



SHERIFF APPEAL COURT

**[2023] SAC (Civ) 15
FFR-PD31-20**

Sheriff Principal M W Lewis

OPINION OF THE COURT

delivered by Sheriff Principal M W Lewis

in appeal by

CRAIG HILL

Pursuer and Appellant

against

ANGUS COUNCIL

Defender and Respondent

Pursuer and Appellant: Digby Brown LLP

Defender and Respondent: Ledingham Chalmers LLP

12 January 2023

Introduction

[1] The central issue in this appeal is whether the sheriff erred in utilising hospital records and attaching to them substantial evidential weight in the context of assessing the credibility and reliability of the pursuer where the authenticity of the records was not agreed and the author was not called to give evidence.

Background

[2] The pursuer seeks damages for injuries which he says he sustained through falling down a flight of stairs in a dark communal stairwell for which the defenders were

responsible. The accident occurred towards the start of spring 2019. At that time the pursuer was living in a top floor flat in a block of 6 flats. The communal stairwell is illuminated by lights which operate on timers. He maintains that despite reports made by him and at least two of his neighbours to the defenders of the lights failing to switch on in hours of darkness, remedial work was not undertaken. The communal stairwells remained unlit in hours of darkness. On his way to work early one morning, he lost his footing because he could not see where he was placing his feet. He bases his claim on the defenders' breach of their common law duty to take reasonable care for the pursuer and their breach of statutory duty under the Housing (Scotland) Act 2001 and the Occupiers' Liability (Scotland) Act 1960.

[3] The defenders disputed liability, contending that there had been no prior reports of defective lighting and that if the accident had occurred as described by the pursuer (which they denied), he had materially caused or contributed to it. The matter of contributory negligence was not insisted upon during the proof.

[4] A two day diet of proof was assigned on the matter of liability, quantum being held over for future determination if required. The principle issue for determination by the sheriff was the cause of the accident. After proof the sheriff granted decree of absolvitor.

Sheriff's decision

[5] The sheriff found on the evidence that the pursuer had not proved on the balance of probabilities that the accident happened as averred on record. The critical findings in fact are these:

“[5] On or around 01 March 2019 the pursuer was resident at 18 Bridge Street, Brechin. Said property is a residential flat located within a three storey block. The block contains two flats on each level. The pursuer's flat was on the top level.

[6] The pursuer a tenant of this property. The property was owned by the defenders. The defenders were responsible for the inspection, maintenance and repair of the communal areas of the building.

[7] The pursuer required to descend four flights of stairs from his flat to reach the main entrance to the building. Lights were located on each landing in the building. The lights were operated by timers. The timers ought to have ensured that the lights were on during hours of darkness through the night and early in the morning.

[8] Prior to 01 March 2019 there was a problem with the lights in the communal stairwell. The lights came on during daylight hours and went off during hours of darkness. This problem had been reported to Grace Mathers by Ian Frier. Grace Mathers was the housing officer who routinely attended at the property on behalf of and in the course of her employment with the defenders. No remedial action was taken by the defenders prior to 01 March 2019.

[9] The pursuer attended the Angus Minor Injuries and Illness Unit at Arbroath Infirmary on 01 March 2019.

[10] The pursuer attended the accident and emergency department at Ninewells Hospital in Dundee on 02 March 2019."

[6] The evidence regarding the cause of the accident came from statements made by the pursuer to his neighbours, Ian Frier and Ian Coutts; entries made on 01 March 2019 in the hospital records by a nurse who treated the pursuer at the Minor Injuries and Illness Unit; and direct evidence from the pursuer. The evidence relative to the prior reports of the defective lighting came from Ian Frier, Ian Coutts, Grace Mathers and the pursuer.

[7] The sheriff recorded that the "case turned on the credibility and reliability of the four witnesses, in particular the pursuer, because no one witnessed his alleged accident."

[8] She noted that neither party took issue with the credibility and reliability of Ian Coutts. She considered that "he was a decent man, who gave his evidence in a truthful and dispassionate way." She concluded that "Unfortunately, his evidence did not shed any light on the circumstances of the pursuer's alleged accident."

[9] She considered that Mr Frier was "a credible and reliable witness" but concluded that "whilst his evidence supported the pursuer's position that the defenders were told

about the lighting deficiency prior to the alleged incident and failed to act, it did not shed any light on the circumstances of the pursuer's alleged accident."

[10] The fluidity of the position of Grace Mathers in relation to the reports of deficient lighting and the inconsistencies in her evidence led the sheriff to conclude that Ms Mathers was not reliable – "her recollection did not seem to me to present a comprehensive or accurate description of events."

[11] The sheriff did not doubt that the pursuer had an accident – she simply did not believe that it happened in the manner contended. She mentioned four particular factors which led her to conclude that the pursuer was not credible or reliable –

- (i) his evidence about the circumstances of his accident and the aftermath were slightly different to that which was averred on record;
- (ii) his evidence about the immediate aftermath of his accident (that he decided to proceed down three flights of stairs and some 23 steps in darkness and go to work two hours early rather than returning to his flat) seemed to the sheriff to be illogical;
- (iii) the contrast between his detailed description of his fall and his vagueness as to what happened for the remainder of the day;
- (iv) the numerous inconsistencies between his evidence and the content of the records from the Minor Injuries and Illness Unit in Arbroath as to the circumstances of the alleged accident.

[12] The sheriff concluded that each of factors (i), (ii) and (iii) in isolation would have been insufficient to cause her to doubt the pursuer's credibility or reliability however in cumulation with factor (iv) she was persuaded otherwise.

[13] The sheriff identified what she considered to be inconsistencies:

- (i) the pursuer said in parole evidence that he missed his footing and fell down a flight of stairs whereas the entries in the records make no mention of falling down a staircase;

- (ii) the pursuer said that the stairwell was in complete darkness because of a problem with the communal lighting whereas the records reflect a failure in street lighting caused him to fall when he left his house;
- (iii) the pursuer said that his father drove him to hospital whereas the records note that he had driven himself to the Unit;
- (iv) the pursuer said that he had worked for part of the day, his boss noticed that his limp was affecting his work, and his father picked him up early whereas the records narrate that he had worked all day in a yard;
- (v) the records note that his presentation was very odd, a matter which the pursuer refuted and that the pursuer appeared under the influence of an unknown substance, again a matter refuted by the pursuer with an explanation that he had taken two doses of co-codamol prior to attending hospital;
- (vi) the pursuer had no recollection of being advised that he was unfit to drive as was set out in the records, his explanation being that as his father was with him, he would not be driving anyway; and
- (vii) the records narrate that he would contact a friend in Arbroath to drive him to A&E in Dundee whereas the pursuer said that he had no friends in Arbroath and there was no need to call anyone as his father had accompanied him to the Unit.

[14] The sheriff recognised that the records “were not agreed to be an accurate account of the circumstances of the accident and that evidence was not led from the author of those notes”. However the number of inconsistencies raised doubts in her mind about the credibility and reliability of the pursuer. In the absence of evidence from any other source as to the cause of the accident “and taken together with the other factors outlined above” the sheriff did not find the pursuer to be a credible or reliable witness.

[15] The resultant appeal focuses on the sheriff’s assessment of the evidence.

Submission for the pursuer

[16] Although there are many grounds of appeal, the essence of the appeal is a criticism of the sheriff's analysis of the evidence: she failed to recognise that the evidence of Mr Coutts and Mr Frier substantially corroborated the pursuer on the mechanics of the accident; she attached too much weight to entries in hospital records, the veracity of which were not agreed; she failed to take into account that the evidence of the pursuer was not impugned in cross-examination; she failed to consider the evidence as a whole; her conclusions do not accord with the evidence which she found to be credible and reliable; and her decision was one which no reasonable judge could have reached. In support of the foregoing, the pursuer relied upon: *AW, as legal representative of LW v Greater Glasgow Health Board* [2017] CSIH 58, *Woodhouse v Lochs and Glens (Transport) Limited* [2020] CSIH 67, *Powell v Streatham Manor Nursing Home* [1935] AC 243, *Benmax v Austin Motor Company Limited* [1955] AC 370. He acknowledged that the authorities set a high bar for an appeal in the present circumstances and that the court must exercise considerable caution when faced with an attack on matters of credibility and reliability. However if a decision cannot reasonably be explained or justified the appeal court can interfere.

[17] The pursuer focused heavily on two particular elements of the sheriff's approach to the evidence: the evidence of Mr Coutts and Mr Frier; and the entries in the Minor Injuries and Illness Unit records.

[18] The sheriff found Mr Coutts and Mr Frier to be credible and reliable. In their parole evidence they supported the pursuer as to the cause of the accident. Their corroboration would not be required if the sheriff found the pursuer to be credible and reliable on the crucial facts. The sheriff erred in discounting the evidence of the pursuer as unreliable and incredible. The sheriff's reasoning for failing to find that the accident was caused as averred by the pursuer was irrational and plainly wrong.

[19] The sheriff had no evidential basis on which to conclude that the records comprised a complete and accurate record of what the pursuer told the nurse about the cause of the accident. The content of the records was not agreed. The pursuer did not have the opportunity to challenge the author about the veracity of the entries. The sheriff's conclusion is irreconcilable with the parole evidence of the pursuer, Mr Coutts and Mr Frier.

[20] Standing the direction that the oral submissions took, the pursuer did not specifically invite me to delete or amend any of the existing findings in fact. On being challenged about this he referred me to paragraph [8] on page 22 of his note of argument which he suggested contained sufficient material from which I could glean replacement findings in fact. The content of paragraph [8] is as follows:

"Delete paragraph [77] and substitute 'Accordingly, I find the pursuer to have established his accident as having occurred, as averred. Standing my earlier finding that, there was a known problem with the lights in the communal stairwell, namely that the stair lights came on during daylight hours and went off in the hours of darkness; that this defect had previously been reported to Mrs Mathers by Mr Frier and that no remedial actions were taken by the defenders prior to 01 March 2019, I find the defenders to have been in breach of their duty of care and their duties in terms of the requirements imposed on them under the 1960 Act. I was not addressed on the pursuer's case under the 2001 Act. Accordingly, I find the defenders liable to make reparation to the pursuer for his loss, injury and damage arising from said breaches and appoint the cause to proceed hereafter as a proof on quantum only, and dates to be assigned."

[21] The paragraph which the pursuer invited me to delete reads as follows:

"[77] In order to succeed the pursuer required to prove that the accident happened as set out in the pleadings. Having found the pursuer not to be a credible or reliable witness, I was left with the evidence of Mr Coutts and Mr Frier that the pursuer told them he fell down the stairs and that the lighting was not working. Though consistent with the pursuer's evidence, it simply proves that he told them that he fell down the stairs. I did not consider that it was strong enough to confirm the pursuer's version of events. Consequently I was not satisfied that the pursuer sustained an accident as averred on record."

[22] The pursuer invited me to recall the interlocutor of 29 April 2022, to grant decree on the merits and to continue the cause to a diet of proof on quantum.

Submission for defenders

[23] With reference to *Clarke v Edinburgh and District Tramways Co.* 1919 SC (HL) 35, *Henderson v Foxworth Investments Ltd* (2014) UKSC 203, and *Weddle v Glasgow City Council* 2021 SLT (SAC) 271 the defenders submitted that the appeal had to fail. There was no evidence from which, even if the pursuer's witnesses were accepted by the sheriff as credible and reliable, there could be any inference of, far less conclusion of negligence. The sheriff had reached the correct conclusion on the evidence. What the pursuer was endeavouring to do was to re-run the case made to the sheriff in the hope of persuading this court to reach a different outcome. That is not the purpose of any appeal and it should not be a function of an appellate court.

[24] The sheriff was entitled, based on the parole evidence, to conclude that neither the evidence of Mr Coutts or Mr Frier could shed any light on the circumstances of the accident. The evidence simply demonstrated that the pursuer told Mr Coutts and Mr Frier that he fell down the stairs. The sheriff did not misunderstand or fail to consider their evidence.

[25] The records were not mentioned in examination in chief. Through cross examination the defenders demonstrated numerous inconsistencies in the evidence of the pursuer which were utilised by the defenders to test the credibility and reliability of the pursuer. They were entitled to do so, and the sheriff entitled to assess credibility and reliability in that context. The sheriff was entitled to take into account the inconsistencies and the vagueness of the pursuer's evidence on a variety of other matters in assessing credibility and reliability.

[26] The decision is comprehensive and reasoned. There are no discernible errors in the sheriff's approach.

[27] For the foregoing reasons the defenders invited me to refuse the appeal and to adhere to the sheriff's interlocutor.

Decision

[28] The facts as found by the sheriff were based on her determination of credibility and reliability. In order to review her decision I have to be satisfied that the findings of the sheriff were plainly wrong and "had reached a decision which no reasonable judge could have reached" (*Henderson v Foxworth* at para [62]; *Weddle v Glasgow City Council* at para [27]).

[29] That is the context in which I will consider the following issues –

- the statements made to Mr Coutts and Mr Frier as to the cause of the accident;
- the evidence of the pursuer;
- the entries in the hospital records;

Statements made to Mr Coutts and Mr Frier

[30] I have scoured the transcripts to ascertain what Mr Coutts or Mr Frier or both had seen or heard about the cause of the accident. The parole evidence of Mr Coutts and Mr Frier reveal that they had both come to know the pursuer through neighbourly exchanges in the communal stairwell which included general pleasantries, discussions about deficiencies with the lighting in the stairwell, the injuries sustained by the pursuer and the cause of them.

[31] Mr Coutts described the layout of the block of flats, the location of the lights in the stairwell, and the persistent failures of the timer for the lights with lights switching on

during daytime and switching off during hours of darkness. He suggested that everyone in the block knew the lights were not working.

[32] He encountered the pursuer at the entrance to the flats one day. The pursuer was using a walking stick. He spoke with the pursuer who informed him that “he had fallen down the stairs, or had an accident on the stairwell as the lights wasn’t (*sic*) working”. Mr Coutts thought the discussion was about a week after the accident but he did not know the date of the accident or when the discussion took place and he could not assist with the level of illumination during hours of darkness.

[33] He had reported the defect to Grace Mathers in person on an unspecified date which he believed to have been after the pursuer’s accident.

[34] Mr Frier corroborated the evidence of Mr Coutts regarding the layout of the block of flats, the location of the lights on the stairwell and the deficiencies with the operation of the timer switch. He explained that there was no real illumination if the lights did not come on.

[35] He spoke with the pursuer a few days after the accident. He encountered the pursuer as he was entering the block of flats. The pursuer was using crutches and was accompanied by his brother. The pursuer told Mr Frier that “he had an accident, he had fell down the stairs”. This did not come as a surprise to Mr Frier because the light switch had been defective since 2014.

[36] He had reported the lighting issue to the council on a number of occasions prior to and after the accident. Much time was spent during examination in chief and in cross-examination about the reporting of defects generally to the Council, the reporting of the lighting issues, speed of response protocols and the dwindling relationship between Mr Frier and Ms Mathers.

[37] The discussions which the pursuer had with his neighbours were brief and unspecific as to date, time, precise location and cause. Neither examination in chief or cross-examination elicited anything more relevant than I have quoted above. It is not surprising that the sheriff considered that the evidence of the neighbours, although credible and reliable, could not assist in ascertain the cause of the accident. There is no contradiction in reaching such a conclusion based on the evidence. She has not erred in her assessment of this chapter of the evidence.

The evidence of the pursuer

[38] Although I have concluded that the sheriff did not err in her evaluation of the evidence of Mr Coutts and Mr Frier, the matter does not end there because the pursuer does not require corroboration. However where an accident occurs in the absence of any witness other than the pursuer, as here, the assessment of the evidence of the pursuer requires careful scrutiny which includes assessing that evidence against other sources of evidence.

[39] The pursuer described the layout of the block of flats, the position of his flat within the building, the entrance to the building, the internal landings and stairwell, the position of the lights in the stairwell, and the defects with the lighting. His evidence about these matters is substantially corroborated by Mr Coutts and Mr Frier.

[40] He described his accident in detail in examination in chief. He did not depart from that description despite a rigorous cross-examination. He stated that he left his flat at 6.30am. He was early because he was en route to an interview in Forfar. He locked the door to his flat and “turned left to head down the corridor which leads to three steps”. The corridor was in complete darkness. As he reached the stairs, he stepped forward left foot first and missed the top step because it was so dark. He fell forwards, landed on his left foot,

and crashed onto a landing at the bottom of the three stairs, banging his back and head off a wall. He lay there for several minutes in shock. He eventually gathered himself and despite being in pain, walked down the remainder of the stairs (four flights) and left the building.

There is no corroboration for this chapter of evidence.

[41] At some point the pursuer cancelled the interview and instead drove to his place of employment. The journey took approximately 15-20 minutes. He arrived at work 2 hours prior to his normal start time. He was vague about his activities during that period and during the rest of the day. In the course of the morning the pain worsened. He said that his discomfort was noticed by his boss in the afternoon who suggested he ought to leave or to arrange for someone to collect him. He vacillated between being collected early in the afternoon and working a full day at the yard. He averred that his brother drove him to the Minor Injury and Illness Unit whereas he gave evidence that he was driven there by his father and was accompanied by his brother. He thought that his father had driven him home, or perhaps even taken him to his mother's house, and then suggested that he may have been driven to Ninewells Hospital that evening. Detail was lacking in relation to timings and events. The pursuer did not lead evidence from his boss, father or brother.

[42] His recollection about his examination at the Angus Minor Injuries and Illness Unit was scant and he became somewhat confused about when he was seen for further examination at Ninewells hospital in Dundee, how he travelled there and with whom.

[43] The sheriff considered that the pursuer was not credible or reliable. If a witness is considered not reliable or not credible the court should proceed to assess the weight of the remaining sources of evidence. The only other possible sources are the pursuer's boss regarding his condition at work, and his father and his brother regarding his condition in the aftermath and the conveyance to the Unit and to Ninewells for assessment and

treatment. He did not call them to give evidence. That leaves the entries in the medical records as to attendance at the hospital and the nature and extent of the injuries. I deal with the entries in the following section.

[44] The sheriff did scrutinise the evidence of the pursuer thoroughly. Her assessment falls into six discrete parts: the averments on record; the pursuer's evidence in chief; his evidence in cross-examination; the submission by the pursuer's counsel on credibility and reliability; the submission by the defence counsel on credibility and reliability; and her decision on credibility and reliability. In reaching her decision she compared his evidence with other sources of evidence available to her including the medical records and against the pleadings on record.

[45] I reject the contentions that the sheriff failed to take into account that the evidence of the pursuer was not impugned in cross-examination and that she failed to consider the evidence as a whole. She undertook her task with care and diligence.

The entries in the hospital records made by the nurse

[46] The pursuer had lodged a large bundle of documents which included a copy of the records from the Minor Injuries and Illness Unit. There was no joint minute agreeing that the content of those records was true and accurate nor did either party call the author (a nurse) to give evidence.

[47] The authenticity of uncontroversial documents in litigation is generally agreed by joint minute. In PI cases joint minutes are routinely used to record agreement about the content of medical records. As to hospital records, the minute should expressly cover the facts and opinions stated if those are not in dispute and should specify the purpose for which it is agreed e.g. to be held as full proof as to the nature and extent of the injuries

sustained, treatment and prognosis or to be held as evidence of its author (MacPhail on Sheriff Court Practice 4th Ed at para 16.30). However the records here were utilised in cross-examination not to be held as evidence of the nature and extent of the injuries but specifically to attack the credibility and reliability of the pursuer as to the cause of the accident. No objection was taken by the pursuer to the line of questioning.

[48] The position of the pursuer now is that if statements in documents are to be given weight they must be spoken to by witnesses. As the author did not give evidence, the sheriff ought not to have attached weight to the content. The submission focused on fairness rather than on any legal principles.

[49] The submission is without merit. In the course of a proof, a witness who has given evidence can then be cross examined on the basis that he has made a prior statement which is inconsistent with his evidence. That is what occurred here. The pursuer was challenged in cross –examination on the basis that he has given an explanation as to the cause of his injury to the nurse which was inconsistent with his pleadings and with his evidence. In other words, the detail given by the pursuer appeared to be inconsistent with the contents of medical records produced by the pursuer. Having disclosed the records to the defenders, they are entitled to put the inconsistencies to the pursuer with a view to testing his credibility or reliability and to refer him to the terms of the records (*Robertson v Anderson* 2014 SLT 709 and MacPhail at para 16.25).

[50] It is clear from the transcript that the pursuer accepted he attended the Minor Injuries and Illness Unit on 01 March 2019 at 17.14 hours; he told the staff what was wrong; he was examined by a nurse; and he was capable of explaining what had happened. He could not explain why it took him over 10 hours to attend the Unit despite increasing levels of pain. The inconsistencies between his parole evidence and the entries in the records are

set out in paragraph [13] above. The cross-examination did not stray into the nature and extent of the injuries and treatment for the injuries.

Conclusions

[51] The sheriff recognised that the inconsistency between the pleadings and the pursuer's parole evidence was *de minimus*. I agree – that matter is not enough to justify the outcome. Similarly the illogicality of his decision to proceed to work rather than returning to his flat is *de minimus* and not sufficient in isolation to justify the outcome. The vagueness of the pursuer on certain aspects of his evidence is troubling but again not sufficient in isolation to justify the outcome.

[52] However the entries in the records which “were full, detailed and inconsistent with the pursuer's version of events” allowed a thorough cross-examination on the cause of the accident. The sheriff did not err in attaching weight to those entries in the records for the reasons set out above.

[53] The sheriff considered the evidence as a whole and in doing so took into account the matters mentioned in paragraphs [50] and [51].

[54] There is no reason to depart from the conclusions reached by the sheriff on her proper consideration of the evidence led. The sheriff has not erred in her evaluation of the evidence, in her assessment of credibility and reliability, and in her reasoning. Her conclusion accords with the evidence which she found to be credible and reliable. She has not left out of account any matters of relevance or had regard to matters which are irrelevant. She has not gone plainly wrong.

[55] The appeal is refused.

[56] The expenses of the appeal are awarded to the defenders. Sanction for the employment of counsel is granted.