EDITORIAL

Occupational stress

Occupational stress actions remain very much an uphill struggle for claimants and the "practical propositions" articulated in *Hatton v Sutherland* [2002] 2 All E.R. 1 provide part of the explanation for this. Proposition 4 tells us that "there are no occupations which should be regarded as intrinsically dangerous to mental health". The Australian courts take a different view and recovery took place in *Kozarov v State of Victoria* [2020] VSC 78. Success was in part due to the judicial recognition that the role in question carried a known occupational health risk. In *Kozarov* the plaintiff was a solicitor and former employee of the Victorian Office of Public Prosecutions (the OPP). For three years, she worked in the OPP's Specialist Sexual Offences Unit (the SSOU). The plaintiff alleged that she sustained psychiatric injury during the course of her employment and further alleged that her injuries were caused through ongoing, repeated exposure to a high volume of sexual offence cases, including many that involved child exploitation and pornography. Her argument that her employer was on notice about the psychological health risks to SSOU solicitors generally, and to her specifically, was accepted.

I would like to suggest that an argument of this sort may be more likely to gain traction in Scotland and England in the future. Since *Hatton* the courts have placed increased importance on employers being proactive in undertaking risk assessments and in *Bailey v Devon* [2014] 7 WLUK 450 it was said that a

> "duty to assess risk in relation to stress in a workplace could now arise at a much lower threshold and such an assessment might well put an employer on clear notice of the need to take adequate steps to prevent an employee from injury".

Such an assessment may reveal that employees undertaking a particular role are especially vulnerable. This may be illustrated by the decision of the Court of Appeal in *Melville v Home Office* [2005] EWCA Civ 06 where the employer's records showed that it recognised that persons who were called on to deal with certain traumatic incidents in prisons, such as suicides, might sustain injury to their health. The court held that it was illogical to argue that when an employer has foreseen a risk of psychiatric injury to employees exposed to certain traumatic incidents, such injury is not foreseeable if the employee does not show impending signs of such injury before the event takes places.

CONTENTS

THOMSON REUTERS

Editor:
Douglas Brodie, Professor of Employment Law, University of Strathclyde

Contributing Editors:
Robert Milligan QC
Lauren Sutherland QC
Gavin Henderson, Clyde & Co
Ranald I. Macpherson

House Editor:
Philippa Blackham, LLB (Hons), Dip LP

W. GREEN

Contributions to the Editor at Thomson Reuters, Atholl Exchange, 6 Canning Street, Edinburgh, EH3 8EG.

For Customer Support, including orders, go to: *www.tr.com/uki-legal-contact*.
Tel: 0345 600 9355

Six issues: subscription price for 2020: £530.

ISSN: 1357-2776.

The *Reparation Bulletin* is published by Thomson Reuters, trading as W. Green. Thomson Reuters is registered in England & Wales, Company No.1679046. Registered Office and address for service: 5 Canada Square, Canary Wharf, London, E14 5AQ). For further information on our products and services, visit *http://www.sweetandmaxwell.co.uk*.

Computerset by W. Green.
Printed and bound in Great Britain by Hobbs the Printers Ltd, Totton, Hampshire.

FSC www.fsc.org MIX Paper from responsible sources FSC® C020438

Issue 155
August 2020

REPARATION

CASE COMMENT

Cuckoo in the nest: *Brisbane* and Scots law on limitation

Ronnie Conway, *Solicitor Advocate*

In the early 2000s, there was widespread claimant and practitioner dissatisfaction with the operation of the law of limitation, as contained in the Prescription and Limitation (Scotland) Act 1973 (the 1973 Act).

There were two particular aspects.

The first was the constructive awareness or "date of knowledge" test, particularly with reference to attributability. The statutory test for discoverability in s.17 refers to a time when it was "reasonably practicable" for the pursuer to become so aware of the relevant facts. It was widely felt that this objective reasonable practicability test did not enable justice to be done for claimants who may have acted reasonably or who had reasonable excuse for inaction, but were instead held to the stringent objective standard. So, in the case of *Elliott v J and C Finney*, 1989 S.L.T. 605 the pursuer was the driver of a car involved in a serious road traffic accident with a lorry. He was detained as an in-patient. He was interviewed by the police whilst in hospital. It was held that it would have been reasonably practicable for him to have obtained the identity of the lorry driver from the interviewing policeman. In *Little v East Ayrshire*, 1989 S.C.L.R. 520, it was held that a pursuer who had been told by an examining specialist that he had a hearing loss, should have immediately established from him whether or not it was noise induced.

These kinds of decisions do not resonate with ordinary experience. The test was criticised by the Scottish Law Commission in its 2006 Discussion Paper (No.132) *Personal Injury Actions; Limitation and Prescribed Claims.* In the final Law Commission Report (No.207) published in 2007 following consultation, the Commission proposed abolition of the reasonably practicability test. Time was not to run whilst a pursuer was "excusably unaware" of any of the s.17 statutory facts.

The other area of dissatisfaction was the exercise of the s.19A "equitable discretion". In theory, the discretion is completely unfettered, although case law has identified certain basic propositions. But at its heart, the criticisms were directed particularly towards a litigation system that vested judges with unguided discretion, the exercise of which appeared to be unpredictable. Both the Discussion Paper and the Report suggested that judges should be ushered towards a list of factors that they may care to take into account.

As it's 2020 might it be an appropriate time to take stock, and to see how claimants have fared since those early years?

Section 17(2): date of knowledge

With the exception of the child abuse victims, where the Scottish Government intervened to cut the Gordian Knot with the Limitation (Childhood Abuse) (Scotland) Act 2017, the answer is worse, much worse. (Even there it is likely that historic claims will be subject to an evidential prejudice test still bedevilled with the problems described below.) We are still stuck with the reasonable practicability test. The intervening case law has not helped. Unlike the English Limitation Act 1980, there is no recognition that expert evidence, either by way of a medical or liability report, might be required before a stateable claim can be made or an action raised. In *Agnew v Scott Lithgow (No.2)*, 2003 S.C. 448, the pursuer suffered from the condition of vibration white finger. He was unaware that his symptoms might not be constitutional but instead related to his use of vibrating tools until after a conversation with work colleagues. A careful study of the judgment shows that this conversation *put him on enquiry* to find out the reasons for his condition. Time did not start to run against him until the date of receipt of a specialist medical report.

However, this case is now frequently cited as authority for the proposition that only a minimal level of misgiving is required to start the clock. Although obiter on limitation, Lord Hodge in the Supreme Court in *Morrison v ICL*, 2014 S.C. 222 at [83] under reference to *Agnew*, appears to state that time started to run from the date of the conversation and not the receipt of the specialist report. He continues " … therefore, only a modest level of awareness between the act or omission suffices".

This approach is particularly relevant to clinical negligence cases. It enables the defenders' bar to argue that time starts to run where there is simply a suspicion that something must have gone wrong, even where that suspicion would almost certainly require confirmation from a consultant and that suspicion does not remotely reach the *Hunter v Hanley* test.

Section 19A: the equitable discretion

The difficulties on the "reasonable practicability" test would not matter so much were a liberal and expansive approach to be taken to the s.19A discretion. Certainly some older cases where there was no evidential prejudice to defenders, took this approach. See, e.g. *Comber v Greater Glasgow Health Board*, 1989 S.L.T. 639

In *A v Hoare* [2006] UKHL 6, the House of Lords dealt with a number of English appeals involving child sex abuse cases. The House held unanimously that the well-known reluctance of abuse victims to come forward to complain of

psychiatric illness until many years after the abuse had ended, was a factor that should be taken into account in the exercise of equitable discretion in terms of the Limitation Act 1980 s.33. All of the cases were allowed to proceed.

Baroness Hale observed:

> "It may be more satisfactory to transfer the question (date of knowledge) into the exercise of discretion in Section 33 … With a properly directed discretion, one should not need the date of knowledge provision at all."

Shortly afterwards, in the Scottish case of *AS v the Sisters of Nazareth* [2008] UKHL 32, the House of Lords approved the approach of the Lord Ordinary and the Inner House to deny the exercise of the s.19A discretion to the historic sex abuse claims before the court. It is this case (and, in particular, the discussion at first instance in *B v Murray (No.2)*, 2005 S.L.T. 982) that has embedded the Australian High Court decision of *Brisbane South Regional Health Authority v Taylor* (1996) C.L.R. 541 in Scots law, to the extent that it is routinely (and usually successfully) invoked by defenders in limitation argument.

Brisbane was a medical negligence case in which the pursuer sought an extension of one year from the primary limitation period in terms of s.31(2) of the Limitation of Actions Act 1974. The Act itself makes no reference to equitable discretion or fairness, and deals only with a one year extension where material facts have newly come into the knowledge of the plaintiff. In the event, the court refused the extension of time by a majority of 4:1 The Lord Ordinary in *B v Murray* was the first to embrace this approach, which was followed in the Inner House, and then rather more lukewarmly by the House of Lords. The *Brisbane* judgment sets out various rationales for the primary limitation period. Perhaps the most important for present purposes are:

(1) that any extension of limitation is automatically prejudicial to a defendant, i.e. there is a presumption against the exercise of discretion; and

(2) that the deterioration in the quality of evidence is not simply to be measured by the known disappearance of witnesses or documents, but also by the "unknown unknowns", i.e. there is a presumption of evidential prejudice solely on the basis of the passage of time.

The well-known Australian tort author Nicholas Mullany deplored this approach and stated in the *Law Quarterly Review* ("Elevating the Burden" 1997 L.Q.R. 113):

> "For Australian tortfeasors, this elevation of presumed prejudice will prove a vital development in limitation law. For those injured for the want of due care, it further evidences the erosion of their common law rights … in reality, there may now be little hope for them [extensions of time] … plaintiffs in the United Kingdom should vigorously resist any push by insurers to be afforded similar privileges in resisting applications for the postponement of time bars."

There has been no shortage of homegrown criticism of the *Brisbane* effect in Scots law. In *Prescription and Limitation of Actions*, 2nd edn (Edinburgh: W. Green, 2012), David Johnston states:

> "These [*Brisbane*] observations have by now become familiar to the Scottish Courts. But it is important to notice that the statutory provision to which they refer is in entirely different terms from s.19A … There appears to be no good reason to adopt a view that the acid test for s.19A jurisdiction is whether the defendant has proven the fact or the real possibility of significant prejudice."

(See also Eleanor J. Russell "Denying the Discretion", 2013 Jur. Rev. 2013, 2, 95–132 and her commentary in *Greens Annotated Acts: Prescription and Limitation of Actions*, 7th edn (Edinburgh: W. Green, 2015), particularly at para.6–70, pp.168–169).

***Brisbane* in practice**

A brief look at two recent cases illustrates the *Brisbane* principles at work.

In *Young v Borders Health Board* [2016] CSOH 13 the pursuer alleged clinical negligence following admission to hospital and an operation for a leg injury in February 2007. She believed from the time of her discharge that something had gone wrong. She contacted the Citizens' Advice Bureau. A letter of complaint was sent by them to the health board on 1 February 2008. An action was raised in February 2011, outwith the primary limitation period. Senior counsel for the defenders distinguished awareness of attributability from actionability, which was not relevant in terms of s.22(3) of the 1973 Act. The pursuer knew something was wrong with her treatment on discharge. It was argued that she was put on enquiry to find out more. It was argued that time ran, if not from the date of discharge, at the very latest from the letter of complaint. The court upheld the defender's argument on reasonable practicability. On s.19A, the court held that the pursuer had not explained the lapse of time from February 2008 to the date of raising the action. There was accordingly a presumptive evidential prejudice to the defender that had not been displaced.

Two points might be made. First, as every clinical negligence practitioner knows, those claims cannot be advanced until the pursuer is in possession of a report that satisfies the *Hunter v Hanley* test. No responsible pleader can make averments or sign a writ absent the possession of such a report. The obtaining of such reports

routinely takes significant periods of time and, where civil legal aid is involved, of periods up to a year. Whilst actionability is specifically excluded from s.17(2)(b) consideration, the time needed for reports should have been put into the balance on s.19A.

Secondly, the Lord Ordinary (Arthurson) has properly construed the current s.19A case law. At present, there is a presumption, both evidential and substantive, against the allowance of the discretion.

In *Quinn v Wrights Insulation Ltd* [2020] CSOH 2 the *Brisbane* jurisprudence also loomed large, where a claim by relatives for a mesothelioma death was dismissed after preliminary proof.

Put briefly, the deceased had been diagnosed with pleural plaques around 1993 or 1994. He did nothing about that hospital diagnosis. In 2012, he received a further hospital diagnosis of pleural plaques. At that time, he contacted the Clydeside Action on Asbestos organisation who referred him to solicitors who intimated a claim for pleural plaques. No settlement was reached. The deceased showed symptoms of mesothelioma by January 2016. As is inevitable in these cases, death (on 11 May 2017) followed this diagnosis.

The relatives' claims were raised on 13 December 2018. They estimated the total value of all claims at £810,000. Liability was admitted. The pursuer's agents admitted that the deceased had knowledge of the relevant statutory facts in terms of s.17(2)(b) by around 1993. It was accepted that following the case of *Aitchison v Glasgow City Council* [2010] S.C. 411 (which had overruled *Carnegie v Lord Advocate (No.3)*, 2001 S.C. 802) the development of the later disease did not set up a separate date for time bar. The Lord Ordinary embarked on an exhaustive examination of all the relevant s.19A factors. She took into consideration that this was the development of the fatal illness of mesothelioma, as opposed to asymptomatic pleural plaques. (In fact, in 1993 and until the case of *Aitchison*, it was not at all clear that a separate limitation date did not materialise with the later illness.) The high value of the claim was acknowledged, and perhaps it might be compared to the standard award for pleural plaques around 1993 of around £3,000–£5,000. However, it was held that the defenders had suffered significant prejudice. In particular, they had lost the chance to settle the claim on a provisional basis. Particular reliance was placed on the *Brisbane* principles.

When the case of *AS v Poor Sisters of Nazareth* went to the House of Lords, Lord Hope stated:

> "But proof that the defender will be exposed to the real possibility of significant prejudice will usually determine the issue in his favour. This is a question of degree for the judge by whom the discretion under Section 19A is to be exercised."

Lord Hope specifically approved the legislative presumption that the pursuer's lost right should not be revived and that the defender should not have a spent liability imposed on him.

It is perhaps unfortunate that Lord Hope did not expand on what he meant by "significant prejudice". If what is meant is "evidential prejudice", then an admitted liability claim should probably pass through subject to a colourable explanation for delay. If what is meant is "financial prejudice" then the loss of a windfall defence to a potential claim for £810,000 is clearly of relevance. But the logical fallacy of the latter approach was described in the Law Commission Discussion Paper, which skewers it as follows:

> "3.11 First, in balancing the prejudice likely to be suffered by the respective parties, it is clear that, if the court allows the action to proceed, the defender loses what is sometimes described as a 'cast iron defence', namely the protection of the time bar, and is then exposed to the risk of being found liable in damages.
>
> Conversely, if the court refuses to allow the action to proceed, the pursuer suffers the equally obvious prejudice of not being able to pursue a potentially good claim. These obvious prejudices are, in a sense, self cancelling and the search must therefore be taken wider in a quest for factors which either diminish or increase the prejudice suffered by each party."

The approach in England: *Cain v Francis* [2009] 3 W.L.R. 551

Quite apart from the academic criticism of the *Brisbane* approach, there is compelling jurisprudence in the area of limitation law, from a source rather closer to home than Australia. In the case of *Cain v Francis*, the Court of Appeal undertook a wide-ranging analysis of the discretionary provisions of s.33 of the Limitation Act 1980.

Delivering the leading judgment, Lady Janet Smith found that the competing prejudices were relevant only insofar as delay and the length of that delay disadvantaged the defendant in their investigation of the claim or the assembly of evidence in respect of the issues of both liability and quantum, "the length of the delay will be important, not so much for itself as to the effect it has had".

Or to put matters another way, the primary consideration should be forensic and not substantive prejudice. This is not a blank cheque for claimants who will still have to provide some kind of explanation as to why matters have not proceeded timeously and also address actual evidential prejudice, which will have to be analysed at a granular level, as opposed to an "unknown unknowns" exercise in magical thinking. Leave to appeal was refused by the Appeal Committee of the House of Lords (including Baroness Hale) and *Cain* is now the settled law in England.

The case for reform

There was and is widespread dissatisfaction with the reasonable practicability test.

It is significant that the s.19A proposals in the Law Commission draft Limitation (Scotland) Bill say nothing at all about balancing of prejudice. Instead, there is a list of matters to which the court may have regard when considering the exercise of s.19A discretion and, in particular, as contained in s.3(c) of the draft Bill:

> "What effect, if any, the length of time that has passed since the right of action accrued is likely to have had on the defender's ability to defend the action and, generally, on the availability and quality of evidence."

In theory, it is repeatedly stated that the court's discretion under s.19A is completely unfettered, and that judges are invited to dine a la carte on what they think fairness and equity require.

In reality, the lugubrious figure of *Brisbane* hovers over them, a dismal waiter constantly directing their attention to those particular items on the menu that must inevitably lead to dismissal or absolvitor.

In 2013 the Scottish Government carried out a consultation on *Civil Law of Damages: Issues in Personal Injury* and at that time committed to legislation on limitation, but nothing has emerged.

It is time for the draft Limitation (Scotland) Bill to be dusted down and put on the statute book.

EXE v Governors of Royal Naval School [2020] EWHC 596

Francis McManus, *University of Stirling*

Background and decision

Between 15 October 1990 and 10 July 1991 the defendant school (RNS) employed H as a kitchen porter. Unknown to RNS, H had a criminal record. He had committed a number of offences, including sexual assault and actual bodily harm. The claimant (EXE) went to RNS in 1989. In 1991, H had sexual intercourse with her, when EXE was 14 years old. That was a crime, of which EXE was a victim. However, RNS did not know about this. RNS discovered other misconduct by H in July 1991, as a result of which H's employment came to an end. H's crimes against EXE continued. The latter suffered significant mental health issues as a result of H's conduct towards her. The court was required to determine whether RNS was either vicariously liable for H's conduct and, or, whether RNS was liable to EXE for negligently recruiting H.

Griffiths J held that since EXE had had consensual sex with H, notwithstanding the fact that H's conduct ranked as a crime, that conduct was not tortious. It therefore followed that RNS was not vicariously liable for H's conduct. However, Griffiths J briefly addressed this issue. His remarks in this context must therefore rank as obiter.

Vicarious liability

In determining whether RNS would have been vicariously liable for H's conduct, Griffiths J employed the now-familiar two stage test. Since H was an employee of RNS, the first stage was automatically satisfied.

As far as the second stage was concerned, Griffiths J held that one was required to determine whether there was a sufficient connection between the position for which H was employed, and his wrongful conduct to make RNS vicariously liable for such conduct (at [126]). This issue had to be addressed after a broad fact-sensitive, and open-minded enquiry. Given the fact that H was employed as a kitchen porter, his Lordship held that there was insufficient connection between H's job and his wrongful conduct to make RNS vicariously liable for his conduct, even during his period of employment (at [127]). Indeed, his Lordship stated that the only connection between his job and his misconduct, was that H came across EXE at the school, during working hours, on the premises, and began to get to know her and her friend while they were sitting on a windowsill of a staircase. However, H's duties did not involve H having any contact at all with the girl at RNS, nor did his position give H any power, authority or influence over the girl at RNS. H did not use his position as a kitchen porter, or his employment at RNS, to get to know EXE or to have sexual contact with her (at [128]). The first act of sexual contact between EXE and H took place after school hours and when EXE was not meant to be at RNS. Indeed, the relationship between EXE and H was mostly conducted in Spain and in the vicinity of EXE's home, and then in H's flat after H had been forced to leave RNS.

Griffiths J concluded (at [130]) by deciding that RNS was not vicariously liable for H's conduct.

Comment

In terms of the law relating to the potential vicarious liability of employers for the conduct of employees, a perennial problem with which the courts have been required to grapple is whether the miscreant employee's conduct is sufficiently connected with what the latter is employed to do. In the last analysis, in *EXE*, even if H's conduct was tortious vis-a-vis the claimant, H was "on a frolic of his own". That is to say, that H had not used/abused his position within RNS to harm EXE. In other words, RNS could not, in any case, have been held to be vicariously liable for H's conduct.

Editorial note

The situation in *EXE* was anticipated by the House of Lords in *Lister v Hesley Hall* [2002] 1 A.C. 215

where it was suggested that vicarious liability would not have arisen had the wrongdoer been the groundsman.

McCulloch v Forth Valley Health Board—a case study in clinical negligence

Robert Milligan *QC*

Introduction

In common with most of Lord Tyre's opinions, the judgment in *McCulloch v Forth Valley Health Board* [2020] CSOH 40 is thoughtful, succinct and well written. Also in common with most of Lord Tyre's opinions in this area, it ends in absolvitor for the defenders, although in this case, only just.

The facts

The pursuers were the relatives of Mr McCulloch (NM), who died on 7 April 2012, shortly after admission to the defenders' hospital, having suffered a cardiac arrest at home. The cause of death was idiopathic pericarditis and pericardial effusion resulting in cardiac tamponade. Mr McCulloch had been discharged from hospital on the day before his death, having previously been admitted on 23 March, discharged on 30 March and readmitted on 1 April.

On each admission NM had been suffering severe pleuritic chest pains worse with inspiration and worsening nausea and vomiting. He had been diagnosed with pericarditis and pericardial effusion. Following further treatment, he had been discharged on 6 April, the day before his death. The treating doctor gave evidence that she had been asked by a colleague for advice on interpreting NM's third echocardiogram and had not been undertaking a complete review. Instead she had been looking for the presence of a pericardial effusion. She had determined that the echocardiogram had shown an absence of any significant features indicating compromise or cardiac tamponade and had attended NM to ensure that his clinical presentation was consistent with her interpretation.

Against that background, the cases made against the treating doctor were whether she should have: (1) prescribed colchicine, a common but not universal treatment for pericarditis in 2012 although acknowledged to have side effects for those, like NM, who had abnormal liver function test results; (2) ordered a further echocardiogram prior to his discharge; and (3) prescribed non-steroidal anti-inflammatory drug (NSAIDs) where NM had not been in pain and despite the risks caused by his pre-existing conditions. There was a further case based on *Montgomery v Lanarkshire Health Board*, 2015 S.C. (UKSC) 63 that the treating doctor had failed to ensure that NM had been aware of any material risks involved in her recommended treatment and of any reasonable alternative treatments, on the basis that had she done so, NM would have opted for the prescription of NSAIDs despite the risk of complication.

Liability

Where the defenders have supportive expert evidence on the question of breach of duty in a clinical negligence cases, it is almost impossible for the pursuer to win. This is partly because of the strict *Hunter v Hanley* test, which requires the pursuer to prove not just that the doctor made a mistake, but that the mistake was one that no ordinarily competent doctor acting with ordinary skill and care would have made.

Even if the pursuer can find an expert to support that extreme view, there is the *Bolitho* hurdle to overcome. This is the rule that the defenders' expert will be accepted unless it can be shown that their evidence is "not reasonable and cannot logically be supported" (see [80]). Although in general we don't have trial by expert (*Davie v Magistrates of Edinburgh*, 1953 S.C. 34, per Lord President Cooper at [40]), in this context we get very close to it.

This case is an interesting illustration of these principles in action since, very unusually, the pursuer was successful in one of the allegations, despite the supportive position of the defenders' expert.

In relation to the prescription of colchicine and NSAIDs, the Lord Ordinary simply held that the pursuer had failed the *Bolitho* test. There were arguments in favour of both prescribing and not prescribing in the circumstances, which made it a matter of clinical judgement on which the court was not qualified to decide.

In relation to the question of whether there should have been a further echocardiogram before discharge, the Lord Ordinary was not prepared to accept the defenders' expert. The reasoning is instructive:

> "93. On this issue I have more difficulty with Dr Bloomfield's [the defenders' expert] opinion. In so far as his view is based upon the fact that Dr Labinjoh [the treating doctor] was not the consultant in charge of planning Mr McCulloch's treatment, it appears to me to fail to take account of the fact that the consultants in the AAU were relying upon the cardiology specialists, and in particular upon Dr Labinjoh, for directions in relation to cardiology investigations, at a time when pericarditis was still in the frame as a possible diagnosis. The conclusion to Dr Labinjoh's note ('I am not certain where to go for a diagnosis from here. Happy to discuss. Please keep us informed.') provided future readers of Mr McCulloch's medical records with no guidance as to what measures, if any, were required, from the point of view of cardiology, prior to discharge. It created the risk which eventuated when the

matter of Mr McCulloch's discharge had to be determined by a relatively junior doctor at a time when Dr Labinjoh was occupied with other matters and unable to provide direct assistance.

94. It also appears to me that Dr Bloomfield's opinion proceeds upon a factual assumption that at the time of Dr Labinjoh's visit Mr McCulloch was well, with the consequence that a repeat echocardiogram was unnecessary. In my opinion that assumption is not consistent with the echocardiogram which, in Dr Weir's words, gave an impression that Mr McCulloch had in general become less well since the previous echocardiogram. Unlike Dr Labinjoh at the time of her visit, Dr Bloomfield was of course aware when forming his expert opinion that Mr McCulloch had been discharged and re-admitted during the period between the two echocardiograms. The expert witnesses may have differed on the significance of the differences between the two echocardiograms, but there were undoubtedly differences. Where, as here, the trend in relation to pericardial effusion appeared to be moving in the wrong direction, it seems to me that Dr Bloomfield's view that it was unnecessary to take any action to confirm prior to discharge that that trend had reversed lacks logical support. The fact that a plan for review was in place does not, in my judgment, provide an adequate rationale when it is borne in mind that that plan had been formulated before the first discharge and second admission, at a time when the echocardiogram trend was moving in the right direction.

95. Moreover, there was nothing in the evidence to indicate a good reason for not instructing a further echocardiogram, other than Dr Bloomfield's view that it was unnecessary. Making provision for a further echocardiogram before discharge would not have prevented efforts continuing, as they did, to reach a definitive diagnosis, and the patient could in the meantime continue to be treated, as he was, with antibiotics, or otherwise as seemed appropriate to the medical team in charge of his care in the AAU.

96. For these reasons I conclude that Dr Bloomfield's view that there was no necessity for Dr Labinjoh to advise that a further echocardiogram be instructed before discharge is not a reasonable one, and in this regard I consider that the *Bolitho* test is met. I accept the opinions of Dr Flapan and Dr Weir that a further echocardiogram ought to have been performed before Mr McCulloch was discharged, and I accept Dr Flapan's opinion that in failing on 3 April 2012 to make provision for this, Dr Labinjoh failed to meet the standard of care incumbent upon her. On this issue I therefore find the pursuers' case of negligence to have been established."

Causation

It is trite law that the pursuer must show not just a breach of duty, but also a causal connection between that breach and the injury complained of. Where the pursuer faces difficulties in proving that causal connection because of evidential problems caused by the negligence of the defenders, the court is generally sympathetic to the pursuer.

For example, in the well-known case of *Keefe v Isle of Man Steam Packet Co Ltd* [2010] EWCA Civ 683, Longmore LJ stated at [19]:

> "19. If it is a defendant's duty to measure noise levels in places where his employees work and he does not do so, it hardly lies in his mouth to assert that the noise levels were not, in fact, excessive. In such circumstances the court should judge a claimant's evidence benevolently and the defendant's evidence critically. If a defendant fails to call witnesses at his disposal who could have evidence relevant to an issue in the case, that defendant runs the risk of relevant adverse findings see *British Railways Board v Herrington* [1972] AC 877, 930G. Similarly a defendant who has, in breach of duty, made it difficult or impossible for a claimant to adduce relevant evidence must run the risk of adverse factual findings. To my mind this is just such a case."

In similar vein, in *Drake v Harbour* [2008] EWCA Civ 25, per Toulson LJ (as he then was) at [28]:

> "28. In the absence of any positive evidence of breach of duty, merely to show that a claimant's loss was consistent with breach of duty by the defendant would not prove breach of duty if it would also be consistent with a credible non–negligent explanation. But where a claimant proves both that a defendant was negligent and that loss ensued which was of a kind likely to have resulted from such negligence, this will ordinarily be enough to enable a court to infer that it was probably so caused, even if the claimant is unable to prove positively the precise mechanism. That is not a principle of law nor does it involve an alteration in the burden of proof; rather, it is a matter of applying common sense."

This approach has also been adopted in clinical negligence cases. For example, in *JAH v Burne* (2019) 166 B.M.L.R. 157 at [64] [my emphasis added]:

> "64. There is, of course, a doubt whether anticoagulation would have been appreciated as the appropriate treatment and whether, if it had, it would have been in time. It seems to me that it is only fair and just that this doubt should be resolved in the Claimant's favour, as it was the Third Defendant's admitted breach of duty which deprived her of this opportunity. There is, in this area of the law, no scope for damages to be awarded on the

basis of "loss of a chance": see *Gregg v Scott [2005] 2 A.C. 176* and resolution of the issue is on an all or nothing basis, determined on the balance of probability. *In my judgment, in resolving issues of detail such as how long it would have taken for the Claimant to be seen, how long it would have taken for investigations to be carried out and when a competent vascular surgeon would have appreciated that anticoagulation was the appropriate treatment, the court should err in favour of the Claimant where it is the Defendant's negligence which deprives the court of the best evidence and causes the need to delve into this hypothetical world*."

Even more recently, in *Younas v Okeahialam* [2019] EWHC 2502 (QB):

"46. I must also bear in mind that it is the fault of the defendant that we are having to undertake this exercise at all, and it would be unfair for the defence to seek to capitalise on the absence of the very evidential audit trail of which the claimant has been wrongly deprived. The claimant starts at a disadvantage inflicted by the defendant; it is right both that that disadvantage should not be unfairly exacerbated, and also that a degree of minimisation of the disadvantage should be looked for, to level things up as fairly as possible. That is what 'claimant benevolence' tries to achieve.

47. I cannot, however, simply assume that the diagnostic process, or any part of it, would have happened as quickly as the claimant needs it to in order to win his case. Nor can I disregard relevant evidence that is not in his favour, even in this hypothetical space. I have to build up the picture as best I can on the materials before me. *Where I am satisfied that the evidence points to a decision within a range, but cannot otherwise discriminate within that range, then I should incline to the point in the range favouring the claimant. But it is the claimant's obligation to satisfy me as to that range*. I must give him the benefit of the doubt, but he must persuade me to doubt in the first place. These are fine distinctions, but real ones, in conducting a difficult exercise fairly."

In this case, there is no mention of "claimant benevolence", and the court adopted the approach that:

"There is simply no basis in the evidence for an assessment of whether, at whatever time it was commenced, and whatever it may have consisted of, such treatment would have been likely to be successful in preventing Mr McCulloch's death."

It would have been interesting to see an analysis of the position if the evidence disclosed at least a realistic possibility that a further echocardiogram would have led to effective treatment.

Consent

Although *Montgomery* represents a major development in the law of informed consent, the courts in Scotland remain cautious in its application. In particular, there is a fine line between what the doctor considers to be reasonable alternatives (which is still governed by *Hunter v Hanley*) and the need to offer those alternatives as part of the discussion about the recommended course of action (where *Hunter v Hanley* does not apply). Here it was held that the possible use of colchicine and NSAIDs was a matter of clinical judgement and so there was no duty to raise the possibility of their use as a matter of informed consent.

The distinction was neatly summarised at [111]:

"*Montgomery* imposes an obligation on the doctor to discuss the risks associated with a recommended course of treatment and to disclose and discuss reasonable alternatives. It does not go so far as to impose upon the doctor an obligation to disclose and discuss alternatives that he or she does not, in the exercise of professional judgement, regard as reasonable. If the doctor is wrong either about the risks of the recommended course or about the reasonableness of any alternative, then he or she might be liable for any consequent loss or injury, but that would be decided by application of the *Hunter v Hanley* test."

Quantum

The case also provides a useful update on "loss of society" awards.

Many of the awards were agreed at levels that I would suggest are very much in line with current practice. For example, the award to the widow (who was presumably of similar age to NM, who was 39 at death) was agreed in the sum of £120,000 plus interest. In my experience, that can be seen as the "standard" award for a spouse, subject to any specific circumstances.

The agreed awards of £30,000 to each of the parents might seem a little low, but it is not clear from the report what age they were.

Of most interest were the agreed awards to the siblings. The award to the sister was £25,000, which I usually treat as the standard award for an adult sibling. The award to the brother was £40,000, but he was a twin brother and that can probably be seen as the top end of the range for a sibling.

The appropriate awards for the young children, aged one and seven at date of death, were held to be £80,000 each. There was an agreed award of £70,000 to the stepson who was aged 13 at the date of death. Again, I see nothing surprising about these awards.

In summary, these awards can probably be seen as a useful starting point in most negotiations concerning loss of society claims.