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ular event), then they can protect it by way of privacy, and can also exploit it commercially by passing rights to the information to other parties – rights which can be enforced through the doctrine of breach of confidence. In the words of Lord Hoffmann:<sup>33</sup>

Some may view with distaste a world in which information about the events of a wedding... should be sold in the market in the same way as information about how to make a better mousetrap. But being a celebrity or publishing a celebrity magazine are lawful trades and I see no reason why they should be outlawed from such protection as the law of confidence may offer.

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EdinLR Vol 11 pp 407-411

## The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007

The incidence of mesothelioma, a cancer once regarded as rare, is now sometimes described as having attained the stage of an epidemic.<sup>1</sup> When the UK mesothelioma register was established in 1968, 153 deaths were recorded for that year: in 2005, a peak of “around 1950-2450 deaths per year some time between 2011 and 2015” was estimated.<sup>2</sup> The most recent figures available now show that annual mortality has already entered that range, with 1969 deaths recorded in 2003.<sup>3</sup>

Two distinctive features of mesothelioma have necessitated special legal responses. The first is that the disease has a long latency period, averaging more than 40 years from asbestos exposure to diagnosis.<sup>4</sup> Recent research across a range of countries has indicated that asbestos consumption from 1960 to 1969 was significantly associated with mesothelioma deaths occurring from 2000 to 2004.<sup>5</sup> In contrast to this lengthy latency period, however, survival times for mesothelioma are short, with most deaths occurring within fourteen months of diagnosis.<sup>6</sup>

33 Para 124.

- 1 C Pelucchi et al, “The mesothelioma epidemic in Western Europe: an update” (2004) 90 *British Journal of Cancer* 1022.
- 2 J T Hodgson et al, “The expected burden of mesothelioma mortality in Great Britain from 2002 to 2050” (2005) 92 *British Journal of Cancer* 587 at 591.
- 3 Health and Safety Executive, *Mesothelioma* (available at <http://www.hse.gov.uk/statistics/causdis/meso.htm>).
- 4 C Bianchi et al, “Latency periods in asbestos-related mesothelioma of the pleura” (1997) 6 *European Journal of Cancer Prevention* 162.
- 5 R-T Lin et al, “Ecological association between asbestos-related diseases and historical asbestos consumption: an international analysis” (2007) 369 *Lancet* 844.
- 6 This is the figure provided by the Scottish Executive (Scottish Executive, *Amendment to Section 1(2) of the Damages (Scotland) Act 1976: Consultation Paper* (2006) para 1.1). No source is given for this figure, but it is consistent with the medical literature: see, e.g. J Peto et al, “Continuing increase in mesothelioma mortality in Britain” (1995) 345 *Lancet* 535.

Those factors have problematic consequences. Because of the latency period, a pursuer who has developed mesothelioma may have been exposed to asbestos from a number of different sources, most obviously where he has had a number of jobs involving such exposure. Where that is the case, there will be no way of establishing which of these exposures caused the mesothelioma. That issue has been addressed by the House of Lords twice, firstly in *Fairchild v Glenhaven Funeral Services Ltd*<sup>7</sup> and thereafter in *Barker v Corus (UK) plc*.<sup>8</sup>

In *Fairchild*, departing from normal principles of causation, it was held that such a claimant could bring an action against any potential defendant who had exposed him to asbestos. The benefit of this decision to pursuers was, however, significantly limited by the decision in *Barker*, where it was held that the claimant could only recover damages in respect of that particular defendant's contribution to the risk. Here, the latency period has a further significant consequence: many of the potential defendants in the three appeals heard together in *Barker* were insolvent and uninsured by the time the cases reached court.

The decision in *Barker* (from which Lord Rodger of Earlsferry dissented) was regarded as controversial and was promptly reversed by Parliament in the Compensation Act 2006.<sup>9</sup> Under section 3 of the 2006 Act, a responsible person in a mesothelioma case<sup>10</sup> is liable jointly and severally with any other responsible person. This does not, however, prevent one responsible person from claiming a contribution from another, or a finding of contributory negligence.

### A. THE PRESENT PROBLEM

*Fairchild* and the Compensation Act 2006 do not, however, solve all the problems attendant on a claim for damages in a mesothelioma case. The background to the specific problem which the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 addresses is as follows.

Historically, a claim for *solutium* was regarded as personal in nature, and so could be made only by the injured person and not by an executor acting in his place.<sup>11</sup> That rule gave rise to a concern that it might encourage defenders to prolong proceedings where a pursuer was terminally ill,<sup>12</sup> and so the rule was modified in 1993. Now, the right to *solutium* unconditionally transmits to the executor.<sup>13</sup>

Relatives of a deceased person may also be entitled to claim delictual damages on

7 [2003] 1 AC 32.

8 [2006] 2 AC 572. On the two cases, see J Thomson, "*Barker v Corus: Fairchild* chickens come home to roost" (2006) 10 Edin LR 421; M Hogg, "Re-establishing orthodoxy in the realm of causation" (2007) 11 Edin LR 8.

9 The Scottish Executive supported this change and a Sewel motion was passed consenting to the UK Parliament legislating on the point. See M Earle, *The Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill* (SPICe Briefing 06/94, 2006) 20-21.

10 For the precise definition of cases covered by the section, see s 3(1).

11 Damages (Scotland) Act 1976 s 2. Prior to the 1976 Act, the rule was subject to a limited exception where an executor was continuing proceedings which had been initiated by an injured person before his death: *Neilson v Rodger* (1853) 16 D 325; *Bern's Exr v Montrose Asylum* (1893) 20 R 859.

12 Scottish Law Commission, Report on the *Effect of Death on Damages* (Scot Law Com No 134, 1992).

13 Damages (Scotland) Act 1993 s 3.

their own account for what can conveniently be termed “loss of society”.<sup>14</sup> This statutory right is akin to *solatium* (and replaces the common law right to *solatium* which such relatives could formerly assert).<sup>15</sup> However, if liability is excluded or discharged prior to the injured party’s death, no claim for loss of society could – prior to the 2007 Act – be made after their death.<sup>16</sup>

Consequently, where a pursuer was suffering from mesothelioma, the value of “his” claim might have increased substantially if he were to forego pursuing it during his lifetime, leaving it up to his relatives to do so after his death. Although this problem is exacerbated by the transmissibility of *solatium*, it could occur regardless of this, particularly in a case where multiple persons fell within the category of relatives entitled to seek damages for loss of society.<sup>17</sup> That difficulty was further exacerbated by the fact that damages for loss of society are now significantly greater than they have been in the past,<sup>18</sup> and also by recent Court of Session reforms having increased the likelihood of an action for damages in a mesothelioma case being concluded within the pursuer’s lifetime.<sup>19</sup>

In principle, this difficulty might have arisen in any case where an actionable wrong had shortened a pursuer’s life expectancy. However, pursuers are unlikely to forego claiming damages for lengthy periods (and procedural bars such as limitation may make such a choice impossible). Because, however, survival times for mesothelioma are typically so short, pursuers were often faced with a tragic choice: in order to maximise the financial benefit to their family, should they avoid seeking compensation – with all the hardship that may entail – during their lifetime?

## B. THE 2007 ACT

The solution offered to this dilemma by the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 is a straightforward one. It creates an exception to the principle that damages for loss of society are unavailable where liability to the deceased has been excluded or discharged before his death.<sup>20</sup> That exception is limited to cases where “the personal injury in consequence of which the deceased died

14 Damages (Scotland) Act 1976 s 1(4), as amended by the Damages (Scotland) Act 1993 (where the term “loss of society” was replaced with a more detailed enumeration of the matters for which the relative can seek compensation). Only members of the deceased’s “immediate family” can claim such damages: for the definition of this term, see s 10(2) and Sch 1 of the 1976 Act, as amended by s 35(3) of the Family Law (Scotland) Act 2006.

15 The common law right is excluded by s 1(7) of the Damages (Scotland) Act 1976.

16 Damages (Scotland) Act 1976 s 1(2).

17 In evidence to the Justice 1 Committee, Phyllis Craig of Clydeside Action on Asbestos referred to a case where a woman with an “asbestos-related condition” had nine children and a husband, which, it was estimated, meant that a claim in delict would increase in value by £118,000 if pursued after her death rather than before. Scottish Parliament, *Official Report*, Justice 1 Committee, col 4112 (6 Dec 2006).

18 This follows the recognition in *Shaher v British Aerospace Flying College Ltd* 2003 SC 540 and *McLean v William Denny & Bros Ltd* 2004 SC 656 that judicial awards for loss of society in recent years had been too low.

19 Justice 1 Committee, *Stage 1 Report on the Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill* (1st Report, 2007) para 11.

20 Damages (Scotland) Act 1976 s 1(2). The 2007 Act inserts new subsections (2A) and (2B) into s 1 of the 1976 Act.

is mesothelioma”, and both the death and a discharge of liability occurred on or after 20 December 2006.<sup>21</sup> In such cases, relatives may claim damages for loss of society after the pursuer’s death despite the earlier discharge of liability.

How does this sit with the existing law of damages? It runs counter to what might be termed the “once and for all” principle – that is, that damages for all losses arising from a delict must be claimed and recovered in the one action.<sup>22</sup> That principle, however, is far from an absolute one,<sup>23</sup> and has for some time been subject to an exception in cases where an award of provisional damages is made under section 12 of the Administration of Justice Act 1982.

While there is a clear public interest in not leaving defenders with a future potential claim hanging over them indefinitely,<sup>24</sup> the consequences of the 2007 Act are no more onerous for defenders than those which might already obtain as a result of an award of provisional damages. Although the 2007 Act leaves the potential future liability open indefinitely, in contrast to an award of provisional damages which will normally place a time limit on subsequent awards,<sup>25</sup> the generally short survival times associated with mesothelioma mean that this distinction is without difference.<sup>26</sup> In any event, the problem – if a problem it is – may be more theoretical than real, as it will frequently be possible to deal with both the original pursuer’s and the relatives’ subsequent claim by means of a single court action.<sup>27</sup>

Purists may be disappointed that the problem has been solved by means of *ad hoc*, mesothelioma-specific legislation, rather than by any reformulation of principle. Originally, the Executive had expressed an intention to give Scottish Ministers the “power to extend the new provision to apply to other diseases or kinds of personal injury if experience shows this to be necessary”,<sup>28</sup> but resiled from this view after the conclusion of the consultation process, citing the unique characteristics of mesothelioma.<sup>29</sup>

Such an *ad hoc* approach has its advantages, particularly insofar as it allows the consequences of the legislation to be quantified with relative precision in advance, and (hopefully) avoids unanticipated consequences of the type which, as a result of earlier legislative reforms, may have contributed to the present problem in the first place.<sup>30</sup> But it also runs the risk of unfairly discriminating against pursuers suffering

21 The Executive originally proposed that the exception would only apply from the date on which the Act received royal assent, but amended its position when it became clear that some degree of retrospectivity would be desirable and would not meet with objections from insurers: see Justice 1 Committee, *Stage 1 Report* (n 19) paras 71-79.

22 See *Potter v McCulloch* 1987 SLT 308 at 310 per Lord Weir.

23 It is perhaps less strictly applicable outside of personal injury cases: see *Duke of Abercorn v Merry & Cunninghame* 1909 SC 750.

24 See *Paterson v Costain Mining Co* 1988 SLT 413 at 414 per Lord Davidson.

25 *Bonar v Trafalgar House Offshore Fabrication Ltd* 1996 SLT 548 at 551 per Lord Gill.

26 Particularly as the onset of a fatal disease within an unpredictable timescale was held to justify a provisional award without limit of time in *Patterson v Ministry of Defence* [1987] CLY 1194.

27 See *Dow v West of Scotland Shipbreaking Company Ltd* [2007] CSOH 71.

28 Scottish Executive, *Consultation Paper* (n 6) para 3.17.

29 *Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill: Policy Memorandum* (SP Bill 75-PM, 2006) paras 13-16.

30 As the Executive has acknowledged: *Policy Memorandum* (n 29) para 17.

similar dilemmas as a result of different forms of personal injury. It is, therefore, to be welcomed that at the same time as proposing this legislation, the Scottish Ministers referred the general question of damages for wrongful death to the Scottish Law Commission, thus providing an opportunity for the law in this area to be rationalised.

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## By the Book: Enrichment by Interference

*HarperCollins Publishers Ltd v Young*<sup>1</sup> is an example of a rarity: a case on corporeal moveables in the Court of Session.<sup>2</sup> The pursuer, the well-known publisher, operates a distribution centre in Glasgow. There it receives books returned from retailers. It pulps the paperbacks, but outsources the pulping of hardbacks and audio books to another company, Stirling Fibre Ltd. The pursuer averred that various of its products, which were wrapped in cellophane, had “gone missing”<sup>3</sup> from the centre or in transit to that company. It further averred that the defender, during a five-year period, had listed for sale 14,083 products published by the pursuer on the internet site *ebay* and had sold 9,365. The defender was said to have made £61,351.57 from these sales. The pursuer averred that it had no commercial relationship with the defender and that the books that he marketed were those items which had gone missing. It sought a whole battery of remedies, including redelivery of the books and payment of the profit made by selling them. The case came before Lady Clark of Calton in the Outer House for a debate.

### A. PROVING OWNERSHIP

The pursuer faced an uphill battle as to proving the books were its property. It averred that due to the scale of its operation at the distribution centre it was “not possible ... to ascertain exactly when or how the items went missing”.<sup>4</sup> About 120 million books were distributed from there every year. The defender argued that there was no proper link between the books which had allegedly disappeared and those sold or held by the defender. The pursuer contended, however, that the low prices at which the defender marketed the goods made it impossible for him to have obtained them legitimately.

1 [2007] CSOH 65.

2 For another example, see *Boskabelle Ltd v Laird* [2006] CSOH 173, 2006 SLT 1079, discussed in D L Carey Miller, “Right to annual crops” (2007) 11 EdinLR 274.

3 [2007] CSOH 65 at para 4.

4 Para 7.