

**SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH  
IN THE ALL SCOTLAND SHERIFF COURT**

[2018] SC EDIN 01

PIC-PN279-17

JUDGMENT OF SHERIFF PETER J BRAID

in the cause

GRAEME JOHN DALY

Pursuer

against

(FIRST) DAVID HEEPS; and (SECOND) MARKERSTUDY LIMITED

Defenders

**Act: Lloyd**

**Alt: Murray**

Edinburgh, 9 January 2018

Having resumed consideration of the cause, the sheriff makes the following findings in fact:

1. The parties are as designed in the instance. The first defender (hereinafter, “the defender”) was the driver of a motor vehicle involved in a collision with the pursuer, as hereinafter described. The second defender had issued an insurance policy in respect of the vehicle.
2. On Sunday 23 August 2015, the pursuer was participating in a 10-mile cycling event, which took the format of a team time trial, along with team-mates David Barclay and Gordon Dick.
3. The pursuer and his team-mates had special time-trial bicycles, special cycling clothing and special aerodynamic helmets.

4. The event took place on a route from near Mawhill, in Perth and Kinross, along the A91 to a junction with an unclassified road near Middleton Fossoway; then along that unclassified road (“the unclassified road”) to near Crook of Devon, where it joined the A977; then along the A977 in the direction of Kinross, to the junction with the B916 at Thalls Farm; and back to Mawhill. The route consisted of three left-hand turns, designed so as to avoid participants having to turn right across the carriageway.
5. The roads over which the event was held were public roads. They were not closed for the event. The cyclists had no priority over motorists (nor *vice versa*).
6. There were marshals on the course and signs warning other road users that a cycling event was taking place. The marshals were wearing high-visibility jackets.
7. The objective of the event was for each team to complete the route in the shortest time possible. All three team members had to finish for their time to count. Team members rode in formation.
8. During the race, the pursuer and his team-mates generally adopted a single file cycling formation, to reduce the aerodynamic drag on the second and third cyclists.
9. The pursuer and his team-mates hoped to complete the route in less than 25 minutes. Their aspirational average speed was at least 24 miles per hour.
10. As the pursuer and his team-mates approached the first left hand turn, being the junction of the A91 with the unclassified road, they were travelling at around 25 miles per hour. Mr Barclay and Mr Dick successfully turned into the unclassified road. The pursuer missed the turning, and continued past it for a short distance. He had to turn back along the A91 and turn right to join his team-mates.

11. The pursuer's team-mates slowed to around 22 miles per hour to allow the pursuer to catch up with them.
12. After entering the unclassified road, the pursuer caught up with his team-mates within around 200 yards. They then accelerated.
13. The national speed limit of 60mph applied to the classified road. The road surface was tarmac, with no centre line marking. The road was rough at the edges, with numerous potholes, some of which were filled with rainwater.
14. Near the junction of the unclassified road with the A91 there was a sign indicating that it was a narrow, single-track road. There was a further, small, "narrow road" warning sign near the entrance to Newbigging Farm. The pursuer's route took him past both of these signs but he did not notice either sign.
15. As they passed Newbigging Farm, the pursuer and his team-mates were cycling in single file, at around 25 miles per hour. Mr Barclay was in the lead, followed by Mr Dick, with the pursuer in third position. Their road position was around one third of the width of their side of the carriageway from their nearside.
16. Meanwhile, the defender was approaching in the opposite direction, in his Ford Explorer 4 x 4 left-hand drive car, registration number 111 Y3X. He had joined the unclassified road from the A977. At that end of the road, there were also "road narrows" and "single track" road signs. He was accompanied by his wife in the passenger seat, and his daughter, sitting in the rear. The Ford Explorer was towing a trailer with a boat (a Toyota Marine Sport) on it. The total length of the car and boat

(together, a "rig") was about 43 feet. The car was 6½ to 7 feet wide. The maximum width of the trailer, including its outriders, was about 8 feet 2 inches.

17. The defender was aware that a cycling event was taking place on the unclassified road. While travelling along the unclassified road, he had passed at least two groups of cyclists taking part in the event. Accordingly, he was, or ought to have been, aware that the cyclists were travelling in groups of three, and were cycling fast. He was, or ought to have been, aware that it was likely that he would encounter further such groups.

18. Mr Barclay saw the Ford Explorer approaching when it was around 200 yards in front of him. He moved to his left, and shouted a single-word warning to his team-mates. When he was around 75 yards from the Ford Explorer, he saw that it was pulling a trailer. He did not issue a further warning to his team-mates.

19. Mr Dick anticipated from the movement of Mr Barclay's cycle left that he was to become the lead cyclist. Mr Dick moved slightly to his right. He heard the warning from Mr Barclay. He saw the Ford Explorer and moved across to his left, taking up position behind Mr Barclay.

20. The pursuer heard Mr Barclay's warning. He gave a momentary glance and saw the Ford Explorer. He was approximately 200 yards from the Ford Explorer. He did not look up again. He moved across to his left. He moved his hands from the racing position, that is on the centre of the handlebars, to a position more towards the outside of the handlebars.

21. All three cyclists were no more than a foot from their nearside verge.

22. The defender saw the approaching cyclists as he neared Newbigging Farm. There were no passing places between him and the cyclists at that time. He was travelling at about 25 miles per hour. He slightly reduced his speed but was still driving in excess of 20 miles per hour. He maintained his direction of travel. The nearside wheel of his trailer was not hard up against the edge of the tarmac surface of the road. The defender's rig was encroaching on to the pursuer's carriageway, leaving insufficient space for the cyclists to pass safely at speed.
23. Mr Barclay and Mr Dick proceeded past the Ford Explorer and trailer, missing it by a matter of inches. As the pursuer passed the Ford Explorer, he assumed that he had safely negotiated the hazard posed by it. He did not see the trailer.
24. As the pursuer passed the trailer, his upper right arm and right hand came into contact with the offside outrider of the trailer. He fell from his bike. He sustained injury. At the time, the pursuer did not know what he had struck.
25. The said collision occurred at a point on the unclassified road, around 75 metres south east of the Newbigging Farm entrance. The width of the road at that point was between 11 and 12 feet.
26. The defender was unable to significantly reduce his speed, or stop his vehicle, because he was driving too fast to allow him safely to do so.
27. The defender was not aware that his vehicle had struck the pursuer.
28. The defender drove at excessive speed, having regard to the nature of the road, and the known fact that a cycling event was taking place.

29. The defender's trailer was not hard up against his nearside verge. Had it been, the accident would not have occurred.

30. The pursuer cycled at excessive speed having regard to the nature of the road and the likelihood of meeting vehicles coming in the opposite direction. His doing so, and his failure to keep a proper lookout, materially contributed to the accident.

31. The accident was filmed on a "dash-cam" video recorder in a minibus driven by Gordon Jenkins and which had been following the pursuer and his team-mates along the unclassified road (5/20, referred to here as the "video footage").

Finds in fact and law:

1. The defender breached his duty of reasonable care towards the pursuer in respect that he did not keep to the left and drove at excessive speed.
2. The pursuer having suffered loss injury and damage through the fault of the defender, is entitled to reparation therefor.
3. The pursuer having materially contributed to the accident through his own negligence, the damages payable to him should be reduced accordingly.
4. The loss sustained by the pursuer is reasonably quantified at £110,000.
5. The appropriate allocation of fault between the parties is 50% to each.

Therefore, grants decree for payment by the defenders, jointly and severally or severally, to the pursuer of the sum of FIFTY FIVE THOUSAND POUNDS (£55,000) STERLING as full and final damages with interest at the rate of 8% per annum from 9 January 2018 until payment; reserves meantime all questions of expenses and appoints parties to be

heard thereon at 10.00am on 9 February 2018 within the Sheriff Courthouse, Chambers Street, Edinburgh.

## **Note**

### **Introduction**

[1] In this personal injuries action, the pursuer is suing for damages in respect of an accident which he sustained on 23 August 2015. On that date, whilst participating in a cycling event he was riding a bicycle along an unclassified road running between the A91 and A997 near Kinross, when he was involved in a collision with a trailer being towed by a car driven by the first defender (hereinafter, "the defender"). The action is founded upon the defender's alleged negligence. The defender denies liability, maintaining that the action was caused by the sole fault of the pursuer. The second defender is the defender's motor insurer and, as such, is jointly and severally or severally liable to the pursuer for any damages payable.

[2] The proof called before me on 14 November 2017. At the outset of the proof, a joint minute was lodged agreeing damages at £110,000 and the proof therefore proceeded before me on 14, 15, 16 and 17 November, restricted to the issues of liability and contributory negligence. The pursuer was represented by Mr Lloyd, Advocate and the defender by Mr Murray, Advocate.

[3] Evidence was given by the pursuer and by Paul Zarb, David Barclay, Gordon Dick and Gordon Jenkins. Of these, Mr Barclay and Mr Dick were the other members of the pursuer's team, and were eye witnesses. Mr Zarb had helped organised the event,

and gave general evidence about it and the presence of marshals, and of signs warning of the event. Mr Jenkins was a bus driver who was driving along the road behind the cyclists, and as such was also an eyewitness. He also spoke to video footage taken from his dash-cam. Evidence was given by the defender and by his wife, Janet Heeps, PC Graham Whyte, PC Stewart Copland and James McCartney. The defender's wife had been concentrating on her phone at the time of the accident and could offer no evidence of any value to the issues in the case, other than confirming that the occupants of the defender's vehicle were unaware that any collision had occurred. PCs Whyte and Copland had viewed the dash-cam footage. Finally, Mr McCartney was presented as a skilled witness. He had prepared a report, no 6/10 of process, based upon his viewing of the dash-cam footage and a visit to the *locus*. While the pursuer's counsel did not dispute that Mr McCartney possessed skill and expertise, he did contend that he was not properly a skilled witness in the context of this case because he could not give any evidence which would assist the court. However, Mr McCartney did use his skill to derive an estimate of speed of the defender's vehicle from his viewing of the video, based partly on his having taken measurements at the *locus* and to that extent I consider that his evidence was both admissible and helpful, since that is not an exercise which I could have undertaken myself (at least not without knowing the distance between two fixed points on the road). However, I do agree that when it comes to interpreting the video, Mr McCartney has no particular skill or expertise and to that extent, evidence by him is not admissible.

[4] As regards my assessment of the witnesses, I generally found all of the witnesses other than the defender to be credible and reliable. I discuss the defender's credibility and reliability below at paragraph [26].

### **Issues not in dispute**

[5] Many issues were not in dispute either because they were admitted on record or because evidence in relation to them turned out to be uncontroversial. I will deal with these first.

### ***The cycling event***

[6] The event in which the pursuer, an evidently keen and proficient cyclist, was participating was a team trial organised by Kinross Cycling Club. The 10-mile route took in the classified road where the accident occurred, which ran between the A91 and the A997. Teams of three set off every few minutes, and the object of the event was to complete the route as quickly as possible, all members of the team having to finish (together) for their time to count. The target time the pursuer's team had set itself was something less than 25 minutes (meaning that, of necessity, they had to cycle at an average speed of more than 24mph). The team consisted of the pursuer, David Barclay and Gordon Dick. The formation in which they were riding was in a line, that is, one behind the other with the lead cyclist changing periodically. The normal road position of the bikes was about one third of (their side of) the carriageway out from the verge, which was equivalent to about two or so bike-widths. When the lead cyclist tired, or

simply no longer wished to be in the lead, he would pull over to his left which allowed the other two to pass and the previous lead cyclist would then bring up the rear. For aerodynamic efficiency, the team cycled as close together as they could which in turn meant that the cyclists in second and third position had to keep their eyes on the rear wheel of the bike in front rather than on the road, so as to avoid colliding with the bike(s) in front. There were marshals positioned along the route and also “cycling event” signs. The roads were not closed to the public and the cyclists had no priority over motorists (or *vice versa*). The normal rules of the road, including the provisions of the Highway Code, therefore applied.

### *The road*

[7] The unclassified road on which the accident occurred was a single track road with passing places. There were “road narrows” and “single track road” signs at either end of the road. The road was rough at the edges with potholes (some of which were filled with water on the day of the accident). The speed limit was 60 mph. The surface was tarmac and there was no centre line marking. The width of the road at the point where the accident occurred was not entirely certain, because no one measured it at the time, and it was a matter of agreement that the road had been repaired since the accident and was now wider than it had been then. However, the width was somewhere between the defender’s rough estimate of three feet wider than the width of his rig (i.e. something just over 11 feet) and Mr McCartney’s more scientific estimate, nonetheless based on an assumption of the width of the potholes, of 12 feet 3 inches.

*The defender*

[8] The defender was driving a left hand drive Ford Explorer 4 x 4, registration 111 Y3X. He was towing a boat, namely a Toyota Marine Sport, on a trailer with outriders, the purpose of which was to guide the boat into position. The total length of the car and boat (which the defender referred to as a "rig") was about 43 feet. The vehicle was about 6½ to 7 feet wide. The maximum width of the trailer including outriders was about 2.5 metres (8 feet 2 inches).

*The accident*

[9] Although the defender somewhat disingenuously queried on several occasions in the course of his evidence whether there ever had been a collision between his trailer and the pursuer, it was in fact admitted on record that there had been such a collision, and there was no doubt, on the evidence, that a collision had occurred. Bearing that in mind, none of the following was controversial. The pursuer and his team-mates were cycling in a generally eastward direction along the road at about 24 to 25 mph with the pursuer at the rear and Mr Barclay at the front. When turning into the unclassified road from the A91, the pursuer had initially missed the turning, resulting in his having to make up ground on his team mates, but he had caught up with them by the time of the accident. There was some variation in the evidence as to where in the formation the pursuer was when he missed the turn, but it is more likely that he was at the rear, and not paying attention to the road, particularly as the other two in the team did not miss

the turn. However, nothing turns on his precise position at that point. Meanwhile, the defender and his rig were travelling in the opposite direction, down the hill at approximately the same speed as the cyclists. Mr Barclay and Mr Devlin managed to cycle between the rig and the verge of the road without hitting the car or the trailer. The pursuer did not. He did miss the car but his shoulder struck the outrider and he was thrown from his bike sustaining various injuries. The cyclists were being followed by a minibus driven by Mr Gordon Jenkins who captured the incident on his "dash-cam", the video footage from which was played many times during the course of the proof. On it, the cyclists can be seen cycling towards the defender's vehicle, which does not stop but continues to drive towards, and past, Mr Jenkins' bus. The footage of the collision itself is indistinct, but Mr Jenkins, who was approaching Newbigging Farm at the time, can be heard uttering an expletive at or about the point of impact. The footage then shows Mr Jenkins' vehicle drive forward until he reaches the cyclists. The pursuer is lying on the verge. One of the cyclists, on the evidence probably Mr Barclay, can be heard to say "Can you call an ambulance for him, I think it's a broken arm". Mr Jenkins replies "Right, I also think I've got it on the camera as well. She never even noticed him." The cyclist then said "she never even slowed down" or words to that effect. Clearly at that time, neither the cyclists nor Mr Jenkins appreciated that the defender's car was left-hand drive, and assumed that the defender's wife, who was the passenger, was the driver. Examination of the footage discloses that there are puddles on each side of the road, close to the verges, presumably being potholes filled with rainwater.

**The disputed issues**

[10] Essentially two issues arise on the pleadings. The pursuer makes two criticisms of the defender's driving. The first is that he made no effort to slow or stop; and the second is that he was not only encroaching on the pursuer's side of the road but that he did not pull over to the left as far as he could. The defender's answer is that he was unable to stop and in any event it made no difference because even if he had, the pursuer was not looking where he was going and would still have struck the trailer. As far as encroachment is concerned, the defender's position was that he was as far over to the left as he could reasonably be. He claims that the wheels of his trailer were at the edge of the tarmac and that he could not have pulled over any further without risking one of the wheels going into a pothole, which could have been dangerous. I will now discuss the evidence in relation to each of these issues in turn.

***Speed***

[11] The pursuer was unable to give any material evidence about the speed of the defender's vehicle, principally because he was not looking at it. He spoke of a momentary glance when he saw the vehicle coming over the brow of the hill and in his own words he didn't see much of the vehicle after that because he was relying on Mr Barclay to keep them safe. As they approached the point where the accident happened, Mr Barclay moved over to allow Mr Dick to move through. Mr Barclay then gave a warning, shouting something along the lines of "get in". At the same time as the pursuer moved in he moved his hands from their central "racing" position on the

handlebars to the outside of the handlebars, for greater stability. He moved into the left hand side as quickly as he could. He was aware of the car passing him safely (which was the next time he saw the car after his initial glance) but he hadn't seen the trailer. The next thing he knew he was lying on the ground. At the point of impact his speed was 23/24 mph, possibly slightly less. It felt like the vehicle was flying past but he could not give any estimate of its speed. In cross-examination, the pursuer said that the team had no plan for dealing with unexpected encounters with tractors or other farm machinery although he acknowledged that part of the race was on an unclassified road which was not closed to the public. He accepted that he was not aware that the car was towing a trailer. He was unaware of any reduction in speed on the part of the cyclists. He didn't recall seeing any "road narrowing" signs. He had missed the turning from the A91 onto the unclassified road. If the car and trailer had been stationary he would probably still have hit them. However he accepted that even if the car and trailer had been where the defender claimed (looking at photograph number 2 in Appendix 5 of 6/10 of process), to cycle through the gap between the trailer and the edge of the road at 24 mph would require concentration.

[12] Mr Barclay said that the cyclists had resumed a speed of 22 or 23 mph, having slowed down to 20 mph or less to allow the pursuer to catch up when he missed the turning from the A91. When he saw the car at first it was 150 to 200 yards away. At that time he didn't see that it was pulling anything. When he did see the trailer it was about 75 yards away. As soon as he saw the car he shouted "nose". That was an indication to his team-mates that a hazard was approaching. He estimated the speed of the car when

he first saw it as being about 30 mph but accepted that it was difficult to estimate the speed of an oncoming vehicle. The car made no effort to slow its speed. In cross-examination, Mr Barclay said that he would have expected his team-mates to have looked up on hearing him shout “nose”. He said he had slowed down on seeing the trailer by adjusting his pedal speed. He hadn’t known whether he would get past the trailer or not. He couldn’t brake quickly because his team-mates would have collided with him which would have caused an even greater accident.

[13] Mr Dick said that the speed of the cyclists was in the region of 24 to 25 mph. He saw the vehicle when it was more than 200 metres away. Mr Barclay shouted “nose” at the same time as Mr Dick saw the car. As they got closer to the car, he realised that it was towing a trailer with a boat on it. The cyclists’ pace had reduced slightly but was still in the low 20s. The car and trailer just missed Mr Dick. He estimated the car speed as being certainly faster than the cyclists – 25 to 30 mph.

[14] Mr Jenkins said that he was travelling behind the cyclists, allowing a reasonable distance between them, not wishing to hassle them. He was going at about 22 mph. The car seemed to keep coming at the same speed.

[15] The defender said that he was driving at 25 mph when he saw the cyclists. He had passed groups of cyclists on the road already. He saw this particular group of cyclists and he thought that they would stop until he was past, although it is unclear why he thought that, since he also said that they did not appear to moderate their speed. When they kept going he assumed the gap was wide enough, although, again, it is unclear why he assumed that since he also said that often other road users saw his car

but not his trailer, which he knew to be wider than his car. He had passed the last passing place where he could have stopped, and on seeing this group, while he didn't judge that it was an emergency situation, he couldn't possibly have stopped before he met them, because of the weight of his rig. He probably slowed down a bit but otherwise he maintained the same speed. He was, in his own words, going far too fast to drive into the area with potholes because of the danger that would have posed to his trailer.

[16] Finally on the question of speed, Mr McCartney made a calculation of speed from the video footage by measuring the distance travelled by the defender's vehicle over a period of a full 6 seconds between two fixed points. That brought out a speed of 22.7 mph, which is consistent with the defender's evidence of having been travelling at 25mph and then slowing slightly.

[17] So far as the foregoing evidence in relation to speed is concerned, on this issue I accept the evidence of the defender, which is supported by that of Mr McCartney, that he was doing at most 25 mph, probably slightly slower by the time of the accident. Other than a slight reduction in his speed to that level from about 30 mph, he did not significantly moderate his speed. That is consistent with the impression of the cyclist heard talking to Mr Jenkins on the video footage that "she" didn't even slow down. By the same token, of course, neither did the cyclists. Given that the defender's car and the cyclists were approaching each other at speeds of just under 25mph, their closing speed was something approaching 50 mph. However the evidence of the pursuer was that he

was not looking at the road and that was because he was relying on Mr Barclay to keep the team safe.

### *Encroachment*

[18] Much evidence was led on the issue of the extent to which the defender's "rig" was encroaching on the pursuer's side of the road; indeed, probably the bulk of the proof was taken up with this issue. The nature of the evidence can conveniently be categorised in several different tranches. The first tranche was the eye witness evidence given by the cyclists. The second tranche is the eye witness evidence given by Mr Jenkins. The third is the evidence given by the defender. The fourth is the evidence given by the various witnesses based upon their viewing and interpretation of the video footage taken from the dash-cam.

[19] Dealing with the first of these, insofar as the pursuer's evidence is concerned, just as he was in no position to say what was the speed of the defender's vehicle, equally he was in no position to say where the car and trailer were positioned in relation to the driver's nearside verge, because he only glanced at the car and did not see the trailer at all, and so he could not possibly form any assessment as to how far it was from the other verge. However, as regards the width of the gap left between the trailer and his nearside verge, he said that he was very close to the verge when he was hit. He said that if the car and trailer had been in the position shown in photographs 2 and 3 of appendix 5 to 6/10 of process, there was enough room to pass. The wheels could not have been there because the car passed very close to him and the trailer must therefore have been

further over, given his own road position. Mr Barclay, when he gave evidence, said that the defender's road position was in the centre of the road, much closer to the cyclists' side of the road than shown in photograph 2 in appendix 5. The car passed him "close – very close" which he estimated as 1 to 2 inches. He couldn't get any closer to the verge than he was or he would have been in the verge. The car narrowly missed him. He thought it was coming too close to his side of the road. Finally, Mr Dick said that he moved to the left when he heard Mr Barclay shout which was the same time that he saw the car. The cyclists were as far left as they could get. The car was in the middle of the road but he didn't see its trailer at first. The car virtually brushed his shoulder as the trailer passed and the outrider narrowly missed him.

[20] The common theme of the cyclists' evidence, then, was that none of them saw the trailer at first and consequently none was in a position to say how close its wheels were to its side of the road. Their evidence was based on their assessment of the gap between the trailer and their own nearside of the road, while passing each other at a relative speed of something approaching 50 mph.

[21] Of all the witnesses, Mr Jenkins had a unique view of the accident, from his vantage point some distance behind the cyclists. His evidence was that the car seemed to be taking up most of the road. It was only as it came closer that he could see that it was towing something. He did not think that there was enough room for the cyclists to pass safely because the car was not giving them enough room. The car was at least another foot, maybe more, over to the left hand side of the photo compared with the

position of the car in 6/20 of process, appendix 5, photograph 2. The cyclists were very close to the verge on their side.

[22] The defender said that he concentrated on getting the trailer as close to his nearside as possible. The trailer was running on the left hand edge of the tarmac. There were a lot of potholes at the edge of the tarmac which he could not drive into because that would have been dangerous. Most of his concentration was on his rear side mirror and on the position of the trailer wheel rather than on the road ahead (he assessed this as 75%/25%, i.e. 75% concentration on the former, 25% on the latter). He remembered thinking that it was too close for comfort. He assumed that, as the cyclists continued to cycle towards him at speed, there was room for them to get past.

[23] The various eye witnesses were asked to view, and comment on, the video footage. The pursuer said he thought it showed that the defender's vehicle was not in at the verge where it should have been. Mr Barclay thought that it showed the defender did not adjust his road position to take account of cyclists on the road. Mr Dick thought that it showed the car in the middle of the road and the cyclists to the left hand side. Mr Jenkins thought that the car was further over towards the cyclists than was necessary and thought that there still seemed to be more room to the car's left hand side. In cross-examination he said that when the video was stopped there seemed to be a bit of space at the left hand side of the vehicle but not much. He said, with some justification, that the quality of the video footage, at least as displayed in court, was not good enough to tell whether or not the trailer wheel was in line with the right hand verge. He could see a gap between the vehicle wheel and the verge on the right. Finally, perhaps not

surprisingly given the bombastic manner in which he gave his evidence, the defender thought that the video supported his evidence that he was as close to the verge as he could get. However, he also accepted that the footage appeared to show that the pursuer was no more than a foot from his left hand verge.

[24] Finally of relevance, PC Coupland who had viewed the video at the police office using better equipment than that available to the court, said that he did not see how the vehicle could have been driven in any other way and that the driver was as far to the left as could be. He had the wheels placed at the kerb edge and he also thought that the pursuer definitely deviated to the right.

[25] In assessing the foregoing evidence, various factors require to be borne in mind. First, the road has been repaired and improved since the date of the accident. Where there is now tarmac all the way to the verge, previously there were potholes and other rough areas. That ties into the second factor which is that whereas Mr McCartney took photographs which were supposed to illustrate the position of the defender's vehicle at the time of the collision (which were put to the pursuer and his witnesses for their comment) – see photos 2, 3 and 4 in appendix 5 to number 6/10 in process – in fact the defender accepted in evidence that as the road was about 6 inches narrower at the time of the accident than when the photos were taken, his vehicle was, on any view, at least a corresponding 6 inches closer to the far side of the road than shown in the photographs. Third, none of the cyclists saw the trailer at first and in the pursuer's case he did not see it all until it was alongside him. None of the cyclists was therefore in a position to say where the wheels of the trailer were in relation to its nearside verge. However, they

were in a position to say where they were in relation to their nearside verge, and to speak to how close the trailer was to them. Fourth, the video footage was ultimately of limited assistance. At least as played on the court's equipment, it was not of the best quality. Although various witnesses proffered a view as to what it showed, it is very difficult to form any definitive view one way or the other on the sole basis of the footage, as to where the trailer wheel was in relation to the verge. However the video does show that the defender's vehicle can be seen to maintain a straight line, deviating either right or left. That is consistent with Mr Barclay's interpretation of the footage that the defender did not adjust his road position to take account of the cyclists. Finally, in assessing where the defender's vehicle was, it is also legitimate to have regard to where the cyclists were on the road, given that they, too, can be seen on the video. The defender himself conceded that the pursuer appeared to be within a foot of his nearside verge. Since we know that the trailer struck the pursuer, that is a powerful factor in determining the position of the trailer.

[26] As counsel for the pursuer submitted, ultimately the factual issues in the case turn not on the video footage but on the direct eye witness evidence. It must be acknowledged that the person in the best position to judge where his trailer was in relation to the side of the road should be the defender himself. Accordingly, much hinges on his credibility and reliability. As counsel for the pursuer submitted, the defender gave his evidence in an over-confident and overbearing manner and was unnecessarily argumentative, particularly, though not exclusively, in cross-examination. He seemed more intent on justifying the manner of his driving, to the extent of

attempting to volunteer to give the court the benefit of his wisdom even when he had not been asked any questions, rather than simply confining himself to answering the questions asked of him. His manner and attitude were such that it was difficult to envisage him ever admitting liability for any road accident, even one which was patently his fault. Those criticisms in themselves, of course, do not mean that his evidence must necessarily be rejected. However, various considerations lead me to the view that the defender's evidence as to his distance from the verge cannot be accepted. First, despite his protestations to the contrary, the journey was, from the defender's perspective at the time, an uneventful one, and therefore one which he had no reason to recall in particular detail. He may have thought, as he claimed, that his encounter with the cyclists was too close for comfort, but it was not, for him, so close for comfort that he felt it necessary to check on the cyclists' safety after he had passed them by either checking his mirrors or indeed asking his wife or daughter (in the rear) to check that he had not hit the cyclists. To the extent that the defender purported to give a detailed account of his thought processes at the time, and of his recollection of precisely how close to the verge he was, I reject that as unreliable. Similarly unreliable was the defender's assertion that he was splitting his concentration as between the verge and the cyclists in the proportions 75%/25% (or, in fairness to him, 50/50, which he also said in cross-examination). I do not accept that concentration can be divided in that way, since at any given moment, a person can be concentrating on only one thing. It may be that what he meant was that 75% of the time he was concentrating on the verge, and 25% of the time on the cyclists, which is not quite the same. Whatever he meant, the allocation

of percentages to what he was concentrating on, more than two years after the event, must be taken with not so much a dose, as a plateful, of salt. This leads on to my next criticism of the defender's evidence, which is his description of the cyclists' behaviour. He initially said that they were going as fast as they could go and that it seemed as if they were trying to overtake, and a short time later he said that they were not in a straight line and were trying to overtake each other. Given the short time he had to observe the cyclists, and that on his own admission a large part of his attention was being devoted to the nearside verge, I do not accept that he had time to form that view, which is in any event inconsistent with the other evidence in the case, which I accept, that the cyclists were not trying to overtake each other. It is of course possible that the defender observed Mr Dick move briefly to his right, but to move from that to a positive exaggerated assertion that the cyclists were "trying to overtake each other" shows a deliberate attempt by the defender to deflect blame, unjustifiably, on to the cyclists. Another such attempt, which involved a greater degree of planning, was in relation to the photographs allegedly showing the position of the defender's rig on the road. It was the defender who decided where to position his car when Mr McCartney took the photographs appended to his report (at least in relation to distance from the verge: Mr McCartney's role was confined to pinpointing at what point along the road the vehicle should be positioned). The purpose of those photographs, which were taken shortly before the proof, was avowedly to illustrate the distance between the defender's trailer and his offside verge. The defender allowed those photographs to be put to the pursuer and his witnesses when they were cross-examined. However, when the

defender came to give evidence he accepted that due to the re-surfacing of the road since the accident, the road was narrower then than now and his car would have been closer to the far side of the road than shown in the photographs; yet that was something known to him when he positioned his car. If he was genuinely trying to illustrate how much space the pursuer had, he would have positioned his car closer to the middle of the road. It was not as though the defender had forgotten, when the photographs were taken, that the road had been resurfaced. Next, the defender's evidence taken as a whole was unsatisfactory and scattered with platitudes which, at first blush, were intended to sound impressive but which were ultimately meaningless. Apart from the reference to splitting his concentration, already referred to, by way of example he said at another point of his evidence that he was extra careful because of the cyclists, before going on to say that "you should be extra careful all the time as far as I'm concerned". At least two observations can be made about that, namely that the defender's evidence had not previously been that he had taken *extra* care because of the cyclists; and by definition, taking extra care means taking more care than normal, hence the reference to taking extra care all the time is meaningless. Having regard to all of these considerations, I therefore reject the defender's evidence as to his road position as not credible or reliable.

[27] A further reason for rejecting the defender's evidence is that it was inconsistent with other evidence in the case which I accept. Although the pursuer and his fellow cyclists could not see the distance between the trailer and its near-side verge, their evidence was uniformly that the trailer passed very close to them (Mr Barclay and Mr

Dick) and, in the pursuer's case, struck him. Since I accept (and the defender himself came to concede in cross-examination) that they were as close to their left-hand verge as they could reasonably be, it follows that the defender must have been closer to their verge than he claimed in evidence, and therefore, having regard to the width of the road as spoken to by the defender and Mr McCartney, he simply cannot have been as close to his verge as he claimed. That is not altogether surprising. Since I do accept the defender's evidence that he was trying to avoid the pot-holes, he must have been maintaining a line which ensured that he avoided them. It was natural that he would leave some margin for error, even a small one, given the potentially catastrophic consequences of his trailer wheel being driven into a pothole, to which the defender himself spoke. There was also a telling passage in the defender's evidence in the course of his cross-examination, when he said that he was going far too fast to drive into the area with potholes, the implication being that had he been going slower, he might have been able to have been further over to his left. Finally, examination of the video footage shows that there was in fact a pothole or other imperfection in the road opposite where the pursuer came off his bike, which clearly the defender must have avoided. We do not know, of course, precisely where in the road the pursuer was struck and, at a speed of over 20 mph, he may have continued to have had some forward momentum after being struck. We do know, though, that the defender drove his car in a straight line. If he missed the pothole, as he did, he is unlikely to have been driving along the edge of the tarmac all the way along the road.

[28] My conclusion that the defender was further from his nearside verge than he claimed is also supported by other evidence. Although Mr Jenkins did waver in his assessment of the position of the trailer when shown the video footage, that must be seen in the context of the video footage itself being inconclusive. He explained this by saying that the eye is better than the video, and it is true that his view of the incident was not precisely the same as the view from his camera. Further, he clearly did notice the collision before it can be observed on the video footage, since he can be heard uttering an expletive before the viewer of the video is able to discern that there has been a collision, lending some force to Mr Jenkins' observation about the comparative virtues of eye and video. While his attention was perhaps primarily on the cyclists, he was an independent witness and I have no real reason to doubt his assertion on oath that his perception at the time was that the car (and therefore, *a fortiori*, the trailer) was not giving the cyclists enough room. My own interpretation of the video footage is inconclusive, but is not inconsistent with the view which I have formed from the other evidence. Further, viewed in real time the impression one has is that the defender's trailer is not as close to the verge as the defender claimed. The defender's evidence did gain some support from PC Coupland and from his viewing of the video footage, but he did not have the benefit which I have had of hearing the other evidence in the case. The defender also submits that there must have been room for the pursuer to pass safely because the other two cyclists did. The answer to that is to point out that Mr Barclay and Mr Dick only just negotiated the gap safely, and that, at a relative speed of just under 50 miles per hour, the pursuer was passing the rig at a different part of the road.

It is of course entirely possible that the pursuer did move slightly to the right once he had passed the defender's car, especially since he thought that the danger had passed by that time. Equally it is possible that the fact of the pursuer changing the position of his hands on the handle bars was in itself sufficient to make him wider than his two companions and thus come into contact with the trailer where they had not. Neither of those possibilities detracts from the fact that, on a balance of probabilities, the defender was further from his nearside verge than he claimed, such that the gap which remained was unsafe for the cyclists to pass through.

### **The Highway Code**

[29] Various sections of the Highway Code were referred to in evidence. In relation to the pursuer, he accepted that rules 66 and 67 applied to him as a cyclist, in particular that he should not ride close behind another vehicle and should look well ahead for obstructions in the road. In relation to the defender, he accepted that extra care should be taken on country roads (rule 154, which also provides that the driver should make sure that he can stop within a distance he can see to be clear). He was also referred to rule 160 which contains a requirement to keep to the left.

### **Submissions**

[30] Both parties lodged helpful written submissions which I do not intend to rehearse in detail. The bulk of these related to the factual issues and to assessment of credibility and reliability, which material I have already covered. Beyond that, counsel

for the pursuer submitted that if I accepted the pursuer's version of events liability followed inevitably because the defender failed to keep left and failed to give the cyclists enough room as required by the Highway Code. As far as contributory negligence was concerned, the pursuer was the last man in a team of three. On any view his vision ahead was more obscured by reason of the presence of his team-mates and he did not see the outriders until he was struck which was in part because of closing speed. Such fine margins were not negligent.

[31] Counsel for the defender submitted that each decision must turn on its own facts and circumstances: *Scott v Warren* [1974] RTR104. The cases of *Randall v Tarrant* [1955] 1ALL ER600, *Ahanounu v South East London and Kent Bus* [2008] EWCA civ 274, *Young v Roache Services Group* [1989] SLT212, *McIntyre v Munro* [1989] GWD – 25-1111 and *Bellingham v Todd* [2011] SLT 1124 were referred to. The last three of those cases were examples of factual backgrounds bearing some passing similarity to the present case, where, in each case there was a finding of liability and of contributory negligence to a greater or lesser degree. *Ahanounu* underlined that the duty on a driver was to take reasonable care rather than to guarantee a claimant's safety (see Lord Justice Laws at pages 16-17); a counsel of perfection should not be imposed.

## **Discussion**

[32] The defender is said to have been negligent in two respects, namely, first, that he was driving too fast having regard to the nature of the road and to the fact that he knew

there was a cycle event taking place, and second, that he failed to be as far over to the left as he could be.

[33] Dealing with speed first of all, in my view the defender was driving too fast, in that he was on his own admission driving at a speed at which it was impossible for him to stop his "rig" before meeting the cyclists. Not only was that in contravention of rule 154 of the Highway Code, referred to above, but the defender was aware not just of the possibility, but the likelihood, of coming across further cyclists given that he knew that there was a cycle event taking place and had already passed at least two teams who would have been travelling, it is reasonable to infer, at similar speeds to that of the pursuer. The defender was also aware that he had passed a stopping place. He was also aware that it was a single track road and that he was taking up most of it. He ought therefore to have been travelling at a much slower speed, such that he was able to stop his rig completely, in the event of encountering a further team of cyclists, as he was likely to do. Finally, the defender was aware, because he accepted in his evidence, that often other road users initially do not see the boat on the trailer behind his car, which was all the more reason to proceed at a speed which did enable him to stop safely whilst proceeding along a narrow road. In relation to his speed, therefore, my view is that the defender failed in his duty of reasonable care to the pursuer by driving at the speed which he did.

[34] In relation to his position on the road, the situation is perhaps slightly more complicated. Parties appeared to conduct the proof on the basis that it would be negligent for the defender to have been any distance at all, however short, from his

nearside verge, but it seems to me that the position is more finely nuanced than that. The defender's duty was to drive with reasonable care. Bearing in mind that it would indeed have been dangerous for his trailer wheel to have gone into a pothole, at least at a speed of 25 miles per hour, and that the standard is one of reasonable care, not perfection (*Ahanounu*), I do not consider that the fact that the defender's trailer was not hard up against the edge of the road surface was necessarily negligent. A driver must be allowed some margin of error. However, it also seems to me that the road position and speed are inextricably linked, in that the faster the defender was driving, inevitably the more difficult it would be for him to position his car as close to the edge of the road as it could reasonably be (and the greater the risk of damage if he did drive into a pothole). The defender was also, or ought to have been, aware that the faster he drove, and the further he encroached on to the cyclists' side of the road, the smaller the gap they had to negotiate at speed and the greater the risk of an accident. The defender stated in evidence that he assumed that because the cyclists did not slow down, there was room for them to pass but that, with respect, seems to me to be a somewhat cavalier attitude to have taken to their safety particularly when he was, or ought to have been, aware that they were cycling very close to one another and that stopping quickly may have been as dangerous for them as it was for him; and he was also aware, as I have already mentioned, that other road users might not see his trailer. Accordingly, I do find that the defender's road position was negligent having regard to the speed at which he was travelling. Putting that slightly differently, had he been driving slower, he ought to have been able to have been even marginally further over to his left, and if he had

been, the accident probably would not have occurred given that, as it was, it was only the pursuer's right shoulder which struck the outrider. I therefore also find that the defender's negligence caused the accident.

[35] However, the pursuer cannot escape criticism either. He was not looking at the road, even after he was aware that the defender's car was approaching, and he did not see the trailer. He was also travelling at excessive speed, having regard to the respective widths of the road and the defender's rig. He ought to have been alerted to the narrowness of the road by the two signs which he had passed (but did not see, because he was not looking). The duty on the pursuer to take reasonable care for his own safety was not lessened by the fact that he was taking part in a team trial cycling event. It may well be that he chose to rely on Mr Barclay to act as his "eyes and ears", and it may be that Mr Barclay should have shouted a further warning on seeing the trailer, but that does not absolve the pursuer of his duty for his own safety in a question with the defender. The pursuer's conduct can perhaps be tested by asking what he ought to have done had he not been taking part in a cycling event but had simply been out for a recreational cycle on his own. In those circumstances, he would have been keeping a proper look out, and when he saw the defender's vehicle approach, he would or ought to have slowed down, moved as far to the left as he could and, if necessary, stopped until the defender's vehicle had passed. The pursuer failed to do at least two of those things (and, like the defender, could possibly have been further to his left had he been cycling at a slower speed). I find that the pursuer, too, was negligent by virtue of his failures to reduce his speed and to keep a proper look out.

[36] It remains to allocate blame for the accident as between the parties. A striking feature of this case is that substantially the same criticisms can be levelled against each party. Just as the defender was not concentrating on the road, but on the verge, so too was the pursuer's concentration elsewhere. He was not looking at the road, but at the rear wheel of the bike in front. Just as the defender maintained his speed (because he was unable to stop), so too did the pursuer (because he was participating in what was, in effect, a race). Neither party was as close to his nearside verge as he might have been had he been travelling at a lower speed, because of the need to avoid potholes. The accident occurred because the parties approached each other at approximately the same speed, neither hard up against his verge, leaving a very small gap to be negotiated by each of them at a closing speed of 50mph. It is difficult to avoid any conclusion other than that the parties contributed equally to the accident and I therefore assess the pursuer's contributory negligence at 50%.

[37] I have consciously not discussed the authorities referred to in any detail, because as counsel for the defender submitted, each case must turn on its own facts and circumstances: *Scott v Warren*. However, for what it is worth, the facts of this case bear a certain similarity to those in *Young v Roche Services Group plc* in which a similar outcome was reached.

### **Decision**

[37] Parties agreed quantum at £110,000. I have therefore granted decree against the

defenders for payment to the pursuer of the sum of £55,000 with interest from date of decree. I have assigned a hearing on expenses for 10 February 2018 at 10.00am.