OUTER HOUSE, COURT OF SESSION

[2017] CSOH 126

PD325/16

OPINION OF LORD CLARKE

In the cause

GEORGE EDWARD MANSON AND OTHERS

Pursuers

against

HENRY ROBB LTD

Defenders

Pursuers: Milligan QC, Wilson Digby Brown LLP
Defenders: Sheldon QC; Clyde & Co (Scotland) LLP

3 October 2017

[1] This is an action brought by the first and second named pursuers as executors nominate for the late George Aberdeen Manson (hereinafter referred to as "the deceased"). The first and second named pursuers, who were the sons of the deceased, also sue as individuals. The third named pursuer is the widow of the deceased.

[2] The pursuers sue for damages in respect of the death of the deceased on 12 February 2016, the cause of death being recorded as epithelioid mesothelioma of the pleura. The deceased had been for some years, in the past, employed by the defenders. They admitted liability for his death as arising from the deceased's employment with the defenders, due to his exposure to asbestos dust and particles.

[3] The case came before me for a Proof on quantum. At the outset of the Proof, counsel advised me that agreement had been arrived at between the parties in respect of certain matters. In the first place, they were agreed that, in terms of an offer on behalf of the first and second pursuers, No 17 of process, and the acceptance thereof No 24 of process, the defenders shall pay £90,000, inclusive of interest to date and gross of the payment of £13,455 payable under the Pneumoconiosis etc (Workers' Compensation) Act 1979 in satisfaction of the first conclusion of the Summons which represents the sum due in respect of solatium and past services in terms of section 8 of the Administration of Justice Act 1982, on behalf of the deceased. I shall, in due course, pronounce decree for that sum.

[4] In terms of a Minute of Agreement between the parties (No 25 of process) it is, agreed at paragraph 18 thereof that the sum to be paid to the third pursuer by way of compensation for loss of financial support in terms of section 4(3)(a) of the Damages (Scotland) Act 2011 is £89,480.31 inclusive of interest on any past element to 11 July 2017. In terms of paragraph 19 of the said Joint Minute it is also agreed that the sum to be paid to the third pursuer by way of reasonable expenses incurred in connection with the deceased's funeral should be £3,698.69 inclusive of interest until 11 July 2017. I shall, in due course, pronounce decree in respect of the foregoing sums

[5] The deceased and the third named pursuer were married in 1957 and lived together until the deceased's death. The first and second named pursuers lived all their lives in the same home with the deceased and their mother until the death of the deceased. All of the pursuers gave evidence, which I accepted, to the effect that they formed a very close family unit prior to the deceased's death. The first named pursuer, who is 59 years old; told the court that he and his brother, the second named pursuer, own the home which they had shared with the deceased and his mother for 25 years. Before the diagnosis of the deceased's

fatal condition, in July 2015, the deceased had, the witness said, been a very fit and active person. He had worked full-time until he was 72 years of age, working a six day week and commuting to London every day, a journey of about one hour each way. His final employment had been as a director in a large company which made satellite dishes. He had been in that employment for 15 or 16 years.

[6] After the deceased retired he remained very active. He and the third named pursuer would go out most days together. He did shopping on behalf of the family and dealt with the family's domestic financial matters. On a number of occasions in his evidence this witness referred to the deceased as "our solid rock".

[7] As regards his own relationship with the deceased, the witness said that the deceased was someone for him to look up to, whose example he wished to follow and who was always there for him. He would see the deceased every day.

[8] The deceased cared for the third named pursuer, taking her to the doctor, for example, when required, and he did gardening and general household duties.

[9] When the deceased was diagnosed with his fatal condition in July 2015, the family were informed that the deceased would be likely to live for only a few months. In the event, the deceased survived for about ten months but his condition deteriorated rapidly and within two months of diagnosis he could not really help himself. The third named pursuer became his virtual full-time carer. The deceased lost a considerable amount of weight and became steadily weaker. He required to be admitted to hospital where he died. Although his family had been warned that the deceased was going to die, his death itself came as a great shock to all of them. It had particularly affected the third named pursuer. She had become withdrawn since it and did not like to go out too much.

[10] The third named pursuer, who is 79 years old, in evidence, confirmed that she and the deceased married in 1957 and had had two children, the first and second named pursuers. They were born in Dalkeith but the family had moved to England in 1972 for work reasons. She and the deceased had had a very close relationship. The witness said that they went everywhere together. The deceased did most of the work required in the house and looked after the garden. He would do shopping and also cook meals for the family. He took responsibility for payment of household bills. These matters were now attended to by her two sons. The witness said that the deceased's death had affected her "awfully". She had depended on him so much.

[11] In his evidence to the court, the second named pursuer, who is 55 years old, confirmed that, prior to the diagnosis of his fatal illness, the deceased had been a very fit man and had done the shopping together with the third named pursuer. The witness had a common interest with the deceased in model railways and this involved both of them travelling to exhibitions of model railways, going as far as Germany for that purpose. The family, the witness said, always did things together "as a group". Although his father was not a great gardener he persevered with it with some help from the third named pursuer. The deceased would do household chores such as hoovering and shopping. On occasions the deceased would do some cooking, particularly when the third named pursuer was not well.

[12] This witness explained that he did not drive, whereas his father did. This witness spoke in a similar vein to that of the evidence of the other witnesses in respect of the deceased's rapid and distressing decline after the diagnosis of his fatal illness. The deceased's death had seriously affected the third named pursuer. He and his brother had tried to fill the gap left by the deceased's death but it was difficult to do so.

[13] The defenders led no witnesses.

[14] The other evidence which I was invited to consider by both parties, in terms of their Joint Minute, was a report prepared by Dr P T Reid MD FRCP Consultant Physician, No 6/8 of process. Dr Reid, at the outset of his report explained that he was instructed to provide a medical report on the late Mr Manson's death due to mesothelioma and his life expectancy, but for the development of this condition. For those purposes he had been provided with medical records pertaining to the deceased and certain correspondence from medical persons relating to the deceased. Dr Reid's report is clearly a very careful and thorough consideration of the deceased's medical history. He notes at page 13 of his report under the heading "Non asbestos-related conditions" as follows:

> "Mr Manson suffered from diabetes mellitus from around 2009, which was complicated by retinopathy and impaired circulation to the feet. He was also obese with a body mass index consistently in the high thirties or low forties (ie he was consistently at the upper end of the class 2 or lower end of the class 3 range). He had hypertension, which was mostly adequately controlled with antihypertensive medication. He had osteoarthritis of the hip and back, a kyphosis, benign prostatic disease and benign colonic polyps"

At page 15 of the report Dr Reid reports under the heading "Cause of Death":

> "His terminal admission was prompted by hypercalcaemia, which is a recognised complication of malignant pleural mesothelioma. The records from the terminal admission are not available. However, information provided in the statement from Janice Harris provides information regarding this period. In my opinion Mr Manson's (*sic*) died as a result of malignant epithelioid mesothelioma."

Dr Reid then concludes under the heading "Anticipated Life Expectancy in the Absence of Mesothelioma":

> "Mr Manson died at the age of 81 and 1 month. The average survival of an 81 year old man is around 8.8 years (Ogden Tables 7th edition). As he never smoked I would increase this by around 2 years. However informed by information in Brackenridge's Medical Selection of Life Risks I would reduce this by 5 years on account of diabetes complicated by retinopathy, maculopathy, grade 2/3 obesity and hypertension. Therefore, but for mesothelioma I estimate that Mr Manson would have lived on average a further 5.8 years."

I understood that there was no quarrel between the parties, in relation to Dr Reid's conclusions, and, in particular, his assessment of the estimated life expectancy of the deceased but for the fatal condition and that that would have been a further 5.8 years.

[15] Against the background of that evidence the remaining areas of dispute between the parties related to the amount of compensation which fell to be paid by the defenders to the pursuers in terms of section 4(3)(b) of the Damages (Scotland) Act 2011 and what sum fell to be payable in compensating for the loss of services provided by the deceased under section 9 of the 2011 Act.

[16] I can deal with the second of the two areas of dispute quite shortly. All the witnesses spoke to the deceased having carried out, to a significant extent, a number of services on behalf of the family unit, of a domestic nature such as driving, gardening, shopping and the taking care of household financial matters. The defenders chose not cross-examine any of the witnesses on this aspect of their evidence. Senior counsel for the pursuers, in his submissions to the court, submitted that a global figure of £9,000 would be an appropriate sum to be awarded under this head with £3,000 thereof being allocated to the past and £6,000 to the future. This, he contended, allowed for some deterioration in the deceased's physical abilities as he got older. I am satisfied, in the absence of any evidence to contradict what the pursuers said in relation to these matters and, having regard to that evidence, the figure suggested by senior counsel for the pursuers is reasonable and I shall make an award to the third named pursuer to that effect.

[17] The main substantial dispute between the parties related to the position to be adopted by the court to the pursuers' section 4(3)(b) claims, in a case like the present, where the deceased was at an advanced age at the date of his death, but where the relatives in

question had lived with him *en famille* until the date of his death and had formed with him a particularly close relationship.

[18] Senior counsel for the pursuers, in his submissions, relied, particularly, upon the fact that all of the pursuers, living as they did with the deceased, witnessed, on a continuing basis, the suffering the deceased endured during his fatal illness and that his death, it was submitted, clearly had a devastating effect on all three of the pursuers. It could be taken from the pursuers' evidence that they had relied on the deceased, prior to his last illness, to an extent much more than might be normal in such a case. The defenders would, it was submitted, no doubt, seek to argue that any awards made in terms of section 4(3)(b) had to reflect significantly the fact that the deceased was 80 years of age when he died and had been suffering from various other ailments for some time. But these factors should not significantly outweigh the extremely close relationship all of the pursuers had with the deceased.

[19] Senior counsel for the pursuers also submitted that the decision in the case of *Hamilton* v *Ferguson Transport (Spean Bridge) Ltd* 2012 SC 486 had made clear that the court, in our system, required to seek to achieve consistency as between jury awards and awards made judicially in death cases like the present - see Lord President Hamilton at paragraph 63. To that end, jury awards should not be treated as any less a source of judicial guidance than previous judicial awards in the assessment of what is the appropriate award to be made in any particular case. See Lord Clarke at paragraph 86.

[20] The first reported judicial award made, it seems, after the discussion in *Hamilton* in a case with some similarities to the present, but which involved claims under the previous legislative regime in this area namely the Damages (Scotland) Act 1976, was *McGee* v *RJK Building Services Ltd* 2013 SLT 428. In particular the court was concerned with the

appropriate awards to be made in terms of section 1(4) of that Act to a widow and two adult daughters of the deceased. The deceased was 71 at the date of his death. His widow was a few months younger. The deceased and his wife had been married for 36 years. The court held, on the evidence, that the marriage was a happy one and that the deceased and his wife enjoyed a rich social life together. The relationship between them was described as being "in practical terms particularly close". The court awarded £80,000 to the widow in respect of her section 1(4) claim. The deceased's daughters were 44 and 37 respectively at the date of the deceased's death. The Lord Ordinary held that they both had enjoyed a close relationship with the deceased. In both cases their marriages had broken down at a fairly early stage. That made the presence of the deceased in their lives especially important both for the daughters and their children. The Lord Ordinary observed at page 437K-L as follows:

> "It was clear that he had provided very considerable support, financially, emotionally and in a practical sense, to both daughters. This included such matters as looking after the daughters' children when their mothers were at work, and taking them to and from school. Both of the daughters and their families lived close to their parents, and this meant they saw a great deal more of one another than is perhaps the norm."

In the foregoing circumstances the court awarded £35,000 to each of the daughters in respect of their section 1(4) claim.

[21] In the case of *McCarn* v *Secretary of State for Business Innovation and Skills* 2014 Rep LR 138, five adult children sought damages for loss of society in respects of the death of their father who had died from mesothelioma at the age of 69. At the time of their father's death the children were aged 40, 38, 37, 36 and 31 respectively. The Lord Ordinary accepted that the deceased had been the pursuers' sole parent since their mother had died in 1998. There was a strong emotional bond between the children and the deceased. It was agreed between

the parties that but for the fatal condition the deceased would have lived for a further 18 years.

[22] At paragraph 48 of his Opinion the Lord Ordinary under reference to section 4(3)(b)(iii):

> "In assessing what is the appropriate measure of compensation in terms of this paragraph I am clearly of the opinion that a very material consideration must be the length of time for which the claimant has been denied the society and guidance of the deceased. I am persuaded that the greater the period of life expectancy of the deceased, the higher the sum which it would be just to award a claimant to compensate for the loss of society and guidance."

In the whole circumstances the Lord Ordinary concluded that an appropriate award for each of the pursuers would be £35,000.

[23] The court in the case of *Gallagher* v *SC Cheadle Hume Ltd* 2015 Rep LR 33, another mesothelioma death case, was required to make awards in respect of the deceased's widow aged 66 and his children who were aged 45, 43, 40 and 33 at the date of his death. The deceased was age 70 at the date of death. The court found that the deceased had been a remarkable man whose death had had a profound effect on the family. The Lord Ordinary expressly followed very closely the approach taken by the Lord Ordinary in the *McGee* case and awarded £80,000 to the widow and £35,000 to each of the children in respect of their section 4(3)(b) claim.

[24] I was referred by senior counsel to the unreported jury awards in the case of *Stanger* v *Flaws* which is referred to in *McEwan & Paton on Damages* at paragraph 13-167. This involved the death of a lady in a fatal road traffic accident. She was 64 years old at the date of her death. Her husband was 68 years old at that time. The couple had been married for 46 years. There were two sons who made claims under section 4(3)(b). They were aged 49 and 46 respectively at the date of the trial. The awards made by the jury were £120,000 to

the widower and £50,000 each to the sons. The deceased was apparently described as the central supportive figure in a close family being described as a homemaker and traditional housewife. The family had suffered deep feelings of grief and sorrow and the husband had been devastated by the loss of the deceased.

[25] It appeared that the first post *Hamilton* award made by a jury was in the case of *Kelly* v *UCS Ltd (in liquidation)* 2013 Rep B 107-6. In that case the deceased was 82 years of age at the date of death. He died of mesothelioma. He and his widow lived in separate houses but spent most of their time together. The widow had nursed him during his fatal illness. The jury awarded to the widow £40,000 for loss of society, distress and grief. A son and daughter of the deceased apparently in their forties at the date of his death were each awarded £25,000 in respect of their claims for loss of society etc.

[26] Senior counsel for the pursuers, relying, it seemed, on the awards made in the *Stanger* case submitted that it could now be said that an appropriate sum to be awarded to a widow/widower in a death case in respect of a section 4(3)(b) claim would be a six figure sum. Reference was made to the recognition by the Extra Division in *Young* v *Macvean* 2015 SLT 729 at paragraph 45 of the "continuing upward pull of jury awards". The awards made by the jury in the case of *Kelly*, it was submitted, fell to be distinguished from the present case in particular because it appeared that the parties had not been living physically together as a family for some time.

[27] In reply senior counsel for the defenders submitted that the judicial task in assessing damages in such cases was to seek to achieve a level of consistency between awards made by juries on the one hand and those made judicially. There was no question, however, of there being a fixed tariff. Circumstances could and did vary greatly from case to case. He did not dispute senior counsel for the pursuers' description of the exceptional and

particularly close relationship of all the pursuers with the deceased. Senior counsel for the defenders also accepted that all three pursuers had clearly been greatly affected by the deceased's death. Whilst seeing him suffering from his fatal illness would have been distressing for them, that had endured only for a relatively short period of time. Against these factors, however, had to be placed the age of the deceased at the date of his death and his life expectancy at that date, particularly having regard to the other illnesses the deceased had been suffering from. Senior counsel for the defenders said that he did rely, to some extent, on the awards made by the jury, post *Hamilton* in the case of *Kelly* but accepted that the awards made in that case may fall to be regarded on the low side. There were material differences between the circumstances of the deceased and his relatives in the cases of *McGhee, Gallagher* and *McCarn*, in particular the age of the deceased persons in each of those cases and their life expectancy at the date of death but for the actual cause of death. The children in the other cases relied upon by the pursuers were also significantly younger than the first and second named pursuers in the present case.

Decision

[28] It is appropriate to recall what Lord Justice Clerk Grant said in *McCallum* v *Paterson* at 1968 SC 280 at pages 282-283 *viz*:

> "No precise rule can be laid down as a yardstick for solatium awards which must of necessity be of a somewhat arbitrary character. Money cannot compensate for pain and suffering and it is impossible, by a monetary award under this head, to put the victim in the situation in which he would have been had the accident not occurred. The test must always be what is fair and reasonable in the circumstances and, because of that, and because of the absence of any specific rules for quantification, reasonable men may vary considerably in their assessment of what the appropriate award should be".

That *dictim* of course was in relation to the law relating to solatium. Section 4(3)(b) of the 2011 Act, of course, gives certain directions as to the specific factors which require to be taken into account in making awards under its provisions but the assessment to be carried out thereby, in my view, may be no less difficult than was the case in relation to assessing solatium claims under the previous law. I consider that senior counsel for the pursuers was correct in conceding that there was no room for anything like a tariff system operating in relation to such claims. Each such claim must be determined on the particular and peculiar facts of the case. Notwithstanding his concession in that respect, senior counsel for the pursuers, in his submissions, might be said to have been advancing the proposition that a tariff system now did exist when he suggested that it might be taken that an award in respect of the spouse of a deceased would be a six figure sum in the range £100,000 to £120,000 and that should be regarded as normal for such a claim.

[29] In the present case there appears to me, to be two sets of factors which are of material importance in seeking to reach a conclusion as to what are just awards in the circumstances. The first set of circumstances relate to the extremely close and long enduring relationship among all of the pursuers and the deceased and how that relationship operated in practice among them. The second set of factors, on the other hand, relates to (a) the advanced age of the deceased at his death, (b) his relatively short life expectancy at the date of his death, having regard to his health, absent the fatal condition and (c) the ages of the pursuers themselves. In that connection I would adopt what the Lord Ordinary said in *Gallagher* v *SC Cheadle Hume Ltd supra* at page 37 where his Lordship was to the following effect:

> "The existing statutory provision in Scotland contained in section 4(3)(b) of the 2011 Act, by which I am bound and to which I must give effect, in my opinion necessarily involves inquiring in each case into the nature and extent of all three elements referred to in the subsection. It is open to a pursuer to highlight the positive aspects of a relationship and to a defender to highlight the negative aspects.

> In relation to the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died, the evaluation must consider what the non-patrimonial benefit is and for how long it is likely that it would have been derived by the relative if the deceased had not died. This must, in turn, involve consideration of the ages of the relative and of the deceased at the date of the deceased's death."

Reference may also be had to what the Lord Ordinary said in the case of *McCarn supra* at page 144, paragraph 47 and 48 where after citing the provisions of section 4(3)(b)(iii) his Lordship said:

> "In assessing what is the appropriate measure of compensation in terms of this paragraph I am clearly of the opinion that a very material consideration must be the length of time for which the claimant has been denied the society and guidance of the deceased. I am persuaded that the greater the period of life expectancy of the deceased, the higher the sum which it would be just to award a claimant to compensate for the loss of society and guidance."

In the present case, it is my opinion, that senior counsel for the pursuers in his submission, underrated the significance of the age and life expectancy of the deceased and the respective ages of the pursuers. The third named pursuer lost the continuing loving and close supportive relationship of an elderly partner. She, herself, was elderly at the date of the deceased's death. The duration of what she lost can be less than a widow, say in her sixties. The first and second named pursuers lost an elderly father. Their suffering in that respect is different from children in a similarly close relationship with a parent where they were, say, in their forties, and the deceased was in his sixties. The duration of what can be said to have expected to be been lost by the death of the deceased, in such a case, is different from that which obtains in the present case. In the difficult business of putting a money value on such losses it seems to me that some significant differentiation in quantification falls to be made, all other things being equal, in the two different sets of circumstances I have just referred to.

[30] As regards the element of distress and anxiety endured by the pursuers in contemplation of the suffering of the deceased himself, before his death, the evidence of the

first named pursuer, which I accepted, was that the deceased who died on 20 February 2016 was, prior to the diagnosis of his fatal illness in July 2015 "a very active and fit person". Without in any sense underestimating the nature of the distress suffered by the pursuers from July 2015 until February 2016, in witnessing the deceased decline, the length of time during which this was endured was relatively short compared, for example, with a case where a person witnesses a long drawn out painful final illness of a close relative.

[31] I have had regard to the various awards referred to by counsel, on both sides of the bar. Unsurprisingly none of those on their facts could be said to be virtually identical to the present. While, of course, I accept the submissions of senior counsel for the pursuers to the effect that, following in particular the decision of the court in *Hamilton* the task of the court, in making a judicial award in such a case, has to be carried out with regard to the level of jury awards in similar cases, to ensure a level of consistency between judicial awards and jury awards. The cases to which I have been referred, while of assistance in showing a range of judicial and jury awards in relation to claims such as the present all, understandably, differ, to a greater or lesser extent, particularly with regard to the ages of the parties, the duration of the relationship and the life expectancy of the deceased at the date of his death, absent the fatal illness in question. (As has been seen, the court was referred to only two jury awards, which do not demonstrate a pattern of awards on such case). Doing the best I can, having due regard to that range of awards and the particular facts of the present case I have determined that the following awards should be made under section 4(3)(b); (a) To the third named pursuer the sum of £75,000 two thirds thereof being referable to the past and one third referable to the future; (b) To the first named pursuer and the second named pursuer I shall award in each case the sum of £30,000, one half thereof referable to the past and one half referable to the future.

[32] As I have already indicated I shall make an award of £9,000 in respect of loss of services under section 9 of the 2011 Act to the third named pursuer with £3,000 thereof being allowable to the past and £6,000 to the future and there shall also be paid by the defender to the first and second pursuers, as executors nominate of the deceased, the sum of £90,000 Sterling inclusive of interest to date and gross payment of £13,455 payable under the Pneumoconiosis etc (Workers' Compensation) Act 1979 in satisfaction of the first conclusion of the Summons. I shall pronounce decree also for payment by the defenders to the third named pursuer, by way of compensation for loss of financial support, in terms of section 4(3)(a) of the Damages (Scotland) Act 2011 of the sum of £89.480.31 inclusive of interest on any past element to 11 July 2017. I shall, furthermore, pronounce decree for payment by the defenders to the third named pursuer of £3,698.69 inclusive of interest to 11 July 2017 in respect of expenses incurred in connection with the deceased's funeral.

[33] With regard to any outstanding questions of interest, payable on any of the foregoing sums I shall have the case put out By Order so that any such matters may be determined and a final interlocutor can be pronounced. In the event of the parties being in agreement in relation to all questions of interest then such a hearing may not be required.