SUBMISSIONS ON BEHALF OF THE SECOND, FIFTH AND SEVENTH PURSUERS

in causa

BRENDA GRAY & OTHERS

against

THE ADVOCATE GENERAL FOR SCOTLAND AS REPRESENTING THE MINISTRY OF DEFENCE

INTRODUCTION

1. We would invite the Court to refuse the defender's motion for dismissal of the action insofar as relating to the second, fifth and seventh pursuers' actions, and to confirm the four day diet of proof.
2. The submission on behalf of the second and fifth pursuers is in five chapters, as follows:
    1) Relevant factual background;
    2) The ordinary and natural meaning of the words of the statute;
    3) The absence of any age-based definition of "child" in section 14 of the Damages (Scotland) Act 2011;
    4) Discussion of relevant case law;
    5) Conclusions

PART 1: RELEVANT FACTUAL BACKGROUND

3. The second, fifth and seventh pursuers' claims arise as follows.

4. The Late Mr Ian Hunter ("the deceased") died of mesothelioma on 12th December 2015 aged 69. For his entire working life he was employed at Rosyth Dockyard. It is averred (at para 4 of Statement of Claim) that that he was

exposed to considerable quantities of asbestos whilst working on ships. Liability and quantum are disputed.

5. For fourteen years until his death the deceased lived with his partner the first pursuer (Brenda Gray). She seeks damages as an individual and as executor. Her claim as an individual arises from her cohabitation with the deceased, as if married, until his death (see Para 7 of Statement of Claim, p13 A-E). The first pursuer has a son, Garry (the second pursuer) and a daughter Sharon (the fifth pursuer), both from a previous marriage. There are four grandchildren; Rachel, Danielle, Jodie and Sharleen. These children and grandchildren are included in the action with claims in terms of section 4(3)(b) of the Damages Scotland (Act) 2011 ("the Act"). The defender challenges the relevancy of the claims of the children of the first pursuer, Gary and Sharon (the second and fifth pursuers) and one of the grandchildren, Sharleen (the seventh pursuer).The defender does not seek to challenge the relevancy of the claims of the first pursuer or the other three grandchildren Rachel, Danielle and Jodie. .

6. The second and fifth pursuers assert title to sue on the basis that each was "accepted by the deceased as a child of the deceased's family" in terms of paragraph (b) of section 14(1) of the Act. Similarly, the seventh pursuer asserts title to sue on the basis that she was "accepted by the deceased as a grandchild of the deceased" in terms of paragraph (d) of section 14(1). The averments on behalf of the second, fifth and seventh pursuers in support of their contention that they were accepted by the deceased as children of his family, or as his grandchild, are at Para 8 of Statement of Claim (p14-15) as follows:

> "The deceased accepted the Second and Fifth Pursuers as children of his family. The deceased accepted the Third, Fourth, Sixth and Seventh pursuers as his grandchild. The deceased and the First Pursuer met in or about March 2001. They formed a relationship and became close. They moved in together in or around July 2001. The deceased quickly became part of the Pursuers' family. The deceased has no other children. He has no other close family relatives. The deceased assumed the position of,

husband to the First Pursuer, parent to Second and Fifth Pursuers and grandparent to their children. He developed a close bond with them. The family was particularly close. It came together often and regularly for visits, meals, activities, outings, discussions and other activities of family life. Apart from the Sixth Pursuer, who latterly lived abroad, the Second to Seventh Pursuers lived close by to the First Pursuer and the deceased. The deceased fulfilled the role of father and grandfather within the family. He provided practical and emotional support, advice, guidance, companionship and affection to each of the Second to Seventh Pursuers. During his illness, the Second and Fifth Pursuers assisted the First Pursuer in caring for the Deceased, as averred. The Second Pursuer accompanied the deceased to his medical appointments, including the consultation at the Victoria Hospital on 3rd September 2015 at which he was informed of that his diagnosis had been confirmed. The Second Pursuer introduced himself as and is referred to in the medical notes attendance as the deceased's step-son. In his Will, dated 6th October 2015 the deceased bequeathed his whole estate to the First Pursuer and appointed her to be his sole executrix. The deceased granted a destination- over to the Second Pursuer and Fifth Pursuer, whom failing their issue, the Third, Fourth, Sixth and Seventh Pursuers. Each of the Second to Seventh Pursuers was part of the close and loving family of the deceased and each suffered considerable distress and anxiety in contemplation of his suffering and loss and grief on his death. They have lost his companionship, counselling and guidance. They accordingly claim under section 4(3)(b) of the Damages (Scotland) Act 2011."

PART II: ORDINARY AND NATURAL MEANING OF THE WORDS OF THE STATUTE

7. The Act entitles "relatives" who are part of the "immediate family" to claim damages for non-patrimonial loss in the event of death for which another person is liable.[1] Section 14 (1) of the Act provides an exhaustive list of the relationships

[1] Section 4(1) and (3)

within the definition of "relative". Paragraph (b) of section 14(1) provides that "relative" includes a person who "is a parent or child of the deceased, accepted the deceased as a child of the person's family, **or was accepted by the deceased as a child of the deceased's family.**" Paragraph (d) provides that "relative" includes a person who "is a grandparent or grandchild of the deceased, accepted the deceased as a grandchild of the person **or was accepted by the deceased as a grandchild of the deceased."**

8. In this case, Garry, Sharon and Sharleen were adults when the deceased joined the family as their mother's partner. Their title to sue is challenged because they were not of "child age" when the deceased and their mother began their relationship. Can a person be "accepted… as a child of the deceased's family" or as his grandchild if that person was an adult at that point? To the best of our knowledge this case is the first occasion on which this particular question has arisen for judicial determination in Scotland.[2] In our submission, the words in the statute "**accepted as a child of the family**" or **"accepted as a grandchild of the deceased"** include a person who is an adult at the time that the acceptance takes place. Whether such acceptance actually took place is a question of fact for determination at proof.

9. A basic principle of statutory construction as explained by Lord Penrose is as follows:

> **"The "golden rule" of construction in its modern expression, requires that the words of a statute must, prima facie, be given their natural and ordinary meaning, in their context and according to the appropriate linguistic register without addition or subtraction, unless that meaning produces injustice, absurdity, anomaly or contradiction."** (***Barratt Scotland Ltd –v- Keith*** 1993 SC 142 at p148A-B);

[2] Being "accepted as a child of the family" is not a new concept. Schedule 1 of the Damages (Scotland) Act 1976 as enacted included in the definition of "relative" the following variation on the form of words in the 2011 Act: "(b) any person who was a parent or child of the deceased; (c) any person not falling within paragraph (b) above *who was accepted by the deceased as a child of his family*."

In our submission an ordinary reading of the words of section 14, in context and according to the appropriate linguistic register does not permit the definition of "child" to be delimited on the basis of age as contended for by the defender.

10. In our submission, it would be wrong to suggest that the word "child" cannot include a person who is an adult. For a concise explanation see Asche CJ in *Public Guardian v MA*[3] (an Australian case concerning guardianship) where the issue was whether the word "child" could extend to an intellectually disabled person over the age of 18:

> "The word "child" has two distinctive but dissimilar meanings which the Oxford English Dictionary recognises by grouping its definitions of the word under two major "significations" (there are in fact more than two but the others are not relevant here). Those significations are "I - With reference to state or age" and "II - As correlative to parent." The first grouping corresponds broadly to the term "infant" as understood in the law. The second to the term "offspring" or "issue." In written and spoken communications, the context usually supplies the grouping and one is not particularly troubled by ambiguity. One may use the term "child abuse" or "child education" without any fear of being thought of referring to abuse or education of adults. On the other hand a person making a will leaving his estate to his "children" (naming them) will not be advised by his solicitor that this will not be recognised by the the court of the children have become adults before the date of his death…." (at p19-20)

11. In our submission, in the phrase "was accepted by the deceased as a child of the deceased's family," the context for the word "child" is as correlative to "parent." There is nothing in the language of the phrase that suggests that "child" is age dependant. It is also clear from the sub-section within which it is contained: *"relative"…. means a person who-….is a parent or child of the deceased, accepted the deceased as a child of the person's family or was accepted by the deceased as a child of the deceased's family."* In that context, the Shorter Oxford English Dictionary defines the word

[3] Supreme Court of the Northern Territory of Australia, 11th April 1990

"child" as *"A son or daughter (at any age) an offspring of human parents."* That definition seems to be consistent with how the word is employed in normal everyday speech where it is common to refer to a group of people as someone's "children" as another way of saying "son" or "daughter," regardless of their age. In a different context a reference to "child" not correlative to parent uses different words, which ordinarily refers to a person who has not yet reached reached adulthood: such as, " *1. A fetus; an infant….2. A boy or a girl….5. A pupil at school."* In our submission, it is difficult to see how the latter definition could possibly fit with the ordinary and natural meaning of the words of the statute. For instance, Section 14(1)(b) also includes in the definition of "relative" someone who "is a parent or child" of the deceased. If applied consistently, the defender's definition of the word "child" would exclude a natural child who had reached adulthood at the time of the death of the deceased. Such an interpretation would be wrong. If it is accepted that "child of the deceased" is correlative to parent then how can the position be different for a person who "was accepted by the deceased as a child of the deceased's family."

12. In a similar vein, the word "grandchild" is defined in the Shorter Oxford English Dictionary simply as "a child of one's son or daughter." "Granddaughter" is defined as "a daughter of one's son or daughter" and "grandson" as a "son of one's son or daughter." In everyday speech "grandchild" and "granddaughter" are used interchangeably. It would be wrong to suggest that "grandchild" can only refer to persons of "child age." Is it incorrect to say that a person has adult grandchildren? It is not. How can the defenders' age-restricted definition of that word be sustained? Just as the word "child" is correlative to "parent" so it is clear that the context for the word "grandchild" is as correlative to "grandparent." The word is defined by the relationship and not by age.
13. Finally, nothing turns on the choice of "was" as opposed to "is," which is to ensure that the sub-section is grammatically correct. Using the present tense alternative, "is accepted by the deceased…" would make no sense because a deceased is *ipso facto* incapable of positive action. Similarly section 14(2)(b) of the Act provides that: "a step-child of a person is to be treated as a person's child." If the defender's argument is correct then an adult child whose mother re-married

could not qualify as a step-child of her husband.[4] Such a restriction is unwarranted. In our submission, any peremptory age-based restriction into the phrase *"accepted as a child of the deceased's family"* or *"accepted as a grandchild of the deceased"* represents a misinterpretation of the sub-section, at odds with ordinary language and with the scheme of the Act.

PART 3: THE ABSENCE OF ANY AGE-BASED DEFINITION OF "CHILD" OR "GRANDCHILD" IN SECTION 14 OF THE DAMAGES (SCOTLAND) ACT 2011

14. In our submission, it is significant that the Act offers no definition of the meaning of "child" or "grandchild" for the purposes of section 14. In particular, it does not stipulate any age when a person is no longer a child. The absence of such a definition, or "line in the sand," suggests that the expression "accepted as a child of the family" refers to the nature of the relationship with the person and not their age. Otherwise, how could the statute be applied fairly to pursuers of different ages? Generally, legislation in which the word "child" requires to be defined by reference to age contains such a definition in express terms. Without one, it is anyone's guess as to where the line is to be drawn. The reason can be found in the entry for "Child, Children" in *Stroud's Judicial Dictionary* as follows:

> "The statutory definitions of "child" show considerable variety, and although the idea that a child was one who had not reached the full age of twenty-one ran through the earlier statutes, this concept has now changed with the Representation of the People Act 1969 (C 15) which, by s. 1, reduced the voting age from twenty-one to eighteen. In any case the more recent definitions provide different age limits for different purposes. Apart from statute and in the ordinary use of the English language, a person of fourteen years of age is a child *(Roger v Varey (1942) 1 K.N. 508)* But it "is impossible to lay down any definite boundary as separating 'children' from 'young men' or 'young women', or any other description by which an advance beyond childhood may be indicated.

[4] In order to claim damages under both section 4(3)(a) and (b) on the death of a step-parent, a step-child of any age must prove that they had been accepted by the deceased as a child of the deceased's family. Again, it is the relationship that is determinative not the age. (Section 4(1)(a) and 4(5)(b).)

> Practically, I suppose that at somewhere between 16 and 17, at its highest, an age has been arrived at which no one would, ordinarily, call 'childhood." (per Wills J., *R v Cockerton* [1901] 1 K.B. 340,341)"[5]

15. In the defender's note of argument its is submitted (at p3) that: *"There is no definition of "child" in the 2011 Act…. Accordingly, for the purposes of defining a "child" it is appropriate to consider how a child is defined in family law and to apply the usual rules of family law on that issue when interpreting the 2011 Act. In family law statutes a child is normally defined as a person under the age of* ***either 16 or 18 years of age****."* This rather begs the question; which is it to be? And on what basis is the distinction to be made? If there is no clear demarcation how is the Court to draw the line? By contrast, Parliament has drawn a line in Section 7 of the Act, which stipulates the amount available to different classes of relative in compensation for "loss of support." In that connection, Section 7 of the Act makes more generous provision for a person who is "a dependent child" of the deceased than for certain other categories of relative. Section 7(3) provides that *"…'dependent child' means a child who as at the date of A's death (a) has not attained the age of 18 years, and (b) is owed an obligation of aliment by A."* As noted above, section 14(1)(b) of the Act does not identify any point by which a person must have been accepted by the deceased as a child of the family. Contrast persons claiming that they either were, or had been living as if they were, the deceased's spouse or civil partner (Section 14(1)(a). The requirement is *"immediately before the death."* In our submission it is reasonable to suppose that had Parliament also intended to place any age or time based restriction on the meaning of "child of the family" it would have done so in the same way as it did elsewhere in the Act – clearly and explicitly. If the defender is correct where is the line? Is it 12 and 14 (common law)? Or 16, (section 93(2)(b)(i) of the Children (Scotland Act 1995?) Or 18, (section 93(2)(a) of the Children (Scotland) Act 1995)? Or 25, (section 1(5) of the Family Law (Scotland) Act 1985 - entitlement to aliment)? In the absence of a line how can the defender's argument be sustained?

PART 4: DISCUSSION OF RELEVANT CASE LAW

[5] Stroud's Judicial Dictionary, Volume I A-E, 2012, Sweet & Maxwell

16. Although the particular question arising in this case has not yet been authoritatively determined, the concept of a person being a "accepted as a "child of the family" is not novel. Indeed, identical language was used in the Damages (Scotland) Act 1976. The same language has been employed in a number of Acts of Parliament dealing with matters of family law.[6] And, albeit in a different context, a similar point arose for determination by the Court of Appeal in *Leach v Lindeman & Ors* 1986 Ch 226. The question in that case was whether a plaintiff who had acquired a step-mother at the age of thirty two could qualify as having been "treated as a child of the family" by the deceased in order to claim a maintenance payment from her estate in terms of sections 1 and 2 of the Intestacy (Provision for Family and Dependants) Act 1975.[7] It is accepted that being "treated" and "accepted" as a child of the family are not the same.[8] However, the reasoning employed by the Court in rejecting the defendant's contention that "child of the family" could only apply to "an unfledged person" could be applied *mutatis mutandis* in the present case. Giving the judgement of the Court, Slade LJ (at p235 et seq.) stated:

> **"One point is, in my opinion, clear beyond doubt and indeed, I think, has been common ground on this appeal: the legislature cannot have contemplated that the mere display of affection, kindness or hospitality by a step-parent towards a step-child will by itself involve the treatment by the step-parent of the step-child as a child of the family in relation to their marriage for the purpose of section 1(1)(d), so as to place the parent and his or her estate under a potential liability to provide for the step-child. Something more is needed: reasonable step-parents can usually be expected to behave in a civilised and friendly manner towards their step-children, if only for the sake of their spouse…**

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[6] See i.e: section 16 of the Matrimonial Proceedings (Magistrates Court) Act 1960

[7] Section 1(1)(d) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased a s child of the family in relation to that marriage."

[8] See p232: "The substitution of the word "treated" for the word "accepted" imported a rather different concept. As Bagnall J pointed out in A. v A. (Family: Unborn Child) [1974] Fam. 6, 15: "Acceptance may involve only the true parent and the acceptor. Treatment of a child involves behaviour towards the child."

What more then is needed? Mr Wakefield in the forefront of his arguments submitted that the treatment by one person of another as a child of the family must necessarily involve the treatment of that other persons as "An unfledged person." While he accepted that the relevant phrase in section 1(1)(d) is not necessarily limited to a minor, he submitted that an adult person can qualify if he has been treated by the deceased as an unfledged person, in the sense that there has been an assumption of parental responsibility, care and control…This submission has its superficial attractions. One's first reaction to the suggestion that a man or woman of mature years and full capacity can be treated as a "child of the family" may be one of surprise. Nevertheless, the submission is not, in my opinion, well founded…The answer to this submission is, I think, to be found in the following passage from the judgement of Booth J in *In re Callaghan, decd* [1985] Fam. 1, 5:

"'Child' for the purposes of section 1, clearly includes an adult child. One of the persons who may apply by virtue of section 1(1)(c) is "A child of the deceased,' and it cannot be suggested that in that context 'child must be limited to a minor or dependent child. In section 1(1)(c) 'child' relates to the relationship between the deceased and the applicant. In my judgement that is precisely the same in section 1(1)(d) of the Act and no different meaning should be given to the word 'child' in the context of the words 'treated by the deceased as a child of the family.' It is again a matter concerning the nature of the relationship between the deceased and the applicant, and it does not follow that treatment necessarily refers to the treatment of the applicant by the deceased as a minor dependent child."

In our submission, there is no reason why the same reasoning should not apply in the present case.

PART 5: CONCLUSIONS

17. In our submission paragraph 1 of section 14(1) of the Act does not operate to prevent claims by a person who while an adult was "accepted by the deceased as a child of the deceased's family" or "accepted by the deceased as a grandchild of the deceased." At this stage the only question is whether to admit the claims to probation. The second, fifth and seventh pursuers offer to prove that they were accepted by the deceased as, respectively, children of his family or as his grandchild. In our submission this will require the Court to make an assessment of the evidence in relation to the nature and quality of their respective relationships with the deceased while he was alive. In this connection, it may well be that the age of the second, fifth and seventh pursuers when the deceased joined their family would be an important factor relied upon by the defender at proof. In our submission, however, it is but one factor. Properly construed, the Act does not delimit by reference to age when a person can or cannot be accepted as a child of a person's family for the purposes of acquiring title to sue for non-patrimonial loss upon their death. The same applies to grandchildren. Accordingly, we would invite the Court to refuse the defender's motion and fix a diet of proof for the claims of all seven pursuers to be determined.

Simon Di Rollo Q.C.

Barney Ross, Advocate

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9th October 2016