

Donnie Smith v Mairi Davidson



No Substantial Judicial Treatment

Court

Sheriff Appeal Court

Judgment Date

14 October 2025

INV-SM4-24

Sheriff Appeal Court

[2025] SAC (Civ) 34, 2025 WL 02921986

Sheriff Principal N A Ross

14 October 2025

Representation

Claimant and Appellant: Party.

Respondent: Party.

Opinion

Sheriff Principal N A Ross

1. In this simple procedure claim the appellant claimed the sum of £1,313, nominally to "create an adequate boundary fence preventing cattle or any stock egress from field onto my property...", being the cost of installation of lawn turf and fence posts. The appellant founded on damage caused by the respondent's cattle, which made their way on to his land across a mutual boundary between the parties' properties. The cattle damaged fencing, the ground surface and movable items. The respondent's position was that the cattle strayed due to a defective fence owned by the appellant. The appellant lodged an additional orders application, seeking a further order, and alleging further damage to a gate and the wire fence. The appellant lodged a second additional orders application on 23 April 2025 seeking interdict, which was heard and refused as incompetent. The appellant also lodged further claim forms – the first on 4 June 2024, and the second on 26 March 2025, both adding further claims for increased fencing and materials. No motion was enrolled in relation to these claim forms, and they were not intimated to the respondent.

2. At the evidential hearing the sheriff noted that the original claim had never been amended. The appellant moved to amend the claim to insert the additional items claimed. The sheriff refused that motion on the basis of lack of fair notice to the respondent, and inability to prepare a defence. The sheriff also noted that, notwithstanding the form of the claim, it was to be treated as a claim for reparation for damage caused by the straying cattle. In terms of the [Animals \(Scotland\) Act 1987](#) liability was strict. The respondent admitted liability.

3. The sheriff proceeded to hear evidence on quantum. Evidence was led about the boundaries of the respective properties, the respondent's ownership of 11 cows with calves, and her 15 years of renting the field adjacent to the appellant's property. The boundary was the mid-point of a burn and was unfenced. On the appellant's

side of the burn, there was a small grassed area which was part of the same field, and then a wire fence which enclosed the appellant's house and garden. The grassed area between stream and fence was rough unimproved grassland, uneven underfoot, with stones, weeds and natural vegetation growing on it. The appellant claimed it was a recreational area. The relevant incident occurred on 1 April 2024 when the respondent's cattle were in the field and strayed across the burn onto the appellant's property, between the burn and the fence. They damaged the fence, disturbed the ground between stream and fence, and destroyed a bucket and a wooden jig frame on the grassed area.

4. The sheriff found the damaged fence was 15 years old, extended to 27 metres, and required to be replaced due to the extent of damage. She found that the cost of repairing the fence to a stock-proof standard was reasonably assessed at £672, and the cost of reinstating the grassed area at £100. She rejected the claim that regrading and turfing of the ground was justified, and rejected the appellant's evidence about damage to the rough grassland area as exaggerated. She awarded the sum of £772 in damages. The respondent had already replaced the bucket and the jig.

5. The appellant appealed, claiming the sheriff erred in failing to consider his updated loss schedule which itemised damage at a higher sum. The sum awarded for reinstatement of the grassed area was inadequate to restore it, which would require regrading, drainage and re-turfing.

The appellant's submissions

6. The appellant submitted that the sheriff erred in not admitting the additional claim forms. There was no material prejudice in admitting the higher claim, which had been intimated by lodging the replacement claim forms. The respondent was on notice of these further claims because they had been discussed at mediation. The sheriff further erred in assessing ground restoration at £100. There was procedural unfairness in admitting productions for the respondent. The respondent's late evidence was accepted while the appellant's was not. The sheriff further erred in omitting specific heads of loss, including a garden swing.

7. The award of £100 was arbitrary and in the face of evidence which demonstrated recreational use of the grassed area. The true claim was £2,193.86. The appellant had lodged an expert report which had not been accepted. Further damage had been caused by a falling tree, and had not been taken into account.

The respondent's submissions

8. The respondent submitted that the award was generous, and covered the cost of replacement of the entire fence, when the initial claim was for replacement of five fence posts. The respondent placed reliance upon the nature of the appellant's conduct of the proof, and on a number of her own personal characteristics, which are not relevant to this appeal.

Decision

9. The appellant's initial complaint was that the sheriff refused to take into account his updated claims. The original claim form was, in his view, either replaced or updated by the two further claim forms lodged on 4 June 2024 and 26 March 2025. The problem is that he did not intimate these to the respondent, or seek to have these accepted by the court. The purpose of a claim form is to inform the respondent of how much the claim is, and the legal basis on which it is made. The respondent must get a fair chance to consider the claim and prepare a response, including evidence. For that, they need fair notice. The respondent is entitled to rely on the claim

which is served on them. If a claimant wishes to change the claim, it is necessary that they tell the respondent if their claim has increased or changed. That can only be done by asking the court's leave to change the claim, and then serving the new claim on the respondent. It is not possible to assume or infer the respondent's knowledge.

10. In this case, the appellant did not initially do either of those things. Only on the date of the final hearing, when prompted by the court, did the appellant move to increase the claim. By that stage it was too late for the respondent to prepare a response or lodge additional evidence. The sheriff found that the respondent did not have fair notice of the additional items claimed. The decision to exclude those additional items was both principled and rational. No error is demonstrated. The evidential hearing proceeded in relation to the claim originally intimated.

11. The appellant also claims it was procedurally unfair to refuse to allow the amended claim, and to "exclude" evidence in his form "E-1", while allowing the respondent to rely on productions unsupported by a form 10A. These issues were not, however, counterparts to each other. Each required to be considered separately. The amended claims were excluded as a matter of fair notice, for the reasons set out above. The form E-1 was appended to one of the additional claim forms, and was thereby excluded also. In any event, E-1 is misnamed, because it did not contain evidence of the claim, but was a list of what was claimed. By contrast, the respondent's productions were lodged, at latest, by 23 April 2025, almost a month prior the hearing, so they were available to the appellant. The productions included photographs, which could only assist the court and the parties, and were available for the purposes of the appellant's cross-examination. They assisted everybody, and could be challenged. The appellant complained that a competing quote was lodged late, but that did not prevent the appellant from presenting his own quote, as he did. The appellant was able to challenge the competing quote. Accordingly, the sheriff properly considered each issue, and gave sound reasons for granting or refusing the motions. There was no error on the part of the sheriff, and no procedural unfairness.

12. Further, even if that were wrong, this appeal could not be successful unless the appellant showed that the evidence wrongfully admitted, or wrongfully excluded, caused his case to fail. He has not done so. The sheriff made a careful assessment of the evidence, and explained her decision fully. She did not accept the appellant's evidence on certain points, for the reasons given in the judgment. She awarded the appellant damages, but in doing so decided that the evidence about the extent of the damage was exaggerated, and the claim excessive. There was no basis on which to challenge those findings. It is not enough that the appellant has a different opinion. The decision was rational, principled and based on the evidence which the sheriff accepted. No error is demonstrated.

13. In relation to the heads awarded, the sheriff made no award in respect of jig and bucket. She explained that the parties agreed that these had been replaced by the respondent. The appellant now claims that the jig was inadequately built, but led no evidence to support that submission. In relation to the alleged omission of claims for a garden gate and tree damage, these were excluded when the additional claims were refused. In relation to the award of £100 for restitution of the grassed area, the sheriff required to identify a fair award to reflect what the evidence showed. She did not accept the evidence which alleged that extensive work, and returfing, was necessary to restore an area which was part of a cattle field and which she found to be wild and uncultivated. In the absence of that evidence, and in the absence of any other figure, only an estimated figure was possible. The sheriff identified that only some damage was done, to rough grassland area. The sheriff made no demonstrable error in estimating a modest sum of £100.

Disposal

14. The appeal is refused. I will answer questions 1 and 3 posed in the appeal report in the negative, and question 2 in the affirmative. The customary rule is that expenses follow success. The appellant has not been successful. I will therefore find him liable to the respondent in the expenses of the appeal, as taxed.

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