EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2014] CSIH 12
XA171/12

OPINION OF THE COURT

delivered by LADY CLARK OF CALTON

in the Appeal

by

CALUM McEWAN

Pursuer and Appellant;

against

LOTHIAN BUSES PLC

Defenders and Respondents:

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Lord Eassie

Lady Clark of Calton

Lord Philip

Pursuer and Appellant: Clark, QC; Slater & Gordon Lawyers

Defenders and Respondents: Cowan, Solicitor Advocate; Simpson & Marwick

24 January 2014

Summary

[1] This is an appeal by the pursuer and appellant from an interlocutor in which the sheriff found in fact and law that a road traffic accident to the pursuer was not caused by the fault and negligence of the bus driver employed by the defenders.

History of proceedings in the sheriff court
[2] The pursuer raised an action of damages in Edinburgh Sheriff Court in respect of injuries which he averred were sustained when he was struck by the wing mirror of a bus driven by an employee of the defenders when the pursuer was walking westwards on the south pavement of Gorgie Road, Edinburgh at about 3.45 pm on 9 November 2010. The defences pled by the defenders were to the effect that the pursuer was extremely drunk and stepped onto the roadway into the path of the bus which then struck him and that the driver could not have avoided the collision.

[3] At a proof on 8 November 2012, the solicitor for the pursuer led evidence from the pursuer and from an expert witness, Mr Seward. Mr Seward was a road traffic investigation and reconstruction consultant. There was a joint minute which agreed various documents, photographs and CCTV footage and stills "as what they bear to be", not that they were true and accurate. The joint minute also agreed damages in terms of paragraph 9 in the sum of £9,000.

[4] One of the productions for the defenders was an unsigned typed document (pages 120 to 122 of the Appendix). This document was headed "statement of witness" with the name given as Jaime Russell Brondum. The typed document gave details of an accident between 1700 and 1800 hours about 6 months prior to 26 April 2011. A description of an accident in Gorgie Road involving a bus and a pedestrian and the circumstances leading up to the accident was given. There was no agreement between the parties in the joint minute, or otherwise, in relation to the evidential status of this document. Mr Brondum was not a witness in the case.

[5] One of the documents which had been seen by Mr Seward prior to the case and which was referred to in his report was said "statement of witness" document and he was asked about this during his evidence. The solicitor for the defenders made objection to a question based on the said document on the basis that Mr Seward could not speak "...to the evidence Mr Brondum is going to give. He is here to assist the Court with his expert analysis." The objection was not sustained (page 27 of the Appendix). Thereafter various parts of said document were put to Mr Seward for his comments during the course of his evidence both by solicitors representing the pursuer and the defenders and, at some length, by the sheriff. In addition to considering various documents, Mr Seward had carried out certain investigations and measurements on his own initiative and he gave evidence about those.

[6] At the conclusion of the evidence led by the pursuer, the sheriff asked whether the solicitor for the pursuer wished to reflect on the evidence thus far and commented that the evidence from the expert witness "does suggest a little difficulty" in the pursuer's case (pages 67 to 70 of the Appendix). Thereafter the solicitor for the defenders stated that he sought absolvitor. He advised that he was not leading any evidence.

[7] The solicitors on behalf of the parties made submissions to the sheriff. In the course of his submissions, the solicitor for the defenders did not insist upon the defence which had been pled that the accident was caused or materially contributed to by the pursuer. He did not insist upon the contention, advanced in the defences, that the pursuer had stepped off the pavement onto the carriageway before he was struck by the bus (paragraph 22 of the note by the sheriff at page 17 of the appeal print). The solicitor submitted that it was not reasonably foreseeable that a pedestrian would seek to cross the road. There was no duty on the driver to do anything until the pursuer was about 5 to 6 metres away and by that time there was insufficient time for the driver to react to the hazard presented by the pedestrian's moving towards the edge of the pavement.

The judgment by the sheriff

[8] In her note, prepared subsequently to her having given judgment *ex tempore*, the sheriff stated that the pursuer's evidence was not seriously challenged. She reflected the evidence of the pursuer in her findings about the circumstances of the accident in findings in fact 6 and 8 (page 14 of the appeal print). She stated:

"[6] He walked along the south pavement of Gorgie Road in a westerly direction. He was walking approximately two-thirds of the width of the pavement from the wall. He was wearing a bright yellow jacket.

...

[8] The pursuer moved to the edge of the pavement intending to cross the road to a newsagent on the north side of the road. As he turned to his right to check if it was safe to do so, and while he was still on the pavement, he was struck in the face by the nearside wing mirror of the defenders' vehicle."

The sheriff also made certain findings in fact based on various measurements carried out by Mr Seward and these are set out in findings in fact 14 and 17. From these findings it is apparent that the width of the pavement is about 2.9 metres. It follows, therefore, from the findings in fact that the pursuer was walking about less than a metre from the pavement edge before he walked to the edge. The external wing mirrors of the bus extended some 30 cm from the body of the vehicle. Inclusive of the two external mirrors, the width of the bus exceeded by 12 cm the width of the bus lane in which it was travelling.

[9] The sheriff also made findings of fact in paragraphs 18 to 20 which led her to find in fact and law that the accident was not caused by the fault and negligence of the defenders' driver. She found:

"[18] The defenders' vehicle was being driven at about 25mph. There was a bus stop about 60 metres ahead and traffic lights. The vehicle was slowing down to about 15mph. There were stationary vehicles in the traffic lane to the offside of the defenders' vehicle. Those vehicles presented a hazard to the defenders' driver. The defenders' driver was aware of the pursuer' presence on the pavement. When the pursuer was about 5 to 6 metres ahead of the vehicle the defenders' driver observed him move to the edge of the pavement.

[19] Reaction time, being the time that passes between the moment a driver sees the need to react and the moment he takes action, is between 1 and 2 seconds. At the fastest reaction time the defenders' vehicle would have travelled between 6.71 and 11.18 metres before the driver would have been able to take any action. The defenders' vehicle would have had to be travelling at less than 12mph to allow the driver to react, at the fastest reaction time, within the distance from the pursuer.

[20] Before the pursuer moved to the edge of the pavement an accident was not reasonably foreseeable. From the moment that the pursuer moved to the edge of the pavement there was insufficient time and distance for the defenders; driver to react and avoid the accident."

Submissions by counsel for the pursuer and appellant in the appeal

[10] Counsel submitted that the sheriff found in fact that the pursuer was on the pavement when he was struck by the wing mirror of the bus and that this established a *prima facie* case for an inference of negligence in the absence of any other evidence. Reference was made to *Laurie* v *Raglan Building Company Ltd* [1942] 1 KB 152; *Watson* v *Thomas S Whitney & Company Ltd* [1966] 1 WLR 57; *Chapman* v *Post Office* [1982] RTR 165. He also prayed in aid *Doonan* v *Scottish Motor Traction Company Ltd* 1950 SC 136 to distinguish and put in context *Ballingall* v *The Corporation of the City of Glasgow* 1948 SC 160.

[11] Counsel submitted that the sheriff erred in her approach to the evidence of Mr Seward. In particular there was no basis in the evidence for the sheriff's findings in fact 18 to 20. The document headed up as "statement of witness" which was before Mr Seward when he prepared his report and which was put to Mr Seward for his comments did not become evidence of fact merely because Mr Seward was asked to comment on it and did so. Counsel explained that Mr Seward had been led as a witness partly in support of the evidence of the pursuer that the accident happened as he averred but mainly to counteract and undermine evidence which, it was anticipated, would be given by Mr Brondum, the driver of the bus to the effect that the pursuer had stepped onto the carriageway, which was what was averred in the defences. The evidence was anticipated because of the pleadings of the defenders and the defenders' production entitled "statement of witness".

[12] Senior counsel also criticised the approach adopted by the sheriff to reasonable foreseeability of the risk of injury. The sheriff stated at paragraph 31 of her judgment (page 21 of the appeal print) that:

"The risk of injury only became foreseeable when the pursuer moved to the edge of the payment by which time the defenders' driver could not avoid the accident. There was no suggestion that the pursuer was at fault"

Submissions by the solicitor advocate for the defenders and respondents in the appeal

[13] The solicitor advocate sought to support the decision making of the sheriff and invited this court to refuse the appeal and to adhere to the interlocutor of the sheriff dated 8 November 2012. As we understood the submissions, he did not however seek to support the very restricted approach taken by the sheriff in relation to the reasonable foreseeable risk of injury.

[14] The solicitor advocate submitted that the sheriff did not err in her treatment of the evidence given by Mr Seward. He departed from his supplementary written note of argument in which various submissions were made that the "statement of witness" was not a precognition and that it was a witness statement from Mr

Brondum which had been admitted as hearsay evidence. Having departed from these submissions, however, the solicitor advocate maintained part of this submission to the effect that it was now too late for the pursuer to raise any issue regarding the admissibility of the "statement of witness". He made reference to the way in which the productions was first referred to by the solicitor for the pursuer in the face of objection by the solicitor for the defenders and thereafter reference was made to the production by both parties.

[15] The solicitor advocate further submitted that in the event that the sheriff was not entitled to make findings in fact 18 to 20, and the information from Mr Brondum's statement was to be wholly ignored and left out of account, there was still evidence available to the court to justify the sheriff's conclusions that there was limited reaction time and a consequent inability of the driver of the bus to avoid the accident. Thus the case of the pursuer failed. He based this submission on the evidence of the pursuer who accepted that he changed course to walk to the kerb shortly before the accident. The solicitor advocate referred to the CCTV photographs which, he asserted, indicated that less than two seconds occurred from the pursuer walking about a metre from the kerb until the accident.

[16] The solicitor advocate further submitted that, in any event, if one excluded the information about speed and distance from the driver's statement, there would be no evidence left to entitle the court to reach any conclusion as to whether "apart from any negligence on the part of the defenders' driver, the accident would not have occurred." It would follow therefore that the pursuer's case would fail on the basis that he had failed to discharge the onus of proving causation.

[17] The solicitor advocate sought to distinguish *Chapman* v *Post Office* on the basis that it dealt with contributory negligence in circumstances where a pedestrian was standing at the kerb. In any event the case was not authority in support of a general rule of strict liability. Reference was also made to *Osei-Antwi* v *South East London and Kent Bus Company Ltd* [2010] EWCA Civ 132. He submitted that whether there was fault was always dependent upon the particular circumstances of the case.

Discussion

[18] The defender's production, "statement of witness", appears to be an account of an accident which bears to be signed "Jaime Brondum, 26 April 2011" and witnessed by Les Muir. The document produced in process does not, however, bear any signature. No evidence was led in the case about the history and provenance of this document or the circumstances about how it was created and by whom. There was no agreement between the parties about the evidential status of the document. According to the notes in the Appendix, the solicitor for the pursuer referred to the document as Mr Brondum's evidence (page 27 of the appendix). The solicitor for the defender objected. The sheriff stated "...part of his analysis is based on his reading of the evidence, the evidence that was before him is what is referred to in this report, whatever Mr Brondum might say later is a different matter." Thereafter there are various references by both solicitors and by the sheriff to this document referring to it as "evidence", but in the context of the materials before Mr Seward when preparing his report.

[19] We do not consider it necessary to consider whether this production, "statement of witness", is properly to be regarded as a precognition and therefore inadmissible on that account, had it been sought to adduce it as hearsay evidence. That is not an issue which concerns us. Whatever the source or reason for confusion or error which prevailed at the proof, we are of the opinion that the "statement of witness" cannot be regarded as evidence *in foro* about the facts in this case. Mr Seward was an expert witness and was not in a position to give evidence about the facts of what the driver was doing, thinking and seeing which is what the "statement of witness" purports to describe. Indeed part of Mr Seward's evidence was to the effect that some of the "facts", such as distances described in the "statement of witness", could not be correct on the basis of his measurements.

[20] We consider that finding in fact 18 is a strange amalgam. Most of finding in fact 18 appears to be based on information from the "statement of witness". There is an exception to this. The sentence "the vehicle was slowing down to about 15 mph per hour" appears to be based simply on an averment in the defenders' pleadings. The finding that "there was a bus stop about 60 metres ahead in traffic lights" appears to be based

on the evidence of measurement given by Mr Seward. That measurement appears to be based on the positioning described by the driver in the "statement of witness". Finding in fact 19 appears to be based on the opinion evidence of Mr Seward but that opinion evidence is based on facts for which there was no foundation in the evidence. The distance travelled by the bus calculated by Mr Seward on the basis of reaction times appears to be based on the speed and positioning of the bus and pedestrian described in the "statement of witness". The speed of less than 12 mph appears to be the opinion evidence of Mr Seward predicated on the position of the bus when, according to the "statement of witness", the pursuer was first seen by the bus driver. Finding in fact 20 is all predicated on a factual position which is not proved by evidence about where and when the defenders' driver first saw the pursuer, the speed of the bus and what the driver was doing.

[21] In our opinion it is plain that the sheriff has erred in making findings of fact which have no proper foundation in the evidence. Even if the parties, or one or other of them, thought that the "statement of witness" was evidence about the facts in the case, and proceeded on that basis, that erroneous belief does not turn it into such evidence.

[22] In the circumstances of this case, we have no hesitation in coming to the conclusion that the pursuer has established a *prima facie* case of negligence on the basis of the facts found by the sheriff which are not challenged. He was on the foot pavement where, as a pedestrian, he was entitled to be and *prima facie* not at risk of being struck by a motor vehicle. We are of the opinion that it is reasonably foreseeable in the circumstances of this case that a pedestrian walking within about a metre of the edge of a pavement may, at any time, change direction and come to the edge of the pavement. In the circumstances of this case, the duty of a driver is to take reasonable care by driving at a speed, manner and position to avoid hitting a pedestrian with part of the bus encroaching over the pavement. Obviously such a *prima facie* case of negligence may be displaced in a particular case depending on the evidence.

[23] But for the reasons already given, the basis upon which the sheriff concluded that the *prima facie* inference was displaced lacked any proper evidential foundation. That notwithstanding, the solicitor advocate for the defender submitted that even in the absence of findings in fact 18 to 21, there was still sufficient evidence available to justify the conclusion of the sheriff that the accident was not caused by the fault and negligence of the defenders' driver. He did not however submit that this court should make any new or additional findings in fact. His submission appeared to be based on the short time frame, according to the CCTV photographs, of two seconds in which the pursuer walked from a position about a metre from the kerb and was then hit by the bus mirror. This submission appeared to be on the basis that the timing involved was insufficient to enable the bus driver to avoid the accident. In our opinion, such a conclusion could not be reached without new findings in fact. In any event, it appears to us that this submission is misconceived. It assumes that the speed and position of the bus before the accident is proved as a matter of fact. But in the absence of evidence from the driver, no such facts are proved in this case.

[24] For the reasons given we allow the appeal, recall the interlocutor of the sheriff dated 8 November 2012, grant decree in favour of the pursuer and appellant in the sum of £9,000 as agreed in terms of the joint minute between the parties number 16 of process together with interest thereon at the rate of 8% per annum from 8 November 2012 until payment.