EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2009] CSIH 64

A1560/02

OPINION OF THE COURT

delivered by LORD NIMMO SMITH

in the cause

DALE McFARLANE

Pursuer and Reclaimer;

against

BARRY THAIN

First Defender;

and

JAMES CAMPBELL

Second Defender and Respondent;

and

THE MOTOR INSURERS' BUREAU

Party Minuters:

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Lord Nimmo Smith

Lord Menzies

Lady Dorrian

Act: Armstrong, Q.C., R Milligan; Drummond Miller LLP (for Beatson & Co, Dunfermline)

Alt: Hanretty, Q.C.; HBM Sayers

Non Participating Party

Party Minuters: Simpson & Marwick

17 July 2009

Introduction

[1] On 17 July 1999 the pursuer was a pillion passenger on a Kawasaki motorcycle which was driven by the first defender. He was seriously injured when the motorcycle collided with a Ford Orion motor car driven by the second defender.

[2] The pursuer initially sued the first and second defenders, alleging that each of them had been negligent. The first defender was uninsured, so the Motor Insurers' Bureau (MIB) entered the process as minuters. The MIB disputed liability on the ground that the pursuer knew that he was uninsured. Further, both the second defender and the MIB pled contributory negligence on the part of the pursuer. The second defender maintained that the pursuer failed in his duty to wear a properly fastened crash helmet. The MIB contended that the pursuer knew that the first defender was unlicensed and had been drinking heavily before the accident; also that the pursuer had failed to fasten the straps of his helmet securely.

[3] A proof before answer took place in 2007, restricted to the issue of liability as directed by the court: see *McFarlane* v *Thain* 2005 SLT 221; 2006 SLT 107. Evidence was given by the pursuer; by an eye witness, Mark Wear; by Police Constable Gordon Muir, who had been called to the scene; and by an accident investigator, John Alexander. Mr Alexander had originally been instructed by the MIB, but by arrangement between the pursuer and the MIB was called as an expert witness for the pursuer. The second defender did not give evidence, but evidence was led on his behalf from Dr N J Mills, an expert in crash helmets. An accident investigator, Dr R F Lambourn, had been instructed on behalf of the second defender and had prepared a report. He sat in court during the evidence of Mr Wear and PC Muir, but did not personally give evidence. Before any evidence was led on behalf of the MIB, senior counsel for the pursuer advised the court that the pursuer no longer insisted upon his case against the MIB, who were duly assoilzied. The first defender did not enter appearance. The first defender was not called as a witness at the proof. In due course, the Lord Ordinary assoilzied the second defender.

The uncontroversial findings in fact

[4] The Lord Ordinary made findings in fact which are not in controversy. Townhill Road in Dunfermline is a main road, running north and south. A number of side roads join it on either side. One of these is Blair Drive, which joins it from the west, forming a T-junction. Both these roads are subject to a 30mph speed limit. Traffic on Townhill Road has priority at the T-junction. At a point about 50 metres south of the T-junction there is a blind summit in Townhill Road. The road is then fairly level until north of the T-junction where it again goes uphill. The brow of the hill to the south of the T-junction restricts the view south from the junction to a distance of about 50 yards.

[5] The motorcycle was being driven northwards on Townhill Road. The second defender drove his car along Blair Drive to the T-junction intending to turn right into Townhill Road. His view southwards was not only restricted by the blind summit, but was also obscured by two cars parked on the west side of Townhill Road just south of the junction. He paused at the junction for five seconds. He then drove out onto Townhill Road at about 3 to 4mph. As he was crossing the northbound lane, and before he reached the southbound lane, the motorcycle driven by the first defender collided with the front offside quarter of the car, near the centre line of the road. The speed of the motorcycle was then about 45mph. Both the first defender and the pursuer were thrown from the motorcycle into the road. The pursuer's helmet came off and he was seriously injured when his head struck the road. The first defender, who had been drinking, was unlicensed and uninsured, and was driving a motorcycle with a defective rear tyre, was not seriously injured, and had the presence of mind to get to his feet and run off.

Pleadings and preparations before the proof

[6] The action was raised in 2002. The procedure was accordingly not subject to the obligatory rules now contained in chapter 43 of the Rules of Court. The pursuer did not elect to adopt the optional procedure previously provided by rule 43.18. The action accordingly proceeded as an ordinary cause, and the pleadings were framed accordingly.

[7] Among the averments of fact on which the pursuer went to proof was the following:

"The first defender would have been visible to the second defender before he drove to the point of the collision".

Among the averments of fault directed against the second defender were the following:

"It was his duty to take reasonable care for the safety of other road users. It was his duty to keep a proper look out for other road users. It was his duty to take reasonable care to avoid colliding with other vehicles. In particular it was his duty not to move into Townhill Road until it was safe to do so....He failed to comply with these duties and as a result the accident occurred".

The scope of Mr Alexander's remit is set out in paragraph 1.4 of his report:

"This report considers the visibility factors at the locus, the manoeuvres being performed by the respective rider and driver of the vehicles involved in the accident, their respective reaction to these manoeuvres and any potential timings involved".

Although we have not seen Dr Lambourn's report, we understand that its scope was similar. Although numerous other considerations were taken into account in the parties' preparations for the proof, it can confidently be said that the sound of the motorcycle was not regarded by either side as a factor of any significance prior to the proof.

Objection to evidence about the sound of the motorcycle

Mr Wear

[8] Mr Wear had been driving his car south on Townhill Road towards its junction with Blair Drive. He saw the second defender's car turn out of the junction, and the ensuing collision. In answer to a general question asking him to describe the movement of the motorcycle leading up to the collision he said:

"I didn't actually see the motorbike in the leading up to the collision, but I did hear what sounded like a motorbike which, at the time, the way sound travelled it sounded like the bike was behind me at that time".

Shortly after this he was asked to describe what he saw and heard and replied:

"Well, travelling southbound, as I said, I did hear what sounded like a motorbike. I mean, I had seen the vehicle approach the junction of Blair Drive, and the distance I was away, I knew that he was going to pull out from the junction, and then once I heard the motorbike and, as I said previously, I believed it was coming from behind, so I checked my mirrors, and at the point when I came back, you know, checking the road back and front was the point in time when the collision occurred".

In cross examination by counsel for the second defender he described the noise as that of a "revved engine", not the sound of an engine under load. He said that he heard it about five seconds before he became aware of the collision. Cross examined by counsel for the MIB he said that he was further north of the junction when he heard the motorcycle, and he agreed that the second defender's car was closer to the source of the noise than he was. He later said that he was about 117 metres north of the point of the collision when he heard the noise.

PC Muir

[9] Although the second defender did not give evidence, PC Muir gave evidence of a statement given by him shortly after the collision. This contained a passage:

"When I got to the junction I stopped and looked both ways. I saw that the road was clear in both directions and pulled out slowly moving to my right. I was almost at the centre of the line when I saw and heard the bike travelling from my right".

He then described the collision which happened immediately afterwards.

Mr Alexander and the objection

[10] As we have said, Mr Alexander was called as an expert witness for the pursuer. During the course of his examination in chief, senior counsel for the pursuer took him at some length through the terms of his report. Encouraged to do so by Mr Wear's spontaneous introduction of the sound of the motorcycle into his evidence (which was not objected to at the time), counsel asked the following question:

"Can I put to you a different consideration perhaps, which is the possibility that when he was at the junction waiting to turn right, [the second defender] could have heard the sound of a motor bike, albeit he would not know which direction the sound was coming from or travelling in?"

Senior counsel for the second defender objected to the line of evidence on the ground that there was no foundation for it on record. The Lord Ordinary allowed the line of evidence to proceed, reserving all questions of competency and relevancy.

[11] When the question was put to him again, the witness said of the sound:

"I would say it would have to influence conduct at the junction....I feel there is a duty on him to display care and wait until the source of the noise has been identified".

Senior counsel for the second defender did not cross examine Mr Alexander on the question of noise, but in cross examination by counsel for the MIB Mr Alexander was referred to paragraph 156 of the then current version of the Highway Code, which spoke of the need to take great care when turning into a main road, and then asked:

"[W]ould you accept that the noise of an approaching motor bike would be relevant for somebody who has to take great care when turning into a main road?"

The witness answered this in the affirmative.

The hearing on evidence

[12] At the hearing on evidence senior counsel for the second defender renewed his objection. In the course of the discussion senior counsel for the pursuer moved the Lord Ordinary to allow the pursuer's pleadings to be amended by adding in the averments of fact the sentence:

"The sound of the motorcycle engine was, or ought to have been, audible to the second defender before he drove into Townhill Road from Blair Drive".

Counsel also sought to amend the averments of fault against the second defender by adding the sentence:

"It was his duty to listen out for and to notice the sound of the first defender's motorcycle while he was stationary at the junction of Townhill Road and Blair Drive".

The Lord Ordinary refused this amendment. She sustained the objection to the line of evidence relating to the sound of the motorcycle, for reasons given at paragraphs 42 to 48 of her Opinion. She thereafter proceeded to assoilzie the second defender, for reasons given at paragraph 61 of her Opinion, which included the following passage:

"I have found in fact (a) that the second defender stopped at the T-junction for about five seconds, during which he checked whether the road was clear to the left and to the right; and (b) that because of all the circumstances, including the blind summit, the obstructed sight-line caused by parked cars, and the speed at which the motorcycle was travelling, the second defender did not see any motorcycle to his right before

beginning his manoeuvre of driving out from the side road.....In those circumstances, the second defender in my opinion fulfilled his duties to take reasonable care and to check that it was safe for him to emerge".

The reclaiming motion

[13] In this reclaiming motion, the pursuer does not seek to challenge any of the Lord Ordinary's findings in fact, as set out above. Nor does he argue that, on the basis of those findings in fact, the Lord Ordinary was not entitled to assoilzie the second defender. Nor does he seek to argue that the Lord Ordinary erred in refusing the motion to allow the pursuer's pleadings to be amended, which was not renewed before us. He seeks to argue, however, that the Lord Ordinary erred in sustaining the objection to the line of evidence relating to the sound of the motorcycle. It is submitted that the Lord Ordinary erred in concluding that fair notice of a case based on the sound of the motorcycle was not given in the pursuer's pleadings, in their unamended form; and in any event she erred in deciding that the objection did not come at too late a stage of the proof. We shall consider these issues in turn. It is only if the pursuer succeeds in persuading us that the objection should not have been repelled that it will be open to us to consider whether, taking account of the evidence relating to the sound of the motorcycle, the pursuer's case of fault against the second defender is made out.

The pursuer's pleadings

[14] As noted by the Lord Ordinary, the pursuer's averments focused on the visibility of the first defender (and the pursuer) on the motorcycle, and the second defender's duty to keep a proper look out for other road users. There are no averments, either of fact or of fault, which expressly refer to the sound of the motorcycle as constituting an audible warning of its presence on the road. It is nevertheless submitted for the pursuer that there is a sufficient basis in the pleadings for a case related to the sound of the motorcycle.

[15] Counsel for the pursuer accepted that the second defender was entitled to fair notice of the pursuer's case against him. They submitted, however, that little notice was required in cases arising from road traffic accidents. In *Adamson* v *Roberts* 1951 SC 681 Lord President Cooper said at page 685:

"[I]t does not appear to me that it is easy to justify the strict application of all the old rules of relevancy to the very familiar situation disclosed in the simple street accident record - if indeed a record, with all its 'rubber stamp' averments, is any longer really necessary in such a case".

In *McCluskey* v *Wallace* 1998 SC 711 Lord McCluskey, in delivering the Opinion of the Court, said at page 716:

"Since at least *Adamson* v *Roberts*, the court has been reluctant to read pleadings in road accident cases with undue strictness".

We see no reason to quarrel with this approach. If, for example, some mention had been made of the sound of the approaching motorcycle in the pursuer's averments of fact, it might be regarded as unduly strict to criticise the pursuer for failing to make any express mention of the sound in the averments of fault.

[16] But here, nothing about the sound featured in the pleadings; and, as we have said, the parties' preparations proceeded accordingly. It was only because Mr Wear spontaneously mentioned the sound in the course of his account of the collision that senior counsel for the pursuer sought to take advantage of this windfall. It is quite clear to us, as it was to the Lord Ordinary, that if the sound of the approaching motorcycle had been regarded as an issue prior to the proof, parties would have made their preparations accordingly. After all, as senior counsel for the second defender forcefully argued, Mr Wear was under the impression, until the collision itself, that the sound was coming from behind him, which was the reason for checking his rear view mirrors. Mr Wear was not asked whether, on what he described as a beautiful sunny afternoon in July, any of the windows of his car was open. An essential question to explore would have been whether the second defender, stationary at the T-junction with his car engine running, could have heard the sound. The

photographs show that there was a high stone wall to his right at the south of the junction, a hedge to his left at the north of the junction; and there were the parked cars on the west side of Townhill Road to the south of the junction, and parked vehicles and a row of buildings on the east side of Townhill Road.

[17] It was urged on us that it was a matter of common sense to conclude that the second defender could have heard the sound, because Mr Wear was further away and he heard it. But the very fact that Mr Wear thought at first that the sound was coming from behind him serves to show that the acoustics of the environment may not point to so simple a conclusion. We have little doubt that, had the pursuer's pleadings contained an express averment about the sound of the motorcycle, both parties would have instructed acoustics experts to carry out the necessary investigations and to report. At the very least, the accident investigators who were instructed would have been asked to cover this matter in their reports. The second defender would have been precognosed on the point (bearing in mind that in his police statement he said that he both saw and heard the motorcycle for the first time immediately before the collision), and the terms of his precognition could have been taken into account in the investigations carried out by any expert witness - acoustics expert or accident investigator - instructed for him. As it was, the issue was dealt with as little more than a footnote in Mr Adamson's evidence. We are surprised by the notion that the pursuer's pleadings gave fair notice to those acting for the second defender of a case based on the sound of the motorcycle, when such a case had not occurred to those acting for the pursuer, who had framed the pleadings and conducted investigations on his behalf, until Mr Wear's evidence.

[18] Counsel for the pursuer further submitted that it was artificial to distinguish between what the second defender could or should have seen and what he could or should have heard. In *Burns* v *Dixon's Ironworks* 1961 SC 102, Lord Justice Clerk Thomson observed at pages 107-8:

"The Court is often charitable to records and is slow to overturn verdicts on technical grounds. But where a pursuer fails completely to substantiate the only grounds of fault averred, and seeks to justify his verdict on a ground which is not just a variation, modification, or development of what is averred but is something which is new, separate, and distinct, we are not in the realm of technicality".

This approach was followed in *McCusker* v *Saveheat Cavity Wall Insulation Limited* 1987 SLT 24, per Lord Dunpark at page 32. Counsel for the pursuer sought to derive comfort from the passage just quoted, and submitted that a case based on the sound of the motorcycle was no more than a variation, modification or development of what had been averred in the pursuer's pleadings.

[19] As matters stand before us, the pursuer cannot (subject to the other issue which we discuss below) succeed without a case based on the sound of the motorcycle. This is therefore crucial for success, yet there is not a word of it expressly pled. We are entirely unable to regard it as a variation, modification or development of what has been averred; on the contrary, it appears to us to be new, separate and distinct. We see no reason to fault the Lord Ordinary's conclusion in this regard.

The timing of the objection

[20] In *McGlone* v *British Railways Board* 1966 SC (HL) 1 the only ground of fault pled against the defenders was that they should have provided and maintained an adequate fence "on all sides" round the transformer on which a boy had sustained electrical burns. In the course of his examination of his own witnesses, counsel for the pursuer put to them questions which elicited evidence to the effect that, if the fence on the east and west sides had been extended to the edge of the platform on which the transformer stood, the boy would have been prevented from obtaining access to the transformer. No objection was taken to these questions. When the only witness for the defence was cross-examined to the same effect, counsel for the defenders objected on the ground that the pursuer had no record for this ground of fault. The Lord Ordinary repelled the objection and decided the case on this ground. On appeal from the First Division, who had reversed his decision, the House of Lords upheld the approach of the Lord Ordinary. Lord Reid said at page 12:

"There may, no doubt, be cases where objection cannot reasonably be expected to be taken at the first moment when evidence is led regarding a ground of fault not pleaded, but in my view in this case there was ample opportunity to take this objection at a much earlier stage in the proof and I think that the Lord Ordinary was right in not sustaining the objection at the stage when it was taken".

Lord Guest said at pages 14 to 15:

"Scots practice requires that, if an objection to a line of evidence is to be taken on the ground of incompetency, it should be taken at the first available time. By failing to table an objection timeously the appellant was entitled to assume that the respondents took the view that the case of an extended mesh fence was covered by the record.....I agree with the Lord President that proper notice must ordinarily be given on record of the attack made upon the other side. The reason is that the other side may be prejudiced by the failure to give proper notice. But the respondents can scarcely object on this ground when they allowed such evidence to be led and failed until the last witness to table an objection to the evidence. Pleadings are to be used as servants and not masters".

[21] For obvious reasons, counsel for the pursuer relied on these passages in submitting that the objection taken by senior counsel for the second defender at the proof had come too late. It was submitted to us that objection ought properly to have been taken during the course of Mr Wear's evidence, at the first or at least the second passages of his evidence quoted at paragraph [8] above. By then, it was argued, it should have been apparent to those acting for the second defender that the pursuer was seeking to base a case of fault against him on the sound of the approaching motorcycle. Although Mr Wear was a witness of fact, it was clear that his evidence had implications for the case of fault against the second defender. The questions designed to elicit evidence that the second defender was closer to the source of the noise than Mr Wear was could have no other significance than as part of a case of fault against the second defender based on his failing to heed that noise and modify his actions accordingly.

[22] We are entirely unable to accept this approach. Although the issue of noise first arose in the course of Mr Wear's evidence, the Lord Ordinary concluded that it was only during the evidence of Mr Alexander that the line of questioning appeared to be directed towards the case of fault based on the noise of the motorcycle. As we have said, and as counsel for the pursuer recognised, Mr Wear spontaneously introduced the question of the sound as part of his account of what he himself saw and did. The first passage of his evidence quoted above in no way relates the sound to the position of the second defender. The second passage, elicited by cross examination, does do this, but in our view, reading the passage in its context, it does not do it in a way which should have alerted senior counsel for the second defender to the possibility that it would then be made the basis for a case of fault against the second defender. It was when it became clear in a question put to Mr Alexander that the pursuer was seeking to make such a case that senior counsel for the second defender objected. In our opinion he did so timeously. The situation is far removed from that in *McGlone* v *British Railways Board*. Whether there is "ample opportunity", or what is the "first available time", to take an objection must depend on the circumstances of the particular case; and there must be room for the exercise of counsel's professional judgment. In our opinion, senior counsel for the second defender (who, as he himself said, is not known to be slow in taking objections) did not leave his objection until too late. Again, we can find no basis to fault the Lord Ordinary's approach to this matter.

Decision

[23] What we have said is sufficient to dispose of this reclaiming motion. We were further addressed on the view we should take of the evidence, had we concluded that the Lord Ordinary erred in repelling the objection and had the matter therefore been at large for our consideration; and on the inferences to be drawn from the fact that the second defender did not give evidence. But in the circumstances, to go into these matters would be an arid exercise, given that if the pursuer had included a reference to the sound of the motorcycle in his pleadings the preparations for and conduct of the proof by the parties would have been totally different.

[24] For these reasons, we shall refuse the reclaiming motion and adhere to the Lord Ordinary's interlocutor of 8 November 2007.

Postscript

[25] By interlocutor dated 16 March 2007, whereby she assoizlied the MIB, the Lord Ordinary continued any question of their entitlement to any award of expenses in their favour, save in so far as already dealt with. The effect of the reclaiming motion has been that the Lord Ordinary has not considered that question further. At the start of the hearing of the reclaiming motion, counsel for the MIB appeared briefly to remind us of this and to invite us in our disposal not to overlook the question of their entitlement to an award of expenses. We shall accordingly put the case out By Order so that all questions of expenses, including those of the MIB, may be considered.