Sheriffdom of Lothian and Borders at Edinburgh

Judgement

by

Sheriff Kathrine EC Mackie

In the cause

John McIntosh, residing at 1 Cowan Den, Turriff, AB53 4AY

Pursuer

Against

(0ne) AVIVA Insurance UK Limited a company incorporated under the Companies Acts with its registered office at 8 Surrey Street Norwich Norfolk NR1 3NG; (Two) Craig Thomson, residing at 8 Craighill Court Dundee, DD4 8XQ

Defenders

Act: Pilkington, Advocate, instructed by NewLaw Scotland, Glasgow
Alt: Macpherson, Clyde & Co Solicitors Edinburgh

PN1050/16

Edinburgh 21 December 2017

The Sheriff having resumed consideration of the cause finds the following facts admitted or proved:-

[1]. The parties are as designed in the instance. The pursuer was born on 9 July 1973. He is employed as an operator with Mackies of Scotland Ice cream manufacturers at their premises in Rothienorman.

[2]. On 11 June 2013 the pursuer was riding his Yamaha 850cc motor cycle registration number R263 UYB in a southerly direction from Fyvie, Aberdeenshire, to his place of employment. He was travelling on an unclassified road near the Mill of Burns Farm. The road is a two way undivided carriageway with no road markings.

[3]. The second defender (Mr Thomson) is aged 33 years. He is employed as a data installer. At the time of the accident he was studying at Dundee College for an HND. During his vacation from college he engaged with an agency who placed him with Ravensby Glass as a driver. He had been employed as a driver previously and had in total about 3 ½ years' experience of driving heavy goods vehicles. On the day of the accident he was driving a Mercedes heavy goods vehicle registration number SV02 JXM (the lorry) in a northerly direction on the same road as the pursuer. At about 11.40am on a bend close to the entrance to said farm a collision occurred between the two vehicles.

[4]. The first defenders are the insurers of the said lorry.

[5]. The pursuer owned the said Yamaha motor cycle for about 3 months prior to the accident. Before that he had owned a 500cc motor cycle for about 3 or 4 years. He obtained a full driving licence to ride motor cycles in 2010 having undertaken about 12 lessons and passed both theory and practical tests which included in particular safe braking operation. The pursuer also holds a licence to drive motor cars and owns a motor car. In good weather during Spring and Summer the pursuer would use his motor cycle to travel to and from work. If the weather was inclement and during winter the pursuer would use his motor car. On 11 June 2013 the weather was dry and sunny.

[6]. The pursuer has no convictions for speeding offences. He has not been involved in any previous accidents.

[7]. The pursuer was familiar with the said road. At that time he worked Mondays to Thursdays and occasionally on Fridays. He was not in a hurry. He used the road to travel to and from work. He was used to meeting other road users, mainly motor cars but also farm vehicles and lorries similar to that driven by Mr Thomson. Mr Thomson had not driven the road before.

[8]. The width of the tarmac surface of the road was 4.4 metres. Traffic travelling in each direction had 2.2 metres of tarmac available. The width of the lorry was 2.5 metres including the front cab and box trailer, and 2.6 metres including the mirrors. Even if the lorry's nearside wheels were at the edge of the road it encroached over the mid-point of the road. A maximum of 1.8 metres of tarmac surface would be available to other road users such as the pursuer.

[9]. At each side of the road there was an area of dirt, mud and detritus. The west side of the road is bounded by a grass verge sloping upwards. The east side of the road is bounded by a more level grass verge. The area of dirt and detritus was greater on the east side. That area would not provide safe traction for a motorcycle.

[10]. On the date of the accident the trees and other foliage around the said farm were in leaf. This together with farm buildings created an obstruction to the view for drivers in each direction at the bend. The bend comprises about a 15 degree change over a distance of about 13 metres. It is a mild bend in the road direction. The restricted view, together with the entrance to the said farm and a junction to Cranna Wood on the opposite side of the road from said entrance, combine to present a hazardous bend. When the foliage was not in leaf the view round the bend would be less restricted.

[11]. As the pursuer approached the bend he was travelling at about 30mph. The speed limit for the pursuer was 60mph. He leaned very slightly to his left as he entered the bend. His motorcycle was positioned about 1 to 1.2 metres from his nearside verge. As he completed negotiating the bend he was confronted by the second defender's lorry.

[12]. At the time of the accident Alexander Ritchie was a police officer with about 9 years service. He attended the locus of the accident with his then colleague PC Daniel. There was insufficient room to the lorry's offside to allow their police vehicle to pass safely. The width of the police vehicle was about 1.7 metres.

[13]. Mr Thomson's lorry came to a stop with its front about 13.5 metres from the apex of the bend. The front of the lorry was angled in to its nearside verge. The rear of the lorry was about 1 metre or so from the nearside verge. Mr Ritchie was able to walk normally along the road between the rear of the lorry and the nearside verge for part of its length. The lorry is about 10 metres long.

[14]. Mr Peter Davey was instructed on behalf of the pursuer. He established Viewpoint Investigative Services Limited in 2013 employing about 9 people including reconstruction experts, vehicle examiners and others. Until August 2013 he was a police officer with Avon & Somerset Police having served 18 years. During that time he gained experience and qualifications as a road traffic officer and for 10 years as a forensic collision investigator. He was involved in the investigation of serious road accidents with multiple fatalities. He obtained an Honours degree from Teesside University in Combined Sciences, is a member of the Chartered Society of Forensic Science and a member of the Institute of Traffic Accident Investigators. He held a Class 1 Police Advanced Pursuit Driver qualification and his interests

include motorcycling. He attended and examined the locus of the accident on 29 May 2014. He prepared a report including a number of photographs, number 5/10 of process, under the auspices of an associated company PIAS Limited. He also considered and responded to the defenders' expert report. His responses comprise numbers 5/22 5/25 and 5/27 of process. A full CV is produced as number 5/32 of process.

[15]. Number 5/28 of process is a photograph taken shortly after the accident by Mr Thomson. It shows the remains of the lorry from its offside. The photograph appears as figure 7 in the report by Mr Davey. A digital copy of the photograph was examined by Mr Davey. An enlarged section of the photograph appears as figure 10 in the said report. To the north of the lorry there is a tyre scuff mark and two gouge marks about 1 metre or so from the pursuer's nearside verge. The tyre scuff mark was caused by the pursuer applying emergency braking, the rear wheel of the motorcycle locking and the pursuer separating from the motorcycle by pushing off it. The two shorter gouge marks were caused by a part of the motorcycle such as the footpeg after it had fallen over onto its side and by the pursuer's boots or helmet. The pursuer was propelled forward past the off-side of the lorry ending up beyond the rear of the lorry. The gouge marks diverge. The motorcycle continued to travel on the road sliding on its side to the pursuer's right. There was no impact damage to the front of the lorry. The motorcycle was on its side as it slid underneath the front of the lorry's cab. A fire ensued engulfing and destroying both vehicles.

[16]. Mr Barry Seward was also instructed on behalf of the pursuer. He is a forensic collision investigator with Viewpoint Investigative Services Limited. He served 30 years as a police officer with Avon &

Somerset Constabulary until his retirement in 2005. For 23 years he was involved in road accident investigation and reconstruction, latterly as Senior Accident Investigator. He has ridden motorcycles for about 33 years and holds advanced driving certificates for both cars and motorcycles. He also holds a City and Guilds certificate in Road Accident Investigation and Reconstruction techniques. A full CV is produced a number 5/33 of process.

[17]. On 21 March 2017 he rode a BMW F800GT motorcycle at the locus following the route taken by the pursuer. He assessed the safe line of approach to and at the bend and the safe speed for a motorcycle. He prepared a report number 5/29 of process together with video footage of his tests.

[18]. The safest line of approach to the bend allowing for the entrance to said farm and the junction to Cranna Wood is towards the centre of the road. After passing the entrance to said farm the correct line into the left hand bend is to move the motorcycle back towards the nearside verge to a position about 1 metre from the verge. The bend, not being acute, could be negotiated safely without a motorcyclist having to lean very far over at speeds up to 40mph. A motorcyclist leans over in order to negotiate bends. The faster the speed or the more acute the bend the further a motorcyclist requires to lean over.

[19]. Mr David Findlay, Collision Investigation Consultant, Findlay Collision Consultancy, Montrose was instructed on behalf of the defenders. He served as a police officer with Grampian Police and the Police Service of Scotland for about 19 years. For about 12 years he was a member of the road policing department holding an SQA Certificate in Police Road Traffic Patrol Operations. He was a Class 1 advanced police driver, attended standard and advanced courses in road collision investigation holds a certificate in Road Collision

Investigation and a City and Guilds Certificate in Police Forensic Collision Investigation. He was collision investigator coordinator from 2012. On his retirement in December 2015 he established Findlay Collision Consultancy.

[20]. On 15 November 2016 he attended and examined the locus of the accident. At the time of his examination the trees and bushes around the bend were not in leaf and the view of drivers on the approach to and at the bend was less restricted than at the time of the accident.

[21]. On 17 January 2017 Mr Findlay arranged to obtain a lorry, similar to that driven by Mr Thomson, with a driver, to drive the route followed by Mr Thomson. The driver had driven the road before. The speed and journey of the lorry was recorded. He prepared a report including photographs and video footage, number 6/3 of process.

[22]. In the video as the lorry approached the bend its speed was about 20mph or less. Its nearside wheels were hard against the nearside verge. At about the locus of the accident a car with a width of about 1.7 metres was seen to pass the lorry safely without evidence of braking.

[23]. The pursuer was correctly and reasonably positioned on his side of the road being about 1 metre or so from his nearside verge as he negotiated the bend. The lorry was blocking the pursuer's lane. It was not hard against its nearside verge. It was about 1 metre or so from its nearside verge. The width of usable road surface left to the pursuer was about 0.8 metres. The pursuer's motor cycle was 0.79 metres wide.

[24]. There was insufficient road space for the pursuer to pass the lorry safely due to the road position adopted by Mr Thomson. Had the lorry been driven with its nearside wheels hard against the nearside

verge there would have been sufficient room for the vehicles to pass each other safely.

[25]. There is insufficient scene evidence to allow any calculation of the pre-impact speed of either vehicle.

[26]. The overall stopping distance for the motorcycle travelling at 30mph is 26.50 metres allowing for a reaction time of 1 second, 33.21 metres allowing for a reaction time of 1.5 seconds and 39.91 metres allowing for a reaction time of 2 seconds.

[27]. The overall stopping distance for the motorcycle travelling at 20mph is 14.76 metres allowing for a reaction time of 1 second, 19.23 metres allowing for a reaction time of 1.5 seconds and 23.70 metres allowing for a reaction time of 2 seconds.

[28]. The overall stopping distance for the lorry travelling at 30mph is 28.69 metres allowing for a reaction time of 1 second, 35.39 allowing for a reaction time of 1.5 seconds and 42.10 metres allowing for a reaction time of 2 seconds.

[29]. The overall stopping distance for the lorry travelling at 20mph is 15.73 metres allowing for a reaction time of 1 second, 20.20 metres allowing for a reaction time of 1.5 seconds and 24.67 allowing for a reaction time of 2 seconds.

[30]. The speed shown on a vehicle's speedometer can be slightly over the actual speed of the vehicle. As he approached the bend Mr Thomson was travelling at about 30mph. Such a speed was unsafe due to the width of the road, the width of the lorry and the restricted view at the bend. A safe speed for the lorry on the approach to the bend would have been 20mph.

[31]. The pursuer did not have sufficient road space to brake to a stop due to the position of the lorry in the road. The lorry continued to

move towards him. Mr Thomson steered to his left at or about the time of the collision.

[32]. The pursuer suffered physical and psychological injuries. He also suffered patrimonial losses. The value of the loss injury and damage suffered by the pursuer is agreed in the sum of £100,000 net of any recoupable benefits and inclusive of interest to 21 March 2017.

Finds in fact and in law:-

1. The second defender failed to keep his lorry in a safe position on the road being as close to its nearside verge as was reasonably possible;
2. The second defender failed to drive at a reasonable and safe speed having regard to the width of the road, the width of his lorry and the restricted view available to road users;
3. The accident was caused by the fault and negligence of the second defender;

Therefore grants decree against the defenders jointly and severally for payment to the pursuer of the sum of One Hundred Thousand Pounds (£100,000) Sterling with interest thereon at the rate of eight per cent from 21st March 2017 until payment; reserves meantime all questions of expenses and assigns 6 February 2018 at 10am within the Sheriff Court House, 27 Chambers Street Edinburgh as a hearing thereon.

<u>Authorities referred to:-</u>

Charlesworth & Percy on Negligence 13th Edition para 10-200

Easdon v A Clarke & Company (Smethwick) Limited [2008] CSOH 29

Dewar v Scottish Borders Council [2017] CSOH 68

Introduction

[1]. The pursuer seeks damages for personal injuries sustained in a road traffic accident on 11 June 2013. Proof was restricted to the question of liability, quantum having been agreed in the sum of £100,000 inclusive of interest in a Joint Minute lodged on 21 March 2017. Evidence was led over several days. In addition to his own evidence the pursuer led evidence from Peter Davey, a Forensic Collision Investigator, Viewpoint Investigative Services Limited, North Somerset and Barry Seward, a Forensic Collision Investigator with Mr Davey's company. The defenders led evidence from Mr Thomson, the second defender, Alexander Ritchie, a police constable at the time of the accident who attended the scene and David Findlay, Collision Investigation Consultant, Findlay Collision Consultancy, Montrose.

[2]. In summary, on 11 June 2013 the pursuer was riding his Yamaha 850cc motorcycle in a southerly direction on an unclassified road south of Fyvie, Aberdeenshire near to the Mill of Burns Farm. The road is a two way undivided carriageway with no road markings. Shortly after the entrance to the farm there is a left hand bend for vehicles travelling south. The second defender was driving a Mercedes lorry registration number SV02 JXM in a northerly direction on the road. Approximately 13.5 metres south of the bend the vehicles collided whereby the motorcycle came to rest under the front cab of the lorry and both vehicles caught fire and were destroyed.

[3]. The issues at proof related to the position and speed of the lorry and any contributory negligence on the part of the pursuer.

Evidence at Proof

The Pursuer

[4]. The pursuer gave his evidence in a careful and considered manner. It was apparent that he has been left with a limited recollection of the accident. He described his usual practice when riding his motorcycle on the road. I formed the impression that the pursuer was a careful and cautious rider. He used his motorcycle to travel to work only if the weather conditions were suitable. If it was inclement he used his motor car. He described the day of the accident as ideal motorcycling conditions, a dry, sunny, summer's day. He had taken driving lessons and passed the theory and practical tests of competency to ride a motorcycle. He obtained his full licence in 2010. He had ridden a less powerful motorcycle, 500cc, for about 3 to 4 years before acquiring the Yamaha 850cc about 3 months before the accident. He had no speeding offences and had not been involved in any previous accidents. He described himself as a competent, safe and cautious rider. I formed the impression that that was an accurate description and that he was anything but a careless motorcyclist.

[5]. The pursuer knew the road well. He travelled to work that way on Mondays to Thursdays and occasional Fridays. He recalled leaving home at the usual time about 11.15am. He was due to clock in between 11.30am and 12 noon. He was not in a hurry. He had no recollection of his actual speed or of checking his speedometer. On the long straight approach to the bend at Mill of Burns Farm he would usually be travelling at 50 to 60mph. As he approached the bend he would decelerate using the throttle to about 30 to 40 mph. At a point when the bend was in full view he would brake using his brake lever on the right handlebar and footbrake in order to navigate the bend at about 30mph. The throttle and brake lever are both operated by the right

hand and cannot be operated simultaneously. The footbrake is in front of the right foot peg.

[6]. As he approached the bend the pursuer would keep to the centre of the road to maximise his view round the bend. As he negotiated the bend he would move closer to his nearside but avoiding the rough ground at the edge of the road and verge. He would take up a position about halfway between the nearside edge and the centre of the road.

[7]. I found the pursuer's evidence of his usual practice credible, convincing and reliable. By contrast his evidence of the actual circumstances of the accident was confused and uncertain. It appeared that some of his views of the circumstances of the accident may have been formed after seeing photographs some time after the accident. Some of his evidence was contradicted by physical evidence from the scene, which was a matter of agreement by the expert witnesses, and accordingly demonstrated, in my opinion, a confused memory of the accident. He said his last memory was seeing the cab of the second defender's lorry on his right hand side. The accident was "a mystery" to him. He said the lorry was where he wanted to be and that the space for him was running out. He thought he was passing the cab of the lorry when the vehicles "got connected somehow". Until he hit the ground he thought he was still on the motorcycle and it was a mystery how the motorcycle came to be under the lorry. He had no recollection of braking. By the time he realised there was insufficient room for him to pass he thought "it was all over". He thought the lorry was about 6 metres away when he first saw it.

[8]. Mr Macpherson submitted that the pursuer offered no positive evidence about the circumstances of the accident, in particular speed, distance or position on the road. He suggested that the pursuer's evidence, in particular apparently not seeing the lorry until only 6

metres away, pointed to a lack of attention on his part. If other evidence from the pursuer's skilled witness was accepted this meant that the pursuer's evidence had to be rejected. He did accept that a pursuer could still succeed even if he had no recollection of the incident.

[9]. I found the pursuer to be a credible witness trying his best to recollect the circumstances of the accident to assist the court, however, it was apparent that he had only a limited recollection of those circumstances which did not assist in establishing what happened. It is not unusual for someone who has been involved in a traumatic accident to have little or no recollection, or indeed a confused recollection, of the circumstances of the accident. This does not necessarily mean that the individual was not paying attention. Having heard and observed the pursuer who, as I have said, appeared a careful and cautious person I did not accept that his limited and sometimes confused recollection of the circumstances of the accident implied that he was not paying attention to the road ahead of him. I accepted his evidence of his usual practice and that he would usually be travelling at about 30mph as he negotiated the bend. I also accepted that he would usually adopt a line about midway between his nearside edge and the centre of the road. The fact that the pursuer did not attempt to assert an actual speed, in my opinion, added to his credibility.

<u>The Second Defender</u>

[10]. While Mr Thomson had driven heavy goods vehicles for about 3½ years in total, at the time of the accident he was not driving them regularly but on an ad hoc basis when engaged by an agency during his vacation from college. He was driving from Inverurie to Turiff having left Dundee at about 6am. He was not familiar with the road, not having driven it before. He chose the route as the "most suitable

and quickest" to avoid road works. As a driver he was required to have breaks after so many hours of driving. He was due to have a break and intended to do so after his delivery in Turriff. He was noticeably quick to say he was not in a hurry.

[11]. Mr Thomson accepted that the road was narrow and that there was a restricted view around the bend. He maintained that he was driving with his nearside wheels hard against his nearside verge at about 30mph on the approach to the bend and that he was slowing down. His evidence about where he was when he first saw the pursuer varied throughout the proceedings. Initially he averred that he was about 30 metres from the bend but this was amended to 44 metres. In his evidence he claimed he was at a point which was estimated to be about 55 metres from the bend. While a certain latitude might be applied to estimates of distance, although Mr Macpherson was not prepared to make such an allowance for the pursuer, the constantly changing estimates provided by Mr Thomson suggested to me that he was attempting to find one that might exculpate him. It was clear from the timing of the amendment to his averments that his estimate changed from 30 to 44 metres after a meeting with his agents at the beginning of 2017 when he was advised of Mr Findlay's report and shown the video footage. That the estimate of 55 metres was not put to the pursuer or to Mr Davey implied that it was not a figure known to Mr Macpherson prior to Mr Thomson's evidence.

[12]. Mr Thomson claimed that when he saw the pursuer he was upright but leaning well over for the bend, travelling at or above 60 mph. He suggested that the pursuer panicked, lost control through inexperience and fell over after the "apex of the corner". As the motorcycle and the pursuer were travelling towards him they "vectored" off. Despite thinking that there would be a collision Mr

Thomson denied emergency braking but said he "tried to bring his vehicle to a slow, controlled and safe stop" having depressed the clutch and put the gears into neutral, although he also said he was in the brace position. He claimed he was parallel to the edge of the road after the lorry stopped. I formed the impression that his choice of language was informed by others.

[13]. Mr Thomson said he took more photographs after the accident than those that were produced, including photographs of the nearside of the lorry. He did not accept that the lorry was at an angle in towards the nearside verge after it stopped or that this was shown to be its position on photograph number 5/28 of process. He maintained there was sufficient room for the pursuer to pass the lorry although he accepted that there would have been insufficient room for the car shown in Mr Findlay's video to pass the lorry in its post-accident position safely. The reason the pursuer parted company with the motorcycle was, in Mr Thomson's opinion, that the pursuer was travelling in excess of 30mph. In cross examination he claimed that he was slowing down to 20mph for the bend and that 30mph would be a reasonable speed in winter if there was a clearer view.

[14]. There were in my opinion a number of inconsistencies and contradictions in Mr Thomson's evidence. I formed the impression that he was exaggerating the distance he was from the bend when he first saw the pursuer. I also found his evidence about the speed and position of the pursuer inconsistent with other evidence. He was clearly at pains to describe the pursuer in unnecessarily derogatory terms, at one point describing him as a rabbit caught in the headlights. Mr Thomson's suggestion that he did not apply emergency braking but brought the lorry to a slow, controlled and safe stop without the gears being engaged was simply incredible in circumstances where he would

have it that he was faced with a motorcyclist travelling at about 60 mph in the middle of the road. I did not find Mr Thomson credible or reliable.

Mr Ritchie

[15]. Despite having been a serving police officer at the time of the accident Mr Ritchie appeared to be reluctant to attend as a witness. He did not attend when required so to do by the defenders' agents. When he did attend he required to be interposed during Mr Findlay's evidence because of child care issues. It appeared that he considered the requirement to attend as a witness a considerable inconvenience. It was surprising that Mr Macpherson made no reference to Mr Ritchie's evidence in his submissions. It would seem that notwithstanding the efforts made to have him attend his evidence was not considered to be of any particular relevance.

[16]. Mr Ritchie's involvement in the circumstances of the accident was limited. He, along with colleagues, attended the locus. He did not carry out any forensic examination. He spoke only to Mr Thomson. No criminal proceedings followed apparently in the absence of corroboration of either party's version of the accident. However he was able to recall that there was insufficient road space available to allow the police vehicle to pass the lorry in its resting position and that the lorry was angled in towards its nearside verge. He recalled being able to walk along the road between the nearside of the lorry and the verge until he had to climb up the verge to get to the front of the lorry. He estimated that the distance from the rear of the lorry to the verge was about 1metre.

The Expert Witnesses

Peter Davey, Barry Seward and David Findlay

[17]. Mr Davey presented his evidence in a careful and considered manner. He demonstrated a clear understanding of the issues. His views were based on a detailed examination of the locus at a similar time of year to the accident, photographs taken at the time of the accident, the police accident report and statements from PC Ritchie, the pursuer and the pursuer's then supervisor. He applied his considerable knowledge and experience to the information presented to him. His position did not change despite Mr Macpherson's best efforts in cross-examination. I found him to be an impressive and well-balanced witness.

The position of the lorry

[18]. Mr Davey considered the position of the lorry from an interrogation of the photographs taken at the time of the accident which had been made available to him. These are reproduced as figures 6 and 7 in his report. In his opinion these demonstrate that the post impact position of the lorry was that it was angled in to the lorry's nearside verge and indeed that the nearside front wheel was on the verge. The defender's expert, Mr Findlay, agreed that the lorry appeared to be angled in to the nearside. In his report, number 6/3 of process, at paragraph 8.3.4 in considering the post collision photographs Mr Findlay stated that "It appears that the front of the vehicle is angled very slightly into the grass verge (possibly a combination of steering and/or the impact itself) and the rear nearside wheels are close to the grass verge.". It became clear during Mr Findlay's evidence that he had had access to photographs which he had relied upon but had not produced with his report. There was accordingly no evidence before me to substantiate his assertion that the rear nearside wheels were close to the grass verge. Mr Seward also agreed that the photographs demonstrated that the lorry was angled to

the nearside, that the front nearside was encroaching on the verge and the lorry could not be driven in a straight line in that position.

[19]. The opinion evidence supported the factual evidence given by Mr Ritchie and contradicted the evidence of Mr Thomson.

[20]. The extent of the angle was a matter of dispute. In Mr Davey's opinion, based upon an analysis of photograph 5/28, the distance from the rear offside wheel of the lorry to the east edge of the tarmac was about 1 metre, but emphasised that the actual rear of the lorry would be nearer that edge because the rear of the lorry was further back than the rear wheel and the angle would continue outwards. In his calculations Mr Davey also took into account that there was dirt and other detritus at the edge of the tarmac which would be a potential hazard for a motorcycle in that there would be a lack of traction there. His evidence on the potential hazard of the dirt area was consistent with that of the pursuer and of Mr Seward. All are motorcyclists. Mr Findlay on the other hand in calculating the same measurement took a straight line across the bottom of photograph number 5/28 of process including the dirt area up to the edge of the grassy verge. Mr Findlay did not appear to have any experience of motorcycling or give any consideration to the potentially adverse effect on a motorcycle of riding in that area.

[21]. The height of the wheel and tyre was agreed to be about 1 metre. Mr Findlay considered that the distance from the offside wheel to the grass verge was about 1.8 metres. When asked to estimate the distance of the offside wheel of the lorry to the east edge the pursuer said he thought it was about 2 metres. Mr Ritchie's estimate was about 1 metre from the verge. It was common ground that the road was 4.4 metres wide and that the lorry was 2.5 metres wide excluding the mirrors. If the rear of the lorry was about 1 metre from the verge post-

accident then the space between the rear offside wheel and the east edge of the tarmac could be only 0.9 metres at most. At the rear end of the lorry the space was probably less because of the continuation of the angle.

[22]. Both Mr Davey and Mr Findlay agreed that the angling of the lorry may have been caused by its being steered to the side although Mr Findlay also suggested that this might have been caused by the impact. Given the considerable difference in weight between the vehicles, Mr Davey estimated that the lorry was about three times the weight of the motorcycle, the latter seems to be unlikely. Accordingly, in my opinion, on balance of probabilities, the lorry's starting position on the road before being steered into the nearside verge was, at least, the resting position of the rear offside wheel. The distance from the rear offside wheel to the rear of the lorry is not known. However, on the basis that the angle would continue to the rear of the lorry the space available to the pursuer was likely to be less than 0.8 metres or so, when including the additional 0.1 metres of the mirrors.

[23]. Mr Findlay arranged for a driver of a similar lorry to drive the same road on the approach to and at the locus of the accident. In the video, Appendix F of 6/3 of process, which was said not to be a reconstruction, a car is seen to pass the lorry at the bend. The car was agreed to be about 1.7 metres wide. Thus there would have been only 2.7 metres of road available to the lorry. The lorry is seen to have its nearside wheels hard against the verge. The vehicles did not appear to have any difficulty in passing each other.

[24]. On the basis of the foregoing, Mr Thomson's evidence that he had driven the lorry with its nearside wheels as close as he could to the nearside verge, that the lorry was not angled in to the verge and that when the lorry came to rest it was parallel to the verge could not be

accepted. It appeared to me that his evidence was self-serving and wholly inconsistent with the factual evidence, which I did accept, and the opinion evidence not only of Mr Davey but also Mr Findlay.

[25]. Mr Macpherson was critical of Mr Davey's evidence in relation to the distance of the rear wheel to the verge obtained from an analysis of the photograph and his reference to the parallax effect. He suggested that Mr Davey was wrong in his explanation of the parallax effect and that he had no relevant qualifications in the analysis of photographs. In dealing with the meaning of parallax Mr Macpherson quoted a definition from the Oxford Dictionary (online) being "The effect whereby the position or direction of an object appears to differ when viewed from different positions eg through the viewfinder and the lens of a camera". In his explanation of parallax Mr Davey said "It's when an object looks in a different position to where it is when viewed from two different perspectives." There is in my opinion little difference between the two explanations and Mr Macpherson's criticism seems to me to be misconceived. In essence Mr Davey was urging appropriate caution in taking measurements from a photograph. A cross check of the measurement of 1 metre offered by Mr Davey can be obtained by taking the measurement of the lorry, 2.5 metres, from the measurement of the road, 4.4 metres, leaving 1.8 metres. Taking Mr Ritchie's evidence into account that the rear of the lorry was about 1 metre from the nearside edge it follows that there can only be about 0.8 metres between the rear offside wheel and the eastern edge of the road. That calculation suggests that Mr Davey's estimate is likely to be more accurate than that of Mr Findlay. Mr Findlay did not claim to have any experience in the analysis of photographs. He took a calculation by merely drawing a straight line along the bottom of the photograph, which does not make any

allowance for the angle of the lorry which he agreed existed. Further, without having any appropriate knowledge or experience as a motorcyclist, he took his measurement into an area where it was suggested by those with relevant experience, namely the pursuer, Mr Davey and Mr Seward, to be unsafe for a motorcycle. Accordingly in my opinion Mr Findlay's estimate of the distance, and thus the road space available to the pursuer, could not be relied upon and Mr Davey's is to be preferred.

[26]. Mr Macpherson recognised that any criticism of Mr Davey's lack of qualifications in the examination of photographs applied equally to Mr Findlay. However, while Mr Davey did not claim to have any specific camera qualification he did say that while serving in the police he had undergone a three day Nikon course in photography and that he had experience of studying photographs and of the pitfalls that can be found in conducting these sorts of exercises. It is in my opinion significant that no criticism was made of Mr Davey's analysis of the photograph, number 5/28 of process, and the discovery therein of the evidence of tyre scuff and gouge marks. Mr Findlay agreed with Mr Davey's interpretation of what was seen on the photograph. In carrying out this exercise Mr Davey said "In some respects you need to know what you're looking for…it's the kind of work that I do on a daily basis is looking for the minute detail like this." In saying that he was not qualified more than anyone else in the court to look at a photograph it appeared to me that he was stating the obvious in that anyone can look at a photograph but was understating his experience in studying photographs for detailed evidence. In my opinion although apparently without formal qualification in the analysis of photographs Mr Davey demonstrated knowledge and experience of such examination in the course of his work as a forensic collision

investigator over a number of years. Further it appeared to me that Mr Macpherson's sweeping criticism of Mr Davey for lack of qualification to examine photographs was irreconcilable with his lack of challenge to, and indeed his own expert's acceptance of, Mr Davey's evidence of the existence of tyre scuff and gouge marks found by detailed examination of the same photograph.

[27]. In his evidence Mr Thomson claimed that the pursuer was riding his motorcycle at a speed at or in excess of the 60mph limit, that when he saw the pursuer the motorcycle was in about the middle of the road, that he was leaning far over, that the pursuer lost control of the motorcycle and came off with the motorcycle travelling along the ground towards the lorry. He described the pursuer as inexperienced, over confident and like a rabbit caught in the headlights. The tyre scuff marks referred to by Mr Davey were, in his opinion, about 1 to 1.2 metres from the east edge, being the pursuer's nearside, of the tarmac surface. Mr Findlay agreed with this interpretation and estimate. It was also agreed that, on balance of probabilities, the tyre scuff mark was as a result of emergency braking by the pursuer. In these circumstances Mr Thomson's evidence that the pursuer was in the middle of the road is contradicted by the physical evidence. The position of the scuff marks was consistent with the evidence of the pursuer about the line adopted by him as a matter of practice when negotiating the bend. It was also consistent with the evidence of Mr Seward as to the appropriate line to adopt to negotiate the bend safely. It was Mr Seward's evidence that travelling round the bend at 30mph it would not be necessary to lean over very much at all.

[28]. In my opinion Mr Thomson's evidence in relation to the position of the lorry on the road and the position of the pursuer was simply not credible having regard to the evidence of the expert witnesses and Mr

Ritchie and the physical evidence as demonstrated by photograph number 5/28 and the video appendix F of number 6/3.

Speed

[29]. It was common ground that there was no physical evidence from the scene of the accident to allow any calculation to be made of the speed of the respective vehicles at the time of or shortly prior to impact. It was presumed that the tachograph which would have been on the lorry was destroyed in the fire. There was no evidence that any remote recording from the lorry existed.

[30]. The pursuer's speed on negotiating the bend was about 30mph. He had no recollection of his actual speed or of having looked at his speedometer. Mr Seward carried out a test run of the route followed by the pursuer on a similar motorcycle hired for the purpose. He is an experienced motorcyclist having ridden for about 33 years. Since his retirement from the police in 2005 he has worked as a consultant forensic collision investigator investigating more than 700 collisions about 60% of which involved motorcycles, many of them in Scotland. He was instructed to assess the probable positioning and safe speed of a motorcycle round the bend at the location of the accident.

[31]. Mr Seward said that on the approach to the bend a motorcyclist would take into account the entrance to the farm and the restricted view round the bend and would adopt a more central position on the road. This would afford a better view and a degree of safety should any vehicle emerge from the farm. Once the entrance had been passed a motorcyclist would return to a position more to the left of centre but not too close to the edge because of the dirt and detritus which would tend to throw a motorcycle off balance. In his opinion the position adopted would be about the middle of the motorcycle's half of the road or about 1.2 metres from the centre of the road. Mr Seward described

the bend as not severe but very gradual. If travelling at 40mph a motorcyclist would not have to lean over much to steer round. The steeper the bend and the greater the speed the more a motorcyclist would have to lean over. Even if the motorcyclist was travelling at more than 40mph he would not have to lean over very much to go round the bend. He considered that up to 40mph would be a safe speed for a motorcyclist to negotiate the bend even with a restricted view.

[32]. Mr Seward considered the scuff marks observed by Mr Davey. He commented that the mark followed a curved path. He explained that if upright both wheels of a motorcycle follow the same path. If the rear wheel locks the rear wheel would swing further out causing a tyre mark. In his opinion, despite the pursuer having no recollection of braking, the mark was evidence of braking and the rear wheel swinging out to the left. A motorcyclist's training would include parting company with the motorcycle in the event of an anticipated collision. The mark seen may be a combination of braking and the pursuer pushing away from the motorcycle. In his opinion the mark was consistent with the pursuer adopting a position near the centre of the road on approach to the entrance to the farm and coming back to the nearside on negotiating the bend. If the mark was solely caused by braking then it suggested that the motorcycle was about 1.4 metres or so from the verge. If it was caused by a combination of braking and pushing off by the pursuer then the motorcycle would have been closer to the verge initially. The motorcycle would have moved out and started to fall before leaving the mark. Accordingly as he negotiated the bend the pursuer's position would have been no more than and probably less than 1.4 metres from his nearside verge.

[33]. Mr Seward's evidence in relation to the probable position of the pursuer's motorcycle prior to the accident, based not only on what was considered by an experienced motorcyclist to be an appropriate position, and was consistent with the pursuer's usual practice, but also on an inference from the scuff marks, was not challenged. Once again Mr Thomson's evidence that the pursuer was in the middle of the road when he negotiated the bend cannot be correct and I did not accept his evidence in this regard.

[34]. Mr Seward also explained that the gouge marks seen at the end of the tyre scuff mark were indicative of the motorcycle being on its side and that the marks would be made by the sharp points such as the foot peg. He also explained that the motorcycle would pivot round once on its side and the rotation and momentum could take it across the road to the front of the lorry. The other gouge mark continuing in a straight line would be likely to be from the pursuer's helmet or boots. In his opinion if the pursuer travelled along the side of the lorry for about 10 metres it indicated a speed at the point when the pursuer came off the motorcycle of about 15 to 20mph on the basis that the rider will continue at the speed of the motorcycle at the point of separation. Mr Seward also suggested that a motorcyclist's reaction time was likely to be faster than the driver of a car or lorry because a motorcyclist's hands and feet are already on or about the front and rear brakes. Unlike a car driver a motorcyclist does not require to move to apply brakes. Mr Seward's evidence on these points was not challenged.

[35]. Throughout his oral evidence Mr Thomson said he was driving at about 30mph on the approach to the bend and prior to the accident. He was aware that the speed limit for lorries such as his was 40mph. He had been travelling at between 30 to 40mph on the uphill stretch of

road before the bend. He "decided to stay at 30mph". He was aware that there was a corner coming up with a restricted view. He remembered looking at his speedometer. In cross examination he maintained that he had been slowing down for the bend to about 20mph but that driving at 20mph on the approach to the bend would have caused a hazard.

[36]. In his defences, lodged on 5 July 2016, Mr Thomson averred that "when approaching the bend at the locus the second defender was travelling at about 30mph". In his report Mr Findlay noted at paragraph 6.2 that Mr Thomson stated he was travelling about 30mph prior to the collision. He also noted that Mr Thomson said the motorcycle was about 30 metres away when he first saw it. In Answers to a Minute of Amendment for the pursuer, lodged on 7 April 2017, Mr Thomson amended his averments of speed to aver that he was travelling "at no more than 30mph". By adjustment to those Answers on 28 April 2017 Mr Thomson amended his averments of speed further to aver that he was travelling "at a speed between 26mph and 30mph".

[37]. It appears that on some unspecified date at the beginning of 2017 Mr Thomson had a meeting with the defenders' agents during which he was shown the video produced by Mr Findlay. It was common ground between Mr Davey and Mr Findlay that from the accepted overall stopping distances and the accepted resting position of the lorry about 13.5 metres from the apex of the bend the estimates of speed and or the distance from the bend when Mr Thomson first saw the pursuer could not be correct. Various explanations for the discrepancy were proffered by Mr Findlay at paragraph 6.5 of his report including that Mr Thomson's estimates of speed and distance were incorrect. On 28 April 2017 the defenders introduced an averment that Mr Thomson saw the pursuer's motorcycle when the cab

of the lorry was about 44 metres from the bend. In his evidence Mr Thomson maintained that he had been about 55 metres from the bend when he first saw the pursuer. That distance was not put to Mr Davey or the pursuer. I formed the impression that it was evidence of which Mr Macpherson was unaware until given by Mr Thomson. I considered that Mr Thomson was probably telling the truth when he said he was travelling at 30mph, this being his position from the outset, but that the remainder of his evidence about slowing down and the distance from the bend when he first saw the pursuer was tailored to attempt to exculpate him for the accident.

[38]. Both Mr Davey and Mr Findlay carried out an examination of the locus and took various measurements. They were assisted by videos taken by Mr Seward on his test drive on a motorcycle and by Mr Findlay's test drive by a similar lorry. There was little if any dispute between Mr Davey and Mr Findlay about the relevant measurements. The width of the tarmac surface of the road was agreed to be 4.4 metres, although as indicated above it appeared that Mr Findlay took into account the area of dirt and detritus at the side of the road which Mr Davey excluded as usable surface for the motorcycle. Both accepted the relative measurements of the lorry, motorcycle and motorcar seen to pass on Mr Findlay's video. Both agreed that the telegraph pole seen at the rear of the lorry post impact was 23 metres from the apex of the bend. There was, as might be imagined, no dispute about the overall stopping distances of motorcars, including motorcycles, and large vehicles including lorries such as that driven by Mr Thomson.

[39]. It is not known where the point of impact was and whether the momentum of the lorry carried it to its resting position after impact or not. Mr Thomson's evidence was that he did not apply emergency

braking on seeing the pursuer but depressed the clutch, thus taking the vehicle out of gear, and applied the brakes to bring the lorry to a controlled and safe stop. The overall stopping distances are calculated on the basis of emergency braking and accordingly if Mr Thomson did not apply emergency braking it undermines and renders useless the calculations made. In my opinion, as I have indicated, his evidence lacked credibility, particularly given that he said his first thought on seeing the pursuer was that there was going to be a collision. In these circumstances a natural reaction would be to apply emergency braking.

[40]. It was on the basis of the application of the overall stopping distances to the known resting positon of the lorry that his original account that he was travelling at 30mph and first saw the pursuer 30 metres from the bend was said to be impossible. As Mr Findlay calculated at paragraph 6.5 of his report at 30 mph with a quick reaction time of 1 second the overall stopping distance would have been 28.7 metres. It was agreed that the lorry came to rest about 13.5 metres from the bend. Accordingly even with a very fast reaction time it was said that the lorry could not have been travelling at 30 mph and stopped where it did. Mr Thomson's original account of the circumstances of the accident cannot be relied upon and as indicated above I found his subsequent positions of 44 metres and 55 metres from the bend simply to be an attempt to place his lorry further and further from the bend in the belief that that would remove him from blame for the accident. There was no reliable evidence about where Mr Thomson first saw the pursuer.

[41]. It is significant in my opinion that the lorry being driven in Mr Findlay's video is being driven very close to its nearside verge and at a speed not exceeding 25mph and indeed reducing to below 20mph as it

approached the bend. While it may be that the driver was aware that he was bringing the lorry to a stop shortly after the bend in the bell mouth of the junction to Cranna Wood the speed is much lower than that claimed by Mr Thomson and nearer that suggested by Mr Davey as being a reasonably safe speed at which to negotiate the bend. It must be recognised that at the time of the exercise carried out by Mr Findlay the visibility around the bend was clearer than at the time of the accident which might suggest that when the view was more restricted a lower speed would be selected.

[42]. As explained by Mr Davey in his supplementary report number 5/27 of process, if Mr Thomson had been travelling at 20mph, assuming a fast reaction time which Mr Davey suggested might be expected of a professional lorry driver, although Mr Thomson might not fit such a description, the overall stopping distance would have been 15.7 metres, 13 metres less than at 30mph. The lorry did stop about 13.5 metres from the bend. Putting the distance the lorry did stop and the overall stopping distance at 20mph together it suggests that Mr Thomson could have stopped about 28 metres from the bend, if applying emergency braking. Had he done so the pursuer, even travelling at 30mph, would have had sufficient distance, assuming a fast reaction time suggested for motorcyclists, to bring his vehicle to a stop, the overall stopping distance being 26.5 metres.

[43]. Where there were differences in the opinions of Mr Davey and Mr Findlay I preferred the opinion of Mr Davey. Mr Findlay appeared to me to have less experience in the investigation of road traffic accidents and the report prepared by him lacked the detail necessary to support the conclusions reached. From his evidence it was apparent that he had received only a black and white copy of photograph number 5/28 of process but took no steps to request a better copy,

particularly to respond to the observations made by Mr Davey about the tyre scuff marks. He said in evidence that he had based his opinion on what he described as a very important photograph which had been produced to him but did not include that or make specific reference to it in his report. He failed to note measurements of the distance between the nearside of the lorry used in his video and the nearside verge. His conclusion that "regardless of the lorry's exact road position and due to its size and weight" there was nothing that Mr Thomson could have reasonably done to avoid the accident and that the pursuer had "negotiated the bend at a speed, although unknown,... such that he was unable to take safe avoiding action" appeared to me to be without any clearly explained foundation and ignored the factual evidence which contradicted the version supplied by Mr Thomson. When presented with the pursuer's position Mr Findlay conceded that the pursuer could not have avoided the accident but nonetheless adhered to his conclusion which exculpated Mr Thomson. Mr Findlay said he had undertaken about 14 instructions since establishing his business and that this case was the first time he had been required to give evidence. There is in his report no declaration of what his duties are as an expert witness and regrettably I formed the impression that Mr Findlay had not fully understood his duty to the court.

Contributory Negligence

[44]. It was argued on behalf of the defenders that the pursuer was travelling at excessive speed for the conditions and layout of the road, failed to anticipate the possibility of an oncoming vehicle and was unable to stop. As such he contravened the provisions of the Highway Code and in particular rules 125 and 126. There was in my opinion no evidence that the pursuer was travelling at excessive speed. Mr Seward's evidence about the safe speed for a motorcyclist to negotiate

the bend was not contradicted by any other evidence. As Mr Davey explained, if the resting position of the lorry was 13.5 metres from the bend the pursuer would have had to be driving at less than 20 mph to have been able to stop before that point. There was no evidence that the pursuer ought to have been travelling at less than 20mph.

Decision

[45]. In my opinion, on balance of probabilities, the accident occurred when the pursuer was confronted by the lorry driven by Mr Thomson effectively blocking the road ahead and leaving him insufficient road space to pass the lorry safely. Mr Thomson knew, or ought to have known, that because of the width of his lorry it encroached over the midpoint of the road. Had Mr Thomson adopted a position on the road whereby his nearside wheels were close to his nearside verge the accident would not have occurred. A safe speed for Mr Thomson on approach to a bend with a restricted view was about 20mph. Had he approached the bend at that speed with his nearside wheels close to the nearside verge the pursuer would have been able to pass safely even if travelling at up to 40mph. The pursuer was correctly and reasonably positioned on his side of the road travelling at about 30mph. On being presented with the lorry blocking his road ahead he reacted by applying emergency braking and parting company with the motorcycle. Had he not done so it is likely that a much more serious and possibly fatal accident may have occurred. Even if it was theoretically possible for the pursuer to have manoeuvered his motorcycle past the side of the lorry, in my opinion, the pursuer cannot be criticised for adopting the course he did when faced with the dilemma presented by the position of the lorry.

[46]. Accordingly the accident occurred as a result of the fault and negligence of the second defender by failing to drive at a safe speed and keep his lorry in a safe position on the road to allow other road users such as the pursuer to pass safely. I do not accept that the pursuer contributed to the accident.

[47]. I was not addressed on the question of expenses and in the absence of any agreement a hearing will be required.