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Insurance News

You'll always be someone's child

The case of *Brenda Gray and Others v The Advocate General for Scotland* raises an interesting issue over the considerations to be applied when determining whether a Pursuer fits within the definition of a child for the purposes of the Damages (Scotland) Act 2011 (the 2011 Act). The case was taken to debate by the Defender on a technical point over whether three of the Pursuers had title to sue.

By way of background, the Pursuers were the family members of the late Ian Hunter, who died shortly after raising proceedings due to his being diagnosed with mesothelioma as a consequence of his employment as a dock worker. The family sought damages for 'loss of society' under s.4 (3) of the 2011 Act.

The First Pursuer (the deceased's partner) and the deceased met in March 2001 and moved in together in July 2001. The First Pursuer's son and daughter (who were also Pursuers in the case) were aged 33 and 36 respectively at this point. Moreover, another of the Pursuers (the First Pursuer's grandchild) was 19 years old. The Pursuers' propositions were that they had been accepted by the deceased as a child/grandchild in terms of s.14 (1) (b) and (d) of the 2011 Act.

The Defender challenged the relevancy of the claims of these Pursuers on the basis of their ages. It was argued that given their ages at the time the First Pursuer and the deceased met, they could not be described as a 'child' in the normal sense of the word. The Defender submitted that the definition of 'child' in terms of s. 14(1) (b) and (d) of the 2011 Act was defined by reference to age, personal status and the element of 'bringing up.' Their argument was that as there was no age definition of 'child' in the 2011 Act, the age a person ceases to be a child ought to be determined by the principles of Family Law.

The Pursuers argued that the definition of 'child' is not age restrictive. The wording of the 2011 Act – '*accepted by the deceased as a child of the deceased's family*' - includes a person who may be an adult at the time the acceptance takes place.

The case raised a novel issue. The Court considered that 'Family Law' was a broad term and within various Family Law statutes a child could mean a 16 year old, an 18 year old, or even in certain circumstances, a 25 year old. The Defender's proposition that the point at which a person ceases to be a child should be determined by reference to Family Law therefore provided no assistance to the Court.

Furthermore, the Court held that if an age restriction was to apply, it would also apply to natural children, disqualifying them from claiming damages where the death of the parent occurred beyond the age cut off point. That would seem inherently unfair. In any event, the Court observed that the important date for determination of the issue was not the date that the First Pursuer moved in with the deceased, it was the date of the death of the deceased.

Ultimately, the Court held that the definition of what is meant by a 'child' for the purposes of the 2011 Act is not age restrictive. It is correlative of relationship, which is a matter of fact. In light of this, the Defender's motion for dismissal was refused and all the Pursuers' claims allowed to proceed to proof on their merits.

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The Court favoured the argument that no matter how old you are you will always be someone's child. Whilst the Defender's argument that a 'child' is defined by reference to age, personal status and the element of 'bringing up' was not accepted, these are factors which will undoubtedly be important in determining the true nature of the relationship of the Pursuers with the deceased, and whether they were indeed 'accepted' as a child or grandchild. However, evidence will be required on these factors, and so whilst the Defender failed in their motion for dismissal, it is still open to them to argue at proof that the Pursuers were not 'accepted' as children/grandchildren of the deceased.

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Teeing off, on the pleadings

When you read of a case involving an accident on a golf course you may expect the case to concern an errant golf ball striking an innocent bystander. Not so in the case of *Colin Taylor v Des Quigley & Others [2016} CSOH, 178* which concerned of all things, a manhole cover. It also provides an analysis of the approach to be taken to the pleading of personal injury actions.

The Pursuer was a member of the Colville Park Golf Club, Motherwell. On 12 June 2011 he stepped on a manhole cover between the club house and the first tee. He fell partly into the manhole. He sued the First - Eighth Defenders who were members of the executive board of the golf club, together with the Ninth Defenders who were the owners of the land and the employer of the Second Defender.

The Court was tasked, at debate, with determining whether the Pursuer had pled a relevant case in law against the Defenders. The Pursuer sued each of the members of the executive board on the basis that they each personally owed him a duty of care and that they had assumed responsibility for matters of health and safety at the golf course. His proposition was that the pleadings were sufficient to give rise to culpability on the part of the Defenders to entitle him to proceed to proof.

The Defenders' position was that the action ought to be dismissed. The First to Eighth Defenders sought to rely on the ordinary rule in law that a member of an unincorporated organisation cannot sue the club or its fellow members as to do so would effectively amount to suing himself. Their argument was that although the Pursuer was suing them in a personal capacity, he had not set out the relevant factual basis from which they were said to owe him a duty of care. The mere fact that they happened to be members of the executive board of the golf club was not sufficient. In order for personal liability to attach to each or any of the members there would have to be adequate averments that they had actual knowledge of the defective condition of the manhole cover. There were no such averments to that effect in the Pursuer's pleadings.

The Court's judgment is both cutting and succinct. It held that no duty of care was owed and suggested that despite the Pursuer having sought to 'dress up' his pleadings there were no pleadings setting out the basis of the case that there ought to be individual liability on the part of the First to Eighth Defenders. The Pursuer had not pled a case that would take him out with the application of the ordinary rule that it is incompetent for a member to sue another member of an unincorporated organisation as to do so would effectively be to sue himself. Standing this, the claim against the Ninth Defender, as the employer of the Second Defender, was also irrelevant.

Nowadays it is unusual to see an action for personal injuries taken to debate by a Defender given that the Rules of the Court of Session for personal injury actions provide for abbreviated pleadings. Nevertheless, abbreviated pleadings do not detract from the obligation to plead a relevant case in law.

The case highlights that even in personal injury actions where the presumption is that a proof or jury trial will be allowed, a relevant case still requires to be pled otherwise the Pursuer risks being taken to debate. The case also illustrates that if the pleading of a case is deficient the Pursuer's case can often end up out of bounds….

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We are Family

In the case of *SD V Graham's Dairies Ltd [2016] CSOH 151* the Court recently considered a point of statutory interpretation when determining whether the Pursuer's partner was entitled to a claim for services.

The case arose out of an accident at work in August 2014. Whilst delivering milk to a supermarket, the Pursuer was trapped against the side wall of his lorry by 9 or 10 wheeled cages which were loaded with cartons of milk. The circumstances of the accident were largely admitted and the Proof was restricted to causation and quantum.

Whilst the main issue in the case was the causation of injury, in assessing quantum, the Court considered whether the Pursuer's partner qualified as a 'relative' for the purposes of a services claim under section 8 of the Administration of Justice Act 1982 (the 1982 Act).

In terms of s.8 of the 1982 Act a claim can be made for 'reasonable remuneration' for 'necessary services' provided by a 'relative' to an injured person as a consequence of their injuries (i.e. assistance with domestic and personal tasks). The 1982 Act defines a relative in s.13(1) as *"any person, not being the spouse of the injured person, who was, at the time of the act or omission giving rise to liability in the responsible person, living with the injured person as husband or wife"*.

At the time of the accident, and indeed the Proof, the Pursuer was married, but separated from his wife. He had a partner with whom he had been in a relationship since around November 2012. The Pursuer and his partner had a daughter together who was born in November 2013. The Pursuer and his partner did not live together. The reason for this was his partner's decision to accommodate the wishes of her daughter, aged 10 years, from her previous relationship.

The question in this case was whether the Pursuer's partner could properly be defined as a relative for the purposes of the 1982 Act. In order to do so, the court had to determine whether the Pursuer's partner was '*living with the injured person as husband or wife'.*

The Defender's argument was that the claim for services ought to be rejected on the basis that the parties did not live together and the Pursuer's partner could therefore not fall within the definition of a relative. Reference was made to the case of *Lawrie v Lanarkshire Health Board* 1994 SLT 633 in which the Court had refused a claim for services on the basis that the Pursuer's girlfriend did not live with him. It ought to be pointed out though that in *Lawrie* the Court did not consider this issue in any great depth.

"...the case may be indicative of the Court being willing to take a more modern approach to the definition of 'living as husband and wife".

The Court analysed the quality of the Pursuer and his partner's relationship. The factors taken into account by the Court included the manner in which they lived together and their reason for doing so; the extent to which the couple were committed to the relationship and the amount of time spent together; social and financial interdependence; and the presence of children. The Court was satisfied that the above factors were present and held that the Pursuer's partner qualified as a 'relative' in terms of the 1982 Act. The Court held that the issue had to be assessed against a background of social norms and modern living. The Pursuer was awarded £7,686 plus interest for this head of claim.

On its facts one may have anticipated the Court would hold that the Pursuer's partner did not fall within the definition of a relative given the couple did not live together. However, the case may be indicative of the Court being willing to take a more modern approach to the definition of 'living as husband and wife'. The case provides examples of the type of factors the Court will take into account when determining whether a Pursuer's partner falls within the definition of a relative for the purposes of the 1982 Act.

A final point to take away is that the judgment may be of a wider application and on the face of it could also apply to claims for the loss of personal services made under s.9 of the 1982 Act which is drawn sharply into focus in fatal claims. Whilst each case would turn upon its own facts, it is a point to bear in mind when considering the potential value of a services claim.

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Litigating in the slow lane

The case of *Brown v Aviva Insurance, [2016] SC Liv 84* concerns a low speed impact case and the issue for sanction for Counsel in that type of action. This is a decision from Livingston Sheriff Court. It is not a decision of the All-Scotland Personal Injury Court and has to be viewed in that context.

Ordinarily, due to their usually modest value, low speed impact road traffic collisions are not often the subject of judicial opinion. This is particularly true in Scotland where one of the last notable decisions (**Spencer v Barron**) was in 2008 and was not formally reported. Little appears to have changed as can be seen from the recent decision of *Brown*. Even then, the Court in *Brown* only dealt with the facts of the case whilst considering whether to grant sanction for the employment of Counsel.

The *Brown* case arose out of a typical rear end shunt. It went to proof (trial) on causation only, quantum having been agreed at £1,823.80. Judgment was ultimately granted in favour of the Pursuer. The Defenders contended that the accident occurred at such a low speed that no injury could have been caused. This was at odds with the Pursuer's evidence that he had sustained injury.

"....where Counsel has been instructed on behalf of one party it does not follow that the Court will automatically grant sanction for the opposing party to employ Counsel."

The decision is a reminder of the difficulties that Defenders face when challenging claims where they consider the accident circumstances could not have caused the alleged injury. The Sheriff in *Brown* considered that if the Defenders' contention was that no injury could have occurred was correct then the logical conclusion would be that the Pursuer was lying about suffering an injury.

It is not possible to tell from the Sheriff's note whether the Defenders led evidence from both medical and engineering experts challenging the causation of injury. Even if such evidence was led, the Pursuer's credibility seems to have been critical in deciding the case in his favour.

However, the case has a rosier conclusion for Defenders in respect of sanction for Counsel. Regular readers of Insight and those keeping an eye on legal developments in Scotland will be aware that this is one of the hot topics resulting from the 2014 Court Reforms. In *Brown* both Pursuer and Defenders were represented by Counsel. Unusually it had been the Defenders who instructed Counsel first. The rationale behind the Defenders' instruction of Counsel is not touched upon in the Sheriff's note.

The Pursuer accepted that Counsel would not have been instructed had the Defender not first instructed Counsel. The Pursuer moved for sanction on the grounds of importance to the client and equality of arms. The Sheriff found against the Pursuer on both of these points. In respect of importance to the client it was observed that they had been happy to proceed to the hearing without Counsel prior to the Defenders instructing Counsel. That ground was therefore dismissed.

On the equality of arms point, the Sheriff noted that this only applied where the other side gained an unfair advantage. He considered that as the case could have been presented '*with relative ease even by an inexperienced solicitor*' the instruction of Counsel by the Defenders did not give them an unfair advantage. In light of this, sanction for the employment of Counsel was refused.

The case serves as a useful recent reminder that in cases where Counsel has been instructed on behalf of one party it does not follow that the Court will automatically grant sanction for the opposing party to employ Counsel. This decision is useful to note in particular for Solicitor-Advocates who may find this argument advanced against them in matters where they are the principal fee earner. It may be difficult for a Pursuer to argue that there is any unfair advantage in such an arrangement. This may be the subject to further judicial comment as time progresses.

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Show me the money

The case of *Eileen Collie v Tesco Stores Ltd 2016 CSOH 149* provides a recent example of the approach taken by the Auditor of the Court of Session ('the Auditor') in dealing with a Pursuer's Account of Expenses ('the Account') in which fees were omitted from the Account.

Collie was a personal injury action set to proceed to jury trial. It settled prior to trial and the Pursuer lodged an Account within the prescribed four month period. Prior to the Account being taxed (assessed) by the Auditor it became apparent that elements of both junior and senior counsels' fees had been omitted from the Account. The Pursuer made an application to the Court to allow an amended Account to be lodged, but subsequently withdrew this application upon Counsel's advice. The view was taken by the Pursuer's Counsel that the Auditor would address the omission. The Auditor failed to include the omitted entries in his report taxing the Account and the Pursuer submitted a Note of Objections to the Court.

The Pursuer's argument was that it was unreasonable for the Auditor, given that vouching for Counsels' fees had been provided and the fact that the Auditor had the power to include omitted charges, for him to refuse to permit the vouched for fees in his report. The Auditor's position was that whilst he had an innate power to amend an included fee that did not include the power to insert omitted fees.

The principal issue for the Court was whether the Auditor had the inherent power to amend an Account to include omitted expenses. The Pursuer argued that the Defender had copies of the omitted fee notes, so would have been aware of the Auditor's duty to include them and could not argue there being a lack of fair notice.

In contrast, the Defender argued that the matter had to be determined by Chapter 42 of the rules of the Court of Session. Their proposition was that it was for the Court to determine whether an amended Account should be received late and, if so, upon what conditions. They argued this was not a decision for the Auditor to take.

The view of the Court was that the case concerned the scope of the Auditor's power to tax the account lodged. It held that the Auditor's discretionary power did extend to permitting omitted sums or supporting vouchers, or both. The Court accepted that the Auditor, when determining whether to insert omitted charges from an Account, could take account of a multitude of considerations, including but not limited to, a lack of notice and any prejudice arising from the taxation process or the parties' conduct in the taxation process. Ultimately, the Court referred the case back to the Auditor for him to exercise his discretion on whether to allow the omitted fees to be included within the Account.

The case reiterates the point that the Auditor has the implicit power to increase fees or include those omitted at his discretion. It also serves as an example of the difficulties that can be encountered if an Account is not properly framed and the additional expense that can be incurred in seeking to argue this before the Court.

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Update

Discount rate for personal injury claims

In the face of legal action from the Association of Personal Injury Lawyers (APIL), the Government is set to announce the result of its review of the discount rate for personal injury claims. The rate has been set at 2.5% since 2001. It is intended to reflect the net real return on the investment of damages based on yields from index-linked Government stock. However, due to the low rate of return on investments, it has been argued that the current rate is too high, leading to injured people being undercompensated.

The Government's announcement was scheduled to be made on 31 January 2017. However, on 27 January 2017, the Lord Chancellor advised the review has taken longer than anticipated. In light of this, no announcement will be made on 31 January 2017 but she 'remains committed' to making an announcement in February 2017. As yet, a date has not been scheduled.

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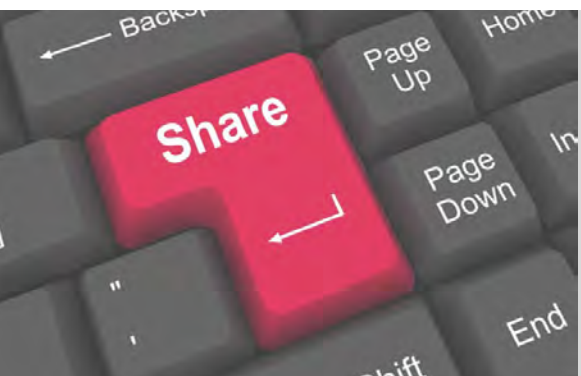

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