SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2014] CSIH 112
PD2432/12

Lord Justice Clerk
Lady Smith
Lady Dorrian

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE CLERK

in the reclaiming motion

by

JAMES CURRIE and MARGARET CURRIE

Pursuers and Reclaimers;

against

ESURE SERVICES LIMITED

Defenders and Respondents:

Act: Dunlop QC, Hood; Allan McDougall
Alt: Murphy QC; Simpson & Marwick

4 December 2014

Introduction

[1] The reclaimers are the father and mother of Gavin Currie who was tragically killed, aged only 25, as a result of a road traffic accident on 28 December 2011. The deceased had been on a zebra crossing on Main Street, Neilston, when he was struck by a car. The respondents, as insurers of the driver of the car, admitted liability. Awards of £42,000 (exclusive of interest) were made in favour of the reclaimers, for grief, sorrow and loss of society and guidance (Damages (Scotland) Act 2011, s 4(3)(b)(ii) and (iii)) suffered by them as a result of the death. The subject of this reclaiming motion is the level of those awards; it being accepted that the awards to each parent could not be differentiated.

The Lord Ordinary's Decision

[2] The nature of the submissions at the proof are important in giving context to the Lord Ordinary's decision. As recorded by the Lord Ordinary, in contending that an award of £65,000 for each reclaimer was reasonable, the reclaimers had submitted that the starting point was the *dictum* in *Hamilton* v *Ferguson Transport (Spean Bridge)* 2012 SC 486 (LP (Hamilton) at para [63]) that greater regard ought to be paid by judges to jury awards in order to narrow the disparity, and to eliminate the inconsistency, between judicial and jury awards. The court in *Hamilton* advised (at paras [76] and [77]) that there ought to be changes in jury trial practice whereby the judge would henceforth

provide the jury with a spectrum within which their award might lie; albeit that this would not be binding upon them. The Lord President had said (at para [70]) that:

> "… other jury awards in comparable cases, provided they are sufficiently well documented and free from special consideration and (in time) disadvantages … should, on being taken into account, be accorded significant weight. Other jury awards should be approached with appropriate caution."

As noted by the Lord Ordinary, the submission continued:

> "Previous jury awards which had been made without the benefit of judicial guidance may be at greater risk of being arbitrary or being influenced by illegitimate factors. On that basis, [the pursuers] … would not seek damages at the level awarded in the '*Nimrod*' cases, discussed in *Hamilton* …, which had been in the £100,000 bracket. … [I]t was accepted that the *Thomson* award which was that of the second pursuer in … *Hamilton* …, at £90,000, had been too high."

Reference was made to two Outer House decisions post–dating *Hamilton* (*McGee* v *RJK Building Services* 2013 SLT 428 and *Ryder* v *Highland Council* 2013 SLT 847) in which the Lords Ordinary had increased past judicial awards following the statement in *Hamilton* (at para [72]) that recent judicial decisions (*Bellingham* v *Todd* 2011 SLT 1124 and *Wolff* v *John Moulds (Kilmarnock)* 2012 SLT 231) markedly undervalued claims for the death of a relative.

[3] The reclaimers' submission then turned to "the most similar judicial award" in *Shaher* v *British Aerospace Flying College* 2003 SC 540, in which an Extra Division had overturned a judicial award of £30,000, which had had regard to a jury award of that amount in *Strang* v *Le Brusq* 2001 Rep LR 52, and substituted one of £20,000. The Division had not been satisfied that there was a pattern in recent jury awards which would indicate that the sum awarded in *Strang* ought to be regarded as reflecting societal expectations (Lord Marnoch at paras [6] and [7]).

[4] The reclaimers' submission, as understood by the Lord Ordinary, proceeded as follows:

> "[15] … In trying to bridge the gap between judicial and jury awards, it should be noted that juries take very seriously the loss of a child who had become a young adult. This was hardly surprising as the loss of a child at this age was particularly cruel in adverting (*sic*) as it did the natural order of things. … Accordingly … the present value award of *Shaher* should initially be doubled (to £56,000) to reflect the importance of this particular type of loss. … [A]n element could be added on to reflect what was missing from *Shaher*, namely the family involvement in the terrible events of the night of 28 December 2011. …
>
> [16] … Considerable emphasis was placed on the *dicta* … in *Hamilton* … (at page 520) … that even if the '100% working rule' was applied, the jury award in the *Hamilton* case was still beyond the latitude to which the jury was entitled but that the position in relation to Mr Thomson's award 'may be less compelling'. … it could be deduced from this that half of the award made to Mr Thomson by the jury was not seen by the court as the upper limit of reasonable. In all the circumstances it was suggested that £65,000, as being effectively the updated mid–point between *Shaher* and *Thomson* was appropriate."

[5] The respondents' reply had contained the following:

"[22] … pre–*Hamilton* jury awards were 'suboptimal' owing to a lack of judicial guidance and the consequent risk of arbitrariness and inconsistency and therefore ought to be treated with circumspection. For example, the quartet (*sic*) of '*Nimrod*' cases were very special and turned on their own facts. Secondly, post–*Hamilton* … there were no jury awards relating to the death of adult children. … [In *Kelly* v *UCS*] the jury had been given a range from £40,000 to £80,000 by the presiding judge. … [T]he only recent guidance … could be found in … *Shaher* … all as now informed by the *dicta* in *Hamilton* … The process of uprating in *Wolff* …, *McGee* … and *Ryder* … might also assist …".

[6] In dealing with these submissions, the Lord Ordinary observed that it would, as was said in *Hamilton* (at para [63]), take time before the new process envisaged in that case had matured. As yet the only recent jury award (*Kelly* (*supra*)) was:

"[30] … clearly insufficient to provide any pattern under the new system of juries being given judicial guidance as to be of direct assistance. Equally, as was made clear in *Hamilton* … previous jury awards must be treated with great caution, just as previous judicial decisions are to be seen as having made awards that 'markedly undervalue' loss of society claims …

… [T]he pursuer asked me to infer from that *dicta* that the award of £90,000 to Mr Thomson did not so obviously fall foul of the 100% working rule. … [T]he £65,000 … could be regarded as effectively the updated midpoint between *Shaher* and the *Thomson* jury award … I do not consider that the suggested inference can be drawn from the *dicta* quoted above. Both the jury awards to Ms Hamilton and Mr Thomson were regarded by the First Division as excessive, even if the 100% working rule were to be applied. … [A]ll that was being said was that £120,000 to Ms Hamilton exceeded the 100% working rule to a greater extent than the £90,000 to Mr Thomson were that rule to be applied. No figures are given for the amount that the award to Mr Thomson could be regarded as exceeding that rule of thumb, but his award was described as 'likewise excessive' in a discussion about the two awards under review. Accordingly, the award to Mr Thomson remains simply as an example of a jury award that was seen to be excessive and that did not withstand a motion for a retrial (*sic*). The award itself is of no assistance to me in determining the appropriate awards to the pursuers."

[7] The Lord Ordinary proceeded to review *McGee* and *Ryder* before returning to what she said had been agreed as "the starting point" in *Hamilton* to the effect that pre–existing judicial decisions had markedly undervalued death claims. However:

"[31] The difficult decision is the extent to which they should be uprated in the absence of any pattern, as yet, of comparable jury awards where guidance has been given …

[33] ... In the absence of any relevant recent jury awards where the jury had the benefit of judicial guidance, I consider that the starting point must be a comparable judicial award. The closest available for the loss of a young adult son is *Shaher* [(*supra*)] …".

The Lord Ordinary uprated the award in *Shaher* to £28,000 to take into account inflation and applied a 50% uplift to arrive at the figure of £42,000 (cf 60% in *McGee* (*supra*) and *Ryder* (*supra*)).

Grounds of appeal and submissions

Reclaimers

[8] The grounds of appeal (RCS 38.18) are in clear and readily understood terms. The Lord Ordinary had erred:

> "a) that the Lord President in … *Hamilton* … had made clear that previous jury awards must be treated with 'great caution', rather than as was said by Lord Hamilton, with 'appropriate caution'; and
>
> b) in her interpretation of paragraph 73 … of the Opinion of the Lord President in … *Hamilton*, by concluding that the First Division … had regarded the award made to Mr Thomson as excessive according to the '100% working rule' …".

It can be seen immediately that what is being focused upon are errors by the Lord Ordinary, which might, if made out, open up the awards for review. There is no discrete point that the awards were inadequate.

[9] The Note of Argument (Practice Note No. 3 of 2011 para 86) recognises that the appropriate test for the successful review of damages awards includes the application of the wrong principles (MacPhail: *Sheriff Court Practice* (3rd ed) para 18–116; *Blair* v *FJC Lilley* 1981 SLT 90 to 92; *Lenaghan* v *Ayrshire and Arran Health Board* 1994 SC 365, Lord Mayfield at 369). In what is said to be related to ground of appeal (b), the Note argues that "the Lord Ordinary appears not to have paid regard to previous jury awards". It continues:

> "The statement in the present case that previous jury awards are to be treated with 'great caution' implies, firstly, a uniform approach to such awards rather than an assessment of the potential significance of each such award and, secondly, that no material guidance can be taken from such awards. These views appear to have led the Lord Ordinary to reject the submission … that the selection of an amount in the present case should take into account the seriousness with which juries view the loss of a young adult child."

The Note refers to a recent jury award of £86,000 in *Scott* v *Parkes*, 22 May 2014, to a mother (41) for the death of her son (19), who had been killed instantly in a road traffic accident.

[10] The oral submission returned to what had been said in *Hamilton* about the application of the 100% rule to the *Thomson* award, arguing that all that had been said was that £90,000 had been excessive and not that £45,000 would have been at the top end of the range of reasonableness. The Lord Ordinary had thought otherwise, hence her awards of just under that supposed ceiling.

[11] It was accepted that the Lord President's reference (at para [70]) to "other jury awards in comparable cases" being afforded "significant weight" was to jury awards in the post *Hamilton* era. The reference to "other jury awards" being approached with "appropriate caution" was to pre–*Hamilton* cases or those not otherwise comparable. There were therefore no jury awards which ought to have been given significant weight. However, the Lord Ordinary ought to have taken into account jury awards from the pre–*Hamilton* era, approached them with caution rather than "great caution" and thus taken into account the £90–110,000 awards to parents for the death of young

adult sons in the "*Nimrod*" cases (2011 SLT (News) 37) and *Gillies* v *Lynch* 2006 Rep LR 138. It had thus not been sufficient for the Lord Ordinary to have uplifted the award in *Shaher*. She ought to have enhanced the revised figure, having regard to these jury awards.

[12] If the Lord Ordinary had so erred, the exercise for this court would be to reasses the awards in light also of the more recent Outer House awards in *Gallagher* v *SC Cheadle Hulme* [2014] CSOH 121 (£35,000 for children of the deceased in their 30s) and *Young* v *MacVean* 2014 SLT 934 (£80,000 for the mother of a 26 year old). If that were done, the range ought to be £65–80,000.

Respondents

[13] The Lord Ordinary had approached the case correctly on the basis of the submissions made to her. She had been told that the "*Nimrod*" cases were not being relied upon as a guide to the appropriate level of award. They could not be so relied upon, because *Hamilton* (*supra*) had advised that the *Thomson* award of £90,000 was already too high. Both parties had submitted that what was required was an uprating of the closest judicial award (*Shaher* (*supra*)) and that is what the Lord Ordinary had done. It was this exercise which had provided the arithmetical basis for the £42,000 and not any consideration of the old 100% rule, in so far as it was applied to the *Thomson* award. The *Thomson* award fell to be disregard as excessive. It ought not to have been taken into account (*Girvan* v *Inverness Farmers Dairy* 1998 SC (HL) 1, Lord Hope at 17), as it apparently had been in *Young* v *MacVean* (*supra*). As might be expected, in *Thomson,* where a new trial had been allowed, there had been no guidance from the Division on what would have been appropriate. The Lord Ordinary had correctly rejected the reclaimers' irrelevant submission and disregarded *Thomson*.

[14] The reclaimers' criticism of the Lord Ordinary's use of the adjective "great", as distinct from "appropriate", before "caution" involved creating a distinction of no meaning or effect. It failed to read both *Hamilton* and the Lord Ordinary's Opinion as a whole. Whether "caution" was qualified by "appropriate" "great" or "very great" (*Wolff* v *John Moulds (Kilmarnock)* (*supra*, Lord Doherty at para [30]) was not significant in the context of the Opinion. The criticism was based upon a narrow textual analysis, which should be avoided (*McGraddie* v *McGraddie* 2014 SC (UKSC) 12, Lord Reed at para [30] following *Piglowska* v *Piglowski* [1999] 1 WLR 1360, Lord Hoffman at 1372). It was not disputed that a judge could have regard to "other jury awards", albeit with caution. However, each case was fact sensitive and generalising was dangerous, especially where the jury award was defective. For example, that in *Scott* v *Parkes* had occurred after the judge had mentioned the sum sued for to the jury, in breach of the guidelines in *Hamilton* (at para [77]).

[15] The Lord Ordinary's approach of uprating *Shaher* by 50% was perfectly reasonable in the absence of any helpful jury awards, even if, contrary to what the Lord Ordinary had said, there was no need to await the creation of a pattern. The awards made by the Lord Ordinary were not "wholly unreasonable or clearly excessive" (*McManus* v *British Railways Board* 1993 SCLR 783, LJC (Ross) at 784). They had been comprehensively, logically and clearly reasoned.

Decision

[16] The court is being asked to review awards of damages made, not by a jury, but by a Lord Ordinary. Since the selection of an appropriate sum involves a degree of judicial discretion, this court may normally interfere only if the Lord Ordinary has applied the wrong principles, in the

sense of misdirecting himself materially on the law, misunderstood the facts or arrived at a manifestly unfair assessment (*Blair* v *FJC Lilley (Marine)* 1981 SLT 91, Second Division at 92). In relation to the last of these, it is only where the award is so manifestly outwith what would be regarded as reasonable that the court could interfere (*McManus* v *BRB* 1993 SC 557, LJC (Ross) at 558, 559, 561).

[17] It is true that the Lord Ordinary did state that previous (pre–*Hamilton*) jury awards should be regarded with "great caution". That is not what was said in *Hamilton*; the adjective used was "appropriate" (*Hamilton*, LP (Hamilton) at para [70]). However, the Lord Ordinary's introduction of a different adjective does not appear to have been of any significance, having regard to the whole exercise that she carried out. It was also balanced by a correct interpretation of *Hamilton* that recent assessments by judges had "markedly undervalued" loss of society claims (*ibid* para [71]). When it came to carrying out her assessment, the Lord Ordinary took as a starting point the award, which had been reduced by the Inner House in *Shaher* v *British Aerospace Flying College* 203 SC 540 (£20,000), to a parent for the loss of a 19 year old eldest son with whom there were the "closest bonds of affection". This was uprated to £28,000 to reflect current value. The Lord Ordinary then took into account the *dictum* in *Hamilton* (*supra*) that this was an undervalue, as was reflected by the first instance decision in *Shaher,* which had taken account of a jury award of £30,000 (current value £45,000) for parents of a 21 year old in *Strang* v *Le Brusq* 2001 Rep LR 52. The Lord Ordinary effectively restored that level of award by uplifting the £28,000 by 50% to £42,000. That was an entirely reasonable approach following the guidance in *Hamilton*.

[18] The Note of Argument, as developed in the oral submission, contained the proposition that the effect of the Lord Ordinary's use of the words "great caution" was that she had reached the view that no guidance could be taken from "such awards" (meaning the "*Nimrod*" cases (2011 SLT (news) 37 and *Gillies* v *Lynch* 2006 Rep LR 138). If this were to have been a point of substance, the court would have expected it to have been spelled out in clear terms in the Grounds of Appeal. It is not, nor is there any mention of either the *Nimrod* cases or *Gillies* in the Note itself. The court therefore hesitated before considering the ultimate proposition advanced. However, the defenders were able to respond adequately to the point and the court therefore addressed itself to the issue. It nevertheless stresses the need for the propositions of law to be clearly set out in the grounds of appeal. If they are not, a reclaimer should not assume that the court will entertain the argument sought to be presented (*Eurocopy Rentals* v *Tayside Health Board* 1996 SC 410, LP (Hope) at 413).

[19] In light of the submissions made to her, the court does not consider that any criticism of the Lord Ordinary's approach is well founded. First, there is no reason to suppose that the Lord Ordinary was unaware of the seriousness with which juries view the loss of a young, or young adult, child. She was aware of this, having noted circumstances in *Shaher* and the levels of award in the "*Nimrod*" cases and *Thomson* (*Hamilton*). It was implicit in her reference to the *dictum* in *Hamilton,* that judges had "markedly undervalued" loss of society awards, that the Lord Ordinary was aware that judges required to view such claims as requiring greater awards and, in that sense, to treat them more seriously. The reclaimers had accepted that the levels of damages in the *Nimrod* cases were not appropriate comparators, nor was that in *Thomson*. In such circumstances, it is difficult to envisage how the Lord Ordinary could nevertheless have taken them into account, in some other rather vague fashion, when determining the appropriate award. She had been asked by the reclaimers to uprate the award in *Shaher* to take into account the higher levels of jury award

to which the Lord President had alluded in his remarks on the judicial undervaluing of loss of society claims. This is what the Lord Ordinary did, albeit not to the level requested by the reclaimers. In carrying out this exercise, the Lord Ordinary did have regard to the higher levels of jury awards in death cases.

[20] The Lord Ordinary considered that it could be inferred from the Lord President's *dictum* in *Hamilton* at para [73] that the jury's award of £90,000 to Mr Thomson had fallen foul of the 100% rule of thumb (ie that a reasonable award would have been £45,000 or less). That interpretation was correct. The Lord President described the *Thomson* award as "likewise excessive"; that is to say that, like the award of £120,000 to Miss Hamilton, it did fall foul of the rule. It is not possible to fault the Lord Ordinary in this regard. She proceeded to conclude, again correctly, that, since the award was deemed excessive, it was of no assistance, beyond that fact, in the exercise which she required to carry out.

[21] Ultimately, 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. It is accepted that the jury awards in the Nimrod cases (2011 SLT (News) 37) were exceptional. *Gillies* v *Lynch* 2006 Rep LR 138 also had certain special features; notably the pursuer's pathological grief reaction and her development of a severe depressive disorder. That being so, and accepting that it is not necessary for a pattern to have been established, there are very few other recent jury awards to act as reasonable comparators beyond *Strang* v *Le Brusq* (*supra*) at £30,000 (now £45,000). On the one hand, the award in *Scott* v *Parkes* is much higher at £86,000 but, it is said, the trial judge had wrongly referred the jury to the sum sued for in his directions. He had also provided a spectrum starting at £45,000 and, again it is said, ending at £80,000. On the other hand, the awards in *Wells* v *Hay* 1999 Rep R (Q) 44 and *McIntosh* v *Findlay* 2001 Rep LR 66 (referred to in a table provided by the reclaimers), uprated to present day values (£56,000–58,000), are not so much greater than the present award.

[22] In all these circumstances, the reclaiming motion is refused.