<u>IN THE SUPREME COURT OF THE UNITED KINGDOM</u>
<u>UKSC 2025/0002</u>

ON APPEAL FROM THE COURT OF SESSION
(FIRST DIVISION, INNER HOUSE) SCOTLAND

APPELLANTS' WRITTEN CASE

in the cause

(FIRST) ELAINE CROZIER OR VEALE, 3 Halsey Drive, Lynefield, Auckland, 1042, New Zealand; **(SECOND) GWEN CROZIER OR LAMB,** 50 Oldwood Place, Livingston, West Lothian EH54 6UJ; **(THIRD) GEMMA ELIZABETH VEALE,** 41 Farrand Road, Kumey, 0891, New Zealand; **(FOURTH) KIERAN NATHAN LAMB,** 50 Oldwood Place, Livingston, West Lothian EH54 6UJ; **(FIFTH) CAITLIN ANNE VEALE,** 3 Halsey Drive, Lynfield, Auckland, 1042, New Zealand; **(SIXTH) AIDAN ETHAN LAMB,** 50 Oldwood Place, Livingston, West Lothian EH54 6UJ

PURSUERS AND RESPONDENTS

<u>against</u>

SCOTTISH POWER UK LIMITED, 320 St Vincent Street, Glasgow, G2 5AD

<u>DEFENDERS AND APPELLANTS</u>

ORDER SOUGHT

1. To allow the Appeal and to dismiss the action as sought in Answer 6 of the Record.

OPENING REMARKS

2. Section 4 of the Damages (Scotland) Act 2011 ("the 2011 Act") reenacted the previous rule that ensured finality of litigation and legal certainty. In s5 of the Damages (Scotland) Act 2011, Parliament reenacted a specific, narrow, and policy-based exception to that rule. The exception avoided the invidious and immediate choice facing individuals suffering from mesothelioma: die having been compensated but having excluded family claims, or die without the benefit of compensation in order to preserve family claims. Those who are not suffering

from mesothelioma do not face this choice. Mr Crozier settled a claim for solatium for pleural plaques (and not mesothelioma) on a full and final basis and any further claims, whether by him and/or his relatives, were excluded by s4 of the 2011 Act. The Respondents, and the courts below, stripped s5(1)(a) of the 2011 Act of its context and proper meaning, transforming Parliament's targeted remedy for a specific injustice into an unwarranted, expanded provision that goes beyond the mischief that section 5 was intended to resolve. In doing so they undermined the finality of settlements, the justice that such finality secures, and created an unprincipled anomaly, for all the reasons detailed below.

STRUCTURE OF WRITTEN CASE

3. The Appellants adopt the following structure:

    a. Introduction and summary

    b. Provisional Damages

    c. Further Legal Background: The dilemma and the solution

    d. The approach to Statutory Interpretation

    e. Grounds of Appeal 1 – 3 - The application of this approach to the 2011 Act

    f. Ground of Appeal 4 – Was Mr Crozier's case a 'mesothelioma' case?

    g. Ground of Appeal 5 – Dependent Claim?

    h. Conclusion

INTRODUCTION AND SUMMARY

Errors of the Inner House

4. The Inner House misdirected themselves on:
    a. the nature of a pleural plaques settlement (there was no compensation for loss of earnings) and that a risk of a condition is not the same as the development of that condition.
    b. the scheme by which living mesothelioma claims are dealt with (compensation for pain and suffering, "lost years", lost services).
    c. the proper interpretation of the scheme re-enacted by ss3-5 of the 2011 Act, including with reference to relevant external aids to construction.

5. With reference to their holdings in paragraphs [28] to [30] of their Opinion, the errors of the Inner House might thus be summarised as:
    a. that the only relevant condition in s5 was that the deceased died from mesothelioma (paragraph 28)
    b. that Mr Crozier's claim for pleural plaques was a mesothelioma case (paragraph 29)
    c. that the defenders' (Appellants') interpretation of s5 required the reading in of additional words (paragraph 30)
    d. that nothing within the external aids to construction detract from interpreting s. 5 of the 2011 Act in the manner determined by the Inner House.

Summary of background and position of the Appellants

6. Before the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 amended the Damages (Scotland) Act 1976, the grant of absolvitor prior to death discharged all potential liability to relatives of an individual who suffered a personal injury.

7. Mesothelioma is an incurable condition that results in death within a short period. Damages to relatives were often higher than those payable to the individual suffering from mesothelioma. An individual suffering from mesothelioma faced an invidious dilemma. They could resolve their own damages claim before they died and obtain damages during their life; their relatives would then be unable to claim damages for their suffering. Alternatively, they could choose to live without the benefit of any damages and leave their executor and relatives to claim for (normally greater) damages arising from their death.

8. In 2006 it was estimated that around 80% of individuals suffering from mesothelioma were not pursuing their own claims, in order not to disadvantage their relatives. The result was that individuals suffering from mesothelioma were living the last few months of their life without the benefit of any comfort that damages could bring them.

9. The Scottish Parliament decided that this invidious dilemma for individuals suffering from mesothelioma should be rectified. The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 ("the 2007 Act") was enacted with the purpose of removing the dilemma. The exclusive purpose of the 2007 Act was to permit individuals suffering from mesothelioma to advance a claim without the consequence that their claim would prevent their relatives from also claiming for damages upon their death. A conscious and considered decision was made to create an exception that would only apply to persons facing the dilemma experienced by individuals suffering from mesothelioma.

10. The 2011 Act repealed the 2007 Act, but for all practical purposes, the terms of the 2007 Act were replicated in ss3-5 of the 2011 Act.

11. Section 5 of the 2011 Act is in the following terms **(emphasis added)**:

"***Discharge of liability to pay damages: exception for mesothelioma***

(1) This section applies where—

(a) ***the liability to pay damages*** *to A (or to A's executor) is discharged, whether by antecedent agreement or otherwise, by A before A's death,*
(b) the personal injury in consequence of which A died is mesothelioma, and
(c) the discharge and the death each occurred on or after 20th December 2006.

(2) Liability arises under section 4(1) but is limited to the payment of such sum of damages as is mentioned in paragraph (b) of section 4(3)."

12. The competing interpretations of section 5 are discussed below. The Appellants submit that the plain and unambiguous meaning of s.5 is that the exception applies only where an individual has a claim for damages arising from the suffering caused by mesothelioma and the liability to pay those damages (for mesothelioma) has been discharged.

13. If an ambiguity does exist, it is submitted that the ambiguity should be resolved in favour of the Appellants with reference to the clear and limited purpose of the 2007 Act, re-enacted in s.5 of the 2011 Act.

The Pleural Plaques Settlement

14. Mr Crozier was a former employee of the Appellants. He developed pleural plaques and asbestosis as a result of being exposed to asbestos. He raised proceedings against the Appellants in 2014 ("the Pleural Plaques Proceedings"). He did not suffer from mesothelioma at that time, although his condition gave rise to a known risk of contracting mesothelioma.

15. The Pleural Plaques Proceedings sought provisional damages, in accordance with s.12 of the Administration of Justice Act 1982, reserving the right to return to Court in the event that Mr Crozier developed one or more of certain identified conditions. Those conditions included lung cancer and mesothelioma. In the alternative, he sought damages at large. In that event, Mr Crozier sought the proportion of damages which would arise if he developed a terminal disease relative to the risk of that eventuality. In either provisional or full and final damages, the only head of claim involved was solatium.

16. Mr Crozier settled the Pleural Plaques Proceedings on a full and final basis on 7 October 2014. Decree of absolvitor was pronounced. A decree of absolvitor is a final decree *in foro*, which is *res judicata*. *Res judicata* is a peremptory plea that the substantial merits of the cause have been decided by a competent court in an action between the same parties, or parties having a like interest, and consequently should not again be adjudicated upon. The plea is necessary for reasons of public policy that a person (including a limited liability company) should not be subjected to a second action on the same grounds. (MacLaren on Court of Session Practice, pp396 and 1090-2).

17. Settlement on a full and final basis paid Mr Crozier damages that were greater than he would have received had he opted for provisional damages, but had not gone on to developed any of the identified conditions. The future component of full and final damages, which reflected the **risk** of future disease and thus pain, suffering, and patrimonial loss, was paid as solatium (see *Harris v The Advocate General for Scotland* 2016 SLT 572 at 576B). Mr Crozier did not suffer from mesothelioma when he settled his claim and accordingly did not receive damages in reparation for any pain and suffering or loss of earnings associated with mesothelioma. A known consequence of the settlement was that Mr Crozier was unable to return to court to claim further damages in the event that he developed any of the identified conditions, such as asbestos

related lung cancer or mesothelioma. Decree of absolvitor was pronounced on 26 February 2015.

18. At no time did Mr Crozier face the invidious dilemma identified in relation to an individual suffering from mesothelioma. He was not faced with the dilemma of whether to forego damages for himself and live the last few months of his life without having been paid those damages. At the date of raising the Pleural Plaques Proceedings and of settlement, it was not known whether Mr Crozier would develop mesothelioma. He therefore did not and could not have faced the dilemma which the 2007 Act sought to resolve.

19. Mr Crozier secured the greater sum of full and final damages rather than opting for lesser provisional damages and retaining the right to return to court in the event of development of an identified condition. He understood, or at least ought to have understood, that he had the option to take provisional damages. He opted for the benefit of full and final settlement. This was a rational decision given his circumstances. The law respects such decisions by giving them finality and in doing so balances the interests of all parties.

After Absolvitor

20. Mr Crozier did in fact contract mesothelioma. He died on 15 October 2018 as a result. As a consequence of the settlement of the Pleural Plaques Proceedings, it was not open to Mr Crozier, prior to his death, to raise proceedings seeking damages from the Appellants in relation to his development of mesothelioma. The Appellants had no liability to Mr Crozier for damages arising for solatium, wage loss or costs incurred due to his development of mesothelioma.

21. The Appellants contend that, likewise, any liability to the relatives of Mr Crozier, arising from his development of mesothelioma, was discharged by the settlement of the Pleural Plaques Proceedings.

22. The Respondents contend that, despite their being no liability to Mr Crozier for damages arising from the development of mesothelioma and despite Mr Crozier never having faced the invidious dilemma discussed above, there remains a liability to his relatives due to the operation of s.5 of the 2011 Act.

23. The Appellants submit that the Respondents' position is contrary to the terms of the 2011 Act and its purpose. It produces an absurd result, namely to allow Mr Crozier's relatives to claim for loss suffered as a result of Mr Crozier's mesothelioma, in circumstances where no such liability was owed to Mr Crozier. Mr Crozier did not, at the point of developing mesothelioma, have any right to return to court and seek further damages. As well as being *res judicata*, to do so would have been contrary to the 'one action rule': *Aitchison v Glasgow City Council* 2010 SC 411 ("*Aitchison*") at [32].

24. The Respondents' position also results in an unprincipled anomaly in the manner in which families of individuals who die from conditions which: (i) can be attributed to the original negligence; but (ii) develop after a full and final settlement has been entered into. The anomaly is examined with reference to the following example scenario:

   a. Individuals A and B both suffer from pleural plaques and asbestosis;
   b. Both A and B settle their claim on a full and final basis;
   c. Individual A then develops and dies from asbestosis related lung cancer; and
   d. Individual B then develops and dies from mesothelioma.

25. In this scenario, neither individual has faced the invidious choice identified by the Scottish Parliament. Neither individual can return to court and seek damages arising from their development of a terminal disease. The family of individual A cannot seek damages arising from the death of A. Section 4(2) of the 2011 Act applies. However, on the Respondents' position, the family of individual B are treated differently and can seek damages arising from B's

death. Following the logic of the Respondents' position, that is because B died of mesothelioma, rather than asbestos related lung cancer, therefore s.5 applies. The Respondents' position therefore turns on the cause of death, rather than whether A or B is faced with the invidious choice that the Scottish Parliament identified should be rectified. This results in an unprincipled anomaly, namely the different treatment of the families of deceased persons. There is no reason in policy why the family of A and B should be treated differently. It is submitted that this anomalous result was not the intention of s.5 of the 2011 Act and is not its effect.

26. In accepting the Respondents' position, the Appellants submit that the courts below fell into error. The Court is moved to allow the Appeal and to dismiss the action.

27. The detail of matters is considered below.

PROVISIONAL DAMAGES

28. It is submitted that the availability of provisional damages are relevant to the context of the 2007 Act, the 2011 Act and Mr Crozier's claim. They are therefore discussed in this section.

29. The availability of provisional damages in Scotland is provided for in the Administration of Justice Act 1982 s 12. Its relevant terms are:

"(1) This section applies to an action for damages for personal injuries in which—

(a) there is proved or admitted to be a risk that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of the action, develop some serious disease

or suffer some serious deterioration in his physical or mental condition; and

(b) the responsible person was, at the time of the act or omission giving rise to the cause of the action,

(i) a public authority or public corporation; or

(ii) insured or otherwise indemnified in respect of the claim.

(2) In any case to which this section applies, the court may, on the application of the injured person, order—

(a) that the damages referred to in subsection (4)(a) below be awarded to the injured person; and

(b) that the injured person may apply for the further award of damages referred to in subsection (4)(b) below, and the court may, if it considers it appropriate, order that an application under paragraph (b) above may be made only within a specified period.

(3) Where an injured person in respect of whom an award has been made under subsection (2)(a) above applies to the court for an award under subsection (2)(b) above, the court may award to the injured person the further damages referred to in subsection (4)(b) below.

(4) The damages referred to in subsections (2) and (3) above are—

(a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and

(c) *further damages if he develops the disease or suffers the deterioration*."

30. This provision was designed with asbestos related conditions in mind. See for example: Robert Milligan, Rep. B 2002,44 (Mar) 2-4:

"*This important provision was designed with asbestos-related diseases particularly in mind. For example, a pursuer with pleural plaques may suffer no functional disability at all and lead a full and normal life. However, there is also a serious risk that the condition may deteriorate and fibrosis develop. In an extreme case, the pursuer might even develop mesothelioma, leading to an inevitable, slow, painful death. It is simply not possible to cover this range of possibilities in a conventional award….Outside the context of asbestos-related diseases, provisional awards are very uncommon.*"

31. One reason that provisional damages provisions are necessary is that, in Scotland, "*Damages in compensation for all the loss arising from one cause of action must all be claimed and recovered in one action. The claim must cover all loss, past, present and future, certain and contingent, direct and consequential…A second action cannot be brought…not even if substantial loss subsequently accrues and even though it be substantial or unexpected." Walker Delict 2nd edition at 462.* In *Aitchison* at [32] it was held that the 'one action rule' was firmly established in Scots' law. The rule derives from public policy. The English & Welsh law equivalent, known as the 'single action rule' has been described as "very old and for the protection of defendants": per Lord Hoffman in *Rothwell v Chemical and Insulating Co Ltd* [2008] 1 AC 281 at [14], cited by the Inner House in *Smith v Sabre* 2013 SC 569 at [27].

32. Provisional damages have in fact been sought in asbestos related claims: e.g. *W v Advocate General for Scotland* 2015 SLT 537.

33. The pleadings in the Pleural Plaques Proceedings contained a conclusion for provisional damages, reserving his right to return for further damages, and in

the alternative, general damages to include the proportion of damages which would arise if he developed a terminal disease relative to the risk of that eventuality. This inclusion was in accordance with the approach to general damages, described in *Harris v The Advocate General for Scotland* 2016 SLT 572 at [16] – [22].

34. Mr Crozier therefore had options. Having raised proceedings for damage caused by pleural plaques and asbestosis, he could seek provisional damages for the loss caused by those conditions and retain the right to return to court in the event that he developed mesothelioma, lung cancer or any other identified condition. That would have retained a liability to him for any loss suffered as a result of developing mesothelioma. By retaining a liability to him for any loss suffered as a result of developing mesothelioma, two consequences emerge: (i) he could have returned to Court to seek compensation for the return conditions that had developed and (ii) had it been mesothelioma, he would not have faced an invidious choice – he could have settled his claim in life, and section 5 could then have been relied upon by his surviving relatives after death.

35. Alternatively, he could receive full and final damages, of a greater amount than the provisional damages, but forego any entitlement to return to court in the event that he did develop a further condition. In the event that a pursuer who takes full and final damages does not develop a further condition, they will have had the benefit of the larger sum of general damages.

36. It is submitted that this context is relevant to the issues in this case because it demonstrates that Mr Crozier, and other pleural plaques or asbestosis sufferers, were:

   a. not facing the dilemma for which the 2007 and 2011 Acts were enacted to resolve; and

b. able, should they wish, to obtain damages for loss actually suffered and retain the right to return to court in the event of deterioration.

FURTHER LEGAL BACKGROUND: THE DILEMMA AND THE SOLUTION.

37. **The Damages (Scotland) Act 1976** ("the 1976 Act")**.** As originally enacted, s1 of the 1976 Act provided, *inter alia*:

"(1) Where a person dies in consequence of personal injuries sustained by him as a result of an act or omission of another person, being an act or omission giving rise to liability to pay damages to the injured person or his executor, then, subject to the following provisions of this Act, the person liable to pay those damages (in this section referred to as "the responsible person") shall also be liable to pay damages in accordance with this section to any relative of the deceased, being a relative within the meaning of Schedule 1 to this Act.

(2) No liability shall arise under this section if the liability to the deceased or his executor in respect of the act or omission has been excluded or discharged (whether by antecedent agreement or otherwise) by the deceased before his death, or is excluded by virtue of any enactment."

38. Section 1(2) of the 1976 Act maintained the common law *status quo* in respect of liability discharged by absolvitor. Where a defender discharged a liability to a living pursuer, the family of that individual could not competently raise proceedings for damages arising from the individual's subsequent death.

39. **The Damages (Scotland) Act 1993** ("the 1993 Act")**.** Prior to the 1993 Act, damages for solatium did not transmit to an executor in the event of death of an individual suffering personal injury. The 1993 Act, amongst other things, expanded the matters for which relatives of a deceased person could claim for and provided for the deceased's entitlement to solatium to transmit to their estate.

40. **The Act of Sederunt (Rules of the Court of Session Amendment No 2) (Personal Injuries Actions) 2002/570**. This introduced a mandatory procedure for actions of damages for, or arising from, personal injuries. The Appendix to Practice Note 2 of 2003 envisaged that Proof would be around 12 months after the lodging of Defences. The perceived ability for personal injury claims to be resolved more speedily gave rise to a greater potential for an individual suffering from mesothelioma, who had an average life expectancy in the region of 14 months, to raise and resolve personal injury claims within their lifetime.

41. **The Rights of Relatives to Damages (Mesothelioma) (Scotland) Bill** ("the 2007 Bill"). This was introduced in the Scottish Parliament 27 September 2006, accompanied by, amongst other things, a policy memorandum. The policy memorandum detailed that s.1(2) of the 1976 Act had the consequence that the relatives of an injured person is prevented from claiming damages if that person has settled their claim in full prior to death. The mischief was identified at [8] that **(emphasis added)**:

"*Currently, mesothelioma sufferers face the* ***dilemma of either pursuing their own damages claim or not pursuing their claim before they die so that their executor and relatives can claim awards which total more than the award of damages the sufferer was entitled to.*** *Most sufferers (around 80%) are not pursuing their own claims in order not to disadvantage their families.*"

42. The policy objective was identified in the Policy memorandum at [12] as being "*…to remove the dilemma which mesothelioma sufferers find themselves in, as described in paragraph 8 above*". The proposed solution was a limited disapplication of s.1(2) of the 1976 Act.

43. The Policy Memorandum records that consultees had suggested that the exception could apply beyond an individual suffering from mesothelioma, with asbestos-related lung cancer being one suggested further disease: Policy Memorandum at [13]. That was rejected by Ministers. It was considered that mesothelioma was a unique condition because: (i) it was invariably caused by exposure to asbestos; (ii) no other exposure causes the disease; (iii) there is no effective treatment which will cure the disease; and (iv) the average life expectancy was 14 months. The importance of these features was that all victims of mesothelioma knew they had a terminal illness and the issue of compensation therefore arose immediately upon diagnosis: Policy Memorandum at [16].

44. The Policy Memorandum emphasised the restricted purpose of the 2007 Bill at [18] – [19]:

"18.…Ministers are taking this urgent action to address the problem which has arisen specifically for victims of mesothelioma. They have no intention of encroaching more widely into the law of damages without advice and recommendations from the Scottish Law Commission and the opportunity to consider and consult on these. Any extension in this Bill beyond mesothelioma would be such an encroachment. Because there is no other "class" of condition or disease which forces people to choose whether or not to pursue their own claim for damages, it could be said that, beyond mesothelioma, the only logical step would be to remove altogether the restriction on relatives' rights in section 1(2) of the 1976 Act. That is not a matter for swift legislation and very limited costing and consultation. At common law, a relative could only claim damages if the deceased could still claim damages at the time of his death. This provision has been enshrined in Scottish statute since 1976. To in effect do away with it, with no appraisal of its rationale, no assessment of the impact on the rest of the legal and procedural framework, and no assessment of the costs to and effect on insurance providers and policy holders, would be unwise and indefensible.

19. It follows from the position set out above that if an order-making power were included it would be restricted to diseases which share the characteristics of mesothelioma. However, there is no likelihood of such a power being needed in the foreseeable future. Ministers therefore consider that the Bill should not contain such a power. This will avoid any doubt about their position and false hope that they would consider widening the provisions in the legislation to conditions which could not be said to share the characteristics of mesothelioma."

45. Consistent with this, on 29th November 2006 the Justice 1 Committee of the Scottish Parliament heard the following evidence from Lorna Brownlee from the Scottish Executive Justice Department at 4091:

"*A mesothelioma sufferer … faces a dilemma: either they pursue their own damages claim before they die, or they do not, so that their executor and relatives can claim awards that total more than the award of damages to which the sufferer was entitled. About 80 per cent of sufferers are not pursuing their own claims, in order not to disadvantage their families.*

The straightforward and specific purpose of the bill is to remove that dilemma for mesothelioma sufferers. It will disapply section 1(2) of the 1976 act so as to allow the immediate family of a mesothelioma sufferer to claim damages for non-patrimonial loss, under section 1(4) of that act, after the sufferer dies, irrespective of whether the deceased has already recovered damages or obtained a settlement."

46. Further, Ms Brownlee stated at 4091:

"*In considering the mesothelioma-specific nature of the bill, it is necessary to be clear about what it is and is not designed to do. The purpose of the bill is to remove the dilemma that mesothelioma sufferers face in relation to whether to* *pursue a damages claim. They face that dilemma because of a unique combination of features relating to mesothelioma. It is almost invariably caused by exposure to asbestos; in the other cases—which probably involve about one in a million people—negligence does not arise. Under current medical science, there is no treatment that will cure anyone with the disease. The average life expectancy of someone who has the disease is 14 months.*

…

The Executive believes that no other class of personal injury shares those characteristics and, typically, puts the sufferer in a dilemma in relation to relatives' compensation claims. No one involved in making personal injury claims has told us that any other groups of claimants face that dilemma and are forgoing their own claims in favour of their relatives' claims. We have introduced the bill to address that specific problem."

47. And finally, Ms Brownlee detailed **(emphasis added)**:

"*In our consultation paper, we suggested that ministers might have the power to extend the new provision to apply to other diseases or conditions if necessary. There was a mixed response to that from consultees. If an order-making power were included, it would be restricted to diseases that share the characteristics of mesothelioma. We see no likelihood of such a power being needed in the foreseeable future, and ministers decided that the bill should not contain it.*

A crucial reason why the bill is mesothelioma specific and why we do not see a need for an order-making power is that ***it is intended to remove a problem that the law causes for a particular group of people; it is not intended to encroach into the law itself any more than is necessary to address the identified problem****. In other words, the purpose of the bill is not to right any perceived wrong in the long-held principle that relatives' rights are extinguished if the deceased settles their claim in full prior to death.*"

48. On 13th December 2006 the Justice 1 Committee of the Scottish Parliament heard evidence from the Deputy Minister for Justice, Johann Lamont. This evidence emphasised again the specific purpose of the 2007 Bill. Ms Lamont explained at 4161 that:

"The purpose of the bill was to address urgently and specifically a problem that the law of damages caused for mesothelioma sufferers, which is that most of them chose not to pursue their own claim in order that their families might benefit from the larger award that is made after death, as the committee heard in evidence."

49. Consistent with this, the Stage 1 Report on the 2007 Bill, published on 12 January 2007 (although inaccurately dated 12 January 2006), made clear the specific purpose and recognised the limitations of the 2007 Bill. It detailed:

"57. The Bill as introduced applies solely to mesothelioma sufferers and does not contain a power for Scottish Ministers to extend the Bill's provisions to apply to other diseases.
58. Scottish Executive officials explained that the purpose of the Bill was to combat the particular dilemma facing mesothelioma sufferers. In light of the unique nature of mesothelioma and in turn the uniqueness of the dilemma it causes, it was explained that the Scottish Executive determined that it was appropriate for the Bill's provisions to be confined to mesothelioma…
…
69. In light of the unique nature of mesothelioma and the dilemma it causes, the Committee considers that it would be inappropriate to extend the application of the Bill's provisions to other diseases and with this in mind believes it was correct to make no provision for Ministers to extend the application of the Bill by order."

50. At the plenary meeting of the Scottish Parliament on 1st February 2007, Cathy Jamieson, then the Minister for Justice, stated **(emphasis added)**:

"*The bill's purpose is straightforward: to address urgently,* ***and exclusively****, a problem that is encountered by mesothelioma sufferers. It will allow the immediate family of someone who has suffered from the disease to claim damages for their grief and suffering irrespective of whether the deceased has already recovered full damages or obtained a settlement.* ***Sufferers of this horrible disease need no longer feel prevented from pursuing their own claims.***

…

There was unanimity among those who gave oral evidence to the Justice 2 Committee that in the light of the unique nature of mesothelioma and the dilemma sufferers face in relation to damages claims, the bill should be confined to that disease.

It is important to state that the purpose of the bill is not to right any perceived wrong in the long-held principle that relatives' rights are extinguished if the deceased settles their claim in full prior to death. The need for the bill has, however, highlighted that there are areas of the law of damages that should be reviewed. We have therefore asked the Scottish Law Commission to undertake a review of the law of personal injury damages, taking into account underlying practices and procedures. That has been welcomed by the Justice 1 Committee."

51. The dilemma faced by an individual suffering from mesothelioma was recognised by Lady Paton in *Dow v West of Scotland Shipbreaking Co Ltd* 2007 Rep LR 60 at [3], with reference to some of the passages relied upon above. Lady Paton noted that "*It is widely acknowledged that having to face such a*

dilemma imposes an unacceptable and distressing burden on both the victim and the relatives."

52. With only minor amendments to the Bill, which are not relevant to this action, The Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 was passed to attempt to avoid the invidious choice for people suffering from mesothelioma, described by Lady Paton. The 2007 Act is in, for practical purposes, identical terms to s5 of the 2011 Act. The Explanatory Notes to the 2007 Act state at [5] that the exception brought in by the 2007 Act applies where "*a mesothelioma sufferer settles his or her claim*". The transitional provision are, similarly, said to relate to "*where a mesothelioma sufferer settles his or her claim, or recovers damages...*". This is consistent with the purpose of the 2007 Act.

53. **The Scottish Law Commission, Report 213.** The Scottish Law Commission published Report 213 on Damages for Wrongful Death in September 2008. As quoted in paragraph 1.1 the reference to the Commission was:

"*To consider the law relating to damages recoverable in respect of deaths caused by personal injury and the damages recoverable by relatives of an injured person; and to make appropriate recommendations for reform*."

54. The Commission set out the background to the reference in paragraphs 1.2-4:

"*1.2 Around the time we received the reference, the Bill which became the Rights of Relatives to Damages (Mesothelioma) (Scotland) Act 2007 was introduced in the Scottish Parliament. Before the 2007 Act came into force, the Damages (Scotland) Act 1976 provided that claims by the relatives of a person who died as a consequence of sustaining a personal injury were extinguished if the injured person had settled his claim before he died. The effect of this provision was that people who suffered from mesothelioma had to decide whether to seek compensation while they were alive or leave* *the claim to be pursued after their death by their relatives. As relatives could often stand to receive larger awards of damages, many mesothelioma sufferers did not pursue their own claims so as to enable their relatives to obtain more generous compensation after their death.*

1.3 The 2007 Act partially disapplies section 1(2) of the 1976 Act where a person dies of mesothelioma. As a result, the deceased's immediate family can claim damages for non- patrimonial loss even where the deceased had obtained an award of damages or settled his claim before he died. Mesothelioma victims no longer have to decide whether or not to pursue their own claims for damages while alive as they can do so without affecting the separate right of their immediate family to claim damages for non-patrimonial loss after their death.

1.4 *At the time the Bill for the 2007 Act was introduced, it became apparent that the provisions of the 1976 Act would merit review and for that reason Scottish Ministers invited us to examine this area of Scots law."*

55. Similar comments were made at paragraphs 2.26-7 and paragraph 3.22. Further, at paragraph 3.23, the Commission record **(emphasis added)**:

"*3.23. In the Discussion Paper we asked whether a relative's claim should continue to be extinguished if before he died the deceased had discharged the responsible person's liability to him or his executor.* ***The majority of respondents took the view that because the relative's right to sue is a dependent right****, it must be extinguished if the responsible person's liability to the deceased was discharged during his lifetime. It remains sound policy that a responsible person should be able to settle a victim's claim before he dies without having to face claims from the victim's relatives after he* *dies which could - in theory at least - be many years later. We agree. Accordingly we recommend that:*

8. The right to sue on the death of a relative should continue to be extinguished if before he died the deceased had discharged the responsible person's liability to him or his executor."

56. The Commission then considered whether the exception for those suffering from conditions other than mesothelioma. The Commission concluded, at paragraphs 3.27-29 **(emphasis added)**:

"*3.27 By contrast with many other diseases, when mesothelioma is diagnosed the prognosis is certain and death will inevitably follow after a short period. As the disease is caused by exposure to asbestos there appear to be no multiple causative factors: therefore the defender's liability can be established relatively easily. This makes mesothelioma cases highly exceptional. At present there do not appear to be any analogous conditions which would merit a similar exception or at least there is no apparent agitation by the public that further exceptions should be made.*

3.28 We are convinced that the special features of mesothelioma justify the retention of the exception to the operation of section 1(2) of the 1976 Act. ***It is not thought that there is at present a need to extend such an exception to other diseases or personal injuries****. Even if it were simple to formulate, in our view a non-disease specific exception is not required. The special nature of mesothelioma cases has been recognised in other areas of the law of reparation. Self-contained solutions to the difficult issues raised by mesothelioma cases will limit their impact on the general principles of the law of delict.*

3.29 In addition, we discussed with the Advisory Group whether Scottish Ministers should be given a power to make orders applying the exception to other diseases. Members of the group were not enthusiastic. They took *the view that, for the reasons discussed above, mesothelioma was an exceptional illness and that accordingly there was no need for Scottish Ministers to have a power to extend the exception. For these reasons we recommend that:*

9*. Where a victim dies of mesothelioma, his relatives should retain title to sue for non-patrimonial loss although the victim has excluded or discharged liability before his death."*

57. At [10] the Inner House of the Court of Session placed emphasis on recommendation 9, holding that it was not consistent with the Appellants' interpretation of s5 of the 2011 Act. In doing so, the Inner House fell into error. To interpret recommendation 9 in this way was to divorce it from its context, including paragraphs 3.27 – 3.29 which directly precede it and make clear that: (i) the recommendation relates exclusively to a difficult issue in mesothelioma cases, namely the dilemma previously faced by an individual suffering from mesothelioma; and (ii) there was a deliberate and considered choice not to extend the exception to any other diseases, which would include pleural plaques or asbestosis.

58. The draft Bill that accompanies the Commission's report was enacted as the Damages (Scotland) Act 2011. The Commission explain the wording of s5(1)(b) is as follows:

> "*Paragraph (b) states that the personal injury from which the victim dies must be mesothelioma. The exception created by the 2007 Act was confined to mesothelioma sufferers on policy grounds and this approach has been followed. It should be noted that the victim's relatives cannot rely on the fact that the victim suffered from mesothelioma if he goes on to die from another cause.*"

59. It is submitted that the purpose of the 2007 Act, re-enacted in the 2011 Act is clear and has two important features. First, its purpose was to remove the

dilemma faced by an individual suffering from mesothelioma whether or not to instigate and resolve a claim for damages post diagnosis of mesothelioma but before their death. The mechanism by which that purpose was achieved was the creation of a limited exception to s.1(2) of the 1976 Act.

60. The second important feature was that this purpose was to be achieved without making any further change to the law. That included not extending the limited exception to s.1(2) of the 1976 Act to any conditions which did not give rise to the same dilemma faced by an individual suffering from mesothelioma. Where an individual did not face the dilemma, it was not considered necessary to create an exception.

61. The Inner House fell into error at [28] in summarising the context of s5 (and its predecessor in the 2007 Act) as being "ensuring that the relatives of persons who have died from mesothelioma are compensated, albeit to a limited extent, for the loss of the deceased even if he had settled his own claim for *solatium* and loss of earnings." (Ground of Appeal 2). As is apparent from the matters discussed above, the targeted issue was to remove the dilemma faced by an individual suffering from mesothelioma, which removal of course had a benefit for both the individual and their family.

62. **The Damages (Scotland) Act 2011**. Section 1 provides for the damages for a pursuer whose expectation of life is diminished in respect of personal injuries. If Mr Crozier had had a valid claim at the point of developing mesothelioma, it would have fallen within s.1 of the 2011. S.1 provides, amongst other things, that:

    a. Suffering as a result of awareness of diminished life expectation is compensatable: s.1(2)
    b. In assessing patrimonial loss, the court is to assume that the pursuer will live until the date death would have been but for the injuries suffered: s.1(5)

c. The pursuer can recover patrimonial loss for the years lost, subject to a reduction of 25%, such deduction to represent what would have been living expenses: s.1(6).

63. Section 2 provides for the transmission of a deceased's rights to damages to their executor. Neither provision applies to the present case.

64. Section 3 provides **(emphasis added)**:

"*Sections 4 to 6 apply where a person ("A") dies in consequence of suffering* ***personal injuries*** *as the result of the act or omission of another person ("B") and the act or omission—*

(a) gives rise to ***liability to pay damages*** *to A (or to A's executor), or*

(b) would have given rise to such liability but for A's death."

65. Section 4, insofar as relevant, provides:

"*(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—

…

(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."

66. Section 5 is in the following terms **(emphasis added)**:

"***Discharge of liability to pay damages: exception for mesothelioma***

(1) This section applies where—

(a) ***the liability to pay damages*** *to A (or to A's executor) is discharged, whether by antecedent agreement or otherwise, by A before A's death,*

(b) the personal injury in consequence of which A died is mesothelioma, and

(c) the discharge and the death each occurred on or after 20th December 2006.

(2) Liability arises under section 4(1) but is limited to the payment of such sum of damages as is mentioned in paragraph (b) of section 4(3)."

67. The competing interpretations of section 5 are discussed further below.

STATUTORY INTERPRETATION

Purposeful interpretation

68. In *Bilta (UK) Ltd (In Liquidation) v Tradition Financial Services Ltd* [2025] 2 WLR 1015 ("*Bilta*") the Court held that:

20. The court's approach to statutory interpretation is well established in our case law. The court derives the meaning of a legislative provision from the words which Parliament has used in that provision having regard to the context of the statute as a whole and the historical context in which the statute was enacted as the context may reveal the mischief which the provision addresses and shed light on its purpose. In R (Quintavalle) v Secretary of State for Health [2003] UKHL 13; [2003] 2 AC 687 , Lord Bingham of Cornhill warned against giving a literal interpretation to a particular statutory provision without regard to the context of the provision in the statute and the purpose of the statute. He stated (para 8):

"Every statute other than a pure consolidating statute is, after all, enacted to make some change, or address some problem, or remove some blemish, or effect some improvement in the national life. The court's task, within the permissible bounds of interpretation, is to give effect to Parliament's purpose. So the controversial provisions should be read in the context of the statute as a whole, and the statute as a whole should be read in the historical context of the situation which led to its enactment.

21. In R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349 Lord Nicholls of Birkenhead made the important constitutional point (p 397) that citizens, with the assistance of their legal advisers, are intended to be able to understand parliamentary enactments and should be able to rely on what they read in an Act of Parliament. He acknowledged the value of the use by judges of external aids to confirm an interpretation reached without such assistance but advocated circumspection in the use of such aids to displace otherwise clear and unambiguous meanings which did not produce absurdity (p 398).

22. That is not to say that there may not be circumstances in which the historical context provides strong pointers as to the meaning of a disputed statutory provision. The modern approach of a purposive interpretation of statutes supports a clear understanding of the mischief which Parliament is addressing in a statutory provision."

69. *Bilta* repeated the now well-cited dicta of Lord Hodge in *R (O) v Secretary of State for the Home Department* [2022] UKSC 3; [2023] AC 255 at [29] – [31]:

"29. The courts in conducting statutory interpretation are 'seeking the meaning of the words which Parliament used': Black-Clawson International Ltd v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, 613 per Lord Reid. More recently, Lord Nicholls of Birkenhead stated: 'Statutory interpretation is an exercise which requires the court to identify the meaning borne by the words in question in the particular context.' (R v Secretary of State for the Environment, Transport and the Regions, Ex p Spath Holme Ltd [2001] 2 AC 349, 396 .) Words and passages in a statute derive their meaning from their context. A phrase or passage must be read in the context of the section as a whole and in the wider context of a relevant group of sections. Other provisions in a statute and the statute as a whole may provide the relevant context. They are the words which Parliament has chosen to enact as an expression of the purpose of the legislation and are therefore the primary source by which meaning is ascertained. There is an important constitutional reason for having regard primarily to the statutory context as Lord Nicholls explained in Spath Holme, p 397 : 'Citizens, with the assistance of their advisers, are intended to be able to understand parliamentary enactments, so that they can regulate their conduct accordingly. They should be able to rely upon what they read in an Act of Parliament.'

30. External aids to interpretation therefore must play a secondary role. Explanatory Notes, prepared under the authority of Parliament, may cast light on the meaning of particular statutory provisions. Other sources, such as Law Commission reports, reports of Royal Commissions and advisory committees, and Government White Papers may disclose the background to a statute and assist the court to identify not only the mischief which it addresses but also the purpose of the legislation, thereby assisting a purposive interpretation of a particular statutory provision. The context disclosed by such materials is relevant to assist the court to ascertain the meaning of the statute, whether or not there is ambiguity and uncertainty, and indeed may reveal ambiguity or *uncertainty: Bennion, Bailey and Norbury on Statutory Interpretation , 8th ed (2020), para 11.2. But none of these external aids displace the meanings conveyed by the words of a statute that, after consideration of that context, are clear and unambiguous and which do not produce absurdity. …*

31. Statutory interpretation involves an objective assessment of the meaning which a reasonable legislature as a body would be seeking to convey in using the statutory words which are being considered. …"

70. In *For Women Scotland Ltd v Scottish Ministers* 2025 SLT 443, the Court stated:

"*11. The general approach of focussing on the words which Parliament has used in a provision is justified by the principle that those are the words which Parliament has chosen to express the purpose of the legislation and by the expertise which the drafters of legislation bring to their task. But where there is sufficient doubt about the specific meaning of the words used which the court must resolve, the indicators of the legislature's purpose outside the provision in question, including the external aids described in para 30 of R (O) quoted above, must be given significant weight. As Lord Sales has stated in an extra-judicial writing, "sometimes the purpose for which legislative intervention was required may be the very prominent focus for the legislative activity which follows from it, and thus may frame in a particularly strong way the context in which that activity takes place" (see "The role of purpose in legislative interpretation: inescapable but problematic necessity" , Presentation at the Oxford University and University of Notre Dame Seminar on Public Law Theory: Topics in Legal Interpretation, 19 September 2024). Such aids can explain the meaning of a statutory provision which is open to doubt and can themselves alert the court to ambiguity in the provision, but they cannot displace the meanings conveyed by the clear and unambiguous words of a provision construed in the context of the statute as a whole.*"

Headings

71. Headings are part of a statute: *R v Montilla* [2004] UKHL 50 at [34] - [36]. A heading may be relevant as a guide to the meaning of a section or the mischief that it is intended to address: e.g. *Project Blue Ltd v Commissioners for HMRC* [2018] 1 WLR [2018] 3169 per Lord Hodge at [42]. Where general words are preceded by a heading indicating a narrower scope this may indicate that the general words are to be given a narrower meaning: *Inglis v Robertson and Baxter* [1898] AC 616 at 624,630.

Avoiding absurd, incoherent or anomalous results

72. It is well established that absurd, incoherent or anomalous results should be avoided where possible. For example, in *R (on the application of Edison First Power Ltd) v Central Valuation Officer* [2003] 4 All ER 209, per Lord Millett stated:

"*The Courts will presume that Parliament did not intend a statute to have consequences which are objectionable or undesirable; or absurd; or unworkable or impracticable; or merely inconvenient; or anomalous or illogical; or futile or pointless.*"

GROUNDS OF APPEAL 1 – 3: THE APPLICATION OF THIS APPROACH TO THE 2011 ACT

73. Grounds of Appeal 1-3 are all directly related to the correct interpretation of the 2011 Act and in particular section 5.

74. The Inner House misinterpreted the plain meaning of ss3, 4, and 5 (Ground of Appeal 1). The object of the 2011 Act was to consolidate legislation for pursuers seeking damages, whose expectation of life had been diminished or who had

died because of the fault of a defender or defenders. The usual rule, which the Appellants contend applies here, that the relatives of those who have discharged their claims cannot claim further, is to be found in s4(2).

75. The heading of s5 is "Discharge of liability to pay damages: exception for mesothelioma". The heading is a guide to the meaning and scope of s5. The effect of the heading is that the whole section is concerned with a discharge of liability to pay damages for mesothelioma. Damages for mesothelioma are only paid to an individual suffering from mesothelioma.

76. The exception for mesothelioma detailed in the heading ought to be applied throughout the section, including s5(1)(a). To do otherwise would be to ignore the heading, the context, and the purpose of s5. The exception for mesothelioma in s5 ought properly to be understood as only an exception for litigants who have discharged a claim for damages as a result of being an individual suffering from mesothelioma (and who therefore did not have to make an invidious choice).

77. The Inner House fell into error at [28] in failing to have regard to the heading and focusing predominantly on the terms of s5(1)(b), relating to the cause of death (Ground of Appeal 2).

78. It is accepted that section 5(1)(a) could, in theory, have included further mention of mesothelioma. For example, it could have read:

"(a) the liability to pay damages to A (or to A's executor) [for mesothelioma] *is discharged, whether by antecedent agreement or otherwise, by A before A's death."*

79. However, it is submitted that the extra words are not necessary because of the heading, and because it is the liability to pay damages for mesothelioma that is to be discharged in order to engage s5.

80. It is submitted that the use of the phrase "is discharged", rather than "was discharged", "has been discharged" or similar, is consistent with the liability, for damages for suffering and loss caused by mesothelioma, being one that existed at the point of the discharge.

81. It makes sense that s.5(1)(b) expressly mentions mesothelioma. That is because it is necessary to do so to avoid s.5 applying in circumstances where a liability to pay damages for mesothelioma is discharged and the individual dies for a reason other than mesothelioma, and it is consistent with the external aids that s.5 is not intended to apply if a person has mesothelioma but dies from some other cause.

82. It is submitted that the Appellants' interpretation is apparent from the terms of s. 5 alone and there exists no ambiguity. However, if that is not accepted, the external aids to construction above make apparent that the Appellants' interpretation is correct. They put beyond doubt that the purpose of the 2007 Act, re-enacted in the 2011 Act, was very specific – to relieve an individual suffering from mesothelioma from a cruel dilemma and otherwise to leave the law untouched.

83. No part of the purpose of the 2011 Act was to enable individuals with pleural plaques or asbestosis to settle or otherwise resolve their claim on a full and final basis and retain a right on the part of their relative to recover damages in the event (which could not be known at that time) that they went on to develop and die from mesothelioma.

84. Other than the statement that such a claim would be excluded or discharged by antecedent agreement by him in terms of s4(2)(a), Mr Crozier's settlement was out of the scope of the 2011 Act. The 2011 Act did not benefit those who were in the position of Mr Crozier, who did not suffer from mesothelioma, and who settled an action for pleural plaques and asbestosis on a full and final basis.

The Respondents' interpretation

85. The Respondents have adopted a selective and slavishly literal interpretation of s5. By doing so, they ignore the plain meaning and purpose of the provision. Further, their interpretation leads to absurdity and an anomaly in the law.

86. The Respondents' position is encapsulated in Stat 5:

"*Explained and averred that the defender's liability to pay damages to the deceased was discharged by the deceased before his death. The personal injury in consequence of which the deceased died was mesothelioma. The discharge and the death each occurred after 20 December 2006. The pursuers are accordingly entitled to claim damages in accordance with section 5 of the Damages (Scotland) Act 2011*."

87. The Respondents' argument requires a partial reading of the 2011 Act:

a. Section 5 is read without regard to the rest of the 2011 Act, notably sections 3 and 4 and the heading to s5. The "liability" referred to in each of these sections has to be the same. Thus, the discharged liability and the liability that allows the exception have to be for mesothelioma.

b. Section 5 is read without any regard to the legislative history.

c. Section 5 is read without regard to the purpose of the 2007 Act, re-enacted in the 2011 Act.

88. One absurdity that arises from the Respondents' interpretation is that someone in Mr Crozier's position, who did not have mesothelioma when he discharged the Appellants' liability, is treated as if he did, thus attempting to secure a benefit to his relatives to which they were not entitled. A second absurdity is

that Mr Crozier could not have claimed for suffering caused by mesothelioma upon diagnosis, but his family could. The approach of the Respondents therefore risks undermining the 'one action rule', well established in Scots' law: *Aitchison* at [32]. The illogical approach to s5 of the 2011 Act identified in paragraph 23 above is also referred to. For completeness, the Inner House misdirected themselves by assuming that Mr Crozier received damages for solatium and loss of earnings (paragraph 28 of their Opinion). No loss of earnings claim was made by Mr Crozier.

89. Separately, the Respondents' interpretation results in the unprincipled anomaly identified above at paragraphs 24 – 25, with reference to individuals A and B. The effect of the Respondents' interpretation is that the families of two pleural plaques/asbestosis sufferers will be treated differently depending upon the cause of death of their relative, in circumstances where neither of the individuals have faced the dilemma which s5 of the 2011 Act was designed to address. The effect is also that in one scenario the defenders to such a claim would have lost the protection that would ordinarily be obtained from a full and final settlement of the claim, consistent with the 'one action rule' and the policy reasons for its existence. In the other scenario, they have not. The development of mesothelioma, on a date after full and final settlement of a pleural plaques/asbestosis claim, gives rise to no policy reasons for the result contended for by the Respondents.

90. As detailed above, Parliament repeatedly asserted that the exception was not intended to encroach upon the law of damages any more widely than was necessary to fulfil the policy of removing the invidious dilemma faced by an individual suffering from mesothelioma. That was because it was considered that there was "no other "class" of condition or disease which "*forces people to choose whether or not to pursue their own claim for damages*": Policy Memorandum to the 2007 Bill at [18]. To take a decision to otherwise remove the legal effect of the settlement of a claim upon a relatives right to damages, absent further consideration, policy justification and analysis of the impact on

insurers, was considered to be "*unwise and indefensible*". Yet, this is the impact of the Respondents' interpretation of s5 of the 2011 Act.

91. The Inner House failed at [28] to have regard to the absurdity and anomaly arising from the Respondents' interpretation (Ground of Appeal 3).

92. The courts below fell into error by failing to apply the natural meaning of the words of s.5, in their context within the 2011 Act. Having regard to the principles of statutory construction discussed above, the Appellants' interpretation is consistent with the purpose of s5, as revealed by its own terms and the external aids to construction.

93. At the very least, the external aids discussed above identify a potential ambiguity regarding the scope of s5 of the 2011 Act. The external aids confirm that the exception in s5 of the 2011 Act ought to be restricted to individuals who suffer mesothelioma, discharge a claim for damages caused from that suffering and then die as a result of mesothelioma. Mr Crozier's circumstances do not, therefore, engage s5 of the 2011 Act. The Inner House was in error at [30] in holding that nothing within the external aids to construction detracted from the Respondents' interpretation of s5 of the 2011 Act.

94. In the circumstances, Grounds of Appeal 1 – 3 should be upheld.

GROUND OF APPEAL 4 – WAS MR CROZIER'S CASE A 'MESOTHELIOMA CASE'

95. At [29] the Inner House held that:

> "*In any event, even if it was a requirement that the claim was settled ("discharged") was a mesothelioma case, that is what occurred here. The deceased's claim included damages for the risk of mesothelioma.*"

96. In so holding, two connected errors were committed. First, it misunderstood the Appellants' interpretation of s5 of the 2011 Act, which requires there to have been a liability for damages caused by mesothelioma. Second, the Inner House erred by conflating a risk of mesothelioma on the one hand and contracting mesothelioma on the other. If the Appellants' interpretation of s.5 of the 2011 Act is correct, it does not apply to the circumstances of the Respondents' claim because the late Mr Crozier did not suffer from mesothelioma at the date of discharge of his claim. He therefore did not fall within the "exception for mesothelioma" created by s.5 of the 2011 Act. Section 5 was not an exception for those at risk of mesothelioma, or those suffering from pleural plaques or asbestosis, for the reasons explained above.

97. Ground of Appeal 4 should be upheld.

GROUND OF APPEAL 5 – DEPENDENT CLAIM?

98. It is not necessary for the Court to determine Ground of Appeal 5 in order to determine the substance of the Appeal. However, the Appellants submit that the Inner House erred in holding at paragraph [10], obiter, that it was incorrect to describe a relatives' claim as "a dependent right" and instead holding that a relatives' claim was an independent right. A relatives' claim is dependent upon the existence of a meritorious claim being available to the injured person. This is consistent with s.3 of the 2011 Act. It is therefore correct to describe a relatives' claim as a dependent right. For example, waiver or recovery of damages by the deceased can exclude claims by their dependants and such claims might also be qualified by the deceased's contributory negligence. Ground of Appeal 5 should be upheld.

CONCLUSION

99. The courts below erred in law in their interpretation of s5 of the 2011 Act, read together with sections 3 and 4 of the 2011 Act, and its application to the

circumstances of the Respondents' claim. This Appeal should be allowed and the Action should be dismissed as incompetent.

Neil Mackenzie KC

Ewen Campbell, Advocate

Kevin Clancy, Solicitor Advocate

8 September 2025