OUTER HOUSE, COURT OF SESSION

[2026] CSOH 89

A426/24

OPINION OF LORD HARROWER

In the cause

(FIRST) SUSAN MARION LEVER; (SECOND) LYNETTE LEWIS; (THIRD) BRIAN LEVER; (FOURTH) LENNOX FITCHETT; (FIFTH) MARCUS FITCHETT and (SIXTH) BRIAN LEVER

Pursuers

against

AYRSHIRE AND ARRAN HEALTH BOARD

Defender

Pursuers: Davie KC, Pilkington; Jones Whyte LLP
Defender: Bennett; NHS Central Legal Office

18 September 2026

The issue

[1] Roy Lever died on 26 November 2022, aged 76. The death certificate listed his cause of death as renal cancer. Between June 2019 and September 2022, he had been receiving care at Ayr hospital and Crosshouse hospital, for which the defender is responsible. Mr Lever's immediate relatives are his widow, children, grandchildren and brother. They are the pursuers in the present action. The pursuers say that, in July 2021, following an ultrasound scan of Mr Lever's kidneys and bladder, the defender's sonographer negligently failed to detect signs of a tumour. But for that failure, they say that Mr Lever would have been

diagnosed with cancer earlier than he was, that he would have received treatment and avoided some of his cancer symptoms, and that he would have lived for an additional 12 months, albeit that, as they accept, Mr Lever's cancer was incurable.

[2] In this action, the pursuers claim compensation under section 4(3)(b) of the Damages (Scotland) Act 2011 ("the 2011 Act") for their distress and anxiety endured in contemplation of Mr Lever's suffering, their grief and sorrow caused by his death, and their loss of his society and guidance. In addition, Mr Lever's widow makes a claim for loss of personal services which, in terms of section 6 of the 2011 Act, is to be understood as a claim under section 4(3)(a). Section 3 of the 2011 Act provides that claims under section 4(3) may only be made where:

> "a person ('A') dies in consequence of suffering personal injuries as a result of the act of omission of another person ('B') and the act or omission-
> (a) gives rise to liability to pay damages to A (or to A's executor), or
> (b) would have given rise to such liability but for A's death."

The action came before me for debate where the pursuers' averments are to be taken *pro veritate*. The sole question was one of how section 3 should be interpreted, and in particular whether Mr Lever could be said to have died "in consequence of" suffering personal injuries as a result of the sonographer's alleged negligence. I was informed that the researches of counsel revealed no authority on the matter.

Background

[3] Mr Lever's medical history prior to the ultrasound scan in July 2021 was largely admitted and can be briefly noted. Mr Lever had presented with symptoms of constipation and weight loss already in 2019. In June 2019, he received a CT colonography. No kidney abnormality was reported. In February 2020, he underwent a transurethral resection of the

prostate, following which, in May 2020, he was reviewed for haematuria, a secondary bleed which typically occurs after such an operation. At that stage, Mr Lever reported having abdominal discomfort, and a urine sample indicated urinary infection for which he was treated with antibiotics. He received an ultrasound examination of his urinary tract in November 2020. No abnormality was reported. Mr Lever underwent a further procedure in December 2020, during which it was noted that there was an obstruction related to scar tissue at the bladder neck. He was unable to pass urine when the catheter was removed in January 2021. It is not averred that the tumour was present at the time of the above scans, or that, if it were, it would have been large enough to disrupt the renal sinus fat or the outline of the renal cortex.

[4] On 2 July 2021, Mr Lever underwent an ultrasound scan of his kidneys and bladder. The pursuers allege breach of duty on the part of the sonographer who reported the ultrasound scan as normal, when it should have raised suspicion of a renal tumour. The pursuers offer to prove that, had the ultrasound scan been reported as they contend it should have been, this would have led to further investigations, including a CT scan. The deceased's tumour would have been diagnosed as at stage pT3 in July 2021. His case would likely have been discussed at an MDT in August 2021, and treatment would likely have commenced in September 2021. This would have included resection surgery (nephrectomy) with immunotherapy plus Tyrosine Kinase Inhibitor (TKI). Although the treatment would not have been curative, they say Mr Lever would have gained an additional 12 months' life expectancy. Instead, Mr Lever only underwent a CT scan on 26 September 2022, which revealed a large tumour in his right kidney. Multiple metastases were found in both lungs.

The law

[5] I have already quoted section 3 of the Damages (Scotland) Act 2011, which sets out the circumstances in which sums of damages will be payable in terms of sections 4 to 6 to dependent relatives. Before setting out the relevant parts of these sections in more detail, it is important to notice the structure of the 2011 Act as a whole. It deals first with the rights of the victim (section 1) and the extent to which these rights transmit to executors (section 2) before moving on to deal with the rights of relatives (sections 3 to 8) and the extent to which those rights transmit to a relative's executor (section 9).

[6] So far as the victim's rights are concerned, section 1(1) provides that section 1 applies to "an action for damages in respect of personal injuries suffered by a pursuer whose date of death is expected to be earlier than had the injuries not been suffered". "Personal injuries" is defined for the purposes of the 2011 Act as meaning any disease and any impairment of a person's mental or physical condition (section 14). An award of solatium may be made in respect of the pursuer's awareness of his reduced life expectancy (section 1(2)) but not otherwise (section 1(3)). In assessing the amount of any patrimonial loss after the date of decree, the court is to make an award in respect of the "lost period", that is, the period between the expected date of death and the date when death would have been expected had the injuries not been suffered (the "notional date of death": section 1(5) and 1(6)). The court should make a deduction of 25% from his income in respect of living expenses during the lost period, or such other deduction as may be necessary to avoid a manifestly and materially unfair result (section 1(6)(c) and 1(7)).

[7] Where the victim dies, whether or not as a result of personal injuries, section 2 provides for the transmission of such like rights to damages for solatium and patrimonial loss as may have been vested in the victim immediately before his death (section 2(1)).

However, the victim's right to patrimonial loss transmits to the executors only in respect of the period up until the date of his death (section 2(2)). Of course, if the victim had dependent relatives, then they will be able to claim for loss of support, to be discussed presently. Since death will have ended the victim's suffering, when assessing transmissible solatium, the court is to have regard only to the period ending immediately before his death (section 2(2)).

[8] Unlike the executor's rights under section 2, the dependent relatives' rights require the victim to have died "in consequence of" suffering personal injuries. Section 4(3) provides for two sums of damages, both of which are payable to immediate relatives (as defined by section 14), but only the second of which is payable to other relatives. The two sums of damages are:

> "(a) such sum as will compensate for any loss of support which as a result of the act or omission is sustained, or is likely to be sustained, by the relative after the date of A's death together with any reasonable expenses incurred by the relative in connection with A's funeral, and
>
> (b) such sum, if any, as the court thinks just by way of compensation for all or any of the following —
>
> (i) distress and anxiety endured by the relative in contemplation of the suffering of A before A's death,
>
> (ii) grief and sorrow of the relative caused by A's death,
>
> (iii) the loss of such non-patrimonial benefit as the relative might have been expected to derive from A's society and guidance if A had not died."

The immediate relative's claim for loss of support after the date of the victim's death mirrors the executor's claim for transmitted rights to recover patrimonial loss which applies only in respect of the period up until death. Moreover, section 7 provides that the total amount to be made available to support the immediate relatives should be 75% of the victim's net income, reflecting the 25% deduction that section 1 assumed the victim would have spent on himself when assessing his right to patrimonial loss for the lost period. Once again, the court may apply a different percentage if it is necessary to avoid a manifestly and material unfair result.

Defender's submissions

[9] Counsel for the defender submitted that the 2011 Act itself offered no guidance as to the interpretation of section 3. Nor, to the extent that it was legitimate to have regard to it at all, did the report of the Scottish Law Commission that gave rise to the 2011 Act (*Report on Damages for Wrongful Death* (Scot Law Com No 213) September 2008). However, having regard to the principles of statutory interpretation, it was unnecessary to look beyond the wording of the statute: *R* v *Secretary of State for the Environment Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349 per Lord Nicholls at 397 - 398; *R (on application of O (A Child))* v *Secretary of State for the Home Department* [2023] AC 255, per Lord Hodge at paragraphs 29 to 31; *Veale* v *Scottish Power UK Plc* 2026 SLT 1 at paragraphs 22 and 23). The meaning of section 3 was clear and unambiguous in its terms and did not produce absurdity. The words "in consequence of" were ordinary words that should be given their ordinary meaning. They meant "as a result of" or "because of". They indicated a direct cause and effect relationship between two events or situations. In the context of section 3, they indicated a direct causal relationship where the second event (the death) happened strictly because of the first (the injury). If the injury caused by the defender did not cause the death, the relatives had no right to claim under sections 4 to 6.

[10] The pursuers did not offer to prove that the deceased died in consequence of personal injury caused by the alleged negligence. They did not aver that but for the negligence the deceased would have survived. On the contrary, on their own averments the renal cancer was incurable. Therefore, the deceased died in consequence of renal cancer not

in consequence of any injury sustained by him as a result of the defender's act or omission. Any injury caused to the deceased by the delayed diagnosis was the additional pain and suffering incurred by the deceased in consequence of his awareness of his reduced life expectancy. This constitutes a claim for solatium, which had transmitted to the first pursuer as executrix, and which had been settled. Even if the pursuers were to prove all their factual averments, their case would necessarily fail (*Jamieson* v *Jamieson* 1952 SC (HL) 44 per Lord Normand at 50). Their case was therefore irrelevant in law and should be dismissed.

[11] Counsel mentioned one English case, decided under the relevant provisions of the Fatal Accidents Act 1976, for such assistance as it might provide: *Hague* v *Dalzell* [2016] EWHC 2753 (QB).

Pursuers' submissions

[12] Senior counsel for the pursuer drew attention to the dependent or parasitic nature of the relatives' right to claim damages. It only arises if the act or omission of which they complain gives rise to a liability to pay damages to the deceased (or his executor), or if it would have done but for his death. Focussing specifically on the second of these alternatives, she submitted that, but for Mr Lever's death, he would have had a claim in respect of his loss of life expectancy, as provided for by section 1 of the 2011 Act. Having provided the relatives with a claim for damages which is dependent on or derived from the victim's right to claim for a loss of life expectancy, it would be odd if section 3 as a whole had been intended to exclude such a claim by the relatives. Moreover, there is nothing to suggest that the heads of loss which section 4 provides for relatives would not be appropriate to include in an acceleration of death case, whether that be a claim for distress

and anxiety in contemplation of the victim's suffering before he died, grief and sorrow or loss of support.

[13] The defender's interpretation of section 3 would require the pursuers to prove that "but for" the omission of which they complain, death would not have occurred. But that did not reflect the wording of the statute which required only that the death be "in consequence of" suffering personal injuries as a result of the omission. Moreover, the words "but for" appeared in the limiting condition in section 3(b) but were not repeated elsewhere in the section. It was enough, to comply with the section, that the negligent omission made a material contribution to the death, specifically, to the death occurring when it did as opposed to some later date.

[14] Moreover, the defender's interpretation would not accord with the purpose of the legislation which includes specifically the liability to pay damages for loss of life expectancy (section 1) and for the relatives' distress and anxiety caused in contemplation of the deceased's suffering before he died (section 4(3)(b)(i)). The court ought to interpret section 3 in a way that reflected the purpose of the legislation as a whole (*Mykoliw* v *Botterill* 2010 SLT 1219; *Faculty of Advocates and Judicial Appointments Board for Scotland, Special Case* 2025 SLT 171).

Decision

[15] Death comes to us all at some point. Indeed, there is a sense in which every action in damages for a wrongful death is an action for a wrongful acceleration of death. In my opinion, section 3 of the 2011 Act is concerned not just with A's death, but with the specific death that occurred, including the fact that it occurred when it did. For A's death to be "in consequence of" suffering personal injuries as a result of an act or omission of B, it is not

necessary, therefore, that A's death would not have occurred but for the act or omission of B. It is enough that A died earlier than he would have done in consequence of suffering personal injuries as a result of the act or omission of B. In other words, it is enough that B's act or omission caused or at least materially contributed to A's death. That being the natural and ordinary meaning of section 3, as it seems to me, the pursuers' action must be allowed to go to proof. But the interpretation of section 3 which I prefer derives support also from a consideration of the context and structure of the statute as a whole.

[16] Turning first to section 4(3) of the 2011 Act, there is nothing in the nature of the heads of loss that relatives are permitted to include in their claim for damages that would necessarily be inconsistent with a case based on acceleration of death. I accept that section 4(3)(a) permits the immediate relatives to recover reasonable funeral expenses, which would otherwise simply be an administrative burden on the deceased's estate. However, there is no reason in principle why the defender should not be required to compensate for such an expense, albeit that the fact that some expenditure will have been required in any event may go towards reasonableness and therefore quantum. So far as the heads of loss under section 4(3)(b) are concerned, the court is given a broad discretion to make such award as it considers just. So, for example, the acceleration of death case may give rise to particular distress and anxiety endured in contemplation of A's suffering before he died (subparagraph (i)). The acceleration of death may have enhanced the relatives' grief and sorrow caused by his death (subparagraph (ii)), and it will very readily have increased their loss of his society and guidance (subparagraph (iii)).

[17] The relatives' right of action is of course dependent on the right of action of the deceased, or the right that he would have had but for his death. Although, therefore, the discussion focussed on what it meant to say that A died "in consequence of" suffering

personal injuries, section 3 in fact raises not one but two causal conditions. Not only must the death have been in consequence of A suffering personal injuries, but A's suffering must itself have been "as a result of" the act or omission of B, such that it gives rise to a liability to pay damages to A, or his executors, or would have done but for A's death. There can be no doubt that a delay in the diagnosis of a progressive disease such as cancer would in principle result in an impaired physical condition such as to satisfy the statutory definition of "personal injuries" (section 14). Nor was it disputed that section 1 would, in principle, have provided A with a right of action in damages for his loss of life expectancy. However, the defender's argument, if correct, would mean that A's eventual death in such a case would bring an end to any right of action against B, other than the executor's. It is unclear why, in drafting section 3 of the 2011 Act, the Scottish Parliament would have gone to the trouble of making A's putative right of action against B a condition of the relative's action in damages, while simultaneously depriving the relatives of any right to recover in such a situation. Such an absurd result is inherently unlikely to have been intended (*Mykoliw* v *Botterill , op cit,* paragraph 20).

[18] In reaching these conclusions, I have not derived any assistance from the English case of *Hague* v *Dalzell, op cit,* cited by counsel for the defender. That was a case under the Fatal Accidents Act 1976, which provides as follows:

> "1. **Right of action for wrongful act causing death**
>
> (1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured."

Mr Justice Lewis's judgment in that case proceeded upon the parties' agreement that the dependants' claim under the 1976 Act could only succeed if he found that the deceased's death would have been avoided by appropriate treatment (paragraph 27), and in the result, that aspect of their claim failed (paragraph 73). Not only therefore does the case deal with an entirely different statute, having proceeded upon a concession, it is not an authority in support of any particular interpretation of that statute. Indeed, it would appear that there are acceleration of death cases in which the English courts have allowed the dependants' claim under the 1976 Act (*Brown* v *Hamid* [2013] EWHC 4067). There are also cases where the dependants' claim failed, but which can only be explained on the basis that it would have succeeded had death been proved to have been accelerated by the defendants' negligence to any material extent (*Davies* v *Countess of Chester Hospital* [2014] EWHC 4294).

Disposal

[19] The interlocutor fixing the debate allowed for discussion of the defender's first and second pleas-in-law. In the event, the second plea-in-law was not insisted upon. I shall therefore repel the defender's first plea-in-law, and fix a case management hearing for a date to be arranged with the Keeper. I shall reserve meantime any question of expenses arising from the debate.