SHERIFF APPEAL COURT

[2025] SAC (Civ) 21

Sheriff Principal G A Wade KC
Appeal Sheriff R D M Fife
Appeal Sheriff J F Kerr

OPINION OF THE COURT

delivered by APPEAL SHERIFF JOAN F KERR

in the appeal in the cause

DS

Pursuer, Appellant and Cross-Respondent

against

NHS GRAMPIAN

Defender, Respondent and Cross-Appellant

Pursuer, Appellant and Cross-Respondent: Party
Defender, Respondent and Cross-Appellant: Reid KC, Dundas; NHS Scotland Central Legal Office

16 July 2025

Introduction

[1] The appellant, DS, underwent an MRI scan of her brain in January 2013. That scan was reviewed by a consultant neuroradiologist. They failed to identify the presence of a pineal cyst in the appellant's brain. That error became manifest in April 2015. Is the consultant neuroradiologist and, in turn, her employer, the respondent, liable in negligence, as a result of that error, for loss and damage suffered by the appellant?

[2] The sheriff determined the answer to that question was yes. However, in awarding damages, the sheriff considered the appellant could only establish a causal link to the failure to report for the pain and suffering she endured between 2013 and 2015. On that basis, he awarded damages for solatium for that period.

[3] In her appeal, the appellant contends the sheriff erred in holding that she had failed to establish a causal link between the failure to report the pineal cyst and: (i) her medical symptoms post-2015; (ii) past loss of income; (iii) future loss of earnings; (iv) disadvantage on the labour market; (v) services; and (vi) miscellaneous losses. She also challenged the sheriff's refusal to allow her motions : (i) to lodge her fourth inventory of productions containing employment and financial information to substantiate her heads of claim; and (ii) to amend the sum sued for during the proof.

[4] In its cross-appeal, the respondent, submits the sheriff erred in his approach as to: (i) whether there was a breach of duty of care/negligence by the consultant radiologist; (ii) the counterfactual circumstances as to how the appellant would have acted in 2013 had the scan been properly reported and what treatment would have been available to her; and (iii) causation and loss. The respondent contends that decree of absolvitor should be granted.

Factual background

[5] The appellant began to experience ringing in her ears, visual disturbance, nausea, headaches and pins and needles in 2011. She consulted her GP and was referred to Aberdeen Royal Infirmary in October 2012. She was seen by Dr Callum Duncan, consultant neurologist, on 28 December 2012. He instructed an MRI brain scan to check if it would provide any explanation for the appellant's symptoms. The scan was carried out on 31 January 2013. The results of the scan were reviewed by Dr Olive Robb, consultant

neuroradiologist. She reported that the scan showed no abnormalities. As events would later show, her report was not accurate.

[6] Following the 2013 scan, the appellant continued to experience worsening symptoms. She underwent a more detailed MRI scan in Poland on 31 March 2015. Upon review, the doctors in Poland identified the presence of a pineal cyst. The appellant recovered a copy of her 2013 scan in April 2015. The 2013 scan had also shown the presence of the pineal cyst.

[7] She contacted Professor Schroeder, a Neurosurgeon based in Germany, on 6 May 2015. She asked if he would be able to remove the pineal cyst, subject to medical recommendation. He confirmed he would perform surgery.

[8] The appellant submitted a request to the respondent requesting that it pay for the surgery to be undertaken by Professor Schroeder on 12 June 2015. That request was granted, even though in the period of 2013 to 2015, surgery for a pineal cyst would almost never be recommended by a medical practitioner in the UK. The appellant underwent surgery for the removal of her pineal cyst on 21 July 2015.

[9] Following her operation, the appellant experienced improvements in her symptoms and her headaches began to resolve, along with her tinnitus and visual disturbances. Subsequently, however, from 2016 onwards, the appellant had episodes of headache, and began to suffer from symptoms of depression, irritable bowel syndrome and chronic fatigue.

[10] The appellant raised the present action against the respondent on 5 April 2018. The appellant offered to prove that Dr Robb breached the duty of ordinary care and skill that she owed to her by failing to disclose the pineal cyst present in the MRI scan of 31 January 2013. Had Dr Robb disclosed the pineal cyst, the appellant's position was that she would have sought and received surgery for its removal in 2013 in Europe, two years earlier than she in

fact did. The delay in diagnosis had caused the appellant to: (i) suffer from headaches, tinnitus and nausea for an additional two years; (ii) suffer from gastrointestinal problems and anxiety from 2016 onwards; and (iii) lead to her not being able to secure permanent employment.

The sheriff's judgment

Procedure

[11] The proof began on 7 September 2022. It lasted 13 days over 5 months. On 7 September 2022, the appellant sought leave to amend the sum sued from £250,000 to £850,000 and to allow late receipt of her third inventory of productions. The amendment was allowed, as was the third inventory, under exception of one production.

[12] During the course of the proof, on 24 January 2023, the appellant sought to lodge a fourth inventory of productions. The respondent opposed late receipt. The sheriff refused the appellant's motion. On 13 February 2023, the appellant made a further motion for late receipt of a different version of her fourth inventory. That too was refused by the sheriff. In addition, she made a motion on that date to amend the sum sued for which was also refused.

[13] The sheriff considered that the appellant's motions for late receipt of her fourth inventory and minute of amendment were made too late and, had they been allowed, would have prejudiced the respondent. In any event, neither the written nor oral evidence led at proof justified the need to amend in a further increase in the sum sued for.

Breach of duty/ negligence

[14] The sheriff held that Dr Robb's review of the MRI scan of 31 January 2013 was negligent and amounted to a breach of the duty of "ordinary competence" that she owed as a neuroradiologist to the appellant: (finding in fact [65]). The sheriff considered the evidence led by the parties' two respective expert neuroradiologists: Professor Jackson for the appellant and Dr Keston for the respondent. He accepted Professor Jackson's evidence. The sheriff concluded that Dr Keston had conceded that what Dr Robb did was a mistake. As a consequence, contrary to the respondent's submission, the sheriff considered that there was no opposing school of thought among the relevant group of medical practitioners between which he had to choose.

Counterfactual

[15] Having accepted negligence was established, the sheriff then asked what the appellant would have done had she been informed of the presence of the pineal cyst in 2013. Evidence was led to show that, even before her MRI scan on 31 January 2013, the appellant had travelled to Poland in 2012 to seek medical care: (finding in fact [10]). The sheriff accepted that in 2013 the appellant would have taken the same course as she ultimately did 2 years later. She would have pursued an operation from Professor Schroeder to remove the pineal cyst: (finding in fact [74]).

[16] That still left the question, though, as to whether surgery for removal of an asymptomatic pineal cyst would have been recommended to the appellant by Professor Schroeder. The respondent led evidence that no such recommendation would have been made by a medical practitioner in the UK. The sheriff accepted that to be the case: (finding in fact [66]). However, on the basis of medical literature led at proof, the sheriff

accepted that Professor Schroeder and others were carrying out such operations in 2013 and surgery would have been available to her then. (finding in fact [74]).

Causation and loss

[17] The respondent led evidence from a consultant neurologist, neuropsychiatrist and neurosurgeon on the question of causation. Taken together, their evidence was that the appellant's pineal cyst was not the cause of her medical problems prior to 2015. Instead, it was submitted that the true cause of the appellant's presenting complaints was that she had been suffering from migraine and a functional neurological disorder. That was evidenced by the fact that, after her surgery in 2015, the appellant's medical symptoms shifted from neurological symptoms to bowel related problems. That being so, the failure to report the pineal cyst in January 2013 was not causative of the appellant's loss and damage, if any had been caused.

[18] The sheriff did not accept that. Instead, he considered it significant that there was no clear alternative diagnosis provided by the respondent to the appellant's evidence that her condition had been improved by the operation in Germany. In circumstances where breach of duty was established, the sheriff decided that a wrongdoer must be held to have caused the loss, unless they could show that there was another cause of the loss.

[19] The sheriff held that the limit of the appellant's loss was between 2013 and 2015. Moreover, he held the appellant had failed to establish a link between the failure to report the pineal cyst and any loss of earned income. The sheriff awarded the sum of £7,500 for solatium to reflect the pain and suffering between 2013 and 2015.

Submissions for the appellant and cross-respondent

Procedure

[20] The sheriff erred in refusing to allow the late receipt of the appellant's fourth inventory of productions. If late receipt created prejudice, the appropriate course was for the sheriff to adjourn the proof to allow the respondent time to consider any new information. The material itself ought not to have been a surprise for the respondent, as the appellant had already given evidence of her financial claim by the time she sought to lodge the fourth inventory. She had already lodged her payslips, and the respondent had recovered her tax records under specification.

[21] There was no prejudice to the respondent in allowing the appellant's motion to amend the sum sued for during the course of the proof.

Breach of duty

[22] The appellant submitted that on the first day of the proof, she objected to the admissibility of the evidence to be given by the medical experts for the respondent. She did so under reference to *Kennedy* v *Cordia (Services) LLP* 2016 SC (UKSC) 59. Her basis for doing so was that those individuals were not sufficiently qualified to give evidence. Consequently, the sheriff ought not to have taken account of their evidence.

[23] She renewed her objections during the course of their giving evidence. The appellant submits that the expert witnesses led by the respondent lacked credibility and reliability. As examples of this, she submitted that there was collusion between the experts to cover up the breach of duty by Dr Robb and that it was notable that those same experts had failed to consider medical literature which was contrary to their own. Her position was that their evidence fell to be excluded in its entirety as a result.

[24] The appellant agreed the relevant test to establish breach of duty was set down by *Hunter* v *Hanley* 1955 SC 200. In failing to report the pineal cyst, Dr Robb had deviated from the ordinary practice to be expected from a consultant neuroradiologist. Notwithstanding the evidence of Dr Keston, any other neuroradiologist would have identified her pineal cyst. The appellant submitted she had established a breach of duty by Dr Robb on the basis of *Hunter*.

[25] The appellant referred to *Montgomery* v *Lanarkshire Health Board* 2015 SC (UKSC) 63 at paras [87] – [89] and *Chester* v *Afshar* [2005] 1 AC 134 at paras [18] and [86] for the proposition that she was entitled to be informed of all available treatments to make an informed decision on the risk and consent.

Counterfactual

[26] The appellant submitted that had she been told about the pineal cyst in 2013 she would have sought additional neurological and neurosurgical opinion. On the evidence led, the sheriff was correct to find that the appellant would have sought surgery in 2013. Even prior to January 2013, the appellant could demonstrate that she had spent considerable time investigating her symptoms. This had included travelling to Europe and consulting with medical practitioners there. The sheriff was also correct to conclude, on the basis of the medical literature lodged in process that surgery would have been offered to her in Europe in 2013. The appellant would have had the right to apply for payment of surgery by the NHS in 2013, as she had done in 2015.

Causation and loss

[27] The appellant repeated that the respondent's experts were not qualified nor credible or reliable to give testimony: *Kennedy* (*supra*). In any event, she submitted that the suggestion by the respondent's experts that her symptoms prior to 2015 had been due to a functional neurological disorder, rather than her pineal cyst, was wrong. The sheriff had been correct to hold that the cessation of her symptoms post-surgery in 2015 provided a sufficient causal link that the cause of her symptoms had been the pineal cyst.

[28] The appellant submitted that the sheriff had erred in not making relevant findings in fact that, had surgery taken in place in 2013 the appellant would have: (i) recovered without complication and without going on to develop gastrointestinal issues and infection, and thus avoided the investigations consequent upon those symptoms; and (ii) resumed employment and would have accepted a permanent role of employment with Shell.

Submissions for the respondent and cross-appellant

Procedure

[29] The sheriff refused to allow the sum sued for to be amended and a fourth inventory of productions to be lodged late. The sheriff's decisions in that regard were discretionary. Having regard to the stage at which the motions were made and the prior procedural history of the case, those decisions were within the range of decisions reasonably open to the sheriff in the exercise of his discretion. There was no proper basis upon which to disturb the sheriff's decisions.

Breach of duty

[30] The sheriff was not entitled to conclude that Dr Robb's reporting of the 31 January 2013 scan constituted a breach of duty. In so concluding, the sheriff demonstrably failed to understand and consider the relevant evidence, proceeded on material misunderstandings of the law and provided inadequate reasoning to support the conclusions that he reached. The sheriff was obliged, but failed, to evaluate that evidence.

[31] The respondent had led evidence from Dr Keston, consultant neuroradiologist, on the issue of breach of duty. He conceded that normal practice would have been to mention and report on the pineal cyst shown in the 2013 scan. There was radiological literature which identified a recognised error rate in the reporting of scans of 5%. The error rate went higher with respect to unexpected findings or where the clinical information did not indicate that a patient was suffering from an abnormality in a specific area. There were several such factors in the appellant's case.

[32] Dr Keston considered that the failure by Dr Robb to report the pineal cyst on the 2013 scan did not constitute a breach of duty. It was an omission which could reasonably have been made by a competent neuroradiologist exercising ordinary skill and care. Dr Keston noted that around 25% of experienced neuroradiologists observing the relevant images, working with a good level of skill and care, would not have reported on the pineal cyst in the same circumstances in which Dr Robb found herself.

[33] The appellant had led competing evidence from Professor Jackson, who was of the view that the actions of Dr Robb were negligent. On the question of breach of duty, the task of the sheriff was not to prefer one expert over the other. The test is whether a clinician, including a neuroradiologist such as Dr Robb in the present case, is negligent if they depart from normal practice in a way which no ordinarily competent clinician would have done:

Bolitho v *City and Hackney Health Authority* [1998] AC 232 at 241 – 243; and *Honisz* v *Lothian Health Board* 2008 SC 235 at para [39]. Dr Keston, being properly qualified, and having given evidence supportive of Dr Robb, the appellant's case ought to have failed, unless there was an evidential basis upon which Dr Keston's evidence could be rejected: *Hunter* (*supra*) at 204 – 205; and *Bolitho* (*supra*) at 241 – 243.

[34] No evidence was led by the appellant to establish a basis upon which Dr Keston's evidence could be challenged. Even if evidence to that effect had been led and the sheriff had been persuaded by such evidence, it would have remained incumbent upon him to set out why he rejected Dr Keston's evidence. The sheriff had failed to do provide any reasoning as to why he was unable to accept Dr Keston's evidence on breach of duty and as such, his reasoning was insufficient: *AW* v *Greater Glasgow Health Board* [2017] CSIH 58 at paras [54] – [55].

[35] Senior counsel submitted the appellant's reliance upon *Chester* (*supra*) and *Montgomery* (*supra*) was misplaced. *Chester* was not relevant to the facts of this case, because there was no causal connection between the failure to report the pineal cyst and the appellant's symptoms. As for *Montgomery*, although the appellant submitted that she had a right to be told about surgical and non-surgical treatments available and their respective risks, her right to be told of such risks only applied with respect to reasonable alternative treatments that a medical practitioner in the UK would recommend. Surgery for a pineal cyst was not such a treatment. Expert evidence had been led to that effect by Dr Statham for the respondent. The correct test to be applied to the question of what constitutes a reasonable alternative treatment is the professional practice test found in *Hunter* and *Bolam*: *McCulloch* v *Forth Valley Health Board* 2023 SC (UKSC) 91 at paragraph. Therefore,

Montgomery did not apply here, because there never would have been a suggestion for surgery to the pineal cyst in 2013 by the medical practitioners.

Counterfactual

[36] The sheriff erred in his approach to the counterfactual circumstances that would have arisen had the appellant been told of her pineal cyst in January 2013. The sheriff had approached the issue by asking whether: (i) the appellant would have sought surgery in 2013; and (ii) whether the appellant would have been offered surgery in 2013.

[37] The sheriff stated that he did not consider the appellant was a reliable witness. Notwithstanding that, in relation to the first question, he accepted the appellant's evidence that she would have sought surgery for removal of her pineal cyst in Germany in 2013 within 4 months of the scan. No explanation was given by the sheriff as to why the appellant was accepted on this point. The respondent had warned the sheriff that care had to be taken in accepting evidence made with the benefit of hindsight: *Smith* v *Barking, Havering and Brentwood Health Authority* [1994] 5 Med LR 285 at 298; *Gestmin* v *Credit Suisse (UK) Limited and another* [2020] 1 CLC 428 at paras [16] – [20]; and *Henderson* v *Benarty Medical Practice* [2022] CSOH 28 at para [49]. Had the sheriff followed the approach laid down in the cases cited to him, he ought to have rejected the appellant's evidence about seeking surgery in 2013. His failure to do so amounted to an error in law.

[38] The appellant's evidence was that, had the pineal cyst been reported in 2013, she would have engaged in discussions with Dr Duncan about her diagnosis and treatment. Her relationship with Dr Duncan, and the respondent more generally, would not have broken down. In cross-examination, the appellant accepted that she would have engaged during follow up proposed. She had engaged with the treatment in Aberdeen to date

in 2013 and there was no objective or contemporaneous evidence to suggest that there would have been any difference following the reporting of the pineal cyst.

[39] The sheriff had correctly concluded that Dr Duncan would have proposed conservative management of the pineal cyst with follow up in a number of months, had it been reported in January 2013. The appellant would have had no reason to reject the reassurance that would have been given to her by the clinicians in Aberdeen. Moreover, the appellant would have been advised that the pineal cyst was not the cause of her symptoms. It is more likely than not that she would not have sought surgery abroad because the pineal cyst would have been managed conservatively.

[40] Senior counsel acknowledged that the appellant had, prior to her 2013 scan, shown prior behaviour of travelling to Europe to receive medical care. The objective evidence for what the appellant would have done was to opt for conservative management of the pineal cyst.

[41] Even if it were the case that the sheriff was correct to hold that the appellant would have sought surgery in 2013, the sheriff was wrong to make a finding that she would have obtained surgery abroad from Professor Schroeder. Neither the appellant's neurosurgeon, Mr Kirkpatrick, nor the respondent's, Mr Statham, were able to comment on the criteria for surgery in continental Europe in 2013. Mr Statham, however, was sceptical that surgery would have been offered. There was, therefore, no neurosurgical evidence available to the sheriff to allow him to conclude that surgery would have been available in Europe in 2013.

[42] The sheriff appeared to have relied upon the medical literature lodged in process to reach the conclusion that surgery would have been available. The expert witnesses led by the respondent had counselled against the risk of non-medically qualified persons relying too heavily on, and drawing conclusions from, medical literature of which they did not

possess a medical understanding. The literature had no bearing on what the counterfactual in 2013 would have been. In any event, the sheriff had erred in law in: (i) his treatment of the literature: *Sienkiewicz* v *Greif* [2011] 2 AC 229 at paras [143] – [159]; *AW* (*supra*) at para [56]; and (ii) providing inadequate reasoning.

Causation and loss

[43] The sheriff erred in law in relation to the burden of proof for causation. A pursuer bears the burden of proof for causation. That burden is retained, and must be discharged, even where negligence is proved: *Brown* v *Rolls Royce* [1960] 1 WLR 210 at 215 – 217. The burden of proving that the appellant's symptoms were caused by the pineal cyst rested upon and remained with her. To discharge that burden, the appellant required to lead evidence from an appropriately qualified expert witness i.e. a neurologist. Without such underpinning from a neurologist, the appellant's case could not succeed. The appellant failed to lead evidence from an appropriately qualified expert to prove a causative link between the presence of her pineal cysts and her symptoms. She had, therefore, failed to discharge the burden of proof which rested upon her. The only reasonable conclusion available to the sheriff was that the appellant had failed to discharge the burden of proof and so her case should have failed.

[44] In any event, the respondent had led evidence to prove that the pineal cyst was not the cause of the appellant's symptoms. Standing his conclusion on causation, the sheriff impliedly rejected the evidence of Professor Carson, Dr Connor and Mr Statham. To reject their evidence, cogent reasons should have been given from the sheriff. There were no reasons. As such, the sheriff erred in law in not providing sufficient reasoning for his finding in causation. That amounted to an error in law: *AW* (*supra*) at para [54].

[45] Insofar as the appellant maintains that she lost a high-profile career, the sheriff was correct to conclude that the appellant significantly overstated her professional success. There was no proper basis in the evidence to support a claim for lost earnings, or any future loss and the sheriff was correct to reject it. The appellant led no evidence about the nature and extent of any expenses which she did in fact incur and would not have been incurred but for the non-reporting of the cyst. Nor was there any evidence led about the nature and extent of any services which the appellant required which would not have been required but for the non-reporting of the pineal cyst.

Decision

Preamble

[46] The appellant represented herself at the appeal and presented her case in an intelligent and commendable way. She had also presented her own case at the diet of proof. She understandably invited us to have regard to the fact that she was a party litigant. We awarded her a degree of latitude with regard to lodging of documentation and presentation of the case in court. Insofar as our decision with regard to her appeal and the respondent's cross appeal is concerned, however, we must simply apply the law and proceed on the basis that "The legal principles about court actions fall to be applied to any person who decides to bring litigation, whether that person is represented or is a party litigant." *Chisholm* v *Grampian Health Board* 2022 CSOH 39.

Procedure

[47] During the course of an action, including during a diet of proof, a judge will be invited to make many decisions about the conduct of the case or how the case and evidence

are to be managed. The appellant contends that the sheriff made two wrong decisions: (i) refusing to admit her fourth inventory of productions at a stage in the proof, firstly, when her own evidence was concluded, and secondly, at a hearing on submissions; (ii) refusing to allow the sum sued for to be increased for a second time at a hearing on submissions. These decisions are discretionary in nature.

[48] The role of an appeal court when asked by a party to interfere with a discretionary decision of a first instance judge is set out by Lord Wheatley in *Forsyth* v *A F Stoddard* 1985 SLT 51 at 53;

> "And when this matter is brought before the appeal court the test is not primo loco whether that court considers it equitable to permit the action to proceed but is whether the judge in the court below in the exercise of his unfettered discretion has misdirected himself in law or otherwise transgressed the limits of discretion reposed in him so as to permit an appellate court to intervene and set aside his decision. It is only in such circumstances that the appeal court is entitled to intervene"

[49] We ask the question as to whether the sheriff erred in law in making either decision and answer that question in the negative. Neither request raised a matter of legal principle. Likewise, we answer in the negative any question of the sheriff transgressing the limit of his discretionary powers which were wide in the circumstances, particularly given the late stage the proof had reached when the motions were made. It does not matter how this court would have decided either matter. On both occasions the decisions made by the sheriff fall within the band of reasonable decisions open to him.

[50] The appellant's appeal in relation to procedural decisions of the sheriff is refused.

Breach of duty/negligence

[51] The respondent contends in its counter-appeal that the sheriff erred in making a finding that Dr Robb was negligent.

[52] In her pleadings the appellant offered to establish that Dr Robb was negligent as she acted as no ordinarily competent consultant radiologist would have, i.e. that she deviated from normal practice. As is well known, the legal test for establishing negligence on the part of a doctor in such a case is found in the case of *Hunter* v *Hanley* 1955 SC 200:-

> "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. If this is the test, then it matters nothing how far or how little he deviates from the ordinary practice. For the extent of the deviation is not the test. The deviation must be of a kind which satisfies the third of the requirements just stated."

[53] The use of the word "no" in the third requirement sets a high bar.

[54] Although the test is at no point set out in his judgment, the sheriff was mindful of it when making finding in fact [65]:

> "In failing to report the presence of a large pineal cyst on the MRI scan of 31 January 2013, Dr Robb fell below the standard expected of a neuro-radiologist of ordinary competence.", and, adding in his Note "[10] … She did not act in accordance with a practice accepted as proper by a responsible body of medical opinion."

[55] However, his reasoning for making these findings does not stand up to scrutiny. The reasoning is set out on page 47 of his judgment:

> "[13] Dr Keston thought the failure to report understandable but, asked to characterise it between a decision made by a body of opinion and a mistake, chose the latter without hesitation.
>
> [14] Contrary, therefore, to the view urged by Mr MacSporran, there is no opposing school of thought among the relevant group of responsible medical practitioners between which I am asked to choose."

[56] Two issues arise: firstly, proper evaluation and assessment of the evidence of the expert witnesses Professor Jackson and Dr Keston reveals that they did belong to opposing

schools of thought; secondly, in such a situation, the court does not simply choose between the evidence of the competing experts.

[57] Para [13] of the judgment quoted above (at [55]) concentrates entirely on one short answer given by Dr Keston to a question posed by the sheriff. Dr Keston did give the evidence attributed to him by the sheriff to the effect that Dr Robb had made a mistake. However that evidence must be put in its proper context. Dr Keston said so much more which was simply ignored in the judgment. Dr Keston adopted the contents of two reports he had prepared and which were lodged (6/4 and 6/5). At paragraph 4 of his opinion, which deals with breach of duty, he accepted that the radiology report for the imaging of 31 January 2013 did not include a description of the 17mm pineal cyst although this abnormality was evident on retrospective view. However he went on to explain that there is a well-established false negative rate for reporting of such abnormalities and an error of this type can be expected to occur in around 5% of cases. He went on to explain that the error rate is higher for unexpected findings or where the available clinical information does not indicate an abnormality in a certain anatomical area and for midline brain abnormalities which more closely resemble a normal anatomical structure or variant. He went on to opine on the possibility that the reporting radiologist misinterpreted the pineal cyst as an artifactual finding cause by pulsatile cerebrospinal fluid flow. He also had regard to the appellant's clinical presentation which was atypical for a lesion of the pineal gland which frequently exhibits a degree of cystic change. The 2013 scan was obtained in order to exclude vestibular nerve lesions. It was his opinion that the combination of all of these factors conferred a high false negative rate in detection and reporting of the pineal cyst and in all the circumstances did not constitute a breach of duty.

[58] He explained and expanded upon this: to paraphrase and summarise his oral evidence given on 30 June 2023 , although the general expected error rate in the reading of images is of 5%, images read, he gave cogent reasons as to why the error rate was greater in the circumstances faced by Dr Robb when reading the scan in January 2013 – Dr Robb had been given a list of the appellant's symptoms (headache, distorted vision and tinnitus) which would have directed her to look for an abnormality on the vestibular cochlear of the eighth cranial nerve. The request had actually been for a scan of the brain and internal auditory meatuas (IAM) and stated that the requesting neurologist was "looking for evidence of a structural cause for her headaches particularly within the brain stem". Accordingly, it was anticipated that the scan would look at the lower part of the brain. Abnormality was absent on the scan in these areas which would have been reassuring and would direct Dr Robb away from other areas. He commented, as had Dr Robb herself in evidence, upon the lack of clarity of the 2013 scan when compared to the one taken in 2015, and considered that the cyst could be interpreted as an artefact (an interference with the scanning process). He carried out an informal study and noted that 25% of the experienced neuroradiologists he canvassed would not have reported on the pineal cyst in similar circumstances to Dr Robb. He concluded that Dr Robb's omission was one which could reasonably have been made by an ordinarily competent neuroradiologist exercising ordinary skill and care. She made an understandable error of observation which many neuroradiologists exercising care would make.

[59] When it was put to Dr Keston that Professor Jackson's view was that no neuroradiologist exercising proper skill and care in the interpretation of this MRI scan would have failed to detect the pineal cyst and mentioned it, his answer was "I disagree with that."

[60] Full cognisance of Dr Keston's evidence would naturally lead to the conclusion that the respondent had presented expert evidence which opposed the view of Professor Jackson. The sheriff erred in concluding that the experts Professor Jackson and Dr Keston were not from opposing schools of thought.

[61] That error occurred due to a lack of evaluation and assessment of the expert evidence. The brevity of the sheriff's summary of their evidence in the judgment is surprising. Professor Jackson's evidence is summarised at paragraphs 34 – 41 and Dr Keston's at paragraphs 77 and 78. The discussion of whether there was negligence is found in six paragraphs of the judgment at pp 47-48.

[62] This was a complex case, involving 13 days of evidence and submissions, including the evidence of 8 medics of whom 6 were expert witnesses. The Lord Justice Clerk makes the obligations of the first instance judge in such a case clear in the case of *AW as legal representative of LW* v *Greater Glasgow Health Board* 2017 CSIH 58:

> "[53] In a case…which involves complex factual evidence and substantial amounts of expert evidence, the Lord Ordinary is obliged to evaluate the evidence led, both as to its individual components and as a totality, to determine its relevance to the fundamental issues in the case. Evaluation is essentially a matter of judgment – an evaluation of the evidence that has been led, with a view to drawing necessary inferences of fact and applying the relevant legal standard, whether as to negligence or causation.
>
> [58] ….Critical assessment of the reasoning underlying expert evidence, and of the premises on which it is based, is essential."

[63] The failure to evaluate and assess the expert evidence in this case leaves this court, in the same position, as was the court in *AW*, where it can look at that evidence and draw its own conclusions from it. Our position is resonant of the dicta of Lord Thankerton in *Thomas* v *Thomas*, 1947 SC (HL) 45, at 54:

> "(3) The appellate Court, either because the reasons given by the trial Judge are not satisfactory, or because it unmistakably so appears from the evidence, may be

> satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate Court."

[64] Turning then to para [14] of the sheriff's opinion quoted at [55] above he states that in circumstances where expert witnesses give opposing views the court would have to choose between experts. We disagree.

[65] This approach attracts the same criticism as was levelled at the first instance judge by Lord Scarman in the House of Lords in the case of *Maynard* v *West Midlands Regional Health Authority* 1984 1 WLR 634 at p 639 thus:

> "I have to say that a judge's 'preference' for one body of distinguished professional opinion to another also professionally distinguished is not sufficient to establish negligence in a practitioner whose actions have received the seal of approval of those whose opinions, truthfully expressed, honestly held, were not preferred. If this was the real reason for the judge's finding, he erred in law even though elsewhere in his judgment he stated the law correctly. For in the realm of diagnosis and treatment negligence is not established by preferring one respectable body of professional opinion to another. Failure to exercise the ordinary skill of a doctor (in the appropriate speciality, if he be a specialist) is necessary"

[66] The correct course when approaching the evidence of competing experts in such circumstances is to heavily scrutinise the evidence of the expert opining against negligence. Lord Scarman's reference to a "respectable body of professional opinion" is important in the context of the current case. The question to be asked in this case was whether Dr Keston's opinion was "respectable". Did it stand up to scrutiny? If that question was answered in the affirmative, then the appellant must fail in proving negligence as the third requirement of *Hunter* v *Hanley* is not satisfied. Put another way, only in circumstances where expert evidence opining lack of negligence does not stand up to scrutiny and cannot be said to be a respectable body of medical opinion can a pursuer seeking to establish negligence be successful. The law was developed in the case of *Bolitho* v *City and Hackney Health Authority* 1998 AC 232 where Lord Browne-Wilkinson said:-

> "…,In the *Bolam* case itself, McNair J. [1957] 1 W.L.R. 583, 587 stated that the defendant had to have acted in accordance with the practice accepted as proper by a '*responsible* body of medical men.' Later, at p. 588, he referred to 'a standard of practice recognised as proper by a competent *reasonable* body of opinion.' Again, in the passage which I have cited from *Maynard's* case [1984] 1 W.L.R. 634, 639, Lord Scarman refers to a 'respectable' body of professional opinion. The use of these adjectives—responsible, reasonable and respectable—all show that the court has to be satisfied that the exponents of the body of opinion relied upon can demonstrate that such opinion has a logical basis… if, in a rare case, it can be demonstrated that the professional opinion is not capable of withstanding logical analysis, the judge is entitled to hold that the body of opinion is not reasonable or responsible…It is only where a judge can be satisfied that the body of expert opinion cannot be logically supported at all that such opinion will not provide the benchmark by reference to which the defendant's conduct falls to be assessed."

[67] The real question for the court where there is competing expert evidence about negligence is whether the opinion of the respondent's expert is a reasonable or respectable one. The sheriff did not examine the evidence of Dr Keston through such a prism. We, therefore, do so.

[68] Looking at Dr Keston's evidence as a whole, he addressed all three requirements of the *Hunter* v *Hanley* test. He looked at the request from the neurologist which led to the scan taking place, he put himself in the place of a neuroradiologist in 2013 and told the court how a neuroradiologist would have approached the scan in light of the request. He gave clear and cogent reasons for why he considered that Dr Robb had followed normal practice and had not been negligent in failing to report the existence of the pineal cyst. He made an appropriate concession that although not all pineal cysts would be reported, ones of the size in this case would have been in 2013. He provided statistical evidence about false reporting in the reading of scans in general from medical literature, provided cogent reasons as to why the reporting error rate would be greater for an abnormality such as a pineal cyst found on the midline of the brain, and, gave evidence from his own experience that around 25% of

neuroradiologists considered to be exercising ordinary competence would have made the same omission as Dr Robb.

[69] It is of note that Professor Jackson was in no way critical of Dr Keston's opinion even though he disagreed with it. There is no suggestion at all in his evidence that Dr Keston's opinion is one which is unreasonably held. That is perhaps not surprising where Professor Jackson agreed that a high proportion of pineal cysts are missed by neuroradiologists when reading scans. He referred to them as "a common miss". It may be that the opinion of the appellant's expert did not meet the third requirement of *Hunter* v *Hanley.*

[70] At this point it is appropriate to comment on a point made by the appellant when asking us to repel the cross appeal. Her contention at proof and appeal was that no regard should be had to any of the expert evidence led by and for the respondent, including that of Dr Keston, as they were not qualified to give expert evidence. The benchmark case relating to the requirements of an expert witness is *Kennedy* v *Cordia Services* 2016 UKSC 6. The appellant stated in her Note of Argument that she was relying upon that case, without taking us to any section of it. She contends that the witnesses for the respondent were neither independent nor impartial. Specifically in relation to Dr Keston she suggests that he, like other experts, may have had some prior knowledge of her case and, therefore, have been influenced by the view of Dr Duncan, her treating neurologist. The only question on that theme which she put to Dr Keston related to the fact that he had worked with Mr Statham, another of the expert witnesses. It did not relate to Dr Duncan. There was no basis for the appellant making such a claim. Dr Keston was demonstrably independent and fair. His relevant experience cannot be questioned and there is no merit in the appellant's contention

otherwise. The appellant made similar submissions about the respondent's experts as a collective. These are without merit.

[71] Dr Keston's opinion was not criticised as being unreasonably held during the course of the proof. On the contrary we find it to be respectable, responsible, and logically held.

[72] Consequently, the court is not persuaded that "no" neuroradiologist of ordinary skill acting with ordinary care would have acted as Dr Robb did. The appellant has failed to establish the test laid down in *Hunter* v *Hanley*. Decree of Absolvitor must be pronounced.

[73] The main point raised by the respondent in the cross appeal, that the sheriff erred in making a finding of negligence, is upheld.

Counterfactual

[74] It is the respondent's contention that the sheriff further erred in deciding that, had the presence of the pineal cyst been reported to the appellant in 2013, she would have sought out and had surgery to remove it 2 years earlier.

[75] Our decision in relation to breach of duty and negligence brings the action to an end. Nonetheless, we will briefly discuss the point raised.

[76] The appellant predominantly gave evidence to the effect that she would have sought second opinions and ultimately surgery if she had been told of the presence of the cyst in 2013. She also gave some evidence that she would have followed the advice of those treating her, which would have been to monitor the cyst and, in the absence of related symptoms, would not have recommended surgery. In order to make Finding in Fact [74] that she would have pursued surgery the sheriff must have accepted the former part of her evidence and rejected the latter part. Against a background where her evidence was generally found to be unreliable (pages 44 to 47 of the judgment), some explanation with

regard to why her evidence on this point was accepted was required. The evidence from her records that she had previously travelled to Poland for a scan in 2012 does not go far enough to justify a finding that she would have pursued and progressed all the way to surgery in 2013 if aware of the cyst. *Smith* v *Barking, Havering and Brentwood Health Authority* 1994 5 Med LR 285 is properly referred to by the respondent as providing a cautionary note to a court when someone is giving evidence with the benefit of hindsight.

[77] Additionally, we are not persuaded that the court had evidence before it to justify a finding that the surgery to remove the pineal cyst would have been available to the appellant in 2013.

[78] Finding in Fact [74] is that the operation performed by Professor Schroeder in Germany in 2015 would have been available in 2013. However, Professor Schroeder did not give evidence. His decision to operate in 2015 seems to have been based to a large extent upon the substantially deteriorated symptoms the appellant described in 2015 as opposed to those in 2013. There is no evidential basis for finding that he would have operated on the appellant in 2013. The preponderance of evidence in the case was that neurosurgeons are cautious about such surgery. The sheriff correctly made a finding (Finding in Fact [66]) that in 2013 – 15 there were very limited circumstances in which such surgery would have been undertaken in the UK, and that the circumstances did not exist in the case of the appellant. The neurosurgeons who gave evidence could not speak about the criteria for surgery out with the UK at the relevant time.

[79] The court was not entitled to extrapolate a position from medical literature in order to justify a finding that the operation would have been available to the appellant in Europe in 2013. This was particularly well counselled against by Dr Connor in his evidence. Such evidence about medical literature can assist the court with regard to assessment of expert

evidence. It is not for the court to draw its own conclusions based on the literature alone: *Sienkiewicz* v *Greif* [2011] 2 AC 229.

[80] For the various reasons discussed, the sheriff was not entitled to decide that the appellant would have had surgery to remove the pineal cyst in 2013 had she been told about it. The respondent's cross appeal point in this regard is upheld.

Causation and loss

[81] Both parties raise an issue at appeal in relation to causation. We will briefly discuss the points raised.

[82] The appellant contends that the sheriff erred in not awarding damages for additional losses such as wage loss and in respect of other symptoms she suffered. The sheriff should have found a causal link between the negligent act and these losses.

[83] The respondent in its cross appeal contends that the sheriff erred in his approach to causation and should have found no causal link at all and made no award of damages.

[84] On page 53 para [43] of his judgment the sheriff's reasoning about causation and loss is stated:

> "It is a sound principle that where a person has, by breach of a duty of care, created a risk, and injury occurs within the area of that risk, the loss should be borne by him unless he shows that it had some other cause. In my view, Dr Robb's breach of duty of care created a risk to the health of the pursuer from the cyst remaining untreated. The symptoms that the pursuer suffered during the period of two years after the scan are injury within that area of the risk. No other cause has been shown."

[85] His reasoning seems to be that Dr Robb created a risk of injury due to negligence; he identified the period from misreporting of the scan until the appellant had the operation to remove the cyst as the period of risk of injury. He accepted that the appellant had

symptoms during that period. As the respondent had shown no other cause for the symptoms then they amount to injury for which the respondent must compensate the appellant.

[86] The effect of this finding is that the onus was on the respondent to prove that an injury had not occurred.

[87] In law, no such onus rested on the respondent. The burden of proving a loss flowing from a breach of duty rests with the pursuer: *Brown* v *Rolls Royce Ltd* [1960] WLR 210 per Lord Denning 215-217. It was for the appellant to prove that her symptoms were caused by the presence of the pineal cyst. It was not for the respondent to disprove it.

[88] The link between the negligent act, should it exist, symptoms and loss can clearly only be achieved if evidence about it is heard and accepted by the court. There is no strict requirement such as is found in the third requirement of *Hunter* v *Hanley* in relation to the issue of causation. Accordingly, if the court hears competing evidence on causation, it can prefer the evidence of one expert over the evidence of another.

[89] In this case the appellant spoke of symptoms which she attributed to the presence of the cyst. She is not medically qualified to establish the necessary link. The only other evidence she led came from her father who added little to the case at all and nothing in relation to causation; Professor Jackson speaking to the issue of negligence on the part of Dr Robb, and from Mr Peter Kirkpatrick, a consultant neurosurgeon, who gave evidence on the issue of surgery. He did speak of his knowledge and experience of pineal cysts. He offered an opinion that a minor head injury triggered the pineal cyst to become symptomatic. However, the sheriff declined to accept that opinion and was critical of other aspects of his evidence. Although Mr Kirkpatrick spoke about symptoms which he considered could arise from a pineal cyst, he was clear that as a neurosurgeon he would

defer to the opinion of a neurologist with regard to their cause. A neurosurgeon would not move to surgery without the support of a neurologist. He repeatedly described the symptoms of a pineal cyst as "nebulous". As a result, input from a neurologist was required. From the foregoing it is clear that the appropriate expert to speak to the issue of causation was a neurologist.

[90] This was clear from the appellant's own case. In her pleadings, when detailing what ought to have happened had the cyst been identified in 2013 it is stated "…a clinical review by a neurologist would have been requested to determine whether the cyst could be responsible for the Pursuer's symptoms." Despite this, the appellant did not lead evidence from a neurologist at all and, therefore, did not lead evidence from an expert who could properly opine that the cause of her symptoms was the pineal cyst. In the absence of such medical evidence the appellant simply could not prove any causal link between the existence of the pineal cyst and her symptoms.

[91] The respondent led evidence from the appellant's treating neurologist at the material time, Dr Callum Duncan, and, expert evidence from Dr Myles Connor. During his treatment of the appellant the former had expressed the view that he did not attribute her symptoms to the pineal cyst. The latter opined that the pineal cyst was not the cause of the appellant's symptoms. He attributed symptoms to migraine or functional neurological disorder. He gave evidence that any improvement in the appellant's symptoms following removal of the pineal cyst could be explained by a placebo effect. She continued to have some symptoms and developed others which bolstered his theory that she suffered from a functional neurological disorder. His evidence was uncontradicted by a neurologist led by the appellant.

[92] In deciding that "No other cause has been shown." the sheriff must have rejected expert evidence led by the respondent from Dr Connor, Professor Carson, consultant neuropsychiatrist and Mr Statham, consultant neurosurgeon. They all opined that the cyst was not the cause of the appellant's symptoms. Only in the case of Dr Connor does the sheriff state in terms that he was dissatisfied with his evidence in any way. He considered that Dr Connor was "wedded to the concept of functional neurological disorders in a manner that contrasts with other practitioners and closed to the basis on which the pursuer's surgery had taken place". This is, in fact, inaccurate: the respondent's other witnesses just mentioned, Mr Statham and Professor Carson also attributed symptoms to functional neurological disorder. In any event, the sheriff did not go so far as to state that he rejected the evidence of Dr Connor.

[93] We pause to comment on Dr Connor's evidence briefly. With reference to medical literature and his own experience and practice Dr Connor explained that in the past a patient such as the appellant who presented with various symptoms which, from a neurological perspective, would arise from different areas of the brain, would perhaps have been thought to have some psychological element to her diagnosis. Neurology is now recognising that in some cases the cortex of the patient's brain is reacting in some way to stimuli so as to produce symptoms. This is a functional neurological disorder. In giving this opinion Dr Connor was assisting the court with regard to an area out with judicial expertise. It was Dr Connor's opinion that a combination of migraine and functional neurological disorder may explain the appellant's symptoms. The characterisation that he was wedded to the latter explanation seems unwarranted and is not accompanied by any evaluation and assessment of the expert evidence by the sheriff.

[94] This apparent rejection of expert evidence should only have taken place after a detailed evaluation and critical assessment of the evidence (*AW supra*). In any event, rejection of the expert evidence led by the respondent regarding causation, followed by a finding that there was a causal link between the alleged negligence and symptoms, would only have been possible and relevant if the appellant had led expert evidence which could have been preferred.

[95] It follows that the appellant's appeal in relation to causation is refused. She failed to lead evidence to establish a causal link between a negligent act, had it existed, and any symptoms or loss.

[96] In relation to the additional losses the appellant mentions she did not lead any medical evidence to support her assertion that ongoing symptoms were linked to the pineal cyst in any way. She did not lead evidence from an appropriate expert regarding her employment and earning potential. The sheriff was entitled to consider her to be an unreliable witness and place little weight on her evidence about such matters.

[97] The respondent's counter appeal that the sheriff erred in his approach to causation is upheld. The onus of proof of causation rested with the appellant, not with the respondent. She failed to discharge that onus.

Disposal

[98] We refuse the appeal, allow the cross-appeal and recall the sheriff's interlocutors of 18 September 2023 and 13 March 2024. We delete findings in fact [65], [71] and [74] – [77] and findings in fact and in law [1] and [2]. In their place, we insert the following finding in fact and in law:

> "The pursuer not having suffered loss, injury and damage through the fault and negligence of a consultant neuroradiologist, for whose actings the defender was vicariously liable, decree of absolvitor is granted in favour of the defender."

[99] With regard to the issue of expenses, senior counsel for the respondent invited us to make a finding of no expenses due to or by either party in the event that the cross appeal was successful as the respondent would not intend to enforce any award of expenses if one was made. We will do so.