

SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2019] SC EDIN 75

PN2538/18

JUDGMENT OF SHERIFF PETER J BRAID

in the cause

AMY COCKBURN

Pursuer

against

MCE INSURANCE COMPANY LIMITED

Defenders

Pursuer: Simpson; Watermans Solicitors

Defenders: Murphy; Gildeas

Edinburgh, 14 August 2019

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

1. The parties are as designed in the instance. The defenders are the motor insurers of the Asprilla RSV motorcycle registration number YM08 OLK, owned by their insured, David Cochrane ("Mr Cochrane").
2. On or about 23 July 2018, the pursuer was driving her Renault Clio motor vehicle, registration number SK08 NXB, on Preston Road, Linlithgow. She was travelling from Linlithgow towards Bathgate.
3. At the same time, Mr Cochrane was riding his said motorcycle on Preston Road, travelling in the opposite direction.
4. The road was wide enough to carry one lane of traffic in each direction.

5. There is no central white line painted on the road.
6. Both drivers were familiar with the road.
7. The road was greasy, following a shower of rain, after a period of dry weather.
8. About half a mile from Beecraigs Country Park, there is a sharp bend. It is shown on the Google image 5/15/1 of process, which shows the bend from the direction in which Mr Cochrane was driving; and on Google image 5/15/4 of process which shows the bend from the direction in which the pursuer was driving.
9. As the pursuer and Mr Cochrane each entered the bend from their respective directions, they saw each other's vehicles. The pursuer's impression was that Mr Cochrane was encroaching on her side of the road. Mr Cochrane's impression was that the pursuer was encroaching on his.
10. Mr Cochrane attempted to take the bend more sharply than had been his original intention. He "counter steered". Because the road was greasy, the front wheel of his motorcycle slipped and he collided with the rear of the pursuer's vehicle.
11. The pursuer, who had been travelling at about 20 mph, braked as soon as she saw the motorcycle, and brought her vehicle to a stop as soon as she could after the collision. The end position of her vehicle is shown in photo 5/16/9 of process.
12. Mr Cochrane fell off his motorcycle. He sustained minor injuries. The pursuer, having got out of her car, went to see if he was injured. He said he

had a grazed knee, adding: "I believe you were on my side of the road". The pursuer did not refute that at the time.

13. Mr Cochrane was not encroaching on the pursuer's side of the road as he negotiated the bend.
14. Mr Cochrane did not lose control of his motorcycle due to any failure to take reasonable care on his part.

Finds in fact and law

1. This court has jurisdiction.
2. The pursuer has a direct right of action against the defenders in terms of the European Communities (Rights against Insurers) Regulations 2002.
3. The defenders' insured did not fail to take reasonable care for the pursuer's safety.

THEREFORE assoilzies the defenders from the craves of the initial writ; finds the pursuer liable to the defenders in the expenses of process, as taxed; allows an account thereof to be given in and remits same, when lodged, to the auditor of court to tax and report

NOTE

Introduction

[1] In this personal injuries action, the pursuer seeks damages against the defenders in respect of an accident she sustained on 23 July 2018, when a motor vehicle she was driving was in a collision with a motorcycle being ridden by the defenders' insured. There is no dispute that she has a direct right of action against the defenders. Nor is there a dispute that the respective vehicles were in a collision. The issue between the parties is whether or not

the motorcycle being ridden by the insured was encroaching onto the pursuer's carriageway immediately prior to the collision, or whether it was the pursuer who had encroached onto the defenders' insured's carriageway (see record, Stat 4, and Answer thereto). A proof, restricted to liability, took place before me on 16 July 2019. The pursuer was represented by Ms Simpson, solicitor and the defenders by Mr Murphy, solicitor. The only witnesses were the pursuer, and the defenders' insured, David Cochrane. A joint minute of admissions, no 19 of process was lodged, agreeing certain documents, the most significant of which were various google images, and photographs taken by the pursuer.

The evidence

The pursuer

[2] The pursuer said that she was driving a black Renault Clio along the road in question, Preston Road, Linlithgow. She was going to Bathgate, having dropped a friend off in Bo'ness. The time of the accident was about 3.20 pm. The road was wet because it had been raining although it was only spitting at the time of the accident. She was familiar with the road, which she drove along often.

[3] She described the *locus* of the accident as a very tight S-bend. She confirmed that it was shown in the Google image 5/15/1 of process, which showed the direction being taken by the driver of the other vehicle. She was driving towards the photographer in that photograph. There was no white line in the centre of the road but there was a defined line which, she said, denoted the middle of the road. As she approached the bend she was doing about 40 mph but she slowed down to about 20 mph coming into the bend. As she came round the bend she saw the motorbike coming the opposite way. He was almost in the middle of the road going at a fast speed. She described his left side as being almost on the

ground. The bike went into the side of her car. She said she was being very cautious because the roads had been wet and she knew it was a blind corner. She maintained that her vehicle had stopped before her car was struck by the bike. There was nowhere for her to go to avoid the collision. The motorcyclist lost control of his bike. There was insufficient room for them both to get round the bend. After the collision she got out to make sure the motorcyclist was okay. He just had a grazed knee. He said to her "I think you were on my side of the road". She felt a bit intimidated. She called the police who said that as no one had been seriously hurt and as the vehicles could be moved there was no role for them to play. She took a photograph of her own car but before she could take a photograph of the bike in its end position, the motorcyclist had moved it. 5/16 of process are the photos that she took. 5/16/2 was a photograph of her vehicle after it was moved. 5/16/9 was a photo of the vehicle where she stopped, before the motorcyclist collided with her. No one had witnessed the accident. The motorcyclist's friend arrived a short time later on his motorcycle.

[4] In cross-examination, the pursuer maintained her position that she had been on her own side of the road. She refused to accept, or admit of any possibility, that she had encroached onto the wrong side of the road.

David Cochrane

[5] Mr Cochrane said that he, too, knew the road very well. He had ridden it many times. The bend was about ½ mile from Beecraigs Country Park where he and his friend (who had very recently passed his motorcycle test) had been for a cup of tea. Although he was wearing some protective leathers he did not have protective trousers on. He was driving sensibly. It had been raining although the rain had gone off. The road was greasy

as there had previously been a long dry spell. He was aware of that and therefore driving cautiously. He described his route, from Beecraigs Country Park, as consisting of a left-hand junction then a right-hand junction then a tight right-hand corner then a straight stretch downhill leading onto the tight left-hand bend where the accident occurred. He wouldn't describe that bend as an S-bend. He was travelling downhill. As he approached the left-hand bend he adjusted his speed downwards. He couldn't really see what was coming because of the foliage. He might have been able to see a van but not a small car such as a Clio. He was doing a "sensible" speed. As he turned into the curve he caught sight of the Clio coming towards him. He thought she was very close to him. He tried to counter-steer to avoid the car. This should have enabled him to take the bend more sharply. He described counter-steering as turning the handle bars (counter intuitively) to the right which enabled the bike to go more sharply to the left. He also touched the rear brake. He had nowhere to go. The Clio was slightly over onto his side of the road. The join line between the tarmac on each carriageway (which the pursuer had referred to in her evidence) was not in the middle of the road at the bend but was biased towards his side of the road i.e. closer to the verge on his side than to the verge on the other side. Looking at image 5/15/1 he was almost at the chevron in that photograph, when he saw the pursuer's car. The pursuer's car would have been a short distance from the chevron. She was still moving when his bike struck her vehicle. It wasn't a high speed collision. He couldn't take that bend at high speed. The front tyre of his bike went away from him and slid into the side of the pursuer's car. He came off the bike, which was inevitable, and lay on the ground for a couple of minutes then got up. He spoke to the pursuer and asked her if she was okay. He then said to her, "I believe you were on my side of the road". He then picked his bike up and moved it. He didn't do that to prevent the pursuer taking a photograph of it, but because it was a

danger to other vehicles. It was quite a busy road. He estimated that the pursuer had driven about 6ft after he struck her car. He confirmed the end position of her vehicle was as shown in photograph 5/16/9. Had the pursuer not been encroaching on his side of the road he would have got round on his own side without any difficulty. He entered the corner at the correct speed having regard to the conditions. He had not been in the middle of the road.

[6] In cross-examination, Mr Cochrane did not accept that he had lost control of the motorcycle. He knew that the pursuer's car was too close to his. That's when he started counter-steering. He was doing 10-12 mph approximately. The pursuer's car was not fully on his side of the road but was partially encroaching. His own vehicle had suffered some damage, to the front wheel and some scrape damage. That was incurred after the collision. He couldn't really estimate the pursuer's speed although his personal view was that 20 mph would be too fast for that bend.

Submissions

Pursuer

[7] The pursuer's solicitor submitted that I should find the pursuer credible and reliable. She had given her evidence in a straightforward manner and did not attempt to embellish. Even if Mr Cochrane's version were accepted he ought to have been able to stop prior to the collision occurring. He failed to take reasonable care in that he lost control of his vehicle. That was the primary cause of the accident. The damage to his motorcycle was consistent with his having lost control. If I found that the defenders' insured had been negligent, but was of the view that there was contributory negligence on the pursuer's part, I should apportion blame equally between the parties.

Defenders

[8] Mr Murphy for the defenders submitted that the pursuer had failed to discharge the burden of proof on her to show that it was Mr Cochrane's negligence which caused the accident. She was an unreliable witness. She was unduly dogmatic whereas Mr Cochrane was prepared to concede gaps in his understanding. There was nothing else he could have done. His reaction was an immediate and reasonable one to the situation that he was faced with as he negotiated the bend. It was solely the pursuer's negligence which had caused the accident.

[9] As regards contributory negligence, were I against Mr Murphy on his primary submission, he submitted that the pursuer bore the lion's share of the blame for the accident and contributory negligence should be assessed at 90%.

Expenses

[10] Both agents agreed that expenses should, in principle, follow success, subject to the *caveat* that a hearing should be fixed in the event of the pursuer being only partially successful, through a finding of contributory negligence.

Discussion

[11] It is always difficult to choose between two competing accounts when both, as here, are plausible, both witnesses appeared credible, and there are neither any independent witnesses nor real evidence which supports one version as opposed to the other. At first blush, everything else being equal, it is as likely that the defenders' insured entered the bend partially encroaching on the opposing carriageway, as it is that the pursuer did so.

[12] On the other hand, the bend where the accident occurred is, on any view, sharp, and the road narrow, and it might be thought marginally more likely that a car, which is wider, would encroach than a motorcycle. Certainly, it would be easier in a car inadvertently to be too far over the centre of the road (particularly if the join line is not in fact in the centre of the road, as Mr Cochrane claimed, although that suggestion was not put to the pursuer and I do not attach any significant weight to it). However, several other factors lead me to prefer Mr Cochrane's account of the accident as being the more probable of the two competing versions. First, he gave a more detailed and spontaneous description of the accident than did the pursuer, whose evidence was less compelling in its detail and at least some of it was given in response to leading questions. As Mr Murphy submitted, Mr Cochrane was more willing to admit of gaps in his knowledge than the pursuer, whose stock response to questions challenging her was that she was 100% correct. Second, Mr Cochrane's account was marginally more plausible. At a closing speed between the vehicles of at least 30 to 32mph, it seems to me unlikely that the pursuer would have had time to stop before her vehicle was struck by the motorcycle. Further, I am able to visualise precisely how the accident occurred on Mr Cochrane's account, while it is more difficult to envisage how the motorcycle would have slid into the rear of the pursuer's vehicle, which is what happened, had the motorcycle been taking the bend partially on the wrong side of the road, as the pursuer claimed – in which event a head-on collision might perhaps have been more likely. Third, recognising that both drivers would have been shaken in the immediate aftermath of the incident and therefore, perhaps unlikely to have been thinking strategically, the immediate response of Mr Cochrane, that he thought the pursuer was on his side of the road, while not conclusive, is a further adminicle of evidence that perhaps she was.

[13] All of the foregoing points towards Mr Cochrane's version as being marginally the more probable, which is fatal for the pursuer's claim. However, it must also be borne in mind that it is not sufficient for the pursuer to prove that she was not encroaching on the defenders' insured's side of the road. She must also prove either that Mr Cochrane was encroaching on her side of the road, or that by failing to properly control his motorcycle, he breached his duty of care towards her. The evidence was also that the road was greasy. The sudden emergence of a car close to the (notional) centre line, even one which was not over that line might have been sufficient in itself to cause Mr Cochrane to take evasive action, resulting in his bike slipping as it did. There was no evidence of excessive speed. It cannot be inferred in the circumstances of this case that Mr Cochrane lost control of his bike through any fault on his part. Sometimes accidents simply happen through no fault of either driver.

[14] In the event I am unable to make any finding that Mr Cochrane failed in his duty to take reasonable care, either by encroaching onto the pursuer's side of the road, by losing control of his motorcycle or otherwise. The action must therefore fail. It is unnecessary to make any finding in fact that the pursuer herself encroached on to Mr Cochrane's side of the road. Although she has failed to establish that Mr Cochrane was at fault, that does not mean that she was: as I have said, some accidents are simply nobody's fault.

Decision

[15] I have therefore granted decree of absolvitor in favour of the defenders. The parties agreed that, in that event, expenses should follow success and I have therefore found the pursuer liable in expenses as taxed.