

OUTER HOUSE, COURT OF SESSION

[2016] CSOH 166

PD2711/15

OPINION OF FRANK MULHOLLAND QC

(Sitting as a Temporary Judge)

in the cause

(FIRST) BRENDA GRAY, Executrix Nominate of the Late Ian Hunter and as an individual; (SECOND) GARRY GRAY; (THIRD) GARRY GRAY as legal representative of RACHEL GRAY; (FOURTH) DANIELLE GRAY; (FIFTH) SHARON MacDONALD; (SIXTH) JODIE McDERMID and (SEVENTH) SHARLEEN DEWAR

Pursuers

against

THE ADVOCATE GENERAL FOR SCOTLAND
as representing the Ministry of Defence in Scotland

Defender

Pursuers: Di Rollo QC, Ross; Digby Brown LLP
Defender: Wilson; Morton Fraser LLP

1 December 2016

Introduction

[1] The defender seeks dismissal of the action in so far as brought by the second, fifth and seventh pursuers as irrelevant, they having no title to sue in terms of the Damages (Scotland) Act 2011.

[2] This claim was initially brought by Ian Hunter who sought damages following being diagnosed with mesothelioma. For his entire working life he was employed at Rosyth Dockyard. It is averred that he was exposed to considerable quantities of asbestos whilst working there on ships. Liability and *quantum* are disputed. Shortly after the action was raised Mr Hunter died on 12 December 2015. Subsequently the current pursuers were sisted as pursuers in the action. The first pursuer seeks damages as executrix nominate of the late Mr Hunter and in addition damages are sought by each of the first to seventh pursuers in terms of the Damages (Scotland) Act 2011.

[3] The first pursuer was the partner of the deceased. The second and fifth pursuers are the son and daughter respectively of the first pursuer, both from a previous marriage. The second pursuer was born on 15 June 1968 and the fifth pursuer on 18 December 1964. The remaining pursuers are the grandchildren of the first pursuer. The children and grandchildren are included in the action in terms of section 4(3)(b) of the Damages (Scotland) Act 2011. The defender challenges the relevancy of the claims of the children of the first pursuer, Garry and Sharon (second and fifth pursuers respectively) and one of the grandchildren, Sharleen, (seventh pursuer). Sharleen was born on 8 September 1981. The defender does not challenge the relevancy of the claims of the first pursuer or the other three grandchildren (third, fourth and sixth pursuers).

[4] The second and fifth pursuers assert title to sue on the basis that each was "accepted by the deceased as a child of the deceased's family" in terms of section 14(1)(b) of the Damages (Scotland) Act 2011. Similarly, the seventh pursuer asserts title to sue on the basis that she was "accepted by the deceased as a grandchild of the deceased" in terms of section 14(1)(d) of the said Act.

[5] The averments on behalf of the second, fifth and seventh pursuers in support of their contention that they were accepted by the deceased as children of his family or as his grandchild, are set out at Statement of Claim 8 of the Record. It reads as follows:

> "The deceased accepted the second and fifth pursuers as children of his family. The deceased accepted the third, fourth, sixth and seventh pursuers as his grandchildren. The deceased and the first pursuer met in or about March 2001. They formed a relationship and became close. They moved in together in or around July 2001. The deceased quickly became part of the pursuer's family. The deceased has no other children. He has no other close family relatives. The deceased assumed the position of, husband to the first pursuer, parent to second and fifth pursuers and grandparent to their children. He developed a close bond with them. The family was particularly close. It came together often and regularly for visits, meals, activities, outings, discussions and, other activities of family life. Apart from the sixth pursuer, who latterly lived abroad, the second to seventh pursuers lived close by to the first pursuer and the deceased. The deceased fulfilled the role of father and grandfather within the family. He provided practical and emotional support, advice, guidance, companionship and affection to each of the second to seventh pursuers. During his illness, the second and fifth pursuers assisted the first pursuer in caring for the deceased, as averred. The second pursuer accompanied the deceased to his medical appointments, including the consultation at the Victoria Hospital on 3 September 2015 at which he was informed that his diagnosis had been confirmed. The second pursuer introduced himself as and is referred to in the medical notes attendance as the deceased's step son. In his Will,

dated 6 October 2015 the deceased bequeathed his whole estate to the first pursuer and appointed her to be his sole Executrix. The deceased granted a destination over to the second pursuer and fifth pursuer, whom failing their issue, the third, fourth, sixth and seventh pursuers. Each of the second to seventh pursuers was part of the close and loving family of the deceased and each suffered considerable distress and anxiety in contemplation of his suffering and loss and grief on his death. They have lost his companionship, counselling and guidance. They accordingly claim under section 4(3)(b) of the Damages (Scotland) Act 2011".

[6] To have a claim for damages in terms of section 4(3)(b) of the Damages (Scotland) Act 2011 an individual must come within the definition of a relative of (the deceased) who is a member of (the deceased's) immediate family. In terms of section 4(5)(a) of the said Act those are the individuals identified in paragraphs (a) to (d) of the definition of relatives set out in section 14(1) of the Act. In relation to the second and fifth pursuers the relevant paragraph is paragraph (b) which provides that "relative" includes a person who "is a parent or child of the deceased, accepted the deceased as a child of the person's family or was accepted by the deceased as a child of the deceased's family". Paragraph (d) provides that "relative" includes a person who "is a grandparent or grandchild of the deceased, accepted the deceased as a grandchild of the person or was accepted by the deceased as a grandchild of the deceased".

[7] The second and fifth pursuers averred that they were each accepted by the deceased as a child of the deceased's family. The defender's position is that whatever their relationship was with the deceased, neither of them could be said to have been accepted by him as "a child of his family". The seventh pursuer avers that she was accepted by the deceased as a grandchild of the deceased's family. The defender's position is that whatever their relationship was with the deceased she could not be said to have been accepted by him as a grandchild of his family.

[8] The basis for the defender's challenge is age related. The second pursuer was 33 years of age when his mother (first pursuer) moved in with the deceased. The fifth pursuer was 36½ years of age and the seventh pursuer was 19 years and 10 months when her grandmother (first pursuer) moved in with the deceased. It is argued and is the basis for the relevancy challenge that given their ages at the time none of them can be described as a "child" in the normal sense in which that word is used.

Submissions for the Defender

[9] The defender submits that "child" in terms of section 14(1)(b) and (d) of the Act is defined by reference to age, personal status and the element of "bringing up". If a person does not have all these qualifications, then he or she will not be a child of the family and will have no title to sue in terms of section 4(3)(b) of the Damages (Scotland) Act 2011. As there is no age definition of "child" in terms of section 14(1) of the Act, the age by which a person ceases to be a "child" is to be determined by the principles of Family Law. In respect of the second, fifth and seventh pursuers as they were aged 33, 36½ and 19 years and 10 months of age respectively when the first pursuer moved in with the deceased, they are not children [grandchild for the seventh pursuer] for the purposes of section 4(3)(b) and 14(1) of the Act. "Child" for the purposes of the Act is not correlative of parent or grandparent. This is clear applying the principles of statutory interpretation.

Submissions for the Pursuer

[10] The second and fifth pursuers submit that it is open to them to prove that they were each accepted by the deceased as a child of the deceased's family and the seventh pursuer was accepted by the deceased as a grandchild of the deceased's family. They are not disqualified from doing so on the basis of their ages at the time the deceased started cohabiting with the first pursuer. "Child" for the purposes of section 4(3)(b) and 14(1) of the Act is defined as correlative of relationship and is not age restricted. This is clear applying the principles of statutory interpretation. "Child" is not defined for the purposes of section 4(3)(b) and 14(1) and therefore is not defined by reference to age. This is clear from the ordinary and natural meaning of the word. If Parliament wanted to define "child" by reference to age it would have expressly done so as it has done in other Acts and in another section of the Act (in another context). Applying the principles of family law to define a child would not provide an age at which a person ceases to become a child. In Acts of Parliament and the common law where a child is defined by reference to age there is no consistency of approach. It depends on the subject matter and circumstances. Therefore the words in the statute "accepted by the deceased as a child of the deceased's family" and "accepted by the deceased as a grandchild of the deceased" includes a person who is an adult at the time the acceptance takes place. Whether such acceptance took place is a question of fact for determination at the proof.

Decision

[11] To determine what a child means in the context of section 4(3)(b) and 14(1) of the Act is an exercise in statutory interpretation. Parties agreed that there was no case in point. There are broadly two approaches to defining what is meant by "child". That is by reference to relationship or age. This is clear from the definitions in the Oxford English Dictionary [Volume III, second edition] at page 112. Asche CJ helpfully commented on both approaches in *Public Guardian* v *MA* [1990] 68 NTR 9, a Supreme Court of the Northern Territories of Australia case (when dealing with a case which involved a proposed invasive medical procedure on an intellectually disabled person aged 19 years). At page 17 he stated:

> "The word 'child' has two distinctive but dissimilar meanings which the Oxford English Dictionary recognises by grouping its definitions of the word under two major 'significations' (there are in fact more than two but the others are not relevant here). Those significations are 'I – With reference to state or age' and II - As correlative to parent". The first grouping corresponds broadly to the term 'infant' as understood in the law. The second to the term 'offspring' or 'issue'. In written and spoken communications, the context usually supplies the grouping and one is not particularly troubled by ambiguity. One may use the term 'child abuse' or 'child education' without any fear of being thought of referring to abuse or education of adults. On the other hand a person making a will leaving his estate to his 'children' (naming them) will not be advised by his solicitor that this will not be recognised by the court if the children have become adults before the date of his death. In Drysdale v Drysdale (1967) 65 DLR (2d) 237 at 239 Wotton .J commented:-
>
> > 'A "child" may be of any age. We are all the children of our parents, for instance, no matter what age we have attained, but in a particular sense a "child" means a young person. There are statutes which refer to "child" or "children" and these words in their usual application mean persons under 21 years of age.'"

[12] In order to discern Parliament's intention as to what is meant by "child" in the context of the two sections there are a number of factors which seem to me to be relevant and of some weight.

These are:

(i) There is no definition of "child" in terms of section 4(3)(b) and 14(1) in the Act.

(ii) There is a definition of "child" in section 7 of the Act in another context.

Section 7 of the Act makes more generous provision in relation to compensation for loss of support for a person who is a "dependent child" of the deceased than for certain other categories of relative. Section 7[3] defines "dependent child" by reference to age [18 years] and obligation (aliment). This is a clear signal of parliament's intention that child in this context is age restricted. It is of significance that in the same act in which Parliament has age restricted the definition of "child" in another context that it has not done so in relation to the definition in section 14(1). It is reasonable to suppose that had Parliament intended to place any age based restriction on the meaning of child in section 14(1) it would have done so clearly and explicitly as it did elsewhere in the Act.

(iii) Section 14(1) provides that relative, in relation to a person who has died, means a person who –

> "(b) is a parent or child of the deceased, accepted the deceased as a child of the person's family or was accepted by the deceased as a child of the deceased's family….
>
> (d) is a grandparent or grandchild of the deceased, accepted the deceased as a grandchild of the person or was accepted by the deceased as a grandchild of the deceased…".

There is of course an absence of an age-related definition here but it also seems clear to me that the definitions given are correlative of a relationship with the deceased. For example, "child of the deceased" is clearly correlative to parent and "accepted by the deceased as a child of the deceased's family" is correlative to parent in the context of the deceased's family. If applied consistently in the same section, which would be expected in the absence of Parliament's express intention to the contrary, then 'accepted by the deceased as a child of the deceased's family' must also be correlative of relationship and not age.

(iv) Section 14(2)(b) of the act provides that a "stepchild" of a person is to be treated as the person's child. Again there is no age restriction.

(v) In determining whether an individual who is not a natural brother and sister of the deceased is to be treated as the brother and sister of the deceased, paragraph (c) of section 14(1) defining 'relative' requires not only that the individual had been accepted as a child of the family in which the deceased was a child but also that he or she was brought up in the same household as the deceased. Here Parliament, in respect of a brother and sister of the deceased, is being explicit on the conditions [beyond relationship] which must be met before an individual can come within the definition of relative.

All these factors taken individually and collectively all point in favour of a definition defined by relationship and not age.

[13] If an age restriction is implied then the question would have to be asked: what is the age restriction? Parliament is silent on the issue so there is no assistance provided there. The defender submits that the answer is to be found in family law. I cannot, however, agree with this submission. Family law is a broad term which covers many different areas of law under this general umbrella. At common law a girl is a child under the age of 12 years and a boy under the age of 14 years. The age of majority is 21. However, in terms of section 93(2)(b)(i) of the Children (Scotland) Act 1995 a child is defined for part one of the Act (which deals with matters including parental rights and responsibilities), as a person under the age of 18 years and in terms of Chapters 2 and 3 of Part 2 (which deals with matters including children's hearings and child protection orders), a child means someone who has not attained the age of 16 years; or a child over the age of 16 years who has not attained the age of 18 years and in respect of whom a supervision requirement is in force. In terms of section 1(5) of the Family Law (Scotland) Act 1985, dealing with the obligation of aliment, a child is defined as a person under the age of 18 years; or over that age and under the age of 25 years who is reasonably and appropriately undergoing instruction at an educational establishment, or training for employment or for a trade, profession or vocation. In terms of international treaties, the United Nations Convention on the Rights of the Child applies to anyone under the age of 18 unless the age of majority is attained earlier.

[14] There is therefore no ready and consistent answer in "Family Law" to who is a child. It depends on the subject matter and the law applicable. In this case would Sharleen (seventh pursuer) be a child if an age restrictive interpretation was applied, applying the principles of family law? She was 19 years and 10 months of age when her grandmother (first pursuer) moved in with the deceased. It is possible that if a definition was extracted from family law, it would define a child as a person under the age of 21 or 25 if certain conditions applied. In any event I would observe that it seems to me that the date which is important for the purpose of the determination of the issue is not the date the first pursuer met or moved in with the deceased. It is the position at the date of the death of Ian Hunter. This is the date at which the issue of whether the second, fifth and seventh pursuers were accepted by the deceased as a child/grandchild of the deceased's family falls to be determined. I do however accept that evidence prior to and post death could be relevant to this question.

[15] It is a fundamental principle of statutory interpretation that words should be given their ordinary and natural meaning. As Lord Penrose stated in *Barratt Scotland Ltd* v *Keith* 1993 SC 142 at p 148 A – B (whether a term in missives was an obligation relating to land):

> "The 'golden rule' of construction, in its modern expression, requires that the words of the statute must, *prima facie*, be given their natural and ordinary meaning, in their context, and according to the appropriate linguistic register, without addition or subtraction, unless that meaning produces injustice, absurdity, anomaly or contradiction."

In the present case defining "child" by reference to relationship (and not age) will not strain the meaning and produce injustice, absurdity, anomaly or contradiction, in fact quite the opposite. Such a definition is consistent with every day usage, dictionary definition, a recognised approach in case law and most importantly appears to be what Parliament intended given the absence of an

age based restriction. It seems to me that to read into the definition of "child" an age based restriction would be to thwart Parliament's clear intention and lead to difficulty in interpretation if the broad concept of family law was the source of the applicable age restriction. To further read into the definition two additional requirements namely, "personal status" and the element of "bringing up" would be to strain the definition beyond what Parliament intended and would lead to inconsistency. For example, if an element of "bringing up" was required then that would mean that the other three grandchildren, namely Rachel [third pursuer], Danielle [fourth pursuer] and Jodie [sixth pursuer] would have no title to sue as it is not being suggested that they were brought up by the deceased, yet their claims have not been challenged. In fact it would rule out many grandchildren who are not brought up by their grandparents. The defender suggests that personal status is a factor when defining "child". The personal status of the second and fifth pursuers at the time their mother moved in with the deceased is that both had children of their own. In the second pursuer's case his children were aged three and a half years (Danielle, fourth pursuer) and two months (Rachel, third pursuer). In respect of the fifth pursuer her children were aged 19 years (Sharleen, seventh pursuer) and 12 years (Jodie, sixth pursuer). There was no information before me about the personal status of the seventh pursuer. I have no doubt that such factors may be relevant to the proof of whether the second, fifth and seventh pursuers were accepted by the deceased as a child/grandchild of the deceased's family but I do not regard personal status as part of the implied definition of a child.

[16] Further if an age based restriction is implied then it would also apply to natural children in terms of section 14(1)(b) disqualifying them from claiming damages where the death of the parent occurred beyond whatever age was the cut-off point applying the principles of family law. That cannot be what Parliament intended as had Parliament intended it, it would have been made clear in the statute as it was made clear in the definition of "child" in other Acts and more importantly as it was made clear in this statute when defining "child" in terms of section 7(3) of the Act.

[17] Although it was accepted by counsel for the pursuers and defender that there were no cases in point, the defender cited a number of cases as helpful in considering how the court should approach the present issue and were supportive of the defender's arguments. In *Telfer* v *Kellock* 2004 SLT 1290 the same sex partner of a woman who died in a road traffic accident and her son sought damages under the Damages (Scotland) Act 1976. Paragraph 1 of Schedule 1 to the 1976 Act provides that "relative" in relation to a deceased person includes "(aa) any person, not being the spouse of the deceased, who was, immediately before the deceased's death, living with the deceased as husband and wife" and "(c) any person….who was accepted by the deceased as a child of the family". The issue for the court was whether the same sex partner was a "relative" and whether the partner's son was accepted by the deceased as a child of his family. Dealing with the same sex partner's claim Lady Smith held that she did not qualify as a relative as she could not demonstrate that she was living with the deceased before the accident as her husband which she could not do because she was of the female gender. The language, which was not ambiguous, plainly denoted a biological distinction between the deceased and cohabitee. If Parliament had intended to extend claims to a person who had been in a same sex relationship it would not have chosen the language in the statute to effect this [see p 1293F and L). I observe that the principles of statutory interpretation applied in that case are the same as I propose to apply in this case. With

regard to the son's claim it was held that "family" in paragraph 1(c) was used in the context of circumstances where the deceased adult, prior to death, engaged in a loving and caring relationship with the child and undertook parental responsibilities. This could be fulfilled without the involvement of another adult in a heterosexual relationship and an adult would not be disabled from so doing by reason of the fact that he or she cohabited in a same sex relationship. This case is clearly dealing with a separate issue to that in the present case. The defenders submitted that paragraphs 15 – 17 of Lady Smith's judgement support the argument that "child" involves an element of bringing up and personal status, particularly the passage at p1294G when dealing with what "family" meant in terms of 1(d). There Lady Smith stated that:

> "it seems clear to me that the expression is being used in the context of circumstances where the deceased adult, prior to his or her death engaged in a loving and caring relationship with the child in question and undertook responsibilities towards that child which were parental in nature. In normal course, such responsibilities could be expected to involve the promotion of the child's health, development and welfare, direction and guidance and the provision of financial support….An adult can, however, have such a relationship with and fulfil those responsibilities towards a child without being involved with another adult in a heterosexual relationship. Nor would an adult be disabled from doing so by reason of the fact that he or she cohabits in a same sex relationship…."

In my view in this passage Lady Smith was describing the factors which would be relevant to proof that an individual was a child of the family. She was not being prescriptive nor was she setting out an exhaustive list. Not all the factors listed would apply in every case and in some cases other factors would be relevant. The use of the words "In normal course" make this point. In any event the factors listed could apply to adult children also and I note the obvious point that there is no reference to age as a cut off point in the passage.

[18] In *McGibbon* v *McAllister* 2008 SLT 459 the pursuer sought damages for loss of society following the death of his partner's 18-year-old son in a road traffic accident. He averred that he had lived with the deceased's mother for most of the deceased's life, which amounted to approximately 16 years. The accident occurred before the insertion of subparagraph (ca) into the Damages (Scotland) Act 1976 Schedule 1. (Subparagraph (ca) inserted into the definition of relative any person…who accepted the deceased as a child of the person's family). The pursuer thus sought damages on the basis that he was *de facto* stepfather of the deceased. The pursuer argued that to hold that he was not a parent of the deceased would be to discriminate against him on the basis of his marital status which was contrary to the European Convention on Human Rights Articles 8 and 14. It was held that the pursuer, on an ordinary reading of Schedule 1 to the 1976 Act, was not the deceased's parent, but to hold that he had no title to sue would amount to a difference of treatment in comparison to others in analogous situations and would be discriminatory and incompatible with Article 14 when taken together with Article 8. There was no reason why, in order to render the provision compatible with the Convention, the meaning of "parent" could not be extended to include someone who to a material extent, as a matter of fact, fulfilled roles usually associated with parenthood. At paragraph 18 of the judgement Lord Brodie stated that:

> "A 'parent' of the deceased is the deceased's natural or adoptive father or mother or……the deceased's stepfather or stepmother. The pursuer, on an ordinary reading or conventional interpretation of the language of the paragraph is not the deceased's parent and does not have title to sue in respect of the deceased's death. Counsel for the pursuer referred me to definition C of 'parent' in the Oxford English Dictionary: 'A person who holds the position or exercises the functions of a parent; a protector, guardian'. It is important to note the abbreviation '*transf*' which appears at the beginning of that definition. That signifies that this is a transferred meaning: it refers to someone who is not a parent in the primary sense but who acts as if he or she were a parent. Counsel submitted that by the time of the enactment of the Damages (Scotland) Act 1993 there was no valid distinction left between married couples and those who were living together as man and wife. He also drew my attention to changing social mores and the fact that many couples live together who are not married. He referred to the opinion of Lady Smith in *Telfer* v *Kellock*, supra, where there is recognition that the concept of what constitutes a family in modern society need not conform to the conventional model. It is true to say that in recent years the legislatures, both in Westminster and Holyrood, have introduced a number of measures which have tended to reduce the differences as between the consequences of, on the one hand, being married and having children of that marriage, and, on the other, living together and accepting the child or children of the other partner as the child or children of the family constituted by the fact of cohabitation. That does not have the result that the fact that a couple have married or entered into a formal civil partnership falls to be ignored for the purpose of determining parties' rights or that for every purpose the members of an unmarried cohabiting couple are to be regarded as if they were married. Equally, it does not have the result that anyone cohabiting with the natural parent of a child, becomes, by virtue of the fact of cohabitation, the parent of that child. It is no doubt true that cohabitation and the consequence that adults live in households with their partners' children have become very common as social phenomena. I do not see that as having yet impacted on the ordinary meaning to be attributed to the word 'parent' or the way in which a statutory provision which uses that word should conventionally be interpreted."

I do not regard this as helpful to the defender. It is dealing with a different situation under a different Act of Parliament. It seems to me that what Lord Brodie is articulating here is that it does not follow that the partner's natural children will become the cohabitee's children upon cohabitation. It will depend on the facts and circumstances as it will depend on the facts and circumstances in respect of the second, fifth and seventh pursuers in the present case.

[19] In support of his argument the defender relied on the legislative history of the relevant provisions including the relevant Scottish Law Commission report on title to sue for non-patrimonial loss (Scot Law Com No 187). The Commission had been asked, in March 2001, to consider the provisions of the Damages (Scotland) Act 1976 relating to the rights of relatives of a deceased person to sue for such loss and to make recommendations as to possible changes in the law. The Commission explained in its report that, in making its recommendations, its policy aims were that (a) the concept of the deceased's "immediate family" should be retained; (b) it should

consist of those relatives who are likely to have had a close tie of love and affection with the deceased in the context of contemporary family structures and (c) appropriate weight should be given to relationships which can arise between persons who have lived and/or been brought up in the same household (see paragraph 2.11). In furtherance of these aims the Commission recommended that any person (including a step-parent) who had accepted the deceased as a child of the family should be entitled to sue for non-patrimonial loss (as well as patrimonial loss), but that a step-parent by virtue of that relationship alone with the deceased should no longer be entitled to sue for non-patrimonial loss. In explaining why the Commission pointed out that there could be cases where a step-parent had married the deceased's parent by the time when the deceased was an adult and had played no part in the deceased's upbringing. In such a case it would be inappropriate to treat the step-parent as a member of the deceased's immediate family and to confer on him or her the automatic right to sue for non-patrimonial loss (paragraphs 2.38-2.40). In place of step-parents, the Commission proposed, to provide that anyone who has accepted a child as a child of that family should have title to sue for non-patrimonial loss as a consequence of the death of that child. Such an amendment would tie in with the existing rule that a person accepted by the deceased as a child of the family should continue to be entitled to sue for non-patrimonial loss (paragraph 2.39). The Commission's view was that a person (whatever their relationship to the deceased) who voluntarily accepts a child as a child of the family has sufficiently close ties with the child to be entitled to sue as a member of the child's immediate family (paragraph 2.40). The defender submits that this is persuasive as to the definition of child being age restricted and the requirements of personal status and bringing up.

[20] I disagree with this analysis. First, this material is only of relevance where the legislative wording was ambiguous, obscure or would lead to an absurdity. I do not regard the legislative wording in section 4(3)(b) and 14(1) of the Act as any of these. I regard the wording as a clear exposition of Parliament's intention that "child" is not age related and is correlative of relationship. Secondly, I note that nowhere in the Commission's report is there a recommendation that a child should be defined by reference to age in the circumstances as pled by the defender. The Commission at paragraph 2.40 [page 12] stated (when dealing with step-parents):

> "We take the view that a person who voluntarily accepts the child of the family has sufficiently close ties with the child to be treated as a member of the child's immediate family"

Further, when dealing with children, the Commission at paragraph 2.44 [page 13] stated:

> "…it is our view that, as the relationship between parent and child corresponds, our recommendations concerning the deceased's child should correspond with our recommendation concerning the deceased's parents. Thus a person should not be entitled to sue for non -patrimonial loss merely because he or she is a step-child of the deceased. As at present, he or she must have been accepted by the deceased as a child of the deceased's family. In that respect we think that there should be no change to the 1976 Act."

The commission is not a law making body but it is important to the law making function of Parliament. It is well aware of the need to be clear in its recommendations, which may lead to legislation if the Government accepts all or some of them. It often includes draft bills with its reports so is knowledgeable on drafting and statutory interpretation. If it recommended that a "child" should be age defined then I would expect the Commission to say so explicitly. It did not. It is clear to me that what the Commission has recommended is that in respect of a step-child what is required is proof that the person has been accepted by the deceased as a child of the deceased's family, which is what the second, fifth and seventh pursuers are offering to prove [grandchild in respect of the seventh pursuer].

[21] The defender cites the commentary of Professor Joe Thomson in support of his submissions. Professor Thomson is a former Professor of Law at the University of Glasgow and Commissioner of the Scottish Law Commission. He is a well respected authority on matters of family law and was involved in the Commission's report which resulted in the Damages (Scotland) Act 2011. In Green's Annotated Acts at paragraph 14.02 (page 24) when discussing section 14(1) of the Act, Professor Thomson states that "whether a person is the child of the deceased will be determined by the usual rules of family law". I do not regard this general remark about how such matters are proved as an authority for an age based definition of child. Even if it was, it would in no way outweigh the multitude of factors which I have set out above as weighing heavily in favour of a definition which is not age based and is correlative of relationship.

[22] As I have indicated above parties submitted that there are no cases directly in point and this appears to be the case. However, there was one case which I thought was of assistance in the interpretative exercise. In the case of *Leach* v *Lindeman and others* 1986 Ch 226 the Court of Appeal in England and Wales considered whether an adult child could come within the definition of "child" in terms of section 1(1)(d) of the Inheritance (Provision for Family and Dependents) Act 1975. Section 1(1) of the Act lists the categories of persons who are eligible to apply to the court for financial provision from the estate of deceased persons. This incudes in terms of subsection 1(d) persons who were treated as a child of the family in relation to that marriage. In the present case the wording of the legislation is slightly different, namely "accepted" rather than "treated". For present purposes I do not think that anything turns on the slightly different wording used. The case dealt with the claim of an adult stepchild against her stepmother's estate for reasonable financial provision to be made for her out of the estate. The claimant had acquired a stepmother at the age of 32 years. In order to qualify she had to establish that she had been treated as a child of the family by the deceased. It was argued against her that she could not qualify as she was not an 'unfledged' person at the relevant time in the sense that there has been an assumption by the deceased of parental responsibility, care and control. This argument was rejected by the court. In rejecting the argument Slade LJ stated at page 235H – 236D that:

> "This submission has its superficial attractions. One's first reaction to the suggestion that a man or woman of mature years and full capacity can be treated as a 'child of the family' may be one of surprise. Nevertheless, the submission is not, in my opinion, well-founded. The observations of Templeman L.J., on which reliance was placed, were made in regard to a girl who at the relevant time was between 10 and 14. The answer to this submission is, I think, to be found in the following passage from the judgment of Booth J. in In re *Callaghan* decd [1985] Fam.1,5: 'Child' , for the purposes of Section 1 , clearly includes an adult child. One of the persons who may apply by virtue of section 1 (1) (c) is 'a child of the deceased' , and it cannot be suggested that in that context 'child' must be limited to a minor or

dependent child. In section 1 (1) (c) 'child' relates to the relationship between the deceased and the applicant. In my judgment this is precisely the same in section 1 (1) (*d*) of the Act, and no different meaning should be given to the word 'child' in the context of the words 'treated by the deceased as a child of the family'. It is again a matter concerning the nature of the relationship between the deceased and the applicant, and it does not follow that treatment necessarily refers to the treatment of the applicant by the deceased as a minor dependent child".

At page 237C-F Slade LJ further stated that:

> "I can see no reason why even an adult person may not be capable of qualifying under that subsection provided that the deceased has (as wife or husband) (or widow or widower) under the relevant marriage, expressly or impliedly, assumed the position of a parent towards the applicant, with the attendant (responsibilities and privileges) of that relationship. If things take their natural course, the privileges of the quasi-parent may well increase and the responsibilities may well diminish as the years go by…."

This to my mind is supportive of the approach which I have taken in determining what is meant by "child" in the present case. In my view it is not age restricted. It is correlative of relationship which is a matter of proof.

[23] For the reasons set out above I refuse the defender's motion for dismissal in respect of the second, fifth and seventh pursuers. The claims of all seven pursuers can be determined at proof. I shall therefore allow a diet of proof at a date to be afterwards fixed.