

## **Mykoliw and Ors v. Botterill and Another [2010] CSOH 84**

### **When Parliament gets it Wrong**

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There is no getting away from the interpretation of statutes. However much our legislators (or, in truth, their draftspersons) try to cover every eventuality, there will be gaps remaining. However hard they try to be unambiguous, their efforts will be frustrated by clever lawyers finding or creating double-meanings, obscure definitions and unlikely constructions. The interpretative requirements in section 3 of the Human Rights Act 1998 have enlarged the scope for finding and applying meanings that are apparently at odds with the words used and sometimes even with the intent with which they have been used. We are all getting used to dealing with provisions that require to be interpreted in an unusual way in order to avoid violating the ECHR. *Mykoliw v. Botterill* involves a much rarer beast - a statutory provision which, it was clear to everyone, did not say what Parliament meant it to say. It involved that much-amended statute, the Damages (Scotland) Act 1976, and concerned a question that many previous courts have been faced with: who counts as “family” within the definition given in that Act?

In *Telfer v. Kellock*<sup>1</sup> a woman was killed in a road accident and her partner sought damages, claiming title to do so under para. 1(aa) of Schedule 1 to the Damages (Scotland) Act 1976, on the ground that she was “living with the deceased as husband and wife”. Lady Smith dismissed the claim on the ground that the words “living with the deceased as husband and wife” indicated unambiguously a parliamentary intention to limit qualifying relationships to those between a man and a woman and that, because the Human Rights Act 1998 was not yet in force, the courts were obliged to give effect to this intention and could not reinterpret it to

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<sup>1</sup> 2004 SLT 1290.

achieve ECHR compatibility. In *McGibbon v. McAlliser*,<sup>2</sup> on the other hand, reinterpretation was indeed required because the 1998 Act was by then in force. The 1976 Act includes parents in the category of persons who can seek damages for non-patrimonial loss on the death of their child, and at that time it also provided that affinitive relationships were to be treated as relationships of consanguinity. This meant that step-parents had the same rights to sue as parents, as did parents-in-law.<sup>3</sup> The pursuer in *McGibbon*, was not a step-parent of the deceased but he was the mother's cohabitant and his argument, that to give the statute its ordinary meaning would be to discriminate against him on the basis of his marital status, was accepted by Lord Brodie.

*Mykoliw v. Botterill*<sup>4</sup> arose from the death of Kevin Michael Mykoliw, who was killed in a road accident. The defenders were sued by various surviving members of Mr Mykoliw's (slightly complex) family under the Damages (Scotland) Act 1976. The case came before Lord Pentland on the Procedure Roll on a motion of the defenders for dismissal of the claim brought by one of the pursuers, Mr James Marshall. He was married to the deceased's mother and as such had been the deceased's step-father. The defenders sought to have his claim for non-patrimonial loss dismissed on the ground that he was not a member of the deceased's "immediate family", because the definition of that phrase had been changed since *McGibbon* and the legislation now unambiguously excluded all affinitive relations of a deceased person.

It was accepted that, prior to amendments to the 1976 Act made by the Family Law (Scotland) Act 2006, Mr Marshall would have had clear title to sue by dint of his status as step-parent. But the wording in the Act had been changed as a result of the recommendations of the Scottish Law Commission in their *Report on Damages for Non-Patrimonial Loss*<sup>5</sup> where they had concluded that the existing definition of "immediate family" no longer appropriately reflected the variety of family structures that existed in Scotland today. The law as it stood was both over-inclusive and

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<sup>2</sup> 2008 SLT 459.

<sup>3</sup> See for example *Monteith v. Cape Insulation* 1999 SLT 116.

<sup>4</sup> 2010 CSOH 84.

<sup>5</sup> Scot. Law Com. 187 (August, 2002).

under-inclusive. It was over-inclusive in that it permitted pursuers to trace their claim through relationships of affinity even when there was in reality no genuine closeness with the deceased that would justify an award for non-patrimonial loss. And it was under-inclusive in that it excluded persons who did have that genuine closeness through having accepted the deceased as a child of their family. The Scottish Law Commission therefore recommended changing the test from the existence of an affinitive relationship to acceptance of the deceased as a child of the claimant's family. This would exclude, for example, a person who becomes the deceased's step-parent after the deceased grew up and left the parental home, but at the same time would normally include a person, whether or not married to or civil partner of the parent, who adopted a parenting role while the deceased was still a child being brought up in the parental home. The Scottish Executive (as the Scottish Government then called itself) announced its acceptance of these recommendations.

The Family Law (Scotland) Bill, as introduced in 2005, did not contain any provisions designed to achieve the recommended amendments in the 1976 Act but as that Bill was making its way through the parliamentary process someone decided that it would be a convenient opportunity to amend the 1976 Act in the way the Commission had suggested. However, the wording used to achieve the aim was substantially different from that in the draft Bill attached to the Commission's Report. Section 35(5) of the 2006 Act added the "accepting adults" category of relatives to the list of relatives in section 10 and schedule 1. That was unproblematical. The difficulty arose with the attempt to exclude step-parents as the sole basis of the claim. Section 35(3) of the 2006 Act added a new section 1(4A) to the 1976 Act, providing bluntly and without qualification that "Notwithstanding section 10(2) of, and Schedule 1 to, this Act, no award of damages under subsection (4) above shall be made to a person related by affinity to the deceased". "Person related by affinity" was further defined to include "a stepchild, step-parent, stepbrother or stepsister of the deceased". The result, on a literal reading of the amended 1976 Act, is that a person is given a right to claim damages for non-patrimonial loss if they had accepted the deceased as a child of the family but that right is blocked if they were related to the deceased by affinity. This was not what was intended. The intention was not to exclude step-parents absolutely, but to change the test that they had to

fulfil, from one of affinity to one of acceptance. Mr Marshall in the present case had (he averred) accepted the deceased as a child of the family, but he was also related to the deceased by affinity. So the question for the court was this: could section 1(4A) be interpreted in a way that did not cut off his claim?

In my commentary to the 2006 Act I said this:

“Though the new section 1(4A) superficially reads as an absolute bar on affinitive claimants, that strict interpretation must be rejected. For otherwise cohabitants who accept each other’s children as children of their family would have a claim while spouses and civil partners who did so would not. Not only is this highly unlikely to reflect parliamentary intention, but it satisfies no legitimate aim. As such it is permitted, even necessary, for the court to read into the new section 1(4A) of the 1976 Act words such as ‘solely on the basis of the affinity’”.<sup>6</sup>

I elaborated on the point in “Rushed Law and Wrongful Death”,<sup>7</sup> which Lord Pentland found “illuminating” as he adopted the suggestion. What is interesting is that he did so using the Human Rights Act only as a subsidiary argument.

Lord Pentland found that article 8 of the European Convention was engaged because the right to sue based on the existence of sufficiently close family ties with a deceased person is an important aspect of family life, even if it can only be exercised after the death of the family member.<sup>8</sup> He then concluded that to deny persons in the position of Mr Marshall title to sue for the death of a relative accepted as a family member, but to allow an unmarried *de facto* parent the right to do so would be discriminatory and incompatible with article 14 of the ECHR when read with article 8 as achieving no legitimate aim.<sup>9</sup> It followed that there was a requirement to read down section 1(4A) of the 1976 Act so that it was limited to situations where the only

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<sup>6</sup> *The Family Law (Scotland) Act 2006: Text and Commentary* (DUP, 2006) at p. 90.

<sup>7</sup> *Journal of the Law Society of Scotland*, April 2006.

<sup>8</sup> At para. 29.

<sup>9</sup> At para. 30.

connection between the claimant and the deceased was the formal relationship of affinity.<sup>10</sup>

Lord Pentland had, however, already reached this result by applying the normal domestic canons of construction, which require the court to apply the literal meaning of statutory words unless to do so would lead to absurdity, anomaly or injustice. The literal approach in the present case would do just that. Counsel for the defenders argued that in such circumstances the remedy lay in legislative rather than judicial amendment of the clear words of the statute and in doing so they were arguing for a highly limited conception of the role of the courts.

Lord Pentland dismissed this argument out of hand. Given the choice between a literal and a sensible interpretation, he held that the court had the power to adopt the sensible interpretation especially where, as here, it was clear that the sensible interpretation consists with the intention of the Scottish Law Commission, who had explicitly stated that step-parents should be able to claim if they can prove that they had accepted the deceased as a child of their family.<sup>11</sup> What is remarkable about this case is that the sensible interpretation could only be achieved by Lord Pentland reading into the new section 1(4A) a qualification that does not actually appear. This was not a case of the court reading in words in order to make sense of a provision, or to resolve an ambiguity, but of a court actually changing its unambiguous meaning. This is “interpretation” only in a stretched meaning of that word, though perhaps no more stretched than is permitted under section 3 of the Human Rights Act 1998.

It was fortunate that the true intent behind the amendment had been expressed so clearly by the Scottish Law Commission, and that the Scottish Executive had accepted that their recommendations should be given effect without qualification, omission or revision. Not all cases of absurd statutory results will be as clear as this and courts in the future may well be faced with palpable absurdity but no clear guidance as to what rule to put in its place. The Human Rights Act 1998 of course provides guidance in cases where Convention rights are engaged, but that will not

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<sup>10</sup> At para. 31.

<sup>11</sup> Scot. Law Com. No 187 at para 2.40.

happen in every case and the courts will be left with having to construe the statute on the basis of what they think the legislation ought to say as opposed to what they know the legislature wanted it to say.