article 14, this is unlikely to prove difficult. So it will not be a particularly great step for the Court to hold that article 12 is, at least in principle, available to same-sex couples. It is difficult to believe they would deny its protections to Dutch, Belgian or Spanish married same-sex couples (complaining for example, on behalf of all couples, about unjustified limitations on marital capacity). The Misses Burden may well have started a ball rolling in a direction they dislike intensely. Victoria Gillick could have warned them.

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Parents and Parenting: *McGibbon v McAllister*

It is not unusual for courts to be asked "who" is a parent but less common for them to be asked "what" is a parent? That in essence was the issue in *McGibbon v McAllister*[1] where Lord Brodie had to consider the meaning of the word "parent" in paragraph 1(b) of Schedule 1 to the Damages (Scotland) Act 1976. The decision may be regarded as of limited importance since the particular problem it raised has now been addressed by the Family Law (Scotland) Act 2006 but it nonetheless highlights interesting issues about the pace and nature of social change and legal reform.

A. THE FACTS

The pursuer, Paul McGibbon, sought damages in terms of section 1(4) of the Damages (Scotland) Act 1976 arising from the death of Mark Hardie as a result of a car accident in July 2004 in which the deceased was a passenger. At the time of the accident, the car was being driven by the defender, Graeme McAllister. Mr McGibbon had cohabited with the deceased's mother since 1989, had cared for the deceased as a child and enjoyed a close relationship with him. Section 1(4) of the 1976 Act provides for damages for patrimonial loss to be awarded to a person who was a relative of the deceased, "relative" being defined in terms of Schedule 1 to the Act. Mr McGibbon sought damages as the *de facto* stepfather of the deceased on the basis that he had been cohabiting with the deceased's mother, had "accepted the deceased as a child of the family and was accepted by the deceased as a stepfather".[2] The 1976 Act, at the time of the accident, included within the definition of "relative" a parent or child of the deceased.[3] It included any child who had been accepted by the deceased as a child of the family[4] but it did not provide for the related situation

1 [2008] CSOH 4, 2008 SLT 459.
2 Para 2.
3 Sch 1 para 1(b). Step-parents and step-children were included: para 2(a).
4 Sch 1 para 1(c).

of a person who had been accepted as a "parent" by the deceased or who had acted as a parent towards the deceased. While, as the result of a previous amendment,[5] the list of those people who qualified as relatives included an unmarried cohabitant of the deceased,[6] the list did not expressly include a person such as Mr McGibbon who had established a relationship with the child of his cohabitant. This possibility has now been expressly brought within the scope of the legislation by means of the Family Law (Scotland) Act 2006,[7] but in order to have title to sue it was necessary for Mr McGibbon to establish that he fell within the definition of "relative" in the 1976 Act prior to that amendment.

The pursuer submitted that despite not being the natural father of the deceased he was nonetheless a "parent", referring in support to a definition of parent in the Oxford English Dictionary as "a person who holds the position or exercises the functions of a parent; a protector, guardian".[8] Although he was neither a natural parent, nor a legal step-parent, his argument was that he was in fact a parent of the deceased on the basis of the parental role he had fulfilled and the closeness of the relationship he had established with the deceased from an early age. He argued further that not to treat him as a parent would amount to discrimination on the basis of marital status and that such discrimination would be contrary both to the overall policy of the Damages (Scotland) Act 1976 and to articles 8 and 14 of the European Convention on Human Rights. The defender in turn submitted that the legal definition of parent in terms of the 1976 Act was clear and closed. In order to be regarded as the deceased's parent Mr McGibbon required to be the natural father, the adoptive father or the stepfather (i.e. married to the deceased's mother) and as he did not fall into any of these categories he was not covered by the statutory provision. It was acknowledged that there might be an anomaly in the Act in that it included a person who was accepted as a child of the family but did not include a person who accepted the deceased as a child of the family; in other words it provided for *de facto* children but not *de facto* parents.

B. THE DECISION

In his analysis of the issues, Lord Brodie undertook a process of statutory construction, looking first at the "ordinary" meaning of "parent" and then considering its application within "a human rights dimension".[9] He recognised that his decision was likely to be of limited impact in that this so-called anomaly had been addressed by the 2006 Act but only after the date of the accident and without retrospective effect. The particular situation of Mr McGibbon would in future fall within the scope of the definition of relative in the 1976 Act. His comments, however, raise interesting issues about the meaning of a parent, about the effect of human rights legislation and about the ongoing relationship between family law and social expectation.

5 Administration of Justice Act 1982 s 14(4).
6 Sch 1 para 1(aa).
7 Sch 1 para 1(ca).
8 *McGibbon* at para 12.
9 Para 17.

According to Lord Brodie, within the meaning of the 1976 Act, the ordinary meaning of a parent was clear, being a natural or adoptive father or mother or a stepfather or stepmother. He went on to consider the various amendments that had been made to the legislation and the fact that there have been significant social changes which affect the way in which families are formed and households live together. While recognising that "cohabitation and the consequence that adults live in households with their partners' children have become very common as social phenomena"[10] he concluded that this in itself was not sufficient to change the ordinary meaning of the word "parent". In considering social developments, he concentrated primarily on the relationship between the adults and concluded that such changes do not "have the result that the fact that a couple have married or entered into a formal civil partnership falls to be ignored for the purpose of determining parties' rights or that for every purpose the members of an unmarried cohabiting couple are to be regarded as if they were married".[11] Despite social changes, he considered that a distinction should be maintained between the formal relationships of marriage and civil partnership and the informal relationship of cohabitation.

Lord Brodie adopted a two-stage approach and, having considered the ordinary meaning of parent, he went on to view the concept within its human rights context. This required consideration of article 8 of the ECHR, which gives the pursuer a right to respect for his family life, together with article 14, which has the effect that any statutory provision which promotes respect for family life must not "draw a distinction on grounds such as sex or sexual orientation without good reason".[12] While recognising that article 8 did not require the state to provide a right to compensation as the 1976 Act does, where such a right was provided it should not discriminate in a way contrary to article 14. Despite expressing some doubts as to whether "marital status" does or should fall within the scope of article 14, he concluded that not "to confer title to sue on someone in the position of the pursuer" would amount to discrimination in terms of that article.[13] In that context, it was possible to interpret the word "parent" in a way which would include someone, like the pursuer, who "as a matter of fact fulfilled the roles usually associated with parenthood".[14] In this way, he accommodated the perceived requirements of human rights' principles without questioning the underlying, ordinary meaning of the word.

C. ANALYSIS

Lord Brodie commented that the process of giving the word "parent" its ordinary or conventional meaning "does not present real difficulty".[15] It might be argued that his confidence was to some extent misplaced. At one time, there was little

10 Para 18.
11 Para 18.
12 *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 at 565E per Lord Nicholls.
13 *McGibbon* at para 19.
14 Para 22.
15 Para 18.

legal uncertainty about the parentage of a child: the parents were the biological or adoptive parents. This certainty, however, has been significantly challenged by medical advances and the development of assisted reproduction. In the context of artificial insemination by donor (AID), the father of the child is not the donor (the biological father) but is instead the person who acts as the social father or intended social father (i.e. the husband or partner of the woman who is inseminated) and where there is no person in that role, then the child has no legal father.[16] In terms of the mother, the approach is relatively consistent in that the woman who carries and gives birth to the child is treated as the child's legal mother.[17]

In Scots family law, there is a split between being a parent and having the legal ability to act as a parent, i.e. to exercise parental responsibilities and rights.[18] Not all parents will have parental responsibilities and rights and not all those who have the responsibilities and rights will be legal parents. In terms of family law, recent areas of reform and proposed reform have focused on the granting of parental responsibilities and rights rather than on the issue of parentage itself.[19] In employment law, within the context of family-friendly provisions, a broad definition of those who are entitled to parental or paternity leave is included in order to reflect the *de facto* parenting responsibilities of a range of adults beyond those of the natural or legal parents.[20] To a large extent these developments reflect an emphasis on parenting rather than on parents. In this decision, as Lord Brodie is interpreting the word "parent", his focus is narrower and looks at the legal status of parent rather than at what it may mean in practice to be a parent. His approach pays too much attention to the relationship between the adults. If we are in fact committed to a child-centred approach, then it would be preferable, in identifying whether or not a person is a parent, to concentrate on the relationship between the adult and the child rather than on the existence and legal nature of the adult relationships. By contrast, fuller analysis of the term "parent" can be found in the opinion of Baroness Hale in *In Re G (Children) (Residence: Same-Sex Partner)*.[21] In particular, her acknowledgement of the category of "social and psychological parenthood",[22] a category into which the pursuer in *McGibbon* would fit, further challenges Lord Brodie's conclusion that the ordinary meaning of "parent" is a straightforward matter.

Rapid change in society, in reproductive technology and in some areas of law, has resulted in legal amendments on a sometimes *ad hoc* and reactive manner without the opportunity to reflect on underlying concepts which may also need to adapt. Social changes are well documented as transforming the way in which households and families have developed. Marital breakdown, the growing incidence

16 Human Fertilisation and Embryology Act 1990 s 28.

17 Human Fertilisation and Embryology Act 1990 s 27.

18 Children (Scotland) Act 1995 ss 1 and 2.

19 See e.g. Children (Scotland) Act 1995 s 3(1)(b), as amended by the Family Law (Scotland) Act 2006 s 23.

20 Maternity and Parental Leave etc Regulations 1999, SI 1999/3312 para 13; Paternity and Adoption Leave Regulations 2002, SI 2002 No 2788 para 4.

21 [2006] UKHL 43, [2006] 1 WLR 2305 at paras 32-35.

22 Para 35.

of unmarried cohabitation, and the consequent diversity of relationships which develop within reformed families have resulted in children residing with and forming close relationships with a range of adults who may not be their natural or adoptive parents. The inclusion of the phrase "accepted as a child of the family" is widespread in Scots family legislation but without sufficient consideration of the position which is occupied by the adult in this accepting relationship. In social terms and in the day-to-day experience of family life, the age-old issue of what children should call a new adult in their household continues. As the decision in *McGibbon v McAllister* shows, this familiar practical dilemma also has a legal aspect. The adult who has accepted a child acknowledges him or her as a member of the family, but what should the child and society call that person? While law struggles to keep pace with change in human rights, in medicine and in daily life by extending and amending the definition of relative or parent, might it be time to reflect anew on what it means, in law, to be a parent? Is it the person who, through registration, consent or birth, has acquired the legal status of parent or is it the person who performs a parenting role?

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Liability of Trustees to Third Parties: The Scottish Law Commission's Proposals

In its Discussion Paper on *Liability of Trustees to Third Parties*[1] the Scottish Law Commission focuses on the dual patrimony theory[2] as a principled basis for the liability of trustees to third parties.

A. *INTRA VIRES* CONTRACTS

Currently, it appears that if T indicates that he is acting in his capacity as trustee of a specified trust, he can enter into an *intra vires* contract with X such that X's rights under the contract are enforceable only against the trust patrimony of T or of T's successor as trustee. Thus, the private patrimony of T or his successor is immune from any claim by X. However, if T says nothing about his capacity or simply describes himself to be "Tom Trustworthy, trustee", his private patrimony is liable, though he can resort to the trust patrimony to exonerate himself or to reimburse himself.

1 Scottish Law Commission, Discussion Paper on *Liability of Trustees to Third Parties* (Scot Law Com DP No 138, 2008; available at *www.scotlawcom.gov.uk*).

2 I.e. the theory that a trustee holds trust assets in a patrimony additional to and separate from his private patrimony. See Scottish Law Commission, Discussion Paper on *The Nature and the Constitution of Trusts* (Scot Law Com DP No 133, 2006) paras 2.16-2.28.