EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

Lady Paton
Lord Hardie
Lord Emslie

[2012] CSIH 35
PD1585/07

OPINION OF THE COURT

delivered by LORD HARDIE

in the cause

RAYMOND MUNRO

Pursuer and Reclaimer;

against

WILLIAM STURROCK trading as SCOTMAPS

Defender and Respondent:

_____

Reclaimer: Hanretty, Q.C., Revie; Andersons LLP
Respondent: Dunlop, Q.C., Pugh; Dundas & Wilson CS LLP

3 April 2012

Introduction

[1] Prior to the Speyside Stages Rally on 21 August 2004 the reclaimer purchased from the respondent a copy of the route notes and DVD which had been prepared by the respondent. The reclaimer competed in the said rally; his co-driver acted as navigator by reading aloud to him the information from the route notes. During stage 6 of the rally immediately after junction number 7 the reclaimer crashed his car on a bend. The bend was classified in the route notes as "4L in". The "4" referred to the angle of the bend and signified that it was 40 degrees. The "L" signified that it was a left hand bend. The word "in" signified that the driver could take a tight line as he went through the bend. The reclaimer alleged that he approached the bend at an appropriate speed and line in terms of the notes, but lost control as a result of which the car collided with a bank on the offside of the track just after the bend.

[2] Even though no other driver made the same mistake on that bend, the basis of the action was the allegation by the reclaimer that the route notes were inaccurate. In particular the reclaimer averred that the bend was much more acutely angled than a 40 degree bend and ought to have been classified as "7L" indicating a left hand bend with an angle of 70 degrees. Had it been so classified, as had been the case in 2001, the reclaimer would have approached the bend at a substantially slower speed and would have taken a different line. After a proof, restricted to the question of liability, the Lord Ordinary assoilzied the respondent and the reclaimer has reclaimed against that interlocutor.

Submissions on behalf of the reclaimer

[3] Counsel for the reclaimer submitted that the Lord Ordinary had failed to take advantage of the opportunity of seeing and hearing the witnesses who had given evidence at the proof and had failed to consider the evidence under reference to the parties' respective positions. He acknowledged that the test which he had to meet was a high one (*Thomas* v *Thomas* 1947 SC (HL) 45; *Thompson* v *Kvaerner Govan Limited* 2004 SC (HL) 1). *Piglowska* v *Piglowski* [1999] 1 WLR 1360 did not appear to add anything to the well established test in these earlier cases. In this case the Lord Ordinary did not comment upon the credibility and reliability of any of the witnesses whom he had heard. Moreover, he was in error because he failed to understand fully the case before him. There were three components to the description of a bend. The first was whether it was a left hand bend or a right hand bend; the second was the angle of the bend; and the third was how a driver might manoeuvre his car round the bend by taking it "tight", "in" or "cut". It was accepted that a measurement of the

bend in question produced an angle of 30 degrees but the angle of a bend was not of itself sufficient information for a driver. For example, a 90 degree bend extending over a long radius would not create any difficulty for a driver whereas such an angle over a short radius would. The Lord Ordinary had simply applied his mind to the exercise of measuring the bend and had failed to consider the subjective exercise of the respondent in preparing the notes. A relatively large number of witnesses had given evidence but it was difficult to see the need for their evidence if it was sufficient simply to rely upon the evidence of a surveyor. In considering the evidence before him the Lord Ordinary had failed to address issues of credibility and reliability of witnesses when he was considering the subjective assessment made by the respondent. The defender's expert witness, J. M. Grierson, emphasised that it was important to have consistency in rally notes to the extent that similar bends were given similar notations. While the weight to be attached by the Lord Ordinary to the evidence about the actual angle of the bend was a matter for the Lord Ordinary, his reasoning was fundamentally flawed. In particular when he observed: "In my opinion the crucial issue in this case is the angle of the bend in question, which must be a question of fact capable of empirical verification." (para.[42]), it was apparent that he had disavowed the subjective element in the exercise undertaken by the respondent. The consequence of this error by the Lord Ordinary was that his decision was plainly wrong and the relevant passages from the evidence were available for assessment by this court. In that event the case should be put out for a By Order hearing to determine further procedure. If, however, the court rejected the submissions for the reclaimer the action would be at an end.

Submissions on behalf of the respondent

[4] Counsel for the respondent submitted that the approach of the Lord Ordinary was impeccable when one had regard to the nature of the case pled by the reclaimer. From the averments it was clear that the reclaimer's primary contention was that the bend in question was much more acutely angled than 40 degrees. Accordingly in determining whether the classification of the bend as a "4" was negligent or not, the starting point must be to ascertain what the angle of the bend actually was, otherwise there would be no reference point from which one could judge the subjective assessment of the respondent in his route notes. The tenor of the evidence heard by the Lord Ordinary was that, although there might be a margin of error between the actuality on the ground and the description in the route notes, one could not ignore the actual angle of the bend. Moreover the evidence was unanimous that a 30º bend could never be

described on any view as a "7". It was clear that, in earlier route notes prepared in 2001 by him, the respondent had wrongly described this particular bend but that was irrelevant, as the court was concerned with events which followed the later notes in 2004. The Lord Ordinary had not proceeded solely upon the evidence of the measured angle of the bend; rather he had accepted the evidence of the defender's witnesses that there could be no criticism of the description of the bend as a "4". In cross-examination the reclaimer had accepted that a bend which was measured at 30 degrees could reasonably be described as a "3" or a "4" but not a "7". (Evidence pp. 183/4 and 292/3.) The witnesses Clark (p. 478), McFadyen (p. 726) and Christie (p. 705) each gave evidence to a similar effect. The Lord Ordinary had accurately recorded the evidence in his Opinion (paras. [8]-[40]) and there had been no criticism of him in that regard. The evaluation of the evidence was essentially a matter for the Lord Ordinary. Counsel submitted that it had not been shown that the Lord Ordinary had gone plainly wrong or had failed to take advantage of seeing and hearing the witnesses, in which event the evaluation of the evidence was not at large for this court and the reclaiming motion should be refused.

Discussion

[5] If, as was submitted by counsel for the reclaimer, the Lord Ordinary wholly misunderstood the case before him and in effect asked himself the wrong question, there is no doubt that he would have erred in law and that it would be appropriate for this court to reconsider the evidence (*Thomas* v *Thomas*.)

[6] Although the respondent's route notes in respect of the bend at which the reclaimer crashed his car describe the bend as "4L in", the thrust of the criticism of the Lord Ordinary's approach was directed to his consideration of the question whether the bend could reasonably be described as a "4". Before considering the approach of the Lord Ordinary, it is, in our view, important to bear in mind the basis upon which the reclaimer alleged negligence on the part of the respondent. In his pleadings the reclaimer averred that it was normal practice for experienced rally drivers such as the reclaimer to purchase such notes prior to a rally and to rely upon them in the course of the rally. As the respondent accepted, drivers relied upon his notes and in these circumstances it was essential that such notes were accurate. The averments in Statement 6 about the method of preparing such notes are as follows:

> "The normal method of compiling such notes is for the compiler to drive round the course with an experienced colleague on a number of occasions, initially noting the various features of the course and thereafter checking carefully that the notes to be provided to drivers are correct in every detail."

In relation to the bend where the accident occurred, his averments are to the following effect:

> "The bend was classified in the route notes as '4L in'. The '4' refers to the angle of the bend and signifies it to be 40 degrees. The 'L' refers to the bend and signifies it to be a left hand bend. The 'in' signifies that the driver can intrude on to the inside verge as he goes through the bend. The notes as written were accurately relayed to him by his co-driver. He approached the bend at an appropriate speed and line in terms of the notes. At a point by which he was committed to his speed and line through the bend, he saw that there were the foundations of a wall on his near side underneath a grassy overlay. He saw also that the bend was much more acutely angled than a '4' bend. His near side tyre went over the wall foundations, throwing the car off line, and he was unable to steer it through the bend. ... Any competent assessment of the route would have assessed the angle of the bend at substantially more than 4. Had the notes specified accurately what was involved at that bend, the pursuer would have approached at a substantially slower speed and would have taken a different line. He would not have been thrown off line by the foundations, and he would have been able safely to negotiate the bend. Had the bend been classified as '7L' the accident would not have occurred."

[7] From the above averments it is apparent that the reclaimer's case was that the route notes were the result of the respondent driving round the course on a number of occasions and forming an assessment, and recording features, of the route, including the angle of bends. As was accepted by counsel for the reclaimer in his submissions, the notes are based upon a subjective assessment. From the summary of the evidence noted by the Lord Ordinary there was an acceptance by a number of witnesses, including the reclaimer, that there may be reasonable disagreement between experienced rally drivers about the classification of a particular bend. However the extent of that legitimate disagreement was limited. Whereas one driver might classify a bend as a "4" and other drivers might classify it as a "3" or "5", the extent of such disagreement could not explain a variation between a classification of a bend as a "4" and a classification of it as a "7". In so far as there was evidence of subjective differences based upon a witness's impression of the bend, the Lord Ordinary expressed the view that such evidence was "in the same category as that of witnesses who give evidence of their estimate of the speed of a vehicle, the distance between two points, the height of a building or the like." (para.[41]). We consider that that was an appropriate manner in which to deal with these differences of impression.

[8] In the course of the proof it became clear that the nearside of the reclaimer's car had not in fact come into contact with any wall foundations or other

obstacle at the time of the crash. As he himself accepted in evidence, the in-car video recording of the crash showed that no such contact had occurred. This was confirmed by a well-qualified roads engineer and safety expert led by the respondent who had viewed the video footage many times, including viewing it in slow motion and frame by frame. Furthermore the weight of evidence was to the effect that the term "in", as applied to any bend in the route notes, did not indicate to a driver that he could "cut", in the sense of driving off the road surface when taking the bend. On the contrary the key in the route notes defined "in" as meaning only "take tight line". In the result the Lord Ordinary was able to conclude, at para [45] of his Opinion, that any criticism by the reclaimer of the term "in" was misplaced; that his car had not clipped the nearside verge; and that he had simply run wide at this bend and up the banking on his offside.

[9] In the end, therefore, the reclaimer's case was limited to his assertion that the bend, which had been classified as a "4", was in reality a "7". His evidence-in-chief, recorded by the Lord Ordinary, was that if it had been a "7" he would have approached it at least two or perhaps three gears lower and at a speed 30-40mph slower. From the summary of the evidence provided by the Lord Ordinary there appears to have been a consensus that a 70 degree bend could never be described as a "4". The parties had joined issue on whether an assessment of "4" in the route notes was outside the range of actuality. To answer that question we agree with the submission of counsel for the respondent that it is necessary to ascertain the angle of the bend, otherwise there is no reference point by which one can judge the respondent's assessment of it. In this respect it is clear that the Lord Ordinary has fully understood the true nature of this case. He has reviewed the evidence of the various witnesses in seeking to resolve the different subjective assessments of the bend where the accident occurred. The Lord Ordinary has found most compelling the evidence of the actual angle of the bend (30 degrees). That angle supported the respondent's assessment of the angle of the bend as being 40 degrees represented by a "4". The difference between 30 degrees and 40 degrees was within the margin of error recognised by all of the relevant witnesses and, in any event, the categorisation of the bend as a "4" when it was in reality a "3" favoured the reclaimer because it should have induced him to drive with more caution. The Lord Ordinary has concluded that the categorisation of the bend as a "4" was not outside the range of acceptability. He was entitled to reach that conclusion. Indeed, had the Lord Ordinary accepted the subjective evidence adduced from a number of the reclaimer's witnesses that the bend was either a "6" or a "7", we consider that such a conclusion would have been perverse in the face of the real evidence of the measurement of the angle of the bend at 30 degrees. It was unnecessary for the Lord Ordinary, in the circumstances of this case, to comment on the credibility and reliability of each of the witnesses on this issue, as it is clear that his decision to prefer the evidence of the respondent's witnesses in this

regard was based upon the evidence of the measurement of the angle of the bend. In all the circumstances we are satisfied that not only can it be said that the reclaimer has failed to meet the high test required to satisfy us that the Lord Ordinary was plainly wrong but we are able to conclude that he was plainly right.

[10] We shall accordingly refuse the reclaiming motion. We shall also reserve the question of expenses.