

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF COURT

[2017] SC EDIN 71

PN2263/16

JUDGMENT

by

SHERIFF ROBERT D M FIFE

in the cause

MS SALLY NICOL

Pursuer

against

ANDRZEJ WALDEMAR KUPINSKI

Defender

Pursuer: Crawford; Cycle Law Scotland

Defender: Comiskey, Reid Cooper

A proof in this action proceeded on 11, 12 and 13 October 2017.

The following authorities were referred to by parties:

1. McFarlane v Thain (2010) S.C.7;
2. Jackson v Murray (2015) UKSC 105;
3. McGeer v Macintosh [2017] EWCA Civ 79;
4. Walker on Delict, (2nd Edition);
5. Section 38 of the Road Traffic Act 1988;
6. Highway Code;
7. Wilkinson, Road Traffic Offences, (27th Edition).

The sheriff, having resumed consideration of the cause:

Finds the following facts to be admitted or proved:

- 1 The pursuer is Sally Nicol.
- 2 The pursuer is a police officer. The pursuer is a very experienced cyclist. The pursuer has recorded some 12,500 miles cycling during the past 5 years. The pursuer completed a course in emergency response training 6 years ago. The pursuer has also completed an advanced driving course.
- 3 The defender is Andrzej Kupinski. The defender is an experienced professional lorry driver.
- 4 On 21 April 2015 at around 1030am the pursuer was riding her bicycle ("bike") within a group of 4 very experienced cyclists ("group of cyclists") on the A811 Gartocharn to A809 road in an easterly direction towards the A809 near to the entrance to Catter Bog cottage ("the cottage"). The group of cyclists was travelling at a speed of around 25mph along at the A811.
- 5 The weather conditions were good on the morning of 21 April 2015. It was dry with good visibility.
- 6 The A811 is a two lane carriageway, with one carriageway in each direction.
- 7 The group of cyclists was riding in single file formation, known as chain gang formation.
- 8 The cycling in chain gang formation is more aerodynamic than cycling individually. The cycling is more efficient. The lead rider will peel off and go to the back of the group so each rider takes it in turn to lead the group.
- 9 There are safety benefits to a group of cyclists riding in single formation or chain gang formation. The group is easier to be seen. The group stays closer together than if cycling individually and takes up less of the road. The group is easier to overtake.

There is less risk of a vehicle cutting in on a group than if cycling individually. A group will be able to get past obstacles or hazards quicker as the group will travel at a greater speed than an individual cyclist.

10 The lead cyclist in position 1 was Gordon Christie. The pursuer was immediately behind Mr Christie in position 2. Dione Downie was in position 3 and Craig Walker was in position 4.

11 On 21 April 2015 the defender was driving an articulated DAF XF Euro 6 460 HGV with registration number PZ73 6HK ("the lorry").

12 Some time prior to 1030am the defender parked the lorry on the left hand side of the A811 facing east, next to the grass verge, a few minutes' walk from the cottage. The lorry took up most of the left hand carriageway. Anyone intending to carry out an overtaking manoeuvre of the lorry would have to enter the opposite carriageway in order to get past the lorry.

13 The defender put on the hazard warning lights of the lorry while the lorry was parked.

14 The defender then exited the cab of the lorry and walked east along the A811 towards the cottage in order to check the location for the collection of equipment he was under instructions to uplift. The defender returned to his lorry and climbed back into his cab some time later but before 1030am.

15 The stretch of the A811 road where the lorry was parked was straight for hundreds of metres in each direction. The defender's lorry was visible to traffic approaching from the west for at least several hundred metres.

16 The pursuer first noticed the parked lorry at a distance of about 100yds.

- 17 The pursuer and the three other cyclists had a clear, unobstructed view of the parked lorry.
- 18 The lorry was stationary with hazard warning lights displayed.
- 19 The lorry was parked close to the left hand side of the road facing east. The pursuer could see that the lorry took up most of the left hand carriageway.
- 20 As the group of cyclists approached the rear of the lorry their intention was to overtake the lorry. The road ahead was clear apart from one oncoming car which was in the distance. It was safe for the group of cyclists to overtake the lorry.
- 21 Each of the four cyclists, and in particular the pursuer, carried out their own safety checks to be satisfied that it was safe for them to overtake the lorry, which was the hazard the group of cyclists had to negotiate round at the time.
- 22 Before carrying out the overtaking manoeuvre the pursuer carried out a number of safety checks. The pursuer looked over her shoulder to ensure there was no one behind her. The pursuer also had a proper lookout ahead of her to see that the road ahead was clear. The pursuer was looking ahead, not with her head down. There was an oncoming car which was in the distance. The pursuer observed the lorry was still stationary displaying hazard warning lights. The pursuer was satisfied it was safe for her to overtake the lorry.
- 23 As the group of cyclists approached close to the rear of the stationary lorry the group, continuing in chain gang formation, moved out to the centre white line of the A811 road in order to overtake the lorry. The pursuer was riding her bike about a foot behind Mr Christie at that time.
- 24 The group of cyclists was travelling at a speed of around 22-25mph at the start of the overtaking manoeuvre.

- 25 Shortly before the group of cyclists started the overtaking manoeuvre of the lorry, the defender turned on the ignition of the lorry and started the engine. The defender looked in his mirrors to check it was safe for him to move forwards. The defender released the handbrake and put his foot on the footbrake.
- 26 As the group of cyclists, still in chain gang formation, was starting the overtaking manoeuvre and was within a few metres of the rear of the lorry, the defender suddenly and without warning slowly moved the lorry forwards on the eastern carriageway of the A811 in the same direction as the group of cyclists.
- 27 The defender gave no indication of his intention to move forwards. Immediately before the defender's lorry moved forwards the lorry was displaying hazard warning lights.
- 28 When the defender's lorry moved forwards Mr Christie, who was still in position 1 of the group of cyclists, had to take immediate evasive action in order to avoid a collision with the lorry. Mr Christie shouted "whoa! whoa!". Mr Christie braked sharply and veered slightly to the left to avoid a collision with the lorry. Mr Christie avoided a collision with the lorry.
- 29 The pursuer, who was in position 2, also reacted immediately to the lorry suddenly and without warning starting to move forwards slowly by braking sharply but she was unable to take avoiding action and her bike collided with the rear of Mr Christie's bike.
- 30 The pursuer was thrown from her bike and landed on her back on the opposite carriageway. The pursuer sustained multiple injuries as a result of the collision and had to be airlifted to hospital.

Findings in fact and in law

- 1 The accident on 21 April 2015 was caused by the fault and negligence of the defender who failed to take reasonable care for the safety of other road users, failed to keep a proper lookout for other road users, and failed to give way to the group of cyclists in the process of overtaking the lorry by moving the lorry forwards slowly eastwards on the A811 from a stationary position, suddenly and without warning, without indicating his intention to do so and when it was unsafe so to do;
- 2 The pursuer took reasonable care for her own safety in all the circumstances;
- 3 The defender has not proved on a balance of probability any finding of contributory negligence on the part of the pursuer;
- 4 As a consequence of the accident the pursuer sustained multiple injuries. Damages are agreed at £20,000 inclusive of interest to 5 September 2017;
- 5 THEREFORE grants decree in favour of the pursuer in the sum of TWENTY THOUSAND POUNDS (£20,000) inclusive of interest to 5 September 2017, thereafter with interest at 8% a year until payment; sanctions the employment of junior counsel; reserves all questions of expenses.

NOTE

Introduction

[1] This is an action for personal injury as a result of a road traffic accident on 21 April 2015.

[2] Parties were agreed in terms of a Joint Minute of Admissions, number 16 of process, that damages should be assessed at £20,000 net of CRU and inclusive of interest to

5 September 2017. In the event liability was established, the agreed damages would be subject to reduction if the court made a finding of contributory negligence on the part of the pursuer.

[3] Accordingly, the proof was restricted to the issues of liability and contributory negligence.

[4] The evidence was heard over two days, namely, 11 and 12 October 2017. There was a hearing on submissions on 13 October 2017.

Accident 21 April 2015

[5] Three witnesses gave evidence for the pursuer, namely, the pursuer Sally Nicol, Gordon Christie and Dione Downie. 4 witnesses gave evidence for the defender, namely, the defender Andrzej Kupinski, Graeme Gordon and two police officers being PC Gemma Kane and PC Donald King.

[6] There was a sharp conflict on the facts. The pursuer averred the defender's lorry, which had been stationary, moved forwards on a road suddenly and without warning as the lorry was being overtaken by a group of four cyclists. The pursuer was one of the cyclists. The pursuer was unable to take evasive action and her bike collided with the lead bike in front of her resulting in significant injuries to the pursuer. The defence to the action was narrow namely that the defender's lorry was stationary at the time of the collision between the two bikes. Accordingly, the defender was not at fault.

[7] In the course of submissions, counsel for the pursuer accepted that in the event of the court finding that the defender's lorry was stationary at the time of the collision the claim in damages could not succeed. Similarly, counsel for the defender accepted that in the event of the court finding that the defender's lorry had moved forwards before the collision when the

pursuer fell off her bike that the defender would be liable in damages, subject to any finding of contributory negligence.

[8] There was no expert evidence in this case. Whether or not liability is established by the pursuer on a balance of probability turns on the assessment of the credibility and reliability of the witnesses who gave evidence before the court. The following is a summary and assessment of each of the witnesses who gave evidence.

Sally Nicol

[9] Ms Nicol was aged 37 at the date of proof. She was a police officer with Police Scotland with 12 years' service.

[10] Ms Nicol was a keen cyclist who had organised regular group cycle runs since about 2011, a short run being about 40 miles and a long run being about 70 miles. The pursuer had recorded some 12,500 miles cycling during the past 5 years.

[11] Ms Nicol had attended a response training course 6 years ago. She had also attended an advanced driving course.

[12] The weather conditions were good on the morning of 21 April 2015. It was dry with good visibility.

[13] Ms Nicol was involved in an accident on 21 April 2015. At the time of the accident on 21 April 2015 Ms Nicol was with a group of four cyclists, riding in single file, with Ms Nicol in position 2.

[14] It was the evidence of Ms Nicol she had ridden with Gordon Christie (position 1) and Dione Downie (position 3) for a number of years. Ms Nicol had ridden a few times with Craig Walker (position 4).

[15] The pursuer gave evidence of safety benefits to a group of cyclists riding in single formation or chain gang formation. There was no contrary evidence. The group stays closer together than if cycling individually and takes up less of the road. The group is easier to overtake. There is less risk of a vehicle cutting in on a group of cyclists than if cycling individually. A group of cyclists is easier to be seen. A group of cyclists in chain gang formation will be able to get past obstacles or hazards quicker as the group will travel at a greater speed than an individual cyclist.

[16] As the group were travelling along the A811 Gartocharn to the A809 in an easterly direction near to the entrance to Catter Bog Cottage the pursuer had a clear, unobstructed view of the rear of the defender's lorry. The lorry was pulled over to the left-hand side of the road facing the same direction (easterly) as she was travelling. The lorry was displaying hazard warning lights. The lorry was not able to get off the road on the left-hand carriageway. The lorry was taking up most of the left-hand carriageway.

[17] It was the evidence of Ms Nicol there was a grass verge on the left-hand side of the road. The defender's lorry was "right up on the verge".

[18] Ms Nicol described the rear of the lorry as being very dirty but that the hazard warning lights were quite clearly visible. The lorry was stationary.

[19] As the group approached the lorry the intention of the group was to overtake the lorry. Ms Nicol described how each of the four cyclists was responsible for their own safety and each would carry out their own safety checks. Ms Nicol carried out safety checks including looking over her shoulder and checking there was nothing behind her. This was a straight stretch of road and she had good visibility ahead. Ms Nicol was looking ahead, not looking down. It was the evidence of Ms Nicol that "it was most definitely safe to overtake". Ms Nicol stated she would not take any risks when carrying out an overtaking

manoeuvre. The group, including Ms Nicol, moved out to the centre white line in order to overtake the lorry.

[20] It was the evidence of Ms Nicol that at that point the lorry started to pull off onto the road. Ms Nicol saw this. The lorry was travelling at a “rolling speed” in the same direction as the group. Ms Nicol was just a couple of metres behind the rear of the lorry when the lorry moved forwards. At that point, Ms Nicol was just by the centre white line with the group still in single file formation.

[21] Describing the accident, Ms Nicol explained “it all happened within a split second”. Ms Nicol realised the overtaking manoeuvre was no longer possible because the lorry had started to move forwards.

[22] The lorry driver had given no indication of his intention to move. There was no signal and no indicator. The last Ms Nicol saw of the rear of the lorry before the accident was seeing the hazard warning lights still on the lorry. Gordon Christie shouted “whoa! whoa!” and he hit the brakes on his bike. Ms Nicol thought Mr Christie veered to the left slightly. Ms Nicol braked but was unable to take avoiding action. Ms Nicol’s bike hit Mr Christie’s bike in front of her. She then went flying off and ended up on her back in the opposite carriageway.

[23] I formed a favourable impression of Ms Nicol as a witness. Ms Nicol was a very experienced cyclist with attention to detail. Ms Nicol was a robust witness who gave a clear and consistent account of the collision. I am satisfied Ms Nicol would not have compromised on her own safety as a cyclist in carrying out an overtaking manoeuvre. I am satisfied Ms Nicol took all reasonable precautions for her own safety before starting the overtaking manoeuvre. Ms Nicol was in no doubt whatsoever the defender’s lorry moved

forwards when she was just a couple of metres behind the lorry and when she was then travelling at a speed of about 24-25 mph. Ms Nicol was a credible and reliable witness.

Gordon Christie

[24] Mr Christie was aged 48 at the date of proof. Mr Christie was a police officer with Police Scotland with 25 years' experience. Mr Christie had completed driving courses in the course of his work as a police officer which stress tested observation skills.

[25] Mr Christie was a keen cyclist and in 2015 he was a member of some cycling clubs. He would cycle 150-200 miles in a week.

[26] On 21 April 2015 Mr Christie was the lead cyclist of the group of 4, with the pursuer being at position 2. They were travelling in single file, known as chain gang, in an easterly direction on the A811 near to Catter Bog cottage ("the cottage"). The group was travelling at around 22-23mph along the A811.

[27] Mr Christie recalled seeing a lorry parked adjacent to the cottage on the other side of the road just prior to the cottage. The lorry was parked right at the grass verge and took up the whole carriageway. It was the evidence of Mr Christie that there might have been about 1 foot between the offside of the lorry and the centre line of the road.

[28] The group had come round a right hand bend with good visibility ahead. Mr Christie could see the lorry up ahead, parked, and with its hazard warning lights on. The intention of the group was to pass the lorry.

[29] In order to pass the lorry it was necessary to go onto the opposite carriageway, cross the centre white lines, for a better view ahead. There was a car coming from the opposite direction but Mr Christie judged that car to be far enough away for it to be safe for the group to overtake the lorry.

[30] It was the evidence of Mr Christie that just as he and the rest of the group approached the lorry in order to overtake the lorry and when the group was about 2-3 metres from the rear of the lorry (it was difficult for Mr Christie to be exact about distances) the lorry started pulling away slowly forwards in the direction of the cottage. Mr Christie saw the lorry stationary with the hazard warning lights still on as the group approached the rear of the lorry. Mr Christie saw no indication from the lorry of any intention to move forwards. Mr Christie was "not far behind the lorry" as the lorry moved off; the group was "seconds" behind the lorry when the lorry moved off.

[31] The group had pulled out to overtake the lorry. Mr Christie had soft pedalled which would give him more time to think what he was doing or going to do. Mr Christie generally kept an eye on speed. Even at soft pedalling Mr Christie would have still been travelling at around 20mph. He was not slowing down.

[32] Mr Christie thought he shouted "whoa!". He had no time to shout out "slow" or "stop" to the others in the group. He was shocked. He got a fright. He had a split second to decide what to do. He did not know where the lorry was going. He sat up in his bike and braked. He was relying on instinct by that time. Mr Christie explained sitting up helped to slow the bike down as there was more wind.

[33] The next thing that happened was that he was aware of the pursuer flying over his right shoulder and that her bike or handlebars had locked under his seat.

[34] Mr Christie ended up on the grass verge on the left hand side of the road behind the lorry.

[35] As for the lorry, Mr Christie believed it "kind of stopped" but eventually turned right after the cottage into a driveway. It was a couple of minutes after the lorry stopped that Mr Christie saw the lorry turn right into a driveway.

[36] Asked whether he had any discussion at the scene, it was the evidence of Mr Christie that someone came from the cottage with a blanket. In discussion Mr Christie had said the lorry driver had pulled out in front of the group of cyclists. This person had said the cyclists were riding two abreast. Mr Christie had stopped any conversation with that person after that was said.

[37] As with the other eye witnesses a brief statement was noted by a police officer. PC Gemma Kane noted the statement of Mr Christie at 1055 on the day of the accident, some 20 minutes or so after the accident. Curiously Mr Christie volunteered to the court that, while he had signed his statement, he had not read over his statement before signing the statement. This did seem extraordinary given his long experience as a police officer. Mr Christie was defensive about the accuracy of the content of the police statement but, given the brief nature of his witness statement, indeed all the witness statements, it is more likely than not that is what Mr Christie said.

[38] I do not place great weight on the police statement for Mr Christie given the brief content but some details are of interest.

[39] The key section of the police witness statement reads:

“...As I was nearing the lorry he appears as if he was pulling off. I don’t know if he saw us. There was a car coming the opposite way towards us. Because the lorry’s been pulling out I’ve had to slow down at which point I heard a scream and then felt Sally’s bike hit the back of mine. The bike wheels locked together and she has come off her bike. The lorry then slowly pulled away and went into the driveway of the big white house...”

[40] There was some focus in the course of Mr Christie’s evidence on the use of the word “appears” but a couple of sentences later Mr Christie continues “Because the lorry’s been pulling away...” I do not consider the word “appears” dilutes Mr Christie’s account of the lorry moving prior to the accident. Reading the police statement as a whole, and having

regard to the limited nature of the statement, there is in my view no inconsistency between what Mr Christie said to the police officer on the day of the accident and his more detailed account of the accident when giving evidence in court.

[41] While I might describe Mr Christie's explanation as odd for not reading the witness statement before signing the statement and attempting to distance himself from at least the word "appears" in the statement, on a full consideration of that evidence and assessing Mr Christie having given evidence in court, I am not concerned at the minor possible discrepancy.

[42] I have concluded that Mr Christie was a credible and reliable witness.

Dione Downie

[43] Ms Downie was aged 47 at the date of proof. Ms Downie was a support officer for Police Scotland. She was a keen cyclist covering about 200 miles a week.

[44] On 21 April 2015 Ms Downie was riding in position 3 in the group of four cyclists in a chain gang formation. Ms Downie denied having her head down, rather she was riding low on her bike but with her head and chin up so that she could see where she was going.

[45] As the group were making their way in a westerly direction along the A811 near to the cottage she saw an articulated lorry ("artic") parked up ahead. She could see the artic from quite a distance as the road was straight.

[46] Ms Downie was behind the pursuer but she could not say how far behind as the distance between herself and the pursuer was "fluid"; it was not a static distance.

[47] As the group of cyclists approached the rear of the lorry, the lorry was stationary with its hazard warning lights on. The group started to overtake the lorry moving towards the centre line of the road as the road was clear ahead. Each cyclist made an individual

decision whether or not it was safe to overtake. Ms Downie was not relying on Mr Christie as the lead cyclist.

[48] When Ms Downie was a distance of about 3 metres from the back of the lorry, the lorry started to move forwards. The lorry gave no warning it was going to move forwards. Ms Downie then saw the pursuer and Gordon Christie come together in a collision. Ms Downie saw Mr Christie's bike move in towards the left hand side of the road as there was contact between the two bikes. Ms Downie managed to go round the side of the two of them to avoid a collision with them.

[49] Ms Downie then cycled past the lorry before coming off her bike at the side of the road then running back to assist the pursuer. It was the evidence of Ms Downie that she went past the cottage before she was able to stop her bike. She stopped her bike about a car length ahead of the lorry, so that she had space to pull in. It was the evidence of Ms Downie that the lorry was definitely moving as she passed the lorry. Ms Downie recalled hearing "a really big noise" from the lorry.

[50] I did not place any weight on the actual position of Ms Downie's bike once she stopped her bike, given the absence of any measurements of distances, but I accepted Ms Downie stopped her bike some distance ahead of the lorry.

[51] Ms Downie gave a consistent account of the lorry moving forwards prior to the accident as the group of cyclists was close to the rear of the lorry. Ms Downie gave her evidence in a straightforward manner. I had no reason to doubt her credibility and reliability as a witness.

[52] I concluded Ms Downie was a credible and reliable witness.

Graeme Gordon

[53] Mr Gordon was aged 62 at the date of proof. Mr Gordon was a farmer at Catter Bog farm (“the farm”).

[54] On the morning of 21 April 2015 a lorry arrived for a collection. The lorry was driven by the defender. The driver parked his lorry on the A811 then came on foot to Mr Gordon’s farm to check that was the right place for the collection and to assess the access for the lorry. Mr Gordon met the defender and showed him where he was to uplift a forklift truck and where the defender could turn the lorry safely.

[55] The defender then walked back along the edge of the A811 to where his lorry was parked. That took several minutes. Mr Gordon remained at the right hand entrance to the access the defender was to use, waiting for the defender to come along the A811 towards him and into the entrance access. Mr Gordon did that to make sure the lorry manoeuvre was safe. The A811 was a very busy road and Mr Gordon did this through habit.

[56] The lorry was parked fully in the left hand lane of the road facing in an easterly direction. The lorry was almost the same width as the carriageway. The lorry was not on the grass verge to the left hand side of the road to any extent.

[57] As Mr Gordon was waiting for the lorry he saw a group of four cyclists in brightly coloured cycling clothing, two abreast, travelling quite quickly eastwards on the A811. Mr Gordon was reasonably sure the group of cyclists were travelling two abreast. Within a very short period of time the group was very close to the parked lorry. It was the evidence of Mr Gordon that at the same time the defender was climbing into his cab from the nearside of the lorry.

[58] Mr Gordon expected the group of cyclists to stop but the group did not stop. The group of cyclists started overtaking the lorry which was still parked. The group had only just started the overtaking manoeuvre when suddenly and without warning the front two

cyclists collided with one another, quite to his disbelief and for no reason he could see, except to suggest that there had been a total misjudgement on the part of the cyclists with them riding too fast and too close. The lorry was sitting stationary when the collision happened.

[59] After the accident Mr Gordon immediately made his way towards where the collision had occurred. His initial impression was that two cyclists had collided, one of the cyclists had fallen off and that the collision was not serious.

[60] When he reached the locus where the collision had occurred, as the road was a very busy road Mr Gordon said to the defender that he should go up the road, as arranged, to enter into the farm access. Mr Gordon then walked back up the road to the access alongside the lorry. The defender was travelling at walking pace. The defender then drove the lorry into the farm access.

[61] Mr Gordon immediately then went back to the locus of the collision where the pursuer was receiving medical assistance. Mr Gordon then returned to the farm where he picked up a new continental quilt which he had in his car in order to make the pursuer more comfortable.

[62] Mr Gordon had a brief exchange with one of the cyclists at the locus who was suggesting the lorry driver was to blame. Mr Gordon had disputed that: "the lorry didn't cause that".

[63] While Mr Gordon was doing his best to tell the truth, I concluded Mr Gordon was not a reliable witness. Where the evidence of Mr Gordon was inconsistent with the three cyclists I preferred the evidence of the three cyclists.

[64] I prefer the evidence of the three cyclists that they were riding in chain gang formation, that is single file, and not two abreast as spoken to by Mr Gordon. While

Mr Gordon may have believed the cyclists were two abreast I have concluded he was mistaken. That mistaken belief by Mr Gordon that the group of cyclists was riding two abreast was likely to have influenced Mr Gordon's perception of what he saw of the collision between the two cyclists and the cause of that collision.

[65] Mr Gordon saw a collision between two cyclists, which is what happened.

Mr Gordon could offer no explanation for the two cyclists colliding, other than suggesting some misjudgement from riding too fast and too close to one another. That was speculation on the part of Mr Gordon. There was, of course, no collision with the lorry.

[66] I prefer the evidence of the three cyclists that the defender moved his lorry forwards slowly, suddenly and without warning, as the group of cyclists was about to commence the overtaking manoeuvre. That is what caused Gordon Christie to take evasive action and led to the pursuer then colliding with Mr Christie's bike.

[67] I do not accept the evidence of Mr Gordon that the defender was in the process of climbing into the cab of the lorry simultaneously as the group of cyclists began the overtaking manoeuvre. Mr Gordon was mistaken about that.

[68] That evidence of Mr Gordon was inconsistent with the three cyclists and with the defender himself. The defender described himself as being in his cab at the time of the collision, having looked in his mirrors, switched on the ignition, turned on the engine, taken off the handbrake and having put his foot on the footbrake, and looked again in his right hand mirror all **before** he saw the cyclists approaching his lorry.

[69] The evidence from the three cyclists was that the lorry moved forwards slowly, travelling at "rolling speed". I have concluded Mr Gordon was mistaken about what he saw from where he was standing that the lorry was stationary. The lorry was moving forwards slowly prior to the collision between the two bikes, but that was not seen by Mr Gordon.

Andrzej Kupinski

[70] Mr Kupinski gave evidence on a live video link from Poland with the assistance of an interpreter.

[71] Mr Kupinski was aged 60 at the date of proof. Mr Kupinski had been a professional lorry driver for 6 years as at the date of the accident on 21 April 2015.

[72] On 21 April 2015 Mr Kupinski was driving an articulated DAF XF Euro 6 460 HGV with registration number PZ73 6HK ("the lorry") eastwards along the A811.

[73] It was the evidence of Mr Kupinski that he stopped his lorry on the left hand side of the A811 on the kerb facing eastwards a short distance before the cottage prior to the incident.

[74] Mr Kupinski parked the lorry, switched on the hazard warning lights on the lorry, turned off the ignition and then got out of the cab to orient himself. He then walked towards the cottage to check if he was at the correct address for the uplift he was to make.

[75] Mr Kupinski met someone at the entrance gate to the farm who showed him the equipment to be loaded on the lorry and the access gate. After that Mr Kupinski went back to his lorry and got back in the cab from the nearside. Mr Kupinski then waited for one of the employees of the farm to signal him when he could enter the access gate.

[76] Mr Kupinski checked his mirrors, started the ignition – that is Mr Kupinski started the engine – took off the handbrake and put his foot on the footbrake, and looked again in his right hand mirror when he then saw the group of cyclists. Mr Kupinski could not be precise about distances as he was looking through his right hand mirror but it was his evidence the group of cyclists was a distance of some 20-30 metres behind the lorry, "quite a fair distance" behind the lorry, when he first saw the group of cyclists.

[77] It was the evidence of Mr Kupinski that his lorry remained stationary and that he kept looking in his right hand side mirror waiting for the cyclists to pass him. Mr Kupinski then noticed one of the cyclists fall to the ground.

[78] Asked if there was any other traffic on the road, according to Mr Kupinski he saw some cars travelling from the opposite direction at about the time of the accident.

Mr Kupinski also saw some cars coming from the right hand side that is behind him.

[79] After he saw the cyclist fall to the ground Mr Kupinski noticed another cyclist pass him as a car passed the lorry from the opposite direction. The cyclist passed the lorry between the lorry and the car coming from the opposite direction then stopped. That cyclist then went back to assist the person who was on the ground.

[80] It was the evidence of Mr Kupinski that the lorry did not move before the collision between the two cyclists. Mr Kupinski gave evidence that he could not move the lorry then as he could see traffic coming from the opposite direction. He was waiting for the person at the cottage to signal him to move forward and guide the lorry right into the access gate as the road into the gate and the access gate were narrow, and for that same person to stop the oncoming traffic for that to happen.

[81] After the collision between the two cyclists Mr Kupinski only moved forward once he saw the oncoming traffic had stopped by the person at the cottage and when that person at the cottage signalled him to move forward. Mr Kupinski then moved forward slowly towards the access gate.

[82] Mr Kupinski proceeded to uplift the equipment, a tractor, onto the lorry and was getting himself ready to leave the premises when he saw police officers arriving at the premises. Mr Kupinski then spoke with police officers through an interpreter.

[83] It was the evidence of Mr Kupinski that he could see the collision of the two cyclists and what happened after the collision through his right hand mirror. The collision must have occurred some distance behind the lorry otherwise he would not have been able to see them behind the lorry. Mr Kupinski repeated that he could not give a precise view on what distance: it was further than just a couple of metres behind and could have been a few tens of metres, greater than 10 metres.

[84] At the very end of re-examination Mr Kupinski was asked:

“If the cyclists say you did move before the fall are they mistaken?”

[85] Mr Kupinski answered the question:

“Well, they might be mistaken but I could also be mistaken. It all happened so long ago.”

[86] On a review of all the evidence, I did consider this was telling from Mr Kupinski not just a throw-away remark. It appeared to me that Mr Kupinski was questioning his own reliability.

[87] On record, it was averred on behalf of Mr Kupinski that he was stationary but that he had indicated right prior to the collision. In evidence Mr Kupinski denied he had indicated right prior to the collision. It was the evidence of Mr Kupinski that he indicated to turn right only when he was turning into the access gate. In order to assist the court I was informed by counsel for the defender that that information had been taken from the police statement noted from Mr Kupinski on the day of the collision as there had been difficulties in obtaining a statement from Mr Kupinski. That may be so but there was no motion to amend to delete that averment. That was the case on record for the defender at proof.

[88] There was no other evidence to support Mr Kupinski that there was oncoming traffic, only one car approaching from the opposite direction. There was no other evidence

to support Mr Kupinski that a person at the access gate stopped the oncoming traffic approaching from the opposite direction. There was no other evidence to support Mr Kupinski that he was signalled from a person at the access gate to move forward.

[89] I regret I found the evidence of Mr Kupinski about the position of the cyclists being tens of metres or at least 10 metres behind his lorry immediately prior to the collision as unconvincing. I have rejected that evidence as unreliable. That evidence was inconsistent with his own evidence of how far was the group of cyclists when he first saw them: “a distance of some 20-30 metres behind the lorry, “quite a fair distance” behind the lorry”. That evidence was also inconsistent with all three cyclists whom I accepted as credible and reliable. If the cyclists were close to the rear of the lorry immediately prior to the collision, Mr Kupinski could not have seen the cyclists from the right hand mirror. His view of the cyclists would have been obscured.

[90] Mr Kupinski described seeing the collision in the right hand mirror then another cyclist passing him before going back to assist the pursuer. According to Mr Kupinski he witnessed a collision between two of the cyclists then he witnessed a further cyclist passing by the lorry. Mr Kupinski saw a cyclist on the road. Mr Kupinski had all this occurring round about his lorry but he gave no consideration to getting out of his cab to see if he could assist, rather Mr Kupinski preferred to move forward slowly with his lorry as soon as he could. I found that absence of consideration troubling although I take into account Mr Kupinski did not speak English.

[91] I have concluded that while Mr Kupinski was doing his best to recall the events of 21 April 2015 and that he genuinely believed his version of the incident was accurate, he was not a reliable witness. On a balance of probability, his account is not supported by the

evidence which I have accepted as credible and reliable. Where Mr Kupinski's evidence was inconsistent with the evidence of the three cyclists, I prefer their evidence.

[92] On an assessment of all his evidence, I consider it was telling that at the very end of his evidence, Mr Kupinski accepted he might have been mistaken in his recollection of what happened.

[93] Looking at the evidence of Mr Kupinski and assessing the reliability of his evidence with other evidence before the court, prior to the collision between the two bikes Mr Kupinski had climbed back into the cab of his lorry; he intended to move forwards; he turned on the ignition and started the engine; he released the handbrake and put his foot on the footbrake. His evidence about the distances of the group of cyclists was unreliable. He could not have seen the group of cyclists in his right hand mirror at the point the group were starting the overtaking manoeuvre. At a distance of a few metres from the rear of the lorry, Mr Kupinski's view of the group of cyclists would have been obscured.

[94] There was no evidence Mr Kupinski switched off the hazard warning lights on the lorry prior to the collision. It was the evidence of Mr Kupinski that he indicated to turn right only when he was turning into the access gate. The evidence of Mr Kupinski was that he did not indicate right prior to the collision, contrary to what is averred on his behalf on record. So, if the lorry moved forwards slowly prior to the collision that was suddenly and without warning.

[95] I have concluded that, on an assessment of all the evidence and on a balance of probability, Mr Kupinski moved the lorry forwards slowly prior to the collision suddenly and without warning and without any indication of his intention to do so, when it was unsafe to do so. That is what led to and caused the collision.

PC Gemma Kane

[96] PC Kane was aged 35 at the date of proof. PC Kane was a police constable with Police Scotland and with 13 years' experience.

[97] PC Kane attended the locus on 21 April 2015, obtained a statement from Gordon Christie and corroborated PC King speaking with Mr Kupinski.

[98] There was no cross examination. PC Kane was a credible and reliable witness in relation to that evidence.

PC Donald King

[99] PC King was aged 37 at the date of proof. PC King was a police constable with Police Scotland and with 18 years' experience.

[100] PC King attended the locus on 21 April 2015, noted statements from witnesses at the scene, noted details of the pursuer, identified the driver of the lorry Mr Kupinski, spoke to Mr Kupinski with the assistance of an interpreter, carried out some road traffic inquiries with Mr Kupinski, arranged recovery of the bikes involved in the collision, returned to the police station and concluded his enquiry.

[101] There was no cross examination. PC King was a credible and reliable witness in relation to that evidence.

Submissions and Discussion

[102] Both parties helpfully lodged written submissions expanded upon in the course of the hearing on 13 October 2017. The written submissions are referred to for their terms.

[103] During the course of the proof all the eye witnesses were referred by parties to various photographs depicting the locus and surrounding area in order to pinpoint

positions of witnesses including where the lorry was parked, where the collision between the two bikes occurred and where was the access gate to the farm in relation to the lorry and the collision etc. It is unfortunate none of the distances were measured. No actual distances were put to any of the witnesses for comment. All the witnesses could speak to were approximate positions, no actual distances at the various key points.

[104] As a starting point each case must be considered on its own facts and circumstances. On the assessment of the credibility and reliability of the witnesses, I have found the three eye witnesses led on behalf of the pursuer, namely the pursuer, Gordon Christie and Dione Downie to be credible and reliable witnesses.

[105] I have concluded the defender and Graeme Gordon were not reliable witnesses as to the facts leading to the collision between the two bikes, that the defender's lorry moved forwards slowly, suddenly and without warning and without any indication, prior to the collision and that where the evidence of the defender and Mr Gordon was inconsistent with the evidence of the pursuer and her two witnesses I prefer their evidence.

[106] The pursuer has proved on the balance of probability that the cause of the collision was that, prior to the collision, the defender suddenly and without warning and without giving any indication, moved forwards slowly in his lorry from a stationary position on the A811 when the lorry was in the course of being overtaken by the group of cyclists and when it was unsafe for the lorry to move forwards. It was reasonably foreseeable that if the defender were to move forwards in his lorry suddenly and without warning and without giving any indication an accident would occur which is what happened.

[107] The accident on 21 April 2015 was caused by the fault and negligence of the defender who failed to take reasonable care for the safety of other road users, failed to keep a proper lookout for other road users, and failed to give way to the group of cyclists in the process of

overtaking the lorry by moving the lorry forwards slowly eastwards on the A811 from a stationary position suddenly and without warning and without giving any indication when it was unsafe so to do.

[108] Further, as I have already noted in this judgment, counsel for the defender conceded that if the court were to make a finding in fact that the defender moved forwards with his lorry prior to the collision of the two bikes then liability would be established. Accordingly, liability has been established against the defender by the pursuer on a balance of probability.

[109] The only other matter for determination is the question of any contributory negligence.

[110] Counsel for the pursuer submitted there should be no finding of contributory negligence. There are written submissions on contributory negligence which I do not intend to repeat but which are referred to for their terms.

[111] Counsel for the defender submitted the court should make a finding of contributory negligence and that should be assessed at 75%. There are written submissions on contributory negligence which I do not intend to repeat but which are referred to for their terms.

[112] The factual basis supporting a contributory negligence case for the defender is set out in Answer 5:

“Believed and averred the Pursuer advised the Police she was travelling approximately one foot behind the lead cyclist at a speed of approximately 24 miles per hour.”

[113] The case on record for the defender was that the pursuer had the following duties of care:

- to take reasonable care for the safety of other road users;
- to keep a proper lookout;

- to keep her bicycle under proper control;
- to take reasonable care to cycle at a safe speed from the cyclist in front; and
- to take reasonable care to cycle at a safe distance from the cyclist in front.

[114] I heard submissions from both parties covering all these duties of care. I was referred to various rules of the Highway Code (see written submissions) in relation to safe speed and safe distance. I refer to section 38 of the Road Traffic Act 1988 and in particular section 38(7) of the Act, as covered in Wilkinson Road Traffic Offences (27th Edition) at 5.48:

“The Highway Code is a good guide to whether the motorist has departed from the required standard of driving, but breach of the code is not necessarily conclusive”.

[115] The pursuer disputed all the propositions put to her that she was in breach of the rules of the Highway Code that applied to her as a cyclist at the time of the collision.

[116] I heard evidence from the pursuer about the safety features of a group of cyclists riding in single formation or chain gang formation, namely, the group is easier to be seen; the group stays closer together than if cycling individually and takes up less of the road; the group is easier to overtake; there is less risk of a vehicle cutting in on a group than if cycling individually and a group will be able to get past obstacles or hazards quicker as the group will travel at a greater speed than an individual cyclist.

[117] The pursuer gave evidence that before carrying out the overtaking manoeuvre she carried out a number of safety checks. The pursuer looked over her shoulder to ensure there was no one behind her. The pursuer also had a proper lookout ahead of her to see that the road ahead was clear. The pursuer was looking ahead, not with her head down. There was an oncoming car which was in the distance. The pursuer observed the lorry was still stationary displaying hazard warning lights. The pursuer was satisfied it was safe for her to overtake the lorry.

[118] As an experienced cyclist, it was the evidence of the pursuer that she would not take any risks when carrying out an overtaking manoeuvre. I accepted that evidence.

[119] The evidence of the pursuer was that she was riding about 1 foot behind Mr Christie at the time of the collision. The pursuer disputed that was not a safe distance between herself and Mr Christie. It was the evidence of the pursuer a distance of one foot was sufficient. No alternative distance was put to the pursuer as being a safe distance. The defender has not proved on a balance of probability that the pursuer was riding too close to the bike in front of her.

[120] The defender gave no indication of an intention to move forwards. The hazard warning lights were being displayed on the lorry before the lorry moved forwards. The lorry moved forwards suddenly and without warning. In all these circumstances I am satisfied the pursuer took reasonable care for her own safety.

[121] The difficulty for the defender in this case is that there was no contrary evidence before the court to challenge the evidence of the pursuer and the witnesses on behalf of the pursuer.

[122] There was no reconstruction evidence, no expert evidence or reliable witness evidence about safe speed or safe distance to challenge the factual evidence from the pursuer of her speed and her distance from the bike in front or to challenge the evidence of Mr Christie about speed, which would then enable the court to draw any adverse inferences and/or make any findings in fact or findings in fact and in law about what would not have been a safe speed or what would not have been a safe distance. No alternative speeds or distances were put to any of the witnesses for the pursuer. Only then would the court be in a position to consider whether there had been any breach of a duty of care by the pursuer in

relation to safe speed or speed distance. There was simply no contrary evidence to the pursuer and Mr Christie.

[123] In all the circumstances, and on the evidence before the court, submissions for the defender on safe speed and safe distance relying on rules of the Highway Code or otherwise to justify any finding of contributory negligence are not supported and could not be supported by any findings in fact nor any inferences arising from any findings in fact.

[124] Further, having regard to findings in fact 1, 2, 3, 4, 5, 6, 7, 8, 9, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24 and 26 I am not persuaded the pursuer failed to take reasonable care for the safety of other road users, failed to keep a proper lookout or failed to take reasonable care to keep her bike under proper control. The evidence that I have accepted as credible and reliable was to the contrary. The pursuer did keep a proper lookout. The pursuer did take reasonable care to keep her bike under proper control. It was the actions of the defender which caused the pursuer to lose control of her bike.

[125] Accordingly, on the case on record for the defender before the court, I am not satisfied the pursuer contributed to any extent to the collision. The submission on contributory negligence is repelled.

Decision

[126] The pursuer has established liability on the balance of probability. No contributory negligence has been established on the part of the pursuer. Damages are agreed in terms of the Joint Minute at £20,000 inclusive of interest to 5 September 2017. As agreed by both parties and to the satisfaction of the court, I sanction the employment of junior counsel. As requested, I reserve all questions of expenses. The Sheriff Clerk will be directed to fix a hearing on expenses.

IN RESPECT WHEREOF

Edinburgh, 31 October 2017

Robert D M Fife
Sheriff of Lothian and Borders at Edinburgh