SHERIFF APPEAL COURT

[2021] SAC (Civ) 20
AYR-A156-15

Sheriff Principal A Y Anwar

OPINION OF

SHERIFF PRINCIPAL A Y ANWAR

in the cause

BILLY MCGOWAN

Pursuer and Appellant

against

AYRSHIRE AND ARRAN HEALTH BOARD

Defenders and Respondents

Pursuer and Appellant: Mr Billy McGowan, self-represented
Defenders and Respondents: Mr Khurana QC; NHS Scotland Central Legal Office

24 May 2021

Introduction

[1] Mrs Annie McGowan died on 9 September 2011. The appellant is her son. He seeks damages for the alleged negligent acts and omissions of the respondent's medical staff in relation to their treatment and diagnosis of Mrs McGowan.

[2] Mrs McGowan was admitted to Ayr Hospital on 30 April 2011 having suffered a stroke. She was discharged on 6 May 2011. She was re-admitted on 20 May 2011. A CT scan confirmed she had suffered another stroke. Stroke secondary prevention was put in place. A CT scan on 13 July 2011 recorded a further stroke.

[3] On 14 July 2011, Mrs McGowan was transferred from Ayr Hospital to a psychiatric hospital, namely Ailsa Hospital. The reasons for referral were noted as "marked anxiety, interfering with stroke rehabilitation, cognitive impairment and frequent panic attacks".

[4] Mrs McGowan was re-admitted to Ayr Hospital from Ailsa Hospital on 29 August 2011. She was exhibiting right sided weakness and slurred speech and was unable to walk. When a patient is admitted to the Accident and Emergency Department at Ayr Hospital, an "Acute Medicine Admission Proforma" ("Admission Form") is provided for completion by staff. One section of the Admission Form reads: "DVT/VTE prophylaxis (see SIGN 62 for indications)". This section of the Admissions Form was not completed at the time of Mrs McGowan's re-admission to Ayr Hospital. Anti-coagulant prophylactic medication can prevent the development of deep venous thrombosis (DVT) and venous thromboembolism (VTE). Mrs McGowan was not given anti-coagulant medication upon her re-admission to Ayr Hospital.

[5] Mrs McGowan died on 9 September 2011. She suffered a fatal, terminal pulmonary embolism which resulted from DVT.

[6] At a proof before answer, the appellant sought to establish negligence on the part of the respondent's staff in relation to their treatment and diagnosis of: (a) sepsis; (b) strokes; and (c) DVT and VTE.

[7] On 14 April 2020 following a proof before answer, the sheriff absolved the respondents. The appellant appeals against that decision.

The sheriff's decision

Evidence led

[8] Two witnesses gave evidence at the proof before answer, namely, the appellant and his expert witness, Dr MacWalter, a retired consultant. Neither witness was cross examined. No evidence was led on behalf of the respondents. No evidence was led from any medical practitioner involved in Mrs McGowan's care.

[9] Dr MacWalter provided a medical report to the appellant's former solicitors. This report was lodged with process. The sheriff records at paragraph [9] of his note that only parts of the report were referred to and adopted by Dr MacWalter in the course of his evidence. Other parts however were read to him in the course of questioning without him being asked to comment upon or adopt them. At times, Dr MacWalter gave evidence which did not appear to fully align with the apparent import of parts of his report.

[10] On behalf of the respondents, a number of objections were made to questions put to Dr MacWalter. The sheriff heard the evidence under reservation. The sheriff's decision to sustain any of the respondent's objections is not challenged in this appeal.

[11] The sheriff has set out the evidence led in detail (paragraphs [6] to [292] of his note). At paragraph [3] of his note he explains his reasons for doing so:

> "The pursuer in this case is a party litigant. He has prepared by writing out detailed questions. He read these questions out to the witness, interspersed with follow-up questions. His questions frequently contained factual assertions, and quoted extensively from medical records and other documents. Many of the questions were of considerable length, and contained several sub-clauses. Often, the witness was not asked to agree with, to adopt, or to comment on what had been read to him, and did not do so. In addition, [Dr MacWalter] was often asked whether staff members had followed normal and usual practice, and gave replies which did not simply affirm or deny this. The pursuer did not make notes of the replies to his questions in the course of the evidence. It is apparent from his submissions that he erroneously understood that certain of his prepared questions had been adopted or assented to, and that he had received affirmative answers to certain questions."

[12] The sheriff made 15 brief findings in fact.

The legal test

[13] The sheriff analysed each chapter of evidence relating to the treatment and diagnosis of sepsis, strokes, DVT and VTE by reference to the well-known tripartite test for negligence set out by Lord President Clyde in *Hunter* v *Hanley* 1955 SC 200.

Sepsis

[14] At paragraphs [198] to [232] and [241] to [244], the sheriff sets out Dr MacWalter's evidence in relation to the alleged negligent failure to diagnose or treat sepsis.
Dr MacWalter had been referred to entries in Mrs McGowan's medical records dated 29 August 2011. Her C-reactive protein and white cell count (WCC) were grossly elevated. Dr MacWalter noted that these abnormal blood test results were thought to be associated with a urinary tract infection (UTI); that elevated WCC could indicate sepsis but could also indicate a UTI; that at this stage no other signs of sepsis, such as fever or a drop in blood pressure were present. On the morning of 29 August 2011, Mrs McGowan had been given trimethoprim for a possible UTI. Later that day, she was prescribed intra-venous amoxicillin for sepsis. On 30 August 2011, she was given doxycycline for a chest infection. On 6 September 2011, she was given tazocin. Tazocin is a broad spectrum antibiotic and is used by medical staff when the source of an infection is not known.

[15] Dr MacWalter was asked during examination in chief whether tazocin ought to have been prescribed earlier on 29 August 2011. He stated that now, a sepsis protocol would say what antibiotic should be chosen as the first line in treatment of sepsis. However, he explained that he did not know if that had been available at the relevant time in Ayr

Hospital. Dr MacWalter was asked whether in not providing an appropriate treatment for sepsis and by administering an oral rather an intravenous antibiotic, the respondents' clinical team had taken a course of action that no ordinary doctor would have taken if acting with ordinary care. Dr MacWalter could not say that the clinical team had taken a course of action no competent doctor would take.

[16] The sheriff concluded that the appellant had failed to establish that there was a normal and usual practice in relation to the treatment of sepsis at the relevant time. He also concluded that the second and third legs of the *Hunter* v *Hanley* test had not been met.

Strokes

[17] At paragraphs [11] to [197], the sheriff sets out Dr MacWalter's evidence in relation to the alleged negligent failure in the diagnosis and treatment of strokes. During the course of evidence, Dr MacWalter was referred to a report of an MRI scan taken on 3 May 2011 which confirmed a single stroke had occurred. A CT scan was taken on 21 May 2011 after Mrs McGowan's re-admission to hospital. It was suggested to Dr MacWalter that this scan confirmed that there had been one further stoke and possibly more than one. An objection to this line of questioning on the basis of an absence of record was sustained. A report of an MRI scan dated 3 June 2011 was put to Dr MacWalter. The report noted that "in comparison with the previous CT scan of 21 May 2011 there had been no significant change".
Dr MacWalter noted that two infarcts could be seen on the result of the scan however it was not possible to say if the scan showed a different stroke or if the further infarct had occurred at the same time as the original stroke. A CT scan of 13 July 2011 recorded one further stroke. The clinical indications noted on a CT scan on 31 August 2011 suggested there had been a further stroke.

[18] Dr MacWalter was asked to comment upon the normal and usual practice in respect of various aspects of the medical treatment of strokes. The sheriff considers his evidence at paragraphs [357] to [385] of his note. In particular, the sheriff noted that Dr MacWalter: (i) did not accept that the Scottish Intercollegiate Guidelines Network (SIGN) guidelines represented normal and usual practice, instead they represented what was perceived as "optimal practice"; (ii) did not accept that the Healthcare Improvement Scotland's publication *Clinical Standards for Stroke Services: Care of the Patient in the Acute Setting - update June 2009* set out what normal and usual practice was, but rather what it should be; (iii) did not confirm whether normal and usual practice for dealing with stroke patients had been defined, noted that each stroke unit had a protocol for managing patients and noted he had not seen one for Ayr Hospital; and (iv) he did confirm that normal and usual practice amounted to "urgent assessment, investigation and treatment" but clarified that health board resources limited how quickly and thoroughly patients could be assessed. The sheriff concluded that the first leg of the *Hunter* v *Hanley* test was satisfied; there was a normal and usual practice for the medical treatment of a person who had just suffered a stroke, comprising urgent assessment, investigation and treatment (finding in fact and law [18]).

[19] The sheriff concluded however that the appellant had failed to establish the second leg of the *Hunter* v *Hanley* test. At paragraphs [370] to [380] the sheriff analyses Dr MacWalter's evidence in this regard. When asked whether, if staff had acknowledged multiple stroke occurrences but not investigated them, they would have failed to follow the normal and usual practice, Dr MacWalter stated that the staff would have acted in a way which was normal hospital practice at the time. He was asked whether if staff acknowledged that multiple strokes had taken place but did not investigate the cause, they would have failed to follow normal and usual practice, Dr MacWalter stated that staff would

not have followed "best practice". When pressed, he stated "all I can say is that they did not follow the very best practice". When asked whether a consultant had failed to adopt normal and usual practice by transferring Mrs McGowan to Ailsa Hospital, Dr MacWalter replied that he could not answer, but that stroke rehabilitation was not available in a psychiatric hospital.

[20] Notwithstanding the absence of direct evidence, the sheriff considered whether he could draw an inference that the respondents had failed to adopt normal and usual practice. The sheriff notes (at paragraph [382] and [383]) that Dr MacWalter's description of normal and usual practice, namely that it comprises "urgent assessment, investigation and treatment" was very vague. He concluded that he had insufficient evidence of what normal and usual practice comprised from which to infer that such a practice had not been followed. Further, the sheriff noted that the inference he was invited to draw was contrary to the evidence of the only expert witness.

DVT/VTE

[21] Dr MacWalter's evidence in relation to the alleged negligent failure to diagnose and treat DVT/VTE is set out in paragraphs [245] to [269] of the sheriff's note. Dr MacWalter agreed that it was normal and usual practice for the Admission Form to be completed and for staff to document whether a patient was at risk of developing DVT or VTE. He stated that the practice of filing in the form had not been followed. In light of this evidence, the sheriff found the first two legs of *Hunter* v *Hanley* established. The sheriff notes that Dr MacWalter was not asked any further questions regarding normal or usual practice in the prevention, diagnosis or treatment of DVT/VTE. He did however state that he did not think that Mrs McGowan had received proper DVT prophylaxis. The appellant sought to

establish that the failure to complete the Admission Form resulted in no anticoagulant therapy being administered. Dr MacWalter was asked whether in these failings, in particular, the failure to administer anticoagulant therapy, the actions undertaken by clinical staff were actions which no ordinary doctor exercising ordinary care would have taken. The sheriff notes that Dr MacWalter did not state this was the case. While he acknowledged that there had been a series of errors, he stated that these were not unusual in the NHS. This issue was not explored further in evidence.

[22] Notwithstanding the appellant's expert's evidence on this issue, the sheriff considered whether he could draw an inference that the third leg of the *Hunter* v *Hanley* test had been met. He concluded he could not. The sheriff noted that section of the Admission Form referred to stated "DVT/VTE prophylaxis (see SIGN 62 for indications)". Dr MacWalter had explained that the SIGN guidelines did not represent normal and usual practice at the time they were introduced and that there had been a delay in their implementation. There had been no evidence before the sheriff as to whether the SIGN guidelines had been implemented at the relevant time.

Causation and quantum

[23] The sheriff also noted that while the appellant led evidence that various acts or omissions resulted in events that caused Mrs McGowan's death, he did not lead any express evidence that her death would not have occurred at the time that it did, but for these events. Nor did he lead any evidence on the issue of life expectancy. Moreover, the sheriff concluded that there was insufficient evidence to provide a reasoned view on the damages sought.

Grounds of appeal

[24] The Note of Appeal extends to 30 paragraphs. The single relevant ground of appeal is that set out in paragraph 9 of the Note of Appeal which is the following terms:

> "It is contended that key testimony provided by the appellant's expert witness has been misrepresented in the [sheriff's] Note as a result of omissions and misquotations, resulting in an unfair judgment."

[25] Notwithstanding the criticisms of the sheriff's assessment of the evidence, this court was not invited to make any findings in fact. Indeed, the grounds of appeal do not assert that the sheriff erred in making any particular finding in fact, nor that he ought to have made alternative or additional findings in fact. This court has been provided with a transcript of day 2 of the proof before answer only.

[26] A detailed note of argument was lodged by the appellant which extended beyond the single ground of appeal stated in the Note of Appeal. No objection was taken by the respondents to the matters now raised. The appellant's note of argument contains a great deal of discussion of Dr MacWalter's evidence however it does not expressly state what, if any, errors were made by the sheriff. It would simply be impracticable to provide a response to each point made by the appellant, a number of which have no bearing on the matters before this court.

[27] Ascertaining exactly on what grounds it is proposed that this appeal should be allowed, has not been a straightforward task. Read together with the note of appeal, the appellant appears to advance the following grounds of appeal:

1. The sheriff has misrepresented the testimony of the appellant's expert witness;
2. The sheriff took account of an immaterial factor, namely whether health board resources limited how quickly and thoroughly stroke patients can be assessed;

3. The sheriff failed to pay proper or due regard to the respondent's failure to diagnose further strokes;
4. The sheriff ought to have found causation established on the basis of Dr MacWalter's evidence that Mrs McGowan's health had deteriorated "further than necessary" when further strokes occurred;
5. The sheriff ought to have found the first leg of the *Hunter* v *Hanley* test had been satisfied in relation to the alleged failure of the respondent's medical staff to treat Mrs McGowan's sepsis with a broad spectrum intravenous antibiotic;
6. The sheriff and the transcript incorrectly record Dr MacWalter's response to questions relating to the underlying cause of Mrs McGowan's death;
7. The sheriff ought to have found the third leg of the *Hunter* v *Hanley* test satisfied in relation to the respondent's failure to administer anti-coagulant therapy for DVT, it being a normal and usual practice not only to complete an Admissions Form noting that a patient was at risk of DVT but also to administer anti-coagulant therapy if the form was correctly completed; and
8. The sheriff ought to have concluded that but for a failure to administer anti-coagulant therapy, Mrs McGowan would not have suffered a DVT resulting in her death.

Submissions for the appellant

[28] The appellant adopted his note of argument during his submissions. I will not repeat those submissions however, I have sought to summarise the salient issues arising in his note of argument in paragraph 27 above. The general content of his submissions should also be evident from the discussion on the various grounds of appeal which follows.

[29] Paragraphs 3 to 13 of the note of argument related to alleged errors in the description of the causes of death in Mrs McGowan's death certificate. During his submissions, the appellant accepted that that was not a matter for this court.

[30] The appellant referred to and quoted from the report of Dr Lindsay Erwin. The sheriff notes at paragraph [319] of his note that while Dr Erwin was listed as a witness for the respondents and had written a report, the witness was not led and his report did not form part of the evidence. The sheriff concluded that the report could not be referred to or relied upon by the appellant in his submissions at proof. He was correct to do so. Equally, the report cannot be relied upon to advance a submission at appeal.

Submissions for the respondents

[31] Counsel for the respondents adopted his note of argument and invited the court to adhere to the sheriff's interlocutor. He referred to dicta in *W* v *Greater Glasgow Health Board* [2017] CSIH 58, *Carlyle* v *Royal Bank of Scotland Plc* [2015] UKSC 13 and *McGraddie* v *McGraddie* [2014] SC (UKSC) 12 in relation to the approach of an appellate court.

[32] The lack of any factual evidence presented a difficulty for the sheriff and for this court. There are very few findings in fact because of the restricted nature of the evidence led. That very much limited the extent to which this court might be invited to make any inferences. The appellant continued to assert, as he had during his submissions at proof, that his questions, document lodged but not referred to and his own personal opinion on medical matters form evidence. That was an illegitimate approach (per Lord Brodie in *LT (as guardian of RC)* v *Lothian NHS Health Board* [2019] CSIH 20 (at paragraphs 63 to 67).

Discussion

[33] The role of an appellate court was recently summarised by the Inner House in *McCulloch* v *Forth Valley Health Board* [2021] CSIH 21 (at paragraphs 25 and 26):

> "25. The role of an appellate court examining a decision made after proof at first instance is well-understood, based on a line of authority coming through *Thomas* v *Thomas* 1947 SC (HL) 45 via *McGraddie* v *McGraddie* 2014 SC (UKSC) 12 and *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203 to *AW* v *Greater Glasgow Health Board* [2017] CSIH 58 . The latter, following a detailed analysis of the authorities, concluded that they confirmed the flexible and undogmatic approach long adopted by the courts in Scotland, based firmly on the advantage enjoyed by the trial judge of having seen and heard the witnesses. Those advantages were particularly acute in relation to issues of credibility and reliability, which may be affected by demeanour and attitude, and in the determination of primary facts. In such cases, as the court noted in *S* v *S* 2015 SC 513, para 23, a demanding test is applied:
>
> 'In an appeal which seeks to challenge findings in fact, an appellate court must have due regard to the limitations of an appeal process, with its '[narrow focus] on particular issues as opposed to viewing the case as a whole' …When considering reversing a first instance judge's findings in fact, therefore the appellate court should confine itself to situations where it can categorise the findings as incapable of being reasonably explained or justified in terms of the dicta quoted in *Henderson* v *Foxworth Investments Ltd* (paras 63-65).'
>
> 26. When it comes to inferences drawn from primary fact the appellate court has more freedom to act. It may reassess the inferences drawn by the trial judge from proven facts. Care must of course be taken in reversing evaluative decisions made by first instance judges, in respect of which the court will apply the ordinary standards of logic and common sense. In cases based on expert evidence an appeal court may be as well placed as the judge at first instance to assess the logic and sustainability of the approaches adopted by the expert witnesses. The court should not shrink from that task, although it ought to give appropriate weight to the trial judge's opinion. An appeal court may interfere where the trial judge has erred on questions of law, including the application of legal principles to the facts of the case, or where the reasons given are plainly insufficient to justify the decision reached."

[34] The appellant seeks to challenges the sheriff's application of the tripartite test in *Hunter* v *Hanley* to the facts. In addition, he seeks to persuade this court that the sheriff erred in failing to draw inferences from primary facts.

[35] The appellant challenges the sheriff's assessment and interpretation of various aspects of the evidence relating to sepsis, strokes and DVT/VTE. However, to establish negligence in respect of any of these aspects of Mrs McGowan's care, the appellant requires to satisfy the court that all three legs of the test in *Hunter* v *Hanley* have been met and moreover, but for the alleged negligence, Mrs McGowan's death would not have occurred. Self-evidently, a successful ground of appeal which addresses only one leg of the test, or does not deal with the issue of causation in relation to any allegedly negligent act or omission will not cause this court to interfere with the decision of a court of first instance:

> "To establish liability by a doctor where deviation from normal practice is alleged, three facts require to be established. First of all it must be proved that there is a usual and normal practice; secondly it must be proved that the defender has not adopted that practice; and thirdly (and this is of crucial importance) it must be established that the course the doctor adopted is one which no professional man of ordinary skill would have taken if he had been acting with ordinary care. There is clearly a heavy onus on a pursuer to establish these three facts, and without all three his case will fail." (*Hunter* v *Hanley* per Lord President Clyde at page 206)

[36] Actions for damages arising from alleged clinical negligence are complex and it is no doubt difficult for a party litigant to discharge the heavy onus referred to by Lord President Clyde without a clear understanding of both the legal test and the need to elicit sufficient evidence to satisfy the court on a balance of probabilities that each leg of the test had been met.

[37] At various point during his submissions, the appellant invited this court to draw inferences in relation to various aspects of the tripartite test in *Hunter* v *Hanley*. The appellant submitted that Dr MacWalter had been reticent during his evidence and had not wished to criticise clinical staff. In short, he invited the court to look beyond his expert's evidence. Such an approach is entirely inappropriate.

[38] Moreover, there must be sufficient proved facts from which an appellate court is invited to draw an inference. In *W* v *Greater Glasgow,* the Lord Justice Clerk, Lady Dorrian delivering the opinion of the court noted at paragraph 62:

> ". . . at least if the primary facts are clear, it is open to an appellate court to interfere with the decision of the trial judge, by analogy with the general approach adopted in *Thomas* v *Thomas* and especially by Lord Reid in *Benmax* v *Austin Motor Co Ltd*. The critical point is that, provided that the primary facts are clear, an appellate court is generally in as good a position to evaluate the evidence as the trial judge . . ."

[39] Standing the absence of sufficient and clear primary facts, this court is not in as good a position to evaluate the evidence at the sheriff at first instance.

[40] Turning to the various grounds of appeal:

The first ground of appeal

[41] At paragraph 4 of the note of appeal, the appellant expressed confidence that a transcript of Dr MacWalter's evidence would support his position that "key testimony" had been misrepresented in the sheriff's note. The transcript of day 2 of the proof did not however support the appellant's recollection of the evidence. I have read the transcript and compared it with the summary of evidence contained in the sheriff's note. The sheriff has noted the evidence with care and precision, at considerable length and has explained his reasons for doing so. I am unable to identify any obvious or material discrepancy between the contents of the transcript and the sheriff's note. The appellant was unable to identify any omissions or misquotations. The appellant has previously sought access to the digital recording of the evidence on the basis that both the sheriff and the person who transcribed the evidence have noted the evidence incorrectly. That motion was refused.

[42] During his submissions, the appellant sought to rely upon questions he had posed to Dr MacWalter. Those questions do not form evidence. The answers to those questions form

the evidence. The appellant appears to have attributed Dr MacWalter with responses which are entirely inconsistent with both the transcript of the evidence and the sheriff's note.

[43] This ground of appeal is without merit.

The second ground of appeal

[44] Dr MacWalter's evidence is summarised accurately by the sheriff at paragraphs [108] to [110] and [195] of his note. The sheriff's note accords with pages 58 to 60 of the transcript of evidence. Dr MacWalter clearly considered the question of health board resources to be relevant to the question of how quickly and thoroughly stroke patients are assessed, investigated and treated. Indeed he refers to the issue of resources "obviously" limiting what health boards can do. Dr MacWalter was not invited by the appellant to clarify or expound his evidence in this regard. The sheriff's consideration of this issue (and finding in fact 7) cannot be described as unreasonable, unjustified or plainly wrong.

[45] The appellant submitted that if the respondent's did not have adequate resources to treat Mrs McGowan, they had an obligation to inform Mrs McGowan who had sufficient resources to fund alternative arrangements. However, the resources available to the respondents, how they deployed these resources to urgently assess, investigate and treat patients, what obligations were incumbent upon them, what resources were available to Mrs McGowan, what private medical care she may have purchased and how that may have prevented her death are all issues which were not explored in evidence.

The third ground of appeal

[46] I am not persuaded that it can reasonably be maintained that the sheriff failed to pay due regard to an alleged failure to diagnose further strokes. The appellant submitted that

Dr Ghosh (a consultant at Ayr Hospital) had deliberately and repeatedly misdiagnosed multiple strokes. While entries in medical records were put to Dr MacWalter, the court did not have the benefit of any evidence from Dr Ghosh which might explain the basis of his clinical assessments and the information upon which such assessment were based. There is no finding in fact that clinical staff had failed to diagnose further strokes. This court is not invited to make such a finding in fact.

[47] In paragraph 41, page 8 of his note of argument, the appellant has selectively quoted from Dr MacWalter's evidence. The sheriff, as he was required to do, has carefully analysed and assessed the evidence in a balanced manner. The evidence in relation to this matter is confused. It is clear from the sheriff's findings in fact that Mrs McGowan had suffered multiple strokes. Dr MacWalter however appeared to have departed from the terms of his report which stated

> "there was an apparent disregard for the reporting of CT brain scans . . . there was certainly a lack of acknowledgment by the medical consultant and his team that the further CT scans . . . demonstrate further neurological damage".

The position was more nuanced during evidence. An objection to a question that a CT scan performed on 31 May 2011 showed there had been more than one stroke was sustained on the basis that there was no record. Dr MacWalter when asked to comment on the results of an MRI scan on 3 June 2011 stated that it was not possible to state whether the report of this scan showed a different stroke to that recorded on 21 May 2011. Dr MacWalter noted that while it was unlikely that a stroke consultant would overlook the results of scan reports when making a decision, reports may have been received and printed for files after the dates upon scans were performed. The sheriff noted that when asked whether, if staff had acknowledged multiple stroke occurrences but not investigated them, they would have failed to exercise usual and normal practice, Dr MacWalter stated that they would have

acted in a way that was normal hospital practice at the time. He was pressed further by the appellant and responded that if staff had not investigated the cause of further strokes, they would not be following best practice. When pressed a third time, he stated "all I can ever say is that they did not follow the very best practice". The sheriff has correctly noted that the answers to these questions to do not satisfy the second leg of the *Hunter* v *Hanley* test; there was no evidence that staff had failed to adopt normal and usual practice.

The fourth ground of appeal

[48] The fourth ground of appeal is without merit. A vague assertion by an expert witness that a patient's health has deteriorated further than necessary cannot form the basis upon which to conclude that but for any alleged negligent acts or omissions death would not have occurred.

The fifth ground of appeal

[49] While there is some merit in the fifth ground of appeal, it only deals with one part of the tripartite test of clinical negligence.

[50] At paragraph [224] of his note, the sheriff records that Dr MacWalter stated in his report "treatment with IV antibiotics is essential in cases of sepsis . . doxycycline is essentially an oral antibiotic and inappropriate when the source of the infection is not ascertained." During evidence, he was asked whether tazocin or an intravenous antibiotic was essential in the treatment of sepsis. He agreed. He was asked whether the use of such antibiotics would constitute normal and usual practice. He agreed it would (page 105 of the transcript). Counsel correctly conceded that the sheriff ought to have concluded that there was a normal and usual practice of treating sepsis with an intravenous antibiotic. I agree

that in light of this evidence, the first leg of the *Hunter* v *Hanley* test had been met. Finding in fact 16 is in the following terms:

> "The pursuer has not proved on a balance of probabilities that there was a normal and usual practice for the diagnosis and treatment of sepsis in hospitals"

Finding in fact 16 should read "It was normal and usual practice for tazocin or an intravenous antibiotic to be used in the treatment of sepsis."

[51] However, the sheriff was correct to conclude that the second and third leg of the test had not been met. In relation to the second test, there was no evidence that the clinical team, who had been treating Mrs McGowan for a suspected urinary tract infection or a chest infection had failed to follow normal practice by not prescribing tazocin or another intravenous antibiotic sooner than they had. Dr MacWalter was asked whether tazocin ought to have been prescribed earlier. He did not answer that question directly. Instead he stated that hospitals have a protocol which states what antibiotics should be chosen as the first line of treatment and that he was not aware of the protocol in Ayr Hospital at the time. Dr MacWalter was specifically asked whether in persisting with oral antibiotics, the clinical team had undertaken a course of action that no ordinary doctor would have taken if acting with ordinary care. His answer was equivocal. He stated that this was a course of action many doctors will have taken, to the detriment of many patients. He stated "I cannot say. . . that it's not a course of action that any competent doctor would take" (page 107 of the transcript).

Sixth ground of appeal

[52] The appellant asserts that he recollects the evidence relating to the underlying cause of death differently to that recorded in the transcript and in the sheriff's note. The sheriff's

note of the evidence and the questions and answers transcribed are entirely consistent. There is no justification for this court to look beyond what it stated in the transcript and the sheriff's note. This ground of appeal is unarguable.

Seventh ground of appeal

[53] In addressing this ground of appeal, it is important to note that Dr MacWalter was asked and agreed that it was normal and usual practice to complete the Admissions Form and that clinical staff had failed to do so. Dr MacWalter was not asked what might be normal and usual practice with regards to the treatment or prevention of DVT/VTE. The appellant submitted that as the form contained a section in which a clinician is required to address whether DVT/VTE prophylaxis is necessary, it is thereby established that it was normal and usual practice to administer DVT prophylaxis. Dr MacWalter was not however asked to address this. When asked whether "failings with sepsis, and anticoagulant therapy and not investigating strokes" were actions which no doctor would have taken if acting with ordinary care, Dr MacWalter did not agree (transcript, page 145). Indeed he stated that he considered the question to be "inappropriate". He acknowledged that there had been a series of errors by the clinical team, however these were not usual. This response was not explored further. Notwithstanding this evidence, the sheriff went on to consider whether he could infer that the third leg of *Hunter* v *Hanley* had been established. He concluded that he could not. For him to do so, the sheriff would have required to draw an inference which was directly contrary to the evidence led before him. The sheriff's conclusion cannot be described as unjustified or plainly wrong. It was entirely consistent with the evidence presented to him. Indeed, paragraph [398] of his note states:

> "It is notable that the pursuer repeatedly asked Dr MacWalter in the course of evidence if certain actions or omissions by medical staff who treated Mrs McGowan were such that no doctor of ordinary skill would have taken them if acting with ordinary care. Dr MacWalter did not at any point conceded that this was the case, and at no point did he state that this essential part of the test had been satisfied. Indeed, when this point was raised, his evidence was to contrary effect".

Eighth ground of appeal

[54] This ground of appeal is unarguable. It is clear that Mrs McGowan was very ill at the time of her death, having suffered multiple stokes, sepsis and a DVT. Even if the sheriff had been satisfied that there was a normal and usual practice of administering anti-coagulant therapy to a patient in Mrs McGowan's condition, that there had been a failure to adopt that normal and usual practice and that the omission to administer anti-coagulant therapy was one no doctor of ordinary skill would have made, there was no evidence that but for the failure to administer anti-coagulant therapy, she would not have died when she did. It is noteworthy that during other chapters of his evidence, Dr MacWalter stated that Mrs McGowan was elderly and frail and that older patients are less likely to respond positively to treatment (pages 94 to 95 of the transcript).

[55] Accordingly, I shall refuse the appeal and adhere to the sheriff's interlocutor of 14 April 2020. In the event of success, the respondents sought expenses. The appellant submitted that he should be entitled to expenses in the event the appeal was refused. He submitted that the proceedings had taken 10 years and the action ought to have been settled many years ago.

[56] Notwithstanding the appellant's impassioned plea, there is no justification for a departure from the normal rule on expenses following success. Accordingly, the appellant will be liable to the respondents in the expenses of the appeal.