

# *JUDICIAL APPOINTMENTS BOARD FOR SCOTLAND*

## THE OFFICE OF SHERIFF

**Please note that this paper was produced by the Sheriffs' Association and, while it provides a good general illustration of the work of a sheriff, it should not be understood as a definitive expression of the Board's views. Further information about the work and jurisdiction of a Sheriff is also to be found in Part 1 of Macphail: Sheriff Court Practice (3<sup>rd</sup> Edition).**

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## **Introduction**

The outstanding feature of the ancient office of sheriff is the wide extent of the jurisdiction, both civil and criminal. The sheriff courts are the main courts of Scotland, located in 49 cities and towns all over Scotland. They deal with the great majority of civil and criminal cases.

## **Appointment**

All permanent sheriffs are appointed by Her Majesty The Queen on the recommendation of the First Minister of the Scottish Executive. The First Minister must consult the Lord President of the Court of Session, Scotland's most senior Judge, before putting his recommendations forward. Once appointed a sheriff may remain in office until the compulsory retirement age which is 70 for all sheriffs appointed since 1995. Sheriffs may, if they wish, retire at any time after reaching the age of 60 but retirement between the ages of 60 and 65 would be on actuarially reduced terms.

## **Qualifications and Experience**

To qualify for appointment as sheriff a person must be and have been an advocate or solicitor for at least 10 years. Because of the nature of the office, those appointed should be practitioners of standing, whether Queen's Counsel, advocates or solicitors with considerable court experience. Before appointment, the person would in many cases have had some experience of the shrieval bench as a temporary or part-time sheriff.

Initially, before sitting alone, a sheriff will normally undergo five days of specific training plus five days sitting alongside an experienced sheriff.

As the jurisdiction of the sheriff is vast, he or she must have a grasp of every aspect of law, both civil and criminal, as well as mastery of the rules of evidence. Each sheriff requires to devote considerable time to maintaining an up-to-date knowledge and awareness of the relevant law, rules of evidence and procedure. Each sheriff requires to read a substantial number of law reports and other relevant publications in order to keep abreast of the many changes that occur in the law. Sheriffs require to be aware of the legislation of both the UK and Scottish Parliaments as well as the decided case law and jurisprudence of the Scottish courts and the European Court of Human Rights.

Each sheriff requires to be versatile and to be able to deal with whatever type of case is put before him or her at short notice and to maintain a sound judicial temperament at all times. Many sheriffs will require to deal with various different types of business during the course of each working day, whether in court or in chambers.

## **Primary Functions**

The primary function of the sheriff is to act as a judge of the first instance. However, sheriffs also exercise some appellate functions and a large number of administrative and *quasi*-judicial functions. There are 49 sheriff courts situated throughout Scotland and each sheriff has the same powers and responsibilities within his or her sheriff court district. In the cities and larger towns a number of sheriffs work in the local sheriff court building. In some courts there may be only one resident sheriff whereas in the more remote areas, particularly those in the islands, the resident sheriff may sit in more than one court during the course of a working week. More recently there have been appointments of sheriffs who are directed to sit where there is a need from time to time: such sheriffs are known as All-Scotland Floating Sheriffs. The sheriff also acts as commissary judge dealing with the granting of confirmation of executors and administration of wills. Sheriffs deal with making requests for extradition to Scotland and the sheriffs in Edinburgh deal with all applications from abroad for extradition of persons from Scotland.

## **Attendance at Court**

The sheriff will normally commence the court sitting at, or sometimes before, 10.00 am. In some areas pressure of business has resulted in courts now starting at 9.30 am. The court frequently sits later than 4 pm. Judicial business, however, extends well beyond the normal court sitting times.

Before going to sit in court the sheriff will usually read and consider reports or other court papers in connection with that day's court business. These reports can be lengthy and complicated and many of them, such as social enquiry reports, psychiatric reports and community service assessments, require to be given careful consideration. Most sheriffs consider such reports the day or, more usually, the night before the case calls in court. The sheriff will often require, before sitting in court, to conduct interviews or preside at hearings in chambers in respect of various types of court business.

The sheriff court sits each day from Monday to Friday except in certain rural areas where the court will only sit for part of the week and the sheriff will have to travel to other sheriff courts in the course of a week's work. Human rights considerations require that on occasion courts sit on Saturdays and public holidays. This is in order to keep to a minimum the period of detention between arrest and court appearance.

Out of court the sheriff has to undertake a substantial amount of written and chambers work. For example, civil judgments, interlocutory matters such as unopposed motions and undefended ordinary actions, warrants for arrestment or inhibition, preparation of stated cases and reports for criminal or civil appeals or children's referral cases, applications for special arrangements for vulnerable witnesses, consideration of applications for adoption and applications for freeing for adoption, undefended divorces based on affidavit evidence, administrative applications such as those relating to liquidations, bankruptcies, clubs, wills and succession, trustees and factors, etc and other

matters of a *quasi* judicial or administrative nature. The sheriff has to deal with consideration of breach reports of community disposals (such as probation) and applications for initiating criminal warrants.

A sheriff may be called on at any hour of the day or night to consider urgent applications for various criminal warrants, civil interdicts, child protection orders and public health warrants and orders. In accordance with a direction by the Lord Advocate (following difficulties with search warrants granted by justices of the peace) applications for criminal search warrants normally all require to be presented to sheriffs for consideration. This has placed substantial additional duties on sheriffs, particularly out of hours. Sheriffs who cover more than one court may additionally spend a considerable amount of time in travelling.

### **Special Conditions of Service**

A sheriff may be required to live in or near the town in which he or she has the main or only court. The sheriff may not engage either directly or indirectly, in private legal practice or in business, and may not accept any other paid appointment. He or she may be directed to serve temporarily in another sheriffdom or at another court in the same sheriffdom; and may also be transferred permanently to another court. The sheriff's leave of absence is fixed by statute at not more than seven weeks in any year, and is subject always to the approval of the sheriff principal.

### **Nature of Work**

#### Criminal Proceedings

The criminal jurisdiction of the sheriff is both summary (where the sheriff sits alone) and solemn (where he or she sits with a jury).

In summary procedure the maximum penalty, except where lower penalties are prescribed by a particular statute, is 12 months' imprisonment and a fine of £10,000. There are, however, wide discretionary sentences including probation which may involve detailed conditions, deferring sentence involving conditions, community service, drug testing and treatment orders, extended sentences and supervised release orders, restriction of liberty orders, supervised attendance orders and the power to order compensation, in addition to other incidental orders including football banning orders, non-harassment orders, anti-social behaviour orders, disqualification orders, and forfeiture of vehicles or other property.

The sheriff has concurrent jurisdiction with the High Court for solemn (jury) proceedings on indictment, with the exception of the crimes of murder, rape and treason. The maximum sentence of imprisonment available to the sheriff was increased from three years to five years with effect from 1 May 2004. This resulted in an increase in solemn business in many sheriff courts as

cases that would formerly have been tried in the High Court are now indicted into the sheriff court. Jury trials taken in the sheriff court have included culpable homicide, attempted murder, assault to the danger of life, assault and robbery, attempted rape, computer fraud, corruption, death by dangerous driving, death of a child during a charity helicopter ride, possession of drugs with intent to supply and being concerned in the supply of drugs, insider dealing and child abuse. The sheriff also has a power to remit to the High Court for sentence in any case in which a longer period of imprisonment than five years is thought to be necessary. In addition, the same discretionary, non-custodial sentences available in summary procedure may be selected. There is no limit on the size of any fine which may be imposed.

An accused in Scotland has no right to elect to be tried by a jury. The *forum*, whether solemn or summary, is decided by the public prosecutor, the Lord Advocate, or his local representative, the Procurator Fiscal. This prosecutorial discretion, together with the increase in the maximum summary sentence, has had the consequence that cases that might previously have been prosecuted on indictment (or that would be tried by a jury in England and Wales) have been prosecuted before the sheriff under summary procedure in Scotland. Also, one of the objectives of the Summary Justice Reform Programme, reflected in the Criminal Proceedings etc (Reform) (Scotland) Act 2007 is to ensure that the Sheriff Court only deals with more serious criminal cases at summary level and that has recently affected the prosecution of summary cases in the sheriff court.

The sheriff is the competent authority in Scotland in relation to requests for enforcement of penalties from European Union States under section 223 of the Criminal Procedure (Scotland) Act 1995. The sheriff also deals with criminal recovery proceedings under the Proceeds of Crime Act 2002. Some courts have specialist courts such as a drugs court with designated sheriffs with additional powers, a domestic abuse court in Glasgow, and specialist youth courts have been tried.

The volume of appeals in criminal cases has increased markedly. In appeals against sentence the sheriff is required to prepare a report for the Appeal Court, providing a sufficient record of all relevant circumstances and the reasons for the sentence. Appeals against conviction are however likely to involve a great deal more work than those against sentence. In summary cases the sheriff has to draft a stated case and set out all the relevant findings-in-fact, together with a detailed note in support and explanation of them. In solemn cases he or she will have to prepare a report for the High Court giving the sheriff's opinion on the case generally and on the grounds of appeal. The amount of work is considerable, has to be carried out within strict time limits, and must be undertaken even in an apparently hopeless appeal.

### Civil Proceedings

The sheriff court has exclusive jurisdiction for all claims under £5,000. Beyond that limit, and subject to a small number of exceptions, the jurisdiction of the sheriff court and of the Court of Session is the same. Because solicitors as

well as advocates have a right of audience in the sheriff court, solicitors can choose to raise the most complicated and important cases in the sheriff court and such cases are common in the sheriff court. There is no pecuniary limit. Important and complex cases, which might otherwise have been taken in the Court of Session, are taken in the Sheriff Court for reasons of cost, geographical convenience, and confidence in the judiciary.

The sheriff court deals with almost all family actions in Scotland. This involves the bulk of divorces, defended as well as undefended; disputes over the custody and maintenance of children; adoptions including contested adoptions, applications to free children for adoption and permanence orders; and the division of family property on separation or divorce. The length and complexity of such hearings has in recent times increased markedly. Cases involving residence and contact orders and freeing for adoption orders can often last for many days and involve difficult and anxious issues where both parties regularly adduce conflicting evidence from expert witnesses. In some courts there are specialist commercial courts and family courts with sheriffs serving in these courts for periods of time.

The sheriff is expected to issue civil judgments with the least possible delay. For the reasons explained above, it can be very difficult to consider cases and prepare judgments in the course of the working day. As a result it is common for sheriffs to undertake this task in private time.

For reasons of speed and minimisation of expense, civil cases in the sheriff court are divided into small claims, summary causes and ordinary causes. Small claims, which comprise claims with a value up to £3,000, are dealt with under special rules which encourage informality and some active intervention by the sheriff. Summary causes, which comprise claims between £3,000 and £5,000, or claims for removal from heritable property of whatever value, have a more structured formality, but do not involve formal written pleadings or the attendance of a shorthand writer to note the evidence. All other cases are generally classed as ordinary causes. They have full, formal pleadings, and shorthand notes of evidence are taken. The sheriff is however required in each defended ordinary cause to deliver a judgment in writing, setting out at length all the relevant facts which he or she has found proved and giving detailed reasons for the decision. In appeals against the sheriff's decision in a small claim or a summary cause, the sheriff must set out in the form of a stated case the facts which have been held proved, with his or her reasons for decision. There is increasing pressure for summary causes and small claims to be litigated without legal representation and for procedures to be sympathetic to party litigants. This requires the sheriff to have particular skill and expertise, and knowledge of a wide range of law and to apply it from his or her own knowledge without the benefit of legal argument.

Appeals against the sheriff's decision in civil cases may be heard by the sheriff principal or by the Inner House of the Court of Session. There is in general an appeal from the sheriff principal to the Court of Session. In matters appealed to the Court of Session, a further appeal may lie to the House of Lords. In certain circumstances the sheriff may have to consider whether to refer a case pending before him to the European Court.

In civil cases a sheriff is bound to follow decisions of the Inner House of the Court of Session which are in point, and also the decisions of the House of Lords in Scottish cases. Decisions of the Outer House of the Court of Session, of the House of Lords in English cases, and of the Court of Appeal in England, are of persuasive, but not binding, authority.

### Children's Referrals

In Scotland children alleged to be in need of compulsory measures of supervision are referred by the Reporter to the Children's Panel and dealt with by a Children's Hearing. In many cases the Children's Hearing requires to remit the case to the sheriff for proof, including, in particular, cases where there is a dispute as to whether the condition(s) upon which a child is to be referred is established. It is the sheriff who has to decide on the evidence at proof whether what is alleged by the Reporter is established. These cases require to be given priority in the court programme and if the child is detained in a place of safety, strict time limits for hearing and disposing of the case apply. Many of these cases are extremely anxious involving serious allegations of physical or sexual abuse of children. Some involve allegations that a child has committed a serious crime, such as rape. Many cases are hotly contested and last for several days or longer, particularly when parties lead conflicting expert evidence. Such cases form an increasing part of a sheriff's work. The sheriff also has a substantial appellate jurisdiction in relation to decisions reached by Children's Hearings as to disposal of a child's case and such appeals have to be dealt with as priority business. Such cases can be very time-consuming and many involve consideration of ECHR arguments. Children's referral cases regularly involve vulnerable witnesses.

### Summary Applications

There are more than 500 statutory appeals or other statutory applications, which are directed to be made to the sheriff. In some of these applications the sheriff's decision is final; in others a further appeal is available. The subjects are so miscellaneous that no summary can even be attempted. While some appeals and applications are by their nature infrequent, others are frequently made. The latter include appeals and applications relating to matters of licensing, gaming, public order, gun control, education, and adults with incapacity. Some appeals are of the nature of judicial review.

### Fatal Accident Inquiries

Inquiries into sudden or suspicious deaths are conducted (a) if the deceased dies in the course of his or her employment or in custody or (b) if the Lord Advocate determines it is appropriate to hold an Inquiry in the public interest. These inquiries are normally selected because of particular public interest or importance and can be very lengthy. Such Inquiries have involved a rail disaster, death of children in dental surgeries under anaesthetic, death in the

oil construction and repair industry, an RAF helicopter crash, death during fire fighting operations, and death as a result of septicaemia after admission to hospital. The sheriff is required to make certain findings and is empowered to make recommendations to avoid a recurrence of the incident. Substantial public interest often attends such inquiries.

### Mental Health Tribunals.

In terms of paragraph 2 of Schedule 2 to the Mental Health (Care and Treatment) (Scotland) Act 2003 sheriffs can act as conveners of the shrieval panel of the Mental Health Tribunal. The sheriff carrying out this function is expected to undergo additional training in relation to the specialised nature of the law and in order to equip him to act as chairman of a tripartite Tribunal consisting of himself, a consultant psychiatrist and another member who has an interest in Mental Health. The Tribunal inevitably hears expert and psychiatric and psychological evidence as well as evidence from social workers and mental health officers. It is of the highest importance dealing as it does with patients in the State Hospital who have carried out extremely violent crimes including murder and sexual crimes of the utmost severity and who may be a serious risk to the public. There is considerable responsibility vested in the Tribunal which is expected to issue written decisions which could have serious repercussions for the public at the end of the hearing or within a very short time. The tribunal has power to review restriction orders and compulsion orders and to revoke them if appropriate.

### Recent developments

(i) The incorporation into the Law of Scotland of the European Convention of Human Rights (in terms of the Scotland Act 1998). Devolution issues, where it is argued on behalf of an accused person that the conduct of the prosecution breaches the European Convention of Human Rights, have become a regular feature of criminal procedure. These cases require the sheriff to know the relevant European Jurisprudence. Likewise with points taken under the Human Rights Act 1998, which also now require to be dealt with.

(ii) Sheriffs are required to adopt a more pro-active role. In civil and criminal cases, sheriffs are expected to be involved in the management of cases. In civil cases, an Options Hearing is set where, under the Rules, the sheriff is required to seek to secure the expeditious progress of the cause by ascertaining from the parties the matters in dispute and information about certain other matters regarding the case. In particular in Family and Commercial actions this is a very important part of the procedure and requires substantial preparation by the sheriff in advance of the Options Hearing. In criminal courts, intermediate diets in summary cases and first diets in solemn cases also require an interventionist approach.

(iii) Child Welfare Hearings. These hearings have become an important part of actions involving residence and contact orders where the sheriff, on an interim basis, requires to make orders considered appropriate having regard to the



welfare of the child. The rules require the sheriff to secure the expeditious resolution of disputes in relation to the child by ascertaining from the parties the matters in dispute and any information relevant to that dispute and allow the sheriff to do anything which he or she thinks fit.

### **Sensitivity of Judgments**

The range of decision-making by the sheriff is very broad, and includes matters of considerable local or public interest. Particularly, but not exclusively, in the more remote areas, sheriff court decisions can be of considerable local interest. Sensitivity and tact must often be applied by the sheriff in dealing with matters involving public interest or concern. In such cases sheriffs often now issue sentencing statements through the Scottish Judiciary's Public Information Officer. Fatal accident inquiries in particular often involve sensitive judgments, not only in relation to those closely involved but to the public at large. They also often raise matters of considerable technicality, upon which the sheriff has to express views in writing. They often attract the attention of the national as well as the local media.

### **Other Activities**

Sheriffs are expected, and are frequently called upon, to serve, and in some instances are required by statute to be represented, on a wide variety of numerous quasi-judicial, administrative and advisory or consultative bodies. These include the Judicial Appointments Board for Scotland, the Upper Tribunal for administrative tribunals, the Rules Council, the Parole Board, the Judicial Studies Committee, the new Scottish Courts Service Board, the Judicial Council for Scotland, the Scottish Legal Aid Board, Justice of the Peace Training Committees, court user groups, criminal justice bodies and research groups.

The Scottish Courts Service Board, under the Judiciary and Courts (Scotland) Act 2008, will be the governing body of the court service involving greater judicial management and oversight. If a Sentencing Council is created on implementation of the Criminal Justice and Licensing (Scotland) Bill, sheriffs will be represented on that body.

