OUTER HOUSE, COURT OF SESSION

[2026] CSOH 87

PD530/25

OPINION OF LORD MALCOLM

in the cause

GAIL BUCKLEY AND OTHERS

Pursuers

against

(FIRST) ALAN BUDZYNSKI AND (SECOND) UK INSURANCE LIMITED

Defenders

Pursuers: E Mackenzie, KC and L Langlands; Irwin Mitchell Scotland LLP
Defenders: Murray, KC; Clyde & Co (Scotland) LLP

15 September 2026

Introduction

[1] In the afternoon of Christmas Day 2024, David Buckley, a retired airline pilot, went out on his motor bike. Tragically, he was killed in a head on collision with a motor car being driven by Alan Budzynski who had attempted to overtake when not safe to do so. Mr Buckley's wife and family were and remain devastated by his untimely death and the manner in which it happened. They sued the driver and his insurers. Liability in damages towards them has been accepted by UK Insurance Ltd. With the exception of Mrs Buckley's plea based on loss of financial support, all of the family's various claims have been resolved extra-judicially.

[2] This opinion addresses an issue of law between the parties which is preventing settlement of the whole claim. It arises in this way. In 2017 Mr Buckley, having cashed in various plans and policies, invested a substantial sum in a St James's Place Wealth Management retirement account (a personal pension scheme as established by section 1 of the Pension Schemes Act 1993). It came to consist of equities from all parts of the globe. From it he drew a regular monthly income and occasionally took out lump sums. On his death, free of inheritance tax and without entering his estate, the account and its constituent investments vested in Mrs Buckley as per his nomination. From then it was open to her to withdraw the savings, draw an income, take ad hoc lump sums, or leave them invested and defer any drawings. To date Mrs Buckley has adopted this last course. The savings are held in a product called a "dependant's drawdown"; they are not a personal pension scheme. This product operates under different rules, for example no further sums can be added to it, and a different tax regime applies to withdrawals.

[3] Mr Buckley had no occupational pension. He used income from the above account to support himself and his family. Mrs Buckley makes a claim for loss of financial support as a result of her husband's death. It is calculated on the basis of deprivation of 75% of the drawdowns which would have been taken by Mr Buckley from his retirement account over the next 20 or so years.

The parties' respective positions

[4] Section 4(3)(a) of the Damages (Scotland) Act 2011 provides that damages can include "such sum as will compensate for any loss of support" caused by the death of Mrs Buckley's husband. The insurers plead that because of the death all of the income producing investments in the account have passed to Mrs Buckley, thus she has not suffered

the claimed loss of support. Failing that, under reference to sections 7(1) and 7(2) of the 2011 Act, any assessment based on the general rule that the claim should be based on 75% of Mr Buckley's net income would result in a "manifestly and materially unfair result", thereby allowing a different percentage to be applied.

[5] On the other hand, Mrs Buckley relies upon section 8(1)(a) of the 2011 Act. It states that

> "… in assessing for the purposes of section 4 or 6 the amount of any loss of support sustained by (Mrs Buckley) no account is to be taken of – (a) any patrimonial gain or advantage which has accrued or will or may accrue to (her), by way of succession or settlement, from (her husband) or from any other person."

The submission is that it follows that her receipt of the retirement account must be ignored when determining the amount of Mrs Buckley's loss of financial support arising from her husband's death. Thus, the claim should be assessed on the basis that her loss is measured by reference to the drawdowns which, but for his death, Mr Buckley would have continued to make. No one has suggested that the investments did not pass by way of either succession or settlement within the meaning of the subsection, and for the purposes of this opinion I will assume that the provision is potentially engaged.

[6] Section 8(1)(a) replicated the terms of section 1(5)(a) of the Damages (Scotland) Act 1976. The equivalent provision south of the border was enacted in section 4 of the Fatal Accidents Act 1976:

> "In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded."

There has been judicial consideration of this provision in circumstances comparable to the present. Since counsel for the insurers invited me to follow the approach adopted in England and Wales, it is appropriate to dwell on this case law.

Case law in England and Wales

[7] The now leading authority is *Rix* v *Paramount Shopfitting Co Ltd* [2021] 4 WLR 109 in which earlier decisions were reviewed by the Court of Appeal. The following general observations can be derived therefrom.

[8] Before one considers deductions under section 4 "one first has to determine what loss the dependants have suffered; and if they have inherited the source of the income upon which they were dependent, they have not lost it", see *Wood* v *Bentall Simplex Ltd* [1992] PIQR P332, Staughton LJ at 349. This was the answer to the question - can one inherit the goose and still claim to have been deprived of the eggs? In the same case, at 342 Beldam LJ commented that such assets are not taken into account either as part of the dependency or as a deduction from it; and it is immaterial that after the deceased's death the family put the whole or part of the assets to a different use producing additional income. If an asset generates income without the need for any substantial work by the deceased, such as a passive investment, and is inherited by the surviving spouse, there is no claim for loss of that income, see *Rix* at paragraph 74.

[9] In assessing a loss of support claim, the task is to identify the extent to which the dependants have been deprived of a "reasonable expectation of pecuniary advantage from the continuance of the life of the deceased", see Erle CJ in *Pym* v *Great Northern Railway Company* (1863) 4 B&S 396. In *Cape Distribution Ltd* v *O'Loughlin* [2001] EWCA Civ 178 that approach was applied in a case involving inheritance of a property portfolio created by the flair and business acumen of the deceased, and which, had he lived, would have increased in both capital and income value for the same reason. In those circumstances the loss was measured by reference to the cost of the professional advice needed to manage the family

assets properly and effectively, see Latham LJ at paragraphs 14 and 15. The assets themselves were not taken into account either as part of the dependency on the deceased or as a deduction from it.

[10] A similar issue arose in *Williams* v *Welsh Ambulance Services NHS Trust* [2008] EWCA Civ 81. Smith LJ endorsed the general principle that where a widow inherits the assets which have produced the income from which the dependency derived, she cannot have both the inherited assets and damages for loss of the income. However, she had been deprived of her husband's flair, skill, expertise and energy in his various wealth creating projects. This was a real loss which could be measured by the cost of a replacement person with similar skills; in other words, the value of the lost services provided by the deceased.

[11] The court must take a realistic and common-sense approach to what is a question of fact, separating out income which was derived from capital from that which was derived from the deceased's labour. The former is no part of the financial dependency because it is unaffected by the death. Thus, rental income from commercial properties was deducted from Mrs Rix's financial dependency claim. What was left was the income from the family business generated by Mr Rix's labour, skill, energy and flair, see *Rix* paragraphs 38-40.

Analysis

[12] For many years benefits accruing because of a death have gradually been excluded from causing a reduction in a dependant's claim for loss of financial support, and this by both judges and the legislature. An early example is life assurance payments not being taken into account on the view that it would be wrong to penalise the claimant and benefit the wrongdoer because the deceased had made provision for the survivor. Another is section 2(1) of the Fatal Accidents Act 1959 which provided that any "insurance money,

benefit, pension or gratuity" is not taken into account. Since the 1976 Act this has been replicated in the Scottish legislation, now to be found in section 8(1)(b) of the 2011 Act.

[13] However, before addressing deductions, either at common law or under statute, the first question is: what has been lost as a result of the death? If the family income was solely derived from passive investments all of which have passed to the surviving spouse, does he or she have any foundation for a loss of support claim? Can it be said that the claimant has been deprived of support previously afforded to him or her by the deceased? If not, the question of deductions or reducing the value of the claim does not arise.

[14] The common law of Scotland mirrors the approach in *Rix* and the other decisions mentioned above. Subject to any statutory override, the claim is compensatory for any loss of financial dependency caused by the death of the claimant's relative. As noted earlier, there was a time when pecuniary benefits consequential on the death were taken into account when measuring that loss. Thus, a claim based on lost earnings could be reduced because of the receipt of inherited assets belonging to the deceased, see for example *Smith* v *Comrie's Executrix* 1944 SC 499. This was the subject of trenchant criticism, including in Professor Walker's *Civil Remedies* at 974 - 976. He observed that to

> "take capital, savings or investments into account is open to the same objection as that levelled against considering insurance policies, that the wrongdoer benefits from the deceased's providence and abstinence from spending."

On similar thinking, the Scottish Law Commission recommended the reform originally enacted in the 1976 Act. It is noteworthy that the Commission was concerned to avoid deductions from claims based on the loss of earned income, see SLC Memorandum No 17: Damages for Injuries Causing Death; 10 April 1972 at paragraph 90.

[15] The common law approach that a loss of support claim is compensatory in nature is reflected in the terms of section 4(3)(a) of the 2011 Act. However, and simplifying

somewhat, if as a result of the death a claimant has lost X but gained Y, the legislation provides that Y is not to be taken into account by way of a reduction in the value of the claim, and this even if it results in over-compensation. However, statute has not removed the need to prove that there is a loss caused by the death. Unlike the fruit of labour or skill, unearned income from investments is not lost, though it will be necessary to ask what has happened to the investments and associated income after the death. If all or some of this does not reach the dependant, for example because of tax or an inheritance by third parties, he or she may be able to establish a claim based on the loss of a continuing benefit had the deceased lived. But if there is a seamless transition of all the income producing assets from the deceased to the widow(er), how can it be said that the death caused her or him to lose the expectation of continuing support from them?

[16] A similar question arose in *Cantwell* v *Criminal Injuries Compensation Board* [2001] UKHL 36, 2002 SC (HL) 1. A police officer was assaulted. As a result of his injuries, he took early retirement on medical grounds. Amongst other things, he claimed for loss of pension entitlement after his normal retirement age. The First Division reluctantly held that no deduction should be made on account of the continuing receipt of Mr Cantwell's ill-health pension. This was because of section 10(a) of the Administration of Justice Act 1982 which stated that when assessing damages for personal injuries no account was to be taken so as to reduce the damages of "any contractual pension or benefit" received by the claimant. The result was that in financial terms the claimant was better off than if the assault had not happened, offending the rule that damages are aimed at compensation, not enrichment. However, the Division felt bound by the terms of the legislation.

[17] An appeal by the Board to the House of Lords succeeded, in essence on the view that the section was not intended to operate to create a loss which otherwise did not exist,

but to stop a real loss being reduced by the consequential receipt of a collateral benefit of a different kind. Thus, his claim for loss of pre-normal retirement earnings was unaffected by Mr Cantwell's receipt of the ill-health pension; but as for loss of pension entitlement, that could only be calculated by reference to both pension lost and pension received. Section 10(a) had no application. Had the ill-health pension matched or exceeded the value of what would have been a retirement pension, that part of the claim would have been valued at nil.

[18] In my view and following authority south of the border in respect of equivalent legislation, similar thinking applies to the current claim. Both at common law and under section 4(3)(a) of the 2011 Act, the first step is to identify whether the death has caused any loss of support. That can be straightforward where income was generated on the basis of the labour or personal qualities of the deceased person. But here the claim is based on deprivation of the benefit gained from Mr Buckley's investments managed in the said scheme.

[19] The fact that all of the same income producing investments have passed to Mrs Buckley and that her husband had no other source of income means that she has suffered no loss of financial support. The answer to the question posed by section 4(3)(a) is that no compensation is required. Of course, Mrs Buckley may choose not to draw down income from the account, but that is her decision. In the circumstances, the question of making deductions from the claim does not arise. Had Mr Buckley returned to employment as an airline pilot, because of section 8(1)(a) receipt of the income from the investments would have been left out of account in respect of a claim based on loss of the benefit derived from his net earned income. That would have been a real loss caused by his untimely death.

In short, I agree with the submission of counsel for the insurers that for these purposes it is important to differentiate between earned and unearned income.

[20] Counsel for Mrs Buckley relied on the prohibition in section 8(1)(a), not that in section 8(1)(b). In my view he was correct to do so. The income from the account now available to Mrs Buckley does not arise from a "pension" within the meaning of that provision. It addresses third party obligations in respect of such as occupational and public service pension schemes. But even if that is wrong, the same analysis applies; see for example *Auty* v *National Coal Board* 1985 1 WLR 784, Oliver LJ at 806H - 807B. The subsection was designed to deal with the receipt of collateral benefits, not to create a loss of support claim which otherwise did not exist. To borrow Oliver LJ's phraseology, the fallacy of the reasoning is that it premises a loss which has not occurred and which cannot be substantiated either in fact or in law.

[21] In these circumstances the question of whether the "manifestly and materially unfair" test in section 7(2) of the 2011 Act allows the court to substitute a percentage other than 75% of the net income does not arise. However, if contrary to my view the statute does require the court to (a) recognise a loss of support claim as desiderated by Mrs Buckley and (b) leave out of account the income now available to her from the investments, section 7(2) was not designed to allow the court to interfere with that. Rather it was aimed at an unfair result caused by the application of the 75% general rule. Section 7(1) simplifies identification of the multiplicand to be used when calculating a loss of support claim. It obviates the previous case by case need to examine the extent to which the deceased used his or her income to support (a) himself and (b) his family. Section 7(2) is a long stop where the general rule causes obvious injustice having regard to the particular circumstances of the family concerned. An example which has been given is where the only dependent relative

was 17 years old. Nothing of that kind arises in the present case. It is however of interest to note that when discussing section 7, the Justice Committee's Stage 1 Report on the Bill preceding the 2011 Act speaks of the need to compensate the relatives for "the lost income-stream from the victim's *earnings*", see paragraph 146 (emphasis added).

Disposal

[22] This case has had unusual procedural features. The bulk of the claims were resolved by agreement. The only dispute concerned the issue of law discussed in this opinion. There was brief oral evidence from Mrs Buckley and the financial adviser who dealt with the investments, none of which was in dispute. The proof, including counsel's submissions, was completed in less than a day. Both counsel were confident that whatever the court's decision, the case would be settled extra-judicially.

[23] Having resolved the matter in question as indicated above, it remains necessary to pronounce an appropriate substantive interlocutor which, if so advised, Mrs Buckley can appeal. Ordinarily this might involve upholding or repelling a plea-in-law, but the pleadings do not contain such. However, I consider that a suitable order would be to absolve the insurers from Mrs Buckley's claim for loss of support. I shall issue an interlocutor to that effect and continue the cause for the lodging of a joint minute resolving the action. If that is not forthcoming within 6 weeks, the case will be put out for a hearing on further procedure.