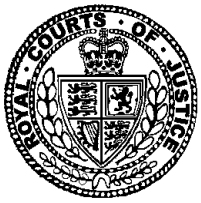

Neutral Citation Number: **[2021] EWHC 2924 (QB)**

Case No: QB 2020 001305

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 3rd November 2021

Before :

MR JUSTICE RITCHIE

- -

Between:

CHARMAINE HAGGERTY-GARTON (FOR HERSELF AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DAVID HAGGERTY-GARTON) (1)
KIRSTY LEE HAGGERTY (2)
ASHLIE JANE HAGGERTY (3)
MARGARET HUGHES (4)
ISABELLE INCZ (5)
OLIVIA AYLMORE (6)
(BY HER LITIGATION FRIEND AMANDA WOOD)

Claimants

- and -

IMPERIAL CHEMICAL INDUSTRIES LTD

Defendant

(John Paul Swoboda instructed by Field Fisher, London) for the Claimants
(Philip Turton instructed by Clyde & Co Manchester) for the Defendant

Hearing dates: 28/29 October, 3rd November 2021

- -

Approved Judgment

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Approved Judgment

Mr Justice Ritchie:

The parties

[1] The first Claimant is the wife of the deceased and brings the claim for herself and her three children Joshua, Ben and Zachary. The 2nd and 3rd Claimants are daughters of, the 4th and 5th Claimants are sisters of and the 6th Claimant is the granddaughter of the deceased.

[2] The Defendant, ICI employed the Claimant in the 1970s.

The issues

[3] This disease based personal injury claim is for damages arising from the death of the deceased (David) due to his exposure to asbestos whilst at work for the Defendant between 1973/4 and 1978/9. Judgment has been entered for damages to be assessed.

[4] The 3 quantum issues remaining for this court to determine are:

PAST

1. Estate claim: solatium for David's pain, suffering and loss of amenity.

PAST and FUTURE

2. Dependency: loss of past and future services which David would have provided.
3. Loss of David's society to the 1st Claimant and her three children.

And interest on past loss and expense.

[5] The heads of loss which are agreed are as follows:

Past

4. Dependency: financial, agreed at £7,944.46.
5. Care provided to David during his illness: £13,320.
6. Patrimonial expenses: £7,424.19
7. Funeral expenses: £3,553.32.

And interest on past loss and expense

Future:

8. Dependency: financial, agreed at £138,687.12

The summary of claim and defence

[6] The claim form was issued on the 7th of April 2020. In the amended particulars of claim the Claimants asserted that David was exposed to asbestos whilst employed by the Defendant between the tax years 1973/1974 and 1978/1979. During those years David worked at the ICI factory in Ardeer, Stevenston, Scotland. Part of his work involved removing old and friable asbestos lagging from pipe work. David was not provided with any adequate safety masks or respirators whilst doing this work and the Claimants alleged that the Defendant did not provide David with any information or training about the dangers of asbestos. The Claimants alleged inhalation of injurious quantities of asbestos dust and fibre and asserted that the

Defendant was negligent in causing or allowing that to occur. The Claimants pleaded that the law applicable to the claim was Scots law but insofar as it is relevant also English law. The 1st Claimant brought the claim under the Damages (Scotland) Act 2011 for herself and her children and asserted that the 1st Claimant and the 2nd to 6th Claimants were dependents/family of David. In addition the Claimants asserted that the first Claimant and her children: Joshua, Benjamin and Zachary, suffered distress, anxiety and horror in the contemplation of David's death and thereafter grief and sorrow, loss of society and bereavement. Likewise under the amended particulars of claim, by late amendment, the second to sixth Claimants sought awards for loss of society.

[7] In the defence dated 23rd June 2020 ICI did not admit the 1st Claimant was the widow of David and required the 1st Claimant to produce her marriage certificate. Nor did they admit that the 1st Claimant was the executrix of the estate of David and required the 1st Claimant to produce a copy of the grant of probate. Nor did they admit that any of the children were entitled to damages. The Defendant required the Claimants to prove that David was employed by them and all facts relating to liability. The Defendant denied David "would have been required to handle asbestos". Defendant required the Claimants to prove that any dust inhaled by David was such that it gave rise to a reasonably foreseeable hazard. As to the applicable law the Defendant denied that Scots law was applicable and pleaded the applicable law was wholly or partly the law of England. The Defendant submitted that any cause of action accrued in England and averred that the recoverability of loss was governed by the law of England. Causation was denied. No admission was made in relation to the report of Doctor Twort, consultant chest physician, served with a particulars of claim. The Defendant did not admit that David developed mesothelioma and asserted that the doctor had failed to give sufficient weight to David's previous medical history and asserted that David had an excessive alcohol intake. A counter schedule was served with the defence and the Defendant asserted that damages for dependency could only be claimed under the Fatal Accident Act 1976 and by the estate under English law, not Scottish law.

The chronology of the action

[8] By an order dated 22nd October 2020 the parties agreed to the trial of a preliminary issue to decide the applicable law for the claim. Directions were given in relation to the preliminary issue and the trial was to take place on the 13th of January 2021 or within six weeks thereafter.

[9] The Defendant abandoned the objection to the proper law and by an order dated 8th of January 2021, by consent, the parties agreed that Scots law did apply to the issues of liability and quantum.

[10] By an order dated 11th January 2021 Master Gidden required the parties to give standard disclosure on quantum by the end of March, to file witness statements by the end of April 2021, gave the Claimant permission to rely on the medical report of Doctor Twort, dated 6 June 2019 and gave the Defendant permission to obtain medical evidence from a consultant physician to be served by the 28th of May 2021. The Claimant was to serve and file an updated schedule of loss by the 30th of July and the Defendant was ordered to file an updated counter schedule by the

27th of August 2021. The case was listed for a 3 day trial in a window commencing the 1st of October 2021

[11] The 1st Claimant's schedule of loss for trial was served within time and totalled £760,289. The Defendant's counter schedule was dated 10.9.2021 and served at some time thereafter. Unless there was an agreement between the parties the counter schedule was served late, only six weeks before trial. The total admitted therein was £432,127.

Evidence

[12] The evidence before me was contained in the witness statements of David, dated 14th September 2018; the 1st Claimant dated 21st April 2021 and Dushal Mehta dated 19th November 2020.

[13] I also had before me the expert reports of Doctor Twort, dated 6th June 2019 and two witness statements from David Short, an expert on Scottish law, dated 25th November 2020 and February 2021. Both were agreed.

[14] The Defendant served and called no evidence.

Agreed facts

[15] Despite the denials and non admissions in the defence, by the time of the trial, liability had been admitted, it was admitted that Scots law applied to the quantification of the claim, it was admitted that the first Claimant was David's wife and the executrix of his estate. It was admitted that her children were entitled to make the claims that they did and it was admitted that the 2nd to 6th Claimants were entitled to make the claims that they had.

[16] The day before the trial started the second to sixth Claimants' claims were settled and came before me only for the purposes of approval.

The application to amend the counter-schedule

[17] Two days before the trial the Defendant served a skeleton argument which contained substantially different figures from those contained in the Defendant's served counter schedule. Although the Defendant did not accept that it needed permission to amend its counter schedule, the Claimants asserted that they were prejudiced by the reductions in the figures which had been admitted in the Defendant's counter schedule, which were reduced in the Defendant's skeleton and that the pleaded case was being changed without permission. To explain this, for instance, in relation to loss of society, having admitted that the appropriate figure was £85,000 in relation to the first Claimant and £30,000 in relation to each of the first Claimant's 3 male children, in the skeleton the Defendant sought to reduce those sums respectively to £25,000, and £5,000 for each of the children.

[18] I was asked to determine whether an application to amend the Defendant's counter schedule was necessary to enable the Defendant to alter its case so radically.

[19] I heard submissions on that topic and gave a ruling on the necessity for amendment of the Defendant's statement of case. Having given that ruling the Defendant gave an undertaking to file a part 23 notice of application to amend its counter schedule

by 4:00 PM on Monday the 1st of November and I preceded to determine the application by the Defendant to amend its statement of case to reduce the figures admitted therein. For the reasons set out in the extempore judgement which I gave on the application, I refused permission to the Defendant to amend its counter schedule. I will not rehearse those reasons here save to say that I did not allow the submitted reductions in the sums admitted in the counter schedule by the Defendant.

[20] The trial therefore proceeded on the basis of 6 quantum issues which, by the morning of day two, had reduced to the 3 issues set out above and the parties relative positions in relation to each issue is set out in the table below. By the time of closing submissions the issues were as follows:

Head of Damage

	Claimant	**Counter-Schedule**	**D's Submissions**
1. Solatium	£100,000	£75,000	£85,000 – 95,000
2. Loss of Society			
Claimant	£140,000	£85,000	
Joshua	£40,000	£30,000	
Benjamin	£40,000	£30,000	
Zach	£40,000	£30,000	
3. Dependency on services			
Past services	£25,616.44	£2,433.96	£5,500
Future services	£180,000	£9,175.07	£8,500

Findings of fact

[21] On the evidence before me I make the following findings of fact.

Before the Disease

[22] David was born on the 8th of July 1955 and would have been 66.25 at the date of trial. He died on the 3rd of January 2019 and was aged 63.5 then. He was brought up in Glasgow and then lived in Stevenston in Scotland until he headed South at the age of 27. He was first married to Mandy and had two daughters during that first marriage. He worked in various jobs including, for a short period, as a car mechanic and then at ICI doing manual labour and later in life he was known as a painter and decorator.

[23] David had a driving licence and drove. He played soccer for Catford Wanderers and later in life coached them.

Health

[24] Health wise, he suffered cervical Spondylosis in 1989 and suffered at least two road traffic accidents in the 1990s which aggravated or caused neck and back difficulties.

[25] David's medical notes in computer form go back to the late 90s and in letter form go back to the mid 90s. There are a number of clear entries showing that David drunk 30 units per week and there are many entries relating to neck and back pain.

[26] On the 3rd of June 2013 David appealed a DWP decision relating to benefits (see the medical notes bundle page 234). The reasons he gave for his appeal were that the assessment in April 2013 did not correctly assess his ability to stand, sit and move around and pick up and move things. He was in pain "all the time" and this restricted his movement. "I have days when the pain is worse and I cannot move virtually at all. On the day of the assessment this was a relatively better day in terms of pain and I had taken extra painkillers in order to get through the interview." The particular effects of the, …(there is then a section I cannot read), he went on to say: moving around I cannot mobilise more than an (unknown number) of metres. I cannot read the number. He goes on to say: without stopping. This is not to mention .. (something) standing and sitting "on average I cannot …. (something) for more than 30 minutes without discomfort being significant. I cannot raise either arm above …. (and then I cannot read the word) height without significant discomfort.

[27] There is also a letter dated November 1997 from the benefits agency asking David to fill out an incapacity work questionnaire.

[28] There are also a number of notes relating to psoriasis and skin difficulties.

[29] He was diagnosed with an abnormal fatty liver in February 2014. In March 2015 there's a note that he drunk 60 units per week. He never smoked.

[30] In June 2015 his GP noted that David suffered significant anxiety problems attending work related DWP programmes. It was noted that his chronic back pain and neck pain problems created irritability but that was controlled. He was described as having long bouts of depression for which he took antidepressants. He was also noted as having problems with dyspepsia and gastro reflux.

[31] In December 2015 his GP noted that David controlled his neck and back pain by pacing his activities. He underwent an anal fistula operation in September 2015 which healed well. The neck pain is described as having started in 1989, being exacerbated in 1991, being exacerbated in 1999 and X rays in 1999 showed "enormous" cervical lordosis, disc bulge at C6/7 and C5/6 with slight narrowing of the thecal sack at C6/7.

[32] In February 2017 the GP noted ongoing neck symptoms exacerbated by a road traffic shunting recently, giving rise to nerve root irritation in his right hand and arm alongside some dizzy spells and falls.

[33] I cannot discern from the medical notes and there is no evidence before me as to when David retired from work.

Relationship

[34] The first Claimant met David in 2015 in a local pub. At that stage they had a group of friends and met up in that group. Over the next 12 months into 2016 the first Claimant and David became closer and their relationship started in January 2017 with their first date. By March 2017 they were together most of the time and he would stay at the first Claimant's flat often and moved his stuff in. From time to time they would stay at David's flat for a change.

[35] At the time that they met David was living with his sister because his flat at 26 Anerley Court, Anerley Park was being renovated.

[36] David began sub letting his flat around March 2017 and moved in with the first Claimant. They built their relationship together. At that time Joshua and Ben were living with the first Claimant full time. Zach was living with the Claimant every other weekend and during the holidays. Both Joshua and Ben were at school as well as Zack. They created their routine. The first Claimant did not drive but David did, so he drove the first Claimant and the children everywhere. That included driving the Claimant to her full time work as a teacher. He also drove the children to school pretty regularly.

[37] David took up the role of house husband. He cooked breakfast and dinner, he did the shopping, he did most of the cleaning and ironing. He did moderate DIY and repairs around the house. At the weekend he coached Catford Wanderers and he regularly took the boys out for dinner and to the local pub where they watched football and played pool together.

[38] At weekends the first Claimant and David enjoyed travelling around the UK, going to Hever castle and Rye and the Kent coast in particular. They went to West End musicals and in November 2017 they went together to Scotland. There he showed her his beloved Glasgow Rangers and he proposed to her and she indicated that she would accept his proposal. Thereafter they planned to marry in 2019.

[39] David was a man of routine and he liked the family to eat together and to watch film matinees at the weekend.

[40] When the Claimant gave evidence, I gained the firm impression that she was a woman who had a full insight into David. She certainly did not believe he was perfect. She described his neck and back pain and his restricted movement in relation to his neck and back symptoms. She described his use of tramadol as a painkiller and his irritability when he was suffering too much pain. She stated that he liked routine. She did not describe any disquiet by David at taking up the house husband role while she went out to work full time as a teacher. She described how she would often work evenings and weekends marking papers and planning for the work ahead and he willingly undertook the roles around the house and of an "Uber"driver transporting the boys wherever they needed to go and indeed her.

[41] It is clear that when they were together the first Claimant was earning a full time wage as a teacher and David relied on state benefits including housing benefit and ESA. He was not going to gain a pension until July 2021 when he reached the requisite age.

[42] David built a strong and warm relationship with Joshua, Ben and Zach and I so find. For instance with Joshua he took the young man away for his birthday to Paris in 2018, with the Claimant, as a surprise. He also took Joshua around the various universities that he sought to apply to and drove Joshua up to Reading for his first term in the autumn of 2018.

[43] With Ben the relationship was also deep and warm but different. He is younger than Joshua and had suffered some trouble at his school, at the time which I believe was in 2016 and 2017, when the first Claimant worked at that school. She subsequently moved. In any event it was to David that Ben turned for counsel and advice for those difficulties and David provided that willingly.

[44] In relation to Zachary, likewise David had a warm relationship with him, but Zachary lived more of the time with his natural father and so already had a father/son relationship there.

[45] I find as a fact that David was a good stepfather to all three boys, bedded down a strong relationship with them based on football in the park, going to Catford Wanderers, watching football in the pub and playing pool, driving them around and being very present in their life. Also, importantly, feeding them breakfast and dinner when they were at home, which was throughout the whole of the week and at the weekends. Neither Joshua nor Ben ever knew their natural fathers and so it was David who became a father figure for them. Being a step father is not and easy role, but he succeeded.

[46] Looking forward to the future, but for this dreadful disease, I find that despite the shortness of their relationship, the Claimant and David had built a life together in which they were happy. They planned to marry and they would have stayed together on the balance of probabilities for the rest of his natural life. I reject the suggestions made in submissions by the Defendant and implied in cross examination, that just because they had only been together for a relatively short period of time the relationship would not have lasted. I also reject the submission that a relationship with a long past defines or guarantees that the relationship will have a long future. Each case is assessed on its own facts and I have assessed the evidence in this case.

The disease

[47] Unbeknown to both David and the first Claimant and the three boys, growing within his pleural cavity was a malignant, death causing disease: mesothelioma. Just as the first Claimant's relationship with David was flowering in 2017, soon after he had discussed marriage with her in Glasgow in the November, he developed a dull ache in his chest in December of 2017. I find that his symptoms started that month. By January 2018 he was suffering night sweats and changed his pyjamas regularly. He stopped his Sunday football and his pain spread and worsened. He also found blood in his urine. He was always a regular attender at his general practitioners and so he did attend his GP and he also attended A&E that month. This seems to me to be a measure of the level of pain that he was suffering. In the February there were further A&E visits with complaints of right sided chest pain running into the right shoulder, night sweats and the like. This continued through to March when he had a chest X ray which showed right pleural effusion. He was referred to the pleural clinic at Saint Thomas' hospital where he complained of very severe right sided chest pain for six weeks with reduced weight, a dry cough and other symptoms. Eventually, that month, liquid was drained from his right lung by an invasive thoroscopy. By April, David's symptoms had improved such that he could have a week in Cyprus with the family. He also had antibiotics, which may have helped. However, the symptoms increased

in May through to June 2018 when his shortness of breath worsened, his walking was reduced and x-ray once again showed right pleural effusion and a growing lesion. His walking was reduced to 100 metres by then. The CT showed significant progressive pathology, which suggested mesothelioma and in June, David received the diagnosis of mesothelioma. The first Claimant described this as a bombshell and I accept that evidence.

[48] This led to the sort of desperate, frantic treatment and worry and anxiety that so often occurs in mesothelioma cases. In July, David and the first Claimant brought forwards their marriage. They were married by the first Claimant's father in Sydenham. They had their ceremony at the pub where they first met.

[49] By August David was receiving chemotherapy and in all, through to December, he received six cycles of chemotherapy. The notes show that although he tolerated the chemotherapy relatively well he deteriorated in September of 2018 and by October of 2018 he carried out his last "Uber" drive for Joshua, delivering him to Reading University. Thereafter he never drove a car again.

[50] By November of 2018 he was housebound and the first Claimant was caring for David pretty much full time day and night. Joshua and Ben helped care for David throughout December. He spent two weeks in hospital in December but came home just before Christmas. The family had no outside help, no carers, no nurses to assist. They did it all themselves. He lost weight, suffered increased pain and suffered many bowel accidents and they had to nurse him, and I so find. He became very unwell, with infiltration by the disease into his liver by December 2018. He suffered fevers, nausea and abdominal pain. Shockingly, and as a surprise to the family, he died on the 3rd of January 2019, a few days after the first Claimant had purchased a bed, on the advice of the local Hospice, to assist in the care and treatment of his disease. I set out below the first Claimant's evidence of the last two months:

> "38. It was in November he came down with a cold. Dave was experiencing usual cold like symptoms which seemed to worsen at an alarming rate. He was experiencing pain in his chest and shortness of breath. His cough returned. The night sweats were relentless, but Dave was now experiencing something new. He was suffering from severe abdominal pain. He had bad constipation and was unable to move his bowel. He was regularly taking the laxative medicines that come as a part of the chemotherapy treatment. I was placing at least two suppositories in his back passage but nothing seemed to work. The pain was becoming unbearable for him. At the end of November Dave was bed bound. I was bed bathing him regularly and helping him to the toilet when he needed to pass urine. On several occasions, Dave was straining so hard in an effort to pass a stool that he fainted. On advice, we continued to increase the laxative treatment. This served only to give him excruciating stomach cramps but no movement. We had reached the point where I was buying special milkshakes from the pharmacy because Dave had stopped eating anything solid. His abdomen felt extended and was extremely tender and he insisted the thought of food made him feel sick. Dave spent most of the end of November curled up in bed, trying to cope with the pain he was experiencing on top of the fatigue. He had stomach pain, abdomen pain, chest pain, shortness of breath, pain in the

> muscles in his side, headaches and tinnitus. He was not eating, barely drinking, sporadically vomiting, coughing, feverish and suffering from night sweats and insomnia. We talked about my stopping work completely because he did not want to be left alone and I did not want to leave him alone during the time I was at work. We decided that I would stick it out until the end of the Autumn term at which point we would revisit the conversation."
>
> "39. I was caring for Dave through the night getting little to no sleep myself and was exhausted. I was also tending his needs in the hours before and after work. We could see that if things did not pick up, it simply was not sustainable. We were putting Dave's extremely poor health down to the last cycle of chemotherapy – six in total. We thought this was the final hurdle – an accumulative affect – and we were still expecting good news when we were due to see the consultant. On December 11th I received a call from Dave saying he could not cope with the pain any longer and he was on his way to the hospital. All his previous symptoms had failed to get any better and he still had chronic constipation causing him excruciating abdominal pain. I left work immediately and headed to hospital. I did not return to work until after Easter the following year. Once Dave was in hospital he deteriorated at an alarming rate. When he left two weeks later, it was under the understanding that he was coming home to die. His suffering during his two weeks in hospital was horrendous. He did not eat. They continued to treat him for the constipation to no effect. He was put on a ward with other people, where the noise and lights were making sleep impossible. They did not have the space for a private room and Dave found the environment deeply distressing. I spent every day with him at the hospital, helping him change, use the bathroom and generally try to comfort him. I brought him blackout sleep masks and ear plugs but the insomnia continued as did the sweats and constant changing of bedding and clothes."

[51] Dr. Twort sets out the chronology of the treatments which David underwent starting in January 2018 with hospital visits, through March and the draining of his right lung, through diagnosis in June and chemotherapy from August to December and the many visits to clinics in between then finally 2 week in hospital in December 2018.

Funeral expenses

[52] After his death of course there was a funeral. The funeral expenses covered not only the casket but also an urn for his ashes and the flowers. Although until trial the defendant rejected the urn and the flowers asserting they were not funeral expenses, those sums were conceded on the second day of the trial.

Each head of loss in issue

Solatium

[53] Both parties agree that the award for solatium which goes to David's estate is equivalent to the English law ~~reward~~ award for pain, suffering and loss of amenity.

[54] I take into account the Judicial College Guidelines book, 15th edition published in 2019. The relevant category is 6 (c) which relates to mesothelioma. It is agreed in this case that the 10% uplift as a result of English law relating to conditional fee

agreements does not apply because the assessment is under Scottish law. The bracket in 2019 was £59,730 to £107,410. That bracket has to be updated for inflation according to the retail price index. I note that the text of the guidance suggests that most reported decisions, other than those involving extremely short periods of symptoms, or very elderly claimants, fall within the middle and upper parts of the bracket.

[55] I have looked carefully at the reported cases in *Kemp and Kemp* on the quantum of damages volume 4 section KE. In particular at the inflation adjusted chart set out in pages KE-0003 and thereafter. As at June 2021 the highest inflation adjusted award for mesothelioma was £115,040 and the lowest was £29,750.

[56] Starting at the midpoint between the top and the bottom of the bracket, that is £83,570. Adjusting for inflation that sum would come to around £89,000 pounds with inflation by October 2021.

[57] I must now consider the factors to take into account when a court is assessing pain suffering and loss of amenity to see how the starting point should be adjusted.

[58] I consider that it is crucial for the court to take into account firstly, the actual words which are: pain, suffering and loss of amenity. Next the breadth of those words. Pain speaks for itself. Suffering is the consequence of the pain and the restrictions that David suffered as a result of the disease. Loss of amenity is far broader and encompasses all of the aspects of life as described in the findings of fact set out above that David was deprived of during the period of his suffering.

[59] It is clear from the guidelines and the case law that the courts also take into account the length of the suffering. In this case I have found the suffering started in December 2017 and went on to the third day of January 2019. That involves approximately 13 months. I take into account that the diagnosis occurred six months before his death and that had a really substantial psychological effect on David. I also take into account that he was deprived of what, for him, was quite clearly a new start in life with three boys whom he clearly bonded with and with a new wife who he clearly loved.

[60] Looking at specific comparable cases I gain assistance from *Witham v Steve Hill* set out in *Kemp* at KE3A-013.1 in which Anthony Metzer QC sitting as a deputy High Court judge awarded £97,500 for pain and suffering for a man aged 55 who suffered mesothelioma for a year. His life expectancy was to 68 due to other factors so, he lost 13 years of life.

[61] David had a life expectancy which is agreed of 22.4 years and hence the loss of life element to the pain and suffering and loss of amenity in relation to what David will have known was being taken away from him is longer. For that purpose the deceased in the *Witham* case could be treated as aged 70 or thereabouts. I also take into account the case of *Head v Culver,* decided in 2019 by HH judge Melissa Clark in the same section of volume 4 of Kemp. The sufferer was aged 60 at trial and still alive. The award was 95,000 pounds. He had suffered already for 17 months and expected only another four months of life with a reduced life expectation of just under 24 years. The treatment under gone by the sufferer in that

case was similar to that under gone by David in this case, namely thoroscopy to drain liquid from the lungs and six cycles of chemotherapy alongside the normal visits to and from hospital. Finally I take into account *Blake v Mad Max limited,* a 2018 case decided by Peter Marquand, sitting as a deputy High Court judge, who awarded £90,000 to a man who died at the age of 61, losing 27 years of life, having suffered mesothelium symptoms for 16 months. He also underwent 6 cycles of chemotherapy and some biopsies.

[62] Taking all those matters into account and my factual findings, I consider that the appropriate award for David, to go to the estate, would be **£97,250.**

Loss of Society

[63] This head of loss is not known to English law. The nearest award in English law is a *Regan v Williamson [1976] 1 WLR 305* award. Watkins J at p308 H citing Lord Edmund-Davies, in *Hay v. Hughes [1975] Q.B. 790,* 802 noted:

> "While it is undoubtedly established that damages can be awarded under the Fatal Accidents Acts only in respect of pecuniary loss and not as a solatium for injured feelings (see *Taff Vale Railway Co. v. Jenkins [1913] A.C.* 1, 4, per Viscount H Haldane L.C. and *Davies v. Powell Dufjryn Associated Collieries Ltd. [1942] A.C. 601*, 617), so that these two children could recover nothing for the deprivation of their mother's love, yet it may sometime have to be considered whether Mr. McGregor is not right in saying (*McGregor* on Damages, 13th ed. (1972), para. 1232): ' . . . it may be argued that the benefit of a mother's personal attention to a child's upbringing, morals, education and psychology, which the service of a housekeeper, nurse or governess could never provide, has in the long run a financial value for the child, difficult as it is to assess."

At 309C Watkins J held that:

> "While I think that the law inhibits me from, much as I should like to, going all the way along the path to which Lord Edmund-Davies pointed, I am, with due respect to the other judges to whom I have been referred, of the view that the word "services" has been too narrowly construed. It should, at least, include an acknowledgment that a wife and mother does not work to set hours and, still less, to rule. She is in constant attendance, save for those hours when she is, if that is the fact, at work. During some of those hours she may well give the children instruction on essential matters to do with their upbringing and, possibly, with such things as their homework. This sort of attention seems to be as much of a service, and probably more valuable to them, than the other kinds of service conventionally so regarded.
>
> So I begin the calculation of the figure of dependency with the sum of £12.50 per week. This, however, covers but a part of the loss of services. What about all those hours in the evening and during the weekends when no substitute service is available? In my judgment, they require to be taken into account. In so doing I recognise the difficulty of reaching conclusions without the assistance of clear guidelines. I am aware that there are good and bad mothers. It so happens that I am concerned in the present case with a woman who was a

good wife and mother. I propose, for the foregoing reasons, to raise the dependency figure to £20 a week."

This award, which has been followed in many English cases, remains grounded in the services provided and valued under the *Fatal Accidents Act 1976.* The Scottish award, under a different statute, is far broader and not based in services of payable value.

[64] Loss of society is provided within Scottish law and I have to decide the appropriate award on the evidence, in accordance with Scottish law.

[65] The expert in Scottish law, who has given evidence to this court, is David Short.

[66] By the time of trial there was no dispute that the first Claimant and her three sons were entitled each to an award for loss of society. The issue related to the quantification thereof.

[67] Section 4 of the *Damages (Scotland) Act 2011* states as follows:

"4 Sums of damages payable to relatives

(1) B is liable under this subsection to pay—

(a) to any relative of A who is a member of A's immediate family, such sums of damages as are mentioned in paragraphs (a) and (b) of subsection (3),

(b) to any other relative of A, such sum of damages as is mentioned in paragraph (a) of that subsection.

(2) But, except as provided for in section 5, no such liability arises if the liability to pay damages to A (or to A's executor) in respect of the act or omission—

(a) is excluded or discharged, whether by antecedent agreement or otherwise, by A before A's death, or

(b) is excluded by virtue of an enactment.

(3) The sums of damages are—

(a) such sum as will compensate for any loss of support which as a result of the act or omission is sustained, or is likely to be sustained, by the relative after the date of A's death together with any reasonable expenses incurred by the relative in connection with A's funeral, and

(b) such sum, if any, as the court thinks just by way of compensation for all or any of the following—

(i) distress and anxiety endured by the relative in contemplation of the suffering of A before A's death,

(ii) grief and sorrow of the relative caused by A's death,

(iii) the loss of such non-patrimonial benefit as the relative might have been expected to derive from A's society and guidance if A had not died.

(4) The court, in making an award under paragraph (b) of subsection (3) is not required to ascribe any part of the award specifically to any of the sub-paragraphs of that paragraph."

[68] Focusing on sub paragraph three (b), there are clearly three parts to the award. Part one is for the past distress and anxiety endured by the relative in contemplation of David's suffering before David died. Part 2 is the relatives' grief and sorrow caused by the death. Part 3 is the loss of non patrimonial benefit the relative might have been expected to derive from David's Society and guidance but for his death. That clearly is a future loss claim.

[69] The word "patrimonial", it is agreed between the parties, represents financial loss, so part three relates to non financial benefits that the relative would have enjoyed from David's continuing presence.

[70] David Short summarised some of the case law guidance as follows:

> "44. In quantifying claims of this nature, guidance can be taken from recent awards made in both jury trials and judicial awards although the particular facts and circumstances of each case must be considered. The Inner House described, in the case of *Young v MacVean 2015 CSIH 70* (Appendix J) "the continuing upward pull of jury awards."
>
> 45. Lord Woolman, in *Bellingham v Todd (Appendix K) 2011 SLT 1124,* considered previous judicial and jury awards and drew the following propositions from them:
>
> (a) The assessment of damages is essentially a jury question;
> (b) That is because such awards should reflect the expectations of society;
> (c) The court is therefore encouraged to look for guidance to jury decisions;
> (d) Reliance can be placed upon a consistent pattern of jury awards; and
> (e) Caution should, however, be exercised before (i) reliance is placed on only one jury award; or (ii) equiparating awards in respect of different classes of relative.
>
> 46. In the case of *Hamilton v Ferguson Transport* (Spean Bridge) Ltd 2012 S.C. 486 (Appendix L) , the Court said that the loss of society awards in *Bellingham and Wolff v John Moulds (Kilmarnock) Ltd* 2011 CSOH 159 (Appendix M) had been "markedly undervalued" and went on say at para 70:
>
> "…. unless parties agree or there is some cause special to the particular action, Parliament's specified adjudicatory body in actions of damages for personal injuries is the jury. That suggests to me that other jury awards in comparable cases, provided they are sufficiently well documented and free from special consideration and (in time) disadvantages such as those mentioned below (see para 71) should, on being taken into account, be accorded significant weight."

[71] Looking at the first part, namely the distress and anxiety suffered by the first Claimant and her three sons during the 13 months when David was becoming more and more unwell, I find the first Claimant's evidence truthful and compelling. I also hold that her suffering, distress and her anxiety, watching the man with whom she had just fallen in love and to whom, for the first time in many many years, she had introduced her sons, becoming more and more disabled had a profound effect on her.

[72] Although there is no similar evidence by way of a witness statement from the three boys, I accept the first Claimant's evidence about her sons, including the fact that they provided physical and emotional support to David during the 13 months of his suffering and in particular after the diagnosis in June of 2018.

[73] Turning to the second part, namely the grief and sorrow of the relatives caused by David's death, I find that the first Claimant's reaction was indicative of the depth of her feeling for him. She fell into such despair that she suffered acute psychiatric difficulties and self harmed. Her anxiety and depression was self described as "completely unmanageable". She had multiple visits to burns units at hospitals and an operation to limit the damage she had caused to herself. She received psychotherapy from the Maudsley hospital and trauma counselling.

[74] As for the boys, the evidence in relation to them is sufficient in my judgment to bring them within what would be regarded as normal awards for children, by which I include step children, cared for by the deceased.

[75] Turning to the third part of this head of damage, future society, there appear to be two constituent elements. The first is what the court finds is to be "expected" from David. The 2nd relates to the actual David's society and guidance which he would have given to the relevant person. When assessing this head of claim, it seems to me that the court needs to look at three main factors: the length, the breadth and the depth of the society and guidance that is to be expected.

[76] The Scottish cases make it clear that the awards are fact specific and the awards are made within guideline brackets, so that there can be some element of predictability and consistency to them.

[77] Looking at the society which David provided to the first Claimant, it is clear that he was a house husband, while she went out to work full time. She is in her late 30s and so has at least another 25 years of full time work in her. I therefore take note of the fact that he was likely to fulfil that emotionally supportive role for the rest of his natural life, but for the disease.

[78] So what did David do as a house husband? He shopped, he cooked breakfast and dinner, he did most of the cleaning and the laundry, he did DIY around the house, but I don't take those into account for the purposes of society. Those are excluded, because those matters are covered by the personal services head of loss.

[79] So the society provided by David is the support that he gave to the first Claimant, a full time working woman and teacher. It involves: the going to the theatres in the West End, taking the family out to the pub, the guidance given to the boys when they need it on so many things in life, the holidays that they would have spent together, the shouting at the TV screen during football matches, the companionship, the emotional love, the physical love, the hugs, the conversation, the support for issues occurring at her work and school events.

[80] One submission made by defence counsel was that the award should be lower in this case because David and the first Claimant had only recently met. He contrasted

that with a couple who had been together for 40 years and were regarded as devoted. I consider that each case depends upon the evidence put before the court. I cannot compare the society of this man and woman with another couple unknown, in circumstances not before me. I find that albeit they had only been together as a couple for two years and had only known each other for three to four years before he passed, they had made the most of their affection and love, married and become deeply entwined, such that their roots had grown together and I find that they would have stayed together on the balance of probabilities in future.

[81] As for the boys, taking into account what is set out in the first Claimant's witness statement, about the intertwining between all three boys and David, albeit to a lesser extent in the case of Zachary, because of the existence of his natural father in his life, I find that they fall into the standard category of award for society, on the basis that David would have continued to be an influential and supportive figure in their lives as they grew up.

[82] What then are the comparable awards in such cases provided to this court by David Short? They are set out in his advice to this court at paragraphs 48-56 of the report dated February 2021. By English law standards they are large. He advises that jury awards are to be taken into account, alongside judicial awards. A comparable case put forward is *Anderson v Brig* (2015) in which an award to the widow of £166,226 at today's value was given by a jury, having been advised by the presiding judge Lady Stacey, that the bracket was between £100,000 and £140,000. In that case the deceased was aged 33 so the length of the loss of society was substantially greater than in the current case.

[83] The next case referred to by David Short is *Stanger v Flaws* (2016) in which a 64 year old died and the widower, age 72, was awarded £140,205 by a jury, who had been given a guideline range of between £80,000 and £120,000, unadjusted for inflation. The inflation adjustment brought the jury's award up from £120,000 to £140,205 at today's values.

[84] The next relevant comparable award is *Gallagher v Cheadle Hume* (2014) in which a judicial award was made of £95,950 at today's values. The deceased was age 70 and had been married to the widow for 47 years. It appears to me from the judgment that the widow was 66 years old at the date of death of her husband. Lord Uist, who gave judgement, reviewed the authorities going back to 2007. He noted in *Wolf v John Moulds* (2012) SLT 231, that the deceased was aged 67 when he died from mesothelioma and that his widow received an award for loss of Society of £50,000. Both elder children were awarded £15,000, being adult daughters. The youngest daughter was age 32, lived at home and was awarded £18,000. Upgraded for inflation the widow's award would be roughly £75,000 in that case.

[85] I note on Page Six of the case report for *Gallagher*, page 179 of the core bundle, that Lord Uist stated this:

> "It is open to a pursuer to highlight the positive aspects of a relationship and to a defender to highlight the negative aspects. In relation to the loss of such non-patrimonial benefit as the relative might have been expected to derive from the deceased's society and guidance if the deceased had not died, the evaluation

> must consider what the non-patrimonial benefit is and for how long it is likely that it would have been derived by the relative if the deceased had not died. This must, in turn, involve consideration of the ages of the relative and of the deceased at the date of the deceased's death. Some may consider the carrying out of such an inquiry in each individual case to be distasteful, if not even offensive, but carried out it must be."

[86] As is set out above, defence counsel properly did ask questions to highlight the negative aspects in relation to loss of society and I have made my findings above. I accept the evidence from the first Claimant in relation both to herself and her three sons.

[87] I also take into account the cases of *McCulloch v Forth* (2020) in which an award of £126,242 (updated for inflation) was made to a widow of a deceased husband aged 39 by Lord Tyre who stated:.

> "[118] It has been settled since *Hamilton* v *Ferguson Transport (Spean Bridge) Ltd* 2012 SC 486 that in assessing the appropriate level of awards for loss of society, judges should have regard to jury awards in comparable cases as well as to past judicial awards"

[88] I take into account *Andrews v Great Glasgow [2019] CSOH 31,* in which £80,886 was awarded (at today's values) when a man aged 77 died and his partner of 20 years for loss of society. That was a sudden death, not a mesothelioma case. The period is also shorter.

[89] I consider that the bracket for the award in this case for the 1st Claimant is £90,000 - £140,000 and I consider that an award of £115,000 is the right award for her.

The boys – loss of society

[90] As for the appropriate awards for loss of society for the three boys, I take into account the same paragraphs of the expert evidence of David Short namely 48 to 56. I again note that the jury awards made by Scottish courts are relevant. I note that the award in *Anderson v Brig* was £94,986; in *Stranger v Flaws* it was £58,418; In *Manson v Henry Rob* it was £33,498; In *Gallagher v Cheadle Hulme* it was £41,978; In *McCulloch v Forth* it was £84,161 and in *Rider v the Highland Council* it was £49,244. All of the awards set out above are inflation adjusted. I consider that none of the awards have facts precisely that are similar to the ones in this case before me.

[91] Most of the above awards were for adult children. The awards in relation to teenage children relate to much younger parents.

[92] It seems to me that, in relation to length, the past period since death, and the future period of 22.4 years, these lengths are directly relevant. In relation to the breadth of the relationship, the father figure style society, revolving around football, pubs, universities and the life guidance and in later life the relationships guidance are all relevant.

[93] In relation to depth, I find that, on the first Claimant's evidence, despite the relatively short period of knowing each other, these boys had bonded well with David and that bond would have created firm and fulfilling society for the rest of their natural lives whilst David was alive.

[94] David Short advises further that:

> "53. In his article, "*Hamish Stanger v Erland Flaws*: squaring the circle between awards by judges and juries", 2016 Rep B 131-2, Robert Milligan Q.C. (Appendix O) suggests that, in light of the *Stanger* decision and looking at all the awards since *Hamilton*, brackets for likely future awards in "standard" scenarios (i.e. where there are close family relations) are as follows:
> …..
> (b) loss of a parent – £35,000 to £50,000 (more for younger children);"

[95] Taking all of the factors into account I consider that an appropriate award for these boys would be £40,000 each to Joshua and Benjamin and £35,000 to Zachary.

Loss of services

[96] Pursuant to Section 9 of the *Administration of Justice Act 1982* for the estate's claim:

> **"9 Services to injured person's relative.**
> (1) The responsible person shall be liable to pay to the injured person a reasonable sum by way of damages in respect of the inability of the injured person to render the personal services referred to in subsection (3) below.
> **[F1**(1A) In assessing the amount of damages payable by virtue of subsection (1) above to an injured person whose date of death is expected to be earlier than had the injuries not been sustained, the court is to assume that the person will live until the date when death would have been expected had the injuries not been sustained.**]**
> **F2**(2) . . . . . .
> (3) The personal services referred to in **[F3**subsection (1)**]** above are personal services—
> (a) which were or might have been expected to have been rendered by the injured person before the occurrence of the act or omission giving rise to liability,
> (b) of a kind which, when rendered by a person other than a relative, would ordinarily be obtainable on payment, and
> (c) which the injured person but for the injuries in question might have been expected to render gratuitously to a relative."

In addition S.6 of the *Damages (Scotland) Act 201*1, in relation to dependency claims, states:

> **"6 Relative's loss of personal services**
> (1) A relative entitled to damages under paragraph (a) of section 4(3) is entitled to include, as a head of damages under that paragraph, a reasonable sum in respect of the loss to the relative of A's personal services as a result of the act or omission.

> (2) In subsection (1), "personal services" has the same meaning as in section 9(1) of the Administration of Justice Act 1982 (c.53) (damages in respect of inability of injured person to render such services)."

[97] David Short advises that past and future personal services, for which relatives can recover, have been held to be services such as: child care, shopping, cooking, cleaning, washing, ironing and Housework generally, home maintenance and DIY, car maintenance and the provision of board and lodging, meals, and transport."

[98] There was no evidence to support car maintenance so I discount that.

[99] These are services with assessable value based on what can be bought on the open market. The first Claimant's evidence of the services that David provided was clear and compelling. He was a house husband. This role is highly valued in modern society. As set out above, he cooked and shopped and cleaned and did most of the laundry and he was also the family taxi driver, which for one person, namely the first Claimant, is quite a lot, but also for three boys, is a great deal.

[100] Taking each item in turn, I find that David did not provide specific childcare services. He did provide shopping services, daily cooking services, cleaning services, washing services, ironing and housework generally, home maintenance and some DIY and of course taxi services.

[101] There was an issue between the parties about whether David could carry out home maintenance and DIY. The Defendant, quite properly, pointed to David's medical notes and his lack of paid work for a considerable number of years, based on his ill health. However, the first Claimant dealt with this head on in her evidence and frankly admitted that he had good days and bad days, he had had chronic neck and back pain for all the time that she had known him but that did not stop him, at his own pace, pottering around, doing maintenance and DIY in her property. I find as a fact that he did do maintenance and DIY, it just was more spaced out, slower and less compact than it would have been had he been without his neck and back pain and anxiety and emotional conditions. I should say, by the way, that there was nothing that I found persuasive in the medical notes after David met the first Claimant, in relation to his mental condition, that suggested he was anything other than in a good place after they started living together.

[102] I take into account that it is a vital precondition built into the statute that the services to be provided by the deceased, are covered by the *Administration of Justice Act 1982* and by section 6 of the *Damages (Scotland) Act 2011*, are of the type which are reasonable and must be "payable", in the sense that they are the sort of services for which, if David had not been there, the 1st Claimant could have paid another person to do them.

[103] The schedule is calculated on the basis of David providing £10,000 in value of services per annum, as a discount from the average figures calculated by the ONS – a Government body, in their *2016 Household Satellite account on household service work done throughout the UK* (Supplementary bundle at page 55).

[104] The Defendant sought to persuade me that to be admitted in evidence, this ONS paper had to be disclosed or served or an expert called to prove it. I am not persuaded by those arguments. Courts use government figures to ensure that awards are grounded and sensible every day. The New Earnings Survey, the Ogden Tables, the life tables and social security rates and Local Council pay rates. I consider that the ONS Survey is helpful. Is sets out that the average value of household services provided in this way:

> "In 2016, the value of the UK's unpaid household service work was estimated at £1.24 trillion, equivalent to £18,932 per person"

My difficulty with this survey was in understanding what it meant. Was "per person" relating to each person who was doing the work or per head of population? There were other obscurities too. So I regret to say that at this time all I can gain from the ONS Survey is that I consider that it may be relevant but is unclear to me.

[105] How then should I assess David's "payable" and "expected" services to the first Claimant and the boys? The parties agree that Scottish law and English law are in synchronicity for this head. It must be done by traditional methods. I have looked at David Short's paragraphs 24 to 27 and the cases therein. I have looked at the case law in *Kemp* on Quantum at chapter 29-043 et Seq. In *Zambarda v Shipbreaking [2013] EWHC 2263* the deceased had cared for his wife due to her health conditions before the symptoms emerged. Later he died from Mesothelioma. The care he would have provided was assessed on an hours provided basis. John Leyton Williams sitting as a deputy, awarded past dependency on services of £71,694 and future dependency on services of £171,065. The deceased had died from mesothelioma aged 77 and before he developed symptoms he cared for his wife who had a longstanding history of medical problems and chronic ill health. In volume 4 of *Kemp* at paras O4-001 et seq are many awards for loss of the deceased's service. In *W v Johnson [2006]* the services award was £41,000; in D *v D* (2011) the parties agreed a future services dependency of £58,600 and a past services dependency of £8,000 for the deceased who died aged 47 and was exceptionally able at DIY leading to a multiplicand of £3,250 pa relating to DIY only. Neither case is directly comparable.

[106] The first Claimant asserted that the court should value the services that David would have provided to the first Claimant and her sons at £10,000 per annum and the defence asserted, in the skeleton argument delivered before trial, that the figure should be £2,000 per annum, although in closing submissions the defence submitted that that was too generous. In the counter schedule the Defendant valued the services far lower, at £600 per annum with a multiplier of 12.79 dropping to £250 per annum with a multiplier of six.

[107] I take judicial notice of the information provided in *Facts and Figures* published by Sweet and Maxwell, showing that outside and inside London cleaners cost between £9.20 per hour and £13.50 per hour. Handymen charge daily rates of around £359, and cleaning and housekeeping is valued at £12 an hour. Those rates are from 2019.

[108] I consider that it is likely, taking into account all of the driving that David did for the first claimant, he would have continued to do so for the whole of their relationship, because she was committed to teaching and was likely to stay as a full time teacher for their natural life together. She does not have a driving licence. For that and for cooking breakfast, for cooking dinner, for washing up, for doing the shopping, for doing most of the cleaning and the laundry and for the rather slow DIY and maintenance, I consider 2 hours per day to be reasonable as an average. That is an average weekly rate of 14 hours which would be reasonable for David on the evidence before me. I do not consider he would have done that during their holidays away, so I use that hourly rate over 48 weeks pa at an average hourly rate of £12 per hour, that would be valued at £8,064 per annum.

[109] I discount that by 25% because the services are gratuitous and round it down somewhat to a multiplicand of £6,000 per annum. I take into account the comments made in *Witham v Steve Hill LTD.[2021] EWCA Civ 1312* at [52] per LJ Nicola Davies:

> "52. It is the value of the services lost which requires assessment and compensation, not the value of how the dependant manages following the death. The decision of the judge to value care, not on the basis of the gratuitous replacement by a friend or relative, but on the basis of the estimated cost of employing labour to replace the lost service, was one open to him to make. Further, having so found, there is no identified requirement to make a 25% or other deduction."

Whilst there may be no requirement to make the gratuitous services deduction, the services from David would have been gratuitously delivered and I consider that on the evidence that deduction is appropriate to reflect the value of the services lost by the first Claimant in this case.

[110] I consider that those services would have continued from the start of his symptoms to the date of trial which amounts to about three and three quarter years. However for the first month or two of that period his symptoms were not anywhere near their height and indeed he continued providing taxi services, so I find a reduced level until October of 2018. Therefore I assess the past loss to death at £6,000 x 0.5 = **£3,000**.

[111] For loss of services from death onwards to trial will be 2 years and 10 months £6,000 x 2.83 = **£16,980**.

[112] Into the future, I assess the loss at £6,000 pa until around age just before 70 in 2025. Thereafter at £3,000 pa to around age 80 and £500 pa thereafter. I apply the following multipliers realising that they are lower than the 18 claimed by the Claimants:

Value: £6,000 x 3.5 =	£21,000
£3,000 x 10.13 =	£30,390.
£500 x 2 =	£1,000
Total:	**£52,390**

The Conclusions

[113] I award solatium of £97,250.

[114] I award loss of society of £115,000 to the first Claimant and £40,000 to each of Joshua and Ben and £35,000 to Zachary.

[115] I award loss of services as follows:

Past to death: £3,000.
Past: from death to trial: £16,980.
For the future: £52,390.

Judgment

[116] The 1st Claimant shall receive the following award of damages, some of which are held on trust for her sons**:**

Past

1. Solatium: £97,250
2. Dependency: financial, agreed at £7,944.46.
3. Care provided to David during his illness, agreed: £13,320.
4. Patrimonial expenses agreed: £7,424.19
5. Funeral expenses agreed: £3,553.32.
6. Services David would have supplied: £19,980.

And interest on past loss and expense. The method of calculating interest under Scottish law is agreed and the parties have agreed that calculation on past losses as £45,511.36.

Future:

7. Dependency: financial, agreed at £138,687.12.
8. Society lost by C1: £115,000.
   - Joshua: £40,000.
   - Ben: £40,000.
   - Zachary: £35,000.
9. Future services: £52,390.

Total damages **£570,549.09** plus interest.
So the total judgment sum is **£614,060.45.**

[117] **Costs**

The order resulting form this judgment has been agreed between the parties.

Ritchie J

End