SHERIFF APPEAL COURT

[2025] SAC (Civ) 15
PIC-PN3579-23

Sheriff Principal C Dowdalls KC
Appeal Sheriff R D M Fife
Appeal Sheriff C M Shead

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL CATHERINE DOWDALLS KC

in the appeal in the cause

JACK McCORMACK

Pursuer and Respondent

against

SPORTSDIRECT.COM FITNESS LIMITED

Defender and Appellant

Pursuer and Respondent: Khurana KC, Calderwood (sol adv); Thompsons Scotland LLP
Defender and Appellant: Pugh KC, Hennessey (sol adv); Keoghs Scotland LLP

29 May 2025

Introduction

[1] The respondent was injured by a ragged edge on the outer rim of a weight plate at the appellant's gym at Glasgow Fort, Glasgow on 5 November 2021. How the weight plate came to be damaged is unknown. Following proof, the sheriff held that the doctrine expressed in the maxim *res ipsa loquitur* applied to the circumstances of the accident. In the sheriff's view the appellant was unable to proffer a reasonable explanation of how the

accident occurred without negligence on their part and accordingly he found in favour of the respondent and awarded damages of £6,881.95.

[2] The appellant submits the sheriff erred in two respects: (i) he had insufficient evidence to make a finding that the appellant had been negligent and (ii) he erred in applying the maxim *res ipsa loquitur*.

Evidence

[3] The respondent, along with his friend, Mr McAlister, went to the Everlast Fitness Club (the gym) operated by the appellant at Glasgow Fort on 5 November 2021. They decided to use a shoulder press machine during their workout. Before commencing the exercise they began loading weight plates onto the machine. That required them to lift up weight plates and slide them on to the rods of the machine. As the respondent slid one of the weight plates onto a rod, he immediately felt pain in his left hand. He moved his left hand away from the weight plate and it started to bleed. He had suffered a cut to the ring finger and palm of his left hand. He attended at reception and received treatment from the appellant's staff. Mr McAlister took the weight plate, which caused the injury, to the reception desk.

[4] The respondent was unclear as to how he had been injured. He remembered catching his ring finger on something on the weight plate, but did not know what. He did not check the weight plate after the accident and went straight to reception.

[5] Mr McAlister did not see directly what happened to the respondent. He had been loading a separate weight plate onto the opposite side of the machine at the time of the accident. He did check the weight plate after the accident. He noticed a ragged edge on the outer rim. He took the weight plate to the reception desk. His recollection was that he

snapped off the ragged edge. He could not recall what he did with the piece. The weight plate was left with an indent, which created a sharp edge a few millimetres in size.

[6] Mr Rashid is an employee of the appellant. He was working at the reception of the gym on 5 November 2021. His evidence was that the weight plate and other equipment in the gym had been inspected that morning. Later that day, he recalled Mr McAlister coming to reception with the weight plate and advising him that the respondent had been injured. His recollection was that Mr McAlister said he had snapped the ragged edge off from the weight plate and put it into the bin.

The sheriff's findings in fact

[7] On the basis of the evidence led, the sheriff made the following findings in fact relevant to liability:

1. As at 5 November 2021, the defender operated a gym at Glasgow Fort, 30 Auchinlea Way, Glasgow. The gym was open to members of the public who had paid a membership subscription to use the facilities. The gym contained a number of exercise machines, and areas for the use of free weights.
2. Entrance to the gym was controlled by members of the defender's staff at a reception desk. The defender's staff were present in the exercise areas of the gym to assist gym members. Cleaning staff were present to clean the equipment, including weight plates for exercise machines, periodically throughout the day in light of the COVID-19 pandemic.
3. As at 5 November 2021, the pursuer was a member of the defender's gym at Glasgow Fort, 30 Auchinlea Way, Glasgow.

4. The pursuer attended the gym on 5 November 2021 with a friend, Mr McAlister. They had been in the gym for some time, using a number of exercise machines. The pursuer was putting weight plates on a shoulder press machine. The weight plates are made of hard material, are circular and are approximately 30 - 40cm (12 - 15 inches) in diameter. These slide on to a rod forming part of the machine. The plates are removable and are stored on stands adjacent to the weights machines.
5. As the pursuer put a plate on the rod and moved it with his left hand, he immediately felt pain, and on moving his hand away from the machine, his hand was bleeding significantly. There was a cut on the ring finger and palm of his left hand.
6. There was a ragged edge on the outer rim of the weight plate the pursuer had been moving, a few millimetres in size. The ragged edge was visible after the accident.
7. The plate the pursuer was fitting to the chest press machine was one of a number stored on a stand adjacent to the machine. The pursuer was unaware of the ragged edge prior to fitting the weight plate to the machine.
8. The defender's staff checked the equipment in the gym for faults on opening the gym on 5 November 2021. No faults were recorded.

The sheriff's judgment

[8] The respondent's action was predicated on the application of the maxim *res ipsa loquitur*. A key point of dispute in deciding whether the maxim applied was whether the appellant had *exclusive* management and control over the premises (emphasis added). It is

noted that the sheriff was not asked to decide if the appellant had exclusive management and control over the weight plate. The sheriff drew an analogy with the circumstances in *Love* v *Motherwell District Council* 1994 SCLR 761 and held that the appellant did have exclusive management and control of the premises. The appellant controlled access to the premises by it being a membership club and having staff present both at reception and on the gym floor. The sheriff was also satisfied that placing a weight plate onto a shoulder press machine in the manner that is normally done should not cause a user to suffer injury. As the weight machine was in the premises over which the appellant had exclusive management and control the sheriff held *res ipsa loquitur* applied.

[9] The sheriff then considered whether the appellant could demonstrate that the accident occurred without fault on its part and he concluded that the appellant had not discharged the burden of proof on it. He did not find the evidence given by Mr Rashid wholly reliable as to the manner in which the appellant's employees had inspected the weight plates on the morning of 5 November 2021. The sheriff did not accept that Mr Rashid had checked all the weight plates or that any check as was carried out would discover a defect on the weight plate, which caused injury to the respondent. The sheriff made a finding that no faults were recorded.

Submissions for the appellant

[10] The sheriff failed to make relevant findings in fact regarding the defect on the weight plate. There was no finding that a "ragged edge", as described by the sheriff, amounted to a defect. Furthermore, the sheriff did not find that the "ragged edge" was visible before the accident. He only held that it was visible after the accident.

[11] The sheriff made no finding in fact as to how long the defect had been present or on anything that would bear on the foreseeability that it might cause injury. Absent any finding as to the extent of the defect, whether it was visible prior to the accident, or for how long it had been present, the sheriff could not have found that the hazard created by the presence of the "ragged edge" was reasonably foreseeable to the appellant. That was fatal to an action based on negligence. The respondent could not establish a case that the appellant had failed to maintain or properly inspect the weight plate on that basis.

[12] The maxim *res ipsa loquitur* only applied where: (i) the incident suggested negligence on someone's part and (ii) because of exclusive management and control by the appellant at the time or times when the negligence occurred, it can be presumed the appellant was negligent: *Scott* v *London and St Katherine Docks Co* (1865) 3 Hurl & C 596 and *McDyer* v *The Celtic Football and Athletic Co Ltd* 2000 SC 379 at pp 383 - 384.

[13] Senior counsel submitted that the respondent had difficulty satisfying either of those criteria. With respect to whether the findings in fact suggested negligence, a piece of gym equipment could become damaged in ordinary usage such that it could present a hazard, without that being negligent. Given that the evidence was that the defect could not be seen unless specifically looked for, it did not automatically follow that damage would have been apparent to a gym user, or that it would have inevitably been reported or otherwise apparent to the appellant's employees. Each of these factors suggest the possibility, at the very least, of a non-negligent cause. Mr McAlister had given evidence that the damage to the weight plate might have been caused by another gym member. Moreover, the sheriff noted that the appellant's staff checked the equipment when the gym opened on 5 November 2021.

[14] Findings in fact [6] and [8] were insufficient, by themselves, to allow the sheriff to hold that the occurrence implied negligence on the part of the appellant. The sheriff had failed to consider whether there was a foreseeable risk of injury. Nor had he made a finding in fact that there had been a want of care on the part of the appellant. On that basis the sheriff erred in holding the first element of *res ipsa loquitur* was satisfied.

[15] Similarly the sheriff had erred in respect of the requirement of exclusive management and control. It was not the state of the premises that caused the accident but the condition of the weight plate. For the operation of *res ipsa loquitur* control over the thing (or *res*) that caused the defect is essential. There had to be a finding in fact that the appellant had exclusive control of the weight plate for the maxim to apply. Whilst access to the gym was restricted to members, the appellant is not vicariously liable for the conduct of its members. The appellant is only liable for their employees or those in a relationship akin to employment: *Easson* v *London and North London Railway Company* [1944] KB 421. In the circumstances of this case, the respondent had to aver and lead evidence that there had been no control exercised by a third party, such as a gym member over the weight plate, in order to establish an inference of negligence by the appellant: *Inglis* v *London, Midland and Scottish Railway Co* 1941 SC 551 at p 556 and pp 559 - 560 and *Murray* v *Edinburgh District Council* 1981 SLT 253 at p.256. The respondent had failed to do so. With respect to the sheriff's reliance on *Love* for the proposition that exclusive control of the premises could infer exclusive control of the weight plate it was difficult to reconcile *Love* with the opinions of the Inner House in *Inglis* and *McDyer*.

Submissions for the respondent

[16] An appellate court may only re-evaluate evidence at proof if it can be demonstrated that the sheriff's reasoning is defective or inadequate: *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203 at para [67]; and *AW* v *Greater Glasgow Health Board* [2017] CSIH 58 at paras [38] - [58].

[17] There was no basis to interfere with the sheriff's findings in fact. The sheriff had accepted the evidence of the respondent and Mr McAlister. In so doing, he accepted there was a defect on the weight plate. He did not accept Mr Rashid's evidence on the checks undertaken by the appellant. There was no basis upon which it could be said the sheriff had erred in making the findings in fact that he did.

[18] The sheriff had found that:

i. The respondent had injured his hand on a jagged weight plate within the appellant's premises whilst using the weight plate in a normal manner;

ii. The appellant had exclusive management and control of the premises and controlled access to them; and

iii. Putting weight plates on a chest machine should not cause the user to suffer a significant cut to the finger or hand.

On the basis of those findings, the sheriff was entitled to hold that the maxim *res ipsa loquitur* applied.

[19] The maxim applies when the facts give rise to an inference of negligence by a defender. If the maxim applies, then the defender must prove either that the specific cause was one which does not connote negligence on their part, or if they cannot do so, that they used all reasonable care: *Smith* v *Fordyce* [2013] EWCA Civ 320 at para [61]; and *David T Morrison & Co Ltd t/a Gael Home Interiors* v *ICL Plastics Ltd* 2014 SC (UKSC) 222 at para [98].

[20] It was accepted that the respondent required to show the appellant had control over the thing which caused the injury. There was no requirement for a respondent to demonstrate exclusive control by the appellant: *Scott.* It was accepted that the sheriff had not made a finding in fact as to who had control of the weight plate. The finding in fact by the sheriff of exclusive control of the premises by the appellant allowed control of the weight plate by the appellant to be inferred. The sheriff was entitled to find the appellant's control in this case was not diluted by their members having access to the weight plate. The appellant continued to be in a position to control access to the weight plate. The circumstances were analogous to *Love*.

[21] With respect to *Inglis* and *Easson* those cases could be distinguished. The issue in those cases was that the train door was not secured properly. By contrast, the issue here was that the weight plate itself was defective. Moreover, it was not enough for the appellant to offer a mere proposition that a third party, such as a gym member, might have used the weight plate. The appellant had to lead evidence to prove the weight plate had been used by third parties and they had failed to do so. The respondent was not under any obligation to exclude all alternative causes, nor was he required to show that no third party had interfered or had access to the weight plate: *David T Morrison* at para [98].

[22] The appellant was unable to prove that the cause of injury to the respondent was one which was not due to their negligence, nor did they persuade the sheriff they exercised reasonable care in maintaining and inspecting the weight plate. Had the appellant made sufficient averments of a reasonable system of inspection and maintenance, they could have led evidence regarding the same to displace the operation of the maxim. In the event, the sheriff upheld the respondent's objection at proof as to lack of record in the appellant's

attempts to elicit evidence on a reasonable system of maintenance and inspection. In the absence of that evidence, the sheriff was correct to hold the appellant liable.

Decision

[23] Essentially, the grounds of appeal are, firstly, that the sheriff did not make relevant findings regarding the defect on the weight plate; and secondly that the sheriff erred in applying the maxim *res ipsa loquitor*. It was not disputed that, if the maxim did not apply, the appeal should be allowed. Accordingly we find it helpful to consider this ground of appeal first.

[24] The appellant argued, inter alia, that for the maxim to apply it was necessary to establish that the appellant had had exclusive management and control over the thing which caused the injury. It was submitted that there was a gap in the sheriff's reasoning and the findings in fact in respect of this issue.

[25] In his submission the respondent argued that it was only necessary to show that the appellant had control over the thing which caused the injury, not "exclusive" control. Reliance was placed principally on the decision in *Scott* to vouch this proposition.

[26] In our view, in common with that of the sheriff, it is unnecessary to decide that question in this appeal given the respondent's acceptance that the sheriff proceeded on the basis that the appellant had exclusive management and control over the premises. We understood the respondent to accept that for the maxim to apply it was necessary for the appellant to have exercised exclusive management and control over the thing which caused the injury: the weight plate. It was acknowledged that the sheriff had not made an express finding to that effect but, it was argued, such a finding had been made by necessary implication.

[27] Accordingly, it was accepted that the focus for the sheriff should have been on the question of control over the weight plate, not merely on control over the premises.

[28] Given the respondent's position it is necessary to consider whether this court should accept that the relevant finding had been made by necessary implication.

[29] The sheriff gave an ex tempore decision on 12 September 2024, followed 2 weeks later by a note of his reasons and lastly, in response to a request from this court, he set out his findings in fact and law. For present purposes the starting point is to consider the terms of his note, particularly at para [19]. As noted, the sheriff did not expressly address the question identified by parties, but he placed reliance on the decision in *Love* both as regards the law and the facts. The reasoning underpinning his judgment is expressed by reference to that decision. At para [20] of the note he again stresses that the key to his approach is to look at who had control over the premises. Beyond that the matter is not addressed.

[30] We reject the respondent's argument on this point. The starting point is that the sheriff did not address the question of control over the weight plate in his note or findings. He did not consider that it was necessary to do so.

[31] Given the decisions to which we were referred and particularly the decision of the Inner House in *McDyer* at 383F - 384A we are satisfied that the sheriff was bound to consider and decide this question; if there was no control over the thing that caused the accident, the maxim could not apply.

[32] In giving the opinion of the Court in *McDyer* the Lord President (Rodger), having referred to the decision in *Scott*, said:

> "That approach has been applied repeatedly in Scots law and we doubt whether its essence has been stated more succinctly than in the words of Lord Maxwell in *Murray v City of Edinburgh Council* at p 256: 'The principle only applies where the incident suggests negligence on someone's part and, because of exclusive management and control in the defenders at

> the time or times when the negligence occurred, it can be presumed that it was the defenders who were negligent.'"

[33] Since the sheriff erred in his approach, we are satisfied that the appeal should be allowed.

[34] However, since the sheriff relied on the case of *Love* we propose to say something about that decision. On appeal the sheriff principal found that the sheriff had been entitled to apply the maxim in respect of a damaged swing even though it was located in a public park to which third parties had access. The sheriff had found the local authority had control of the swing and the park. *Love* was a summary cause action. The sheriff principal did not engage in any analysis or discussion of the relevant authorities and made only a passing reference to *Murray.* In particular, there is no indication he considered the decisions in *Easson* and *Inglis*. Those were both cases in which injury was caused where a train door was not properly secured. Where a third party, such as a passenger, might be responsible for interfering with the doors the maxim was not applicable. In the former case Goddard LJ expressed the point in this way:

> "In the present case it seems to me it is impossible to say that the doors of an express corridor train travelling from Edinburgh to London are continuously under the sole control of the railway company in the sense in which it is necessary that they should be for the doctrine of res ipsa loquitur …to apply. Passengers are walking up and down the corridors during the journey and get in and out at stopping places… Before a train leaves a station the company must see that the carriage doors are closed. They are not under an obligation to inspect the off-side doors of the carriages at every stop. There must be a reasonable inspection, and they must do the best they can."

[35] We cannot reconcile the decision in *Love* with the opinions delivered in *Easson*, *Inglis* and the later decision in *McDyer.* In *Love* the thing (*res*) which caused the accident was the chain attached to the swing. It was not within the exclusive management and control of the local authority as members of the public had access to the park where it was situated. To

conclude otherwise appears to us to be contrary to the dicta in the three cases referred to. We do not consider that the decision in *Love* was a sound precedent on which to draw an analogy with the circumstances of the present case. Since the sheriff's decision on this point was based on drawing that analogy, we conclude that his reasoning cannot be supported.

[36] Each case is fact specific. The appellant operated a gym which was open to members of the public who paid a membership or subscription to use the facilities, including an area for the use of free weights and a number of shoulder press machines. In our view the appellant required to have exclusive control of the weight plate (the *res*) for the maxim to apply. Having regard to the dicta and circumstances in *Easson*, *Inglis* and *McDyer* in our view it cannot be said that the appellant had exclusive control of the weight plate.

[37] Although we propose to allow the appeal for the reasons given, in deference to the arguments advanced, we should express our view in relation to the absence of findings in respect of defects on the weight plate and the inference of negligence.

[38] The sheriff made findings in fact that as the respondent was putting the weight plate on a shoulder press machine within the appellant's gym he sustained injury to his left hand on a ragged edge on the outer rim of the weight plate. The respondent was unaware of the ragged edge prior to fitting the weight plate to the machine. There was no evidence the respondent was moving the weight plate in anything other than normal use. The weight plate should not have had a ragged edge. Putting a weight plate on a shoulder press machine should not ordinarily cause a significant injury to the hand if proper care is taken. There was no evidence of any system of inspection and maintenance by the appellant, as that evidence was excluded by the sheriff following an objection by the respondent for lack of record. The sheriff did not accept the sufficiency of any check made of the equipment on the morning of the accident.

[39] It is necessary to look at the sheriff's judgment as a whole including both the note and the findings in fact and law. In the particular circumstances of this case, and in the absence of evidence as to when or how the edge of the weight plate became ragged, we do not agree the sheriff needed to make findings in fact about any defect on the weight plate or for how long any such defect was present. Had it been open to sheriff to apply the maxim he would have been entitled to conclude that the circumstances yielded a prima facie inference of negligence which it was then for the appellant to rebut. For the reasons given by the sheriff, which rested primarily on his assessment of the evidence, we consider he would have been entitled to reach the conclusion that the appellant had failed to rebut that inference and that accordingly the appellant had been negligent.

[40] In *Thomson* v *Iceland Foods Ltd* [2024] SAC (Civ) 50 we note that similar arguments challenging the sheriff's conclusion that the appellant had been negligent were advanced and rejected. The court held that the sheriff was entitled to conclude that the accident was of a type which does not ordinarily occur if proper care is taken. In the present case it was averred that a properly maintained weight would not have a chip in it that caused injury. *Thomson* provides an example of circumstances which are similar to the present case, where negligence may be inferred. The distinction lies in the absence in the present case of the control necessary to entitle the court to apply *res ipsa loquitor.*

[41] Accordingly, had it been necessary to do so to decide the appeal, we would have refused the first ground of appeal. We will sustain the second ground of appeal to the extent indicated, recall the sheriff's interlocutor of 12 September 2024 and grant decree of absolvitor in favour of the appellant. We will reserve the question of expenses. Parties should attempt to agree the matter of expenses and advise the clerk of their position. Should that not be possible within 21 days, the clerk will arrange further procedure.