

SCOTLAND / JUDGMENT

Kendal & Anor v Davies [2000]

ScotCS 230 (17 August 2000)

[2000] ScotCS 230

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[2000] ScotCS 230 [New search] [Help] OUTER HOUSE, COURT OF SESSION OPINION OF LADY PATON in the cause JOHN KENDAL AND ANOTHER Pursuers; against CARL DAVIES
Defender:

Pursuers: Philip Stuart, Advocate; Aitken Nairn W. S. Defender: Shand, Advocate; Brechin Tindal Oatts 17 August 2000 Claim for necessary services and paid care

- [1] On 29 September 1995 the pursuers, a young engaged couple, were driving south on the A917 St. Andrews to Crail road. They were involved in a road traffic accident. Both pursuers suffered injuries, but the first pursuer's injuries were the more serious and included a severe head injury with permanent after-effects, all as set out in Article 4 of Condescence. In this action for damages, parties were agreed that liability is admitted and that contributory negligence is not in issue (despite original averments and a plea-in-law directed to contributory negligence, subsequently deleted by amendment). The only dispute is quantum of damages.
- [2] The first pursuer, John Kendal, was born on 24 April 1974. He is currently aged 26. He seeks damages of £1.5 million. One of his heads of claim is a claim in terms of s.8 of the Administration of Justice Act 1982 for necessary services, and a claim for future paid professional care. Section 8 provides for damages representing reasonable remuneration for necessary services rendered by a relative and repayment of reasonable expenses incurred in connection with such services.
- [3] The relevant averments are to be found in two passages in Article 4 of Condescence. One passage at p.14B-15B is in the following terms: "On his marriage [to the second pursuer on 31 August 1996] the first pursuer has continued to require help and assistance from the second pursuer who has to accompany him when he is outside. She provides him with continuing

rehabilitative support. The first pursuer relies upon the second pursuer to structure his day. She has to provide him with constant memory prompts. She encourages his interest in music. She works with him on their computer. She plays board games with him. She has to supervise him when he is bathing. The first pursuer required to move to the country to Drummond Hall Cottage, Cairntully, Perthshire in October 1997 to avoid noise and traffic. He will incur additional transport costs. He will need to purchase a car. He will have extra petrol costs. The second pursuer is providing the first pursuer with services. She is providing him with company, support and structure to his life. Because of the need to provide these services and the requirement to live in a remote area, the second pursuer has not been able to take up full time employment as a scientist. Had she been able to do so she would have been earning about £17,000 net per annum by April 1998. In the event that in the future, the second pursuer becomes unable to provide continuing care, support and stimulation, the first pursuer will require a professional case manager and bought in support."

- [4] The other passage is at p.13B-C: "[The first pursuer's] mother gave up her job as an administrator and warden at the House of St. Gregory, Oxford. She earned about £5,200 per annum from said employment. She also worked twelve hours a week in administration for the Fellowship of St. Albans and St. Segius, Oxford. She earned £5 per hour for said work." Challenge to specification of averments relating to services and paid care
- [5] At debate, counsel for the defender submitted that the claim for services and paid care in the future could be a substantial one. The first pursuer was currently aged 26; the multiplier selected from the Ogden Tables could be in the upper range; and if the first pursuer's case was that the multiplicand for services was about £17,000 per annum, this part of the first pursuer's claim could be very large indeed. Accordingly the defender was entitled to fair notice of the nature and extent of the services being rendered and likely to be rendered, together with for example some indication of time periods and some indication of the value of the services. Such fair notice was required to enable the defender properly to prepare for the proof, and to have enough information upon which, if so advised, a responsibly estimated tender could be made. It was well established that the court should endeavour to ascertain the actual value of the services rendered, rather than approaching the matter on the basis of earnings lost by the relative rendering the care: *Forsyth's C. B. v Govan Shipbuilders Ltd.*, 1988 S. L. T. 321; *Howie v Upper Clyde Shipbuilders Ltd.*, 1991 S. L. T. 2; *Farrelly v Yarrow Shipbuilders Ltd.*, 1994 S. L. T. 1349; *Housecroft v Burnett*
- [1986] 1 All ER 332 ; *McMillan v McDowall* , 1993 S. L. T. 311; *Galbraith's Curator ad Litem v Stewart* , 1997 S. L. T. 418; and *Ingham v John G. Russell (Transport) Ltd.* , 1991 S. L. T. 739. In a simpler case, involving modest services for a short period, the rules of fair notice might well be satisfied by brief averments. However in a case such as the present, where services or care might have to continue for life, and might involve a certain number of hours every day and possibly every night, a defender was entitled to a reasonable degree of specification. Each case depended on its facts, but in the present case, the averments

were not sufficient. It was probable that the pursuer had obtained a report from a care costs expert, which would in all likelihood include details of the type of services rendered, hours spent, and value of these services possibly discounted to reflect the fact that tax, national insurance and agency contributions do not require to be paid where services are rendered by a relative: *Gordon v Wilson*, 1992 S. L. T. 849. However any such report had not been lodged in process or made available to the defender, nor had elements such as the annual cost of care, the periods of time devoted to care, the type and level of value of care, been averred on record.

- [6] Counsel pointed out that the defender could not oblige the pursuers to undergo an interview with a care costs expert instructed by the defender. Nor could the defender oblige the pursuers to lodge their care costs expert's report in process. Thus the only indication given to the defender of the possible annual cost of services and care was contained in averments that "[b]ecause of the need to provide these services and the requirement to live in a remote area, the second pursuer has not been able to take up full time employment as a scientist. Had she been able to do so she would have been earning about £17,000 net per annum by April 1998." There were at least two criticisms to be made of these averments. Firstly, as indicated in the authorities cited, a claim for necessary services was not to be valued as if it were "compensation for the change in the relative's life" such as loss of that relative's earnings, but rather on the basis of the value of the services rendered. Thus while in Scotland there was some authority suggesting that the relative's lost earnings or "earnings foregone" could be taken into account as a background factor or form of cross-check of the value of the services, it was important to note that this line of authority had begun in *Forsyth's C. B. v Govan Shipbuilders Ltd.* cit. sup., where Lord Clyde, faced with a lack of evidence about the actual value of the relative's services, had been driven to rely upon earnings foregone in the absence of other, more appropriate, evidence. In subsequent cases, earnings foregone had played very much a background or cross-check role. Thus for example in *Howie v Upper Clyde Shipbuilders Ltd.* cit. sup., Lord Cameron heard evidence about rates which would have been charged by a nursing agency, and also evidence about earnings foregone. Ultimately, on the invitation of the pursuer's counsel, he chose the lower figure, namely the earnings foregone, when assessing the value of the services rendered by her. The important point was that the Lord Ordinary had the evidence of commercial rates before him, and had not awarded damages exceeding the commercial value of the services (in contrast with the present case, where the averments seemed to suggest that £17,000 per annum was claimed, *prima facie* an extravagant annual rate for the sort of services specified on record). Similarly English courts, when dealing with an equivalent head of claim, made it clear that the commercial rate for the services rendered was to be the ceiling in any valuation of services: see *Housecroft v Burnett* cit. sup. Thus it would not do for the first pursuer to aver that the second pursuer might have earned £17,000 per annum, when there were no averments relating to the nature and extent, time periods and rates, and value of the services actually being rendered.

- [7] The second criticism of the first pursuer's averments relating to earnings foregone by the second pursuer was that they betrayed confusion of thought between a claim for loss of earnings possibly being suffered by the second pursuer, and the claim for services rendered by the second pursuer. In particular, the reference to "the requirement to live in a remote area" seemed to suggest that, had the couple been living in a town or city, the second pursuer could have taken up some form of remunerative work, as there would no longer be any difficulty arising from her remote situation, and accordingly that she was suffering a loss of earnings as a result of the situation in which she found herself, caused by the injury to the first pursuer. However such a loss of earnings suffered by the second pursuer was not in itself a relevant head of claim when dealing with the first pursuer's loss, injury and damage. For these reasons, counsel for the defender invited me to exclude from probation the passage at p.14B to 15B as fatally lacking in specification, although no particular attack was made upon averments contained in that passage relating to increased transport costs and the need to purchase a car.
- [8] A challenge of lack of specification was also made in relation to the passage in Article 4 of Condendence at p.13B-C which dealt with services rendered by the first pursuer's mother. While some details of the services rendered could be found at p.13C-14A of Article 4, there were no averments giving fair notice of time periods or rates or, in short, the first pursuer's estimate of the value of any services rendered.
- [9] Counsel for the defender added that it would of course be open to the pursuers to amend at any time, to give fuller and better particulars about services and paid care.
- [10] Counsel for the pursuers submitted that the averments should be remitted to probation as they stood. The defender was entitled only to fair notice, and the exercise of fixing reasonable remuneration for necessary services in terms of section 8 was necessarily a broad one, not an intricate mathematical exercise: cf. dicta in *Ingham v John G. Russell (Transport) Ltd.*, cit. sup. at p.744D-E, 747G; and Lord Clyde's approach in *Forsyth's C. B. v Govan Shipbuilders Ltd.*, cit. sup. A number of factors would have to be considered when fixing reasonable remuneration. The effect of any failure on the part of the pursuers to lead precise evidence about reasonable remuneration would be not to exclude the claim, but simply to restrict it to the minimum justified by the evidence: *Clark v Sutherland*, 1993 S. C. 320. The pursuers had indicated the sort of services being rendered. It was not incumbent upon a pursuer to spell out the precise content of a care costs report: to do so would be averring evidence. There was sufficient on record for the defender to instruct his own care expert. It was a misconstruction to suggest that the pursuers' averments implied that necessary services or paid care were valued at £17,000 per annum. That figure was simply what the second pursuer would, but for the accident, have been likely in normal course to have been earning by April 1998. That level of earnings was a factor which the court might find useful when valuing necessary services, for example, by using it as a cross-check. Similarly the effect of the remote location upon the earning capacity of a relative rendering services might be a factor for consideration. There was sufficient averred on record to

enable the court to arrive at a minimum level of remuneration. The court would be entitled to add a sum to reflect the contingency that a paid carer might be required. In relation to the passage at 13B-C, the level of the mother's earnings was a factor which could be taken into account. There were sufficient averments setting out the basis of the services claim, and it would be for the court to assess reasonable remuneration on the basis of the evidence led.

Conclusion

- [11] I accept that the primary measure of damages for services and paid care should be the value of the services and the cost of the paid care. Earnings lost by a relative providing services do not provide the true measure, although they may in some cases provide a cross-check. I also accept that the degree of specification required of averments relating to services and paid care will vary from case to case. There are many cases involving fairly minor services rendered by a relative over a short period of time where fairly inspecific averments may suffice. However different considerations arise in cases involving a claim for services and paid care which might, on one view, result in evidence being led to establish an annual value or cost amounting to thousands of pounds, and a significant multiplier. In such cases it is my view that a defender is entitled to fair notice of certain basic elements to enable him properly to prepare for the proof or jury trial, and, if so advised, to calculate a tender. Such basic elements include the nature of the services rendered, an indication of the time periods involved, and an indication of the value being placed on those services by the pursuer or his expert. The necessary degree of specification can usually be achieved by reasonably brief averments. The lodging in process of a report by a care costs expert may assist.
- [12] In the present case, the pursuers have not to date lodged any care costs report in process. The defender is entirely dependent upon the information contained in the averments. The averments as they stand suggest that the claim for services and paid care may be a substantial one, possibly amounting to thousands of pounds each year, with a significant multiplier being apparently a multiplier for life for a young man currently aged 26.
- [13] In respect of the passage at p.14B-15B, I have formed the view that the failure on the part of the first pursuer to aver some of the basic elements referred to above has resulted in a lack of specification such that the defender is not given fair notice of the nature, extent, and value of the claim in respect of necessary services and paid care. If the first pursuer wishes to make a claim in respect of necessary services and paid care, I consider that some reformulation would be necessary, giving the defender fair notice of the basis upon which an assessment of these services in monetary terms may be made. I shall accordingly sustain the defender's first plea-in-law to the extent of excluding from probation the passage commencing at p.14B with the words "On his marriage the first pursuer has continued to require help" to and including the words "She has to supervise him when he is bathing." at p.14D, and the passage commencing at p.14E with the words "The second pursuer is providing the first pursuer with services" to and including the words "will require a professional case manager and bought in support." at p.15B.

- [14] In relation to the passage at p.13B-C, I consider that these averments, taken with the surrounding averments at p.12D-13B and p.13C-14A, are sufficient for a proof before answer, partly because the major part of the parents' services were rendered during a finite period of about eleven months between the date of the accident (29 September 1995) and the date of the pursuers' wedding (31 August 1996), partly because the averments do not have to be read as implying that the services rendered are necessarily to be valued by means of the earnings foregone, and partly because there is probably just sufficient information contained in the averments to enable an assessment of damages to be made. Accordingly I shall remit the passage at p.13B-C to probation.
- [15] It would of course be open to the first pursuer to amend his pleadings. Meantime, I reserve the question of the expenses of the debate to enable parties to address me on that matter.
- [16] In relation to further procedure, towards the end of the debate, counsel for the defender moved to amend the defender's first and third (originally fourth) pleas-in-law by adding after the words "ought not to be remitted to probation" the words "failing which any inquiry should be by way of proof before answer". Although counsel for the pursuers sought a proof simpliciter on the basis of the original wording of the pleas, both of which he invited me to repel, I permitted the defender's amendment as I considered that the dispute over quantum of damages was appropriate for a proof before answer.
- [17] In conclusion therefore:
- (1) I shall sustain the defender's first and third pleas-in-law as amended at the bar to the extent of excluding from probation the two passages indicated above, namely the passage commencing at p.14B with the words "On his marriage the first pursuer has continued to require help" to and including the words "She has to supervise him when he is bathing." at p.14D, and the passage commencing at p.14E with the words "The second pursuer is providing the first pursuer with services" to and including the words "will require a professional case manager and bought in support." at p.15B, and quoad ultra allowing the parties a proof before answer on their respective averments.
 - (2) I shall reserve the question of the expenses of the debate to enable parties to address me on that matter. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2000/230.html>

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Prepared on 29 October 2026 · Esheria