OUTER HOUSE, COURT OF SESSION

[2018] CSOH 102

PD21/15

OPINION OF LORD WOOLMAN

In the cause

MORAG McKENZIE AND OTHERS

Pursuers

against

(FIRST) ASDA GROUP LTD

(SECOND) DHL SERVICES LTD

Defenders

Pursuers: Beynon; Morisons LLP
First Defenders: Love QC, Pugh; Clyde & Co
Second Defenders: Shand QC, Morton Solicitor Advocate; BTO

23 October 2018

[1] A serious road accident took place near Drum in Perthshire on 9 January 2012. Mr Robertson, an employee of DHL Services Ltd, was driving a Scania articulated lorry ("the tanker") along the A977 eastwards toward Kinross. His load consisted of a very large quantity of aviation fuel. The weather and road conditions were good. Drivers had switched on their headlights, but it was still light and visibility was also good. Shortly before 4.28pm Mr Robertson drove through the Crook of Devon. As he left the village, the speed limit on the road increased from 30mph to 40mph.

[2] Mr McKenzie, an employee of ASDA Group Ltd, was also on the A977 that day. He was driving a Mercedes Sprinter van embossed with ASDA livery. He was delivering goods to a particular property. Relying on the van's satellite navigation device, he turned first into a cul de sac. He discovered that the house was not located there and checked his delivery note. It provided more information about how to find the road opening that he was looking for. He drove the van back to the main road and saw the "markers" mentioned in the delivery note. He realised that the other opening was nearby and lay to the east of the cul de sac.

[3] Mr McKenzie gave the following account of what happened next. He looked left at the T-junction and saw the tanker coming toward him with a line of cars behind it. It was not travelling very fast and was some distance away. He judged it safe to exit the cul-de-sac and executed a right hand turn. The van was then in front of the tanker, travelling in the same direction along the A977. Mr McKenzie accelerated, reaching in his estimate a speed of 30mph. He scanned to see the opening into which he was going to turn to make the delivery. About halfway between the two entrances he saw it. He then performed a mirror – signal – manoeuvre. The van had no central rear view mirror so he used the wing mirror. He saw the tanker positioned a comfortable distance behind him in the same carriageway. He then put on the indicator light, braked and began the right turn. He did make another check to see what was happening with the traffic behind him.

[4] From other evidence in the case, including the police investigations made at the time, the following picture emerges about the sequence of events. The distance between the two openings is 70m. After the van emerged from the cul de sac, the tanker began to overtake the van. It was entirely in the opposite carriageway. Mr McKenzie, however, was not aware of its position. When the tanker was almost level with the van, he began to make the right

hand turn. The nose of the van crossed the centre line of the road and entered a short distance into the opposite carriageway. The front left wheel arch of the tanker struck the front offside of the van. Although it was only a glancing blow, it deflected the tanker off course. It veered off the carriageway, over the verge, down an embankment and into a garden of a house called Blue Cedars, which is owned by Mrs Morag McKenzie.

[5] The tractor unit of the tanker detached from the trailer. Tragically, Mr Robertson sustained serious injuries in the cab from which he died. The trailer rolled over and thousands of gallons of aviation fuel spilled into the garden, but did not ignite. The van was left stationary on the road facing Drum. Mr McKenzie was found by individuals who came on the scene in a state of shock.

[6] Blue Cedars lies along a short road with three other houses. One of them was the delivery address. At the time of the accident, Mrs McKenzie was at home with her daughter and granddaughter, who both lived with her at the time. They each now sue for damages. Subject to one wrinkle, quantum is agreed. Accordingly, I shall say only this. The accident had a deep and lasting effect on their lives. Mrs McKenzie did not live in the house for two years afterwards.

[7] There was other relevant evidence. Prior to the accident Mr Leppard, a teacher at Alloa Academy, had been driving behind the tanker for about 20 minutes. He said that throughout that period it was being driven at or below the speed limit. Indeed he was somewhat frustrated, because he was late to pick up his son from school. He did not see the van because the tanker lorry obscured his view ahead. What he did see was this. The tanker moved smoothly into the other lane. He described it as a sinuous movement like that of a snake with the cab as its head. Mr Leppard's initial reaction was "you can't park there". He then noticed the trees to that side of the road beginning to shake and realised it was

crashing. His next thought was "we are all going to die". Mr Leppard did not recollect seeing any of the tanker's rear light cluster come on, either prior to the overtaking manoeuvre or during the period when it was out of control.

[8] The van weighed about four tonnes. It was fitted with an Isotrak device, which tracked its location and performance. Mr Kuldip Sond, a systems integration manager with ASDA examined the data from the device. He said that Mr McKenzie had driven normally that day. He had driven under the speed limit, and had not engaged in harsh braking, coasting or over-revving the engine. The data indicated that the van had travelled at a maximum speed of 26mph on the A977 after leaving the cul de sac, and decelerated to 19mph just before Mr McKenzie made the turn. Mr Kuldip Sond conceded that, while these times were accurate, it was possible that the van had attained higher speeds.

[9] Mr Alick Williams of the Vehicle and Operator Services Agency (VOSPA) examined the van on the day after the accident. He found that both the brake and indicator lights were in working order. This evidence was led because one of the experts, Mr Taylor, queried this point. I conclude that nothing material hinges on it.

[10] The tanker weighed about 44 tonnes. Its tachograph disclosed that it was travelling at a speed of 29.2mph at 16:27:24 hours. There is no data recording the speed between that time and the power interruption at 16:28:21 hours, which was the time of the collision. The tanker was also fitted with a "Telematics" satellite tracking system. It showed that the tanker had a speed of 33 mph at 16.28 and that the rollover prevention system activated at 16:28:43.

[11] Each party instructed a road traffic expert to prepare a report and I heard evidence from two of them: Messrs Hooghiemstra and Taylor. The first defender elected not to lead

Mr Elliott, but his report was lodged in process. Although I have derived considerable assistance from the expert evidence, I must reach my conclusions based on the facts.

[12] I begin with two observations. First, many accidents involve a combination of various factors. Secondly, the critical sequence of events took place in a very short space of time. The time that elapsed from the van turning into the A977 until the collision was under 10 seconds.

Mr McKenzie

[13] I am satisfied that Mr McKenzie was negligent. When he turned into the eastbound carriageway, he knew (a) that he was entering in front of a line of traffic in a 40mph zone, and (b) that he would be very shortly turning right. He owed a duty to take reasonable care to ensure that he did not either come on to the A977 or turn off it before he had checked that it was safe to do so. In particular, he needed to ascertain the position of the tanker and the other traffic behind at both points.

[14] I found him to be an unreliable rather than incredible witness. His account appeared to me to be now etched in his brain as a result of thinking about it so much over so many years. I reject his evidence that he checked his wing mirror and that the tanker was fully established in the lane reasonably far behind him. That simply does not square with the other evidence.

[15] Further, Mr McKenzie only checked his mirror once. As he himself accepted, a second check of the mirror or a swift glance over his shoulder before making the turn would have alerted him to the position of the tanker. In the whole circumstances of the case, that would have been the reasonable thing to do.

Mr Robertson

[16] I hold that Mr Robertson could have reasonably foreseen that if he drove the tanker negligently, it could cause harm to other road users and neighbouring proprietors. Further, it is fair, just and reasonable that he owe a duty of care to such persons: *Mitchell* v *City of Glasgow Council* 2009 SC (HL) 21. I therefore reject Miss Shand's preliminary argument that he owed no such duty to the pursuers.

[17] I conclude that Mr Robertson breached that duty by embarking upon the overtaking manoeuvre. A reasonable driver would have had regard to the following factors: (a) the van was embossed with ASDA livery and travelling slowly, so it might well be making further deliveries, (b) this was a single carriageway A class road, (c) the speed limit was 40mph, (d) there were various road features, including openings on each side, a bus stop, a pedestrian crossing, and a right-hand bend, and (e) the tanker was carrying a heavy load of volatile fluid. All these features made overtaking a potentially hazardous enterprise. I hold that Mr Robertson materially contributed toward the accident.

Apportionment

[18] Each defender has vicarious liability for the conduct of their drivers I must apportion the contribution that they should make toward damages and expenses, having regard to the degree of blameworthiness and causative potency: *Downs* v *Chappell* [1997] 1 WLR 426 at 445H. Each defender submitted that I should hold the other defender entirely responsible, or alternatively 80 per cent to blame. The pursuer contended that they were each equally to blame. Having regard to the whole circumstances, I apportion matters as follows: 75 per cent to the first defender and 25 per cent to the second defender.

Quantum

[19] As I mentioned above, quantum is agreed in the joint minute. It states:

> "28. In the event that the first and second defender, or either of them, is found liable to make reparation to the pursuers, quantum of damages is agreed to the date of proof in the following sums:
>
> i. £75,000 to the first pursuer;
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> ii. £20,000 to the second pursuer; and
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> iii. £5000 the third pursuer."

[20] Miss Shand argues that I should strike out the claims for the second and third pursuers on the basis that they represent pure economic loss. I construe paragraph 28, however, as precluding that argument. A joint minute is a contract. The form of words chosen by the parties here does not admit of qualification. Once the condition is met, payment must follow.

[21] But in any event the claim by the second and third pursuers relates to outlays and costs incurred by them as persons then occupying Blue Cedars and does not represent pure economic loss.

Conclusion

[22] At this stage I shall make an award of damages and expenses in favour of the pursuers, in accordance with the figures set out in the joint minute. I shall also certify the following persons as skilled witnesses for the pursuers: Mark Hooghenstra, Road Traffic Accident Investigator, Dr S Birrell, Consultant Psychiatrist, Dr R Howie-Davies, Consultant Psychologist and Paul Hanson, Engineer.

[23] Meantime I shall leave over matters relating to the expenses as between the defenders. If they are agreed, I shall reflect that in the same interlocutor. Otherwise I shall put the case out by order.