SHERIFF APPEAL COURT

[2025] SAC (Civ) 29
PIC-PG109-22

Sheriff Principal A Y Anwar KC

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL AISHA Y ANWAR KC

in the appeal in the cause

DAVID DOWNIE (AP)

Pursuer and Appellant

against

NHS FIFE HEALTH BOARD

Defender and Respondent

Pursuer and Appellant: Allardice, advocate: Livingstone Brown Limited
Defender and Respondent: McConnell KC; NHS Scotland Central Legal Office

23 September 2025

Introduction

[1] Can a larger bench of the Sheriff Appeal Court review an earlier decision of the court delivered within the same proceedings? The respondent challenges the competency of this appeal and invites the court to address this question. They also contend that this appeal was not timeously made and that the appellant is barred by acquiescence from challenging the decision he now seeks to appeal.

Background

[2] The appellant sought damages in respect of the alleged negligent management of his care by a medical practitioner employed by the respondent. The appellant was diagnosed with Bipolar Affective Disorder in around February 2004. He received treatment at various times including compulsory in-patient treatment. On 14 January 2016, the appellant was detained in hospital on a short-term detention certificate whilst in police custody. On 18 January 2016, the respondent's clinician, Dr Narayan, revoked that certificate. The appellant discharged himself from hospital against medical advice. Following his discharge, the appellant was convicted of a number of criminal offences.

[3] These proceedings were raised on 8 January 2019 at Kirkcaldy Sheriff Court. The appellant contends that Dr Narayan failed to diagnose that, as at January 2016, he had a recognised psychiatric condition and that it was negligent of Dr Narayan to revoke his certificate. He sought damages for the consequences of these alleged failures. Put shortly, he averred *inter alia* that had Dr Narayan not revoked the certificate, he would not have been convicted of criminal offences.

[4] The action proceeded to a diet of debate in July 2021. The respondent challenged the appellant's averments based on the application of the doctrine of *ex turpi causa non oritur actio*, namely, that a pursuer cannot base a cause or head of claim upon their own wrong doing. The sheriff excluded the claim arising from the appellant's criminal activity. His claim based on a breach of duty of care was allowed to proceed to proof.

[5] That decision was appealed. The appellant argued the sheriff's conclusion on the operation of *ex turpi causa non oritur actio* was in error. This court, sitting as a triple bench in terms of Chapter 7 of the Act of Sederunt (Sheriff Appeal Court Rules) 2021 ("the SAC Rules"), refused that appeal, adhered to the sheriff's interlocutor, and remitted the action to

the sheriff to proceed as accords. On 29 November 2022, the action was transferred to the All-Scotland Sheriff Personal Injury Court. A diet of proof took place on 13 August 2024. Evidence was led over 7 days.

[6] The sheriff's judgment was issued on 26 February 2025. He granted decree of absolvitor and reserved expenses. Expenses were dealt with by interlocutor dated 11 April 2025. This appeal was subsequently lodged on 25 April 2025.

The grounds of appeal

[7] Three grounds of appeal are advanced. First, that the sheriff and this court erred in law in excluding the appellant's averments on the basis of the doctrine of *ex turpi causa non oritur actio.* The respondent challenges the competency of that ground of appeal. The second and third grounds of appeal concern the sheriff's judgment following proof and are not relevant for the purposes of this opinion.

Competency

[8] The respondent referred the following three questions to this court:

(a) The final interlocutor having been granted on 16 February 2025, has the appeal been lodged timeously?;

(b) The appellant having applied for a decision on expenses, has the appellant acquiesced in the decision dated 11 April 2025 he now seeks to challenge?; and

(c) Is it competent for a single Appeal Sheriff to review the decision of the Sheriff Appeal Court dated 20 September 2022?

[9] The appellant originally sought to have the appeal determined by a single appeal sheriff in terms of Chapter 8 of the SAC Rules. In his note of argument lodged in advance of

the hearing on competency, however, the appellant changed his position and sought instead to have the appeal determined by a larger bench, namely by a bench of five Appeal Sheriffs. The respondent maintained that was not competent.

Submissions for the respondent

Timing of the appeal

[10] Whether the appeal was timeous was primarily a question of statutory interpretation of the Courts Reform (Scotland) Act 2014 and the SAC Rules. The sheriff's decision of 26 February 2025 was a final judgment. It disposed of the whole subject matter of the proceedings and assoilzied the respondent (*McCue* v *Scottish Daily Record and Sunday Mail Ltd* 1998 SC 811 at pp 812 – 813).

[11] The approach contended for by the appellant was neither efficient nor purposive. It would involve parties expending resources on, and the allocation of judicial time to, arguments about expenses following a decision, in circumstances where that decision was to be appealed. The contextual and purposive interpretation was to understand that the legislation allows a party to appeal, as of right, against a decision which disposes of the subject matter of an action. Expenses can thereafter be dealt with on an informed basis, depending on the outcome of the appeal.

[12] By way of analogy, senior counsel referred to Rule 38.2 of the Rules of the Court of Session 1994. There was no good reason to think that Parliament intended to implement a different regime in the Sheriff Court than it had in the Court of Session. To do so would likely lead to confusion. This court had previously observed that it was inherently desirable for there to be consistency between both court's rules, unless good reason to the contrary existed: *Gray* v *Cape t/a Briggate Investments* [2023] SAC (Civ) 19; 2023 SLT (SAC) 139 [32].

[13] In recent years, legislation has moved away from an interlocutor-based approach to appeals to a decision-based approach: *Finlayson* v *Munro* [2019] SAC (Civ) 27; 2020 SLT (Sh Ct) 287 [6] – [8]. Cases regarding Court of Session procedure decided under differently worded, now repealed, statutes were not in point when interpreting the 2014 Act.

[14] If the appeal was late, the appellant's request for relief from his failure to comply with the 2021 Rules should be refused. No explanation had been provided to explain the lateness of the appeal and the prospects of success for the appeal were weak.

Acquiescence

[15] The interlocutor of 11 April 2025 was pronounced on the appellant's unopposed motion. He sought to be found liable for the expenses of the action, albeit subject to modification. Objectively, the appellant had acquiesced: *Clark* v *Greater Glasgow Health Board* [2017] CSIH 17; 2017 SC 297. The appellant now contends that his motion was enrolled to facilitate the bringing about of a final judgment; however, the decision of 26 February 2025 was a final judgment. As regards the interlocutor dated 11 April 2025, a party cannot seek the recall of an interlocutor granted on their own motion: *McGuinness* v *Bremner plc* 1988 SLT 340; *Jongejan* v *Jongejan* 1993 SLT 595; and *Crabbe* v *Reid* [2019] SAC (Civ) 6; 2019 SC (SAC) 33.

Competency of seeking to overturn an earlier appeal decision within the same process

[16] If the appellant's submission was correct, then it would be competent for any unsuccessful appellant to simply make a further appeal within the same process and ask the court to convene a larger bench in an attempt to achieve a different outcome.

[17] Section 48(1)(c) of the 2014 Act, properly understood, states that previous decisions of the Sheriff Appeal Court are binding upon it, except where the Sheriff Appeal Court has convened a larger bench. The exception contained at section 48(1)(c) can only be engaged if the Sheriff Appeal Court was being asked to overturn a decision from a different process - not the same process.

[18] Section 116(2) of the 2014 Act did not assist. The language within section 116(2) was neither ambiguous nor obscure. There was accordingly no need to have regard to the Parliamentary material on its enactment. The phrase "stage of appeal" within section 116(2) referred to any stage of the existing appeal before the Sheriff Appeal Court.

[19] Even if the court considered regard could be had to Parliamentary material, it was clear that the purpose of amendments 92 to 95 made at the Second Reading of the Bill by the Justice Committee of the Scottish Parliament on 17 June 2014 was to align the procedural rules of the Sheriff Appeal Court with the rules in place in the Court of Session.

[20] The contention that the Sheriff Appeal Court can review its own decisions in the same process would put it in a different position to the Outer House and Inner House which, in terms of sections 18 and 39 of the Court of Session Act 1988, cannot review their own decisions. In *Bremner* v *Martin t/a George Martin Engineering* 2006 SLT 169 it was held that a Lord Ordinary had no general power to alter the substance of an interlocutor. That line of authority can be traced back to *Cuthill* v *Burns* (1862) 24 D 849. The principle that a court's interlocutor cannot be reviewed by the same court is of general application across the civil courts. The contention for the appellant must be that this court has a power to review its own decisions that is not enjoyed by either the Outer or Inner House. *Bremner* was approved by the Inner House in *Henderson* v *Greater Glasgow Health Board* [2014] CSIH 41; 2014 SC 681 [19].

[21] Senior counsel also submitted that if the attempt to challenge this court's earlier decision was deemed invalid, then the consequence, in his submission, was that the entirety of the appeal fell to be treated as incompetent. He conceded, however, that he had no authority to found that submission.

[22] As for the appellant's secondary position of a motion to remit to the Court of Session, no complex point or novelty was apparent within the appeal before the court to justify remit to the Court of Session. That motion ought to be refused.

Submissions for the appellant

Timing of appeal

[23] The appeal was lodged timeously. Where a decision pronounced after proof disposing of the merits of the cause reserves the question of expenses and appoints parties to be heard thereon on at a future date, there is no final judgment until the question of expenses has been disposed of: *Siteman Painting and Decorating Services Limited* v *Simply Construct (UK) LLP* [2019] SAC (Civ) 13 [22]; 2021 SLT (Sh Ct) 34 [22]; *Gray* [27]; and Macphail, *Sheriff Court Practice*, (4th edition) (2022), paragraph 18.31. The sheriff's judgment of 26 February 2025 did not deal with expenses. It was only when the sheriff issued an interlocutor dealing with expenses on 11 April 2025 that a final judgment was given by the sheriff. The appeal was marked within 28 days of 11 April 2025.

[24] In the event the court was to hold the appeal was lodged late, the appellant moved the court to grant relief for that failure in terms of Rule 2.1 of the SAC Rules.

Acquiescence

[25] If the court held the appeal was lodged timeously, the question of acquiescence did not arise. In any event, there was no acquiescence. The procedure followed to deal with the expenses by the parties was merely to facilitate the bringing about of a final judgement. As for the suggestion by the respondent that the appeal was incompetent standing the manner in which the expenses had been dealt with on 11 April 2025, the question of competency of an appeal which seeks to review earlier interlocutors was comprehensively considered in *McCue*. It stated that where a party sought to reclaim against an interlocutor pronounced on his own motion in order to submit to review a prior interlocutor, this was not a question of competency. While normally the court would not countenance such a motion, it was not precluded.

Competency of seeking to overturn an earlier appeal decision within the same process

[26] Counsel stated in the course of his submissions that, at the time the sheriff and the Sheriff Appeal Court issued their decisions in 2021 and 2022 respectively on the issue of the application of the maxim *ex turpi causa non oritur actio*, they had made no error in law. However, the recent decision of the Court of Appeal of England and Wales in *Lewis-Ranwell* v *G4S Health Services (UK) Limited and others* [2024] EWCA Civ 138; [2024] KB 745 cast doubt upon those decisions. If the Supreme Court upheld the Court of Appeal's decision in *Lewis-Ranwell*, the exclusion of a number of the appellant's averments from probation would have been unjustified and wrong in law.

[27] The appellant's primary motion was for this court to fix an appeal hearing with a bench of five Appeal Sheriffs. That would allow the court to reconsider its earlier decision, as well as the challenge to the sheriff's judgment following proof.

[28] Counsel submitted it was competent for this court to convene a larger bench to reconsider an earlier opinion which it had issued within the same process. Section 48(1)(c) of the 2014 Act provides that a decision of the Sheriff Appeal Court on the interpretation or application of the law is binding in proceedings before the Sheriff Appeal Court, except in a case where the court hearing the proceedings is constituted by a greater number of Appeal Sheriffs. Section 116(2) of the 2014 Act made it competent for the Sheriff Appeal Court to review all prior decisions in the proceedings; that included prior decisions made at any stage of appeal. That would include this court's decision of 20 September 2022.

[29] If the court determined, however, that it was not competent to challenge an earlier decision of this court within the same process, then the appellant's secondary position was for the appeal to be remitted to the Court of Session in accordance with section 112 of the 2014 Act. Counsel submitted that, standing the decision of the Court of Appeal in *Lewis-Ranwell*, there was a novel point of law raised in this appeal suitable for determination by the Court of Session.

Decision

Timing of the appeal

[30] Section 110(1)(a) of the 2014 Act provides that an appeal may be taken to the Sheriff Appeal Court, without the need for permission, against a decision of a sheriff constituting final judgment in civil proceedings. Rule 6.3 of the SAC Rules requires such an appeal to be made within 28 days of the decision appealed against. Section 136 defines a final judgment as:

> "a decision which, by itself, or taken along with previous decisions, disposes of the subject matter of proceedings, even though judgment may not have been

> pronounced on every question raised or expenses found due may not have been modified, taxed or decerned for".

[31] The respondent submitted that earlier decisions which discussed the meaning of the term "final judgment" and which related to Court of Session procedure had been determined under differently worded and now repealed statutes and were no longer relevant. I am not persuaded that is so. The relevant language used in section 136 reflects the language used in section 53 of the Court of Session Act 1868 and by reference to which the Lord President (Glencorse) was then able to conclude in *Baird* v *Barton* (1882) 9 R 970, that there was a:

> "…very clear implication…that until the question of expenses has been disposed of,– that is, until one or other of the parties has been found entitled to expenses, or expenses have been found due to neither party, – there has been no final judgment, and the whole subject-matter of the cause, in the language of the Act of 1868, has not been disposed of".

A similar argument to that advanced by the respondent in this competency challenge was considered and rejected by Appeal Sheriff Holligan in *Siteman*. I agree with Appeal Sheriff Holligan's comprehensive analysis and his conclusion, namely, that the relevant parts of the 2014 Act restate, in modern language, the provisions of the Court of Session Act 1868 and the Sheriff Courts (Scotland) Act 1907 and that, accordingly, the earlier decisions which considered whether an interlocutor was a "final judgment" and could be appealed without leave, remain authoritative.

[32] I was referred by the respondent to the decision of this court in *Finlayson*. That case involved a consideration of section 110(1)(b)(i) of the 2014 Act and is not relevant to the discussion of whether the interlocutor complained of in the present case constituted a "final judgment".

[33] The respondent also drew the court's attention to Rule 38.2(1)(b) of the Court of Session Rules which provides *inter alia* that an interlocutor disposing of the whole merits of the cause whether or not the question of expenses is reserved or not disposed of may be reclaimed against without leave within 21 days. It was submitted that there could be no good reason for Parliament to have intended to provide a different regime in the Sheriff Court to that in the Court of Session. In my judgment, the language used in the 2014 Act is clear and unambiguous; the drafter of the 2014 Act can be assumed to have been aware of the long line of authorities which had considered the meaning of the term "final judgment" in the context of the 1868 and 1907 Acts when drafting the definition section of the 2014 Act. There is no basis upon which this court can look beyond the clear terms of sections 110(1)(a) and 136 of the 2014 Act.

[34] The sheriff's interlocutor of 26 February 2025 granted decree of absolvitor and assigned a hearing on the question of expenses. The question of liability for expenses had not been determined. That issue was determined on 11 April 2025. Accordingly, this appeal, having been lodged within 28 days of the interlocutor of 11 April 2025, was timeously made.

Acquiescence

[35] It is not necessary to consider whether the appellant acquiesced in the interlocutor which he now seeks to appeal. Without a decision on the issue of expenses, the appellant could not exercise his right of appeal. He precipitated the decision on expenses by lodging a motion to allow him to appeal the sheriff's decision. That does not lead to the conclusion that he acquiesced in the sheriff's decision on the merits.

Competency of seeking to overturn an earlier appeal decision within the same process

[36] The question is whether the first ground of appealcan be allowed to proceed before a larger bench than issued the decision dated 20 September 2022 and re-visit that decision. The appellant relied upon sections 48 and 116 of the 2014 Act. Sections 48 and 116 of the 2014 Act provide:

> **"48 Status of decisions of the Sheriff Appeal Court in precedent**
> (1) A decision of the Sheriff Appeal Court on the interpretation or application of the law is binding—
> (a) in proceedings before a sheriff anywhere in Scotland,
> (b) in proceedings before a justice of the peace court anywhere in Scotland,
> (c) in proceedings before the Sheriff Appeal Court, except in a case where the Court hearing the proceedings is constituted by a greater number of Appeal Sheriffs than those constituting the Court which made the decision.
>
> **116 Effect of Appeal**
> (1) This section applies to—
> (a) an appeal to the Sheriff Appeal Court under section 110 (including such an appeal remitted to the Court of Session under section 112), and
> (b) an appeal to the Court of Session under section 113 or 114.
> (2) In the appeal, all prior decisions in the proceedings (whether made at first instance or at any stage of appeal) are open to review."

[37] The appellant is correct to submit that that there is no express prohibition contained within the 2014 Act preventing this court from reviewing its own decisions. That can be contrasted with the provisions of the Court of Session Act 1988, which provide that the judgments of the Outer House or Inner House are final in those courts (sections 18 and 39 of the 1988 Act; *Bremner*; and *Henderson*). However, it is a well-established principle that a court cannot review or recall its own interlocutor (*Campbell* v *James Walker Insulation Ltd* 1988 SLT 263 at pp 264 – 265; *Bremner* at p 170; and *Henderson* [20]). Any rule to the contrary would lead to uncertainty and undermine confidence in the finality of judicial decisions.

[38] I am not persuaded that the language of section 48 is wide enough to accommodate the interpretation contended for by the appellant, nor that it is capable of displacing that

well-established principle. Section 48 deals only with the status of decisions of the Sheriff Appeal Court, not with competency, and not with the jurisdiction of the court. Section 48(1)(c) provides that a decision of the Sheriff Appeal Court on the application or interpretation of the law is binding on the Sheriff Appeal Court, unless it is constituted by a greater number of Appeal Sheriffs than those constituting the court which made the decision. It does no more than that. It is plain that subsection (1) refers to prior decisions in separate proceedings. It does not create a novel power for the court to review its own prior decisions in the same proceedings. It would require the clearest statutory language to create such a power.

[39] It was submitted that section 116(2) provided that clear statutory language. It provides that the Sheriff Appeal Court can competently review "all prior decisions in the proceedings" which includes those made at first instance and those made "at any stage of appeal". That logic is flawed, because it would permit the Sheriff Appeal Court potentially to review any decisions made by the Inner House on appeal in the same proceedings (such as appeals remitted prior to final judgment in terms of section 112 of the Act). The absurdity of that result illustrates that the wording of section 116 cannot be interpreted without reference to context, including the existing established rules that a court does not review its own interlocutors, or those of a superior court. I find it difficult to accept that Parliament would have intended such an absurd outcome which would fundamentally alter the hierarchical status of the courts without express and unequivocal language to that effect.

[40] Section 116 is discussed briefly in Macphail, *Sheriff Court Practice*, (4th edition) (2022) at paragraph 18.123:

> "An appeal is effectual to submit to review all prior decisions in the proceedings (whether made at first instance or at any stage of appeal)… The general intention of

> this provision is to enable the court, when entertaining a competent appeal, to review prior decisions **which had not been previously appealed**." [emphasis added]

[41] In excluding prior decisions which have not previously been appealed, this extract does not support the appellant's submission, albeit that little analysis of the language used in section 116 is offered. Section 116 applies to both the Sheriff Appeal Court and the Court of Session. It does so without awarding any further powers to the former. Section 116(2) requires to be read in the context of other provisions of the 2014 Act. Part 5 of the Act deals *inter alia* with appeals from a sheriff to the Sheriff Appeal Court (section 110), the Sheriff Appeal Court's powers of disposal (section 111), remits of appeals to the Court of Session (section 112) and appeals from the Sheriff Appeal Court to the Court of Session (section 113). There is no provision dealing with an appeal from a smaller bench of the Sheriff Appeal Court to a larger bench of the same court in the same proceedings. While section 116 deals with the power of both the Sheriff Appeal Court and the Court of Session to review prior decisions in the same proceedings, the words appearing in parenthesis in section 116(2) require to relate to the provision of the 2014 Act under which an appeal is made. In my judgment, the words "or at any stage of appeal" refer to the existing, and uncontroversial, power of the Court of Session to review the decisions of the inferior appeal court. If the appeal is made to the Court of Session, section 116(2) opens to review all prior decisions in the proceedings whether made at first instance or at any stage of appeal before the Sheriff Appeal Court; if the appeal is made to the Sheriff Appeal Court it opens to review only prior decisions in the proceedings made at first instance. Anything else would lead to an absurd outcome.

[42] The language used in section 116(2) is ambiguous. As I am unable to construe the provision in any other way which does not lead to an absurd outcome, it is legitimate to

resort to Parliamentary material to consider whether the language used in section 116(2) was intended to produce the result contended for by the appellant (*Pepper* v *Hart* [1993] AC 593).

[43] Section 116 appeared as clause 110 of the Courts Reform (Scotland) Bill. The words "prior decisions in the proceedings (whether made at first instance or at any stage of appeal)" were proposed by the Cabinet Secretary for Justice, Kenny MacAskill, as amendment 92 and moved by the Minister for Community Safety and Legal Affairs, Roseanna Cunningham, without any discussion or debate. The Official Report of the Justice Committee of 17 June 2014 records that in moving the amendment, the Minister stated:

> "Amendments 92 to 95 are technical drafting amendments that will ensure consistency of language in the provisions governing the effect of an appeal to the sheriff appeal court, the Court of Session and the Supreme Court. They make it clear that, in each case, the appeal court may review any prior decision in the proceedings including, where relevant, any prior decision on appeal."

[44] The purpose of the amendment was to align the effect of an appeal to the Sheriff Appeal Court with the rules governing appeals to the Inner House and the Supreme Court and to create a consistency of approach to appeals. Rule 38.6(1) of the Act of Sederunt (Rules of the Court of Session 1994) submits to review by the Inner House all previous interlocutors of the Lord Ordinary, not those of any prior appeal before the Inner House. The absence of any meaningful discussion or debate on amendment 92 points irrefutably to the absence of any intention to displace the well-established rule that a court cannot review its own interlocutor.

[45] Accordingly, insofar as the first ground of appeal invites this court to convene a larger bench to review the decision of the Sheriff Appeal Court dated 20 September 2022, it is refused as incompetent.

Remit to the Inner House

[46] During the course of the hearing on competency, the appellant made a motion at the bar to remit the appeal to the Inner House in terms of section 112 of the 2014 Act. That motion cannot be considered by this court: a quorum of three appeal sheriffs is required (paragraph 1(2) of Schedule 1 to the SAC Rules).

[47] The appellant seeks to appeal the decision of this court delivered on 20 September 2022, not because he contends that there was any error in law at the time the decision was made, but because he anticipates a change in the law by means of a favourable outcome in *Lewis-Ranwell*, which is presently before the Supreme Court. The appellant has not sought to sist this appeal pending a decision in *Lewis-Ranwell*. The submissions made in support of the motion to remit were brief and somewhat vague.

[48] I note that the question for determination in the Supreme Court is whether, if an individual commits an unlawful act due to the alleged negligent failure by another to prevent it but is, at trial, found not guilty by reason of insanity, the illegality defence applies to bar the individual's claim against the negligent party in tort. Mr Lewis-Ranwell was arrested on suspicion of causing grievous bodily harm and subsequently released on police bail after being seen by medical professionals. Shortly thereafter, while in a delusional state, Mr Lewis-Ranwell attacked and killed three men in their homes. He was charged with murder. At trial, he was found not guilty by reason of insanity.

[49] In the present action, the appellant pled guilty to the offences with which he was charged. He accepted responsibility for his actions. Counsel for the appellant did not satisfactorily address the court as to how the outcome in the *Lewis-Ranwell* case would assist him. If the appellant wishes to insist upon his motion to remit, a written motion should be

lodged setting out the grounds on which the motion is made and addressing the test set out in section 112 of the 2014 Act. A quorate bench will be convened to hear that motion.

Disposal

[50] The first ground of appeal is refused as incompetent. The appellant's motion to remit the appeal to the Inner House is also refused as incompetent, it having been made at the bar before an inquorate bench. A procedural hearing will be assigned for parties to address the court on expenses and on further procedure in relation to the remaining grounds of appeal.