

SHERIFFDOM OF LOTHIAN AND BORDERS
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2020] SC EDIN 18

PN2896-18

JUDGMENT OF SHERIFF R B WEIR QC

in the cause

JOHN McCOURT

Pursuer

against

CHIVAS BROTHERS LIMITED

Defenders

Pursuer: Macmillan, Advocate, DJ McKay LLP
Defender: Thomson, Advocate, DAC Beachcroft Scotland LLP

EDINBURGH, 30 November 2019

The Sheriff, having resumed consideration of the cause:-

Finds in fact:

[1] The pursuer is John McCourt. His date of birth is 23 May 1956. He is aged 63.

[2] He is employed by the defenders as a Warehouse Operative at their premises located at Dumbuck Warehouse, Glasgow Road, Dumbarton.

[3] The defenders are Chivas Brothers Limited, a company incorporated under the Companies Acts and having their registered office at 111-113 Renfrew Road, Paisley, Renfrewshire, PA3 4DY. They are distillers of whisky.

[4] As at 10 July 2017 the pursuer's usual place of employment was Dumbuck Warehouse, Glasgow Road, Dumbarton ("Dumbuck").

[5] Dumbuck is a maturation warehouse where barrels of whisky are stored until the whisky has matured for the requisite period.

[6] On 10 July 2017 the pursuer was instructed to attend at Balgray Warehouse, Willowyard Road, Beith ("Balgray"). Balgray is also a whisky maturation warehouse.

[7] The pursuer had only visited Balgray once before, about five years previously.

[8] The purpose of the pursuer's attendance at Balgray was to assist, as part of a three man team, in the loading of a Trader Locked Vehicle ("TLV") with barrels of whisky for onward transportation.

[9] The TLV, which he was instructed to load, had two decks to its rear to which barrels required to be delivered to a capacity of 102. The practice, which the pursuer followed on 10 July 2017, was for the lower deck to be loaded first, followed by the upper deck.

[10] To that end barrels of whisky were delivered to the rear of the TLV, by means of a forklift type vehicle, loaded from the front of the lower deck of the TLV, and secured in place by wooden wedges (or "scotches").

[11] Access to both decks of the TLV was gained by means of a set of metal steps which were affixed within, and to the rear of, the TLV, as shown in the photographs comprising no 5/6 of process.

[12] Loading and unloading required that the TLV be on an even surface. If the surface was uneven, the effect of gravity could cause the barrels of whisky to roll, thereby presenting a risk to the safety of those charged with the loading of the TLV.

[13] In July 2017, the only material difference between the loading procedures at Balgray and Dumbuck arose from the fact that the topography at Balgray was less regular. To accommodate this irregularity at certain of the warehouses, lorries would require to be reversed onto small metal ramps.

[14] The purpose and effect of the ramps was to elevate the rear of the TLV to counteract the camber which existed outside certain of the Balgray warehouses.

[15] The ramps were introduced to the Balgray site in about 1990 as a result of a safety initiative by an individual called Thomas Crow.

[16] At the material time, the pursuer was engaged in loading barrels onto a TLV from warehouse 22 at Balgray.

[17] Warehouse 22 was one of the warehouses outside of which it was necessary for the TLV to be reversed onto a pair of metal ramps.

[18] As a result of the TLV being positioned on ramps, the bottom rung of the steps was located in a position approximately 70cm (or approximately 27.5 inches) from the ground. The distance from the bottom rung of the lower ladder of the TLV to the ground, when it was parked outside warehouse 9 at Balgray (where no metal ramps were employed) was about 16 inches.

[19] When ascending or descending the steps there was nothing in particular to obstruct the pursuer's view of the ground.

[20] The pursuer completed the task of loading the lower deck of the TLV.

[21] The pursuer then required to access the upper deck, for which purpose he dropped the top deck down and unhooked a ladder which was attached to, and stored within, the rear of the TLV.

[22] By about midday the pursuer had loaded the last remaining barrel on the upper deck of the TLV. He then made to descend the ladder from the top deck and return to ground level.

[23] There came a point in time when the pursuer's right foot was in contact with the lowest rung of the ladder, and he made to step from the ladder to the ground.

[24] At some point in the course of this manoeuvre the pursuer felt pain in his back. The precise mechanism by which that pain was caused was unresolved by the evidence.

However, in July 2018, the pursuer told Mr Bruce Thomas, consultant orthopaedic surgeon, that he came rapidly down onto a straight leg in an unexpected way injuring his lower back, staggering backwards on one leg, but he did not fall to the ground.

[25] Production no 5/2 of process comprises a copy of the medical report by Mr Bruce Thomas dated 30 July 2018, the contents of which are the equivalent of the oral evidence of that witness in the cause.

[26] Production no 5/3 of process comprises a copy of an Incident Report relating to the pursuer's accident.

[27] The defenders' Safe System of Work, applicable as at 10 July 2017, did not specifically address the height differential arising from the use of metal ramps outside certain of the defenders' warehouses.

[28] Paragraph 187 of the "HSE Guidance: A Guide to Workplace Transport Safety (HSG136, 3rd Edition, 2014)" (no 5/7 of process) provides *inter alia* "[W]here possible, use steps in preference to ladders but both should...have the first rung or step positioned so that it can be easily reached, ideally approximately 40cm from the ground, and no more than 70cm".

[29] In July 2017, following the pursuer's accident, the defenders held a safety meeting which included, as an agenda item, "access/egress solution for high ramp warehouses at Balgray". As at September 2019 no change to the arrangements for such access/egress had been effected by the defenders.

[30] On 21 August 2017 the defenders provided advice to their employees about safe access and egress to/from steps/ladders, vehicles and production plant equipment. The

advice directed the attention of employees to the importance of facing the equipment and maintaining three points of contact, and making sure feet were firmly on the ground before releasing the hand grip.

Findings in Fact and Law

[31] The mechanism by which the pursuer suffered an injury to his back was not established in the evidence.

[32] The pursuer did not suffer loss, injury or damage as a result of any fault on the part of the defenders.

THEREFORE:

- (i) Grants decree of absolvitor in favour of the defenders.
- (ii) Reserves meantime the question of expenses, and appoints parties to be heard thereon at Edinburgh Sheriff Court on a date to be afterwards fixed.

Note:

[33] In this action the pursuer seeks to recover damages for an injury which he claims to have occurred during his descent from the back of a lorry loaded with barrels of whisky. I was told that the lorry most nearly concerned is called a trader locked vehicle, which, for convenience, I shall refer to as a "TLV".

[34] During the proof I heard evidence from only two witnesses, namely the pursuer and Charles McGhee, a process leader employed by the defenders at the material time. The evidence was in relatively short compass. Mr Macmillan, Advocate, appeared on behalf of the pursuer and Mr Thomson, Advocate, appeared for the defenders.

[35] Damages were agreed between the parties in the sum of £10,000, net of recoverable benefits, and inclusive of interest to the date of the proof.

[36] The immediate circumstances giving rise to the pursuer's claim are expressed in the pleadings in the following way:

"After the lower deck was full of whisky barrels, the pursuer lowered the upper deck flooring into position using the electric control at the side of the vehicle, which is accessed from the ground, in order to load whisky barrels onto this deck. A retractable ladder fixed to the underside of the vehicle is used to access the lower deck from the ground. The pursuer required to access the lower deck in order to reach the upper deck. In order to access the upper deck there is a lightweight aluminium ladder that is placed on the lower deck. After the upper ladder had been put in place the pursuer filled the upper deck with 52 barrels...The vehicle was parked on a metal ramp. This caused the rear of the vehicle to increase in height by approximately 12 inches. The pursuer placed his right foot on the bottom rung of the lower ladder. He attempted to place his left foot on the ground. As the pursuer attempted to make contact with the ground he jolted his lower back and stumbled backwards to his injury."

[37] I do not propose to rehearse the evidence at length. The salient parts of the evidence which bear upon the question of whether liability has been established are set out in my findings-in-fact above.

[38] In his evidence-in-chief the pursuer appeared to me to be clear about what it was that had caused him to sustain an injury. As I noted that evidence it was to the following effect. The pursuer had completed the task of loading both decks of the TLV. In order to return to the ground he descended the ladder which had earlier been set up to allow access to the upper deck. The pursuer continued his descent on the lower ladder (which accessed the lower deck of the TLV). He described coming down "as normal". He was not sure how many rungs he had negotiated. But, with what turned out to be his right foot on the bottom rung of the lower ladder, the pursuer stepped down in the expectation that his left foot would encounter either another rung or the ground itself. That expectation was based on his normal experience of working on the lorries and stepping directly onto the ground.

Instead, there was (as the pursuer put it) “nothing there”. He thought that he immediately pulled himself back up and, simultaneously, felt his whole back jerk. The pursuer conceded that he had obviously forgotten that the gap at the bottom would have been slightly bigger because of the effect of the TLV’s rear being parked up on the metal ramps. There was no suggestion that the pursuer had suffered an injury as a result of his left leg impacting with the ground.

[39] During examination-in-chief Mr Macmillan put to the pursuer a “progress of events”, relating to the mechanism of the accident, which was recorded in the medico-legal report, prepared on behalf of the pursuer, by Mr Bruce Thomas dated 30 July 2018. That report was agreed by parties to represent the oral evidence of Mr Thomas and, accordingly, falls to be treated as unchallenged evidence. The description (at paragraph 3.04) included the following passage:

“On reaching the lower most rung he stepped to step onto the ground, but due to the camber of the loading ramps, the ground was not where he expected it to be and therefore essentially he came rapidly down onto a straight leg in an unexpected way injuring his lower back, staggering backwards on one leg but did not fall to the ground.”

[40] Asked specifically about that passage, the pursuer stated that he was “content” with the accuracy of the description recorded by Mr Thomas. There the matter was left. For completeness, it is necessary to record Mr Bruce’s professional opinion that “the injury sustained at the time of the index event are [*sic*] consistent with the mode of injury. I believe an unexpected drop of 26 inches from the bottom of the ladder resulted in a severe jarring injury to his lower back and the onset of acute pain with some later radiation to his left leg”.

[41] In cross-examination the pursuer was challenged to explain the apparent difference between his account of the accident in evidence and that given to Mr Thomas. He was also asked to account for the reference in a statement, given to Jim Moffat on the day of the

accident, in which the pursuer was recorded as having stated that he “let go of the ladders and landed on my left leg”. Once it was explored in more detail with him, the pursuer essentially disavowed the description of the accident circumstances contained in Mr Thomas’s report. That was important. In effect, by doing so, he disavowed his own case on causation.

[42] In re-examination the pursuer was essentially led to a position where he adopted Mr Thomas’s narrative, and in particular paragraph 4.02 of the report, no 5/2 of process, and also an entry in his GP records (no 5/1 of process) for 13 July 2017, notwithstanding that that narrative appeared to be at odds with the passage in the pleadings quoted above.

[43] The pursuer presented as a pleasant individual and I was left with no reason to doubt that he suffered some kind of an injury at Balgray on the day claimed. However, his evidence about how the pain which he experienced occurred was confused and contradictory.

[44] The only other witness to give evidence in court was Charles McGhee, a process leader with the defenders at Dalmuir. I did not find Mr McGhee to be an especially forthcoming witness. His evidence was, however, of importance in respect that he was responsible for taking the photographs comprising no 5/6 of process. Following the incident involving the pursuer, Mr McGhee and a colleague photographed the back of a TLV which had been positioned in the same location as the TLV loaded by the pursuer. Mr McGhee caused a measurement to be made of the distance from the bottom rung of the lower ladder of that TLV to the ground. His initial position was that the measured distance was approximately 28 inches, then 72cm. This was about twelve inches higher off the ground than the bottom rung of a TLV ladder outside warehouse 9, which the witness also measured, and where no raised metal platforms were in use. In cross-examination,

however, Mr McGhee accepted that the measured distance, viewed from a slightly different perspective, may have been 26.5 inches.

[45] Mr McGhee was asked whether there had been a risk assessment undertaken in respect of the egress from TLVs which were elevated on metal ramps. His somewhat evasive response was that there had never been perceived to be a hazard in that respect. The "Safe System of Work and Record of Competency Assessment" (no 5/4 of process), which was agreed to be relevant to the task on which the pursuer was engaged, appeared not to address the specific matter of the height differential arising from the use of the metal ramps. Mr McGhee confirmed that, following the incident involving the pursuer, the defenders held a site safety meeting. The record of that meeting (no 5/12 of process) noted that, as at 3 October 2017, a solution to the issue of access/egress for high ramp warehouses at Balgray was designated "not started". Mr McGhee explained that this was because no solution had been found and the arrangements for access/egress remained the same. He agreed that the pursuer's accident had probably prompted a toolbox talk/discussion (no 5/13 of process) in the course of which employees were addressed on the subject of safe access/egress to/from vehicles.

[46] I heard no evidence on any practical measures which could have been taken to alter the existing ladder arrangements at the rear of the defenders' TLVs.

Submissions

The pursuer

[47] Mr MacMillan commended to me as, generally at least, credible and reliable the evidence of both the pursuer and Mr McGhee. He proposed that I make a number of findings-in-fact consistent with liability and causation having been established. To the

extent that I have accepted some of those findings-in-fact these are set out above.

Mr Macmillan submitted that the circumstances described in the evidence of the two witnesses disclosed a failure to take reasonable care to provide a safe place and system of work, and safe plant and equipment. He focussed attention on the unsuitability of the TLV ladder when it was employed on a TLV parked on raised metal ramps. There was a failure to undertake any assessment of the risk posed to employees by having to work in that combination of circumstances.

[48] The standard of care which the pursuer was entitled to expect was, it was submitted, "informed by" the terms of regulations 6, 7 and 8 of, and schedule 6.1 to, the Work at Height Regulations 2005, and regulations 5, 8 and 9 of the Provision and Use of Work Equipment Regulations 1992, and subsequently 1998. By that, I understood Mr Macmillan, in effect, to equate a contravention of the regulations with a failure to take reasonable care in the respects covered by those regulations. If such care had been exercised a longer ladder should have been provided for the pursuer's use.

[49] Anticipating that there would be criticism of inconsistencies in the pursuer's evidence about the mechanism of injury, Mr Macmillan invited me to make findings based on the factual accounts which the pursuer had given to his GP and Mr Thomas, the pursuer's expert orthopaedic consultant. Those accounts rested on a version of events which involved the pursuer sustaining what was, in effect, a jolting or jarring type of injury to his back when his left leg landed heavily on the ground. There was no dispute that the pursuer had suffered some kind of injury while egressing from the back of the TLV on 10 July 2017. On record the dispute about the mechanism of the accident was focussed by the defenders on a failure by the pursuer to maintain three points of contact and his familiarity with the increased height from the ground to the bottom rung of the TLV ladder. To the

extent that inconsistency had emerged during the pursuer's evidence it was explicable (as I understood the submission) by the pursuer having "fastidiously maintained" that he had indeed maintained three such points of contact, rather than simply addressing how the impact with the ground had caused his back to suffer a jolt.

The defenders

[50] The fundamental position advanced on behalf of the defenders was that the pursuer had not provided to the court a consistent and coherent narrative of events such as would enable the court to make reliable findings in fact on the critical matter of how the pursuer came to sustain an injury. Mr Thomson drew attention to the discrepancies which arose between the pursuer's factual case on record, his evidence-in-chief, and his cross-examination. Mr Thomson emphasised that the pursuer's disavowal of the account which, as a consequence of the joint minute, it is agreed he gave to Mr Thomas for the purposes of the medical report, no 5/2 of process, undermined completely the case on causation. The pursuer's evidence could even be described as "Delphic", where the mechanism of injury was concerned. The pursuer's evidence should, accordingly, be rejected.

[51] As to the remaining issues which arose for consideration, Mr Thomson referred to the Health and Safety Executive Guidance on workplace transport safety, and, in particular, paragraph 187 which provided as follows:

"Where possible, use steps in preference to ladders but both should...have the first rung or step positioned so that it can be easily reached, ideally approximately 40cm from the ground, and no more than 70cm."

As it happened, Mr McGhee's evidence disclosed that the actual measured height between the lower rung of the lower ladder and the ground was potentially within the guidance just

quoted (at 26.5 inches), and any non-compliance was so marginal as to be of no moment for the purposes of what constituted the exercise of reasonable care in the circumstances.

[52] Moreover, the absence of risk assessments, or employee induction, on the matter of employees working from the rear of TLVs which had been elevated on ramps, did not assist the pursuer's case. As I understood his submission, Mr Thomson contended that, viewed in context, the act of stepping off the bottom rung carried with it no obvious risk, especially in circumstances where the supposed hazard (of stepping down to the ground level) was obvious and visible, that there was no history of accidents during the operation in which the pursuer was engaged, and that the fitting of ladders at the rear of TLVs had itself been recognised as an improvement. In any event, no causative link had been established between the lack of any risk assessment, or training, and the incident (whatever it was).

Discussion

[53] In considering whether the pursuer has established liability against the defenders at common law, it is worth observing that the pursuer did not advance a case to the effect that the gap between the bottom rung of the lower ladder and the ground was unsafe by reason of the height differential being different from the gap between the rungs further up that ladder (or, for that matter, the ladder to the upper level of the TLV). Nor was it submitted that the use of metal ramps, in the circumstances described in the evidence, was inappropriate. The substantial criticism advanced by the pursuer, as I understood it, was that the height differential was simply too large. Although I heard no evidence as to whether a longer lower ladder could have been accommodated at the rear of the TLV, it became clear, at least in Mr Macmillan's submissions, that the pursuer's case was that a longer ladder should have been provided.

[54] I am not persuaded by that submission. In reaching that view it is unnecessary to explore whether it is strictly accurate to describe the various statutory regulations cited by Mr Macmillan as “informing” the standard of care which the pursuer was entitled to expect (although it respectfully seems to me that generalisation in this area is to be avoided). That is because, in the final analysis, his submission as to what constituted a safe place of work, and safe plant and equipment, focussed on the suitability of the TLV ladder in conjunction with a TLV which was parked on raised metal platforms. The only evidence led in relation to the suitability of the lower ladder was by reference to the HSE Guidance: A Guide to Workplace Transport Safety (no 5/7 of process). An excerpt from paragraph 187 has already been quoted. It merits repetition:

“Where possible, use steps in preference to ladders but both should...have the first rung or step positioned so that it can be easily reached, ideally approximately 40cm from the ground, and no more than 70cm...”

[55] Yet the first of three photographs comprising no 5/6 of process showed (so far as I could judge from the orientation of the photograph) that the measurement from the outer part of the lower rung to the ground was actually in the region of 70cm. It did not seem to me that the photograph justified the pursuer’s averment that the height of the bottom rung of the lower ladder was confirmed to be 28 inches (or 71.12 cm) at the Balgray Site. At all events I did not feel able to conclude from the photograph that the ladder fell outwith the parameters of the HSE Guidance just mentioned, even although Mr McGhee, at one point in his evidence, offered the view that the measurement was nearer 26.5 inches (which did not seem to me to be an accurate reflection of what I myself could see in the photograph either).

[56] The evidence left me otherwise ignorant on the matter of whether a longer ladder could have been accommodated on the back of the TLV. Indeed, I heard no evidence about any other steps which the defenders could or should have taken to avoid the pursuer’s

accident. On record, all that was averred was that a risk assessment should have been carried out. Since, on my estimation, the ladder appeared to comply with the HSE Guidance relied on by the pursuer, it is not clear to me what that risk assessment should have revealed.

[57] If, however, I am wrong in my assessment of the lower ladder's compliance with the terms of the HSE Guidance there is, in my opinion, an equally fundamental reason why the pursuer cannot succeed in the present action. I did not understand Mr Macmillan to dispute that what the pursuer was recorded as having told Mr Thomas about the mechanism of the accident described an impact type injury in which the pursuer landed heavily on a straight left leg. That was the basis upon which Mr Thomas offered the opinion that "the severe jarring injury to the pursuer's lower back was consistent with the mode of injury described".

[58] The difficulty which, notwithstanding Mr Macmillan's best efforts, I have been unable to overcome is that, in his own evidence-in-chief, the pursuer clearly described an entirely different mechanism of injury, in which he felt pain *before* he came into contact with the ground. It could at least be said, in favour of that explanation, that it was essentially consistent with the mechanism of injury described in the pleadings, and quoted above. In cross-examination, however, the pursuer disavowed the description of the accident circumstances contained in Mr Thomas's agreed report. To add an additional layer of confusion, when Mr Macmillan re-examined him, the pursuer appeared to come round to the position that what Mr Thomas had recorded was, after all, correct. The trouble was that that evidence was at odds with the pursuer's own pleadings.

[59] Mr Thomson submitted that the case really came down to the related issues of reliability and causation. I agree. Indeed, it might reasonably be thought that, from the outset, there was an inherent contradiction between the terms of both the pleadings and

Mr Thomas's report (and, for that matter, the GP record for 13 July 2017). That contradiction was never reconciled. Unsurprisingly, it rendered the pursuer's evidence on causation confused and, ultimately, contradictory. To conclude, as Mr Macmillan suggested that I should, that the explanation for the obvious inconsistencies in his evidence lay in the pursuer's determination to show that he had maintained three points of contact with the lower ladder at all times, would be to engage in little more than speculation. But the immediate difficulty which that aspect of the pursuer's evidence presents is that, from the mere fact that the pursuer suffered pain stepping off the bottom of the lower ladder, it does not follow that the defenders were in breach of duty (cf *Gilchrist v Asda Stores Ltd* [2015] CSOH 77). In summary, drawing these unnecessarily complicated strings together, I am forced to the unavoidable conclusion that the pursuer has failed to prove that any negligence on the part of the defenders was causative of the injury he sustained.

Decision

[60] In the result the defenders are entitled to decree of absolvitor. I have fixed a hearing on expenses, on a date to be afterwards fixed, lest there be any issue of controversy between the parties in that respect. If agreement can be reached on how expenses should be disposed of that hearing can simply be cancelled in consultation with the sheriff clerk.