

OUTER HOUSE, COURT OF SESSION

[2015] CSOH 56

PD1160/14

OPINION OF LORD McEWAN

In the cause

IAN WHYTE

Pursuer;

against

BLUEBIRD BUSES LIMITED

Defenders:

Pursuer: Christine; Thompsons
Defenders: McGregor; Morisons LLP

8 May 2015

[1] This is an action where the pursuer sues the defenders in reparation for injuries sustained when he was struck by the defenders' bus in Elgin near to a bus stop. At the time (2008) the pursuer was a schoolboy. He is now 17. A figure of damages of £8,000 was agreed on full liability.
[2] What the pursuer avers is this. He was standing on the edge of the pavement in East Road in front of the bus shelter. The defenders' bus approached the stop and the front nearside encroached over the edge of the pavement striking him. It is admitted that the bus did not mount the kerb. The pursuer accepts there was some jostling and pushing. Importantly at 6D is an *esto* case which states that if the pursuer "moved into contact with the bus" the bus was so close to the edge of the pavement that it was able to strike him while he remained on the pavement.
[3] In the defences (page 8) it is averred that the boys had been messing about and stepping off the pavement. It is claimed the pursuer moved beyond the edge of the pavement and struck the bus. It is also said that a boy called Ross pushed the pursuer into the bus or the pursuer in trying to get away from Ross moved into the bus. They say that the bus did not mount the kerb (although in 2009 this was alleged against the defenders in an earlier action by his mother). Nor, it is said, did the bus encroach over the edge of the pavement.
[4] At the proof I heard evidence from six witnesses. A further one had already given evidence on commission.

[5] Let me summarise the salient facts given in evidence and my conclusions. There was no issue of credibility between the parties. The pursuer was the first witness and remembered that he was going to school and was waiting with four other boys at the bus stop and near to the bus shelter. They can all be seen in many of the photographs. In his own words he said that there was a wee bit of playing about "mucking about, having a laugh and winding each other up…". The time was 8.15am. In his police statement which he accepted (number 6/5 at page 84) he said that he and the others were waiting to be first in the queue. He said he saw the bus approach from his right and stood back from the rest. The photographs show that the pavement is tarmac with an edge of kerb stone all along the bus bay at the stop. (Seen at, for example, number 7/6/1 of process; a photograph taken after the accident.) He looked to the left then back again and the back of his head struck the bus. He was knocked down, got up and went home as he was in shock. He later gave and signed a statement to the police.

[6] In cross-examination he was asked about the pleadings in the earlier action which his mother had raised on his behalf (that is number 7/11) and in it, it is alleged that he was struck by the nearside of the bus. He denied that and said he had been struck by the front (nearside) pillar. At the time he was not tall enough to be struck by the overhanging nearside wing mirror. He again accepted he was pushing and jostling but was not on the road when the bus arrived. He was asked to confirm that a number of still photographs showed where he was (numbers 7/17, six photos; 7/18 and 7/20, two photos). He agreed they were accurate. The colour photo (7/17/6) is the same as the black and white photo (7/4). It shows the pursuer with his right toe on the kerb and Ross behind and close to him. He appears to be leaning slightly forward. The time is 8:15:14 and the bus is braking. Just before the bus hit him he felt a pull on his schoolbag. That was probably done by the witness Kieran Ross. In re-examination he confirmed the accuracy of the photos from the six cameras on the bus and the positions of the various people shown in them.

[7] Kieran Ross, now aged 22, was the next witness. He accepted he and the others were "mucking about" as they waited. He said the bus came in too fast and was too close to the kerb. Ian looked left then right and the bus hit his head. He then said that the bus corner was over the pavement and Ian was hit by the left corner of the (front window). He confirmed that the pursuer fell, then got up and ran off. He maintained his evidence about how the bus approached the bay in cross and re-examination. He denied pushing the pursuer but admitted he had a hand on him. He too confirmed the accuracy of a number of photos shown to him.

[8] The one expert led was James McCartney, aged 54, an experienced accident investigator. He spoke in detail to all the photographs lodged and to his two reports (6/3 and 6/6 of process). He described the angled approach to the bus bay. He had particularly watched buses approach over a continuous period of two hours. Only two had come in close causing pedestrians to step back but most were nowhere near the kerb. He confirmed this from his own photographs (number 7/6) and in particular 7/6/6 and 7/6/9. These show a bus in the bay about a drain's width from the kerb. His female assistant in the yellow jacket is approximately where the pursuer was in 7/4. Where the bus is she is plainly safe. To steer in parallel a driver had to encroach before the stop near the middle part of the taper then straighten to the right as the wheels were eight feet behind the front of the bus (eg his sketch 7/5/10). There were seven cameras on the bus with timings in milliseconds. The word "Brake" appearing in the images shows where braking was applied.

[9] The witness Zoe Ogilvie gave evidence on commission before the proof (number 22 of process). The commissioner has produced a favourable report on her. She was seated in the shelter and saw the accident. She can be seen there in 7/17/6. She said it was due to the bus overhanging the kerb. The witness did not have the benefit of seeing the CCTV though she did see the photos, number 7/6. She confirmed the boys were "jumping about" (11B) and the pursuer was "sort of on the kerb" (11D) (14B) (19, 20 and 22). She believed the bus was slightly overhanging the pavement (13). She was shown her police statement but did not remember giving it or its contents but said it would have been accurate (28). In cross-examination she was less certain if she had seen the impact (21). Later on, (24/5) she said he hit the side of the bus.

[10] Sergeant Robertson, aged 49, was a witness. He had been the investigating police officer. He took three important statements which he proved in evidence. These were contained in number 6/5 of process and were the statements of the pursuer, Andrew McKenzie and Zoe Ogilvie.

[11] Andrew McKenzie aged 37 was the first witness for the defenders. He saw the accident and at the time was taking his daughter to the bus. They can be seen in 7/17/3. As he approached the bus stop over the grass (seen in the photographs) he saw the boys jostling one another on the pavement. They were all known to him and he described it as a "play fight". At the critical moment he saw the pursuer spin round anti-clockwise and then hit off the side of the bus. He said that the pursuer's head hit the bus when his "top half" was off the pavement. His feet were on the kerb but his top half overhung the pavement.

[12] He looked at the photographs and confirmed their accuracy. He was positive that the bus had not encroached over the kerb at the critical moment. He read his police statement but was not asked about it. In cross-examination he said the pursuer spun anti-clockwise when he was hit and that his body had gone into the bus.

[13] The final witness was the bus driver Paul Williams (aged 69). He had formerly served many years in the Royal Navy and that day drove the low floor single deck bus (as seen in the photos). He knew the route and had driven it many times. He told how he approached the stop at the bus bay and was aware of boys "jumping back and forward…" He was driving in slowly and braking. There are three separate angled sections of kerbing in the bus bay (seen on the photographs) and he had to go in at an angle then straighten to be parallel to the pavement. The bus fitted the bay. He had a good view through the glass door to his left. He said he drove in, in such a way that no part of the bus overhung or touched the kerb. Just as he stopped he heard an "enormous bang" to the nearside and behind him. He saw the pursuer run away and reported the incident. After a delay the waiting passengers boarded and he continued on his journey. At the time he said he was driving slower than normal and braking as the photographs showed. He denied encroaching on the kerb and said if the pursuer had struck the front pillar or window he would have seen it.

[14] In cross-examination he confirmed he was close to the kerb but some inches out. he did not qualify or depart from his evidence in chief.

[15] A number of productions were put in evidence and I make here the following notes on them. The record (as amended) in the present action is number 23 of process. The record in the previous action by the pursuer's mother, Zoe Cawthorne, is number 7/11 of process. The statements made to the police are in 6/5 and the expert's reports are numbers 6/3 and 6/5.

[16] There are a number of important photographs taken from cameras on the bus and from outside after the event.
[17] Number 6/8 of process shows eight stills from Camera 6 on 3 September from 08:15:10 to 08:15:17. Probably the most important of these are 6/8/5 and 6/8/6. (These have been taken from the CD which is number 7/3 of process.) Number 7/4 is a single still from Camera 1 at 08:15:14. It shows the pursuer standing at the very edge of the kerb. Number 7/6, 1 to 21 in a series of photos of the bus lane, the stop, the approach road and various members of the defenders' staff. It forms part of the expert's report. Number 7/17 is a series of photos from Camera 1 starting at 08:15:09. (Six stills of which number 6 is the same as number 7/4.) Number 7/18 is a single still from Camera 2 at 08:15:14. It shows the driver and the bus about to pass the pursuer who is not yet on the kerb edge. Number 7/19 are two stills at 08:15:14 and 08:15:15. In the latter no pedestrians are visible. Number 7/20 shows two stills number 1 is at 08:15:14 and shows the pursuer facing sideways with his right foot raised. The next one at 08:15:15 shows him having fallen away from the bus with his legs in the air. The front of the bus is well past him.
[18] At the hearing I was referred to two cases *viz McEwan* v *Lothian Buses* [2014] CSIH 12 and *Chapman* v *The Post Office* [1982] RTR 165. I refer to these below.
[19] Mr Christine for the pursuer urged me to find for the pursuer. Counsel began by referring me to the pre-trial minute of agreement on *quantum*. The issue was whether the pursuer was hit while he was on the pavement. He said he was there but could not say why he was struck. The witness Ross was of the view that the front nearside corner of the bus hit him, and that agreed with the witness on Commission (Ogilvie). The expert witness (McCartney) said that the front of the bus could overhang and the CCTV still in number 6/8 of process confirmed this. The bus was very close to the kerb, indeed too close. The alternative version of the witness McKenzie was that the pursuer hit the bus, but that was also consistent with overhang. The driver was aware of the presence of young people. His account of the point of impact should not be accepted. He must have seen the children jostling with one another. There was no need for him to be as close as he was, and that was also negligent. There were no puddles at the kerb and no elderly or disabled persons waiting. There was no contributory fault. The pursuer was only 11 at the time. Neither of the cases cited to the court was precisely in point since both involved wing mirrors.
[20] Mr McGregor moved me to assoilzie the defenders. He said that the bus did not encroach by overhanging the pavement and it was the pursuer who struck the bus. Unless he was hit by the front nearside corner there could be no liability. Only Ross said that had happened, and that evidence was contradicted by McKenzie and the driver (Williams). Both of these witnesses were credible, reliable, coherent and careful. The witness Ogilvie had not had the benefit of seeing the CCTV. The driver used all his mirrors to steer into the bay at a minimal speed. Neither case cited was precisely in point; and in *McEwan* the sheriff had misled one of the parties. If the defenders were to any extent at fault the pursuer was 90% to blame.
[21] Let me turn now to the cases cited beginning with *Chapman*. The plaintiff was standing on the kerb and may have been leaning out a little when she was struck by the wing mirror of the Post Office van. The van was being driven next to the kerb. She had been found fifty *per cent* to blame. In the Court of Appeal, however, that was reversed Lord Denning remarking "I see no reason why a person standing on the kerb is guilty of negligence at all: even if she leans out or has her back turned to the oncoming traffic…"

[22] *McEwan* v *Lothian Buses* is a decision of an Extra Division. What happened was this. The pursuer was walking on the pavement of a road in Edinburgh when he was struck by the wing mirror of the defenders' bus. The case was complicated by the admission of evidence in the form of a statement by the driver, upon which an expert made comments and the sheriff later, findings in fact. Thereafter it looks as if the sheriff may have misled the defenders by stating her view, and in the result they did not lead evidence. She found in favour of the defenders. There was also an issue as to whether the pursuer had moved towards the edge of the pavement as if to cross the road. What became critical on appeal was that the sheriff's conclusion lacked any evidential basis. The pursuer was entitled to be on the pavement and not be at risk of being struck by a vehicle.

[23] I now make the following findings. There was no issue of credibility and I found the pursuer to be a reliable witness. He was quietly spoken and I accept that before the accident he was larking about with the others and may have been on the road. That was seen by the driver as he approached. However at the time of the accident the pursuer was standing on the kerb albeit very close to the edge. The photo (7/4) shows his right toe on the kerbstone with his heels on the pavement tarmac. Just before the accident he was in some way handled by his friend Ross. It is unclear whether it was a pull away from the edge. Ross was a poor witness and not reliable on detail. For example he said the bus came in too fast. I do not accept that. It is contradicted by the driver and the photos. He said that the bus front nearside corner was over the pavement. I do not accept that as accurate. It is also contradicted by the witness McKenzie (whom I wholly believe and accept). At the date of the proof Ross's memory of the exact events was unclear. McKenzie however who was taking his daughter to the bus stop was clear that at the time of the accident the pursuer was on the kerb and his head hit the side of the bus towards the front. I accept his evidence that at the time of the accident the front of the bus was not across the kerb. I accept his evidence that he saw that the top half of the pursuer's body was overhanging the kerb. That is also consistent with the photo referred to above.

[24] Mr McCartney was a good and impressive witness. He spoke to the shape of the bus bay and how a bus approaching, with its front wheels 8 feet behind, might overhang for a short distance before straightening into the bay at the stop. This manoeuver I accept from him was at the middle point of the taper. He watched for a long period and I accept he only saw two buses come in very close to the kerb. I accept of course the commissioner's report on Zoe Ogilvie. I did not see her and did see and assess McKenzie. In my opinion he had a better view and perspective than she could have had sitting down. Her evidence changed slightly on to where the impact was and I do not accept that the boy was hit by the front nearside. In fairness to her she is consistent with a side impact. On balance I prefer to rely on McKenzie.

[25] I find the driver to be credible and reliable.

[26] I accept he was slowing to less than a walking pace and that his front nearside was not over the kerb at the point where he hit the pursuer. I accept he straightened the bus at the angle of the bay near the first drain shown in Photo 7/6/9. I also accept and hold proved from him that the pursuer struck the side of the bus behind where he was sitting and when the bus had passed him.

[27] What is also important and I find proved on the photographs, is the position of the bus at and before the time of the accident. Mr McCartney and the bus driver conclusively proved the photos to be accurate. It clearly appears from number (7/20/1 and 2) of process that when the

pursuer was hit the bus was up against the edge of the kerb, though not overhanging it. Given my finding of how the pursuer was standing a collision was inevitable.

[28] On these findings I have no hesitation in finding that the defenders' driver was not at fault in driving the front nearside in such a way as to overhang the kerb. If that was done at all it was well before the accident. However the *esto* case alleges the bus was too close to the kerb. I find that established, and bearing in mind that the driver had seen the boys earlier. I consider it was negligence to have driven so close. The bus ought not to have been driven in such a way as to hit someone on the kerb even if he was at the edge. I consider that on these findings *Chapman* is in point and I will follow Lord Denning's reasoning. The pursuer, wholly on the pavement, is entitled not to be struck by a vehicle. There is no room for any contributory negligence especially in view of his age.

[29] I will accordingly grant decree for the agreed sum of £8,000 and reserve expenses.