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Rules Are Rules - Acorn Services v Policek, 2014 SC EDIN 67

This was an appeal against a refusal by the Sheriff at first instance to recall a decree granted in absence.

The Defenders failed to respond timeously to service of court proceedings and the Court granted Decree in absence in the sum of £16,506 for renovation works carried out to the Appellant's property by the respondents.

The Appellants sought to have the Decree recalled on the basis that the writ was served upon the Defender when she was out of the country. They contended this explanation ought to have been accepted at face value and a preliminary proof ought to have been fixed by the Sheriff at first instance to explore this.

Further, the Sheriff had found the defence being proposed by the Defender was lacking in detail. The Appellant argued that the Sheriff was wrong to require additional specification and all that was required was a stateable defence.

Decision

The appeal was refused. The Sheriff at first instance had not erred in law in exercising her discretion. The test applied by her was correct.

Explanation for failures

There was a lack of material in support of the Defender's contention that she was out of the country or that the Pursuers had acted in bad faith in serving the writ. In fact, there was some information to cast doubt on this explanation. The Defender had not taken the opportunity to "*lay all her cards on the table*" in providing an explanation.

Proposed defence

The defence simply contained bald assertions which gave no clue as to the nature of the defence. The Sheriff was referred to a report lodged by the Defender but she correctly concluded that this did not in any way support the Defender's case. The Sheriff wasn't looking for a polished defence but what was provided was unspecific and amounted to a dilatory defence. The Sheriff did not misdirect herself as to the test to apply to the proposed defence.

Comment

The decision follows several recent decisions by the courts in Scotland where Defenders' attempts to have a Decree in absence recalled have failed. The courts in Scotland have recently adopted a stricter approach towards parties' failures to adhere to procedural rules and deadlines.

There is now a crackdown upon failures to adhere to court procedure and timetables. Whereas previously the Scottish courts could have been persuaded without much resistance to excuse such failures, this is no longer the case.

It should therefore be borne in mind that, where a Decree is passed against a Defender, as a result of a failure to timeously instruct legal representation for example, the courts will require a detailed, honest and convincing explanation as to how this came about before it is recalled.

It will also be necessary to be armed with a full and detailed defence at the outset. However, even if the Defender provides all of this, it is now far from guaranteed that the court will exercise its discretion to recall the decree.

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In this edition

Jury Trials - always bad?

There is a prevailing view among some practitioners that Defenders should seek to avoid Jury Trial at all costs, the assumption being that a Jury will usually favour a Pursuer. However, two jury decisions in recent months serve as a reminder that this is not always the case.

In ***Henderson v The Burntisland Shipbuilding Company & another*** (26 June 2014), claims were brought by various relatives of a man who had died of asbestos related mesothelioma. Most of the relatives had their claims settled, but a jury trial proceeded in respect of claims brought by the step-children of the deceased's daughter. They argued that although not blood relatives, they were accepted by the deceased as his grandchildren, and as such, qualified for an award under section 4(3)(b) of the Damages (Scotland) Act 2011. Having heard evidence as to the nature of the relationship, the Jury were obviously not persuaded that it was sufficiently close, and declined to award any damages to the step-children.

In ***Ferguson v Ferguson***, (14 November 2014), a woman sued the owner of a dog which bit her on the face, causing serious injury. The Defenders pleaded contributory negligence. The Jury awarded damages of £6,000, which they then reduced by 85% to reflect contributory negligence. Such a high percentage is extremely rare in judicial awards. The sum awarded by the Jury is also probably below that which might have been expected from a judge.

These cases serve as a reminder that it should not always be assumed that Juries will be more sympathetic than Judges towards Pursuers, particularly in lower value claims. The particular facts and circumstances of each case must be carefully considered. Careful preparation and presentation of a case at Jury Trial will increase the chances of favourable outcomes for Defenders.

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Ladders - whether part of the workplace: Derek Smith v Muir Construction Ltd.

The Pursuer was a joiner working for the Defenders, engaged in the construction of a townhouse with a colleague. A ladder had been left protruding over a stairwell opening to the first floor. The Pursuer decided to use the ladder to access the first floor. He shouted to his colleague that he was going up the ladder. The colleague heard a crash and found the Pursuer lying injured under the stairwell opening. The Pursuer had no memory of the accident and the colleague did not see it happen. The Defenders argued that there could have been any number of explanations for the accident. Lord Glennie accepted the Pursuer's contention that he "most likely" fell whilst ascending the ladder.

Decision

The Defenders argued that there was no need for the Pursuer to have attempted to access the first floor; that they had not provided the ladder for that purpose and therefore there was no breach of duty. Lord Glennie rejected those arguments. He found that there had been no attempt by the Defenders to prevent the ladder being used, either by removing it, blocking up the opening or issuing written or oral warnings or instructions, and consequently the first floor remained part of the workplace and accordingly, liability had been established.

Comment

Whilst the Court accepted that the accident happened as a result of the Pursuer falling from the ladder, if an alternative explanation for the accident had been accepted by the Court, this would still have led to a finding of liability on the basis of either an unsecured ladder being used for access or the Pursuer having fallen through an unguarded opening. In either circumstance, liability would have been established under the Workplace Regulations.

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Braking Bad? - Richard Little v Ian Glen and Others

The Facts

On 12 April 2008, the Pursuer was seriously injured in a road traffic accident. The Pursuer was very drunk and was returning home in the early hours of the morning. It was dark and he was walking along a winding country road without streetlights or pavements. As the Pursuer walked south on the road, he was hit by a north-bound taxi driven by the First Defender.

At first instance, it was established that the First Defender had 2 to 3 seconds within which to react before colliding with the Pursuer. The First Defender attempted to avoid the Pursuer by swerving to the right, however, the nearside of the First Defender's taxi hit the Pursuer.

The Lord Ordinary's Decision

Lord Jones held that the First Defender had not been negligent, finding that a pedestrian standing at or about the point of impact could see the First Defender's car approaching from a distance of just under 200 metres. In the circumstances, it was not foreseeable that a pedestrian would choose to cross and walk into the path of the car. The First Defender could not be expected to be on the lookout for pedestrians behaving in this manner. He had not been negligent in using dipped headlights. He had not failed in his duties by trying to swerve to avoid the Pursuer.

The Reclaiming Motion

The Pursuer reclaimed, arguing that the taxi's stopping distance was such that, had the First Defender applied his brakes immediately upon seeing the Pursuer, the car may have come to a halt or, at the very least, slowed to a speed which would have rendered serious injury unlikely.

It was argued that the Lord Ordinary ought to have asked himself the question: given that the pedestrian had been seen from 40 to 50 metres away, ought the driver to have braked instead of swerving to avoid the Pursuer?

The Decision of the Inner House

Lady Paton delivered the opinion of the court. Whilst it appeared that the Lord Ordinary did not make a specific finding on the braking issue in his decision, it had to be assumed that he had considered the evidence in its entirety in reaching his conclusions.

The stopping distance was only one factor taken into account by the Lord Ordinary when assessing negligence. He had made it clear that he did not consider the First Defender's actions in swerving to try and avoid the Pursuer to be negligent in the circumstances.

The Inner House was not persuaded that Lord Jones' decision could not be explained or justified. In any event, the Inner House confirmed that, even if they were persuaded that the Lord Ordinary had erred, they would not have found the First Defender negligent for failing to brake as soon as he was aware of the Pursuer. He could not be criticised for choosing the emergency reaction of swerving to avoid a pedestrian whose behaviour was affected by his intoxication on a dark country road. The reclaiming motion was refused.

Comment

It was perhaps always going to be difficult for the Reclaimer. Lord Jones had heard several days of evidence and the Inner House was clear at the outset that it would be slow to interfere with his decision in such a fact sensitive case.

Lady Paton carefully set out the limits of appellate court interference. The Inner House, which did not have the privilege of hearing the evidence first hand, would not interfere with the decision unless, in the absence of some other identifiable error, it was satisfied that it could not reasonably be explained or justified.

The Inner House was satisfied that Lord Jones had carefully weighed up and assessed the evidence and submissions before reaching his conclusions.

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Poles Apart... - Matthew Coia v Portvadie Estates Limited

In the case of ***Matthew Coia v Portvadie Estates Limited***, a decision of the Extra Division of the Inner House of the Court of Session issued on 6 January 2015, the Pursuer was employed as a chef by the Defenders who operated a hotel and lodges at Portvadie Marina, Loch Fyne. Although he was free to find his own accommodation, he had stayed in a caravan provided by the Defenders who in turn deducted £15 per week from his salary. There was nothing in his contract obliging him to stay on their premises.

When the pipes in the caravan froze and burst, the Defenders agreed to let the Pursuer stay in a lodge normally reserved for paying customers. Again, the deduction from his salary continued but, as before, there was no contractual obligation for him to stay there. A month later, the Pursuer was advised by the Defenders that the lodge was required for a paying customer and that he required to remove his belongings. Whilst doing so, he dislodged a metal pole inside a wardrobe which fell and struck him on the foot.

The matter went to Proof at Dunoon Sheriff Court in June 2014, with little dispute over the circumstances of the accident itself. The Sheriff granted Absolvitor in favour of the Defenders, in short, agreeing with the Defenders' submissions that "a pole contained in a wardrobe in what is normally a lodge occupied by guests" was not "work equipment" in relation to the Pursuer in terms of the Provision and Use of Work Equipment Regulations 1998. He also took the view that when the Pursuer was in the lodge he was not "at work" or "in work with work equipment" in terms of the Workplace (Health, Safety and Welfare) Regulations 1992.

The Pursuer appealed to the Court of Session on the basis that the Sheriff had erred in law in finding that, at the time of the accident, he was not "at work" or that the pole was not "work equipment". He argued that he was an employee of the Defenders complying with an instruction given in the Defenders' capacity as employers in order to help prepare the lodge for the arrival of guests; nothing, in the circumstances, took him out of working in the course of his employment. In relation to the pole as work equipment, the Pursuer maintained that employees such as cleaners and housekeepers "used" (in the sense of coming into contact with) the wardrobe and its pole - "It was for use at work, and the appellant was working when he was using it".

In refusing the appeal and upholding the Sheriff's decision at first instance, the Inner House indicated that they did not consider the wardrobe or pole to be work equipment. It was not placed there "for work" and there was no evidence that it had any practical purpose in relation to work. It was an item for storage of clothes. It did not follow that just because an item might be cleaned by a cleaner that its practical purpose was for use at work by that cleaner. The Court also took the view that the Pursuer was not "at work" at the time he suffered the injury, stating that *"the appellant sustained injury when he was removing his own personal possessions from a wardrobe in premises he occupied otherwise than as a result of his contract of employment".*

The decision, both at first instance and at appeal, is a sensible one. Albeit the parties may have had an employer/ employee relationship on paper, the Courts seem prepared to acknowledge that the extent of such a relationship, in the context of workplace regulations, ends somewhere within the boundaries of common sense.

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Update

Richard Baker MSP has now introduced his proposal for the Damages Claims (EU Directive on Safety and Health at Work) (Scotland) Bill to the Scottish Parliament.

The proposal is for a Bill that will "*ensure that all Scottish workers will have effective legal protection against a breach of their rights under European law*".

As insurers will be aware, the proposal results from the introduction of s69 of the Enterprise and Regulatory Reform Act 2013 and the fact that a breach of duty imposed by health and safety regulations is no longer actionable in the civil courts unless the regulation specifically permits it.

Responses to the proposal are invited and require to be submitted by no later than 31 March 2015.

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