OUTER HOUSE, COURT OF SESSION

[2007] CSOH 176

OPINION OF LADY PATON

in the cause

DALE McFARLANE

Pursuer;

against

(FIRST) BARRY THAIN and

(SECOND) JAMES CAMPBELL

Defenders;

and

THE MOTOR INSURERS BUREAU

Minuters:

Pursuer: Clancy, Q.C.; Gardiner, Advocate; Drummond Miller, LLP

First Defender: No appearance

Second Defender: Hanretty, Q.C.; HBM Sayers

Minuters: R.W. Dunlop, Advocate; Simpson & Marwick

8 November 2007

Collision between motorcycle and car

[1] Late one afternoon on Saturday 17 July 1999, James Campbell (the second defender, aged 67) left his home in Dunfermline. He drove his Ford Orion car in an easterly direction along Blair Drive towards a T-junction with the main road, Townhill Road. His intention was to turn right onto the main road, and to drive in a southerly direction. When he drove out into the main road, his car was in collision with a Kawasaki motorcycle being ridden in a northerly direction along the main road by the first defender, Barry Thain (then aged 22). The first defender was thrown onto the road. His pillion passenger Dale McFarlane (the pursuer, then aged 23) was thrown some distance in a northerly direction. The pursuer's crash helmet came off. He suffered a head injury and a broken leg.

[2] In this action, the pursuer sues the first and second defenders. As the first defender was uninsured, the Motor Insurers Bureau (MIB) entered the process as Minuters. The MIB dispute liability on the ground that the pursuer had known that the motorcyclist was uninsured. Further, both the second defender and the MIB plead contributory negligence on the part of the pursuer. The second defender maintains that the pursuer failed in his duty to wear a properly fastened crash helmet. The MIB contends that the pursuer knew that the

motorcyclist was unlicensed and had been drinking heavily before the accident; also that the pursuer had failed to fasten the straps of his helmet securely.

[3] A proof before answer took place in 2007, restricted to the issue of liability as directed by the court (2005 S.L.T. 221; 2006 S.L.T. 107). A video of the scene of the accident was played in court, and photographs and plans were referred to. A description of the physical characteristics and lay-out of the scene of the accident can be found in paragraphs [51] and [52] below. The crash helmet worn by the pursuer was not produced, and parties relied on verbal descriptions. The pursuer gave evidence, as did an eye-witness Mark Wear; a police officer called to the scene (Constable Muir); and an accident investigator John Alexander. Mr Alexander had in fact been instructed by the MIB, but by arrangement between the pursuer and the MIB, was called as an expert witness for the pursuer. Evidence was then led on behalf of the second defender from Dr N.J. Mills, an expert in crash helmets. An accident investigator instructed by the second defender (Dr R.F. Lambourn) sat in court during the evidence of Mr Wear and Constable Muir, but did not personally give evidence. Finally, evidence was about to be led on behalf of the MIB from the first defender, his father Kenny Thain, and his brother Scott Thain. However at that stage, senior counsel for the pursuer advised the court that the pursuer no longer insisted upon his case against the MIB. The MIB were duly assoilzied, with a reservation relating to expenses. Counsel for the MIB withdrew. The remaining counsel made submissions, and I took the case to *avizandum* without having heard evidence from either the first or the second defender.

An outline of evidence relating to the accident

[4] Evidence relating to the accident included the following:

The pursuer (aged 30) stated that at the time of the accident he had been an apprentice roof tiler, but was temporarily unemployed. On the night before the accident, he had been in his friend Kenny Thain's house at Johnston Crescent, having a drink. He could not remember leaving the house the next day. Kenny's son, the first defender, must have been present at some stage in order to give him a lift on the motorcycle. The pursuer could remember stopping off at the Broomhead flats to get money from a friend Robert Hamilton, in order to buy more drink. He could not remember much about travelling on the motorcycle, any events prior to the accident, the time of the accident, the weather, or the place. He remembered being in hospital, asking his mother why he was there. He also remembered putting on a crash helmet at Kenny's house. It was a full face visor helmet with a bar in front of the chin. The pursuer had not been sure how to fasten the clip of the chin straps. The first defender helped him. The pursuer thought that he had probably taken the helmet off when visiting the Broomhead flats. When cross-examined by counsel for the second defender, the pursuer agreed that he did not own a crash helmet, and that the first defender had supplied the helmet and helped him with the chin straps. However the pursuer could not remember whether the first defender helped him again with the chin straps after the visit to the Broomhead flats. He agreed that the fact that the helmet came off in the accident suggested that he had not fastened the chin straps properly, although he later said that he did not know why the helmet had come off. The pursuer showed a clear appreciation of the need for a securely fastened crash helmet for his own safety when travelling pillion on a motorcycle. During cross-examination by counsel for the MIB, the pursuer clarified that he had been drinking vodka and lager with Kenny Thain. In cross and re-examination, the pursuer confirmed that he had known that the first defender had only a provisional driving licence. He had simply never thought about whether the first defender had passed a test for riding a motorcycle. Similarly the pursuer had never thought about the question whether the first defender was insured to ride a motorcycle.

[5] Mark Wear (aged 39) was a customer service adviser who happened to be driving his car southwards down Townhill Road towards the junction with Blair Drive just before the accident. He saw a car in Blair Drive intending to make a right turn across the north-bound carriageway and then to travel south in front of him. Mr Wear said that he did not see a motorcycle in the moments leading up to the collision. However he could hear the noise of a motorcycle, which sounded as if it was coming from behind him. He acknowledged that his impression was mistaken, as he subsequently saw that the motorcycle had in fact been travelling towards him. Mr Wear remembered three stationary parked cars on the west side of Townhill Road to the

north of the junction between Blair Drive and Townhill Road, but no parked cars to the south of that junction. In his opinion, therefore, there was nothing to obstruct the driver's view as he emerged from the side road and turned right. Mr Wear saw the car approach the junction, and stop there for about five seconds. The car then moved off in a continuous motion. Mr Wear, having heard the sound of a motorcycle, was checking his mirrors when the collision occurred. He did not actually see the collision. When he looked again, the car was covering the north-bound carriageway, with the front of the car a short distance from the central line. The motorcycle had hit the car in the area between the offside wing and the driver's door. Mr Wear then saw a person lying on the south-bound carriageway, and a crash helmet bouncing towards his car. According to Mr Wear, the helmet was not a full face visor helmet. When Mr Wear went to help, he discovered that two people had been riding the motorcycle: one was lying injured; the other left the scene, and jogged up Lauder Street (a street almost opposite Blair Drive). The police arrived within about five minutes.

[6] When cross-examined by counsel for the second defender, Mr Wear estimated the car's speed at 3 to 4 miles per hour, possibly faster. There had been nothing unusual about the car's manoeuvre. In Mr Wear's view as a driver, it had been safe for the car-driver to pull out of the side road. There was no sound of braking, and no indication of any rapid movement on the part of the motorcycle to the right or the left, no evasive movement. When cross-examined by counsel for the MIB and re-examined, Mr Wear agreed that he had given Constable Muir a signed statement estimating the speed of the motorcycle as "faster than 30 miles per hour, probably about 40 miles per hour" (although his personal memory was of giving the constable an estimate of 30 to 40 miles per hour). Having been reminded of that statement, Mr Wear thought that he might have had a fleeting glimpse of the motorcycle just before the collision.

[7] Constable Gordon Muir, aged 40, was on duty nearby, and was called to the scene of the accident. He arrived at about 17.50 p.m. He noted the time of the accident as 17.45 p.m. The collision appeared to have occurred on the north-bound lane, two feet from the centre line, just in line with Blair Drive. The pursuer was lying on the south-bound carriageway, to the north of the bell-mouth of Lauder Street. The pursuer's helmet was lying on the ground, further north of the pursuer. When Constable Muir examined the helmet, he noticed that it was a full face visor helmet, with some scraping damage, and that there was nothing unusual about the chin straps.

[8] Constable Muir stated that the second defender readily admitted to being the driver of the car, and gave a breath test (which was negative) and a statement in the following terms:

"... When I got to the junction I stopped and looked both ways. I saw that the road was clear from both directions and pulled out slowly heading to my right. I was almost at the centre line when I saw and heard the bike travelling from my right. It was travelling very fast; I think about 60 miles per hour. I stopped immediately and I saw the bike rider try to swerve past the front of the car. He failed to avoid me and struck the front [right hand side] of my car. At this time I saw that there were two persons on the bike. They appeared to fly over the front of the car. The two of them landed on the roadway to the left of my car. The boy in the white helmet landed up the road a bit further. One of the bikers, a young fellow with a dark helmet, seemed to tumble in the road. He got to his feet and ran up Lauder Street. I reversed my car back into Blair Drive and went over to see the injured boy ... when I drove it was fair, the roads were dry, and I had a good view. In my opinion the rider of the bike is to blame for the accident due to his sheer speed."

[9] When cross-examined by counsel for the second defender, Constable Muir confirmed that the second defender had not mentioned anything about parked cars obstructing his vision. However Constable Muir had personally seen at least two vehicles parked on the west side of Townhill Road, just south of the junction with Blair Drive. Those cars would have obscured the second defender's vision as he tried to emerge from Blair Drive. The constable confirmed that the cars did not belong to people who had stopped to help at the accident. Constable Muir then described the long hazard warning lines in the centre of the road, intended to alert drivers to dangers in the area, including traffic emerging from junctions, and a blind summit just south of Blair Drive. The speed limit was a maximum of 30 miles per hour, although a reasonably careful driver would proceed having regard to all the conditions - in other words, he might proceed more slowly. The crash

helmet which the pursuer had been wearing was a full face helmet, an entire sphere covering the whole of the head except the eyes. There were straps and a clip beneath the chin. Constable Muir (a motorcyclist himself) examined the helmet, and saw no reason why the straps could not be fastened.

[10] When cross-examined by counsel for the MIB, Constable Muir confirmed that the pursuer had shown a reluctance to name the motorcyclist (see paragraph [20] below). Constable Muir further commented that, based upon an oil deposit which indicated the point of impact, the driver appeared to have cut the corner of Blair Drive. He agreed that it was basic training for any motorcyclist to wear a helmet with properly fastened straps which would prevent the helmet from coming off. The constable advised the court that the first defender had been convicted on summary complaint of failing to report the accident, and being uninsured.

[11] In re-examination, Constable Muir confirmed (reading from page 28 of his police notebook, a page which had not been lodged as a production) that the pursuer had said, in the course of giving a statement:

" ... When we got near to the Spar [a shop situated at the junction of Blair Drive, Townhill Road, and Lauder Street], I remember seeing a car on the left between cars. It looked to me as if it was reversing."

Constable Muir explained that his impression was that the pursuer was referring to seeing a car reversing slowly out into Townhill Road.

[12] John Alexander (aged 63), formerly a police inspector in charge of traffic management and now an accident investigator, examined the locus, took photographs and a video, and studied statements, plans, and reports. He prepared a report for the MIB. He used an estimated distance given by the second defender in his insurance claim form, namely an estimate that the pillion passenger had been thrown about 45 feet from the point of impact, landing to the north of the bellmouth of Lauder Street. (Constable Muir's evidence during the proof tended to support the second defender's estimate.) On the basis of that "throw distance" rounded up to 15 metres, Mr. Alexander concluded that the motorcycle's speed at impact was 31 miles per hour . However bearing in mind the fact that the pursuer's trajectory would be obstructed to some extent by the first defender's body, and also by the pursuer's grip of the pillion handles, Mr. Alexander ultimately concluded that the motorcycle had been travelling at about 45 miles per hour.

[13] From measurements at the locus and calculations, Mr. Alexander concluded that a driver whose view was unobstructed by any cars parked to the south of Blair Drive would have seen the upper body of the biker at about 72 metres. However if parked cars obstructed the driver's sight-line, visibility would be more likely to be 50 metres. If the driver had begun his manoeuvre of crossing the main road before he saw the motorcycle travelling at 45 miles per hour, he would have had to accelerate briskly in order to reach the south-bound lane safely. If the driver had seen the motorcycle at any distance between 45 to 72 metres, it was not clear whether he would manage to avoid being in the path of the bike. The driver would have to brake and stop, but much would depend upon his initial acceleration, his reaction time, and his braking time. Much too would depend upon the position of the motorcycle at the point when the car-driver decided to stop, and whether there was sufficient time for the motorcyclist to react and take evasive action. A car or cars parked to the south of Blair Drive would undoubtedly cause observational difficulties for the car-driver; but if his view was so restricted, that meant that additional care was required as he emerged into the potential flow of traffic. Mr. Alexander considered that it would be foolish of the driver to commit himself to the manoeuvre while not appreciating the nature of the traffic from the south. The driver should manoeuvre out until he gained an appropriate view southwards.

[14] Mr. Alexander's report contained *inter alia* the following conclusions:

"8.1 There is little doubt that southerly visibility for drivers emerging from Blair Drive is affected by the distinct dip in the road to the south of locus. In ideal traffic conditions, this would provide about 75.00 metres for emerging drivers to detect and assess the approach and speed of any northbound traffic. The presence of a parked motor car at the western kerb of Townhill Road, to the south of Blair Drive junction, was obviously creating a further visibility restriction or difficulty for the driver of the Ford Orion motor car ...

8.6 Visibility at the locus was reduced by the parked motor car at the western side of Townhill Road. This has been estimated at 50.00 metres or thereby, which at 45 miles per hour, equates to a travel time factor of 2.49 seconds over that distance. Motorcyclists are more aware of their travel environment and react quicker to situations with which they are confronted, compared for instance, to the average car driver ...

8.7 [An allowance for a reaction time on the part of the motorcyclist in the range 1.10 to 1.30 seconds] provides a time factor of 1.19 to 1.39 seconds for evasive action by the rider of the Kawasaki motorcycle. Given that restricted time factor, it is extremely unlikely that this would be sufficient to allow any effective evasive action to be undertaken by the Kawasaki motorcyclist ...

8.10 The driver of the Ford Orion motor car is emerging from a relatively difficult junction on the western side of Townhill Road. The difficulty is magnified by the presence of a parked motor car to the south of the junction, which demands that extra care and attention should be exhibited by that driver, particularly for traffic approaching from the south. That his vehicle was broadside and completely blocking the northbound lane, when impacted by the Kawasaki motorcycle, identifies that such care and consideration for approaching traffic was lacking.

8.11 The rider of the Kawasaki motorcycle is travelling northwards on Townhill Road towards the locus. Travelling on the primary road, there should be no particular difficulties experienced by the rider, apart from any presented by parked motor vehicles and potential for emerging vehicles from the many junctions along the length of Townhill Road. However the dominant aggravating factors on the part of the rider ... undoubtedly [include] an element of inappropriate speed.

8.12 Given all the pre-impact factors involved in this accident, there is a clear contribution to the accident circumstances by the driver of the Ford Orion car, when he encroached into the course or route of the approaching Kawasaki motorcycle. That is not to downplay the contribution made by the rider of the Kawasaki motorcycle, where ... inappropriate speed would contribute to his inability to respond timeously to the emerging manoeuvre."

[15] When cross-examined by counsel for the second defender, Mr. Alexander confirmed that, when travelling north, the distance from the crest of the blind summit to Blair Drive (shown in photograph E of number 7/8/B of process) was about 50 metres. The maximum legal speed limit in the area was 30 miles per hour. It was the driver's responsibility to drive at that speed or at a lesser speed, anticipating, for example, pedestrians, or a vehicle emerging at a junction. The driver should drive at a speed which permitted him to bring his vehicle to a stand-still if necessary. If a motorcyclist travelling north along Townhill Road at 30 miles per hour crested the blind summit and saw a car emerging from Blair Drive, and if it was assumed that the rider had a normal reaction time, and that his tyres and brakes were in good condition, the motorcycle could come to a halt within 26 to 28 metres. That would permit the motorcyclist to stop well within the 50 metre distance available, without colliding with the car. Nevertheless any cars parked on the west side of Townhill Road, to the south of Blair Drive, would have added to the difficulty of the situation, and much would depend upon when the motorcyclist first saw the vehicle emerging and presenting a danger.

[16] The pursuer closed his case with a Joint Minute in which parties agreed that on 22 September 1999 the first defender was cautioned and charged with a breach of section 3 of the Road Traffic Act 1988 (careless driving), and replied "I probably was going a bit faster than I should have."

[17] Dr. N.J. Mills, aged 63, Reader in Polymer Engineering at Birmingham University, was led in evidence by Mr Hanretty on behalf of the second defender. He was *inter alia* a long-serving member of the British Standards Committee on Motor Cycle Helmets. He confirmed that crash helmets had been shown to be effective in preventing head injuries in motorcycle accidents. It was now mandatory for motorcycle riders and their passengers to wear helmets. The purpose of the chin strap was to keep the helmet in place if the wearer was involved in a crash and ended up flying through the air. Obviously if the helmet came off before the wearer hit the ground, the head would be unprotected. Thus failure to fasten the chin strap resulted in the same exposure to injury as if the wearer had not been wearing a helmet. Having studied the circumstances of

the pursuer's accident, Dr Mills' opinion was that a helmet would have prevented injury to the pursuer's head had the helmet been securely positioned on his head. The likely outcome in such circumstances would have been minor short-term concussion.

[18] When cross-examined by counsel for the pursuer, Dr Mills acknowledged that he had no medical qualifications. He had not seen the helmet in question, nor did he know its make, size, and condition. Dr Mills thought however that it was overwhelmingly likely that the helmet complied with the relevant British Standard (BS6658), as it would be an offence for a supplier to sell a crash helmet which did not conform to the British Standard. Further, for a helmet's safety features to be compromised, it would have had to be damaged previously in a serious accident. It would not have been advisable to wear a helmet that was too big, but nevertheless such a helmet, if strapped on tightly, should stay on the wearer's head. It was possible, but not very common, for the helmet to come off *after* the wearer had hit the ground. Finally, Dr Mills accepted that a motorcyclist could still suffer bad head injuries even although wearing a helmet, where in some circumstances the forces were too great for the design of the helmet.

The witnesses in the case

The pursuer

[19] The pursuer's memory of events was limited, in my view for three reasons: post-traumatic amnesia possibly followed by a degree of more permanent brain damage; the passage of time since the accident; and a desire to "cover up" for his friend the first defender and for himself. The pursuer's memory may have been better in the days immediately following the accident. For example, the pursuer managed to give Constable Muir some information on 18 July 1999, one day after the accident, and one day before being transferred to the Southern General Hospital for specialist head injury treatment for his skull fracture and subdural haematoma. On that occasion the pursuer told Constable Muir that he had been drinking with the first defender and the first defender's father before the accident. He also told the constable that "when we got near to the Spar [a shop situated at the junction of Blair Drive, Townhill Road and Lauder Street] I remember seeing a car on the left between cars. It looked to me as if it was reversing." By contrast at the proof in 2007, the pursuer stated that he could not remember the place of the accident, or the events prior to the accident.

[20] Both in 1999 and during the proof in 2007, the pursuer appeared to wish to protect the first defender to some extent. For example, in July 1999 Constable Muir had difficulty obtaining the name of the motorcyclist from the pursuer. The constable acknowledged that the difficulty may have been attributable to the fact that the pursuer had head injuries and was extremely ill. Nevertheless the pursuer appeared unwilling to disclose the name of the motorcyclist until the pursuer's uncle, who was present in hospital and who was encouraging the pursuer to give information, leaned (no doubt inadvertently) on the pursuer's broken leg. The pursuer then told the police officer that the motorcyclist had been "Barry from Brucefield", then "Barry Vane", and ultimately on being questioned further, clarified the name as "Barry Thain". When giving evidence in court in 2007, the pursuer gave a similar impression of attempting to protect the first defender. For example, when describing the drinking session before the accident, the pursuer freely admitted that he had been drinking with Kenny Thain, the first defender's father, but was vague about the first defender's involvement in any drinking session. He conceded that the first defender must have been present at some stage on Saturday 17 July 1999, as the first defender had given him a lift on the motorcycle. Otherwise he did not acknowledge that the first defender might have been drinking. Of note also was the fact that the pursuer was not entirely truthful about the criminal offence for which he was serving a sentence of imprisonment at the time of the proof. He initially stated that the offence was possession of cannabis. Only when cross-examined by counsel for the MIB did he acknowledge that the offence was in fact being concerned in the supplying of cannabis. I ultimately concluded that the pursuer was credible and reliable in parts of his evidence, but incredible and unreliable in other significant parts.

Mark Wear

[21] Mr Wear was an honest independent eye-witness, trying to recollect events as best he could after the passage of a considerable number of years. He was wholly credible, but in relation to some parts of his evidence (for example, the type of helmet worn by the pursuer, the position in which the pursuer was ultimately found, and the location of cars parked near the T-junction) I concluded that his memory of events was not always accurate, and should not necessarily be relied upon.

Constable Muir

[22] Constable Muir arrived at the scene of the accident a few minutes after the collision. He too was a motorcyclist, and accordingly his observations were particularly acute and well-informed. He noted the physical characteristics of the scene and the vehicles involved. He drew a rough sketch at the time, and later prepared a more careful sketch. He seemed confident and accurate in his evidence about the location of any parked cars, the type of helmet which the pursuer had been wearing, the position in which the pursuer was found, and other details. I regarded him as wholly credible and reliable. Wherever discrepancies in evidence emerged, I preferred and relied upon the evidence of Constable Muir.

The expert witnesses

[23] Similarly the two experts, Mr. Alexander and Dr. Mills, were in my view wholly credible and reliable.

Submissions

(1) Submissions for the pursuer

[24] Senior counsel submitted, as a general principle applicable to this particular case, that as neither the second defender nor his accident expert Dr Lambourn had given evidence, the court should wherever possible draw inferences favourable to the pursuer. Reference was made to *Ross v Associated Portland Cement Manufacturers* [1964] 1 W.L.R. 768, at pages 775, 784-5, and 788; and *O'Donnell v Murdoch McKenzie & Co,* 1967 S.C. (H.L.) 63, at pages 71-2.

The speed of the motorcycle

[25] Counsel contended that the second defender's estimates of the speed of the motorcycle (namely 60 miles per hour in his police statement; and 80 to 100 miles per hour in his insurance claim form) were inconsistent, unreliable, and untested in evidence. Mr Wear's evidence of a speed of 30 to 40 miles per hour was to be preferred. In relation to the estimate of 45 miles per hour given by the accident investigator Mr. Alexander, two assumptions had been factored in, namely the obstruction by the motorcyclist's body, and the gripping of pillion handles. Neither assumption was evidence-based. Accordingly counsel invited the court to accept Mr Wear's evidence together with a modified version of Mr. Alexander's evidence, and to conclude that the motorcycle was travelling at a speed of about 40 miles per hour.

Whether the driver's sight-line was obstructed

[26] Counsel invited the court to find that there were no parked cars interfering with the car-driver's view to the right. Mr Wear's evidence on that matter was clear and unchallenged, and was to some extent supported by the fact that the second defender had not mentioned any parked cars obstructing his vision when speaking to Constable Muir. As for the constable's evidence that there had been two cars parked to the south of Blair Drive on the west side of Townhill Road, counsel submitted that *esto* that evidence was accepted, the constable had arrived at the scene some minutes after the accident: the cars to which he was referring must have appeared after the accident had occurred.

The noise of the motorcycle

[27] It was submitted that the pursuer was entitled to rely upon the motorcycle noise and its possible warning effect. The second defender's objection to the line of evidence, made in the course of the proof, should be repelled for three reasons:

(i) The question of noise had been raised spontaneously by the eye-witness Mr Wear in his evidence-in-chief. Counsel for the second defender and the MIB had then thoroughly explored the issue in cross-examination. Further in re-examination, a clear line had been adopted on behalf of the pursuer in order to demonstrate that if Mr Wear could hear the noise from a distance of 117 metres from the collision point, then the second defender could surely hear it. No objection had been taken to any of that evidence. It was only during Mr. Alexander's evidence that an objection had been taken to the line.

(ii) The evidence about motorcycle noise was significant. In the absence of an explanation from the second defender, one was left with several possible options. For example, the driver may have heard the noise, but chosen to drive out not knowing where the sound was coming from, and ignoring the real possibility that a motorcycle might be travelling towards him. Another possibility was that the driver was not paying sufficient attention, and did not notice the noise until it was too late. Any option which could be envisaged indicated fault.

(iii) The pursuer was entitled in law to build a case in part based on motorcycle noise as (a) the averments in Article IV of Condescendence at page 15 of the Record were sufficiently wide to include a case about the effect of such noise on the driver's duty of care: cf. *Adamson v Roberts,* 1951 S.L.T. 355, Lord President Cooper at page 356. (b) The objection came too late: cf. *McGlone v British Railways Board,* 1966 S.C. (H.L.) 1, at pages 12 to 14. (c) In any event, the question of noise was merely a variation or development of the existing case: cf. *Burns v Dixon's Ironworks,* 1961 S.C. 102. Counsel moved to amend the Record at page 8C by inserting after the words "The first defender would have been visible to the second defender before he drove to the point of the collision" the words "The sound of the motorcycle engine was or ought to have been audible to the second defender before he drove into Townhill Road from Blair Drive". Counsel also moved to amend at page 15A-B, by inserting after the words "In particular it was his duty not to move into Townhill Road until it was safe to do so" the words "It was his duty to listen out for and to notice the sound of the first defender's motorcycle while he was stationary at the junction of Townhill Road and Blair Drive". There was no prejudice to the second defender in allowing the amendment, as he could have dealt with the question of noise by giving evidence about it.

Fault

[28] Counsel submitted that the all-pervasive consideration was that priority had to be given to traffic on Townhill Road. The Highway Code was relevant, as provided by section 38(7) of the Road Traffic Act 1988, and in particular paragraphs 146, 156, and 187 of the Code. The Code gave explicit warnings about looking out for motorcycles.

Fault, if no cars obstructed the driver's sight-line

[29] If no cars obstructed the second defender's view, he had 75 metres of clear visibility down the north-bound carriageway. He would have over 4 seconds of visibility if a motorcycle was travelling north at 41 miles per hour, and 3.75 seconds if the motorcycle's speed was 45 miles per hour. Either provided ample time within which to complete the crossing of the north-bound carriageway if no motorcycle had been in view at the start of the manoeuvre. The collision therefore meant either that the second defender did not notice the motorcycle in his view, or alternatively that he started his manoeuvre before the motorcycle was in his view but took an inordinate amount of time to cross the road. Also the second defender should not have cut the corner, as that prolonged his time in the north-bound carriageway. In all the circumstances, the second defender had been negligent, and had failed to keep a proper lookout and to avoid a collision.

[30] If the court did not accept those submissions, the pursuer was entitled to rely on the motorcycle noise. It was obvious that if the second defender could hear the motorcycle, but could not see it, he should have

waited to see if it was travelling north towards him.

Fault, if one or more cars obstructed the driver's sight-line

[31] If, on the other hand, the court held that two cars had been parked south of Blair Drive as Constable Muir stated in evidence, counsel accepted that the second defender's line of sight would be considerably less, probably about 50 metres. That presented a very considerable hazard, and it was all the more important for the second defender to take great care when emerging. In such circumstances, Mr Alexander suggested that the driver should have turned left, or should have edged out in a "stop-start" manner. The driver should therefore have gone a certain distance for a better view before completely obstructing the north-bound carriageway. The second defender had not done so, and was therefore negligent.

[32] If necessary, counsel would again rely upon the motorcycle noise, which was all the more significant if the driver's vision was restricted by parked cars.

Contributory negligence

[33] Counsel accepted that the court should hold that it was likely that the pursuer's injuries would have been less severe if the helmet had remained on his head. However it was going too far to say that the pursuer had demonstrated a reckless disregard for his own safety. The pursuer had borrowed the helmet. It was not known whether it fitted him properly. He had been keen to fasten the borrowed helmet, and had got the assistance of the first defender to do so. A badly-fitting helmet could come off, even if the chin straps were fastened. It was not known whether at the time of the accident the straps were fastened or unfastened. One could not rule out the possibility that a helmet might be too big, and might come off even if the straps were fastened.

[34] When quantifying the reduction in damages to reflect contributory negligence, the approach adopted in *Hitchens v Berkshire County Council,* Bingham's Motor Claims (11th ed.) page 236, cited on behalf of the second defender, should not be followed. *Hitchens* was wrong in principle, and contrary to authority. The judge had ignored the important consideration that the pursuer was not to blame for the accident. The pursuer would not have suffered any injury had the defenders not been negligent. Accordingly the defenders should take the lion's share of the responsibility for injury to the pursuer. That approach had been adopted in *O'Connell v Jackson* [1972] 1 Q.B. 270, Edmund Davies L.J. at pages 274E to 275F, 277B to 278A; *Froom v Butcher* [1976] 1 Q.B. 286, at pages 286G, 295G to 296D; *Capps v Millar* [1989] 1 W.L.R. 839; and in cases in the Outer House in the Court of Session.

[35] Wearing an unfastened helmet was not as bad as wearing no helmet. The present case should be treated as similar to a seat-belt case (cf. *Froom* and *O'Connell*) but the court should distinguish between the situation where a pursuer wore a helmet with chin straps not securely fastened and the situation where a pursuer wore no helmet. If the court were to make a finding of contributory negligence, the percentage reduction should be 10 per cent.

(2) Submissions for the second defender

[36] Senior counsel for the second defender contended that any observations from *Ross* and *O'Donnell cit. sup.* were made prior to the Civil Evidence (Scotland) Act 1988. The court should therefore be slow to draw the inferences suggested by counsel for the pursuer. The second defender's position had been clearly put in his statement to Constable Muir, and in his insurance claim form.

Objection relating to motorcycle noise

[37] Timeous objection had been taken as soon as a case based on motorcycle noise appeared to be about to be made. Standing that timeous objection, and the lack of averments on record, the pursuer was not entitled to make a case of fault based on motorcycle noise. Obviously such evidence about noise as had been elicited could be taken into account as purely background material.

Fault

[38] Counsel submitted that an absence of challenge to evidence, such as Mr Wear's evidence about parked cars, did not make that evidence credible or reliable. Constable Muir's evidence about the parked cars was to be preferred. His evidence was to some extent supported by what the pursuer was noted as having said about seeing a car on the left (apparently reversing) as they neared the Spar shop. If the court held that there were two cars parked south of Blair Drive as described by Constable Muir, then the second defender's line of vision was undoubtedly obscured, and the situation facing him was a very difficult one. However the suggestion that the second defender should have turned left should be rejected: that manoeuvre would have placed the second defender's car, a slow-moving vehicle, in the path of the motorcycle, producing even greater risk.

[39] On the evidence, the motorcycle had not braked, but had driven straight into the car. Furthermore there had been an available escape route, namely the two-foot gap between the second defender's car and the centre line, but the first defender had not taken that route. The real cause of the accident was the motorcyclist. Accordingly counsel invited the court to assoilzie the second defender. If, contrary to that submission, liability was to be apportioned between the first and second defenders, the level of contribution attributable to the second defender should be very modest.

Contributory negligence

[40] There was no evidence to suggest that the helmet was faulty, or did not fit. The pursuer had clearly acknowledged that the chin straps should be properly fastened, and that a failure to secure the helmet was dangerous. The evidence established that the pursuer's serious head injury would have been avoided had he been wearing a securely fastened crash helmet. There was a great difference between short-term concussion and permanent brain damage. Damages should therefore be reduced to reflect the pursuer's failure to take care for his own safety.

[41] When assessing the percentage reduction, guidance could be found in authorities such as *Froom v Butcher* [1976] 1 Q.B. 286, where Lord Denning had apparently set a tariff in seat-belt cases . But it was important that each case should be assessed on its own facts, and it was inappropriate to be restricted by a tariff. *Capps v Millar* [1989] 1 W.L.R. 839 was of assistance, but the level of blameworthiness in the present case was higher, as the pursuer himself clearly acknowledged that a failure to fasten the straps was dangerous. In the present case there had been an exploration of blameworthiness: contrast with the case of *O'Connell v Jackson* [1972] 1 Q.B. 270. The facts in the present case were tantamount to not wearing a helmet at all. Adopting the logical approach taken in *Hitchens v Berkshire County Council,* Bingham's Motor Claims (11th ed.) page 236, and applying that approach to the facts in the present case, the court should make a finding of 75 per cent contributory negligence.

Discussion

The pleadings, the objection, and the proposed amendment

[42] The pursuer's averments focus on the visibility of the motorcyclist, and the driver's duty to keep a good look out and to see the approaching motorcyclist when at the junction of Blair Drive and Townhill Road. The relevant averments are in the following terms:

"COND. II ... The first defender would have been visible to the second defender before he drove to the point of the collision ...

COND. IV The accident was caused or materially contributed to by the fault and negligence of the second defender. It was his duty to take reasonable care for the safety of other road users. It was his duty to keep a proper look out for other road users. It was his duty to take reasonable care to avoid colliding with other vehicles. In particular it was his duty not to move into Townhill Road until it was safe to do so. It was his

duty not to block the carriageway for traffic travelling in the opposite direction. He failed to comply with these duties and as a result the accident occurred. He knew, or ought to have known, that if he failed to fulfil these duties an accident of this type would occur. But for his failure to fulfil these duties the accident would not have occurred."

[43] A defender is entitled to fair notice of the case being made against him. In my view the second defender's preparation for, and conduct of, the proof, would have been very different had the question of aural warning of an approaching motorcycle been put in issue. For example, (a) the leading of expert evidence on the matter might have been thought advisable, for many reasons. One reason was well-illustrated by the witness Mr Wear, namely the difficulty a person might have in pin-pointing the source, proximity, or direction of any noise. Other reasons can be envisaged. Accordingly an additional expert witness might have been instructed. (b) The remit given to any existing expert witness (in the second defender's case, Dr. Lambourn) might have been significantly wider, covering the issue of vehicle noise in a city or town. (c) The question of vehicle noise would no doubt be considered when making the decision whether or not to lead the evidence of the second defender.

[44] Accordingly in my view the pursuer's averments are not sufficient to entitle the pursuer to extend the case of fault to include the noise made by a motorcycle engine and a duty (said to rest on a driver in a residential area) to listen for sounds which might alert him to an approaching motorcycle, even if he could not see one. Nor do I accept that a case based on noise is merely a variation or development of the existing case.

[45] Two questions then arise:

(i) whether the second defender's objection to the line of evidence was raised timeously; and

(ii) whether the pursuer should be permitted to amend his pleadings.

[46] The issue of the noise of the motorcycle was raised spontaneously by the eye-witness Mr Wear, as part of his description of events. Such noise featured in subsequent evidence, both in the cross-examination of Mr Wear and the subsequent evidence of Constable Muir, but in the context of clarification of the sequence of events, during which other possible noises were being explored (for example, whether there was any sound of braking). In my view, only when the pursuer's expert Mr. Alexander was giving evidence did the pursuer's counsel's line of questioning begin to suggest that the second defender, as a car-driver, should have heard the noise of the motorcycle when waiting at the T-junction and should have treated that noise as a warning, making him pause before pulling out of the side road. At that stage, counsel for the second defender made his objection. I consider that the objection was timeously made, as in my opinion only at that stage were there clear indications that the pursuer might be endeavouring to construct a case of fault based on motorcycle noise.

[47] In relation to the question of late amendment, this action has been in court since 2002. Witnesses such as Mr Wear and Constable Muir have been available for precognition. Against that background, no good reason was advanced to explain and justify the introduction of a new line relating to liability at such a late stage. Furthermore, I consider that the second defender would be seriously prejudiced if the amendment proposed were to be allowed at this late stage, for the reasons outlined in paragraph [43] above. Accordingly I refuse to exercise my discretion to allow the late amendment sought.

[48] At the time the objection to the line of evidence was made, I heard submissions and allowed the line of evidence to continue, reserving all questions of competency and relevancy. Having heard the further submissions at the hearing on evidence, and having formed the views noted above, I now sustain the objection. As a consequence, I shall not entertain any submission relating to a case of fault dependent upon an alleged duty resting upon the second defender to have heard the noise of a motorcycle, and as a result to have been put on the alert such that he should have paused before pulling out of the side road.

Findings in fact

[49] Having heard the evidence and the submissions, and taking into account where necessary the guidance in *Ross v Associated Portland Cement Manufacturers* and *O'Donnell v Murdoch McKenzie & Co., cit. sup.,* qualified to some extent by the enactment of the Civil Evidence (Scotland) Act 1988, I found the following facts proved:

[50] On Friday 16 July 1999, the pursuer went out with Kenny Thain, the father of his friend the first defender. They were initially drinking in a pub. It is not clear whether the first defender joined them at that stage. The pursuer and Mr. Thain then returned to the latter's house. They continued drinking. They consumed vodka and lager. The first defender joined them at some stage, but on the evidence led before me in the proof, I am not prepared to find it established that he drank alcohol, or was affected by alcohol. The pursuer stayed overnight. The next day, Saturday 17 July 1999, the group decided that they needed more drink. The intention was to borrow money from a man named Robert Hamilton, who lived at the Broomhead flats. The first defender decided to use a Kawasaki 305 cc motorcycle to travel to the Broomhead flats in order to obtain the money, and thereafter to buy more drink. The pursuer was to ride pillion passenger. The pursuer knew that the first defender had only a provisional licence. He did not think about whether the first defender had a motorcycle licence or whether he was insured. The pursuer did not have a crash helmet. However the first defender provided the pursuer with a full face helmet, and helped the pursuer when he had difficulty securing the straps under his chin. The two then mounted the Kawasaki motorcycle, and travelled to the Broomhead flats. It was late afternoon, and the weather was dry and sunny. There were no visibility problems caused by either weather or lighting conditions. The two went in to meet Mr. Hamilton. The pursuer removed his helmet for that visit. When he put it on again to resume the journey on the motorcycle, I am satisfied on a balance of probabilities that he did not succeed in securely re-fastening the chin straps. The pursuer and the first defender then departed on the motorcycle.

[51] In the course of their journey, the Kawasaki motorcycle travelled in a northerly direction along Townhill Road. Townhill Road ran through a residential area consisting of houses and shops. It was a fairly narrow main road, with a single carriageway in each direction. The narrowness of the road was on 17 July 1999 compounded by parked cars on either side. Many small side roads adjoined the main road at regular intervals. The speed limit in the area was a maximum of 30 miles per hour. There were long white lines running along the centre of the road, defining the centre of the road, but also warning drivers of hazards as set out in the Highway Code, paragraph 106 ("A broken white line**.** This marks the centre of the road. When this line lengthens and the gaps shorten, it means that there is a hazard ahead. Do not cross it unless you can see the road is clear well ahead and wish to overtake or turn off"). One hazard to which drivers should be alerted by the long white lines was the possibility of vehicles emerging from side roads.

[52] At one section of Townhill Road, vehicles travelling northwards had to proceed up a hill with a blind summit. About 50 metres beyond the crest of the summit lay the T-junction where the side road Blair Drive adjoined the west side of Townhill Road. A driver travelling up the incline could not see the T-junction until reaching the crest of the hill. Similarly a driver emerging from Blair Drive could only see a vehicle approaching from the right (south) when that vehicle became visible at or approaching the crest. A little beyond the T-junction, and on the east side of Townhill Road, was another side road, namely Lauder Street. Thus Blair Drive, Townhill Road, and Lauder Street formed a staggered junction.

[53] One contentious issue at the proof was whether cars were parked on the west side of Townhill Road, just south of Blair Drive. If so, the sight-line to the right for a driver emerging from Blair Drive would be restricted. Ultimately, having heard all the evidence and the submissions, I prefer and accept the evidence of Constable Muir. Bearing in mind that he arrived at the scene within a few minutes of the accident, I find it proved on a balance of probabilities that he saw the pattern of parked vehicles at the scene of the accident as it existed at the time of the accident. Accordingly I find as a fact that there were two cars parked on the west side of Townhill Road, just south of Blair Drive, which significantly restricted the sight-line of the second

defender at the T-junction when he intended to turn right out of Blair Drive, and reduced his sight-line to, at best, 50 metres.

[54] A further contentious issue was the speed of the vehicles involved in the collision. In relation to the Ford Orion car driven by the second defender, I accept the evidence of Mr Wear on this matter. Mr Wear had good reason to watch the progress of the car, as it was pulling out of a side road to drive in front of him. Accordingly I find as a fact that the Ford Orion was travelling at 3 or 4 miles per hour just before the collision. In relation to the Kawasaki motorcycle, I have carefully considered the submissions presented by senior counsel for the pursuer. Nevertheless I saw no reason to take issue with the meticulous measurements, calculations, and analysis carried out by the experienced road traffic expert led on behalf of the pursuer, namely Mr. Alexander. The eye-witness Mr Wear had, at best, a fleeting glimpse of the motorcycle before the collision. Similarly the second defender had only a very short time within which to assess the motorcycle's speed. Accordingly I prefer the unmodified evidence of Mr. Alexander, and find as a fact that the Kawasaki motorcycle was travelling at about 45 miles per hour just before the collision.

[55] In terms of section 2 of the Civil Evidence (Scotland) Act 1988, I am entitled to take hearsay evidence into account. The second defender's police statement, noted in paragraph [8] above, represents his account given almost immediately after the accident, at a time when his memory of events must have been fresh. His account was in many respects corroborated by the evidence of the eye-witness, Mr Wear. With the exception of the second defender's estimate of the speed of the motorcycle (which I have commented on in paragraph [54] above) I see no reason to reject any of the second defender's account as given to Constable Muir. Accordingly I further find in fact that at about 17.45 p.m. on Saturday 17 July 1999, the second defender drove his Ford Orion car in an easterly direction along Blair Drive. He stopped at the Give Way lines at the T-junction with Townhill Road for about five seconds, during which he checked whether the road was clear to the left and to the right. Because of all the circumstances, including the blind summit, the obstructed sight-line caused by the parked cars, and the speed at which the motorcycle was travelling, the second defender did not see any motorcycle to his right before beginning his manoeuvre of driving out from the side road. He accordingly committed himself to the manoeuvre, and moved out into the main road at a continuous speed of about 3 or 4 miles per hour, cutting the corner of Blair Drive to some extent as he did so. Very shortly thereafter, when the front of his car was about two feet short of the centre-line of the carriageway, he caught sight of a motorcycle speeding towards him from his right on Townhill Road. He braked. However the second defender, who was riding the Kawasaki motorcycle at a speed of about 45 miles per hour, had very little space (only 50 metres or less) and very little time (at most, 2.49 seconds, of which 1.10 to 1.30 seconds would be required for reaction time) within which to react and take evasive action. In the result, the first defender was unable to avoid the car. The motorcycle collided with the car. The first defender was thrown onto the road. His pillion passenger, the pursuer, was thrown about 15 metres in a northerly direction. The pursuer's crash helmet came off because he had not fastened the chin straps securely. The pursuer landed on the southbound carriageway, to the north of the bellmouth of Lauder Street. He suffered a broken leg and a serious head injury when his unprotected head came into contact with the hard surface. Had the pursuer's crash helmet remained on his head, his injuries would have been significantly less severe, and would have amounted on a balance of probabilities to a broken leg and concussion.

[56] Mr Wear and others stopped to help. The pursuer was lying bleeding and in pain on the roadway. The first defender picked himself up and jogged away from the scene, still wearing his crash helmet. Mr Wear watched him go, bemused by his departure.

[57] The police arrived within minutes. Constable Muir took witnesses' details and some statements, although other statements (such as those from the pursuer and Mr Wear) had to be taken during the following days and weeks. The second defender was interviewed at the scene of the accident, under caution. His statement, as taken by Constable Muir, is noted in paragraph [8] above.

[58] The pursuer was taken to hospital. He was diagnosed as suffering a broken leg and head injuries, ultimately found to be a skull fracture and subdural bleeding. As indicated in paragraph [20] above, he

eventually disclosed the first defender's name as the motorcyclist. On 22 September 1999, when the first defender was cautioned and charged with a breach of section 3 of the Road Traffic Act 1988 (careless driving), he replied: "I probably was going a bit faster than I should have".

Liability

[59] In my opinion, the primary cause of the accident was the excessive speed at which the first defender was riding the Kawasaki motorcycle. The first defender was travelling at about 45 miles per hour in a residential area with shops, houses, pedestrians and vehicles, where the maximum legal speed was 30 miles per hour. Furthermore, he was travelling at 45 miles per hour, despite the particular circumstances and inherent hazards at the locus, all as described in paragraphs [51] and [52] above. Those circumstances and hazards included a fairly narrow main road, with a single carriageway in each direction; parked cars on either side, reducing the width of the road even further; many small side roads from which traffic might emerge; and a blind summit just south of the point in Townhill Road where the collision occurred. The speed at which the first defender was travelling was, in all the circumstances, dangerous. It gave neither him, nor other road users, sufficient time to react. It was entirely foreseeable in the circumstances that an accident of some sort might occur because of the speed at which he was travelling. In the particular circumstances which occurred, the speed at which he was travelling when he crested the blind summit meant that he had very little space (50 metres or less) and very little time (2.49 seconds) within which to react and take evasive action when he noticed the obstacle in his way. The evidence established that an average time for reaction would be within the range 1.10 to 1.30 seconds, leaving the first defender just over a second within which to try to avoid the car. Thus with reference to Article 3 of Condescendence, I find that the first defender failed in his duty to take reasonable care for the safety of other road users. He failed in his duty to drive at a reasonable speed. He failed in his duty not to drive at a speed which meant that he was unable to stop within his maximum visibility distance. He is liable to make reparation to the pursuer for the latter's loss, injury and damage.

[60] I now turn to the question of liability in relation to the second defender. I accept that the second defender had a duty to give way to traffic on Townhill Road. With reference to Article 4 of Condescendence, I accept that the second defender had a duty to take reasonable care for the safety of other road users; to keep a proper look out for other road users; to take reasonable care to avoid colliding with other vehicles; not to move into Townhill Road until it was safe to do so; and not to block the carriageway for traffic travelling in the opposite direction. However I do not accept that the second defender breached any of those duties. In reaching that conclusion, I have taken into account the following matters:

[61] I have found in fact (a) that the second defender stopped at the T-junction for about five seconds, during which he checked whether the road was clear to the left and to the right; and (b) that because of all the circumstances, including the blind summit, the obstructed sight-line caused by parked cars, and the speed at which the motorcycle was travelling, the second defender did not see any motorcycle to his right before beginning his manoeuvre of driving out from the side road: see paragraph [55] above. In those circumstances, the second defender in my opinion fulfilled his duties to take reasonable care and check that it was safe for him to emerge. In relation to the manner in which and speed at which the second defender emerged, I do not accept that either can be held to be negligent. Ultimately, counsel for the pursuer did not seriously contend that the second defender should have turned left, and I agree that the second defender was under no duty to do so. Senior counsel nevertheless submitted that, in the event that there were cars parked to the south of Blair Drive, the second defender ought to have edged out in stages, in order to achieve better visibility *en route* while leaving passing space in the northbound carriageway. In my view, however, the continuous moderate speed of 3 or 4 miles per hour adopted by the second defender cannot in the circumstances be criticised as a breach of the duties set out in Article 4 of Condescendence. As for the cutting of the corner when turning right, I was not satisfied, on the evidence, that this slight lapse made any significant contribution to the accident.

[62] In the result, therefore, I absolve the second defender from any blame for the accident.

Second defender's plea of contributory negligence on the part of the pursuer

[63] As I intend to grant the second defender absolvitor, the following observations on his sixth plea-in-law of contributory negligence on the part of the pursuer are purely *obiter.*

[64] Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 provides *inter alia:*

"where any person suffers damage as the result partly of his own fault and partly 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."

[65] The court must make such a reduction in damages as would be just and equitable, having regard to "the claimant's share in the responsibility for the damage". That involves not only causation (i.e. whether the injuries could have been avoided or their severity reduced by the wearing of a seat-belt or a helmet) but also blameworthiness: cf Edmund Davies L.J. in *O'Connell v Jackson* [1972] 1 Q.B. 270, at page 277G to 278C. What is just and equitable is not therefore purely a question of medical or scientific causation: the element of blameworthiness may be highly significant. There may be exceptional cases where the failure to wear a seat-belt or a crash helmet is, in Lord Denning's phrase "almost forgivable" (*Froom v Butcher* [1976] 1 Q.B. 286, at page 296A). In such exceptional cases, there may be no, or a very minor, reduction in damages, despite medical evidence that all of the injuries could have been avoided had the seat-belt or crash helmet been fastened securely.

[66] In *Froom v Butcher, cit. sup.,* at pages 295G to 296D, Lord Denning clearly acknowledges the two elements of causation and blameworthiness. In relation to the latter, he comments:

"If [an inquiry into whether the failure to wear a seat-belt was entirely inexcusable or almost forgivable] could easily be undertaken, it might be as well to do it."

Thus while Lord Denning goes on to suggest that *in most cases* it may be inadvisable to prolong matters by an expensive and hotly disputed inquiry into the degree of blameworthiness, and that in such circumstances, evidence about causation may point to one of three categories of reduction (nil, 15% or 25% for the reasons he gives), Lord Denning did not rule that such an approach must invariably be adopted in every case. Indeed, in the *dicta* quoted above, Lord Denning approves of an exploration of relative blameworthiness where that can be done, with the clear implication that the percentage reduction in such cases will not necessarily be nil, 15% or 25%.

[67] In the present case, there has been evidence relevant to the blameworthiness of the pursuer. As indicated above, the whole blame for the accident lies, in my view, with the first defender. However when assessing what percentage reduction in damages should be made in respect of the pursuer's failure to take reasonable care for his own safety by wearing a securely fastened crash helmet, which would on the evidence have made a significant difference to his injuries (broadly speaking mild concussion and a broken leg, instead of brain injury and a broken leg), the following factors are relevant:

(i) The wearing of a crash helmet by motorcyclists was made compulsory in 1973, and was compulsory on the day of the accident.

(ii) The pursuer was well aware that it was important for his own safety when riding pillion on a motorcycle that he should wear a crash helmet which was securely fastened.

(iii) The pursuer had made some attempt to wear a crash helmet, putting on one lent to him by the first defender.

(iv) The chin straps of that helmet were not defective. Nevertheless, the pursuer had difficulty securing the straps, and needed the first defender's assistance in fastening the clip.

(v) The pursuer later took the helmet off at the Broomhead flats. He did not succeed in re-securing the chin straps after the visit to the flats, despite knowing how important it was not to ride pillion without a securely-fastened crash helmet.

(vi) The pursuer's helmet came off in the accident because the chin straps were not secured. His unprotected head then struck the roadway.

(vii) Had the pursuer's helmet remained securely fastened and on his head, he would have suffered a broken leg and concussion, instead of a broken leg and a serious brain injury.

[68] Against that background, the second defender's plea of contributory negligence criticises the pursuer for his failure to fasten his crash helmet. The plea does not extend to knowledge on the part of the pursuer that the first defender had allegedly been drinking heavily before riding the motorcycle, nor to knowledge that the first defender was unlicensed to drive a motorcycle (contrast with the plea of contributory negligence made on behalf of the MIB).

[69] Focusing solely, therefore, on the pursuer's failure properly to secure the helmet which he was wearing, I found the guidance given by the Court of Appeal in *Capps v Miller, cit. sup.,* of particular assistance. That decision concerns failure to secure a helmet at a time when the wearing of a helmet had been made compulsory (contrast with the earlier case of *O'Connell v Jackson*). I find the reasoning in *Capps* more persuasive in the circumstances of this particular case than the reasoning in *Hitchens,* which was a first instance decision concerning seat-belts in a case settled by agreement before the Court of Appeal could give any guidance. Taking into account all the evidence in the present case, I consider that a reduction in damages of 15% would be just and equitable to reflect the pursuer's contributory negligence. Had the evidence and the second defender's plea of contributory negligence extended to questions of the pursuer's knowledge that the first defender had been drinking heavily, and that he had no licence to ride a motorcycle, the percentage reduction would in all likelihood have been higher to reflect a greater degree of blameworthiness on the pursuer's part.

Decision

[70] For the reasons given above, I sustain the second defender's third plea-in-law, and assoilzie the second defender from the conclusions of the summons. It is my intention to sustain the pursuer's third plea-in-law and grant decree in absence against the first defender. However before I grant any such decree, I shall put the case out By Order to enable counsel for the pursuer to address me on the question whether the damages sought should be modified to reflect any quantification of the pursuer's loss, injury and damage. I reserve meantime all questions of expenses, insofar as not already dealt with.