

Recent developments in clinical negligence

Amber Galbraith, KC & Carolyn McPhee, Advocate

Lever v Ayrshire & Arran Health Board [2026] CSOH 89

- Renal cancer
- Ultrasound scan July 2021
- Died November 2022
- Claims by widow, children, grandchildren, brother



Lever v Ayrshire & Arran Health Board [2026] CSOH 89

Damages (Scotland) Act 2011

s.1	diminished expectation of life
s.2	transmission of deceased's rights to executor
s.3-8	rights of relatives

14 Interpretation

(1) In this Act, unless the context otherwise requires—

"personal injuries" means—

(a) any disease, and

(b) any impairment of a person's physical or mental condition

Lever v Ayrshire & Arran Health Board [2026] CSOH 89

1 Damages to injured person whose expectation of life is diminished

(1) This section applies to an action for damages in respect of personal injuries suffered by a pursuer whose date of death is expected to be earlier than had the injuries not been suffered.

(2) In assessing the amount of damages by way of solatium the court is, if the pursuer—

(a) was at any time,

(b) is, or

(c) is likely to become,

aware of the reduced expectation of life, to have regard to the extent to which the pursuer, in consequence of that awareness, has suffered or is likely to suffer.

(3) Subject to subsection (2), no damages by way of solatium are recoverable by the pursuer in respect of loss of expectation of life.

(4) In making an award of damages by way of solatium, the court is not required to ascribe specifically any part of the award to loss of expectation of life.

Lever v Ayrshire & Arran Health Board [2026] CSOH 89: When do Sections 4-6 apply?

A person (A) dies as a consequence of personal injuries caused by another person's (B) act or omission

and either

Liability exists

B's act or omission gives rise to liability to pay damages to A (or A's executor)

or

Liability would have existed

B's act or omission would have given rise to that liability but for A's death

Sections 4-6 apply

Lever v Ayrshire & Arran Health Board [2026] CSOH 89

In my opinion, section 3 of the 2011 Act is concerned not just with A's death but with the specific death that occurred, including ***the fact that it occurred when it did****. For A's death to be "in consequence of" suffering personal injuries as result of an act or omission of B, it is not necessary, therefore, that A's death would not have occurred but for the act or omission of B.* ***It is enough that A died earlier than he would have done in consequence of suffering personal injuries as a result of the act or omission of B.***

Gregg v Scott [2005 UKHL 2

- House of Lords decision
- Delayed diagnosis of cancer
- Prospects of survival for 10 years reduced from 42% to 25%
- 10 years = cure



Gregg v Scott [2005] UKHL 2

"If you ask a stupid question, you get… a stupid answer."

Lord Neuberger, 2008



Gregg v Scott [2005] UKHL 2

What was the claimant's life expectancy without the treatment, and by how much would that expectancy have been increased if he had had the treatment?



Life Expectancy and the Balance of Probabilities

WITHOUT TREATMENT

43

50% chance of reaching

WITH TREATMENT

47

50% chance of reaching

4 years

Life expectancy lost

On the balance of probabilities

JC v Mather [2012] EWHC 2063

- Delayed diagnosis of malignant melanoma by GP
- Breach of duty admitted
- Timely diagnosis would not have increased chances of survival for further 10 years on balance of probability
- Principal claim failed on basis of *Gregg v Scott*
- Secondary claim for reduction in life expectancy for three years succeeded
- Award??

Lever v Ayrshire & Arran Health Board [2026] CSOH 89

- Delayed diagnosis will constitute a personal injury;
- Loss of life expectancy due to delayed diagnosis will sound in damages, under s.1 of 2011 Act;
- If have delayed diagnosis case, where cannot prove on balance of probability would have 'survived' in *Gregg v Scott* sense, still have a claim;
- But how much??

Wilkie v Tayside Health Board [2025] CSOH 111

When does Hunter v Hanley apply?

What happens when it doesn't?

Is a protocol a determinative legal standard?

Case summary

What happened?

Severe hypoxic brain injury during birth

The finding

37cm SFH at 40 weeks

The omission

No referral for ultrasound scan

The protocol – where did discretion lie?

Problem	**Action**
Fundal height 3cm ≤ gestation or clinically small for dates or oligohydramnios. **Use own clinical judgement.**	Refer Consultant Clinic with scan within 1 week.

Two approaches, different conclusions

Protocol

Mandatory referral

↓

No scan arranged

↓

Liability established

Hunter v Hanley

Clinical judgement assumed

↓

Expert support for non-referral

↓

Breach not established



The appeal

The Health Board's four criticisms:

Wrong legal test
Protocol breach treated as negligence

Standard of care
Misdirection on *Hunter v Hanley*

Protocol
Status, meaning and application

Evidence
Misunderstanding of midwifery assessment

What is the legal status of a protocol?

Protocol ≠ legal standard of care?

Evidence of reasonable care – or determinative of negligence?

O'Brien v Guy's and St Thomas' NHS Foundation Trust [2022] EWHC 2735 (KB)

What constitutes an exercise of clinical judgement?

One clinical encounter, two interpretations

The pursuer's position

Clinical measurement

↓

Numerical threshold reached

↓

Mandatory referral

The Health Board's position

Clinical measurement

↓

Interpretation in clinical context

↓

Judgement about referral

Misapplication of *Hunter v Hanley*?

An objective test

The decision – or the decision-making process?

Can an objectively defensible decision be negligent because the clinician did not consciously reason their way to it?

Did Lord Young correctly interpret the protocol?

Where did the discretion lie?

Lord Young

Numerical threshold = mandatory referral

Health Board

Clinical judgement applies to all three triggers



Fair notice?

Was liability established on a basis that had actually been advanced on record?

Joint expert meetings: agreement without explanation

Agreement is not equal to analysis

What does a list of answers of ‘yes’, to binary questions actually tell the court?

Reasoning – qualifications – clinical context

What might the Inner House do?

1. **Uphold Lord Young**
   Mandatory referral; reasonable care required compliance

2. **Apply *Hunter v Hanley***
   Professional judgement involved; alternative findings become central

3. **Reinterpret the protocol**
   Clinical discretion retained; non-referral potentially justified

4. **Decide on a narrower ground**
   Fair notice, legal reasoning or further procedure



Parliament House

Edinburgh

EH1 1RF

DX 549302, Edinburgh 36

www.compasschambers.com

Amber Galbraith, KC

amber.Galbraith@compasschambers.com

Carolyn McPhee, Advocate

carolyn.mcphee@compasschambers.com

Gavin Herd

Practice Manager

0131 260 5648

gavin.herd@compasschambers.com