**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2012] CSIH 52**

**PD2039/09 and PD1444/09**

OPINION OF

THE LORD PRESIDENT

in motions for new trials

*in causis*

(1) KIRSTY MAY HAMILTON

Pursuer and Respondent;

against

FERGUSON TRANSPORT (SPEAN BRIDGE) LTD

Applicant and Defender:

and

(2) GILBERT DENNIS THOMSON

Pursuer and Respondent;

against

DENNIS THOMSON BUILDERS LTD

Applicant and Defender:

_____

# Lord President

# Lord Eassie

# Lord Clarke

**Lord Emslie**

**Lord Brodie**

## (1) Act: Murphy, Q.C., Pugh; HBM Sayers (Defender and Applicant)

**Alt: Reid, Q.C., Lloyd; Morton Fraser LLP (Pursuer and Respondent)**

**For the Scottish Ministers: Balfour; Scottish Government Legal Directorate**

**(2) Act: Jones, Q.C., Pugh; HBM Sayers (Defender and Applicant)**

**Alt: Milligan, Q.C., Thornley; Balfour + Manson LLP (Pursuer and Respondent)**

**For the Scottish Ministers: Balfour; Scottish Government Legal Directorate**

8 June 2012

**Introduction**
[1] In each of these two processes the defenders have enrolled a motion for a new trial. Both motions raise similar considerations and were heard together. Because potentially these considerations gave rise to important matters of principle and practice in relation to the conduct of civil jury trials, an enlarged bench was convened to hear the motions.

**The statutory provisions**
[2] The Court of Session Act 1988 provides:

"9 The Lord Ordinary may allow a proof -

(a) in any action, other than an action enumerated in section 11 of this Act, without the consent of both parties and without reporting to and obtaining the leave of the Inner House;

(b) in any action enumerated as aforesaid, if the parties to the action consent thereto or if special cause is shown.

...

11 Subject to section 9(b) of this Act, the following actions if remitted to probation shall be tried by jury -

(a) an action of damages for personal injuries;

(b) an action for libel or defamation;

(c) an action founded on delinquency or quasi-delinquency, where the conclusion is for damages only and expenses; and

(d) an action of reduction on the ground of incapacity, essential error, or force and fear;

and such an action which has been ordered by the Lord Ordinary to be tried by jury is hereafter in this Act referred to as a jury action.

...

29(1) Any party who is dissatisfied with the verdict of the jury in any jury action may, subject to such conditions and in such manner as may be prescribed, apply to the Inner House for a new trial on the ground -

(a) of misdirection by the judge;

(b) of the undue admission or rejection of evidence;

(c) that the verdict is contrary to the evidence;

(d) of excess or inadequacy of damages; or

(e) of *res noviter veniens ad notitiam*;

or on such other ground as is essential to the justice of the cause.

...".

[3] Section 1 of the Damages (Scotland) Act 1976 (as amended) provided:

"(1) Where a person dies in consequence of personal injuries sustained by him as a result of an act or omission of another person, being an act or omission giving rise to liability to pay damages to the injured person or his executor, then, subject to the following provisions of this Act, the person liable to pay those damages (in this section referred to as 'the responsible person') shall also be liable to pay damages in accordance with this section to any relative of the deceased, being a relative within the meaning of Schedule 1 to this Act.

...

(4) ... if the relative is a member of the deceased's immediate family (within the meaning of section 10(2) of this Act) there shall be awarded, without prejudice to any claim under subsection (3) above, such sum of damages, if any, as the court thinks just by way of compensation for all or any of the following -

(a) distress and anxiety endured by the relative in contemplation of the suffering of the deceased before his death;

(b) grief and sorrow of the relative caused by the deceased's death;

(c) 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,

and the court in making an award under this subsection shall not be required to ascribe specifically any part of the award to any of paragraphs (a), (b) and (c) above."

Immediate relatives included parents and children of the deceased. The 1976 Act has now been repealed by the Damages (Scotland) Act 2011, section 4(3)(b) of the 2011 Act being in substantially the same terms as section 1(4) of the 1976 Act, but such repeal does not affect the present proceedings. An award made under section 1(4) is conventionally referred to as a "loss of society" award. It replaced, but is different from, damages at common law in respect of *solatium* for the death of a close relative.

**The present awards**

[4] On 18 December 2007 Mrs Caroline May Hamilton, then aged 50, was driving northwards on the A82 towards Fort William when an articulated lorry, being driven southwards by an employee of Ferguson Transport (Spean Bridge) Ltd ("Ferguson Ltd"), toppled over and crushed Mrs Hamilton's car killing her outright. She was survived by her husband, James Ian Hamilton, then aged 67 and by her only child, Kirsty Hamilton, then aged 17. In due course proceedings were raised against Ferguson Ltd in the Court of Session by Mr and Miss Hamilton for reparation arising out of the death of Mrs Hamilton. Ferguson Ltd admitted liability. The action was remitted for trial by jury. An issue was proposed by the pursuers, which was not objected to by the defenders. Attached to the issue was a schedule of damages for each of the pursuers in which there were separate heads for damages under section 1(4) of the 1976 Act (as amended), for loss of financial support and for loss of services rendered by the deceased. Each of these heads was broken down into claims for the past and for the future. Mr Hamilton's claim additionally sought recovery of funeral expenses. At the head of the schedule for Mr Hamilton appeared the words "DAMAGES CLAIMED BY FIRST PURSUER - £250,000" (the total sum ultimately concluded for by him). At the head of the schedule for Miss Hamilton appeared the words "DAMAGES CLAIMED BY SECOND PURSUER - £175,000" (the total sum ultimately concluded for by her). Prior to the jury trial all the heads of damages other than those under section 1(4) had been agreed. In the event the jury, following trial on 16 February 2011, returned a verdict in favour of Mr Hamilton of a total of £179,835, of which £50,000 was in respect of the section 1(4) award for the past and £30,000 in respect of section 1(4) for the future. No motion was enrolled by Ferguson Ltd with respect to the award made to Mr Hamilton - we were informed that dealings in relation to a tender affected that. As respects Miss Hamilton the jury returned a verdict in her favour of a total of £142,060, of which £22,060 in aggregate was in respect of agreed financial heads and £120,000 (£50,000 to the past and £70,000 to the future) was in respect of the claim under section 1(4). Ferguson Ltd enrolled a motion for a new trial in respect of the award to Miss Hamilton on the basis of "excess ... of damages" (Court of Session

Act 1988, section 29(1)(d)), though as will become plain reliance was also placed on "such other ground as is essential to the justice of the cause" (section 29(1), concluding clause).

[5] On 10 March 2007 James William Thomson, then aged 26, was working in the course of his employment with Dennis Thomson Builders Ltd ("Thomson Ltd") on a building site on Shetland. As he was doing so a canister of expanding foam, provided to him for the purposes of his work, exploded killing him instantly. He was survived by his wife and three children, by both his parents, his brother, his sister, his half-sister and his half-brother. An action was raised against Thomson Ltd in the Court of Session by these relatives for reparation arising from the death of the deceased. All these claims, bar that made by the deceased's father, were ultimately settled. At the time of his son's death the deceased's father ("Mr Thomson") was 57 years of age. Mr Thomson's claim was sent to jury trial. Thomson Ltd admitted liability. Mr Thomson's sole claim was under section 1(4) of the Damages (Scotland) Act 1976 (as amended), divided in the issue, to which Thomson Ltd did not object, into awards for the past and for the future. At the head of the schedule of damages appeared the words "DAMAGES CLAIMED BY THE THIRD PURSUER [Mr Thomson] - £100,000" (the total sum ultimately concluded for by Mr Thomson). In the event the jury, following trial on 2 February 2011, returned a verdict in favour of Mr Thomson for £90,000, of which £50,000 was to the past and £40,000 to the future. Thomson Ltd enrolled a motion for a new trial in respect of that award on the basis of "excess ... of damages", reliance also being placed on "such other ground as is essential to the justice of the cause".

**Submissions for Ferguson Ltd**

[6] Mr Murphy first addressed the issue of excess of damages. The starting point in that exercise was to identify a benchmark figure. Reference was made to the two-stage approach set out in *Girvan* v *Inverness Farmers Dairy* 1998 SC (HL) 1, per Lord Hope of Craighead at pages 16-17; *Heasman* v *JM Taylor & Partners* 2002 SC 326, per Lord Hamilton at paragraph [21]). That involved an initial judicial assessment of the appropriate sum, by reference to awards in similar cases by both judges and juries, followed by a comparison with the award made in the case in question. There was no consistent pattern of jury awards with which one could make a comparison in Miss Hamilton's case. Two recent judicial awards suggested that the appropriate range for bereaved children was £15,000 - £25,000 (*Bellingham* v *Todd* [2011] CSOH 74; *Wolff* v *John Moulds (Kilmarnock) Ltd* 2012 SLT 231; cf Scottish Law Commission Discussion Paper on Damages for Wrongful Death (No. 135 of 2007), Appendix C). In fact, the upper limit of £25,000 was awarded to young children. Thus, applying the test in *Girvan*, an appropriate range for an adult child might be £15,000 - £20,000. The award to Miss Hamilton was out of all proportion to this and, by any measure, excessive. As a result, a retrial should be granted in terms of section 29(1)(d) of the Court of Session Act 1988.

[7] It was submitted that the current system of civil jury trials involved uncertainties of law and procedure. The guidance in the directions which had been given to the jury on damages, while not formally challenged, was limited. They had been advised to make a "reasonable" and "moderate" award under section 1(4), but only in the context of having been told that the "maximum" award which they could award the respondent was around £152,000, that being the balance of the sum in the issue after certain other elements of her claim were settled. That was bound to have affected their deliberations. In principle, Scots law did not permit awards of exemplary or aggravated damages: they were instead compensatory in nature (*Wason* v *British Transport Commission* 1960 SC 261, per Lord Justice Clerk Thomson at page 264; *Black* v *North British Railway Co* 1908 SC 444, per Lord President Dunedin at page 453; *Heasman* v *JM Taylor & Partners*, per Lord Hamilton at paras [1] - [3]). However, absent appropriate guidance, jury awards in some cases vastly exceeded judicial awards in similar cases, bore no relation to compensatory principles and were instead suggestive of aggravated damages. Section 1(4) of the 1976 Act was concerned purely with non-patrimonial loss. The definition of a "relative" to whom such damages might be awarded was very wide (1976 Act, Schedule 1). Any insurer involved in such cases could be required to pay out a substantial sum of money where multiple claimants were involved, increasing the possibility of injustice.

[8] Claims under section 1(4) of the 1976 Act were, in some ways, unsuitable for determination by a jury due to the sympathy which they naturally engendered: an objective approach was required. The nature and

function of a compensatory award for hurt feelings and loss of society and guidance was not easily converted to a monetary value. It was clear that judges found it conceptually difficult to award compensation for such loss (*Young* v *Glasgow Tramway and Omnibus Co (Limited)* (1882) 10 R 242, per Lord Shand at page 244; *Black* v *North British Railway Company*, per Lord President Dunedin at page 453; *McKiernan* v *Glasgow Corporation* 1919 SC 407, per Lord President Strathclyde at page 408; *Elliot* v *Glasgow Corporation* 1922 SC 146, per Lord President Clyde at pages 147-149; *Quin* v *Greenock and Port-Glasgow Tramways Co* 1926 SC 544, per Lord President Clyde at page 547; *McGinley* v *Pacitti* 1950 SC 364, per Lord President Cooper at pages 368-369; *Traynor's Executrix* v *Bairds & Scottish Steel* 1957 SC 311, per Lord Guthrie at page 314; *McGregor* v *Webster's Executors* 1976 SLT 29, per Lord Cameron at page 34; *McCallum* v *Paterson* 1968 SC 280, per Lord Justice Clerk Grant at pages 282-283; cf *Sims* v *William Howard & Son Ltd* [1964] 2 QB 409, per Lord Denning, MR at page 415). That difficulty would inevitably be shared by a jury, for whom Parliament had provided no mechanism for appropriate guidance.

[9] If there were to be no change in the current law and procedure, there was a risk of a disproportionately wide range of awards depending on the mode of inquiry and procedure. The difficulty had been recognised in other jurisdictions. In Canada, awards to quadriplegics for non-pecuniary damages had, in the absence of special circumstances, been capped at $100,000 (*Andrews* v *Grand & Toy Alberta Ltd* [1978] 2 RCS 229, at pp 260 *et seq*). In England and Wales the amount which could be awarded as damages for bereavement was fixed at £11,800 (Fatal Accidents Act 1976, section 1A; Damages for Bereavement (Variation of Sum) (England and Wales) Order 2007, SI 2007/3489). Juries required adequate guidance and help were they to award appropriate damages (*Simpson* v *Harland & Wolff plc* [1988] NI 432, per Lord Lowry, LCJ at page 439-40, citing *Broome* v *Cassell & Co* [1971] 2 QB 354, per Phillimore LJ at page 399).

[10] The appeal process did not eliminate the element of uncertainty. The test employed by the Inner House in effect changed where a case was the subject of a second motion for a new trial following a second award of purportedly excessive damages: in effect the "any reasonable jury" test was abandoned for an "any jury" test (*Girvan* v *Inverness Farmers Dairy*, per Lord Hope at page 20; *Girvan* v *Inverness Farmers Dairy (No.2)* 1996 SC 134, per Lord McCluskey at page 141). This was, in part, a result of the lack of power to award damages in the Inner House. The absence of such a power, the lack of consistency, the uncertainty and the need for greater guidance had been judicially recognised in Scotland (*McCallum* v *Paterson (No.2)* 1969 SC 85, per Lord Guthrie at page 92; *Elliot* v *Glasgow Corporation*, per Lord President Clyde at page 149; *McGinley* v *Pacitti*, per Lord President Cooper at page 369; *McGregor* v *Webster's Executors*, per Lord Cameron at page 34; *Girvan* v *Inverness Farmers Dairy (No.2)*, per Lord Abernethy at page 153; *Girvan* v *Inverness Farmers Dairy*, per Lord Hope at pages 20-22; *Heasman* v *JM Taylor & Partners*, per Lord Hamilton at para [19]; *McLeod* v *British Railways Board* 2001 SC 534, per Lord President Rodger at para [17]).

[11] The need for reform could be presented as a purely domestic challenge. Nevertheless, it had been framed as a human rights challenge, as an interference with the defenders' rights under Article 1 of Protocol 1 ("A1P1) could be identified.

[12] The allowance of a new trial in which no guidance on damages would be given to the jury would be inconsistent with Ferguson Ltd's rights under A1P1. Seven features were significant about the present practice: (1) uncertainty over the nature, purpose and quantification of section 1(4) claims; (2) the lack of meaningful guidance given to a jury as regards comparable awards; (3) the risk of confusion between the global sum set out in the issue and what it represented in relation to an award of damages; (4) the excessive latitude and uncertainty inherent in the test of excess at a first motion for a retrial; (5) the unsatisfactory situation by which, following a second trial, a sum previously regarded as excessive was now to be treated as not so (*Girvan* v *Inverness Farmers Dairy*); (6) the apparent legal contradiction whereby a jury award not disturbable on a motion for a new trial might be several times that which would be made on a judicial award; and (7) the fact that, where there was no special cause, defenders were forced to submit to a process which was objectively disadvantageous and productive of increased costs (as in repeated trials). Given these features, the state had failed positively to provide a legal process for assessing damages, either at jury trials

or in motions for a new trial, with adequate safeguards to protect against the risk of disproportionately large awards, as had happened in these cases. Absent the provision of safeguards, a remit to another jury trial would be unlawful under section 6(1) of the Human Rights Act 1998. The insurers were being deprived of the peaceful enjoyment of their possessions, namely, the funds out of which they were required to meet disproportionate awards made by civil juries. Reference was made to *Axa General Insurance Ltd* v *Lord Advocate* [2011] UKSC 46, especially per Lord Reed at para [107]. The defence to an action to which the insurers were subrogated (*Caledonian North Sea Ltd* v *British Telecommunications plc* 2002 SC (HL) 117, per Lord Bingham of Cornhill at para [11]) could be regarded as an asset; it was transmittable, had a value and would feature in a balance sheet. As to disproportionate awards of damages giving rise to an infringement of Convention rights, reference was made to *Tolstoy Miloslavsky* v *United Kingdom* (1995) 20 EHRR 442 (an Article 10 case). The manner in which proceedings affecting a party's possessions was conducted and uncertainty as to the outcome could properly give rise to a claim under A1P1 (*Sovtransavto Holding* v *Ukraine* (2004) 38 EHRR 44, especially in the court's assessment at paras 90-98).

[13] It was practical to give juries guidance as to damages. This had been done in England and Wales, where defamation and similar actions were still tried by juries (*Thompson* v *Comr. of Police of the Metropolis* [1998] QB 498). Such guidance should be in accordance with Lord Hope's approach in *Girvan* at pages 16-17. The jury should be given guidance by the presiding judge, not by reference to specific cases but by an indicative, non-prescriptive, bracket. The judge should be entitled to take into account the guidelines for levels of damages issued by the Judicial Studies Board. With a degree of certainty in awards introduced, the "100% rule" (*Young* v *Glasgow Tramway & Omnibus Co (Limited)*, per Lord President Inglis at page 245) should no longer apply in motions for a new trial. An issue should no longer include a figure for total damages claimed. The motion for a new trial should be granted. The submissions for Thomson Ltd were prospectively adopted. The contention in respect of the reading down of section 29 of the Court of Session Act 1988 or, failing that, for a declaration that the provision was incompatible with the Convention was no longer insisted in.

**Submissions for Thomson Ltd**

[14] Mr Jones acknowledged that, under the structure of the Court of Session Act 1988, jury awards of damages were subject to a measure of judicial control, being liable to be set aside on the ground of "excess or inadequacy of damages" section 29(1)(d)). This was one of the "safeguards ... written into the [Jury Trials (Scotland) Act 1815] to secure that, so far as possible, justice was done to defenders, and that in a general way awards for similar injuries should conform to a general pattern" (*McCallum* v *Paterson (No.2)*, per Lord President Clyde at page 88). What a party was, however, entitled to expect was a coherent system which was fair as between one pursuer and another and as between one defender and another, as well as between the pursuer and the defender in any given case. The judicial attitude towards allowance of a new trial had evolved over time. In *Landell* v *Landell* (1841) 3 D 819 four of the consulted judges had spoken of a "moral conviction that the jury ... have committed gross injustice". In *Young* v *Glasgow Tramway & Omnibus Co (Limited)* Lord President Inglis had spoken of the sum being "altogether so extravagant that no other jury would repeat it" and that "unless it can be said that the verdict ought not to have been more than one-half of the sum awarded, there is not, according to our practice, any room for interference". In *McKiernan* v *Glasgow Corporation* the court applied *Landell* and *Young*. *Elliot* v *Glasgow Corporation* (a father's claim for the death of his 2 year old son) was to the same effect - Lord President Clyde (at page 149) had said that it was desirable that juries should be made aware, in *solatium* only cases, of the limited character of the claim and of the considerations which required them to regard a strict moderation in fixing their award in respect of it. In *McGinley* v *Pacitti* (a case which included claims for loss of earnings) Lord President Cooper had opined that the "working rule" was applicable only to cases of "pure *solatium*". It was unsatisfactory to have judicial control only at the stage of review; there should be a means of judicial control at the trial stage. It was acknowledged that the references in *McGinley* and other cases to *solatium*, including in death cases, being "an acknowledgement of, rather than reparation for, the pursuer's wounded feelings" was no longer in point, as section 1(4) claims were intended to be compensatory (*Dingwall* v *Walter Alexander & Sons (Midland) Ltd* 1981 SLT 313). In *McGregor* v *Webster's Executors* the First Division had granted a new trial, albeit the award was well within the "working rule"; the test applied was that of "no reasonable jury". Awards

by judges and by juries should not be greatly out of step with one another (*McLeod* v *British Railways Board*, at para [17]). A jury would expect to be given judicial guidance as to the parameters within which it should assess damages. Reference was also made to *O'Brien's Curator Bonis* v *British Steel plc* 1991 SC 315, per Lord President Hope at page 321. It would be practical and appropriate for the presiding judge to give to the jury an indicative but non-prescriptive spectrum of levels of damages which might be reasonable. In the Thomson trial, however, the total sum claimed in the issue had been referred to by counsel for the pursuer in his address to the jury, albeit as a ceiling and as an example. The judge had then simply said that the jury could choose whatever sum between zero and £100,000 they thought was just. The figure in the issue, being the only specific figure before the jury, introduced an imbalance which offended against the requirement of equality of arms between the parties. It was not compliant with Article 6 of the Convention. Reference was made to *Hentrich* v *France* (1994) 18 EHRR 440, per the Commission at paras 60-63 and per the Court at paras 53-56. The absence of appropriate procedural safeguards also gave rise to Convention unfairness. It was important to note that under section 29(1) of the 1988 Act a new trial could be granted "on such other ground as is essential to the justice of the cause".

[15] It was appropriate to consider bereavement awards in the context of other awards for personal injuries (*Girvan* v *Inverness Farmers Dairy (No.1)* 1994 SC 701, per Lord Justice Clerk Ross at pages 703-6). English awards for general damages could be relied on (*Allan* v *Scott* 1972 SC 59). Reference was made to the Judicial Studies publication *Guidelines for the Assessment of General Damages in Personal Injury Cases* (10th ed), caps 2 and 3. An appropriate award to Mr Thomson would have been about £25,000. As to jury awards, while these should be taken into account, the Nimrod awards (*Young* v *Advocate General for Scotland*, 27 October 2010; *Dicketts* v *Advocate General for Scotland*, 3 November 2010; *Swarbrick* v *Advocate General for Scotland* 19 January 2011 (all reported in 2011 Rep LR at pp 39-40) should be looked at with particular caution. In each of these cases the sum on the issue had been £100,000. Also, the first of these awards had been widely publicised in the press. The Article 6 and A1P1 contentions were interrelated. Reference was again made to *Hentrich* v *France*. Here the interference with the insurers' possessions had been disproportionate. While a jury might reflect public opinion, the parameters against which a new trial should be granted were for the judges. A new trial should be allowed here, with appropriate guidance to the jury.

**Submissions for Miss Hamilton**

[16] Mr Reid submitted that the motion for a new trial should be refused. It was not necessary to provide guidance in order to resolve the present case, although it might be desirable.

[17] The following general propositions were advanced: (i) The award made to Miss Hamilton was adequate but Ferguson Ltd had failed to demonstrate that there had been an excess of damages; (ii) the test for setting aside a jury's award was the "no reasonable jury" test (*Girvan* v *Inverness Farmers Dairy*, per Lord Hope at page 14; *McLeod* v *British Railways Board*, per Lord President Rodger at para 4; *Heasman* v *JM Taylor & Partners*, per Lord Hamilton, at para 20); (iii) the enforcement of an obligation to pay damages under the general law being an incident of the contractual arrangement voluntarily entered into by insurers, and the consequent depletion and replacement of their funds from time to time being part and parcel of the enjoyment of possession of their assets, there was no interference with their property at all; (iv) in any event, if an award was held to be excessive under the operation of the "no reasonable jury" test it would be set aside, again resulting in no interference with the insurers' possessions at all; (v) if the award was adequate but not excessive, any "interference" was justified, the award representing just compensation; (vi) the absence of specific guidelines in the legal rules governing the assessment of damages was an inherent feature of the law in this and other areas and any purported "uncertainty" had to be viewed in that light (*Elliot* v *Glasgow Corporation*, per Lord President Clyde at pages 147-149); (vii) the verdict of a civil jury properly instructed could not be said to be unfair, arbitrary or capricious; their discretion was not unfettered but subject to judicial direction, which it was presumed they would follow; they were obliged to reach a verdict according to the evidence and unable to make an award greater than the sum sued for, which was a safeguard absent in English defamation cases tried before a jury (cf *Tolstoy Miloslavsky* v *United Kingdom*); (viii) the verdict of a reasonable jury would not offend against the principle of proportionality; there was insufficient evidence that

the jury system was not properly and fairly implementing the will of Parliament as regards trial by jury; (ix) the defenders' criticisms of the jury system were, in general, unjustified as juries were discriminating and more sensitive to modern values in society, which placed greater value on a claim for loss of life on behalf of a close relative than had once been the case; there being insufficient evidence that jury awards were widely discrepant, any inconsistency between judicial and jury awards in bereavement cases was largely due to judges failing properly to take full account of them; (x) any Convention rights vested in the defenders had been departed from due to their having failed to raise an objection to the case being tried by a jury either at the stage at which issues were approved, or some later stage prior to the trial, and, standing the concessions that the Convention argument could stand alone, by failing to follow the correct procedure under Rule of Court 82 as regards the raising of such an issue; (xi) any refinement of the practice in jury trials should be minimal and carried out with a light touch, in order to preserve and maintain respect for the jury's assessment which was, intrinsically, just as good as, if not better than, a judge's assessment; and (xii) any "reading down" of section 29 of the Court of Session Act 1988 would involve a fundamental departure from the unambiguous meaning of the section and was, therefore, impermissible.

[18] The question of excess of damages for an award made in an individual case was dependent on the facts and circumstances, which were primarily a matter for the jury. The principle of legal certainty should not be overemphasised: one could never expect absolute precision in awards made in this area. The law could not be stated in any more certain terms than having a statement of general principle, the "no reasonable jury" test, for the Inner House to apply. The application of that test might lead to results which differed as between cases. The "working rule", developed as a rule of thumb, had been departed from. It was debatable whether Lord Hope had intended to revive it in *Girvan*, referring to it more as a "cross-check". However, such bereavement awards as had been made by juries indicated what society considered to be fair and reasonable. It was necessary to consider and take full account of such awards, particularly where a pattern emerged. That was especially so where a gulf between jury and judicial awards had developed (*Shaher* v *British Aerospace Flying College Limited* 2003 SC 540). There was authority for the view that a second jury award following a retrial could be supported by the award given in the original trial (*Girvan* v *Inverness Farmers Dairy*, per Lord Hope at page 20; cf *McCallum* v *Paterson* 1969 SC 85, per Lord President Clyde at page 88).

[19] Standing the circumstances of Miss Hamilton's case as established in the evidence, the jury were entitled to take into account the particularly close relationship which she had had with the deceased. It was misleading to suggest that the pursuer had "left home". She was 17 years old at the time of the accident and had embarked on studies in another part of the country, but was not an adult child who had left home for good. In fact, the deceased had arranged matters so that the pursuer was staying with another family. She was not living an independent life. That was of some significance, particularly in relation to the loss of society and guidance which formed part of the award. The jury would have been aware that, while the loss of a close relative becomes less painful over time, it never disappeared and could come to the forefront at any point in time. They were also entitled to contrast the evidence of Miss Hamilton's relationship with the deceased with that of the deceased with her husband, allowing them to make a discerning award providing more for Miss Hamilton for her future bereavement. It was accepted that the award was generous, but it was not excessive. Moreover, one had to read the directions by the trial judge to the jury in their entirety to give context to the remarks regarding the figure of £152,000. It would be speculative to infer that the jury would have understood the directions as implying that that sum would be a reasonable award.

[20] There was a pattern of jury awards in bereavement cases which suggested that Miss Hamilton's award was within the appropriate range. As each case depended on its own facts and circumstances, there was, strictly speaking, no binding precedent in the law of damages. Juries would not necessarily have knowledge of any pattern in analogous judicial awards; even if they did they would not be bound by it (*McGregor* v *Webster's Executors*, per Lord Cameron at page 35). One could not test the reasonableness of the award by a perceived hierarchy: while one might normally expect the surviving spouse to receive more, that was not always necessarily the case. The court should assume that the relevant facts and inferences had been determined by the jury in a manner which most strongly supported the view that the amount awarded was not excessive (*Winter* v *News Scotland Ltd* 1991 SLT 828, per Lord Morison at page 829). One could not simply

ignore the awards which had been made in the Nimrod cases because they involved damages being paid to the parents of children who had died rather than to the child of a deceased parent. While an award for a class of relative in a particular case might not be relevant to a case involving another class of relative, in some circumstances it might be (cf *Murray's Executrix* v *Greenock Dockyard Co Ltd* 2004 SLT 1104, per Lord President Cullen at para [13]). In relation to awards given to children and parents of a deceased a broadly similar range had been established (*Cruickshank* v *Fairfield Rowan Ltd* 2005 SLT 462, per Lord Brodie at paras [26]-[29]; *McLean* v *William Denny & Bros Ltd* 2004 SC 656, per Lord President Cullen at paras [27]).

[21] One had to approach the "two-stage" test set out in *Girvan* v *Inverness Farmers Dairy* by Lord Hope with a degree of caution. It was put forward on the basis of an absence of modern jury awards as a basis for comparison and only where the court found it helpful to employ it. In the "Nimrod" cases there was an established pattern of jury awards in relation to bereavement, which had to be taken into account. *Gillies* v *Lynch* 2006 Rep LR 138 was also of relevance. In *Bellingham* v *Todd* the Lord Ordinary had correctly identified the need, in principle, to take into account such a pattern, but had not applied that principle in the award ultimately made. In *Wolff* v *John Moulds (Kilmarnock) Ltd* analogous jury awards had, wrongly, been treated with caution. If there was a discrepancy in awards between the two forms of civil procedure, it was because judges gave insufficient weight to jury awards and there had been few such awards to which reference could have been made. The sum specified in the issue should be retained as a safeguard, providing as it did a cap on the level of awards. The award in the present case was within the reasonable range for a discerning jury.

[22] The alleged interference with the defenders' A1P1 rights involved four elements of jury trial procedure: the sum sued for; the sum inserted in the issue; the lack of guidance given to a jury as regards an appropriate bracket or spectrum of awards; and the inability of a defender to challenge the sum sued for, it being entirely in the hands of the pursuer. The defence could discuss figures in broad terms by, for example, suggesting that the amount asked for was "wholly extravagant" or, as here, that a "five figure sum" was more appropriate. It was accepted that the insurers' fund allocated to meet claims qualified as a relevant possession for the purposes of A1P1. However, there had been no "interference" with that fund in an insurer being required to make payment following a verdict in a jury trial. It was simply an incident of the maintenance of the insurer's fund (cf *Aston Cantlow and Wilmcote with Billesley Parochial Church Council* v *Wallbank and Another* [2004] 1 AC 546, per Lord Hope at paras 67-72, Lord Hobhouse of Woodborough at paras 77-78 and 91-92, Lord Scott of Foscote at paras 133-134). Liability to pay damages arose not from an intervention by the state but by the application of private law as an incident of a validly entered into contract which formed part of the enjoyment of the insurer's property.

[23] The defenders' business was inherently associated with uncertainty. Any excessive award could be remedied by appeal and, in any event, was just as likely to be balanced by an unchallenged inadequate award, a settlement or an adjustment of premiums. A degree of flexibility was required to allow juries to assess damages according to the facts of the particular case. There were no legal rules governing the assessment of such damages. That was an inherent feature of this area of the law and *Tolstoy Miloslavsky* v *United Kingdom* made clear that the Convention did not require that a defender be able to anticipate with any degree of certainty the *quantum* of damages that would be awarded in his particular case (at paras 41-44). As regards the defenders' reliance on *Tolstoy Miloslavsky*, it was important to note that it was a defamation case, with no cap on the sum which could potentially have been awarded by the jury, and that the test to be applied - in determining whether or not an award should be set aside in a defamation case in England - appeared to be higher than the test applied by this court on a motion for a new trial (cf paras 49-51). Moreover, it involved Article 10 of the Convention and was more concerned with the proportionality of an award than with the overall fairness of proceedings and was thus not directly in point (*Heasman* v *JM Taylor & Partners*, per Lord Coulsfield at para 25). One could not expect precise rules as regards awards for *solatium* which were very much a matter for the jury depending on the facts and circumstances of the case (*Heasman*, per Lord Coulsfield at para 23 and Lord Hamilton at para 22). There was no evidence of any systemic failure in the jury system in Scotland, but, like any other system, it could perhaps be improved.

[24] In any event, it was submitted that the defenders had waived their rights under A1P1 by agreeing to a jury trial. The arguments presented did not depend on what happened at the actual trial under consideration. They were concerned with the system of jury trials and what should be the correct procedure. If their arguments were correct, they would apply no matter the outcome of the trial in question. They had voluntarily and unequivocally made an informed choice not to object to trial by jury (cf *McGowan* v *B* 2012 SLT 37). By agreeing to the issues in the present case they had tacitly waived any rights in that regard. The insurers would have been well aware of the arguments that were available as regards jury trials. However, the point was not taken. No notice of a devolution issue had been served in terms of chapter 82 of the Rules of Court.

[25] In summary, the sum sued for in fact provided a safeguard. Those defending an action would be likely to complain were there no such cap. While there might legitimately be criticism of the amount sued for in particular cases (cf *McCallum* v *Paterson*, per Lord Guthrie at page 89), that was not to say that the practice of specifying such a sum itself could be criticised. It was speculative to suggest that the jury had been unfairly influenced by the sum in issue. They had awarded less than 80% of the sum to Miss Hamilton and less than 50% to the deceased's husband. The complaint that there was insufficient guidance given to a jury was undermined by *dicta* which suggested that the inexperience of a jury in granting awards did not necessarily render a trial unfair (*Heasman* v *JM Taylor & Partners*, per Lord Hamilton at para 19 and Lord Coulsfield at paras 19-26). The complaint that the defence were prevented from mentioning any figure, in contrast to the pursuer, was not strictly accurate. They could, at least in broad terms, give a suggestion as regards the figure which should be awarded. Indeed that had been done in the present case. The defence could always indicate that the sum claimed was wholly extravagant. *Hentrich* v *France* could be distinguished. It was an unusual case involving a right of pre-emption which did not have an equivalent in other states. Moreover, it concerned the inability of one party to present an argument which clearly did not apply in the present case. It did not support the defenders' arguments as regards equality of arms.

[26] The system of jury trials had not been shown to be inherently unfair. While there was always room for improvement, there was nothing in the present case which suggested that the motion for a new trial should be granted. The motion should be refused. If the court was minded to give guidance it should do so by way of a "light touch". It may be that such guidance should be given in consultation with the Rules Council and possibly the Scottish Law Commission. If the matter was not approached with caution, there was a danger that the role of the jury could be undermined and usurped. They may be some difficulty with the suggestion that a bracket of appropriate awards be given to a jury: if that bracket was too narrow the need for the jury became questionable. In any event the present system was adequate and had stood the test of time.

**Submissions for Mr Thomson**

[27] Mr Milligan submitted that we should refuse the motion for a new trial. He adopted in whole the submissions by Mr Reid with one caveat. That concerned his consideration of the case of *Tolstoy Miloslavsky*. He outlined the three main themes of the pursuers' argument: first, the distinction which fell to be drawn between any alleged unfairness (domestically or in Convention terms) in a general sense of a jury trial and any alleged unfairness in this particular trial - for a new trial to be granted section 29 of the 1988 Act had to be satisfied; secondly, the importance of jurors in setting levels of damages to reflect the values of society, to counterbalance any advantage of consistency and uniformity; and, thirdly, the desirability for guidance, not only for jurors but also for Outer House judges, particularly in relation to bereavement awards. In regard to the last matter, the solution to the perceived gulf between jury and judicial awards was for judges to raise the level of their awards to reflect recent cases involving juries. That could now be done where, as here, a discernible pattern of awards had emerged. It was also an answer to the questions which had been raised regarding legal certainty.

[28] During the 1950s and 60s there were many civil jury trials and the awards given in those cases formed the basis for subsequent judicial awards. That had to be borne in mind when considering the defenders' submission that jury awards should be ignored. Moreover, there had historically been a series of reviews on whether or not civil jury trials should be maintained and, at least in the context of the Court of Session, the

decision had always been that they should be. Indeed, the most recent review of civil courts in Scotland had recommended their retention and even their reintroduction to the sheriff court (Report of the Scottish Civil Courts Review, vol 1, paras 156-163). In none of these reviews was it apparent that any question had been raised as to the form of issue in a jury trial. It appears only once to have been the subject of negative judicial comment and then only in the context of its application in that particular case (*McCallum* v *Paterson (No.2)*, per Lord Guthrie at page 89). One of the main factors in the most recent review's conclusion that jury trials should be retained and extended to the sheriff court was the experience in England where the absence of civil jury trials had caused awards of damages to fall behind the general estimate of the public (at para 157 of the Review; cf The Report of the Law Commission in England and Wales on *Damages for Personal Injury Non-Pecuniary Loss* (1999) (Law Com. No.257); *Heil* v *Rankin and Another* [2001] QB 272). The rationale for their retention was that it ensured that damages reflected the modern attitude to the value of life (*Currie* v *Kilmarnock and Loudoun District Council* 1996 SLT 481, per Lord President Hope at page 483, Lord Prosser at page 485; *Girvan* v *Inverness Farmers Dairy (No.2)*, per Lord McCluskey at page 141; *Girvan* v *Inverness Farmers Dairy*, per Lord Clyde at pages 24-25; *Shaher* v *British Aerospace Flying College Ltd*, per Lord Marnoch at para [6]; cf *Kingswell* v *The Queen* [1985] 159 CLR 264, per Deane J at pages 301-302). It was understandable why that value had increased over time, given that mortality rates were higher and life expectancy lower in the period following the war. It was Mr Thomson's position that the giving of guidance to jurors was not necessary though it might be desirable. It might be that this court was not best placed to issue such guidance and that the matter might be better left for consideration by the Rules Council. The importance of the jury's role had even been recognised in England, where it had also been stressed that the court should not interfere unless the jury's award substantially exceeded the most that any jury could reasonably have thought appropriate (*Kiam* v *MGN Ltd* [2003] QB 281 per Simon Brown LJ at paras 30-34 and 48-53).

[29] It was accepted that the test for whether or not damages were excessive was whether no reasonable jury properly directed could have made the award in question. However, in practice, that test was difficult to apply and depended on the facts and circumstances of each case (*Tate* v *Fischer* 1998 SLT 1419 per Lord Justice Clerk Cullen at page 1421). In cases involving pure *solatium* the court would apply the test with a greater degree of latitude than if it were considering a case involving only pecuniary damages. It was incumbent upon the defenders to show not just that there had been unfairness, but that it was central to the justice of the case that a new trial be allowed. It was also accepted that the two-stage approach set out in *McGregor* and *Girvan* was correct. However, it had to be borne in mind that, at the first stage, the court were bound to take into account jury awards as well as judicial awards. While acknowledging that principle, the defenders did not appear to have taken into account relevant jury awards in the figures which they had suggested as appropriate in the current cases. The earlier cases clearly recognised the principle of taking into account jury awards, albeit they felt that there was an insufficient number of jury cases from which a benchmark could be established (*McLeod* v *British Railways Board*; *Shaher* v *British Aerospace Flying College Ltd*; *McLean* v *William Denny & Bros Ltd*). However, such a pattern could now be seen. The number and pattern of awards for bereavement meant that they had now to be taken into account. The figure which appeared in the issue was not a problem; it provided a safeguard in the relevant proceedings.

[30] From a review of the relevant authorities the following principles could be derived: the assessment of non-pecuniary loss was essentially a jury question, the appeal court being slow to interfere with such awards; the starting point was what the appeal court would award, taking into account recent awards from both judge and jury; previous jury awards were at least as important as previous judicial awards in determining the appropriate level of damages for non-pecuniary loss, particularly where a clear pattern could be ascertained; the appeal court should then ask whether the award under appeal was one that no reasonable jury properly directed could have made; if so, the question was then whether it was essential to the justice of the cause to allow a new trial; and, in considering that question, it should be noted that there was a long standing tendency for judicial awards for "loss of society" to be significantly lower than jury awards.

[31] It was not necessary to consider any arguments in relation to Article 6 of the Convention. A right to a fair trial had always existed in this jurisdiction. Reference was made to written guidance issued to juries in

actions for loss of an adult child in Texas which, it was submitted, was similar to the guidance provided here. He submitted that this demonstrated that other mature jurisdictions placed significant reliance on awards made by juries. Article 6 had not been drafted with this kind of dispute in mind but as a bulwark against totalitarianism. It was submitted that the procedural safeguards in place in civil jury trials in Scotland were more than adequate and that this mode of trial was not incompatible with a right to a fair hearing in terms of Article 6 of the Convention (*Heasman* v *JM Taylor & Partners* per Lord Coulsfield at paras [19]-[20] and Lord Hamilton at para [19]; cf *Judge* v *United Kingdom* (2011) 52 EHRR SE 17, at paras 36-37). The size of the award did matter. Whether or not there had been unfairness in a particular case depended on the circumstances. It could not be said that a jury acting without greater guidance would, *per se*, be acting contrary to Article 6. Even if the award here was excessive and thus a breach of Article 6 had taken place, it did not automatically follow that the jury in any retrial would require greater guidance. It was only once the result was known that one could say whether or not there had been a breach of Article 6. It could not be said that a trial by a jury "inevitably" breached Article 6 (cf *Transco plc* v *HM Advocate* 2005 1 JC 44 per Lord MacLean at para [7], Lord Osborne at para [24] and Lord Hamilton at para [44]). That was not to say that there might not be scope for improvement.

[32] Properly understood, *Tolstoy Miloslavsky* v *United Kingdom* was helpful to the pursuer's position. It was of note that the Commission had declared inadmissible the applicant's argument that he had not had a fair hearing by an impartial tribunal in that case (see paras 29-30). The case concerned the provisions of Article 10 of the European Convention on Human Rights and related to issues which did not arise in the present case (*Heasman* v *JM Taylor & Partners*, per Lord Coulsfield at para [25]).

[33] In *Bellingham* v *Todd*, the Lord Ordinary had clearly identified the need to take into consideration any pattern of previous jury awards and had discussed relevant cases (at paras 47 to 48). However, when one considered the award actually made in that case it was unclear that the principles stated had been applied. The reasoning was difficult to ascertain. In any event, the decision was not binding on this court and should be treated with extreme caution. Criticism could also be made of the reasoning in *Wolff* v *John Moulds (Kilmarnock) Ltd*. In that case, the Lord Ordinary had effectively excluded consideration of all relevant jury awards (at paras 30-31). The reasoning provided in rejecting these awards was questionable, particularly in relation to the "Nimrod" awards. While obviously there might be a need to bridge the gap between judicial awards and jury awards, there were two sides to this argument. It could not be right that all relevant jury awards were simply ignored.

[34] Applying the relevant test to the circumstances of the present case, it could not be said that the award made by the jury was one that no reasonable jury could properly have made. Applying the two-stage test, even if the award was at the higher end of the scale, it was in line with comparable jury awards. Indeed, if one treated the cases of *Wolff* and *Bellingham* with caution, there was very little authority to suggest that such an award was excessive.

[35] It would be strange to see a need to change the procedure as regards the sum claimed in the issue. Until now that sum had been seen as a safeguard which was, perhaps, absent in other jurisdictions (cf *Tolstoy Miloslavsky* v *United Kingdom*). It was of note that in the present case an attempt had been made by the pursuer to increase that sum at an earlier stage in the proceedings. The fact that that attempt had failed, following opposition, demonstrated that it did operate as such a safeguard. Again, there was a need to distinguish between unfairness arising in a particular case and the identification of a general unfairness. If, for example, the pursuers put in the issue a figure which was extravagant and bore no resemblance to the matters in dispute, it would be a special case which might be dealt with by the trial judge or by the defenders opposing issues at that stage. Beyond that, any attempt to ascertain what effect the figure may have had on the jury in this case would involve speculation. It may be that the figure of £100,000 was psychologically attractive to a jury, being a six figure sum demonstrating the acceptance of a serious loss. Indeed, if this court were to give guidance it may be that, for a close relation, damages for bereavement could be up to £100,000. In any event, the simple solution to the problems identified as regards the gulf between jury and judicial awards was for judicial awards to be increased rather than for jury awards to be lowered.

**The Scottish Ministers**
[36] Mr Balfour was not called on to address the court: in the event no submissions had been advanced that any statutory provision required to be read down or declared incompatible with Convention law.

**Discussion**
**Civil jury trial and excess of damages**
[37] In the late Middle Ages there were, in the lower judicatories in Scotland, processes upon brieves in which jurors of an assize of "twelve leal men" were summoned to determine issues of fact in civil matters; but by about the sixteenth century these processes had fallen into disuse. The Jury Trials (Scotland) Act 1815 introduced to Scotland civil jury trials upon the model of what had long been established in England and Wales. A separate jury court was set up to which issues suitable for determination by a jury could be remitted. The Court of Session Act 1830 abolished the separate jury court and transferred its functions to the Court of Session.

[38] The 1815 Act had, by section VI, provided for an application to the Court of Session for a new trial on various grounds including "Excess of Damages". In *Landell* v *Landell* the pursuer sought damages from the defender, a near relative, and the sheriff clerk on the ground that she had been unlawfully incarcerated under a warrant at the former's instance, granted by the latter. In the form of issue damages were laid at £2,000. The jury returned a verdict in favour of the pursuer and awarded damages of £500 against the relative and £300 against the sheriff clerk. A new trial was sought on the ground of excess of damages. The case came before the Second Division which consulted the other judges. A motion for a new trial was refused by a majority. Within that majority a composite opinion was delivered by Lords Fullerton, Mackenzie, Jeffrey and Murray. That opinion contained the following passage:

"Now, from the various cases referred to, it is evidently not enough, in order to bring the damages within the description of excessive, that they are more, and even a great deal more, than the amount at which the injury sustained might have been estimated, in the opinion of the individual members of the Court to whom the application is made. Indeed, if that were enough, the Court would just be called upon to review the verdict of the jury, in a matter peculiarly within their province, and that upon a comparatively imperfect view of the evidence. It is clear that, in order to warrant the application of the term 'excessive', the damages must be held to exceed, not what the Court might think enough, but even that latitude, which, in a question of amount so very vague, any set of reasonable men could be permitted to indulge. The excess must be such as to raise on the part of the Court, the moral conviction that the jury, whether from wrong intention, or incapacity, or some mistake, have committed gross injustice, and have given higher damages than any jury of ordinary men fairly and without gross mistake exercising their functions, could have awarded. It must be admitted that, even in this sense, there can be no definition of the term excessive, and indeed no form of expression can be well devised that does not leave this very point somewhat vague, and does not raise a kind of secondary jury question to be determined by the Court. But, considering the whole circumstances of the case, the difference of opinion which exists in the Court, and particularly the opinion of the Judge who tried the case, against disturbing the verdict, we are not satisfied that there is such an excess of damages here as to sustain the application for a new trial."

[39] *Landell* v *Landell* was considered in the House of Lords in *Girvan* v *Inverness Farmers Dairy* - an action of damages in which the pursuer, an active shot, had sustained an elbow injury which disabled him from shooting competitively at the level he had hitherto achieved. Lord Hope regarded *Landell*, as a decision of the whole court, to be a judgment of high authority (page 16). He then said:

"It follows that, if a series of new trials is to be avoided, a fairly broad approach must still be taken to the question whether the jury have committed a gross injustice or reached a palpably wrong result."

In that passage Lord Hope used the expression "gross injustice", which had been used in *Landell*, and "palpably wrong result" (an expression apparently adopted from Morris LJ's judgment in *Scott* v *Musial* [1959] 2 QB 429 at pages 437-8, an approach which Lord Hope had previously described at page 14 as

"entirely in accordance with what the whole court had laid down in *Landell* v *Landell*"). Although invited to do so by counsel for the defenders, Lord Hope was not (page 10) disposed to give up as having no useful part to play, at least in cases of *solatium* for personal injuries, the so-called working rule favoured by Lord President Inglis in *Young* v *Glasgow Tramway & Omnibus Co (Limited)*. At pages 16-17 Lord Hope continued:

"But we can now accept, in view of the insufficiency in modern practice of jury awards as a basis for comparison and without departing from the underlying principles, that it is open to the court, if it finds this helpful, to consider the matter in two stages. In this respect useful guidance is to be found in *McGregor* v *Webster's Executors*. It can take as its starting point its own assessment of the sum which it would be appropriate to award upon a proper judicial assessment of the value of the claim. Clearly the court has to start somewhere, even although a broad approach has to be taken in reaching the result. And this clearly is a legitimate starting point, as the court cannot approach the question whether there was an excess or inadequacy of damages without having some regard to the awards made in similar cases. So awards made by both judges and juries should be taken into account at this stage. The result of this exercise is likely to be the assessment of a relatively narrow range of figures within which a judge, if presented with the same evidence, could properly place his award. The majority of the information used for the purposes of this exercise is likely to come from awards made by the judges. Where there are jury awards in similar cases they should be taken into account also. But no greater weight should be attached to them than would be given to them by a judge when making his assessment. ...

But then there is the next stage, when the court's assessment must be compared with the jury's award."

[His Lordship then dealt with elements of damages which were capable of arithmetical calculation and continued]:

"But if the award [is] for *solatium* only, or it is the *solatium* element in the award only which is under attack, the position is different. This is not a figure which is capable of precise calculation. Reasonably and fair minded jurors may quite properly arrive at widely differing figures in making their assessment of the amount to be awarded for pain and suffering and general inconvenience. It has to be recognised that a reasonable jury, when asked to value in money a claim for damages which cannot be calculated, may arrive at a result which is different from that which a judge will reach when basing his decision on previous awards. We have come a long way since 1815 when it was regarded as perfectly proper, subject only to limited safeguards, to leave it entirely to a jury to assess the damages. But if there was any justification for preserving the present system it lies in this fact: that judges may, because of the different nature of the exercise on which they are engaged and their background of experience, take a quite different view from twelve ordinary men and women on the jury as to the current money value of the pursuer's claim.

It is in this context that the so-called working rule must be regarded. It cannot be treated, and was never intended to be treated, as a precise formula. It is no more than a rule of thumb, or a check, which the court may use as a guide to the decision in each case. It is really no more than a convenient way of describing the test laid down in *Landell* v *Landell* in order to illustrate the width of the approach. The court can use it or depart from it as it thinks fit."

[40] I have a number of observations to make on these passages, to which I shall in due course (paras [61]-[62]) return.

[41] In addressing the circumstances of the case before him Lord Hope said (at page 20):

"I would be inclined to set the figure for the appropriate judicial award, taking the most pessimistic view of all the physical and emotional effects of the injury - but leaving out of account the effect on the pursuer's sporting activities - at about £25,000 to £30,000. But the factor which I have left out of account in this assessment is a factor of great importance, because a jury would be entitled to attach great weight to it in

reaching their view as to how much money should be paid to the pursuer to compensate him for what, in this respect, he has lost."

Lord Hope did not seek to put a value on that factor but held that the amount for *solatium* awarded by the second jury (£95,000) should not be disturbed. He then considered possible changes in practice but observed that it was for the Court of Session, not the House of Lords, to make any such changes.

[42] Lord Clyde, concurring in the result, agreed that the standard to be adopted in deciding whether or not there should be a new trial was that which had been authoritatively expressed in *Landell* v *Landell.* At pages 24-5 he said:

"In a matter as imprecise as the assessment of *solatium* there can be as many opinions as the number of those required to assess it. So it is understandable that judges have tended to look to precedent and a considerable resource is now available from which awards can be found in comparable cases both in Scotland and, since the decision in *Allan* v *Scott*, in England. The jury does not have this resource. But the jury may well through its numerical strength and its varied experience be able to provide a direct reflection of what would in the eyes of the ordinary individual be considered reasonable. On the other hand ignorance of other comparable awards may create undesirable discrepancies. A judge has less danger of erring in the latter respect since he may at least have some assistance in earlier awards in comparable cases, but he may be less immediately aware than a jury may be of current values and even unconsciously lose some flexibility through the weight of precedent. The point was developed by Lord Lowry CJ in *Simpson* v *Harland & Wolff plc* at p 440 in these words:

'But in England what started in 1934 as the general level of jury awards has gradually but inevitably been transformed into the general level of judges' awards and the level of awards of general damages in England and Wales has tended to fall behind the level of awards of general damages here [that is in Northern Ireland]. This tendency is inevitable, since the age of judges ranges from middle-aged to elderly and, as objective people (including, I believe, most High Court judges) will readily concede, elderly people (particularly men), if they are not in business or constantly dealing with pecuniary transactions of some kind, become less adaptable and less receptive to changing in values, even though at the same time they may remain intellectually able and alert ... A judge's award of general damages is not intrinsically *better* than a jury's. The chief merit of the former is not in its amount but in its greater predictability and consistency, which ought to be readily achievable by a numerically small judiciary. These qualities are based on the knowledge of other awards in like cases and on the ability, through experience, to make fine distinctions and adjustments between one case and another and they promote fairness, as between one claimant and another. But it does not follow that a judge, equipped with all the experience of the standard of the reasonable juror, should reject that experience in an effort to conform to a different standard.'

It is plainly desirable that awards of *solatium* in comparable cases should bear a coherent relationship with each other. Justice requires to be done not only between pursuers and defenders, but between pursuer and pursuer and defender and defender. The court is given the ultimate responsibility for determining whether a jury's award is unjust in its quantification. In a system in which damages may be assessed in different cases either by a jury or by a judge it is essential, not only for the profession, but also for the court both in the making of awards and in the consideration of awards which have been made, for there to be available a convenient record of awards by juries as well as by judges. In recent times the stock of jury awards has not been extensive and there may be some practical difficulties in the tracing and analysing of such awards. It appears however that such work has now been set in hand more systematically than it may have been in the past. The collection and classification of such material is obviously to be encouraged."

[43] Lord Clyde also declined to interfere with the second jury's award. The remaining members of the Committee agreed with Lord Hope.

**Judicial and jury awards**

[44] There is a clear potential for tension between judicial and jury awards for non-patrimonial damage. The

former are, inevitably, influenced strongly by a desire for consistency, with due regard to the justice which Lord Clyde required to be done not only between pursuers and defenders but between pursuer and pursuer and defender and defender, and are thus heavily dependent on awards made in comparable cases. The latter are, under the present practice, reached without any guidance on such matters but have the advantage of bringing to the exercise the views of twelve randomly selected members of the adult community.

[45] In the real world that has in current practice - and it may always have been so - resulted, in relation to some types of case at least, in markedly different levels of award dependent upon which system of adjudication has been invoked. This is an unsatisfactory state of affairs. In *McLeod* v *British Railways Board* (a personal injuries action in which the jury awarded the pursuer £250,000 as *solatium* for burning injuries) Lord President Rodger, delivering the Opinion of the Court, which refused the motion for a new trial, said at para [17]:

"We feel no particular satisfaction in doing so. A legal system which regards as legally justifiable two wholly different awards of damages for the same injury, depending purely on the procedure adopted, lacks the element of consistency which is one of the hallmarks of a mature system. While, therefore, that lack of consistency does not point to a breach of the parties' Convention rights, it does suggest that there may be a need for re-examination and reform, as Lord Hope observed indeed more than three years ago in *Girvan* (at p 22)."

Although no reforms have hitherto been instituted, to some extent matters have moved on since then. Although the number of personal injuries cases which proceed to an award by a jury is small in comparison with judicial awards, there has been an increasing tendency for jury awards to be noted, albeit briefly (Hajducki - *Civil Jury Trials* (2nd ed) para 2.19). Mr Milligan, who has wide and recent experience of this class of practice, informed us that pursuers who had themselves suffered injury were, acting on legal advice, in general content to proceed to proof rather than to insist on jury trial. Even in respect of *solatium* it was not perceived that juries would award significantly more than judges. The position was, however, quite different in death cases, such as the present, where judicial awards were perceived as falling well below jury awards. The answer to the problem, he suggested, was that judicial awards in such cases should be much higher. In loss of society cases the award is to be "such sum of damages, if any, as the court thinks just by way of compensation ...". It could not be right that that sum should vary markedly depending on whether it was assessed by judge or jury.

**The English experience**

[46] In England and Wales trial of personal injury actions by juries was effectively abolished by judicial decision in the 1960s (see *Sims* v *William Howard & Son Ltd*). At pages 415-6 of the report of that case Lord Denning MR said:

"It is now recognised that in these personal injury cases there should, as far as possible, be some degree of uniformity. This is desirable so that there should be justice between plaintiff and plaintiff and between defendant and defendant. It is not fair or just that one injured man should get twice as much as another for very similar injuries. The judges have therefore over the years evolved a scale which is well known and is applied daily up and down the country. This scale can be applied on a trial by judge alone. But never on trial by jury."

Thus the principle of consistency of awards trumped any advantage that trial by jury might have in such cases. The disadvantage that this approach had, with regard in particular to non-pecuniary awards, was recognised by the Law Commission in England and Wales and led to a review of such awards in *Heil* v *Rankin* [2001] QB 272, where increases in the levels of general damages - significant in the case of more serious injuries - were approved by the Court of Appeal.

**The significance of the jury in Scotland**

[47] In Scotland the qualified entitlement of a person culpably injured by another (or the relatives of a person

so killed) to trial by jury was confirmed by section 11 of the Court of Session Act 1988. In *Shaher* v *British Aerospace Flying College Limited* Lord Marnoch, delivering the Opinion of the Court, said at para [6]:

"Indeed, as Lord Hope of Craighead makes clear at p 7 of [*Girvan*] the 'overall philosophy' of Scottish practice is that the assessment of damages is first and foremost a matter for a jury. We, ourselves, might go further and suggest that it is this very philosophy which gives to awards of damages in this area their essential legitimacy. These awards, as it seems to us, should in the end reflect the expectation of the society which the legal profession serves and represents, rather than be simply an invention of that profession."

Earlier in that paragraph the court had noted the "huge gulf" between judicial and jury awards and observed:

"We would be less than frank if we did not immediately concede very real difficulty in finding a way to bridge that gulf."

That problems remains.

**Human rights**

[48] Article 6(1) of the European Convention on Human Rights provides, read short, that in the determination of his civil rights and obligations everyone is entitled to a fair hearing by an independent and impartial tribunal. "Everyone" includes an insurer who is subrogated to a defender's rights and obligations in an action for personal injuries. In *Heasman* v *JM Taylor & Partners* an Extra Division, of which I was a member, rejected a contention advanced before trial that civil jury trials were of their nature incompatible with the Convention. In my view that decision, which was not challenged by either of the defenders before us, was sound. I see no reason to depart from any of the observations which I made there. I shall return to these.

[49] Section 2(1) of the Human Rights Act 1998 requires a court, when determining a question which has arisen in connection with a Convention right, to "take into account" various matters, including judgments of the European Court of Human Rights. There is an ongoing debate as to the practical effect of the phrase "take into account". For present purposes I proceed on the basis that a court in the United Kingdom in addressing a question of domestic law, whether common law or statutory law, in connection with a Convention right, should be duly apprised of relevant Convention jurisprudence and should construe and apply the domestic law so informed and influenced.

[50] Since the decision in *Heasman* the European Court has, in a Grand Chamber judgment (*Taxquet* v *Belgium* (2012) 54 EHRR 26), given further consideration to the use of jury trials, albeit in a criminal context. One of the criticisms which had been advanced was of the lack of reasoning of the assize court's judgment. The Grand Chamber held that the applicant's trial had not been Convention compatible - though essentially because of the particular circumstances of the trial in question. It stressed the framework in which an assize court (a jury court) gives its judgment. At para 92 it said:

"... art 6 requires an assessment of whether sufficient safeguards were in place to avoid any risk of arbitrariness and to enable the accused to understand the reasons for his conviction ... Such procedural safeguards may include, for example, directions or guidance provided by the presiding judge to the jurors on the legal issues arising or the evidence adduced ... forming a framework on which the verdict is based or sufficiently offsetting the fact that no reasons are given for the jury's answers ... Lastly, regard must be had to any avenues of appeal open to the accused."

[51] While the issue in *Taxquet* was the absence of reasons, it is noteworthy what emphasis the court gave to the importance of the procedural framework, including judicial guidance, within which a lay jury reached and enunciated its decision (see also, in a criminal context, *Beggs* v *HM Advocate* 2010 SCCR 681, at para [207], referred to with approval in *Taxquet* at para 36.)

**Judicial directions on damages**
[52] In *Heasman* I said at para [19], in considering the various features of practice in civil jury trials:

"More troubling, in my view, is the absence before the jury of any information about sums awarded by judges or juries in comparable cases. The traditional direction to the jury on solatium is that given by Lord Guthrie in *Traynor's Executrix* v *Bairds and Scottish Steel*, perhaps amplified by a reference to current purchase prices of familiar items, such as a house or a motor car. In his dissenting opinion in *Girvan* v *Inverness Farmers Dairy*, at p 153, Lord Abernethy forcibly criticised the practice of not giving to jurors more assistance as to the range of figures which might be appropriate. The practice was not changed by the promulgation of any rule of court (see *Girvan* v *Inverness Farmers Dairy*, per Lord Hope at pp 20-2), though the possible need for re-examination and reform of this matter has again been suggested (*McLeod* v *British Railways Board*, per Lord President Rodger at pp 540-1, para [17]). While the continuation of this practice is, in my view, regrettable, I am not persuaded that a jury, denied such guidance, is inevitably disabled from making a fair award."

I remain of the view that the absence of directions about sums awarded in comparable cases is a less than satisfactory aspect of civil jury trials. This does not, as I said in *Heasman*, inevitably disable a jury from making a fair award but it nonetheless significantly increases the risk that the award will be arbitrary or, perhaps, unduly influenced by the total damages figure appearing on the issue before them (see below). The time has, in my view, now come for this court, in furtherance of Convention jurisprudence including *Taxquet*, to set a framework for civil juries against which they can address levels of damages. This will not be wholly novel. While in modern times judges have ordinarily charged civil juries in the restrained manner adopted by Lord Guthrie in *Traynor's Executrix* v *Bairds & Scottish Steel*, that has not always been so. In *Simpson* v *Liddle* (1821) 2 Murray 579 (referred to by Lord Moncrieff in *Landell* v *Landell* at page 824) damages were laid at £1,000 but restricted by counsel to £500. The Lord Chief Commissioner (Lord Adam) in charging the jury observed (page 583):

"In every case, it is usual to claim, as damages, a much larger sum than is expected; and in this case, Mr Jeffrey has limited his demand to £500. Without wishing to take this question out of your hands, I mention it that you may not be misled; as, were you to give the sum now demanded, it would be very like what the law calls vindictive damages. You will consider the actual loss suffered by the pursuer, which appears to me very trifling. The uneasiness of mind and public disgrace suffered, is the great question here. This must differ in the circumstances of every case, and the compensation ought to be considered with composure, and without being inflamed by what may have been stated by counsel."

The jury returned a verdict of £100 damages. Thus, while no figures were given, fairly definite directions were given to the jury not only to disregard the sum in the issue, which had been departed from, but also not to be misled by the restricted sum which counsel sought, which "would be very like what the law calls vindictive damages". The presiding judge went so far as to say that the actual loss suffered by the pursuer appeared to him to be "very trifling".

[53] The setting by the presiding judge of a framework in terms of guidance on levels of damages would not be novel in the United Kingdom. Practice authorised by the Court of Appeal has provided for such guidance to be given to jurors in defamation, false imprisonment and malicious prosecution cases in England and Wales (*John* v *MGN Ltd*; *Thompson* v *Comr. of Police of the Metropolis*). I apprehend no insurmountable difficulties in presiding judges in this jurisdiction giving appropriate directions on levels of damages in personal injuries (including death) cases. For the procedural background against which this might be done see para [76] below.

**The form of the issue**
[54] Another feature of Scottish practice which the defenders criticised was the inclusion in the issue before the jury of the total sum claimed. This practice has a long history. In *Landell* v *Landell* the form of issue included the statement "Damages laid at £2,000". In a death case of about the same time (*Morton (Cooley's*

*Factor)* v *Edinburgh and Glasgow Railway Co* (1845) 8 D 288) the issue included the statement "Damages laid at £5,000". By 1948 the conventional form of issue included the statement "Damages claimed: [£x]" (see *Hayden* v *Glasgow Corporation* 1948 SC 143, at page 146). It was that form of issue which was before the jury in each of the present cases. In *Heasman* the inclusion of a figure for "Damages claimed" was treated as a form of safeguard for defenders: it set a limit beyond which the jury could not go. But it has its dangers. In the absence of judicial guidance on a possible monetary range of awards, it is, in accordance with current practice, the only specific figure which the jury has before it. In the absence of positive judicial direction that it should be ignored, it may appear to the jury to be a figure which , in accordance with law and practice, might reasonably be claimed.

[55] In some cases judicial directions in relation to the use of the sum claimed may be positively misleading. In Miss Hamilton's case, in which the sum claimed on the issue was £175,000, the trial judge, having subtracted the agreed figures for patrimonial loss, told the jury that "the figure net which is left for the daughter is £152,040" (my arithmetic suggests that the figure in question was £152,940). Far from a direction to the jury that this figure would be an excessive award for Miss Hamilton's loss of society, the impression left is that it would not be unreasonable - and that notwithstanding that in the next paragraph the judge refers to this and the sum claimed by Mr Hamilton as "ceiling figures". While it might be that a firm direction by the trial judge could put the sum claimed in the issue in its proper place, I see this sum as a distraction to the jury which would be better avoided by its omission. If, notwithstanding judicial directions, a jury were to award more than the sum concluded for then, in the absence of amendment, decree on applying the verdict would be restricted to the sum in the conclusion.

**Jury awards for loss of society**

[56] When in 2003 *Shaher* v *British Aerospace Flying College Limited* was decided, there were a limited number of relatively recent jury awards for loss of society to parents or children about which information was available. These were *Wells* v *Hay* 1999 Rep LR 44 (where £37,500 was awarded to a single mother of a 19 year old son killed in a car crash), *Strang* v *Le Brusq* 2001 Rep LR 52 (where £30,000 was awarded to each of the parents of a 21 year old son) and *McIntosh* v *Findlay* 2001 Rep LR 66 (where £37,500 was awarded to a posthumous child for the loss of his father). The Lord Ordinary in *Shaher* had made to each of the parents of a 19 year old son an award of £35,000. On a reclaiming motion the Extra Division, looking at the matter *de novo*, reduced these awards to £20,000 each. The Division (para [7]) was not confident that these three jury awards (and one other) went the length of establishing that loss of society awards to parents of adult children should then be taken to lie within the range of £30,000 to £35,000 for each parent, as opined by the Lord Ordinary. However, the court envisaged that future jury awards might disclose a broader and different pattern which in the end would prove more reliable.

[57] Since *Shaher* there have been a number of further reported jury awards where claims were made by parents or children of the deceased. In *Warnock* v *Clark Contracts* 2005 Rep LR 90 (a breakdown of the total awards is to be found in Hajducki - *Civil Jury Trials* (2nd ed) at page 259) a jury awarded £16,250, £16,000 and £16,000 for loss of society to three children, aged 9, 6 and 3 respectively at the date of death of their father, then aged 34, who had died after falling through a skylight. The 2011 equivalent figures were about £20,000 (see table in *Wolff* v *John Moulds (Kilmarnock) Ltd* at para [19]). In *Gillies* v *Lynch* the mother of a young woman, aged 24, killed in a road accident, was awarded £80,000 for loss of society. That figure, we were informed, would now, regard being had to inflation, be the equivalent of about £98,400. The brief report states:

"The pursuer, because of certain health problems, had had an unusual degree of emotional dependence on her daughter. She had developed a 'grief reaction'."

More recently, three separate juries have made loss of society awards to the parents of young servicemen killed together when a Nimrod aircraft took fire, exploded and crashed in Afghanistan. Each of these awards included an element under section 1(4)(a) of the 1976 Act (as amended). We were told that a recording of the last minutes of the stricken aircraft was played several times to the juries. The awards are reported in 2011

Rep LR 39-40. In the first of these (*Young* v *Advocate General for Scotland*, 27 October 2010) the jury awarded £90,000 (£60,000 to the past and £30,000 to the future) to a single mother, aged 54 at the date of the death and 57 at the date of the trial. In the second (*Dicketts* v *Advocate General for Scotland*, 3 November 2010) the jury awarded to each of the mother and father (aged 62 and 66 years respectively) of a 27 year old serviceman, an only child, £98,000 (£49,000 to the past and £49,000 to the future) for loss of society. In the third (*Swarbrick* v *Advocate General for Scotland*, 19 January 2011) the jury awarded £100,000 (£50,000 to the past and £50,000 to the future) for loss of society to the single mother, aged 57, of a 28 year old serviceman who, though living away from home, had a close relationship with his mother. It is understood that, in each of these cases, the sum claimed at the head of each issue was £100,000. In *Dicketts* the jury additionally awarded to each parent £2,000 for agreed loss of services.

**Recent judicial awards for loss of society**

[58] There is a very striking difference between these awards and recent judicial awards for loss of society to parents or children. In *Bellingham* v *Todd* various members of the family of the deceased, 40 years old at the date of his death, sued another road user for damages arising out of a road accident. Liability was disputed; there was also a plea of contributory negligence. The Lord Ordinary found the other road user to have been negligent and to have caused the accident but, on the basis of contributory negligence by the deceased, reduced the damages by 80%. The pursuers included two young children of the deceased and his father. Their respective ages do not appear from the report. Information about various jury awards, including *Warnock*, *McIntosh*, *Strang*, *Gillies*, *Young*, *Dicketts* and *Swarbrick* were put before the Lord Ordinary (Lord Woolman), as well as each of the parties' respective valuations of the claims. The updated values for *Warnock, McIntosh, Strang* and *Gillies* were put at £45,000, £45,000, £39,500 and £89,000 respectively. At para [47] Lord Woolman, having referred to various authorities, said:

"I draw the following propositions from [the cited 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

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."

He continued:

"[48] I adopt those principles in considering the proper approach in this case. I observe first that there is only one category of recent jury awards which admits of a possible pattern: that relating to loss of a child. However, that category must be looked at with care. In the three 'Nimrod' cases, the jury might be thought to be especially sympathetic to young men who had died in the service of their country.

[49] My second observation is that any judicial awards now made should be materially increased above the rate of inflation. That is because jury awards provide a surer guide to the correct level of damages."

The figures (before deduction of contributory negligence) which he arrived at for loss of society for the two young children and the deceased's father were respectively £25,000, £25,000 and, according to the issued Opinion, £15,000. Counsel expressed some surprise at the last figure, given that the defender's valuation was £25,000 (the pursuers' was £90,000) - but it may nonetheless be correct.

[59] The other recent judicial award is *Wolff* v *John Moulds (Kilmarnock) Ltd*, where the deceased died of mesothelioma. Liability was admitted by the second defender; there was no appearance for the first defender. The pursuers included three adult children, aged 32, 43 and 45 at the date of the proof in 2011. The deceased had died in March 2007 aged 66. The Lord Ordinary (Lord Doherty) was referred to *Strang, McIntosh, Warnock, Gillies, Young, Dicketts* and *Swarbrick*, as well as the jury awards in the present cases. He was also referred to certain judicial awards, including *Bellingham*. At 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 s. 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 (*Girvan* v *Inverness Farmers Dairy* 1998 SC (HL) 1 per Lord Hope of Craighead at p 11G-12A, 12H, 16H-17B; *McLean* v *William Denny & Bros Ltd* 2004 SC 656 in the Opinion of the Court at paragraphs [32] - [34])."

At para [30] he distinguished the peculiar circumstances of *Gillies* and, rightly, took the view that he could not take account of the present cases, which were then subject to motions for a new trial. He continued (at para [30]):

"In my opinion the three Nimrod cases - *Young, Dicketts* and *Swarbrick* - need to be treated with very great caution for two reasons. First, the awards there appear to me to be, at best, at the very top of the range of awards which might have been upheld had the verdicts been challenged. Second, I think it is not unreasonable to infer that the awards reflect each jury's understandable sympathy for the families of young servicemen killed on active service in Afghanistan."

At para [31] he said:

"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 (*Girvan,* per Lord Hope of Craighead at p 16G-17B). In my view it would be wrong to give such awards significant weight in the judicial assessment. The awards in the Nimrod cases fall into that category. So, if upheld, would the awards in *Thompson* (*sic*) and *Hamilton*."

The youngest of the deceased's daughters still lived at home. She appears to have been close to him and to have been upset as his health deteriorated. The other daughters lived in England; they were in regular telephone contact with the deceased and had seen him two or three times a year. Lord Doherty took the view (para [40]) that section 1(4) awards to adult children ought to be less than awards made to young children. Looking at both judicial awards and jury awards he concluded that just awards for the older daughters was £15,000 each and for the youngest daughter £18,000.

[60] 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 had suffered similar loss of society. The propositions set out by Lord Woolman at para [47] should be read subject to my observations in para [63] below. Lord Doherty at para [23] finds support in Lord Hope's observations in *Girvan* at page 17 (as interpreted by the First Division in *McLean* v *William Denny & Bros Ltd*) that primacy should not be given to jury over judicial awards.

**Observations on *Girvan***

[61] In *Girvan* at pages 16-17, in the passage cited fully at para [39] above, Lord Hope, in explaining what he described as the proper approach, suggested that a legitimate starting point (for a Division hearing a motion for a new trial) would be the court's own assessment of the sum which it would be appropriate to award upon a proper judicial assessment of the claim. He continued:

"So awards made by both judges and juries should be taken into account at this stage. The result of this exercise is likely to be the assessment of a relatively narrow range of figures within which a judge, if presented with the same evidence, could properly place his award. The majority of the information used for the purposes of this exercise is likely to come from awards made by the judges. Where there are jury awards in similar cases they should be taken into account also. But no greater weight should be attached to them than would be given to them by a judge when making his assessment."

Lord Hope does not explain how this exercise is in practical terms to be done, given the wide disparity in some cases between judicial and jury awards for comparable situations. Although he says "... no greater weight should be attached to [jury awards] than would be given to them by a judge when making his assessment", he does not explain what weight a judge or judges would, or should, attach to such awards. The reader may be left with the impression that, as the number of available judicial awards is likely to be greater than the available jury awards, greater weight may be given to the judicial awards. It may also be observed that Lord Hope's "proper approach" proceeds on the premise that there is an "insufficiency in modern practice of jury awards as a basis for comparison". The only recent awards, apart from the award under review, were the earlier award in the same case and the award in *Currie* v *Kilmarnock and Loudoun District Council*. While it cannot be said that there is yet an abundance of documented jury awards, there are more in range, number and significance than were available in *Girvan*.

[62] In *McLean* v *William Denny & Bros Ltd* (a reclaiming motion from the Lord Ordinary) the court, of which I was a member, made certain *obiter* observations at paras [29] and following. These included noting at para [32] what Lord Hope had said in *Girvan* at page 17 where he "drew no distinction between awards by judges and those made by juries". The court went on to say:

"We may say that we did not understand counsel for the first pursuer to advance the view that any greater weight should be attached to an award by a jury per se than that attached to a judicial award."

**The objective and how it may be achieved**

[63] That concession, which I do not understand the court in *McLean* to have doubted, requires, in my view, some comment. If greater regard than hitherto is not had by judges (at first instance or in the Inner House) to jury awards, then the disparity between judicial and jury awards is likely to remain - a state of affairs which "lacks the consistency which is one of the hallmarks of a mature system" (*McLeod* v *British Railways Board*, at para [17]). The objective must now be to seek to narrow that disparity and to eliminate, in so far as practical, that lack of consistency. That can be done by three measures: first, by judges, sitting alone or in the Inner House, having significantly more regard to available jury awards (particularly where they demonstrate a pattern); secondly, by juries being given by the presiding judge fuller guidance than hitherto as to the level of damages which, consistently with other cases, might reasonably be awarded by them; and, thirdly, by appellate courts continuing to intervene, where necessary, on comparative justice grounds as envisaged under statute since 1815. This is a process which will take time and experience to mature. As to the first element, proof as well as jury trial has been a competent mode of inquiry in personal injury actions since 1866 (Evidence (Scotland) Act 1866, section 4). There is no reason to suppose that Parliament intended that awards by juries should have priority over awards by judges - or *vice versa*. Judicial and jury awards give different but complementary guidance for what is a just award of damages (see para [44] above). In an age when life may be thought to be more precious than it may have been thought to be by earlier generations, and where consequentially the loss of the life of a close relative may seem a greater loss than it might have seemed earlier, the input of jury awards, reflective of the views of the community, may, in death cases, be particularly important. While awards made by juries without the benefit of judicial guidance may be at greater risk of being arbitrary or of having been influenced by illegitimate factors, those made with that (non-prescriptive) benefit are likely to be a valuable source for assessment in future cases. As to the second element, some suggestions are made below (para [76]) as to what procedural arrangements might be put in hand. The objective should be to eliminate, or at least reduce, the disparity between judicial and jury awards while at the same time securing that "awards ... in comparable cases ... bear a coherent relationship with each other" (*Girvan*, per Lord Clyde at page 25). If that objective is achieved, then parties whose disputes over

damages are litigated can be better satisfied that they have had a fair trial - whether the adjudicating body is a judge or a jury.

[64] In my view this court is empowered, and ought, to make the proposed procedural changes in furtherance of its own domestic responsibility for the due administration of justice. It is unnecessary to hold that either of the trials presently under review involved an actual breach of the respective insurer's rights under Article 6(1) of the Convention. Under section 29 of the Court of Session Act 1988 a new trial may be granted for "any other cause essential to the justice of the case". That includes "anything which occurs in the conduct of the case before the jury which is inconsistent with the conditions of fair trial, and displaces any reasonable confidence in the result arrived at" (*Reekie* v *McKinven* 1921 SC 733, per Lord President Clyde at pp 734-5). If the court is satisfied that the particular circumstances of these trials, including the absence of any judicial guidance on damages and the possible distraction of the figures appearing in the issues, as well as the particular outcomes, are such as to meet that test, then it can grant new trials. The exercise of that power can be informed by Convention jurisprudence, including *Taxquet* v *Belgium*.

**A1P1**

[65] A submission was also made by the defenders that the trials, conducted without judicial guidance on damages, involved an infringement of A1P1. In my view it is unnecessary to express a concluded view on this submission. In the ordinary case A1P1 is concerned with direct infringement by the state of a person's right to enjoyment of his possessions. No such direct infringement arises in the present cases, which are essentially concerned with the private rights and obligations of the parties. The state (in the form of the court) becomes involved only if the procedural arrangements which it lays down or tolerates give rise to an unfair trial, with consequences for the possessions of the insurers. In *Sovtransavto Holding* v *Ukraine*, on which much reliance was placed, the primary complaint by the applicant was under Article 6(1), which was upheld. There was also held to be a violation of A1P1. At para 98 the Court found:

"that the manner in which the proceedings were conducted and ended, and the uncertainty in which the applicant company was left, upset the 'fair balance' that has to be struck between the demands of the public interest and the need to protect the applicant company's right to the peaceful enjoyment of its possessions. Consequently, the State has failed to comply with its obligation to secure the applicant company the effective enjoyment of its right of property, as guaranteed by Art.1 of Protocol No.1."

It is not altogether clear what was the "public interest" which had to be put into the balance against the need to protect the applicant's right to the peaceful enjoyment of its possessions but it does seem that there were Ukrainian state interests involved. The President of the Republic had been urged to "defend the interests of Ukrainian nationals"; and that President for a second time drew the President of the Supreme Arbitration Tribunal's attention "to the need to protect the State's interests" (para 22). Accordingly, the proceedings in question seem to have pitted state interests against those of the applicant company. These were not, as in the present cases, proceedings simply between private parties. Thus, it is at least doubtful whether A1P1 is engaged in the present cases. The defenders' complaint about procedural unfairness is more securely rested on Article 6(1).

**Waiver**

[66] Mr Reid advanced a submission for the pursuers that each of the defenders had waived their rights to complain that the current procedures for civil jury trials involved an unjustified infringement of their Convention rights. The legal test for waiver was whether there had been a voluntary, informed and unequivocal election by a party not to claim a right or raise an objection which it was open to that party to claim or raise (*Millar* v *Dickson* 2002 SC (PC) 30, per Lord Bingham of Cornhill at para [31]; *McGowan* v *B* 2012 SLT 37). In *Heasman* v *JM Taylor & Partners*, it was said, only Lord Johnston had suggested that the defender's contention was premature.

[67] In my view neither of the defenders can properly be said to have waived their right to complain that their Convention rights have in the result been infringed. When the issues were approved in these cases it had been

decided (in *Heasman*) that civil jury trial did not inevitably infringe a defender's Convention right to a fair trial; and no A1P1 issue was raised. In *Heasman* I envisaged (at page 347) the possibility that in a particular trial it might be necessary for the presiding judge to give directions on damages; Lord Coulsfield at page 340 observed that it would be premature to uphold the defender's contention at the stage it was advanced; Lord Johnston (at p 349) also regarded that contention as premature. Although the defenders' arguments before us extended more generally to the fairness, or lack of it, of jury trials without directions on damages, their fundamental contention was that in the trials with which we are concerned, in which they were found liable in damages which they claim to be excessive, their Convention rights were infringed. Standing an authoritative decision that civil jury trials did not inevitably infringe a defender's Convention rights, there cannot, in my view, be said, by the failure through their legal advisers to object to the approval of issues, to have been a voluntary, informed and unequivocal election not to raise, after an adverse decision at trial, a contention that that decision was arrived at in circumstances which infringed the defenders' Convention rights. There is an analogy with the rejection of the plea of waiver by legal representative in *Jude* v *HM Advocate* 2011 SCCR 300 (conceded by the Crown in appeal proceedings in the Supreme Court - see *Jude* v *HM Advocate* 2012 SLT 75, per Lord Hope at para [4]).

***Tolstoy Miloslavsky***

[68] Both sides relied, for their different purposes, on *Tolstoy Miloslavsky* v *United Kingdom*. Count Tolstoy had been found, in defamation proceedings in the High Court in England, liable to Lord Aldington in a substantial sum in damages. He subsequently complained that his Convention rights had been infringed. His complaints initially included a complaint about the fairness of the trial, particularly the judge's summing up. That complaint was ruled by the Commission to be manifestly unfounded (*Tolstoy* v *United Kingdom* (20th February 1992, Application no.18139/91)). The Commission subsequently declared admissible the applicant's complaints that the requirement that he find security for the costs of his appeal (to the English Court of Appeal) denied him access to a court, contrary to Article 6 of the Convention, and that the award of £1,500,000 (in damages) and an injunction against him were such as to constitute an interference with his freedom of expression, which was neither prescribed by law nor necessary in a democratic society (contrary to Article 10). These issues went to the Court. The first of them (denial of access to a court) has no relevance here. As to the second, reference was made before us to the Court's judgment at paras 41-44 and paras 49-51. These passages are directed to the requirements under Article 10, in the first case, that the conditions to which the exercise of freedom of expression may be subject are "prescribed by law" and, in the second case, are "necessary in a democratic society" (including not being disproportionate to the relative legitimate aim). As to the first, the Court held that, given that the absence of specific guidelines (as was the case at the time of the trial) was an inherent feature of the domestic law of damages in the area of defamation, the award was "prescribed by law" but found that, in the circumstances, the scope of judicial control, at the trial and at the appeal, did not offer adequate and effective safeguards against a disproportionately large award. In these circumstances the Court found there to have been a contravention of Article 10 (*Tolstoy Miloslavsky* v *United Kingdom* (1995) 20 EHRR 442).

[69] As Lord Couslfield pointed out in *Heasman* at para [25], it is necessary to bear in mind that the Court's observations in these passages in *Tolstoy Miloslavsky* were concerned with Article 10 and not with Article 6 and are therefore not directly applicable. A finding by the European Court of disproportionality in the procedural arrangements does, however, in my view, at least raise a question about the fairness of the trial. At para [16] of my Opinion in *Heasman* I agreed with Lord Coulsfield that *Tolstoy Miloslavsky* was not directly applicable but that that case suggested that "subject to appropriate safeguards the determination of issues, including the assessment of damages, by a civil jury is (or at least may be) a process compliant with art. 6". The qualification was important. Mr Milligan suggested under reference to para 51 of *Tolstoy Miloslavsky* that the decisive factor in that case was the size of the award; but the Court there held that the size of the award "in conjunction with the lack of adequate and effective safeguards at the relevant time against a disproportionately large award" had given rise to the violation. *Tolstoy Miloslavsky* does, however, suggest that the absence of appropriate directions on damages, combined with an excessive award, may not be Convention-compliant (see para 50, as read with para 28).

**The test for excess**

[70] There have been a number of formulations over the years as to what constitutes "excess" (or "inadequacy") of damages for the purposes of the statute. But there was no material dispute between the parties before us that, in modern parlance, the test was whether "no reasonable jury" properly directed could have assessed damages at the sum or sums in question (see *McLeod* v *British Railways Board* at para [4]; and my observation in *Heasman* at para [20]). What is or is not reasonable must be addressed in context. The relevant context includes the levels at which courts (including juries) have in this jurisdiction been in use to assess damages for comparable injuries. As Lord Hope observed in *Girvan* at page 16, the Inner House can "take as its starting point" its own assessment of the sum which it would be appropriate to award upon a proper judicial assessment of the value of the claim. Lord Hope goes on to say "so awards made by both judges and juries should be taken into account at this stage." I have already made some observations about the difficulties presented by that exercise in cases where there is a marked disparity between judicial and jury awards (see also *McLean* v *William Denny & Bros Ltd* at para [33]). But difficult and uncertain as it may be, the exercise must be undertaken. In addressing it judges must, however, constantly bear in mind that Parliament has, as recently as 1988, re-affirmed that certain actions (including an action of damages for personal injuries), if remitted to probation, "shall be tried by jury" (Court of Session Act 1988, section 11), subject only to parties to the action consenting to proof or special cause being shown (section 9(b)). Thus, unless parties agree or there is some cause special to the particular action, Parliament's specified adjudicatory body in actions of damages for personal injuries is the jury. That suggests to me that other jury awards in comparable cases, provided they are sufficiently well documented and free from special consideration and (in time) disadvantages such as those mentioned in para [71] below, should, on being taken into account, be accorded significant weight. Other jury awards should be approached with appropriate caution.

**Analysis of the recent cases**

[71] As regards reported jury awards in section 1(4) claims, the award in *Gillies* v *Lynch* may to a large extent be explained by the particularly vulnerable health of the deceased's mother. The three "Nimrod" cases have a certain consistency, one with another, but they also have their specialties. Each, in contrast with the present cases, involved a section 1(4)(a) element - the playing of the flight recorder must have been particularly harrowing for the juries; the loss of life while in the service of the state as a result of the negligence of the state is a specialty; and one cannot but suspect that the sum stated in the issue was, to some extent at least, distracting. *McIntosh* and *Warnock* involved much younger children than Miss Hamilton. *Strang* is on its face more closely related to Mr Thomson's situation - though the ages of the parents are not recorded. All of these awards suffer from the disadvantage that no judicial guidance was given to the juries as to what might be an appropriate order of award. I leave out of account the award of £80,000 in respect of section 1(4) to Mr Hamilton; where the award under challenge was made by the same jury as made the award to Mr Hamilton, it cannot be assumed that the latter is one which a reasonable jury made.

[72] On the other hand, the recent judicial decisions of *Bellingham* and *Wolff* markedly undervalue, in my view, the relative section 1(4) claims.

**Disposal of the present motions**

[73] In the state of the available material it must ultimately be a matter of impression as to whether the awards made to Miss Hamilton and to Mr Thomson were beyond what a jury, acting reasonably, might have awarded. Although Miss Hamilton by the time of her mother's death had left school and was studying away from home, she was very close to her mother. They treated each other as friends and spent a lot of time together. Miss Hamilton would readily confide in her mother, who was supportive and gave her confidence. At the time of the trial she remained deeply affected by her loss. She believed that, if her mother had survived, their relationship would have become even better. She was visibly upset for much of the time when she was giving evidence. Notwithstanding these features, by which the jury were no doubt much affected, I am satisfied that an award of £120,000 to Miss Hamilton under section 1(4)(b) and (c) was excessive. Even if the "100% working rule" were to be applied, the award is, in my view, beyond the latitude to which the jury was entitled. Although the position in relation to Mr Thomson may be less compelling, I am satisfied that the award to him of £90,000 solely under section 1(4)(b) and (c) was likewise excessive. The evidence was to the

effect that the deceased was married with children, albeit both families lived in the same village. Father and son worked in the same building company and, apart from the usual family gatherings, had a number of common interests, including sea angling. Otherwise, there was no special feature of their relationship.

[74] I would accordingly allow a new trial in each case. In reaching this decision I have had some regard to awards for *solatium* (or in England for general damages) to surviving victims, in particular to those with psychological or psychiatric sequelae (McEwan and Paton - *Damages for Personal Injuries in Scotland* - Case Notes caps 28 and 28A; *Judicial Studies Board* - Guidelines for the Assessment of General Damages in Personal Injury Cases (10th ed) caps 2 and 3. There is, of course, not an exact parallel with section 1(4) claims but as the Court of Appeal, in a judgment delivered by Sir Thomas Bingham, said in *John* v *MGN Ltd* at p 614 (when considering the use which might be made in defamation cases of awards of damages in personal injury cases):

"It is in our view offensive to public opinion, and rightly so, that a defamation plaintiff should recover damages for injury to reputation greater, perhaps by a significant factor, than if that same plaintiff had been rendered a helpless cripple or an insensate vegetable. The time has in our view come when judges, and counsel, should be free to draw the attention of juries to these comparisons."

Similar broad comparisons may be made between awards for psychological and psychiatric sequelae and those for bereavement.

[75] The justice of each case also, in my view, requires this disposal.

**Guidance**

[76] As I have said, the current absence of judicial guidance to juries on levels of damages is an unsatisfactory feature of our practice. It should, in my view, now be changed. There was some discussion as to how procedurally this might be done. There was a broad consensus that, at the conclusion of the evidence, the parties should, in the absence of the jury, briefly address the trial judge on their suggestions as to the level of non-pecuniary damages which would be appropriate. In light of these submissions and having regard to his own experience and judgment, the trial judge would, in addressing the jury, suggest to them a spectrum within which their award might lie. That spectrum, he would inform them, was for their assistance only; it was not binding on them.

[77] These suggestions appear to me to be sensible. What form the guidance took would of course depend on the particular circumstances of the case. Where a spectrum was deployed, this might not be of the whole span of the parties' suggested figures but would be the range within which, in the judge's opinion, a just award might properly lie. In some cases a single, non-prescriptive figure or series of figures might be appropriate. Where there was a conflict in the evidence what was appropriate by way of damages would, of course, also depend on what the jury determined as to the extent of loss of society actually sustained. In such cases it might be appropriate to offer the jury more than one spectrum, figure or series of figures. Counsel in addressing the jury would be free to suggest figures as to what they maintained was appropriate (*John* v *MGN Ltd* at pages 615-6) but would not cite authority to them. The issue would no longer contain a figure for "Damages claimed" but the actual sum for which decree could ultimately be granted would be limited by the sum concluded for in the summons. If a party conceived that the guidance given by the trial judge on damages was unsound in law, it might except to his charge. The note of exceptions could then be considered in due course in any motion for a new trial.

[78] These changes in practice will inevitably involve uncertainties in their early years of implementation. In particular, so long as there remain significant disparities between judicial and jury awards, the task facing the presiding judge will not be an easy one; but, hopefully, these disparities will diminish over time. It may be that in the light of experience rules of court can be devised to fix procedural aspects; but the implementation of these changes need not await the promulgation of such rules. This added structure should reduce the risk of arbitrary and excessive awards.

[79] These changes have been devised, with the assistance of counsel, to address the particular problem of section 1(4) awards in the Court of Session. But there is no reason why they should not be applied, with any necessary modifications, to other claims for damages falling within section 11 of the 1988 Act or, if - as proposed in the Civil Courts Review at para 163 - civil jury trial is made available in the suggested new specialist personal injury court, to appropriate claims for damages made there.

**Acknowledgement**
[80] In conclusion I would wish to record the assistance which the court has received from the submissions of all counsel in these cases.

**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2012] CSIH 52**

**PD2039/09 and PD1444/09**

OPINION OF LORD EASSIE

in motions for new trials

*in causis*

(1) KIRSTY MAY HAMILTON

Pursuer and Respondent;

against

FERGUSON TRANSPORT (SPEAN BRIDGE) LTD

Applicant and Defender:

and

(2) GILBERT DENNIS THOMSON

Pursuer and Respondent;

against

DENNIS THOMSON BUILDERS LTD

Applicant and Defender:

_____

# Lord President

# Lord Eassie

# Lord Clarke

**Lord Emslie**

**Lord Brodie**

## (1) Act: Murphy, Q.C., Pugh; HBM Sayers (Defender and Applicant)

**Alt: Reid, Q.C., Lloyd; Morton Fraser LLP (Pursuer and Respondent)**

**For the Scottish Ministers: Balfour; Scottish Government Legal Directorate**

**(2) Act: Jones, Q.C., Pugh; HBM Sayers (Defender and Applicant)**

**Alt: Milligan, Q.C., Thornley; Balfour + Manson LLP (Pursuer and Respondent)**

**For the Scottish Ministers: Balfour; Scottish Government Legal Directorate**

8 June 2012

[81] Your Lordship in the Chair has set out fully the circumstances of these two cases and the submissions advanced on behalf of the parties and has extensively reviewed the relevant authorities. I am in agreement, in light of that exposition, with the views which your Lordship expresses concerning the test for excess or inadequacy of damages and how that test should now be approached and applied. I concur with your Lordship that each of the motions for a new trial which are before us should be granted.

[82] As respects the way forward, I am at one with your Lordship in the Chair that, in part informed by recent Convention jurisprudence, there is a need to change current practice in the conduct of civil jury trial; and that thus, first, in future the risk of the jury being inappropriately influenced by the presence in the issue of the unilaterally determined sum sued for should be avoided by that sum no longer being before the jury and, secondly, the jury should now be provided with some judicial guidance in their assessment of the amount of damages.

[83] On the latter matter of guidance, however, I would for my part say that while the broad consensus view of a possible procedure offered by the parties is on its face sensible and will probably be sufficient in many cases (perhaps particularly bereavement cases, upon which the submissions tended to focus), there may be other jury trial cases in which the presiding judge, or the parties, may think that, rather than endeavouring to give them a spectrum or bracket, the jury may be better assisted by being given broad possible reference points in the shape of information as to the general level of contrasting or possibly comparable awards in different fields of non-patrimonial loss (cf, the quotation from the judgment of Sir Thomas Bingham in *John* v *MGN Ltd* which your Lordship gives at paragraph [74] of his Opinion). Given that the Court is now sanctioning a change of practice by relaxing the taboo earlier developed whereby the trial judge did not assist the jury in its assessment of damages for non-patrimonial loss, I think that there is much to be said for allowing the details of the new practice to be fashioned by experience.

**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

# Lord President

# Lord Eassie

# Lord Clarke

**Lord Emslie**

**Lord Brodie**

**[2012] CSIH 52**

**PD2039/09 and PD1444/09**

OPINION OF LORD CLARKE

in motions for new trials

*in causis*

(1) KIRSTY MAY HAMILTON

Pursuer and Respondent;

against

FERGUSON TRANSPORT (SPEAN BRIDGE) LTD

Applicant and Defender:

and

(2) GILBERT DENNIS THOMSON

Pursuer and Respondent;

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# (1) Act: Murphy, Q.C., Pugh; HBM Sayers (Defender and Applicant)

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**Alt: Milligan, Q.C., Thornley; Balfour + Manson LLP (Pursuer and Respondent)**

**For the Scottish Ministers: Balfour; Scottish Government Legal Directorate**

8 June 2012

[84] I refer to the opinion of your Lordship in the chair. I am in agreement with its conclusions and the manner in which your Lordship proposes that these motions should be disposed of. I simply wish to add the following.

[85] First, it seems to me that the measures proposed by your Lordship in the chair are required to address concerns expressed over the years as to the lack of certainty about the basis upon which certain jury awards were arrived at and also to address apparent discrepancies in the treatment of like cases depending on whether or not they were decided by judge or jury. The changes in procedure proposed by your Lordship in the chair can be justified, in my view, without any question of them being driven by Strasbourg jurisprudence.

[86] Secondly, I consider that your Lordship in the chair is right to emphasise that, standing the will of Parliament with respect to the continuing role of juries in our system of civil litigation, jury awards ought not to be treated as any less a source of guidance than judicial awards in the assessment of what is the appropriate award to be made in any particular case. This approach to matters has, in my view, often been paid only lip service in the past.

[87] Thirdly, in my opinion, and in this respect I go somewhat further than your Lordship in the chair, the arguments advanced by the applicants relying on A1P1 were misconceived and something of a red herring.

While the discussion before the court referred throughout to the interests of insurers, what was lost sight of was that no insurance company was a party to these actions. In that situation the decisions that the court requires to arrive at in dealing with these cases must be the same as they would be had the defenders in question been uninsured. The position therefore is, in my opinion, as indicated by Lord Reed in *Axa General Insurance Ltd and Others* v *The Lord Advocate and Others* [2011] UKSC 46 at para 112 of his judgment, where he said:

"In addition, if the insurers cannot challenge the Act in the present proceedings, it is uncertain whether there are any other proceedings in which their rights under A1P1 can be protected. It is difficult to see how the A1P1 rights of an insurer could be asserted in proceedings brought under the Act against the insured, since the court would not be concerned in such proceedings with the effect upon a third party of an award of damages against the insured. There may be a question whether the validity of the Act could be determined in any subsequent proceedings for indemnification brought against the insurer, where the issue would be the interpretation of the insurance policy. In these circumstances it would in my opinion be mistaken to deny the appellants the status of victims on the basis that they are not directly affected by the Act ..." (emphasis added).

In the present cases, any liability on the part of an insurer arises from its pre-existing contract to indemnify the defender in question in certain circumstances. In that situation the position is as Lord Hobhouse put matters in *Aston Cantlow PCC* v *Wallbank* [2004] 1 AC 546, at para 91 of his opinion:

[A1P1] "does not extend to grant relief from liabilities incurred in accordance with the civil law. It may be that there are cases where the liability is merely a pretext or mechanism for depriving someone of their possessions by expropriation but that is not the case here. The liability is a private law liability which has arisen from the voluntary acts of the persons liable. They have no Convention right to be relieved of that liability".

The position of the insurers, in the present case, is different from the situation of the insurers in the *Axa* case. In the *Axa* case the insurers were seeking to avoid or to challenge, by way of judicial review, liability under legislation which they claimed, if brought into force, would interfere with their human rights under A1P1. In the present cases the insurers, not parties to the proceedings, cannot, by invoking A1P1, avoid a liability of theirs which they have voluntarily undertaken under private law (whatever may be their rights under Article 6 in proceedings where they were a party).

**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

# Lord President

# Lord Eassie

# Lord Clarke

**Lord Emslie**

**Lord Brodie**

**[2012] CSIH 52**

**PD2039/09 and PD1444/09**

OPINION OF LORD EMSLIE

in motions for new trials

*in causis*

(1) KIRSTY MAY HAMILTON

Pursuer and Respondent;

against

FERGUSON TRANSPORT (SPEAN BRIDGE) LTD

Applicant and Defender:

and

(2) GILBERT DENNIS THOMSON

Pursuer and Respondent;

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# (1) Act: Murphy, Q.C., Pugh; HBM Sayers (Defender and Applicant)

**Alt: Reid, Q.C., Lloyd; Morton Fraser LLP (Pursuer and Respondent)**

**For the Scottish Ministers: Balfour; Scottish Government Legal Directorate**

**(2) Act: Jones, Q.C., Pugh; HBM Sayers (Defender and Applicant)**

**Alt: Milligan, Q.C., Thornley; Balfour + Manson LLP (Pursuer and Respondent)**

**For the Scottish Ministers: Balfour; Scottish Government Legal Directorate**

8 June 2012

[88] I have had the advantage of reading in draft the opinion prepared by your Lordship in the chair, and am in full agreement with its terms.

[89] Like your Lordship, I am persuaded that in fulfilment of the court's long-established responsibility, under statutory "new trial" provisions, to promote comparative justice and a measure of consistency in decision-making, it is now essential to act positively to address the conditions under which a wide gulf has developed as between judicial and jury awards in bereavement cases. Our jury practice in particular has been the focus of sustained challenge over many years, primarily under domestic law, but now also by reference to Article 6 of the European Convention on Human Rights and, in these appeals, A1P1. Relevant defects and disadvantages have often been alluded to, and while the new proposals will no doubt require modification and amendment in the light of experience they do seem to me to offer an acceptable, and unavoidable, first step towards resolving a long-standing problem.

[90] On my understanding of these proposals, the potential distraction of a unilaterally stated "ceiling" on the form of issue will henceforth be avoided. At the same time, trial judges will have a wide discretion to provide a jury with whatever figure or figures may be thought helpful in relation to their allotted task. Even if, in a given case, any range of figures suggested by the parties in discussion were to appear too wide for that purpose, it ought still to be possible to help the jury by other means. Reference might, for example, be made to particular awards in the past which seemed apposite or, alternatively, comparisons or contrasts might be

drawn with general levels of award in other contexts. Time and experience will show the best way forward here, but on any view a measure of guidance would seem to represent an improvement on the situation which currently prevails.

**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2012] CSIH 52**

**PD2039/09 and PD1444/09**

OPINION OF LORD BRODIE

in motions for new trials

in causis

(1) KIRSTY MAY HAMILTON

Pursuer and Respondent;

against

FERGUSON TRANSPORT (SPEAN BRIDGE

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and

(2) GILBERT DENNIS THOMSON

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## *(1) Act: Murphy, Q.C., Pugh; HBM Sayers (Defender and Applicant)*

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**For the Scottish Ministers: Balfour; Scottish Government Legal Directorate**

[91] I agree with the conclusions of your Lordship in the chair and with the manner that your Lordship proposes that these motions for new trials should be disposed of. I further agree with the desirability of the objective identified at para [63] of your Lordship's opinion of narrowing the disparity which may arise as between the awards of damages made, on the one hand, by a judge and, on the other, by a jury, in respect of *solatium* or a bereavement claim as now articulated in section 4(3)(b) of the Damages (Scotland) Act 2011; and I agree with your Lordship's proposals as to how this might be achieved. At risk of superfluity, I add my observations on just two matters: the respective statuses of judicial and jury awards in future, and the possible application of A1P1.

[92] In *Heasman* v *JM Taylor & Partners supra* at para 25, Lord Coulsfield, agreeing with what had been said in the Northern Irish case of *Simpson* v *Harland & Wolff plc* [1988] NI 432 by Lord Lowry LCJ, as quoted by Lord Clyde in *Girvan* v *Inverness Farmers' Dairy*, observed, that "there is no particular reason to regard a judge's award as having any greater intrinsic merit than a jury's award." Lord Coulsfield was referring to the assessment of *solatium* for non-fatal personal injury but the same can be said about the assessment of a bereavement award. That would seem to be necessarily so. The impossibility of equating pain and suffering or grief with a specific sum of money, repeatedly remarked on in the authorities cited at para [8] of the opinion of your Lordship in the chair, means that any attempt to do so is essentially an arbitrary exercise. Leaving aside for the moment access to precedent, by which I simply mean knowledge of and reference to a body of other awards, there is no reason to suppose that a judge is better equipped than a jury to carry out that exercise. However, that does not mean that the reverse is true and that a jury is any better equipped than a judge. Admittedly, Lord McCluskey did express the opinion that juries are more fitted to make such judgments than are judges when *Girvan (No 2)* was in the Division (*Girvan* v *Inverness Farmers' Dairy (No 2)* 1996 SC 134 at 141), but that particular view did not find support when the case went to the House of Lords (*supra* at 17). Again, the Opinion of the Court in *Shaher* v *Scottish Aerospace Flying College Ltd supra* includes the statement (at pp 542 to 543) that "the 'overall philosophy' of Scottish practice is that the assessment of damages is first and foremost a matter for a jury" but a construction of that passage as according jury awards primacy over judicial awards was specifically rejected in the Opinion of the Court in *McLean* v *William Denny & Bros Ltd supra* at 663 as contrary to what had been said by Lord Hope in *Girvan (No 2*). As was confirmed by Lord Clyde in the course of his speech in Girvan (No 2) (*supra* at 24), "an award of *solatium* which does justice between the parties is very much a jury question, as a matter of fact and circumstance where precise rules are not to be expected". That, however, is saying no more than that assessment of this sort of damages, as with other sorts of damage, is a question of fact and therefore within the province of a jury. Procedurally, the default position is that actions for damages for personal injury (including actions in respect of the death of a relative) shall be tried by jury: Court of Session Act 1988 section 11(a). Such actions may also be tried by a judge; the respective tribunals are equally legitimate. It can be said that twelve jurors with their knowledge of the world will bring strengths to the decision-making process which a single judge is unlikely to have. That may be so. In the passage referred to by Lord Coulsfield, Lord Lowry instanced a jury's likely greater sensitivity to the changing value of money. However, as was recognised by Lord Lowry in the same judgment (*Simpson* v *Harland & Wolff plc supra* at 440), judges' awards offer the considerable advantage of consistency and, it may also be said, proportionality. Taken together, judicial awards provide a coherent body of decisions by reference to which it should be possible to achieve comparative justice. That is not the only aim of a system of compensatory damages but clearly it is one of the aims and from what we were told by Mr Milligan there would not appear to be any general dissatisfaction with the level of judicial awards overall. It may be that future experience of jury trials in which the procedural innovations proposed by your Lordship in the chair are employed will show that in respect of some sorts of claim judges' awards have been too low, but as matters stand I see no basis for giving the relatively few currently available jury awards, which are the products of what is now accepted to be a sub-optimal procedure, any higher status than the body of judicial awards. As it appears to me, a strength of what your Lordship in the chair proposes is that by informing juries of the band of previous judicial awards and encouraging judges to look to jury awards, assumptions on the part of one tribunal or the other can be tested. If jury awards consistently remain at levels which currently would be regarded as high when

compared to judicial awards then I would expect judges, like the judges in Northern Ireland referred to by Lord Lowry, to conclude that the jury levels represented what was "reasonable" and therefore should be adopted. However, for the present I would see that process as being unwarrantably skewed and possibly completely undermined if it were to start with the assumption that a particular jury award was in some way better or of greater weight than a particular judicial award.

[93] I share Lord Clarke's opinion that the arguments based on A1P1 were misconceived. Put shortly, the contention was that because there was a *prima facie* entitlement to jury trial in a case of damages for personal injury, the insurer of the person found to be at fault was at risk of being "deprived of his possessions" in contravention of A1P1 in that the mechanisms afforded by a jury trial for the assessment of the non-patrimonial element in the claim led to a result which was uncertain and unpredictable. The features of jury trial leading to that result were listed as: uncertainty as to the nature, purpose and quantification of what were claims under section 1(4) of the Damages (Scotland) Act 1976 and are now claims under section 4(3)(b) Damages (Scotland) Act 2011; the lack of any meaningful guidance given to the jury in making an assessment of such claims; the risk of confusion in the minds of the jury as between the global sum stated in the issue and what it represents; the excessive latitude given to jury awards in applying the test of excess of damages in the event of a motion for a new trial; the shift from a "no reasonable jury" to a "no jury" test as between a first and a second motion for a new trial; and the apparent contradiction that compensatory damages can be assessed at very different sums in respect of the same loss, and yet both be regarded as acceptable, depending upon the mode of inquiry adopted and stage reached in the jury trial process. I would accept each of these features as presenting a basis for valid criticism but I do not see A1P1 as being engaged. The "possessions" in question were said to be the insurers' funds and the various rights subrogated to them consequent on their indemnifying the insured under the contract of insurance. Lord Clarke indicates that this is a fundamentally wrong approach given that the insurers are not parties to the actions and in that context refers to what Lord Reed said in *AXA General Insurance Ltd and Others supra*. However, even putting that consideration aside, and looking at the position as we were invited to do from the perspective of the insurer as *dominus litis*, I simply fail to understand how he has been deprived of his possessions or how his peaceful enjoyment of them has been otherwise interfered with. As Lord Clarke explains, and as Mr Reid QC had argued, the insurers had undertaken to indemnify their insured in respect of liabilities incurred under the current law in return for premiums. They must be taken to have assessed the associated risks, including the risks associated with litigation, in fixing these premiums. That the assessment of non-patrimonial damage may fall to be carried out by a jury is merely one of these risks.

[94] Reference was made to the decision of the European Court of Human Rights in *Sovtransavto Holding* v *Ukraine supra* in support of the applicability of A1P1. I confess to have had some difficulty in knowing exactly what to take from this case, not least because the applicant company had so much to complain about as to its treatment at the hands of various public authorities in the Ukraine. The complaints were in large part upheld. The Court accepted that there had been various violations of Article 6 (1) in respect of the right to have a fair and public hearing of its case by an independent tribunal within a reasonable time. The Ukrainian proceedings were found to be deficient in respect of each aspect of that right. They were also found to have been incompatible with legal certainty. Not content with finding that there had been multiple violations of Article 6 (1), the majority of the Court went on to find that there had been a violation of A1P1. At para 96 of its judgment the Court stated that the right guaranteed by A1P1 includes a positive obligation on the part of the state to protect the right of property, even in cases involving litigation between individuals or companies. The Court went on:

"This means, in particular, that the States are under an obligation to afford judicial procedures that offer the necessary procedural guarantees and therefore enable the domestic courts and tribunals to adjudicate effectively and fairly any disputes between private persons."

Given the circumstances of the case, there would seem to be force in the partial dissent by Judge Cabral Barreto who expresses the view that it was unnecessary to examine whether there had been a violation of A1P1 as the applicant company's complaints under A1P1 were exactly the same as those that had been

examined under Article 6 (1). The proposition that if property rights are to be protected then there must be Article 6 compliant courts where such rights can be vindicated is perhaps not surprising. However, the question as to whether there is a breach of A1P1 by reason of the absence of "the necessary procedural guarantees" must be fact sensitive and at least on the facts in *Sovtransavto* what the Court was contemplating when it made its finding of breach of A1P1 in parallel to its finding of breach of Article 6 was something of the nature of a completely dysfunctional legal system where the rule of law was simply not applied. I would see the fundamental failures described in *Sovtransavto* as not just different in degree from the criticisms which were levelled at Scottish jury trials, but different in kind.