Clinical Negligence in 2026

Recent Developments and Early Strategic Lessons for Practitioners

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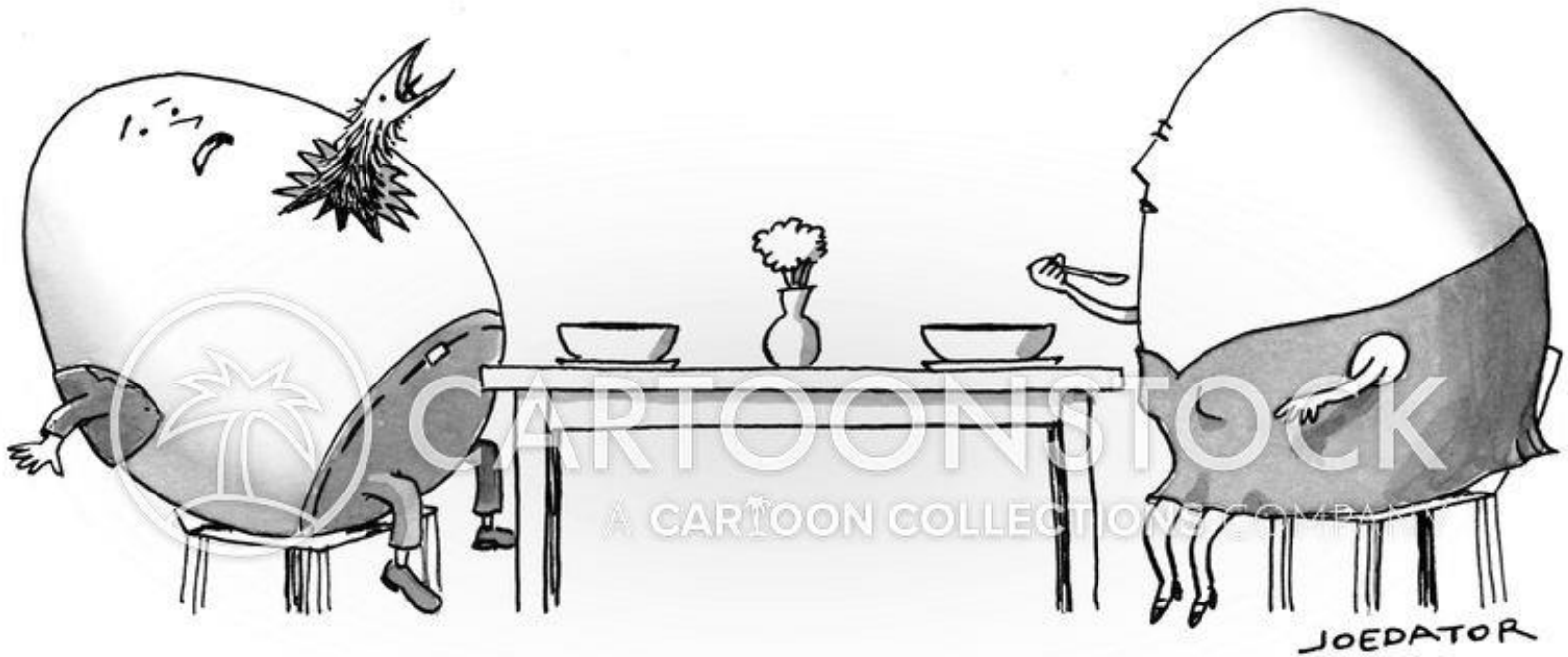

IF HUMPTY-DUMPTY HADN'T DIED IN THE FALL

Counterfactual first, cases second

- Start with the practical problem: what is the but-for world?
- We will use recent cases as worked examples of what courts accepted or rejected.
- Talk focuses on practical case architecture, not a catalogue of authorities.
- Theme: early advice before pleadings, expert instructions and valuation harden.

The Scots law foundation

Hunter v Hanley 1955 SC 200; Honisz v Lothian Health Board 2008 SC 235; Bolitho v City and Hackney Health Authority [1998] AC 232; Montgomery v Lanarkshire Health Board [2015] UKSC 11; McCulloch v Forth Valley Health Board [2023] UKSC 26

• Breach: Hunter v Hanley asks for **usual and normal practice**, **departure**, and **conduct no ordinary skilled professional would take** with **ordinary care**.

But doesn't always need to be established for a pursuer to succeed

• Expert evidence: Honisz and Bolitho remind us that responsible opinion must still be logical.

• Consent: Montgomery and McCulloch distinguish material risks from reasonable alternative treatments with the latter being determined by the "professional practice" test

• Counterfactual: what probably would have happened if the correct legal duty is met?

The counterfactual question

- Not: what could have happened in an ideal NHS?
- Ask: what probably would have happened if ordinary care had been taken in the real system then?
- Prove: the real pathway: staff, guidance, local protocols, transfers, theatres, reporting and monitoring.
- Then prove the outcome link: would that pathway probably have changed the injury or loss?

Some examples of where this can cause difficulties:

- type of hospital and specialism and access to certain equipment
- assessing a realistic timeline/chronology including the sequence of events, results of tests such as scans/bloods etc.
- factor in the realities of a busy NHS hospital: for example, a theatre may not have been open for surgery
- factor in out of hours realities: for example, the MRI scanner may not have operated outside of normal hours
- as a matter of fact, what information did the clinician under attack actually have?
- the medical notes can be anything from utterly pivotal to the polar opposite depending on the circumstances
- obtaining accurate factual information about the treatment plan and journey with reference to the notes and other contemporaneous documentation is key!!
- local guidance, pathways, protocols etc can vary between Health Boards. Make sure you recover ones which were in force at the time of alleged negligence
- trying to get statements from treating clinicians (or even identify them in the first place)

Build the counterfactual as a chain

1. Identify the decision point.
2. Identify what was known or ought to have been known.
3. Define the ordinary competent response.
4. Map the real-world pathway and timings.
5. Identify the outcome-changing step.
6. Match each link to the right expert discipline.
7. Plead the chain, not just the conclusion.

Expert instructions should force the chain (but not break it)

Hunter v Hanley 1955 SC 200; Kennedy v Cordia (Services) LLP [2016] UKSC 6; Griffiths v TUI UK Ltd [2023] UKSC 48

- Separate out breach, counterfactual, causation and quantum.
- Ask the Hunter v Hanley question, not simply whether care was suboptimal.
- Ask what facts, timings and documents the expert assumes.
- Ask what changes if the court finds fact X rather than fact Y.
- Use the relevant rank and specialism. Breach and causation may (or indeed often) need different experts.

Recent developments as examples: the Scottish cases

- AM v Lothian Health Board [2026] CSOH 42: CTG, hindsight and decision points.
- Claire Bayne or Wilkie v Tayside Health Board [2025] CSOH 111: pathway, place of birth and timing. Protocols!!
- DS v NHS Grampian 2025 SLT (SAC) 87: missed imaging, counterfactual surgery and causation evidence.
- Brian Taylor v Forth Valley Health Board [2025] CSOH 103: consent breach, Somatic Symptom Disorder and quantum.
- David Downie (AP) v Fife Health Board 2025 SLT (SAC) 127: mental health detention and statutory causation.

AM v Lothian Health Board: facts and issue

AM v Lothian Health Board [2026] CSOH 42

- Birth injury claim at the Royal Infirmary of Edinburgh.
- Proof before answer limited to breach; causation and quantum left for later if required.
- Cardiotocography (CTG) monitoring commenced at about 0220 after triage assessment.
- A midwifery and obstetric case
- Issues included assessment of the pursuer and commencing CTG, CTG interpretation, issue of meconium, staining, syntocinon, and whether Category 1 or Category 2 caesarean section.
- Late amendment refused after factual evidence had closed.

AM v Lothian Health Board: counterfactual lesson

- Outcome: defenders assoilzied.
- The court assessed decisions prospectively, not by working backwards from the injury.
- Later guidance could not be used to impose a later, higher standard on earlier clinicians.
- Expert discipline mattered: midwifery evidence could not decide what an obstetrician ought to do.

- Link to counterfactual: 'earlier caesarean' must be anchored to time, trace, category and ordinary competent practice.

- when dealing with a case from so many years before, getting witness recollection pinned down early doors is key. But also highlights the inherent unreliability of witness testimony many years later in the absence of supporting contemporaneous documentation
- a useful reminder of how expert reports should be framed and that their views should be supported wherever possible by other sources of information so as not to be *ipse dixit*
- when relying on guidelines etc., make sure they were actually in force at the relevant time
- the difficulties for a pursuer in successfully arguing *Bolitho*
- the inherent complications and difficulties in any birth case especially so many years later and relating to interpretation of the CTG trace
- objecting to the contents of an expert report prior to proof starting??


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Claire Bayne or Wilkie v Tayside Health Board: facts and pathway

Claire Bayne or Wilkie v Tayside Health Board [2025] CSOH 111

- Maisie Wilkie was born at Perth Midwifery Led Unit and suffered severe hypoxic brain injury.
- Defenders accepted that birth at Ninewells Hospital would have avoided injury.
- Pathways for Maternity Care used green, amber and red pathways.
- Perth Midwifery Led Unit was for low-risk birth; Ninewells had 24-hour obstetric and neonatal support.
- Referral protocol: fundal height 3 cm below gestation or clinically small for dates - refer for scan within one week.
- Agreed counterfactual: scan on 1 April 2010 would have led to suspected growth restriction and birth at Ninewells.

Claire Bayne or Wilkie v Tayside Health Board: counterfactual lesson

• Outcome: defenders liable; quantum reserved.
• The transfer-time case failed: a guaranteed 12-minute transfer or standby ambulance was not established.
• The ultrasound protocol case succeeded: scan required once fundal height was 37 cm at 40 weeks.
• The successful counterfactual was complete: scan -> suspected growth restriction -> pathway switch -> Ninewells -> monitoring -> timely delivery.

• Link to counterfactual: in pathway cases, the counterfactual is a timetable, not a slogan.

As an interesting, if very significant aside, the pursuer failed to establish a normal and usual midwifery practice which the pursuer's midwife departed from.

And yet she won the case based on the failure of the midwife to follow the local protocol.

The decision is being reclaimed but raises some fundamental and important questions….

- what is a normal and usual practice? Does it exist at all if practice varies from HB to HB?
- must a pursuer establish that and a departure from that to succeed in any claim?
- how does that fit with an issues such as here where there is a protocol?
- what of exercising "clinical judgement"?
- does a local protocol determine the local normal and usual practice?

DS v NHS Grampian: facts and issue

DS v NHS Grampian [2025] SAC (Civ) 21

- 2013 brain MRI was reported as normal, but a pineal cyst was later identified.
- Sheriff found breach and awarded £7,500 solatium for symptoms between 2013 and 2015.
- Pursuer appealed on causation and loss.
- defender cross-appealed on breach, counterfactual and causation.

- Pursuer's counterfactual: if told in 2013, she would have pursued and obtained European surgery two years earlier.

- Key question: did breach, the surgery counterfactual and causation each have evidential support?

DS v NHS Grampian: counterfactual lesson

• Outcome: pursuer’s appeal failed and defender's cross-appeal allowed in full ; decree of absolvitor.
• Breach failed: the 'no ordinary skilled professional' requirement in Hunter v Hanley sets a high bar.
• The European surgery counterfactual was not proved: no evidence from the surgeon and literature alone was insufficient.
• Causation failed: no neurologist evidence for the pursuer on whether the cyst caused the symptoms.

• Link to counterfactual: do not let the counterfactual outrun the evidence or the expert disciplines.

Key lessons from this case:

- a reminder that it is not for the court at proof to decide whether expert evidence to prefer per se. It must follow HvH and Bolitho;
- causation is an issue at large and it is for the court to determine that based on the competing expert evidence.
- But ultimately, the pursuer must prove her loss was caused by the negligence…
- don’t litigate in a regional ShCt unless you have to….


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Brian Taylor v Forth Valley Health Board: facts and issue

[2025] CSOH 103

- Operation removed the pursuer's right kidney and cured his cancer.
- Defender admitted negligence in respect of lack of informed consent.
- Admitted point: surgery should not have gone ahead when it did, given anxiety and changed information on the morning of surgery.
- Proof concerned whether the admitted breach caused Somatic Symptom Disorder and the value of the claim.
- Counterfactual: delayed operation, proper consent, different surgeon availability, scar and psychological outcome.

Brian Taylor v Forth Valley Health Board: counterfactual lesson

2025] CSOH 103

• Outcome: breach materially contributed to Somatic Symptom Disorder; but for breach, SSD was unlikely to have occurred.
• Total award: £904,000 before interest issues.
• Quantum included solatium, wage loss, future paid care, therapies, equipment and miscellaneous future costs.
• Consent cases still need a counterfactual: what would the patient probably have done with proper advice?
• Link to counterfactual: admitted breach does not prove causation or value.

Key lessons from this case:

- just because the pursuer is very peculiar and mentally distressed and unreliable doesn't mean his case necessarily fails. Here, it had the precise opposite effect. But, in general, that's not the case!!!
- in a highly complicated case on causation, sometimes it can be easier to concentrate on the key caudal factors in terms of material contribution;
- just because a pursuer didn't pay tax on his wages is not a bar to him claiming for wage loss;
- sometimes less is more when it comes to expert evidence;
- Professor Alan Carson isn't always right……

David Downie (AP) v Fife Health Board: facts and issue

[2025] SC EDIN 11; Mental Health (Care and Treatment) (Scotland) Act 2003, s 44

- Mental health negligence claim arising from care at Stratheden Hospital in January 2016.
- Short-term detention certificate granted on 14 January and revoked on 18 January.
- Pursuer discharged against medical advice and alleged negligent management by hospital psychiatrist.
- Issues included mental state examination, risk, named person, statutory criteria and consultation with senior colleagues.
- The case was confined to the negligence pled; negligent misdiagnosis was not open.

David Downie (AP) v Fife Health Board: counterfactual lesson

David Downie (AP) v Fife Health Board [2025] SC EDIN 11; Hunter v Hanley 1955 SC 200; Honisz v Lothian Health Board 2008 SC 235

• Outcome: defender assoilzied.
• The court could not say no ordinarily competent locum consultant psychiatrist would have revoked the certificate.
• Psychiatry allowed a range of reasonable views, especially with diagnostic uncertainty and least restrictive principles.
• Causation was weak: many alleged losses pre-dated revocation or were inevitable from prior events.

• Link to counterfactual: statutory counterfactuals need statutory criteria, lawful duration and downstream causation.

Key lessons from this case:
- on causation and damages, be realistic and don't look for damages that will clearly not be proved. Also, be wary of the *obiter dicta* relying on this in other cases such as on quantum

Recent developments as examples: wider case law

- Paul and another v Royal Wolverhampton NHS Trust, Polmear and another v Royal Cornwall Hospitals NHS Trust, Purchase v Ahmed
- known as “Paul”
- [2024] UKSC 1
- secondary victim viability.

- MIM v Sheffield Teaching Hospitals NHS Foundation Trust [2026] EWHC 562 (KB)
- Paul applied to labour and delivery.

- CCC (by her mother and litigation friend MMM) v Sheffield Teaching Hospitals NHS Foundation Trust [2026] UKSC 5
- lost-years damages and early valuation.

- Lewis-Ranwell v G4S Health Services (UK) Ltd and others [2026] UKSC 2
- illegality and threshold triage.

Secondary victims: Paul, Polmear and Purchase

[2024] UKSC 1

- Supreme Court dismissed the appeals by six to one.
- Doctors owe duties to patients, not to close family members to protect them from witnessing death or medical crisis.
- Secondary victim recovery generally requires witnessing an accident or its immediate aftermath.
- In medical cases, symptoms or injury often develop over time and do not amount to an accident.

- Lord Carloway: despite historical differences, the same result would be reached under Scots law.

- Link to counterfactual: a strong but-for medical case does not create a duty to relatives.

MIM v Sheffield Teaching Hospitals NHS Foundation Trust: Paul applied

[2026] EWHC 562 (KB),

- Father witnessed negligent labour and delivery; son born in poor condition and required resuscitation.
- Defendant admitted deteriorating CTG and that delivery should have been at 0930 rather than 0947.
- Defendant admitted delivery by 0941 to 0944 would have avoided all injury.
- Claimant alleged an external traumatic event and adjustment disorder.
- Claim struck out: the pleaded events were a medical crisis or mishap, not an accident.

- Link to counterfactual: even a clear delivery counterfactual did not supply the missing legal event.

CCC v Sheffield Teaching Hospitals NHS Foundation Trust: quantum counterfactual

[2026] UKSC 5

- Child suffered severe brain injury from hypoxia at birth; negligence admitted.
- Life expectancy agreed at 29; but-for working life agreed to age 68 with pension prospects.
- Supreme Court held lost-years damages are available in principle to children injured in early childhood.
- Croke v Wiseman overruled; loss must be proved by ordinary principles.
- Usual method: Ogden multiplier, net annual income and deduction for living expenses.

- Link to counterfactual: valuation is also a but-for exercise and must be built early.

Lewis-Ranwell v G4S Health Services (UK) Ltd and others: threshold bar

[2026] UKSC 2

- Claimant killed three men while psychotic and was found not guilty of murder by reason of insanity.
- He claimed negligence by custody and mental health services caused his release into the community.
- Claim included detention, reputation, earnings, care, treatment and indemnity losses.
- Supreme Court held the illegality defence was engaged and the negligence claim was barred.

- Link to counterfactual: some claims fail before breach and causation because the law will not recognise the loss.

How these cases change - early file handling

- **AM v Lothian Health Board [2026] CSOH 42 and Claire Bayne or Wilkie v Tayside Health Board [2025] CSOH 111**
- Decision-point and pathway cases need a precise time map.
- Also, recovering reliable evidence when the negligence is so many years ago is challenging.
- Recovery of protocols etc is critically important.

- **DS v NHS Grampian [2025] SAC (Civ) 21 and David Downie (AP) v Fife Health Board [2025] SC EDIN 11**
- Making sure your expert evidence is tested comprehensively from an early stage and that they have all the necessary factual information, whether helpful or unhelpful, to hand

- **Brian Taylor v Forth Valley Health Board [2025] CSOH 103 and CCC (by her mother and litigation friend MMM) v Sheffield Teaching Hospitals NHS Foundation Trust [2026] UKSC 5**
- A paradigm example of how to carefully consider which experts you need to instruct and when you can push the boat out in complex and unusual cases and get a good outcome (for a pursuer) but very much a unique case!!

- **Paul and another [2024] UKSC 1, MIM v Sheffield Teaching Hospitals NHS Foundation Trust [2026] EWHC 562 (KB), and Lewis-Ranwell v G4S Health Services (UK) Ltd and others [2026] UKSC 2:**
- threshold viability may need advice before expert spend.

- The first question is not always which expert. Sometimes it is what counterfactual, or is this claim legally available?

"And, sir, in your expert, professional opinion, was the victim already deceased when the defendant arrived at the scene?"

The Ten Commandments of Instructing an Expert

I. Identify the correct medical discipline.

II. Identify the correct medical expert and ensure that they apply the correct test.

III. Ask whether more than one expert is required on breach of duty.

IV. Identify which experts are needed to establish causation.

V. Identify which experts are needed to establish loss.

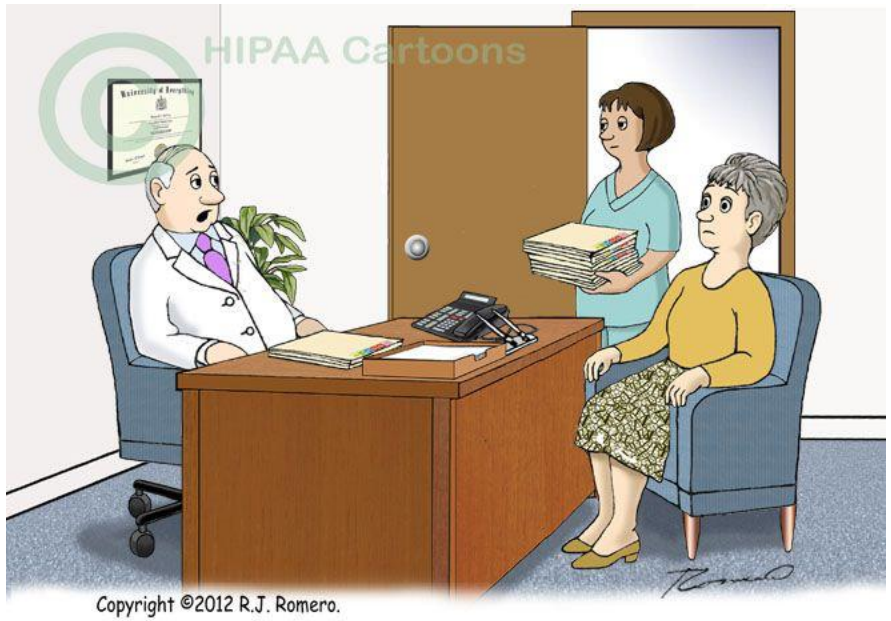
VI. Do not send breach experts other reports on breach before they have formed their own view.

VII. Ensure they see and consider all relevant factual information, records and statements.

VIII. Ensure they take account of the counterfactual and the realities of the medical profession and the NHS. No assumptions. No hindsight. No confirmation bias.

IX. Ensure they comment on the other side's reports, explaining where and why they agree or disagree.

X. Consult early and regularly.



"Janet, would you please delete all of my personal snide remarks and print a copy of Ms. Cole's electronic medical record?"

The Medical Records: Our Ten Commandments

I. Identify where treatment has been obtained.

II. Recover all the relevant records.

III. Have you got all the records/imaging???

IV. Identify and try and agree a joint bundle early on.

V. Paginate them early FFS!!!

VI. Expert input is key in interpreting/understanding the records.

VII. Identify treating clinicians from the records.

VIII. Use the records to map out the chronology/timeline and the counterfactual.

IX. Update the records as need be during the course of the action.

X. Revisit the records before proof and at every substantive stage.

When to involve counsel early

- Catastrophic injury or reduced life expectancy.
- Birth injury, CTG interpretation or maternity pathway cases.
- Delay, transfer, escalation, imaging, reporting or theatre-timing cases.
- Consent cases where the patient decision is disputed.
- Secondary victim or psychiatric injury claims.
- Mental health detention, illegality or public policy issues.
- High value cases with messy causation or pleadings that do not yet track the counterfactual.

What to send counsel

- A short neutral chronology with key decision points.
- Key records, including the adverse records.
- Local protocols and guidance in force at the material time.
- Complaint response, significant adverse event review or internal investigation.
- Proposed breach points and current causation theory.
- Expert reports, or draft questions before the expert is instructed.
- Current counterfactual chain and provisional valuation.
- Specific questions: viability, expert discipline, pleadings, missing evidence, settlement strategy.

Final takeaways

Hunter v Hanley 1955 SC 200

- Start with the decision point, not the outcome.
- Build the real-world counterfactual, not the perfect-world one.
- Break causation into timed and evidenced steps.
- Match each step to the right expert and the Hunter v Hanley test.
- Plead the chain.
- Get advice before the case theory hardens into the wrong shape.

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