

Chapter 39: Scots Law

Chapter summary

The law of Scotland affects journalism in different ways from that in England and Wales. This chapter briefly outlines the Scottish legal system and its judiciary and shows how reporting restrictions affect coverage of criminal proceedings, especially cases involving children. Media organisations based in other parts of the UK may need to pay special consideration to what they publish in Scotland, because contempt laws are interpreted differently.

The legal system

Scotland's legal system differs greatly from that in England in the structure of the courts, the judiciary, procedure and terminology.

Distinctive Scots law - parts of the common law, legislation passed by the Scottish Parliament, Acts of Parliament which apply only in Scotland, and consequent case law – place limitations on journalism. But several Acts of the Westminster Parliament which restrict reporting do not apply in Scotland.

The High Court of Justiciary, sitting as an appellate court, is the final court of appeal for Scottish criminal cases, while the Supreme Court in London is the highest appeal court for Scottish civil cases and for criminal cases in which appellants claim their human rights have been breached.

Prosecutions

The Lord Advocate, who is appointed by the Scottish government, is responsible for the prosecution of crime in Scotland through the Crown Office and Procurator Fiscal Service (COPFS). High Court prosecutions are prepared by the Crown Office and are conducted by an advocate depute, known as Crown Counsel. In lower courts, prosecutions are prepared and conducted by a local Procurator Fiscal or Depute Fiscal.

Section 52A of the Crime and Disorder Act 1998, which – as chapter 7 of *McNae's* explains - in England and Wales affects how 'allocation' and 'sending' hearings in magistrates' courts are reported, does **not** apply in Scotland. Committals for trial in serious criminal cases take place in private before a sheriff, and little more than the name of the accused and the nature of the charges can be published.

Scots law does not distinguish formally between indictable-only and either-way offences. Although the most serious offences – including murder, culpable homicide (equivalent to manslaughter), rape and incest – may be tried only in the High Court, other offences are effectively either-way in that they may be prosecuted following either solemn or summary procedure. The decision on which procedure to use, and in which court the case should be tried, rests with the Crown as prosecuting authority. Trials following solemn procedure will take place in either a sheriff court or the High Court with a jury of 15. In Scotland there are no opening speeches to the jury in solemn trials.

The High Court of Justiciary

The High Court deals with serious offences and all trials follow solemn procedure. It sits mainly in Edinburgh, Glasgow and Aberdeen but regularly goes on circuit in other main Scottish centres. There are 34 High Court judges, headed by the Lord Justice General, and his deputy the Lord Justice Clerk. The judges are styled 'Lord -----'. Lord is an honorary title. Appeals brought to the High Court will be heard before a panel of at least three High Court judges.

The same High Court judges may also sit as judges in the Court of Session dealing with civil matters. When they do, the Lord Justice General is known as the Lord President.

The Sheriff Court

The Sheriff Court is in effect two courts in one. In summary procedure the sheriff sits alone. In solemn procedure the sheriff sits with a jury of 15. Sheriff courts also deal with the early stages of all prosecutions following solemn procedure, where the proceedings take place in private.

Scotland is divided into six sheriffdoms, each headed by a sheriff principal. Each sheriff is either an advocate (barrister) or a solicitor.

Appeals from summary trials will be dealt with by the Sheriff Appeal Court, which sits in Edinburgh. Appeals from solemn trials go to the High Court sitting as a court of appeal.

The Sheriff Court also deals with civil cases, and sheriffs conduct Fatal Accident Inquiries – roughly equivalent to, but not as frequent as, inquests south of the border.

(Chapter 16 of McNae's explains the English and Welsh inquest system)

The Justice of the Peace Court

The Justice of the Peace Court deals with minor offences following summary procedure, and some minor administrative matters. Unpaid justices of the peace (magistrates) sit with no jury.

Contempt of court

Although the Contempt of Court Act 1981 was intended to bring uniformity throughout the UK, it was often applied more strictly in Scotland. See below: '**Cross-border publication**'.

But the courts have taken the right to freedom of expression under the European Convention on Human Rights into account. In 1998 a High Court judge, Lord Prosser, said juries were healthy bodies which did not need a germ-free atmosphere.

Proceedings become active upon arrest or when a warrant to arrest is granted, and cease to be active more or less at the same point as in England. However, in Scotland the risk of contempt continues when proceedings have been deserted (abandoned) *pro loco et tempore* (temporarily), as distinct from being deserted *simpliciter* (permanently) when proceedings cease to be active.

Proceedings where orders have been made under section 4(2) and section 11 of the 1981 Act are listed on the Scottish Courts website at <http://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders>.

(Chapter 18 of McNae's explains the 1981 Act in general)

Photographs

There has also been a stricter approach to the publication of photos of an accused, at least before the Crown completes its case, in all cases (solemn and summary). It has become the practice for newspapers not to publish a photo of an accused until the Crown's prosecution case is completed, unless it is absolutely clear that the accused's identity will not be an issue.

Sexual offences

Scotland for many years has relied almost entirely on a voluntary code adopted by the editors, and on the Editors' Code of Practice as applied by IPSO, to ensure anonymity for victims of sexual offences. It appears to have worked well, although sometimes judges make an order under section 11 of the Contempt of Court Act to give legal effect

to the complainant's anonymity. In 2004 the Sexual Offences (Amendment) Act 1992 was extended to Scotland but only to prohibit the Scottish media from identifying a complainant in a sexual offence in other parts of the UK. **(See McNae' 11.9 on relevant parts of the Editors' Code)**

Judges have power under section 90 of the Criminal Justice and Licensing (Scotland) Act 2010 to make a witness anonymity order. Section 92(3) of the Criminal Procedure (Scotland) Act 1995 allows a judge to order in cases 'of rape and the like' that the court should be cleared. The normal practice is for the press to be allowed to remain on the understanding that the alleged victim remains anonymous.

The Sexual Offences (Scotland) Act 2009, which came into operation in December 2010, extended the list of sexual offences and provided that sexual intercourse and oral sex with anyone under the age of 16 remains unlawful in Scotland.

Children in court proceedings

Scotland has its own arrangements relating to reporting of court cases when children are involved.

Criminal Proceedings

Reporting restrictions under the Children and Young Persons Act 1933 and Youth Justice and Criminal Evidence Act 1999 which, as chapter 9 of *McNae's* explains, can provide anonymity for juveniles in England and Wales in reports of court proceedings, do not apply in Scotland. Instead, section 47 of the Criminal Procedure (Scotland) Act 1995 says no child under 18 who is involved in a case in any way may be identified in a report of criminal proceedings which is published or broadcast anywhere in the United Kingdom. The ban includes naming the child's address or school or using any photograph of him or her.

Exceptions are when the child is a witness only, and not also a victim, and no accused in the case is under 18. Even then, the court can prohibit identification of the child by making an order under section 46 of the Children and Young Persons (Scotland) Act 1937.

The court has the power to lift the ban on publication under the 1995 Act in the public interest. The press may wish to apply for it do so where there are special circumstances, possibly through the Crown advocate.

There is no legal reason why children who are victims of crime cannot be named even after an arrest has been made, as section 47 applies to a report of proceedings in a court. But once court proceedings have started, the child must be anonymous.

Lord Brand ruled in the High Court in Edinburgh in 1983, that the ban on identification cannot apply to a dead child.

There is no power to prevent identification of a young person who is over 18.

The 1995 Act does not apply to cases tried outside Scotland.

Criminal responsibility starts at the age of eight – although no child under 12 can be prosecuted under section 52 of the Criminal Justice and Licensing (Scotland) Act 2010. In practice, juveniles under 16 are not taken before the criminal courts except on serious charges such as homicide. Instead the Reporter, a public official, usually refers their cases to a Children's Hearing, a social work tribunal at which a three-member Children's Panel of lay-persons decides on what action should be taken. The public is barred but bona fide representatives of the media may attend these hearings. Appeals from Children's Hearings to the Sheriff Court must be heard in chambers, but the sheriff may allow reporters to attend. In 1985 Sheriff Principal Caplan at Paisley suggested that a sheriff should normally do so unless satisfied there were grounds for excluding reporters from a case. No children appearing

before a Children's Hearing, or subsequent proceedings or appeals from such a hearing, may be identified, and their pictures may not be published. The High Court ruled in 1993 that even publishing a picture showing a child which does not identify him nevertheless contravenes the Act.

Civil Proceedings

There is no automatic ban on identifying a child concerned in custody proceedings etc in the Sheriff Court or the Court of Session. But section 46 of the Children and Young Persons (Scotland) Act 1937, as amended, gives civil courts the power to order that no report shall reveal the name, address, school or particulars calculated to lead to identification of any child *under 17* concerned in the proceedings and that no picture of the child should be published. Proceedings where orders have been made under section 46 of the 1937 Act are listed on the Scottish Courts website at <http://www.scotcourts.gov.uk/current-business/court-notice/contempt-of-court-orders>.

A practice direction from the Lord President suggests to the courts that where such proceedings are held in public, no names should be mentioned in open court.

The court has power to hear such cases in private, where the hearing will take place in chambers. Reporting on a child case which *is* heard in chambers could be a contempt. There is likely to be contempt if a newspaper goes beyond picking up the bare results of a case in private and publishes details of the hearing, thus frustrating the court's wishes.

Fatal Accident Inquiries

Section 22 of the Inquiries into Fatal Accidents and Sudden Deaths (Scotland) Act 2016 is now in force, and allows a sheriff to make an order prohibiting the publication of anything which would identify of a child under 18 in relation to the Inquiry. This specifically covers the name, address or school of any child under 18 involved in the proceedings, and anything else which might identify the child.

Cross-border publication

Publishers, broadcasters and website operators can face problems if publishing material which is likely to be read or viewed on both sides of the border, particularly in relation to contempt of court.

Material published in England and Wales, and therefore intended to keep within the restrictions imposed by English law, might amount to a contempt in Scotland, for example because it carries a photograph of an accused person in a Scottish prosecution. There might also be problems in relation to websites – during Peter Tobin's 2008 trial for the murder of schoolgirl Vicky Hamilton, Scottish police contacted the Wikipedia website and arranged for it to take down the page about him, which detailed his previous convictions for raping two teenaged girls and for the murder of Polish student Angelika Kluk, whose body he hid in the Catholic church where he was working as a handyman.

Publishers whose editions or magazines are published outside Scotland should be safe in relation to contempt as long as the publication is not actually distributed in Scotland. Scottish editions, of course, must meet the requirements of Scottish law. The same applies to broadcasters – so, for example, BBC Scotland's coverage of a court case, might differ considerably from that which the same case would receive from the corporation south of the border or in Northern Ireland. The Press Association has on occasion run two versions of a story, one intended for publication in England and Wales, and bearing a warning that Scottish subscribers should check with their own lawyers before using it, and one for the Scottish services and written to comply with Scots law.

Websites which are run from outside Scotland are beyond the jurisdiction of the Scottish courts. Websites run from within Scotland must ensure that they abide by Scots law.

The occasionally odd result of having two jurisdictions side-by-side is demonstrated by the 2011 case of the footballer who obtained an injunction from the High Court in London to stop the media identifying him in accounts

of his adulterous relationship with a reality TV star. But he was identified on the front page of the Glasgow-based *Herald* newspaper, which, being within the Scottish jurisdiction, was not bound by the High Court's order. Liberal Democrat MP John Hemming later named Ryan Giggs in the House of Commons as the individual who obtained the gagging order. The UK media then quoted the MP.

The equivalent of the injunction in Scotland is an interdict. The terms of an injunction obtained from the courts in England and Wales can effectively be extended to Scotland if an application for an interdict is made to the Court of Session. (See also McNae's 27.3.2 on injunctions).

Recap of major points

- Scotland has its own legal structure and proceedings.
- Some aspects of media law are governed by Acts of Parliament unique to Scotland and associated case law.
- No one under 18 who is involved in criminal proceedings can be identified but above that age there is not normally any bar.

Useful websites

<http://www.legislation.gov.uk/browse/scotland>

Legislation applicable in Scotland

www.scotland-judiciary.org.uk

Information about Scottish judges and their work

<http://www.scotcourts.gov.uk/current-business/court-notices/contempt-of-court-orders>

Information on court announcements, including reporting restrictions

<http://www.copfs.gov.uk/>

Crown Office and Procurator Fiscal service