OUTER HOUSE, COURT OF SESSION

[2020] CSOH 20

PD92/18

OPINION OF LORD BRAILSFORD

In the cause

SAMUEL CAMERON

Pursuer

against

MARTIN SWAN AND ANOTHER

Defenders

Pursuer: Young QC, Thomson; Digby Brown LLP
Defenders: Shand QC, Bennett; BTO Solicitors LLP

27 February 2020

[1] I heard proof in this case in which the pursuer sought damages from two defenders as a result of a road traffic accident which occurred in Wellmeadow Street, Paisley in the early hours of the morning of 23 April 2016. The accident occurred when the pursuer was lying in the carriageway of the said street. The first defender was the driver of a van which collided with the pursuer. The second defenders were the employers of the first defender, the van driver.

Procedural background

[2] By terms of interlocutor dated 21 December 2018 Lord Boyd of Duncansby allowed parties a proof on liability. In terms of the said interlocutor the defenders were ordained to lead at proof. The defenders denied liability for the accident but separately stated a case that the accident was caused or materially contributed to by the pursuer's own fault and negligence[1]. It was not disputed that the proof on liability encompassed the issue of contributory negligence.

[3] Joint minutes were tendered either before or during the course of proof[2]. These minutes contained significant factual agreement and will be referred to where appropriate during the course of this opinion.

Non-contentious factual background

[4] On the basis of averment there was significant agreement in relation to the factual circumstances surrounding this accident. On 23 April 2016 at or about 0455 hours in the morning the pursuer, who had been a pedestrian walking in Wellmeadow Street, Paisley, was lying on the roadway of that street to the west of its junction with Lady Lane. Wellmeadow Street is a single carriageway extending generally east to west, there is one lane for vehicular travel in each direction, the street is subject to a 30mph speed limit. There is provision of street lights which were, at the time of the accident lit. Wellmeadow Street is a continuation of High Street, Paisley. At the time of the accident the first defender was driving a Mercedes delivery van registration number SF64 CGV which belonged to the second defenders. The first defender was driving in the course of his employment as a

[1] Answer 6, page 21 of record dated April 2018.
[2] Numbers 28, 29 and 30 of process.

delivery driver with the second defenders. He was in the course of making bakery deliveries to various locations in, amongst other places, the town of Paisley. Immediately prior to the accident the first defender was driving the said vehicle in a westerly direction on High Street and thereafter into Wellmeadow Street. As he approached Wellmeadow Street the first defender was following a private hire taxi vehicle driven by Robert Maule, a witness at the proof. The vehicle being driven by Mr Maule slowed down and pulled over to the nearside of the street at or about the junction of Wellmeadow Street and Lady Lane at which time the first defender overtook that vehicle. Thereafter the vehicle being driven by the first defender struck the pursuer on the westbound carriageway of Wellmeadow Street. Immediately after the accident emergency services attended at the locus. The first defender was convicted of an offence under section 3 of the Road Traffic Act 1998 having pled guilty to that offence.

Duties

[5] The pursuer's case was based on an alleged breach of duty by the first defender to take reasonable care to see that the pursuer did not suffer injury. The case was pled in this general manner having regard to the consideration that this was a personal injuries action. As developed, the duties were more precisely stated as a failure of a duty to keep a good lookout and a failure to keep a safe distance between the vehicle he was driving and the taxi vehicle being driven by the witness Mr Maule. There was no dispute that in the event of the first defender being found in breach of duty, the second defenders as his employers were vicariously responsible for his actions. As already noted there was a case of contributory fault pled by the defenders against the pursuer. That case averred a failure by the pursuer

to take reasonable care for his own safety constituted by a breach of a duty not to lie to down on a public road, at night, wearing dark clothing.

Evidence

(a) Defenders

[6] The defenders adduced evidence from four persons, Martin Swan, the first defender, Robert Maule, the taxi driver already referred to, Professor Graham Edgar, a cognitive psychologist and psycho-physicist specialising in visual perception and situational awareness and PC John McKinney, a police officer who attended the locus immediately after the accident which is the subject matter of this action.

[7] Robert Maule was the driver of the taxi which he was driving in front of the van being driven by the first defender. He said that he had driven along High Street as it led onto Wellmeadow Street. He noticed a van being driven behind him. He thought it was "a bit closer than I would like without tailgating". He took it that it was a delivery van and was "letting him pass". At or about the same time he saw what he thought were bags of rubbish lying on the road. He stated that "As I moved in to the side a delivery van which had been behind me has taken it that I was letting him past and has continued driving past and drove right over the top of the person." On appreciating that it was a person he stopped his vehicle to see that the person was "okay". When he realised that the van had run over, or collided, with the person lying in the roadway he resumed driving and he followed the van which had stopped at traffic lights approximately 100 yards beyond the locus of the accident. He flashed his lights to attract the van driver's attention. He left his vehicle and spoke to the van driver who had opened the van window adjacent to him.

Mr Maule thought the van driver appeared to be shocked when informed he had run over a person lying on the road. Both men then returned to the locus of the accident.

[8] In addition to the foregoing account of the accident Mr Maule described the light conditions at the time of the accident as being dark with, he thought, the sun just coming up. He thought that immediately prior to the accident he was travelling at about 30 mph. He thought that he had stopped "more or less next to the man" who had been involved in the accident. He accepted that he gave a statement to a police officer which was timed at 0520 on the morning of the accident. On being shown the note, he accepted that it "pretty much accords with my recollection".[3] The extract from the police constable's note book which the witness described was in the following terms:

> "I was driving along the High Street near to the university when I saw something lying in the middle of the road. At first I couldn't tell if it was a person or some rubbish but as I got closer I saw it was someone right in the middle of road. As I got to the junction with Lady Lane I pulled into the left and slowed down to try to move around the person lying in the road. As I moved to the side a delivery van which had been behind has taken it that I was letting him past."

[9] Martin Swan is the first defender in the action. On the day of the accident he was working in the course of his employment as a van driver. He had been employed in that capacity for 17 years at the time of the accident. On the day in question his shift started at midnight and was due to end at 0930. At the time of the accident he was en route to the Royal Alexandra Hospital in order to make a bakery delivery at those premises.

[10] In relation to his recollection of the accident he said that he became aware of a taxi in front of him at traffic lights in Causeyside Street, Paisley. He followed that taxi into High Street and was approaching Wellmeadow Street. As both vehicles approached the junction of Lady Lane and Wellmeadow Street the taxi began to pull to the left which Mr Swan took

---

[3] The statement was taken by PC John McKinney, who was a witness. The statement was spoken to by PC McKinney and forms number 7/52 of process.

to be the driver of the taxi permitting him to drive past. He drove past and stated "I felt a bump – I thought it was a pothole or stone on the road – maybe 10 to 15 seconds later I seen flashing lights and a taxi pulled up beside me. The driver of the taxi said 'that was a boy you ran over'". Mr Swan said he was concerned about this and stated that "I saw nothing on the road before the bump". He remembered that the taxi driver dialled 999 and that he, Mr Swan, spoke to the emergency services operator on the phone. He then parked his van adjacent to the accident and waited for the police to arrive.

[11] In relation to the conditions at the time of the accident, his recollection was that it was dark and he said "I thought that there were no street lights on". He was asked his height and answered 5 feet 8 inches. In response to questions in cross-examination he stated that he did not think he was driving too close to the taxi immediately prior to overtaking that vehicle. He reiterated that he thought the taxi was pulling to the left in order to allow him to overtake it. He said that he thought he was driving "pretty carefully". He was asked what position the man was in. He stated that when he saw the man, which was after the accident, he was lying across the road.

[12] PC John McKinney was on duty on the day of the accident. He arrived at the locus just after 0500 in the company of another constable. He took a statement from the first defender [4]. He confirmed that the first defender was at the locus when he arrived. He was asked about the position the pursuer was lying in the carriageway. He firstly confirmed that the pursuer was lying in the road. He said "his head straddled the central reservation, but mostly in west bound carriageway. His feet were pointing diagonally towards Lady Lane". He described the general alignment of the pursuer in the carriageway as being with his head to the west, lying diagonally with the feet towards Lady Lane.

[4] Number 7/52 of process.

[13] Professor Graham Edgar was instructed by the defenders "… to evaluate the psychological and perceptual factors that may have contributed to the road traffic collision at 0455 on the 23rd April 2016 on Wellmeadow Street Paisley."[5] Professor Edgar stated that he had "[O]ver 30 years experience working as a cognitive psychologist and psycho-physicist specialising in visual perception and situation awareness."[6] His curriculum vitae, material considered and sources used in the preparation of his report were provided to the court.[7] No challenge was made to the witness's expertise.

[14] Professor Edgar produced a report dated 7 January 2019[8]. This report was the subject of examination and cross-examination. In addition to speaking to his own report Professor Edgar was shown a report dated 21 August 2008 by David Loat, a specialist in traffic accident analysis and reconstruction instructed on behalf of the pursuer. He made certain comments and observations in relation to this report.

[15] Professor Edgar had been provided with information relative to the accident in the form of statements from the first defender, Mr Maule the taxi driver and PC McKinney. His narration of the material available to him is stated in his report [9]. The information recorded by Professor Edgar is consistent with the evidence I heard in court. The witness considered the issues of the visibility of the pursuer in the road to a person such as the first defender. In addition he considered the different concept of conspicuity, that is the extent to which a hazard "stands out" from its background.

[16] His conclusions on these matters were as follows:

---

[5] Number 7/16 of process, paragraph 3.1.
[6] Number 7/16 of process, page 2.
[7] Number 7/16 of process, pages 2-9.
[8] Number 7/16 of process, pages 2-9.
[9] Number 7/16 of process, paragraph 6.1-6.14.

"13.1 Mr Swan may have had a sightline to the prone figure of Mr Cameron by 'looking across' the curve as he approached the locus. Research suggests, however, that drivers rarely look across the curve in this way.

13.2 In the final approach to the locus, Mr Swan's view of Mr Cameron would, in all probability, have been impeded to some extent by Mr Maule's taxi. Only when Mr Maule's taxi pulled to one side, would the figure of Mr Cameron have been revealed.

13.3 Mr Cameron is likely to have presented as a relatively low contrast and low conspicuity hazard compared to other aspects of the scene.

13.4 Mr Cameron is likely to have been relatively less visible if he were laying across the road, rather than, 'in line'.

13.5 If Mr Cameron was laying, 'in line' he would present a more unusual aspect to an approaching driver than that provided were he laying across the road.

13.6 Mr Cameron may have presented in what could be considered an unexpected location and an in an unexpected attitude (laying prone in the roadway). This may have further lowered his conspicuity with respect to Mr Swan, making it more likely that Mr Swan would allocate attention to other (brighter, bigger, moving) aspects of the scene – such as Mr Maule's taxi.

13.7 Overall, I believe that there were issues with both the visibility and conspicuity of Mr Cameron, with respect to Mr Swan, that may have contributed to the incident of the 23rd April 2016 on Wellmeadow Street, Paisley."

(b) Pursuers

[17] Mr George Gilfillan was a road traffic incident consultant. He had prepared a report in relation to the accident in this action. That report was produced [10] and spoken to. He also spoke to a set of 18 photographs which he had prepared for use in conjunction with his report.[11] Mr Gilfillan stated that he had been between 1977 and 2001 a police officer with Strathclyde Police. In 1988 he had transferred to the traffic department of Strathclyde Police and thereafter been involved exclusively in road traffic issues. He had passed certain certificates in relation to that speciality and had attended the Standard Advanced Accident

[10] Number 7/17 of process.
[11] Number 7/18 of process.

Investigation Courses organised by Grampian Police in conjunction with Aberdeen University. Neither his qualifications nor his ability to give opinion evidence in relation to the accident in this action were challenged by the defenders. For the purposes of preparation of his report, Mr Gilfillan was provided with certain documentary material and a copy of a DVD showing video footage of a pedestrian and police drive through of the locus of the accident.[12] Mr Gilfillan also indicated that he attended the locus initially on 12 March 2017 at which time he conducted an examination, observed the road layout and obtained measurements thereof. That investigation was carried out during the hours of daylight. Having regard to the fact that the incident occurred during the hours of darkness he visited the locus again on 30 March 2017 to ascertain lighting conditions and drivers' views during the hours of darkness.[13] Between paragraphs 15-38 of the report Mr Gilfillan described the locus and what the photographs he had taken illustrated. In the remainder of the report Mr Gilfillan offered what were termed "comments" on various aspects involving the accident. This passage of the report included his opinion under the heading "Driver Reaction Times".[14] The author defined reaction time as "the time that passes between the moment the driver observes the need for action and the moment they take action." It was stated that this was made up of three elements, perception time, thinking time and action time. Having considered these matters Mr Gilfillan concluded and expressed the opinion:

> "… that there would have been insufficient time or distance available to Martin Swan to react by taking avoiding action to the pedestrian lying on the road due to the presence of the proceeding motor vehicle driven by Mr Maule."

[18] The pursuer's mother, Lindsay Cameron, gave brief evidence primarily relating to items of clothing which the defender had worn at the time of the accident.

---

[12] Number 7/17 of process at paragraph 13.
[13] Number 7/17 of process at paragraph 14.
[14] Number 7/17 of process at paragraph 63.

[19] PC Gordon McIntyre is a serving police officer based at the time of proof in Glasgow. He had 13 years experience as a road traffic police officer. His evidence involved a video drive through which he had, in the company of a police colleague, conducted on the evening of 19 July 2016 at or about 10.00pm. He explained that using a police car, a BMW 3 Series, he conducted two passes over the locus of the accident. During these passes a dash cam fitted to the vehicle recorded what was observable through the front windscreen of the vehicle during the drive through. He stated that the drive through was conducted at 30mph, that being the speed limit in force in the relevant roads. He stated that the video would show what he saw, as a front seat passenger in the vehicle, during the course of the drive through. He also expressed the view that if a person's position was higher than his in a saloon car, for example in the front seat of a van, a greater, or more extensive, view of the road ahead would be available. He said that he had a clear and unobstructed view of the road ahead. He accepted that a vehicle of the same sort as the taxi being driven by Mr Maule immediately ahead of the van being driven by the first defender was not used in the exercise. He further accepted that he was not aware of the distance which the taxi was ahead of the van being driven by the first defender. He explained that the exercise was not a reconstruction of the path of the van being driven by the first defender but that it provided, and was intended to provide, an overview of what might be seen from a vehicle following the same path. In cross-examination he accepted that the camera was situated in the middle, that is broadly equidistant between each side, of the vehicle and rested upon the dash. He further accepted in cross that the drive through was conducted at a different time of the day than the time when the accident occurred. Lastly, he accepted that the drive through was performed in summer at a different season of the year than the accident.

[20] He pursuer's final witness was Barry Seward, a road traffic investigator. Mr Seward spoke to a report[15] prepared[16] in relation to the accident in this case. He was not the author of the report, that person being unable to attend court. He did however say that he had read the report and considered all the evidence that the author had had access to. He had also visited the locus of the accident prior to giving evidence.

[21] The purpose of the report was to address the issue of the conspicuity of a person lying in the roadway in the position of the pursuer to a person driving a vehicle in the position of the first defender. In relation to the issue of conspicuity Mr Seward accepted that his knowledge and experience was in "not comparable to that of Professor Edgar". He stated that his evidence was based on experience of road traffic reconstructions which he had acquired whilst a serving police officer and latterly when engaged in the private sector as a road traffic investigator. He accepted that his scientific knowledge of the issue of conspicuity was not comparable to that of Professor Edgar. Notwithstanding the limitations imposed by that concession he expressed views on the efficiency of headlights on vehicles and their contribution to the issue of conspicuity. In cross-examination he accepted that the report to which he was speaking was not a reconstruction exercise. It was intended to assist the court and be illustrative of visibility and the view from the vehicle being driven by the first defender. The proposition was put in cross-examination to Mr Seward that the available evidence demonstrated the accuracy of the proposition that in some circumstances some people would be aware of something while in the same circumstances other people will not. He agreed with that proposition.

---

[15] Number 6/64 of process prepared by Mr Loat.
[16] A professional colleague of the witness.

Relevance of the first defender's criminal conviction - Law Reform (Miscellaneous Provisions) (Scotland) Act 1968, section 10

[22] There was no dispute that on 3 July 2017 the first defender pled guilty at Paisley Sheriff Court to a charge under section 3 of the Road Traffic Act 1988.[17] The charge to which the first defender pled guilty is in the following terms:

> "That on 23 April 2016 on a road or other public place, namely Wellmeadow Street, Paisley you Martin Swan did cause serious injury to Samuel Cameron, ... by driving a mechanically propelled vehicle, namely motor vehicle registered number SF64 CGV without due care and attention and did fail to keep a proper lookout, overtake a statutory vehicle, fail to observe said Samuel Cameron lying on the roadway there, cause said motor vehicle to drive over him to his severe injury and danger of life, contrary to the Road Traffic Act 1988, section 3."

Both parties were agreed that the provisions of section 10 of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1968 were relevant to the consideration of that conviction in the context of the present action. The relevant parts of the provision are as follows:

> "10(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in the United Kingdom ... shall ... be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings ...
>
> (2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence before any court in the United Kingdom ...
>
> (a) he shall be taken to have committed that offence unless the contrary is proved."

Although the submission of both parties in relation to the application of the principles in section 10 of the said Act of 1968 were expressed somewhat differently the conclusions they reached were essentially similar. It can be expressed in the following way. The effect of

[17] Joint Minute no 28 of process paras 24 and 25.

section 10 is now authoritatively explained, in a decision which is binding upon this court, by Lord Carloway in *Towers* v *Flaws*:[18]

> "The only effect of section 10 ... is to allow the pursuer to introduce the conviction into the proof and thereafter rely upon it to reverse the onus of proof as between themselves and the first defender. The manner in which this ought to be done is by proving the terms of the libel, as found established by the jury (usually by production of an extract conviction) and to compare it with the averments of negligence on record. In so far as there is a coincidence between the proved libel and the averments, there is no onus of proof on the pursuer. Thus, if the conviction involved driving at excessive speed or a failure to heed road signs, in the event of a dispute the onus would be on the defender to disprove these facts if they were reflected on record. Proof of the conviction achieves no other purpose."

I would note that the law in England and Wales in relation to these matters is based upon a different statutory provision but one couched in identical terms to section 10 of the 1968 Act[19]. Moreover the English statute had been construed by the courts in a way directly comparable to the approach expressed by Lord Carloway in *Towers (supra)*.[20] It is clear from the foregoing that having regard to the relevant terms of the charge already quoted in the context of the present case a burden of proof lay upon the first defender to prove that he did not drive without due care and attention and, specifically, did not fail to keep a proper lookout when overtaking a statutory motor vehicle, did not fail to keep a proper lookout when failing to observe the pursuer lying on the roadway and did not fail to keep a proper lookout when causing his motor vehicle to drive over the pursuer to his severe injury.

---

[18] [2015] CSIH at paragraph 27.
[19] Civil Evidence Act 1968 section 11.
[20] *Hunter* v *Chief Constable West Midlands Police* [1982] AC (HL) 529 per Lord Diplock at page 544D-E.

Defender's submissions

[23] Senior counsel for the defenders first submitted that there was no evidence that the first defender did not exercise due care and attention whilst driving his vehicle on the occasion of the accident. It was submitted that it was no part of the criminal charge of which the first defender was convicted, the consequences of which as a matter of law have just been discussed, that he drove too close to the vehicle in front of him. In any event, and notwithstanding that fact, there was no evidence to that effect. It was further submitted that the tenor of the pursuer's evidence as expressed by Mr Seward in oral testimony and by the author of the report that person adopted and spoke to was to the effect that it would be very unusual to encounter a pedestrian lying in a roadway.[21] There was a further concession in both the report relied upon and Mr Seward's oral testimony that it was a matter for the court to determine why the first defender did not see the pursuer lying in the road and that the driver of a vehicle would not expect to see a person lying in a road.[22] Beyond this reliance was placed on the evidence of Mr Maule whom it was said gave evidence to the effect that when he pulled in on seeing the person lying in the roadway and to allow the vehicle being driven by the first defender to overtake him that vehicle would be almost "on top of the person" in the roadway. The conclusion counsel for the first defender took from this evidence was that the pursuer's claim that the first defender failed to exercise due care and attention when driving the motor vehicle amounted to no more than a contention that the first defender did not see the pursuer lying on the roadway whereas Mr Maule in the vehicle preceding the first defender had noticed the pursuer in that position.

---

[21] No 6/64 of process paragraphs 6.3.24-25.
[22] No 6/64 of process paragraph 6.4.13.

[24] The submission was developed on the basis that it did not follow from the fact that Mr Maule saw the pursuer lying in the roadway that the first defender should have seen the pursuer in that position. In relation to that submission it was pointed out that prior to the accident the pursuer was lying prone in the roadway. It was an agreed fact that his feet were facing the westbound traffic, that is traffic coming in the direction which the vehicle being driven by the first defender was proceeding.[23] Beyond the terms of the joint minute it was observed that the evidence of Mr Maule, PC John McKinney and the locus of blood spots in photographs produced to the court supported the proposition that the pursuer's body and the point of impact with the first defender's vehicle was either completely or substantially in the westbound carriageway of the road in the proximity of the centre line.

[25] The evidence in relation to the positioning of the pursuer at the time of the accident was relevant because of the pursuer's submission that the primary issue in the case was the view and visibility of the pursuer in the roadway at the time of the accident. Senior counsel for the first defender noted that in evidence Mr Seward accepted that the issues of view and visibility were of primary importance in the case. Moreover Mr Seward stated that in relation to these issues "he definitely did not consider himself a comparable expert to Professor Edgar" the defender's expert in relation to those matters.

[26] In relation to view and visibility Professor Edgar gave evidence which was submitted to be uncontradicted.[24] In submission Professor Edgar's evidence was as follows. The first defender would require a line of sight to the pursuer. A line of sight is essential but of itself an insufficient pre-requisite to the pursuer being visible to the first defender. The Professor expressed the view that as the first defender travelled round the gentle

---

[23] Joint minute no 29 of process at paragraph 1.

[24] No 7/16 of process, the views are summarised at paragraphs 13.1-13.6.

right-hand bend immediately prior to the locus of the accident there may have been a line of sight to the pursuer but only if he were to look across the bend to where the pursuer was lying in the roadway. Whether or not that line of sight would exist would depend on where the two vehicles, that is the van being driven by the first defender and Mr Maule's taxi, were placed laterally to each other and how close to each other they were at that point in time. This view was not challenged in cross-examination. It followed that whether or not the first defender had the opportunity to observe the pursuer lying in the road depended upon him directing his view toward the pursuer across the bend and, at the time he so directed his gaze, to a sightline being present. These were essentially matters of chance. This evidence was said to be bolstered by Professor Edgar's opinion that drivers tend to look at the tangent point on a curve and where that point is at any given point in time will change depending on their position on the road.[25] Professor Edgar further explained that the reason drivers look at the tangent point of a curve is to enable them to stay in lane. That view was apparently accepted by Mr Seward in a letter that he wrote and which was produced in which he commented upon Professor Edgar's report[26] where he expressed the view, apparently in conformity with the views of Professor Edgar, that the purpose of a driver looking to the right of the vehicle ahead would be "to ascertain where the road is going and the severity of the bend being negotiated". In the same letter Mr Seward expressed the view that drivers tended not to fixate on a point but glanced around as they drove.[27] In commenting on these observations by Mr Seward, Professor Edgar explained that human beings do not have panoramic vision and can only see clearly for a small area directly in front of them.

---

[25] No 7/16 of process page 17, figure 1 and explanation thereto.
[26] No 6/65 of process.
[27] No 6/65 of process at paragraph 2.2.

[27] The conclusion and submission made by senior counsel for the defender in relation to this passage of evidence was therefore to the effect that whether or not the first defender had a line of sight to where the pursuer was lying amounted to no more than a matter of chance.

[28] The submission continued by accepting that once the taxi moved over to the nearside there would be no physical impediment blocking the first defender's view of the road ahead. It was however submitted further that the fact that the first defender did not see the pursuer after the taxi moved to the nearside does not mean that the first defender failed to exercise the standard of skill and care to be expected of a competent and careful driver. It was said that he may not have looked at the centre line at all, or if he did he may have looked at the centre line at a point further westwards to the position where the pursuer was located. Further evidence of Professor Edgar was relied upon in relation to this submission. It was observed that the Professor's evidence was that the human brain has a large amount of information to process in the act of driving and does not have the resources to process it all.[28] Factors which the first defender had to cognitively process as the taxi pulled over were suggested as being; what the taxi was doing; where it was going; what was happening at the nearby junction between Wellmeadow Street and Lady Lane; was there any traffic approaching; were any pedestrians in view. These considerations would require the pursuer's vision to be directed, albeit briefly, in different places. There was said to be a degree of acknowledgement of this factor by Mr Seward who in his evidence accepted that at the time on the morning of the accident "the primary object in view" to the driver of the van would be the taxi ahead of him and pulling in.

[28] No 7/17 of process at paras 11.6-11.16, 12.10 and 12.13.

[29] In regard to this chapter a further psychological consideration to which the court's consideration was drawn by Professor Edgar was that expectation is a relevant factor in where a driver will look and whether they will recognise a hazard as such if their eye does happen to fix on the thing that constitutes the hazard.[29] In that regard counsel relied on the fact that, as already noted, both Mr Loat and Mr Seward acknowledged that it would be very unusual to encounter a pedestrian lying in the roadway.

[30] In relation to the issue of what might have been observed by the first defender, Professor Edgar also expressed views about what "contrast" is and how it affects what can be seen.[30] He referred to an academic study which looked at contrast thresholds for drivers under similar like adaptation levels to those in the instant case. It was submitted that this study showed that for a sample of regular drivers that did not report issues with night driving the maximum estimated contrast of 65% for the pursuer's clothing surfaces horizontal to the road referred to in the report would have been above the threshold for about 75% of the drivers in this study. The implication is that 25% of such drivers would not have been able to discern the pursuer from the background. Professor Edgar, in considering this report, made the point that it was a laboratory study and although it tested car drivers they were not engaged in a driving task at the time of testing and the stimuli used were not realistic. His conclusion was that the study shows that not all drivers will necessarily observe targets of even fairly high contrast. His view and evidence was that in real life the figures for those that did not observe the target would be higher than those in the study. The conclusion drawn by counsel for the first defender and the submission was that even if the first defender had chance to look at precisely the spot where the pursuer was lying, he

[29] No 7/6 of process at section 12.
[30] No 6/17 at section 9.3.

may not have been able to discern a shape on the road. Furthermore, even if he had observed a shape lying on the road, he may not have been able to discern that the shape was a person.

[31] On the basis of the foregoing, counsel for the defender submitted that it did not follow from the fact that Mr Maule saw the pursuer the fact that the first defender did not see him must mean that the first defender's driving fell below the standard to be expected of the ordinary, competent and careful driver. It further followed that there was no evidence contradicting the unchallenged evidence of the first defender that he exercised due care and attention as he was driving on High Street and Wellmeadow Street and that he was keeping a proper lookout.

[32] As a matter of law it was submitted that it had not been established that the first defender did not look towards the centre line of the road at all or did not look at it often enough to constitute failure to keep a good lookout. It was further submitted that even on the hypothesis that it were to be held established that the first defender did not look towards the centre line of the road at all or did not look at it with any particular regularity and that meant that his driving fell below the standard of skill and care to be expected of a competent and careful driver, that does not mean that the first defender owed the pursuer a duty to look toward the centre line of the road. Nor, it was submitted, would it mean that the first defender owed the pursuer a duty to look towards the centre line at a point in time at which the first defender (a) had a line of sight to the pursuer and (b) was sufficiently close to the pursuer for the first defender in theory to be able to make out that there was a person where the pursuer was lying.

[33] In support of these propositions, counsel relied upon well-known statements of law in *Bourhill* v *Young*[31] and *Donoghue* v *Stevenson*.[32] I was invited to pronounce decree of absolvitor.

[34] In the event that, notwithstanding her primary submission, a finding of liability was made by the court it was submitted that the court should find there was a high degree of contributory negligence on the part of the pursuer. It was said that as between the pursuer and the defenders the pursuer should bear the heaviest responsibility.

[35] In that regard it was noted to be a matter of agreement the pursuer was intoxicated as he lay on the roadway.[33] There was further evidence that points to the pursuer having taken the drug MDMA, commonly known as ecstasy.[34] Beyond this there was said to be evidence which points on the balance of probabilities to the pursuer having deliberately lain down in the road.

[36] In relation to the law on contributory negligence it was submitted that as between a pursuer and a defender the court must have regard to both the blameworthiness and the causative potency of each party's acts.[35] Each case must, of course, depend on its own facts. In the present case the submission for the defender was that contributory negligence should be assessed at 85%. The factors relied upon were that the pursuer placed himself in the road, in the dark, wearing dark clothing against a grey road surface.

---

[31] [1943] AC 93.
[32] [1932] AC 562.
[33] Joint Minute no 28 of process at paragraph 8(vii).
[34] Joint Minute no 28, appendix 1 and 2.
[35] *Jackson* v *Murray* [2015] UKSC 5 per Lord Reed at paragraphs [19]-{26}, and per Lord Hodge at paragraphs [45], [46], [50], [54], [57] and [58].

Pursuer's submissions

[37] Senior counsel for the pursuer invited the court to accept the evidence of Mr Maule, who was described as having a good recollection of events. In particular I was invited to accept Mr Maule's evidence that "he felt" that the van "was a bit close" as it followed him towards the locus. My attention was also drawn to the fact that Mr Maul observed something in the roadway at the locus which he initially thought was rubbish but then recognised was a person. I was further invited to accept the evidence of PC McKinney in relation to the positioning of the pursuer on the roadway after the accident and the evidence of Mrs Cameron, the pursuer's mother, that the training shoes the pursuer was wearing at the time of the accident were "probably white" and had Adidas stripes on their side which were reflective. The evidence of George Gilfillan and Mr Seward were also relied upon.

[38] In relation to other evidence senior counsel for the pursuer contended that the first defender was "an unsatisfactory witness", and said to be demonstrably wrong on a number of matters. He was also said to have given his evidence dogmatically. On the basis of those factors I was, as I understood it, invited to categorise Mr Swan as an unreliable witness.

[39] In relation to the evidence of Professor Edgar, senior counsel for the pursuer did not take issue with Professor Edgar's scientific conclusions. He characterised the criticisms which he did make of the Professor's evidence as being "relatively minor ones". In characterisation of the minor errors he submitted that the "wording of his report appears, in places, to strain in favour of the defenders". He pointed out that various studies referred to in the text or footnotes were not produced. It was said he did not produce his calculations in relation to a statistic which was not readily apparent from the relevant study. Lastly, it was said that the Professor cited one study for a proposition which, when challenged in cross-examination, he said was a "throwaway" from the study.

[40] Senior counsel for the pursuer founded upon Professor Edgar's conclusion in evidence that there could have been a sight line down the offside of the taxi towards the pursuer given the right-hand bend "especially if there was a reasonable gap between the vehicles as they proceeded round the bend". He also founded upon the report in relation to contrast founding on the fact that the report showed there was a contrast difference which 75% of individuals could detect. In relation to this my attention was drawn to contrast differences between various items of the pursuer's clothing, particularly that the pursuer's top was dark and that his shoes were light.

[41] On the basis of the foregoing the submission on behalf of the pursuer was that there was a clear contrast between the driving of Mr Maule and Mr Swan. Mr Maule managed to identify and react to the pursuer's presence despite being concerned about the close proximity of the first defender's vehicle behind him which would have been a distracting factor.

[42] On the basis of that factor it was submitted that the defender should be found liable to make reparation to the pursuer.

[43] In relation to the issue of contributory negligence my attention was drawn to a number of reported cases involving drunk pedestrians in which judicial comment has been made as to the relevance of their intoxication.[36] The conclusion which I understood to be drawn from these authorities was the fact that whilst every case must turn on its own facts, and that intoxication was a fact in a case, it had to be considered as such. The fact that a person was intoxicated did not axiomatically give rise to a finding of contributory negligence. The important consideration or fact was how that feature affected and impacted

[36] *Lunt* v *Khelifa* [2002] EWCA Civ 801, *McNab* v Bluebird Buses 2007 REP LR 36, *Lightfoot* v *Goahead Group* [2011] EWHC 89 (QB)

upon a person's behaviour. My attention was further drawn to two cases involving drunk pedestrians lying in the roadway.[37] In regard to more general principles in relation to the law pertaining to contributory negligence, my attention was drawn to the opinion of Lady Hale in *Eagle* v *Chambers*[38] and to the opinion of Lord Reed in *Jackson (supra)*.

[44] Having regard to all the considerations identified in the foregoing authorities I was invited, if making a finding of contributory negligence, to apportion blame in the proportion 60% to the first defender and 40% to the pursuer.

Conclusions

(i) Reliability and Credibility

[45] The only challenge to witnesses' reliability and credibility came from the pursuer who challenged the evidence of the first defender, Mr Swan and, in some respects, the evidence of Professor Edgar. It is convenient to deal with these challenges at this stage.

[46] In relation to Mr Swan he was described as an "unsatisfactory witness who was demonstrably wrong on a number of matters". He was also said to have given his evidence "dogmatically". On the basis of those submissions I was invited to treat him as an unreliable witness.

[47] To be dogmatic, or express a view dogmatically, is conventionally understood to mean expressing a view or opinion in a peremptory or assertive manner in a way that is intended to convey that what the utterer says is undeniably true. The assessment of whether a person is speaking in that way is, I would venture, very likely to be a matter of subjective interpretation. It is, again in my view, apart from in no doubt the most obvious cases,

---

[37] *Donogho* v *Blundell* [1986] CLY 2254 and *Green* v *Bannister* [2003] EWCA Civ 1819.
[38] [2003] EWCA Civ 1107.

something which is difficult to form an entirely objective view about. My impression of the first defender as a witness would not conform to the description of someone giving evidence dogmatically. He seemed a little nervous, which I would not regard as unreasonable or unusual. He did not understand all questions and occasionally required a question to be repeated. Again I would not consider that unusual. He answered a number of questions in a manner which could be construed as inconsistent with his best interests, which I would not regard as a characteristic of dogmatism. It follows that, attempting to be as objective as possible, I do not accept the characterisation placed upon the first defender's evidence by senior counsel for the pursuer as dogmatic.

[48] In relation to the other matter relied upon, demonstrable error in a number of respects, it is correct that there were a number of errors in his evidence, for example in submission counsel pointed out that the witness said the accident happened at 4.40am when otherwise reliable evidence placed it 15 minutes later. I would not regard an error of that nature as being necessarily indicative of unreliability. It appears to me to be no more than a piece of evidence which given that it was unlikely to be correct the court would be entitled to disregard without necessarily affecting adversely an overall assessment of the witness's reliability. The other matters relied upon by counsel for the pursuer in his challenge to the reliability of the first defender were, in my view, areas where his evidence was at odds or varied with the evidence of other witnesses, principally Mr Maule. Again I consider that I am entitled to be selective in preferring the evidence of witnesses, no doubt influenced by any other evidence on the matter which was available. Further, I would regard the variances pointed out by counsel for the pursuer as mainly representing areas of detail where there was scope for slight differences in the view expressed by different witnesses.

[49] Looked at in the whole my view was that the first defender was a nervous and concerned witness. At all times he was in my view attempting to answer questions truthfully and to the best of his ability. Whilst there are aspects of his evidence where I would prefer the evidence of other witnesses I do not consider that there is any material which would entitle, or indeed persuade me to conclude, that the totality of his evidence should be rejected as unreliable.

[50] I would, respectfully, characterise senior counsel for the pursuer's challenge to the reliability of the evidence of Professor Edgar as being lukewarm. The first criticism was that the wording of his report appeared in places to strain in favour of the defender. Despite couching the proposition in the plural he cited only one example[39]. The example cited was where the Professor concluded in one aspect of his report in relation to the conspicuity of the pursuer on the roadway that he "would not necessarily be registered by all drivers" whereas, senior counsel submitted, the previous text of the report makes clear that the vast majority of drivers would register the contrast presented by the pursuer. In my respectful opinion senior counsel is in error in the conclusion he draws. There is no inconsistency in my view between the statement that a person would not necessarily be registered by all drivers where the previous text quite properly on the basis of scientific evidence accepted that a majority of drivers (75%) would register the person. It follows that I reject that criticism of Professor Edgar.

[51] The criticism that not all studies referred to in Professor Edgar's report were produced is factually correct. It is however equally correct that no criticism prior to proof of this was made by those representing the pursuer. There was no suggestion that the absence

[39] In number 7/16 of process at paragraph 9.3.15.

of the reports rendered the text of the report unintelligible nor were the conclusions of the report challenged on the basis of the absence of the reports. It is, in my experience, a fairly common feature of practice in the field of personal injuries litigation for reports by expert witnesses to cite papers and not, unless asked specifically by the opposing party, to produce the same. I do not consider that this criticism has merit in the context of a challenge to the reliability of Professor Edgar. I take a similar view in relation to the challenge based upon the text of the report not producing calculations in relation to a statistic which was said not to be readily apparent from the relevant study. The last challenge to the reliability of the Professor's evidence was the submission that he referred to a passage in a study which, in cross-examination, he accepted was a "throwaway" line from the study. Again it is factually correct that Professor Edgar characterised his reference to the line in that way. Rather than being the subject of criticism I interpreted that as candour on his part accepting that the part of the report referred to was of little weight or materiality.

[52] I did not consider that any of the criticisms alleged by senior counsel were, individually or collectively, of any materiality. More important was the concession made by senior counsel for the pursuer that he did "not take issue with Professor Edgar's scientific conclusions." I regarded Professor Edgar as a reliable witness.

[53] I should indicate that I regarded all other witnesses in the case as persons who were attempting to the best of their ability to, in the case of witnesses to fact, recall the events they spoke to truthfully. In the case of witnesses of opinion I considered that they were doing their best to be of assistance to the court and express their views within the confines of their knowledge and the information available to them.

(ii) General

[54] This was a case in which the defender led, there being an onus upon the first defender, if he were to succeed in rebutting the facts established in the terms of the libel of the criminal charge to which he had previously pled guilty. The relevant parts of that charge were that at the time of the accident with which this action is concerned the first defender drove without due care and attention, failed to keep a proper lookout and failed to observe the pursuer lying on the roadway. The onus of proof in relation to these matters plainly rested upon the first defender with the second defender being, derivatively, in the same position. Beyond that in relation to the case of common law fault pled against the defenders by the pursuer there was a case that the first defender did not keep a safe distance between his vehicle and the taxi in front of him, a case that the first defender failed to keep a good lookout and that he failed to see the pursuer lying on the roadway, essentially mirroring what was in the criminal libel.

[55] I deal firstly with the case pled by the pursuer that the first defender did not keep a safe distance between his vehicle and the taxi being driven in front of him. The only direct witnesses to this matter were the first defender and Mr Maule. The first defender's evidence was general in the sense that he said he was driving carefully, observing the speed limit and at a suitable distance behind the taxi proceeding down the road in front of him. Mr Maule's evidence was of a subjective impression that the van being driven by the first defender was "a bit closer than I would like" but, and not without importance, this was qualified by the concession that the manner of driving by the first defender at the distance he observed was "without tailgating". In the totality of that evidence, objectively judged, I do not find an evidential basis for an allegation of breach of a duty to keep a safe distance. The content of the duty to keep a safe distance must include consideration of factors such as road

conditions, visibility and the ability to stop the following vehicle without causing a collision. None of these features figure in the evidence in the context of the distance between the vehicle being driven by the first defender and the taxi in the time immediately prior to the accident. There is the further consideration that as a matter of fact the first defender was able, apparently without difficulty, to move his vehicle round the taxi when it pulled over to the nearside of the road. It follows that I do not consider that there is an evidential basis for this allegation of breach of duty.

[56] The primary case which must be considered arising both from the libel in the criminal charge and the case of common law fault is that the first defender failed to keep a proper lookout and failed to observe the pursuer lying in the roadway. Put bluntly if the first defender does not rebut the factual presumption in relation to these matters created by the existence of the criminal conviction the pursuer must succeed and the defenders must be found liable.

[57] In relation to this matter the first defender, upon whom the onus of rebuttal lies, relies primarily on the evidence of Professor Edgar whose conclusions in relation to this issue are set forth in paragraph [16] hereof. Essentially these conclusions were to the effect that as he approached the locus the first defender may, at certain points, have had a sightline by looking across the curve in the road he was proceeding upon to the pursuer's prone figure on the roadway. Importantly the conclusion was that a sightline might have existed not that it did exist. The qualification depended upon a number of factors spoken to in evidence by Professor Edgar. The most important of these qualifications was that the sightline would as a matter of probability have been impeded by the presence of the taxi in front of the first defender's van. Unimpeded visibility would only have been possible after the taxi pulled to the nearside of the road which occurred a very short distance from the

impact point. The degree of impediment to visibility constituted by the presence of the taxi until it pulled over was, on the basis of the evidence, unknown. The reason for this lack of knowledge is because the precise configuration of the taxi and the following van were not capable of ascertainment on the basis of the evidence. Neither the precise distance at any given time between taxi and van was a matter of evidence. Likewise the exact placement of each vehicle in the roadway and in conjunction with each other was, again on the basis of the evidence, unknown. Without knowledge of these factors Professor Edgar's evidence, unchallenged in this respect, was that it was impossible to determine if at any point in time there was as a matter of fact a sightline available to the driver of the van to the pursuer lying on the roadway.

[58] Beyond these features directly referable to the issue of a sightline there was the added complication given by the issue of conspicuity of the pursuer lying on the roadway. This aspect of matters depended, as I understood the evidence, on two distinct areas in the evidence of Professor Edgar. First, the issue of whether as a matter of contrast the pursuer would be likely to be visible to the driver of an approaching vehicle. In that regard the evidence was that with the exception of his trainers, which I accept were white in colour and had a reflective stripe on them, the pursuer's clothes were of grey or relatively dark colour. The evidence of Professor Edgar was that on the balance of probabilities the contrast between the clothing and the roadway upon which the pursuer was lying was such that not all drivers would be able to perceive the pursuer as the body of a person lying on the roadway. In relation to this some assistance is, in my view, obtained from the evidence of Mr Maule. Mr Maule did observe something lying on the roadway as he approached the locus. His evidence was that he initially thought it was rubbish but then appreciated that it had the shape of a body, at which point he began to brake and pull over. On the basis of the

evidence of Professor Edgar it is clear that the first defender would only have had an uninterrupted view of the pursuer lying prone on the roadway after Mr Maule's taxi had pulled to the nearside of the road. This was, clearly on the basis of the evidence, only a short distance from the place where the pursuer was lying. The first defender's evidence was that on going past the taxi he did not see anything on the road and then felt a bump which he thought was a stone or pothole on the road. My conclusion in relation to this passage of evidence is that the first defender was truthful and accurate when saying that he did not see the pursuer before the point of impact and that he cannot be criticised, or more importantly found at fault, for this. His view was brief and the lack of contrast between the pursuer and the roadway rendered the impression gained by the first defender as reasonable and consistent with driving with the appropriate degree of care and attention.

[59] The second aspect of Professor Edgar's report in relation to the visibility of the pursuer is essentially one concerning the psychology of drivers. Put simply the evidence of the Professor, which was in fact supported by evidence from Mr Seward, was that to the driver of an oncoming vehicle an unexpected thing in a roadway has the psychological effect on the human brain of lowering the conspicuity in relation to the object. The pursuer was lying in an unexpected location in an unexpected attitude and therefore his conspicuity to the first defender would, as a matter of probability, have been lower than had the obstruction in the roadway been of the sort that might have been expected. Whilst I would not consider that element of the evidence to be determinative of itself it is in my view another adminicle of evidence supporting the proposition that not only was the first defender truthful when saying that he did not observe the pursuer lying on the roadway but that he could not be held at fault for so failing.

[60] For completeness I should make some consideration of the evidence relied upon by the pursuer. In that regard I do not consider the characterisation placed on the pursuer's position by senior counsel for the defenders to be unfair or inaccurate. Her characterisation of the pursuer's case was that essentially because Mr Maule saw the pursuer on the roadway it followed that the first defender should have been able to see the pursuer and his failure to do so constituted fault. The error in that proposition is self-evident. Unless two persons are in exactly the same position at the same time (and, further, have equally acute vision) it cannot logically be said that what one saw would automatically be visible to the other. Beyond that simple logical proposition there are also the considerations that I have already discussed. The highest that Professor Edgar's evidence could be taken as demonstrating was that the first defender might have had a sightline to the pursuer. That is insufficient to satisfy the test of the balance of probabilities. As a matter of conspicuity there was a low contrast between the pursuer and the road surface upon which he was lying thus reducing the opportunity or possibility of the defender discerning his presence on the roadway. It was a matter of agreement that the pursuer was lying in line with the vehicle being driven by the first defender as it approached him. This orientation again reduced the ability of the first defender being able to discern the pursuer on the roadway. Psychological evidence was adduced which suggested that on the balance of probabilities, drivers of motor vehicles are slower to recognise unexpected objects in their path. The effect of this is that there is a time lapse between something being visible and the brain of a driver recognising that fact and taking appropriate action. The fact that Mr Maule initially considered what was in the road as rubbish is, at least to some extent, supportive of this.

[61] The pursuer produced evidence from two road traffic incident consultants, Mr Gilfillan and Mr Seward. Both were clear that the exercises they undertook were not

reconstructions of the accident but merely tools designed to assist what might have been visible at the locus to a person in the position of the driver of the van. Neither of these persons sought to challenge the evidence of Professor Edgar. Mr Seward accepted that Professor Edgar had far more knowledge in relation to questions of visibility than he possessed. Both these persons accepted there were limitations in the information they produced based upon differences between the time and road conditions prevailing when they conducted their investigations and when the accident occurred. I am bound to say that whilst I have no criticism of the content of what was produced by Mr Gilfillan or of that which Mr Seward spoke to, I did not find that material of particular assistance in reaching a view in relation to the merits of this action.

[62] In conclusion I am satisfied that the first defender was truthful when stating that he saw nothing in the road ahead of him prior to impact. On his approach to the locus his view of the position where the pursuer was lying was obstructed or at least impeded by the presence of Mr Maule's taxi in front of him. He may never have had a sightline to the accident locus. Even if he had a theoretical sightline to the locus, he may not actually have looked at the position where the pursuer was lying. He required as part of his normal driving to have regard to all other aspects of the road. The evidence was clear that drivers require to look at a number of locations as they proceed. It follows that if at any time he happened to look to the position where the pursuer was lying there might have been no sightline to that point. In any event the pursuer was a low contrast, low conspicuity and unexpected object on the roadway. Having regard to all these features I consider that the first defender has rebutted the onus upon him to disprove the libel of the criminal charge to which he pled guilty and was convicted. The pursuer has not proved breach of the sole

standalone duty at common law, that is a failure to "keep a safe distance between his vehicle and Mr Maule's taxi."

[63] There remains the issue of contributory negligence. Having regard to the views I have expressed in relation to the issue of fault, this is no longer live. I should however make some brief observations. I take no issue with the submissions of either party in relation to the applicable law. The question of contributory negligence is a matter of fact to be determined by the factfinder. In assessing those facts to apportion blameworthiness the court requires to have consideration of the causative potency of each party's acts. The fact that a person was intoxicated when they were injured as a result of another person's breach of duty does not axiomatically give rise to a finding of contributory negligence. The court requires to have regard to the causative potency of the person's intoxication in the same way as it would any other causative factor.

[64] In the context of the present case, had I determined that the first defender was at fault for the accident I would, depending upon which breaches of duty had been upheld, have required to have consideration of his driving without due care and attention, failing to keep a proper lookout, failing to observe the pursuer lying on the roadway and failing to keep a safe distance between himself and the taxi in front of him. These are plainly important features in the causation of a road traffic accident. On the other hand I would have required to consider the fact that the pursuer of his own volition, whilst he was intoxicated, lay down on a public road in the centre of a large town. The degree of intoxication would, as a matter of probability, have at least some bearing on the issue of causative potency. In that regard there was little evidence but I would have been entitled to have regard to the fact that the lying down on a road and apparently going to sleep at or about 5am is, on the balance of probabilities, action redolent of a significant degree of

intoxication. Having regard to all these considerations I would have found that the pursuer's action significantly contributed to his accident. I would correspondingly have made a significant finding of contributory negligence.

[65] In light of the foregoing I will assoilzie the defenders from the conclusion of the summons.