

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2015] CSIH 70
PD706/13

Lord Eassie
Lord Menzies
Lord Brodie

OPINION OF THE COURT

delivered by LORD BRODIE

in the cause

by

MARTHA SARAH YOUNG

Pursuer and respondent;

against

ARTHUR MACVEAN

Defender and reclaimer:

Pursuer and respondent: G Clarke QC, Forsyth; BLM
Defender and respondent: Milligan QC; bto

29 September 2015

Introduction

[1] The pursuer sues for damages in respect of the death of her son who was killed on 1 June 2010 when a motorcar driven by the defender mounted the pavement of Danes Drive, Scotstoun, Glasgow, and struck him. The defender's driving on that occasion was such that he was convicted of contravention of section 1 of the Road Traffic Act 1988 and sentenced to a term of four and a half years imprisonment.

[2] The defender's liability for causing the death of the deceased is admitted. Following proof on the quantification of the damages, the Lord Ordinary awarded the pursuer the sum of £249,600 in terms of interlocutor dated 11 November 2014. The defender now reclaims on the ground that this award was excessive. That ground relies on two propositions. The first proposition is that the Lord Ordinary erred in law in holding that the pursuer was to be regarded as a secondary victim

who was therefore entitled to damages for personal injury in the form of psychiatric illness caused by her experience of the death of the deceased in addition to such damages as she was entitled to as the relative of a deceased who has died as a result of the fault of another person, as is provided for by the Damages (Scotland) Act 2011. The second proposition is that the sum of £80,000, being that head of damages awarded by the Lord Ordinary in terms of section 4(3)(b)(ii) and (iii) of the 2011 Act in respect of loss of society, is excessive.

[3] The pursuer was born on 26 April 1954. She is a widow, her late husband having been killed in a helicopter crash in 1992 when returning from working offshore. Her deceased son was born on 7 March 1984. He was accordingly 26 years of age at the date of his death. Her son was the third of the pursuer's close relatives who died suddenly and unexpectedly. When the pursuer was 21 years of age her father died in the street having suffered a stroke.

Summary of the award of damages

[4] The Lord Ordinary's award of damages had the following heads:

1.1 Damages in respect of bereavement

1.1.1 Distress, grief and loss of society, as provided for by section 4 (3) (b) of the Damages (Scotland) Act 2011 - £80,000, with one half allocated to the past and interest on that one half from the date of the deceased's death.

1.1.2 Loss of financial support, as provided for by section 7 of the 2011 Act - £2500

1.1.3 Personal services as provided for by section 9 of the Administration of Justice Act 1982 - £5190 in respect of the past (an annual figure of £1250 with interest) and £24,940 in respect of the future (based on a multiplicand of £1250 and a multiplier of 19.95)

1.2 Damages in respect of personal injury

1.2.1 *Solatium* – £35,000

1.2.2 Loss of earnings - £60,000

1.2.3 Services - £20,000

1.2.4 Cost of clinical psychological treatment - £6250

A secondary victim

The law

[5] Not every adverse consequence of an act or omission, which, from some perspective or another, can be described as wrongful ("a wrong"), gives rise to a claim for damages. That is so independent of questions of foreseeability and causal connection. The law sets limits beyond which adverse consequences will be regarded as too remote from the relevant wrong to give rise, on the one hand, to a right of action and, on the other, to an obligation to make reparation. In order for the relevant right and the correlative obligation to arise, the loss must be caused by the wrong and it must have been reasonably foreseeable that the wrong would cause the loss but, in addition, there must be what is usually described as a relationship of "proximity" between the person who suffers injury and loss and the wrongdoer. Thus, a particular wrong may cause loss to a number of persons but only those who can establish the requisite relationship of proximity with the wrongdoer will fall into the class of victims who have a claim for damages against the wrongdoer. Where the relevant wrong is a careless act or omission then the issue can be framed in terms of whether the victim was within the ambit of such duties of care as were owed by the wrongdoer.

For there to be a duty of care owed by the wrongdoer to a particular injured person there must be a relationship of sufficient proximity between them. If the relationship is too remote then there is no duty and therefore no liability in the event of injury, even although injury has been caused by the wrongdoer's act or omission.

[7] An example of what falls to be regarded as too remote and therefore which will not give rise to a claim for damages, is where the injured person is someone who has suffered financial loss as a consequence of physical injury to or the death of another person (the "primary victim"). For instance, an employer cannot sue in respect of the death of an employee, however indispensable that employee may be to the financial success of the employer's business: *Reavis* v *Clan Line Steamers* 1925 SC 725. An exception is made by the 2011 Act in the case of the death of the primary victim where derivative claims are given to certain classes of relatives of the primary victim to recover certain heads of damages (a bereavement award). But, as a matter of the common law of negligence, the general rule is that however adversely affected he may be by reason of the death of another, a person suffering injury or loss in respect of that death has no claim for damages against the wrongdoer.

[8] That is the general rule. It is subject to an exception in the common law. The exception applies to cases, such as the present case, where the affected person has suffered psychiatric injury (conventionally referred to as "nervous shock") by reason of the contemplation of the death of or physical injury to the primary victim. However, the exception does not apply to all such cases. Subject to what Lord Wilberforce referred to as an extension to the exception (see in *McLoughlin* v *O'Brien* [1983] 1 AC 410 at 418), it only applies where the nervous shock has been caused by the shocked person being immediately and directly confronted, through sight or sound of it, by the primary victim's death or injury. In *Alcock* v *Chief Constable of South Yorkshire Police* [1992] 1 AC 310 at 410, Lord Oliver of Aylmerton summarised the nervous shock cases which do fall within the exception as being those "in which the event of injury to the primary victim has been actually witnessed by the plaintiff and the injury claimed is established as stemming from that fact". Thus, the plaintiff who suffers nervous shock by reason of his witnessing the suffering or death of a primary victim is treated essentially as if he too had been physically injured. A direct psychological affront is taken to be the equivalent of a direct physical affront. Lord Oliver described a plaintiff who falls within the exception as a "secondary victim" of the relevant wrong.

[9] The question then comes to be how is a secondary victim to be identified. Lord Oliver's answer was explained by him as follows (*supra* at 411A-412A):

> "Although it is convenient to describe the plaintiff in such a case as a 'secondary' victim, that description must not be permitted to obscure the absolute essentiality of establishing a duty owed by the defendant directly to him—a duty which depends not only upon the reasonable foreseeability of damage of the type which has in fact occurred to the particular plaintiff but also upon the proximity or directness of the relationship between the plaintiff and the defendant. The difficulty lies in identifying the features which, as between two persons who may suffer effectively identical psychiatric symptoms as a result of the impression left upon them by an accident, establish in the case of one who was present at or near the scene of the accident a duty in the defendant which does not exist in the case of one who was not. The answer cannot, I think, lie in the greater foreseeability of the sort of damage which the plaintiff has suffered. The traumatic effect on, for instance, a mother on the death of her child

is as readily foreseeable in a case where the circumstances are described to her by an eyewitness at the inquest as it is in a case where she learns of it at a hospital immediately after the event. Nor can it be the mere suddenness or unexpectedness of the event, for the news brought by a policeman hours after the event may be as sudden and unexpected to the recipient as the occurrence of the event is to the spectator present at the scene. The answer has, as it seems to me, to be found in the existence of a combination of circumstances from which the necessary degree of 'proximity' between the plaintiff and the defendant can be deduced. And, in the end, it has to be accepted that the concept of 'proximity' is an artificial one which depends more upon the court's perception of what is the reasonable area for the imposition of liability than upon any logical process of analogical deduction.

The common features of all the reported cases of this type decided in this country prior to the decision of Hidden J in the instant case and in which the plaintiff succeeded in establishing liability are, first, that in each case there was a marital or parental relationship between the plaintiff and the primary victim; secondly, that the injury for which damages were claimed arose from the sudden and unexpected shock to the plaintiff's nervous system; thirdly, that the plaintiff in each case was either personally present at the scene of the accident or was in the more or less immediate vicinity and witnessed the aftermath shortly afterwards; and, fourthly, that the injury suffered arose from witnessing the death of, extreme danger to, or injury and discomfort suffered by the primary victim. Lastly, in each case there was not only an element of physical proximity to the event but a close temporal connection between the event and the plaintiff's perception of it combined with a close relationship of affection between the plaintiff and the primary victim. It must, I think, be from these elements that the essential requirement of proximity is to be deduced, to which has to be added the reasonable foreseeability on the part of the defendant that in that combination of circumstances there was a real risk of injury of the type sustained by the particular plaintiff as a result of his or her concern for the primary victim."

[10] As appears from the foregoing passage, the scope of the exception to the general rule cannot be identified by logic or by the application of some principle. Rather, its parameters are determined by what the courts have been prepared to allow in previous cases. The exception is productive of anomalies and artificial distinctions. As with other common law rules and the exceptions to them, it is the result of incremental development by way of comparison and analogy, each step having been seen to be consistent with what was required by justice in the particular case. The outcome of such a process may be satisfactory and may point the way to further development. On the other hand it may not. The latter is the position taken by the House of Lords in respect of this particular area of the law. The point was underlined by Lord Steyn in *Frost (White)* v *Chief Constable of South Yorkshire Police* [1999] 2 AC 455 which, like *Alcock*, was a case arising from the horrific events of 15 April 1989 at the Hillsborough Football Stadium in Sheffield resulting in the death of 96 spectators and physical injury to more than 700 others. In *Alcock* the plaintiffs were all relatives of primary victims who had suffered shock by reason of what they had seen or heard of the unfolding disaster either at the stadium or through the medium of a live television broadcast and as a result developed psychiatric illness. In *Frost* the plaintiffs were police officers who had suffered post-traumatic stress disorder caused by their experience in tending primary victims or otherwise

dealing with the bodies of primary victims. In neither case was there any doubt as to the plaintiffs having suffered injury in the form of psychiatric illness by reason of events surrounding the deaths of those who were the primary victims of the relevant negligent acts and omissions for which the defendant was responsible. Nevertheless, in both cases the plaintiffs failed. In *Frost* at 500A Lord Steyn said this:

> "My Lords, the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify. There are two theoretical solutions. The first is to wipe out recovery in tort for pure psychiatric injury. … But that would be contrary to precedent and, in any event, highly controversial. Only Parliament could take such a step. The second solution is to abolish all the special limiting rules applicable to psychiatric harm. … Precedent rules out this course and, in any event, there are cogent policy considerations against such a bold innovation. In my view the only sensible general strategy for the courts is to say thus far and no further. The only prudent course is to treat the pragmatic categories as reflected in authoritative decisions such as the *Alcock* case [1992] 1 AC 310 and *Page v Smith* [1996] AC 155 as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament. In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible. It must be left to Parliament to undertake the task of radical law reform."

[11] As appears from the judgment of the Master of the Rolls in *Taylor* v *A Novo (UK) Ltd* [2014] QB 150, the law remains as it was stated to be in the speeches of Lord Oliver in *Alcock* and Lord Steyn in *Frost*. Lord Dyson MR included this in the conclusion to his judgment at paragraph 31:

> "In the *Frost* case the House of Lords recognised that this area of the law is to some extent arbitrary and unsatisfactory. That is why Lord Steyn said 'thus far and no further' in the *Frost* case and Lord Hoffmann and Lord Browne-Wilkinson agreed with him. …The courts have been astute for the policy reasons articulated by Lord Steyn to confine the right of action of secondary victims by means of strict control mechanisms. In my view, these same policy reasons militate against any further substantial extension. That should only be done by Parliament."

[12] The "strict control mechanisms" referred to by Lord Dyson are the five common features set out by Lord Oliver in the passage quoted above from *Alcock* and elaborated into seven requirements by the judge at first instance in *Taylor* v *A Novo (UK) Ltd* in terms which Lord Dyson implicitly approves at paragraph 2 of his judgment:

> "In a careful and thoughtful judgment, the judge helpfully said that it was clear from the case law that, in order to succeed as a secondary victim, Ms Taylor had to satisfy the following seven requirements: (i) her injury was reasonably foreseeable; (ii) she was a close relative of and had a close emotional relationship with the primary victim; (iii) she had suffered a recognised psychiatric injury; (iv) the injury was caused by the actions of the defendant; (v) the injury was caused by "shock" as a result of a sudden perception of the death of, or risk to or injury to the primary victim; (vi) she was either present at the scene of the accident which caused the death or must have been involved in its immediate aftermath

(both physical and temporal proximity being required); and (vii) she must have perceived the death, risk of injury with her own senses."

[13] Accordingly, whether one takes this from Lord Oliver's features, thirdly, fourthly and lastly, or from requirements (v), (vi) and (vii) as set out in paragraph 2 of Lord Dyson's judgment, in addition to the other factors which are identified, for a psychiatrically injured person to qualify as a secondary victim in respect of the death of a primary victim, she must have been present more or less at the time and place of the event which caused the death and her injury must have been caused by the sudden perception through her own senses of the fate of the primary victim. As Lord Wilberforce said in *McLoughlin* v *O'Brien supra* at 422G to 423B (a passage cited with approval by Lord Keith in *Alcock* at 396C):

"...as regards communication, there is no case in which the law has compensated shock brought about by communication by a third party. ...The shock must come through sight or hearing of the event or of its immediate aftermath. Whether some equivalent of sight or hearing, eg through simultaneous television, would suffice may have to be considered".

We would observe that, as is clear from the context, when Lord Wilberforce uses the expression "hearing of the event" he means direct auditory appreciation of what is happening, as opposed to "communication by a third party". However, in addition to cases of shock coming through the seeing or hearing of "the event", Lord Wilberforce recognised cases of shock coming through the seeing or hearing of "its immediate aftermath" as falling within the exception to the general rule. It was this admission of those shocked by reason of their having come upon the immediate aftermath of the event causing the death of or injury to the primary victim into the class of those whom Lord Oliver was in *Alcock* to describe as secondary victims, that Lord Wilberforce in *McLoughlin* designated the "extension" to the exception.

[14] The issue in the present case is whether the Lord Ordinary was correct to conclude that the pursuer was a secondary victim by virtue of her having been exposed to the immediate aftermath of the event which led to the death of her son.

The facts in the present case

[15] The Lord Ordinary found the evidence in the case to be essentially uncontroversial. There was no issue about the pursuer's credibility and reliability. No objection was taken to the pursuer's narrative of events being supplemented by hearsay from the professional witnesses who had interviewed her. These were Dr Ann Harper, a psychologist, and Dr Jane McLennan and Professor Christopher Freeman, both psychiatrists. The Lord Ordinary concluded that there did not seem to be any real disagreement between the parties that the pursuer has suffered a serious psychological injury as a result to her son's death. As far as the features of the case which led the Lord Ordinary to conclude that the pursuer came into the category of secondary victim, she did not make anything of the nature of specific findings of fact. Mr Clarke, who appeared for the pursuer, identified paragraphs 8, 11, 19 and 20 of the Lord Ordinary's opinion as sufficiently summarising the evidence upon which he founded. We accordingly reproduce these paragraphs as follows:

"[8] Unusually for the pursuer she had not seen her son for some days prior to 1 June 2010. She had been away from home for a short period. She had communicated with him on the Monday prior to the incident and had agreed that she would see him later at the

gymnasium which they both attended in Scotstoun, Glasgow. On Tuesday 1 June she finished her work at approximately 4pm and recalled visiting the post office in the Hyndland area of Glasgow. She returned home where she spoke with her daughter stating that she was proposing to attend the gymnasium. Her scheduled class was at approximately 6pm. She left her house shortly after 5pm and noted on her approach to the gymnasium that there was a traffic jam resulting in traffic being diverted at the roundabout near the sports centre onto Dumbarton Road. Eventually she found a parking place in a side street and walked towards the centre. As she was doing so she was aware of police activity and streets being cordoned off. As she was passing the scene of the crash she was able to see a very badly damaged vehicle against a tree. Her immediate thought was that someone must have died. Her concern was also that someone must be suffering as a result of this. Her initial reaction was one of relief that her own children could not be involved as her son did not drive and her daughter was at home. She felt that the crash looked 'so bad' and the state of the vehicle 'affected me'. The witness expressed empathy towards the family which must have been suffering from the consequences of what she believed was an accident at the time. On entering the gymnasium she was beginning to feel a sense of unwillingness to carry on with her class. She heard people talking about the crash and making comments such as, 'this might stop people speeding on that road'. Dr McLennan, the psychiatrist, ...described the pursuer's mood at this point as being 'preoccupied by the accident'. ... the pursuer had asked staff to tannoy for her son because she did not see him around, as expected. The pursuer stated in her evidence that a friend had overheard that a 20 year old boy had been knocked down. The friend then said that it made one think of one's own children. The pursuer started to think about her own children while at the same time attempting to push these thoughts out of her mind. She said however that she 'felt the energy going out of me.' At some point she had started her exercise class but after the warm up had stopped for a drink of water. She noticed that her phone showed that there had been six missed calls. At that point she became scared. The calls were from her daughter Stephanie whom she phoned to discover that police had been at the house. The pursuer shouted to her friend that she thought that the victim of the 'accident' was her son David. She went to the desk to ask them to check the computer to find out whether her son had signed in. He had not. Dr McLennan's evidence was to the effect that it was at this point that the pursuer was almost hysterical, screaming and desperate to see her son. Her friend was trying to comfort her. It appears that a member of staff had left the gymnasium to speak to police outside after the pursuer had tried to seek out her son. The pursuer was aware of police officers entering the gymnasium. The pursuer used words to her friend such as 'Ask if it's David Young'. She was aware of the police approaching her and asking her name. She kept shouting 'Is it David, is it David'. She was taken upstairs to an office. There she was asked if David had a tattoo and when she said he had, she was told that he was dead. At that point she remembers screaming and shouting words such as 'I don't think I can go through this again. I can't do this'. She was taken to a police car and then escorted home. Her friend was present. She then described the situation in her home with family visiting and coming round her. Eventually she was taken to the mortuary where she required to identify her

son. Her initial reaction in seeing the body was that it was not her son's face which she saw but her deceased husband.

...

[11] ... Police Constable Michelle Murphy had been called to the scene immediately after the crash. She attended as a traffic officer with the Road Policing Department at approximately 1645 hours. Already at the scene were fire crew, paramedics and other members of the Road Policing Department. Constable Murphy took responsibility for the ... log... This document was agreed in one of the joint minutes of admissions. ...It records the arrival of the photographer at 1800 hours and the removal of the body of the deceased at 1820 hours. This officer left the scene at approximately 1800 hours to attempt to trace family members. She and a colleague went to the home address of the pursuer and spoke to her daughter Stephanie. PC Murphy's colleague, PC Morrison, took a note of a contact number and a personal mobile number for the pursuer. The officers returned to the *locus*. On return there a staff member from the sports centre exited and approached the police officers to say that there was a woman inside who was 'really upset' and who believed that her son had been involved in the traffic 'accident'. This ... would tend to indicate that the pursuer believed that her son was involved in the crash prior to being told about it. The officers entered the sports centre and were directed to the canteen. PC Murphy saw Mrs Young who appeared to be very upset. She repeatedly said, 'I know it's my boy'. The officers had given the pursuer no information by this time. When the group was shown to an office the police officer noted that the pursuer kept repeating the same words over and over again. PC Morrison asked the pursuer if her son had a tattoo. She was able to confirm the identity of the deceased. She noted that the pursuer was by this time hysterical and screaming words loudly. The officer was very concerned for her. At times the pursuer had her head down. Then she would get up and pace the floor. The officer was of the view that the pursuer could not leave the office as she was not in a fit state to go outside. Some time was taken up trying to calm her down. Eventually, although still upset, she was sufficiently composed for the officers to take her home. They allowed her friend to come with her. As they left the gymnasium, an area which was cordoned off was visible as well as the damaged wall but the officer did not believe that the damaged vehicle could be seen, at least from her position at that time.

....

[19] What is particularly relevant from that account is the state of the pursuer shortly before the death of her son being confirmed by the police. Dr Harper stated that after the pursuer had noticed a message on her telephone from her daughter referring to the police, the pursuer had become panicky and had run screaming to the front desk of the gymnasium to ask the reception staff to see if David had been in that evening.

[20] Dr Harper also described the psychological *seqellae* following the death of the pursuer's son. She described the grief response as having developed into significant

depressive episodes. As at November 2012 the pursuer had described herself as 'marking time' with little motivation for anything. The difficulties in her relationship with her daughter were causing the pursuer further distress. She had feelings of causing annoyance to her daughter, while at the same time expressing the view that her only cause for living was her daughter. Dr Harper noted feelings of passive suicide ideation. There was evidence of significant symptoms of depression including pessimism about the future, feelings of guilt, self-dislike, agitation, indecisiveness, loss of energy, irritability and fatigue. Dr Harper described the levels of depression as well within the severe range. Dr Harper had access to a number of sources of information including the pursuer's medical records and correspondence from COPE Scotland. These records revealed instances of the pursuer experiencing flashbacks of the deceased lying in his coffin as well as persistent ruminations about her son. She suffered sleep difficulties, disturbed sleep patterns, panic attacks, low mood and suicidal ideation, inability to obtain work or undertake daily living activities such as shopping and eating. Dr Harper at that time considered that the pursuer was suffering from complex grief response with severe depressive illness and anxiety. Dr Harper saw the pursuer again in November 2013 and provided a second report. Because of a change in the criteria required, Dr Harper was now of the view that the pursuer met the diagnostic criteria for post-traumatic stress disorder. Dr Harper noted that the pursuer described recurrent, involuntary and intrusive distressing memories of the traumatic event. She recalled seeing the car damaged and described it as 'mangled'. She still had distressing memories of this. She had recurrent distressing dreams in relation to her son and although these did not include dreams about his death, they were characterised by separation from her son. The pursuer repeated to Dr Harper that she had recurrent flashbacks of her son in his coffin and imaginings of injuries on his body which however she did not see. She displayed symptoms of avoidance and unwillingness to approach the area in which her son died. She also tended to avoid her son's friends and avoided speaking about her son to family members.
Dr Harper described the pursuer as expressing significant alterations in cognition and mood which were characteristic of post-traumatic stress disorder. The pursuer described feelings of fear when out walking in the street and seeing vehicles approaching her. She expressed feelings of guilt in being unable to protect her son and described symptoms of pervasive self-loathing. Dr Harper expressed this as more than grief. As at the stage of her second consultation with the pursuer Dr Harper was of the view that the pursuer was suffering from post-traumatic stress disorder alongside a secondary depressive illness. Dr Harper emphasised the significance in the present case of the fact that the pursuer had seen the mangled vehicle prior to her entry to the gymnasium and her consequent anxiety which increased prior to the confirmation of her son's death."

Submissions

For the defender and reclaimer

[16] Mr Milligan, who appeared on behalf of the defender and reclaimer, adopted his written submission with its review of what were put forward as the relevant authorities in an area of the law which was well settled: *McLoughlin* v *O'Brien*, *Alcock* v *Chief Constable of South Yorkshire Police*, *Frost (White)* v *Chief Constable of South Yorkshire Police*, *Taylorson* v *Shieldness Produce Ltd* [1994] PIQR

P329, *Taylor* v *Somerset Health Authority* [1993] PIQR P262, *Taylor* v *A Novo (UK) Ltd North Glamorgan NHS Trust* v *Walters* [2003] PIQR, *Galli-Atkinson* v *Seghal* [2003] Lloyds Rep Med 285, and *Liverpool Women's Hospital NHS Trust* v *Ronayne* [2015] EWCA Civ 588. Mr Milligan relied particularly on what had been said by Lords Keith, Ackner and Oliver in *Alcock (supra* at 392G-H, 397F, 398B-C, 398F-H, 399E-G, 401F, 405C-H, 410E-411G, 417B-H, 418A-C), by Lords Steyn and Hoffman in *Frost* (*supra* at 500B-E, 502F-H, 511A-B), by Auld J in *Taylor* v *Somerset Health Authority* (*supra* at P267-P268) and Lord Dyson MR in *Taylor* v *A Novo (UK) Ltd* (*supra* at 992B-D, 1003H-1004E). In contrast, the observations by Clarke LJ in *North Glamorgan NHS Trust* v *Walters* about this being a developing area of the common law where the control mechanisms should not be applied too rigidly were not only *obiter* but out of line with what had been said by Lords Steyn and Hoffman in *Frost*. *Galli-Atkinson* should be confined to its facts which included the plaintiff having been aware that her daughter had been involved when she first saw the scene of the accident and then seeing her daughter's body in the mortuary.

[17] Mr Milligan noted that notwithstanding some judicial criticism of the current law, a proposal for reform by the Scottish Law Commission had been rejected by the Scottish Government (see Civil Law of Damages: Issues in Personal Injury, December 2013).

[18] Turning to the facts of the present case, it was Mr Milligan's submission that the pursuer's shock was caused by being told about the death, not by witnessing the events or even the aftermath. Although the pursuer did witness the aftermath in the sense of seeing the defender's wrecked motorcar, she did not realise at the time that the wreck was the consequence of an event which had involved any of her close relatives. She did not suffer any shock as a result of seeing the aftermath. Indeed, far from being shocked at that point she was relieved as she thought that her children could not be involved. If the aftermath assumed any significance in the present case it only did so retrospectively, in a way similar to the live television reporting of the Hillsborough disaster. It was not viewing the site of the accident that had "violently agitated [the pursuer's] mind". Becoming worried, as the pursuer did, is quite different from being shocked. One was naturally wholly sympathetic towards the pursuer but, as a matter of law, she was in no different position than the vast majority of parents who lose a child through the fault of another. She was at least in a better position than her counterparts south of the border, who, in similar situations, do not have the derivative rights in respect of bereavement conferred by the 2011 Act.

[19] Mr Milligan emphasised that the pursuer's shock had resulted from what she had been told. While she could be regarded as having witnessed the aftermath of the event which resulted in the death of her son that is not what caused her shock. Her injury was therefore too remote for her to be a secondary victim. There was no question but that she had suffered psychiatric injury. Her case evoked sympathy but there were issues of comparative justice; like cases must be treated alike. One of the reasons for that was in order that parents in a similar situation can be given reliable advice as to the claims that may or may not be available to them.

[20] Mr Milligan emphasised that in order to be a secondary victim a pursuer who has not actually seen or heard the event causing injury or death to the primary victim, must see the aftermath and must be traumatised as a result of that. In the present case the pursuer's direct perception of the aftermath ended when she passed the scene of the collision. At that point she was unaware that her son was involved. What then happened in the gym was as a result of what she was told by other people. Thus, as a matter of fact, the pursuer had not been traumatised by what

she had seen at the scene. The Lord Ordinary's error, as demonstrated by paragraph 51 of her opinion, was to view the aftermath retrospectively, and to ascribe to it a significance that it had not had at the time. The decisions in *North Glamorgan NHS Trust* v *Walters* and *Galli-Atkinson* v *Seghal* showed that a person may be traumatised by more than one event but to be a secondary victim and therefore able to claim damages, a person must have suffered trauma consequent on directly experienced events. There had been no case where a non-traumatic event had been considered relevant.

For the pursuer and respondent

[21] Mr Clarke stated at the outset that the pursuer's claim did not involve any development of the law. The Lord Ordinary's decision was correct when judged by reference to the current law. He accepted that a large component in the pursuer's psychological injury was caused by learning of the death of her son, but could there be said to be any difficulty in the case had PC Murphy met the pursuer at the scene and told her of the death then? It was for the defender to persuade the court why the pursuer's case was any different from that of the plaintiff in *Galli-Atkinson*. Had the Lord Ordinary discounted the distinctions which arise on an application of the control mechanisms because they seemed "artificial" that would have been an error, but that is not what the Lord Ordinary had done. This was not a case where the pursuer had viewed an accident scene but had not thought about it. She had immediately had concerns. The gym was very near to where the pursuer saw the wrecked motorcar. She became aware of missed calls on her mobile phone. No one had told the pursuer of her son's death before the police entered the gym but it was the Lord Ordinary's impression, recorded at paragraph 32 of her opinion, that the pursuer was in a near hysterical state by the time the police arrived. The pursuer became sufficiently agitated for the receptionist at the gym to go to speak to police officers. PC Murphy then spoke to the pursuer. Professor Freeman had understandably conceded that the pursuer's experience over what was a relatively short period had been "ghastly". In order to become aware of the "immediate aftermath" it was not necessary that one should see, for example, a dead body. The only material difference as between the facts in the present case and the facts in *Galli-Atkinson* was that the plaintiff in that case had been in denial as to the death of her child.

Decision

[22] The key passage in the Lord Ordinary's opinion on the issue of whether the pursuer was to be regarded as a secondary victim is found at paragraph 51. It is in the following terms:

> "If I understood the position of Mr Milligan, coming upon the aftermath of an accident means coming upon it in the full knowledge that one is aware of a relative or person of proximity's involvement in it. Otherwise one does not qualify to come within the definition of a secondary victim as one only learns of the relative's involvement retrospectively. Once again I find this an artificial distinction, however I do not need to form a view about that very narrow approach. In the present case, the pursuer began to feel uncomfortable very shortly after viewing the wrecked vehicle; her suspicions about her son's involvement began fairly soon thereafter; and she was distressed prior to her confrontation with the police who confirmed his identity. Looking at the series of events taken together with the other facts of this case I have come to the view that, after applying all of the relevant control mechanisms, the pursuer should be classed as a secondary victim."

[23] In our opinion the distinction which Mr Milligan drew when making his submissions to the Lord Ordinary and which he drew in his submissions to this court was a necessary one whereas the Lord Ordinary's evident disapproval of the distinction looks to have led to error. This, as Mr Clarke presented it, was an immediate aftermath case. In other words this was not a case where the pursuer was present at the event that caused the death of her son - the defender driving his vehicle into collision with him as he walked along the pavement. As *McLoughlin* illustrates, if a plaintiff is exposed, through her senses, to the immediate aftermath of an event which has caused the death of or serious injury to a close relative and, as result of that sensory exposure sustains "nervous shock" then she has a claim for damages; the horror of the immediate aftermath is treated in the same way as the horror of the original event. However, in keeping with that, if nervous shock on exposure to the aftermath of an event is to give rise to claim for damages, the conditions for recovery which apply to nervous shock on exposure to an event must also apply to nervous shock on exposure to the aftermath of the event. These include the requirement that the relevant injury to the secondary victim was caused by shock as a result of what she perceived with her own senses.

[24] It is instructive to consider the explanation given by Lord Oliver for rejecting the plaintiff relatives' claims in *Alcock* (*supra* at 417):

> "As I read the evidence, the shock in each case arose not from the original impact of the transmitted image which did not, as has been pointed out, depict the suffering of recognisable individuals. These images provided no doubt the matrix for imagined consequences giving rise to grave concern and worry, followed by a dawning consciousness over an extended period that the imagined consequence had occurred, finally confirmed by news of the death and, in some cases, subsequent visual identification of the victim. The trauma is created in part by such confirmation and in part by the linking in the mind of the plaintiff of that confirmation to the previously absorbed image. To extend the notion of proximity in cases of immediately created nervous shock to this more elongated and, to some extent, retrospective process may seem a logical analogical development. But, as I shall endeavour to show, the law in this area is not wholly logical and whilst having every sympathy with the plaintiffs, whose suffering is not in doubt and is not to be underrated, I cannot for my part see any pressing reason of policy for taking this further step along a road which must ultimately lead to virtually limitless liability."

[25] We would regard the present case as being of the same nature as Lord Oliver's characterisation of *Alcock*. The pursuer saw the wrecked car but did not immediately associate it with any of her relatives. Only thereafter did that visual image provide

> "the matrix for imagined consequences giving rise to grave concern and worry, followed by a dawning consciousness over an extended period that the imagined consequence had occurred, finally confirmed by news of the death."

[26] The Lord Ordinary said that she did not have to form a view on what she clearly thought had been an unduly narrow distinction because "the pursuer began to feel uncomfortable very shortly after viewing the wrecked vehicle". That may be, but when the pursuer viewed the wrecked vehicle she had no reason to connect what she saw with her son. Indeed, as the Lord

Ordinary found, her initial reaction was one of relief that her own children could not be involved as her son did not drive and her daughter was at home. Thus, as far as the pursuer's perception at the time of viewing it was concerned, the wrecked vehicle could not be the aftermath of an event which had had injurious consequences for either of her children. That initial feeling of relief gave way not long afterwards to a feeling of increasing concern and worry for her son, but, on the evidence heard by the Lord Ordinary and narrated in her opinion, it cannot be said that the pursuer suffered nervous shock as a result of viewing what might be described as the aftermath of the event in which her son was killed. It has to be kept in mind what is meant by the admittedly somewhat dated expression "nervous shock". Lord Ackner explained the concept in *Alcock* supra at 401F:

> "'Shock', in the context of this cause of action, involves the sudden appreciation by sight or sound of a horrifying event, which violently agitates the mind. It has yet to include psychiatric illness caused by the accumulation over a period of time of more gradual assaults on the nervous system."

[27] We do not take issue with the proposition, acceded to by Professor Freeman in evidence, that the pursuer's experience over what was a relatively short period had been "ghastly", but it did not involve the sudden appreciation by direct sight or sound of a horrifying event or of direct sight or sound of the horrifying immediate aftermath of such an event. The sight or sound of the defender driving into collision with the pursuer's son would undoubtedly have been horrifying but the pursuer was not present when that event occurred. Coming upon a wrecked vehicle immediately after such a collision in the knowledge that her son was involved in a collision which had resulted in the wreck might also be equally horrifying, but that is not what occurred; the pursuer was unaware of any connection with her son when she saw the vehicle. It is accepted that the pursuer sustained psychiatric injury but hers is of the nature of an illness caused by the accumulation over a period of time, albeit a relatively short time, of, to use Lord Ackner's words, more gradual assaults on the nervous system. While perhaps not entirely logically, psychiatric injury of that sort does not give rise to a claim for damages. As Brennan J put it, giving judgment in the High of Court of Australia in 1984 in *Jaensch* v *Coffey* 155 CLR 549 at 567:

> "A psychiatric illness, induced by mere knowledge of a distressing fact is not compensable; perception by the plaintiff of the distressing phenomenon is essential."

[28] The Lord Ordinary noted that the pursuer began to feel uncomfortable very shortly after viewing the wrecked vehicle; that her suspicions about her son's involvement began fairly soon thereafter; and that she was distressed prior to her confrontation with the police who confirmed his identity. These events, "taken together with the other facts of the case" led her to conclude "after applying all of the relevant control mechanisms" that the pursuer should be classed as a secondary victim. We cannot support that conclusion. The Lord Ordinary does not specify what she meant by "the other facts of the case" but we take it that she was referring to the pursuer having developed a psychiatric illness of the nature of post-traumatic stress disorder or depression as a result of the distressing events of 1 June 2010. About that there is no question but while psychiatric illness is a necessary element in a claim of this sort, its existence does not assist in satisfying the "control mechanisms". A claim will arise only in the highly particular circumstances where the illness is the result of direct perception of the distressing phenomenon. On the evidence as

narrated by the Lord Ordinary, that did not occur here. The pursuer was not a secondary victim and accordingly is not entitled to damages in respect of her psychiatric illness.

Quantification of the loss of society claim

Submissions

Defender and reclaimer

[29] It was Mr Milligan's submission that the Lord Ordinary's award of £80,000 in respect of the head of damages defined by section 4(3)(b)(ii) and (iii) of the 2011 Act, otherwise the loss of society award, was plainly and clearly excessive. That the award was excessive became evident when regard was had to the recent case of *Currie* v *Esure Services Ltd* where, at first instance, Lady Wise awarded a sum of £42,000 to each parent for the loss of their 25 year old son: [2014] CSOH 34. The Lord Ordinary in the present case had been aware of Lady Wise's decision but did not have the benefit of the opinion of the court delivered by Lord Carloway in the unsuccessful reclaiming motion at the instance of the pursuer: 2015 SC 351. As plainly and clearly excessive, the Lord Ordinary's award was accordingly amenable to review by this court: *Purdie* v *William Allan & Sons Ltd* 1949 SC 477, Butler v *Adam Lynn Ltd* 1965 SC 137, *Currie* v *Esure Services Ltd*. It was impossible not to feel sympathy for the pursuer in the present case but regard had to be had to the importance of comparative justice and the consideration that consistent and therefore predictable decision-making by the courts promotes settlements and thereby avoids the stress of litigation.

[30] Traditionally, Mr Milligan reminded the court, there is a hierarchy of loss of society awards with the highest awards being made to spouses: *Weir* v *Robertson Group* 2006 Rep LR 114 at paragraph [33], *Bellingham* v *Todd* 2011 SLT 1124 at paragraph [50]. Awards in respect of the death of adult children have been lower.

[31] Mr Milligan reviewed the recent decisions of the Inner House in respect of claims in respect of loss of society. In *Shaher* v *British Aerospace Flying College* 2003 SC 540 the parents of a young man killed in a flying accident were awarded £30,000 each by the judge at first instance. These awards were held to be excessive and were reduced to £20,000 each (£28,000 in present day values after allowance for inflation). In *McLean* v *William Denny & Bros Ltd* 2004 SC 656 the widow of a man who died of mesothelioma was awarded £28,000. The Inner House held that the award was not excessive given that jury awards suggested that judicial awards were on the low side. Equally, in the opinion of the Inner House, it was not too low, given that jury awards do not have any primacy over judicial awards (see also *Hamilton* v *Ferguson Transport (Spean Bridge) Ltd* 2012 SC 486 at paragraph 92). The Inner House gave general guidance to the effect that spousal awards should generally be in the region of £25,000. *Murray's Executrix* v *Greenock Dockyard Co Ltd* 2004 SLT 1104 was heard at the same time as *McLean*. The awards of £20,000 to the widow and £6,000 to the daughter were held to be unreasonably low and were increased to £28,000 and £10,000 respectively. Separate motions for a new trial in two cases were heard together by a court of five judges in *Hamilton* v *Ferguson Transport (Spean Bridge) Ltd* and *Thomson* v *Dennis Thomson Builders Ltd* 2012 SC 486. The award to the father in *Thomson* of £90,000 was held to be excessive, although the awards in *Bellingham* and *Wolff* were "markedly undervalued". Unfortunately, no more widespread guidance was given, either as to the appropriate figures or the approach to be taken. In *Currie* v *Esure Services Ltd* the Inner House considered that Lady Wise had been correct in interpreting the decision in *Hamilton and Thomson* as meaning that the jury award of £90,000 to the father in *Thomson* was more than 100 *per cent* of what was appropriate. She had also been correct in her approach of taking the

award in *Shaher* and increasing it by 50 *per cent* to take account of higher jury awards. There was no suggestion in the opinion of the court that £42,000 was at the lower end of the appropriate range.

[32] Mr Milligan turned to a consideration of awards in the Outer House. He suggested that several distinct approaches were apparent from the decisions. The first approach was to follow the guidance of Lord Drummond Young in the case of *McGee and Ors* v *RJK Building Services Ltd* 2013 SLT 428, which in turn was based on the decision in *Wolff and Ors* v *John Moulds (Kilmarnock) Ltd* 2012 SLT 231 (see *Gallagher* v *Cheadle Hume Ltd* 2014 SLT at paragraph [13] and *Stuart* v *Reid* 2014 Rep LR 107 at paragraph [17]). In *McGee* the award to the widow of a man aged 71 at death was £80,000 with awards of £35,000 to each of his daughters, £27,500 to a son whose relationship with the deceased had not been so close and £20,000 to a granddaughter with whom the deceased had had a close relationship. The second approach was to start with *Bellingham* v *Todd* 2011 SLT 1124 (see *Ryder* v *Highland Council* 2013 SLT 847 at paragraph [63]). The third approach was to start with the jury award in *Kelly* v *Upper Clyde Shipbuilders Ltd* 29 July 2012, unreported (see *McCarn* v *Secretary of State for Business Innovation and Skills* 2014 Rep LR 138 at paragraphs 38 and 39). The fourth approach was to take as the starting point the decisions of the Inner House.

[33] In Mr Milligan's submission, the proper approach was to take the guidance of the Inner House as the starting point and in particular the decision in *Currie*, as the most recent Inner House authority. The difficulty with the first two approaches was twofold. In the first place, the awards in *Bellingham* and *Wolff* had been criticised by the Inner House in *Hamilton* and they therefore provided, at best, a shaky foundation for decision-making. Even in *McGee*, it was noted that *Wolff* sits uncomfortably with *Bellingham*, which it purports to follow (see *McGee supra* 437C-D). Secondly, it was not clear whether the criticism made in *Hamilton* was in relation to all of the awards in *Wolff* or only in relation to the award to the parent. *Bellingham* was only criticised by counsel in *Hamilton* in relation to the parental awards but Lord Uist in *Gallagher* had stated that the criticism applied across the board. As far as the third approach was concerned, since it questioned the approach of the judge at first instance in *Currie*, which has since been affirmed by the Inner House, it must be treated with caution. Using *Kelly* as a starting point had also been doubted by Lord Woolman in *Stuart* v *Reid*.

[34] Mr Milligan submitted that the appropriate range of award in the present case was £40,000 to £50,000. An award of nearly double that sum is plainly excessive.

[35] Within the week previous to the present hearing there had been a jury trial in the case of *Anderson* v *Brig Brae* where the Lord Ordinary, Lady Stacey, in her charge to the jury had suggested a range of £50,000 to £80,000 as the appropriate level as compensation for loss of society to the parent of a 31 year old man killed in an accident. The jury awarded £80,000. Given the decision in *Currie*, it is not clear why such a high range was suggested. Either the circumstances were significantly different from *Currie* or the range was too high. *Anderson* perhaps illustrated the difficulty facing a trial judge in applying the recommendation of the Lord President in *Hamilton*. What exactly is it that the trial judge should be guiding the jury on? Is it the level that the judge would award or the range of awards that are beyond appeal? It also indicated an unsatisfactory uncertainty as to the appropriate level of damages for a claim of this sort. If the award for the loss of a 26 year old son can be £42,000 or £80,000 or some other greater or lesser sum then it will be impossible to advise clients (whether pursuers or defenders) as to appropriate settlement levels. Cases which should be resolved without litigation will have to be taken to proof or jury trial.

[36] Mr Milligan concluded by submitting that the reclaiming motion should be allowed and the interlocutor of 11 November 2014 recalled with decree being pronounced for a lesser sum. The figure he proposed was £42,000 plus interest on 50 *per cent* of that sum from date of death

Pursuer and respondent

[37] Mr Clarke submitted that the appropriate figure for loss of society should be informed by the jury award of £86,000 in *Scott* v *Parkes*, 22 May 2014, unreported, where there had been a close relationship between mother and son but there had not been the history of the sudden deaths of the pursuer's father and husband as there had been in the present case. Here the Lord Ordinary had heard psychiatric evidence to the effect that the loss of an adult child is the most serious bereavement that a person can experience. The pursuer had spoken to the severe trauma that she had suffered. On any view an appropriate award in this case would be in excess of £42,000; £60,000 would not be untoward. That being so it cannot be said that an award of £80,000 was plainly and clearly excessive. It was true that the award of £90,000 to a father in *Thomson* was held to be excessive but that was in the absence of a "special feature of their relationship" (see *Hamilton* v *Ferguson Transport (Spean Bridge) Ltd and Thomson* v *Dennis Thomson Builders Ltd supra* at paragraph 73). The recent jury award in *Anderson* v *Brig Brae* indicated that the Lord Ordinary's award could not be regarded as excessive.

Decision

[38] Where a person dies in consequence of suffering personal injuries as the result of the act or omission of another and the act or omission gives rise to liability to pay damages, section 4(3)(b) of the 2011 Act provides that the damages shall include 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 the deceased before his death; (ii) grief and sorrow of the relative caused by the deceased's death; (iii) 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. Thus, the head of damages conveniently described as a loss of society award is intended "by way of compensation". While it is true that no sum of money can ever compensate for the death of a close relative, the application of section 4(3)(b) therefore requires a court to attempt, as far as that is possible, to match the degree of suffering experienced by a particular pursuer with the amount of damages awarded. In other words, an award which is "just by way of compensation" will be one which is case and fact sensitive. For example, the evidence may demonstrate that a particular relationship was very close or that another relationship was less close. That might point to a higher award in the former case and a lower award in the latter case: see, eg *McGee* v *RJK Building Services Ltd supra* at 437G and 438B. Thus, simply because one award, made in the circumstances of a particular case, is materially greater than another award, made in the circumstances of another case, does not mean that the first award should necessarily be regarded as excessive. That said a just award is one that achieves comparative justice; like cases should be treated alike. At least when made by a judge, an award of damages in respect of personal injuries or death should be similar in amount to previous awards made in similar cases. Indeed, in *Girvan* v *Inverness Farmers Dairy* 1998 SC (HL) 1 at 17, Lord Hope refers to the "narrow range of figures" he would expect from properly assessed awards in similar cases (see also *McLean* v *William Denny & Bros Ltd*). Indeed, if there is a particular skill which a judge can be expected to contribute to the

assessment of damages (which is "first and foremost a matter for a jury") it is that of comparison with and differentiation from previous cases. As Mr Milligan emphasised in the course of his submissions, it is because judges are expected to act in this way that it becomes possible for parties' representatives to advise parties as to what would be a likely award, thereby facilitating settlement and thus avoiding unnecessary litigation. Moreover, while particular relationships between persons in the same degree of kinship no doubt differ in quality one from the other, there are limits as to the possibility or indeed appropriateness of a court comparing the strength of one mother and son bond with another mother and son bond. Mr Milligan asked rhetorically what was the Lord Ordinary in the present case saying to the mother in *Currie* v *Esure Services Ltd* about the quality of her relationship with her late son when the Lord Ordinary in the present case awarded £80,000 for loss of society as opposed to the £42,000 awarded in *Currie*. A legitimate answer to that rhetorical question would be that the Lord Ordinary was saying nothing whatsoever to Mrs Currie, the Lord Ordinary's focus was exclusively upon the case before her and doing justice, as she saw it, in that case. We have no doubt that that was the Lord Ordinary's intention, but equally we see the force of Mr Milligan's submission that doing justice is at least in part about doing comparative justice and that involves dealing with the particular case under consideration in a similar fashion to other similar cases .

[39] The large discrepancy between the loss of society award in this case and that in *Currie* has given us long pause for thought. In *Currie*, the second pursuer, a mother aged 60 at the date of proof, sued in respect of the loss of society of her 25 year old son who had died as a result of having been run down by the defender's vehicle when walking on a pedestrian crossing. The evidence led in the case indicated that the second pursuer had been much affected by her son's death. By interlocutor dated 21 February 2014, Lady Wise awarded £42,000 in respect of the loss of society claim. In the present case, the pursuer, a mother aged 59 at the date of proof, sues in respect of the loss of society of her 26 year old son who had died as a result of having been run down by the defender's vehicle when walking on a pavement. The evidence led in the case indicated that the pursuer has been much affected by her son's death. By interlocutor dated 11 November 2014 the Lord Ordinary awarded £80,000 in respect of the loss of society element in the pursuer's claim. While these are the barest of outline sketches of the two cases, they do raise a question as to how, if the award in *Currie* was at an appropriate level, the award in the present case can also be said to be at an appropriate level when it is nearly twice as much as the figure selected by Lady Wise. The point becomes acute in that Lady Wise's award was the subject of a reclaiming motion which put in issue whether she had adopted the correct approach and, in particular, whether she had had proper regard to the level of the available jury awards. Although the point was not specifically taken that the award was inadequate, the purpose of arguing that Lady Wise had erred in her approach to the assessment of the loss of society award was to open the way to persuading the Inner House to substitute a higher figure. The Inner House declined to do so. It held that the criticism of Lady Wise had not been well founded and, by interlocutor dated 4 December 2014, refused the reclaiming motion. While the Inner House did not specifically endorse Lady Wise's award, it confirmed that she had been correct in understanding that the Lord President in *Hamilton* had expressed the opinion that the jury's award of £90,000 to the father of the deceased *Thomson* had fallen foul of the 100 *per cent* rule of thumb (in other words that a reasonable award would have been £45,000 or less). Moreover, the opinion of the court included the following:

> "if the court were asked whether, having regard to comparable jury awards, the awards were manifestly outwith the appropriate range, it would be bound to answer that question in the negative."

[40] Thus, there is recent Inner House authority to the effect that an award of £42,000 in a not dissimilar case to the present was not manifestly outwith the appropriate range, whereas a jury's award of £90,000 to the parent of an adult child has been held to be excessive by a factor of two. In assessing damages a judge sitting alone is exercising a discretion on the basis of the evidence before him, but if that discretion is exercised properly the resulting figure will be consistent with other awards, particularly when the other awards have been made or approved on appeal. In the present case in awarding £80,000 the Lord Ordinary ascribed nearly twice the amount to loss of society in respect of the death of an adult child than had been done in any previous judicial award. Does that mean that it was plainly and clearly excessive and that therefore the relevant ground of appeal should be upheld and a lower figure substituted?

[41] We have ultimately come to answer that question in the negative. A number of considerations have led us to that view. First and by way of context, we remind ourselves that in a case such as the present the assessment of damages is primarily a matter for the judge at first instance and that function is discretionary in nature. To the extent that the translation of intangibles such as grief and suffering into a sum of money is possible at all, it is not an exercise that is capable of being carried out with precision. It is likely to depend on impression and imponderable considerations. Its purpose, however, is to provide just compensation. The award is not to be quantified simply by reference to a tariff. Rather, the sum of damages is to be assessed by reference to the particular circumstances of the case, as disclosed in the evidence. Accordingly, when an assessment of damages is made the subject of review by an appellate court that court must give full weight to the privileges enjoyed by the judge at first instance: she is the primary decision-maker, she is exercising a discretion and she has heard the evidence which is the basis for the decision. That does not mean that her award will be given the leeway that would be accorded to a jury award, as discussed, for example, in *Girvan* v *Inverness Farmers Dairy*, but, where the first-instance judge has not misdirected herself in law, the test for setting aside an award of damages which is said to have been excessive is a relatively high one: the appellate court must be satisfied that the award is plainly and clearly excessive. It is only if the judge's figure is "out of all proportion to the true sum which ought in the view of the appeal court to have been awarded" that it is open to revision: *Purdie* v *William Allan & Sons supra* at 480. As Lord Justice Clerk Ross put it when delivering the opinion of the court in *McManus* v *BRB* 1993 SC 557 at 558: "an appellate court can only interfere with an award made by a judge ...if the award can be described as wholly unreasonable or clearly excessive." Lord Ross was discussing an award of *solatium* but the same considerations apply to a loss of society award: *Currie* v *Esure Services Ltd* 2015 SC 351 at paragraph 16.

[42] The second consideration which has led us to our conclusion that high as it appears to us to be, this award is not one that we are entitled to set aside, is that it was open to the Lord Ordinary to hold this case to be one where the loss of the deceased had a special significance: cf *Shaher* v *British Aerospace Flying College Ltd* . This was the third occasion when the principal male member of the pursuer's family had died suddenly and unexpectedly. On the basis of the evidence as narrated by the Lord Ordinary there is at least a suggestion that this history made the experience of her son's

death particularly hard to bear but the Lord Ordinary did not specifically articulate that point when she came to discuss quantification of damages. What she did say, and there is no attack on her assessment of the evidence, was that the untimely loss of her husband had brought the pursuer into a particularly close relationship with her son. We confess to some unease about the practicality and the appropriateness of forensic examinations of the quality of the relationships between pursuers making bereavement claims and their deceased relatives but it is clear on the authorities that this is a relevant consideration and in the present case what was spoken to by the pursuer was supported by the psychiatric and the psychological evidence.

[43] A third consideration overlaps with the second. In this case the Lord Ordinary had heard and accepted psychiatric and psychological evidence of the particularly close relationship between the pursuer and her son and her extreme distress at his death. The Lord Ordinary correctly directed herself that she must distinguish between an abnormal or pathological grief response which is not something that can be compensated by a loss of society award, and non-pathological grief which can be. Difficult as the task may have been, when considering the evidence of the pursuer's distress the Lord Ordinary must therefore be taken to have drawn the line between on the one hand pathological grief and, on the other, non-pathological grief. The point we make is a modest one. In this case, in contrast perhaps to some of the other cases cited to us, the Lord Ordinary heard a substantial amount of detailed evidence as to the pursuer's reaction to her son's death. There is no issue but that the evidence pointed to her having suffered extreme grief in circumstances which were to an extent special. At some point that grief may have been such as to be regarded as pathological, but until that point, as to which the Lord Ordinary was best placed to judge, it fell to be compensated by a loss of society award. Put shortly, the Lord Ordinary had material before her to allow her to conclude that this was a case for an award at or about the top end of the appropriate range.

[44] A fourth consideration also arises out of the psychiatric evidence which the Lord Ordinary heard and to which she attached weight. The argument for the defender and reclaimer is that the Lord Ordinary's award does not fit into the structure or pattern which can be derived from a consideration of previous judicial awards. On one view that might be so. However, in part at least, that structure is based on what are no more than conventions or, at best, assumptions. For example, as is demonstrated in the article by Mr Andrew Hadjucki QC, *Changing Values: Bereavement Awards in the Post-Shaher World*, 2003 SLT (News) page 189 (referred to in *McLean* v *William Denny & Bros and Ors*), awards in respect of the loss of a spouse have generally been higher than awards in respect of the loss of a child and where the award is in respect of the loss of a child, the older the child the lower the award. The Lord Ordinary referred to this in her opinion as the "accepted hierarchy in cases of loss of society awards". As the Lord Ordinary appreciated, while a hierarchy may be accepted it is no more than an expression of conventional wisdom as to what losses are the more or less severe. In contrast, the Lord Ordinary had heard evidence which she summarised as follows:

> "Both Dr McLennan and Professor Freeman were of the view that the loss of an adolescent or young adult child was, for anyone, the hardest loss to bear and was indeed worse than losing a partner or young child."

The Lord Ordinary had regard to that evidence. It cannot be said that she was wrong to do so, and once that evidence became part of the material which instructed her decision-making, the accepted hierarchy of awards lost much of its significance. If the accepted hierarchy is displaced, the search

for comparative justice must take place in a somewhat broader landscape; bereavement awards involving other relationships than parent and adult child become relevant. Among the cases to which the Lord Ordinary was referred was the decision of Lord Drummond Young in *McGee* v *RJK Building Services Ltd*. It had been submitted to the Lord Ordinary on behalf of the defender that this award (£80,000 to a widow in respect of the loss of society of her husband who had died aged 71) was of no assistance in the present case because a claim in respect of a deceased spouse was at the top of the hierarchy, but once the rationale for the hierarchy had been displaced that submission lost much of its force. We would accept that the Lord Ordinary does not appear explicitly to have placed particular weight on the decision in *McGee*, albeit in our opinion she would have been entitled to do so. On the other hand she did, correctly in our opinion, place weight on the evidence of Dr McLennan and Professor Freeman on the comparative severity of the loss the pursuer had suffered. The Lord Ordinary having done so, it becomes difficult for this court to conclude that her award is as out of line with other judicial awards as it might have appeared at first blush.

[45] The final consideration to which we have had regard is what may be described as the continuing upward pull of the available jury awards. The Lord Ordinary had regard to jury awards, as she was entitled to do. Among them were the *Nimrod Cases* (*Young* v *Advocate General for Scotland* 2011 Rep LR 39, a jury award of £90,000 to a 54 year old parent of a 21 year old deceased; *Dicketts* v *Advocate General for Scotland* 2011 Rep LR 138 a jury award of £98,000 to each parent aged 62 and 68 of a 27 year old deceased; and *Swarbrick* v *Advocate General for Scotland* 2011 Rep LR 40, a jury award of £100,000 to a 53 year old parent of a 28 year old deceased) which arose from the crash of a RAF Nimrod aircraft over Afghanistan involving the loss of a number of armed forces personnel. That a court should look to jury awards for guidance as to what is the appropriate level of damages in a particular sort of case has been clear since at least the judgment of the House of Lords in *Girvan* v *Inverness Farmers Dairy*. So doing is not free from difficulty. The Lord President in *Hamilton* envisaged something of the nature of an on-going dialogue between judges and juries with each having regard to the others decisions with and so zeroing in on a mutually determined range of figures reflecting the respective insights as to what was just in particular circumstances. We would accept Mr Milligan's observations that the court has yet to devise an entirely satisfactory mechanism for achieving this dialogue. Moreover, there are relatively few jury awards with which to make comparisons. While there are also not many judicial awards that is less of a problem in that one reasoned judicial award which is open to analysis carries a weight which an unreasoned and potentially arbitrary jury award cannot. It is only when a sufficient number of jury awards are available to indicate a trend or pattern can they rationally inform a judicial decision-maker. So at least goes the argument. Then, because jury awards are not open to analysis but are expressed simply as a sum of damages, they are very vulnerable to being disregarded as having any general application because of some particular aspect of the case or the way it was decided. Paragraph 21 of the opinion of the court in *Currie* demonstrates both the limited number of available jury awards in cases analogous to the present and the limitations of such jury awards as there are. We take no issue with anything said by the court in *Currie*. It follows that it was not open to the Lord Ordinary in the present case to take anything from the *Nimrod Cases* beyond that because of their highly special circumstances (which included trials where the juries had heard played the aircraft voice recording of the moments prior to the crash) the awards made there were significantly higher than would be appropriate in the generality of cases. The Lord Ordinary would not seem to have made

use of the award in *Thomson*. The jury award of £80,000 in *Gillies* v *Lynch* 2006 Rep LR 138 would not appear to have been cited to her. As the court observed in *Currie*, that case had special features, notably the pursuer's pathological grief reaction and her development of a severe depressive disorder. Whereas the same could be said of the pursuer in the present case, as we have discussed, these are not matters which properly should be had regard to in assessing a loss of society award. On the other hand, problematic as the *Nimrod Cases*, *Thomson* and *Gillies* may be, each provides an example of a jury assessing damages for the loss of the society of a young adult child at a figure above the maximum relevant judicial award prior to the present case. The same can be said of three other jury awards mentioned in the opinion of the court in *Currie*: *Wells* v *Hay* 1999 Rep R (Q) 44, *McIntosh* v *Findlay* 2001 Rep LR 66 and *Scott* v *Parkes*; and the award made only in the week prior to argument of this reclaiming motion in the case of *Anderson* v *Brig Brae*. The present day values of the awards in *Wells* and *McIntosh* were stated in *Currie* as being £56,000–58,000. In *Scott* v *Parkes* the award was £86,000 and in *Anderson* v *Brig Brae* it was £80,000. It was the same Lord Ordinary (Lady Stacey) who was the trial judge in both *Scott* and *Anderson*. Mr Milligan was critical of the amount of leeway that she had allowed the juries in both cases when directing them as to the parameters within which they might make their award (while recognising that they might go outwith these parameters) and he described the jury trial procedure as "sub optimal". It may be that the procedure still contains deficiencies but that does not wholly rob the awards in *Scott* and *Anderson* of any utility. For us it is of some significance that in each case the jury chose to fix the loss of society award either above or at the highest figure in the range suggested by the trial judge. In each case the figure fixed was close to that chosen by the Lord Ordinary in the present case. We do not say that that last fact completely vindicates the Lord Ordinary in the sense of putting this ground of appeal beyond argument or that it would necessarily persuade us to make an award at the same figure were it our function to do so. However, it does demonstrate what may be described as a continuing upward pull of jury awards. It appears to us that this is a further consideration against interfering with the award reclaimed against.

Disposal

[46] The reclaiming motion is accordingly allowed insofar as it relates to the heads of damage consequential upon the Lord Ordinary finding the pursuer to be a secondary victim. It is refused insofar as it relates to the quantification of the loss of society award. We shall therefore recall the interlocutor of the Lord Ordinary with a view to substituting decree for the sum which reflects our decision. We reserve all questions of expenses.

[47] The case will be brought out by order so that the court may be addressed on the full terms of the interlocutor which should be pronounced following on our opinion and on any matter in relation to expenses.