



FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2024] CSIH 14
PD101/21

Lord President
Lord Boyd of Duncansby
Lady Wise

OPINION OF THE COURT

delivered by LORD CARLOWAY, THE LORD PRESIDENT

in the reclaiming motion

in the cause

ELAINE CROZIER OR VEALE AND OTHERS

Pursuers and Respondents

against

SCOTTISH POWER UK PLC

Defenders and Reclaimers

Pursuers and Respondents: Milligan KC, Balfour; Thompsons LLP
Defenders and Reclaimers: N R Mackenzie KC, E Campbell; Shepherd and Wedderburn LLP

4 June 2024

Introduction

[1] Robert Crozier died of mesothelioma, a form of cancer, on 15 October 2018. He had been employed by the defenders as a mechanical fitter between 1969 and 1992. In 2014, he sued the defenders for damages, having developed pleural plaques and contracted

asbestosis as a result of being exposed to asbestos in the course of that employment. It was averred by the defenders, and admitted by the pursuer, that part of the damages claimed related to the risk of Mr Crozier developing mesothelioma. Mr Crozier settled that action on 7 October 2014. Decree of absolvitor was pronounced on 26 February 2015. At the time of settlement, Mr Crozier did not have mesothelioma.

[2] Following his death, the pursuers, who are members of Mr Crozier's immediate family, raised the present action. They seek damages for the anxiety and distress which they suffered in contemplation of Mr Crozier's death, their loss and grief upon his death and the loss of his society and guidance, all in terms of section 4(3) of the Damages (Scotland) Act 2011.

[3] The defenders contend that the action is incompetent, because, in terms of section 4(2) of the 2011 Act, the pursuers' right to claim damages upon Mr Crozier's death was precluded by the previous settlement. The pursuers accept that section 4(2) provides that, as a generality, no claim for damages for a wrongful death can be brought by the relatives of a deceased person if the deceased has settled his own claim for damages flowing from the same wrong. They rely upon section 5(1), which provides an exception to that rule where the deceased has died of mesothelioma, and contend that it applies even if he was not suffering from mesothelioma at the time of settlement.

[4] The case thus concerns the application of well-established principles of statutory interpretation to section 5(1) of the 2011 Act. A single question arises: does that section entitle the relatives of a person to claim damages following his death from asbestos related mesothelioma, notwithstanding the settlement?

Legislative history

Pre-Damages (Scotland) Act 2011

[5] Following recommendations from the Scottish Law Commission (Report No 31, July 1973, on the *Law Relating to Damages for Injuries Causing Death*), sub-sections 1(1) and (3) of the Damages (Scotland) Act 1976 restated the common law whereby, when a person dies as a result of another's fault or negligence, that person's relatives had the right to seek compensation for loss of support which had previously been provided by the deceased. The Act gave immediate relatives a right to a loss of society award (s 1(4)). No damages were to be payable to relatives of a deceased who had settled ("discharged") his own claim for damages arising out of the same act or omission (s 1(2)).

[6] Between 1990 and 1992, the Scottish Law Commission re-considered the effect of the 1976 Act. They reasoned that, if a person pursued his claim to a conclusion, he would secure *inter alia* an award of *solatium* at common law, which tended to be higher than the relatives' statutory loss of society, and a sum to compensate any loss of earnings. If he died before the case could be concluded, his *solatium* claim died with him. His executor would be able to continue with the claim for loss of earnings up to the date of death. If the wrongdoing had caused the death, the deceased's relatives would be able to claim loss of society and loss of support from the date of death. The latter would only be a proportion of the loss of earnings. In that situation, the Commission reasoned that a deceased's family, who could be expected to inherit the deceased's estate, would receive much less compensation than if the deceased had not died prior to the conclusion of his claim. In particular, a living pursuer might receive (at that time) *solatium* of up to £30,000. Loss of society for the family would be unlikely to exceed £20,000 in total. The deceased's right, when in life, to receive *solatium* did not transmit to his executor.

[7] Mesothelioma posed a particular problem. Death tended to follow quickly after diagnosis. As a result, victims of the disease did not generally have sufficient time to pursue a claim to its conclusion. This had the potential to give defenders an incentive to delay settlement until the pursuer had died; thus reducing the amount of any damages (SLC, *The Effect of Death on Damages*, Discussion Paper No 89 (Nov 1990) paras 1.1 – 1.3 and part II; and SLC, *Report on the Effect of Death on Damages*, No 134 (March 1992) paras 1.2 and 1.3 and part II). The Commission made a series of recommendations to remedy this. These included the transmission of the deceased's right to *solatium* to his executor and the clarification of, and expansion upon, the level of what was previously an award for loss of society (SLC Report No 134, part IV); now a "section 1(4) award". These recommendations were amended into the 1976 Act (ss 2 and 1(4) respectively) by the Damages (Scotland) Act 1993 (ss 2 and 1). Sub-Sections 1(1) and (2) of the 1976 Act were not changed.

[8] Over a decade later, in 2006, the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill was introduced. At stage 1, the leader of the Bill team explained its purpose as follows:

"Broadly speaking, the payments that are made under the various aspects of a damages claim are similar, regardless of whether settlement is made before the sufferer's death or afterwards in relation to claims by the executor and relatives, apart from payments that are made to relatives under section 1(4) of the 1976 Act for their non-patrimonial loss. ... [S]ection 1(4) damages constitute an additional amount—which can be substantial—that is paid to the immediate family only if the sufferer does not settle their claim in full prior to death.

A mesothelioma sufferer therefore faces a dilemma: either they pursue their own damages claim before they die, or they do not, so that their executor and relatives can claim awards that total more than the award of damages to which the sufferer was entitled. About 80 per cent of sufferers are not pursuing their own claims, in order not to disadvantage their families.

The straightforward and specific purpose of the bill is to remove that dilemma for mesothelioma sufferers. It will disapply section 1(2) of the 1976 Act so as to allow the immediate family of a mesothelioma sufferer to claim damages for non patrimonial

loss, under section 1(4) of that Act, after the sufferer dies, irrespective of whether the deceased has already recovered damages or obtained a settlement.

...

In considering the mesothelioma-specific nature of the bill, it is necessary to be clear about what it is and is not designed to do. The purpose of the bill is to remove the dilemma that mesothelioma sufferers face in relation to whether to pursue a damages claim. ...”.

[9] The Bill became the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007. It amended the 1976 Act to disapply the bar under section 1(2) to a relative’s claim, where the deceased had settled his own claim in mesothelioma cases. Specifically, section 1 of the 2007 Act under a general heading “Mesothelioma: rights of relatives of a deceased person to” disapplied the bar where:

“2B(a) the personal injury in consequence of which the deceased died is mesothelioma”.

The Damages (Scotland) Act 2011

[10] In September 2006, prompted by the discussions on the 2006 Bill, the Scottish Ministers asked the Commission to review once again the law on damages recoverable by the relatives of those whose death was caused wrongfully. The Commission issued their *Report on Damages for Wrongful Death* in September 2008 (SLC Rep No. 213). It is interesting to note that the Commission regarded (para 3.23) the relatives’ claim as “a dependent right”. Historically that is incorrect; it was an independent right. Nevertheless, they recommended (No 8) the retention of the general rule that the right of relatives to sue for damages upon a person’s wrongful death should continue to be extinguished where the deceased had settled his own action for the wrongdoing. They recommended that the mesothelioma exception should remain (paras 3.23 and 3.29). The reasoning behind this was the “highly exceptional” nature of mesothelioma cases; that, when the disease was diagnosed, death would inevitably

follow shortly afterwards (para 3.27). In due course, the defenders would argue that this meant that the Commission had in contemplation the situation in which, at the time of settlement, the person was already known to be suffering from mesothelioma. However, the Commission's recommendation (No 9) did not say that. It read:

“Where a victim dies of mesothelioma, his relatives should retain title to sue for non-patrimonial loss although the victim has excluded or discharged liability before his death”.

The terms of the relative section in the draft Bill reflected this wording.

[11] The 2011 Act resulted from the Commission's recommendations. It repealed, and in part re-enacted, the 1976 Act. It preserved the mesothelioma exception. The relevant provisions are as follows:

“3 Application of sections 4 to 6

Sections 4 to 6 apply where a person (“A”) dies in consequence of suffering personal injuries as the result of the act or 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.

4 Sums of damages payable to relatives

- (1) B is liable under this subsection to pay—
 - (a) to any relative of A who is a member of A's immediate family, such sums of damages as are mentioned in paragraphs (a) and (b) of subsection (3),
 - (b) to any other relative of A, such sum of damages as is mentioned in paragraph (a) of that subsection.
- (2) But, except as provided for in section 5, no such liability arises if the liability to pay damages to A (or to A's executor) in respect of the act or omission— (a) is excluded or discharged, whether by antecedent agreement or otherwise, by A before A's death, or (b) is excluded by virtue of an enactment.
- (3) The 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.

...

5 Discharge of liability to pay damages: exception for mesothelioma

- (1) This section applies where—
 - (a) the liability to pay damages to A (or to A's executor) is discharged, whether by antecedent agreement or otherwise, by A before A's death,
 - (b) the personal injury in consequence of which A died is mesothelioma, and
 - (c) the discharge and the death each occurred on or after 20th December 2006.
- (2) Liability arises under section 4(1) but is limited to the payment of such sum of damages as is mentioned in paragraph (b) of section 4(3)."

[12] Section 5(1)(b) is identical to the amendment to section 1 of the 1976 Act, introducing section 1(2B)(a). The Explanatory Notes to the 2011 Act stated:

"35. Section 5 re-enacts subsection ... (2B) of section 1 of the 1976 Act which were inserted by ... the 2007 Act.

36. It forms an exception, in cases where a victim dies of mesothelioma, to the general principle laid down in section 4(2) that the defender B is not liable to pay damages to the deceased's (A's) relatives where A has discharged or excluded liability before A's death.

37. Subsection (1) contains three criteria which must be met for section 5 to apply.

38. Paragraph (a) provides that A must have discharged B's liability to A before death.

39. Paragraph (b) provides that the personal injury from which A dies must be mesothelioma.

...

41. Subsection (2) provides that, where the ... criteria set out in subsection (1) are met, B will be liable in damages to A's relatives even though A had discharged the liability before A's death. However, B's liability is limited to damages for non-patrimonial loss; A's relatives may seek an award in terms of section 4(3)(b) but not damages for loss of support under section 4(3)(a)."

The Lord Ordinary's decision

[13] Two principles were relevant. First, a person claiming damages founded upon a single wrong could bring only one action for reparation which addressed all losses, past and prospective (*Aitchison v Glasgow City Council* 2010 SC 411 at para [26]). Secondly, it was sufficient, for the purposes of foreseeability in cases of asbestos exposure, that the defender should reasonably have foreseen a risk of some pulmonary injury, even if not necessarily mesothelioma (*Jeromson v Shell Tankers (UK)* [2001] ICR 1223, at para 32). It was not correct to define "liability" within section 5(1)(a) as "liability for any, and only any, personal injury existing at the time of the discharge". "Liability" in section 5(1)(a) bore the same meaning as it did in section 3; ie liability arising from a defender's act or omission.

[14] Applying these principles and section 4(2) of the 2011 Act, when Mr Crozier settled the 2014 action, he discharged the defenders from all liability arising from their negligent exposure of him to asbestos, including mesothelioma. However, on the pursuers' averments, their claims satisfied the conditions of section 5. They were therefore entitled to seek relevant damages for Mr Crozier's death.

[15] None of the external materials, notably the Explanatory Notes, which were relied upon by the defenders, displaced the meaning conveyed by the words of the 2011 Act. The Act's provisions were clear and unambiguous. They did not produce absurdity. The Explanatory Notes to the 2011 Act made it clear that no conditions applied to the section 5 exception apart from those set out in subsections 5(1)(a) to (c). The Explanatory Notes to the 2007 Act might appear consistent with the defenders' interpretation, but they had not been endorsed by Parliament. That removed any justification for reliance on such materials (*R (O) v Home Secretary* [2023] AC 255, at para 30).

Submissions

Defenders

[16] The pursuers' action was incompetent. The right to claim damages for any negligent exposure of Mr Crozier to asbestos by the defenders was removed by the decree of absolvitor in their favour. Delictual liability was for *damnum injuria datum* (injury culpably inflicted; Gloag and Henderson, *The Law of Scotland* (15th ed), para 25.02). Only one action could be pursued to enforce an obligation to make reparation for loss caused by an act or omission (*Aitchison v Glasgow City Council* at paras 16 and 31 *et seq*; *Dunlop v McGowans* 1980 SC (HL) 73 at 81). A decree of absolvitor was a final decree *in foro*. It was *res judicata*; its subject matter could not be adjudicated upon again.

[17] Under section 12 of the Administration of Justice Act 1982, it was possible for a pursuer to seek an award of provisional damages if there was a risk of a serious deterioration in his condition in the future. Provisional damages were of no use to a pursuer with mesothelioma, which was a singular, rapidly fatal condition. The starting point for an award in a pleural plaques case was one for provisional damages with a discounted future award to reflect the risk of mesothelioma (*Harris v Advocate General* 2016 SLT 572 at paras [22] *et seq*).

[18] Words in a statute derived their meaning from their context (*R (O) v Home Secretary* rubric at 256). The context of a legislative provision included its history and the relevant common law (*ibid*; *Aitchison v Glasgow City Council* at para [12] *et seq*). The 2007 Act was passed to provide an exception to the general rule. This was to prevent a person, who was suffering from mesothelioma, from having to make the invidious choice between settling a claim, or delaying settlement in order to give his family the opportunity to sue after his death (*Dow v West of Scotland Shipbreaking Co* 2007 Rep LR 59 at paras [1] and [3]). At no

point was it considered necessary to have an exception for sufferers of pleural plaques, whether on policy or any other grounds.

[19] In order to meet the exception in section 5, Mr Crozier would have had to have:

(i) raised proceedings whilst suffering from mesothelioma; and (ii) died from mesothelioma.

His previous proceedings concerned the defenders' liability to pay damages for pleural plaques. He discharged that liability. Mr Crozier did not raise, and could not have raised, proceedings for his subsequent mesothelioma. The Lord Ordinary erred in holding that the only requirement for the section 5 exemption to apply was that the injured person had to have died from mesothelioma. Headings were part of a statute (*R v Montila* [2004] 1 WLR 3141 at paras 34 – 36). Where general words were preceded by a heading which indicated a narrower scope, that might indicate that those general words should be given a narrower meaning (*Inglis v Robertson* (1898) 25 R (HL) 70 at 76). Section 5 only made sense if its heading, "[E]xception for mesothelioma", was read into each subsection.

[20] The defenders' liability to Mr Crozier arose when he developed pleural plaques. The Lord Ordinary erred in failing to accept that "liability" should be defined by reference to personal injury. He erred in his application of the single action rule. His decision resulted in absurdity. It allowed two actions to proceed for the same loss caused by the same wrong; one for pleural plaques and one for mesothelioma. He erred in applying an absurd interpretation of section 5(1)(a), and in not correcting that absurdity by reference to other relevant sources, including the Explanatory Notes to the 2011 and 2007 Acts.

Pursuers

[21] It was not disputed that, where a deceased person had settled a claim for damages, the defender generally had no liability to pay damages to his relatives (2011 Act, s 4(2)).

Section 5 provided an exception to this, where the three conditions set out in subparagraphs (a) to (c) were satisfied. The respondents offered to prove that their claim satisfied all three of those conditions. In relation to (a), Mr Crozier's claim in relation to pleural plaques and asbestosis arose in relation to the same acts and omissions of the defenders. Their liability to pay damages to Mr Crozier was discharged by the settlement of his claim. Condition (b) was satisfied, as Mr Crozier died from mesothelioma. Condition (c) was satisfied, as the discharge and death occurred in 2015 and 2018 respectively. The prior discharge of the defenders' liability was a necessary condition for the application of section 5. The Lord Ordinary's approach was consistent with the clear and unambiguous wording of that section. The Explanatory Notes to section 5 could not displace that. The Lord Ordinary interpreted section 5 as providing an exception, which required only that the deceased had died of mesothelioma.

[22] The Lord Ordinary's interpretation of sections 3 to 5 was consistent with the single action rule. The fact that it permitted the deceased to recover damages for pleural plaques and his relatives to recover damages following his death was not absurd. The same result could have arisen if the deceased had accepted provisional damages. The interpretation contended for by the defenders would require several words to be read into the statute. The provisions contained no words regarding the condition from which the deceased was suffering at the time of the settlement.

[23] It was possible that the words used in section 5 went beyond the mischief identified by the (then) Scottish Executive in proposing the legislation. That did not mean that the court should ignore the words used and substitute a different wording that might be more consistent with an expressed aim of the Scottish Government. It was not apparent from the words used in the 2007 Act that the intention of Parliament was the same as that in the

Explanatory Notes. Any such intention was not set out in the Explanatory Notes to the 2011 Act. It would be destructive of all legal certainty (*Cora Foundation v East Dunbartonshire Council* 2014 SC 665 at para [32]; *Fothergill v Monarch Airlines* [1981] AC 251) if individuals had to search through the legislative history of, and the Explanatory Notes to, an earlier piece of legislation in order to ascertain Parliament's intention.

Decision

[24] The Damages (Scotland) Act 2011 repeals and re-enacts, with amendments, its 1976 equivalent which had in turn replaced, but in large part re-enacted, the common law in relation to the rights of persons to sue on the wrongful death of a relative. It provides a reasonably comprehensive and comprehensible code for, in the case of immediate relatives, recovery of both the expanded loss of society and loss of support awards or, if not immediate, only loss of support. That claim is normally excluded if the deceased has previously settled his own claim, or where it has already been determined. The position created by the 1976 Act remained intact until the Damages (Scotland) Act 1993 which allowed the deceased's claim for *solatium* to transmit to the executor and provided for the expanded loss of society (section 1(4) award). The reason for these provisions was the perceived imbalance between what a deceased could obtain as *solatium* and the alternative of the relatives' claim for loss of society.

[25] It is the change brought about by the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 which is most relevant for present purposes, given that its provisions are retained in the 2011 Act. The 2007 Act contains, in essence, only one operative clause. This is that the claims of relatives, in which liability would otherwise be excluded by the

operation of section 1(2) of the 1976 Act (ie prior settlement), are not so excluded where “the personal injury in consequence of which the deceased died is mesothelioma”.

[26] The court requires to apply the standard canons of statutory interpretation. It must ascertain the intention of Parliament as expressed in the words of the statute in light of the particular context (*MacMillan v T Leith Developments* 2017 SC 642, LP (Carloway), delivering the opinion of the Full Bench, at para [54], citing *R v Environment Secretary, ex parte Spath Holme* [2001] 2 AC 349, Lord Nicholls at 396-7, in turn citing *Black-Clawson International v Papierwerke Waldhof-Aschaffenburg* [1975] AC 591, Lord Reid at 613).

[27] An appropriate starting point is that the language should bear its ordinary meaning in the general context of the statute (*ibid*). Citizens should be able to rely upon what they read in an Act of Parliament (Lord Nicholls at 397). External aids to interpretation, including Explanatory Notes, may cast light on the meaning of a provision, whether ambiguity exists or not. However, as it was neatly put in *R (O) v Home Secretary* [2023] AC 255 (Lord Hodge at para 30):

“... none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity.”

[28] The words under consideration are clear and unambiguous. The context, although expressed in terms of the resolution of a dilemma, is ensuring that the relatives of persons who have died from mesothelioma are compensated, albeit to a limited extent, for the loss of the deceased even if he had earlier settled his own claim for *solatium* and loss of earnings. The way in which the 2007 and 2011 Acts did this was simply to disapply the bar on damages claims which have been settled or otherwise disposed of, where “the personal injury in consequence of which the deceased died is mesothelioma”. There is no other relevant condition. There is no ambiguity. No absurdity is created by allowing immediate

relatives to claim some damages, by way of the expanded loss of society but no loss of support, for the loss of a relative who has previously claimed *solatium* and loss of earnings. That is sufficient to dispose of the reclaiming motion.

[29] In any event, even if it were a requirement that the claim which was settled (“discharged”) was a mesothelioma case, that is what occurred here. The deceased’s claim included damages for the risk of mesothelioma. When a person settles a claim in relation to pleural plaques or asbestosis, having elected not to seek provisional damages, part of the *solatium* is almost bound to be attributable to the prospect of the development of mesothelioma in due course.

[30] Finally, even if it were necessary to take greater account of the Explanatory Notes or the Parliamentary statements, nothing in these materials detracts from interpreting the relevant provision in the manner indicated. None of the materials state that it is a condition of the exception to the bar on claiming damages that the deceased had to have developed, and be known to have developed, mesothelioma at the time of settlement. In order for that condition to apply, the court would have to read into section 5(1) words that are not there.

[31] The court will refuse the reclaiming motion and adhere to the interlocutor of the Lord Ordinary dated 27 July 2023. However, all that that interlocutor states is that the Lord Ordinary refused an unspecified motion at a diet of debate. This needs clarification by adding after “the defender’s motion” the words “to find that the action is incompetent”.