OUTER HOUSE, COURT OF SESSION

[2014] CSOH 103

PD2598/12

OPINION OF LORD UIST

in the cause

MARGARET ANNE GALLAGHER and OTHERS

Pursuers;

against

S C CHEADLE HUME LTD and OTHERS

Defenders:

Pursuers: MacMillan; DAC Beachcroft Scotland LLP
1st, 2nd, 4th and 5th Defenders: McGregor; HBM Sayers; Simpson & Marwick WS

24 June 2014

Introduction

[1] The late James Patrick Gallagher was born on 9 February 1939 and died of mesothelioma on 23 December 2009. This action for damages is brought by his widow Margaret Ann Gallagher (the first pursuer), who was born on 22 December 1943 and whom he married on 29 December 1962, their four surviving children and seven grandchildren. The four surviving children are James Joseph Gallagher, born on 18 April 1966; Angela Mary McCabe, born on 18 April 1964; Mary Ann Thomson, born on 16 March 1976; and Theresa Rose Gallagher, born on 17 April 1969. They are respectively the second, third, fourth and fifth pursuers. James lives in Aberdeenshire and his sisters live in Ayrshire. The seven grandchildren are RJG, born on 25 June 1999 and DSG, born on 26 March 2002 (the sons of James Joseph Gallagher); Michael Joseph McCabe, born on 8 December 1997 (the son of Angela Mary McCabe); SJG, born on 8 October 2007, and JPG, born on 4 October 2009, the sons of Mary Ann Thomson; Marie Therese Guise Gallagher (daughter of Theresa Rose Gallagher), born on 11 April 1987, who is the sixth pursuer; and Laura Grace McCrimmond (daughter of James Joseph Gallagher), born on 28 September 1988, who is the seventh pursuer. Apart from Laura, who lives in the United States, all the grandchildren live in Scotland. Liability to make reparation to the pursuers in respect of Mr Gallagher's death has been admitted by the first, second, fourth and fifth defenders, each of whom negligently exposed him to asbestos during his employment with them. The action therefore went to proof on the issue of *quantum* only. I heard evidence from the first to sixth pursuers and from Michael Joseph McCabe, who was a minor when the action was raised but is now over the age of majority.

[2] Mr Gallagher's mesothelioma first manifested itself in the form of a cough in 2008. On 26 October 2008 he attended Crosshouse Hospital with what was noted to be "cough with purulent sputum for the last

few days, today sharp pain across back and chest, worse on inspiration". On 14 February 2009 he contacted NHS 24 with what was noted to be "chest wall pains for 7+ days and shortness of breath, pain at back worsens on movement, sore to touch". He was examined by Dr McHattie, who recorded "Chest pains for 1 week. Getting worse. No medical advice sought. Sharp pains and sore to touch. Intermittent. All at right side at back of shoulder, lower back and right pectoral area. Not breathless, sharp pain when taking a deep breath. No URTI. O/E Dyspnoeic at rest. JVP elevated. No ankle oedema. Pulse 96/min. BP 130/86. HS 1+2+0. Poor AE on right. PN L=R=resonant." It was Dr McHattie's impression that Mr Gallagher was suffering from pneumonia, that he required a chest x-ray and that he should be referred to Crosshouse Hospital. On 16 March 2009 an x-ray showed that Mr Gallagher's right pleural infusion had increased since previous views. On 14 April 2009 he attended at the clinic of Dr Kenneth Anderson, Consultant Physician, who recorded: "Chest discomfort and cough have been present since February 2009. The chest x-ray shows a right pleural effusion with some pleural thickening. … His weight has reduced by about half a stone over the last few weeks … the chest x-ray showed a right pleural effusion with a possible mass. An urgent CT scan of the thorax has been requested." On 19 May 2009 Dr Anderson recorded: "The CT scan shows pleural thickening with a pleural effusion which requires a VATS biopsy." On 9 June 2009 Mr Gallagher underwent a video imaged pleural biopsy, drainage of the pleural effusion and talc pleurodesis at the Golden Jubilee National Hospital, Clydebank, from which he was discharged on 11 June 2009. He was diagnosed with mesothelioma on 27 July 2009. He was a patient receiving palliative care at Crosshouse Hospital from 10 December 2009 until his death.

[3] It was clear from the evidence that Mr Gallagher was a remarkable man and that his death has had a profound effect on his family. He was born and brought up in the Anderston area of Glasgow, one of a family of seven children. At the age of 11 he moved with his family to Saltcoats. He attended local schools and after leaving school became a clerk with British Rail in Kilmarnock. He was called up to do his national service in the RAF. He thereafter went on to establish a successful career as an instrument engineer. He and his wife had five children (four of whom survive him) and subsequently seven grandchildren, all of whom I have referred to above. He was very much a family man and was greatly respected and admired by his family: indeed, I think it would not be going too far to say that he was adored by them. He was musically gifted, his father having been a master mandolin player who encouraged him to play music from an early age. He was an accomplished guitar player. He was also a man of deep faith who was a member of the music group in his parish church. His family were devastated by his unexpected illness and death. Mrs Gallagher described the loss of his companionship as absolutely devastating. Two grandchildren were specially affected by his death. Marie Therese Gallagher looked upon him as the only father figure in her life and called him dad when she was little. She was effectively brought up by her grandparents and considered their home, where she spent the majority of her time until March 2012, to be hers also. He provided her with emotional and spiritual guidance and she was shocked when she learned of his illness and, subsequently, his death. Mr Gallagher's grandson Michael Joseph McCabe, who suffers from an unpleasant medical condition, was also specially affected by his death. He looked upon his grandfather as his main role model and had a particularly close relationship with him. In his own words he held his grandfather, who helped him greatly with his medical condition, nurtured his religious faith, instilled in him a love of music and provided him with love and support whenever he was confused "on a pedestal in a childish manner". He described Mr Gallagher as irreplaceable.

The principal dispute

[4] The principal dispute between the parties related to the appropriate awards which should be made to the pursuers under section 4(3)(b) of the Damages (Scotland) Act 2011 ("the 2011 Act"), which covers

> "such sum, if any, as the court thinks just by way of compensation for all or any of the following:
>
> i. distress and anxiety endured by the relative in contemplation of the suffering of A before A's death,
> ii. grief and sorrow of the relative caused by A's death,

iii. the loss of such non-patrimonial benefit as the relative might have been expected to derive from A's society if A had not died."

Section 4(4) of the 2011 Act provides that the court, in making an award under section 4(3)(b), is not required to ascribe any part of the award specifically to any of the sub-paragraphs of that paragraph. I was referred to certain recent cases dealing with awards under section 4(3)(b) of the 2011 Act or its statutory predecessor, section 1(4) of the Damages (Scotland) Act 1976 ("the 1976 Act") and I propose to deal with each of these in turn and then to narrate the submissions of counsel briefly before setting out my views and determining the amounts of the awards to each of the pursuers.

Previous decisions

[5] In *Bellingham* v *Todd* 2011 SLT 1124 Lord Woolman considered previous judicial and jury awards. At para [47] he stated as follows:

> "The issue of how to deal with the variation between judicial and jury awards has been addressed in a number of cases: *Girvan v Inverness Farmers Dairy* 1998 SC (HL) 1; *Shaher v British Aerospace Flying College Ltd* 2003 SC 540; *McLean v Wiilliam Denny & Bros Ltd* 2004 SC 656 and *Murray's Ex v Greenock Dockyard Co Ltd* 2004 SLT 1104. I draw the following propositions from those decisions:
>
> a. the assessment of damages is essentially a jury question;
> b. that is because such awards should reflect the expectations of society;
> c. the court is therefore encouraged to look for guidance to jury decisions;
> d. reliance can be placed upon a consistent pattern of jury awards; and
> e. caution should, however, be exercised before (i) reliance is placed on only one jury award; or (ii) equiparating awards in respect of different classes of relative."

The deceased in that case was aged 40. The age of the widow is not given, but it is stated that they had two young children. The deceased also had a son Steven, aged 25, from a previous relationship. On 5 May 2011 Lord Woolman made the following awards under section 1(4) of the 1976 Act: £50,000 to the widow; £25,000 to each of the two young children and £15,000 to the adult son, Steven.

[6] In *Wolff* v *John Moulds (Kilmarnock) Ltd* 2012 SLT 231 the deceased died from mesothelioma aged 67 in 2007. The awards made by Lord Doherty on 29 September 2011 under section 1(4) of the 1976 Act were as follows: £50,000 to the widow; £15,000 to each of two adult daughters who lived away from home but had regular contact with the deceased; £18,000 to the youngest daughter aged 32 who lived at home and had relied on the deceased to a much greater extent than her siblings; and £6,500 to the granddaughter, on the basis that the bond between a grandchild and grandparent was less strong than the bond between child and parent. At p 236B-C, para [23] Lord Doherty said:

> "In relation to each of the pursuers I require to make a judicial assessment of what is just compensation for the matters referred to in section 1(4). That involves the difficult exercise of taking account of both judicial awards and jury awards. I am not required to give primacy to jury awards. The weight to attach to them depends on the whole circumstances, including the information available relating to the awards, their similarity to the case under consideration, and the number of such awards ..."

After considering the prior judicial and jury awards to which he had been referred, he went on to say at p 237B-C, para 31:

> "My duty is to carry out a proper judicial assessment with a view to determining compensation which is just to both parties. I have endeavoured to obtain such guidance as I can from both judicial and jury awards. Jury awards can be very much higher than any judge would award carrying out a proper judicial assessment (taking account of judicial and jury awards) without being so extravagant

or palpably wrong that they will be held to be excessive ... In my view it would be wrong to give such awards significant weight in the judicial assessment."

[7] In *McGee* v *RJK Building Services Ltd* 2013 SLT 428 the deceased was aged 71. The widow was a few months younger than him and they had been happily married for 36 years at the time of his death and enjoyed a good social life together. The action was also raised by the deceased's two daughters aged 44 and 37 as individuals and on behalf of their son aged 17 and daughter aged 9 and the deceased's son aged 43 as an individual and on behalf of his daughters aged 13 and 10. On 18 January 2013 Lord Drummond Young made the following awards under section 1(4) of the 1976 Act: £80,000 to the widow; £35,000 to each of the daughters, who had enjoyed a close relationship with the deceased; £27,500 to the son, whose relationship with the deceased had not been as close; £20,000 to the youngest granddaughter to reflect the exceptionally close nature of her relationship with him; £25,000 to the grandson as the deceased had been the main adult figure in his life; and £12,000 to each of the two elder granddaughters whose relationship with the deceased had been straightforward without the special factors applying to the other grandchildren. At p 436L-437F, paras [32] and [33], Lord Drummond Young stated as follows:

"[32] I was referred to a number of recent cases dealing with awards under section 1(4). Fairly recent awards under that subsection are to be found in *Bellingham v Todd* and *Wolff v Moulds*. The first of those cases involved the death of a man of 40. His wife was awarded £50,000, a 25 year old child *(sic)* £15,000 and a younger child £25,000. *Wolff* involved the death of a man aged 67. His widow was awarded £50,000, and children ranging in age from 32-45 *(sic)* were awarded sums between £15,000 and £18,000. A grandchild aged 13 was awarded £6,500. In view of the ages of the deceased there would appear to be a significant discrepancy between the awards in those cases; the widow, in particular, of a man of 40 can expect to enjoy a much longer period with him than the widow of a man of 67. The awards in both cases were, however, the subject of critical comment in *Hamilton v Ferguson Transport (Spean Bridge) Ltd* 2012 SC 486. The main issue that confronted the court in the latter case was the form of direction that should be given to juries in relation to the level of damages; clearly that aspect of the decision is not relevant for present purposes. Nevertheless, Lord President Hamilton stated, at 2012 SC p 519, 2012 SLT p 735, para [72], that "the recent judicial decisions of *Bellingham* … and *Wolff* … markedly undervalue … the relative section 1(4) claims". No guidance is given, however, as to how far the awards in the earlier cases undervalued the s 1(4) claims. Moreover, when the age of the deceased is taken into account, the awards in *Wolff* were markedly higher than those in *Bellingham*, and it is not clear to what extent the difference is relevant to the criticism of the awards in the two cases.

[33] Counsel for the pursuer submitted that I should make use of the awards in *Wolff* as a starting point, subject to certain special features that attached to the deceased's two daughters and his grandson D, the sixth pursuer. Nevertheless, in view of the criticism in *Hamilton*, she submitted that I should increase the awards in that case by approximately 50 per cent and use that as a starting point. Counsel for the defenders accepted that some uprating of the awards would be necessary. She also drew attention to a recent jury award in *Kelly v Upper Clyde Shipbuilders Ltd* (29 July 2012, unreported), where, in respect of the death of an 82 year old man from mesothelioma, £40,000 was awarded to the widow, £25,000 to each of the adult children (whose ages are not known), £8,000 to a grandchild aged 18, £4,000 to a grandchild aged 11 and £1,500 to a grandchild aged 5. She submitted that those awards were lower than recent judicial awards. I am not convinced that that is so; at 82, the deceased in *Kelly* was markedly older than the deceased in *Wolff*, who was aged 67, and that is bound to have had an effect on the awards. Overall, I am of the opinion that the awards in *Wolff*, if appropriately upgraded to account for the criticism in *Hamilton*, provide a useful starting point. The deceased in that case was 67; the deceased in the present case was 71. There is thus a general degree of comparability. Furthermore, the decision in *Wolff* is fairly recent."

[8] The case of *Hamilton* to which Lord Drummond Young referred came before five judges on motions in two separate cases for a new trial on the ground that the awards of damages under section 1(4) of the 1976 Act were excessive. The decision was issued on 8 June 2012. The deceased in the first action, *Hamilton* v *Ferguson Transport (Spean Bridge) Ltd* was a 50 year old woman who was killed in a road traffic accident. Her widower was aged 67 and her daughter 17. The jury awarded the widower £80,000 (£50,000 attributable to the past) and the daughter £120,000 (£50,000 attributable to the past) under section 1(4) of the 1976 Act. There was no motion for a new trial in respect of the award made to the widower as dealings in relation to a tender had affected that, but there was such a motion in respect of the award of £120,000 made to the daughter. The deceased in the second action, *Thomson* v *Dennis Thomson Builders Ltd*, was aged 26 when he was killed on 10 March 2007 in the course of his employment. Only the claim by the deceased's father, who was aged 57 at the date of the deceased's death, was not settled. On 2 February 2011 the jury awarded him £90,000 (£50,000 attributable to the past). The motions for new trials were allowed by the court on the ground that the awards made by the juries were excessive, the test of excess of damages being whether no reasonable jury properly directed could have assessed damages at the sum in question. At p 519, para [72] Lord President Hamilton expressed the view that "the recent judicial decisions of *Bellingham* v *Todd* and *Wolff* v *John Moulds (Kilmarnock) Ltd* ... markedly undervalue the section 1(4) claims".

[9] In *Ryder* v *Highland Council* 2013 SLT 847 Lord Tyre issued his decision on 13 June 2013. The action was brought at the instance of the then 17 year old son of the deceased, who was aged 36 when she was killed in a road traffic accident. The action failed on the question of liability, but Lord Tyre stated that, had liability been established, he would have awarded the pursuer damages of £40,000 under section 4(3)(b) of the 1976 Act. He set out the nature of the relationship between the pursuer and the deceased at p 862E-J, paras [60] and [61] and reviewed the cases mentioned above at p 862J-863A, para [62]. He then explained the reasons for his award at p 863A-C, para [63] as follows:

> "In the present case the history of the pursuer's relationship with the deceased is somewhat unusual; there have clearly been periods of comparative estrangement. However, these difficulties had come to an end at least a year before the date of the accident, and I accept the pursuer's evidence that at the time of his mother's death they had become close. I take into account that the deceased was only 36, and the pursuer only 17, at the date of the accident, and that the pursuer could and would have expected his mother to remain an important part of his life for many years to come. He is especially unfortunate in having no other close relatives to provide him with support. I accept the submissions on behalf of the pursuer that in the circumstances of this case the best guidance is afforded by *Bellingham v Todd*, uprated to take account of the observations in of the court in *Hamilton v Ferguson Transport (Spean Bridge) Ltd*. Having regard to the ages of the pursuer and the deceased, I would have regarded £40,000 as an appropriate award under section 4(3)(b), with interest at four per cent per annum on one half of that sum from the date of the deceased's death until the date of decree, and thereafter at eight per cent per annum until payment."

Submissions

[10] It was submitted on behalf of the pursuers that I should follow the approach of Lord Drummond Young in *McGee* and award the first pursuer £80,000 in respect of her claim under section 4(3)(b) of the 2011 Act. Mrs Gallagher had been married for 47 years, as opposed to the widow in *McGee*, who had been married for 36 years. Although Mr Gallagher had not died in his own home (as Mr McGee had), Mrs Gallagher had watched him waste away at home before he went into hospital and died. There was no good reason to distinguish between the award to the widow in *McGee* and the award to the widow in this case. So far as the four children (the second, third, fourth and fifth pursuers) were concerned, the section 4(3)(b) awards to each of them should be £35,000. It was difficult to distinguish between each of the four children in this case and the two daughters in *McGee*, each of whom was awarded £35,000, the son having been awarded less as he was not as close to his father as his sisters. In the present case all four children had a close, albeit separate and distinct, bond with their father. The depth of feeling which they had for him was almost tangible and the respect and admiration which they had for him was plain. Each had separately

demonstrated how important he had been to them and the loss to each of them was only too obvious. Their grief and sorrow was evident and his society and guidance was irreplaceable. For the two sons of the second pursuer (RJG and DSG) and his daughter Laura in the US (the seventh pursuer) the awards should be £12,000, following *McGee* at pps 483D to 438I. The third pursuer's son, Michael Joseph McCabe, and the sixth pursuer, Marie Therese Gallagher, should each receive £25,000 as they were each in the same category of relationship to Mr Gallagher as the son D was to Mr McGee in the case of *McGee*. SJGT and JPGT, the young sons of the fourth pursuer Mary Ann Thomson, should be awarded £12,000 or such other sum as the court felt was necessary to reflect their young age.

[11] On behalf of the defenders it was submitted that the following awards should be made: to Mrs Gallagher as an individual, £50,000; to each of the four children, £25,000; to each of the granddaughters Marie Therese and Laura, £8,000; to each of the three grandsons RJG, DSG and Michael, £4,000; and to each of the two young grandsons SJGT and JPGT, £1,500. The criticism of awards made by the Lord President in the case of *Hamilton* had to be seen in the context of motions for new trials in relation to the award to the daughter of a deceased mother and it should not have been taken (as it was by Lord Drummond Young) as the basis for increasing the award to the widow in *McGee*. Moreover, it was not appropriate to contrast and distinguish awards to children and grandchildren. Each individual dealt with the loss of a beloved relation such as a father or grandfather in different ways. An individual's reaction to the death or the fact that he lived far away and saw the deceased only on a number of occasions each year were not factors which should be taken as a gauge or a measure of the grief and sorrow suffered or the non-patrimonial benefit which has been lost. It was difficult to say that a son who lived in London would grieve less than another son who lived in the same street as his late father and the court should be cautious about embarking on making such distinctions. The nature of these elements was so subjective and personal that an exercise which effectively distinguished one sibling from another was inappropriate. The awards to the children in the present case should therefore be the same and ultimately the same as awarded in the case of *Kelly*. The same approach should be applied to the adult grandchildren who would be on a par with the grandchildren who were teenagers at the date of the death in *Kelly*. A similar approach should be applied when considering the younger grandsons, with their awards reflecting their degree of comprehension of what happened to their grandfather. In the event that the court considered it appropriate to differentiate between relations on the basis of special factors or a special relationship future death claims brought under Chapter 43 of the Rules of Court should give notice of these elements either in the pleadings or in the statement of valuation as in the present case the first indication that the defenders received of the granddaughter Marie Therese living with her grandparents and identifying Mr Gallagher as a father-type figure and referring to him at one period as her father was in the course of the evidence led at the proof. The evidence was unobjectionable as this was a Chapter 43 action containing a general averment of a close bond between all the pursuers and Mr Gallagher.

Discussion

[12] In *Hamilton* Lord President Hamilton, after reviewing the awards made by the Lords Ordinary in the cases cited above, said at p 514, para [63]:

> "The task presented to each of these Lords Ordinary was difficult. They were faced with the almost impossible exercise of reconciling judicial awards with jury awards for relatives who suffered similar loss of society."

It is clearly the case that the assessment of a loss of society award under section 4(3)(b) of the 2011 Act is a difficult task for a judge. The reason for that is that it involves assessing financial recompense for a non-financial loss. Such an assessment is akin to, but in my opinion even more difficult than, the assessment of *solatium* for a physical or psychological injury, in relation to which Lord Justice-Clerk Grant said in *McCallum v Paterson* 1968 SC 280 at p 282:

> "No precise rule can be laid down as a yardstick for *solatium* awards, which must of necessity be of a somewhat arbitrary character. Money cannot compensate for pain and suffering and it is impossible, by a monetary award under this head, to put the victim in the situation in which he would have

been had the accident not occurred. The test must always be what is fair and reasonable in the circumstances and, because of that, and because of the absence of any specific rules for quantification, reasonable men *(sic)* may vary considerably in their assessment of what the appropriate award should be."

Of course, what I have to assess in this case is not common law *solatium*, but, under section 4(3)(b) of the 2011 Act, such sum, if any, as I think just by way of compensation for the distress and anxiety endured by the relative in contemplation of the suffering of the deceased before his death, the grief and sorrow of the relative caused by the death and the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if he had not died. The legislature has therefore clearly enacted a provision laying down what elements have to be taken into account in the award of damages under the subsection and that the award of damages must be by way of compensation for all or any of them, but has given no guidance as to what level of award would be appropriate, even as a starting point. There is no range of figures provided and there is no limit on the amount which can be awarded, the only control over awards being by way of a reclaiming motion in the case of an award made by a judge and by way of a motion for a new trial in the case of an award made by a jury. This contrasts with the fixed bereavement award of £10,000 in England under section 1A of the Fatal Accidents Act 1976, which is payable to only the spouse of the deceased and, where the deceased was never married, to his parents if he was legitimate and to his mother if he was illegitimate. The existing statutory provision in Scotland contained in section 4(3)(b) of the 2011 Act, by which I am bound and to which I must give effect, in my opinion necessarily involves inquiring in each case into the nature and extent of all three elements referred to in the subsection. It is open to a pursuer to highlight the positive aspects of a relationship and to a defender to highlight the negative aspects. In relation to the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died, the evaluation must consider what the non-patrimonial benefit is and for how long it is likely that it would have been derived by the relative if the deceased had not died. This must, in turn, involve consideration of the ages of the relative and of the deceased at the date of the deceased's death. Some may consider the carrying out of such an inquiry in each individual case to be distasteful, if not even offensive, but carried out it must be.

[13] In assessing the awards under section 4(3)(b) of the 2011 Act in this case I propose to follow the approach taken by Lord Drummond Young in *McGee*, which was informed by the decisions in *Bellingham, Wolff* and *Hamilton*, and of Lord Tyre in *Ryder*. I consider that I have not been provided with any good reason why I should not follow Lord Drummond Young's approach. I do not think it is correct to say that what the Lord President said in *Hamilton* at para [72] is restricted to an award to a child for the loss of a parent. In my opinion what he said applies generally to all awards under section 4(3)(b) of the 2011 Act (which must, in my view, be inter-related and form part of a structure). It is my view that when referring to "the relative section 1(4) claims" he was referring to all the section 1(4) claims. Accordingly, I agree with the assessments made by Lord Drummond Young in *McGee* and I consider that the amounts suggested by the pursuers in the submission made on their behalf, which I have set out at para [10] above, are reasonable and appropriate, with the exception of the awards proposed for the two youngest grandchildren SJGT and JPGT. SJGT was only 2 years old and JPGT was just under 3 months old when Mr Gallagher died. In the case of each of them I fix the award under section 4(3)(b) of the 2011 Act at £2,500. If the levels of awards now being made under section 4(3)(b) of the 2011 Act are thought to be excessive then it will be for higher judicial authority to say so. Half of each award is attributable to the past.

Other heads of damages

[14] The following heads of damages payable to Mrs Gallagher, exclusive of interest, were agreed; as the executrix of Mr Gallagher (transmissible *solatium*) – £65,000; for past loss of support to the date of the proof - £69,432, and for future loss of support from the date of the proof - £95,554 (these figures will require to be adjusted *inter se* to take account of the date of decree); and funeral expenses – £3,314.

[15] So far as the award under section 8 of the Administration of Justice Act 1982 to Mrs Gallagher is concerned, this must be based on a jury approach in light of the history of Mr Gallagher's illness which I have set out above at para [2]. Her evidence was that he required little by way of care until the dramatic downturn in his health in November 2009. I agree with the suggestion on behalf of the defenders that an award of £4,000 would be appropriate under this head.

[16] In relation to the claim for loss of services under section 9 of the Administration of Justice Act 1982, there was evidence that Mr Gallagher was capable of undertaking domestic electrical and plumbing repairs and was adept at DIY and car maintenance. As he was still in work and had other commitments outside the home his time for such activities was limited. Again adopting a jury approach, I fix the sum due for past and future loss of services (which will be awarded to Mrs Gallagher) at £7,500, of which half will be attributable to the past.

Decision

[17] I shall make the awards which I have indicated above together with the agreed awards. Interest will run as follows: on the award of transmissible *solatium* to Mrs Gallagher as executrix, at four per cent per annum from 26 October 2008 until 23 December 2009 and thereafter at eight per cent per annum until the date of decree; on the award for funeral expenses at eight per cent per annum from 18 January 2010 until the date of decree; on the award for past loss of support at four per cent per annum from 15 May 2009 to the date of decree; on the award under section 8 of the Administration of Justice Act 1982 at four per cent per annum from 26 October 2008 until 23 December 2009 and thereafter at eight per cent per annum until the date of decree; on the award under section 9 of the Administration of Justice Act at four per cent per annum from 23 December 2009 until the date of decree; and on the awards under section 4(3)(b) of the 2011 Act at four per cent per annum from 23 December 2009 until the date of decree. It will be for the parties to calculate interest to the date of decree in light of the awards which I have made. I shall appoint the case to call By Order for calculations of interest to be provided so that a final interlocutor can then be pronounced.

[18] I would add that in a case where a pursuer is seeking to make out that he or she had a more than ordinary relationship with a deceased so as to affect the amount of the award being sought under section 4(3)(b) of the 2011 Act it would be helpful if the special features of the relationship were averred in the pleadings, even in an action brought under Chapter 43 of the Rules of Court. If this is done then proper notice will be given to defenders of those special features and they will be able to take them into account when making an offer or tender. It is clearly both undesirable and unfair that defenders should first learn of such special features in the course of the evidence being led at a proof.