee

On settlements up to and including £1,500	£370
On settlements over £1,500	£810

Completion Fee

On settlements up to £2,500	25%
On the excess over £2,500 up to £5,000	15%
On the excess over £5,000 up to £10,000	7.5%
On the excess over £10,000 up to £20,000	5%
On the excess over £20,000	2.5%

Pre-litigation expenses for compulsory protocol personal injuy claims

The protocol scale for settlements agreed under the **compulsory** protocol is:

Part 1 + Part 2 + VAT & reasonable disbursements

Part 1
£546 + 3.5% of the agreed damages up to £25,000

Part 2
25% of the agreed damages up to £3,000; plus
15% of the agreed damages over £3,000 up to £6,000; plus
7.5% of the agreed damages over £6,000 up to £12,000; plus
5% of the agreed damages over £12,000 up to £18,000; plus
2.5% of the excess of the agreed damages over £18,000.

NOTES

1) In addition, VAT (on all elements) and outlays will be payable.

2) In cases including a payment to CRU the protocol fee will be calculated in accordance with the following examples:

(i) Solatium (General Damages)	£5,000
Wage loss	£5,000
CRU repayment (all of which can be offset)	£2,000
Sum paid to pursuer	£8,000

In these circumstances the protocol fee will be based on £10,000 being the total value of the pursuer's claim.

(ii) Settlement as above but repayment to CRU is £2,000 and only £1,000 can be offset. Payment to the pursuer is £9,000 and to the CRU is £2,000. The protocol fee will be based on £10,000, this being the value of the pursuer's claim, as opposed to the total sum paid by the insurer, which is £11,000.

3) In cases involving refundable sick pay the protocol fee will be calculated by including any refundable element.

Illustrations

Damages	Costs
£1,500	£745 + VAT & disbursements
£5,000	£1,810 + VAT & disbursements
£10,000	£2,185 + VAT & disbursements

Pre-litigation expenses for protocol professional negligence claims

The protocol scale for settlements agreed from 1 January 2011 is as follows:

Instruction Fee

On all settlements	£1,041

Completion Fee

On all settlements up to £2,500	25%
On the excess over £2,500 up to £5,000	15%
On the excess over £5,000 up to £10,000	7.5%
On the excess over £10,000 up to £20,000	5%
On the excess over £20,000	2.5%

VAT will be payable in addition on all elements of the fee, except where the claimant is VAT-registered.

Disbursements reasonably incurred will be payable in addition.

Illustrations

Damages	Costs
£2,500	£1,666 + VAT and disbursements
£10,000	£2,416 + VAT and disbursements
£20,000	£2,916 + VAT and disbursements

Post-litigation judicial expenses

Expenses generally follow success. The successful party prepares an Account of Judicial Expenses, either when an action is settled during the course of litigation or when a court makes an award of expenses.

The Judicial Account of Expenses is prepared on the basis of a statutory fixed Table of Fees, which regulates the expenses that the successful party can claim. These are updated annually by statute. The tables of fees allow the successful party to recover their expenses, either on the basis of fixed 'block fees' for particular types of work or by charging for the time spent on the case, by reference to fixed rates. The block fee is most commonly used.

The paying party cannot challenge the choice of the successful party as to the basis for calculating their expenses.

Quite often the successful party will send their papers to a law accountant (costs draftsman) to prepare their Judicial Account of Expenses. The draftsman's fee cannot be included in the account of expenses but there is a scale fee for preparing the bill.

There are different Tables of Fees for the Court of Session and the Sheriff Court although the principles are the same. The Sheriff Court tables reflect the fact that in the main, counsel is not involved.

Additionally, it is open to the successful party to request that the Court Auditor (Costs Judge) uplifts its expenses by a percentage increase, based on what is fair and reasonable. Factors taken into account include the complexity of the litigation, skill and specialised knowledge, time spent, the number and importance of documents, the place and the circumstances, the value involved and the importance to the client.

There are no hard and fast rules to determine what is fair and reasonable. It is our practice to forcefully negotiate expenses within the constraints of the economics of doing so.

Outlays (Disbursements)

In addition to VAT, the judicial account of expenses will include outlays. These include court 'dues' (fees), counsel's fees, expert reports and witness expenses. Court dues include fees for entering appearance, the fixing of the Proof or debate, and any motions (applications) made. Outlays can increase the account of expenses considerably.

Counsel's fees

In the Court of Session, counsel's fees are almost always recoverable as part of any award of expenses or upon settlement, although there is limited scope for challenging the level of an individual fee. In the Sheriff Court, the court must be asked to sanction the employment of counsel. The Sheriff will do so in cases that are considered difficult or complex or where the case is of particular importance to the client.

Experts

The successful party must seek to have its expert witnesses 'certified' by the court (i.e. the court confirms that their involvement was reasonable) before it is entitled to recover the expert's fees.

Certification is generally a formality. It is rare for the involvement of an expert to be successfully challenged.

Negotiation of expenses and taxation

On receipt of the Account of Expenses (Bill of Costs), the unsuccessful party will consider it and negotiate settlement of the account.

Because of the fixed fee regime, there is only limited scope for substantial discounting of costs claimed in litigated cases unless they are calculated wrongly. However, if the account cannot be agreed, it will be submitted to the Court Auditor for taxation. At taxation, the auditor has discretion to increase or reduce the account. In practice the auditor's decision is final, although it can be challenged before the court in exceptional cases.

Funding

Solicitors can enter into Conditional Fee Arrangements (CFAs) in Scotland and although rare, legal aid is still available for personal injury claims. CFAs are often unattractive to the claimant's solicitor because any success fee / uplift is not recoverable from the losing party, only from the solicitor's own client.

What does all this mean in practice?

The settlement figure generally has no direct bearing on levels of expenses in Scotland, subject to the application of an uplift as discussed above. The impact on costs of increasing the value of much of the Sheriff Court's workload has yet to be determined. The table below is based on our experience of expenses in litigated cases over the years. For obvious reasons, this should be regarded as a guideline only.

Court	Stage of proceedings at settlement date	Pursuer's approximate costs
Court of Session	After exchanging valuations	£20,000 - £25,000
Court of Session	At pre-trial meeting	£30,000 - £40,000
Court of Session	At doors of court	£60,000
Sheriff Court	Pre-Proof	£6,000 - £10,000

Subrogated recoveries

The costs regime set out above also applies where insurers are looking to recover their outlays. It is important to note that the way the system for recovering costs in Scotland is set up can make recoveries uneconomic, particularly in lower value cases. The costs system operates so that a successful party recovers only around two thirds of the costs incurred, rather than all the costs incurred, without the added potential for a success fee which is generally the case in England and Wales. The limited costs recovery is an important matter when insurers are considering the economics of recovering an outlay in a lower value case.

It is also necessary to be wary of the simple procedure rules. In particular, for all claims with a value of less than £3,000, excluding personal injury, the following regime applies:

- Claims worth less than £200 - no fee payable
- Where the claim is less than £1,500, costs will be £150
- Claims above £1,500 - recovery of fees 'not exceeding' 10% of the settlement figure, plus VAT and disbursements

The effect of the small claim rules is that it is often simply not economic to litigate to pursue recovery of an outlay of less than £3,000. Even above that limit insurers need to consider carefully on a case-by-case basis whether it is economic to pursue a recovery.

SUMMARY OF LITIGATION IN SCOTLAND

- There is no claims portal in Scotland, although the new compulsory pre-action protocol for personal injury claims has granted pre-action dealings more formality and structure.

- There are now two personal injury courts with Scotland-wide jurisdiction, the All-Scotland Sheriff Personal Injury Court, and for cases worth more than £100,000, the court of session.

- An automatic timetable is now issued at the outset of personal injury cases in the Court of Session and Sheriff Court.

- There is no true pro-active management of cases outside the commercial procedure.

- Parties can still withhold evidence until shortly before Proof (trial) and therefore early settlement can often only be achieved by conducting a proactive defence. This does, however, also allow astute defenders the opportunity to enter into tactical negotiations prior to exchanging evidence.

- Once litigated pursuers' costs are generally significantly lower than in comparable cases in England and Wales. Pre-litigation costs are noticeably higher than protocol costs.

The ongoing court reforms in Scotland are part of a significant raft of fundamental changes to how civil litigation is conducted in this jurisdiction. Still to come:

- A new simplified procedure for low value Sheriff Court personal injury claims expected in early 2017. With an upper value still to be determined, these will be heard by the new team of Summary Sherrifs across Scotland.

- The Scottish Government has promised legislation before the end of 2017 giving effect to the costs reforms that were put forward by the 2013 Taylor Report and have been the subject of much consultation, debate and lobbying. It is widely expected that qualified one-way costs shifting (QOCS) will be introduced in Scotland for the first time.

- For now at least, the Scottish Government appears to have lost its appetite for its previous proposal to increase limitation in personal injury claims to five years but we cannot assume that this is off the agenda. If combined with QOCS, insurers can expect a substantial increase in indefensible whiplash claims.