OUTER HOUSE, COURT OF SESSION

[2015] CSOH 51

PD1593/12

OPINION OF LORD UIST

In the cause

ADAM WAGNER

Pursuer;

against

(FIRST) THOMAS GRANT and;
(SECOND) ARLA FOODS UK PLC

Defenders:

Pursuer: Clarke QC, Love; Thompsons (for Motorcycle Law Scotland)
Defenders: Hanretty QC, Galbraith; DAC Beachcroft Scotland LLP

30 April 2015

Introduction

[1] The pursuer, who was born on 23 September 1991, sustained serious injuries, including a below-knee left leg amputation, when he was involved in a road traffic accident on 27 August 2009. At about 11pm that day he (then a learner driver) was riding his Honda CB125 motorcycle west on the B7076 Gretna to Johnstonebridge Road at Nouthill Farm, Gretna Green when he collided with a milk tanker consisting of a cab and trailer ("the vehicle") driven by the first defender in the course of his employment with the second defenders which was reversing into the road on the pursuer's left leading to Nouthill Farm. The B7076 road ran generally east to west with a single lane in each direction. It was unlit and subject to the national speed limit of 60 mph. At the material time the weather was dry. There was an unobstructed view of the entrance to the farm road from a distance of about 350 metres, after a crest in the road.

[2] In this action the pursuer seeks damages from the defenders for the loss, injury and damage which he sustained. All heads of damage, apart from the cost of prosthetics, have been agreed. The case therefore went to proof only on the disputed questions of liability and the cost of prosthetics.

The circumstances of the accident

[3] Only three people were present when the accident occurred – the pursuer, his uncle Alastair Pasco, who was riding his motor cycle close to that of the pursuer, and Mr Grant, the driver of the vehicle. Each of them gave evidence.

[4] The pursuer himself had no recollection of the accident. He could remember leaving his work at the Welcome Break Service Station on the M74, filling his motor cycle with petrol and leaving the service area to head for the B7076 road. His next memory was waking up in hospital a few days later.

[5] His uncle, Alastair Pasco, a man who had held a motorcycle licence for about 22 years and was the chairman of the Lonewolves Motor Cycle Club in the local area, was very familiar with the B7076 road. He had also been working at the Welcome Break that evening and was riding his motor cycle close to that of the pursuer. He had regularly ridden back and forth to work with the pursuer, whom he described as a competent and safe rider who was preparing for his driving test and had to be precise about what he was doing on the road. The pursuer had had experience of motor cycles before the age of 17 as he had ridden off-road. Since the accident he had remained keen on motor cycles and passed his driving test. At the material time the pursuer was riding in lead position on his left side of the lane and Mr Pascoe was on the right side about 30 feet behind him. He saw the glow of headlights on the other side of the lane while accelerating towards 50-55 mph. He was riding with a dipped beam headlight and the pursuer was on high beam until he saw the oncoming vehicle, when he dipped his headlights. The pursuer reached the rise on the approach to Nouthill Farm slightly before he did. Towards the top of the rise he saw a set of headlights on the opposite lane and a pair of sidelights on the same vehicle, causing him to think that it was a wagon of some description. He was sure it was on the other lane 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 his nephew. 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. He himself 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. In the aftermath of the accident he saw the tanker diagonally across the westbound lane at an angle of about 45 degrees as if it was about to go into the farm entrance. He had never previously seen a tanker perform such a manoeuvre there. Before the accident he had not seen any hazard warning or reverse lights or headlights flashing on the vehicle. He just considered the vehicle to be in the other lane coming towards them.

[6] At the material time the first defender, Mr Grant, a very experienced HGV driver, was reversing the vehicle into the farm road in order to collect milk from the farm and then transport it to the dairy in Lockerbie for processing. 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 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 pulling 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.

[7] Constable Stewart Hunter attended the scene of the accident. He had previously been a long distance lorry driver for 18 years. When he drove over the hill in the same direction as that in which the pursuer and his uncle had earlier been heading he could see the tanker sitting at an angle and other vehicles behind it on the other side. The headlamps, top lights, orange side lights and trailer coupling light of the tanker were illuminated. The cab of the tanker was on the westbound lane in a straight alignment, either on or straddling the centre white line. He took a statement about the occurrence of the accident from Mr Grant, which was in the following terms:

> "I have driven for Arla Transport since April 2007. I start at 5 pm. My main job is farm collections. I drive an Arla vehicle DK55 DYN, which is a ERF and a tanker for milk.
>
> Today, 27.08.09, I started work at 1700 and carried out normal deliveries. I done my daily checks. One of my pick-ups is at Nouthill Farm. At about 2300 I arrived at Nouthill. I travelled past the entrance in line with the gates from there. I stopped the vehicle, I looked ahead and the road was clear, I put my hazard lights on and my working lights on. I checked the road ahead and mirrors for behind, the road was clear and I started my manoeuvre which is reversing into the farm entrance. I positioned my vehicle into the middle of the road. I was reversing less than walking speed. The trailer was lined up with the gate.
>
> I seen two lights coming, which I thought was a car. I thought, where did they come from. I stopped the vehicle in the middle of the road; seconds later these lights were on me. I had no time to get my truck out of the way. The lights were level with the cab when I seen they were bikes. The first went by, he was going at about 30-40, at a guess; I don't know. The bike hit the rear bumper of the trailer, which carried him into the wall at the side.
>
> The second bike missed the trailer, I think he either hit the first bike or came off at the grass; at that point I put the handbrake on and went to see what happened."

In response to a question from Constable Hunter Mr Grant stated that when he saw the lights he would have moved out of the way if he could have. Road policing officers had attended for a short time but left once they discovered that it was not a fatal accident. Constable Hunter's sergeant decided that there was no need for further investigation of the accident.

[8] Mr Barry Jamieson and his wife Mrs Karen Jamieson gave their evidence on commission prior to the proof. Mrs Jamieson was driving their car east on the B7076 and her husband was in the passenger seat. On a straight stretch of road she could see lights in the distance about half a mile ahead opposite a farm. She did not know if they were moving or stationary, but as she got closer she could see that they were stationary. She slowed down as soon as she saw the lights because she did not know what she was coming to. As she approached the lights she could see quite a large vehicle and two cars in front of her as well. When she got there she could see a milk tanker diagonally across the road "all litten up along the side" and guessed he was reversing into the farm. She had no difficulty in seeing those lights, which "were like a whitey colour", and was aware of them for some distance, maybe half a mile. The front lights of the cab were shining into a hedge. She slowed down and stopped and she and her husband got out of their car. She was

familiar with such a scenario in the morning after milking time and later at night. She did not realise until she got closer that the tanker was diagonally across the road. Mr Jamieson was very familiar with the road. About half a mile in the distance he saw the tanker "litten up" diagonally across the road with its nearside facing him where it had obviously stopped on its way to reversing into the farmyard. As his wife started to slow down he could see two cars between them and the tanker which had arrived on the scene before them. He could see the front and rear lights of the tanker and orange lights along its side. He had seen the lights from approximately half a mile away. His wife slowed down and stopped behind the two cars in front of them. He was accustomed to milk tankers on that road and familiar with the fact that they went up to farms. He agreed that the cab of the tanker was in the same lane as he was and facing approximately forwards so that he could see the lights at the back of the cab just beside the cab wheels. The tanker part was at an angle of approximately 45 degrees across the road and its rear light s were visible. The whole tanker was on the road, none of it having entered the farmyard. He thought that they had arrived on the scene approximately ten minutes after the accident happened. He thought there were maybe six orange lights along the side of the tanker, just enough to light up so people could see the side of the vehicle. He thought that, if you were driving in the opposite direction, when you came over the incline you would see a vehicle where the tanker was in plenty of time to slow down.

[9] Dr Patrick Kearns was a consultant ophthalmologist of 20 years experience who gave a general explanation of how the eye operates and functions in lower light conditions. When shown a video reconstruction of the vehicle at the farm entrance (7/15 of process) he said he would not have been sure what he was looking at. He expressed the opinion that, if there was a big disparity in brightness between two lights that could make an observer less aware of another light. He could not give an opinion on the effect of headlights on the observer's ability to perceive objects beyond the headlights. He accepted that a motorcyclist's vision would improve the closer he got to the point of impact. He accepted that he had not carried out any research into driving perception and response and was no better qualified to speak about headlamps and hazard light operation than any man in the street. I found his evidence to be of very limited, if any, value.

[10] Jean Edgar was a retired health and safety inspector, having spent 24 years working for the Health and Safety Executive. She had been asked by the pursuer's solicitors to provide an opinion on health and safety management and risk assessment in relation to the accident. She said that the responsibilities of an employer involved the provision of a safe vehicle and a trained and qualified driver and to do a risk assessment of the work activity. Where loads had to be lifted and deposited there were hazards which required to be identified so as to reduce risks. Only significant risks, not trivial ones, had to be considered. In this particular case the driver had no control over the selection of the vehicle, but the employer did. The employer also had responsibility for the management of health and safety systems, such as considering the route, the volume of traffic, the weather, whether the driver was being asked to carry out the task in the hours of darkness, and whether one person was sufficient to do the work. The employer should have had a generic risk assessment that covered everything broadly and trained the driver to do a dynamic risk assessment if a factor changed. In the case of frequent visits the employer could establish better what the arrangements should be. If there was a danger in darkness five days a week the employer should consider whether the timing of the task was appropriate as that was a factor which was

entirely in the control of the employer. The main point was that the reversing of vehicles should be avoided. If reversing was necessary there should be a banksman. Alternative options in this case would have been to carry out the manoeuvre in daylight or to use a smaller vehicle (which could have driven forwards into the farm road).

Submissions

[11] The broad proposition advanced on behalf of the pursuer was that the evidence established that the pursuer and his uncle Mr Pascoe were riding their motor cycles at 50-55 mph, that before they approached the rise in the road they were able to observe the headlights and roof lights of the cab of an articulated lorry in the eastbound lane , that the pursuer dipped his headlight, that both men thought they did not see till much later that there was a trailer blocking the westbound lane at an angle of about 45 degrees across it, and that the pursuer could not have avoided the trailer, with which he proceeded to collide. The evidence established that not only were the pursuer and his uncle not able to see the trailer until very late on, but also that they were not realistically able to do so. There was a reasonably foreseeable risk of injury when the vehicle was reversed across the road in darkness.

[12] The submission for the defenders was that the accident was caused solely by the fault of the pursuer. The presence and movement of the defenders' vehicle in the course of the reversing manoeuvre would have been obvious to the pursuer had he been keeping a proper lookout on the road ahead. Had he been doing so he would have appreciated the presence of the vehicle, that it was engaged in a reversing manoeuvre, that it was displaying hazard, working and marker lights and obstructing the lane ahead of him and he would have slowed down and brought his motor cycle to a stand at a safe distance from the vehicle.

Conclusion about the accident

[13] At the end of the day there was not much dispute about the circumstances of the accident. I found Mr Grant to be an entirely credible and reliable witness. I conclude 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 Pascoe was about the extent of the lighting on the vehicle. On this point I have no hesitation in accepting the evidence of Mr Grant and rejecting that of Mr Pascoe. Mr Grant impressed me as an attentive driver an in my view he was well aware of the lights which his vehicle was displaying.

[14] 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. I had to deal with a strikingly similar case in *Cronie* v *Messenger* (unreported, 21 October 2005, opinion attached), in which a Ford Galaxy travelling on the A75 road collided with a coal lorry which was reversing into a coal yard in hours of darkness

and blocking the lane on which the Ford Galaxy was travelling. As a result of the accident a passenger in the Ford Galaxy was killed. In that case I held that the accident had been caused partly by the fault of the driver of the coal lorry in carrying out in the hours of darkness an inherently dangerous manoeuvre on a major road and partly by the fault of the driver of the Ford Galaxy in failing to keep a proper lookout. I held that the driver of the coal lorry was entitled to a 40% contribution to the damages which he had paid. I stated that the driver of the coal lorry had to bear the major responsibility for the accident as he had created the danger which gave rise to the circumstances leading up to it but that, on the other hand, no accident would have occurred had the driver of the Ford Galaxy been keeping a proper lookout and slowed down or stopped before reaching the coal lorry. While it is correct to state, as counsel for the defenders did, that in that case the driver of the coal lorry had admitted liability, the apportionment of fault between him and the driver of the Ford Galaxy was my decision after hearing evidence.

[15] Unsurprisingly, counsel for the pursuer relied heavily on my decision in *Cronie* v *Messenger* when it was drawn to his attention. On the other hand, equally unsurprisingly, counsel for the defenders vehemently and insistently urged me either to distinguish or not follow my decision in *Cronie* v *Messenger*. He submitted that in the present case the vehicle was readily visible and did not constitute a danger because of the lights which it was displaying. The manoeuvre being carried out would have been obvious to anyone who was paying a blind bit of notice. Any obstruction on the road created a danger: that was the point. There was nothing in itself wrong about a lorry reversing, which was a normal part of daily existence. Pretty good advance warning had been given by the lights which were being displayed on the vehicle. The reversing of the vehicle in this case was not negligent because it was something that was there for all the world to see. The alternative was simply to stop traffic moving. There was, for example, always a risk when a vehicle turned right over the other lane. The pursuer here had been utterly reckless in riding into the trailer. In *Smith* v *McGuinness* (21 January 2004, unreported) the defender's coal lorry blocked the lane on its own side of the road when about to make a right turn, causing to build up behind it a queue of traffic, into which the pursuer drove. It was held that the accident was not caused by any fault on the part of the lorry driver. *Dymond* v *Pearce* [1972] 1 QB 496, in which a motor cyclist who rode into a lorry parked on the road overnight for the driver's convenience was held solely to blame for the accident, was powerful support for the proposition that in this case the sole cause of the accident was the pursuer's negligence.

[16] A myriad of activities upon which human beings generally engaged involved inherent danger: it was an inherent aspect of life in a civilised, developed and economically active society that people would become exposed to dangers of almost infinitely variable types. The description of something as inherently dangerous (other than cases involving the carrying out of dangerous operations on land or the use of products such as poisons and explosives) was apt to distract from the test to be applied for negligence at common law, as set out in the speech of Lord Macmillan in *Muir* v *Glasgow Corporation* 1943 SC (HL) 3 at p10. Where, as in the present case, the claim proceeded upon the basis of omissions to take precautions desiderated in the pleadings, regard should also be had to the guidance provided by Lord President Dunedin in *Morton* v *William Dixon Ltd* 1909 SC 807 at p809. The pursuer in the present action desiderated a number of precautions, but, inasmuch as he made no attempt to deduce evidence about what was commonly done by

others, it necessarily had to follow that he proceeded upon the basis that failure to adopt such precautions constituted manifest folly.

[17] In considering the movement of road haulage vehicles it was necessary to take into account that such vehicles were very frequently either stationary or creating some form of obstruction by manoeuvring at such speeds either forwards or in reverse whereby, in contrast to the speed of other vehicles in the vicinity, they constituted some form of obstruction. As a matter of common sense it mattered not whether an articulated vehicle such as the one in the present case was on its own side of the road or not: even if reversing on its own side of the road it necessarily obstructed the carriageway. If the reversing of such vehicles in the hours of darkness was inherently dangerous notwithstanding the multiplicity of lighting systems illuminating the full length of the tractor unit and of the trailer the impact upon the road haulage industry in Scotland would be significant. The present familiar sight in Scotland of reversing vehicles according to the ordinary needs of commerce in both daylight and darkness would require to be addressed by the eradication of vehicle movements altogether, the introduction of some other precautions not yet desiderated or the adoption of the precautions suggested by the pursuer, which could not on the evidence be said to be reasonable. There was unchallenged evidence about the frequency of the manoeuvre being carried out in the present case: had it been inherently dangerous then an accident would previously have taken place. It was significant that the accident happened in darkness when it might reasonably be anticipated that road traffic volume would be less than at any other time. The place where the manoeuvre was being carried out was visible from very significant distances in both directions. The road ran through an area in which farming activities were an obvious aspect of daily life. Road users travelling in the opposite direction from that in which the pursuer was travelling had brought their vehicles to a stop in time without any apparent difficulty. On the evidence it was plain that the pursuer had proceeded at speed and without varying his speed to a point immediately in face of the trailer. Had either the pursuer or his uncle been aware of the hazard warning lights and working lights they would have slowed their motorcycles in anticipation of bringing them to a halt should circumstances so demand. Mr Pasco appreciated that the vehicle was stationary opposite the farm entrance and that pedestrians might be in the vicinity. He should therefore have been able, if required, to bring his motor cycle to a stop in time. The failure of the pursuer and Mr Pasco to keep any sort of even cursory lookout ahead of them was the sole cause of the accident (*Wills* v *T F Martin (Roof Contractors) Ltd* [1972] RTR 368; *McLeod* v *Cartwright* 1981 SLT (Notes) 54). Even if the defenders were partly to blame any fault on their part would not be of causal potency.

[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:

> "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."

His Lordship added at p 459:

> "... 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.

Cost of prosthetics

[19] The pursuer underwent a left transtibial amputation following the accident. He is at present provided with an NHS prosthesis. He said that he could not run or kneel down, ride his mountain bike or climb ladders because of sores on his stump. Very simple tasks which people took for granted were difficult for him, especially on an uneven surface. He went up and down stairs only if he had to as the stump on his left leg was quite weak, and he always used the bannister. He had had three or four different prosthetic feet and nine or ten sockets since the accident. At one point he had had a silicon ankle part until it broke after having worked well: it had some movement in it and was slightly better over uneven surfaces. He hoped to become a motor cycle mechanic and go on to become an MOT tester. He had been successful in his

application for a mechanic's course at Dumfries College. He had twice met Mr Baxter, who had told him that a BiOM foot had recently become available on the market. It made walking, running, tackling stairs and dealing with slopes a lot easier.

[20] On the issue of the cost of prosthetics I heard evidence from two expert witnesses, namely, Mr Moose Baxter, a consultant prosthetist from Dorset Orthopaedic Co Ltd in Ringwood, Hampshire who was a witness for the pursuer, and Mr John Herdman, a prosthetist from London who was a witness for the defenders. The former's reports are 6/23 and 6/35 of process and the latter's report is 7/11 of process. Mr Baxter spoke to his reports and Mr Herdman spoke to his report in evidence. Each is well qualified, but Mr Baxter, being now 30 years old and having qualified in 2007, has less experience than Mr Herdman, who is now 59 years old and has been working in the field since August 1997.

[21] Mr Baxter initially recommended in his report 6/23 of process dated 25 September 2013 the prescription of four prosthetic limbs, two general day-to-day limbs, a high activity limb and a water activity limb at an estimated cost for supply and maintenance over a five year period of £61,250. It was Mr Baxter's opinion that the pursuer should have the funds to obtain his life-long prosthetic service from the independent sector in order to enable him to obtain prostheses as and when he required and not when NHS budget restraints permitted and to avail himself of a wider range of componentry than that which is available under the NHS. He recommended that sound clinical evidence would be required showing the benefits achieved following the fit and supply of the recommended prostheses approximately 6 to 12 months after delivery of them in order to substantiate that the recommendations were correct for the pursuer's long-term future. In his updated report 6/35 of process dated 15 April 2014 he recommended a trial of the BiOM prosthesis be carried out in order to establish the benefits which the pursuer could specifically receive from this type of foot/ankle. A BiOM foot/ankle was unique in its function in that it provided active, powered, plantar flexion mimicking the action of the absent calf muscles and Achilles tendon. It had been shown to improve significantly a user's mobility while reducing the metabolic cost. It had been available in Europe only since about October 2013 although he understood that over 1,000 units had been produced and fitted in the United States. It had great benefits for walking on flat surfaces and up slopes and improved the user's ability to descend slopes due to the remarkable 24 degrees of passive plantar flexion range available. It had a stair-climbing function which applied a greater amount of power to pushing off at the toes, thus helping to improve the user's ability to ascend stairs and, particularly, steep inclines. The estimated cost of supply and maintenance of the prosthetic limbs recommended in the updated report over a five year period was £149,564.

[22] Mr Herdman considered that the majority of the pursuer's concerns about his existing NHS prosthesis were caused by the poor quality of its socket fit and function. He had examined the pursuer and felt that he did not present any physical limitations to prosthetic rehabilitation. He believed that the pursuer was capable of returning to all his previous pastimes given the appropriate prosthetic hardware, starting with a comfortable socket that allowed him full control over the prosthesis. He expected such additional control to improve the pursuer's confidence on all surfaces and allow him to extend his range of activities, including better management of slopes and rough terrain. He believed that the provision of a comfortable socket, a carbon fibre foot and appropriate support would offer the pursuer the opportunity to extend his mobility beyond his

earlier experience and allow him to master all terrains. He would design the socket of the prosthesis to allow greater flexion and so negate the need for a rotation device to allow the pursuer to kneel more comfortably when working on his motor cycle. He did not recognise the need for a less active or more pedestrian day-to-day limb and preferred that the pursuer be given the opportunity to use the higher activity foots on day-to-day limbs and benefit from the increased mobility that he had already demonstrated. In general he did not recommend water activity limbs (WAL) as an aid to swimming as he believed that they added nothing to the swimming experience and in some cases could be an impediment. Casual amputee swimmers did not use them: they were buoyant and difficult to control in the water and the foot orientation, being set at about 90 degrees to the shin, did not aid propulsion. The WAL assisted the wearer to be upright in the shower but, since residual limb hygiene was of paramount importance, the prosthesis had to be removed at some stage to allow the residuum to be thoroughly cleaned. He felt that the provision of a suitably adapted bath or shower cubicle with a stool was far more appropriate to allow for whole body cleansing. He recommended that the pursuer be supplied with two general purpose prostheses of similar build and specification capable of supporting a moderate to high activity lifestyle at a total cost of £20,000 over five years.

[23] Mr Herdman did not favour the BiOM system (which was relatively new and of which he had no experience) suggested by Mr Baxter: he could see a place for it in the geriatric environment, but he did not see a place for it at all in the case of a younger person. The system was designed for low to moderate activity, the use of batteries (which lasted only between four and six hours) heightened the maintenance involved and the burden of the maintenance was greater than the benefit. He thought the cost of the system was reasonable, but that it would reduce in the future. He believed that there was a difference in philosophy between himself and Mr Baxter. His (Mr Herdman's) approach to prosthetic rehabilitation was to liberate the amputee with a more robust limb which went successfully with every environment and required the minimum of maintenance. There were quite a number of negatives in the BiOM system which he would not normally impose on a young man. He thought that the pursuer would be very well catered for by what he was recommending.

[24] I am not persuaded by the evidence of Mr Baxter and I accept the evidence of Mr Herdman. I am not satisfied that what Mr Baxter proposes for the pursuer is reasonably necessary. In response to question from me he accepted that what he was proposing was "a Rolls Royce" prosthetic arrangement. I accept the submission for the defenders that the implementation of Mr Herdman's recommendations would enable the pursuer to pursue an active and energetic lifestyle and prevent him adopting the life of a professional amputee. Damages for the cost of prosthetics must therefore be calculated in accordance with Mr Herdman's recommendations.

Decision

[25] I find 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 falls to be assessed at 40%. I also find that the cost of prosthetics is to be calculated on the basis of the evidence of Mr Herdman. The case will be put out by order on a date to be arranged so that decree can then be pronounced after the figure for damages has been calculated by the parties in accordance with their previous agreement and the terms of this opinion.

OUTER HOUSE, COURT OF SESSION

OPINION OF R F MACDONALD QC
(Sitting as a Temporary Judge)

In the cause

ELIZABETH SENGA CRONIE AND OTHERS

Pursuers;

against

NORMAN CRAIG MESSENGER

First Defender;

and

JAMES KELLY

Second Defender:

First Defender: R N Thomson; Simpson & Marwick
Second Defender: Di Rollo QC; HBM Sayers

This action, which was conjoined with the action at the instance of Thomas Best and others against the same two defenders, arises out of a road traffic accident. Tenders lodged on behalf of the first defender were accepted by all the pursuers at the outset of the proof and the actions thereafter proceeded to proof on the question whether the first defender should be entitled to recover from the second defender a contribution to the damages in terms of section 3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

In light of the evidence led I make the following findings in fact:

(1) On 11 January 2001 at or about 6.30pm a Ford Galaxy motor car registered number N318 PGE being driven in an easterly direction by the second defender collided with a scenic articulated motor lorry being driven by the first defender on the A75 road between Stranraer and Newton Stewart outside the entrance to Ferguson's coal yard, which was adjacent to the disused Barlae Filling Station. At the time of the collision it was dark and the weather was dry.

(2) The scene of the accident is depicted in the scale plan no 11/4 of process.

(3) The speed limit on the A75 was 60mph.

(4) Before the collision occurred the first defender, who was delivering coal from Hunterston to Ferguson's coal yard, approached the scene from the east, stopped his lorry on his own side of the road (the westbound carriageway) slightly before the entrance to the coal yard, crossed the road to the coal yard gates which he opened with keys left in a box nearby and then returned to his lorry, which he intended to reverse off the road onto the ground outside the coal yard gates and through the gates.

(5) In order to position his lorry to carry out the reversing manoeuvre, he drew forward in an S shape manoeuvre as depicted in the sketch no 39/2 of process drawn by him in the course of his evidence so that the cab of the lorry was straddling the white line in the middle of the road facing westwards and the tailgate of the trailer was approximately ten feet beyond the coal yard entrance at the roadside. His headlights were dipped and his hazard lights were flashing. Two white lights at the top of the cab, one of which is shown in the photograph 11/4/17 of process, were also illuminated at the front of the vehicle. Four amber side lights on the cab, one behind the back axle, two on the diesel tank and one below the driver's door were illuminated. Four amber side marker lights, one at the rear, one between axles 2 and 3, one in front of axle 3 and one at the front, were illuminated on the trailer. Before he began his reversing manoeuvre he checked the road in each direction and saw that the road was clear.

(6) As the first defender began his reversing manoeuvre the Ford Galaxy driven by the second defender came round the shallow bend about 240 metres west of the accident scene travelling at or about the speed limit of 60mph. The second defender saw the lights of a vehicle ahead, made a remark to one or more of his passengers about them and dipped his own headlights. He continued to drive at the same speed on the straight stretch of road about 180 metres long beyond the bend and leading up to the lorry. At a point about four metres before the cab of the lorry the second defender caused the Ford Galaxy to swerve onto the soft verge to his nearside in an attempt to avoid a collision but it continued in an eastward direction and collided with the third axle from the rear of the trailer of the lorry and one of the trailer's side marker lights. At the time of the collision the lorry was travelling at a speed of under 5mph. The relative positions of the vehicles at the time of the collision are shown in the scale plan no 48/2 of process prepared by the then Constable Stuart Wilson. As a result of the collision one of the passengers in the Ford Galaxy was killed and the other passengers were injured.

(7) The first defender was subsequently charged with causing death by dangerous driving contrary to section 1 of the Road Traffic Act 1988 in terms of the copy indictment no 11/2 of process. He went to trial on that indictment at Stranraer Sheriff Court and on 12 February 2002 he was convicted by unanimous verdict of the jury of a contravention of section 3 of the Road Traffic Act 1988. He was fined £1,000, had his licence endorsed with nine penalty points and was disqualified from driving for six months.

(8) The collision was caused partly by the fault of the first defender in carrying out in the hours of darkness an inherently dangerous manoeuvre on a major road and partly by the fault of the second defender in failing to keep a proper lookout. Had the second defender been keeping a proper lookout as he rounded the bend and thereafter on the straight stretch of road he would have seen the cab's headlights, top front lights, front hazard lights and at

least some of the trailer's side marker lights and appreciated that there was a vehicle at least partly on its wrong side of the road, the eastbound carriageway.

These findings are based upon the evidence which I found to be both credible and reliable, mainly that of the first defender, the police witnesses who attended at the scene of the accident, constables Douglas Bell and Stuart Wilson, Finlay Murdoch, the lorry driver who was behind the second defender on his approach to the scene and the first defender's employer, Sandy McCracken. I found the first defender to be a straightforward, honest and careful witness and I have no difficulty in accepting entirely his account of what happened from the time at which he arrived outside Ferguson's coal yard. I accept Mr Thomson's submission that the first defender's incorrect view that he did nothing wrong supports his credibility in that it gives him no reason to lie in order to justify himself or his actions. On the other hand, I had considerable doubts about the reliability of the second defender on important matters. He was at pains throughout his evidence to describe the lights of the other vehicle as on the other side of the road. He said that as he came round the bend he said "really to Michael", who is his son, "what's that on the other side of the road?". He explained this by saying he saw just headlights, which he thought were those of a slow moving tractor or something on the other side of the road. While I accept that he made some remark about the lights up ahead, I do not accept that it was in the words which he says it was, and, in particular I do not accept that he used the words "on the other side of the road" in his remark. I have therefore made no finding about the exact terms of the remark, but the inference which I draw from finding that he made some remark is that he noticed something unusual about the lights up ahead. Moreover, he was adamant in his evidence that there were no hazard lights flashing on the vehicle ahead, when plainly there were. I accept the evidence of the first defender that the lights were on at the time, which is what one would expect, and that of Mr Murdoch, the lorry driver who appeared on the scene immediately after the accident and the two police witnesses, all of whom spoke to the hazard lights of the lorry being on.

Mr Di Rollo for the second defender sought to rely heavily on the evidence of his expert witness Dr John Searle, the author of the report no 11/5 of process, dated 28 February 2003. In my judgement the evidence of Dr Searle was fundamentally undermined in cross-examination and as a result he was generally discredited as a witness. First, he presented the diagram 11/6/19 to show the movement of the lorry to get to its accident position. This diagram was, he said, based on what was said by the first defender in his evidence at the criminal trial according to a transcript of that evidence taken by someone present in court. I refer to section 12 of his report, which deals with the first defender's actions. The relevant portion of the transcript on which he bases his account and diagram of the first defender's actions, beginning with the point at which the first defender returned from the coal yard gate to his lorry reads:

> "I then returned to my lorry and considered that the safest means of driving in was to draw the vehicle across the carriageway, check round to make sure I was clear and then start reversing in. This is what I did with my hazard warning lights on."

I fail to see how any reasonable reading of those words could have led to what Dr Searle said about the first defender's actions in section 12 of his report and what is shown in the diagram,

involving as they do a manoeuvre which began with the lorry entirely on its own side of the road.

In cross-examination he said that if he was re-writing this part of the report he would not do it the same way, but he expressed no such reservation in the course of his evidence in chief. Secondly, he gave evidence-in-chief on the subject of the trailer's lights along the lines of para 8.4 of his report to the effect that this trailer was constructed according to old regulations. Under cross-examination he admitted that "this part of my report may be incorrect and this may be more of a newer trailer" and also "I was not altogether happy with this section of my report". If it was the case that he was not altogether happy with that section of his report then it is regrettable that he did not deign to advise the court of that in examination-in-chief. His evidence-in-chief on this point was therefore misleading, and, as Mr Thomson pointed out, no explanation or excuse for it was tendered by him. In my opinion Dr Searle's failure to qualify his evidence on these two important matters in evidence-in-chief even gives rise to doubts about his credibility. It is clear that he failed to exhibit the care and objectivity reasonably to be expected of an expert witness. I consider that the criticisms made of him by Mr Thomson are all well-founded. I do not accept his opinion evidence on all crucial matters relating to the accident as I feel unable to place any reliance on it.

I must now, in light of the findings which I have made, determine the contribution which the second defender must make to the damages paid by the fist defender to all the pursuers. Section 3(2) provides that this shall be "such contribution, if any, as the court may deem just". A body of evidence was led about whether or not it was possible for the lorry to have turned within the coal yard had it gone in head first. Mr Thomson submitted that I should find that it would not have been possible for the lorry to turn and that that reduced in some way the blameworthiness of the first defender. I do not agree. The blameworthiness of the first defender falls to be determined by what he did in carrying out an intrinsically dangerous manoeuvre, whatever the reason for his doing that may be. I therefore consider the evidence about whether the lorry could have turned in the coal yard to be irrelevant in the present context. Both the first and second defenders were at fault but the first defender must in my opinion bear the major share of the responsibility for the accident as he created the danger which gave rise to the circumstances leading up to it. On the other hand, no accident would have occurred had the second defender been keeping a proper lookout and slowed down or stopped before reaching the lorry. I was referred to the decision of the second Division in *Drew* v *Western* SMT 1947 SC 222 on the application of section 3(2), as well as English decisions on the equivalent English provision and also decisions on contributory negligence. Each case must depend on its own facts and I am of the opinion that in apportioning liability my function is essentially a jury one and I must take a broad approach. Adopting such an approach, I deem it just to find the first defender entitled to recover from the second defender a 40% contribution towards the damages. I shall therefore sustain the first defender's seventh plea-in-law to that extent.