SECOND DIVISION, INNER HOUSE, COURT OF SESSION

[2015] CSIH 97
PD1537/13

Lord Justice Clerk
Lady Dorrian
Lord Malcolm

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD JUSTICE CLERK,

in the cause

DAVID TOWERS and OTHERS

Pursuers and Reclaimers;

against

ERLAND THOMAS FLAWS

First Defender and Respondent;

and

STEPHEN CARTWELL PROCTOR

Second Defender and Respondent:

Act: Milligan QC, C Wilson; Digby Brown LLP
Alt: Murphy QC; HBM Sayers (First Defender and Respondent)
Alt: Springham; BTO (Second Defender and Respondent)

27 February 2015

Introduction

[1] This reclaiming motion concerns whether special cause exists for a personal injuries action involving a straightforward, if tragic, road traffic accident to be withheld from civil jury trial (Court of Session Act 1988, ss 9(b) and 11(a)). On 26 September 2014, the Lord

Ordinary refused the pursuers' motion to allow issues because of the existence of averments relating to the first defender's criminal conviction stemming from the accident. It is against that interlocutor that the pursuers have reclaimed.

Averments

[2] The pursuers seek damages for losses sustained as a consequence of the death of the late Moira Towers. The action is brought by and on behalf of various family members and executors dative. The facts, as averred by the pursuers, are that on 26 February 2012, the deceased was driving west along the A965 Kirkwall to Stromness Road, approaching the staggered crossroads junction at Hatston Park. The first defender was driving east along the same road. The second defender emerged from Hatston Park, turning left to join the main road ahead of the first defender and also travelling east. A collision occurred when the first defender's car crossed into the path of the deceased.

[3] The pursuers make no more specific averments of fault other than to say that their claim is based on the defenders' breach of duty to take reasonable care for the deceased. The pursuers do aver that, on 31 October 2013, at the High Court at Edinburgh, the first defender was convicted of causing the deaths of the deceased and her passenger by dangerous driving, contrary to section 1 of the Road Traffic Act 1988. No further averments are made about the conviction (ie the facts found proved in terms of the libel).

[4] The first defender admits his conviction, but contends that the second defender was at fault by causing him to swerve into the path of the deceased's oncoming car by pulling out of the junction ahead of him without having kept a good lookout. The second defender had failed to drive away from the junction with suitable urgency. The first defender acted in an emergency situation and was forced to swerve into the deceased's path. The second

defender denies that he was at fault. He avers that he pulled out from the junction and was struck by the first defender's car which was "driving at high speed".

[5] The pursuers do not direct a positive case against the second defender other than by adopting that of the first defender on the hypothesis that the first defender's account of the accident is well founded. They do not adopt or repeat the second defender's averments which, somewhat anomalously, remain denied by them.

[6] Thus far, it might be thought, this is a relatively straightforward road traffic case, albeit that there is a paucity of averment from the pursuers on the grounds of negligence and the facts of the conviction. As can be seen from the indictment and High Court minutes lodged in process, the facts found proved by the jury support the second defender's averments against the first defender which, as already noted, remain denied by the pursuers notwithstanding their own reliance on the conviction (*infra*).

[7] The peculiarity which emerges from an otherwise uncluttered record, at least on the merits of the claim, starts with the first defender's reference in his pleadings to a road traffic reconstruction report, which he avers was obtained after the criminal trial. He avers that there were material omissions and deficiencies in the police report relied upon by the Crown at the trial and in an expert report obtained by the defence. The first defender denies committing the offence upon which the pursuers found.

[8] It has to be assumed, albeit that it is not made explicit by the pursuers, that the whole purpose of averring the conviction is to found upon section 10(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 which reverses the onus of proof in certain circumstances (see *infra*). There is no other obvious reason for doing so, hence the first defender's averment that he did not commit the offence. The pursuers' reaction to the first defender's reference to the evidence at trial is not to challenge its relevancy but to call for

greater specification of the omissions and deficiencies in the reports. The second defender's approach is to refer to the police report, which, it is said, concluded that the first defender was responsible for the accident. He avers that "no evidence was led from an expert on behalf of the first defender at his trial". In response to that counter, the first defender avers that the police report itself is inadmissible and incompetent and should not be admitted to probation.

The decision of the Lord Ordinary

[9] The Lord Ordinary was thus faced with a record upon which, rather than having simple averments and counter averments of fault, contained in addition criticism of evidence led by the Crown in the criminal trial and the content of a report obtained for the first defender. It was not disputed that the latter report was not even used at the trial. It is not surprising, in that puzzling state of the pleadings, that the Lord Ordinary reached the decision which he did.

[10] He observed that it was essential to focus on the circumstances of the particular case. He concluded that:

> "The mere fact of a defender challenging the evidential basis of a conviction might be unusual but that of itself would not…constitute special circumstances. In this case I am however persuaded that the challenge…will involve the raising of a number of difficult issues of mixed fact in law (*sic*)… I do not think these will be easy for a jury to deal with or for a judge to instruct a jury on with confidence. The problem…raises the distinct possibility of a muddled jury, a situation which is not consonant with the interests of justice".

It must be assumed that the Lord Ordinary accepted the "difficult issues of mixed fact and law" that were proffered by the defenders in argument; no other issues having been identified by him in his Note. Those difficulties, which the first defender had submitted "would make the conduct of a jury trial unduly problematic", were the onus of proof, the

differing civil and criminal standards of proof, and the fact that the nature of the defence required "the examination of the emergence of new evidence which may cast doubt on the reliability of the criminal conviction". In this context, contrary to the pursuers' submissions, (*infra*), the court has little difficulty in understanding the Lord Ordinary's reasoning on the pleadings put before him.

Submissions

[11] The submissions were interrupted *in limine* by the court seeking to be addressed on the relevancy of the averments about any omissions and deficiencies at the criminal trial. Under some prompting by the court, underpinned by a question of how the case could be remitted for jury trial in the face of these averments, the pursuers moved the court to exclude these averments from probation (and to amend their own pleadings accordingly). This motion was not opposed by the second defender, who was content that, if it were granted, issues should be allowed. The first defender maintained opposition to both the motion, except in so far as relating to the defence report, and the allowance of issues.

Pursuers and reclaimers

[12] An appellate court was entitled to interfere with a Lord Ordinary's discretionary decision if he had failed to give adequate reasons, if errors of law were disclosed in the reasons that he did give, and if he had been "plainly wrong" in the exercise of his discretion. The Lord Ordinary had given no explanation of the "difficult issues" of fact and law that were said to arise. It was impossible to understand how the Lord Ordinary had exercised his discretion. The court should therefore be "less reluctant than usual" to interfere with his decision (*Lai Wee Lian* v *Singapore Bus Service (1978)* [1984] AC 729, Lord Fraser at 734 – 735).

[13] The Lord Ordinary had failed to recognise that the effect of the pursuers' averment of the conviction was simply to "reverse" the onus of proof. The civil proceedings did not challenge the criminal conviction. The civil jury would have no regard to the evidence that was led before the criminal jury, except insofar as it may be repeated before them. The conviction was simply an adminicle of evidence, which raised an "inference of negligence" (*Stupple* v *Royal Insurance Co* [1971] 1 QB 50, Buckley LJ at 76; *Ameen* v *Hunter* 2000 SLT 954 at 954 – 955; *King* v *Patterson* 1971 SLT (Notes) 40; Scottish Law Commission: *Memorandum on the Law of Evidence* (no 46) (1980), para K10; *Cronie* v *Messenger*, unreported, Judge MacAulay QC, 25 June 2004, para [26]; *Hunter* v *Chief Constable of the West Midlands* [1982] AC 529, Lord Diplock at 543 – 544). The circumstances were no different from any other case in which a defender did not accept that his criminal conviction reflected what had occurred.

[14] In so far as the Lord Ordinary had been persuaded that a successful defence before a civil jury might undermine public confidence in the criminal jury system, he had erred in law. The operation of the statutory presumption founded upon had not, in practice, undermined public confidence (*Wright* v *Paton Farrell* 2006 SC 404, LP (Hamilton) at para [19]; *Hunter* v *Chief Constable of the West Midlands (supra)).*

[15] The Lord Ordinary had been plainly wrong to reach the conclusion that he did. The case concerned a straightforward road traffic accident. The only practical question for the jury was the apportionment of blame between the two defenders.

First defender

[16] The Lord Ordinary's judgment, being *ex tempore,* ought not to be subjected to an overly critical textual analysis *(McGraddie* v *McGraddie* 2014 SC (UKSC) 12, Lord Hoffman at

para 30). The Lord Ordinary had correctly identified the important issue; that evidence may be led that cast doubt on the reliability of the criminal conviction. The first defender intended to lead evidence to rebut the presumption that he had committed the offence. It would be "highly undesirable" if a civil jury returned a verdict in conflict with that of a previous criminal jury. Such a verdict would undermine public confidence in the administration of criminal justice and offend against the principle of legal certainty *(Wright* v *Paton Farrell* (*supra*)). Those risks could be ameliorated only by the delivery of a reasoned opinion.

[17] The first defender intended to lead evidence, which had not been led at his criminal trial, in order to point to deficiencies in the evidence at his criminal trial. The purpose of doing so was not to challenge the conviction. Rather, the evidence was relevant to a proper understanding of the context of the conviction and should be allowed in the interests of fairness. It was not unusual to lead evidence that may be relevant for one purpose but irrelevant for another *(Dennison* v *Chief Constable of Strathclyde* 1996 SLT 74).

[18] The requirement for the jury to be directed upon, and to consider the effect of, the "new evidence" in the context of the statutory presumption as to the commission of the offence would entail difficult and potentially confusing questions of shifting onus.

[19] All that the first defender wanted to do was to establish that the material in the new road traffic reconstruction report was new and had not been dealt with at the trial. His averments were relevant to do this.

[20] The Lord Ordinary had sufficiently identified the issues canvassed and his Note demonstrated a lawful exercise of his discretion. If he had erred, looking at the matter *de novo*, it was plain that special cause existed. Certain propositions required to be taken into account. Section 10 introduced a rebuttable presumption of fact. It did not limit the evidence

to prove the contrary. It was not competent to review a conviction in a civil process (*Moore* v *Secretary of State for Scotland* 1985 SLT 38). The new evidence was admissible "at large" by way of background or "incidentally" (*Stupple* v *Royal Insurance Co* (*supra*), Buckley LJ at 76) to the circumstances of the conviction. It would be "unfair" to exclude it. It was at least arguable that evidence could be led that the testimony at the criminal trial had been incompetent. The new evidence was admissible as relevant to rebutting the presumption and gave context to the conviction and ensured that the civil court was not left in the dark as to the evidence led at the trial. This approach did not challenge the conviction although it could cast doubt upon it. It was consistent with Buckley LJ in *Stupple* (*supra*), *Cronie* v *Messenger* (*supra*), Lord Diplock in *Hunter* v *Chief Constable of the West Midlands* (*supra*) and *Dennison* v *Chief Constable of Strathclyde* (*supra*)).

[21] If these propositions were accepted, it followed that there would be a serious risk that a jury would become confused as regards the new evidence and the interplay between it and the weight to be attached to it, in the context of whether the presumption were rebutted on a balance of probability. A jury could be distracted by the differing standards of proof. It was arguable that weight could be attached to the conviction itself. If there were an argument about this, the case was not suitable for jury trial. The conviction was not inconsistent with a finding of joint and several liability, even if the presumption were rebutted. If it were rebutted, that was not inconsistent with a finding of fault against one or both of the defenders. This was not, therefore, a simple matter for a jury.

Second defender

[22] As already observed, the second defender was content with issues, in the event that the averments relative to the evidence at the criminal trial were excluded. He adopted the

first defender's submissions only in the event that the averments were allowed to remain on record.

Decision

[23] Section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 provides that:

> "(1) In any civil proceedings the fact that a person has been convicted of an offence… shall … be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, … whether or not he is a party to the civil proceedings…
>
> (2) In any civil proceedings in which… a person is proved to have been convicted of an offence…
>
> (a) he shall be taken to have committed that offence unless the contrary is proved…
>
> (b) … for the purpose of identifying the facts which constituted that offence, the contents of any document which is admissible as evidence of the conviction, and the contents of the …indictment …shall be admissible in evidence for that purpose."

[24] In the immediate aftermath of the introduction of the section, which follows the identical English provision (Civil Evidence Act 1968 s 11, see *Hunter* v *Chief Constable of the West Midlands* [1982] AC 529, Lord Diplock at 544), there was a concern about what effect subsection 10(1) actually had. Lord Avonside explained (*Caldwell* v *Wright* 1970 SC 24 at 27) that the fact that a person had been convicted of dangerous driving was not necessarily evidence of negligence. It depended upon the facts upon which the conviction was based. In allowing a proof before answer and refusing issues, he was heavily influenced by the then novelty of the provision.

[25] In February 1971, there was a flurry of activity in which it was argued that reliance on the section might prejudice a pursuer's right to a jury trial. Lords Milligan (*Fardy* v *SMT Co* 1971 SLT 232) and Cameron (*Gemmell* v *McFarlane* 1971 SLT (notes) 36 followed Lord Avonside in withholding relatively straightforward road traffic cases from jury trial. Lord Milligan noted the divergence of opinion between Lord Denning MR and Buckley LJ in *Stupple* v *Royal Insurance Co* [1971] 1 QB 50 on whether a conviction had probative value *per se*. Lord Cameron had been concerned that, whereas there was a conviction for drink/driving in his case, there were acquittals of reckless and careless driving.

[26] At the end of the same month, however, Lord Stott (*King* v *Patterson* 1971 SLT (notes) 40) reached a different decision. He explained that, by then, the court had had sufficient experience of the practical operation of section 10. He concluded:

> "It is well settled that special cause for refusing issues must be found within the confines of the particular case and nothing has been put before me this morning to suggest that any difficulty will arise which would constitute special cause for declining to remit this very simple straightforward case to a jury".

By the time Lord Dunpark (*Garnett* v *Gowans* 1971 SLT (notes) 77) followed Lord Stott later that year, matters appeared to have settled down. It must certainly have been clear that the averment of a conviction, and consequent reliance upon it to reverse the onus of proof, could not, without more, constitute special cause.

[27] The only effect of section 10 in a case such as the present is to allow the pursuers to introduce the conviction into the proof and thereafter rely upon it to reverse the onus of proof as between themselves and the first defender. The manner in which this ought to be done is by proving the terms of the libel, as found established by the jury (usually by production of an extract conviction), and to compare it with the averments of negligence on record. In so far as there is a coincidence between the proved libel and the averments, there

is no onus of proof on the pursuer. Thus, if the conviction involved driving at excessive speed or a failure to heed road signs, in the event of a dispute the onus would be on the defender to disprove these facts if they were reflected on record. Proof of the conviction achieves no other purpose. Contrary to the view of Lord Denning MR in *Stupple* v *Royal Insurance Co* (*supra*), but coincident with that of Buckley LJ, the conviction itself carries no probative weight which requires to be balanced with new, or old, evidence which undermines it.

[28] That being so, as Lord Stott put it in *King* v *Patterson* (*supra*), there is no special cause revealed by mere reliance on section 10. Such reliance does not raise any difficult issue of fact, law or a mixture of both. The jury will not be asked to review the soundness of the criminal conviction. They will be told of its existence, since it must be proved in the civil case, but proving that certain testimony was, or was not, led at the trial is irrelevant to proof of the facts on record. Similarly, any contention about the admissibility of the evidence led at the criminal trial has no bearing on the task of the civil jury. There is no question of challenging a criminal conviction. That conviction stands. If the civil jury determine on the evidence before them that the defender has demonstrated that he was not negligent, that will be a matter entirely for them. There is no difficulty in this. The evidential basis of the conviction will remain undisturbed and no problem of undermining public confidence or uncertainty will arise.

[29] It follows from this that the first defender's averments about: (a) obtaining a road traffic reconstruction report after the trial; (b) there being deficiencies in the police report relied upon at the trial; and (c) the existence of deficiencies in the defence expert report (which was not in any event used at the trial) are irrelevant. They ought therefore to be excluded from probation as should the equally irrelevant averments about the first

defender's sentence and his previous convictions. Once cleared of this irrelevant material, which was what the Lord Ordinary was faced with, the case returns to being a straightforward road traffic case in which there is no special cause which would justify it from being withheld from jury trial. The trial judge will have to direct the jury on the onus being upon the first defender to prove that his crossing the road into the path of the pursuer (which is the only negligence pled coincident with the conviction) was not due to his negligence but that *quoad ultra* the onus is on the party seeking to prove negligence. That should not pose any problem and is a frequent, if not common, feature in jury trial practice.

[30] The court will accordingly: (1) allow the record to be amended in the fourth article of condescendence by deleting: (i) "He was subsequently sentenced to 5 years imprisonment"; and (ii) the words from "The first defender is called upon…" to "…will be founded upon"; (2) exclude from probation: (i) the first defender's averments in answer to that article, namely: (a) "Admitted that the defender was sentenced to 5 years imprisonment"; (b) "Subsequent to the defender's conviction…" to "…obtained by the defence"; (c) "The police collision report…" to "…at the defender's trial"; (d) "and sentenced to 5 years imprisonment"; and (e) "The Defender's convictions…" to the end of the answer; (ii) the second defender's averments in answer to that article, namely: (a) from "Not known and not admitted that subsequent…" to "…will be founded upon"; (b) "A collision investigation report…" to "…responsible for the accident."; and (c) "He was sentenced…" to the end of the answer"; (3) allow the reclaiming motion; (4) recall the interlocutors of the Lord Ordinary dated 26 September 2014; and (4) allow issues.

[31] In so determining the future procedure of the cause, the court is not prohibiting the first defender from leading evidence, by way of general background, that his road reconstruction report was instructed after the criminal trial. No doubt that will emerge

before the jury in normal course. What it is determining is that that fact (ie when particular evidence was uncovered) is *per se* irrelevant to the proof of the facts of the accident with which the jury will be concerned. In due course, the trial judge will direct the jury that they must decide the case solely on the basis of the evidence which they have heard. If there is evidence about the testimony adduced in the criminal trial, which there may be for a variety of reasons, the judge may also have to direct the jury that the criminal conviction carries no weight and that its only effect is on onus of proof; a matter which may well be of little significance once all the evidence is out (*Sanderson* v *McManus* 1997 SC (HL) 55, Lord Hope at 62).