
David Stephenson

Year Of Call: 1991
Silk: 2009



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Practice Areas

Clinical Liability
Insurance Law
Medical Law

Court and Tribunal Experience

David has an exclusively civil practice predominantly within the Court of Session in both the Inner and Outer Houses. He appears infrequently in the Sheriff Court, mainly in connection with medical Fatal Accident Inquiries or insurance policy disputes. He appeared as junior counsel in the former House of Lords.

Qualifications/Education

Education

1982: Diploma in Legal Practice, University of Aberdeen

1981: LLB (Hons), University of Aberdeen

1971 - 1977: Royal High School of Edinburgh

Practice Profile

David has acted for NHS bodies and medical defence unions for more than twenty-five years and has extensive experience of clinical malpractice actions in general and high value obstetric actions in particular. He is recommended by both The Legal 500 and Chambers & Partners in connection with medical negligence. David has appeared in medical Fatal Accident Inquiries. He has 'prosecuted' in an NHS disciplinary case, has chaired an NHS Classification Committee in respect of a disciplinary matter and an Annex C professional competency panel. He has acted as Chair of a panel appointed by the Scottish Ministers to consider and determine disputes regarding general medical services contracts. He has acted as curator ad litem for a patient said to be in a Persistent Vegetative State and regularly advises on end of life decisions and consent to treatment. He has acted for Health Boards in the recovery of sums claimed fraudulently from the NHS. He has advised in connection with pharmaceutical services regulation, disputes arising from NHS service provision including arrangements for the out-of-hours service, contractual arrangements between Health Boards and GP primary care providers, fertility treatment, patient record confidentiality and doctor/patient confidentiality. He has given advice on proposed legislation by the Scottish Government impacting on medico-legal matters. He is involved in the trans-vaginal "mesh" cases.

David also acts on a regular basis for insurance companies. He advises on issues arising from the existence and scope of policy cover. He acts for insurers in respect of the recovery of sums expended in indemnifying against insured risks including property and other damage. Cases have involved the consequences of under declaration of business turnover at annual renewal, double insurance, the exclusion of public liability cover for biological hazard exclusion clauses, cover for hazardous waste disposal, structural damage to adjacent buildings caused by construction works, fire damage caused by hot works, the extent of cover for asbestos-



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Memberships/Appointments

March 2017:

Spoke at Royal College of Physicians and Surgeons Glasgow, Undergraduate Conference.

September 2016:

Spoke at British Orthopaedic Association Congress in Belfast of legal aspects of virtual fracture clinics.

September 2016:

Appointed Convenor of Faculty of Advocates Equality & Diversity Committee.

June 2016:

Spoke at Ampersand Medical Negligence Conference on "No-blame" scheme proposals.

March 2016:

Member of Faculty of Advocates Sub-Committee considering Scottish Government's "No-blame" compensation scheme for medical injuries.

October 2015:

Chaired morning session of MLM Edinburgh medical negligence conference

June 2015:

Gave evidence on behalf of Faculty of Advocates to Justice Committee of Scottish Parliament on the Apologies (Scotland) Bill

November 2014:

Appointed by the Scottish Ministers as Chair of a Panel to consider and determine disputes regarding general medical services contracts in terms of Part 7 of Schedule 5 to the National Health Service (General Medical Services Contracts) (Scotland) Regulations 2004/115, and disputes regarding certain other primary medical services agreements in terms of Part 7 of Schedule 1 to The National Health Service (Primary Medical Services Section 17C Agreements) (Scotland) Regulations 2004/116

related disease, material non-disclosure, fraudulent devices, and alleged arson by the insured.

Chambers & Partners, 2013/14, "He often acts in complex and high-value claims, and receives regular instructions from the NHS Scotland Central Legal Office and the Medical & Dental Defence Union of Scotland. Expertise: "He is well known as a robust litigator." "He is very clued up on complex medical issues and tricky causation."

Chambers & Partners 2014/15. Expertise: "He is an incredibly accomplished performer in court." "He is one of the senior counsel at the Scottish Bar with the most experience of medical negligence work." Chambers & Partners 2016/17. "A formidable opponent on the medical negligence defence side, who frequently receives instructions from a range of health boards."

Legal 500 2016/17. "He provides excellent written advice on unusual legal/medical queries."



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2014:

Member of Faculty of Advocates Sub-Committee considering Assisted Suicide (Scotland) Bill, subsequently giving evidence for Faculty on the Bill to the Scottish Parliament Justice Committee, and Sports and Health Committee.

2014: Member of Faculty of Advocates Equality and Diversity Committee.

June 2014:

Co-Chaired Ampersand's Summer Medical Negligence Conference March 2014: Co-chaired and spoke at joint Ampersand and Mason Institute Symposium, "The Assisted Suicide Bill: Does Scotland Need to legislate?"

2013:

Invited Member of the University of Edinburgh School of Law, Mason Institute, an interdisciplinary organisation including lawyers, medical scientists, medical practitioners, social scientists, engineers and artists, and focussing on ethical, legal, social and cultural implications of advances in medicine and life sciences.

October 2013:

Chaired the Medico-Legal Management Medical Negligence Conference at the Royal College of Surgeons, Edinburgh.

2012:

Member of the Faculty of Advocates Sub-Committee which considered Scottish Government proposals for the introduction of a no-fault compensation scheme for injuries arising from medical treatment.

2012:

Chair of the Faculty Sub-Committee which considered and reported on the proposed Apologies (Scotland) Bill. Subsequently gave evidence to the Scottish Parliament's Justice Committee during their consideration of the Bill.

Commercial Law

T&G Grampian Ltd v Allianz Insurance Plc, 11 September 2017, Commercial Court, Aberdeen Sheriff Court;

An action arising from a fire at the pursuer's premises. After Proof, Sheriff Summers held that the defenders were not obliged to indemnify the pursuers. The account given of the fire to the insurers by the pursuer's director had been deliberately untruthful. A fraudulent device having been used to seek a benefit, the policy was void.

Higherdelta Ltd v Covea Insurance Plc, [2017] CSOH 84; [2017] G.W.D. 21-349;

After Proof the insurers were found liable to indemnify owners of commercial premises in respect of a fire at their restaurant premises. No factor relied upon by the insurers to avoid the policy amounted to a material failure to disclose, or a material misrepresentation.

McLean v Greater Glasgow Health Board [2016] CSOH 68;

reclaiming motion abandoned in course of hearing in March 2017. Approach by Auditor to challenge of counsel's fees in party/party account. <http://www.scotcourts.gov.uk/search-judgments/judgment?id=13d714a7-8980-69d2-b500-ff000d74aa7>

Turnbull v MNT Transport (2006) Ltd, AXA Insurance UK Plc & Chaucer Syndicates Ltd 2011 SLT 650

Cited by MacGillivray On Insurance Law. Double insurance dispute between defenders and two potential insurers
<http://www.scotcourts.gov.uk/search-judgments/judgment?id=906586a6-8980-69d2-b500-ff000d74aa7>

Administrative Law (including judicial review)

S Petitioner [Lothian Health Board] CSIH, 22 January 2013

Attempt to recovery counselling records for use in child protection proceedings

Greater Glasgow Health Board v Martin CSOH, 23 May 2013

Recovery from an optician of sums fraudulently claimed from the



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To 2009:

Reporter to the Scottish Legal Aid Board

1982-1990:

Solicitor in private practice, latterly a partner in a Glasgow city centre firm acting principally for insurers.

Publications/Articles

Co-author with Paul J Jenkins and Lech A Rymaszewski FRCS(Orth) Consultant Orthopaedic Surgeons, Legal Aspects of Virtual Fracture Clinics, Journal of Trauma and Orthopaedics, 2016

The Scottish Statutory Duty of Candour, [2016] EdinLR Vol 20 pp 224-229

September 2015: Letter, British Medical Journal, The Assisted Dying Bill Is Not A UK Bill, BMJ 2015;351:h4768

Westlaw Insight article, Child Birth, 2015

Co-author Westlaw Insight article, Abortion, 2015.

NHS, appeal subsequently refused

Dr Brewster & Ors v Tayside Prim Care NHS Trs & Ors
Judicial review re pharmaceutical regulation, 10 May 2001 Lord Carloway

<https://www.scotcourts.gov.uk/search-judgments/judgment?id=3d2687a6-8980-69d2-b500-ff0000d74aa7>

Media & Defamation

Sarwar v News Group 1999 SLT (OH) 327

Action of defamation brought by Member of Parliament against publishers of News of the world newspaper.

Medical/Clinical Negligence Law

Brabender v Fife Health Board [2016] CSOH 168, 6 December 2016; [2016] G.W.D. 39-701

Delayed diagnosis of bilateral eye tumours in a baby, resulting in the removal of both eyes.

<https://www.scotcourts.gov.uk/search-judgments/judgment?id=731225a7-8980-69d2-b500-ff0000d74aa7>

JM as legal representative of RM v Highland Health Board [2014] CSOH 9, 23 January 2014, Rep. B. 2014 117(April) 7-8; [2016] CSlH 25, 2016 SC 647, 2016 GWD 12-241 [IH];

Leave to appeal to the Supreme Court was refused by the Inner House on 22 June 2016. An application for permission to appeal was refused by Supreme Court 20 March 2017. Cerebral palsy claim arising from alleged delay in delivery of baby.

<https://www.scotcourts.gov.uk/search-judgments/judgment?id=588d8aa6-8980-69d2-b500-ff0000d74aa7>

Donald v Ayrshire & Arran Health Board & Ors [2013] CSOH 23, 2013 GWD 7-166, Rep B 2013, 112 (Jun), 7-8, 2013 SLT (News) 243

Alleged negligence of vascular surgeon in connection with subsequent death due to pulmonary embolism). Commented on in Rep. B. 2013 112(Jun)7-8

<https://www.scotcourts.gov.uk/search-judgments/judgment?id=80a68aa6-8980-69d2-b500-ff0000d74aa7>



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Clinical Negligence,
Chambers & Partners 2014-15

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Holdich v Lothian Health Board 2014 SLT 495

Breach of contract; Causes of action; Damage to property; Duty of care; Health boards; Mental distress; Pleadings; Relevance; Scotland; Semen samples. Alleged damage to cryogenically stored sperm following upon refrigerator failure. Gametes as property. Remedies in delict and/or contract? The case has been extensively commented on and is discussed in James Lee, 'Yearworth v North Bristol NHS Trust: Instrumentalism and Fictions in Property Law', in E Waring, S Douglas and R Hickey (eds), *Landmark Cases in Property Law* (Oxford, Hart Publishing, forthcoming 2014 and in Junor, 'Lossof Opportunity of Having Family: Holdich v Lothian Health Board' SLG 2014 82(2) 44-46. It was referred to In Re Warren [2014] 3MLR 1310.

<https://www.scotcourts.gov.uk/search-judgments/judgment?id=483186a6-8980-69d2-b500-ff0000d74aa7>

Conquer v Lothian Health Board [2013] CSIH 55, 4 June 2013

Alleged delayed diagnosis and treatment of a soft tissue injury of the upper limb

<https://www.scotcourts.gov.uk/search-judgments/judgment?id=b65da4a6-8980-69d2-b500-ff0000d74aa7>

Dow v Tayside University Hospitals NHS Trust 2006 SLT [Sh Ct] 141; 2006 SCLR 865; 2006 GWD 30-653

Appeal to Inner House abandoned during week before due to commence. Failure to abort second twin not discovered until too late for lawful termination resulting in live birth at term. Cited in Jones, *Medical Negligence*, 4th edition at 2-015, 2-067, 2-004; Grubb, *Principles of Medical Law*, 3rd edition at 3.09, 3.13, 3.22; McBryde, *The Law of Contract in Scotland*, 3rd edition at 2-04, 5-02, 9-23

<http://www.scotcourts.gov.uk/search-judgments/judgment?id=73cd86a6-8980-69d2-b500-ff0000d74aa7>

D's Parent and Guardian v Argyll & Clyde Acute Hospitals NHS Trs 2011 SLT 1137, 2012 S.C.L.R. 124, 2011 G.W.D. 20-466

A cerebral palsy case, the first Scottish case to address the question of periodic payments, commented on in Smyth v JDS, Court of Protection No.10334473, 12 January 2012 and referred to by the Privy Council in Simon v Helmot [2012] UKPC 5, [2012] Med. L.R. 394, (2012) 126 B.M.L.R. 73

<http://www.scotcourts.gov.uk/opinions/2011CSOH99.pdf>



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Personal Injury Law

Holdich v Lothian Health Board 2014 SLT 495

Breach of contract; Causes of action; Damage to property; Duty of care; Health boards; Mental distress; Pleadings; Relevance; Scotland; Semen samples. Alleged damage to cryogenically stored sperm following upon refrigerator failure. Gametes as property. Remedies in delict and/or contract? The case has been extensively commented on and is discussed in James Lee, 'Yearworth v North Bristol NHS Trust: Instrumentalism and Fictions in Property Law', in E Waring, S Douglas and R Hickey (eds), *Landmark Cases in Property Law* (Oxford, Hart Publishing) and in Junor, 'Loss of Opportunity of Having Family: Holdich v Lothian Health Board' SLG 2014 82(2) 44-46. It was referred to in *Re Warren* [2014] 3MLR 1310.

<https://www.scotcourts.gov.uk/search-judgments/judgment?id=483186a6-8980-69d2-b500-ff0000d74aa7>

Kirkham v Link Housing Group Ltd, [2012] CSIH 58, 2012 Hous. L.R. 87, 2012 G.W.D. 24-500

P.I. case involving issues as to extent of Housing Association's contractual obligations under statutory tenancy <https://www.scotcourts.gov.uk/search-judgments/judgment?id=cf3b86a6-8980-69d2-b500-ff0000d74aa7> Fletcher v Lunan [2008] CSOH 55, 20 March 2008, Lord Carloway. 2008 Rep LR 119 Interim award of damages in a quadriplegia case

<https://www.scotcourts.gov.uk/search-judgments/judgment?id=caa58aa6-8980-69d2-b500-ff0000d74aa7>

Property Law And Conveyancing

Kirkham v Link Housing Group Ltd, [2012] CSIH 58, 2012 Hous. L.R. 87, 2012 G.W.D. 24-500

P.I. case involving issues as to extent of Housing Association's contractual obligations under statutory tenancy

<https://www.scotcourts.gov.uk/search-judgments/judgment?id=cf3b86a6-8980-69d2-b500-ff0000d74aa7>