

The Scottish legal system is a distinct and very separate system from that operated by our neighbours in England, Wales and Northern Ireland. There are, however, common areas where the law is similar. These include Road Traffic law, Company law and areas where UK Government has introduced new law that is the same in both jurisdictions e.g. most Social Security law.

An Adversarial System

Both Scots law and English law are adversarial in their approach.

A is injured due to B's negligence. How does A get reparation for his loss? A has to intimate a claim, alleging fault and negligence on B's part. If that claim is not settled then A requires to raise court proceedings.

B may wish to defend those proceedings and possibly make a counter allegation that the injuries sustained by A were due to his own fault or that of another party. In an adversarial system A's allegations and B's allegations will be tested by the court. In civil cases (see below) the court will decide on the test of "balance of probabilities".

The courts do not adopt an inquisitorial approach; in other words, they let the parties fight it out, subject to technical rules of evidence and procedure. The judge will not intervene other than to ensure both parties get a fair hearing. A judge in an inquisitorial system, such as France, will take a more proactive role in investigating the circumstances, calling and questioning witnesses. In Scots law at the end of a criminal trial or civil hearing the judge, or jury, will reach a decision based purely on the evidence led and legal arguments put forward by the parties.

The Scots legal system is therefore adversarial in that parties have to prove or defend their own cases on evidence and law without the proactive intervention of a judge or third party. The parties have to prove their cases, usually with the help of a solicitor or advocate.

The Courts

The principal courts are the Court of Session and High Court of Justiciary. The Court of Session deals with civil matters and the High Court with criminal matters.

Sheriff Courts can deal with both civil and criminal matters. These courts are situated in the principal cities and most large towns, providing local justice facilities.

The first point of contact for most people with a legal problem will be a solicitor. In particularly complex cases counsel may be instructed. In Scotland they are known as Advocates. In England Barristers are the equivalent. Legal aid is available to many people for both civil and criminal matters, depending on income and other factors.

Criminal Law

Criminal law covers the prosecution of all offences and crimes.

An offence for example would be to throw litter in the street or to drive too fast. Offences are infringements of legislation (enactment's of Parliament) designed for the good order of society.

A crime would be to assault another person or to steal goods. Many crimes are not defined by legislation but have evolved through time and have no strict definition. So, for instance, the High Court was able to declare

the sale of glue sniffing kits a crime without the need for government legislation. In England, where law is statute based, legislation was required.

The public prosecutor, known as the Procurator Fiscal, has the ultimate say, in most cases, as to whether or not a prosecution will take place. All prosecutions have to be carried out in a fair and open manner. (see Sacro Briefing Paper no. 4 Detention, Arrest and Bail.)

The guilt or innocence of an accused is for a judge or jury to determine. In criminal cases on the test of “beyond reasonable doubt”.

Most prosecutions are dealt with in the District or Sheriff Court, and it is only the more serious crimes, such as rape, serious assault or murder, involving possible long sentences, that will proceed in the High Court.

The Sheriff Court is an extremely busy legal forum handling both civil and criminal business. Whilst the sentencing powers of a Sheriff may be limited, a great deal of criminal work is undertaken by this court because it is local, and can remit appropriate cases to the High Court for sentencing.

Civil Law

Civil law covers disputes between people, companies, businesses etc. Matrimonial disputes, contract disagreements and neighbour disputes would all be dealt with under this category.

Parties start a court action by way of written documents lodged in court. The papers state their case, based on legal arguments and evidence.

Over 95% of all civil court actions settle out of court through negotiation. Of those that are raised in court only a tiny minority have a full hearing. A full hearing would involve actual court proceedings going ahead with witnesses being led and challenged and legal arguments based on law and previous cases being made. This would normally be before a judge sitting alone but can, in exceptional circumstances, be before a jury.

A development in the law has been the increased use of tribunals for such matters as unfair dismissal, social security claims and tax disputes. Aggrieved parties can seek, without the necessity of employing lawyers, to have matters in dispute reviewed by independent tribunals with powers to change or amend decisions, and in certain situations award compensation.

There is also increased use of alternative dispute resolution, and court-based mediators will increasingly bring parties together prior to formal proceedings commencing to explore informal mediated agreements.

Criminal Law: <https://tinyurl.com/5h8dmhx8>

Civil Law: <https://www.mygov.scot/civil-cases>

This is one in a series of briefing papers on Community Mediation for practising and trainee mediators.

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