FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 30
PD92/18

Lord President
Lord Menzies
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

SAMUEL CAMERON

Pursuer and Reclaimer

against

MARTIN SWAN AND ANOTHER

Defenders and Respondents

Pursuer and Reclaimer: Young QC, L Thomson; Digby Brown LLP
Defenders and Respondents: Shand QC, Bennett; BTO LLP

10 June 2021

Introduction

[1] This ought to have been a relatively straightforward road traffic accident case. It was not disputed that, at about 5.00am on 23 April 2016, the pursuer was lying in the middle of a street in central Paisley. He was intoxicated. The first defender was driving a van in the course of his employment with the second defenders. He ran over the pursuer. The first

defender pled guilty to a contravention of section 3 of the Road Traffic Act 1988 (careless driving).

[2] On 26 September 2018, the Lord Ordinary refused a motion for *interim* damages. He considered it likely that the defenders would be found liable, but that a substantial element of contributory negligence would follow. Although the Lord Ordinary thought that it was generally undesirable to split proofs, he reasoned that an early finding on liability and contributory negligence would allow the pursuer to seek an award of *interim* damages in due course and might assist parties in the settlement of the case. On that basis, he allowed a proof restricted to liability and contributory negligence. This was scheduled to take place in the early part of 2019, with a view to a date being fixed for a proof on quantum later. Given the existence of the conviction, the Lord Ordinary subsequently (21 December 2018) ordained the defenders to lead at the proof.

[3] The Lord Ordinary's efforts to secure an early resolution of the litigation were in vain. The proof commenced on 7 May 2019 before a different Lord Ordinary, who made *avizandum* on 14 May 2019. His decision and relative opinion ([2020] CSOH 20) were only issued on 27 February 2020, some 9 months later. This is an unacceptable delay, especially given the limited nature of the factual and legal dispute. The court does not know when the Lord Ordinary first formulated his thoughts on the evidence, but a delay of this nature does not provide the reader with confidence that, when he did so, the testimony or the demeanour of the witnesses would have been fresh in his mind or that, even with the benefit of his notes, he could recollect the evidence accurately.

[4] In mitigation, the delay may have been materially contributed to by the defenders' introduction, without objection, of expert evidence from a psychologist which was directed towards demonstrating what the first defender might or might not have seen before he ran

over the pursuer. That was a question for the Lord Ordinary to decide on the facts proved. The legitimate scope of opinion evidence on the matter for decision arises sharply, especially given the Lord Ordinary's ultimate reliance upon it.

The Lord Ordinary

Findings

[5] The Lord Ordinary recorded that, on the basis of the averments on record, there was significant agreement about what had happened. At about 5.00am the pursuer, who had earlier been recorded on CCTV walking unsteadily in Wellmeadow Street, was lying in the middle of the road at a point to the west of its junction with Lady Lane. Wellmeadow Street is a continuation west of the High Street. There is street lighting, which was on at the material time. The first defender was driving a Mercedes van. He was making bakery deliveries. As he approached Wellmeadow Street, he was behind a private hire taxi, which was being driven by Robert Maule. Mr Maule slowed down and pulled over to the nearside at or about the junction. The first defender overtook him and ran over the pursuer.

[6] The Lord Ordinary narrated Mr Maule's testimony as being that he was driving towards Wellmeadow Street when he noticed the first defender's van. The Lord Ordinary recorded Mr Maule as saying that he thought was "a bit closer than I would like without tailgating" (cf Mr Maule's testimony below). At about the same time, he saw what he thought were bags of rubbish on the road. He said that: "As I moved in to the side a delivery van which had been behind me has taken it that I was letting him past and has continued driving past and drove right over the top of the person". On appreciating that it was a person that he had seen, Mr Maule had stopped. The van had not done so until it reached a set of traffic lights about 100 yards further on. Mr Maule caught up with the first

defender, who opened the window and appeared shocked when he was told that he had run over a person.

[7] Mr Maule accepted the accuracy of a police officer's note, of what he had said at the time, as follows:

> "I was driving along the High Street … when I saw something lying in the middle of the road. At first I couldn't tell if it was a person or some rubbish but as I got closer I saw it was someone right in the middle of the road. As I got to the junction with Lady Lane I pulled into the left and slowed down to try to move around the person lying in the road. As I moved to the side a delivery van which had been behind has taken it that I was letting him past."

[8] The first defender testified that he was following the taxi on the High Street. As both vehicles approached the junction with Lady Lane, the taxi began to pull over to the left. He took it that the taxi was letting him past. He moved to overtake and felt a bump, which he thought might have been caused by a pothole or a stone on the road. The taxi subsequently pulled up beside him and the driver had told him that he had run over "a boy". The first defender "saw nothing on the road before the bump". His recollection was that the street lights were not on. He did not think that he had been driving too close to the taxi.

[9] PC Jon McKinney arrived at the *locus* and described the pursuer as having his head straddling the central "reservation", but mostly in the westbound carriageway. His feet were pointing diagonally towards Lady Lane.

[10] Professor Graham Edgar, a psychologist, was called by the defenders. His instructions had been "to evaluate the psychological and perceptual factors which may have contributed to the … collision". He had over 30 years experience working as a cognitive psychologist and psychophysicist specialising in visual perception and situation awareness. He had prepared a report. No challenge was made to his expertise. The Lord Ordinary narrated Prof Edgar's conclusions in terms (paras 13.1-7) of his report. These were that the

first defender may have had a line of sight to the pursuer, if he had looked across the curve of the road as he approached the *locus*. Research suggested that drivers rarely look across a curve in this way. The driver's view would "in all probability" have been impeded to some extent by the taxi. Only when the taxi pulled to the side would the pursuer have been visible. The pursuer was "likely to have presented as a relatively low contrast and low conspicuity hazard compared to other aspects of the scene". The pursuer may have presented "in what could be considered an unexpected location and in an unexpected attitude". This would have "further lowered his conspicuity … making it more likely that [the first defender] would allocate attention to other (brighter, bigger, moving) aspects of the scene – such as [the] taxi". Overall, Prof Edgar considered that there "were issues with both the visibility and conspicuity of [the pursuer] … that may have contributed to the incident".

[11] The pursuer led George Gilfillan, a road traffic incident consultant and former police officer. He had taken a DVD of a drive-through at the scene and a number of still photographs of the *locus*. According to the Lord Ordinary, Mr Gilfillan had produced a report in which he had expressed the opinion that:

> "… there would have been insufficient time or distance available to [the first defender] to react by taking avoiding action to the pedestrian lying on the road due to the presence of the proceeding (*sic*) motor vehicle driven by Mr Maule".

[12] PC Gordon McIntyre was also adduced. He had conducted two drives-through. A van driver would have had a greater view of the road ahead than a car driver. PC McIntyre had had a clear and unobstructed view of the road, although he had not carried out the exercise with a car in front of him.

[13] The final witness for the pursuer was Barry Seward. He was a road traffic investigator, who had been substituted for the author of a report, who could not attend the

proof. Mr Seward had accepted that his knowledge and experience were not comparable to those of Prof Edgar. He had been a police officer. The Lord Ordinary observed that Mr Seward agreed with a proposition put to him in cross-examination that, with regard to visibility, in some circumstances some people would be aware of something, while in the same circumstances others would not.

Reasoning

[14] Having narrated the submissions of the parties at some length, the Lord Ordinary reached certain conclusions. The credibility and reliability of the first defender had been challenged. The pursuer had submitted that he was an "unsatisfactory witness who was demonstrably wrong on a number of matters". The Lord Ordinary rejected a criticism that he had given his evidence dogmatically. He had noticed a number of errors in the first defender's testimony. In relation to conflicts with the testimony of Mr Maule, the Lord Ordinary regarded these as mainly matters of detail in which there was scope for slight differences in view. Looked at as a whole, the first defender, although nervous and concerned, had attempted to answer the questions truthfully and to the best of his ability. The Lord Ordinary continued:

> "Whilst there are aspects of his evidence where I would prefer the evidence of other witnesses I do not consider that there is any material which would entitle, or indeed persuade me to conclude, that the totality of his evidence should be rejected as unreliable."

Criticisms of Prof Edgar's evidence as unreliable were also rejected.

[15] The Lord Ordinary recorded that he accepted that the onus was on the defenders as the first defender had previously pled guilty to a charge that he had driven without due care and attention, failed to keep a proper lookout and failed to observe that the pursuer was lying on the roadway. He did not consider that the onus was reversed in relation to whether

the first defender had kept a safe distance between his van and the taxi. He did not accept that there had been a breach of the latter duty, standing Mr Maule's evidence that, although the van was a bit closer than he would have liked, this was "without tailgating". The Lord Ordinary reasoned that, since the first defender was able to move his vehicle around the taxi when it pulled over to the nearside, there was no evidential basis to establish a breach of this duty.

[16] The Lord Ordinary relied, as the defenders had done, on the testimony of Prof Edgar. He noted Prof Edgar's conclusions as being that, as the first defender approached the *locus,* he may have had a sightline by looking across the curve of the road. He continued:

> "Importantly the conclusion was that a sightline might have existed not that it did exist. The qualification depended upon a number of factors spoken to … by Professor Edgar. The most important of these qualifications was that the sightline would as a matter of probability have been impeded by the presence of the taxi in front of the first defender's van. Unimpeded visibility would only have been possible after the taxi pulled to the nearside of the road which occurred a very short distance from the impact point. The degree of impediment to visibility constituted by the presence of the taxi until it pulled over was … unknown. The reason for this lack of knowledge is because the precise configuration of the taxi and the following van were not capable of ascertainment on the basis of the evidence. Neither the precise distance at any given time between taxi and van was a matter of evidence. Likewise the exact placement of each vehicle in the roadway and in conjunction with each other was, again on the basis of the evidence, unknown. Without knowledge of these factors Professor Edgar's evidence, unchallenged in this respect, was that it was impossible to determine if at any point time there was as a matter of fact a sightline available to the driver of the van to the pursuer lying on the roadway."

[17] The Lord Ordinary added to this by addressing the "conspicuity" of the pursuer. He described the pursuer's clothes as being "grey or relatively dark colour". Prof Edgar had said that:

> "on the balance of probabilities the contrast between the clothing and the roadway … was such that not all drivers would be able to perceive the pursuer as the body of a person …".

The Lord Ordinary obtained assistance in this regard from the evidence of Mr Maule. Mr Maule had said initially that he had thought it had been bags of rubbish on the road before appreciating that it had the shape of a body, at which point he began to brake and pull over. On the basis of the evidence of Prof Edgar, the first defender would only have had an uninterrupted view of the pursuer once the taxi had pulled over to the nearside. This was only a short distance from where the pursuer was lying. The first defender had not seen the pursuer before the point of impact.

[18] The Lord Ordinary considered the general psychology of drivers in relation to the visibility of the pursuer. He repeated Prof Edgar's evidence that an unexpected thing on a roadway had the psychological effect of lowering the object's conspicuity. The pursuer had been lying in an unexpected location in an unexpected attitude. His "conspicuity" would "as a matter of probability" have been lower than an obstruction which might have been expected. This supported the proposition that not only was the first defender truthful when he said that he had not seen the pursuer, but also that he could not be held at fault for so failing. The Lord Ordinary continued:

> "The highest that Professor Edgar's evidence could be taken as demonstrating was that the first defender might have had a sightline to the pursuer. That is insufficient to satisfy the test of the balance of probabilities … Psychological evidence was adduced which suggested that on the balance of probabilities, drivers of motor vehicles are slower to recognise unexpected objects in their path. The effect of this is that there is a time lapse between something being visible and the brain of a driver recognising that fact and taking appropriate action."

[19] On the Lord Ordinary's approach, the first defender's view of the pursuer was obstructed or at least impeded by the presence of the taxi. The first defender may never have had a sightline to the *locus*. Even if he had, he may not have looked at where the pursuer was lying. The pursuer was a low contrast, low conspicuity and unexpected object.

Having regard to these factors, the defenders had rebutted the onus upon them to disprove the libel of the criminal charge. The pursuer had failed to prove a breach of the sole standalone duty in relation to keeping a safe distance between his van and the taxi.

[20] On contributory negligence, the Lord Ordinary contrasted the hypothetical fault of the first defender with the pursuer's degree of intoxication and his act of lying down, and apparently going to sleep, in the middle of the road. He would have found that the pursuer's actions had significantly contributed to the accident. He did not, however, make any attempt to assess the degrees of culpability.

Aspects of the testimony

The Protagonists

[21] The view of a driver approaching the *locus* from the High Street is shown in the photograph below. The police officers are on the pavement beyond (to the west of) the junction with Lady Lane. The car in the photograph is at the point where Mr Maule said that he stopped; parallel to where the pursuer was lying, in part on the central broken line. The van is that driven by the first defender.

[22] Mr Maule was the first person to give evidence. He described approaching the *locus* where the road bends slightly to the right. He saw what he originally thought were bags of rubbish lying in the middle of the road. He pulled over, when he realised that it was a man lying slightly beyond the junction with Lady Lane. It had been "just literally split seconds" between him thinking that there were bags of rubbish on the road and realising that it was a person.

[23] Mr Maule had become aware of the van coming up behind him before he turned onto the High Street. After he pulled over, the van moved onto the oncoming carriageway before returning to its own side of the road. That was when it ran over the pursuer, who had been lying more or less along the white line. Mr Maule accepted the accuracy of his statement to the police. The statement had gone on to say that, when the first defender got out of his van, he had said to Mr Maule: "Did I hit it?" It was then that Mr Maule told him that "it was a guy". Mr Maule confirmed that he had had time to stop before he reached the pursuer. He had been travelling at about 30mph. The pursuer had been wearing a light top.

[24] In cross-examination, Mr Maule said that the first defender had been driving sufficiently close to get his attention. He was not tailgating in the sense of "sitting in the back seat", but "he was closer than I liked". Mr Maule had been driving in the middle of the carriageway. His attention had been drawn to the pursuer because the object which he had seen was something in the middle of the road that he was going to have to go around. He first noticed something on the road from the position of the photographer in photograph 5 (see the testimony of George Gilfillan below). He realised it was a person when he was in the photographer's position in photograph "7, maybe 8, certainly 8". He did not need to perform an emergency stop. He made a gradual turn with gradual braking, as there was

room to pull in just beyond Lady Lane. At that point the first defender "would have just been right behind me".

[25] The first defender testified that he had started his shift at 12 midnight and was driving from the Piazza Shopping Centre to the Royal Alexandra Hospital as part of his delivery run. As he approached the *locus*, there was a taxi in front of him. Prior to the layby at the junction, the taxi had begun pulling over in order to let him past. The first defender did not recall the taxi indicating. The taxi had pulled in just before the junction of Lady Lane. He knew this because, if the taxi had pulled in after Lady Lane, it would have run over the pursuer. As he passed the taxi, he felt a bump. He had not seen anything on the road before the bump. He thought that it might have been a pothole, a bit of wood or a stone. The taxi driver had later pulled up beside him and said: "That was a boy you ran over". There had been no other pedestrians or vehicles about at the time. There had been no street lights on. It was dark. It was a clear night. He had been keeping a proper lookout. The first defender was sure that the accident had occurred at about 4.40. He was confident that that was the case. The pursuer had been wearing a blue hoodie.

[26] The first defender was not asked in examination-in-chief what the distance had been between his van and the taxi nor was he asked what speed he was driving at.

[27] The first defender had been charged with careless driving by the police, but the complaint served upon him was one of dangerous driving. He had had a solicitor, who had been provided by the second defenders' insurers, representing him at the trial. He pled guilty to careless driving. On being asked how that had come about, he replied:

> "Well, really, it was actually my wife. She got a bit emotional … because my lawyer says I could go to prison for a year … for dangerous driving".

The first defender did not think that he had been guilty of careless driving. He nevertheless pled guilty to that charge. At the time of the plea, he did not agree that he had failed to keep a proper lookout. He had been aware that a road traffic expert's (Mr Gilfillan's) reconstruction of the accident was supportive of his position. He had nevertheless decided to plead guilty, even though he did not accept the accident had been his fault. He had assumed responsibility for it when his wife became emotional. Rather than have his wife "hysterical", and having regard to the possibility that he might lose his job if he were disqualified, he took the (6) penalty points.

[28] When asked in cross-examination about the distance between him and the taxi, the first defender said that he did not think he had been too close. He had been made aware that the taxi driver had said that he was a little too close, but not tailgating. When he had been driving behind the taxi, he had looked up its off-side to the road ahead. He was paying attention to the road ahead beyond the taxi. When the taxi pulled in, the first defender did not brake. He did not recall the taxi driver's brake lights going on. He disputed the idea that the taxi had pulled over because he was too close behind it, that he had wanted to get past him and had effectively forced him to pull over. When he overtook the taxi, he did not move at all towards the other carriageway from his position in the centre of the lane. He then said that he might have straddled the white line a little bit.

[29] The first defender accepted that the first thing he had said to the taxi driver was: "Did I hit it". He had been aware that he had hit something, but he had not seen anything at all on the road. The pursuer had not been lying along the white line, but across the road. In a curious passage, the first defender said that he had asked the police why, if he had been behind the taxi yet had run over the pursuer, the taxi had pulled over. If the taxi driver had

thought it was a person on the road, he would have stopped short of the person and put his hazard warning lights on. He was therefore blaming the taxi driver "in a way".

Professor Edgar

[30] Apart from his conclusions, which the Lord Ordinary repeated, Prof Edgar spoke to the detail of his report. His testimony in chief extended to almost 175 pages of transcript. Any summary is bound to be of some length, but it is necessary if only to understand the nature of his evidence and what the Lord Ordinary made of it. Prof Edgar's undergraduate degree is in psychology. He has a masters in research methods and a doctorate in aerovisual psychophysics. He has particular expertise in the aerospace aspects of his profession.

[31] Prof Edgar went through his definitions of "brightness" (the subjective experience of luminance), "illuminance" (the amount of light falling on a surface); "conspicuity" (the attention-getting value of a particular object to a particular viewer); "contrast" (the difference between an object's luminance and the background luminance); "hazard" (an object that may require some action in order to avoid a collision); and "visibility" (the extent to which an object can be detected visually at a sensory level). Hazard perception required visual detection and recognition of hazards. The hazard had to be detected at a sensory level and discriminated from background. A driver has to be aware of a hazard, recognise it as a hazard and respond to it. Examination of these matters continued for some time. There was a huge variation of perception reaction time (PRT). With a relatively conspicuous object, PRT was 1.5 to 2 seconds.

[32] Drivers without a lead car tended to look further ahead than drivers following another car. In the final approach ("the final few yards") to the *locus* (ie the pursuer), the taxi would probably have partially or completely blocked the first defender's view of the

pursuer. Whether the first defender looked across the bend to the *locus* could not "be determined from the available evidence". A driver was likely to look at, and would be influenced by, a lead car, including when going round a bend. There was statistical material on the level of this occurring. It explained why the taxi driver, but not the first defender, had seen the pursuer. In relation to looking over the taxi, the further back the van was from the taxi, the more the road ahead would be "blocked". If a car was driving at 30mph, the Highway Code recommended a 2 second distance, ie 26 metres. If the first defender's potential view of the pursuer started when the taxi pulled over, the time to hit the pursuer would have been less than the normal PRT.

[33] If there were a sightline to the pursuer, the next element was his visibility, having regard to the contrast between his clothing and the road surface as influenced by the ambient and headlight illumination during "nautical twilight". The back of a figure lying on a surface would produce an illuminance value of 9.2 lux. A driver needed an illuminance level of between 1 and 2 lux to recognise a light object, 3.2 to 5 lux for a greyish object and 15 to 20 lux for a dark object. The pursuer would have had an illuminance value of 7.36 lux. Similarly on visibility, most drivers could distinguish between low contrasts of above 8%. In the pursuer's situation, there was a luminance difference of 10.4% for a side (vertical surface) view and 188% for a top (horizontal surface) of such a figure. Prof Edgar considered the position if the first defender's testimony had been (although in the event it was not) that he had felt the bump some 20 or 30 yards after the taxi had pulled over. The time to impact would be 1.3 to 2.04 seconds. This would not allow for PRT.

[34] Normally, a contrast, and hence the visibility, of a pedestrian increases as illumination increases. Assuming that the pedestrian is lighter than the background, the contrast may be unchanged by alterations in luminance. The road surface had a

"reflectance" of 6%, whereas the pursuer's clothing was 18%. The horizontal surface had a 65% contrast and the vertical surface had one of 9%. Drivers could detect contrasts of these levels. They may see that something is there, but would have trouble telling what it was. Not all drivers would "resolve targets" of even fairly high contrast. An in-line orientation of the pursuer may have been relatively more visible to the first defender compared to him lying across the road, but it was also a more unusual view of the human form, so recognition might be more difficult.

[35] Prof Edgar dealt with the strength and direction of dipped headlights. The main focus would be to the nearside. He did not think that the headlights from the taxi or the van would have had a significant effect on the pursuer's visibility, as compared to the ambient illumination, as the contrast would remain the same. The contrast calculations indicated that some, but not all, drivers would have detected the pursuer, as his presence would not be expected. They would have a tendency to concentrate on longer, brighter, moving objects. Sometimes drivers "looked but failed to see" a hazard. As a matter of scientific fact, drivers cannot monitor and attend to all aspects of a situation. Prof Edgar was then taken to his conclusions, which the Lord Ordinary narrated in his Opinion.

The pursuer's witnesses

[36] Barry Seward had been a policeman for 30 years; 24 in the road traffic department. He had spent 37 years as a road accident investigator. He accepted that he was not a comparable expert to Prof Edgar on "conspicuity", but his testimony was based on experience. He had examined several cases of people being run over when lying on roads. For an object to be visible there had to be a contrast. The larger the object, the easier it was to see. The pursuer had been a reasonably substantial object. The *locus* from the first

defender's viewpoint was downhill. A car in front of him would be lower. The first defender's eyeline was 1.8 metres above the ground. He had a view to the off-side of the taxi as the right-hand bend approached. His straight-ahead view would be up the off-side of the taxi to where the pursuer was lying. A driver was trained to look as far ahead as possible and to scan the road up and down, right to left, moving around the area ahead. He would glance to various points.

[37] A normal driver would leave some 26 metres between him and a car ahead in order to comply with the Highway Code's 2 second rule; that being the distance which would be travelled at 30 mph during the 2 second or so PRT. The lights of the taxi would have fallen on the pursuer and would have made him more conspicuous. Although dipped headlights concentrated on the nearside, there was off-side lighting too. This would have covered most of the opposite carriageway, and certainly the central section of the road. Mr Seward repeated that, because of the bend, the first defender would never have had to look over the top of the taxi. His view would always have been to the off-side of the taxi. If there were something unusual on the road surface, he would expect someone to see it, especially if, as in the case of a person, it was raised above the normal level of the road surface.

[38] George Gilfillan was called by the pursuer. He had prepared a report for the first defender in the context of the prosecution. Although he identified the report, he was not asked about any of its content, other than the photographs to which it referred. He identified photographs 5, 7 and 8 as being respectively 80, 50 and 30m to the east of the centre line of Lady Lane. The centre line was about 15m east of where the pursuer was found.

[39] PC Gordon McIntyre spoke to carrying out a drive through of the *locus*, in a similar van to that driven by the first defender, with a car about a car's length in front of him. He

was travelling in the passenger seat at about 30mph. As the *locus* was approached, it was downhill. From a distance of 200 yards there was an excellent view of the *locus* as the topography rose into Wellmeadow Street. He had a clear unobstructed view and could see over the car in front.

Submissions

Pursuer

[40] The pursuer's first ground of appeal was that the Lord Ordinary's application of the reverse onus of proof, which was contained in section 10(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 (*Towers* v *Flaws* 2020 SC 209, at para [27]) was flawed. The burden of proof being on the defenders meant that, in determining a matter on the balance of probabilities, overcoming the onus in the face of a criminal conviction, after a full hearing, was likely to be "an uphill task" (*Hunter* v *Chief Constable of the West Midlands Police* [1982] AC 529, at 544). A person who had pled guilty, after receiving legal advice, ought to face a struggle of equal proportions. The defenders' argument, that the *locus* in the complaint related only to Wellmeadow Street, and that therefore the driving on the High Street was not subject to a reverse onus, was not sound, standing the latitude permitted by the Criminal Procedure (Scotland) Act 1995 (Sch 3, para 4(2)). It was the quality of the first defender's driving rather than its location which was the essence of the charge. The defenders' argument on that point had not been advanced at first instance. The Lord Ordinary had correctly identified the existence of the reverse onus, but had failed to apply it to the facts. This was apparent from his reasoning when he stated that Prof Edgar's evidence had been that the first defender might have had a sightline to the pursuer but that

was "insufficient to satisfy the test of the balance of probabilities". Given the reverse onus, it was for the defenders to prove that the first defender did not have a sightline to the pursuer.

[41] The second ground of appeal was that, in his summary of the evidence, the Lord Ordinary: made material errors of fact; failed to record and to consider relevant evidence; and set out evidence which had not been led at the proof. The first defender's evidence ought to have been treated with caution, given his plea of guilty and the inconsistencies between it and that of the taxi driver. There had been no criticisms of the taxi driver's reliability or credibility. Any evaluation of the first defender's evidence, on whether he drove with due care and attention, had to be judged against his acceptance that he had not seen the pursuer at all. This was not a case in which a driver had seen an obstruction but had misidentified it, or where he had seen an obstruction too late to react. The defenders had led no evidence of the approximate distance between the van and the taxi. Prof Edgar was not able to say anything other than that the first defender might or might not have had a sightline. The Lord Ordinary's determination, that there would only have been an unimpeded view once the taxi had pulled over, failed to address the first defender's evidence that the taxi had pulled over before the junction. If that were true, he would have had an uninterrupted sightline for some time. The first defender had been adamant about where the taxi had pulled over, even although that version had not been put to the taxi driver. The Lord Ordinary made no mention of this conflict of evidence. He had been bound to express a view upon it, given that he relied on the existence of a very short unimpeded view.

[42] The Lord Ordinary did not deal with the first defender's evidence that he had looked up the off-side of the taxi in advance; suggesting that his view would not have been blocked by the taxi. The first defender did not say that his view of the *locus* had been impeded.

Those who had conducted drives-through considered that the first defender would have had an excellent view of the approach to the *locus*, given the right-hand bend and the height of the van's cab relative to a car. Mr Seward had said there would have been a good sightline down the off-side of the taxi through the bend. This was not contradicted by Prof Edgar.

[43] Even on the basis of Prof Edgar's evidence about the degree of light on the *locus*, the pursuer had been visible to the first defender. Although Mr Maule had initially thought that the obstruction consisted of bags of rubbish, he realised within split seconds that it was a person. He had had ample time to think, react and stop without the need for emergency braking, even although his attention had been drawn to the closeness of the van. The taxi driver's evidence was that he had been at a particular spot, demonstrated by Mr Gilfillan as being some 80 metres from the centreline of Lady Lane, when he had first noticed the obstruction and some 30 to 50 metres short of that point when he realised that the object was a person. As the pursuer was some 15 metres beyond the point, the taxi driver had seen the object from a distance of 95 metres and identified it as being a person between 45 and 65 metres away. The Lord Ordinary did not deal with any of this evidence in his opinion.

[44] Although Prof Edgar had mentioned a variety of factors which might distract a driver from noticing a hazard, there were no such hazards. The Lord Ordinary's conclusions on illuminance, contrast and visibility were not supported by Prof Edgar's testimony. There was no discussion of any of this evidence by the Lord Ordinary. There was no other traffic or pedestrians around. The first defender did not say that he had seen a brake light on the taxi. There were no road signs or traffic lights to contend with. The first defender was an experienced professional driver. Prof Edgar could not discount the possibility that the first defender had failed to see the pursuer simply because he was not

driving with due care and attention. There was no basis upon which to justify the first defender's failure to see the pursuer at all.

[45] The Lord Ordinary failed to engage with the first defender's testimony about where the taxi had stopped. Although he suggested that the differences between the testimony of the first defender and other witnesses were slight, the position of the taxi on the approach to the *locus* was a major issue. The Lord Ordinary said that, on some matters, he may have preferred the evidence of others, but he did not say on what issues or to which witnesses he was referring. There were other factors in the first defender's evidence which called his credibility and reliability into question. He had said that there had been no street lights on. He thought that the pursuer had been wearing a blue hoodie. His testimony, that the pursuer was lying across the road after the accident, could not explain how the taxi could then have driven up to the traffic lights without colliding with him. The first defender said that he had not crossed into the opposite carriageway, but the taxi driver's evidence had been to the contrary.

[46] The Lord Ordinary said that Mr Gilfillan had spoken to his report as if it had been adduced in evidence. Mr Gilfillan did produce a report and he had been on the defenders' list of witnesses. He was called by the pursuer, but only to speak to the book of photographs which had been put to the taxi driver. No evidence beyond that had been led from Mr Gilfillan.

[47] The only positive evidence that the first defender had been driving with due care and attention came from the first defender himself. His evidence should have been treated with caution and afforded little weight. The defenders had not adduced any evidence that: the first defender did not have a sightline to the pursuer which could have explained a failure to see the pursuer; he had no opportunity to view the pursuer in spite of driving with

due care and attention; the pursuer presented such a poor contrast as to render him indistinguishable from the roadway; and the accident had not been caused by the first defender's failure to drive with due care and attention and to keep a good lookout. The court should be satisfied that the defenders were liable to make reparation to the pursuer for his loss, injury and damage.

[48] A finding of contributory negligence on the part of the pursuer should be within the range of 33 to 40%. The relevance of intoxication had been considered in a number of cases (*Lunt* v *Khelifa* [2002] EWCA Civ 801 at paras 8, 18 and 20; *McNab* v *Bluebird Buses* [2007] Rep LR 36 at para 11; *Lightfoot* v *Go-Ahead Group* [2011] RTR 27 at paras 38 and 39; and *Green* v *Bannister* [2003] EWCA Civ 1819 at para 7). Findings on liability and contributory negligence should be made and a proof on quantum allowed.

Defenders

[49] The defenders maintained that the Lord Ordinary had reached the correct conclusion on the evidence. He had not erred in holding that the defenders had discharged the onus of proof which was upon them in terms of the 1968 Act. In relation to the contentions that the Lord Ordinary had not had regard to certain evidence, there was no reason to consider that evidence had been overlooked just because it had not been expressly mentioned. Where the Lord Ordinary had made primary findings in fact, the court should not interfere with them unless they were plainly wrong (*Henderson* v *Foxworth Investments* 2014 SC (UKSC) 203 at paras 48, 57, 62-68; *Anderson* v *Imrie* 2018 SC 328 at paras 36, 95 and 96, 111 and 115).

[50] Driving in the High Street, when he was said to have been too close to the taxi, was not part of the libel to which the first defender had pled guilty. There was no reverse onus in relation to that element. There was only a change in onus where there was a coincidence

between the proved libel and the averments (*Towers* v *Flaws* at para 27). Even in the context of criminal proceedings, if an accused were charged with driving in three separate streets, it was not competent to lead evidence of his driving in neighbouring streets (*Symmers* v *Lees* 2000 JC 149). The defenders were not precluded from advancing this argument in a reclaiming motion, even if it had not been raised at first instance.

[51] There was no duty on the first defender to have looked at the road surface of Wellmeadow Street ahead of the taxi as he travelled behind the taxi on the High Street. There was no dispute that the pursuer had been lying in an unexpected location in an unexpected attitude. There is no dispute that the first defender had been unaware of the pursuer's presence. The first defender owed no duty to look through the bend in circumstances where he was unaware of the presence of the pursuer and could not reasonably have been expected to have known of it. This meant that the pursuer was not a "neighbour" of the defenders (*Bourhill* v *Young* 1942 SC (HL) 78; *Scott* v *Gavigan* [2016] EWCA Civ 544). The evidence was that the purpose of a driver looking at the bend of a road was to ascertain where it was going and its severity. Even if the first defender did have a line of sight to the pursuer, the fact that he did not look at that line did not mean that his driving fell below the requisite standard of skill and care (*Sam* v *Atkins* [2006] RTR 14; *Whittle* v *Bennett* [2006] EWCA Civ 1538).

[52] The Lord Ordinary had proceeded on the basis that there was an onus on the defenders. He had been entitled to conclude that the first defender had driven with due care and attention. The only purpose of section 10 of the 1968 Act was to reverse the onus of proof. The conviction carried no probative weight. The first defender had testified that he had driven with due care and attention and there was no evidence to contradict this. That was sufficient to discharge the onus (*Stupple* v *Royal Insurance Co* (1971) 1 QB 50 at 72). The

first defender's testimony was supported by other evidence. Prof Edgar had said that, at some distance from the *locus*, there might have been a line of sight but, even if there had been, night drivers would look at the lead car and at the edge of the curve only 20% of the time. The amount of time looking at the far distance was negligible. Drivers did not have panoramic vision. They required to move their eyes around to build up images. A line of sight was an insufficient requirement for a driver to perceive and respond to a hazard. Prof Edgar had said that the pursuer was most inconspicuous at a distance. The pursuer was likely to have been "of lower conspicuity" than other stimuli in his field of view. Psychological evidence had been adduced that drivers were slow to recognise unexpected objects. The taxi would probably have impeded the first defender's view. The taxi had pulled over only a short distance from where the pursuer was.

[53] The Lord Ordinary had regard to the evidence of Mr Seward. Mr Seward had adopted the report of another person. He had not carried out calculations in relation to the relative positions of the van and the taxi. Mr Seward deferred to Prof Edgar on conspicuity.

[54] It could be inferred, from the Lord Ordinary's finding about the positioning of the taxi, that he preferred the evidence of the taxi driver to that of the first defender on that aspect. The Lord Ordinary did not have to assess the precise time or distance available to the first defender in order to determine that the defenders had discharged the onus. The evidence available did not allow such an exercise to be carried out with precision. It did show that the taxi had only pulled over when it had been a short distance from the point of impact. The agreed police accident investigation evidence was that the impact occurred between 15 and 16 metres from the centre of the Lady Lane junction. Prof Edgar estimated that the distance of the first defender's van from the pursuer, at the point when the taxi pulled over, had been between 20 to 30 yards (18.3-27.4m).

[55] The time to contact, assuming a speed of 30mph, was between 1.3 and 2.14 seconds. On that basis, the first defender had had insufficient time to react. Mr Seward said that a normal driver, driving at 30mph behind another vehicle, should be 26 metres behind the front car. Reaction time would be between 2 and 2.5 seconds. The first defender would travel 26.8m in the 2 seconds available for reaction. Had the first defender been aware of the pursuer when the taxi pulled over, he would not have been able to stop the van before reaching the pursuer. Prof Edgar had given evidence about luminance and that the side of the pursuer would have been more visible than the top. Although in-line orientation may have been relatively more visible than when a person was lying across the road, it would be an unusual view of a person and recognition could be relatively more difficult. An unexpected thing in an unexpected location at an unexpected attitude would be less conspicuous than an obstruction which was anticipated.

[56] The taxi driver had not been certain about where he had been when he had first become aware that the obstruction in the road was a person. His memory for some details was not clear, particularly in relation to the position of the pursuer, which was agreed as being lying face down. Although he had thought that the first defender's near-side wheels had hit the pursuer, it was agreed that it had been the off-side ones. The first defender had given a clear explanation as to why he had pled guilty to the reduced charge.

[57] The fact that at some point the first defender had looked up the off-side of the taxi did not mean that he had, at that time, a line of sight to the pursuer. There was no authority for the proposition that the first defender's evidence should be treated with caution because he had pled guilty to the charge. The same applied to the contention that a person who had pled guilty should face "an uphill struggle". It was not disputed that the first defender had not seen the pursuer. He had been shocked when he learned that he had run over the

pursuer. The fact that there were errors in the first defender's memory was not surprising given that the proof was three years after the accident. His impression that there had been no street lighting was not significant. The same applied to precisely where the taxi had pulled over. The Lord Ordinary had the advantage of seeing and hearing the witnesses and, having heard and considered all of the evidence, he was entitled to find the first defender to be credible and reliable. What mattered was whether the decision was one which no reasonable judge could have reached (*Henderson* v *Foxworth Investments* at para 62).

[58] It was accepted that the Lord Ordinary had erred in failing to assess contributory negligence. The pursuer's level of fault should be assessed at 85%.

Decision

General

[59] In *Woodhouse* v *Lochs and Glens (Transport)* 2020 SLT 1203, the court analysed the scope of a reclaiming motion against a Lord Ordinary's determination on whether a driver had been negligent. That determination is one of law but it is nevertheless heavily dependent upon primary findings of fact. In reviewing the latter:

> "[31] …an appellate court must exercise appropriate caution, especially where the Lord Ordinary's decision has been based on determinations on credibility or reliability. Where this occurs, the appellate court must be satisfied that the findings of the Lord Ordinary were 'plainly wrong' (*Clarke* v *Edinburgh and District Tramways Co* 1919 SC (HL) 35, Lord Shaw at 37, approved in *Thomas* v *Thomas* 1947 SC (HL) 45, Lord Thankerton at 55, Lord Macmillan at 59). These words mean that, in the view of the appellate court, the Lord Ordinary reached a decision which no reasonable judge could have reached (*Henderson* v *Foxworth Investments* 2014 SC (UKSC) 203 Lord Reed at para [62]). This in turn is explained as meaning that the decision cannot reasonably be explained or justified (*ibid* para [67]).
>
> [32] 'Plainly wrong' is not the only ground for review. The Lord Ordinary may have made 'some other identifiable error' including:

> 'a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence' (*ibid*)."

[60] The Lord Ordinary erred in several of these respects. He erred in law by failing to apply the reverse onus of proof. He failed to consider relevant evidence. He misunderstood the evidence of the principal witnesses. He took into account evidence of opinion which ought to have been excluded as inadmissible. He reached a conclusion which cannot reasonably be explained or justified.

Onus of proof

[61] The principal error relates to the application of the onus of proof. The first defender pled guilty to a libel that he caused serious injury to the pursuer in Wellmeadow Street by driving without due care and attention in that he failed to keep a proper lookout, overtook a stationary vehicle, failed to observe the pursuer on the road and drove over him. The *locus* of the libel was the place at which the pursuer was injured. It is wide enough to encompass the nature of the first defender's driving as he approached that point; albeit that the careless driving may have started in the High Street. Although driving too close to the taxi was not specifically libelled, that was one aspect falling within the general libel of driving without due care and attention and failing to notice the pursuer. The short point is that the first defender's plea of guilty to causing injury by careless driving reversed the onus relative to negligent driving at or about the *locus* which resulted in him running over the pursuer.

[62] The Lord Ordinary states specifically that he took notice of the reverse onus, but the content of his opinion demonstrates that he did not apply it. This is illustrated first by the Lord Ordinary's reference to the possibility of the first defender having a line of sight to the pursuer not being sufficient "to satisfy the test of the balance of probabilities". It was not for

the pursuer to satisfy the court that the first defender had a line of sight to the pursuer, but for the defenders to demonstrate that he did not. Since the first defender did not say that his line of sight, to the point at which the pursuer was lying, was impeded in any way, this was, despite Prof Edgar's speculation, an almost impossible task.

[63] Secondly, the Lord Ordinary observed that the evidence did not establish: the configuration of the taxi and the van; the distance between taxi and van; and the position of each vehicle in the road. That observation is broadly accurate, but the problem thereby caused was, standing the reversal of onus, one for the defenders and not the pursuer to overcome. It was for the defenders to demonstrate that the first defender drove at a safe distance from the taxi and had been incapable of seeing the pursuer. Since the first defender was not asked, far less did he say, at what distance in terms of metres he had been driving behind the taxi, and at what point, or at what speed he had been travelling, this too was bound to be an uphill struggle.

Relevant evidence: the guilty plea

[64] Although the Lord Ordinary accepted that the first defender had, as a generality, been trying to tell the truth, he did not deal with the important issue of why the first defender pled guilty to the charge. The first defender proffered an explanation based upon his wife's reaction on being told of the risk that he might be going to jail if he were convicted of dangerous driving. There is no indication of when this reaction occurred or when the first defender either determined to plead or instructed that plea. There was no independent evidence to support the first defender's explanation. In particular, his solicitor, who had been funded by the defenders' insurers, was not called to state what his understanding of the position might have been or what advice he had tendered. The solicitor could not

ethically have advised or tendered such a plea of convenience. The first defender's wife was not called to confirm her or her husband's attitude.

[65] The tendering of a plea of guilty was a very significant formal step for the first defender to take. It amounted to a clear and unequivocal judicial admission that his negligence had been the cause of the injuries to the pursuer. The Lord Ordinary does not appear to have taken this admission into account. He does not explain what weight he attached to it as an apparently important piece of evidence. If he simply accepted the explanation tendered by the first defender, he ought not only to have said so in plain terms but also explained why he did not attach any weight to it, especially when there was no objective support for it. The *dicta* in *Hunter* v *Chief Constable of the West Midlands Police* [1982] AC 529 (Lord Diplock at 544) may not be strictly applicable. Nevertheless, a similar proposition, whereby a person who has judicially admitted a criminal offence ought to face an "uphill task", if he attempts to negate his conviction despite the higher standard of proof in the criminal proceedings, is apposite. In this respect, the Lord Ordinary failed to have regard to relevant evidence.

Relevant evidence: the first defender's account

[66] The second area in which the Lord Ordinary erred is in relation to his analysis of the evidence. On line of sight, he appears to have failed to consider the testimony of the first defender. If, as he says he did, the Lord Ordinary considered that the first defender was attempting to tell the truth, a question arises about how he treated the first defender's account of the accident. The first defender maintained that he had a view along the off-side of the taxi to where the pursuer was lying. That would conform to what is shown by the photograph. If the Lord Ordinary accepted that as accurate, he does not explain how it

accorded with his reasoning that the pursuer was not at fault in failing to see a substantial, light (not dark) coloured object (even if it were not recognised as a person); ie the pursuer lying in his pathway. On the first defender's account of the accident, the taxi driver pulled in at the roadside in advance of the junction with Lady Lane. If the Lord Ordinary accepted that, a similar consideration arises. That would have given the first defender a substantial period of time in which to react and to avoid the pursuer. There is no treatment of these aspects of the first defender's testimony. The Lord Ordinary was bound to consider this testimony as it bore upon the central issue in the case. He was bound to explain whether he accepted or rejected the first defender's testimony in these areas. If, as appears to be the case, he did not accept it, he ought to have provided some reason for doing so.

[67] The Lord Ordinary stated that there were aspects of the first defender's evidence where he would have preferred the evidence of "other witnesses", yet this did not persuade him that the totality of his evidence should be rejected as unreliable. Put in such a general way, such a statement is unexceptional. The difficulty lies in the lack of any explanation of which aspects and which witnesses the Lord Ordinary was referring to. If the Lord Ordinary rejected the first defender on where the taxi driver had pulled over and that he had a view along the off-side of the taxi, there is not much else to be reliable about other than his accepted position that he did not see anything on the road as he moved past the taxi. There were other criticisms of the first defender's testimony, notably his recollection that there were no street lights on, which would have been very odd. His attempts to blame the taxi driver may also have merited comment. The more minor matters, such as the time of the accident and the colour of the pursuer's clothing, may seem relatively insignificant, but the picture which the first defender painted was markedly different from that of the taxi driver. The contrast ought to have been analysed and clear findings made.

[68] The first defender said that he had not seen anything on the road before feeling a bump. The Lord Ordinary did expressly accept the first defender's testimony on this point. If it is correct, it is difficult to see how the first defender could not be at fault if, on his own account: (a) he had an unimpeded view along the off-side of the taxi; and/or (b) the taxi had pulled into the roadside in advance of the junction. The Lord Ordinary does not explain what, in this context, he made of the first defender's apparently spontaneous statement to the taxi driver of "Did I hit it", if he had not seen anything before the bump.

Relevant evidence: the taxi driver and the pursuer's witnesses

[69] The photographs of the *locus* point to a driver having an unimpeded view to the point where the pursuer was lying. The first defender maintained that he was not too close to the taxi, but that he had been made aware that the taxi driver had expressed the view that he had been closer than he would have liked. Ultimately, before pulling over, the taxi driver had said that the van was "right behind me". Again, the Lord Ordinary was bound to deal with the conflict of the evidence. Although the first defender may not have been tailgating the taxi initially, the question had to be one of whether being closer to the taxi than the taxi driver "would have liked" was redolent of negligence and, in any event, whether the first defender's ultimate position "right behind" the taxi was itself negligent.

[70] The photographs appear to be self-explanatory, although the pursuer did lead evidence of what they showed. Mr Seward spoke to: the *locus* being downhill; the elevation of the first defender in the van; and the view which would have been apparent along the off-side of the taxi to where the pursuer was lying. There ought to have been no need for the first defender to look over the taxi, especially if he was affording the taxi a 26 metre gap in order to conform to the Highway Code's 2 second guidance. Mr Seward had considerable

experience of examining the scenes of road traffic accidents, including ones where a person had been lying on the road. Although he accepted that his expertise was not "comparable" to that of Prof Edgar in relation to visibility or "conspicuity", he was not deferring to Prof Edgar in relation what he described at the *locus*. There is no treatment of Mr Seward's testimony by the Lord Ordinary beyond a general statement that he did not find it of "particular assistance" in reaching a view on the merits. This is difficult to understand given that Mr Seward was saying, in essence, that the first defender had (as the first defender had accepted) an unimpeded view of where the pursuer was lying for some considerable distance prior to running over him.

[71] Similar considerations apply to Mr Gilfillan, whose report the Lord Ordinary referred to although Mr Gilfillan had not spoken to its terms in his testimony. Again, the Lord Ordinary said that this was not of particular assistance to him in reaching a view on the merits. The problem with that is that Mr Gilfillan had calculated the distances from the position of the photographer in photograph 8 to the central line of Lady Lane. This was 30m. It represented the point at which the taxi driver had realised that there was a person lying on the white line between the carriageways. There was therefore a distance of some 45 metres from the point at which the taxi driver recognised that the obstruction was a person and the location of the pursuer. This was outside the reaction time and distance spoken to by Prof Edgar. Given that there was only a need to avoid the pursuer, as distinct from stopping in advance (as the taxi driver had achieved without heavy braking or turning), why this evidence was not of assistance is obscure.

[72] The Lord Ordinary was in error in thinking that Mr Gilfillan had spoken to his report. However, he states that he did not find it of assistance in reaching a view of the merits. This error cannot therefore be regarded as a critical one, despite the Lord Ordinary's

specific mention of the content of his report that the first defender had had insufficient time in which to react.

[73] The Lord Ordinary did not deal with the testimony which was given by PC McIntyre to the effect that the first defender would have had a clear and unobstructed view of the road ahead.

Professor Edgar

[74] Despite its length, Prof Edgar's testimony added very little, if anything, to the equation of whether the first defender had been negligent. His expertise is not in question. He is an eminent person in his fields of endeavour. His testimony has been set out in some detail for reasons already given. Before dealing with its relevance, it is worth revisiting the limits of expert evidence in cases of this nature.

[75] The determination of whether a party in a road traffic case has been negligent is one for the fact finder; in this case the Lord Ordinary. The Lord Ordinary must put himself in the place of the reasonably skilled and competent driver and decide for himself whether negligence has been made out. Evidence of fact which explains the nature of the accident *locus* will of course be relevant. This will customarily be given by the police officers on the scene or road traffic investigators who have visited it. It can be given by anyone who has viewed the scene and is sufficiently familiar with it. This is not opinion evidence, although it may be given by a person with a degree of skill and knowledge in the examination of road traffic accidents.

[76] *Kennedy* v *Cordia (Services)* 2016 SC (UKSC) 59 sets out the parameters of opinion evidence. The opinion of the court (delivered by Lords Reed and Hodge) had regard (at para [43]) to the two questions posed by King CJ in *R* v *Bonython* (1984) 38 SASR 45 (at 46 –

47) on the admission of expert testimony. The first of these was divided into two parts; the first part being:

> "whether the subject matter of the opinion is such that a person without instruction or experience in the area of knowledge or human experience would be able to form a sound judgment on the matter without the assistance of witnesses possessing special knowledge or experience in the area".

[77] *Kennedy* referred (at para [44]) to four considerations which govern the admissibility of skilled evidence. The first of these was whether the proposed skilled evidence will assist the court in its task. In applying this, "the threshold is the necessity of such evidence". It was for the court to decide whether expert evidence was needed, when its admissibility was challenged (para [45]). Having looked at the Federal Rules of Evidence in the United States of America, as quoted by Justice Blackmun in *Daubert* v *Merrell Dow Pharmaceuticals Inc* 509 US 579 (1993) (at 588), the court (at para [47]) advised caution against too rigid an interpretation of necessity where a skilled witness was put forward to present evidence of fact in an efficient manner rather than to express an opinion on the factual evidence of others. The court continued:

> "If skilled evidence of fact would be likely to assist the efficient determination of the case, the judge should admit it".

[78] Much of Prof Edgar's evidence was about research which has been done on how drivers can and do react in particular situations. As such, this would be competent, if it were relevant. The Lord Ordinary was not called upon to address the issue of relevancy. The essence of Prof Edgar's evidence was foreshadowed in the defenders' pleadings. There, it is said that:

> "…perception of a hazard, such as a pedestrian lying in the road, requires both visual detection and recognition that there is a hazard. Detection requires that a hazard is both detected at a sensory level and discriminated from the back ground.

> There are two key characteristics of a hazard – visibility and conspicuity. Visibility means that the hazard is theoretically detectable by a driver at a sensory level. Conspicuity means the extent to which a hazard stands out from its background".

The pleadings continue for some lines in this vein.

[79] It may be valuable in the academic or scientific world to describe matters in such terms and to carry out what may be useful research into them. It says very little other than the obvious. For a driver to notice that there is a hazard, he has to see it and recognise it. It has to be visible. The degree to which it is visible or conspicuous will depend on its size, shape and colour in relation to any background. If, as in this case, it is an unexpected hazard, or at least one which the driver did not anticipate, the slower he will be to react to it. None of this is of any practical assistance to the judge. It does not tell the judge anything that he or she should not already know; applying common sense and experience. Much of Prof Edgar's evidence ought to have been excluded from the judge's consideration on the ground that it was of no assistance to the court in the efficient determination of the case. It was far from necessary. Rather, it distracted the judge from the simple task, which was for him to carry out; *viz.* to decide whether, put shortly, in the exercise of reasonable skill and care, the first defender ought to have seen that there was a hazard in his path and taken steps to avoid it. Instead of deciding that for himself, having heard the evidence of fact on the *locus* and the movements of the van and taxi, the Lord Ordinary adopted Prof Edgar's non-expert and mostly inadmissible view on whether the pursuer "in all probability": had a line of sight; whether that was impeded by the taxi; and whether the pursuer was visible.

[80] Prof Edgar's evidence on factual matters, such as the perception reaction time of drivers, was no doubt admissible. It did not differ from that of Mr Seward in its reference to the Highway Code 2 second guidance. Prof Edgar went beyond axioms about the visibility or "conspicuity" of items on roadways when he provided detailed scientific calculations.

The problem is that the Lord Ordinary did not analyse the evidence about the measures of lux or the percentages of luminance and contrast. If they are analysed, they do not detract from the proposition, which the Lord Ordinary rejected, that a person lying on the road, in the manner in which the pursuer was dressed and positioned, and with the ambient and headlight illumination, would have been visible to drivers, even if some (perhaps negligent) drivers might not have seen him at least until it was too late.

[81] In so far as the Lord Ordinary attached any weight to Prof Edgar's testimony on general visibility, "conspicuity" or the contrast of the pursuer, he was in error. This was not evidence either of fact or opinion which was capable of assisting the court in its task. In so far as Prof Edgar's detailed analysis of these matters is concerned, the Lord Ordinary did not rely on it. Had he done so, the measures examined would not have supported the defenders' contention that the first defender could not, with reasonable skill and care, have seen the pursuer and taken some form of avoiding action which would have prevented his injuries.

Conclusion

[82] All of the above leads to the conclusion that the Lord Ordinary's decision cannot reasonably be explained or justified. On the evidence before him, the first defender had (as he himself accepted) an unimpeded view along the off-side of the taxi as he approached the *locus* where the pursuer was lying. He failed to see him as he lay on the road. That is *prima facie* evidence that he failed to keep a good lookout. A driver has a duty to take reasonable care for other persons using the highway; even persons who are lying on it in a drunken stupor. Drivers are not entitled to assume that other users of the road will do so with reasonable care. Common experience is that many do not. The erratic behaviour of

intoxicated persons in the early hours of the morning in town centres is something which requires to be guarded against. Coming across the intoxicated, whether vertical or horizontal, in the middle of an urban street is something which can and does happen (see eg *Green* v *Bannister* [2003] EWCA Civ 1819; *Donoghoe* v *Blundell* [1986] CLY 2254). Even if it is unexpected and unanticipated, it is reasonably foreseeable.

[83] *Bourhill* v *Young* 1942 SC (HL) 78 is not in point. Mrs Bourhill claimed to have suffered shock as a result of the noise of an accident. She had not seen it. The case was about remoteness of damage in the context of a person who was not directly involved. *Scott* v *Gavigan* [2016] EWCA Civ 544 turned on its own facts. In that case, the pursuer had, when only 10m away, run towards and into the path of a moped. The rider attempted to take appropriate avoiding action but he could not avoid a collision. Similarly, *Sam* v *Atkins* [2006] RTR 14 involved a situation in which a pedestrian stepped out in front of the defender's car, giving the driver no time to react.

[84] This is not such a case. It is one of a driver failing to see something in the middle of the street along which he was driving. The street lights were on and the pursuer was wearing light grey clothing. The case is not comparable with those in which a person is driving along an unlit country road at night and fails to see a pedestrian in dark clothing. Even in that situation, there remains a duty on a driver to take reasonable care for pedestrians, and that involves keeping a good lookout on the road ahead, especially when overtaking a car which has pulled over to let him past. Irrespective of the statutory reversal of onus, this is a relatively clear case of negligent driving. The first defender had a duty to take reasonable care to keep a good lookout on the road ahead and not to overtake other vehicles unless it was safe to do so; that is when the road could be seen to be sufficiently clear. He did not do so.

[85] On that basis, the reclaiming motion should be allowed. The interlocutor of the Lord Ordinary of 27 February 2020 must be recalled, as will the associated expenses interlocutor of 19 March 2020. The court will find that the accident was caused by the fault and negligence of the first defender and that the second defenders are vicariously liable therefor. It will allow a proof on quantum.

[86] It is accepted that the Lord Ordinary erred in failing to make a finding of contributory negligence. This is disappointing given the clear statement on the need to do so in *Hogan* v *Highland Regional Council* 1995 SC 1 (LJC (Ross), delivering the opinion of the court, at 2). The court has to determine that matter as if it were a court of first instance. It has no difficulty in holding that the greater fault lay with the pursuer in lying down in the middle of the street in a state of intoxication. He owed a duty of care to himself and he breached that duty.

[87] The degree of culpability is significantly greater than that of the pursuer (33%) in *Lunt* v *Khelifa* [2002] EWCA Civ 801, which involved a drunk pedestrian stepping out into the road. The intoxication there was said not to have been the important question. The latter was what the pursuer had done and not the reason why he had done it (Latham LJ at para 18). It is also greater than that (50%) of the pursuer in *McNab* v *Bluebird Buses* [2007] Rep LR 36, who was walking, in a manner which did not face the oncoming traffic, along a dark road, wearing dark clothing. The circumstances in *McNab* were not too dissimilar from those in *Lightfoot* v *Go-Ahead Group* [2011] RTR 27 in which the pursuer was 40% to blame for stepping out into a dark, country road to wave down an approaching bus.

[88] *Green* v *Bannister* is a much better comparator (see also *Donoghoe* v *Blundell*). There, the pursuer had lain down in a drunken state in a *cul de sac* and was run over by a person who was reversing from a parking space. He was found 60% to blame. The pursuer in this

case chose a more dangerous location to lie down. Having regard to all the circumstances, the court will apportion 65% fault to the pursuer and 35% to the defenders.