

## Legal Update: Scottish Court of Appeal re-affirms law on secondary victims

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**The Scottish Court of Appeal has recently reaffirmed the law on secondary victims by ruling that damages can be claimed only when an illness is the result of the direct perception of a distressing event.**

In *Martha Young v Arthur MacVean*, a bereaved mother sought damages as a secondary victim because she saw the vehicle which hit and killed her

26-year-old son.

She was awarded almost £250,000 at first instance. However, the decision was overturned on 29 September because, when she saw the accident, she was not aware her son was involved. The realisation - and the shock - came later.

### The case

Young's son was killed on his way to the gym. A vehicle, driven by the defender, mounted the kerb and struck him. Young, who had arranged to meet her son at the gym, saw the damaged car. At the time, unaware her son had been hit, she actually felt relieved that he could not drive. After her exercise class, she heard that a young boy had been killed outside the building and she realised her son had not arrived at the gym. She became increasingly hysterical, most notably when police officers confirmed her his death shortly afterwards.

BTO acted for the defender both at first instance and at the appeal. It challenged the idea that Young was a secondary victim and it argued that the award made for "loss of society" was excessive.

### The shock

The law has long recognised that secondary victims are entitled to claim damages if they satisfy strict conditions. In this case, there is no doubt that the pursuer had a close tie of love and affection with her son and that she suffered a psychiatric injury. However, the appeal court drew a parallel with the Hillsborough cases.

In Sheffield, relatives of primary victims saw images which provided "the matrix for imagined consequences giving rise to grave concern and worry, followed by a dawning consciousness over an extended period that the imagined consequence had occurred, finally confirmed by news of the death".

In this case, Young had an initial feeling of relief, which later gave way to increasing concern and worry. She did not suffer nervous shock as a result of viewing the aftermath of the car accident. For her to be considered a secondary victim, the injury needed to be caused by the shock of what she perceived with her own senses. Shock cannot be compensated if it occurred when a third party broke the news to you.

The issue of secondary victims has been the subject of much judicial scrutiny over the years. The distinctions are described as artificial or, as Lord Steyn said in *Frost*, "a patchwork quilt of distinctions which are difficult to justify". However, the courts have taken the view that it is a matter for Parliament - not them - to address. And the Scottish Law Commission actually rejected a proposal for reform in this area.

### **The compensation**

Although the mother failed in her claim as a secondary victim, she is still entitled to an award for the distress, grief and loss of society suffered as a result of the death under the *Damages (Scotland) Act 2011*.

In England and Wales, the figure for bereavement is a fixed statutory sum of £12,980. There has been much publicity about the high awards made in Scotland for what is essentially the same head of claim.

At first instance, Young was awarded £80,000, which bto argued was excessive. However, the appeal judges were reluctant to interfere with the award made by the judge at first instance as he had had the benefit of hearing the evidence first-hand. They also noted that the loss of the deceased had a "special significance" because Young had also suffered the untimely loss of her husband in a helicopter crash in the North Sea.

### **Where now?**

If left to stand, the first instance findings would have threatened to erode the long-standing principles in relation to the law on secondary victims. The decision of the appeal court should, for now at least, avoid the floodgates being opened in other cases of this type.

Regarding the quantification of damages in Scottish fatal claims, that very much remains a moveable feast.

**By Carly Forrest, partner and solicitor advocate within BTO's insurance representation team**

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