

Recent Developments in Claims under the Damages (Scotland) Act 2011

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Introduction

- Review of Four Cases
  - *Veale (Crozier) and Ors v Scottish Power UK plc* 2026 SC (UKSC) 77
  - *Buckley v Budzynski* 2026 SLT 895
  - *Lever v Ayrshire and Arran Health Board* 2026 SLT 989
  - *CD v Grampian Health Board* 2026 SLT 1034
- Theme of the Year
  - Scrutinising the statutory definitions.
  - Not always a common practice in personal injury where so much is fact specific and common law.

Quick Word on Statutory Interpretation

- Ascertaining 'the mischief', i.e., the problem identified by legislators for which the legislation is considered the remedy.
- Courts apply legislation as enacted, even if that is inconsistent with the intended mischief.
- Unless the statute is ambiguous or produces absurd results.
- See:
  - *Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG* [1975] AC 591 at 613
  - *R v Secretary of State for the Environment, Transport and the Regions, ex p Spath Holme Ltd* [2001] 2 AC 349 at 396
  - *R (O) v Secretary of State for the Home Department* [2022] AC 255 at paras. 29-31

Veale (or Crozier) v Scottish Power UK plc

- Background
  - In 2014, Robert Crozier settled a claim for pleural plaques on a full and final basis.
  - Settlement of the kind now provided for in *Harris v Advocate General for Scotland* 2016 SLT 572
    - Award of *solatium* for pleural plaques and asbestosis.
    - Award for damages for future risks in line with the *Harris* calculation.
  - Mr Crozier died of mesothelioma in 2018.
  - Not in dispute he could not make any claim on his own behalf, and not in dispute that his estate could not make any claim on his behalf.
  - Family members raised claims for loss of society only under Section 5 of the 2011 Act.
  - Defender argued claim was incompetent under Section 5 as Mr Crozier had never settled his personal mesothelioma claim.

Veale (or Crozier) v Scottish Power UK plc

- Section 3 (a), Section 4 (2) and Section 5 (1).
  - 'liability to pay damages'.
- Section 3: provides that Sections 4 to 6 apply where a person A dies as a result of an act or omission and it 'gives rise to liability to pay damages to A'.
- Section 4 (2): 'no such liability arises if the liability to pay damages…(a) is excluded or discharged…by A before A's death.'
- Then Sections 4 (3) and 6 set out what heads of claim a relative can pursue.
- Key point is that, in general, a person can either settle a claim while they're alive, or their relatives can settle a claim when they're dead, but not both. But:

Veale (or Crozier) v Scottish Power UK plc

- Section 5

'(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).'

Veale (or Crozier) v Scottish Power UK plc

- Two main lines of argument by pursuers (both accepted):
  - Firstly, 'Liability to pay damages' has to mean the same thing in Section 5 as it does in Sections 3 and 4 (para. 12)
  - It cannot be read as only a liability to pay damages for mesothelioma.
  - Secondly, the defender's position relied on the liability to Mr Crozier being both discharged and not discharged (referred to by pursuers' counsel on appeal as 'Schrödinger's liability'), so the argument was self-defeating (paras. 16-17)
- Effect
  - If a pursuer dies of mesothelioma, having previously made a full and final settlement of another asbestos claim, they can make no personal injury claim.
  - Relatives are able to claim for Section 4 (3)(b) loss of society awards only.

Buckley v Budzynski

- Section 4 (3)(a) – 'Loss of Support' Claim
  - '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…'
- Section 7 (1) – Calculation of Loss of Support Claim
  - '…loss of support is to be assessed applying the following paragraphs –

    (a) the total amount to be available to support A's relatives is an amount equivalent to 75% of A's net income,

    (b) in the case of any other relative than…[*a spouse or dependent child*]…

    the relative is not to be awarded more in compensation for loss of support than the actual amount of that loss.'

Buckley v Budzynski

- Background
  - Motorbike road traffic accident. Deceased was killed when defender tried to overtake when it was not safe to do so.
  - Liability not in dispute – all claims other than the widow's loss of support claim were settled.
  - Mr Buckley had a private personal pension scheme with St James' Place.
    - From retirement onwards, he had drawn out a regular monthly income and occasional lump sums.
    - On his death, the remaining value of his pension moved across to a 'dependant's drawdown' product.
    - The pursuer had not actually drawn any income from it following the deceased's death.
  - Pursuer's claim was for 75% of the calculated value of Mr Buckley's but-for drawdown income over the course of his expected life.

Buckley v Budzynski

- Defender Argument
- Because the deceased's pension investment passed in full to the pursuer, she has had no factual loss of support.
- As a fallback, relied on Section 7 (2):
  - 'if satisfied that it is necessary to do so for the purposes of avoiding a manifestly and materially unfair result, the court may apply a different percentage to that specified in subsection (1)(a) [75%]'

- Pursuer Argument
- The inheritance of the pension investment is to be ignored for calculating loss of support per Section 8 (1)(a).
  - 'in assessing…the amount of any loss of support sustained by a relative of A no account is to be taken of –

    (a) any patrimonial gain or advantage which has accrued or will or may accrue to the relative by way of succession or settlement, from A or from any other person…'

Buckley v Budzynski

- *Rix v Paramount Shopfitting Co Ltd* [2021] 4 WLR 109 at para. 74
  - 'The starting-point must be that in a case where a wife has inherited from her deceased husband an asset which generates income without the need for any substantial work on his part she cannot claim to have lost the income of which she previously enjoyed the benefit: as Staughton LJ said in *Wood* you cannot claim for loss of the eggs if you have inherited the goose.'
    - (*Wood v Bentall Simplex Ltd* [1992] PIQR P332)
- *Williams v Welsh Ambulance Services NHS Trust* [2008] EWCA Civ 81
  - Drew distinction between passive income and income reliant on the deceased's 'flair, skill, expertise and energy'.
- In *Rix* was that the claimant received a loss of dependency claim based on the loss of income to the family business from the loss of the deceased, but no award for the rental income from properties the deceased had owned and she had inherited.

Buckley v Budzynski

- Lord Malcolm held for the defender:
  - 'The fact that all of the same income producing investments have passed to Mrs Buckley and that her husband had no other source of income means that she has suffered no loss of financial support. The answer to the question posed by section 4(3)(a) is that no compensation is required.' [para. 19]
- Pursuer's counsel was correct to found on Section 8 (1)(a) rather than (b), but:
  - 'The subsection was designed to deal with the receipt of collateral benefits, not to create a loss of support claim which otherwise did not exist.' [para. 20]
- Had it been relevant, the defender would not have succeeded on the Section 7 (2) 'manifestly and materially unfair result' argument. [para. 21]

Buckley v Budzynski

- Issues to watch
- Rental Property Income
- Family Business Income
  - Whether percentage ownership shares or salaries drawn by deceased and spouse do or do not reflect effort in the business.
- Occupational pensions
  - Whether or not they pay death benefits.
  - Less clearly caught by *Buckley* than SIPPs.
- Self-Invested Personal Pensions
  - Or shares, etc.
  - To make things more complicated, these are becoming subject to inheritance tax as of 6 April 2027.
  - Sections 69 (9)(b) and 71 of the Finance Act 2026 amending Section 151 (2) of the Inheritance Tax Act 1984.
  - Deceased will nominate someone to receive benefit of SIPPs held in trust, but technically non-binding on trustees.
  - Investigate with deceased's CFA the usual approach of the fund.

Lever v Ayrshire and Arran Health Board

- Section 3
- '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.'
- *Lever* is about the interpretation of 'in consequence of'.
- Essentially a causation issue, and a question of whether and to what extent acceleration of death is relevant.

Lever v Ayrshire and Arran Health Board

- ‘Acceleration of death’ clinical negligence action.
  - Debate on the interpretation of Section 3.
  - Deceased died of renal cancer aged 76 in November 2022.
  - Admitted breach of duty in July 2021 where defender’s sonographer failed to detect a tumour during an ultrasound.
  - Delayed diagnosis case.
  - Not in dispute his renal cancer was incurable.
  - But for the failure to diagnose in July 2021, the deceased would have lived 12 months longer.

Lever v Ayrshire and Arran Health Board

- Defender Argument
- 'in consequence of' meant 'as a result of' or 'because of'.
- There had to be a direct cause and effect relationship.
- 'If the injury caused by the defender did not cause the death, the relatives had no right to claim under sections 4 to 6.' [para. 9]

- Pursuer Argument
- Defender's position would cause an inconsistency between a living pursuer having a claim for lost years under S. 1 of the Act and relatives not having a claim for acceleration of death. [para. 12]
- 'In consequence of' cannot be restricted to meaning 'but for' as that appears elsewhere in Section 3. [para. 13]

Lever v Ayrshire and Arran Health Board

- Pursuer's interpretation preferred by Lord Harrower.
  - 'Death comes to us all at some point. Indeed, there is a sense in which every action in damages for a wrongful death is an action for a wrongful acceleration of death…it is not necessary, therefore, that A's death would not have occurred but for the act or omission of B. It is enough that A died earlier than he would have done in consequence of suffering personal injuries as a result of the act or omission of B. In other words, it is enough that B's act or omission caused or at least materially contributed to A's death.' [para. 15]
- Indications are that quantum will be affected in cases where there is only a short-term acceleration of death [para. 16].

Lever v Ayrshire and Arran Health Board

- Possible Issues/Lines of Argument to Consider
  - In delayed diagnosis cases, still a distinction between acceleration of death cases (allows awards under 2011 Act) and increase in pain and suffering cases where date of death on balance doesn't change (transmissible *solatium*, etc. only).
  - Is *Lever* using the term 'caused or materially contributed' correctly?
  - Is Section 3 even concerned with causation at all, or does 'in consequence of' simply mean liability arises in cases where the causation threshold appropriate to the case at common law has been achieved?
  - How would *Lever* apply in a case where material contribution isn't a sufficient threshold for causation, and the pursuers can only win on 'but-for' causation? (per *Holmes v Poeton* [2024] KB 521).

CD v Grampian Health Board

- Health Warning: under appeal on multiple points.
- Interesting issue on limitation under Section 18 (2)(b) of the 1973 Act.
- Delayed diagnosis of a brain tumour and haemorrhage in a five-year old child, leading to her death in September 2019.
- Title to sue was at issue in respect of the sixth pursuer, the adult daughter of the fourth pursuer, who had been the third pursuer's (father's) partner as at date of death and married him in 2020.
- Quantum was at issue in respect of the third and fourth pursuer.
- Other pursuers' claims had settled before proof.

CD v Grampian Health Board

- Section 14
  - (1)…"'relative", in relation to a person who has died, means a person who –

    …

    (b) 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,

    (c) is the brother or sister of the deceased or was brought up in the same household as the deceased and accepted as a child of the family in which the deceased was a child,

    …'
- Section 4 (5)(b) and Section 14 (2) then need to be read together.
- Fourth pursuer, as father's partner, qualified for a loss of society claim under Section 14 (1)(b), having 'accepted the deceased as a child of the person's family'.

CD v Grampian Health Board

- Lord Arthurson held the language of Section 14 (1)(b) precluded a loss of society award to the sixth pursuer:
  - 'The pursuers contend that the fourth pursuer being E's step-mother, and the sixth pursuer being the fourth pursuer's daughter, the sixth pursuer and E can be deemed under the statute to have been sisters. This is an attractive submission, but on reflection I have concluded that a plain reading of section 14 of the 2011 Act requires the claimant "relative" to establish on the facts that she or he was brought up in the same household as the deceased and that she or he was accepted as a child of the family in which the deceased was a child. This presents a very real chronological problem for the sixth pursuer in the present case, as she was on the facts available to the court surely brought up in an entirely different household, albeit that she maintained visiting rights latterly in the household of the third and fourth pursuers.' [para. 12]

CD v Grampian Health Board

- The 2011 Act allows for certain claims by children and certain claims by dependent children (*Gray v Advocate General for Scotland* 2016 SLT 1287).
- Not clear from the judgment whether both the deceased and sixth pursuer lived (temporarily or otherwise) with the third and fourth pursuer for any length of time whilst both were minor children.
- Policy issue with 'brought up in the same household' excluding households into which one or both relevant children have visitation rights (as opposed to households with primary custody).

CD v Grampian Health Board

- Loss of Society Awards:
- To Third Pursuer (Father): £150,000
- 'the death of a very young child in such circumstances as this must require an uplift in the figure set by me in *Paterson v Lanarkshire Health Board* 2023 SLT 67.' [para. 16]
- *Paterson*: negligent suicide case where mother's distress and anxiety, grief and sorrow element was very high: £100,000 (£109,000 RPI)
- Even applying RPI to previous cases, highest loss of society award to a parent recorded post-*Hamilton*.
- In both *Scott v Parkes* (death of a 19-year-old) and *McArthur v Timberbush Tours* (death of a 26-year-old), the awards to parents are now around £133,000 adjusted for RPI.

CD v Grampian Health Board

- Loss of Society Awards:
- To Fourth Pursuer (Stepmother): £75,000
- Only comment Lord Arthurson makes is 'noting in passing the case of *McArthur v Timberbush* 2021 SLT 1021' [para. 16]
- *McArthur* makes awards to both a stepfather and step-sister of the deceased.
- Lord Armstrong referred to step relation awards not being fixed at a significantly lower level.
- Mother and Father both awarded £100,000 (£133,000 RPI)
- Stepfather (of deceased from age 9 to 26) awarded £70,000 (£93,100 RPI)



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