

EXTRA DIVISION, INNER HOUSE, COURT OF SESSION

[2016] CSIH 34

PD1593/12

Lord Menzies

Lady Smith

Lord Drummond Young

OPINION OF THE COURT

delivered by LORD MENZIES

in the Reclaiming Motion

in the cause

ADAM WAGNER

Pursuer and Respondent;

against

(FIRST) THOMAS GRANT AND (SECOND) ARLA FOODS UK PLC

Defenders and Reclaimers:

Pursuer and Respondent: Clarke, QC, Love; Thompsons Solicitors

Defenders and Reclaimers: Hanretty, QC, Galbraith; DAC Beachcroft (Scotland) LLP

13 May 2016

Introduction

[1] This action for damages for personal injuries arises from a road traffic accident which occurred on 27 August 2009. At about 11pm on that date the pursuer was driving his motor cycle west on the B7076 Gretna to Johnstonebridge Road. His uncle, Alastair Pasco, was driving another motor cycle about 30 feet behind the pursuer and to the right of him. The pursuer was a learner driver; his uncle had held a motor cycle licence for about 20 years, was chairman of a local motor cycle club and was very familiar with the road. At the time of the accident it was dark; the B7076 road, which ran generally east to west with a single lane in each direction, was unlit and was subject to the national speed limit of 60mph. At the time the weather was dry. Both the pursuer and his uncle had been working at the Welcome Break Service Station on the M74 that day, and were returning from work; the pursuer was also familiar with the road.

[2] Nouthill Farm is situated to the south of the B7076 road and adjacent to it; access to the farm is gained by an entrance road which leads off the B7076. Drivers approaching Nouthill Farm from the east and driving in a westerly direction have an unobstructed view of the entrance to the farm, and the roadway in the immediate vicinity of it, for about 320 metres, after a crest in the road.

[3] At about the time that the pursuer and his uncle were approaching Nouthill Farm from the east, the first defender was driving an articulated milk tanker consisting of a cab and trailer; he was working in the course of his employment with the second defenders, who owned the tanker. He had been instructed to carry out the routine collection of milk from Nouthill Farm – an operation which he himself had performed on about 370 occasions, and the same vehicle had been used for milk collections from Nouthill Farm on about 818 occasions in total. In order to gain access to the farm, it was his practice to approach the farm from the west, so travelling in an easterly direction along the B7076. He would slow down or stop just outside the farm and check for any oncoming traffic or traffic approaching from the rear; he would then drive about 50/60 feet beyond the farm entrance, position the lorry in the middle of the road, check again for traffic, and then reverse the articulated lorry into the farm entrance. He was carrying out this manoeuvre when the accident happened. By this time, his headlights were on, as were his hazard warning lights, his working lights and his reversing lights. The cab of the articulated lorry was generally on the eastbound carriageway either just straddling the white line or on the white line , with its headlights shining straight down the road in an easterly direction, and the trailer was situated broadly diagonally across the westbound carriageway , so that all (or substantially all) of the road in each direction was blocked.

[4] At proof the pursuer had no recollection of the circumstances of the accident. His uncle, Mr Pasco, gave evidence to the effect that before he reached the rise to the east of Nouthill Farm he saw the glow of headlights on the opposite carriageway. He was driving with a dipped beam headlight and the pursuer's headlight was on high beam until he saw the oncoming vehicle, when he dipped his headlight. Towards the top of the rise (and so about 350 metres from the entrance to Nouthill Farm) Mr Pasco saw a pair of headlights on the opposite lane and a set of small lights on the same vehicle, causing him to think that it was a wagon of some description. He was sure it was on the other carriageway because of its position. He could not tell if it was stationary or moving, and, if moving, in which direction. The cab of the vehicle was facing towards him and the

pursuer. It did not give him any cause for concern as he thought it was just another vehicle on the road. As they approached the vehicle it seemed perfectly normal until the pursuer's headlights showed up the trailer on the road. The pursuer braked, swerved to the left and collided with the last wheel arch on the trailer, causing him to be propelled from his motor cycle. Mr Pasco managed to get round the back of the trailer but was brought off his motor cycle by a high kerb at the entrance to the farm.

[5] As a result of this accident the pursuer sustained serious injuries, including a below knee left leg amputation. He raised the present action seeking damages from the first and second defenders jointly and severally. The Lord Ordinary heard evidence at proof over several days in June 2014, and on 30 April 2015 he issued his opinion. He found that the accident was caused partly by the fault of the pursuer and partly by the fault of the defenders, and that the proportion of blame attributable to the pursuer fell to be assessed at 40%. He also made certain findings with regard to the cost of prosthetics, with which this court is not concerned at present. By interlocutor dated 3 June 2015 the Lord Ordinary *inter alia* decerned against the second defenders for payment to the pursuer of £341,356, and assoilzied the first defender from the conclusions of the summons.

[6] Both parties have reclaimed against the Lord Ordinary's interlocutor dated 3 June 2015. The second defenders challenge the Lord Ordinary's finding that the accident was caused by fault of the second defenders, and also challenge his finding as to the extent of contributory negligence on the part of the pursuer. The pursuer challenges the Lord Ordinary's approach to the award of damages, and also challenges the Lord Ordinary's decision to assoilzie the first defender. It was agreed by both parties that at this stage we should consider only issues of fault, contributory negligence and absolvitor, and that any issues about damages should, if necessary, be considered at a later stage. We agreed to this procedure, and accordingly in this opinion we deal only with issues of fault, contributory negligence and absolvitor.

The Lord Ordinary's opinion of 30 April 2015

[7] The Lord Ordinary set out in summary the evidence before him. He noted that Mr Pasco had stated in evidence that he had never previously seen a tanker perform such a manoeuvre there, and that before the accident he had not seen any hazard warning or reversing lights or headlights flashing on the vehicle. He just considered the vehicle to be in the other carriageway coming towards them. The Lord Ordinary summarised the evidence of the first defender, Mr Grant, to the effect that he had carried out the same manoeuvre on many previous occasions at about the same time of night. The tractor unit of the lorry was facing east in the eastbound lane with its headlights on towards the direction from which the pursuer was travelling. The trailer was angled across the westbound lane and blocking it. The headlights, hazard lights, reversing lights and working lights of the vehicle were illuminated. Mr Grant had checked for oncoming and rear traffic before he began to carry out the manoeuvre into the farm. When the pursuer appeared on his motor cycle a few hundred yards away Mr Grant saw two lights which he thought represented a car. It crossed his mind to pull out of the way by moving forward but he did not

have the time to do so. It turned out that the lights represented two motor cycles. One of them hit the trailer and a nearby wall and the other went round the rear of the trailer.

[8] The Lord Ordinary found Mr Grant to be an entirely credible and reliable witness and concluded that the accident occurred as described by him in his oral evidence and police statement and that the vehicle was at the time displaying all the lights which he said it was displaying. The only relevant dispute between him and Mr Pasco was about the extent of the lighting on the vehicle. On this point the Lord Ordinary had no hesitation in accepting the evidence of Mr Grant and rejecting that of Mr Pasco. This finding was not challenged before us.

[9] The Lord Ordinary went on to state the following in paragraph [14] of his opinion:

> "The question then comes to be whether the defenders were to any extent to blame for the accident. The manoeuvre which the vehicle was carrying out in the hours of darkness was by its very nature intrinsically dangerous. It involved the other lane being blocked by the trailer in a diagonal position. I accept that the position of the vehicle shortly before the accident was such that the pursuer and his uncle were misled into thinking that it was either stationary or moving on the other lane and presented no danger to them on their own lane. It is in my view significant that it was not only the pursuer but also his uncle who failed to appreciate that there was an obstruction across their lane and failed to stop in time".

The Lord Ordinary then went on to refer to a case with which he had to deal in October 2005, namely *Cronie* v *Messenger*, which he described as being a strikingly similar case.

[10] The Lord Ordinary went on to consider the submissions for the pursuer and the defenders, and at paragraph [18] of his opinion he gave his reasoning and conclusions about liability as follows:

> "[18] I am satisfied that in this case the execution of the reversing manoeuvre by the vehicle in the hours of darkness was by its very nature something which created an unnecessary danger to other vehicles using the road, particularly those travelling in a westward direction. The manoeuvre caused the trailer of the vehicle to be positioned diagonally across the westbound lane, completely blocking it. The facts of *Cronie* v *Messenger* (in which the accident occurred in January 2001) themselves demonstrate that an accident of the type which did happen is liable to happen when a manoeuvre of this type is carried out in darkness. As Lord Denning MR pointed out in *Chisman* v *Electromation (Export) Ltd and Another* [1969] 6 KIR 456, in which a lorry was parked at night on its wrong side of the road, at p. 458:
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> > 'It is plain to me, as it was to the judge and must be to everybody, that to put a lorry with its lights on in the middle of the night on the wrong side of the road facing in the wrong direction is plain obvious negligence'.
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> His Lordship added at p.459:
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> > '….where there is an obstruction in the road negligently placed there and then an oncoming vehicle which for some reason or another – carelessness – does not see it or does not take proper avoiding action, or whatever it may be, the negligence of both

are equally causes of the accident and the only thing is for the damages to be apportioned between them'.

In the present case the cab of the vehicle was positioned in such a way that it could have given the impression to anyone travelling westwards that it was on its own side of the road, either stationary or moving. There was no evidence that it was essential that this manoeuvre be carried out in hours of darkness, or that the vehicle in question had to be used. It could have been carried out in daylight or by a smaller vehicle which would have been able to execute a normal right turn into the farm road. The blocking of the other lane by the trailer in darkness was avoidable. Even if it was not, it would have been possible for some form of advance warning to have been given to westbound traffic, either by way of a warning sign or someone appointed to provide a form of advance warning. I see no reason not to follow the approach I took in *Cronie* v *Messenger* and I therefore hold that the defenders were negligent in carrying out this manoeuvre in darkness. In saying this I must at the same time express my considerable sympathy for Mr Grant, who struck me as a highly responsible man. He was put in a position which was not of his own choosing: he had no say in the choice of vehicle or the time of day at which the manoeuvre had to be executed. I fully accept that, once he had taken up his position with the trailer across the westbound lane there was nothing that he could have done to avoid the accident. I reject the exaggerated claim by counsel for the defenders that a finding of negligence against them would effectively bring road haulage transport to a stop. The fact that the road in *Cronie* v *Messenger* was a major road, the A75, is not a valid ground of legal distinction. In both cases the road in question was a dark, unlit road subject to the national speed limit of 60 mph. I do not accept the submission of counsel for the pursuer that in this case the blame attributable to the pursuer should be less than that attributable to the driver of the Ford Galaxy in *Cronie* v *Messenger*. I therefore propose to make the same apportionment of fault as I did in that case and find the pursuer 40% to blame for the accident".

The Lord Ordinary's note dated 7 October 2015

[11] The pursuer having raised in his grounds of appeal the issue of the Lord Ordinary having granted decree of absolvitor in favour of the first defender, the Lord Ordinary provided a note explaining why he granted decree of absolvitor against the first defender. He indicated that he could not understand why the action was raised against Mr Grant, as it was of no benefit to the pursuer to raise it against him. Mr Grant was an employee acting in the course of his employment at the material time and his employers were vicariously liable for his acts and omissions. A decree against his employers, which would require to be satisfied by their insurers, was sufficient for the pursuer. He stated that Mr Grant struck him when giving evidence as a generally responsible individual who was simply carrying out the task entrusted to him by his employers. He was 51 years old and had been a driver of heavy goods vehicles since 1984. A decree against him (which he would no doubt not have the means to satisfy) would be likely to have a serious effect on his credit rating.

[12] In the course of the hearing of this reclaiming motion, senior counsel for the second defenders and reclaimers did not ask us to interfere with the Lord Ordinary's disposal regarding Mr Grant, and expressed the view that it would have no practical effect either for the pursuer or for the second defenders and their insurers. Senior counsel for the pursuer explained that he was not asking this court to recall the Lord Ordinary's decree of absolvitor in relation to the first defender. In these circumstances we see no reason to consider this matter further, and we express no view about the Lord Ordinary's disposal in this regard.

Submissions

Submissions for the second defenders and reclaimers

[13] Senior counsel for the reclaimers adopted his written note of argument. He submitted that the Lord Ordinary failed to give proper consideration to the evidence when reaching his conclusion that the defenders were at fault. His starting point was that reversing the vehicle in the hours of darkness was inherently dangerous; in this respect he fell into error. It is a common fact of modern life that commercial vehicles have to execute awkward manoeuvres at all times of the day and night. Other road users, such as the pursuer, must be alert to this state of affairs and take reasonable care in light of it. If the Lord Ordinary's reasoning was correct, it would follow that all traffic of whatsoever kind carrying out any form of turning manoeuvre which has the effect of crossing any opposing carriageway must be carrying out an inherently dangerous manoeuvre which should be avoided, and that the provision of lighting or the obvious presence of the vehicle may only result in a greater or lesser finding of contributory negligence. This was simply wrong.

[14] In reaching his conclusion that the execution of the reversing manoeuvre by the vehicle in the hours of darkness was by its very nature something which created an unnecessary danger to other vehicles using the road, the Lord Ordinary appears to have regarded as important the fact that "the cab of the vehicle was positioned in such a way that it could have given the impression to anyone travelling westwards that it was on its own side of the road". In coming to this view, the Lord Ordinary failed to take proper account of the evidence from several witnesses as to the lighting on the vehicle; the Lord Ordinary accepted Mr Grant's evidence that at the material time the headlights, side lights, hazard warning lights, working lights and reversing lights were all on.

[15] There was no evidence to entitle the Lord Ordinary to conclude that the operation of collecting milk from this farm should only have been done during the hours of daylight. This was not put to the first defender, and his evidence was that the cows were milked two to three times a day and the milk required to be collected from storage tanks at regular intervals. The Lord Ordinary had inverted the onus of proof in this regard; it was not for the defenders to prove that it was essential that this manoeuvre be carried out in the hours of darkness, but for the pursuer to lead evidence that the task could and should always have been carried out during daylight hours. Similarly, it was for the pursuer to prove that another, smaller, vehicle could and should have been used. Mr Grant gave evidence that taking a smaller rigid vehicle into the farmyard could be unsafe as it might mean reversing out into the main road. PC Hunter, who had personal experience of

HGV driving, confirmed that the farmyard was confined, and if a lorry drove forwards into it, then it would have to reverse onto the main road, which would be contrary to the Highway Code. There was no evidence of what other companies did in similar situations, nor of industry practice. Reversing, of itself, may not be relevant to any potential "danger", as any vehicle turning into the farm would have to block the opposing carriageway for a time while it negotiated the entrance. A proper consideration of the evidence could not have led to the conclusion that a smaller vehicle should have been used.

[16] The Lord Ordinary also erred in suggesting that it would have been possible for some form of advance warning to have been given to westbound traffic, either by way of warning sign or someone appointed to provide a form of advance warning. He accepted the evidence about the lighting system, but did not explain why this was not sufficient to provide advance warning. There was no evidence of any industry practice as to the provision of a warning person or banksman, nor that the provision of a warning sign or a banksman would have been any more effective than the extensive lighting on the vehicle. Requiring employees to walk along an unlit road to provide advance warning carried other obvious risks of injury.

[17] Moreover, the Lord Ordinary failed to take account of material evidence. Both the pursuer and Mr Pasco gave evidence as to what they would have done if they had seen warning lights on the vehicle. The pursuer said that if he saw flashing hazard lights he would expect there to be a problem and he would reduce his speed. If he saw an obstruction across the carriageway he would slow down and stop. Mr Pasco gave evidence that if he had seen the hazard warning lights he would have slowed down and could have brought his motor cycle to a standstill. If the reversing lights on the lorry had been operating he would have seen them from around 150 metres away, in plenty of time to stop. The Lord Ordinary failed to take account of any of this evidence.

[18] The Lord Ordinary was plainly wrong in relying as he did on his earlier decision in *Cronie* v *Messenger*. There were important distinguishing features between the two cases. The driver of the lorry in *Cronie* had been convicted and had accepted liability; in the present case, liability was disputed and indeed the Lord Ordinary assoilzied the first defender. *Cronie* v *Messenger* was concerned with a road accident involving an inherently dangerous manoeuvre on a busy major road, namely the A75. The Lord Ordinary was wrong to regard this as not being a valid ground of distinction with the present case. Moreover, there was no evidence in *Cronie* v *Messenger* that the driver of the car would have been able to stop had he seen the lorry; in this regard, too, the present case fell to be distinguished. *Cronie* v *Messenger* provided little, if any, assistance.

[19] Properly understood, senior counsel submitted that the evidence pointed inevitably to the cause of the accident being the pursuer's driving. The Lord Ordinary accepted the evidence that all the lights on both the cab and the trailer of the lorry were illuminated, including hazard warning lights on the cab and along the side of the trailer, and also working lights and reversing lights. On the evidence, the pursuer and his uncle would have had about 18 seconds from the crest of the first hill on the road, and about 13 seconds from the crest of the second hill on the road, in which to see the lights and take appropriate action. Their failure to do so caused the accident. As senior counsel had submitted to the Lord Ordinary, "it's not a danger because it's lit up like a

Christmas tree. If it was visible from half a mile away, in the mind of the ordinary, reasonable driver, is that a danger? No.", to which the Lord Ordinary had replied "Well, it was lit up better than a Christmas tree". In light of the evidence, the Lord Ordinary erred in finding that the accident was caused by the defenders, and went plainly wrong when he found the second defenders at fault.

[20] Senior counsel addressed us on the proper function of appellate courts in the light of the recent decisions of the UK Supreme Court in *McGraddie* v *McGraddie* 2014 SC UKSC 12 and *Henderson* v *Foxworth Investments Ltd* 2014 SC UKSC 203. He adopted the reasoning in three articles on the appellate courts published in 2015 SLT at pages 125, 130 and 138, and also referred to the decision of the Second Division in *HS* v *FS* 2015 SC 513. He submitted that the law of Scotland, as updated in *McGraddie* and *Henderson*, remained fundamentally as stated in *Thomas* v *Thomas* 1947 SC (HL) 45. In the present case the Lord Ordinary had gone plainly wrong, and this court should be seeking to "get the right result". The right result in this case was that the accident was not caused by fault of the defenders, and the Lord Ordinary's interlocutor should be recalled and decree of absolvitor pronounced.

[21] In any event, the pursuer was the author of his own misfortune. The primary cause of the accident was the pursuer's driving, and even if the court held that the defenders were in some way in breach of duty, the pursuer must fail on the basis of causation – *Dymond* v *Pearce* 1972 1 QB 496.

[22] Finally, even if the pursuer's actions were not the sole cause of the accident, senior counsel submitted that the degree of responsibility to be shouldered by the pursuer should be considerably higher than the 40% selected by the Lord Ordinary. No reasoning was provided by the Lord Ordinary to justify his assessment of contributory negligence – he simply stated that he proposed to make the same apportionment of fault as he did in *Cronie* v *Messenger* and find the pursuer 40% to blame for the accident. He gave no independent assessment of the actions of the pursuer as opposed to the car driver in *Cronie*, nor did he refer to the pursuer's evidence that he would have been able to control and stop his motor cycle had he seen the lights on the lorry. In all the circumstances, senior counsel submitted that fault should be apportioned by finding the pursuer not less than 80% to blame for the accident.

Submissions for the pursuer and respondent

[23] Senior counsel for the pursuer adopted his supplementary note of argument and moved us to refuse the reclaiming motion. He submitted that it was important to bear in mind that both the pursuer and his uncle gave evidence that if they had seen the hazard warning lights on the lorry they would have slowed down or come to a stop. They were misled by the headlights of the lorry into thinking that the vehicle was on the other side of the road. No driver would continue driving a motor cycle if he sees hazard warning lights across his carriageway; although the Lord Ordinary held that all the lights on the lorry, including the hazard warning lights on the trailer, were on, he did not find that the pursuer or his uncle actually saw them. Accordingly, although advance warning by lighting was not wholly absent, the Lord Ordinary must have taken the view that it

was not sufficient to warn of the hazard created. The pursuer had pled an *esto* case that, if the hazard warning lights and lights along the side of the trailer were lit, they were not visible to traffic travelling west until it was too late to warn that the trailer was blocking the westbound lane. The risk only arose from articulated lorries carrying out this reversing manoeuvre – for rigid lorries, the headlights of the lorry would not be pointing straight down the road, and oncoming traffic would not be misled into the belief that the lorry was on its own side of the road. The second defenders accepted (in answer 7) that a rigid lorry could have been used for this operation, and indeed that, for operational reasons, after the accident they decided to allocate a rigid lorry to collect milk from Nouthill Farm.

[24] Senior counsel submitted that the manoeuvre which was being carried out at the time of the accident was intrinsically dangerous because it involved an articulated tractor unit and tanker trailer in the hours of darkness, on an unlit B road in a rural location subject to a 60mph speed limit reversing into a dark and unlit farm driveway, in consequence of which the combined vehicle blocked the road on both sides, with the lorry cab located in the eastbound lane while its headlights were pointed in the direction of traffic travelling west.

[25] This court should exercise caution in reversing the Lord Ordinary's evaluation of the facts. We should not give way to the temptation of retrying the case on the printed evidence. In addition to referring us to *McGraddie* v *McGraddie* and *Henderson* v *Foxworth Investments Ltd*, senior counsel referred us to the observations of Lord Hope of Craighead in *Thomson* v *Kvaerner Govan Ltd* 2004 SC (HL) 1, particularly at paragraphs [17] and [18], and of Lord Hoffmann in *Piglowska* v *Piglowski* [1999] 1 WLR 1360, particularly at 1372. In the present case, it was clear that the Lord Ordinary found it to be a straightforward road traffic case, and did not consider it necessary to set down every fact and finding. Senior counsel also referred us to the Canadian case of *Housen* v *Nikolaisen* [2002] 2 RCS 235, and to the recent judgment of the UK Supreme Court in *Kennedy* v *Cordia (Services) LLP* [2016] UKSC 6, particularly at paragraphs 108-114.

[26] The burden on the reclaimers was, senior counsel submitted, significant, it was for them to demonstrate an error that is obvious and which leads to the conclusion that the Lord Ordinary was manifestly or plainly wrong. The reclaimers had failed to discharge this burden; the decision of the Lord Ordinary was one that a reasonable judge could have reached on the evidence before him. Both in regard to the finding of fault on the part of the defenders, and in regard to assessment of contributory negligence, it cannot be said that the Lord Ordinary had gone plainly wrong. The reclaiming motion should accordingly be refused.

Reply for the reclaimers

[27] Mr Hanretty repeated that on the basis of the evidence accepted by the Lord Ordinary it cannot be said that there was any inherent danger in the manoeuvre which the first defender was performing, and that the Lord Ordinary had gone plainly wrong. He submitted that the case of *Kennedy* v *Cordia (Services) LLP* was of no assistance in the present case. It was concerned with duties owed by an employer to an employee; although there were observations about the common

law, the case is of no assistance in relation to a road traffic accident such as is the subject of the present case.

Discussion and decision

[28] The defenders and reclaimers complain about the lack of reasoned justification for the Lord Ordinary's decision that the execution of the reversing manoeuvre by this articulated lorry in the hours of darkness was by its very nature something which created an unnecessary danger to other vehicles using the road, particularly those travelling in a westward direction. We accept that his reasoning was perhaps not as full as it might have been, but the Lord Ordinary clearly regarded this as a relatively straightforward road traffic accident which did not require him to set out his reasons, or any underlying jurisprudence, in great detail. In the circumstances of this case we consider that he gave sufficient detail to enable the basis for his decision to be understood reasonably clearly.

[29] The basis for his conclusion is to be found in the opening sentences of paragraph [14] of his opinion, which we have set out at paragraph [9] above. The key to the Lord Ordinary's reasoning is that the pursuer and his uncle were misled into thinking that the articulated lorry was in the other lane and presented no danger to them on their own lane. The pursuer's uncle gave clear evidence that he saw a pair of headlights on the opposite carriageway with a set of small lights above, that he knew it was a wagon of some description, that it was facing towards them, he was very sure that it was on the other carriageway and not on his own, and it did not give him any great concerns because it was just another vehicle on the road. It was not until the pursuer's headlights showed up the trailer across the road that he perceived the danger.

[30] The Lord Ordinary returned to the point about the pursuer and his uncle being misled at paragraph [18] of his opinion, where he observed that "the cab of the vehicle was positioned in such a way that it could have given the impression to anyone travelling westwards that it was on its own side of the road, either stationary or moving". The feature which caused the pursuer and his uncle to be misled was the fact that the operation was being carried out by an articulated lorry, not a rigid lorry, with the consequence that although the trailer unit was diagonally across the westbound carriageway and blocking it, the headlights on the cab unit were still directed down the eastbound carriageway in a broadly easterly direction, causing the pursuer and his uncle to believe that the vehicle was on its own carriageway and causing no danger to them. It was accepted by the defenders that a rigid vehicle could have been used to collect milk from Nouthill Farm – indeed, the defenders aver that after the accident, for operational reasons, they decided to allocate a rigid lorry to this task as the larger articulated lorry would not be fully utilised.

[31] On the uncontradicted evidence of the first defender, it would still be appropriate to reverse a rigid lorry into the entrance of Nouthill Farm, rather than to drive it forward into the farmyard, because it was difficult even for a rigid lorry to turn in the rather tight space of the farmyard, and any obstruction would mean that the lorry would have to be reversed out into the road, which would not be safe. However, the manoeuvre of reversing a rigid lorry into the farm entrance

would not be likely to mislead oncoming traffic approaching from the east into believing that the lorry was entirely on the opposite carriageway, because the headlights of a rigid lorry would not be directed down the eastbound carriageway: as the lorry performed its reverse turn and began to block the westbound carriageway, its headlights would turn through an arc to the north. The risk of confusion to oncoming drivers would be reduced or eliminated. It was this risk which was central to the Lord Ordinary's conclusion about fault.

[32] We have considered all of the well-known authorities about the function of an appellate court to which we were referred, including *Thomas* v *Thomas*, *Housen* v *Nikolaisen*, *Thomson* v *Kvaerner Govan*, *Piglowska* v *Piglowski*, *McGraddie* v *McGraddie*, *Henderson* v *Foxworth Investments Ltd* and *HS* v *FS*, as well as the three learned articles on the function of an appellate court in 2015 SLT. We are content to follow the summary of the guidance given by Lord Justice Clerk Carloway (as he then was) in the last two paragraphs of *HS* v *FS*. We are satisfied that there is no basis to interfere with the Lord Ordinary's decision that the second defenders were at fault, in the absence of any error of the kind described in *Thomas* v *Thomas*. We do not consider that it can be said that the Lord Ordinary was "plainly wrong".

[33] We agree with the formulation of why this manoeuvre was intrinsically dangerous which was given by senior counsel for the pursuer and respondent and which is set out at paragraph [24] above. We emphasise that it was because the lorry was articulated and so its headlights were pointing in an easterly direction, in the direction of oncoming traffic, whilst the tanker trailer was blocking the oncoming carriageway, that the operation was dangerous. We do not suggest that all manoeuvres involving the reversing of articulated lorries are likely to be inherently dangerous – each case must depend on its own facts and circumstances. However, we are satisfied that in the particular circumstances of this case the Lord Ordinary was entitled to conclude that the manoeuvre was dangerous, and was entitled to reach the view that the accident was caused by fault of the defenders. We express no views about the suggestion that banksmen or other forms of advance warning might have been provided.

[34] Although both sides referred us to *Kennedy* v *Cordia (Services) LLP*, we did not find this to be of assistance to us. That case was concerned with the duties of care owed by an employer to an employee. Although the UK Supreme Court discussed common law duties of care, and the duties to carry out risk assessments and provide adequate equipment to reduce the risk of injuries, these discussions were in the context of employers' duties of care towards employees. They do not assist us in considering the issues which have arisen from the road traffic accident in the present case.

[35] For these reasons, we are unable to agree with the submissions for the defenders and reclaimers that the Lord Ordinary erred in finding the accident to have been caused by fault of the defenders. To that extent, therefore, we shall refuse the reclaiming motion.

[36] However, this leaves the issue of contributory negligence. The Lord Ordinary addressed this briefly at paragraph [14] and again in the last two sentences of paragraph [18] of his opinion. He stated that he did not accept the submission of counsel for the pursuer that in this case the blame attributable to the pursuer should be less than that attributable to the driver of the Ford

Galaxy in *Cronie* v *Messenger*, and he therefore proposed to make the same apportionment of fault as he did in that case, namely to find the pursuer 40% to blame for the accident. He does not appear to have considered whether the blame attributable to the pursuer should be more than that attributable to the driver of the Ford Galaxy in *Cronie* v *Messenger*, nor did he carry out any assessment of the quality of the pursuer's driving or the particular aspects of his fault in this case. He appears to have simply adopted what he did by way of apportionment of damages in terms of section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 in that case, and applied this to the exercise which he carried out in terms of section 1(1) of the Law Reform (Contributory Negligence) Act 1945 in the present case. He gives no further justification or reasoning for his selection of 40% as the pursuer's share in the responsibility for the accident.

[37] There are no hard and fast rules as to how a court should assess a pursuer's share in the responsibility of damage – it must apply a commonsense approach to the task, and assess the causative potency and the blameworthiness of the pursuer's actions – *Davies* v *Swan Motor Co (Swansea) Ltd* [1949] 2 KB 291 at 326. We are mindful of the observations of the Second Division in *Porter* v *Strathclyde Regional Council* 1991 SLT 446 at 449:

> "It has been laid down in *McCusker* v *Saveheat Cavity Wall Insulation Ltd*, and in *MacIntosh* v *National Coal Board* that the Inner House will not interfere with the Lord Ordinary's apportionment of negligence except in exceptional circumstances which must demonstrate that 'he has manifestly and to a substantial degree gone wrong'. Even if the Inner House would have expected a different apportionment, it will not interfere".

[38] However, in the present case the Lord Ordinary gives no indication that he has carried out any assessment of the causative potency or the blameworthiness of the pursuer's actions. If he has done so, he gives no explanation for reaching the figure of 40%, except that this was the figure which he adopted in *Cronie* v *Messenger*. There were material factual differences between that case and the present case. The pursuer in that case was a passenger in a car being driven by the second defender, which was involved in a road accident with an articulated lorry outside a coal yard on a major road, the A75, at night. Not surprisingly, the configuration of the road was not exactly the same as in the present case – in that case there was a shallow bend about 240 metres away from the accident site, and a straight stretch of road about 180 metres long beyond the bend and leading up to the lorry. Liability as between the first defender (the driver of the lorry) and the pursuer was not in issue, and as a result of that accident the first defender had already been convicted of a contravention of section 3 of the Road Traffic Act 1988 by the unanimous verdict of a jury, fined £1,000, and disqualified from driving for 6 months. The second defender made a remark to one of his passengers about the lights up ahead shortly before the accident, from which the Lord Ordinary inferred that he noticed something unusual about the lights up ahead.

[39] By contrast, in the present case the accident occurred on a minor road. The pursuer would have taken about 18 seconds to drive from the crest of the first hill on the road, from which the lighted lorry could be seen, and about 13 seconds from the second crest on the road, to the point of impact. The distance between the second crest and the point of impact was agreed to be 320 metres. The Lord Ordinary found that all the lights (headlights, side lights, hazard warning

lights, working lights and reversing lights) on the cab and on the tanker trailer were on at the time, and indeed observed himself during submissions that it was lit up "better than a Christmas tree". Liability on the part of the first and second defenders was not admitted, and the first defender was not convicted of any road traffic offence as a result of this accident.

[40] We consider that it will seldom be appropriate to choose a figure for contributory negligence as between two vehicles in a road traffic accident solely by reference to an assessment in another case, even if that case bears points of similarity with the case under consideration. In most such cases there will also be points of difference; it may be helpful to refer to another case (or cases) by way of yardstick or as a point of reference, but it will usually be necessary for a judge to state why he or she considers that the same award should be made as in another case, and to give express consideration to the causative potency and blameworthiness of the pursuer's actions in the instant case.

[41] In the present case, the Lord Ordinary has not set out his reasoning on the point at all, and in all the circumstances of this case we consider that he has manifestly and to a substantial degree gone wrong. Despite the misleading effect of the articulated lorry's headlights, we consider that the degree of blame attributable to the pursuer in failing to keep a proper lookout when the tanker trailer was lit up "better than a Christmas tree" and the pursuer had between 18 and 13 seconds to see it and slow down or stop must be significantly greater than 40%. We consider that a just and equitable figure to reflect the pursuer's blameworthiness is 60%. We shall accordingly allow the reclaiming motion to the extent of quashing the Lord Ordinary's assessment of 40% contributory negligence, and substituting therefor 60%.

[42] How this will affect the sum awarded in terms of the interlocutor dated 3 June 2015 may depend on whether the pursuer wishes to insist on his reclaiming motion regarding the Lord Ordinary's approach to the cost of prosthetics. We shall accordingly have this matter put out by order in about 4 weeks from the date of this opinion, to enable parties to address us as to further procedure.