

## Scottish courts and the law



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# Contents

<b>Introduction and guidance</b>	<b>6</b>
Introduction and guidance	6
What is a badged course?	7
How to get a badge	8
<b>Week 1: Why do courts exist and what do they do?</b>	<b>10</b>
Introduction	10
1 What are courts?	11
2 Why have courts?	13
2.1 Courts in Scotland	14
3 Courts and the state in Scotland	15
3.1 The rule of law	15
3.2 The jurisdiction of the courts	16
4 This week's quiz	18
Summary	19
<b>Week 2: Bringing a case to court</b>	<b>21</b>
Introduction	21
1 Categories of unlawful conduct	22
1.1 Classification of unlawful conduct	24
2 Thinking about bringing a case	25
2.1 Factors to consider when building a case	27
3 This week's quiz	29
Summary	30
<b>Week 3: The court structure in Scotland</b>	<b>32</b>
Introduction	32
1 An overview of the court system	33
1.1 An overview of the court structure in Scotland	34
1.2 Scottish civil court structure	35

# Introduction and guidance

## Introduction and guidance

Welcome to this badged open course, *Scottish courts and the law*.

The course lasts eight weeks, with approximately three hours of study each week. You can work through the course at your own pace, so if you have more time one week there is no problem with pushing on to complete another week's study.

After completing this course you will be able to:

- understand the structure and jurisdiction of the Scottish court system
- understand the relationship between different types of court in Scotland
- understand the role of personnel within the court system
- understand why methods of adjudication such as courts exist.

**After completing *Scottish courts and the law*, you may like to enrol on these free OpenLearn courses:**

[The Scottish Parliament and law making](#)

[Legal skills and debates in Scotland](#)

[Law and change: Scottish legal heroes](#)

And if you would like to take your study in this subject area further, sign up to the Open University course [Law making in Scotland](#).

## Moving around the course

In the 'Summary' at the end of each week, you can find a link to the next week. If at any time you want to return to the start of the course, click on 'Course content'. From here you can navigate to any part of the course. Alternatively, use the week links at the top of every page of the course.

It's also good practice, if you access a link from within a course page (including links to the quizzes), to open it in a new window or tab. That way you can easily return to where you've come from without having to use the back button on your browser.

## What is a badged course?

While studying *Scottish courts and the law* you have the option to work towards gaining a digital badge.

Badged courses are a key part of The Open University's mission *to promote the educational well-being of the community*. The courses also provide another way of helping you to progress from informal to formal learning.

To complete a course you need to be able to find about 24 hours of study time, over a period of about 8 weeks. However, it is possible to study them at any time, and at a pace to suit you.

Badged courses are all available on The Open University's [OpenLearn](#) website and do not cost anything to study. They differ from Open University courses because you do not receive support from a tutor. But you do get useful feedback from the interactive quizzes.

## What is a badge?

Digital badges are a new way of demonstrating online that you have gained a skill. Schools, colleges and universities are working with employers and other organisations to develop open badges that help learners gain recognition for their skills, and support employers to identify the right candidate for a job.

Badges demonstrate your work and achievement on the course. You can share your achievement with friends, family and employers, and on social media. Badges are a great motivation, helping you to reach the end of the course. Gaining a badge often boosts confidence in the skills and abilities that underpin successful study. So, completing this course should encourage you to think about taking other courses.



## How to get a badge

Getting a badge is straightforward! Here's what you have to do:

- read each week of the course
- score 50% or more in the two badge quizzes in Week 4 and Week 8.

For all the quizzes, you can have three attempts at most of the questions (for true or false type questions you usually only get one attempt). If you get the answer right first time you will get more marks than for a correct answer the second or third time. If one of your answers is incorrect you will often receive helpful feedback and suggestions about how to work out the correct answer.

For the badge quizzes, if you're not successful in getting 50% the first time, after 24 hours you can attempt the whole quiz, and come back as many times as you like.

We hope that as many people as possible will gain an Open University badge – so you should see getting a badge as an opportunity to reflect on what you have learned rather than as a test.

If you need more guidance on getting a badge and what you can do with it, take a look at the [OpenLearn FAQs](#). When you gain your badge you will receive an email to notify you and you will be able to view and manage all your badges in [My OpenLearn](#) within 24 hours of completing the criteria to gain a badge.

Get started with [Week 1](#).



# Week 1: Why do courts exist and what do they do?

## Introduction

During this week you consider what a court is and the role they perform in society. You explore perceptions of courts and think about how courts fit within the organs of the state. The rule of law is introduced and you are asked to think about its relevance to the justice system in which courts play an essential role.

By the end of this week you will be able to:

- explain what a court is
- describe the rule of law
- explain some of the principles underpinning the justice system in Scotland.

Before you start, The Open University would really appreciate a few minutes of your time to tell us about yourself and your expectations of the course. Your input will help to further improve the online learning experience. If you'd like to help, and if you haven't done so already, please fill in this [optional survey](#).

# 1 What are courts?

Law permeates every aspect of society and our daily lives whether we are at home, during leisure time, travelling, at work, viewing films, using social media, having a meal, shopping in the local supermarket, driving, going to school, attending university or going on holiday. Laws are created in different ways but to be effective, mechanisms for the enforcement of law and for resolving disputes involving law need to exist. This is why over the past 1000 years a system for resolving disputes, the courts, evolved. The role of the courts is now to enforce and declare the law.

Nowadays we tend to take the existence of the court system for granted. But while aspects of the court system such as judicial decisions (judgments made by the judges), court costs, the role and appointment of judges, reform of the justice system and televising proceedings are discussed in the media and in parliament it is rarer for questions to be asked about the function of courts, why they exist and their role in contemporary society.

Courts are formally constituted bodies through which legal disputes can be dealt with. They are an adjudication mechanism provided by the state. These legal disputes can be disputes between individuals or organisations such as companies, local authorities or government bodies. They may be disputes between states or between a state and a member of the public. There will also be times when a member of the public is unable to take advantage of their legal rights, and requires the state to enforce them on their behalf. Sometimes the actions of a member of the public or organisation create a situation where the state is required to prosecute. The most obvious example of this is when they are accused of committing criminal activity (an offence), for example, theft, criminal damage, environmental pollution or fraud. It is necessary for the state to determine whether the activity (offence) has been committed and, if so, to apply appropriate sanctions. The court is the independent body through which the state carries out this role.

You have probably encountered a range of fictional film or television representations of courts, have seen or heard media reports about particular court cases or heard reference to 'legal' terms such as pursuer, delict, custody, contempt of court, damages, litigation, prosecution, class actions, interdict and compensation. These will have created an impression of the work of courts and why they exist. Activity 1 asks you to consider what you may have already heard about the role and structure of courts.

## Activity 1 Thinking about courts



Allow about 5 minutes

Take a few moments to think about what you have heard or seen about courts and court proceedings. Make a note of any key points you recall and then note down your thoughts on the following questions:

Why do we have courts?

*Provide your answer...*

Why do you think courts are important?

*Provide your answer...*

Do you think courts are accessible?

*Provide your answer...*

Who would you expect to see in a court room?

*Provide your answer...*

.....

### Discussion

You may have thought about some of the portrayals of courtrooms you have seen in films or the appearance of a court building you may have walked past recently. Or you may have thought about a reporter discussing the fine imposed on someone, the damages awarded to someone injured in an accident, a prison sentence reported in the media, or the reported trial of an individual in an international court. Courts and the decisions of courts are frequently in the news but these news reports tend to focus on the outcomes of cases and rarely on the personnel, procedure, reasoning and role of the court.

There are no 'right' answers to this activity and its purpose was to get you to think about what existing knowledge you have and what your views and impressions may be. At the end of the course you will return to the notes you have made here to aid reflection on the course as a whole.

## 2 Why have courts?

The statements in Box 1 help to highlight some of the reasons why courts are regarded as important, the role they play and functions they perform.

### Box 1 Why do courts exist?

1. Courts are important because they help protect our constitutional rights to equal protection and due process under the law.
2. Both criminal and civil courts provide the opportunity for the parties to have their cases heard by neutral judges and/or juries. This process ensures that all cases are decided in a fair and consistent manner.
3. Courts provide a forum to resolve disputes and to test and enforce laws in a fair and rational manner.
4. Courts are an impartial forum, and judges are free to apply the law without regard to the states wishes or the weight of public opinion but in line with human rights.
5. Court decisions are based on what the law says and what the evidence proves; there is no place in the courts for suspicion, bias or favouritism. The procedures and decisions must be accessible and transparent and apply the rights found in the European Convention on Human Rights (ECHR). This is why justice is often symbolised as a blindfolded figure balancing a set of scales, oblivious to anything that could detract from the pursuit of an outcome that is just and fair.
6. Courts exist to do justice, to guarantee liberty, to enhance social order, to resolve disputes, to maintain the rule of law, to provide for equal protection to all regardless of background and to ensure the due process of law.
7. Courts exist so that the equality of individuals and the state is reality rather than empty rhetoric and to ensure that the rights enshrined in the ECHR are applied in its decisions and complied with by legislation.

From these statements it can be seen that courts are regarded as playing an important role in protecting and enforcing the rights of individuals. Those rights may come from (be derived from) statutes, treaties (for example, the ECHR) or common law.

The courts' function is to adjudicate legal disputes between parties and carry out the administration of justice in accordance with the rule of law. The courts' role is to determine disputes in the form of cases which are brought before them. As mentioned earlier these disputes may be between the state and individuals, between individuals, between individuals and organisations, between organisations, between organisations and governments etc. In order to resolve the dispute the courts hear the evidence presented by the parties in a case before making a decision based on what facts have been proved and the applicable law. A judgment is made on which party is liable, or not, and then a decision is made on the appropriate remedy or sanction and costs.

The parties to a case are those involved in either bringing the case or defending the case, or those who have been joined into the case by those bringing or defending the case.

‘Judgment’ (rather than ‘judgement’) isn’t a misspelling; it refers to legal decisions or verdicts.

## 2.1 Courts in Scotland

There are different types of courts in Scotland which, between them, cover a wide range of legal disputes, from individuals accused of crimes, individuals and companies in debt, children at risk of harm, businesses involved in commercial disputes or individuals asserting their contractual rights. Which particular court hears a legal dispute is determined by a number of factors. These factors can be categorised into either civil or criminal. This categorisation is important as it determines which court will hear the case, the procedure to be followed and the standard of proof. These will be explored in the next section.

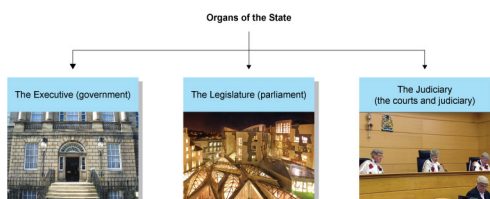


**Figure 1** The courts

## 3 Courts and the state in Scotland

You have learnt that courts are part of the apparatus of the state. They are formally constituted bodies and an adjudication mechanism that is provided by the state. But if the state provides courts as an adjudication mechanism and the state employs the judges that sit in the courts, what happens if the state becomes the party to a legal case? What is the position of courts and judiciary (judges) within the state?

Most states abide by constitutional arrangements (principles) which govern the behaviour of the organs of the state (such as courts, the judiciary, legislative and executive) and protect their citizens.



**Figure 2** Organs of the state

### 3.1 The rule of law

The rule of law is regarded as underpinning the constitutional arrangements of any just and democratic society. It underpins the constitution of the UK and has been respected for many centuries in Scotland. It remains a cornerstone of the constitution and is often referred to by politicians who are proud of the respect shown for the rule of law in Scotland today.

Kenny, McAskill, in the foreword to the 2012 *The strategy for justice Scotland*:

I care deeply about Scotland. It is a successful country where, for the most part, people lead good lives in safe and secure communities. We are a country with a long tradition of respect for the rule of law. We are a fair and just country. We show compassion for others and uphold the values of social justice.

(The Scottish Government, 2012)

There are a number of principles which help underpin the rule of law. Each of these has relevance to the law and legal system in Scotland. The principles and their definitions are shown in the interactive diagram below, click on each word to learn more.

Interactive content is not available in this format.



Interactive 1 Underpinning the rule of law

The principle of impartiality is linked to the concept of separation of powers. The concept of separation of powers means that the organs of state, executive, legislature and judiciary, should be separate from each other. This separation enables a system of checks and balances on the use of power. These checks and balances are aimed at safeguarding against the abuse of power by the state and the protection of citizens. It effectively means that the law-making bodies, the public services such as the Procurator Fiscal Service and

the courts are independent of each other. It also ensures that although the government can be party to actions before the courts, the courts' ability to consider such cases is not compromised. This means that within Scotland the legislative, executive and judicial functions of the state are exercised independently of each other.

## 3.2 The jurisdiction of the courts

Whilst the judiciary forms part of the organs of state, they operate independently within it. This independence is constitutionally enshrined. In Scotland judicial functions are carried out by a range of different courts. Each court can only decide on matters that are within its remit (that it has specific power to deal with). The power of a court to consider any particular matter is referred to as its jurisdiction.

This can refer to:

- the nature of the case, or
- the geographical location of the subject matter of the case, or
- the parties to the case.

You will explore the jurisdiction of the individual courts in Scotland in more detail later. All cases that are brought before a Scottish court must also be clearly identified as either civil or criminal. This categorisation is important. Courts hearing civil matters have different procedures from those hearing criminal matters. Those procedures are clearly specified and strictly adhered to in all court proceedings.

In Scotland however not all judicial business is within the jurisdiction of the courts. There are also tribunals which function as an alternative to courts informally resolving legal disputes and dispensing justice. The Scottish Courts and Tribunals Service (SCTS) provides administrative support to Scottish courts and tribunals, and to the judiciary of those courts. Its website states that 'The SCTS supports justice by providing the people, buildings and services needed by the judiciary, courts, Office of the Public Guardian and devolved tribunals' (SCTS, n.d).

Before moving on to consider the factors that need to be considered when bringing a case Activity 2 asks you to reflect on the features you would expect of a just legal system.

### Activity 2 A new justice system

 Allow about 10 minutes

**Note:**

Please complete this activity on a Mac/PC browser, as this activity may not function correctly in a mobile/tablet browser.

From the list below identify the features you would include if you were tasked with designing a just legal system for a new state and drag them into the box. Please give reasons for your answers in the textbox below.

Interactive content is not available in this format.



Interactive 2 Features of a new legal system

*Provide your answer...*

### Discussion

As you worked your way through the list and identified which you would include in the justice system for a new state you thought about the reasons for what you had chosen. You may have found some of the features on the list more relevant than others and you may have disagreed with some of the features on the list.

The features on the list can be found in the Scottish legal system. The rights outlined are regarded as fundamental to any democratic society. Overall these features ensure freedom of individuals, fairness, due process in the legal system, transparency, and a just legal system. They ensure that power is not abused by those who have the privilege of governing. However, within the UK the power not to apply statutes which are contrary to human rights is unique in Scotland.

The one feature that could lead to conflicts of interest is enabling judges to hold a paid second job. This will be explored in the section on the legal profession.

## 4 This week's quiz

Check what you've learned this week by taking the end-of-week quiz.

[Week 1 quiz](#)

Open the quiz in a new window or tab then come back here when you've finished.

## Summary

During this week you considered courts. You thought about your own perceptions before looking at the role of courts and thinking about the rule of law. You learnt about the importance of this concept and the principles which underlie it before considering the features of a just legal system. You should now be familiar with the role of the courts in Scotland and their place in society.

You should now be able to:

- explain what a court is
- describe the rule of law
- explain some of the principles underpinning the justice system in Scotland.

Having learnt about why courts exist, the functions they perform and role they play in society, next week you will explore the difference between civil and criminal and the factors to be considered when bringing a case to court.

You can now go to [Week 2](#).



# Week 2: Bringing a case to court

## Introduction

In this week you learn about the difference between civil and criminal unlawful conduct. This difference is important as it determines in which justice system a case will be heard. You then consider the factors to be considered when bringing a case to court.

By the end of this week you will be able to:

- explain the categorisation into civil or criminal
- explain the difference between burden and standard of proof
- describe the factors relevant to bringing a case to court.

# 1 Categories of unlawful conduct

Courts determine cases that are brought before them. Generally the matters they deal with relate to some form of unlawful conduct (conduct that is contrary to or forbidden by law). That conduct will be classified as either civil or criminal. This classification will determine which branch of the legal system (justice system) a case is heard in.

Criminal activity is one form of unlawful conduct and can occur at personal, business, and executive levels. Criminal activities by individuals include burglary, assault, trafficking, theft, environmental damage and murder. Criminal activities by businesses include fraud, industrial espionage, pollution and tax evasion.

Civil disputes are also a form of unlawful conduct. These disputes can occur at a personal level, for instance, when neighbours argue over late-night noise or access to a shared driveway, when parties to a marriage or relationship decide to separate or when there is a dispute as to who should have day-to-day care of a child or relative. Civil disputes can also arise between individuals and businesses, for example, when customers refuse to pay their bills or companies fail to deliver a service to an agreed level. They can occur between businesses over the right to use a brand name or trademark. They may also occur between individuals and local councils over matters such as parking restrictions, traffic calming and planning permission.

## Activity 1 A crime or civil wrong?

 (Allow about 10 minutes)

The ten examples below are all examples of unlawful conduct. Take a few moments to read through the examples and then indicate whether you think they should be categorised as civil or criminal unlawful conduct. As you make your decisions think about why you have categorised each example as either criminal or civil.

Example	Civil or criminal unlawful conduct?
Taking stationery from your place of work	<input type="text" value="Provide your answer..."/>
Taking sugar from a supermarket café when you buy a takeaway cup of coffee	<input type="text" value="Provide your answer..."/>
Keeping money if you receive too much in change	<input type="text" value="Provide your answer..."/>
Keeping money you have found in the street	<input type="text" value="Provide your answer..."/>
Being in possession of cannabis	<input type="text" value="Provide your answer..."/>
Playing music so loudly in your home that it disturbs your neighbours	<input type="text" value="Provide your answer..."/>

Downloading box sets and films from the internet without paying for them or without authorisation

*Provide your answer...*

Dropping litter in the street

*Provide your answer...*

Driving a car at 32 mph in a 30 mph zone

*Provide your answer...*

### Discussion

When discussing unlawful conduct lawyers tend to use terms such as 'civil matter' or 'criminal conduct' rather than using the term 'unlawful conduct'. In the following explanations the terms 'civil matter' and 'criminal conduct' are used.

Taking stationery from your place of work, keeping money you found in the street and keeping money if you receive too much change are all forms of theft. Theft is a form of criminal conduct.

Taking sugar from a supermarket café when you buy a take away coffee could be a civil matter because you form a contract when you buy a cup of coffee. As part of that contract sugar and milk are provided to meet individual tastes and preferences. If however you were to take more sugar than you needed then this could become criminal conduct because implied within the contract to purchase the coffee is a contractual term that you would use only the sugar you needed. If you took more than you needed, then this could be construed as theft and, as such, it would be an example of criminal conduct.

Possession of cannabis and dropping litter in the street are examples of criminal conduct.

Playing music in your home so loudly that it causes your neighbours discomfort may become criminal conduct if your behaviour is persistent. Also, your neighbours could sue you for civil compensation as you are interfering with their enjoyment of their property. The neighbours could ask the court to make an order prohibiting you from playing your music; this order is known as an interdict.

If you download box sets or films from the internet without paying for them or without authorisation, the entertainment company which owns the rights to the box set or film could sue you for compensation as you are depriving them of legitimate business. Likewise if you try to sell illegally downloaded music, this is a crime and you could be fined or even sent to prison.

Driving your car over the speed limit is a crime.

From these examples you can see that sometimes conduct can be both a civil and a criminal matter.

## 1.1 Classification of unlawful conduct

Classification of unlawful conduct into civil or criminal helps determine whether the case will be heard in the civil justice system or the criminal justice system. This is important as there are significant differences between these two systems. These include:

- the rules on who may bring a case
- the rules on who may sit in judgment in a case
- the time limits in which the case must be brought
- how the case may be funded (paid for)
- the procedure for bringing the case
- rules on the evidence that can be used and considered
- which court will hear/try the case and where any appeal can be made
- the remedy/punishment available
- what legal terminology is used.

### Box 1 The distinct parts of the Scottish justice system

The justice system in Scotland is split into two distinct parts: the criminal justice system and the civil justice system.

The distinction between the two parts of the system is as follows: the criminal justice system exists to prosecute, or otherwise deal with, those who commit crimes. On the other hand, the civil justice system exists to give people and organisations a way to protect and enforce their legal rights and to regulate disputes in respect of those rights. Each part of the Scottish justice system has its own courts and processes for dealing with cases and appeals.

(Harvie-Clark, 2014)

	Civil	Criminal
Why is the conduct labelled as unlawful?	To provide a resolution of disputes between individuals	To protect society and reflect society's values
Who brings the case?	The individual (or organisation) who has suffered the wrong, generally referred to as the pursuer	The state (generally the Procurator Fiscal)

**Figure 1** Difference between civil and criminal cases

## Standard of proof

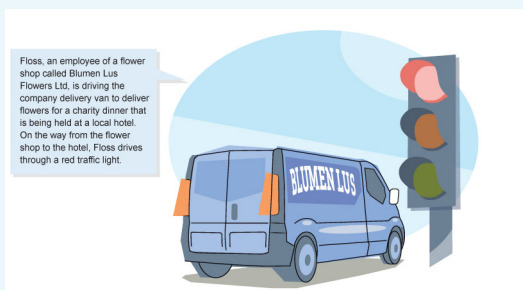
One of the major differences between the systems of civil and criminal justice is the standard of proof. The standard of proof is the level to which a legal case must be proven. The standard of proof is a concept. It means that the pursuer or prosecution has to provide evidence to a certain standard before the case against the defendant can be proved. The standard of proof differs from the burden of proof. The burden of proof is a concept used to indicate which party to the legal case has to prove a factual point in support of their claim or defence.

## 2 Thinking about bringing a case

Bringing a legal case is rarely simple or straightforward. It can often be a lengthy and costly procedure. When thinking about the practicalities of bringing a legal case we tend to think about the cost of legal fees (for legal advice and representation) and how to get access to appropriate legal expertise. In reality these are only part of a much larger picture as consideration also needs to be given to aspects of the case such as court fees, gathering evidence, court procedure, time limits, the time and personal costs of those involved in a case, emotional costs in terms of the stress and uncertainties of the case outcome. These are all factors that can be important influences on a case. The purpose of this course is not to turn you into a legal practitioner but to raise awareness of the role and purpose of the justice system and the processes used. Within the Scottish justice system there are many rules and regulations and the rest of the course will consider key aspects which have relevance to the accessibility and transparency of law and legal proceedings.

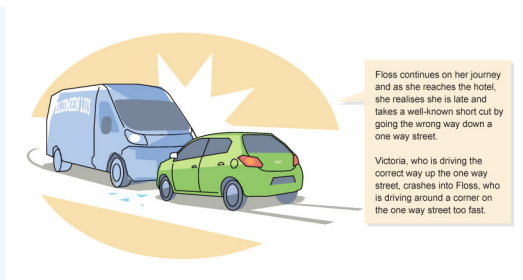
What then are the matters which need to be considered in building a good legal case? As in constructing a building, it is important to ensure that any legal case is built upon sure foundations. First, you need to establish that a cause of action exists in law (there are recognised grounds on which to bring a claim or prosecution). There are many causes of action and ways in which a legal case can be built. Different rules and procedures will be followed depending on the nature or classification of the case brought. The scenario in Box 2 illustrates some of the matters which need considering. You are not expected to be able to identify the relevant areas of law but you should follow the discussion of the relevant matters.

### Box 2 Blumen Lus Flowers



**Figure 2** Floss drives through a red light

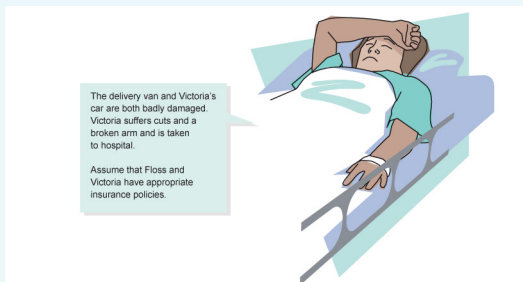
What relevant matter can be identified here? Floss, as an individual, has driven through a red traffic light. Failing to stop at a red traffic light is a criminal offence. It falls within the classification of criminal offences known as driving offences. You may have also spotted that Floss did this in a company van whilst on company business. That factor is not immediately relevant.



**Figure 3** Floss drives around the corner too fast

Floss has committed at least one further criminal offence by choosing to drive the wrong way down a one-way street. Has a speeding offence also been committed? A speeding offence is committed by a person driving over the speed limit on a particular road. Here the only information given is that Floss was driving 'too fast'. This does not provide enough information. Was the 'too fast' judgement made by a measurement of the delivery van's actual speed or by an eye-witness account of estimated speed?

Victoria was driving along the road in the correct manner. There is, however, no indication of the speed of Victoria's vehicle. As Floss is clearly at fault (driving the wrong way down a one-way street), and the crash took place on a corner of the road, this is unlikely to be an issue.



**Figure 4** Victoria breaks her arm

Floss has committed a number of driving offences. These are criminal offences and any prosecution for these offences will take place in the criminal justice system. As a result of Floss's actions the delivery van has been damaged, Victoria's car has been damaged and Victoria has suffered personal injury. What is Victoria's position? Victoria may choose to pursue a claim for compensation for the damage to the car and the personal injury caused. These are claims that would normally be heard in the civil justice system. The likely basis for these claims would be in a law known as delict and, in particular, the delict of negligence. In simple terms, this states that a road user owes a duty of care to other road users. If that duty of care is breached (broken) and damage occurs, then compensation may be payable. Here Floss's criminal acts would indicate that the duty of care owed to Victoria has been breached. As an alternative, Victoria may seek compensation through the insurance company.

Before any prosecutions or claims for compensation are made, evidence would be gathered to prove the facts. This is likely to include statements from Floss and Victoria, eye-witness accounts, police traffic collision reports, any photographic evidence from cameras positioned at the traffic lights, film from any local CCTV cameras, expert evidence from a garage about the damage to the car and company vehicle, medical reports on Victoria's injuries, reports on any loss of property or loss

of earnings suffered by Victoria, proof of ownership of the vehicles, proof of insurance, reports of any faults on the vehicle (for example, were the brakes on the company van in good condition) and photographs from the scene of the accident. What may appear to be a simple accident with one party obviously at fault will require evidence to prove that fault. Floss may try to bring a counter-claim and allege that Victoria was at fault as Victoria failed to stop her vehicle in time.

## 2.1 Factors to consider when building a case

The Blumen Lus Flowers scenario illustrates how even an apparently simple scenario can involve both the criminal and the civil justice system. It also illustrates the need for careful collection of the facts and evidence, and to consider all possible outcomes. Don't worry at this stage if you aren't familiar with all the terminology that has been used or if you did not follow every step in Floss's and Victoria's story. The purpose of the scenario was to illustrate why a starting point is necessary when thinking about building a legal case and why it can be likened to constructing a building, as a legal case also needs solid foundations.

In summary, the following must be considered:

1. What event has happened?
2. Was there an applicable law?
3. What evidence is needed to prove breach of an applicable law?
4. Are there any complete, or partial, defences.

If answers can be found to those four questions, then the process of building a case can begin.

In the scenario above, the answers to the four questions are as follows:

### 1. What event has happened?

Several identifiable events have happened.

- Floss drove through a red traffic light.
- Floss drove the wrong way up a one-way street.
- Floss drove 'too fast'.
- Floss crashed into Victoria on a bend in the road.
- Floss has no defence.

### 2 Was there an applicable law?

There are applicable laws to each event:

- a number of driving offences appear to have been committed – criminal unlawful conduct
- delict (in particular negligence) – civil unlawful conduct.

### 3. What evidence is needed to prove breach of an applicable law?

Evidence will be needed to prove that Floss has committed the driving offences (criminal unlawful conduct) and to prove that there has been a breach of duty of care and proof of the damage caused as a result (to establish grounds for a case based on the delict of negligence). This evidence will consist of some of the items already stated.

### 4. Are there any complete, or partial, defences?

A complete defence is one when its facts are proven completely absolves the defendant and ends the case. By raising a partial defence the defendant hopes to mitigate the outcome of the case against them. We are told Victoria is driving in the correct manner. There is, however, no indication of the speed of her vehicle. If the pursuer proves Floss was driving too fast and that this contributed in part to the severity of the accident the damages she receives may be reduced. In this sense Victoria has a partial defence.

### Other procedural matters

An experienced lawyer will automatically consider a wealth of other procedural matters. These will include:

- Is it a civil or criminal matter?
- Who has the burden of proof?
- What rules of evidence apply?
- Who can bring the legal case (who is recognised by the court as having standing)?
- What laws apply and what procedures need to be followed?
- Is there an alternative to court action?
- What remedy/punishment/settlement is being sought?
- Is a courtroom the best place to resolve the matter?
- Against whom should a case be brought?

However, the emotional costs of bringing or participating in a case and the merits or otherwise of individual legal cases are not matters that are often discussed. Lawyers tend to make decisions based on the evidence with which they are presented, by remaining impartial and by applying the law. These decision-making skills are important and have been developed to ensure that all sides are considered and weighted up when making decisions, and that those decisions are based on evidence and not emotion.

Whilst established procedures for bringing and conducting cases (case management) and progression of a case through the courts - court judgments are based on the facts and evidence presented. Here the individual deciding a case (usually a judge) has some discretion in weighing up the facts and evidence presented.

## 3 This week's quiz

Check what you've learned this week by taking the end-of-week quiz.

[Week 2 quiz](#)

Open the quiz in a new window or tab then come back here when you've finished.

## Summary

In this week you learnt about the classification of civil and criminal unlawful conduct and the consequences that follow this. You also considered the factors to be considered when bringing a case to court.

If you want to find out more about bringing a case to court in Scotland there are a number of voluntary organisations whose websites contain information on how to bring a case, the things to think about, appealing parking tickets etc., These include the Citizens Advice Bureau Scotland website, the courts in Scotland website – their details can be found on the additional resources page at the end of the course.

You should now be able to:

- explain the categorisation into civil or criminal
- explain the difference between burden and standard of proof
- describe the factors relevant to bringing a case to court.

Having learnt that there are two separate justice systems, civil and criminal, next week explores the court structure in Scotland.

You can now go to [Week 3](#).



# Week 3: The court structure in Scotland

## Introduction

In this week you explore the structure of the court system in Scotland. You learn about the courts, their functions, the types of cases they hear and any routes of appeal that exist.

By the end of this week you will be able to:

- describe the court structure in Scotland
- explain the work of the courts in the civil justice system
- explain the work of the courts in the criminal justice system.

# 1 An overview of the court system

As we have learnt, all court business in Scotland is classified as either criminal or civil. This classification is important as it determines a number of things such as the remedy or sanction which may be applied, the reasons for bringing a case and who may bring the case (have standing to bring a case). The court structure reflects this classification by structurally separating criminal from civil courts.

Criminal cases (sometimes referred to as matters or business) are heard in the criminal courts. These courts consider prosecutions brought by the Procurator Fiscal (you learn more about this later). The court structure and procedures are known collectively as the criminal justice system. Civil cases are heard within the civil courts. In civil cases (sometimes referred to as matters or business) the court will determine disputes between the parties to the case. These courts also have their own structure and procedure, known as the civil justice system.

At the end of this course you will find a link to a glossary of Scottish legal terms which lists terms lawyers use together with an explanation.



**Figure 1** The coat of arms of the Scottish courts

## 1.1 An overview of the court structure in Scotland

In this section you consider the court structure. Before exploring each of the courts and their role you should watch the following video.

In this video Eric McQueen, Head of the Scottish Courts Service, gives an overview of the court structure in Scotland.

Video content is not available in this format.

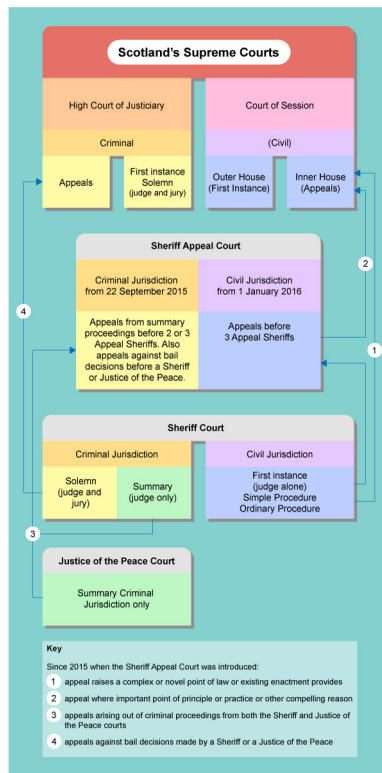
The criminal justice system (Eric McQueen, Scottish Court Service)



Eric McQueen  
Chief Executive, Scottish Court Service

## 1.2 Scottish civil court structure

Figure 2 illustrates the court structure in Scotland. The arrows indicate the routes of appeal which exist. If certain criteria are met it is sometimes possible to appeal the decision made in one court to another court.



**Figure 2** Court structure in Scotland

### 1. The Court of Session

The Court of Session, Scotland's supreme civil court, sits in Parliament House in Edinburgh as a court of first instance and a court of appeal.

The court is headed by the Lord President the second in rank being the Lord Justice Clerk.

The court is divided into the Outer House and the Inner House.

#### Outer House

The Outer House consists of 22 Lords Ordinary sitting alone or, in certain cases, with a civil jury. They hear cases at first instance on a wide range of civil matters, including cases based on delict (tort) and contract, commercial cases and judicial review. The judges cover a wide spectrum of work, but designated judges deal with intellectual property disputes. Special arrangements are made to deal with commercial cases. An appeal lies to the Supreme Court of the United Kingdom.

#### Inner House

The Inner House is in essence the appeal court, though it has a small range of first instance business. It is divided into the First and the Second Divisions, of equal authority, and presided over by the Lord President and the Lord Justice Clerk respectively. Each division is made up of six Judges, but the quorum is three. Due to

pressure of business an Extra Division of three judges sits frequently nowadays. The Divisions hear cases on appeal from the Outer House, the Sheriff Court and certain tribunals and other bodies. On occasion, if a case is particularly important or difficult, or if it is necessary to overrule a previous binding authority, a larger court of five or more judges may be convened.

Cases can be presented by:

- An advocate - a member of the Faculty of Advocates whose status and function correspond to that of a barrister in England
- A solicitor-advocate - a member of the Law Society of Scotland. Experienced solicitors who obtain an extension of their rights of audience by undergoing additional training in evidence and in the procedure of the Court of Session.
- An individual who is a party to a case, but a firm or a company must always be represented by counsel or by a solicitor-advocate.

The origins of the court can be traced to the early sixteenth century.

(Scottish Courts and Tribunals, n.d.)

## 2. Sheriff Court

The sheriff courts are the local civil courts in Scotland, as there is a sheriff court in every city and a number of the towns. They have jurisdiction in respect of a wide range of civil (and criminal) matters.

The sheriff is the judge who hears cases at first instance. There are currently 142 sheriffs in post in Scotland. With some exceptions, sheriffs do not generally specialise in particular types of civil case (such as family cases or personal injury cases) or between civil and criminal cases.

Each sheriffdom also has a sheriff principal, whose duties include hearing appeals in civil cases from individual sheriffs and managing the sheriff courts in his or her sheriffdom. Each sheriff court also has a sheriff clerk, with responsibility for the day-to-day administration of the courts.

There are three types of court procedure used in the sheriff court:

- **ordinary cause procedure:** this type of procedure is mainly used in cases relating to divorce or dissolution of a civil partnership, children, property and claims for recovery of debt or damages exceeding £5,000.
- **summary cause procedure:** this type of procedure is one which, if it relates to the payment of money, is used where the value of the claim is over £3,000 and up to (and including) £5,000. It is mainly used for disputes involving rent arrears, delivery of goods and debts.
- **small claims procedure:** this is an informal type of procedure used where the value of the claim is up to (and including) £3,000. It is used for resolving minor disputes (mainly relating to debts and consumer issues).

From November 2016 a simple procedure has also existed. This can be used for very specific cases involving claims for less than £5,000. These include the payment of money, the recovery or delivery of movable property where there is an alternative claim for payment and an order to make someone do something specific and there is an alternative claim for payment of money. This procedure is designed to provide a speedy, inexpensive and informal way to resolve these types of disputes.

Before a claim is made a claimant should try and resolve the dispute. Following the submission of a claim form the sheriff may refer a case for Alternative Dispute Resolution (ADR). ADR is a term used to cover a variety of dispute mechanisms including mediation, conciliation, arbitration or an Ombudsman.

### **Specialisation**

Under the Ordinary Cause Rules (OCR), the court rules applicable to the ordinary cause procedure, there are special rules applicable to certain types of court action. The main examples include commercial actions (OCR, chapter 40) and personal injuries actions (OCR, chapter 36), designed to allow the disposal of cases more quickly (and which are based on rules earlier introduced in the Court of Session). Another example is the special provision in the court rules for various types of family actions (OCR, chapters 33, 33a, 33AA and 33B).

In commercial actions there is a limited degree of specialisation amongst the judiciary, as commercial actions are dealt with by a nominated commercial sheriff (OCR, rule 40.2). However, the procedure for commercial actions is currently only available at seven sheriff courts.

In addition, Glasgow Sheriff Court and Edinburgh Sheriff Court, because they serve large population centres, provide the main examples of court business in particular geographical areas being of sufficient volume to be organised in such a way so that, in practice, sheriffs become specialists to some extent in other areas of legal practice. This applies to family actions (both courts), personal injuries actions (Edinburgh) and actions relating to adults with incapacity (Glasgow).

### **Appeals**

In an ordinary cause action, appeal is either: a) to the sheriff principal, and then to the Inner House of the Court of Session (see further below); or b) from the sheriff directly to the Inner House of the Court of Session. Finally, an appeal can be made to the UK Supreme Court on a point of law only (as opposed to a question of fact) (Macphail 2006, para 18.99).

In summary cause actions, appeal is to the sheriff principal on a point of law only and then to the Inner House of the Court of Session on a point of law, if the sheriff certifies the cause as suitable for such an appeal, and then finally to the UK Supreme Court. In small claims, appeal is to the sheriff principal on a point of law only (Sheriff Courts Act 1971 (c 58), section 38; Court of Session Act (c 36), section 40; Macphail 2006, paras 31.333 and 32.137).

(Harvie-Clark, 2014)

### **Sheriff Appeal Court - Civil**

Civil appeals are heard by a bench of three appeal sheriffs sitting in Edinburgh, although procedural business, routine appeals and appeals from small claims and summary causes may be dealt with by a single appeal sheriff in the local sheriffdom.





