Web Blue CoS



OUTER HOUSE, COURT OF SESSION

[2017] CSOH 68

PD1723/14

OPINION OF LORD PENTLAND

In the cause

PETER DEWAR

Pursuer

against

SCOTTISH BORDERS COUNCIL

Defenders

Pursuer: Love QC, Bennett; Thompsons (on behalf of Road Traffic Accident Law (Scotland) LLP)
Defenders: MacPherson (sol adv); Clyde & Co

26 April 2017

Introduction

[1] In this personal injuries action the pursuer sues Scottish Borders Council for damages arising from a motorcycle accident on 12 August 2011 in which he was seriously injured; he alleges that the accident was caused when he lost control of his motorcycle due to a dangerous defect in a road, which the defenders had negligently failed to inspect, maintain and repair. The case came before me for a proof before answer restricted to the question of liability, damages having been agreed in the sum of £250,000 inclusive of interest to the first day of the proof.

[2] The circumstances of the accident may be summarised as follows. At about 2.30pm on 12 August 2011 the pursuer was riding his Pan European Honda ST 1300 touring motorcycle northwards on the A701 Moffat to Edinburgh road. The road runs generally in a north-south direction; it is a typical A class rural road. It comprises (and comprised at the time of the accident) a single carriageway in each direction; it was subject to a speed limit of 60 miles per hour. At a point about one mile south of the village of Tweedsmuir there was a double or 'S' bend in the road for northbound traffic. Before the bend there was a triangular safety sign, warning of a double bend ahead. The first part of the double bend comprises a bend to the right for vehicles travelling north; this bend begins as a fairly gradual one before tightening. On emerging from the first bend, the driver promptly encounters another bend, this time to the left. At the section of road I have just described, the centre of the road was marked by long white lines with short gaps, indicating a hazard.

[3] At the time of the pursuer's accident there was a damaged area of road surface along the nearside edge of the northbound carriageway as one approached the right-hand bend. The exact nature of the damage and its extent were the subject of disputed evidence at the proof; for present purposes it is sufficient to say that the road surface was worn away and uneven along a length of some 15 to 20 metres adjacent to the edge of the road. The width of the damaged strip varied along its length, but was probably between about 25 to 40cm from the edge of the road into the carriageway. The width of the northbound carriageway was about 2.75 metres. This narrow strip of eroded road surface continued to a point at about the apex of the first bend. The pursuer's motorcycle left the road at the end of or perhaps just beyond this eroded area and continued more or less straight ahead onto and across the grass verge. Its front wheel then struck a large stone concealed in thicker undergrowth slightly beyond the grass verge; the impact caused the motorcycle to come to an abrupt halt; the rear wheel probably cartwheeled forwards. The pursuer was thrown from the motorcycle. As a result of the accident he suffered severe injuries, from which he has not fully recovered.

[4] The pursuer alleges that the accident was caused when he lost control of his motorcycle due to the defective road surface. He claims that the eroded area constituted a hazard that gave rise to a significant risk of an accident to a careful road user. He maintains that the defenders were at fault in failing to deal with the hazard before his accident.

[5] The defenders deny that they were at fault. They say that they had a reasonable system of road inspection and that the road was properly inspected and maintained. Whilst they accept that there was some erosion of the carriageway surface at the roadside, they contend that this was not of sufficient severity to warrant repair under and in terms of their maintenance and repair policy. The defenders' position is that the road was not dangerous to a motorcyclist, so long as he exercised reasonable care.

Evidence at the proof

[6] In addition to his own evidence, the pursuer led evidence from two police officers who attended the scene of the accident soon after it occurred: Constables Lee Harper and Eric Brown. He also led expert evidence from a chartered civil engineer, Andrew Hill, a partner in the firm of Strange Strange and Gardner, consulting forensic engineers in Manchester. The defenders, for their part, led evidence from: Jack McBirnie, another police officer who attended the scene shortly after the accident; Kenneth McCudden, a roads inspector in the defenders' employment; Stuart Blackwood, a traffic collision investigator; and Peter Dixon, another civil engineer.

The pursuer

[7] The pursuer has been left with a limited recollection of the accident. He recalled that he had been travelling from RAF Spadeadam in Cumbria to stay with his brother in Fife. He had stopped for a break and something to eat at Gretna Green at about 2.00pm; he was not in a hurry. He chose to take the A701 because he understood it to be an attractive road for motorcyclists. He was not familiar with the section of road where the accident happened. He remembered that after passing Moffat, the traffic on the road was light.

[8] At the time of the accident the pursuer was an experienced motorcyclist. He drove about 10,000 miles per year and had toured in Scotland and in Europe. He had been riding motorcycles

for about 7 years and had owned the Honda throughout that time. He was 44 years old. He was serving as a warrant officer class 1 in the military provost guard service. It emerged in the course of the evidence that a number of the witnesses had been informed that the pursuer held an advanced motorcycling qualification; this was a misunderstanding of the position, however.

[9] In his evidence the pursuer said that, based on his experience and usual practice he thought that he would have approached the right-hand bend in the road at a speed of about 50 miles per hour, although he could not now be precise about his speed. He would have reduced speed ahead of the bend. It was not a tight or dangerous bend. His practice would have been to adopt a line towards the nearside of the road so that he could see round the bend as he negotiated it; he would adjust his line if the bend got tighter. The pursuer said that he remembered moving to the left as he approached the right-hand bend in the road; he did this so that he could improve his line of sight through the bend. His last recollection, before regaining consciousness in hospital three days after the accident, is of feeling a thump to his chest and of a sensation of fear. Having regard to his experience and usual practice, the pursuer thought that he would have maintained his position on the left of the carriageway as he drove round the bend. He said that he would have stayed away from the edge of the road because it could be dangerous to ride too close to it; as he put it, he would have been well on the road. The pursuer was not able to identify the point at which his motorcycle left the road. His understanding was that he came off the road on the nearside at about the apex of the right-hand bend. The pursuer acknowledged that it was important to travel at a speed which allowed him to assess the road conditions.

[10] The pursuer impressed me as a calm and rational witness. He gave his evidence in a frank and straightforward manner, without apparent embellishment or exaggeration. In view of his limited recollection of the accident, the pursuer's evidence does not, however, assist in establishing what happened and, more importantly, why it happened.

Police Constable Lee Harper

[11] Police Constable Lee Harper is an experienced traffic officer. He is a motor mechanic and holds qualifications as an advanced police driver. He has been involved in the mechanical aspects of road accident investigations during his 17 years of police service in the Scottish Borders, although he is not a trained collision investigator. He was familiar with the section of road where the accident happened. He patrolled it regularly and had attended accidents there. He described the curvature of the right-hand bend as light to moderate.

[12] Constable Harper arrived at the scene of the accident with his colleague, Constable Brown, at the stage when a helicopter was removing the pursuer to the Southern General Hospital in Glasgow; he thought this would have been around 50 minutes after the accident. The road had by then been closed to traffic. Initially it had been thought that the accident involved a fatality. When it became clear that this was not the case it meant that a full police investigation would not be required.

[13] Constable Harper described seeing very severe erosion of the tarmacadam road surface on the west edge of the northbound carriageway. He said that the condition of the road surface in that area was horrendous; it was badly maintained and in poor condition. It had been in that condition for at least two months before the accident and was clearly in need of repair. The edge of the road was heavily worn or missing; there were a number of small potholes in that area. He

pointed out in the police photographs (taken on the day of the accident by Constable McBirnie) what he described as a ragged edge of road surface running along the west edge of the carriageway; this area of the road was, according to Constable Harper, totally eroded. The base layer of tarmacadam was visible. The edge of the road was uneven. It seemed to Constable Harper that the top layer of soft gravel was missing. He could see the loose gravel which formed what he described as the base layer. The result was that there would be minimal adhesion for the tyres of a motorcycle. The tyres would be liable to skid off and slip. A motorcyclist who hit that patch of road would, in Constable Harper's view, almost certainly lose control of his vehicle.

[14] Asked about the depth of the eroded area, Constable Harper said that it was more than 40mm; at some points the defect was 50mm deep. He acknowledged that he was not a qualified surveyor. In view of the depth and nature of the defect, Constable Harper considered that this part of the carriageway was not suitable to drive on. It would not have provided good support or traction; it would have been like driving on ball bearings. He thought that the defective area extended into the carriageway by about 450mm.

[15] The officer found the pursuer's motorcycle lying in the grass close to the road. Judging by the short distance it had travelled from the carriageway, Constable Harper was of the view that the motorcyclist had not been driving too fast. If he had been, the motorcycle would have ended up much further into the grassy area. There was no apparent defect in the motorcycle. The condition and wear of the tyres were not indicative of the motorcycle having been habitually driven at too high a speed.

[16] According to Constable Harper, the eroded area was in the line of a typical tyre track for a motorcycle negotiating the right-hand bend in the road. He considered that the accident was caused by the motorcyclist losing control of his vehicle as he passed over the eroded area. He had left the carriageway and come into contact with a large stone in the grass verge. He thought it unlikely that speed had been a causative factor. The motorcyclist had, in his opinion, done well to remain upright.

[17] In cross-examination, Constable Harper disagreed that the pursuer should have chosen a line which avoided the broken-up section. The line taken was, in his view, the one that gave the rider the greatest degree of stability as he drove round the right-hand bend. He accepted that he had not measured the depth of the erosion or got down to examine it. He agreed that he was not a trained accident investigator. He did not at any stage report the damaged condition of the road to the defenders.

[18] Whilst Constable Harper was a confident witness, there were important aspects of his evidence which I found to be unconvincing and implausible. His description of the condition of the road as horrendous seemed to me to be a substantial exaggeration; no other witness went that far. The photographs and the video do not, as it seems to me, support that description. If the road had been in as dangerous a state as he claimed for as long as two months, it is surprising that he did nothing at any stage, including in the aftermath of the accident, to draw this to the defenders' attention. It is important to note that Constable Harper's evidence about the condition of the road was based entirely on his visual impressions at the time. He was not required to carry out a detailed or methodical investigation of the accident; he did not take any measurements at the location of the accident. In these circumstances, I consider that his estimates of the dimensions and the depth of erosion of the road should be treated with caution.

Police Constable Eric Brown

[19] Police Constable Eric Brown was an experienced motorcyclist with twenty-one years' service in the police. He had been a motorcycle escort rider and was qualified as an advanced motorcyclist.

[20] Constable Brown's evidence was broadly in line with that given by his colleague. He described the right-hand bend in the road as being slight. A motorcyclist could negotiate it safely at about 60 miles per hour. The witness spoke to seeing the area of broken tarmacadam with lots of loose tar chippings in it. The damaged section of carriageway led directly to a line in the grass left by the motorcycle as it passed from the road onto the nearside verge. This was just after the apex of the right-hand bend in the road.

[21] The officer said that the eroded area was about 20 metres in length and between about 30 and 60 centimetres wide. He did not measure the depth of the defect, but formed the impression that it was between 25 and 50mm at different points along its length. It was about 50mm deep at the point where the line through the grass led from the edge of the road. As to the nature of the surface damage, Constable Brown's view was that the top layer had broken away down to the sub-base, which was also breaking down. He thought that more than just the top layer had gone.

[22] Constable Brown's view was that the pursuer had ridden over the eroded area, lost control of his vehicle and been forced off the road onto the grass verge where his front wheel had struck a stone. It would have been like riding over ball bearings. In the circumstances, the pursuer had done well to keep his motorcycle upright. He thought that the pursuer would probably have seen the eroded area, but by then it would have been too late for him to have taken avoiding action.

[23] Asked about the correct road position for a motorcyclist to adopt when negotiating the right-hand bend, Constable Brown stated that he should follow a line about 30 to 45mm from the nearside edge of the road and maintain that line until he had come out of the bend. By maintaining that line, the rider would have an extended view around the corner; that would not be so if he moved too close to the centre line. If the pursuer had taken up a position towards the nearside of the road, he could not be faulted on that ground, in Constable Brown's view.

[24] Constable Brown said that he found nothing at the scene to suggest that excessive speed played a part in the accident. If the pursuer had been driving too fast, his motorcycle would have been leaning over and would have been propelled from underneath him; he would probably have left the road at about the apex of the bend. The motorcycle would then have ended up in a different position, further away from the road than where it was in fact found. Constable Brown thought that the more likely explanation was that the pursuer had noticed the damaged area of tarmac at a point when it was too late for him to do anything about it. He had succeeded in keeping the motorcycle upright, but it had left the carriageway and gone into the grass by the roadside. Constable Brown did not submit a traffic intelligence report to the defenders after the accident. He did not believe that Sergeant Cockburn, his immediate superior, had done so either.

[25] In cross-examination, the witness accepted that he had not carried out an investigation into the accident. His understanding was that Constable McBirnie would have done that. When shown video footage of the road taken by the pursuer's wife on 18 August 2011, Constable Brown acknowledged that an advanced motorcyclist might begin to move away from the nearside of the carriageway at a point close to the start of the eroded area of road surface; such a motorcyclist

might choose to move towards the centre line in the road. Notwithstanding this evidence about what an advanced motorcyclist might think it appropriate to do, the officer's view remained that what he referred to as the standard line to follow would be about 30 to 45mm from the road edge. That position would give the rider a good view round the bend for as long as possible.

[26] After the accident, Constable Brown sent an email to one of the defenders' officials to notify him of the accident. He did not mention anything about the condition of the road surface; he said this was because he thought that this would be covered in the traffic intelligence report and that this would be handled by one of his colleagues.

[27] In evaluating Constable Brown's evidence, it is important to note that, like his colleague, he too did not carry out a systematic or detailed investigation of the accident. His evidence, including his estimates of dimensions, was based merely on his visual impressions formed at the time. He took no measurements. In these circumstances, I consider that one must be cautious about his estimates.

Andrew Hill

[28] The final witness led by the pursuer was Andrew Hill, a chartered civil engineer. He said that he regularly prepared accident investigation reports for court cases; these included consideration of the length of time a defect may have been in existence, the cause of it forming in the first place, and the extent to which it presented an actionable hazard. When asked to explain what an actionable hazard was, he said that this was an issue to be determined by the court; he was only in a position to express a view based on his engineering knowledge. Mr Hill accepted that he was not a road accident investigator or a specialist in investigating motorcycle accidents. He had not attended the place of the accident. His views were based on examination of the photographic and video evidence and of certain documents that were supplied to him by the pursuer's solicitors, including precognitions. It is important to note that Mr Hill had not ever worked for a roads or highways authority or as a roads engineer. His experience in relation to the policies of roads authorities was in relation to litigation. He had no practical experience of carrying out roads inspections.

[29] Mr Hill's opinion was that there was a defect of about 50mm in depth and 500mm in width at the place of the accident. It extended over a length of about 12 to 17 metres. He considered that this presented a significant potential hazard to road users and that the defenders should have identified and repaired it. The defect would have existed at the time of the defenders' last inspection of the road on 19 July 2011 and probably for several months before that. The wearing course or top layer of the road surface had broken away, exposing the sub-base. His evidence as to the depth of the defect was, he acknowledged, based on an assumption that the wearing course was typically 40 to 50mm in depth. He accepted that it was difficult to estimate such dimensions on the basis of a visual examination of photographic and video evidence. In terms of their policy, the defenders should, in Mr Hill's opinion, have repaired such a defect before the accident; it was either a category 1b or 1c defect depending on the line of the wheel track (I shall explain the meaning of this terminology later). He would expect an attentive roads inspector to detect a defect of 50mm depth and several metres (at least) in length. He thought that the defenders' inspector could be criticised for not noting the defect.

[30] Mr Hill was a measured witness, who explained his views clearly and, I thought, objectively. It seemed to me, however, that his opinion as to the nature and extent of the damage to the road surface was of limited assistance; his views were based entirely on impressions formed from looking at photographs and the video. I do not consider that he was properly qualified to express an opinion on the question as to whether the defenders' roads inspector acted negligently.

Jack McBirnie

[31] The first witness led for the defenders was Jack McBirnie, a retired police officer of about 31 years' service. He is now self-employed as a collision investigator, although he was not asked to give evidence in that capacity in the present case. He attended the scene of the pursuer's accident as the on-duty collision investigator. He arrived about an hour after the occurrence of the accident. Since it was by then clear that the accident would not be a fatal one, Mr McBirne was required only to carry out a limited investigation, in the course of which he took some photographs.

[32] Mr McBirnie acknowledged that the road surface was not perfect, but considered it to be not atypical of other sections of the A701 or similar roads. He described it as breaking up slightly on the left-hand side. He considered the area of erosion to be irrelevant to the causation of the accident because he found the tyre track of the motorcycle to be somewhat to the north of the damaged area at the point where the track could be seen to begin on the verge. The track started some metres beyond the northern limit of the eroded area. Mr McBirnie thought it unlikely that the motorcycle had travelled over the eroded area; if it had done so, it would have left the carriageway at a different point. Mr McBirnie's view was that the motorcycle left the road whilst still in an upright position; it was travelling on a relatively straight path. It was only when it struck a depression in the verge that it cartwheeled. In Mr McBirnie's opinion, the pursuer probably had a momentary lapse of concentration. There was no evidence that he had been travelling fast. It would appear that he had just run wide for whatever reason.

[33] Asked about the dimensions of the eroded area, Mr McBirnie's evidence was that it was about 350 to 400mm in width and about 20 metres in length. He thought that the depth varied between about 25 and 50mm, although it did not look to him to be as much as 50mm.

[34] Mr McBirnie impressed me as a careful and well-balanced witness. He gave his evidence in a clear and straightforward manner. I do not, however, consider that it would be appropriate to attach any weight to his estimated dimensions (including the depth) of the eroded area of road surface. As with the other officers, these were visual impressions and no more than that. I do, however, accept as broadly accurate his evidence that the surface was breaking up slightly at the edge of the road and that the condition of this part of the road was not unusual. That description struck me as more balanced and plausible than the picture painted by Constables Harper and Brown.

Kenneth McCudden

[35] The next witness for the defenders was Kenneth McCudden, a technical assistant roads inspector employed by the defenders. He has been in his current position for just over 10 years. He has 30 years' experience with the defenders or their predecessors working on the roads. He started as a roads labourer and worked his way up; at different stages of his career he worked on

haulage and as a squad foreman. It was clear from his evidence that Mr McCudden has a wealth of practical experience of the roads network in the Scottish Borders and that he is familiar with all aspects of roads repairs and maintenance.

[36] Mr McCudden explained the defenders' system for inspecting, maintaining and repairing the roads for which they are responsible. The defenders carry out this work on the basis of policies and guidance contained in their Carriageways Lifecycle Plan ("the plan"). The purpose of the plan is to set out the defenders' policies and service standards in relation to the maintenance and management of the carriageways in the Scottish Borders. For the purpose of the present case the relevant provisions of the plan are those which prescribe reaction times for certain categories of road defects. In summary, category 1a defects are defined as those which present an immediate and critical hazard to road users. The plan requires that these be immediately made safe and repaired. The plan explains that defects falling within this category include: major debris and spillage, carriageway collapse or comparable severe surface defect, isolated standing water at a depth likely to cause a loss of control, and missing or severely defective ironwork. Category 1b defects are those which present an urgent or imminent hazard or risk of rapid deterioration; they are required to be made safe or repaired within 48 hours. The plan states that defects within this category include potholes exceeding 40mm in the wheel track. Category 1c defects are defined as those which present a moderate level of hazard or risk; the plan states that they should be repaired within 7 days. They are said to include potholes exceeding 40mm in depth in all other locations (ie other than in the wheel track). The plan goes on to explain that category 2 defects are those which, following a risk assessment, are deemed not to represent an immediate or imminent danger. Defects within this category are to be repaired within a planned programme of works.

[37] Mr McCudden explained that A class roads were inspected on a monthly basis. B class roads were inspected every two or three months depending on their level of use. He was responsible for carrying out the inspections. He worked to a set programme. He inspected A and B class roads from a car. He would be alone in the car and would drive at around 25 to 30 miles per hour along a prescribed route. He would look out for defects, hazards and obstructions. He had a dictating machine switched on in the car and would record defects when he saw them. Sometimes he would stop the car and get out to look at the condition of a road. He would assess potholes on the basis of his experience. On returning to the office, he would complete a safety inspection sheet for the route he had inspected that day or the previous day.

[38] Mr McCudden inspected the section of road where the accident occurred on 19 July 2011; it came within the inspection route referred to, under and in terms of the defenders' system, as "Tweedsmuir to Dumfries and Galloway boundary". This was the last inspection of that route before the accident. The route extended to about five or six miles. Mr McCudden said that he would hope to cover it in a single day. The defenders' standard form of safety inspection sheet identifies various types of defects; they include potholes. The safety inspection sheet completed by Mr McCudden in relation to his inspection on 19 July 2001 shows that he found no action was required to be taken in relation to this route. If he had identified the need for repairs to be carried out, Mr McCudden would have drafted an order for repairs and sent this to the repairs squad.

[39] When asked to consider the police photographs and the video taken by Mrs Dewar, Mr McCudden described the damaged area as a slight unevenness at the road edge. He thought that between about 10 to 20mm of surface dressing had come off at the road edge; the road in that

area had broken up. This would probably have been caused by the weight of heavy lorries carrying timber. It was not uncommon for the road surface to be in such a condition. He accepted that the road would have been in the condition shown in the photographs and the video at the time of his inspection on 19 July 2011.

[40] Mr McCudden said that he would not class the condition of the side of the road, as shown in the photographs and the video, as a defect in terms of categories 1a, b or c of the plan. It was not, in his view, strictly accurate to describe the eroded area as a pothole, but even if it were to be treated as such, he was clear that the depth of the defect was nowhere near 40mm at any point. Mr McCudden said that if there was a defect of between 30 and 40mm in depth, he would highlight it for future attention; it might be that repairs would then be carried out to such a defect under the defenders' capital works programme.

[41] Asked to describe how the carriageway was constructed, the witness said that the top layer was surface dressing of between 10 and 15mm; below this was the wearing course, which was usually 40 to 50mm; immediately beneath that there was the base course of about 60 to 100mm; after that there would be a sub-base of between 100 to 200mm; below that would be hard core.

[42] In cross-examination, Mr McCudden said that he liked to think that he carried out his duties as a roads inspector carefully. He recognised that it was an important rôle. He said that he understood that he had to carry it out safely, carefully and diligently so that road users were protected. With these considerations in mind, Mr McCudden said that he would tend to err on the side of caution when carrying out his inspections. He was sure that if there had been a defect in the road extending to a greater depth than 30mm, he would have noticed and recorded it.

[43] I was impressed by Mr McCudden. He testified in a straightforward and reasonable fashion. He seemed to me to be a highly experienced, careful and responsible official with a well-developed understanding of the importance of his responsibilities as a roads inspector. I found his evidence, in all its material parts, to be credible and reliable. Counsel for the pursuer argued that Mr McCudden's evidence was internally inconsistent because he accepted that the surface dressing would have been rolled in so as to become part of the wearing course, with the result that the layer that had worn away must have been greater than 20mm in depth and would have been of the order of 40mm deep. I do not accept this criticism; it proceeds on the basis of an unrealistically technical and narrow analysis of the evidence. Mr McCudden was entirely clear in his evidence that the depth of the eroded area was substantially less than 40mm along its whole length. It was, in his experienced opinion, the surface dressing or the top layer that had worn away. That seems to me to make sense; it also fits with Mr McBirnie's evidence that the road surface was breaking up slightly. At the end of the day I believed Mr McCudden's evidence that he had not noticed a category 1 defect at the time of his inspection of the road on 19 July 2011 and that had such a defect been present he would have noticed and recorded it. I accept his evidence that there was, in fact, no such defect in the road at that time.

Stuart Blackwood

[44] The first of the two expert witnesses led on behalf of the defenders was Stuart Blackwood. He is a former police officer; he worked in road policing for about 20 years. During his time in the police, Mr Blackwood was a full-time collision investigator for 10 years. For the past 4 years he has been the principal consultant and manager of the incident and reconstruction group of an

organisation known as the Transport Research Laboratory based in Edinburgh. He specialises in road accident reconstruction. He said that he had a good understanding of the performance and characteristics of motorcycles, although he had no formal training in motorcycles at an advanced level. He had ridden motorcycles about 25 years ago. Mr Blackwood gave evidence having listened to the factual evidence led from the pursuer and from Constables Harper and Brown. Mr Blackwood spoke to and adopted a report he had prepared for the purposes of the present case. He accepted that his findings in his report were, to some extent, affected by his mistaken belief that the pursuer held advanced motorcyclist status. It seems that this misunderstanding was derived from police statements provided to him for the purposes of preparing his report.

[45] Mr Blackwood inspected the site of the accident and took measurements and photographs in June 2015. He thought that the road had been repaired between the date of the accident and the date of his visit, although he was not able to expand upon the nature, extent and date of any such repair work.

[46] Under reference to his report, Mr Blackwood expressed the view that the small area of deterioration at the nearside of the road would have been visible to the pursuer as he approached and entered the right-hand curve. He considered that the motorcycle left the nearside of the carriageway at a point north of (ie beyond) what he described as the minor deterioration in the road surface; it had then carried straight on. He thought that if the pursuer had not struck the stone in the undergrowth, he would probably have been able to come to a controlled halt. Mr Blackwood said that, in his opinion, there were several potential reasons why the motorcycle left the carriageway on the nearside. He thought that the pursuer might have failed to interpret the severity of the curve at an early stage. There were other factors that might have contributed to the accident; they included: travelling too close to the edge of the road, travelling too fast for the severity of the curve, and travelling too fast for the road conditions as the curve tightened. He was of the opinion that the pursuer should have seen the area of erosion as he approached it.

[47] In Mr Blackwood's view, the probability was that the pursuer ran over the defect on the road and that doing so caused him to leave the carriageway. There was nothing officially laid down for motorcyclists at that time in relation to the road position to adopt at and for a right hand bend.

[48] In cross-examination, Mr Blackwood agreed that he was not in a position to say conclusively that the pursuer had been travelling at an excessive speed. In his view, the motorcycle effectively followed the line of the curve. If there had been an excess of speed, he would have expected a different trajectory as the motorcycle left the road; it would have ended up further out to the left than was the case.

[49] Mr Blackwood has substantial experience of investigating road accidents; he gave his evidence in a constructive manner and appeared keen to assist the court. I accept his evidence that the pursuer probably drove over the eroded area of road surface and that this caused his motorcycle to leave the road. The remainder of his evidence about possible contributory causes of the accident was, in my view, speculative. I acknowledge that there are a number of other factors, some of which Mr Blackwood highlighted, which might have contributed to the accident; they include excessive speed on approach to the 'S' bend, failure to interpret the bend properly, and riding too close to the edge of the road. It seems to me, however, that these other factors cannot be said to be more than mere possibilities and that there is insufficient evidence to show that any of them was, in fact, a material cause of the accident. As to Mr Blackwood's view that the pursuer should have seen and avoided the eroded strip of road surface, I think that this is not a justifiable criticism. My impression, looking at the evidence as a whole, is that it would have been difficult for a driver approaching at a reasonable speed to have seen the narrow strip of eroded road surface. The amount of time available to the pursuer to observe, take account of and react to the eroded area would have been minimal.

Peter Dixon

[50] The final witness was Peter Dixon, a chartered civil engineer and a traffic accident investigator. He spoke to a report prepared for the purposes of the present case. Mr Dixon formed his own consultancy in 2014; before that he worked for the Transport Research Laboratory. Mr Dixon explained that he had

specialised in highway engineering for most of his 40-year career. He spent 8 years with Surrey County Council working on a variety of design and maintenance functions. He worked for a major multi-national transport and engineering consultancy for 20 years. During that employment, he was involved in the design and maintenance of a range of infrastructure schemes in the north-west of England. For the past 18 years Mr Dixon has conducted forensic investigations and reconstructions of road accidents for the purposes of litigation in which he has been instructed as an expert witness. He said that he had undertaken commissions for a number of roads and highways authorities to evaluate maintenance systems with a view to finding weaknesses and suggesting improvements.

[51] Mr Dixon had not visited the accident site. He offered his views about the nature and extent of the defect present at the accident location on 12 August 2011 based upon his interpretation of the police photographs and those taken by Mr Blackwood on 5 June 2015. He had also seen the video taken by Mrs Dewar. His examination of one of the police photographs (by enlargement) suggested to him that the depth of the defect at the nearside of the carriageway was approximately 20mm. He was not certain about this estimate and stressed that he had little by way of a reference point within the photograph to allow his assessment to be necessarily accurate. He was, however, sure that the depth of the eroded area was well short of 50mm. Mr Dixon explained that the process of applying surface dressing to a road involved pouring a film of hot bitumen into which the contractor would apply a layer of stone chips. The mixture would then be rolled into the surface of the road. The thickness of such a layer of surface dressing would typically be between about 10 and 15mm. The defenders' officials informed Mr Dixon that a layer of surface dressing had been applied to the section of road at the accident site in 2004.

[52] It was Mr Dixon's understanding that by about July or August 2015 some patching repairs had been carried out in the central area of the northbound carriageway at the location of the accident. As far as he was aware, there had been no repairs carried out to the edge of the road.

[53] In his report and his evidence Mr Dixon referred to his examination and analysis of two pavement core samples, which he understood to have been obtained by contractors appointed by the defenders in August 2015. He sought to draw conclusions from the core samples about the thickness of the materials used in the composition of the road at the time of the accident and about the likely condition of the road at that time. It became clear, however, that Mr Dixon's evidence on these issues was based on a number of questionable and, in my view, unreliable assumptions. The first difficulty was that Mr Dixon's knowledge about the taking of the core samples was extremely limited and indirect. The contractors did not give evidence at the proof and no documentary evidence relating to their work was made available to the court. Mr Dixon had not been present at the time the samples were obtained and had no real knowledge of the way in which the sampling exercise was carried out. He was not in a position to say where exactly the samples had been taken from. He referred to photographs he understood the contractors to have taken at the time of their core sampling exercise; on the basis of a comparison of these photographs with the police photographs and those taken by Mr Blackwood, Mr Dixon concluded that the core samples had been taken in the area of road erosion that had existed at the time of the accident. There are a number of difficulties about Mr Dixon's approach to this aspect of the evidence. The photographs said to have been taken by the contractors were not produced at the proof; there was no direct evidence as to when or by whom they had been taken. It was not proved that the core samples lodged as productions were in fact the core samples taken by the contractors and examined by Mr Dixon. Mr Dixon's views were based on his understanding, apparently obtained from discussions with the defenders' officials in 2015, that no repair works had been carried out to the area of eroded road surface between the date of the accident and the core sampling exercise. This assumption is open to serious question. Mr McCudden accepted that there had been some temporary patching done to this area; he explained this to the pursuer in an email of 23 April 2012. Mr Blackwood, who visited the accident site, was of the view that there had been repairs to the eroded area.

[54] In view of these difficulties, I am not persuaded that any reliable conclusions can be drawn from the evidence given by Mr Dixon about either of the core samples. I do not consider that it would be safe to hold that the core samples showed the composition or condition of the road at the time of the accident.

[55] Mr Dixon is clearly an experienced accident investigator. He gave his evidence in a professional and objective manner. Most of his evidence was taken up with consideration of the core samples. I did not find the remainder of his evidence to be of assistance in resolving the contested issues.

Decision

[56] The preponderance of the evidence points towards the accident having occurred when the pursuer's motorcycle drove over the area of eroded road surface, causing it to leave the carriageway. This seems to me to be the most probable explanation for the accident. I acknowledge that Mr McBirnie disagreed, but on this point I consider that the views of Constables Harper and Brown and of Mr Blackwood are to be preferred. They were each satisfied that the accident resulted from the pursuer driving over the eroded strip at the side of the road. In this connection, it is significant that the pursuer's motorcycle was found slightly beyond the damaged area. As to the issue of speed, I do not consider that the evidence supports a finding that the pursuer was driving at an excessive speed or that he failed to exercise a reasonable level of care and attention as he drove round the first part of the 'S' bend in the road. I do not consider that he can be faulted for not noticing the eroded area as he came towards it; in my view, it would have been difficult for a driver approaching at a reasonable speed to have seen and reacted in sufficient time to the relatively narrow strip of surface erosion. Nor am I persuaded that the pursuer was at fault in regard to the line he adopted in driving round the bend in the road; the evidence on this point was at best equivocal; in my view it does not justify a finding that the pursuer was negligent in the line he selected.

[57] These findings are not sufficient to allow the pursuer to establish liability, however. In *MacDonald* v *Aberdeenshire Council* 2014 SC 114 the Inner House held that for a roads authority to be liable, an injury must be caused by a hazard that would create a significant risk of an accident to a careful road user and the authority must be at fault in dealing with the hazard. The second part of these requirements means that the pursuer must establish that a roads authority of ordinary competence using reasonable care would have identified the hazard and would have taken steps to correct it; the hazard must be apparent to a competent roads engineer.

[58] In the present case the pursuer does not advance any criticism of the adequacy or sufficiency of the defenders' system for inspecting the road where the accident occurred. He accepts that the approach governing inspection and maintenance of roads set out in the defenders' plan was entirely reasonable. There is no challenge to the method of inspection described by Mr McCudden in his evidence. The pursuer's case is accordingly a narrow one; it is wholly based on the proposition that Mr McCudden's inspection carried out on 19 July 2011 was negligent because he failed to identify the strip of eroded surface running along the side of the road on the northbound carriageway as a defect falling within either category 1b or 1c of the defenders' plan. In order to establish his case on this narrow basis the pursuer would have to prove two matters: first, that there was, in fact, a defect falling within one of those categories on 19 July 2011 and secondly that if there was such a defect on that date, Mr McCudden was negligent in failing to identify it. In my opinion, the pursuer has not proved either of those key points.

[59] As to the first point, I am not satisfied that there is any acceptable evidence that a defect falling within either category 1b or 1c existed at the time of Mr McCudden's inspection. The pursuer founded on the evidence of Constables Harper and Brown about the depth of the eroded area on the date of the accident, but I do not consider that their evidence on that point can be regarded as accurate or reliable. As I have already explained, their estimates of depth were based merely on visual impressions and not on any methodical or systematic investigation. They took no measurements. They did not draw the attention of the defenders to the alleged defect. It has to be borne in mind also that at the proof they were being asked about their recollections of small dimensions based on limited visual impressions formed at the scene of an accident more than six and a half years ago. Mr Hill, for his part, accepted that it was difficult to estimate dimensions on the basis of a visual examination of photographic and video evidence. I prefer the evidence of Mr McCudden to that of Constables Harper and Brown. Mr McCudden impressed me as a careful and competent roads inspector. He was clear that there was no reportable defect, in terms of either of categories 1b or 1c, at the time of his inspection; if there had been he would have identified and recorded it. I accept

his evidence on these points. Mr McCudden's evidence as to the absence of any dangerous defect in the road is consistent with the evidence of Mr McBirnie, another witness by whom I was generally impressed. His evidence was to the effect that there was nothing out of the ordinary about the condition of the road at the location of the accident. He described the condition of the road as breaking up slightly on the left-hand side. That seems to me to be a reasonable encapsulation of the matter. Mr Blackwood and Mr Dixon, although their evidence was subject to important limitations, also provided broad support for the view that the eroded area did not amount to a significant hazard. There is thus a substantial body of evidence tending to show that the descriptions provided by Constables Harper and Brown were exaggerated and, in particular, that it would not be right to rely on their estimates of the depth of the defect. I note also that there was no evidence of previous accidents due to the allegedly defective condition of the road or that any other motorcyclists had experienced difficulties because of it.

[60] Those findings are sufficient to dispose of the action in the defenders' favour. I would add that there was, in any event, no evidence which would enable the court to hold that Mr McCudden's inspection on 19 July 2011 was negligently performed. It is obvious that, in carrying out his inspection, Mr McCudden had to rely on his experience and make judgements, in the light of his skill and experience, about the condition of the road. There was no other witness with practical experience of carrying out road inspections. In that state of the evidence, there is no basis on which I could make a finding as to what exactly would have constituted a reasonable (ie a non-negligent) inspection in the circumstances. For example, suppose that I found as a fact that the defect was 42mm deep in some places; on what basis could I hold that failure to identify such a defect amounted to negligence, as opposed to an excusable error of judgement? Without evidence as to what would have been acceptable and unacceptable in terms of reasonable practice, it seems to me that the court is not equipped to decide whether the allegedly negligent inspector fell short of a reasonable level of skill and care. This is not, as counsel for the pursuer suggested at one point, a jury question on which the court can reach its own view without recourse to any evidence. In my opinion, the court's assessment as to whether the level of care actually shown fell short of the care that would be expected of a reasonably competent roads inspector in the circumstances has to be built upon the secure foundation of evidence explaining what such a hypothetical inspector would have done in the same set of circumstances. The necessary corner stone, comprising evidence as to reasonable and acceptable practice, has not been put in place in the present case. In short, there is no evidence as to what would have amounted to the exercise of an ordinary level of skill and care in the circumstances (cf *Hunter* v *Hanley* 1955 SC 200; *Honisz* v *Lothian Health Board* 2008 SC 235; and *French; Dempsie* v *Strathclyde Fire Board* 2013 SLT 247). In the absence of any acceptable evidence that there was a reportable defect in the road and that it amounted to one that any competent roads inspector would have identified, there is no basis on which I could hold that Mr McCudden was negligent in the way that he carried out his inspection on 19 July 2011.

[61] In conclusion, I find that the pursuer has not established the critical factual issues on which his case depends; accordingly, he cannot succeed in the present action. I have great sympathy for the pursuer, who sustained serious injuries with lasting effects. In order to obtain damages from the defenders he must, however, prove that Mr McCudden acted negligently. On the basis of the evidence led before me, I am not satisfied that the pursuer has done so. It follows that I must assoilzie the defenders from the first conclusion of the summons. I have reserved all questions as to expenses.