

Litigating With A Kilt On!

A brief guide to civil litigation in Scotland



Transparency

Prescription/ Limitation

- ❑ Prescription and Limitation (Scotland) Act 1973 applies. The limitation period in Scotland is the same for raising a Personal Injury Action – 3 years.
- ❑ The limit for a non-personal injury action is 5 years in Scotland but 6 years in England.
- ❑ In Scotland the clock stops running only when the Defender has been served with the Summons or Writ, not when the Court issues it.

Delict

- ❑ Negligence - *Donoghue v Stevenson* is the basis of the duty to take reasonable care. It is a Scottish case!
- ❑ Pure economic loss. Generally there must be physical loss or injury sustained in a case based on delict.
- ❑ Nuisance. There is a general duty not to cause serious disturbance or substantial inconvenience to a neighbour or to cause damage to their property by use of heritable property.

Contract

- ❑ Sale of Goods - implied terms from statute of quality and fitness for purpose apply.
- ❑ Supply of Services - no implied term from statute that services will be undertaken with reasonable care, common law must be relied upon.
- ❑ Incorporation/battle of forms - applied in a similar way to England and Wales.
- ❑ Contract (Rights of Third Parties) Act 1999 does not apply. Common law governs Third Party rights.

Statutory Duties

- ❑ Health and Safety Legislation applies in Scotland as does the Enterprise and Regulatory Reform Act 2013.
- ❑ Occupiers' Liability (Scotland) Act 1960. There is a duty to take reasonable care to ensure that a person does not suffer injury or damage by reason of any danger on his premises.
- ❑ Consumer Protection Act 1987 applies.

Contribution Claims and Contributory Negligence	<ul style="list-style-type: none"> <input type="checkbox"/> S3 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 applies to claims for a contribution from other parties. Decree must have passed. There is a two year period from decree to seek recovery this applies only to delictual claims. <input type="checkbox"/> Civil Liability (Contribution) Act 1978 does not apply. The only route to obtain a contribution is under the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940. <input type="checkbox"/> The Law Reform (Contributory Negligence) Act 1945 applies in Scotland as in England in relation to contributory negligence issues.
Evidence – Disclosure	<ul style="list-style-type: none"> <input type="checkbox"/> No obligatory disclosure in Scotland, parties must apply to the Court specifying the document or category of document that they require by way of a “Specification of Documents”. <input type="checkbox"/> Documentary evidence and any real evidence must be lodged at Court as productions. <input type="checkbox"/> Expert reports – parties can chose which expert reports they wish to rely upon and do not require to disclose any report unless they wish to do so. <input type="checkbox"/> Joint instruction of experts seldom occurs.
Witnesses	<ul style="list-style-type: none"> <input type="checkbox"/> Witnesses usually require to give full oral evidence, precognitions or witness statements usually remain privileged throughout an action and are not normally disclosed or exchanged. Exception is in commercial actions where there may be exchange of witness statements/ affidavits. <input type="checkbox"/> The only usual requirement is to identify the witnesses to be called four or eight weeks prior to the Proof.
Pleadings	<ul style="list-style-type: none"> <input type="checkbox"/> There are strict time limits in relation to when parties can adjust or amend their pleadings. These vary according to the type of case.
Tenders	<ul style="list-style-type: none"> <input type="checkbox"/> A Tender is similar to a part 36 offer but cannot be made until proceedings have been raised and there has never been any requirement to make an actual payment into Court. There is no fixed time for acceptance of a Tender. The Pursuer is allowed a reasonable period to accept a Tender.
Choice of Court	<ul style="list-style-type: none"> <input type="checkbox"/> Sheriff Court: from 22 September 2015 all claims where the sum sued for is £100,000 or less must be raised in the Sheriff Court. It can also deal with higher value claims. Specialist Personal Injury Court from 22 September 2015. <input type="checkbox"/> Court of Session: from 22 September 2015, for claims where the sum sued for is more than £100,000. <input type="checkbox"/> New Sheriff Appeal Court from January 2016 for civil cases. <input type="checkbox"/> Court of Session Inner House (Edinburgh): appeals. <input type="checkbox"/> Several types of specialist procedure in both Court of Session and Sheriff Court: be aware that different rules apply to each. <input type="checkbox"/> Supreme Court (London): highest appeal court for Scottish civil cases.
Pre-action Protocols	<ul style="list-style-type: none"> <input type="checkbox"/> Pre-action protocols in Scotland are generally voluntary. The Court of Session’s Commercial Actions Protocol is mandatory. If the first case conference has to be adjourned through non-compliance, the defaulting party may have to bear indemnity-level costs of the adjourned hearing.
Expenses	<ul style="list-style-type: none"> <input type="checkbox"/> As in England, expenses (costs) are almost without exception recoverable by the successful party. The method of assessment is different, generally in Ordinary Sheriff Court and Court of Session cases judicial Accounts of Expenses are required. These are fixed based on a statutory fixed table of fees.
Representation	<ul style="list-style-type: none"> <input type="checkbox"/> Sheriff Court – Solicitors <input type="checkbox"/> Court of Session – Solicitor Advocates and Advocates (Counsel).



Basic Scottish Terms and their English equivalents:

Scottish Term	English Term
Sheriff Court	County Court
Court of Session	High Court
Pursuer	Claimant
Defender	Defendant
Proof	Trial
Tender	Part 36 Offer
Lodging	Filing
Expenses	Costs
Sist	Stay
Interdict	Injunction
Delict	Tort
Precognition	Similar but not exactly the same as witness statement

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“Excellent level of service
and legal advice”
(Chambers UK)