



OUTER HOUSE, COURT OF SESSION

[2024] CSOH 39

PD372/22

OPINION OF LORD SANDISON

In the cause

NIGEL DICK

Pursuer

against

JOSEPH MERRICK

Defender

**Pursuer: Mackay, KC et Hovey; Thompsons
Defender: Brownlee; Eversheds Sutherland**

3 April 2024

Introduction

[1] At about 5.30pm on 26 August 2019, bicycles being ridden respectively by the pursuer, Nigel Dick, and the defender, Joseph Merrick, collided at or near the junction of National Cycle Route (NCR)7 and NCR75 between Linwood and Johnstone. Both men were injured, Mr Dick very seriously so. The matter came before the court for a diet of proof before answer of four days' duration in order to determine who was at fault in causing the accident, and if both parties were at fault, in what proportions. The following aerial photograph shows the layout of the cycle paths, but should not be regarded as inferring

anything about the precise location of the collision, which was one of the matters in dispute between the parties.



Statutory provision

[2] The Law Reform (Contributory Negligence) Act 1945, as applicable to Scotland, *inter alia* provides:

“1.— Apportionment of liability in case of contributory negligence.

- (1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage ...”

The evidence

Pursuer's case

[3] **Nigel Dick** (54) stated that he was employed as a senior control engineer in Renfrew. In 2019, he was commuting to and from work and his home in Lochwinnoch by car or bicycle. On the day of the accident, he was cycling home from work and had started his

journey about 5.00pm. He rode along public roads before joining the NCR75, intending then to turn right (or westwards) along the NCR7 towards his home. He was very familiar with the route, cycling it at least nine times a month. He was riding his own bicycle, and again was well acquainted with its operation. He had not ridden the bicycle since the accident; it had been kept in his garage.

[4] He had been cycling southwest on the NCR75. Where that route approached the NCR7, it split into a Y shape, with the right-hand fork intended for those heading right onto the NCR7 westbound and the left-hand fork for those heading left onto the NCR7 eastbound. He was intending to turn right. As he approached the junction, he was travelling at his normal speed for the location, being something between 12 and 15mph. It was not possible to take the bend onto the NCR7 at speed. He was crouched down slightly lower than a normal riding position, leaning forward, and his hands were covering the brakes. On approach, he slowed down slightly and could see that his way to join the NCR7 was clear. He did see a cyclist on the NCR7, whom he now believed to be the witness William Howard, approaching the junction from the west, a good distance - some tens of metres - away, but the NCR7 was otherwise clear. He would not have emerged onto the NCR7 had it been dangerous to do so. He made the turn onto the NCR7 and was established on that route when he looked up and saw Mr Merrick's bicycle emerge from behind Mr Howard in order to overtake him. Mr Merrick had started his overtaking manoeuvre when Mr Dick emerged onto the NCR7. As his bicycle and that of Mr Merrick converged, he expected Mr Merrick to move back in towards Mr Dick's right-hand side, but instead he started to go to Mr Dick's left. Having expected Mr Merrick to steer to the right, Mr Dick had steered to the left, and the collision occurred. He recalled saying "You have gone the wrong way".

[5] After the impact, he remembered feeling pain and hitting the ground. Once lying on the ground, he could not feel his arms or legs, and said to himself "I'm broken". He tried to get up and passed out. The impact had been on his chest, perhaps slightly to the right-hand side of it. He sustained serious injuries. His right lung was damaged, collapsed and filled with fluid. Paramedics had put a tube into it from under his armpit. The pain from the insertion of the tube had caused him to regain consciousness, and he heard the paramedics tell him to calm down. He had been told afterwards that his heart had stopped and that he had required resuscitation. He had also shattered his C3/C4 vertebrae, and was paralysed from the neck down for a period. He had not entirely recovered, and was still quite severely affected by his injuries.

[6] He had not been able to ride his bicycle again. It had been taken from the scene of the accident by the police, picked up by his brother and stored in his garage. A neighbour had told him that it was pretty much unscathed. He had attended a reconstruction of the lead-up to the accident organised by his solicitors, along with junior counsel, his wife and the expert witness John Franklin. They had conducted exercises to try to establish his speed at the time of the accident. A bicycle had been ridden several times down the NCR75 and westwards onto the NCR7 at varying speeds between around 12 and 18mph, measured by a trip computer taking a reading from the wheel. He had observed those rides and had identified that which he thought most closely to approximate to his speed on the occasion in question. A video had been made, which was shown. The result of the exercise was that his speed was thought to have been about 15mph, which would be within the normal range of speeds he would travel in taking the bend.

[7] He had taken videos of his bicycle after the accident, to show the lack of damage to it. The wheels were the standard spoked wheels which came with the bicycle. They still ran

true, without touching the brakes. The relative videos were shown, and the running of the wheels demonstrated by the pursuer in court.

[8] The pursuer was aware of the Strava app which could, *inter alia*, be used to monitor bicycle rides on a mobile phone, but did not himself use or have it.

[9] The place where the accident had happened was not a T-junction. There were no warning signs or signs directing traffic, and there were no road markings of any kind. It was a merging of two paths, with no right of way for anyone. He had been on a normal commute at a normal speed. If anyone had formed the notion that he had been on a time trial, he had no idea how that impression could have been given. He had been wearing a rucksack with personal items in it. Equally, he had no recollection of having given an account of the accident to hospital staff, and had been on pain relief after his admission. In particular, he had no recollection of having said that Mr Merrick had been going about 25mph and that he had been going faster. He would not have been doing 25mph at that point.

[10] In cross-examination, Mr Dick stated that his approach to the junction had been downhill on the NCR75 before veering right onto the NCR7. Although he remembered the accident itself fairly vividly, his memory of its aftermath was poor. He had been unconscious at the scene and had been given CPR by a passerby. He reiterated that he did not recall having told hospital staff of what had occurred in any detail. He had completed his turn onto the NCR7 before the collision.

[11] His neighbour had adjusted the handlebars of his bicycle after it had been returned to him. They had been more upright after the accident. They must have been moved by the accident. The bicycle had aerobars fitted to extend the rider's comfort and reach. Mr Dick had previously done a lot of long-distance rides. The part of the aerobars in line with the

handlebars functioned as forearm rests, and one's hands held the upturned section. One leaned forward and hunched in order to become more aerodynamic. There were no brakes or gear levers on the aerobars, and so one could not control one's speed when using them. Immediately after the accident, his bicycle had been propped up against a metal post on the northern side of the NCR7. The aerobars had been displaced upwards by 10 or 20 degrees. On the approach to the junction, his body position was down low, but his forearms were on the handlebars and his hands were covering the brakes. He was fairly sure that he was not using the aerobars. He accepted that one's body position would be low if one was using the aerobars.

[12] He further accepted that the speed estimation exercises which had been carried out had suggested that his speed at the time of the accident was 13.4mph. The bicycle used in the exercises did not have an aerobar fitted, the rider had his hands in the same position as Mr Dick had had his hands, but was not leaning forward. Mr Dick had observed the exercises from the south side of the NCR7. His view of what was happening was not unimpeded. He could not recall if he had moved position during the exercises. There had been at least three runs and he had chosen one as representing his speed at the time of the accident. He accepted that perceptions of speed could be different when riding as opposed to when observing. He knew the speed he had come down the hill, he did it a lot. In the exercise, he had chosen the speed he had been doing at the time, although he could have been out by a few miles per hour.

[13] He had a driving licence. On the day, he was merging into a path. There were no lines marked on it. There was no right of way, but he would have waited at the junction if proceeding would have impeded someone. He could not comment on where he and Mr Merrick had ended up after the collision.

[14] In re-examination, Mr Dick stated that when the collision was imminent, he had moved his hands from the brakes onto the aerobars. The clamps attaching the aerobars to the handlebars were slightly loose, and the aerobars were able to move up and down if pressure was applied to them.

[15] **Joseph Merrick** (66), the defender, stated that he was a retired schoolteacher and fair-weather cyclist. He used the Strava app to look back at his cycling trips. On the day in question, he had been called in to do supply teaching work at Glengarnock. His wife had dropped him off in the morning and he was to cycle back home to Anniesland in the evening. She had fallen ill during the day and he had stopped work earlier than usual to cycle home on the NCR7. He was familiar with the route and the junction in question, having cycled it a few times previously, although not several times a week. He had also used the NCR75, so was familiar with the junction from that perspective too. While cycling eastwards along the NCR7, he came across a cyclist in front of him, about 50 metres before the junction. That cyclist was going considerably more slowly than him, and he overtook him. He then moved back to the left-hand side of the path and proceeded. He followed the rule of the road on the path, namely keeping to the left. Mr Dick suddenly emerged from the junction and came straight into him at 45 degrees, right at the junction. It was a severe impact on Mr Merrick's left-hand side. Although he was cycling with his hands on his brakes, he had no time to react and apply them. As one approached the junction, one could not see onto the NCR75. He could see that the path in front of him was clear for metres ahead. He had not been going fast and had not taken any steps to slow down when approaching the junction. He was a car driver too, and accepted that one ought to be able to stop in an emergency, but saw no necessity to slow down. He did not know how fast he

was going. His Strava app said that his trip average had been 18mph. On a clear straight path, 20mph was not fast. He was a slow cyclist.

[16] He had broken his left collarbone in the accident. In hospital, he had not been asked about the accident and did not recall giving any information beyond the fact that he had been hit. After the accident, his wife had come to the scene. He had asked her to do so, but had not explained exactly what had happened as he did not want her to be alarmed. It was very concerning that Mr Dick had stopped breathing for a while. He had not invited her to take photographs of the scene, but in fact she had done so. He had annotated, though not particularly accurately, another photograph, not taken by her, to show where he and Mr Dick had come to rest after the accident. They had both ended up on the southern verge of the NCR7, Mr Merrick with his feet adjacent to a metal pole which was a metre or so east of the junction and Mr Dick in a more easterly position facing the other way from Mr Merrick but with their heads near each other. The point of collision had been on the NCR7 at the junction, perhaps towards the middle of the path. Mr Merrick had been hit on the left-hand side. After the accident, his bicycle had been propped up against a metal pole to the south of the NCR7, which was directly opposite the matching pole to the north against which Mr Dick's bicycle had been propped. His bicycle was damaged in the collision; the brake and gear lever was badly damaged, the front fork was compromised and the frame, which was carbon fibre, would have had to be X-rayed to ensure its safety before the bicycle could be ridden again. He had not thought that to be worth the expense, and had disposed of the bicycle.

[17] He had not consulted solicitors prior to the raising of the present action. A few months after the accident, he had made an insurance claim for a new bicycle and his insurers had appointed his present solicitors. He had given them accurate information. He had

commenced cycling again now. He believed that he had the right of way at the point of the accident, as anyone coming out of the NCR75 and turning right would have to cut across people going east on the NCR7. Mr Dick had come straight through the junction at speed and right into him. He had not seen whether Mr Dick was in a hunched position, simply that he was exceptionally low on his bicycle, indeed strangely so. The collision had happened in the tiniest element of a second. He did not know whether Mr Dick had slowed or not before the collision. The accident had not happened as Mr Dick maintained; that was nonsense. Both would have braked had they been approaching each other head-on. Mr Merrick was not in the process of overtaking Mr Howard when the collision occurred, nor had he just finished doing so. That categorically did not happen. The police had not taken a statement from him after the accident; they had taken one from Mr Howard. He had already overtaken Mr Howard and was re-established on the left-hand side of the path when he was hit at the junction. Mr Howard was cycling slowly; he was barely moving. Mr Dick had not completed his turn and was not established on the NCR7 at the time of the collision. Mr Merrick had the right of way and was not travelling fast. The accident had not happened west of the metal poles. He had not commenced overtaking at a point when Mr Dick would have been visible to him.

[18] Mr Merrick was presented with a document bearing to be the Strava data for the ride which ended in the collision. It showed his speed at that point to be 20.1mph, although he had never seen that type of analysis before. He stated that if that was what his Strava data said, he would accept it. It bore to show that he had travelled at up to 26.6mph during the trip, and that would be about right. He had only joined the NCR7 less than 150 metres before the accident.

[19] In cross-examination, Mr Merrick re-iterated that the collision had taken place right at the junction of the NCR7 and the NCR75. He had never had any issues at the junction before. The verges had been heavily foliaged at the time. He had seen Mr Dick for a split second, but had had no time to react. The collision was not head-on; he had been hit on his left-hand side, instantaneously. He thought that Mr Dick's head had struck the left side of his chest. He had had no opportunity to press on his brakes, even though his fingers were on them. As Mr Dick exited the junction, his upper body was low to his bicycle. All that could be said about his speed was that he was not there, and then he was. If Mr Merrick had had the opportunity, he would have avoided him. He was aware of being thrown from his bicycle and struggling to breathe. Mr Dick's head had ended up close to his, and Mr Merrick had spoken to him, asking "What happened there?" Mr Dick was unconscious, with a froth around his lips, not moving at all. Mr Merrick asked Mr Howard to call the emergency services and tell them that Mr Dick was not breathing. A young woman arrived at the scene and took the telephone from Mr Howard. She had tried to resuscitate Mr Dick and relay information to the emergency services. In addition to his fractured left collarbone, Mr Merrick had sustained broken left ribs.

[20] When his attention was drawn to hospital notes taken on 29 August 2019, recording that he had been cycling at more than 20mph, Mr Merrick stated that although he was in agony and squealing at the time, the notes were vaguely consistent with his recollection. Mr Dick's bicycle was fitted with aerobars, which allowed the rider's body position to be down and reduced resistance from the body to air. Mr Dick's body position at the time of the accident was consistent with the use of aerobars. Mr Merrick's overtaking manoeuvre had been completed before the collision. His speed felt comfortable to him. He cycled with

his body upright, not using aerobars. His hands had been on the brakes, but he had had no opportunity to apply them.

[21] **William Howard** (63) gave evidence by WebEx, which was interposed between the chief and cross of Mr Merrick. He was anxious to make clear at the outset and throughout his evidence that he had no clear memory of the collision. On the day in question he had set out on a leisurely cycle ride to get power back into his legs after recent surgery. He had walked uphill for a bit, and then cycled eastwards down the NCR7 on the left-hand side. At a junction on the main path, someone had passed him by at some pace. Another cyclist came down the NCR75 quite fast. He had ploughed right into the cyclist who had overtaken Mr Howard and they had both fallen off their bicycles in different directions. One had appeared to be knocked out, but the other had said that he was not breathing and that Mr Howard should call 999.

[22] The cyclist whom he now knew to be Mr Merrick had passed him when he was not going fast. He could not say exactly where the overtaking manoeuvre took place, perhaps 20 to 30 feet or so before the junction. That was guesswork, however - it had happened a few years ago. He could not remember the exact layout of the paths and junction - it was his first time on the path. He could not swear to the exact distance from the junction that the overtaking manoeuvre took place, and was not to be quoted on the matter. He had been in shock. The collision had occurred not long after Mr Merrick overtook him, just seconds afterwards. On being referred to photographs of the scene, Mr Howard appeared to come to the view that the overtaking manoeuvre had taken place perhaps seven to 10 metres west of the metal poles and that the point of impact had been just east of those poles, at the junction. He had been able to see the junction as he approached it. Mr Merrick had been ahead of him when the collision occurred, but, he

thought, still on the right-hand side of the track. Mr Howard was not going fast. The collision had been in front of him, but not particularly close to him. He was lucky not to have been skelped himself; that would have caused him a lot of health problems. Mr Dick was coming down the slope of the NCR75 quickly and without slowing down had ploughed into Mr Merrick, who did not know what had hit him. It had happened years ago; his memory was not that clear.

[23] He could not remember where Mr Dick and Mr Merrick had been lying after the accident, or how close they were to the poles. He had got off his bicycle and had come across Mr Dick first, then Mr Merrick. They were about 10 feet apart. Mr Dick was on his side, with a rucksack on his back. He had not seen anyone propping up their bicycles against the metal posts.

[24] He might have given statements previously about the matter, but thought that he had changed his mind about what had happened after doing so. He might have given a statement to the effect that Mr Merrick had overtaken him 3 yards before the collision, but could not remember if that was true or not. He might have made a mistake about that, and in any event did not remember saying it. On being shown a signed statement which he had given to the pursuer's solicitors in February 2022, Mr Howard stated that he could not remember signing it or what he had said in it. He would have been trying to tell the truth at the time. The statement contained an observation that Mr Merrick had passed him 3 yards before the collision, but he could not remember whether that was accurate or not. Mr Howard had been slightly back when the collision occurred, so that did not seem right. It was not consistent with what he was saying in his evidence to the court, and he could not explain why. He did not remember saying anything about there having been a cyclist behind him, as the statement claimed. His memory about the whole incident was not that

good anymore. He believed that Mr Merrick had been on the right-hand side of the track on impact, but his memory was not great. In response to a leading question, he stated that it was a possibility that the collision had been head-on.

[25] He had given a statement to a police officer after the accident, but could not remember what he had said. He would not have lied. On being shown the signed statement he had given to the police on the day of the accident, he agreed that he had said that he had been overtaken by another male cyclist just as they were approaching a Y-junction. He did not remember saying that the collision had occurred right in front of him. He did not remember giving the statement at all, but obviously must have done so. There was a sketch of the scene in the policeman's notebook. He had not drawn it, had not signed it as accurate, and did not think that he had even seen it.

[26] In cross-examination, Mr Howard stated that the policeman's sketch accurately showed the direction of travel of Mr Dick and Mr Merrick respectively. An asterisk drawn at the junction was consistent with his memory of where the collision had occurred. His recollection of precise details was not particularly good. He could remember fundamentally what had happened. Mr Merrick had overtaken him. He was going slowly and the manoeuvre had been completed. The collision had happened in front of him, at the junction. The cyclists ended up on the grass verge opposite the junction. Mr Dick was partially on the path opposite the mouth of the junction, with his head towards the verge.

[27] In re-examination, Mr Howard stated that Mr Merrick had ended up on the grass verge, Mr Dick on the pathway. When he spoke to the police officer, he probably did not know the names of the cyclists. He had not drawn the sketch in the notebook. He did not remember having seen it, but he must have done.

[28] **John Franklin** (75), a consultant in cycling skills and safety, provided an expert report dated 28 March 2023 considering the circumstances of the accident, the layout at the locus, the behaviour of the two cyclists and their relative right of way over one another. He was the author of *Cyclecraft*, the definitive guide to skilled cycling technique published by the Stationery Office in various editions from 1988 to 2020, and of *Advanced Cycling* for the Institute of Advanced Motorists in 2010. He was a member of the UK Government/CTC Reference Group that developed the National Standard for Cycle Training and accreditation scheme launched in 2003, and of various other Department of Transport advisory and working groups.

[29] He had visited the site of the accident on Friday 1 July 2022 with a bicycle in order to survey the scene and gain an understanding of what might have occurred. He had met Mr Dick there. He had returned to carry out speed tests on 9 November 2022. Mr Dick had told him that he had crossed a bridge over the A737 and had then turned right onto the NCR7, towards the west, that he thought that he had managed the turn onto NCR7 and then saw Mr Merrick coming towards him at speed, and that he recalled saying to him, "Oh dear, you have gone the wrong way", following which he had hit the ground. The bicycle he was riding was unscathed. That was consistent with previous accounts of the accident reported to Mr Franklin.

[30] At the locus there was a triangular junction between three cycle paths: the NCR7 to the west and east and the NCR75 to the north. The paths were unsegregated shared use cycle/pedestrian paths, mostly 2.4 metres wide but a little wider through the triangular junction. The NCR75, coming from a bridge over the A737, descended a steady hill. Although not very steep, the gradient added to the speed of a cyclist approaching the subsequent junction. Visibility along the through route of the NCR7 from west to east was

good but more limited to and from the NCR75. There were no regulatory signs or markings at or near the junction and no indication of priorities.

[31] Mr Merrick had been using a Strava performance tracking device at the time of the accident, which recorded data about a cyclist, including speed, and stored it online for subsequent retrieval. Mr Franklin had been provided with an excerpt from Mr Merrick's Strava log for his ride leading up to the locus. Although he had limited experience of Strava use or logs, this showed that he was travelling at 20.1mph (approximately 8.99 metres per second) approaching the scene of the collision. One could not tell from the Strava data on which side of the path Mr Merrick had been travelling. As Strava had an accuracy of only 15 to 30 metres, it was not possible to locate precisely Mr Merrick's position on a path only 2.4 metres wide. All highways (including cycle paths) had design speeds, intended to facilitate normal traffic and limit high speeds. A speed of 20.1mph was greater than the recommended design speed for cycle paths of 30km/h (18.75mph). That was the highest theoretical speed that cycle paths were designed to accommodate safely. In England, the Department for Transport had recommended that people who wished to cycle faster than 18mph should not use shared-use paths but should restrict their cycling to the roads. At the locus the design speed of the cycle paths was much less than 30km/h due to the poor intervisibility at the junctions. There were no speed limit signs. Technically, there was no speed limit for cyclists; it was a matter of judgment, discretion and experience. The casualty rate on cycle paths was high.

[32] It had been suggested that Mr Dick rode into Mr Merrick on his left side. However, if Mr Dick had ridden directly into the side of Mr Merrick, it was almost certain that Mr Dick's bicycle would have suffered damage, which it did not. Mr Franklin had investigated hundreds of cycling collisions and could not think of a single one in which

the wheels of a bicycle ridden into the side of another one had not been damaged. Neither bicycle in the present case had apparently been damaged in that way, which meant that a perpendicular or "T-bone" collision, or even one at 45 degrees as claimed by Mr Merrick, could not have been what had happened. If there was damage to the front fork of Mr Merrick's bicycle, as he claimed, that would have needed a significant impact at the front of the machine, and would have resulted in wheel damage as well. Much more likely was that the two cyclists suffered a glancing person-to-person impact, left side to left side, in which their bikes did not make contact. This would have happened if the two cyclists, at the point of impact, were each riding in opposite directions along the NCR7, rather than one riding across it. This could have been the case if Mr Dick had completed his turn onto the NCR7 and then met Mr Merrick riding on its southernmost side, perhaps because Mr Merrick had not yet completed an overtaking manoeuvre past Mr Howard.

[33] There was no direct evidence as to the speed of Mr Dick. However, during Mr Franklin's second site visit, Mr Dick's solicitor had ridden a bicycle at various speeds approaching the locus, witnessed by Mr Dick. The exercise was repeated until Mr Dick was satisfied that the speed was similar to that of himself on the day of the accident. Mr Franklin had timed the rides over a measured distance of approximately 16 metres at the approach to the locus. When the speed was considered by Mr Dick to be close to his own, the exercise was repeated three times at about that speed and an average time and speed calculated. All distances were actually measured in paces, each pace being approximately 1 metre. Times of 2.56, 2.49 and 2.80 seconds were measured, averaging 2.66 seconds. This gave an average speed over the measured distance of 6.01 metres/second (approximately 13.4mph). The exercises had been videoed, and the videos were shown in court.

[34] Based on a video taken on 10 March 2020, recorded from a bicycle being ridden eastwards along the path, estimating its speed in metres per second (6.25mph), and seeing an unconnected cyclist emerging from the NCR75 and turning right when the camera was at 21 seconds from the junction, one could calculate that Mr Merrick could have seen Mr Dick from about 6 seconds before the junction. Due to the poor sightlines at the junction, Mr Dick would not have been able to see Mr Merrick until he was about 3.5 metres before the junction. It was speculation that Mr Merrick had been masked by Mr Howard as Mr Dick approached the junction. To stop at the junction, it would have been necessary for Mr Dick to have been travelling at no more than 2.4 metres per second (5.36mph) when Mr Merrick was first seen. That was a very slow speed and one at which some people were unable to maintain balance. If Mr Dick was travelling at 13mph, it would have taken him around 12 to 15 metres to stop.

[35] There were no rights of way, or indicated priorities, at the locus. There were no surface priority markings or regulatory signs. The only signs present were informative direction signs which conveyed no indication of priority. All three junctions at the locus involved oblique angles between at least two of the paths; none was in the form of a T-junction. This form of Y-junction was not uncommon on cycle paths or rural roads. Therefore the presumption sometimes made that traffic travelling across the top of a T-junction had right of way over anyone coming along the stem of the T did not apply. The presumption relied upon the fact that traffic from the stem was obliged by geometry to turn slowly; at the locus it was physically possible to make all relevant turns at speed. Where there were no defined rights of way, markings or signs, all highway users were required to proceed on the basis that someone else might conflict with their direction of travel and everyone should therefore proceed with care. That involved reducing speed as

necessary in order to be able to stop, checking for traffic on intersecting route(s) and being able and willing to give way to it. Although there were no rights of way at the junction, there was a presumed priority along the paths leading to it. On a two-way highway vehicular traffic (which included cycles) should keep to the left-hand side unless circumstances justified adopting a different position. One exceptional circumstance was when one vehicle overtook another. In this case the overtaking vehicle had to ensure that it was safe to overtake before doing so and that it would remain safe until the overtaking manoeuvre was complete. A vehicle did not have priority to overtake another vehicle coming towards it on the same side of the path. If there was uncertainty as to whether the way ahead would remain clear (and there was always uncertainty if there was a junction approaching), no overtaking manoeuvre should take place. Rule 67 of the Highway Code told cyclists to look all around to make sure it was safe before moving away from the kerb, when pulling out to overtake or to pass stationary vehicles, or when turning at junctions or stopping. The Highway Code applied when cycling on any route adopted as a public highway and was accepted as good practice on unadopted highways.

[36] If Mr Howard was correct that he was overtaken by Mr Merrick only seconds before the collision, to have overtaken so close to the junction was a dangerous practice and one with a high probability of a collision occurring should anyone emerge from the NCR75. Mr Merrick did not have priority over anyone coming from the NCR75 and he should not have been on the right side of the path approaching the junction. If Mr Merrick's speed approaching the locus was around 20mph, that was in excess of the design speed of cycle paths, especially with another cyclist ahead of him (Mr Howard) and a junction coming up. A reasonable speed for the circumstances would have been no more than 10mph but that would still not have given sufficient time safely to overtake before the junction. The

Highway Code warned cyclists to take care passing on cycle tracks and to be prepared to slow down or stop as necessary. The rule (62) specifically referred to passing pedestrians, children and disabled people, but the same principle applied to passing other cyclists. Measurements made at the locus with regard to Mr Dick's likely speed and his turning movement at the junction supported his contention that he had turned fully onto the NCR7 before the collision. As Mr Howard was not involved in the collision it would appear that Mr Dick had had sufficient time to turn in front of him. He might have based his decision to go ahead on the fact that he could see Mr Howard at a sufficient distance. He should have taken longer to make his decision. Poor visibility at the junction made it more difficult for Mr Dick to respond to Mr Merrick's presence than vice-versa. He may have had less than 1 second to respond after turning onto the NCR7. Most of that time could be taken up with reaction time before the brakes could be applied. Mr Dick was probably travelling too fast when he reached the NCR7. As Mr Dick did not come into conflict with Mr Howard, who was riding on the north side of the path, it seemed likely that no collision would have taken place had the south side of the path been free for Mr Dick to use. Thus the primary cause of the accident happening was probably that Mr Merrick was already riding on the south side of the path approaching the locus, contrary to safe practice.

[37] In cross-examination, Mr Franklin stated that he had no formal scientific qualifications beyond A level mathematics. His report proceeded on the basis that the collision had occurred to the west of the junction, but he was not completely sure that Mr Dick had made the turn onto the NCR7 before it happened until he had investigated further. He had come to the conclusion after looking into matters that the point of collision had been to the west of the metal posts, that is at least 2 metres to the west of the junction between the two paths. The collision therefore took place wholly on the NCR7; it was not

a junction accident. Mr Dick would have been able to see more than 10 metres along the NCR7 when he was 3.5 metres from the junction with the NCR75. At the speed he was going, he could not have stopped at the junction. Reaction time would also have been necessary. It was not good practice only to brake when you saw someone at a junction. Aerobars had no brakes. It was not good practice to use aerobars at a junction in ordinary circumstances - one should have one's hands on the brakes. Hazards should be anticipated. Some hazards were more difficult than others to avoid. Some were unavoidable. Mr Merrick too had been going into a situation where he had no right of way at far too high a speed.

[38] Had the collision occurred as Mr Merrick described, there would have been damage to the wheels of the bicycles, regardless of the speed of the impact. Strava was very accurate when it came to speed. The apparent speed at which Mr Dick had been travelling, or 12 to 13mph at any rate, was similar to the maximum speed at which the turn onto the NCR7 could be taken. It might be that the estimation had not been entirely accurate.

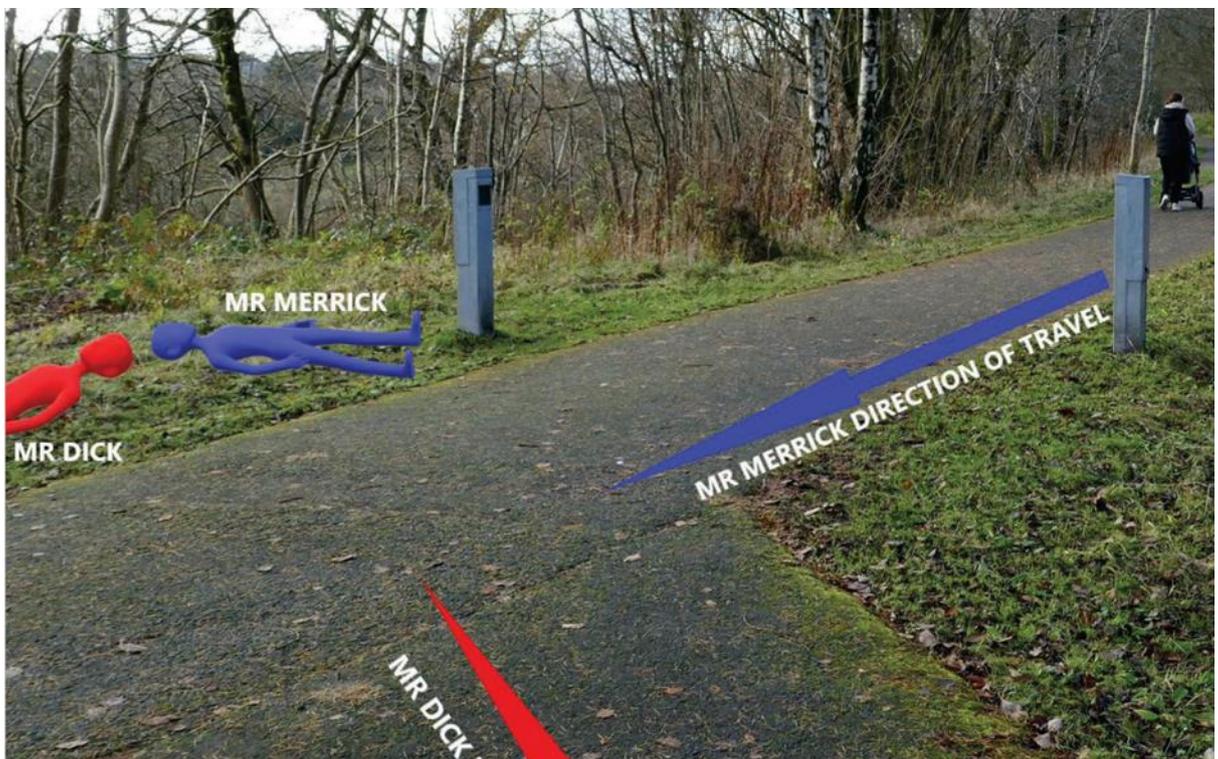
[39] In relation to the video taken on 10 March 2020, Mr Franklin did not know who had taken it. The speed of the bicycle from which it had been taken had been deduced from the rate at which it passed landmarks known to be a particular distance apart. The speed of the cyclist who had emerged from the NCR75 in the video was unknown.

[40] In re-examination, Mr Franklin stated that a Y-junction was a hazard; one ought to anticipate hazards and adjust one's speed accordingly. Both parties in the present case ought to have anticipated a hazard and adjusted their speed.

[41] **Mark Hill** (60) spoke to an expert Collision Reconstruction Report prepared by him in January 2024. He stated that he was a Principal Consultant in the Investigations Group at TRL (the Transport Research Laboratory), specialising for over 20 years in road accident

reconstruction and providing consultancy advice. TRL was part of the Transport Research Foundation, an independent, non-profit organisation providing impartial advice and consultancy in the transport sector. He specialised in road traffic accident reconstruction and held a Master of Science degree (with Distinction) in Collision Investigation. He had undertaken numerous collision investigations across the entire spectrum of severity, complexity, and transport modes and had reported his findings to all strata of the judicial system. He held the Licentiate of the City and Guilds of London Institute in Traffic Accident Investigation.

[42] It became apparent in the course of Mr Hill's evidence that the parties had agreed the resting positions of the parties after the accident. The position of Mr Dick was agreed as being as depicted in the following photograph. The position of Mr Merrick was agreed in a more roundabout way, but essentially was also as is shown in the photograph.



[43] Mr Hill had visited the site of the accident on 30 August 2023 and again in the week of the proof, when he had ridden through the locus in both directions in order to get a feel for it. He had also examined Mr Dick's bicycle. On Mr Dick's route, he had felt comfortable making the bend at 12 to 13mph, certainly no more. He was aware that the Strava data suggested that Mr Merrick's speed had been 20.1mph and considered that to be at the edge of the comfort zone. By way of overview, he considered that the evidence he had seen supported the conclusion that there had been a collinear collision. In his experience, no collision as described by Mr Merrick had failed to result in front wheel damage to the bicycle coming from the side. Similarly, if Mr Merrick's description of how the collision occurred was correct, his body would have come to rest further south and east than he did. Mr Hill did not have experience of collisions between the bodies of cyclists.

[44] Mr Merrick's post-collision rest position was west of the junction between the two cycle paths. A perpendicular or 45-degree collision would have been highly likely to have caused him to come to rest further south of the cycle path, on the southern verge of the NCR7 opposite the junction with the NCR75. His actual rest position supported a collinear, or almost collinear collision with an opposing cyclist, whilst both riders were established on the NCR7, and it was highly unlikely, given their rest positions, that a perpendicular collision occurred. The same would apply if the collision had been at a 45-degree angle. Mr Merrick could not have ended up where he did if the collision had been at that angle. That was not possible. Mr Merrick's significantly greater speed accorded him significantly greater momentum. It was a matter of basic physics that a collinear collision would result in the direction of the body with greater momentum prevailing. The body with lesser momentum would be pushed back. Although he did not know the precise combined weights of each man and his bicycle if, for example, both were of, say, 82kg in mass

and Mr Merrick's speed was 21mph and Mr Dick's speed 13mph, Mr Merrick would have a momentum of 770kg/ms-1 and Mr Dick would have an opposing momentum of only 477kg/ms-1. Further illustrative calculations were done by Mr Hill in the witness box at my request, demonstrating the effect on their differing momentums if the weight or speed of each man varied from the primary example. It followed, said Mr Hill, that a collinear contact would have likely pushed Mr Dick eastward as the two riders came together. Mr Merrick's resting position close to the metal post supported the conclusion that, if the collision was collinear, it would have occurred at least adjacent to the metal posts, if not west of them.

[45] Cyclists travelling southward on the NCR75 toward the junction with the NCR7, intending to travel westbound, crossed over the A737 overbridge and commenced a downhill course, through a shallow right curve toward the junction. The approach to the junction was bordered by narrow grass verges and mature hedge- and treelines, limiting views of the NCR7 to the right (westward). The final approach to the NCR7 curved right, left, and right through shallow deviations over some 50 metres, levelling out just prior to the junction. The hedge and treeline to the right was established and initially dense, but the latter part of the border comprised silver birch saplings and, lastly, a large goat willow tree. At the time of Mr Hill's visit to the site, the deciduous vegetation would have been similar in density and extent to that at the date of the collision. A goat willow tree to the cyclist's right was passed at 9 metres from the junction threshold and an uninterrupted sightline over some 150 metres was available westward at that point. Equally, cyclists passing that point could be seen by traffic on the NCR7. Cyclists then negotiated an approximate 130 degree change of direction to their right, in order to commence their westbound course on the NCR7. It would have taken Mr Dick 1.5 seconds to travel the 9 metres from the goat willow

tree to the junction threshold at 13mph. The Y-junction was a hazard. One should slow down and be aware when approaching a junction. That applied to both riders in the present case. Although not signed in advance, the junction with the NCR75 was visible from the NCR7 from 150 metres away with prior knowledge and from 100 metres away without.

[46] Although the exact nature of the damage to be expected to Mr Merrick's bicycle depended on the nature of the collision, in general terms a side collision to the front wheel would have caused it to buckle, likewise if there had been a side collision to the rear wheel it would have buckled. If the side collision was to the middle of the bicycle and was significant, the rear wheel would have buckled in that situation also. Mr Dick's front wheel would have buckled if the angle of its collision with Mr Merrick's bicycle had been at 45 degrees or greater. Little force was required to result in buckling of a spoked wheel when force was applied to its side and this was particularly the case in side impacts in collisions. In this case, there was no evidence of either direct side impact to the wheel or of an indirect induced force to the wheels from an impact into the side of Mr Merrick's bicycle. On Mr Dick's bicycle, both the front and rear wheels displayed very slightly out-of-true alignment, but not to the point of rubbing against the brake blocks. Mr Hill's opinion was that that was not related to the collision, but was likely the result of typical road use. The aerobar extensions were found after the accident to be elevated upward extremely from a typical position.

[47] Mr Merrick had a Strava account, which was an app accessed by an enabled Android, iPhone, or fitness GPS-type device that measured a number of activity functions. This account recorded, via satellite fix, his speed, distance travelled, and other associated functions, such as maximum speed, altitude gained/lost, and so on. Strava data was only accurate to a few metres, typically around 5 to 10 metres, depending on the device and the

location. Built and tree-lined environments could significantly affect and decrease the accuracy of the plots produced from satellite fixes. A number of sources commented on the accuracy of GPS augmented devices and the Strava application, with a general finding that Strava was accurate to around a 90% level of precision. Mobile phones used for satellite positioning functions were found to have a mean accuracy of +/- 5 metres. Any weight placed upon any position recorded via a satellite fix had to be considered with this error margin in mind, in addition to any error margin associated with a particular application, such as Strava. The Strava data provided by Mr Merrick could not with any certainty assist with precisely where to the metre he was at the moment of impact, either along the cycle path, or across the width of the path. Mr Hill had been provided with a number of Strava pages in the form of a single printed document, which was not in a format enabling him to interrogate the data. The collision occurred shortly before the sudden drop in speed disclosed by the data. The speed of Mr Merrick at the moment of collision was likely about 20.1mph. As to Mr Dick's speed, in the absence of other data to assist, Mr Hill was reliant on the reconstruction exercise conducted with the assistance of Mr Franklin, suggesting a speed of approximately 13.4mph (6 ms⁻¹) on approach to the locus.

[48] The reaction time of a driver (or rider) to an event requiring action was often referred to as the Perception-Response Time (PRT). A driver's perception-response time only commenced at the point he first perceived the hazard. The four stages of perception-response time were detection, identification, decision and response. The perception-response interval ended, for example, when a foot landed on the brake pedal or hands began to turn the steering wheel. For an alert driver, a typical perception-response time was suggested to be between 0.75 second and 1.5 seconds. This was dependent upon various factors. For an angular path intrusion such as the one in issue here (ie Mr Dick

emerging onto the NCR7 from the NCR75) a reasonable rounded range of 1.0 second to 1.5 seconds as a reaction time was appropriate.

[49] It seemed clear that the collision between the two cyclists occurred when they were both on the NCR7. The angle between the two bicycles and riders at the point of collision would have had to be very shallow, if not collinear. Any angle of incidence greater than probably about 10 degrees would more likely have resulted in a separation of both parties, and given the apparent final resting position of Mr Dick in relation to Mr Merrick, it seemed likely that the two riders and their machines had coalesced. Given the apparent rest positions of both parties, the contact probably occurred nearside to nearside. Had the contact been a side impact of Mr Dick's bicycle into the side of Mr Merrick's machine, the deflection of Mr Merrick would have been notably greater.

[50] It would have taken Mr Dick 2.6 seconds to travel the 14 metres from the point when he could first have had a good view along the NCR7 to the assumed point of collision at or near the metal posts. At the point when Mr Dick would first have been able to see clearly onto the NCR7 and would also have been able to be seen by Mr Merrick, the latter would have been 24 metres from the point of impact. If Mr Merrick had seen Mr Dick at the earliest opportunity and recognised that as an event requiring an emergency response, it would have taken him 15.4 metres to stop if he required a 1 second PRT, or 19.9 metres if he required a 1.5 second PRT. As to Mr Dick, on the same hypotheses, it would have taken him 8.3 metres to stop if he required a 1 second PRT and 11.1 metres to stop if he required a 1.5 seconds PRT. In order to avoid a collision, there would need to have been a separation of the two parties by a minimum of 23.4 metres where both riders had a PRT of 1 second. The slower the speed of either party, the greater was the opportunity for a collision to be avoided.

[51] In cross-examination, Mr Hill denied that he had tried to match the content of his report to Mr Dick's version of events. It was a cycling convention to ride on the left and pass on the right. Both riders should have approached the junction with due care and have been prepared to stop. If he had been Mr Dick, he would have stopped at the junction. He might have done the same had he been Mr Merrick, because Mr Dick was a potential hazard. Although there was no formal speed restriction on a cycle path, an appropriate speed in all the conditions was called for. Some hazards could not be avoided. One should not emerge from a junction when it was unsafe to do so. Mr Dick could have stopped short of the junction had he seen Mr Merrick at the first opportunity and had a 1 second PRT, but not if he needed a 1.5 second PRT. It was possible that Mr Merrick was obscured by Mr Howard when Mr Dick looked along the NCR7.

[52] Aerobars lowered the profile of a rider's body, generating less wind resistance in time trials and the like. They could also be used for comfort in that they allowed changes of position during a ride. Aerobars did not have brakes on them. Mr Merrick's account of Mr Dick's body position at the point of impact was consistent with the latter having been using aerobars. In photographs taken shortly after the accident, the aerobars on Mr Dick's bicycle were not in their normal position, but rather were bent back. That could have been caused by the impact of the collision. There might have been a glancing blow between the aerobars and Mr Merrick's bicycle.

[53] There was no physical evidence as to the speed of either rider. Mr Hill had ridden the route taken by Mr Dick at the junction at between 12 and 14mph. The bicycle he rode did not have aerobars. He agreed that the perception of speed might be different as between a rider and an observer, that it would have been difficult for Mr Dick to estimate his own speed accurately, and that a wrong estimate would affect the calculations he had done. If

Mr Dick has rounded the corner at more than a comfortable speed, then the modelling would have to be revisited. The configuration of the corner at the junction would not have allowed Mr Dick to strike Mr Merrick at 90 degrees, but similar effects to a 90-degree strike were to be expected even if the strike had been at 45 degrees as described by Mr Merrick.

[54] In re-examination, Mr Hill stated that if Mr Dick's aerobars had been loose, they would have moved backwards on impact if he was still holding them. An impact at 45 degrees would have pushed them forwards, not backwards as it appeared had happened in fact.

[55] The defender elected to lead no evidence.

Pursuer's submissions

[56] Senior counsel conceded at the outset that Mr Dick was partially at fault, and submitted that the critical question for the court was the just and equitable apportionment of blame between the parties. Neither party appeared to have taken any steps in anticipation of coming into conflict with the other, as they should have done. If the court accepted Mr Dick's account of the mechanism of the collision, it was submitted that the greater proportion of the blame should rest with Mr Merrick and that a just and equitable apportionment would be a finding of 25% blame to Mr Dick and 75% to Mr Merrick. If, on the other hand, the court accepted Mr Merrick's account of a 45-degree collision mechanism, it was submitted that the blame should be apportioned 75% to Mr Dick and 25% to Mr Merrick.

[57] Mr Dick should be accepted as a credible and reliable witness. He accepted that his recollection of events post-accident was poor. However, his memory of the accident itself was fairly vivid. He was not dogmatic about anything and conceded matters which were not clear in his recollection. His evidence was consistent with that of Mr Howard

regarding Mr Merrick having overtaken in close proximity to the junction and still being on the southernmost part of the path at point of impact, and with the opinion of Mr Hill that the ultimate resting position of Mr Merrick was impossible on his own version of the collision. Mr Merrick, on the other hand, was unreliable. He was dogmatic and his very detailed evidence about things that happened in a fraction of a second was unrealistic. Mr Howard was a partly reliable witness. His recall of the accident was patchy and occasionally inconsistent. Mr Franklin had an undisputed expertise and his impartial evidence had not been contradicted. The crucial element of his evidence concerned the safe speed at which the parties could have approached the Y-junction, namely 10mph for Mr Merrick and 7mph for Mr Dick. All the evidence of speed suggested on a balance of probabilities that the approach speed of both parties was substantially in excess of the safe speed. If so, then both parties were in breach of their respective duties to take reasonable care. It was a reasonable inference that if both parties were approaching a hazard at a safe speed and keeping a good lookout, the accident would not have happened. Mr Franklin also opined that if the collision had been as spoken to by Mr Merrick, he would have expected buckling of the wheels of his bicycle. This evidence was supported by Mr Hill. Mr Hill's skill in giving evidence on the matters within his report was not disputed. He did not have a contradictor. He was a very impressive expert witness. He was clearly of the view that, standing the laws of momentum, it was impossible for the parties to have had a 45 degree collision at the location spoken to by Mr Merrick and to have come to rest in their agreed positions. Ultimately, providing Mr Merrick's speed was greater than Mr Dick's, the momentum of the collision was in Mr Merrick's direction of travel. The point of impact must have been to the west of their resting positions.

[58] Mr Dick was clear that he took the turn and established himself on the NCR7. Having joined the NCR7 he observed Mr Merrick overtaking Mr Howard, expecting him to complete the overtake and move in, but instead he moved to Mr Dick's left. There was a head-on collision. He stated that he would not have emerged if it was dangerous. He confirmed that it was not until he was established on the NCR7 that he looked up and observed that Mr Merrick had come out from behind Mr Howard to overtake. Both Mr Franklin and Mr Hill spoke to bicycle wheels being strong in their longitudinal axis but weak transversely. Accordingly, both would have expected damage to the wheels of Mr Merrick's bicycle in the event of a perpendicular collision. Mr Merrick spoke in detail to certain damage sustained to his bicycle but made no reference to damage to the wheels. The court should find that the mechanism of the collision was collinear, once Mr Dick was fully established on the NCR7, in close proximity to the posts and 5 metres west of the junction.

[59] In relation to the extent to which parties maintained a proper look out, according to Mr Hill's unchallenged evidence they could have seen each other when Mr Dick was 9 metres from the junction and 2.6 seconds from the likely point of impact, with Mr Merrick 24 metres away along the NCR7. Mr Dick's evidence was that he looked to the right on approaching the junction and saw Mr Howard some distance away. He was clear that he would not have emerged onto the NCR7 had he considered Mr Howard was so close that it might be dangerous. Mr Merrick's evidence was unsatisfactory. He initially stated that he had had no chance to observe Mr Dick prior to impact, then conceded that he saw him for a split second before the collision. That evidence was entirely inconsistent with his maintaining a proper lookout having regard to the distance and time during which he would have been afforded a view of Mr Dick.

[60] Mr Merrick's Strava data indicated that at the point of the collision he was cycling at 20.1mph. He could not recall his speed, but took no issue with the suggestion of 20mph. Mr Franklin opined that a safe cycling speed for him at the locus would have been 10mph. Mr Dick estimated his speed at between 12-15mph, being his normal speed for the journey. Mr Franklin, on the basis of the reconstruction exercise, opined 13.4mph. Mr Hill's estimate, based on the comfortable speed at which the bend could be taken, was 12.7mph.

[61] On the basis of the evidence of Mr Dick and Mr Howard, the court should find that Mr Merrick overtook Mr Howard in close proximity to the locus and remained on the opposite side of the cycle path at the point of impact.

[62] Both parties accepted that they were familiar with the junction. Mr Franklin and Mr Hill agreed that it was a potential hazard, and that both parties should have anticipated it and adjusted their speed. The accident involved a combination of both riders going too fast and neither rider keeping a proper lookout. Mr Merrick's fault occurred long before he came to the junction, not in the micro-seconds before the collision. Had he been travelling at the safe speed of 10mph, the accident would have been avoided.

[63] It was a matter of agreement between the parties that there were no signs or markings indicating any right of way at the junction. The court should find that neither party had right of way. Accordingly, both parties ought to have been aware of the risk of encountering another cyclist. Although there were no directly analogous cases, assistance in approaching the apportionment of liability could be found in *Eagle v Chambers* [2003] EWCA Civ 1107, [2004] RTR 9, per Hale LJ giving the judgment of the court at [10], [14] and [15]:

“[10] There are, as has often been held, two aspects to apportioning responsibility between claimant and defendant, the respective causative potency of what they have done, and their respective blameworthiness: see the well-known words of Denning L.J. in *Davies v Swan Motor Co Ltd* [1949] 2 K.B. 291, 326, approved by the House of

Lords in *Fitzgerald v Lane* [1990] RTR 133, 143; and Lord Reid in *Stapley v Gypsum Mines Ltd* [1953] A.C. 663, 682 and in *Baker v Willoughby* [1970] A.C. 467, 490.

...

[14] We accept that s.1 of the 1945 Act requires the court to consider 'the claimant's share in the responsibility for the damage'. But the section is premised on both parties being at fault. It is also impossible to consider the claimant's 'share' without also considering that of the defendant. Moreover the court has to do what is 'just and equitable' which includes being fair to the claimant as well as to the defendant. Realistically, therefore, the court has to compare the one with the other. The court would inevitably have to do this if there were cross claims between the parties.

[15] A little time was spent in argument discussing the case (which this is not) where there are cross claims between the parties. Section 1(1) of the 1945 Act refers to responsibility for 'the damage', not responsibility for the accident. That is why a passenger who was in no way to blame for 'the accident' may share responsibility for his own damage, for example by not wearing a seat belt. Could there ever be a situation in which one party was, say, 60 per cent responsible for the other party's damage but only 40 per cent responsible for his own? A car can do so much more damage to a person than a person can usually do to a car. Fortunately, it is not necessary for us to resolve this debate. The potential 'destructive disparity' between the parties can readily be taken into account as an aspect of blameworthiness. Where there are cross claims, the arithmetic will reflect the different amounts of damage done. Thus, while one might not wish to rule out the possibility that there might be an exceptional case in which different apportionments were possible, no one has yet thought of an example where this would be so."

[64] The most probable mechanism for the collision was that Mr Dick had established himself on the NCR7, encountered Mr Merrick, and that parties had suffered a glancing impact. Mr Dick had approached the junction with the NCR7, looked to his right for oncoming traffic, and observed Mr Howard. His assessment was that there was sufficient space for him to proceed. That assessment was correct as no collision or near-miss took place between him and Mr Howard. At the time he glanced to his right, he did not see Mr Merrick and could not therefore take his location and speed into consideration. Due to Mr Merrick's speed and decision to overtake, he presented a hazard that was not obvious to Mr Dick at the time he assessed it was safe and clear to proceed. By contrast, Mr Merrick's view was that he had right of way, and that that justified his actions or inactions that day. He was cycling too fast. He did not anticipate any hazard whatsoever at the junction. He

did not adjust his speed and he did not monitor the NCR75 on approach to the junction. He considered 20mph to be a perfectly reasonable speed. Had he been cycling more slowly, anticipating hazards, and not overtaking on approach to the junction, it would have been safe for Mr Dick to proceed and the accident would have been avoided. Accordingly, when considering causative potency and blameworthiness, the balance tilted firmly in favour of Mr Dick. There was more than sufficient width for two cyclists to pass on opposite sides without incident. Had Mr Merrick been positioned on the left side of the NCR7 - as Mr Howard was - there would have been no collision and the loss, injury and damage sustained by Mr Dick that day would have been avoided entirely. The action which was most causative of the collision was the action of Mr Merrick in overtaking Mr Howard in close proximity to the junction. Altogether, the blameworthiness and causative potency of Mr Merrick's conduct was greater than that of Mr Dick's by a considerable margin.

[65] In *Hernandez v Acar* [2019] EWHC 72 (QB), Master Davison had stated:

"[42] ... To the extent that courts have on occasion found that one party's 'reckless' driving was the exclusive, proximate cause of an accident, that is not, as I find, this case... The accident was the product of fault on both sides, the claimant's in going too fast and the defendant's in not getting a proper view down [the main road] before pulling out...

[43] As with the decision in *Jones v Lawton* [2013] EWHC 4108 (QB), there is a certain 'broad symmetry' between the faults of the claimant and the defendant. In terms of culpability or blameworthiness, I would place a little more of the blame on the claimant than the defendant. Although the [Highway] Code and the authorities lay heavy emphasis on the duty of the motorist emerging from the minor on to the major road, the fact remains that the claimant was doing around double a safe speed for the conditions. However, as to causative potency, there is a significant difference in the comparison, which (to borrow another phrase from the same case) 'tilts the balance' back in favour of the claimant. As the Highway Code notes, motorcyclists are vulnerable road users. In collisions with other motor vehicles it is the motorcyclist who is liable to suffer significant injury and not the driver. That is an unhappy feature of riding bicycles and motorcycles and is tragically illustrated by the facts of this case."

[66] Reference was also made to *Worsfold v Howe* [1980] 1 WLR 1175, [1980] RTR 131 and to *Heaton v Herzog* [2008] EWCA Civ 1636, [2009] RTR 30.

Defender's submissions

[67] Counsel for Mr Merrick submitted that decree of absolutor should be granted, which failing a finding of contributory negligence in the order of 90% should be made. Mr Dick had offered to prove a specific set of circumstances, in particular that he was established on the NCR7, and that the collision occurred 2 to 4 metres to the west of the metal posts. He had not proved that case, and had not proved that Mr Merrick had acted negligently in the circumstances. The evidence of Mr Merrick and Mr Howard should be preferred to that of Mr Dick, meaning that the collision should be held to have occurred at the mouth of the junction as Mr Dick left the NCR75, at a speed that allowed Mr Merrick insufficient time to respond, rendering the accident unavoidable for him.

[68] Mr Dick had been asked about entries in his medical records shortly after the accident, in which it was noted that he did not remember much, that the circumstances of the accident were unclear, and that he had lost consciousness. Given the severity of his initial injury and the fact that his evidence was given 4½ years after the event, the court should regard his memory of the accident as poor, and in particular should proceed on the basis that he could not be sure that he had made the turn onto the NCR7. His evidence regarding the use of the aerobars on his bicycle was inconsistent. He initially stated that he was pretty sure that he had not been using them as he came down the NCR75, then suggested that he had moved his hands to the aerobars when the collision was imminent. The aerobars had no brakes. He had accepted that his body position was leaning forward over the handlebars, covering the brakes. That was inconsistent with his evidence that the

impact occurred on his central core or chest. A more credible explanation for his low-profile body position and speed through the junction was that he was using the aerobars with no ability to brake. He accepted in his evidence that he was using them moments before the collision and at the point of impact.

[69] Mr Dick accepted that the representative speed adopted by Mr Franklin in his report might not be accurate, and that he could have been going a little faster on the day. His evidence was that his usual speed coming down that hill was 12-15mph. That would be regarded as an uncomfortable speed by Mr Hill, who felt on the edge of his comfort zone when performing a run through at lesser speeds. Mr Dick recalled seeing Mr Howard a few metres away from him on the NCR7 before emerging from the NCR75. He did not recall seeing Mr Merrick. No credible explanation had been given for that. Neither Mr Franklin nor Mr Hill was able to provide such an explanation beyond the “eclipsing” of Mr Merrick behind Mr Howard, which was speculative.

[70] Mr Howard was the only independent witness to the accident. He was trying his best to assist the court. The collision happened very quickly and to his surprise, so it was understandable and reasonable that his recollection of events was not perfect. Any inconsistencies in his evidence were not material. There were four key facts from Mr Howard’s evidence: (a) Mr Merrick had completed his overtake of Mr Howard before the junction; (b) the collision happened in front of him; (c) the collision happened at the mouth of the junction; and (d) as a result of the collision the parties were thrown into a position approximately consistent with their agreed resting position. Further, his evidence was that he was travelling slowly when overtaken but that the collision happened at speed and that he was lucky not to have been injured by Mr Dick’s actions in coming down the hill

and hitting Mr Merrick. He confirmed that he was not even sure that Mr Merrick knew what happened.

[71] Mr Franklin stated that there were no speed limits for bicycles on a cycle path. The speed at which cyclists chose to ride was entirely a matter for them, taking into account their experience and their perception of the hazards around them. He conceded in his evidence that the methodology of estimating Mr Dick's speed of 13.4mph by way of the reconstruction exercise was unreliable. The only explanation he could provide for Mr Dick not seeing Mr Merrick when he looked to his right before emerging from the junction was that the latter must have been masked by Mr Howard. That was not credible given the vast number of variables involved. It was also inconsistent with the evidence of both Mr Merrick and Mr Howard that the overtaking manoeuvre had been completed prior to the junction, and the collision occurred when Mr Merrick was in front of Mr Howard. It was his evidence that not every hazard on the road or cycle path was avoidable. He suggested that 10mph would have been a reasonable speed for Mr Merrick to be travelling. That figure was not justified with any literature or analysis. Even if Mr Merrick been passing through the mouth of the junction at 10mph, and was faced with Mr Dick travelling at speed through the junction, there was nothing he could have done to avoid the collision. Whilst Mr Franklin was able to offer some evidence to the court that fell within the boundaries of his qualifications, he opined on matters that were not within his area of expertise. He was not qualified to speak to physics, yet attempted to perform various calculations based on speed, time and lines of sight.

[72] Mr Hill made a number of fundamental concessions that rendered the conclusions in his report unreliable. Firstly, he did not know the respective weights of the parties and their bicycles but conceded that variation in weight or speed would have had an effect on

the force of momentum and had not been considered by him. Secondly, his evidence was that it would have taken 1.5 seconds for Mr Dick to travel the 9 metres where he was visible to Mr Merrick on the NCR75 before reaching the junction with the NCR7. With an average response time of 1 to 1.5 seconds, this evidence supported Mr Merrick's position that he had insufficient time to observe and react to Mr Dick before the collision. Mr Hill went on to accept that this calculation was based on his own model of a comfortable speed at 12.7mph. At Mr Dick's assumed speed of 13.4mph, he would have been visible for even less time, and less again at a higher speed such as his usual speed of 12-15mph when descending the hill. Thirdly, Mr Hill confirmed that if he had been at an unmarked junction on a bicycle or in a car, with the intention of turning into a live lane of traffic, and saw traffic, he would have stopped. Fourthly, he accepted that riding with common sense on a cycle path would dictate that one did not emerge from a junction when it was unsafe to do so. Fifthly, with the view afforded to Mr Dick to the west of the junction, the only explanation he could think of for why Mr Merrick was not visible was that he had been eclipsed by Mr Howard. He conceded that it would have taken a very precise set of variables for that to be the case. Sixthly, he accepted that Mr Dick had had a good view to the west from 10 metres short of the junction and that he could have stopped within 8.2 metres of the junction had he applied his brakes, thus avoiding the collision. Seventhly, he did not use aerobars when performing his ride throughs at the locus. Given the concession by Mr Dick that he was using aerobars prior to the collision, Mr Hill's thoughts on his ride-throughs were not a reasonable comparison. Eighthly, he accepted that the speed calculation conducted by Mr Franklin and Mr Dick was unreliable. Ninthly, he accepted that any physics-based calculations that he undertook which incorporated that speed were unreliable as a result. Tenthly, he performed a maximum cornering speed calculation at the junction and conceded that that

calculation assumed a comfortable coefficient, when there was no evidence to support that assumption. In other words, if Mr Dick's speed on the day was not a comfortable speed, Mr Hill's model was unreliable. Finally, the basic premise of his report was that Mr Merrick's greater momentum would have driven Mr Dick backwards to the agreed resting position of both parties, by some 5 metres or so. It was on that basis that Mr Dick averred that the collision occurred 2 to 4 metres to the west of the pillars on NCR7, and that he was therefore already established on the NCR7, having made his intended turn. Mr Hill had conceded that that calculation was flawed, with no analysis performed to justify it. He conceded that with the lack of detail available to him, he could not calculate anything more precisely. He also conceded that the unknown nature of Mr Dick's speed made the calculation impossible.

[73] The concessions made by Mr Hill were fatal to Mr Dick's case. Mr Dick offered to prove that the collision occurred 2 to 4 metres west of the posts on the NCR7 and accepted that the final resting position of the parties was east of the pillars opposite the mouth of the junction. Without scientific explanation justifying how parties had moved approximately 5 metres back along the path after the collision, Mr Dick could not prove his case. Mr Hill conceded that his calculation on this point was fundamentally unreliable. His report could not be relied upon.

[74] The evidence of Mr Merrick was given in a clear and unambiguous way. He made concessions where appropriate. He was not obstructive or evasive in his answers. He accepted what he felt he could accept, but was firm and consistent in rejecting those suggestions with which he disagreed. He first recalled seeing Mr Dick a split second before the collision. That was consistent with the calculations of speed and visibility made by Mr Hill. He remembered specifically how low Mr Dick was to the handlebars, which was

consistent with Mr Dick's own recollection of being low down and his evidence that his hands were on the aerobars moments before the collision. Mr Merrick was clear throughout his evidence that he had overtaken Mr Howard a safe distance from the junction, and had a clear path ahead of him. That was consistent with the evidence of Mr Howard. When asked about his speed on the day of the accident, he was clear that it was a comfortable speed. He had his hands on the brakes as he always did and was ready to respond to a hazard if necessary. He simply did not have time to respond to Mr Dick, consistent with the evidence of Mr Hill. When asked about his Strava data he conceded that if his speed was accurately noted there as 20.1mph, then he could not dispute it. However, no evidence was adduced to explain what that 20.1mph figure meant, why it represented the locus speed of Mr Merrick, or how it had been calculated. Those features rendered the Strava data relative to his speed on the day unreliable.

[75] There was an evidential inconsistency between Mr Howard and Mr Merrick in terms of which side of the path the latter was on as he passed the mouth of the junction. If Mr Merrick's general version of events was preferred to Mr Dick's, then irrespective of which side of the carriageway Mr Merrick was on, the collision was unavoidable. Which side of the path Mr Merrick was on at the point of the collision was relevant only if Mr Dick had proved that he was established on the left-hand side of the NCR7 heading west and the collision was collinear. He had not proved that.

[76] As to Mr Merrick's speed, remark had already been made about the unreliability of the Strava data. Mr Merrick was familiar with the route and had never had any problems with the junction. He rode in such a way as to anticipate hazards, with his hands on the brakes, and had a clear path ahead of him. The hazard on this particular occasion was Mr Dick, who came at him with less than 1 second for him to observe and respond, and was

impossible to avoid. There was, further, no credible evidence before the court to suggest that if Mr Merrick had been cycling at a lower speed he would have been able to avoid the collision. There was no reliable evidence that his speed had contributed to the accident in any way.

[77] The evidence of Mr Merrick generally should be preferred to that of Mr Dick. There was no dubiety in his recollection. He did not suffer any head injuries as a result of the accident. He was conscious at all times immediately post-accident and gave evidence that he directed Mr Howard to call 999 and raise the alarm that Mr Dick appeared not to be breathing. His account was supported by his medical records, his injuries, Mr Howard's recollection and the agreed resting position of the parties on the grass verge opposite the junction. His account of the low profile of Mr Dick at the point of collision was supported by Mr Dick's own acceptance that he was using the aerobars moments before the collision.

[78] In summary, the court should find that, on approach to the junction between the NCR7 and the NCR75, Mr Merrick overtook Mr Howard and completed that manoeuvre before the junction, while the path ahead of him was clear. Mr Dick exited the junction into the path of traffic and collided with Mr Merrick at the mouth of the junction. Mr Dick and his bicycle collided with the left-hand side of Mr Merrick and his bicycle. Mr Dick was using his aerobars immediately prior to and at the point of impact. The force of the collision drove parties across the junction to their final resting position opposite its mouth. At Mr Dick's estimated speed of 13.4mph, Mr Merrick had approximately 1 second to observe and respond to him exiting the junction before the collision, and correspondingly less than that if his speed was greater.

[79] The conclusion which fell to be drawn from those circumstances was that Mr Dick had failed to prove his case. He was the party who was turning across a live lane of traffic.

It was his duty to ensure it was safe to emerge. He failed in that duty and in so doing was the sole cause of the accident. Mr Dick could have avoided the collision had he applied his brakes when Mr Howard, and potentially Mr Merrick, became visible to him to the west of the junction. Mr Merrick could not have avoided the collision. Failure to avoid a collision did not mean that he had acted negligently. Some accidents were unavoidable. This one was unavoidable because he was afforded less than a second to notice and respond to the emerging Mr Dick. The duty incumbent on Mr Merrick was one of reasonable care, not an absolute duty to avoid all hazards. There was no acceptable evidence that he had acted unreasonably in the circumstances. Decree of absolvitor should be granted.

[80] If Mr Merrick was found to have been in some way negligent, the court should consider the actions of Mr Dick in comparison to his. There was no evidence that, had Mr Merrick adopted a lesser speed on approach to the junction, the collision would have been avoided. There was no speed limit on the relevant cycle path and Mr Merrick's evidence was that he was cycling in a comfortable way, anticipating hazards with his hands on the brakes. He had less than 1 second to notice and respond to Mr Dick. His position on the carriageway was not material given he had a clear path ahead of him and had completed his overtake. Mr Dick was the only party to the collision crossing a live lane of traffic. He observed Mr Howard but not Mr Merrick to his right-hand side. He could have stopped had he applied his brakes but did not. He emerged into the NCR7 when it was clearly unsafe to do so, whilst using the aerobars. The aerobars had no brakes, so he had no control of his speed. His own speed estimation was an uncomfortable speed according to Mr Hill, and it could have in fact been faster than that. There was only one party to this action who could have avoided this collision and that was Mr Dick. If the court was minded to apportion blame between parties, it should balance that apportionment in

such a way as to reflect the contributory actions of both parties. If Mr Merrick was in any way to blame, he should be regarded as very substantially less to blame than Mr Dick, with no more than a 10% attribution of liability.

Decision

[81] I found the evidence of both Mr Dick and Mr Merrick to be credible. Each was doing his best to recount the events surrounding the collision truthfully. The fact that their two versions of events differ so significantly from each other means that at least one of them cannot be reliable. Mr Dick's reliability was criticised on account of the effect on his memory of the injuries he suffered, but he was clear that he could remember the events leading up to the accident (if not those occurring afterwards) quite vividly, and I saw no reason to doubt that. Mr Merrick was criticised as being dogmatic and his evidence about things that happened in an instant as unrealistic, but I do not accept that. It is true that he gave his evidence in a guarded manner, but I considered that that was only to be expected given that he was being said to be responsible for the grievous injuries sustained by Mr Dick.

[82] Some attempt was made to use notes taken in hospital after the accident in relation to both parties to cast more light on what might have happened. The parties agreed that those notes were what they bore to be, but their authors were not called to speak to the circumstances in which they were taken or how accurate they were intended to be. Neither party had any (or at least any positive) recollection of having said the things apparently attributed to him, which was hardly surprising given that both were at the time being treated for serious injuries. Mr Merrick did not seek to dispute the accuracy of a note suggesting that he had been travelling at more than 20mph at the time of the collision, but

beyond that I did not find the hospital notes to be of any particular probative value. The same can be said for the content of the letter written by Mr Merrick's insurers' solicitors, which he had not even seen before giving his evidence.

[83] One might have hoped in such circumstances that the evidence of the sole eyewitness to the accident would be of assistance. However, Mr Howard was a reluctant and highly unsatisfactory witness. Despite warnings from me, he frequently interrupted counsel's questions, or having apparently answered a question, paused momentarily before commencing to ramble about a subject of his own choosing. Often the subject of the ramble was his own health conditions, which, while no doubt of great moment to him, seemed to have a decidedly limited relevance to the issues in dispute and to have been advanced in the hope of even at that late stage somehow being excused boots. On the occasions when he did seem to commit himself to some positive proposition, he immediately followed that up by some remark which had the effect - and, it seemed to me, the purpose - of removing any force from what he had just said. In these circumstances I place little credence in, and absolutely no reliance on, his evidence. That extends to not regarding the evidence of any other witness as corroborated by happening to coincide with his, or as undermined by differing from his, in relation to any matter. Again, no evidence about statements supposedly made by him outside the witness box was given by those who took the statements, and he at least affected not to recall having given them, contradicting their contents liberally where he seemed to have committed himself to anything remotely definite. It seemed to me that his unwillingness to be involved in any legal (or other) ramifications of the accident started as soon as it had occurred. I place no weight on the content of those statements.

[84] I regarded Mr Franklin's evidence as credible and generally reliable, although on questions of distance and sight lines at the junction I preferred that of Mr Hill, as having been obtained in more precise ways. Overwhelmingly, the nature of his experience of cycling safety issues generally made it difficult to conceive of someone more suitably qualified to speak of them, in particular the safe speeds at which each party could have travelled. The one part of his evidence which I did not consider reliable was that concerning the video taken (without his involvement) on 10 March 2020. I consider that he was rather unwisely drawn into commenting, and in effect speculating, on what could be made of the content of that video, and ultimately I understood him to agree with that point of view. I thus leave that chapter of his evidence out of account, but do not consider that it detracts in any way from what else he had to say.

[85] Mr Hill was a most impressive expert witness, amply qualified and experienced in the matters to which he spoke, and plainly independent of those instructing him. That does not mean, however, that I found all of his evidence to be ultimately persuasive. In particular, his evidence about the application of the laws of momentum and the significance of the resting places of the parties after the collision appeared to me to be attended by a number of imponderables, and dependent on such assumptions, as to render it of little weight in determining the mechanism of the collision. Again, however, I did not consider that the difficulties with that chapter of Mr Hill's evidence detracted from the other matters upon which he opined.

[86] Against that background, the key piece of evidence as to the mechanism of the collision is the clear opinion of both Mr Franklin and Mr Hill that the lack of damage to the wheels of either bicycle is inconsistent with Mr Dick's bicycle having impacted that of Mr Merrick at anything like 45 degrees. That opinion was based on the extensive and

uniform experience of both experts, was supported by a clear explanation of where the strength and weakness of a spoked wheel lie, and is readily comprehensible. No contrary evidence was led. It must follow that the collision was either collinear, or else very nearly so. That in turn implies that Mr Dick had either completed, or almost completed, his turn onto the NCR7 when the collision occurred and that, at least in broad terms, his account of the mechanism of the collision is to be preferred to that of Mr Merrick, although it is easy to see how Mr Merrick could mistakenly have perceived what happened from his point of view and given how quickly it occurred. That conclusion does not enable an exact ascertainment of the place where the collision occurred, beyond that it was probably close to (but could have been either east or west of) the metal posts on either side of the NCR7. It equally does not enable a determination to be made as to whether, when the collision occurred, Mr Merrick was on the northerly or southerly side, or indeed in the middle, of the NCR7. For reasons shortly to be stated, I do not consider that an inability to determine those things affects the decisions I have to make in any way. I also hold, on the basis of the evidence of Mr Hill and that of both parties, that the primary collision was between the bodies of the parties, being the right-hand side of Mr Dick and the left-hand side of Mr Merrick, rather than between their bicycles. It was accepted by Mr Dick that he was adopting a low riding position on his approach to the locus and that at the point of the collision at least he was holding the aerobars. There is no evidence which enables a firm conclusion to be drawn as to whether he was using the aerobars on approach, but again I do not consider that that makes any material difference to the assessments of liability and contribution which I have to make.

[87] It is fundamental to the proper resolution of this case to appreciate that the NCR7 and the NCR75 are not roads, and that any attempt to treat them as if they are, and to apply

to them the rules or conventions of the road, is entirely misconceived. Indeed, it is not even strictly correct to describe them as cycle paths. They are simply paths, open to cyclists as well as to anyone else who wishes to use them other than by way of motorised vehicles, be that pedestrians, children on scooters, teenagers on skateboards, or mothers pushing prams. Their users can be young or old, nimble or lumbering, able to see and hear well or not, alert to their surroundings or lost in their favourite music or a podcast on their headphones.

There are no lane markings indicating that particular categories of user should only occupy certain parts of the path, or that cyclists travelling in one direction should use one section of the path and those going the other way a different one. Indeed, every user of the path is perfectly entitled to use any part of it, just as it pleases him or her. There are no priorities, either as between categories of user or within one category. Pedestrians occupy no lesser place in the hierarchy of users than cyclists. Every user must respect the interests of every other user.

[88] It is against that background that the behaviour of the parties to this action must be assessed. Starting with Mr Merrick, as the party being blamed for the accident in this process, I find, firstly, that he was travelling along the NCR7 before the accident at a speed of around 20mph. Although no attempt was made to establish the provenance of the Strava data presented to him, it was not objected to, and the suggestion frankly made to him that he was riding at a speed of 20.1mph just before the collision was met with an implicit if not quite express acceptance. He did not consider that that was a fast speed. In that he was entirely wrong. I accept the evidence of Mr Franklin that it was about twice the safe speed of 10mph at the location in question. I have already touched upon the reasons why a speed of 20mph or so was excessive. Put short, it did not enable Mr Merrick any margin to react safely to any of the eminently foreseeable hazards which might crop up along the path he

was travelling. In the event, it was Mr Dick's unobserved approach to and exit from the NCR75 junction onto the NCR7 which constituted the hazard that Mr Merrick's speed deprived him of the opportunity to respond to safely. It could just as easily have been a child running out excitedly from the NCR75 junction, or Mr Howard falling off his bicycle ahead of him, or any number of other foreseeable eventualities.

[89] The other way in which Mr Merrick was at fault (although it operated in conjunction with, rather than separately from, his excessive speed) was in not keeping an adequate lookout ahead. The parties were visible to each other from the point at which Mr Dick passed the goat willow tree 9 metres before the threshold of the junction of the NCR7 and the NCR75. Given the speed at which both parties were travelling, it was possible for either or both of them to have taken action at that stage to avert the collision. The slower either of them had been moving, the greater that opportunity would have become. However, Mr Merrick did not see Mr Dick on the NCR75 at all. He did not see him until he had rounded the corner of the junction and was practically upon him. That happened because Mr Merrick, in addition to going far too fast, was not exercising reasonable care to observe the path and in particular the junction which he knew lay ahead of him. He saw no need to do so, conceiving wrongly that he had the right of way and imagining without any proper basis that other users of the path would share his view about that and act accordingly. In respect of his chosen speed and his deficiencies in keeping a good lookout, Mr Merrick's actions represented failures to take reasonable care for the safety of other path users, in particular Mr Dick. Those failures caused or materially contributed to the collision and to the loss, injury and damage which flowed therefrom.

[90] I do not consider that any separate criticism can be made of Mr Merrick's overtaking manoeuvre or his supposed failure to move back to the northmost side of the path

sufficiently quickly before approaching the junction. He was entitled to overtake Mr Howard so long as he did not endanger any other users of the path in doing so, and the details of when and where he carried out his manoeuvre are not sufficiently clear to justify a conclusion that he breached any duty of care incumbent upon him in that regard. Equally, he was entitled to cycle to the north, south or middle of the path, subject to the same condition. Put another way, Mr Dick was not entitled to suppose that any traffic (of whatever sort) that he might encounter upon making his turn onto the NCR7 would be on the northmost part of the path. Any criticism that might be made of Mr Merrick being on the southern part of the path, or indeed in the middle of it, after having overtaken Mr Howard, ultimately resolves itself into the same issues of failing to keep an adequate lookout and maintain a reasonable speed already canvassed.

[91] Turning to Mr Dick, his conduct may be criticised on much the same grounds. As to his speed, while recognising the limitations of the reconstruction exercise which took place, I am prepared to accept the result it produced, 13.4mph, as representing a reasonable estimate of how fast he was travelling down the slope of the NCR75 towards the junction. Again, that was at least broadly speaking twice the safe speed as spoken to by Mr Franklin, whose evidence on that matter I accept. Such an excessive speed may be criticised on the same grounds as was Mr Merrick's speed; essentially, it did not give him time to assess and react safely to the presence and behaviour of other users of the path. Mr Dick ought to have been travelling at a speed which would have allowed him both to ensure that he could assess adequately the presence of other path users on the NCR7 and also that he could stop comfortably at the junction if necessary. A stop might have been required, not because any traffic on the NCR7 had any particular priority over him, but simply because the presence of other path users at or around the junction might have required it.

[92] Likewise, Mr Dick did not keep an adequate lookout as he approached the junction. In part at least, that was because the speed of his approach did not permit him sufficient time to do so once he had passed the goat willow tree. He failed to see Mr Merrick, who was within his field of vision. If it was at any point the case that Mr Merrick was obscured behind Mr Howard, that situation - given their respective speeds - cannot have pertained for more than a moment, again emphasising the inadequacy of Mr Dick's survey of what was happening on the NCR7 before bowling into the junction. Whether he was using the aerobars on his approach to the junction, thereby rendering it impossible for him to brake quickly, or whether he was in a position to use the brakes but did not do so, either at all or sufficiently, are matters which are all subsumed into the greater criticism that his speed approaching, going through and exiting the junction was excessive throughout.

[93] In the regards set out, Mr Dick's actions represented failures to take reasonable care for his own safety (and that of other path users). Those failures caused or materially contributed to the collision and to the loss, injury and damage which followed thereon.

[94] As to the apportionment of responsibility for that loss, injury and damage, this was a multi-factorial accident. Those factors were the speed of both riders, and their respective failures to maintain an adequate lookout when approaching the junction. I do not find it possible to conclude that the fault of either contributed more to the causation of the accident and its consequences than the fault of the other, or that one was more blameworthy than the other. Each was travelling at about twice the safe speed for him, and each completely failed, for no good reason, to take the steps reasonably necessary to observe the presence of the other until the collision was inevitable. Neither had any priority over the other, and the responsibility to take reasonable care for the safety of himself and others was equally incumbent on each. Neither was more vulnerable than the other. In these circumstances I

consider it just and equitable to hold Mr Dick 50% responsible for his own loss, injury and damage. Any damages found ultimately to be due to him shall fall to be reduced to that extent, all in terms of section 1 of the Law Reform (Contributory Negligence) Act 1945.

Conclusion

[95] I shall find that the loss, injury and damage suffered by Mr Dick was caused or materially contributed to by Mr Merrick's fault at common law, but that it was also materially contributed to, to the extent of 50%, by his own fault. The case will be continued, if necessary, to an assessment of the quantum of the damages due.