SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2018] SC EDIN 39

PN1912/17

JUDGMENT OF SHERIFF K J McGOWAN

in the cause

MR JASON MOFFAT

Pursuer

against

ZENITH INSURANCE PLC

Defenders

Pursuer: Crawford; Thompsons
Defender: Edwards; Ledingham Chalmers

Edinburgh, 26 June 2018

The Sheriff, having resumed consideration of the cause, assoilzies the defender from the first crave of the initial writ; meantime reserves all questions of expenses.

Introduction

[1] This case came before me for proof on 29 May 2018. I heard evidence from the pursuer and the defenders' insured, Mr Skinner ("the insured"). A number of matters, including quantum, were agreed in a joint minute.

[2] I was referred to the case of *Stewart* v *Glaze* [2009] EWHC 704 (QB); 2009 WL 873922. I considered also the cases of *Lunt* v *Khelifa* [2002] EWCA Civ 801 and *Ahanonu* v *South East London & Kent Bus Company* [2008] EWCA Civ 274, cited therein. I was also referred to

certain parts of the Highway Code ("the Code") which I have incorporated into my findings for ease of reference.

[3] Both sides made written submissions available to me which I have summarised below. Having heard the evidence and submissions, I made the following findings in fact.

Findings in fact

[4] On 24 September 2015, at about 5pm, the insured was making his way home from work at Leith Street. He was driving his Volkswagen Passat ("the VW"). It was daylight. The weather was fair and dry.

[5] The insured was seeking to avoid roadworks at the west end of Queen Street by making his way north across Edinburgh to reach Ferry Road.

[6] The insured drove the VW north down Dundas Street. At that time, the speed limit there was 30mph. The insured does not live in Edinburgh. He knows some parts of the city less well than others. He knew that at some stage he would require to make a left turn, but he did not know exactly where.

[7] In Dundas Street, there were some parked vehicles. The traffic was relatively light. There were no vehicles in front of the insured impeding his progress. The insured was driving at about 25 mph. The road surface was dry but rough in places with a number of potholes.

[8] On the west side of Dundas Street south of Fettes Row heading north, there are successively parking spaces for vehicles; a large refuse bin; a single yellow line; and double yellow lines: Production 5/4/4/2. Immediately to the north and south of the junction there are islands in the centre of the road each displaying a "keep left" sign: Production 5/4/4/3.

[9] As the insured reached the foot of Dundas Street, he decided to turn left. He thought that this was the route which would take him towards Ferry Road. In fact, he was mistaken and he was turning into the western section of Fettes Row, which is a cul-de-sac.

[10] As the insured approached the junction, the VW was in more or less a central position in the northbound carriageway. The insured looked in his rear view mirror. About 30 yards from the junction of Dundas Street and Fettes Row, the insured indicated to turn left and began to slow down. He then signalled a left turn. He checked his rear and nearside wing mirrors and looked over his shoulder. He slowed down. He did not see the pursuer. He began to execute a left turn.

[11] At about the same time, the pursuer was cycling from work in Earl Grey Street to his home in Granton. The pursuer was wearing a blue jacket and grey trousers. He was cycling northwards on Dundas Street. On approach to the junction with Fettes Row, the pursuer was behind the insured. He was cycling at a speed of about 30mph.

[12] His attention was focused on the road surface.

[13] The pursuer first noticed the VW when it was around 20-30 metres in front of him. He was aware of the VW slowing down.

[14] The pursuer did not moderate his speed and continued to cycle down Dundas Street at a speed of up to 30mph.

[15] The insured was indicating to turn left. The pursuer failed to see the VW's indicator. The pursuer decided to overtake the VW vehicle on its nearside.

[16] As the VW effected a left turn into Fettes Row, the pursuer was unable to avoid colliding with it.

[17] The pursuer's cycle hit the rear nearside door of the VW. The cycle scraped along the nearside of the VW. The pursuer's right hand struck the nearside wing mirror of the VW.

The pursuer was thrown off his cycle and projected over the bonnet of the VW. He ended up on or close to the south pavement of Fettes Row at its corner with the east pavement of Dundas Street, near a bin and a streetlamp: Production 5/4/4/3.

[18] Rule 160 of the Highway Code ("the Code") provides that road users should, once moving:

> "…be aware of other road users, especially cycles and motorcycles who may be filtering through the traffic. These are more difficult to see than larger vehicles and their riders are particularly vulnerable. Give them plenty of room, especially if you are driving a long vehicle or towing a trailer."

[19] Rule 161 of the Code provides:

> "Mirrors. All mirrors should be used effectively throughout your journey. You should
> - use your mirrors frequently so that you always know what is behind and to each side of you
> - use them in good time before you signal or change direction or speed
> - be aware that mirrors do not cover all areas and there will be blind spots. You will need to look round and check.
>
> Remember: Mirrors – Signal – Manoeuvre."

[20] Rule 170 of the Code provides:

> "Take extra care at junctions. You should
> - watch out for cyclists, motorcyclists, powered wheelchairs/mobility scooters and pedestrians as they are not always easy to see. Be aware that they may not have seen or heard you if you are approaching from behind
> - watch out for pedestrians crossing a road into which you are turning. If they have started to cross they have priority, so give way…"

[21] Rule 182 ('Turning left') provides:

> "Use your mirrors and give a left-turn signal well before you turn left. Do not overtake just before you turn left and watch out for traffic coming up on your left before you make the turn, especially if driving a large vehicle. Cyclists, motorcyclists and other road users in particular may be hidden from your view."

[22] Rule 183 of the Code provides:

> "When turning
> - keep as close to the left as is safe and practicable

- give way to any vehicles using a bus lane, cycle lane or tramway from either direction."

[23] Rule 204 of the Code provides:

> "The most vulnerable road users are pedestrians, cyclists, motorcyclists and horse riders. It is particularly important to be aware of children, older and disabled people, and learner and inexperienced drivers and riders."

[24] Rule 211 provides:

> "It is often difficult to see motorcyclists and cyclists, especially when they are coming up from behind, coming out of junctions, at roundabouts, overtaking you or filtering through traffic. Always look out for them before you emerge from a junction; they could be approaching faster than you think. When turning right across a line of slow-moving or stationary traffic, look out for cyclists or motorcyclists on the inside of the traffic you are crossing. Be especially careful when turning, and when changing direction or lane. Be sure to check mirrors and blind spots carefully."

[25] Rule 163 provides:

> "Overtake only when it is safe and legal to do so.
> You should… only overtake on the left if the vehicle in front is signalling to turn right and there is room to do so…".

[26] Prior to the collision the pursuer had not moderated his speed sufficiently. The pursuer was cycling at an excessive speed having regard to the layout of the road, the junction ahead, and having been aware of the insured's vehicle slowing down ahead.

[27] The pursuer was paying more attention to the road than the VW. The pursuer failed to keep a proper look out and observe the left turn indicator on the VW. The pursuer attempted to undertake the insured on the inside in circumstances which were inherently dangerous and unsafe.

[28] After the accident, the pursuer was conveyed to hospital in an ambulance. He was seen in triage and the history recorded as having been given by him was: "Cycling downhill 30 m/hr rolled over car…": Production 6/1/3.

[29] The discharge letter from the hospital to the pursuer's GP records:

> "This 42-year-old gentleman was admitted to RIE on 24/19/15 following a collision with a stationary car whilst he was cycling at around 30 mph..": Production 6/1/4.

[30] The discharge letter from the consultant to the pursuer's GP records: "42 yom attends following an RTC where he was cycling and struck a car at up to 30 mph."

[31] On 27.09, the pursuer gave a statement to PC Jamie Entwistle. While giving that statement, he said:

> "Around 5 PM… I left my work… and I was heading to my home address. As I was cycling down Dundas Street, heading north, I was aware of a greenish VW Passat ahead as it was slowing down. He then stopped at the cross junction with Fettes Row. At this junction, there is always a right of way for traffic on Dundas Street. It appeared like he stopped to let another car do a manoeuvre, but I don't recall what.
>
> As I approached the vehicle from the rear, it was still stationary in the centre of the road and I thought the car was going to go straight ahead or turn right into Fettes Row as there was no left signal. As I came alongside this vehicle it accelerated and immediately turned left heading into Fettes Row. My right hand struck his left wing mirror which exploded causing my handlebars to turn towards the car and my front wheel which struck his left wing causing me to flip over the bonnet and land on my left hip and arm.": . Production 6/6/1-2.

[32] On a full liability basis, the loss, injury and damage sustained by the pursuer as a result of the accident is properly valued at £17,350 inclusive of interest to 30 May 2018.

Submissions for pursuer

[33] The Court should find that the pursuer had suffered loss, injury and damage as a consequence of the fault and negligence of the insured and, accordingly, that he was entitled to reparation from the insured, and to pronounce decree for payment by the insured to the pursuer of the sum of £17,350, inclusive of interest to 30 May 2018.

[34] The sole question for the Court to determine was liability. Causation of injury was not in dispute, and quantum had been agreed.

Evidence

[35] The pursuer led evidence himself. The insured led the evidence of its insured driver, Stephen Skinner.

The pursuer

[36] The pursuer was a credible and reliable witness.

[37] His evidence was that he was proceeding down Dundas Street on his bicycle when he noticed the VW. It slowed and became stationary at the junction with Fettes Row. The car was positioned towards the middle of the road, consistent with the position it would take to turn right onto Fettes Row. The driver was not indicating in any direction.

[38] The pursuer was taking care as the road conditions on Dundas Street were poor. In particular, there were many pot-holes. Visibility was good, and the weather was fine.

[39] As the pursuer came alongside the VW it suddenly accelerated and swung to its left as though to turn left into Fettes Row, which is a dead-end. This caused the car to collide on its front nearside with the pursuer's bicycle. He was thrown from it, suffering injury.

[40] His evidence was that he was given no warning whatsoever of the manoeuvre.

[41] He gave evidence that had the insured been indicating left, he would have stopped behind him.

[42] Under cross-examination the pursuer was prepared to make appropriate concessions. In particular he accepted that, in terms of Rule 163 of the Highway Code, one ought only to overtake on the left when the vehicle in front is signalling to the right. This concession was relevant to the question of contributory negligence.

The insured

[43] To the extent that the insured's evidence conflicted with the pursuer's, the Court should prefer the pursuer's as a more credible account.

[44] The insured accepted Rules, 159, 160, 161, 170, 182, 183, 204 and 211 of the Highway Code. In particular, he accepted that it was incumbent upon him to take particular care for vulnerable road users including cyclists, and that it was essential to undertake appropriate safety checks before making a manoeuvre. These include mirror checks, blind spot checks, and final checks after indicating. He accepted that it was often difficult to see cyclists coming up from behind and at junctions and that, in consequence, it was necessary to take extra care for them.

[45] His evidence on his road position conflicted with the pursuer's. Moreover he did not accept that his car had been stationary, or that he had failed to indicate left. The Court should prefer the pursuer's evidence on each of these points. In relation to positioning, if what was said by the insured was correct, the pursuer would have needed to attempt a road-line which would have taken him straight into contact with the VW and towards the left-hand side of Fettes Row.

[46] Of far greater importance, the insured accepted that he had not seen the pursuer prior to the collision. Despite this he refused to accept that he had not performed his safety checks properly (particularly in relation to checking his nearside mirror and blind spots).

Liability

[47] The fact that the insured accepted he had not seen the pursuer was determinative of primary liability. Had he undertaken his safety checks appropriately and at the appropriate

time, he would have seen the pursuer and he would not have attempted the manoeuvre. The accident would have been avoided.

[48] Separately: (i) if it was accepted by the Court that the insured was not indicating then he was at fault. Had he indicated left, the pursuer would have stopped behind him; (ii) if the pursuer's evidence was preferred to the insured's on the positioning of the vehicles at the junction, then he was at fault. It would mean he was not in a position as close to the left as was safe and practicable in terms of Rule 183.

Contributory negligence

[49] The insured had pleadings suggesting that the pursuer materially contributed to the accident.

[50] It was submitted that the exercise is one of impression, taking in to account all of the circumstances.

[51] The pursuer's concession in relation to Rule 163 suggested that some blameworthiness attaches to him.

[52] In the event that the Court considers that the pursuer ought to have taken greater care, it was submitted that the relative blameworthiness of the parties was not the sole consideration. The Court also ought to take into account the causative potency of the car versus a bicycle. It was respectfully suggested that 25% is appropriate.

[53] It was accepted that there was a sharp issue of fact as to whether or not the insured was signalling a left turn.

[54] It was accepted that it could not be inferred that the insured had not looked (or not done so adequately) simply because a collision occurred. But there were other circumstances which gave rise to that inference. It was common ground that Dundas Street had not been

busy with other traffic. Because of the road markings, it was reasonable to infer that there were no parked cars just before the junction with Fettes Row. It was clear that the pursuer was in fact there. In these circumstances, it was very surprising that the insured had not seen the pursuer if he had looked or had looked properly.

[55] It was accepted that there was no direct evidence as to the distance over, or the time period during, which the pursuer had been behind the VW prior to the collision.

[56] There was also an acute factual dispute as to the road position of the VW prior to the accident. That may be very much a matter of impression which would be understandable at this juncture.

[57] In assessing the issue of contributory negligence, the court should begin by assessing blameworthiness. In that respect, the insured had accepted that the VW was 3 to 4 feet from the kerb. That had caused the pursuer to think that there was a gap which he could get through. That was not blameworthy.

[58] Further, and in any event, the "causative potency" was relevant given the potential damage which a car could cause compared to that of a bicycle.

Submissions for defender

Analysis of evidence

[59] There were perhaps four key evidential issues to be considered, namely (i) the position of the VW as it turned left; (ii) whether the insured was indicating a left turn; (iii) the point of impact between the VW and the pursuer's cycle; and (iv) when and where the pursuer caught up with the VW.

[60] On these matters, the evidence of the insured should be preferred. His evidence was credible and reliable. For example, his evidence as to the reason for his left turn was wholly believable.

[61] By contrast, the pursuer said that the car had stopped. But both agreed that the traffic was light – so what reason would there have been for the insured to come to a halt?

[62] It may have been the pursuer's impression that the VW stopped but there was no reason for the insured to be making a right turn.

[63] The insured said that there were some parked cars on the left-hand side. This was then followed by a double yellow line. The position adopted by the insured, in the centre of the road, was definitely normal and reasonable.

[64] The pursuer's evidence about the extent to which the VW had moved from Dundas Street into Fettes Row at the point of collision should be rejected.

[65] The insured was clear that he had not seen the pursuer. Nevertheless, on his evidence he had complied with the duty incumbent upon him. A possible explanation was that the pursuer had blended in to what was behind him. Given the slope on Dundas Street, he would not have been silhouetted.

[66] The insured's evidence was that the accident would still have happened even if he had seen the pursuer. This was an indication of the speed at which the pursuer was cycling.

[67] We did not know how long the pursuer had been in the insured's (rear) line of sight. The pursuer had not been asked about that. The pursuer may only have been there for a fraction of a second.

[68] The pursuer's evidence was difficult to reconcile. In his statement to the police, he said that there was no indication of a left turn and he assumed that the VW was going to go

straight ahead or turn right. In that statement he also appeared to acknowledge the possible presence of another road user.

[69] In these circumstances, even on the pursuer's own evidence, he undertook a dangerous and reckless manoeuvre.

[70] As to speed, the pursuer's evidence was that he slowed down. But his comments to the medical staff were likely to be true and were indicative of the speed at the point of collision.

[71] In any event, if the pursuer did slow down, it followed that he had been going faster.

[72] Under cross examination, the pursuer was referred to Rule 163 of the Code. He appeared to be reluctant to accept that what he did breached that Rule. He attempted to justify his actions by reference to "filtering". The suggestion that this was a legitimate manoeuvre was contradicted by the insured's evidence as to what happened.

Liability

[73] It was trite to say that in actions arising out of road traffic collisions, it is usually recognised that each decision turns on its own facts and circumstances. Authorities are seldom cited in simple cases, such as this, where liability is dependent on merely whether or not the insured is shown to have failed to take reasonable care.

[74] Nevertheless, the Court was reminded of one particular general proposition of law at paragraphs 5 and 6 of Coulson J's judgement in *Stewart*.

[75] In summary, the following matters were founded upon:

a. excessive speed given the road condition and layout of the road;

b. failure to slow down on being aware of the insured's vehicle slowing down ahead;

c. failure to adhere to Rule 163 of the Highway Code to only overtake on the left when a vehicle in front is signalling to turn right and there is room to do so;

d. carrying out an unnecessarily and inherently dangerous undertaking manoeuvre.

[76] In carrying out an undertaking manoeuvre, it was incumbent on the pursuer to ensure that he was able to do so without risk to himself and other road users.

[77] Failing to realise not merely the possibility that the insured was turning left, but the real chance that was happening.

Contributory negligence

[78] *Esto* the court was not satisfied that the insured took reasonable care on 24 September 2015 and that his fault caused the collision, it is submitted that the pursuer's own actions justify a substantial finding of contributory negligence.

[79] The factors relied upon in relation to liability (above) were relevant here also. Weighing up the relative blameworthiness of the parties, it would not be just and equitable to find both parties equally blameworthy. The pursuer's actions were the major causative factor. As such he is more blameworthy than the insured.

[80] The evidence supported a finding of contributory negligence in the region of 75% – 80%.

Grounds of decision

Credibility and reliability

[81] The pursuer seemed to me to be not entirely frank in his evidence at times and there were quite long delays in his answering some questions in cross-examination. He seemed reluctant to accept (i) the import of his statements to the medical staff and the police and (ii)

the terms of Rule 163 of the Code. In my opinion, he was downplaying his speed and the obvious danger of undertaking a car, even on his version of events that it was not signalling a left turn.

[82] By contrast, I found the insured to be a straightforward witness and where there were disputes between the two witnesses, I preferred his testimony.

Comments on key facts

Insured's signal

[83] It is possible, of course, that the insured made a late decision to turn left and did so suddenly. But on balance, I accepted the insured's evidence that he did signal a left turn. It seemed to me that it was more likely than not that he was signalling and that the explanation for the pursuer not seeing the signal was (i) that he was, as he said, concentrating on the road surface and (ii) approaching at what was, in the circumstances, an excessive speed. He was not sufficiently focused on the VW.

VW's position on the road

[84] I accepted the insured's evidence about his position on the road. In my opinion, given the presence of parked cars and refuse bins on the west side of Dundas Street, the natural line for vehicles travelling north would have been towards the centre of the road when south of Fettes Row, moving towards the centre of the northbound carriageway as he approached the junction: production 5/4/4/2. Although Rule 183 of the Code of refers to keeping to the left, it does not appear to me that that requires the driver of a vehicle making a left turn to hug the kerb, particularly where the carriageway on which the vehicle is travelling before a turn is a single carriageway.

VW's speed and movement

[85] The insured gave unchallenged evidence that he was proceeding at about 25 mph and began to slow on approach to the junction. There was no evidence to contradict that and I accept it. It is consistent with the insured knowing that he had to make a left turn at some point but not being entirely sure where that might be.

[86] I found that the insured's vehicle was not stationary at any point.

Pursuer's speed

[87] In my view, the pursuer was cycling at or close to 30 mph at the point of impact. That is consistent with his statements at the hospital. In my opinion, he sought to distance himself from the statements when he gave evidence. It is also consistent with the insured's impression about the speed and strength of the collision. I would also suggest that it is consistent with how far the pursuer travelled after the collision i.e. more or less the entire width of Fettes Row. Furthermore, based on the pursuer's evidence that he slowed down as the VW did so, my conclusion is that he was travelling faster than 30 mph beforehand.

Pursuer's road position

[88] Plainly, the pursuer was behind the VW just prior to the collision. But there was no direct evidence about how long or over what distance he had been behind it before the collision. The pursuer's own evidence was that he was about 20 to 30m behind the VW when he first saw it. He did not suggest that a significant amount of time or distance elapsed between him first seeing the VW and the collision occurring. He appeared to me to indicate that he had first seen at as he was approaching the junction with Fettes Row. Based on that

conclusion and the evidence of relative speed, it appears to me that the pursuer was gaining on the VW. His evidence appeared to me to be that when first seen, it was in the position of the black cab illustrated in production 5/4/4/3.

[89] Beyond saying that he was behind the VW there was no direct evidence as to the pursuer's road position laterally. Thus I am unable to say whether he was in the centre of the northbound carriageway, nearer the west pavement or nearer the centre line.

The standard of care

[90] It was correctly recognised by both parties that cases of this type are fact sensitive and that being so, decisions in other cases are rarely of great help.

[91] Nevertheless, Mr Edwards did cite one case, namely *Stewart*. It also concerns a road traffic accident but its facts are very different from the present case. Nevertheless, it contains some helpful passages.

[92] In relation to the standard of care to be exhibited by a driver, the judge, Coulson J, had this to say:

> "**2. Applicable Principles of Law**
> *2.1. The Reasonable Driver*
> 5 I have to apply to Mr Glaze's actions the standard of the reasonable driver. It is important to ensure that the court does not unwittingly replace that test with the standard of the ideal driver. It is also important to ensure, particularly in a case with accident reconstruction experts, that the court is not guided by what is sometimes referred to as '20-20 hindsight'. In *Ahanonu* v *South East London & Kent Bus Company Limited* [2008] EWCA Civ 274, Laws LJ said:
>
> > 'There is sometimes a danger in cases of negligence that the court may evaluate the standard of care owed by the defendant by reference to fine considerations elicited in the leisure of the court room, perhaps with the liberal use of hindsight. The obligation thus constructed can look more like a guarantee of the claimant's safety than a duty to take reasonable care.'
>
> 6 In that case, the judge at first instance had found the defendant's bus driver negligent, although the damages were reduced by a finding of 50% contributory

> negligence. The Court of Appeal concluded that the judge's findings could not stand and they held that the bus driver was not negligent at all. In his judgment, Lawrence Collins LJ disagreed with the judge's finding that the bus driver should have carried on keeping an eye in his nearside mirror to look for pedestrians on a particular part of the carriageway at the entrance to Peckham Bus Station. He said that this was a 'counsel of perfection and it ignores the realities of the situation'. He concluded that an overall evaluation of the circumstances led inevitably to a finding that there was no negligence. His conclusion of (*sic*) paragraph 20 was in these terms:
>
> > 'I accept the submission for the defendants that, taking into account human reaction times for responding, the reality of the situation where the turn takes only seconds is that, given the driver's concentration on the vehicle in front, even if he had by chance looked up and seen the claimant in his nearside mirror after pulling away, it would have been just as the accident was taking place.'
>
> 7 By the same token, it is also important to have in mind that a car is 'potentially a dangerous weapon' (Latham LJ in *Lunt* v *Khelifa* [2002] EWCA Civ 801) and that those driving cars owe clear duties of care to those around them. Compliance with speed limits and proper awareness of potential hazards can often be critical in such situations."

[93] In my view, it is helpful to look at *Ahanonu* in a little more detail. The facts were as follows.

[94] On 7 December 2002 at Peckham Bus Station the claimant was squashed between the defendants' bus and a bollard. The accident took place at the exit road from the bus station where there was a right angle corner turning left for buses leaving the bus station with the carriageway protected by railings. Following a trial, it was held that the driver had been negligent but the damages should be assessed on the basis of the claimant having been 50 percent contributorily negligent. The defendants appealed.

[95] The locus of the accident was a crucial factor in the case. In order to leave the bus station, the driver had to go along an access road. In order to do this he went over a pedestrian crossing inside the bus station. After the pedestrian crossing, the driver then had to negotiate after about 15 metres a left-hand, right-angled bend. Buses would also be coming to the bus station from the opposite direction.

[96] The claimant's factual account was that on the day of the accident she walked to the bus station to take a bus to go home. As she got to the entrance to the bus station, she left the footpath and went onto the carriageway side of the railings to try to recover some notes she had dropped. It was at that time that the bus came into collision with her. Her case was that this was a hazardous corner; the accident was foreseeable because many pedestrians jaywalked across the carriageway; and the driver could and should have seen her before the collision and stopped or otherwise avoided it.

[97] The driver admitted that he did not see the claimant before the collision. The defendants' case on the facts was that the claimant was crossing the exit road by the zebra crossing, but instead of staying on the crossing to arrive safely at the footway where she would be protected by the railings, she cut across and came up behind the bus which was either moving very slowly or was stationary because it was blocked by a bus ahead; and it was in that way that she came between the rear near side of the bus and the railings so as to be in a position to be squashed by the bus.

[98] The judge at first instance found that the claimant had been lying about the piece of paper blowing into the road and that she had moved from the zebra crossing to the back of the bus and had been squashed against the bollard.

[99] Nevertheless, he held that the driver had been negligent in failing to see the claimant. One of the grounds on which he did so was a finding that the driver fell below the standard of a reasonably competent bus driver in colliding with the claimant, where she was there to be seen when he had not checked his nearside rear view mirror sufficiently frequently in relation to the foreseeable hazard known to him of pedestrians walking on the wrong side of the railings.

[100] On appeal, Laws LJ's conclusion was that the judge's conclusion could not stand.

“18 This was a case where the claimant's case was that the bus had driven past her before crushing her against the outside of some metal railings. On her case, the front of the bus had driven right past her, allowing her to catch a glimpse of the bus driver as the front of the bus went past. Her case was discredited at trial. [The defendants’] bus was already well into completing its difficult left turn manoeuvre. The claimant was not on the corner as he started the manoeuvre because otherwise he would have seen her at the front of the bus. The whole manoeuvre took only seconds.

19 I have some difficulty with the judge's approach of rejecting the claimant's case as to how the accident happened and what the negligence was and in substituting a wholly different finding as to what happened, but I do not rest my conclusion on that point. I consider that the judge did not take sufficient account of the following matters. The first is that the claimant was probably moving (and may indeed have been moving fast) at the time of impact. The second is that, even if pedestrians do use the carriageway, [the defendants’ driver] had no reason to think that there would be anyone at the near side rear of his bus. He had just driven round the corner with the front of his bus and there had been nobody there to be seen. There was no reason for him to expect a pedestrian to take the extremely dangerous path taken by the claimant.

20 The third point is this. I would accept the submission for the claimant that it is not open for this court to interfere with the judge's finding and that the driver did not look in his rear view mirror even though the only reason, it seems, for rejecting his evidence and finding it unreliable was simply that this point was not mentioned in the contemporary reports. But I accept the submission for the defendants that the judge's finding that he should have carried on keeping an eye in his nearside mirror is a counsel of perfection and it ignores the realities of the situation. There was a far more obvious and real danger. He was following another bus. He had taken a wide sweep as usual at the bend in order to get round the corner and was keeping an eye on the bus in front in case it suddenly stopped. He had passengers in his bus. Buses frequently leave the bus station at about the same time as other buses and have to queue to get into Peckham High Street. If he had taken his eyes off the back of the bus immediately in front, there could have been a very serious accident indeed, with the large exposed glass frontage of his bus crashing into the rear of the bus in front. Given the nature of the exit, that must have been a real risk. It seems to me that an overall evaluation of the circumstances would lead inevitably to a finding that there was no negligence, particularly in view of the extraordinarily dangerous action of the claimant and the need to keep an eye on the bus in front. This was not mere jaywalking. He would have had to keep a constant lookout in the mirror to have seen the claimant and that in itself would have been a careless act, given the proximity of the bus in front. I accept the submission for the defendants that, taking into account human reaction times for responding, the reality of the situation where the turn takes only seconds is that, given the driver's concentration on the vehicle in front, even if he had by chance looked up and seen the claimant in his nearside mirror after pulling away, it would have been just as the accident was taking place. On the judge's finding it would have required constant but dangerous attention to the mirrors to have prevented the accident.”

[101] The other members of the court agreed and the appeal was allowed with a finding that the defendants were not liable.

[102] I do not say for a moment that that case and the present one are on all fours, although there are some broad similarities in the sense that this was to do with a left hand turn and the extent of a driver's duties to carry out observation as to what might be on his nearside.

[103] But the case is helpful for the focus it brings to the evaluation of what is required in fulfilment of the duty of reasonable care.

Do the circumstances give rise to an inference of breach of duty?

[104] It is clear that the proposition "there was a collision between a bicycle and a car, therefore there is a presumption that the driver of the car was to blame" is not the law. But in my view, neither is it the law that "the driver of a car did not see a cyclist before a collision occurred, therefore there is a presumption that the driver did not look properly (and was therefore negligent)". As Mr Crawford accepted, it is always a matter of circumstances.

[105] Although the Code is clearly relevant to evaluating what should be done by the "reasonable driver" in fulfilling the legal obligation of exercising reasonable care, the rules relied upon by the pursuer in this case are, inevitably, expressed in general terms because they are intended to cover a wide variety of circumstances. For example, it is simply not possible to prescribe how frequently a driver should check mirrors on approach to a left hand turn.

[106] In the present case, the insured's evidence was that he had "checked his mirrors and looked over his shoulder". I accepted that evidence and accordingly on the facts, a case that the insured did not look at all is not made out.

[107] Mr Crawford's position on behalf of the pursuer was that in the circumstances, an inference could nevertheless be drawn that the insured had not looked properly.

[108] Holding the thought that the obligation on drivers (and other road users) is to take reasonable precautions – albeit to have particular awareness of the possible presence of cyclists – my view is that that there are two reasons why that proposition cannot succeed in this case.

[109] First, while the driver of a car must pay attention to the possibility of other road users behind him or to his nearside, the exercise of that duty cannot be to the exclusion of paying attention to what is happening (or may be about to happen) elsewhere: see, for example *Stewart*, paragraphs 71 – 76, especially paragraph 74; *Ahanonu*, paragraph 20.

[110] Second, absent evidence, I cannot make a finding that the pursuer was in the defender's rear view or wing mirror line of sight for any material period prior to the collision. Indeed, on balance it appears to me on the other evidence to be more likely that he "caught up" with the VW just before the collision occurred. There was no evidence at all about the pursuer's lateral road position. The pursuer was not wearing fluorescent clothing and there was no evidence of his cycle showing lights.

[111] I do not suggest that the pursuer was at fault in any of these matters. They are simply relevant to the question as to how apparent his presence should have been to do the insured; over what period; and whether it can be inferred that the insured, when carrying out the observations that he did make, did not do so properly.

[112] In all the circumstances, I am unable to conclude that there was a breach of the duty desiderated.

[113] For the foregoing reasons, I have concluded that the pursuer's case cannot succeed.

Contributory negligence

[114] Given the conclusion I have reached on primary liability, I do no more than express my views briefly on this point.

[115] There were a number of facts "in play" in this case which, depending on how they were determined, could have a bearing on contributory negligence, so it is not realistic to run through a variety of hypothetical scenarios trying to determine how contributory negligence would have been determined had any or all of them been established.

[116] Accordingly, I shall restrict my comments to one scenario only. Assuming for the sake of argument that I had accepted the pursuer's account of the position of the VW and the absence of a left turn signal, I would still have found him to have contributed to the accident a material extent. I say that for three reasons. First, based on his statement to the police, he must have been in some doubt as to the intentions of the insured. Thus, he should have been on his guard and moderated his speed (or moderated it further). Second, perhaps particularly in the context of road traffic accidents, it may – depending on the circumstances – be negligence not to anticipate carelessness on the part of others. Third, on the pursuer's own evidence he was paying more attention to the road surface than to the VW. That may be understandable given the condition of many road surfaces – but the condition of road surfaces is a matter which must be taken into account by road users (particularly those on two wheels) and inform the manner of driving and/or cycling, as the case may be.

[117] In short, given the road conditions and what the pursuer was confronted with (on his evidence, a car stationary in front of him), making no right hand signal, the pursuer was cycling too fast and was blameworthy in seeking to pass it on the near side: the Code, Rule 163. I would have deducted one third of any damages awarded on that basis.

Disposal

[118] I have concluded that the accident was not caused by any fault on the part of the defender; and was caused by the fault on the part of the pursuer. Therefore, I shall assoilzie the defender from the first crave of the initial writ. At the request of parties, expenses were reserved.