

Fatal Claims in Scotland - an Overview of Recent Decisions

There remains a significant difference between England and Scotland in relation to the treatment of fatal claims. In England bereavement claims are only applicable to a very limited range of relatives and for a limited sum of money. Only a spouse or parents of an unmarried minor (and only the mother of an illegitimate unmarried minor) can claim. The total damages are limited to £10,000. A child cannot claim for the loss of a parent or sibling, nor can a parent claim for loss of an unmarried child or one who has reached majority. Those who claim will receive less than they would for a moderate back injury. It must therefore come as a surprise to many English solicitors and claims handlers that the awards and class of individuals who can claim are far greater north of the border.

There is no doubt that awards in this area have increased substantially in recent years as witnessed by jury awards and recent decisions of the Inner House in the Court of Session (the Scottish appeal court). Although single judges hear most cases in Scotland, it is possible for either party to opt for trial by jury. In theory at least, all personal injury case should be heard by jury unless parties agree otherwise or "special cause" is shown. Generally, defenders prefer to avoid the lottery of a jury as juries are unpredictable and tend to award higher awards. A jury is provided with no guidance as to judicial level of awards and are circumvented only by the maximum of the sum sued for.

For example, in *Strang v Le Brusq* 2001 Rep, L.R. 52 a jury awarded £30,000 each for parents of a 21 year old man who was still living at home. In *Wells v Hay* 1999 Rep. LR (Quantum) 44 a jury awarded a single mother £37,146.37 for the loss of her 19 year old son. In *McIntosh v Findlay* 2001 Rep L.R. 66 the posthumous child of an 18 year old merchant seaman was awarded £37,500 for "loss of society". In *Warnock v Clark* Contracts 2005 Rep .L.R a loss of society award of £40,000 was made in favour of the widow of a 34 year old man who died after falling through a skylight. Awards of £16,000 each were made to the three children aged 9, 6 and 3. In *Gilles v Lynch* (unreported 24 March 2006) a jury awarded £80,000 to the mother of a 24 year old female who was killed in a road accident.

The recent case of *Audrey Weir v Robertson Group (Construction) Ltd*, 18 August 2006, CSOH, highlights the current although unsettled position in Scotland. Mrs Weir raised an action for damages on behalf of herself and her two children aged 12 and 10. Her husband, James Weir died as a result of an accident at work. They had been married for 15 years and had a close relationship. Mrs Weir claimed for funeral expenses, loss of support, loss of services and claims under S1(4) of the Damages (Scotland) Act 1976. S1(4) provides for an award for the deceased's "immediate" family as compensation for (a) distress and anxiety endured by the relative in contemplation of the suffering of the deceased before death, (b) grief and sorrow caused by the death and (c) loss of patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance had he not died.

In his judgement, Lord Glennie considered the disparity between awards of damages made by judges and juries in respect of bereavement. In the past insurers have argued unsuccessfully that jury awards (which tend to be higher) should set no precedent and should not be relied on. Claimants' solicitors have argued otherwise.

This disparity was also recognised by the Scottish appeal court in *Shaher v British Aerospace Flying College Ltd*, 2003, SC, 540 which it was described as a "huge gulf". *Shaher* was concerned with a loss of society to the parents of a student who died in a

flying accident. On appeal, the court awarded £20,000 to each parent. The court reiterated that judges should look for guidance to jury awards as well as judicial awards. In a case where there is a clear pattern of jury awards, judges should take that pattern into account. They should however, take account of the fact that jury awards in the past have tended to be higher than judicial awards and make the necessary adjustments.

Since *Shaher* there have been two further decisions of the Scottish appeal court. In [McLean v William Denny & Bros Ltd 2004 SC 656](#) the Scottish appeal court upheld an award of £28,000 to the widow of a 75 year old man who died of mesothelioma. In [Murray's Executrix v Greenock Dockyard Co Ltd 2004 Rep. L.R.86](#) the Scottish appeal court differing from the Lord Ordinary, made awards of £28,000 and £10,000 respectively to the 63 year old widow and 32 year old daughter of a man who also died of mesothelioma.

Lord Glennie in the case of *Weir* felt that the relationship in *Shaher* was different to the present case. Here he was concerned with an award to the wife of two young children. He awarded Mrs Weir £35,000 and her two children £17,000 each for their claims under S1 (4).

Lord Glennie states that there is a hierarchy of awards. An award to a widow is likely to be significantly higher than an award to parents or children of a deceased, the reason being that a husband and wife will have developed and grown together throughout their marriage, both physically and emotionally. The loss of a spouse will be particularly hard to bear. Within a range of other relatives, he felt that much would depend on age and vulnerability. The likely award to a parent of a deceased child will vary according to the age of the child and the emotional dependency of the parent on that child. Similarly, the likely award to a child of a deceased parent will depend to a large extent on the age and dependency of a child upon a parent. In cases where the deceased has suffered a long and debilitating illness, for example mesothelioma claims, he thought that awards made to elderly widows would be less than those made to younger widows in sudden death cases. A younger widow should expect to have her whole married life ahead of her.

Although Lord Glennie has attempted to clarify the position in Scotland, there is no doubt that claimants' solicitors will continue to challenge the hierarchy of awards. Further litigation and discussion in this area of the law is inevitable.

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