10 February 2016

PRESS SUMMARY

Kennedy (Appellant) v Cordia (Services) LLP (Respondent) (Scotland) [2016] UKSC 6
On appeal from [2014] CSIH 76

JUSTICES: Lady Hale (Deputy President), Lord Wilson, Lord Reed, Lord Toulson, Lord Hodge

BACKGROUND TO THE APPEAL

The appellant was employed as a home carer by the respondents. Her work involved visiting clients in their homes and providing personal care. On 18 December 2010, at around 8pm, she was required to visit an elderly lady. There had been severe wintry conditions in central Scotland for several weeks, with snow and ice lying on the ground. The appellant was driven to the house by a colleague, who parked her car close to a public footpath leading to the house. The footpath was on a slope, and was covered with fresh snow overlying ice. It had not been gritted or salted. The appellant was wearing flat boots with ridged soles. After taking a few steps, she slipped and fell, injuring her wrist.

The Lord Ordinary, relying on expert evidence, found the respondents liable for the appellant's injury on the basis that they did not provide her with protective footwear. The Lord Ordinary's decision was reversed by an Extra Division of the Inner House. The appellant's appeal to the Supreme Court concerned the admissibility of evidence given by the expert witness, and whether the respondents had been in breach of their statutory duties or negligent.

JUDGMENT

The Supreme Court unanimously allows Ms Kennedy's appeal. Lord Reed and Lord Hodge (with whom Lady Hale, Lord Wilson and Lord Toulson agree) give the judgment of the court.

REASONS FOR THE JUDGMENT

Lord Reed and Lord Hodge provide guidance on the evidence of skilled witnesses under Scots law, addressing (i) admissibility **[39-56]**; (ii) the responsibilities of a party's legal team **[57]**; (iii) the court's policing of the performance of the expert's duties **[58-59]**; and (iv) economy in litigation **[60-61]**. In the present case, the expert witness had experience and qualifications in health and safety **[9]**. His evidence on factual matters was relevant and admissible. He had the necessary experience and qualifications to explain how anti-slip attachments reduced the risk of slipping **[62-63]**. His evidence on health and safety practice was relevant **[64]**. Whilst some of his statements might appear to be inadmissible expressions of opinion on the respondents' legal duties, an experienced judge could treat the statements as opinions as to health and safety practice, and make up his own mind on the legal questions **[66]**. The witness's evidence provided a basis for the Lord Ordinary to determine whether the defenders had suitably and sufficiently evaluated the risks and identified the measures needed to protect health and safety **[67]**.

The statutory case was based first on the Management of Health and Safety at Work Regulations 1999 ("the Management Regulations"), which implement Directive 89/391/EEC ("the Framework Directive"), and under regulation 3(1) require a suitable and sufficient risk assessment to be carried out **[85-89]**, and secondly on the Personal Protective Equipment at Work Regulations 1992 ("the PPE

Regulations"), which implement Directive 89/656/EEC ("the PPE Directive"), and under regulation 4(1) require suitable personal protective equipment to be provided to employees who may be exposed to a risk to their health or safety while at work except to the extent that such risk has been adequately controlled by other means which are equally or more effective **[93-97]**.

The most logical way to approach the issues was through a consideration of the suitability and sufficiency of the risk assessment **[89]**. The appellant was exposed to a risk of slipping and falling on snow and ice which was obvious and was within the knowledge of the respondents, who had previous experience of home carers suffering such accidents each year. The risk had been identified in a 2005 assessment, and risks of that general nature were also identified in a 2010 assessment **[90]**. No consideration had been given to the possibility of personal protective equipment. The precautions taken, in the form of advice to wear appropriate footwear, did not specify what might be appropriate. The Lord Ordinary was entitled to conclude that there had been a breach of regulation 3(1) of the Management Regulations **[92]**.

The appellant was "at work" whilst she was travelling between the home of one client and that of another in order to provide them with care. Contrary to the view of the Extra Division, the words "while at work" in regulation 4(1) of the PPE Regulations, and "whilst they are at work" in regulation 3(1) of the Management Regulations, mean that the employee must be exposed to the risk during the time when she is at work. They do not refer to the cause of the risk **[100]**. The Directives encompass not only risks arising specifically from the nature of the activities which the worker carries out, but also risks arising from the natural environment to which the worker is exposed whilst at work **[102]**. The Lord Ordinary found that anti-slip attachments were available which would have been suitable to reduce the risk of home carers slipping and falling on ice, and that the risk was not adequately controlled by other means which were equally or more effective. He was therefore entitled to conclude that there had been a breach of regulation 4(1) of the PPE Regulations **[106]**.

In relation to the common law case, it was a mistake to view the appellant as being in the same position as an ordinary member of the public. She was required to visit clients in their homes in hazardous weather conditions, whether or not the roads and footpaths in question had been treated. Her employers were able (and obliged by statute) to consider the risks to her safety and the means by which those risks could be reduced **[108]**. A reasonably prudent employer would conduct a risk assessment so as to take suitable precautions to avoid injury to its employees. The duty to carry out a risk assessment was logically anterior to determining what precautions a reasonable employer would take to fulfil its common law duty of care **[110]**. The respondents were aware of a history of accidents each year and were aware that the consequences were potentially serious. Those circumstances were sufficient to require an employer taking reasonable care for the safety of its employees to inquire into possible means of reducing the risk. Upon such inquiry, or the carrying out of a proper risk assessment, on the evidence accepted by the Lord Ordinary the respondents would have learnt that attachments were available at a modest cost to reduce the risk, and had been used by other employers in a similar position. The Lord Ordinary was entitled to conclude that the respondents were negligent in failing to provide the appellant with such attachments **[112-113]**.

The Lord Ordinary made no express findings as to causation, other than that the appellant would have used attachments if they had been provided. The concept of "suitability", under regulation 4(1) of the PPE Regulations, contained a causal component: the equipment must adequately control the risk so far as was practicable. A risk would not be "adequately" controlled unless injury was highly unlikely **[118]**. In the circumstances, it was reasonable to infer that the failure to provide the anti-slip attachments caused or materially contributed to the accident **[119]**.

References in square brackets are to paragraphs in the judgment