SHERIFFDOM OF TAYSIDE CENTRAL AND FIFE AT PERTH

[2025] SC PER 66

PER-A126-24

JUDGMENT OF SHERIFF S G COLLINS KC

in the cause

BEAR SCOTLAND LIMITED
a company incorporated under the Companies Act and having a registered office at Bear House, Inveralmond Road, Inveralmond Industrial Estate, Perth PH1 3TW

Pursuer

against

SCOTT DAMMER

Defender

Pursuer: Clyde & Co. (Scotland) LLP, Solicitors
Defender: DWF LLP, Solicitors

Perth, 18 August 2025

The sheriff, having resumed consideration of the cause

Finds in fact

Introduction

1. On 12 December 2019 the defender was driving a motor vehicle on the M90 motorway, approaching a major road sign near junction five. A safety barrier extended from the location of this sign along the left side of the carriageway in the direction of oncoming traffic ("the barrier"). The road sign and barrier, as they then were, can be seen in photograph 1 of production 6/1/2 for the defender. The barrier was of relatively recent construction, in good or fair condition, and not in need of repair.

2. The barrier consisted, firstly, of a number of open, single sided, metal box beams supported on metal posts, extending to a total length of around 10 metres from the sign. Attached to the end of these box beams was a further length of barrier known as a P4 terminal, also supported on metal posts. At the end of the P4 terminal was a metal component with a rectangular yellow and black diagonal pattern, facing the oncoming traffic. The total length of the P4 terminal was around 5 metres.

3. The barrier was located and designed to prevent vehicles from striking the road sign, should they leave the carriageway at this point, and so reduce the risk of injury to their occupants. The P4 terminal component, in particular, was designed to collapse and concertina if struck by a vehicle, again with the intention of reducing the risk of injury. The metal posts supporting the barrier were driven into the ground, rather than set in concrete, with the intention of cushioning any impact.

4. As the defender's vehicle approached the sign, it left the carriageway and collided with the P4 terminal, causing damage both to it and to the box beam section of the barrier to which it was attached. This collision was caused by the defender's fault and negligence.

The contract

5. From around 2012 the pursuer contracted with the Scottish Ministers in relation to the repair and maintenance of the Scottish road network, and in particular the North East Scotland trunk road network which included the M90 ("the contract"). In terms of the contract the pursuer agreed to respond to incidents involving damage by third parties to certain Crown property on the road network, and to carry out repairs thereto. This property included the barrier struck by the defender's vehicle on 12 December 2019.

6. The contract was entered into following a competitive tender process. The tender submitted by the pursuer contained a schedule of charges for a total of around 44,000 separate items of work ("the schedule"). These included composite charges, representing materials, labour and plant costs for the particular items of work. The charges specified in the tender were based on and reflected competitive market rates for the items of work to which they related. The pursuer won the contract by a significant margin. Their tender having been accepted by the Scottish Ministers, the schedule of charges was then incorporated into the contract.

The works

7. The pursuer received notification of the defender's collision with the barrier from Police Scotland, shortly after it occurred. In terms of the contract an emergency response was required and accordingly two of the pursuer's employees immediately attended at the scene. They assessed the damage and made the site safe pending repair. They travelled by van and brought equipment, including traffic cones, necessary for this purpose. They compiled an Incident Response Report, now production 5/2/1 for the pursuer. As recorded in this report they were on site between around 1050 hours and 1320 hours on 12 December 2019.

8. The Incident Response Report was passed to the pursuer's operations team. It was recognised that the nature of the incident was 'category 1'. As such, in terms of the contract, the pursuer was obliged to carry out repairs within 28 days.

9. On 18 December 2019 two of the pursuer's employees attended at the scene. One was an engineer, known as an aspect inspector. He was trained in the relevant standards for designing and repairing barriers known as the National Highway Sector Scheme. He took

photographs, determined the nature and extent of the damage, and determined what needed to be done to repair it. He compiled a Reactive Operations Report, now production 5/2/2 for the pursuer. Under the heading 'defect repair summary' he noted the need for "barrier repair – renew P4 terminal".

10. In the light of the Reactive Operations Report, the pursuer's operation team sourced the necessary materials for the repair. Given that repairs such as those required in the present case were common, and that they required to be carried out within 28 days, the pursuer held stock of all the relevant materials. Accordingly they did not have to order them in from suppliers, and so do not have individual receipts for the particular materials used.

11. On both 9 and 10 January 2020, between around 1800 hours and 0200 hours, four of the pursuer's employees attended at the scene and carried out repair and replacement works in relation to the barrier and P4 terminal. These employees produced daily work records and a document headed "VRS Operations Record" in connection therewith, now lodged as a productions 5/2/2 and 5/2/4 for the pursuer.

12. Given the nature of the work it had to be done by the pursuer at night. It involved closure of a lane of the motorway and the pursuer was not permitted by the contract to do this during the day. As the pursuer's employees were required to work at night, they were entitled to be paid double time.

13. The pursuer's employees removed and disposed of the damaged P4 terminal. It could not be repaired. A like for like replacement was not available and accordingly a newer version of a P4 terminal had to be installed. This was three to four metres longer than the original, but no more expensive. Part of the open box beam section of the safety barrier had also been damaged by the defender's vehicle, and in particular some of the supporting

posts had been knocked out of the ground. This required to be repaired, and the posts relocated in new holes.

14. Additionally, however, the pursuer's employees extended the safety barrier by around 10 metres, by adding a new length of open box beam. They also inserted a new corrugated beam around 3 metres in length, joining the new box beam section to the new P4 section. In order to support this new part of the barrier, four new posts were required. The new extension can be seen in the red boxed area marked on the third photograph in production 6/1/2 for the defender, which shows the barrier in 2020, following completion of the repairs. It significantly enlarged and improved the barrier relative to its state prior to the defender damaging it.

The charges

15. The Incident Response Report, Reactive Operations Report, VRS Operations Record and worksheets were passed to the pursuer's commercial team, which was headed by Mark Godsell, their commercial director. Using these documents his team assessed the works which had been done. They referenced these works in the schedule of charges. As these charges dated from 2012, they were then increased in line with a price fluctuation index published by the Building Cost Information Service, operated by the Royal Institute of Chartered Surveyors. Mr Godsell then created a pro forma document entitled "Damage to Crown Property Valuation", now lodged as production 5/1/1 for the pursuer ("the valuation").

16. The valuation sets out the charges made to Scottish Ministers by the pursuer for the works carried out by them in connection with the barrier. It comprises the following items and costs:

Emergency Response	
Response team to make site safe	£385.16
Hire of cones/signs etc., 189 cones @ £0.99 each	£187.11
Administration charge/cost recovery	£325.00
Traffic management for repair	
Traffic management dual carriageway lane closure,	
2 days@ £981.83 per day	£1,963.66
Repair/maintenance of damage	
Take down existing safety barrier, single sided,	
24.80 metres @ £15.36 per metre	£380.93
Corrugated beam, single sided, 3.20 metres @ £28.77 per metre	£92.06
Open box beam, single sided, 9.60 metres @ £43.81 per metre	£420.58
Short driven post, 4 thereof @ £79.82 each	£319.21
P4 (single) Safety Terminal to any type of barrier,	
one thereof @ £5,212.76 each	£5,212.76
Design, approve and record remedial works to network	£52.78
Percentage addition for night time working @ 15% of £8,447.05	£1,267.06

Accordingly the total charge for repair of the barrier was assessed by the pursuer as being £10,611.38.

17. The charges in the valuation, with the exception of the administration charge of £325, accurately reflect the charges for the identified items as set out in the schedule to the contract, but adjusted in line with the price fluctuation index.

18. The 15% uplift for night-time working was also provided for in the contract, which permitted such an uplift to be applied not only to labour costs, but also to plant and materials used during night-time working. This was a compromise position reached between the pursuer and the Scottish Ministers when negotiating the contract. The true uplift for night-time labour costs was 100%, that is, double time, and the pursuer was liable to pay this uplift to its employees under their contacts of employment. In the valuation the 15% uplift was accordingly applied to all charges except those relating to emergency response and administration, which totalled £8,447.05.

Recovery

19. In 2012 the Scottish Ministers assigned to the pursuer their rights to recover losses arising from damage caused by third parties to relevant Crown property. This included loss arising from damage to the barrier caused by the fault and negligence of the defender: see production 5/1/4 for the pursuer.

20. In order to identify the defender as the person against whom their claim for damages should be addressed, the pursuer required to obtain a copy of the Police Scotland accident report relative to the said collision. The pursuer was required to pay the sum of £104.50 for this: see production 5/1/2 for the pursuer. It also required to instruct and pay Turnamms, an external agency, to trace the defender's insurers by accessing the motor insurers bureau register. These outlays were included in the administrative charge/cost recovery charge of £325 set out in the valuation. The remainder of this charge was calculated on the basis of an

estimated two hours work by the pursuer's administrative staff @ £30 per hour, and two hours work by a loss adjuster @ £70 per hour.

Finds in fact and law

1. The defender is liable to compensate the pursuer for the loss and damage caused to the barrier and P4 terminal located near junction five of the northbound carriageway of the M90 which, as a result of the defender's fault and negligence, was struck by his vehicle on 12 December 2019.

2. The measure of damages recoverable is assessed on the basis of the reasonable cost to the pursuer of repairing the barrier and replacing the P4 terminal, together with consequential losses including expenses necessarily incurred and not too remote, but discounting betterment, namely £8,179.18.

Therefore:

Grants decree against the defender for payment to the pursuer of the sum of £8,179.18, and reserves the questions of interest and expenses meantime.

NOTE

Introduction

[1] In this case there was no dispute that by his fault and negligence in driving on 12 December 2019 the defender's vehicle collided with the barrier seen in photograph 1 of production 6/1/2. There was no dispute that the pursuer, as a result of an assignation agreement with Scottish Ministers lodged as production 5/1/4, was entitled to claim reparation for the loss occasioned by the damage to the barrier that this collision caused.

There was also no dispute that the pursuer, pursuant to its contract with Scottish Ministers, had carried out repairs to the barrier which included replacement of the P4 terminal component of it. Accordingly I heard proof restricted to quantum alone. The central issue was whether there was evidence relevant and sufficient to prove the loss claimed by the pursuer, and if not, to what lesser extent.

The relevant law

[2] The relevant law in Scotland is well established. The barrier is corporeal property. The primary aim of reparation for damage to corporeal property is to achieve *restitutio in integrum*, that is, to restore the pursuer, insofar as an award of money can do so, to the position which they would have been had the damage not occurred. As regards the measure of damages, the courts in Scotland have warned against attempting to reduce this issue to a number of exclusive rules. It has been emphasised that all methods of arriving at chargeable sums are in principle open for consideration, albeit that some methods are commonly used in particular circumstances. Thus if the property is damaged and it is reasonable to repair it, the appropriate measure is usually the reasonable cost of the repair. If property is damaged but not repaired, the appropriate measure will typically be diminution, that is, the reduction in its market value. Where property is destroyed, the generally applicable measure is its market value at time of destruction, although it will sometimes be appropriate to award a sum equivalent to that required to replace it. In any event, the pursuer may also be entitled to recover losses which are consequential on damage or destruction of the property, such as expenses necessarily incurred, if not too remote. But these principles are applied flexibly, having regard to the nature of the property, the extent

of the damage, and the reasonableness of any remedial action taken: see Stair Memorial Encyclopaedia, Vol. 15, *Obligations*, paragraph 915, and cases cited there.

[3] Because reparation is compensatory, however, a pursuer should not recover damages for betterment. In other words an award of damages should not put the pursuer into a better position than they would have been in had the wrong not occurred. Accordingly if repairing or replacing damaged property results in improving it, such as to leave the pursuer with an asset which is substantially and quantifiably newer, upgraded or more valuable, then a deduction may be made in an award of damages to reflect the benefit received. Cases in which a claimant is permitted to recover damages based upon the cost of acquiring a new replacement for its old, damaged property, without giving credit by way of "a new for old deduction", ought to be exceptional. But if the evidence shows that the pursuer had no choice but to carry out the repair or replacement, then new for old betterment is likely to be seen as incidental to this, and so not deducted from an award of damages: see for example *Barrowfen Properties Limited* v *Girish Dahyabhai Patel, Stevens & Bolton LLP, Barrowfen Properties II Limited* [2025] EWCA Civ. 39, paragraphs 106 to 120, and cases cited there.

[4] Both parties referred to the decision of the Court of Appeal of England and Wales in *Coles* v *Hetherton* [2015] 1 WLR 160, and to a string of county court decisions where insurers have in recent years put the road repair authorities south of the border to proof of loss in claims arising from damage to highway furniture by negligent drivers in similar situations to the present: *Highways England Company Limited* v *Peter Hughes*, 13 April 2018, Derby County Court ("*Hughes*"); *Highways England Company Limited* v *Tesco Underwriting Ltd.*, *Highways England Company Limited* v *Jonathan Martyn Booth*, 21 August 2020, Cardiff County Court ("*Booth*"); *National Highways Ltd. (formerly Highways England Company Limited)* v *Katie*

Hubble & others, 13 January 2023, Manchester County Court ("*Hubble*"); *National Highways Limited* v *Aviva Insurance Limited*, 18 October 2022, Harrogate County Court ("*Aviva No. 1*"); *National Highways Limited* v *Aviva Insurance Limited*, 25 April 2023, Birmingham County Court ("*Aviva No. 2*"). I was told that the present case was the first time that a similar challenge had been made in Scotland.

[5] From these cases it appears that damage to highway furniture in England and Wales (such as the barrier in this case) constitutes damage to a chattel (which for present purposes can be taken as equating to corporeal property in Scots law), and that the appropriate award is one of general damages for diminution in value: *Coles*, paragraph 27. In practical terms this can be calculated by determining the reasonable – but not the actual - cost to the pursuer of repairing the barrier so as to restore it to the condition which it was in before the collision occurred: *Coles*, paragraph 27; *Booth*, paragraph 62. The reasonable cost of repair is however only an evidential tool - albeit an important one - for assessing diminution in value: *Coles* paragraph 28, *Booth* paragraph 71. A detailed examination of the sums sought by the claimant is not always required, and the courts (seemingly concerned by the sheer number and factual complexity of these claims) are entitled to refuse to carry out such an exercise unless the sum claimed appears to be clearly excessive: *Coles*, paragraph 27; *Booth*, paragraph 90; *Hubble*, paragraphs 221 – 227. If the sum claimed does appear to be clearly excessive, the Court will be justified in investigating whether the sum exceeds the cost that the claimant would have incurred in having the repairs carried out by a reputable repairer on the open market: *Coles*, paragraph 27; *Booth*, paragraph 73. That does not mean that there is only one possible figure for diminution in value, and there may be a range of reasonable repair costs: *Hughes*, paragraph 33. If the court does investigate, and the total repair cost exceeds the notional cost of repair on the open market, then the sum claimed will

be reduced to the notional figure. The question is not whether each item charged is reasonable, but whether the overall charge is reasonable: *Coles*, paragraph 44.

The evidence

[6] The evidence led for the pursuer consisted of a single witness, Mr Mark Godsell, who adopted his affidavits of 15 January and 13 February 2025, and was cross examined. Mr Godsell is the pursuer's commercial director, and is responsible in particular for quantity surveying, commercial systems, insurance and procurement. He explained that in around 2012 the pursuer had won a competitive tendering process as a result of which it was appointed by Scottish Ministers as the trunk road repairs contractor for the North East of Scotland, including the M90. The tender was based on a schedule of charges for some 44,000 items of work, which was later incorporated into the contract.

[7] Mr Godsell said that incidents involving damage to motorway safety barriers were very common. There was an established process for repairing them, which was followed in the present case. The pursuer received notice of the incident from the police, and immediately sent an emergency response team to assess the damage and make the site safe. This team produced an Incident Response Report which was passed to the pursuer's operations team. Given the nature of the damage ("category 1"), the pursuer was contractually obliged to carry out repairs within 28 days. Accordingly an engineer attended the site and produced a Design of Reactive Operations report, detailing the necessary repairs. The relevant materials were sourced and employees from the operations team then attended at the site and carried out the repair. This team would generate a VRS Operations Record and daily work records.

[8] Mr Godsell accepted that he had not visited the site, and did not himself see the damage, nor the repairs carried out. Rather, following the repair the various reports just mentioned were submitted to his team. Under his supervision they assessed from this documentation the nature and extent of the works carried out and referenced them in the schedule of charges. They then created the valuation, itemising the total charge for the repair. The pursuer took steps to identify the defender and his insurers. A claim for the sum set out in the valuation was then submitted.

[9] Mr Godsell had no direct knowledge of the state of repair of the barrier before it was struck by the defender's vehicle. But he said that under the contract the pursuer was required to proactively inspect all installations and grade their state of repair as poor, fair or good. Had the barrier been listed as being in poor condition this would have been recorded and the pursuer would have been bound to repair it regardless of the damage caused by the defender. But it was not. It was of a relatively new construction. Mr Godsell explained that if a barrier in poor condition was damaged, the opportunity might be taken to bring it up to contemporary standard. If so, this would be reported by the pursuer as betterment. The Scottish Ministers would make a payment to the pursuer for this, and the person responsible for the damage would only be charged for the cost of repair, not improvement. This was a common situation.

[10] Mr Godsell was asked why there were no supply invoices produced for the materials which had been used for the repair. He said that because the pursuer only had 28 days to carry out the repair, and because it was a common type of repair, they had to hold the necessary items in stock. So there were no individual invoices for the materials in this case. But had the materials been purchased for the particular repair their cost would have been similar or the same. Mr Godsell was asked why no documentation had been produced in

relation to subcontractors. He said that this was because subcontractors were not used for the repair. All the persons doing the work were the pursuer's employees, paid by them, and the labour charges in the valuation reflected the time and agreed hourly rates for the work they did.

[11] Mr Godsell was asked about the charge for night-time working, why it was 15%, and why this percentage was applied to plant and materials as well as labour. Mr Godsell explained that the pursuer had to carry out the work at night, as it was not permitted by the contract to restrict a lane on the M90 during the day. He said that the 15% night-time working rate had been contractually agreed as part of the competitive tender process. Its application to plant and materials was part of a compromise reached when the contract was negotiated. He pointed out that if the uplift were applied to labour only, it should have been 100%, not 15%, as operatives were paid double time for night-time working.

[12] It was put to Mr Godsell that key documents had not been produced to the court, in particular the contract itself, the price fluctuation index, the schedule of charges and the Civil Engineering Contractors Association ("CECA") work rates. He did not know why these documents had not been produced, but confirmed that the charges set out in the valuation accurately reflected the rates in the contract and schedule of charges, plus an adjustment for inflation accurately reflecting the publicly available price fluctuation index. Mr Godsell said that the CECA rates included charges for plant, cones and use of particular vehicles. These too were publicly available. He confirmed that the charges made in the valuation reflected the correct CECA rates, including for the vehicles actually used in the present repair as listed on the documentation created by those on site.

[13] It was put to Mr Godsell that because the contract gave the pursuer exclusive rights to carry out repairs on the Scottish roads, the charges in the contract and schedule, and

which were applied in the present case, did not represent the open market rate for the repairs. He replied that they did, and explained that they were all agreed following a competitive tender process - which the pursuer had won by a significant margin – and so had been market tested in that context.

[14] Mr Godsell was questioned about certain of the individual charges set out in the valuation. As regards the £385.16 charge for emergency response, he explained that this involved immediate attendance, with two safety operatives, and a van. It was a composite, contractual rate based on operatives, van and fuel. The operatives were required to make the site safe, in particular by removing any debris, and highlighting the area with cones. This was a core area of work, and the pursuer was contractually obliged to attend as many incidents as occurred. The charge was based on the total sum allocated by Scottish Ministers for emergency response, divided by the estimated annual number of incidents.

[15] As regards the £325 administration charge/cost recovery, Mr Godsell accepted that this was not a figure derived from the schedule of charges. He said that it was an estimate of the costs to the pursuer of administering the repair process. It was calculated on the basis of 2 hours work by an insurance clerk @ c.£30 per hour, and 2 hours work by a quantity surveyor @ c£70 per hour, both employed by the pursuer. It also included an outlay of £104.50 to Police Scotland, this being the cost of a police report, which was necessary to identify the defender as the person responsible for the damage. It also included an outlay by way of a payment to Turnamms, an external agency with access to the Motor Insurers Bureau database, which was necessary in order to identify the defender's insurance company.

[16] As regards the £1963.66 charge for two days of traffic management, it was put to Mr Godsell that this was excessive. Under reference to production 6/1/3 it was put to him

that a P4 terminal could be installed in two hours, rather than two days. Mr Godsell did not accept this. He said that production 6/1/3 was a sales pitch document, and inaccurate. A P4 terminal would take around eight hours to install. Two days were charged in the present case because in addition to the P4 installation it was also necessary to remove the old P4 and make safe the foundations. In the present case there was also damage to the barrier caused by the collision, which meant that it had too had to be repaired and replaced.

[17] By reference to the photographs in production 6/1/2, taken before and after the incident, it was put to Mr Godsell that the barrier had been extended significantly during the works and that this represented betterment. He offered possible explanations, but ultimately he was unable to explain why the new length of barrier and posts (highlighted in the red box in photograph three of production 6/1/2) had been installed. He accepted that it would be necessary to ask the operatives who did the work. He also accepted that the charges in the valuation for corrugated beam (£92.06), open box beam (£420.58) and short driven posts (£319.21) were attributable to this new extended piece of barrier, a total of £831.85. When adjusted to reflect the 15% uplift for night-time working which had been added to it, Mr Godsell calculated that this total became £956.63.

[18] As regard the new P4 terminal and its connector, Mr Godsell explained that it was longer, as could be seen in the photographs, but that this was because the preexisting, shorter, design was no longer available. But it was still a P4 terminal, was not charged by the metre, and so the cost was approximately the same as for the old design, even though more steel was involved. So there was no betterment in relation to the P4 terminal itself.

[19] Mr Godsell said that the charge for a P4 terminal had been relatively static over the previous six or seven years. He had broken down the total charge of £5212.76 in the valuation in a separate document, now lodged as production 5/3/3. This showed that the

total cost included around £2,000 for the P4 terminal (around £1,800 for the part itself plus around £200 for delivery), £1,500 to £2,000 for labour, plus additional costs for concrete, a connector piece, disposal, and small items of plant such as hammers, disc cutters etc. Mr Godsell said that the figures in production 5/3/3 reflected adjustment of the figures in the schedule in line with the price fluctuation index.

[20] It was put to Mr Godsell that some of the costs listed in production 5/3/3 duplicated other charges made in the valuation. He did not accept this. In particular he said that the 18 tonne tipper truck listed in production 5/3/3 could not be used as a traffic management vehicle. None of the four members of the barrier gang should be involved in traffic management either. Although 10 hours work is listed for the barrier gang, this is the whole shift, which included two hours of travel to and from the depot. It therefore tied up with the eight hour shifts recorded elsewhere. The costs of disposal were low, because since 2012 tipping commercial waste attracts landfill tax, which was therefore not in the schedule of charges.

[21] The defender also led evidence from a single witness, Mr Guy Johnson, who adopted his witness statement of 10 January 2025, lodged as production 6/1/5, and was cross examined. Mr Johnson is the Director of Highways Adjusting Ltd, a loss adjusting practice specialising solely in highway claims. He has a degree in Building Surveying and is a professional member of the Royal Institute of Chartered Surveyors. He said that he has reviewed in excess of 5,000 highway and street furniture claims in the last 5 years. He reviewed the papers in the present case prior to preparing his statement, but did not attend at the site.

[22] Mr Johnson said that the costs charged in this case were outside the range which he would expect. He said that he would expect the cost of claim of this sort to be in the region

of £6,000 to £7,000, all in. However he said that only three companies would carry out this kind of work in Scotland – that is, replacing a P4 terminal - the other two being Amey and Autolink (who have responsibilities in relation to the A74 only). And he did not demur from the proposition that these companies too would be contracted to Scottish Ministers via a competitive tendering process based on composite rates and therefore that their rates were likely to be comparable to those charged by the pursuer. He declined to suggest that all these companies' rates were inflated.

[23] Mr Johnson criticised the lack of documentary evidence produced in support of the claim, which had the result that the valuation was simply "numbers on a piece of paper". He objected to composite rate charges – that is, charges for plant, labour and materials – without breaking down the costs of each. He also objected to what he said amounted to duplication, for example, double charging for labour. Indeed he objected to the whole contract based charging approach, which he said was not a suitable mechanism to assess the reasonable cost of repair.

[24] However with one caveat Mr Johnson did not take issue with Mr Godsell's breakdown of the costs of installation of the P4 terminal lodged as production 5/3/3 and the breakdown in it – which had been produced after Mr Johnson had compiled his witness statement. He was generally content that the items included and the charges made for them in production 5/3/3/ were reasonable. His principal caveat was as regards the cost of traffic management. He said that the barrier crew could also do traffic management, and the 18 ton tipper truck could have been used for this purpose too. Therefore traffic management should not be included both as part of the cost of replacement of the P4 terminal as set out in production 5/3/3, and also charged separately at £1,963.66 in the valuation.

[25] With reference to the two hour time for installation of a P4 terminal suggested in production 6/1/3, Mr Johnson accepted – notwithstanding the terms of his witness statement to the contrary - that this period of time was just for the pure nuts and bolts. He accepted that longer would be required for the whole job – a minimum of six hours. Mr Johnson took no issue with the material cost of a P4 terminal being around £1800 to 2000 – indeed he produced a document, lodged as production 6/1/4, where examples were given at around this same price. He agreed that the cost of a P4 terminal had been generally stable, except for the period of the Covid pandemic and following the war in Ukraine, and that the cost quoted by Mr Godsell was reasonable.

Pursuer's submissions

[26] The pursuer lodged written submissions which were adopted and supplemented by oral argument. In summary it was submitted that it was of importance that the pursuer was acting not only to repair damage caused by the defender, but under a contractual obligation to do so in the context of a main motorway. It was submitted that if the defender was successful in trimming components of the pursuer's costs, this would set a worrying precedent for the pursuer and other organisations contracted by Scottish Government to carry out repairs to the roads.

[27] The reparation sought by the pursuer was not too remote and had been adequately mitigated: cf. *Armstead* v *Royal & Sun Alliance Insurance Company Limited* 2024 UKSC 6. But for the collision, repairs to the barrier would not have been necessary. The pursuer had led evidence from Mr Godsell as to the repairs conducted and the process of assuring that they were required and proportionate. The defenders had failed to counter this assessment with

evidence as to a reasonable alternative method of repairing the barrier. Therefore the pursuer was entitled to recover the full cost of the repairs required.

[28] It was apparent that the barrier and P4 terminal had been destroyed and required to be replaced rather than repaired. The measure of damages recoverable was the monetary amount of the diminution in value caused by the defendant's negligence, calculated by the reasonable cost of repairs so as to put the damaged article back into the state it was before it was damaged: cf. *Coles*. Alternatively it was the notional reasonable cost of repairing the highway, being the cost of restoring it to its pre-accident level of functioning: cf. *Hubble*.

[29] The costs were reasonable. The rates used were based on a competitive tender and the subsequent contract. The price of the materials, and in particular the P4 terminal, had been vouched. Mr Godsell had confirmed that the labour rates were calculated using the independent CECA schedule. Mr Godsell should be accepted as a credible and reliable witness and his evidence should be preferred to that of Mr Johnson. Decree should be granted as craved.

Defender's submissions

[30] The defender also lodged and adopted written submissions and supplemented them with oral argument. In summary it was submitted that the pursuer had a fundamental lack of evidence to prove the claim.

[31] Mr Godsell had been the pursuer's only witness, but he had not visited the site and had had no direct involvement with the management of the repairs. He was merely speaking to documents provided by others. He also repeatedly referred to documents which had not been produced, including the contract between the pursuer and Scottish Ministers, the price fluctuation index, and the CECA work rates. Without these, neither the

court nor the defender could assess the reasonableness of the cost of repair. The whole claim was calculated under composite rates, regardless of whether the actual repairs had taken less time than detailed in the valuation. Mr Godsell's breakdown of costs for the P4 terminal in production 5/3/3 stemmed from 2012 rates, and the repair costs claimed could not be said to be reasonable or even the actual cost of the repairs. He had also made an admitted error in his initial affidavit by providing a higher costing for a double P4 terminal rather than the single terminal which was in fact used in the repair. Additionally, Mr Godsell had conceded that the repaired barrier over-extended beyond the pre-incident barrier and that £956 of the claimant repair costs would likely have related to the over-extension.

[32] It was submitted that Mr Godsell's evidence therefore contained inaccuracies and a lack of clarity. Mr Johnson's evidence should be preferred due to his role as an experienced highways loss adjuster: cf. *Brit Inns Limited & Ors* v *BDW Trading Limited* [2012] EWHC 2143 at paragraph 56. As Mr Johnson had said, without substantiating evidence being produced the pursuer's claim was, as simply "numbers on a piece of paper".

[33] As to the law, the appropriate award for damage to corporeal movable property was for diminution in value, and the most practical way of assessing this was the reasonable (rather than the actual) cost of repair: *Aviva (No. 2)*, *paragraph 27; Booth*, paragraphs 62, 72. It was accepted that a detailed examination of the sum sought by the pursuer was not always required by the court, but the court would be justified in carrying out a detailed investigation if the sums sought appeared to be clearly in excess of the cost that the pursuer would have incurred in having the repairs carried out by a reputable repairer: *Hubble*, paragraphs 222 – 224.

[34] But in most cases the reasonable cost of repair should be assessed on the basis of what the repairs would cost on the open market, and to use the rates actually charged as

evidence of the reasonable costs of repair would be to use the contractual rate is evidence of same. That approach had been rejected in *Hughes*, *Aviva*, and *Hubble*. To allow the pursuer to rely on the costs charged by it would be to permit them to set their own market rate, which would be undesirable.

[35] If the pursuer wished to contend that the sums were not clearly excessive when compared to the reasonable cost to prepare it was incumbent upon them to provide the court with the necessary evidential tools to carry out that exercise. In the present case the sum sought were clearly excessive, as Mr Johnson said. The pursuer's case fell apart at this point, as it had failed to provide the necessary evidence to enable the court to carry out a comparison between the sum sought and the reasonable cost of repair.

[36] Accordingly, it was submitted, the pursuer had failed to prove its case. As such, the court should not award any level of damages at all, but should dismiss the case - or in any event, should only award such damages for repairs which had been evidenced as reasonable.

Analysis and decision

[37] I do not accept the defender's criticisms of Mr Godsell's evidence. I found it to be detailed and clear, and demonstrated his long experience in adjusting claims of this type and familiarity with the many technical issues involved. I accepted him as a credible and reliable witness, and this is reflected in my findings in fact based on his evidence. It is true that the contract and schedule, the price fluctuation index, and the CECA rates, were not lodged, but it was not submitted that Mr Godsell's evidence was inadmissible in the absence of them. He was familiar with these documents and was able to give clear evidence about those parts of them relevant to the items of work set out in the valuation. Mr Johnson did

not suggest that the charges themselves were out of line with those of other contractors for comparable work, nor that they were, in their own terms, excessive. If the defender had wanted to challenge Mr Godsell's evidence by reference to the documents mentioned, it could have readily obtained and lodged those which are publicly available, and recovered the relevant parts of the contract and schedule by specification, but did not do this. In the circumstances I was prepared to accept Mr Godsell's evidence as credible and reliable even in the absence of the documentation just mentioned.

[38] Mr Godsell was also criticised in that in his affidavit of 15 January 2025 he had provided comparative costings for the P4 terminal which related to a double terminal, not a single terminal such as was used in the present case. But again, this did not cause me to doubt Mr Godsell's credibility or reliability more generally. Mr Godsell had recognised his error in relation to the double P4 terminal prior to giving evidence, and had corrected it in his supplementary affidavit of 13 February 2025. Accordingly he showed himself willing to recognise his error and make appropriate concessions and revisions, which if anything was to his credit. But in any event the costings which he then provided for purchase and installation of a single P4 terminal in the document lodged as production 5/3/3 were – in large part – not challenged by Mr Johnson.

[39] Mr Godsell's willingness to make appropriate concessions also included his evidence in relation to the extension of the barrier during the repairs. This extension, which is evident from the photographs of the barrier before and after the collision, included a new section of barrier of around 10 metres. Mr Godsell suggested that this might be because it had been necessary to create new holes for the posts, given the extent of the damage and the nature of the terrain. This showed knowledge of the technical issues, but ultimately he accepted that he did not know why the extension had been installed, and that it would be necessary to ask

those who actually carried out the work. As the pursuer did not intend to lead such evidence, Mr Godsell readily recognised that the court might not be willing to award damages for this element of the work, and provided a calculation of those charges in the valuation which he identified as attributable to the extension.

[40] As to Mr Johnson, I was in general terms prepared to accept him as a credible and reliable witness. He clearly has a great deal of experience in considering claims of this sort, and has featured as a witness for the insurers in at least one of the county court cases referred to above (*Aviva No. 2*). However where their evidence differed, I preferred that of Mr Godsell, due to what appeared to me to be a stronger grasp of some of the details and greater clarity in explanation. Mr Johnson's evidence was also inconsistent in some respects, for example, in saying at paragraph 20 of his statement that a P4 terminal could be installed in two hours – and producing the document lodged as production 6/1/3 in support of this – only to row back considerably on this in the course of his oral evidence. But having said that, there was ultimately not much dispute between Mr Godsell and Mr Johnson. While he was in principle critical of the absence of certain background documentation, and the use of composite, contract charges in assessing the reasonable cost of repair, Mr Johnson's position was that the total repair and replacement cost should have been in the region of £6,000 to £7,000. Almost all the difference between the higher of these two figures and the total in the valuation can be accounted for by the traffic management cost of £1963.66 – which Mr Johnson said involved duplication of an item in Mr Godsell's detailed breakdown of the cost of supplying and installing the P4 terminal - and that part of the cost attributable to the extension of the barrier. Given this, the dispute between the parties appeared a relatively narrow one.

[41] The defender's main point of contention was – in effect – that it was not open to the court to determine the reasonable cost of repair based solely on evidence of the charges in the contract between the pursuer and Scottish Ministers, and in the absence of evidence of what the actual repairs would have cost on the open market. Therefore even standing Mr Johnson's evidence as to the reasonable overall cost of repair, it was submitted that no award should be made at all, and the case should be dismissed – as in *Aviva (No. 2)*. I do not accept that. It is true that in *Hughes* at paragraph 91 it was said that to rely on evidence of comparable contractual charges made might be regarded as allowing the claimants to set their own market rates, which would be undesirable. And in *Hubble* and *Aviva (No. 2)* the court was not willing to accept the available evidence of contractual charges as establishing loss in the particular cases. But at paragraph 260, Q5, sub-paragraphs 5.1 and 5.2 of *Hubble* the court also said that in principle a claimant's contracts could be relevant to assessment of whether the sum claimed was clearly excessive and if so assessment of the reasonable cost of repair. And in any event, as noted, the Scottish approach to quantification of damages is a broad and flexible one, intended to achieve insofar as reasonably possible, *restitutio in integrum*. The reasonable cost of repair is typically assessed by reference to open market rates, but need not always be – particular where, as here, there is either no open market at all, or only a very restricted one.

[42] Accordingly it goes too far to say that evidence of the charges agreed by the pursuer with Scottish Government are irrelevant to assessment of the reasonable cost of repair. While accepting that the pursuers cannot be allowed to 'set their own market rates', the evidence is that they did not do this. Rather – as Mr Godsell said and which I accept – the charges set out in the schedule and which are reflected in the valuation were charges that resulted from a competitive tender process in 2012 in which the pursuer was successful. It

can be inferred from this that the charges agreed by Scottish Ministers were not excessive relative to the pursuer's competitors for the contract, and that to this extent, these charges have been market tested. Mr Johnson, as noted, accepted that they were likely to be comparable to the charges of other companies doing similar works in Scotland and England, and he declined to say that any of the particular charges were in principle excessive. This does not mean that the court should always accept, or accept uncritically, the contractual charges agreed with the pursuer as representing the reasonable cost of repair, merely that these charges are relevant to, and so can give an evidential basis for, assessing what it was.

[43] However a particular difficulty for a pursuer seeking to rely solely or largely on evidence of contractual charges is that in some aspects of the claim it may be clear that they cannot assist at all. That difficulty arises in the present case. It is clear from the photographs, and not disputed by Mr Godsell, that the barrier was significantly extended in the course of the repair. On the face of it this extension appears to be an improvement to, or betterment of, the barrier, and not merely a repair. The pursuer included the contractual charges for the materials for this extension in the valuation. But even accepting that the charges reasonably represented the cost of the extension, they cannot assist in explaining why the barrier was extended in the first place, and whether it was reasonable to do so in the context of the damage caused by the defender. If the claim relative to the extension was to be supported, therefore, evidence would be required from one or more of those who actually did the work, as Mr Godsell accepted. But the pursuer, for reasons unknown to me, chose not to lead any such witness, and accordingly there is no evidence which would enable the court to conclude that the costs of the extension are part of the reasonable cost of repair. This means that the part of the claim based on the charges attributable to the extension must be disallowed.

[44] Mr Johnson, as noted, criticised the claim not only in seeking to recover loss assessed by reference to contractual charges, but also on the basis that these charges were composite, in that they included elements for materials, plant and labour. I do understand the risk that in some cases this will not precisely reflect the actual materials used, the actual plant employed, or the actual labour required. But where, as here, there is a commonly occurring piece of repair work, and there is no dispute that it will typically require certain materials, particular items of plant and certain amounts of labour, and that a charge has been set in a competitive tendering process including each of these elements, then the mere fact that the charge is composite does not render it valueless for assessment purposes. It may be higher than the actual cost in a particular case, or it may be lower than the actual cost. But the aim is to assess the reasonable, not the actual, cost of repair, and the mere fact that a charge is composite does not preclude it from being used for such an assessment.

[45] As noted above, the county courts in England and Wales have held that unless the total sum claimed in a highway furniture quantum dispute appears 'clearly excessive', it need not be examined in detail: see in particular *Hubble*, paragraphs 221 – 227, picking up on dicta in *Coles*, paragraph 27. This threshold test seems to have been introduced – in effect - as a matter of legal policy, mindful of the large number of such disputes being litigated. As was pointed out in *Aviva (No. 2)*, paragraph 29, it immediately begs the question, clearly excessive relative to what point of reference? Differing from the District Judge in that case, I consider that contractual charges can in this case provide such a reference point. This difference comes down not to matters of law, but to the nature and extent of the evidence led. In any event, however, I am not attracted to the threshold test suggested in *Hubble*, and do not consider that it is appropriate for me to approve such a rule in Scotland, nor to apply it in this case. It runs against the flexible approach of the Scottish court to assessment of

damages mentioned above, and its rejection of exclusive rules in this context. If the court has the evidence sufficient to assess whether a claim is 'clearly excessive', then it will likely also have sufficient evidence to assess whether the claim represents the reasonable cost of repair and/or replacement, in which case it should simply proceed to do so, while mindful that assessment of damages is not an exact science and that a broad and commonsensical approach will often be appropriate.

[46] In the light of these considerations, the various sums sought to be recovered by the pursuer in the valuation can be considered in turn:

(i) *Emergency Response*

Response team to make site safe	*£385.16*
Hire of cones/signs etc., 189 cones @ £0.99 each	*£187.11*

The barrier is a safety barrier protecting road users and a large road sign on a busy motorway. It having been struck by the defender's vehicle there was an obvious need for an immediate attendance at the site to carry out a preliminary inspection, to clear any debris and to make the site safe for other road users pending full assessment of the damage and the extent of the need for repair or replacement. It is apparent from production 5/2/1 for the pursuer, the Incident Response Report, as spoken to and explained by Mr Godsell, that two of the pursuer's employees did indeed attend the site for these purposes very soon after the collision on 12 December 2019. They required to attend at the site, in a van fuelled and equipped for emergency response, and to take traffic cones with them for use to highlight the area if required. It is also apparent that these employees were present on site for some two and a half hours. The cost of this emergency response was an expense necessarily incurred by the pursuer, and represents a recoverable loss consequential

on the damage to the barrier. Although Mr Johnson queried in his witness statement whether any emergency response had in fact taken place, I am satisfied that it did, and I did not understand him to suggest that the charge made was excessive or unreasonable for such a response in the circumstances. I will allow this part of the claim in full.

(ii) *Administration charge/cost recovery* *£325.00*

Mr Johnson queried the basis for this charge in his witness statement, but Mr Godsell helpfully broke it down in his evidence. He explained, as noted above, that it represented a non-contractual estimate of the costs to the pursuer of administering the repairs process. This included two hours work @ £30 per hour by the pursuer's clerks in coordinating the work, and two hours work @ £70 per hour by a quantity surveyor in determining the charges to be made to Scottish Ministers by reference to the schedule to the contract. These costs appeared to me to be reasonable and to be a loss properly consequential on the damage to the barrier. If an owner of property has to go into the market to obtain a repair by an independent contractor, the costs quoted to them will inevitably include an element representing the time and labour of the staff who deal with the paperwork and personnel in relation to the repair, including the calculation and rendering of the invoice. There is no material difference between such a situation and the present, simply because these costs arise in-house. However the £325 charge also, as Mr Godsell accepted, included outlays (i) to Police Scotland in the sum of £104.50 for a report identifying the defender as the person responsible for the damage to the barrier (see production 5/1/2 for the pursuer), and (ii) an unspecified sum which would have been paid to Turnamms for

a further report identifying the defender's insurance company. These are not costs incurred in connection with the repair itself, but are expenses necessarily incurred by the pursuer as a result of the damage to the barrier in order to pursue a claim for loss against the pursuer, and are recoverable. Overall I consider the claim made under this head to be reasonable and will allow it in full.

(iii) *Repair/maintenance of damage*

Take down existing safety barrier, single sided,

24.80 metres @ £15.36 per metre *£380.93*

Corrugated beam, single sided, 3.20 metres @ £28.77 per metre *£92.06*

Open box beam, single sided, 9.60 metres @ £43.81 per metre *£420.58*

Short driven post, 4 thereof @ £79.82 each *£319.21*

I accept Mr Godsell's evidence that in order to effect the repair it was necessary to take down the damaged barrier – in the sense of removing the damaged section of barrier and the posts on which it was supported I also accept that this work was in fact done – that is apparent from consideration of the photographs lodged as production 5/1/3 by comparison to those lodged as production 6/1/2. I also accept, in the absence of any specific challenge to it, that the £380.93 cost claimed for this work is reasonable (noting in passing that there is no charge made for putting the barrier up again). As regards the claims in respect of corrugated beam, open box beam, and short posts, I accept Mr Godsell's evidence that these relate to the provision and installation of the new, extended area of barrier, distinct from the P4 terminal, which can be seen in the red box in the third photograph in production 6/1/2. For the reasons already discussed, it has not been established by evidence that this extension

was a repair reasonably required by the damage to the barrier caused by the defender. It appears to be an improvement, or betterment, of the existing barrier. Accordingly I will not allow the claims for the costs associated with the beams (£92.06 and £420.58) and posts (£319.21), which total £831.85.

(iv) *P4 (single) Safety Terminal to any type of barrier,*

one thereof @ £5,212.76 each *£5,212.76*

Mr Godsell provided a detailed breakdown of the sum claimed under this head in a document which he created and is now lodged as production 5/3/3. His evidence regarding this breakdown is noted above, which includes the cost of the P4 terminal components as purchased from the manufacturer (£1,988.86), but also the ancillary costs as regards parts, plant and materials. Again as noted, and as I understood him, Mr Johnson did not take significant issue with this breakdown. His principal complaint was that there was duplication in relation to the charges for traffic management made elsewhere in the valuation. He considered that the four man barrier gang and 18 ton tipper truck charged for in production 5/3/3 could have been used for traffic management duties as well. Mr Godsell was however adamant that this was not appropriate (in particular, in the interests of safety), and on balance, and for the reasons already mentioned, I was prepared to accept his evidence on this in preference to that of Mr Johnson. I will accordingly allow this head of the claim in full. I would only add that I do not consider that any deduction for betterment is required on account of the fact that the existing P4 terminal was replaced with a new one – and indeed one of a different design. I accept Mr Godsell's evidence from which it can be inferred that the existing barrier was in good or fair condition at the

time of the collision. The new design was no more expensive than the old design. And in any event the replacement of the P4 terminal was clearly necessary in the interests of safety of road users.

(v) *Traffic management for repair*

Traffic management dual carriageway lane

closure, 2 days @ £981.83 per day *£1,963.66*

As noted, Mr Johnson suggested that this charge was excessive and duplicated costs charged in relation to the installation of the P4 terminal. As I have said, I do not agree, but it still does appear to me that this element of the claim should not be allowed in full. It is apparent from the Daily Work Records lodged as production 5/2/4 that the pursuer's employees attended at the site on 9 and 10 January 2020 to undertake the repairs. In particular, they are recorded as having left the depot at 1800 hours on each day and returned at 0200 the following morning. On 9 January it is recorded that they 'removed the damaged fence and replaced with new'. On 10 January they 'built the P4 and tightened all'. A significant element of their time on 9 January will therefore have been dedicated to building the extension to the barrier, the reasonableness of which for the repair has not been established in evidence. As to how much time was spent installing the extension, this can only be estimated, but I consider that it is reasonable to put it at 25%. Therefore I consider it is appropriate to discount the sum sought by way of traffic management costs by this same amount. Put another way, if the works reasonably required to replace the P4 terminal and repair the barrier would only have taken one and a

half days, then the defender's insurers should not have to pay for two days of traffic management. This head of the claim will therefore be discounted to £1,472.75.

(vi) *Design, approve and record remedial works to network* *£52.78*

I understood this cost to relate to the work of the aspect inspector who compiled the Reactive Operations Report now production 5/2/2 for the pursuer. This person was not part of the emergency response team, but was a qualified engineer with experience and authority to design and approve an appropriate repair. In this case this appears to have been a relatively simple task, but did require attendance on site on 18 December 2019 and completion of the relevant paperwork. The cost to the pursuer thereof was consequential on the damage and the claim is reasonable.

(vii) *Percentage addition for night-time working @ 15% of £8,447.05* *£1,267.06*

I accept Mr Godsell's evidence that the repair work had to be done at night, given that the pursuer was – understandably - not permitted by the contract to close a lane of a motorway during the day in order to carry out such work. I also accept his evidence explaining why the 15% rate was decided on, and why it was applied to materials and plant as well as labour. It was, as he said, a reasonable compromise, negotiated with Scottish Ministers at the time of tendering for the contract. As no subcontractors were involved in the work, and all the pursuer's employees would have been entitled to a 100%/double time uplift for night time working, I am not satisfied that the application of a 15% uplift across the board is excessive in this case, or represents an

unreasonable addition to the cost of the repairs overall. In other cases conceivably it may do – for example where a greater proportion of the total cost comprises plant and materials relative to labour. But in any event, as I have made deductions in relation to the claims for both the extension to the barrier, and consequently the traffic management costs, so the uplift for night time working must also be reduced. Furthermore, the pursuer applied the night time uplift to all the charges with the exception of those relating to emergency response and administration. But I can see no good reason why it should be applied to the charge in relation to designing, approving and recording the remedial works, as there is no evidence that these were, or required to be, done at night. Accordingly the total to which the 15% night-time uplift will be applied is £380.93 ('repair/maintenance of damage') plus £5,212.76 (provision and installation of the P4 terminal), plus £1472.75 (traffic management), that is, £7,066.44. This results in an uplift of £1,059.96, and thus a total claim (including the uplift and the design, approving and recording charge) of £8,179.18 (£380.93 + £5,212.76 + £1,472.75 + £52.78 + £1,059.96).

[47] In the initial writ the pursuer craved decree for payment in the sum of £10,965.88. This was quantified as represented by the total sum set out in the valuation (£10,611.38), together with additional claims for (i) the sum of £104.50 in respect of the cost of the Police Scotland report referred to above, and (ii) the sum of £250 as "the pursuer was inconvenienced as a result of the incident". As regards (i), as noted this cost was incorporated into the administration charge in the valuation, and has therefore already been accounted for. As regards (ii) there was neither evidence nor legal submission directed

towards how the pursuer did in fact, or could in law, have suffered inconvenience entitling it to an award of damages. Accordingly neither of these additional claims will be allowed.

Conclusion

[48] I will therefore grant decree for payment by the defender to the pursuer in the sum of £8,179.18 by way of compensation for the loss to the pursuer occasioned by the defender's fault and negligence in driving on 12 December 2019, and as represented by the reasonable cost of repairs to the barrier and replacement of the P4 terminal. I will reserve questions of interest and expenses. Should these matters not be capable of agreement in the light of this judgment, I will hear parties on them in due course.