

ARTICLES

Relatives' claims on death

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In this article the author discusses the changes made by the Family Law (Scotland) Act 2006 to those relatives qualifying for damages under s 1(4) of the Damages (Scotland) Act 1976.

Introduction

Recent amendments to the Damages (Scotland) Act 1976 extend, and in some cases, restrict, the categories of relatives who are entitled to a claim under s 1(4) of the Act. These changes follow upon the Scottish Law Commission's *Report on Title to Sue for Non-Patrimonial Loss* (no 187).

Section 1(4) provides for claims for the deceased's immediate family for distress and anxiety endured by them in contemplation of the deceased's suffering before his death, for grief and sorrow caused by the deceased's death, and for loss of the deceased's society and guidance. The definition of immediate family is to be found in s 10(2) of the 1976 Act, which in turn refers to categories of persons in terms of Sch 1 of the Act.

Prior to amendment, an immediate relative was any person who immediately before the deceased's death was the spouse of the deceased, a person not being the spouse of the deceased who cohabited with the deceased immediately before his death, any person who was a parent or child of the deceased and any person who was accepted by the deceased as a child of his family.

Changes to those qualifying for damages under s 1(4)

Extension of definition of immediate family

Section 35(5)(b) of the Family Law (Scotland) Act 2006 extends the categories of relatives who qualify for claims under s 1(4). The relevant provisions are to be applied to claims for relatives arising out of a death which occurred on or after 4 May 2006; see reg 8 of The Family Law (Scotland) Act 2006 (Commencement, Transitional Provisions and Savings) Order 2006 (SSI 212/2006).

Immediate family is now to include a brother or sister. The absence of brothers and sisters as qualifying for non patrimonial loss was the subject of judicial criticism in *Quinn v Reid*, 1981 SLT (Notes) 117; see also comment in *Inner House Monteith v Cape Insulation*, 1998 SC 903, at p 908; 1999 SLT 116, at p 120, and Maguire,

The Damages Scotland Act 1993, 1993 SLT (News) 245, at p 248.

The issue of siblings was also the catalyst which caused the then Justice Minister, Jim Wallace, to refer the issue of s 1(4) claims to the Scottish Law Commission on 22 March 2001 after he received a letter from an aggrieved sibling. The Commission in its report found that the vast majority of consultees took the view that such claims should be competent. A close bond may in fact exist between siblings. There are circumstances where one can envisage a particular loss for a sibling, such as where they are living together in old age or where the siblings are twins.

There is also provision in the section for a *de facto* sibling where a person was brought up in the same household as the deceased and was accepted as a child of the family in which the deceased was a child (s 35(5)(b)(ii) of the Act).

The next category of cases is grandparents or grandchildren of the deceased. Again the Law Commission found that the vast majority of consultees took the view that they should be included and that it is common for a strong and affective relationship to arise between grandparents and grandchildren.

Section 35 as recommended by the Commission also takes the opportunity of curing the apparent anomaly arising in para 1(c) of Sch 1 of the 1976 Act. Paragraph 1(b) provided for immediate relatives to include any person who was a parent or child of the deceased. Paragraph 1(c) additionally allowed inclusion of a person accepted by the deceased as a child of his family. This would mean that someone who was accepted as a child of the family of a deceased could claim for damages under s 1(4) in respect of the death of that deceased. However, surprisingly, para 1(c) did not allow the converse, that is a claim by a person who accepted the deceased as a child of the family (*Moodie* (1993) 38 JLS 212, at p 213)). Such a person now falls within the category of immediate relatives (s 35(5)(b) of the 2006 Act).

The second set of amendments extending the category of relatives is to be found in Sch 2 of the 2006 Act.

Paragraph 2 of the schedule provides that a civil partner falls within the definition of immediate family in an equivalent way to a spouse, whether that be a person who was a civil partner or was in a relationship which had the characteristics of a relationship between civil

partners. The inclusion of civil partners in the definition of immediate relatives is long overdue and reflective of the status given to such relationships especially in terms of the Civil Partnership Act 2004. An attempt had been previously made to argue that civil partners in any event should be included as immediate relatives, having regard to the Human Rights Act 1998 (*Telfer v Kellock*, 2004 SLT 1290). However the case did not turn on the provisions of the 1998 Act because it was agreed that the Act was not retrospective and therefore did not cover the case. The argument, however, that where there is ambiguity the interpretation of a statutory provision should be in accordance with the Convention was rejected on the basis that Sch 1 of the 1976 Act was not ambiguous: the language plainly denoted a biological heterosexual definition.

Exclusions from definition of immediate family

The s 35 amendments also deal with the categories of relatives who are excluded from the definition of immediate family.

In terms of s 35(3) relationships by affinity to a deceased are entirely excluded for the purposes of s 1(4) claims. This in fact fulfils the original intention of the Scottish Law Commission giving rise to the 1976 Act which indicated that relationships by affinity were not to be included for the purposes of title to sue for loss of society (see Appendix 11, *Report on the Law Relating to Damages for Injuries Causing Death*, Scottish Law Commission, no 31, p 43). Despite this indication the subsequent 1976 Act did not exclude such claims. This is because of the terms of para 2(a) of Sch 1 of the 1976 Act, which stated that any relationship by affinity for the purposes of Sch 1 shall be treated as a relationship by consanguinity (see Maguire, *The Damages (Scotland) Act 1993* (supra) at p 248). This was confirmed in the case of *McAllister v Imperial Chemical Industries Plc*, 1997 SLT 351, where a daughter in law was held to qualify for s 1(4). This interpretation received more authoritative approval from the Inner House in *Monteith v Cape Insulation*, 1998 SC 903; 1999 SLT 116, where a mother in law was held to qualify. The foregoing gave rise to the irony that the grandparents, grandchildren, brother and sister were excluded but a son in law, daughter in law, mother in law or father in law were included. From experience, although relationships by affinity can be close, surprise was often exhibited and at times embarrassment, even from those who were entitled, when families were advised of their rights.

Section 35(3) also makes clear that exclusion for affinity extends to step relationships, whether that be as step child, step parent, step brother or step sister of the deceased or any descendent of any step relatives (see para 2(a) of Sch 1 of the 1976 Act which provides for a step child of any person to be treated as their child).

However, there are possible exceptions to the foregoing. Firstly, the definition of siblings, as we have seen, includes someone who is not a brother or sister of the deceased but who was brought up in the same household as the deceased and was accepted as a child of the family in which the deceased was a child. That would quite clearly potentially cover a step brother or step sister. Secondly, provision is made for a person who was not a parent or child of a deceased but was accepted as such. Again that could include a step parent or step child. It is noticeable that this second definition relates to acceptance and is not tied to living in the same household.

Implications for patrimonial loss claims

It should perhaps not be forgotten that there is impliedly an extension of relatives who are entitled to claim for patrimonial loss, and not just s 1(4). This is because in extending the definition of "immediate relative" the definition of "relative" is thereby extended, and it is this latter definition which gives rise to entitlement to patrimonial loss.

It should also be noted that the exclusion of relatives for the purposes of s 1(4) does not exclude them as relatives for the purposes of patrimonial loss. In other words, persons related to the deceased by affinity might also claim for loss of support and loss of services (s 1(3) of the 1976 Act and ss 8, 13 and 9(2) of the Administration of Justice Act 1982).

Value of claims

Having regard to the changes, the question inevitably arises as to what values might be awarded to these extended categories for s 1(4) claims.

The interpretation of and values for immediate relatives prior to these changes have been the subject of much comment and development. There was the Scottish Law Commission's *Report on the Law Relating to Damages for Injuries Causing Death*, (supra) which was implemented by the 1976 Act; judicial interpretation thereafter, at times contradictory (*Dingwall v Walter Alexander & Sons (Midland) Ltd*, 1982 SC (HL) 179; 1981 SLT 313, as against *Donald v Strathclyde Passenger Transport Executive*, 1986

SLT 625); Lord Kingarth's careful analysis of the Scottish Law Commission's Report *The Effect of Death on Damages* (no 134) and s 1(4) in *McManus's Exrs v Babcock Energy Ltd*, 1999 SC 569; 2000 SLT 655; thereafter jury awards highlighting a disparity between those awards and judicial awards; further consideration of values in *Shaher v British Aerospace Flying College Ltd*, 2003 SC 540; 2003 SLT 79 (see also *Changing Values: Bereavement Awards in the post-Shaher World* by AM Hajducki, QC, at 2003 SLT (News) 189); and latterly *McLean v William Denny & Bros Ltd*, 2004 SC 656; 2004 SLT 1099 as well as *Murray's Exrs v Greenock Dockyard Co Ltd*, 2004 SLT 1104.

What might be said after *McLean* is that with some categories of relatives there is less of a disparity between judicial and jury awards such as spouses. Following this and more recent authorities there might just be discernible a hierarchy of values. The spouse is certainly at the top of that hierarchy. Then there may be younger children losing a parent and/or a parent losing a younger child (see *Shaher* and *Warnock v Clark Contracts*, Outer House, Lord Wheatley, 18 November 2004, unreported) and an equivalence between an adult child and an elderly parent (see *Cruickshank v Fairfield Rowan Ltd*, 2005 SLT 462, but see also *Gillies v Lynch*, Lady Clark, 24 March 2006, which is under appeal).

With the new amendments one can see civil partners being equivalent to a spouse. It is more difficult to determine where a grandparent or grandchild will fit. In today's society relationships between a grandchild and grandparent can be extremely close, often arising out of care being taken over in the absence of the parents at work. One can see how that might be equivalent to a child losing a parent or a parent losing a child. It cannot be presumed that a brother and sister relationship would fall into a category lower down the hierarchy. What for example would be the position regarding a twin and how would that differ from siblings who are close in age and have continued to be close emotionally?

Parties may also look in more detail at the evidence of relationships given the greater potential for emotional variance, on the face of it, in some of these extended categories, for example brothers and sisters. Furthermore, just because the court indicated that it would be invidious to delve into s 1(4) circumstances of spouses that might not be the case for more remote categories (see *Murray's Exrs*, at p 1106).

On the practical side pursuers' agents will require to explore more extensively the family network to ascertain possible s 1(4) claims. There may be a large number of individual instructions to obtain and instances will be much longer. Where there are no instructions intimation to a relative will require to be given in terms of Rule of Court 43.14. It cannot be presumed, as with a relative who does not qualify for loss of support or loss of services, that the claim will be less than £200.

There might be some scope for defenders in cases of diminished life expectancy, and indeed an impetus, to seek to limit the cumulative effect of s 1(4) by seeking to settle the injured person's claim as quickly as possible to extinguish any rights of relatives in terms of s 1(2) of the 1976 Act. In respect of mesothelioma cases that possibility is now being foreclosed by the Rights of Relatives (Damages) (Mesothelioma) (Scotland) Bill, which disappplies s 1(2) for such cases. The Scottish Executive have announced that it will apply to cases which have not settled or been resolved by 20 December 2006 (Scottish Parliament Justice 1 Committee, Minutes of Proceedings 13/12/06, col 4164).

It is this last measure which has recently caused the Scottish Ministers to ask the Commission to review damages recovered in respect of deaths caused by personal injury and damages recoverable by relatives and the injured person. One of the questions will obviously be whether the Rights of Relatives Bill should be extended to cases of diminished life expectancy other than mesothelioma. However, the Commission's remit is much wider. The Commission would be very unlikely to overturn its previous report on s 1(4) and indeed politicians are unlikely to agree to go back on the changes in the Family (Scotland) Act 2006 or the Rights of Relatives Bill.

Further implications

There are, however, other issues in fatal damages which may require examination. For example there is no case authority in Scotland on lost years in terms of s 9 of the 1976 Act (see *Farrelly v Yarrow Shipbuilders Ltd*, 1994 SLT 1349; 1994 SCLR 407, where s 9 was not addressed). English authority on the point can be found in *Harris v Empress Motors Ltd* [1984] 1 WLR 212; [1983] All ER 561. Many practitioners on both pursuers' and defenders' sides would like to see this clarified. It may also bear comparison with loss of support.

Loss of support itself may also be an issue. Lord Glennie in *Weir v The Robertson Group*

(Construction) Ltd, Outer House, Lord Glennie, 11 July 2006 (2006 GWD 25-575) questioned the correctness of the line of authority on the method of calculating loss of support and in particular in the Inner House case of *Brown v Ferguson*, 1990 SLT 274; 1988 SCLR 577. The

Law Commission hope to issue a discussion paper in the summer of 2007.

NEWS

General

Evaluation of High Court reforms

A report has been published setting out an evaluation of the reforms to the High Court that were introduced by the Criminal Procedure (Amendment) (Scotland) Act 2004.

The evaluation, commissioned by the Scottish Executive and undertaken by Aberdeen University, covers the year from April 2005, when the reforms were introduced.

The main changes identified between the pre-reform and post reform samples include: a 90 per cent fall in trial adjournments, from 475 to 46; a 92 per cent fall in the number of Crown witnesses inconvenienced by adjournments of trial, down from 16,795 to 1,295; prosecutors being better able to identify and cite only those witnesses vital to a case, thanks to increased agreement of evidence in advance of trial and earlier case preparation; a substantial reduction in the number of cases requiring two or more trial sittings or dates, down from 279 to 32 cases or from 33 per cent to 4.5 per cent, meaning that far fewer victims and witnesses have to make repeated attendances at court; and a substantial reduction in the number of cases set down for trial, from 94 per cent to 33 per cent, due to the introduction of mandatory preliminary hearings to discuss how prepared the prosecution and defence are for trial and what evidence can be agreed in advance. Overall, it is said that the reforms, taken together with legal aid reforms and sentence discounting provisions, have contributed to a trebling in accelerated pre-trial guilty pleas, from 10 per cent in the pre-reform sample to 31 per cent in the post reform sample.

The full report, entitled *An Evaluation of the High Court Reforms Arising from the Criminal Procedure (Amendment) (Scotland) Act 2004*, can be viewed at <http://www.scotland.gov.uk/Publications/2007/02/19111137/21>.

Consultation on draft single survey regulations

Communities Scotland have launched a consultation on draft regulations requiring houses for sale to be marketed with both a single survey and a property sale questionnaire before an offer can be made: the Housing (Scotland) Act 2006 (Prescribed Documents) Regulations 2007 and the Housing (Scotland) Act 2006 (Amount of Penalty Charge) Regulations 2007. The draft regulations, drawn up under Pt 3 of the Housing (Scotland) Act 2006, are set out in a consultation paper entitled *The Single Survey: Fairer for Everyone*, which can be viewed at <http://www.communitiesscotland.gov.uk/stellent/groups/public/documents/webpages/cs.012537.hcsp>. Responses can be submitted by 15 May 2007, by emailing betterinformation@communitiesscotland.gsi.gov.uk or by writing to John McRorie, Communities Scotland, Thistle House, 91 Haymarket Terrace, Edinburgh EH12 5HE.

Business change

Adie Hunter, Solicitors, 15 Newton Terrace, Glasgow are pleased to announce that they have acquired the practice of Hutchisons, Queens Chambers, 173 Queens Drive, Queens Park, Glasgow with effect from 22 February 2007. The practice will be carried on from 15 Newton Terrace to where all files and papers have been transferred. The firm telephone number will remain as 0141 2483828; fax 0141 2212384; and the email address is enquiries@adiehunter.co.uk.

Juliet Grant-Hutchison has resigned from practice on her appointment as an immigration judge.