# XXV. Scotland

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In choosing five significant Scottish cases from the last quarter century, the decision was made to select five appeals which went either to the House of Lords (which was the final court of civil appeal until 2009) or to the United Kingdom Supreme Court (which has been the apex civil court since 2010). The five judgments span the topics of liability for remote harm (so-called 'remoteness of damage'), the apportionment of liability in cases involving the contributory negligence of the victim, medical negligence, and the liability of professional legal advisers to parties other than their clients.

## 1. *Simmons v British Steel plc*[1]

The decision of the House of Lords in *Simmons v British Steel plc* is an important judgment on the so-called 'remoteness of damage' issue, that is the extent to which a wrongdoer can be held liable for consequential losses which follow on from the initial harm caused.

The respondent, Mr Simmons, worked for the appellants, British Steel plc, at the latter's steelworks. He injured his head at work, injuries for which British Steel were held liable at first instance. Following the accident, Mr Simmons had also gone on to suffer an exacerbation of an existing skin condition as well as a personality change which caused him severe depression. He additionally claimed damages for these further injuries, but at first instance the judge held that they had not been caused by the accident; rather, the judge considered that the further injuries had resulted from Mr Simmons' anger at his initial injury and the way he had been treated following it, and that British Steel were not responsible for his reaction to the original injury. On appeal to the Inner House of the Court of Session, the appeal bench overturned the finding that British Steel were not liable for these further injuries. British Steel appealed that decision to the House of Lords, which dismissed its appeal. Their Lord-

[1] [2004] United Kingdom House of Lords (UKHL) 20; 2004 Session Cases House of Lords (SC(HL)) 94; 2004 Scots Law Times (SLT) 595.

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ships took the view that Mr Simmons' anger had arisen at the time of the initial injury he suffered, and that such anger was an emotion likely to arise from an injury of this sort.[2] It had therefore been caused at least in part by the injury itself. Whilst anger is not itself a compensable form of injury, this anger had materially contributed to (ie was a significant cause of) the exacerbation of his skin condition and his depression. Because of the causal connection between the initial injury (and the attendant anger of the victim) and the subsequent injuries, British Steel were also liable for those subsequent injuries of Mr Simmons.

The judgment is significant because of the extended discussion in the House of Lords of the proper approach to be taken in delictual cases in respect of liability for subsequent injuries following an initial injury for which a wrongdoer is liable. In the House of Lords, their Lordships expressed concern that, in oral pleadings before the Inner House, doubt had been expressed by counsel that the law on the liability for consequential damages was unclear. Their Lordships thought that the Scottish law on the matter was clear, and to the following effect: (1) the basic rule had been set out in *Allan v Barclay*,[3] namely that '[t]he grand rule on the subject of damages is, that none can be claimed except such as naturally and directly arise out of the wrong done; and such, therefore, as may reasonably be supposed to have been in the view of the wrongdoer';[4] (2) given this rule (with its focus on reasonably foreseeable consequences), the Scottish courts had never adopted the approach briefly followed in English law (as a result of the decision in *Re Polemis*[5]) of imposing liability for all the direct consequences of wrongdoing, an approach quickly ditched in *Overseas Tankship*[6] in favour of a reasonable foreseeability approach; (3) though the language of liability for 'natural' and 'direct' damage is vague and not easy to interpret (and hence to be avoided), the 'ultimate test is whether the damage was reasonably foreseeable';[7] and (4) the current principles could be summed up as being that, once liability for harm is established, any question of the remoteness of damage is to be approached along the following lines –

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[2] See speech of Lord Rodger, para 55.

[3] (1864) 2 M (Macpherson's Session Cases) 873.

[4] Lord Kinloch, 874.

[5] *Re Polemis and Furness, Withy & Co* [1921] 3 King's Bench (KB) 560.

[6] *Overseas Tankship (UK) Ltd v Morts Dock & Engineering Co Ltd (The Wagon Mound)* [1961] Appeal Cases (AC) 388.

[7] Lord Rodger in *Simmons*, para 66.

(a) The starting point is that a defender is not liable for a consequence of a kind which is not reasonably foreseeable.
(b) While a defender is not liable for damage that is not reasonably foreseeable, it does not follow that it is liable for all damage that was reasonably foreseeable: depending on the circumstances, the defender may not be liable for damage caused by a *novus actus interveniens* or unreasonable conduct on the part of the pursuer, even if it was reasonably foreseeable.
(c) Subject to the qualification in (b), if the pursuer's injury is of a kind that was foreseeable, the defender is liable, even if the damage is greater in extent than was foreseeable or it was caused in a way that could not have been foreseen.
(d) The defender must take his victim as he finds him (what is sometimes referred to as the 'thin skull' rule).
(e) Subject again to the qualification in (b), where personal injury to the pursuer was reasonably foreseeable, the defender is liable for any personal injury, whether physical or psychiatric, which the pursuer suffers as a result of their wrongdoing.[8]

Given the existence of a multiplicity of cases on the topic of remoteness of damage, not always consistent and not always adopting the same language, it is immensely helpful to have an authoritative judgment setting out the key principles applicable to cases concerning the extent to which a wrongdoer is liable for consequential injuries flowing from an initial injury for which it has been found liable.

The judgment in *Simmons* has been applied in a number of later Scottish judgments[9] as well as followed in some English judgments.[10]

### 2. *Jackson v Murray*[11]

This decision of the UK Supreme Court analyses and applies the statutory provision on the apportionment of liability between parties in respect

[8] See, for a recitation of these principles, Lord Rodger in *Simmons*, para 67.

[9] Including *D v The Bishops' Conference of Scotland* [2022] Court of Session, Outer House (CSOH) 46; and *Henderson v Sutherland* 2008 Scottish Civil Law Reports (SCLR) 219.

[10] Including *Sparrow v Andre* [2016] England & Wales High Court (EWHC) 739 Queen's Bench (QB); and *Hicks v Young* [2015] EWHC 1144 QB.

[11] [2015] United Kingdom Supreme Court (UKSC) 5, 2015 Session Cases (SC) (UKSC) 105, 2015 SLT 151, [2015] 2 All England Law Reports (All ER) 805. The case was

of wrongfully caused injuries when contributory negligence of the victim is present.

The facts concerned a thirteen-year-old girl, who had been severely injured when, having stepped out from behind a minibus to cross a country road, she was struck by a car. The driver of the car had seen the minibus but had not contemplated that anyone would get off it and immediately cross the road. He failed to properly observe the road conditions, was driving too fast, and so did not see the girl when she stepped out. Had he been driving at a reasonable speed, and had he been properly observing the road conditions, he would not have hit her. At first instance the court held that the accident had in part been caused by the negligence of the driver, but also by the contributory negligence of the victim. The court assessed the level of contributory negligence as being 90% and therefore awarded the victim damages valued at only 10% of the loss suffered. On appeal to the Inner House of the Court of Session, the court reduced the level of the victim's contributory negligence to 70%. The victim further appealed to the Supreme Court. A majority of the Supreme Court bench held that, in the absence of any identifiable error made by the first instance court, only a difference of view regarding the apportionment of responsibility which exceeded the ambit of reasonable disagreement would merit a conclusion that the lower court had erroneously assessed the appropriate level of contributory negligence. On the facts of the present case, the majority took the view that there was no satisfactory explanation for the view that the major share of responsibility for the victim's injuries was properly attributable to her. The conduct of the driver has played at least an equal role in causing the victim's injuries and was at least equally blameworthy. As the lower courts had therefore made an error which exceeded the ambit of reasonable disagreement, the girl's appeal was allowed and a 50% reduction of the damages award was ordered on account of her contributory negligence.

The judgment is noteworthy in relation to the court's interpretation of the statutory provision which governs apportionment of liability in cases of contributory negligence, the Law Reform (Contributory Negligence) Act 1945. The principal provision of that Act (sec 1 (1)) states that:

'Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be

discussed by *M Hogg* in: E Karner/BC Steininger (eds), European Tort Law (ETL) 2015 (2016) 519, nos 10–16.

reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.'

The adoption of this legislative provision represented a leap forward in a fair approach to cases involving contributory negligence, as, prior to the coming into force of the provision, the presence of contributory negligence on the victim's part was a bar to recovery at common law by the victim. However, the provision is inherently vague: specifying that the appropriate reduction in damages is to be such as 'the court thinks just and equitable' given the victim's 'share in the responsibility' for an injury leaves it unclear how such responsibility is to be judged. Greater responsibility could in theory be merited for conduct of the victim which is more blameworthy than that of the wrongdoer, or for conduct which is causally more potent, or by reference to some other criterion relevant to assessing responsibility. As different courts might take different approaches to this key issue, the vagueness of the provision opened the door to conflicting decisions on this point.

In an earlier English judgment on the provision, *Davies v Swan Motor Co (Swansea) Ltd*,[12] Denning LJ had suggested that causation was the 'decisive factor' in the judicial determination of the appropriate share to be borne by each party.[13] But that approach has not proven popular in more recent decisions, which have more commonly proceeded from an approach that blameworthiness and causal potency are equally important factors. A dual approach is approved of in the judgments in *Jackson*: for instance, Lord Reed refers to both considerations, stating that the defender's conduct 'played at least an equal role to that of the pursuer in causing the damage and was at least as blameworthy'.[14] In analysing the facts of the case before him (in which the victim had walked out on to the road some distance ahead of the car), Lord Reed contrasted cases where a pedestrian might walk out directly in front of a car, saying that in such cases the pedestrian's conduct would be the 'more direct and immediate cause of the damage', interrupting circumstances in which an accident would not otherwise have happened.[15] However, nothing is said by the Justices on the extent to which other factors beyond causal potency and blameworthiness may be taken into account: the lack of consideration of any such additional issues might suggest either that none were relevant on the facts before the court, or that the court thought that no other issues

[12] [1949] 2 KB 291.
[13] At 326.
[14] See judgment of Lord Reed, para 43.
[15] See judgment of Lord Reed, para 40.

would be relevant even if present. Clarification on this matter would be of great assistance. Furthermore, including 'causal potency' in the consideration is itself problematic, albeit having the renewed imprimatur of the Supreme Court in this judgment: it is unclear what exactly makes a cause 'potent', and the suspicion is raised that employing causal language of this sort may be a substitute for other, unexpressed considerations masked by the use of such language or else may simply repeat considerations already addressed under the head of blameworthiness.[16]

Although there is some general discussion of the interaction of causal potency and blameworthiness in the case, this is largely undertaken by reference to specific case law. A fuller, theoretical discussion of the relationship between the two matters (and more fundamentally of whether causal potency is an appropriate consideration) is not present in the judgments of the Supreme Court, though it has generated some recent academic commentary.[17]

So, while this is a significant judgment in this area of law, its significance in part lies in the fact that it has highlighted the need for further judicial examination and clarification of this key legislative provision, in particular the appropriate matters for inclusion in a judicial assessment of a just and equitable apportionment of liability.

The decision has been applied in later Scottish[18] judgments, as well as followed in some English[19] decisions.

### 3. *Montgomery v Lanarkshire Health Board*[20]

This decision of the UK Supreme Court marks a major shift in the appropriate determination of medical negligence liability in the light of a shifting paradigm in the doctor-patient relationship. An older paternalistic

[16] See the concerns expressed about the usage of causal potency in *J Goudkamp*/*L Klar*, Apportionment of Damages for Contributory Negligence: The Causal Potency Criterion (2016) Alberta Law Review (Alta L Rev) 849.

[17] See *J Goudkamp*, Apportionment of Damages for Contributory Negligence: Appellate Review, Relative Blameworthiness and Causal Potency (2015) 19 Edinburgh Law Review 367; and *Goudkamp*/*Klar* (2016) Alta L Rev 849.

[18] See *Cameron v Nwankwo* [2022] CSOH 7; *McCreery v Letson* [2015] CSOH 153.

[19] See, for instance, *Palmer v Timms* [2024] EWHC 2292 (KB); *Gul v McDonagh* [2021] England & Wales Court of Appeal, Civil Division (EWCA Civ) 1503; *Chisholm v D & R Hankins (Manea) Ltd* [2018] EWHC 3407 (QB).

[20] [2015] UKSC 11, 2015 SC (UKSC) 63, [2015] AC 1430. The case was discussed in ETL 2015 by *Hogg* (fn 11) nos 17–28.

view of the doctor-patient relationship has been replaced by a modern approach based on open discussion and informed patient decision-making.

The pursuer, Mrs Montgomery, was expecting her first child. She suffered from insulin-dependent diabetes, making it more likely that she would give birth to a baby which was larger than normal. As a result of complications during the delivery of her child, the baby was born with severe disabilities. Mrs Montgomery raised an action seeking damages for her child's injuries, alleging negligence on the part of the consultant obstetrician and gynaecologist who had been responsible for her prenatal care, her labour, and the delivery of her baby. Her claim rested on the arguments that (1) the consultant had failed to advise her about the risk that her baby's shoulders might not pass through her pelvis during vaginal birth (so-called 'shoulder dystocia') or to advise her of the alternative possibility of delivery by caesarean section; and (2) the doctor had negligently failed to perform a caesarean section when presented with abnormalities in labour disclosed by cardiotocograph (CTG) data. Her claim was rejected both at first instance and on appeal to the Inner House of the Court of Session, on the basis of expert evidence of standard medical practice,[21] and because, even if she had been given advice about the risk of serious harm to her baby as a consequence of shoulder dystocia, it would have made no difference in any event, because she would not have chosen to have her baby delivered by caesarean section. The Supreme Court overturned the decision of the lower courts, holding the defenders liable for negligence on the part of its medical staff.

The Supreme Court took the view that Mrs Montgomery had been entitled to decide which form of treatment she wanted, and that her consent was necessary before undertaking any treatment. It held that the doctor had been under a duty to take reasonable care to ensure that Mrs Montgomery was made aware of any material risks involved in treatment to be recommended, and of reasonable alternatives or variants. A 'material risk' meant one to which, in any given case, a reasonable person in the patient's position would be likely to attach significance, or a risk of which the doctor was, or should reasonably have been, aware that the particular patient would be likely to attach significance. A doctor was entitled to withhold from the patient information as to a risk if the doctor reasonably considered that its disclosure would be seriously detrimental to the health of the patient, but this therapeutic exception was limited; a

[21] This approach was consistent with the leading English authority of *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] AC 871.

doctor was also excused from conferring with a patient in circumstances of necessity. On the facts of the present case, the court held that it had been incumbent on the doctor to advise Mrs Montgomery of the risk of shoulder dystocia associated with vaginal delivery, and to have discussed with her the alternative of a caesarean section. The doctor's failure to do this was negligent.

As noted earlier, the decision represents a major change in the approach to medical negligence. The approach in the courts prior to the decision in *Montgomery* had supported the view that the doctor had not been negligent, because the risk of shoulder dystocia in vaginal delivery was less than 1%. Under that previous approach, doctors would not ordinarily be held to be negligent if they followed the practice of a responsible body of medical opinion, the medical consensus being that risks of less than approximately 1% need not ordinarily be communicated to patients. However, the new approach of the Supreme Court radically changed the prior law, departing from the previous paternalistic spirit (where doctors made appropriate choices about minor risks) and placing a much greater emphasis on patient autonomy and decision-making in relation to risks relating to medical treatment. The decision represents an authoritative formulation of what had been an emerging tendency in the lower courts towards a more patient-oriented approach in the years before the *Montgomery* decision.[22] The Supreme Court additionally developed this emerging view by making it clear that the assessment of 'significant' risk is not a matter of percentages: a 'material' risk (the description used in *Montgomery*) is a subjective, patient-focused assessment, signifying a risk to which a reasonable person in the patient's shoes would attach significance. A reasonable patient might conceivably take the view that even a statistically insignificant risk was significant if materialisation of the risk would result in serious, adverse consequences. So, doctors must appreciate that risks which they might previously have decided not to mention must now proactively be raised with their patients and, if a patient wishes, must become the subject of discussion and appropriate 'comprehensible' advice.[23]

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[22] So, for instance, in *Pearce v United Bristol Healthcare Trust* (1998) 48 Butterworths Medico-Legal Reports (BMLR) 118, Lord Woolf had remarked (at 124) that 'if there is a significant risk which would affect the judgment of a reasonable patient, then in the normal course it is the responsibility of a doctor to inform the patient of that significant risk, if the information is needed so that the patient can determine for him or herself as to what course he or he should adopt'.

[23] See para 85.

The decision of the Supreme Court (which has been followed in later Scottish and English cases[24]) was a welcome one, reflecting a paradigm shift in the way that medical practitioners and patients were already approaching the doctor-patient relationship. Patients are no longer viewed as the passive recipients of care decisions made in their best interests, but rather as co-operative partners in a doctor-patient dialogue intended to ensure appropriately informed consent by the patient to proposed treatment.

### 4. *Steel and another v NRAM Ltd*[25]

This decision of the UK Supreme Court is significant in what it confirms about the extent of a practising lawyer's liability to a third party (a party other than the lawyer's client) and about the centrality of the requirement that any reliance placed upon a misrepresentation by a representee must be reasonable if it is to found an assumption of responsibility in delict by the representor.

The relevant facts concerned dealings between the respondent, NRAM Ltd (who were commercial lenders), and the appellant, Ms Steel, a solicitor acting for Headway Caledonian Limited (HCL), to which third party NRAM had extended loan facilities. The loan was for HCL's purchase of four commercial premises, in return for which loan HCL had granted a security over the whole premises. In response to a communication by NRAM indicating that they wished to discharge the security in relation to a portion of the whole premises, Ms Steel replied by email with attachments constituting 'discharges for signing and return as well as the whole loan is being paid off for the estate and I have a settlement figure for that'. Relying on this request, NRAM argued that they were misled by Ms Steel into discharging the entire security when it ought to have been left in place in relation to two of the premises. NRAM argued that their error had been caused by Ms Steel's email, the contents of which constituted a negligent misstatement for which she was responsible. As HCL had gone into liquidation, NRAM claimed damages amounting to approximately £ 458,000 from Ms Steel and her employer.

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[24] Including *Butler v Ward* [2025] EWHC 877; *Bilal v St George's University Hospital NHS Foundation Trust* [2023] EWCA Civ 605; *General Dental Council v Williams* [2023] EWCA Civ 481; *McNab's Executor v Greater Glasgow Health Board* [2020] CSOH 53; it was also applied in *McCulloch v Forth Valley Health Board* [2023] UKSC 26, which is analysed as case number 5 in the main text.

[25] [2018] UKSC 13, 2018 SC (UKSC) 141, 2018 SLT 835, [2018] 1 Weekly Law Reports (WLR) 1190, [2018] 3 All ER 81. The case was discussed in *E Karner/BC Steininger* (eds), European Tort Law 2018 (2019) 563, nos 7–13.

At first instance, the judge held that Ms Steel had owed no duty of care to NRAM when she made the erroneous statement because (1) it had not been reasonable for NRAM to rely on Ms Steel's statements without verifying whether they were accurate; and (2) Ms Steel could not reasonably have foreseen that NRAM would rely on her statements without carrying out such verification. On appeal to the Inner House of the Court of Session, the appeal court (by a 2:1 majority) reversed the judgment at first instance, holding that Ms Steel was liable in delict because she had 'assumed a responsibility' to NRAM in relation to the statements she had made. Ms Steel appealed this decision to the Supreme Court.

The Supreme Court upheld the appeal, affirming that: (1) in an arm's length transaction such as the one before the court, a solicitor owes a duty to their client but will generally not owe a duty to the other party to the transaction; and (2) a representee is required to establish both that it was reasonable to have relied on a representation and that the representor should reasonably have foreseen such reliance. The court stated that a superior court should only set aside the evaluation of a judge at first instance that (a) it was reasonable for the solicitor not to have foreseen that the other party would rely on her representations without first checking their accuracy; and (b) that the reliance placed on those representations by the other party had been unreasonable, if it were satisfied that such evaluation was wrong. In this case, as that evaluation at first instance had been correct, the appeal would be allowed.

The decision provides Supreme Court confirmation of the well-established rule that solicitors in general only assume a duty to advise their own clients, and not the other side in any transaction. There are exceptions to that general rule, and the Supreme Court mentions examples of cases where an exception has applied: for instance, the New Zealand case of *Allied Finance and Investments Ltd v Haddow and Co*,[26] in which a solicitor had issued a certificate to the other party falsely certifying the truth of a particular matter. The Supreme Court thought that the instant case was not an exceptional case of that sort, and considered that the majority of the Inner House had been wrong in thinking that it was. While one of the Inner House judges (Lady Smith) had endeavoured to evaluate the matter of liability by asking whether the solicitor had assumed a responsibility for her representation (holding that the email she had sent indicated that she had), the Supreme Court believed this to be an insufficient enquiry: it was, in addition, necessary to evaluate the reasonableness of any purported reliance on the solicitor's representation.

[26] [1983] New Zealand Law Reports (NZLR) 22.

In reaching its decision, the Supreme Court undertook a full review of the authorities relating to liability for negligent misstatements, beginning with *Hedley Byrne & Co Ltd v Heller & Partners Ltd*.[27] In that seminal judgment, the House of Lords had emphasised the need for *reasonable* reliance on a representation. Summing up that line of authority, the Supreme Court observed that, '[i]f it is not reasonable for a representee to have relied on a representation and for the representor to have foreseen that he would do so, it is difficult to imagine that the latter will have assumed responsibility for it'.[28] The requirement of reasonable reliance has been reaffirmed in many cases following *Hedley Byrne*, including *Caparo Industries plc v Dickman*.[29] This central requirement is one which a court cannot ignore when deciding whether a representor should be taken to have assumed responsibility for a representation, for (as the Supreme Court notes):

'neither the general jurisprudence relating to liability in negligence for a misrepresentation leading to economic loss nor the focussed jurisprudence relating to a solicitor's liability to the opposite party in that regard supports a conclusion that it is not always necessary for the representee to establish that it was reasonable for him to have relied on the representation. On the contrary, the reasonableness of his reliance on it is … central to the concept of an assumption of responsibility'.[30]

Crucially therefore, even if a representor could foresee that its representation would or might be relied upon by the party to whom it is made, if any such reliance were unreasonable, it cannot give rise to an assumption of responsibility by the representor. The reliance of the representee in this case was not reasonable, so the court held: it is unreasonable to rely, without checking, on a factual matter which is wholly within the knowledge of the representee.[31]

The decision has been followed in some later Scottish[32] and English[33] decisions.

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[27] [1964] AC 465, [1963] 3 WLR 101, [1963] 2 All ER 575.

[28] See para 19.

[29] [1990] 2 AC 605, [1990] 2 WLR 358, [1990] 1 All ER 568.

[30] See para 35.

[31] See para 38.

[32] See *Franks v Inglis* [2021] Sheriffdom of Tayside Central and Fife at Perth (SC PER) 41.

[33] Including *McLean v Thornhill* [2023] EWCA Civ 466; *Benyatov v Credit Suisse Securities (Europe) Ltd* [2023] EWCA Civ 140; and *Ashraf v Lester Dominic Solicitors* [2023] EWCA Civ 4.

### 5. *McCulloch v Forth Valley Health Board*[34]

The Supreme Court's groundbreaking medical negligence decision in *Montgomery v Lanarkshire Health Board* was discussed above.[35] Its later decision in this case draws a distinction between a doctor's duty to disclose risks of treatment to a patient (the subject of the decision in *Montgomery*), where a 'reasonable patient' test applies, and the extent of any duty of disclosure of possible alternative treatments (the subject of this decision), where the traditional *Hunter v Hanley*[36] test of a responsible body of medical opinion was said by the Supreme Court to continue to apply. The decisions in *Montgomery* and *McCulloch* must therefore be read together to gain a full appreciation of the scope of liability for medical negligence in Scotland.

In *McCulloch*, the courts were faced with a claim in medical negligence brought by the relatives of a 39-year-old man who had died from a cardiac arrest. They alleged that his death had been caused (or materially contributed to) by the negligence of Dr Labinjoh, a consultant cardiologist employed by the defenders. On 1 April 2012, Mr McCulloch had been admitted to hospital with symptoms of severe pleuritic chest pains and vomiting, something for which he had been previously treated the month before. Dr Labinjoh, reviewing the results of an echocardiogram, discounted the likelihood of pericardial constriction and stated that she was 'not certain where to go for a diagnosis from here'. Mr McCulloch thereafter appeared to improve and was discharged, against the wishes of his wife. The following day, Mr McCulloch suffered a cardiac arrest and died. The deceased's family alleged that Dr Labinjoh had been negligent in her assessment of Mr McCulloch's state of health before his release, given the evidence she had had presented to her. It was further argued that, adopting the approach taken by the Supreme Court in *Montgomery*, Dr Labinjoh had failed to warn Mr McCulloch of material risks attendant upon her recommended treatment and of any reasonable alternative treatments (including the use of anti-inflammatory drugs).

At first instance, the judge had held that Dr Labinjoh had been negligent in failing to prescribe anti-inflammatory drugs, but that there had been no breach of a duty to warn of risks of the sort imposed in *Montgomery*, as such a duty could only arise in respect of risks associated with a recommended course of treatment – it did not extend to risks associated

[34] [2023] UKSC 26, 2023 SC (UKSC) 91, 2023 SLT 725, [2024] AC 925, [2023] 3 WLR 321, [2023] 4 All ER 943.

[35] See case number 3.

[36] 1955 SC 200.

with courses of treatment that were *not* regarded, in the doctor's exercise of professional judgement, as reasonable alternatives. In relation to the negligent failure to prescribe the drugs, the judge held that that this negligence had not been demonstrated to be a cause of death. On appeal to the Inner House of the Court of Session, this finding of negligence had been overturned (while the finding on a lack of causation was affirmed).

On appeal to the Supreme Court, the Court affirmed first that the legal test for establishing negligence by a doctor in diagnosis or treatment is whether the doctor has acted in accordance with a practice accepted as proper by a responsible body of medical opinion (the *Hunter* test); and second, that the professional practice test did not apply to a doctor's advisory role in discussing with the patient any recommended treatment and possible alternatives, and the risks of injury which may be involved (the *Montgomery* exception). As to which of those tests should be applied to the assessment of whether an alternative treatment is reasonable and requires to be discussed with the patient, the Court held that the identification of reasonable alternatives was as much a matter falling within medical expertise and professional judgement as the identification of risks associated with any treatment. The narrowing down from possible to reasonable alternatives was an exercise of clinical judgement to which the professional practice test should be applied. It was only once the reasonable alternatives had been identified that the doctor's advisory role arose, and the duty of reasonable care required the doctor to inform the patient not only of the recommended treatment option but also the reasonable alternatives (plus 'no treatment', if that were a reasonable alternative) indicating their respective advantages and disadvantages and the material risks involved.

In this case, because the doctor had decided that prescribing anti-inflammatory drugs was not a reasonable alternative treatment, and because that view was supported by a responsible body of medical opinion, there had been no breach of any duty of care owed to the patient. The appeal by the deceased's relatives was therefore dismissed.

This decision offers a welcome clarification on the proper test to be applied in certain circumstances of patient-doctor interaction. The Supreme Court's view is that, at stage one, when deciding whether it is reasonable to give specific advice or information to a patient, the medical professional can exclude matters which a reasonable body of medical opinion would consider it inappropriate to raise with a patient, this extending to unreasonable forms of treatment (the *Hunter* test); thereafter, at stage two, having exercised professional judgement at the first stage consideration, the medical professional must provide the advice or infor-

mation that a reasonable patient would wish to have in the circumstances, including information about material risks relating to any treatments which have not been excluded at stage one (the *Montgomery* test).