HANDY GUIDE – SCOTTISH CLAIMS AND COURT PROCEDURE

BRODIES LLP

CONTENTS

INTRODUCTION

This guide provides an introduction to Scottish court procedure 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 help 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

Two separate pre-action protocols currently operate in Scotland for personal injury claims (excluding disease and clinical negligence).

- 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. In practice parties have been willing to apply the voluntary protocol beyond the £10,000 limit.
- A Compulsory Pre-Action Protocol is 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.

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 contained within the procedural Sheriff Court rules applicable to personal injury actions and grants the court 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.
- Thereafter, the compulsory protocol will only continue to apply if a binding admission of liability is made by the insurer.
- The claimant must respond to any allegation of contributory negligence before raising proceedings.
- Claimants should instruct medical reports within five weeks of the admission of liability, and disclose them within five weeks of approval by the claimant.
- Claimants 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.

- Claimants 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, claimants must wait 14 days before raising proceedings.
- Once proceedings are commenced the court can sist (stay) proceedings or apply cost penalties to any party who has either breached the protocol or who has accepted an offer to settle which is both equivalent to an offer made prior to litigation, and which 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 by parties voluntarily, by 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 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

  - 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.
- Claimants 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 court to exercise its discretion to apply costs penalties.

OTHER PRE-ACTION PROTOCOLS

Disease pre-action protocol

A voluntary protocol for disease claims came into effect on 1 June 2008. It 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 voluntary personal injury protocol with requirements to provide medical information, as well as employment history and Inland Revenue records.

There is no upper value for claims under the disease 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 claimant's medical witness.

The protocol allows a 'timebar holiday', with a claimant 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 pre-action protocol

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.

The professional risks pre-action 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.

The protocol includes:

- A requirement on both sides to exchange expert evidence.
- A requirement to consider Alternative Dispute Resolution (ADR).
- A transparent fixed costs regime.
- An ability to rely on protocol correspondence when arguing questions of costs in court.

Our experience is that claimants do not tend to use the professional risks protocol in complex and higher value claims. Take up, even in lower value cases, has been limited. The requirement to consider ADR is weakened by the lack of any judicial sanction if ADR is unreasonably refused.

However, the protocol encourages early exchange of information and reasonable pre-action behaviour with an emphasis on avoiding litigation.

THE SCOTTISH COURT SYSTEM

There are two levels of civil court in Scotland. Jurisdiction is divided between the Court of Session (based in Edinburgh but with jurisdiction over the whole of Scotland), and the local sheriff courts, in 39 towns and cities (with restricted geographical jurisdiction). One specialist sheriff court, the Sheriff Personal Injury Court, sits in Edinburgh but can deal with personal injury claims throughout Scotland.

A claim with a value of £100,000 or less must be raised (issued) in the sheriff court.

There is no upper limit to the value of claims that may be raised in the sheriff court. Claims of significant value are commonly raised in the Court of Session, greater use is now being made of the specialist all-Scotland Sheriff Personal Injury Court.

Most personal injury claim with a value of £5,000 or less will normally be dealt with through the sheriff court summary cause procedure. However, low value employers' liability claims worth £1000 or more can also be heard in the Sheriff Personal Injury Court.

Claims not involving personal injury with a value of £5000 or less are handled in the sheriff court using "simple procedure".

The all-Scotland Sheriff Personal injury Court was established in 2015. It has jurisdiction across the whole of Scotland for all personal injury claims worth more than £5,000, and those worth £1,000 or more where the claim involves an accident at work.

The sheriff court and the Court of Session have separate forms of procedure, governed by different rules of court. However, the rules applicable to personal injury actions are now effectively identical in both courts.

Additionally, there is a 'Commercial Cause' procedure available in both the sheriff court and the Court of Session, which provides an expedited route for commercial claims. It involves greater case management and control by the court.

PERSONAL INJURY ACTIONS IN THE SHERIFF COURT & THE COURT OF SESSION

Separate sets of personal injury rules apply to personal injury actions in the Court of Session (Chapter 43 of the Rules of the Court of Session) and the sheriff court (either Chapter 36 of the ordinary cause rules or Chapter 34 of the summary cause rules depending on value).Complex, catastrophic injury and clinical negligence cases can be removed from the standard personal injury procedure so that they are subject to more rigorous case management under the Chapter 42A (Court of Session) or Chapter 36A (sheriff court).

The key features of all three sets of court rules 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.

KEY DIFFERENCES IN SCOTTISH PROCEDURE

Disclosure

In Scotland, there is no obligatory disclosure. Instead, a process known as "commission and diligence" is used to recover documents.

- Parties seeking documents during the course of proceedings must apply to the court by lodging a "specification of documents" specifying the document or category of documents that they require (e.g. GP and hospital records), if these are not disclosed voluntarily.
- The claimant in a personal injury action 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 personal injury court rules dictate that parties are required to provide medical reports with their Statement of Valuation of Claim.

Pre-accident medical records can be recovered provided they are relevant to the issues set out in parties' written pleadings.

Witnesses

In personal injury cases, witness statements (or 'precognitions' as they are known in Scotland) remain privileged throughout an action and are not normally disclosed or exchanged. Parties are required to identify the witnesses who will be called to give evidence. This must be done at least eight weeks prior to Proof (trial) by lodging (serving) a 'List of Witnesses'. The list can be lodged late by consent and with leave of the court.

The rules regarding witness statements are different in commercial actions. Courts can, and frequently do, order parties to prepare and lodge formal signed witness statements.

Experts

In personal injury actions "productions" (documentary and real 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.

In other types of action productions may not require to be lodged until 4 weeks before trial.

However, in commercial proceedings and some case managed cases, parties are expected to identify and lodge productions at an earlier stage.

Parties can choose which expert reports they wish to rely upon and do not need to disclose a 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, it is unusual for a party to seek to lead an expert without a report.

There are no joint report statements by experts in Scotland. Each party is free to instruct their own expert to provide a report.

In commercial proceedings and some case managed cases, parties' experts are often ordered to meet to narrow the issues in dispute.

We do, of course, provide tailored advice on the selection of individual experts for particular cases.

Pleadings

In England, pleadings all remain as separate documents - statements of case, defence, Part 18 requests and replies. In Scotland, following an adjustment period (the automatic period during which all parties can alter their written pleadings); parties' pleadings are incorporated into one document called the 'Record' (sheriff court) or "Closed Record" (Court of Session). Thereafter, parties can amend their pleadings only with leave of the court.

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

Offers to settle – tenders and claimants' offers

In Scotland, an offer to settle may be made by a defender by way of 'tender' (a Part 36 offer equivalent). The tender is a formal document lodged in court which has adverse cost consequences for a claimant who fails to beat the offer. A tender cannot be made until proceedings have been raised (issued).

A tender can be accepted by a claimant at any time. However, there are cost consequences for a claimant who chooses to accept a tender after a 'reasonable' period of time for acceptance has elapsed.

A tender can be withdrawn by a defender at any time prior to acceptance without the leave of the court.

A claimant can choose to lodge a "claimant's offer". Again, this is a formal document lodged with the court. It sets out the sum of money which the claimant is prepared to accept in settlement of the claim. If the court eventually awards more than the claimant has offered to accept then the court will penalise the defender by ordering the payment of an additional sum of money calculated as a proportion of the claimant's recoverable solicitor costs. The court can also make a similar order for payment if the defender has settled a claim by accepting a claimant's offer after a reasonable period of time for acceptance has already elapsed.

Trials and hearings in Scotland: Proof, proof before answer and debate

A civil trial in Scotland before a single judge 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 between a proof and a proof before answer 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 (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. A debate or procedure roll is rare in personal injury cases. The court must be persuaded that it is necessary and is likely to allow the court to dispose of proceedings without the need for evidence to be led.

In other actions in the sheriff court a party seeking a debate must set out any proposed arguments in advance and persuade the sheriff that a debate is appropriate. In the Court of Session 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.

Jury trial

In personal injury actions conducted in either the Court of Session or the all-Scotland Sheriff Personal Injury Court, the claimant has an automatic right to jury trial, although that right is not generally exercised. If the claimant opts for jury trial, it can be resisted, but only on 'special cause' being demonstrated to the court.

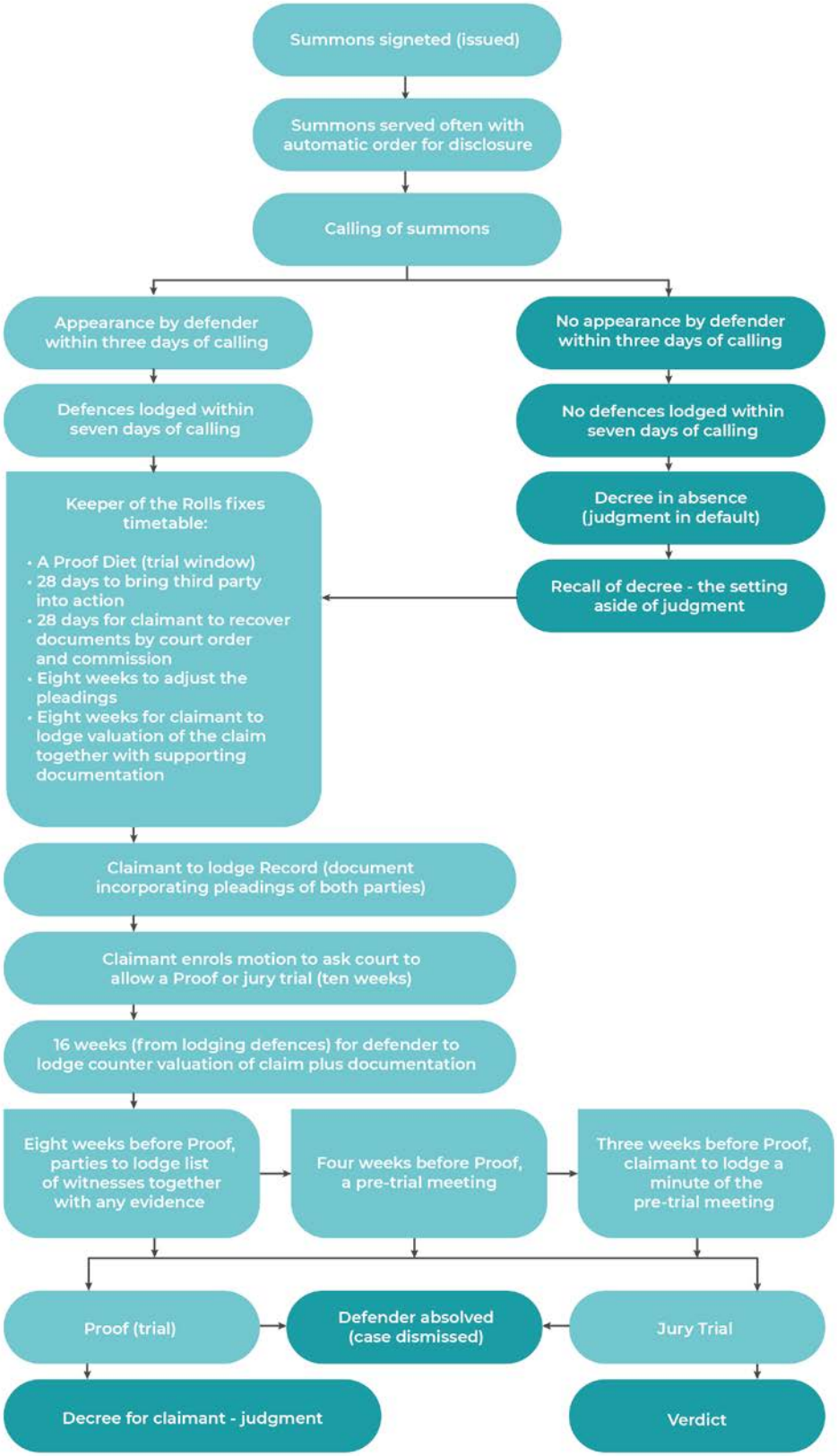
The most common ground for objection is that there are complex issues involved that render the case unsuitable for consideration by a jury.

Despite previous suggestions 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.

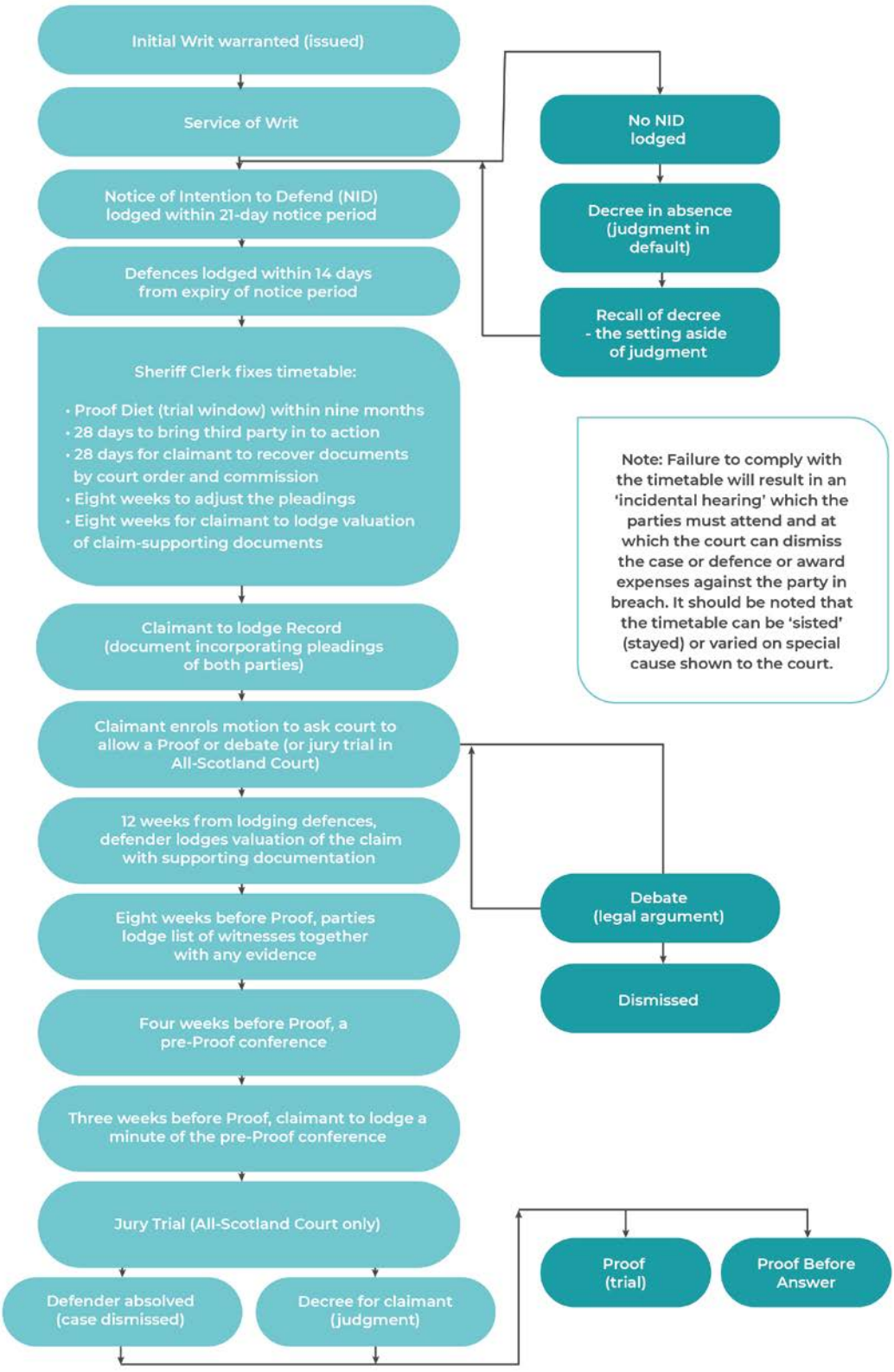
Juries are not experienced in quantifying damages so there is an inherent risk that a jury may award significantly higher damages than a judge. Historically, jury awards for "solatium" (pain and suffering) have been substantially higher than judicial awards. Jury trials have led to a significant increase in the damages awarded in fatal claims in particular.

Current case law establishes that a jury award will not be overturned by an appeal court unless it is approximately 100% more than would reasonably have been awarded by a judge at first instance.

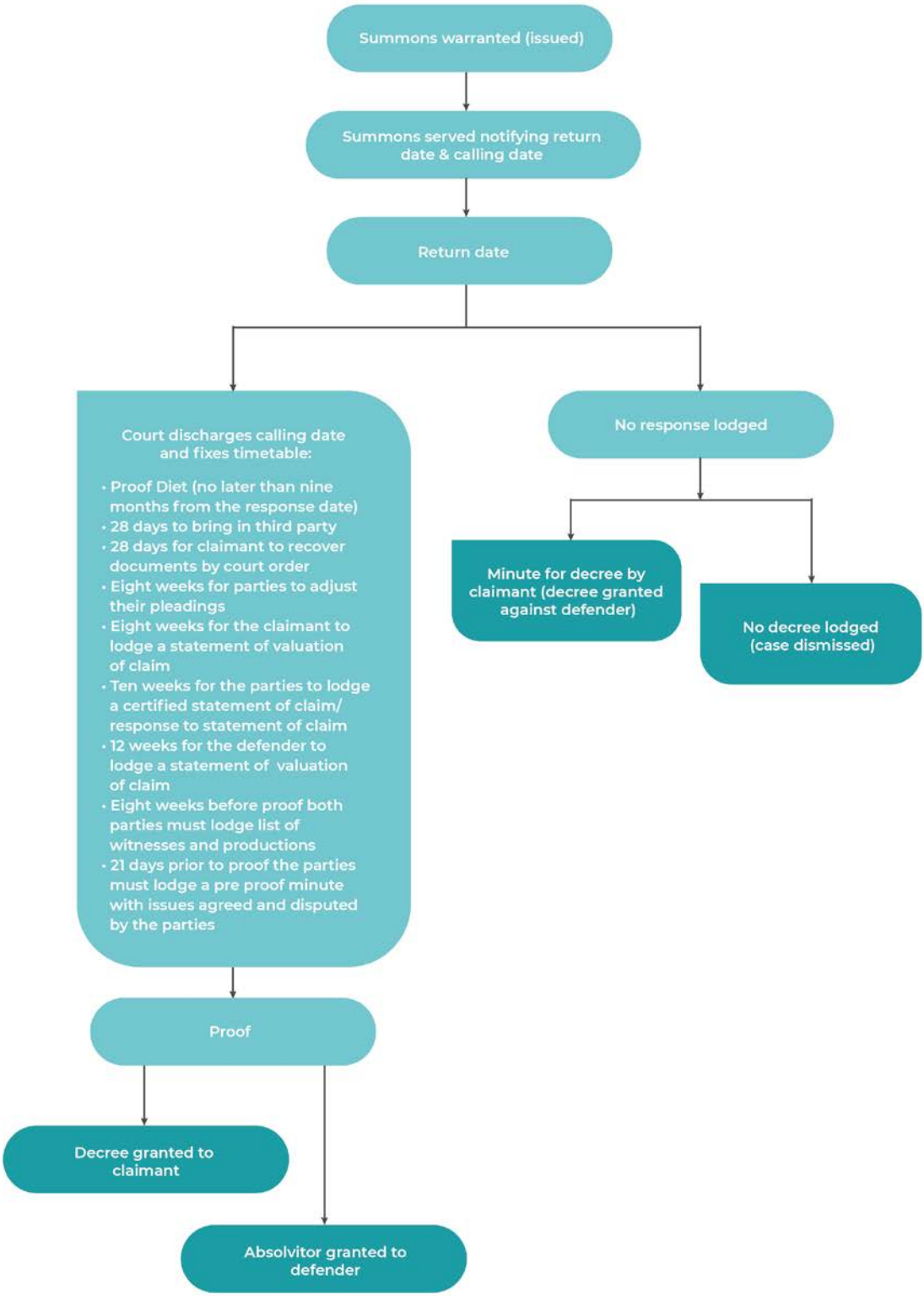
OVERVIEW OF A COURT OF SESSION PERSONAL INJURY ACTION



OVERVIEW OF A SHERIFF COURT PERSONAL INJURY ACTION



OVERVIEW OF A SHERIFF COURT SUMMARY CAUSE PERSONAL INJURY ACTION



THE COURT OF SESSION NON-PERSONAL INJURY CASES

The standard procedure in the Court of Session for cases which are not dealt with under either the personal injury or the commercial procedures is as follows:

- A summons is served on the defender.
- After 21 days the claimant lodges the summons with the court for "calling".
- The defender has 3 days from the date on which the summons calls to "enter appearance".
- If a defender fails to enter appearance, decree in absence may be granted against them.
- A defender who has entered appearance must also lodge defences within 7 days of the date on which the summons calls.
- If a defender fails to lodge defences, decree in absence may be granted against them.
- After defences are lodged parties have an automatic 8 week "adjustment period" to adjust their pleadings.
- The court can be asked to extend the adjustment period on cause shown.
- When adjustment period comes to an end the claimant will lodge a Closed Record which is a copy of the pleadings incorporating all adjustments.
- Parties will then decide whether to fix a proof, proof before answer or procedure roll. If they cannot agree then case will call before a judge on the By Order (Adjustment) Roll.

THE SHERIFF COURT NON-PERSONAL INJURY CASES

The sheriff court operates three procedures for non-personal injury cases of different value:

- Simple procedure for cases valued below £5,000 (excluding personal injury claims).
- Summary cause procedure for certain specialist types of claim (including personal injury) valued up to £5,000. The intention is that summary cause will be abolished entirely and these cases will move to be dealt with under simple procedure. No timescale is currently available.
- Ordinary cause procedure for cases valued over £5,000.

Simple Procedure

The Sheriff Court Simple Procedure was introduced in November 2016 for non-injury claims valued below £5,000. Simple Procedure is 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.
- An integrated case management system – a portal for the submission and exchange of all documents.

It is anticipated that simple procedure will be extended to apply to low value personal injury claims during 2020.

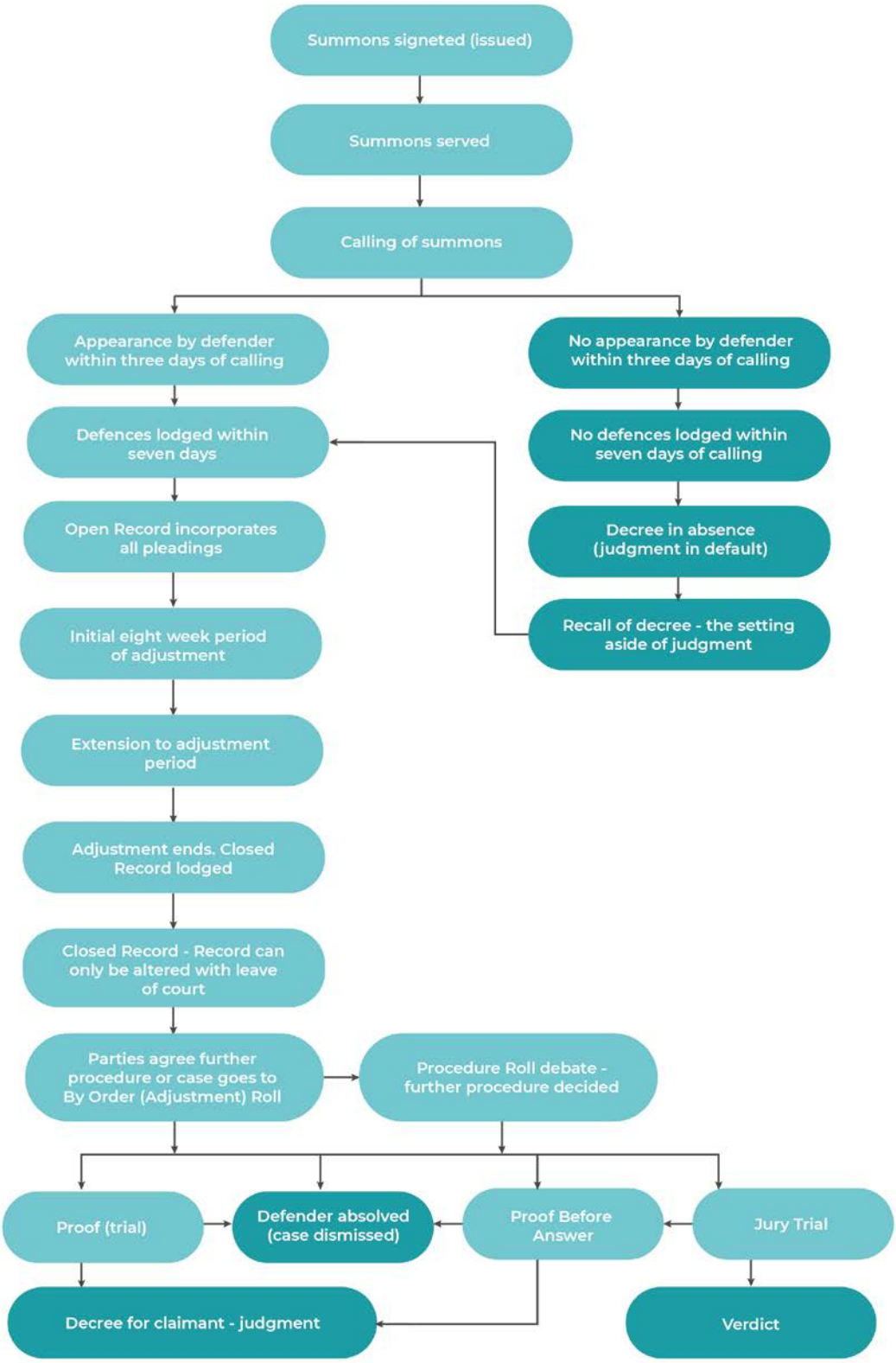
Ordinary cause procedure

Under ordinary cause procedure in the sheriff court, the procedure is as follows:

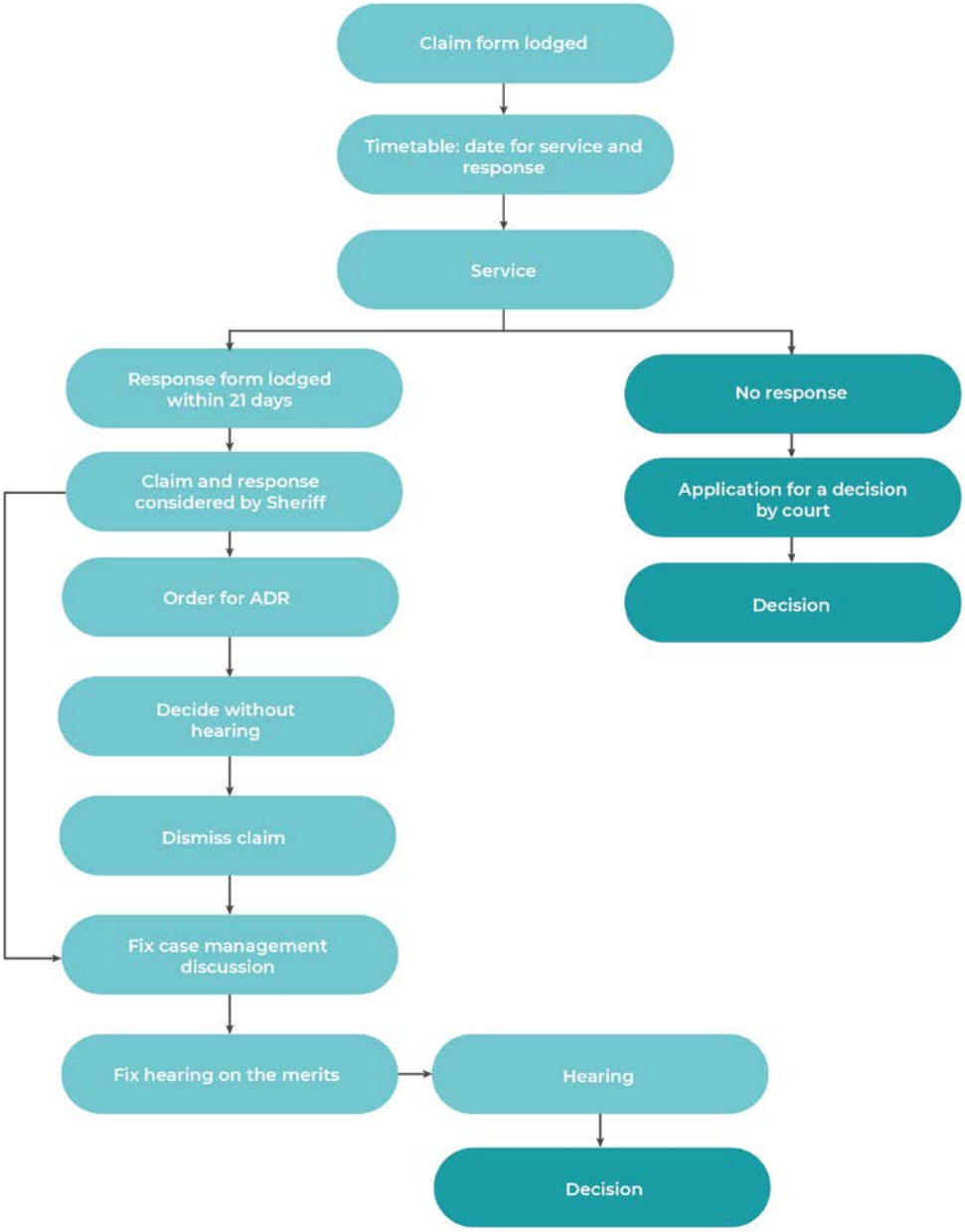
- An Initial Writ (Summons) is served on the defenders (defendants), who have 21 days to lodge (serve) a Notice of Intention to defend the claim.
- A further 14 days is allowed thereafter for defences to be lodged.
- An automatic adjustment period of approximately eight weeks follows (during which parties 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. Our solicitors are experienced advocates in the sheriff court and can defend cases to proof (trial) without recourse to counsel. We also have our own team of in-house counsel who conduct cases in both the sheriff court and the Court of Session.

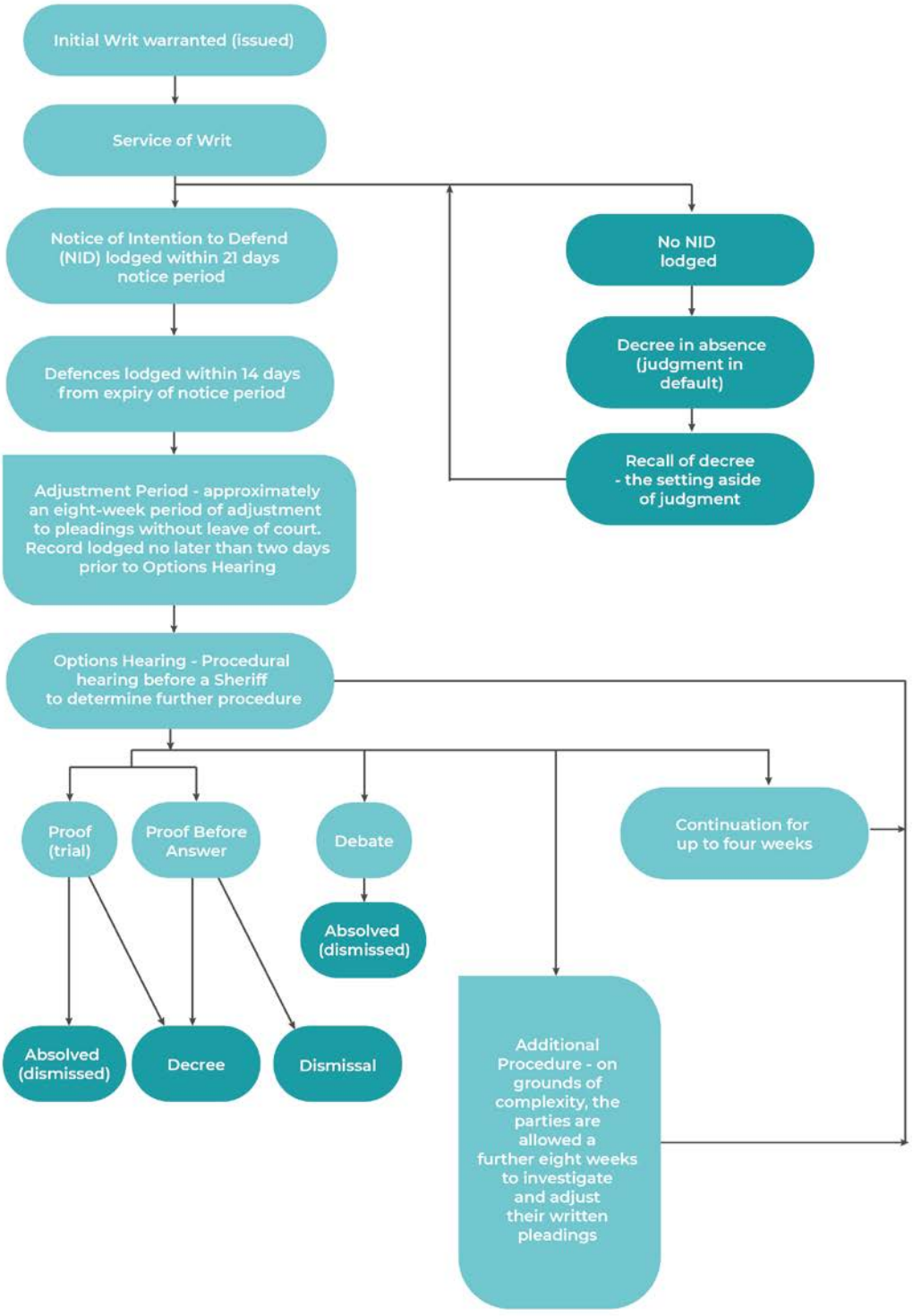
OVERVIEW OF A COURT OF SESSION NON-PERSONAL INJURY ACTION



OVERVIEW OF A SHERIFF COURT SIMPLE PROCEDURE



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. However, in Scotland proceedings must be both lodged with the court and served on the defender within that three-year period.

For non-injury claims a "prescriptive period" of five years applies, compared with the six year limitation period in England. It is important to note that the court action needs to be both lodged with the court and served on the defender within the five year deadline.

Parties can agree not to argue limitation in personal injury claims. There is also scope for the court to allow a personal injury claim to proceed out of time under s.19A of the 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.

In cases involving the five year period of prescription neither the parties nor the court can extend or suspend the prescriptive period. A very limited ability to extend the prescriptive period is due to be introduced in 2019/2020 but this seems unlikely to be widely used.

DISCOUNT RATE

As a result of the Damages (Investment Returns and Periodical Payments) (S) Act 2019 Scotland has adopted a different methodology for calculating the discount rate. Historically the discount rate has been the same in England and Scotland but the increase in the rate in England to minus 0.25% in August 2019 did not apply to Scotland. As provided for in the 2019 Act the Government Actuary carried out a separate review and determination of the rate in Scotland and issued a report in September 2019. The report set the Scottish discount rate at minus 0.75%. That rate is effective from 1st October 2019 and will ordinarily be subject to review by the Government Actuary every 5 years.

EXPENSES (COSTS)

As in England, recoverable costs (known in Scotland as expenses) are generally awarded to the successful party. However, the method of assessment of recoverable costs in Scotland is very different.

Expenses for personal injury and disease claims settled pre-litigation

The level of expenses recoverable by a claimant in these cases which settle pre-litigation will depend on which pre-action protocol applies.

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

The voluntary protocol scale for settlements from 1 January 2011 to date 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%

Illustrations: voluntary personal injury pre-action protocol

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

Pre-litigation expenses for compulsory protocol personal injury 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 claimant	£8,000

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

(ii) Settlement as above but repayment to CRU is £2,000 and only £1,000 can be offset. Payment to the claimant 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 claimant'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: compulsory personal injury pre-action protocol

Damages	Costs
£1,500	£973.50 + VAT and disbursements
£5,000	£1,771.00 + VAT and disbursements
£10,000	£2,396.00 + VAT and disbursements

Pre-litigation expenses under professional negligence pre-action protocol

The protocol scale for settlements from 1 January 2019 to date is as follows:

Instruction Fee

On all settlements £1,230

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: professional negligence pre-action protocol

Damages	Costs
£2,500	£1855 + VAT and disbursements
£10,000	£2605 + VAT and disbursements
£20,000	£3105 + VAT and disbursements

Judicial expenses recoverable by a successful party post-litigation

Recoverable judicial expenses are generally awarded to the successful party.

The successful party prepares an Account of Judicial Expenses.

The Judicial Account of Expenses is prepared on the basis of a statutory fixed Table of Charges, which regulates the expenses that the successful party can claim. These are updated annually by statute.

The successful party can prepare their account of expenses, either on the basis of fixed statutory "inclusive charges" for particular periods of the litigation/types of work done or by charging for the work carried out by reference to set statutory "detailed charges". Most accounts are prepared on the basis of "inclusive charges".

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 separate Tables of Charges for the Court of Session and the sheriff court although the principles are the same.

It is open to the successful party to ask the court to order that the Auditor of Court (Costs Judge) uplifts its expenses by a percentage increase. This is known as an "additional charge". Factors taken into account by the court 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.

Every case is decided on its own facts and, if an additional charge is allowed, there are no hard and fast rules to determine the level of additional charge which the Auditor of Court

may allow. In the sheriff court an additional charges of between 25% to 75% is likely to be awarded. In the Court of Session additional charges often fall within the range of 80% to 200%. Parties are free to agree the appropriate level of additional charge.

Outlays (Disbursements)

In addition to VAT, the judicial account of expenses will include entries in respect of outlays. These include court 'dues' (fees payable to the court for various procedural stages of the court proceedings), counsel's fees, fees for expert reports and any 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 recoverable as part of any award of expenses or upon settlement. There is some limited scope for challenging the recoverability or 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. If sanction is not granted then the successful party cannot recover fees incurred to counsel.

Ultimately, the test for the granting of sanction is a discretionary matter for the Sheriff.

Experts

The successful party must seek to have its expert witnesses 'certified' by the court. Certification will be granted if the court is persuaded that it was reasonable and proportionate for the successful party to instruct the expert. If an expert is not certified by the court then any fee charged by the expert cannot be recovered.

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 the level of charges is set down in statutory tables, there is only limited scope for substantial discounting of costs claimed in litigated cases - unless they are calculated wrongly. If, for any reason, the account cannot be agreed, it will be submitted to the Auditor of Court 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 in Scotland can already enter into “no win no fee” agreements and, in the near future, will also be able to agree a success fee with a claimant based on a sliding scale percentage of damages (a “damages-based agreement”). The success fee will not be recoverable from the losing party.

Although relatively rare, legal aid is still available for personal injury claims.

Along with damages-based agreements will come a Scottish version of “qualified one-way cost shifting” (QOCS). Once operational this will mean that unsuccessful claimants in personal injury actions will not normally be required to pay the successful defender’s expenses. There will be exceptions for cases involving fraud or abuse of process.

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 additional charge uplift as discussed above. The table below is based on our experience of expenses in litigated personal injury cases over the years in the Court of Session and Sheriff Personal Injury Court. For obvious reasons, this should be regarded as a guideline only as actual costs will vary depending on case type and value.

Likely recoverable expenses in personal injury cases

Court	Stage of proceedings at settlement date	Claimant’s approximate costs
Court of Session and SPIC	After exchanging valuations	£20,000 - £25,000
Court of Session and SPIC	At pre-trial meeting	£30,000 - £40,000
Court of Session and SPIC	At doors of court	£60,000

Subrogated recovery actions

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 at most around two thirds of the costs incurred, rather than all the costs incurred. 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 £300 - no fee payable.
- Where the claim is less than £1,500, recoverable costs will be £150.
- Claims above £1,500 – maximum recovery of costs will be 10% of the settlement figure. The effect of the simple procedure expenses 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 of 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 claimants' costs are generally significantly lower than in comparable cases in England and Wales.
- 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:
- The introduction of further costs reforms set out in the Civil Litigation (Expenses and Group Proceedings (S) Act 2018 including damages-based success fee agreements and qualified one-way costs shifting (QOCS)