

SCOTLAND / JUDGMENT

Stainsby v Fallon [2010]

ScotCS CSIH_64 (06 July 2010)

[2010] ScotCS CSIH_64

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[2010] CSIH 64, 2010 GWD 26-487, 2010 Rep LR 127 [New search] [Help] EXTRA DIVISION,
INNER HOUSE, COURT OF SESSION Lady Paton Lord Carloway Lord Bonomy

[2010] CSIH 64 PD1398/06 OPINION OF THE COURT delivered by LADY PATON in the cause
MHAIRI STAINSBY Pursuer; against JANICE FALLON Defender:

Act: Milligan, Q. C., Bonnar & Company Alt: MacMillan, Advocate; Andersons LLP (for Golds,
Solicitors, Glasgow) 6 July 2010

Introduction

[1] At about 9.30 pm on 13 July 2005 , two brothers (Dylan aged 9, and Jason aged 13) were walking along the pavement towards an ice-cream van parked in School Quadrant, Airdrie. Dylan missed his footing at the edge of the pavement and fell onto the road. He was trapped under the rear nearside wheel of the defender's passing Freelander vehicle. He suffered injuries including a fractured jaw, the loss of two front teeth, damage to other teeth, fractures of the first and second metatarsals of his right foot, and grazes and bruises. Dylan's mother, the pursuer, raised an action of damages against the defender in the Court of Session under Chapter 43 of the Rules of Court. Two grounds of fault were set out in the pleadings, namely that the defender had driven too close to the pavement; and that she had failed to sound her horn on entering School Quadrant. A civil jury trial took place in October 2008. Having heard the evidence for the pursuer and submissions, the Lord Ordinary withdrew the case from the jury and directed them to find that the accident had not been caused to any extent by the defender's fault. The jury did as directed. The pursuer has enrolled a motion for a new trial, contending that the case should have been left with the

jury for their determination. The pleadings

- [2] The pursuer avers inter alia: "On or about 13 July 2005, at or about 9.30pm, the defender was driving a Land Rover Freelander, registration number J9 FAL in School Quadrant, Airdrie. The weather was fine and road conditions were dry. Lighting up time was around 9.09 pm . Street lights were lit. The child, Dylan Lindsay ('Dylan') was walking along the pavement, towards an ice-cream van which was parked at the kerb, several yards ahead. He would have been readily visible to the defender as she approached from behind. Dylan missed his footing at the edge of the pavement and fell into the road, close to the pavement and parallel to it. The defender failed to observe Dylan fall onto the road. She was driving slowly and had opportunity to avoid him. The defender drove her vehicle over Dylan. The defender stopped her vehicle with the rear wheel trapping Dylan. The vehicle was around 40cms from the pavement. As a result of the accident, Dylan sustained the loss, injury and damage hereinafter condescended on. The rear wheel of the defender's car was lifted off Dylan by Jason McCrimmon. With reference to the defender's averments in answer, admitted that police and ambulance attended the scene. Not known and not admitted that the defender was not charged with any offence. Not known and not admitted that a scuff mark was identified on the nearside front wing of the defender's vehicle. Quoad ultra the defender's averments in answer are denied except insofar as coinciding herewith. Dylan was lying face down in the roadway before the defender's car passed over him. He did not fall into the front nearside wing of the defender's car. Any prudent driver would have exercised caution, given the presence of children on the pavement close to an ice-cream van. Any prudent driver would not have driven close to the pavement, or would have sounded the horn on entering School Quadrant. In the circumstances, such a driver would have driven at a speed and a distance from the pavement which permitted evasive action in the event that a child ran or fell onto the road".
- [3] The defender avers inter alia: "Admitted that on or about 13 July 2005 at about 9.30 pm , the defender was driving a Land Rover Freelander registration number J9 FAL in School Quadrant, Airdrie. Admitted that the weather was fine and road conditions were dry. Admitted that lighting up time was around 9.09 pm . Admitted that street lights were lit. Admitted that the child Dylan was walking along the pavement, towards an ice-cream van which was parked at the kerb, several yards ahead. Admitted he was readily visible to the defender as she approached from behind. Admitted that Dylan Lindsay was involved in an accident with the defender's vehicle on said date. Admitted that the defender stopped her vehicle with the rear nearside wheel trapping Dylan by the clothing on his upper body. Not known and not admitted that the vehicle was about 40 cms from the pavement. Quoad ultra denied. Averred that on said date the defender was driving home with her son and his friend. The defender turned into School Quadrant in Airdrie where she has lived for 22 years. She adopted a reasonable road position taking into account that there were other parked vehicles in School Quadrant and, in particular, a white van parked on the opposite side of the road at the entrance to School Quadrant. There was no reason for her to sound her horn. The defender always drives extremely slowly in this area as the road is often busy

and congested with vehicles. The defender was aware of an ice-cream van and brought her car to almost a crawl. She saw two boys on her left hand side, one of whom she now knows to be Dylan Lindsay. As she drew level with the boys she saw Dylan trip over his shoe laces and he then fell onto the nearside of her car. The defender immediately brought her vehicle to a halt. Police and ambulance attended the scene. The defender was not charged with any contravention of the Road Traffic Act. Police identified a scuff mark on the defender's vehicle on the nearside which was the point of contact with the defender's vehicle when Dylan fell onto the nearside of the car. The defender's vehicle did not run over Dylan. Dylan's mother attended the defender's house following the accident and said to the defender that the accident was not her fault as Dylan had tripped over his shoe laces and fallen in front of the car. This was also the view of the police officers who attended the scene". Outline of evidence

- [4] The following outline of evidence is abbreviated, paraphrased, and selective. Its purpose is to note any evidence led before the jury which might have entitled them to decide that the defender was in breach of a duty of care, resulting in injury to Dylan.
- [5] Dylan's mother, the pursuer, was at the ice-cream van. She heard Jason scream, turned round, and saw Dylan lying on the road parallel with the pavement, with his head nearest to her. The Freelander vehicle driven by the defender was moving slowly towards the ice-cream van, and came to a stop with Dylan pinned beneath the rear nearside wheel. The pursuer did not see Dylan fall, and could not say why or how he fell. According to her, Dylan could not remember what happened before his accident.
- [6] Jason Stainsby, Dylan's brother, said that he and Dylan had been walking side by side along the pavement towards the ice-cream van. Dylan was walking on the outside of the pavement. They were not larking about, running, jostling, or pushing each other. Jason caught a glimpse out of the side of his eye of Dylan falling straight down. The defender's car was moving slowly at the side of them. Jason did not know what made Dylan fall, did not see the way in which Dylan fell, and could not remember Dylan's position under the Freelander. He acknowledged that he had been in a state of shock.
- [7] Police Constable Robert Brown was called to the scene of the accident. He ascertained that the front wheel of the Freelander had not run over Dylan. He thought that there was a "cleaning mark" just before the rear nearside door of the Freelander, which was consistent with Dylan tripping off the pavement and falling into the side of the car. In cross-examination he stated that the car's position was "what you would expect a reasonable driver to be in". However he stated that he, as an advanced driver, would have moved further out because of the children on the pavement.
- [8] John Alexander, road traffic accident investigator, estimated that the Freelander had been about 40 cm (or 16 inches) from the edge of the pavement at the relevant time. He noted from photographs that there was blood on the rear nearside tyre of the vehicle, and blood on the road in front of that tyre. He gave his opinion, as an advanced police driver, that the

driver of the Freelander, when passing children (described in the Highway Code as particularly vulnerable and unpredictable road-users) should have moved over to her right thus moving away from the potential danger presented by the children on the pavement. The driver was at fault by failing to move more to the right, by about 30 cm or one foot. Had the driver moved about a foot further to the offside, the area involved in injuries to Dylan would have been adequately cleared. If it proved impossible to move further to the right because of traffic or parked cars, the driver should have sounded her horn to warn the children of her approach from their rear. Had the driver sounded the horn, there was a distinct possibility that the injuries would not have been sustained.

- [9] Professor Welbury, professor of paediatric dentistry, gave an opinion that Dylan's dental injuries were caused by some element of blunt trauma, such as falling to the ground, or hitting an object such as a wall. He also accepted that the dental injuries could possibly have been caused by a hard tyre moving slowly.
- [10] Mr George Bennet, consultant orthopaedic surgeon, stated that the fractured metatarsals in Dylan's right foot were most likely to have been caused by the rear wheel running over his foot. The abrasions on the groin, flank, and abdomen were consistent with contact with the rear wheel. A blunt liver injury was consistent with contact with the rear wheel after a fall. However the abrasions to the right hand and wrist were consistent with a fall on an outstretched hand onto a hard surface. The Lord Ordinary's decision to withdraw the case from the jury
- [11] Having heard submissions, the Lord Ordinary provided the following note recording the submissions made, and giving a ruling with reasons: "At the conclusion of the evidence of the pursuer Mr MacMillan, counsel for the defender, made a motion that I should withdraw the case from the jury as there was no evidence of negligence on the part of the defender and no evidence of the requisite causation. His submission was that there were two recognised headings on the basis of which the case should be withdrawn. The first was the facts adduced in evidence set up an essentially different case from that stated on record and on that basis did not constitute a relevant case in relation to the pleadings or issue. The second was that the pursuer had failed to produce sufficient evidence to support the case on record. Further, he submitted that the evidence led only established that the accident had been caused by the boy's tripping on the pavement for whatever reason. Any inference or conclusion that the defender was at fault would be contrary to the evidence. The case was in that rare category that if the jury were in favour of the pursuer the Inner House would simply grant absolutor on a motion for a new trial: *Ross v Fife Health Care* 2000 SCLR 620. Reference was made in the course of his submission to the following cases: *Tully v North British Railway Company* 1909 1 SLT 471 per Lord President Dunedin at p 476; *Mitchell v Caledonian Railway Co* 1910 SC 546 per Lord Johnstone at p 548; *McDonald v Duncan* 1933 SC 737 per Lord Murray at p 745. Mr MacMillan drew attention to the averments on record at page 6 to the effect that the defender had the opportunity to avoid Dylan and drove her vehicle over him. The flavour of these averments, which he submitted had not been

established, was that the incident occurred in front of the vehicle and the defender drove over Dylan while he was lying prone in the road. The evidence of his brother Jason was that immediately prior to the accident the car was level with the two boys and that fitted in with the photographic evidence. The evidence led by the pursuer had established that Dylan tripped on the pavement and fell into the side of the defender's car. It had been accepted by the pursuer's own accident expert, Mr Alexander, that in this case there was no question of the car knocking the boy down. There was no evidence that the defender failed to observe Dylan fall onto the road or that she had the opportunity to avoid him. The evidence of the defender's driving was redolent of caution on her part. Constable Brown in his evidence had not criticised her driving. She was as far away from the pavement as it was possible for her to be on her own side of the road and there was no obligation on her to sound her horn just because there were children on the nearside pavement who, I would add for emphasis, were walking in the direction of an ice-cream van parked on the same side of the road. In response Mr Conway submitted that the motion was fundamentally misconceived and should be repelled. All reasonably favourable inferences should be drawn in favour of the pursuer from the evidence. He accepted that on the evidence the defender did not drive completely over Dylan's body. Dylan fell close and parallel to the pavement. The car was 40 centimetres from the pavement. The two specific allegations of fault, namely, driving too close to the pavement and failing to sound the horn, were based on defensive driving and a failure to react. He accepted that the evidence was of a collision between the child and the vehicle and that it hardly mattered whether he struck the bodywork of the side of the car before being found trapped at the near rearside wheel. He founded on section 38 of the Road Traffic Act 1988 and various provisions of the Highway Code about being alert to the danger posed by child pedestrians. Reference was made to the following cases: *O'Donnell v Lambert & Mackenzie Limited* 1967 SC (HL) 73; *Jolley v Sutton London Borough Council* 2000 PIQR 136 per Lord Steyn at pps 143 and 146; *Hughes v Lord Advocate* 1963 SC (HL) 31 ; *McCluskey v Wallace* 1998 SC 711 ; *Adamson v Roberts* SC 681 per Lord President Cooper at p 684 and three English cases, *Eagle v Chambers* ; *Ehrarie v Curry* and *J v West*. The case of *Anderson v Roberts* was particularly relied upon. That case, which was one decided on the relevancy of the averments, contained averments by the pursuer that while walking along a busy foot pavement where it was narrowed by a projecting building she required in passing other pedestrians to put one foot over the edge of the pavement into the gutter and that as she did so she was struck by the defender's van. The circumstances are therefore quite different from the present case and clearly distinguishable. Moreover the alleged fault was based on speed and failure to keep a lookout as well as warning and control and failure to leave a safe margin of clearance when passing pedestrians at the edge of the footway. That case in my opinion does not assist the pursuer. In my opinion Mr MacMillan was correct in his submission that this is one of those rare cases in which on the evidence it is my duty to withdraw the case from the jury and I do so for the reasons set out by him in his submission. The evidence led did not establish that the defender failed to observe Dylan fall into the road or that she had the opportunity to avoid him. To the contrary, the evidence led by the pursuer establishes only that Dylan tripped on the pavement and fell onto the adjacent

roadway against the side of the defender's vehicle, whether or not he struck the bodywork of the vehicle before becoming pinned down by the rear nearside tyre. There is no suggestion that he fell in front of the vehicle and that the defender ran over him. There is no criticism of the defender's speed. Indeed, she was driving at crawling speed while negotiating what was for her a difficult right hand bend with a transit van parked on the corner at her offside. I am clearly of the opinion that on the evidence led no reasonable jury would be entitled to attach any blame to the defender for the accident which occurred. She was under a duty to exercise reasonable care for the safety of other road users, including child pedestrians, and nothing in the evidence establishes that she failed in that duty. The exercise of reasonable care did not, as a matter of law, require her to sound her horn when passing the two children on the footway in the circumstances. They were on the same side of the road as the ice-cream van, were not larking about and there was no reason to think either would move into the roadway. Further, there is no evidence that sounding the horn would have prevented Dylan's trip. On one view it might have precipitated it. Nor would a reasonable jury be entitled to hold that the defender failed in her duty to exercise reasonable care for Dylan's safety by driving 40 centimetres from the pavement in the circumstances. The evidence, particularly the photographic evidence, establishes that she was as far out from the pavement as she could be on her own side of the road and that cannot in my opinion amount in law to a lack of reasonable care. Her position was one which a reasonably careful driver would have adopted. The evidence in this case establishes that the defender was blameless. No reasonable jury could return a verdict for the pursuer. I shall accordingly direct them to return a verdict for the defender". Submissions for the pursuer

- [12] Counsel submitted that the case should not have been withdrawn from the jury. There was evidence entitling the jury to infer negligence on the part of the defender. Only if there was no evidence upon which a jury properly directed could find in favour of the pursuer should the case be withdrawn from them: *Robertson v John White & Son SC (HL)* 22, at pages 27 and 29-30; *Park v Wilsons & Clyde Coal Co* 1929 SC (HL) 38, at page 49; *McDonald v Duncan SC* 737, at page 740; *Mitchell v Caledonian Railway Co SC* 546. Alternatively there had to be a major departure from the pleadings resulting in material prejudice to the defender: a mere discrepancy between the pleadings and the evidence was not enough: *Mitchell v Caledonian Railway Co*; *McDonald v Duncan* at pages 740-742. In the present case there was no such discrepancy. Even if there were, no objection had been taken during the trial, and there had been no suggestion that the defender had suffered prejudice. Nor was the present case one in which the accident had been inaccurately described in the pleadings solely with a view to achieving a jury trial: contrast with *Tully v The North British Railway Co*

(1909) 1 SLT 474.

- [13] At the stage when the motion to withdraw the case was made, no evidence had been led on behalf of the defender. The jury were entitled to draw inferences most favourable to the pursuer: *O'Donnell v Murdoch McKenzie & Co* 1967 SC (HL) 63. There was evidence that children acted unexpectedly (cf *Melleney v Wainwright*

- [1997] EWCA Civ 2884; paragraph 181 of the Highway Code). There was evidence from Mr Alexander that the defender should have driven further out into the road. In those circumstances, while there was evidence in favour of the defender, it could not be said that there was no evidence upon which the jury could find in favour of the pursuer. It could not be said as a matter of law that there was no negligence if the rear wheel (and not the front wheel) struck Dylan. However, the Lord Ordinary had treated the question whether in all the circumstances the defender drove with reasonable care as a question of law when the question was one of fact for the jury: Fleming, *The Law of Torts* (9 th ed) Ch 7 page 117; *Qualcast (Wolverhampton) Ltd v Haynes*
- [1959] 2 WLR 510, at pages 519-521; *Kite v Nolan*
- [1983] RTR 253, at pages 255L-256E. Even an expert witness could not usurp the function of the jury: *Davie v Magistrates of Edinburgh* 1953 SC 34. By withdrawing the case from the jury for the reasons given in his note, the Lord Ordinary had strayed into carrying out the jury's function. He had in effect given his view on the question of driving with reasonable care, but that question was one for the jury. Submissions for the defender
- [14] The Lord Ordinary was correct to withdraw the case from the jury. There was insufficient evidence supporting the averments on the record: *Mitchell v Caledonian Railway Co* 1910 SC 546 at pages 548-549; *McCaffery v Lanarkshire Tramways Co* 1910 SC 797; *Ross v Fife Healthcare NHS Trust* 2000 SCLR 620, at pages 621-622; and *Mulligan v Caird (Dundee) Limited* 1973 SLT 72, at page 73. In particular there was no evidence of negligence: Mr Alexander and Constable Brown did not support a move to the right, and there was no evidence that it had been open to the defender to drive more to the right. Moreover there was no evidence suggesting that Dylan would have avoided injury had the *Freelander* been positioned further to the right.
- [17] The defender had come to court to meet a case that Dylan had fallen in front of her car. Her defence was that Dylan had fallen into the side of her car. The evidence as it came out supported the latter situation: hence the lack of defence objection during the trial, as the pursuer was simply failing to prove her case. If the pursuer's pleadings had properly reflected a fall into the side of the car, the case might have been taken to debate on the view that the appropriate disposal was dismissal or at least a proof rather than a jury trial: cf *Tully v The North British Railway Co*
- (1909) 1 SLT 474, at pages 475 to 477. The defender had accordingly suffered prejudice by the lack of fair notice. Discussion

- [15] Only in rare and exceptional circumstances will a case in which evidence has been led before a civil jury be withdrawn from that jury before they give their verdict. Withdrawal may be appropriate where the evidence did not reflect the case pled on record; or where there was no evidence to support a claim of negligence; or where a lack of fair notice in the pleadings caused the defender prejudice: *Park v Wilsons and Clyde Coal Co* 1929 SC (HL) 38 at page 49; *McDonald v Duncan* SC 737 at page 740. The case pled on record
- [16] We are not persuaded that there was such a discrepancy between the pursuer's averments and the evidence led at the trial that the case should have been withdrawn from the jury. For example, it was not averred in the pleadings that Dylan fell in front of the Freeland, or that he was run over by the front wheel. The pursuer's averment that Dylan "did not fall into the front nearside wing of the defender's car" did not necessarily, in our view, imply a fall in front of the vehicle. We consider that the pleadings entitled the pursuer to lead the evidence which was led. We do not accept that the factual case which emerged was so different from that pled on record as to justify withdrawal of the case from the jury. Whether there was evidence to support a relevant case of negligence
- [17] If the jury were to rely upon evidence including the contemporaneous photographs and parts of the evidence of Mr Alexander and Constable Brown, they would be entitled to conclude that the defender was, in the prevailing circumstances, driving too close to the pavement in breach of her common law duty of care. Further if the jury were to accept some of the evidence of Mr Bennet and Mr Alexander, they would be entitled to conclude that the breach of care caused the injury to Dylan's foot in that the car had run over his foot, and that positioning the car more to the right would have avoided contact between the car and Dylan. In the result it cannot be said that there was no evidence before the jury entitling them to find the defender liable in negligence causing injury to Dylan. Whether lack of fair notice in the pleadings caused the defender prejudice
- [18] In our view, the pursuer's pleadings gave sufficient notice of the case made against the defender. The pursuer does not aver that Dylan fell in front of the car, or that the car's front wheel ran over him. If the defender considered that the pleadings were not sufficiently clear, a motion seeking further and better specification could have been enrolled in terms of Rule of Court 43.6(5). The defender's legal representatives came to trial prepared to explore precisely how and why Dylan came to be on the roadway under the defender's car, and whether in the circumstances there was any negligence on the part of the defender which caused or contributed to any injury suffered by Dylan. In all the circumstances we are not persuaded that the case should have been withdrawn from the jury on the basis of lack of fair notice causing the defender prejudice. The Lord Ordinary's reasons
- [19] In relation to the note provided by the Lord Ordinary (quoted in paragraph [11] above), the Lord Ordinary appears to have assessed the evidence and to have given his own view that no negligence had been established and thus that no reasonable jury could find fault on the part of the defender. It may be that the jury would have agreed with the Lord Ordinary, but as there was, in this particular case, some evidence upon which the jury could have found

the defender at fault causing injury to Dylan, the assessment remained one for the jury.
Decision

[20] In all the circumstances we are satisfied that this case should not have been withdrawn from the jury. We shall grant the pursuer's motion for a new trial. BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII URL: <https://www.bailii.org/scot/cases/ScotCS/2010/2010CSIH64.html>

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