

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

[2017] SC EDIN 81

PN/2603/16

JUDGMENT OF SHERIFF PETER J BRAID

in causa

SHARON GILMOUR

Pursuer

against

LINEA DIRECTA ASEGURADORA SA COMPANIA SE SEGUROS Y REASEGUROS, a
company registered in the Commercial Register of Madrid, Volume 7, 902, Folio 41, Page M-
127697, Company Number A-80871031 and having its registered office at Tres Cantos, Madrid
(28769), Calle Isaac Newton 7, Spain, whose UK Handling Representative is Coris UK Ltd, 40
Holburn Viaduct, London, EC1N 2PZ

Defender

Act: Wilson
Alt: Galbraith

Edinburgh, 14 November 2017

The sheriff, having resumed consideration of the cause, makes the following findings in fact:

Findings in fact

1. The pursuer is Sharon Gilmour. She resides in Saltcoats, Ayrshire. Her date of birth is 14 October 1970.

2. The defender is Linea Directa Aseguradora Sa Compania De Seguros Y Reasegueros, a company registered in the Commercial Register of Madrid, Volume 7, 902, Folio 41, Page M-

127697, Company Number A-80871031 and having its registered office at Tres Cantos, Madrid (28769), Calle Isaac Newton 7, Spain.

3. On 21 September 2014, the defender was the motor vehicle insurer of a motor vehicle, namely a Honda 650 CB motorcycle with registration plate TF-6986-O (“the motorcycle”), owned by Jose Luis Delgado Morales (“the insured”). The defender is domiciled in Spain.

4. On 21 September 2014, the pursuer was in Costa Adeje, Tenerife, Spain. She had travelled to Tenerife that day on holiday.

5. The pursuer arrived in Costa Adeje at about 1.00 pm. After going to her holiday apartment, she went out for a walk and to have a drink.

6. She went into Alex’s Bar, which is situated on the east side of the Avenida de los Pueblos.

7. The Avenida de los Pueblos is a main road which runs through Costa Adeje in a generally north/south direction. It has two lanes in each direction and is divided by a central reservation. An aerial view of it is shown in the photographs on page 5 of number 6/9 of process.

8. Alex’s Bar is shown most clearly on photograph 5/11/1 of process, being an image from Google Maps as at August 2014. It is the property on which the words “Pint of Beer” and “Sangria” appear on the shopfront. Next to the bar is a supermarket (lying further to the south). It is shown most clearly on photograph 5/11/2 of process. Directly outside the supermarket is a pedestrian crossing, which crosses the Avenida de los Pueblos (divided by the central reservation).

9. The pursuer consumed four bottles of beer, each of just under one pint, in Alex’s Bar, leaving there in the late afternoon or early evening.

10. The pursuer's holiday apartment lay to the northwest of Alex's Bar; that is, to reach it, she had to cross the Avenida de los Pueblos, and then turn to her right (north).
11. When the pursuer left Alex's Bar she was carrying a bottle of sangria in one hand and tomato juice in the other, which she had previously purchased in the adjacent supermarket.
12. She started to cross the Avenida de los Pueblos, from east to west, with the intention of returning to her apartment.
13. As she crossed the first two lanes, in order to reach the central reservation, she did not use the pedestrian crossing. She was turning behind her to speak to a man whom she had met in Alex's Bar, and who was also crossing the road from east to west. She was not looking out for on-coming traffic.
14. At the same time, Holly McMonagle was walking down a footpath on the east side of the central reservation, generally heading from north to south. She was approaching a street-lamp which lies on the central reservation approximately opposite Alex's Bar (being the street-lamp shown in photograph 5/11/14 of process). Ms McMonagle had reached approximately the point where the two people shown in that photograph are situated when she first saw the pursuer.
15. Ms McMonagle's attention was drawn to the pursuer because the pursuer was not looking where she was going. Ms McMonagle shouted to the pursuer to watch where she was going. The two women passed each other at or about the street-lamp referred to in finding in fact 14.
16. The pursuer either did not hear Ms McMonagle or paid no attention to her and continued to cross Avenida de los Pueblos. She appeared to be under the influence of alcohol. She stepped on to the west-most lanes, at least two metres in front (that is, to the north) of the pedestrian crossing. As she did so she was still shouting back to the man who was crossing the road behind her. She did not look out for on-coming traffic.

17. Almost immediately, the pursuer was struck by the motorcycle, which was being ridden by the insured. She landed a short distance before (that is, to the north of) the crossing. She was not thereafter moved, and did not move, before the emergency services arrived. She is shown being tended to on the upper photograph on page 15 of number 6/9 of process.

18. Liability for the accident falls to be determined according to the law of Spain.

19. Under Spanish law, liability for an accident between a motor vehicle and a pedestrian is regulated by Royal Decree 8/2004 of 29 October 2004. Article 1 of that Act provides that the driver of a motor vehicle is responsible, as a result of the risk created by the act of driving, for damage caused to persons or property in connection with the driving. Where injury is caused, the driver is relieved of this responsibility only when he proves that the damage or injury was due solely to the conduct or negligence of the injured (or *force majeure* unrelated to the driving or operation of the vehicle). If there is negligence on the part of both the driver and the victim, there is a fair apportionment of liability and the amount of compensation, having regard to the relevance of the fault of each.

20. The effect of that Royal Decree is to establish strict liability on the part of a driver of a motor vehicle which is in collision with a pedestrian. Liability of such a driver is presumed unless he can prove that the other party caused the accident in full. The burden of proof thus lies on the driver to prove not only that his driving complied with all relevant driving regulations and that he took all necessary care but also that the other road user, namely the pedestrian, was the sole cause of the accident.

21. The standard of care which the driver has to establish in order to escape liability is one which goes beyond reasonable care. He must show that his driving was beyond reproach and that the accident was unforeseeable and unavoidable.

22. A Spanish court will absolve a driver completely only where there is clear evidence that he was not to blame and did not cause the accident. However, an assessment of concurrent or

contributory negligence is based upon a consideration of the whole circumstances, and the court has complete discretion as to how to apportion liability depending on the respective degrees of fault of the driver on the one part, and the pedestrian on the other.

23. Assessment of fault takes into account such matters as: speed, the layout of the road, whether or not the driver had a clear view, what lane the driver is in and whether or not the pedestrian was using an available pedestrian crossing.

24. By crossing the road where she did, without looking, whilst under the influence of alcohol and not making use of the pedestrian crossing, the pursuer failed to take reasonable care for her own safety. She thereby materially contributed to the accident.

The sheriff makes the following findings in fact and law

1. This court has jurisdiction.
2. The pursuer has a direct right of action against the defender in terms of Council Regulation (EC) No. 1215/2012 of 12 December 2012.
3. The defender, not having proved that the accident was wholly caused through the fault of the pursuer, and not having proved that the insured's driving was beyond reproach, is liable to make reparation to her therefor.
4. The pursuer having materially contributed to the accident through her own negligence, any award of damages should be reduced.
5. The appropriate allocation of fault as between the pursuer and insured is two thirds (66.67%) to the pursuer and one third (33.33%) to the insured.

Therefore finds the defender liable to make reparation to the pursuer, any damages being reduced by 66.67% on account of the pursuer's contributory negligence; assigns 20 November

2017 at 2p.m. within the Sheriff Court House, 27 Chambers Street, Edinburgh, as a hearing on expenses and as a procedural hearing to determine further procedure.

Note

[1] This action arises out of an accident sustained by the pursuer when she was in Costa Adeje, Tenerife on holiday in September 2014. It is not disputed that this court has jurisdiction, by virtue of Council Regulation (EC) number 1215/2012 of 12 December 2012, nor is it disputed that the pursuer has a direct right of action against the defender, an insurance company, by virtue of that Regulation.

[2] The accident having occurred in Spain, liability falls to be determined in accordance with Spanish law. A preliminary proof on liability took place before me on 24 to 27 October 2017. Initially it appeared that two issues fell to be resolved at the proof namely:

- (i) how the accident occurred and;
- (ii) how Spanish law deals with liability of the driver in a collision with a pedestrian.

However, as will be seen, there turned out to be little or no divergence between the parties on that second issue, their respective experts being in full agreement as to what the law of Spain is.

The evidence

[3] It being accepted from the outset that the onus of proof lay on it, the defender led at the proof. The first witness was Holly McMonagle who is English but who has lived in Tenerife for some 14 years and now works there. She remembered the incident well because her aunt had been in a road traffic accident that very day. She was walking along a footpath leading to the

central reservation on the Avenida de los Pueblos, where the accident occurred. She described the layout of the road, by reference to photographs. None of that evidence is controversial, and it is recorded in findings in fact 6 to 8. She observed the pursuer come from her left, crossing the road. She thought she may have come from a bar (Alex's Bar) although she could have come from the supermarket next door. She was carrying a bottle of sangria and some tomato juice. Ms McMonagle noticed that the pursuer was not crossing on the pedestrian crossing which crosses Avenida de los Pueblos at that point. She, the pursuer, was not paying attention to where she was going. She was looking behind her, speaking to a man who was also crossing the road in her direction. Ms McMonagle shouted to the pursuer to watch where she was going. They passed each other at about a street-lamp which is on the central reservation, shown on photograph 5/11/14 of process, where the fence begins. The pursuer, who appeared to Ms McMonagle, due to her demeanour, to be under the influence of alcohol, paid no attention to her, or did not hear her, but continued to cross the next two lanes of the road, still looking behind her. Almost immediately she was struck by a motorcycle and fell to the ground. She landed short of the pedestrian crossing. She had not been crossing at the crossing. The motorcycle was not travelling fast. He managed to stop before reaching the crossing. Neither he nor his passenger fell off. The bike was moved after the accident, before photographs were taken. As regards where on the road the pursuer was when she was struck, that was not explored in detail with Ms McMonagle. However, she did volunteer at one point in her evidence that the pursuer was struck where the arrow was pointing in the photographs on page 6 of 5/9 of process.

[4] Ms McMonagle did not know the pursuer or the driver. She was contacted on Facebook by the pursuer some time later. The pursuer asked her to be a witness. She said that she would be but warned the pursuer that as far as she was concerned the accident was the pursuer's fault. In response to a question which was objected to by the pursuer, and the answer to which was given under reservation of relevancy and competency, Ms McMonagle said that the pursuer told her on Facebook that she had no recollection of the accident.

[5] The next factual witness was the pursuer herself. She said that she had arrived in Costa Adeje that day and got to her apartment at about 1.00 pm. After unpacking and changing she went out for a walk and to have a drink. She went into Alex's Bar, on the east side of Avenida de los Pueblos. She had four beers. When she came out she crossed the road. She was adamant that she used the crossing. Initially in her evidence she said that she was intending to go for something to eat first and then go back to her apartment. A few minutes later she agreed with a question put to her by counsel that she was intending to go home for something to eat. To reach her flat from Alex's Bar entailed crossing the road and then turning to her right. The pursuer's evidence was noteworthy for being punctuated by repeated assertions, not always in direct response to questions, that she was on the pedestrian crossing when she was hit. The first example of this came when she was asked, in a scene-setting question by counsel, where she was in September 2014 (clearly meaning, in the context in which the question was asked, where was she on holiday). She replied that she was on the pedestrian crossing. She did not accept that she was drunk. She had been speaking to people in the bar, in the way that one does on holiday. She said she had no recollection after stepping onto the second half of the road, from the central reservation, until waking up in hospital.

[6] In cross-examination it was put to the pursuer that after the accident she had revisited the scene some weeks later to try to find witnesses. She denied that, but accepted having been back each year since, and in September 2015 she said she had located a witness who had approached her in a bar and said that he remembered the incident. She accepted that she had been in touch with Holly McMonagle via Facebook. Indeed she accepted that she had told Holly McMonagle that she could not remember what had happened. She said that she had said that in order to find out what Holly McMonagle was going to say and whether it was consistent with what she told solicitors investigating the claim. It was also put to her that she had given conflicting accounts of her recollection of the incident to three doctors whom she had seen for the purposes of medical reports. For example, in 5/2 of process, being a report by Mr Angus McLean, Consultant Orthopaedic Surgeon, she is recorded as having said that she could not recall the exact circumstances of the accident, but was subsequently advised that cars had stopped and the motorbike came either on the inside or outside of the cars and hit her. In 5/3 of process, a report by Mr Colin J Mumford, Consultant Neurologist, it is recorded that she had no recall of what happened after she had left the bar. She explained away these apparent inconsistencies by saying that she was definitely on the crossing and that the doctors must have misunderstood in some way what she had said.

[7] The final eyewitness was Nuno Gonzalo, who lives and works in Costa Adeje. He said that in September 2014 he was crossing the road from west to east (that is in the opposite direction to the pursuer). He thought the accident occurred in the early hours of the afternoon. He passed a woman, to whom he did not pay particular attention at the time. He himself used the crossing. They passed on the central reservation. Before he had reached the other side of

the road he heard a bang. He looked round and saw the woman on the floor. He thought she was maybe dead. She was surrounded by others and he went on his way. A week or two later a woman whom he now knew to be the pursuer came in to a bar where he worked asking if anyone had witnessed her accident. He said that he had. He did not recognise the woman who came into the bar as being the woman who had been injured but he assumed it was her. He went with her to the police station and assisted her in trying to obtain a copy of the police report. He had seen her subsequently and they said hello to each other but they were not friends. He did not drink with her. She was lying just short of the pedestrian crossing when he saw her on the ground.

[8] It was put to Senor Gonzalo that he could not be sure that it was the pursuer who had been injured. However, he said that he was certain it was the same incident. He had not witnessed any other incidents. Anyway, he had definitely accompanied the pursuer to the police station to help her get a report of the accident which he had witnessed. He was in no doubt that she was the woman he had passed even though he had not paid any attention to her at the time.

Expert evidence – Cesar Troya Santana Engineer

[9] Evidence was given by Senor Santana who had prepared a report which is number 6/9 of process. He gave his evidence by live video link with the aid of an interpreter. I fully accept that Senor Santana has the necessary skill and experience to qualify him to give opinion evidence to the court. However, his report was largely undermined by the fact that it was clearly based on the police report, which, for whatever reason, was not available to me as it did

not form part of the productions which had been lodged. He also seemed unable to grasp the concept that his opinion must be based only on evidence which the court had heard, or to say what his opinion was without having any regard to the police report. I appreciate that he was operating at a disadvantage, not having been able to sit in on the evidence, and that there may also have been difficulties in translation. Nonetheless, his approach did significantly diminish the weight which I could attach to his evidence. Senor Santana did give some evidence which appeared to be based upon the evidence which had been elicited (as explained to him by counsel), namely, he offered the opinion that the insured was not driving at excessive speed because he was able to stop before the pedestrian crossing. He was also asked by the defender what the prevailing speed limit was. That question was objected to and the evidence given under reservation. He said that when he visited the road, the speed limit was 40 kmph. It also appeared that Senor Santana had drawn the arrows on the photographs on page 6 of his report, to indicate where the pursuer was when struck, based upon his interpretation of the material before him at that time. Finally, one significant piece of evidence given by Senor Santana was that it was difficult to predict how a pedestrian would be moved when hit by a motorcycle, the precise direction of travel depending on various factors.

Evidence as to Spanish law

[10] Evidence about Spanish law was given, for the defender, by Ivan Gonzalez Barrios (Senor Gonzalez) and for the pursuer by Ana Romero-Porro, both lawyers. They spoke to their respective reports nos. 6/3 and 5/12 of process. Through no fault of his own, Senor Gonzalez's evidence was difficult to follow because he was giving it by video link with the assistance of an

interpreter who clearly had some difficulty (through no fault of her own) with interpreting legal concepts. That made his evidence more difficult to follow than it might have been. His report was written in Spanish. There was a translation of it lodged in process which was, if anything, even more opaque than the translation by the interpreter in court. In addition it was not spoken to in evidence and so is technically not before me (with the exception of one small part thereof which was agreed by joint minute as mentioned below). By contrast, Senora Romero-Porro spoke fluent English and had written her report in English. Her evidence was therefore easier to understand. However, in the event, the evidence which she gave corresponded almost exactly with my eventual understanding of the evidence given by Senor Gonzalez on the previous day. Moreover, Senora Romero-Porro confirmed that she had read and understood Senor Gonzalez's report and that she agreed with it, save only that she thought that the case examples which he had given were not as representative as they might have been, since they illustrated only cases where the driver had been completely exonerated rather than cases where there had been contributory negligence. As regards informing the court what the law of Spain is, however, both experts were in complete agreement and having regard to the lack of controversy between them, it is regrettable that parties were unable to agree what Spanish law is. They did agree that the law was to be found in Article 1 of the Royal Decree 8/2004 of 29 October 2004 but they could not agree on how that fell to be translated into English. The extent of their agreement on that matter, reflected in a joint minute which was eventually lodged, was that two different translations had been prepared, one for the pursuer (which was in fact Senora Romero-Porro's translation as it appeared in her report), and the other for the defender, but that agreement is of little use save to confirm that the translations are similar, the

pursuer's being in better English. Be all that as it may, having heard from both experts, my understanding of Spanish law is as follows. Where there has been an accident between a motorist and a pedestrian (or cyclist) the onus is on the motorist to establish that he is not at fault. In that sense, Spanish law imposes strict liability. If the motorist is to avoid liability completely, there is a high onus on him to show, first, that the pedestrian was negligent and, second, that the pedestrian's negligence wholly caused the accident. That entails showing that the motorist was unable to avoid the accident. He must also show that his driving is beyond reproach. That entails a higher standard than reasonable care and a higher standard than simply complying with all relevant road traffic regulations. If the motorist is unable to do that he will be at least partly liable to the pedestrian. However, when it comes to contributory negligence, the court has a very wide discretion in allocating blame. It is sufficient for the court to be satisfied that the pedestrian's fault contributed, at least to some extent, to the accident, and the judge then has a very wide discretion as to how to allocate blame. I have encapsulated my understanding of all of this in findings in fact 19 to 23, the wording of which is largely based on the evidence of Senora Romero Porro, but only because her English was easier to follow than the interpretation of Senor Gonzalez's evidence.

[11] There was one aspect of Spanish law which was disputed which was in relation to the standard of proof which applied, and whether it was proof on a balance of probabilities or proof beyond reasonable doubt. When counsel for the pursuer sought to put a question about this to Senor Gonzalez, counsel for the defender objected on the basis that there was no basis for such a question in the pleadings, nor had it been foreshadowed in the expert report. Again, I allowed evidence in relation to this issue (including that subsequently given by Senora Romera-Porro) to

be given under reservation of all questions of competency and relevancy. Senor Gonzalez confirmed that the court had to be satisfied to a very high standard about the quality of the motorist's driving. It was not entirely clear if he was speaking about the standard to which facts had to be proved, or the standard of driving which had to be proved. Senora Romero-Porro said that proof had to be beyond reasonable doubt, which she explained as relating to the presumption of strict liability. A high standard of evidence was required because of the risk created by the act of driving and potentially severe consequences of an accident. To overcome strict liability, the evidence presented had to be such as to eliminate any suggestion of negligent driving. It seems to me that this evidence does not so much indicate that the standard of proof in Spain is beyond reasonable doubt, as we understand that concept; rather that for a driver to escape all liability there must be clear evidence that his driving was of such a high standard that he was not at fault to any extent and that the pedestrian was the sole cause of the accident.

Ruling on admissibility of evidence

[12] Before going on to assess the evidence, I must first rule on matters of admissibility. As is evident from the foregoing account of the evidence, there are three passages of evidence to which objection was taken, and I deal with each in turn in the following paragraphs.

The speed limit

[13] Counsel for the pursuer submitted that no fair notice had been given of such a line, there being no averments on record. He further pointed out that, technically, the only evidence led was of the speed limit at the time of Senor Santana's visit, not at the time of the accident.

Counsel for the defender answered that by pointing out that the pursuer had put speed in issue by averring that the insured was travelling at speed and in any event that the speed limit was part of the general background circumstances relevant in considering liability. The court must bear in mind that Chapter 36 procedure, which governs this action, provides for abbreviated pleadings. It would be rare to find averments about a speed limit. That was something which must be taken to be within the defender's knowledge. In relation to this passage of evidence, I prefer the submission of the defender. Evidence about the prevailing speed limit is but one element of the general factual background, and I hold the evidence to be admissible. What weight I then attach to it is a separate matter which I deal with below.

The Facebook exchange

[14] Counsel for the pursuer also submitted that evidence of the Facebook exchange between the pursuer and Ms McMonagle was irrelevant and inadmissible, in the absence of any averment on record. Counsel for the defender's short response was that the questions which were put went to credibility and reliability and thus were admissible. I agree. The evidence in question was of a prior statement by the pursuer, namely that she could remember nothing of the accident, which was different from the evidence she gave in court. That is clearly pertinent to an assessment of her evidence. The position might have been different had the pursuer denied there had been any such exchange, and the defender had then sought to lead detailed evidence about what the Facebook messages had been. However, that was not what happened. The pursuer readily accepted that she had told Ms McMonagle that she was unable to remember the accident, and that admission, along with her explanation that she effectively told

a deliberate lie in order to tease out Ms McMonagle's evidence is material to an assessment of her credibility and reliability. Indeed, the evidence given by Ms McMonagle in a sense becomes irrelevant, being superseded by the pursuer's admission, but I will formally repel the objection.

The standard of proof in Spanish Law

[15] There are two issues to resolve here. The first is whether the question of standard of proof is regulated by the applicable law (Spanish law) or the *lex fori* (Scots law). If the former, then evidence would be relevant; if the latter, then it would not. The second issue is whether, assuming the evidence to be admissible, I should allow it to be led, in the absence of notice having been given in the pleadings. There was no dispute between the parties that, ordinarily, questions of admissibility of evidence are regulated by the *lex fori* (Anton, Private International Law, para 27.14). It was further agreed that in order to decide whether there was an exception to that general rule, one must have regard to what is commonly referred to as Rome II, or Regulation (EC) number 864/2007 of the European Parliament and of the Council of 11 July 2007. Article 22 has the heading "Burden of Proof" and, in so far as material, provides as follows:

"1. The law governing a non-contractual obligation under this Regulation shall apply to the extent that, in matters of non-contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof".

Also relevant is article 1.3 which provides:

"This Regulation shall not apply to evidence and procedure, without prejudice to article... 22".

[16] The difference between the parties came down to this. Counsel for the defender submitted that burden of proof meant precisely what it said, and was to be distinguished from the standard of proof which therefore fell to be determined by Scots law. Counsel for the pursuer submitted that a more expansive approach ought to be taken. He referred to article 15 of Rome II, which sets out the scope of the law applicable under the regulation, including the basis and extent of liability and the assessment of damage. He sought to draw a distinction between rules of evidence which determined what evidence could be led, on the one hand, and the approach to that evidence on the other. The former was governed by the *lex fori*, the latter by the applicable law. In support of this submission he referred to the case of *Wall v Mutuelle De Poitiers Assurances* [2014] 1WLR 4263. Although that case concerned the assessment of damages, the Court of Appeal ruled that when assessing damages, the law applicable in the context of article 15 extended to judicial guidelines used in practice by French judges and the trial judge should apply them, subject to the same margins of discretion as a French judge would have.

[17] On this matter, I prefer the approach of counsel for the pursuer. It is clear that Spanish law requires the driver to prove a high standard of driving and that the onus of proof (whether one categorises it as proof beyond reasonable doubt or by using some other formula) is one which cannot be discharged lightly. Rather than focussing on whether the standard can be categorised as one of beyond reasonable doubt, and whether that does or does not fall within article 22, I do consider that, so far as I can, it is clear that I should approach the evidence which has been heard in the way that a Spanish judge would and that that is a matter which is governed by the applicable law. I agree that the exclusion from the regulation of evidence and

procedure relates more to questions of what evidence is admissible and how it is to be adduced, rather than how it is to be treated by the court once adduced. The fact that there is a clear blurring of the lines between the standard of proof on the one hand, and the standard of driving which must be proved on the other, further underlines, in my view, that this is a matter which is governed by Spanish rather than Scots law.

[18] Evidence of the approach to the evidence by Spanish courts is therefore admissible as a matter of law. That leads on to the second issue, which is whether fair notice was given on that line. I consider that it was, given that Rome II was put in issue. The defender's interpretation of it was clearly different (and, as I have held, wrong) but that does not mean that fair notice was not given. In any event the defender's expert was able to answer the questions put and he did agree with the pursuer's expert and accordingly there is no prejudice to the defender in allowing the evidence.

[19] Having ruled her evidence to be admissible, then, I accept Senora Romero-Porro's evidence about the evidence which a defender must lead to overcome the presumption of strict liability, as narrated above in paragraph 11. As can be seen from my narration of her evidence, however, once analysed it appears that the objection to it and my ruling thereon seems largely to be beside the point, because her evidence did relate not so much to the standard of *proof* as to the standard of *driving* which a driver must demonstrate if he is to avoid liability entirely. That is also consistent with Senor Gonzalez's evidence. That evidence is all clearly governed by the applicable law and not the *lex fori*, however one interprets Rome II. However, the evidence of the Spanish lawyers is also perhaps relevant, and is in my view admissible, as to the wide margin of discretion a Spanish judge has when it comes to allocation of blame as between

motorist and pedestrian, when assessing contributory negligence, which I take into account below when considering that issue.

Assessment of the evidence

[20] Dealing with the foregoing witnesses in the order in which they gave evidence, I found Ms McMonagle to be entirely credible and reliable. She had no axe to grind whatsoever. She had a good recollection of the incident and did not deviate from the evidence which she gave. She partly remembered the incident because of a similar incident involving her aunt earlier that day. I accept that she shouted a warning to the pursuer which she would not have done had she not been concerned for the pursuer's safety. She insisted that the pursuer was not using the pedestrian crossing, and that evidence was consistent with the position in which the pursuer was lying when she was being tended by emergency services. The only part of her evidence which I have treated with caution is her very brief assertion as to where the pursuer was when struck, which I discuss more fully in paragraph 26 below. By contrast, the pursuer was a most unimpressive witness and I found her to be generally incredible and unreliable. She evidently came into the witness box with the prior, and almost the sole, intention of persuading the court that she was on the pedestrian crossing, as evidenced by her volunteering that information when asked where she was on holiday. Even allowing for the fact that she may have been nervous, the reliability of her evidence was further undermined by the inconsistent statements which she has previously made. It is of course possible that the doctors who have compiled the reports may have picked her up wrongly (and technically, their reports have not been proved). However, even disregarding any prior inconsistent statement to the doctors, the pursuer herself

acknowledged that she had told Ms McMonagle that she could not remember the circumstances of the accident at all and her explanation for having said that was implausible. On the pursuer's own account, she had lied in order to elicit information. Even if that were true, it undermines her credibility, since it shows her to be someone prepared to lie to advance her case. However, I think it more likely that what she said to Ms McMonagle was true, and that she could not in fact remember anything about the accident. In addition, Senor Gonzalo said that the pursuer told him that she could not remember what had happened. Even if one allows for the possibility that the pursuer was not the person he saw or heard being run over, she was undoubtedly the person who came into the bar where he was. Accordingly, the preponderance of the evidence is that the pursuer could not remember anything about the accident and was therefore in no position to say, in court, whether or not she was on the pedestrian crossing or indeed to give any reliable evidence about the circumstances of the accident. Even on the hypothesis that she could remember what happened, I prefer the evidence of Ms McMonagle in so far as it is different from that of the pursuer, in which event the pursuer does remember but must be lying. Whichever way it is approached, I cannot accept her evidence that she was on the crossing when struck. Since, as I have found, the pursuer does not remember anything of the accident, it does not matter whether that lack of recollection has been caused by the consumption of alcohol or the accident itself, although I think more probably the latter. I do not find that she was very drunk, but her consumption of alcohol is relevant insofar as it may have contributed to her failure to look where she was going and her failure to use the crossing. I further gained the impression from the pursuer's demeanour while she gave her evidence that she was making parts of it up as she went along. She clearly had no recollection as to whether

she was in fact intending to go for something to eat before going home, or was going to go back to her apartment and eat there. She volunteered or agreed with both propositions in her evidence in the space of a few minutes. I also note from one of the medical reports that she had said that she assumed she was probably going for something to eat, in other words did not know for sure. The picture of her coming out of the bar, in holiday mode and cheerful having consumed four beers and then taking the shortest distance towards her apartment (i.e. not using the pedestrian crossing), all the while engaging in doubtless light-hearted banter with a man she had been speaking to in the bar, is all too easy to accept as entirely credible, and is an inference I am able to, and do, draw from Ms McMonagle's evidence.

[21] Turning to the last of the eyewitnesses, Nuno Gonzalo, I found him credible and generally reliable. I accept that he is not a friend of the pursuer and has no interest in the outcome of the case. He was prepared to make concessions where appropriate, for example, that he would have been drinking. Critically, however, he did not see the accident and he was not able to say where the pursuer had been when she was hit. Some doubt was cast on whether the pursuer was in fact the person whose accident he witnessed. I say that for two reasons. First, he thought that the accident he witnessed occurred in the early hours of the afternoon, whereas on the evidence of the other witnesses it occurred several hours after that. Second, he said that the pursuer came into his bar a week or two after the accident which he witnessed, whereas the pursuer's own evidence was that that occurred a year later. Although Senor Gonzalo only witnessed one accident at that crossing, that is not to say that there could not have been other accidents of which he was unaware. Having said that, he seemed reasonably confident, from having assisted with the pursuer trying to obtain the police report at the police

station, that the two accidents were one and the same. Also, as between Senor Gonzalo and the pursuer as to when the first conversation between them took place, I prefer the evidence of Senor Gonzalo (which undermines still further, if that is possible, the evidence of the pursuer). On a balance of probabilities, I consider that the accident he witnessed probably was the one involving the pursuer, but ultimately, it does not matter, since Senor Gonzalo's evidence was when analysed equally consistent with the accounts given by the pursuer and by Ms McMonagle and I have already made clear which of those I prefer.

[22] As regards Senor Santana's evidence, I am unable to draw very much of value from his report. In particular, I cannot draw any inference as to where exactly on the road the pursuer was when she was struck, nor whether the insured had time to react, because it was clear that the calculations done by Senor Santana were based upon the police report. In passing, I would also observe that his calculations about reaction and stopping time appeared to be by reference to the point where the pursuer stepped off the pavement, as opposed to the point when she would first have been visible to the insured, which may have been earlier, and as such may have been of little value even if the police report had been lodged as a production, and spoken to. I do accept his evidence about the speed limit when he visited the *locus*. While I take counsel for the pursuer's point that there was no direct evidence about the speed limit at the time of the accident, I consider that it can be inferred that it would be the same, at least absent any suggestion or evidence to the contrary. However, the speed limit is fundamentally irrelevant to this action, there being no evidence as to what speed the insured was driving at, and for that matter no evidence of the speed at which other vehicles were travelling. I do however accept Senor Sentana's evidence about the difficulty of predicting how a pedestrian

will be moved, when struck by a motorcycle, which in turn means that it is difficult to make any deductions from the landing position as to where a person was when struck, certainly without knowing at least some of the variables which can exist such as speed and direction of travel of the motorcycle, and precisely where on the body the pedestrian was struck.

Submissions

Defender

[23] I will record counsels' submissions only insofar as not dealt with, inferentially or expressly, above in relation to the matters already discussed. Counsel for the defender submitted that on the evidence I was able to find that the action was caused by the sole negligence of the pursuer and that the insured could not have avoided the accident. While it was unfortunate that the court had not heard from the driver, that was because the pursuer's legal representatives had opposed a motion to have him included as a witness (although that was because the defender had not complied with the court's timetable and I consider this submission to be without foundation). The presumption in article 1, sub-paragraph 1 of the Royal Decree had been displaced in that the pursuer was entirely to blame for the accident, which the driver could not have avoided. The fact that neither he nor his passenger were dislodged or fell and that he had seemed to stop straightaway, according to Ms McMonagle, demonstrated that he had been driving in a careful fashion. The photographs also demonstrated the steep incline of the northbound carriageway which would have been to the driver's left. His view would have been restricted. There was evidence from which I could conclude that he was not able to stop or avoid the collision. Counsel referred to the cases of

Tessa Till v Tayside Transport Co Ltd [2017] CSOH 6 and *Birch v Paulson* [2012] EWCA Civ 487 as examples of cases where a pedestrian had been found wholly to blame for an accident, even in the absence of evidence from the driver.

Pursuer

[24] Counsel for the pursuer submitted that the defender had not discharged the onus upon it. I should find that it had not been proved that the accident occurred as averred by the defender. The evidence of Holly McMonagle was inconsistent. Senor Gonzalo supported the evidence of the pursuer. The engineering evidence was worthless. No evidence at all had been led as to *inter alia*: (a) the actions of the driver; (b) the speed of the motorcycle; (c) the location of the motorcycle; (d) what lane the motorcycle was in; (e) where in what lane the motorcycle was; (f) when the driver first saw the pursuer; (g) what decisions the driver took; or (h) what evasive steps, if any, he took. The higher Spanish legal test required to establish sole fault had not been met.

Discussion

[25] As regards how the accident occurred, for the reasons given above, I accept the evidence of Ms McMonagle. The pursuer came out of the bar after consuming a few drinks. She crossed the first two lanes of Avenida de los Pueblos, not looking where she was going and looking behind her. When she got to the central reservation, Ms McMonagle shouted a warning which the pursuer did not hear or ignored. She continued to cross the road without looking (in fact, still looking behind her) whereupon she was struck by a motorcycle driven by the insured. She

was not on the pedestrian crossing. I reach that view for two reasons. First, I accept the evidence of Ms McMonagle as to where she left the road, i.e. opposite the street-lamp. Second, even allowing for the fact that one cannot deduce, from where she landed, where the pursuer was, precisely, when she was struck, on any view she is unlikely to have gone backwards. There is also evidence that the motorcycle stopped before the pedestrian crossing. I therefore, with no hesitation, have reached the view that the pursuer was at fault (a) for not looking and (b) for not using the pedestrian crossing which was only a few metres away.

[26] However, the matter does not end there because it is also clear that under Spanish law, the insured can escape liability only if he shows that the pursuer's negligence was the sole cause of the accident. I further accept that in Spanish law it is difficult for him to discharge that onus. He can do so only by satisfying the court that his driving was beyond reproach and that he could not have avoided the accident. While I have found that the approach taken by the Scottish courts should mirror that of the Spanish courts, and that the test is not one of proof beyond reasonable doubt as we would understand that term, in fact it makes no practical difference, because even on a balance of probabilities, let alone a test of beyond reasonable doubt, I would not have been satisfied that the insured had done everything he could have done to avoid the accident. We did not hear evidence from the insured. We do not know, therefore, when he first saw the pursuer. We do not know at what precise speed he was travelling (albeit there is evidence that it was not excessive at least in terms of the likely speed limit). We do not know whether he would have had a view of her as she crossed the central reservation (if not the first two lanes of the road). I am not prepared to draw any inference about that from the photographs, as counsel for the defender invited me to do. There was no

evidence about that from any of the witnesses. If Ms McMonagle noticed that the pursuer was not looking where she was going, so too should the insured, if he had seen her. Further there is no direct evidence (or indeed, indirect evidence) as to how far across the road the pursuer had gone before she was struck. I discounted most of the evidence of Senor Santana, for reasons given above, other than his evidence about the difficulty of predicting how a pedestrian will move when struck by a motorcycle. It follows that although the pursuer could not have travelled backwards after being struck by the motorcycle, she could have been hit at an angle and gone to the side. Further, the evidence given by Ms McMonagle and Senor Santana was, to a degree, somewhat circular. Senor Santana had prepared photographs with arrows on them, based on other evidence which he had read. Ms McMonagle then said that the accident occurred where the arrow was pointing. That evidence was then used as the factual basis for Senor Santana's evidence in court. While it might have been different had this issue been explored in more detail with Ms McMonagle in her evidence, as it stands I am not prepared to attach any weight to her comment about the arrow pointing to the location of the accident, and on the whole evidence, I cannot conclude exactly how far across the road the pursuer was when she was struck. Further, assuming that the insured was in the left lane when he struck the pursuer, we do not know why he was in that lane. The evidence of Senora Romero-Porro was that normally one should drive in the right hand of two lanes. Conversely, if the insured was in the right lane, then he would have had more time to see, and avoid, the pursuer.

[27] Accordingly, recognising the high standard of driving which Spanish law requires a motorist to prove in order to escape liability completely I cannot conclude that he has discharged that onus, either beyond reasonable doubt or on a balance of probabilities. Putting

that another way, having heard the evidence of both experts and trying as best as I can as a Scottish judge, to follow the approach of a Spanish judge who had heard the same evidence as I have heard, I conclude that a Spanish judge would not have absolved the insured of all blame. It follows that I find that, in Spanish law, the defender is liable to make reparation to the pursuer.

[28] For completeness, I have had regard to the cases cited by counsel for the defender.

These are however of limited value for two reasons. First, every case must turn on its own facts and circumstances. I accept as a matter of principle that in Spain, as in Scotland or England, a defender may succeed in showing that he is not liable even where neither the driver nor the pursuer has given evidence (which effectively is the position we find ourselves in here, the evidence of the pursuer being to all intents and purposes worthless). However, whether he does so or not depends on what other evidence is available. That might include CCTV evidence or expert evidence or other eye witness evidence. Here we simply have the evidence of one witness who saw the pursuer cross the road, and one who heard the collision. That is, in my view, for the reasons I have given, insufficient in this particular case to enable me to conclude that the insured could not have avoided the collision or that his driving was beyond reproach. Second, the difference between Spanish law, and Scots law, must be recognised. It is one thing for a defender to succeed where a pursuer has not proved on a balance of probabilities that he failed to take reasonable care; quite another for him to succeed where the burden is on him to displace a presumption of strict liability. The cases in this jurisdiction (including, in this context, England) must therefore be treated with some caution before founding upon them to any extent in a Spanish context.

[29] However, it is equally clear that the pursuer's own negligence did materially contribute to the accident by crossing where she did without looking. The only remaining live question is by what percentage any damages should be reduced. Perhaps predictably, counsel for the defender urged me to assess contributory negligence at the highest end of the scale; counsel for the pursuer was at the opposite end of the spectrum.

[30] Again, approaching the manner as would a Spanish judge applying Spanish law, it is clear that I have a very wide discretion. It would be wrong in principle, in my view, to absolve the defender entirely by assessing contributory negligence at 100%, where I have been unable to find that the defender has proved that the pursuer's negligence was the sole cause of the accident. On the other hand, I am satisfied that the pursuer did fail to take reasonable care for her safety by not only attempting to cross the road away from the pedestrian crossing, which was only metres away, but that she did so without looking and by so doing, materially contributed to the accident. Contrary to the pursuer's own averment, there is no evidence that the insured was travelling "at speed". The evidence which I do have points the other way – that he was not travelling at excessive speed as he did manage to stop before the crossing. While the insured must share some responsibility under Spanish law, a greater share of blame must in my view be attributed to the pursuer. Accordingly, I assess contributory negligence at 66.67%.

[31] As invited to do by the parties, I have pronounced an interlocutor in appropriate terms giving effect to the foregoing finding, and assigning a procedural hearing for 20 November 2017 which will also be a hearing on expenses.