OUTER HOUSE, COURT OF SESSION

[2021] CSOH 75

PD335/20

OPINION OF LORD ARMSTRONG

In the cause

ROBERT McARTHUR, and OTHERS

Pursuers

against

(FIRST) TIMBERBUSH TOURS LIMITED; (SECOND) ERS SYNDICATE MANAGEMENT LIMITED

Defenders

Pursuers: Galbraith QC, Singer (sol adv); Thompsons
Defenders: Miller; Kennedys Scotland

22 July 2021

Introduction

[1] On 27 September 2018, Michael McArthur ("the deceased") was working in the basket platform of a cherry picker which was elevated to the upper levels of the exterior of a building located on Balkerach Street, Doune. As he did so, a tour coach, travelling on the same side of the road, struck the arm of the cherry picker, as a consequence of which the deceased was thrown from the basket platform and fell to the road, sustaining fatal injuries.

[2] The pursuers are, respectively, the deceased's father, suing as an individual and as executor dative, his mother, his half-sister, and his step-father. In this action, they seek damages from the defenders in respect of the deceased's death. The first defenders are

Timberbush Tours Limited, the owners and operators of the coach, and the second defenders are ERS Syndicate Management Limited, their insurers. The first defenders having admitted liability in respect of the accident, contend that the sums sued for are excessive, and that the accident was caused solely, or was materially contributed to, by the deceased's own fault.

The evidence

[3] The evidence led at the diet of proof was in short compass. In the course of the pursuers' case, evidence was given by the second, first and fourth pursuers, and by two expert witnesses, Helen McLachlan and Ewan Innes. No witnesses were led in evidence on behalf of the defenders.

[4] It was agreed between the parties by joint minute, *inter alia*, that:

- The accident caused the injuries that led to the death of the deceased;
- The deceased was pronounced dead within an hour of the accident occurring;
- At the time of the accident, the deceased was not secured to the cherry picker basket by a lanyard or harness;
- At the time of the accident, the deceased was not wearing any personal protective equipment;
- The deceased held a certificate of training which recorded that he had successfully completed training in relation to the "Safe Use and Operations of Mobile Working Platform including Harness Inspection & Fitting", at Ardmaleish Boatyard, Isle of Bute;
- Documents disclosed by the Crown Office and Procurator Fiscal Service indicated that Kevin Bowie, as a director of Precision Decorating Services

(Scotland) Limited, was the subject of prosecution in relation to the accident, in relation to alleged contraventions of the Work at Height Regulations 2005, and the Health and Safety at Work Act 1974, and that no trial diet had been yet been fixed;

- Statements by a number of individuals, in particular, Andrew Thomson, Gillian Blair, Janet Box, Cameron Wylie, Mario Maczko, Iain Skinner, John Nicol, and Julie Davies, were to be treated as their oral evidence; and
- Statements to police officers had been made by a number of individuals, including Eilidh McArthur, Malcolm Dryden, and Kevin Bowie. There was no dispute between the parties that the content of these statements constituted hearsay.

The second pursuer

[5] The second pursuer, confirmed that her date of birth was 6 March 1965, and that Michael, her son, the deceased, had been born on 10 June 1992. She described Michael as having been a sweet, funny, kind, fun-loving, and happy boy, whose hobbies included football, in relation to which he was an ardent supporter of Celtic Football Club, boxing, and fishing, and who had friends all around the Isle of Bute, where they lived. She and his father, the first pursuer, had separated in 2001, but they remained still very close. From that point, she and the first pursuer had shared care and custody of Michael. Shortly after their separation, she had met the fourth pursuer. They had formed a lasting relationship and continued to live together. She described the fourth pursuer and Michael as having a great relationship. When not staying with his father, Michael had lived with the second and fourth pursuers, and their daughter, the third pursuer. They would all go on day trips

together, and went on holiday together. Michael was very much involved in the community in Rothesay, as was borne out by the attendance at his funeral, which was crowded, the siting of two benches on the island in his memory, and the overwhelming support which she had received after his death.

[6] From the age of 16 years, Michael had worked as a painter and decorator. At one stage he had moved to New Zealand, where he stayed for just over a year, before returning to work at a local boatyard. Thereafter, he had worked with Kevin Bowie in Glasgow. He had previously worked with Kevin Bowie as an apprentice painter and decorator at Mount Stuart, on the Isle of Bute. In relation to his work for Kevin Bowie, he had told her that it involved working at a hotel with a cherry picker, but that everything was fine and that he felt safe. He had previously had an argument with Kevin Bowie when he had indicated that he was not prepared to work, hanging out of a window, when it was not safe to do so. On that occasion, he had persuaded Kevin Bowie that he was right to refuse to do so.

[7] Her son had died, some 2 weeks after the conversation about the cherry picker. He had started the job on about 1 September 2018 and died on 27 September 2018. Her understanding was that Michael and Kevin Bowie had a good working relationship, that Kevin Bowie was in charge, that Michael worked for him, that Kevin Bowie was the boss and Michael his employee, and that Kevin Bowie was in control of what Michael did.

[8] She had last seen Michael about 2 weeks before the accident. The manner in which she had found out about the accident had been particularly upsetting. It had been apparent that other people knew what had happened, but felt unable to tell her. She was told of his death at the local police office, and had found the experience extremely distressing. When relating this passage of evidence, she became obviously emotional and upset. When her daughter, the third pursuer, was told of the death, she too was distraught. Both she and the

second pursuer had suffered intense grief. Michael's funeral was attended by some 800 mourners. At the following Celtic home game, a 2 minute silence was held at the 26th minute of the match, reflecting his age at the time of death, followed by lengthy applause. Subsequent fundraising, in his name, had raised £15,000 for local charities.

[9] The second pursuer explained that Michael had been 14 years of age when her daughter, the third pursuer, was born. She had adored him. Michael and the third pursuer had always been in constant touch with each other. He had always looked out for her, and had been protective and very supportive of her. She had loved him, and it was obvious that she still missed him very much. When she had been told of his death at the police office, she had visibly slumped and screamed continuously. She had been particularly affected by his death, and had suffered adverse effects, including anxiety. The second pursuer thought her daughter may get benefit from counselling in the future. Her daughter had told her that she thought she would never be happy again. In relation to herself, the second pursuer said that, since her son's death, her heart was broken, and that she had required counselling for a year. As she put it: "Inside, I'm a mess". Since his death, she had experienced significant difficulties with recollection.

[10] In cross-examination, she accepted that the deceased had gone to New Zealand on his own, in circumstances where he had no family members there, and returned only because his visa had expired, and that he had travelled to Glasgow regularly to watch Celtic home matches. He held a season ticket and would go with friends and his father. He was well-liked, had a large circle of friends and, socialised with them. She did not accept that he was fully independent, in that, as she put it, she did a lot for him, but she did accept that insofar as his free time was concerned, he chose what he did.

[11] She confirmed that when her son first worked with Kevin Bowie, for Precision Decorating Services (Scotland) Limited, from about 2015, he had worked long hours and had lived with friends on the mainland, away from home, returning to Rothesay in 2018. Although he had gone back to Glasgow to stay with friends in August 2018, he had liked being at home as well, and always came back. She accepted that Michael had wanted to pass his driving test on the basis that he might have an opportunity to work in New Zealand, and that he was keen to pursue opportunities generally.

[12] She confirmed that 2 weeks before the accident, she had met her son, Michael, for lunch, and that he had told her of his argument with Kevin Bowie when he had refused to work by hanging out of a window. Her understanding was that Kevin Bowie was in charge, in that he obtained jobs of work, and gave them to her son, Michael, to carry out. Michael had told her, in relation to the use of the cherry picker, that he was not keen on working at heights but that, as he had put it: "in the cage, you feel secure - you'd be surprised". She accepted that Michael appeared to have an understanding of what was safe and what was not.

[13] When she was shown a photograph, 7/4 of process, she accepted that it depicted Michael working at height from a cherry picker, at the gable end of a building, in circumstances in which he was not wearing a harness, but with warning tape around the base of the cherry picker. She did not agree with the proposition that although Michael was protective of others, he was not protective of himself. In the photograph, Kevin Bowie was to be seen at the base of the cherry picker.

[14] She confirmed that, after the death, she had received counselling, once per week, for about a year, and had found it effective. She qualified that, however, by saying, obviously upset, that her son was still dead.

[15] She confirmed that there was a 14 year age gap between Michael and the third pursuer, and that her daughter had always lived on the Isle of Bute.

Robert McArthur

[16] Mr McArthur, the first pursuer, confirmed that his date of birth was 3 November 1959. He is resident in Rothesay. He described his son, Michael, the deceased, when a child, as being "a terrific boy, a good boy". Mr McArthur had separated from his wife, the second pursuer, in 2001, but she had remained his best friend. From that date, they had shared the care and custody of Michael between them. He and the second pursuer had drifted apart, but they had never fallen out, and Michael had been a big part of that. Generally, Michael had lived with his mother, the second pursuer, but had stayed with Mr McArthur at the weekends. Sometimes he would visit his father in the evenings. The arrangement was flexible. At the time, the first and second pursuers had lived only about 1.5 miles apart. When Michael was aged 16 years, he secured a job at a local boatyard, and had lived with Mr McArthur during that period because his home, the first pursuer's, was nearer Michael's place of work than his mother's was, and was therefore more convenient for Michael who did not drive.

[17] As a young adult, Michael had remained a good boy. He was funny, kind and loving, and a good son. As father and son, they had a great relationship, and would spend time together following Celtic Football Club, and having a drink afterwards. When Michael returned from New Zealand, having spent about a year there, he lived with Mr McArthur, but saw his mother and half-sister, the third pursuer, regularly. When Michael had been living in Glasgow, Mr McArthur had seen him most weekends. Michael would come to Rothesay, and stay either with Mr McArthur or with his mother.

[18] Mr McArthur was aware of Kevin Bowie, and understood that Michael worked for him, that Michael referred to him as his mate, that they got on well, and that Michael had worked for him twice: once in Glasgow, when he returned from New Zealand; and later, in the short period before the accident. Mr McArthur's understanding was that Kevin Bowie was the boss, that he owned the company and obtained jobs of work, and that Michael worked to his direction. Kevin Bowie decided what job of work Michael would be doing, and Michael followed Kevin Bowie's instructions. Although Michael had his own painting and decorating tools, brushes, scrapers etc, generally Kevin Bowie provided equipment, as was appropriate for an employer in relation to his employee.

[19] Mr McArthur had learned of the accident when the police had come to his door. When he arrived at the police office, the second and third pursuers were screaming and sobbing. He had felt sick. He described his son, Michael, as someone who "brought people in". Since his death, every day was another day without him. He felt that something was missing in his life, and missed Michael's love and his laughter. In the local community, there had been a huge reaction to his death. Vigils had been held, and at his funeral, over 800 people had attended. In the church, there had been standing room only.

[20] In cross-examination, Mr McArthur confirmed that Michael was aged 9 years when his parents' marriage had broken down. Although Michael had accepted the fourth pursuer as his step-father, Mr McArthur felt that his son was closer to him, as his natural father. He confirmed that when Michael was working for him, Kevin Bowie was in charge. He knew that Michael had a qualification in relation to safe working, involving harness inspection etc.

The fourth pursuer

[21] The fourth pursuer confirmed that his date of birth is 6 June 1975. He had first met the second pursuer in about 1999, and had formed a relationship with her in 2001, when Michael, the deceased, was aged 8-9 years. He and Michael would visit theme parks together, and would go fishing with Michael's friends. From the time when the fourth pursuer and Michael's mother, the second pursuer, began living together, he saw Michael most days. As Michael grew older, and was working, he lived either with his father, the first pursuer, or with the fourth and second pursuers. The relationship between the fourth pursuer and Michael, as step-father and step-son, was a good one. They got on well together, and there were no issues in that regard. They had always played on-line gaming together. As part of the family, Michael had gone on holiday to the USA with the fourth and second pursuers. In the period before the accident, when he had been working at the local boatyard, Michael had stayed with his father, but had always come home, to the fourth and second pursuers, on a Friday night. Accordingly, during that period they had still seen him at least once per week.

[22] The fourth pursuer said that words could not adequately describe the experience of hearing the news of Michael's death, at the local police office. He was able to cope with the fact of his death by trying to block it out, but regularly, events associated with Michael caused the impact of it to hit him again.

[23] He described the relationship between his daughter, the third pursuer, and Michael as being "great". They had always got on really well, and there were never any issues between them. In his opinion, the relationship had grown stronger and better as she had grown older. Since his death, she often wore a Celtic football shirt with Michael's name on the back. She had required counselling, and was prone to breaking down at times. His view

was that Michael's death would always affect her. In his opinion, Michael's death had left a huge hole within the family.

[24] In cross-examination, the fourth pursuer conceded that, in the period of his relationship with the second pursuer, Michael had probably spent more time with his father, but explained that, if that was the case, it would have been due to the whereabouts of Michael's work. He also conceded that, as was normal, as Michael had grown older, he had spent more time with friends rather than with family.

Helen McLachlan

[25] Ms McLachlan was a retired counsellor who had provided counselling to the third pursuer. In the period from November 2018 until January 2020, she had provided counselling to her once per week, except during school holidays.

[26] At the beginning, it was clear that the third pursuer was suffering extreme grief and loss, that she was in shock, and in denial. She did not want the fact of Michael's death to be true, and had found the reality to be horrific. It had taken some weeks to reach the stage where she was able to talk about losing her step-brother. As her counselling progressed, she began to be able to verbalise her feelings, but still wanted to be able to tell Michael things, and still, habitually, would go into his room. She felt angry that he had been taken from her. The death had affected her life. She had experienced panic attacks when at school. The impact of Michael's death was devastating for her. Whenever she thought about it, she became upset. She continued to want to love and hug him. The manner of his death had exacerbated its impact on her.

[27] When Ms McLachlan had last seen the third pursuer, she was using coping mechanisms successfully, was sleeping better, and was able to sleep alone sometimes, rather

than with her mother. In Ms McLachlan's view, it was possible that, in the future, any other loss in her life might result in a recurrence of the acute impact of Michael's death, with the possibility that her grief and anxiety might be opened up again to the full. There was a risk that she might succumb to depression. Ms McLachlan was aware that the third pursuer had developed a fear that her parents might also die suddenly. In her view, the third pursuer's disturbed sleep patterns, her anxieties, and such fears, did not bode well for a favourable future in that regard.

Ewan Innes

[28] Mr Innes was a counselling supervisor who, for a period of something over 1 year, had provided counselling to the second pursuer in relation to the loss of her son, Michael. When he had first seen her, she had been distraught and extremely upset. He had provided therapeutic support, and trauma treatment, by practicing active listening, projecting into the future, and promoting emotional maintenance. Her loss was affecting her by producing trauma in grief, and affecting her ability to cope and relate to others, and her daily functioning generally. She experienced flashbacks, and succumbed to weeping for no apparent reason. Her grief was affecting her whole life, including her ability to sleep and to work. In Mr Innes' view, the manner of Michael's death had produced a very exacerbated negative impact on her. She found it horrific, and it had resulted in greater emotional pain. Additionally, Michael's age, 26 years at the time of his death, was a significant factor, which had contributed to her emotional loss. He had not yet married, and had not achieved his aims. She would not be able to see him as a mature man in later life, and would never be a grandmother to his children.

[29] At the conclusion of his input, Mr Innes considered that the second pursuer had come to terms with the notion that she would have to live with the fact of Michael's death, but also that she could not reverse its effect. Following her counselling, however, her functioning was improved. His professional opinion was that, in the future, she would still struggle to cope with constant referable reminding events, such as birthdays and Christmas, and would face related challenges for the rest of her life. He considered that she had striven to get better, had followed his advice, had shown a lot of courage, and, in the course of that process, had displayed a rare dignity.

Submissions for the pursuers

(1) Quantum

(i) Funeral costs

[30] Funeral costs were agreed between the parties in the sum of £4,994.

(ii) Transmissible solatium

[31] Under reference to the statements of eyewitnesses to the accident, it was submitted that the deceased had sustained catastrophic injuries, as more fully set out in the post-mortem report. His head and facial injuries would have been significantly painful and traumatic throughout his period of consciousness. He died shortly afterwards. The Judicial College Guidelines for the Assessment of General Damages in Personal Injury Cases, 15th edition, at paragraph 1 "Injuries Resulting in Death" (B): in respect of severe burns and lung damage causing excruciating pain but followed by unconsciousness after 3 hours and death 2 weeks later, indicated a range of damages of £8,970 to £9,100. In the case of *Dyson* v *Heart of England NHS Foundation Trust* [2017] EWHC 1910 (QB), damages of £3,000 were

considered appropriate in relation to circumstances involving extremely painful headaches for several hours, followed by death. In all the circumstances of the pursuer's suffering, it was submitted that an award of £5,000, plus interest, would be appropriate.

(iii) Damages (Scotland) Act 2011, section 4(3)(b)

[32] In terms of the section, the relevant sums of damages payable to relatives are such sum, if any, as the court thinks just by way of compensation for all or any of the following—

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

(ii) grief and sorrow of the relative caused by the deceased's death, and

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

[33] It was submitted that in respect of each of the pursuers, the relevant context was that of an extremely close and loving family, now devastated by the loss of a son and brother. The manner of the deceased's death had contributed to the extent of the grief suffered by his family members.

(iv) The first and second pursuers

[34] There were a number of relevant factors to be considered. In circumstances in which the deceased had been his parents' only son, and had died only at the beginning of his adult life, they were now denied his company, support and guidance. In considering the extent of their grief and sorrow, and the loss of non-patrimonial benefit, it was submitted that, on the basis of the evidence, the appropriate award should be at the top end of the referable scale. It was submitted that there should be no distinction made between the first pursuer and the

second pursuer in that respect. Together they had shared the care and custody of the deceased in his developmental years, equally, and both had maintained particularly strong bonds with him throughout his life. It was not the case, as was suggested for the defenders in the course of the proof, that the deceased had become estranged from his family. As one would expect, as a young man he had left home and spread his wings, but he had always kept in constant touch and had come home regularly. At the time of his death, he had continuing strong ties not just with his family, but also to the local community. Under reference to the cases of *Hamilton* v *Ferguson Transport (Spean Bridge) Ltd* 2012 SC 486, *Scott* v *Parkes*, Outer House, 22 May 2014, unreported, *Young* v *MacVean* 2015 SLT 729, *Anderson* v *Big Brae Garage Ltd*, Outer House, 25 June 2015, unreported, and *McCulloch and others* v *Forth Valley Health Board* [2020] CSOH 40, it was submitted that, having regard to the relatively young age of the deceased, the extremely close bonds between him and his parents, and the violent nature of his death, the appropriate award in respect of the case of each of the first pursuer and the second pursuer was £120,000.

(v) The third pursuer

[35] The relationship between the deceased and the third pursuer had been an extremely close and loving one. He had been part of her life since birth, and, throughout, they had been as close as siblings could be. They had maintained regular contact throughout her life. She had been devastated by the effect of his death, had required counselling, and was likely to experience consequent life-long emotionally detrimental impact. Under reference to the cases of *Currie* v *Esure* 2014 CSOH 34, and *Young* v *Advocate General*, 2011 Rep LR 39, it was submitted that an appropriate award would be one of £50,000.

(vi) The fourth pursuer

[36] From the point when the deceased had been 9 years of age, the deceased had been very much part of the fourth pursuer's life. From that point he had lived with the fourth pursuer and his mother, the second pursuer, on a basis equal to the periods during which he had lived with his father, the first pursuer. The fourth pursuer had spent much leisure time with the deceased, and had embraced him as his step-son. As he had put it in evidence, the death of the deceased had left a hole in the family. Under reference to the case of *McCulloch and others* v *Forth Valley Health Board (supra)*, it was submitted that the appropriate award of solatium in these circumstances was one of £70,000.

(2) Contributory negligence

[37] It was submitted that the clear cause of the accident was fault on the part of the driver of the first defenders' coach, who had failed to avoid an obvious hazard. At the time, the deceased had been carrying out work as directed by Kevin Bowie, his *de facto* boss. Kevin Bowie had been the sole person responsible for the work to be carried out by the deceased, and, with the exception of the deceased's own paint brushes, scrapers etc, for the procuring of the necessary equipment, and in particular the cherry picker. The tenor of the evidence was that Kevin Bowie had been in control, and had directed operations at all times. It was accepted that at the relevant time, no system of traffic management was in place, and that the pursuer had not been wearing a harness. In that latter respect, it was significant that there was no evidence to the effect that a harness had been provided, or, in the circumstances of the accident under consideration, what difference a harness, if worn, would have made. Kevin Bowie's failure, to consider the safe management of the work being carried out by the deceased, had resulted in his ongoing prosecution.

[38] Under reference to *Lyell* v *Sun Microsystems* 2005 SCLR 786, *Ruddy* v *Monte Marco & M & H Enterprises Ltd* [2008] CSOH 40, and *Toner* v *George Morrison Builders* 2011 Rep LR 18, it was submitted that Kevin Bowie owed a duty of care to the deceased, which, in the circumstances of the work which the deceased was directed to carry out, he breached. In circumstances where the deceased had in the past indicated concerns for his own safety, it was legitimate to infer that he had been a young man who was not reckless in that regard. Although he held a training certificate, there was no evidence as to nature or extent of the training which had been provided, or in what context it was relevant. Under reference to the cases of *Wallace* v *Stewart Homes (Scotland) Ltd & another* 2014 SCLR 1 and *Toner* v *George Morrison Builders*, it was submitted that this was not a case which was comparable with circumstances in which a workman took obvious risks, for example, by choosing to climb an obviously dangerous ladder, or to work on a roof without edge protection. In the whole circumstances of the case, it was submitted that the defenders had failed to prove contributory negligence on the part of the deceased, and that accordingly no finding of contributory negligence should be made. In the event that it was considered that a finding was appropriate, it should be at a minimal level.

Submissions for the defenders

[39] It was accepted that an award in respect of funeral expenses should be made in the sum of £4,994, plus interest.

[40] It was accepted that the deceased had suffered catastrophic injuries. It was a matter of agreement that he had died at 11.05am on the day of the accident. In relation to the timing of events following the collision, and under reference to the statements of Julie Claire Davies, and Mario Maczko, the accident appeared to have taken place at about 10.15am. On

that basis, the deceased's suffering, prior to his death, had endured for some 50 minutes. In the case of *Beggs* v *Motherwell Bridge Fabricators Ltd* [1998] SLT 1215, transmissible solatium in respect of a period of suffering of some 25 minutes, had been valued at £250. Allowing for inflation and interest since 1998, an appropriate award in the circumstances of the present case would be in the region of £2,000-£3,000.

(1) Damages (Scotland) Act 2011, section 4(3)(b)

[41] Although it was recognised that following the case of *Hamilton* v *Ferguson Transport (Spean Bridge) Ltd,* it was appropriate to have regard to previous jury awards when considering the appropriate level of damages, the matter was one within the court's discretion, having regard to the particular facts of the instant case. The imperative to be borne in mind was that any award should be fair, just and reasonable in all the circumstances. In *Young* v *MacVean*, an award of £80,000 had been made in respect of the loss of a child where there had been particularly close bonds of love and affection, and prolonged grief. Similarly, it was recognised that in the case of *Scott* v *Parkes* OH, 22 May 2014, unreported, on similar facts, an award of £86,000 had been made. By comparison, in the instant case, although a tragic loss had been suffered, the relationships which the individual pursuers had with the deceased, were not of such a comparably extraordinary nature as to justify awards from the upper spectrum of appropriate valuation.

[42] Insofar as the first, second and fourth pursuers were concerned, the evidence indicated that as the deceased had grown older, he had spent more time with his own friends than with family. He had been pursuing his aims and hobbies, and had been living an independent life at the time of death, as was borne out, by, for example his time spent in New Zealand, and the fact that, on the evidence of the statement of Eilidh McArthur, (not a

relation), he had arranged to live with others when working in Glasgow, until such time as he was able to find a home of his own. In relation to the first and second pursuers, it was true that the deceased had been close to his parents, but he had become increasingly less dependent on them, and, in particular, less so after 2001 when they had separated.

[43] So far as the third pursuer was concerned, the evidence was that she and the deceased had been close, but it was significant that the age gap between them was some 14 years. Their relationship was to be characterised as being not a conventional sibling bond, and it was significant that the deceased had been spending increasingly less time with his family. The counselling undergone by the third pursuer had been positive in its effect, and, as was the case with the second pursuer, she was not currently receiving counselling.

[44] Insofar as the fourth pursuer was concerned, the fact of the matter was that the deceased was not his child. Although he had been, of course, saddened by the loss, the deceased's relationship with his own father had been a closer one. Reference was also made to the fact that the fourth pursuer had become involved in the action at a relatively late stage. In that regard, it was submitted that, had his bond with the deceased been as close as was claimed, it would have been anticipated that he would have entered the action at an earlier date.

[45] In the whole circumstances, although there was obvious love and affection between the deceased and the members of his family, their relationships could not properly be described as extraordinarily close, and in these circumstances, the appropriate extent of the referable damages, in respect of section 4(3)(b) of the 2011 Act, should not be viewed as being at the upper end of the available spectrum.

(2) Contributory negligence

[46] It was submitted that the deceased had materially contributed to the circumstances of his death. The primary causative factor, in that regard, had been fault on the part of the driver of the coach, but blameworthiness on the part of the deceased had contributed to the eventual loss.

[47] It was accepted that at the time of the accident, no traffic cones had been put in place, there was no banksman, the deceased had been alone in the overhead basket, the arm of the cherry picker had been positioned over the road, and that the deceased had not been wearing personal protective equipment or a harness. It was, however, significant that the deceased had held a certificate of training in respect of the "Safe Use and Operations of Mobile Working Platform including Harness Inspection & Fitting". The second pursuer had indicated in evidence that the deceased had expressed concerns to her about working at heights, and he had previously refused to work by leaning out of an open window at height when he considered it unsafe to do so. There were photographs in evidence of the deceased working on a previous occasion with appropriate measures in place, including traffic warning tape around the foot of the a cherry picker, and the presence of a banksman, in circumstances where the arm of the cherry picker was not positioned over the adjacent roadway. The statement by Malcolm Dryden indicated that, previously, when the deceased had been working from a cherry picker with Kevin Bowie, there had been traffic cones placed around it. In these circumstances, it was submitted that the deceased was a workman who was aware of health and safety procedures, who had relevant experience and qualifications, and whose work was not wholly directed and controlled by Kevin Bowie in respect that he could refuse to work as instructed, and had done so in the past. The statement of Kevin Bowie disclosed that there had been a previous instance when the

deceased, having experienced difficulty fitting a harness, had discarded it, saying "I've never worn one yet". On the evidence, the deceased had been alone in the overhead basket, operating the controls of the cherry picker and, in particular, the orientation of its arm over the adjacent roadway. It was submitted that, in these circumstances, the deceased's actions had been unsafe, he had displayed a reckless disregard for his own safety, had placed himself in danger, had increased the risk of the situation, and had thereby contributed to the accident. Accordingly, in these circumstances, a finding of contributory negligence was appropriate. Under reference to the case of *Cameron* v *M & K McLeod Limited* [1995] GWD 34-1721, it was submitted that the facts of that case indicated that even if there was a finding that the deceased had been working under a system of control operated by Kevin Bowie, a finding of contributory negligence to the extent of 40% would be appropriate.

Analysis and decision

[48] I found each of the witnesses who gave evidence to be credible and reliable.

(i) Transmissible solatium

[49] I am satisfied on the evidence that, when thrown violently from the basket of the cherry picker, the deceased sustained significant head and facial injuries, and was conscious and in significant pain for some 50 minutes before his death at 11.05am. During that period he was heard to be screaming and attempting to stand up and, for a period of some 30 minutes, underwent resuscitation attempts by attendant paramedics. He sustained various lacerations and abrasions, fractured teeth and a fractured mandible, some 12 fractures to his ribs, a fracture of the sternum, and multiple internal soft tissue injuries.

In these circumstances, having regard to the catastrophic nature of his injuries, it is reasonable to infer that the period immediately prior to death would have been painful, frightening and traumatic. Having regard to the Judicial College Guidelines for the Assessment of General Damages in Personal Injuries Cases, and the case of *Dyson* v *Heart of England NHS Foundation Trust*, to which I was referred, I am persuaded that a fair and reasonable award for transmissible solatium, in these circumstances, should be fixed at the sum of £5,000.

(ii) 2011 Act, section 4(3)(b)

[50] It has been settled, since *Hamilton* v *Ferguson Transport (Spean Bridge) Ltd*, that in assessing the appropriate levels of award for loss of society, judges should have regard to jury awards in comparable case as well as to past judicial awards. Awards by juries must be accorded appropriate respect.

[51] On the evidence presented, the deceased would appear to have been a remarkable young man who brought people together and was much appreciated by his local community. I accept that in the context of strong family ties, his relationships with the pursuers were particularly close, and that, in consequence, his death has had a profound effect, and has especially affected them.

[52] I accept, that, as one would expect to be the norm in young adult life, the deceased had left home, had spread his wings, and had set out to fulfil his own aims and ambitions. Against that however, I also accept that he had remained close to his family. On the evidence, he kept in regular touch, and visited the other close family members regularly. I do not accept, therefore, that he had, in effect, become estranged or distanced from his family, or the community on the Isle of Bute, to any extent that was more than would be

expected to be the norm in that context. In particular, I note that his decision to live in Glasgow was based principally on the location of his workplace at that time, rather than on a distinct wish to remove himself from proximity to his family.

[53] It was submitted that no distinction should be drawn between the referable awards to be made in respect of the first and second pursuers on the basis that although they were no longer a couple, they remained good and, on the evidence, best friends, and that each retained an equally strong bond with the deceased. They had shared care and custody of him as he grew up, and each had a comparable deep and lasting bond with him. I accept that characterisation, and see no reason to differentiate between them in respect of the distress, anxiety, grief, sorrow, and loss experienced by each of them.

[54] I note that section 4(4) of the 2011 Act provides that the court, in making an award under paragraph (b) of subsection (3) is not required to ascribe any part of the award specifically to any of the sub-paragraphs of that paragraph. Having regard to the cases of *Scott* v *Parkes,* in which a jury awarded £86,000 (present day value, £98,900) to a bereaved mother in respect of the death of her son, *Young* v *MacVean,* in which the equivalent award, following the death of a son who was 26 years of age, was £80,000 (present day value, £92,000) *Anderson* v *Brig Brae Garage Limited*, in which £80,000 (present day value, £91,200) was awarded, and *McCulloch and others v Forth Valley Health Board,* in which £80,000 was awarded, but taking into account, in this case, the particularly special significance of the first and second pursuers' loss, having regard to the deceased's relatively young age, the additionally catastrophic and violent manner of his death, and the depth of the extremely close bonds between both parents and their son, all contributing to the significant impact of his death on them, I assess the referable awards of damages in respect of each of the first and second

pursuers in the sum of £100,000. Of these sums, I would attribute one half to the past in each case.

[55] I was referred to the case of *McCulloch and others v Forth Valley Health Board* for the propositions that in the determination of appropriate awards made in respect of step-relations, it was not appropriate to differentiate between such relationships and equivalent relationships of the blood, on that distinction alone, and that the decision in that case was an indicator that such awards should not be fixed at a significantly lower relative level. I accept that analysis.

[56] In relation to the third pursuer, I accept the evidence that, as the deceased's half-sister, her relationship with him was an extraordinarily close and loving one, that he had been a significant part of her life since her birth, that they had been in regular contact throughout her life, and that her resulting loss is likely to be a lasting one. The intensity of that loss is illustrated by her need for counselling, and, in that regard, I attach weight to the evidence of Helen McLachlan in relation to her prognosis as to the future emotional impact on the third pursuer of her loss. Having taken into account the decision in the case of *Currie* v *Esure,* in which the referable award was £22,500 (present day value, £25,875), I consider that the facts of the instant case indicate that the third pursuer's bond of exceptional closeness and affection with the deceased was of an extraordinary nature, and of a degree of intensity significantly greater than that under consideration in that case. Given that context, and assessing the appropriate level of damages on that basis, attaching due weight to the whole referable circumstances of the case bearing on the third pursuer's extraordinarily intense grief and loss, I find that a fair, just and reasonable award is one in the sum of £45,000, of which I would attribute one half to the past.

[57] As regards the fourth pursuer, the deceased, from the age of 9 years, had been an integral part of his family life. The deceased had lived with him and the second pursuer on a shared and equal basis with the first pursuer. The fourth pursuer and the deceased had shared common interests and had spent much leisure time together, and he considered the deceased to be his step-son. I accept the fourth pursuer's description that the deceased's death had "left a hole in the family", and also that, for him personally, the death has been of especial significance, given the very close bond between them. I attach no weight to the proposition that the fact of the fourth pursuer's late entry into the action is somehow demonstrative of a lesser bond between him and the deceased. In the absence of any explanation in that regard, in a situation where there could be a number of cogent or understandable reasons, I do not consider it appropriate to draw any adverse inference, and would consider it speculative to do so. Adopting the approach considered appropriate in *McCulloch and others v Forth Valley Health Board*, on my assessment of the extent of the fourth pursuer's loss in this regard, I assess the appropriate award of damages in the sum of £70,000, of which sum I would attribute one half to the past.

(iii) Contributory negligence

[58] It was accepted that the primary cause of the accident was the failure, by the driver of the first defenders' coach, to avoid an obvious hazard. In relation to the nature of the deceased's working relationship in the period immediately prior to his death, I accept the evidence that Kevin Bowie was the person responsible for arranging the work which was to be carried out by the deceased, for controlling what was to be done, and for providing the equipment, other than the deceased's own brushes, scrapers and the like, which was necessary in order for that work to be carried out. I attach particular weight to the evidence

that it was Kevin Bowie who sourced and organised the provision of the cherry picker for the job in question. A number of the witnesses spoke of the deceased working "with" Kevin Bowie, but, in the context of ordinary non-legal usage, I attach no particular significance to that description, which I consider is properly to be understood simply as denoting the person for whom work is done, rather than a specific contractual relationship.

[59] It is accepted that there was no system of traffic management, in the form of traffic cones, around the cherry picker at the referable time. While it is also accepted that the deceased was not wearing a harness, there was no evidence to the effect that he had been provided with one for the work in hand, or what difference the wearing of a harness would have made to the consequences of the accident. On the basis that Kevin Bowie was in control of the work to be carried out, I accept that there appears to have been a failure on his part in assessing how the work involved was to be carried out safely. Under reference to the cases of *Lyell* & *Sun Microsystems*, *Ruddy* v *Monte Marco & M & H Enterprises Limited*, and *Toner* v *George Morrison Builders*, the issue is to be considered on the basis that in assessing the relative duties of care owed in such a delictual context, the technicalities of employment are less relevant than the issue of control. Against that background, a person who is in a position to direct and control another person within the context of a work relationship must be held to owe a duty of care in that regard. On that basis, that person's position is to be viewed as being analogous with that of an employer at common law. On my assessment of the whole evidence relating to the working relationship between Kevin Bowie and the deceased, I find that Kevin Bowie was in *de facto* control of the deceased's working activities and that, on that basis, the indices of employment were present, and that, at the relevant time, the deceased was working under a contract of service, rather than a contract for services.

[60] Separately, the evidence which I accept indicates that the deceased had an awareness of the need to work safely, and had previously refused to work in a manner required of him which he considered to be unsafe. I do not accept, therefore, that it was part of the deceased's character that he would work in a manner which indicated a reckless disregard for risk in his working environment. In that context, I consider that the fact that the deceased had told his mother that he felt safe when working in the basket of the cherry picker is properly to be regarded as an assessment by him based on his past experience, which, in turn, it would be reasonable to infer, would have been a factor which would have informed his decision-making in that regard. On the basis that the statements by Malcolm Dryden, and, in particular, that by Kevin Bowie, to the effect that the deceased had said, in relation to a safety harness, that: "I've never worn one yet", constitute hearsay evidence, I do not consider their evidential effect to be such as to undermine my conclusions on the other evidence which I accept. Although some emphasis was placed on the fact that the deceased held a training certificate referable to the use of a mobile working platform and harness inspection and fitting, no evidence was led as to the content of the referable training. In that regard, the issue of whether the training undergone, in the context of a boatyard, was significantly referable to the operation of the particular cherry picker in question, in an urban environment, was not explored in the evidence. In that situation, it is not implicit that training provided in the context of a boatyard was necessarily materially relevant to an urban environment. I am satisfied that the facts and circumstances of this case are not comparable with those considered, for example, in the cases of *Wallace* v *Stewart Homes (Scotland) Ltd & another*, *Toner* v *George Morrison Builders*, or *Cameron* v *M & K McLeod Limited*, in which, variously, experienced workmen were found to have acted in the face of obvious risk and readily apparent danger. On my assessment of the evidence, that is not the

context in which the deceased's accident occurred. In the whole circumstances, having regard to the particular facts of this case, and, in particular, given the nature of the working relationship between the deceased and Kevin Bowie, I find that, in relation to the accident which caused his death, the deceased was not contributorily negligent.

Conclusion and disposal

[61] For the reasons I have stated, having regard to the whole facts and circumstances referable to each, I assess the following awards of damages to be fair, just and reasonable.

[62] In the case of the first pursuer, as executor, I award transmissible solatium in the sum of £5,000, with interest to the past from 27 September 2018, at 8% *per annum*, until the date of decree. I award damages in respect of funeral costs in the agreed sum of £4,994. I understand that payment of that sum was made on 6 November 2018 and, on that basis, I award interest to the past from that date, at 8% *per annum*, until the date of decree.

[63] In relation to the first pursuer, as an individual, and the second pursuer, I award damages in respect of loss of society, under section 4(3)(b) of the 2011 Act, to each, in the sum of £100,000, with interest at 4% *per annum*, on half thereof, from 27 September 2018 until the date of decree.

[64] In relation to the third pursuer, I award damages in respect of loss of society in the sum of £45,000 with interest at 4% *per annum*, on half thereof, from 27 September 2018 until the date of decree.

[65] In relation to the fourth pursuer, I award damages in respect of loss of society in the sum of £70,000 with interest at 4% *per annum*, on half thereof, from 27 September 2018 until the date of decree.

[66] I reserve, meantime, all questions of expenses. The case will be put out By Order to allow parties to consider that issue, and the calculation of interest due.