



OUTER HOUSE, COURT OF SESSION

[2017] CSOH 118

PD207/16

OPINION OF LORD UIST

in the cause

NINA KENNEDY

as an individual and as Executrix Dative of the late Vincent Kennedy

and OTHERS

Pursuers

against

VERONICA MACKENZIE

Defender

Pursuers: Milligan QC, Thornley; Digby Brown LLP

Defender: Love QC, Bennett; BLM Law LLP

6 September 2017

Introduction

[1] The late Vincent Kennedy (“the deceased”) was born on 19 March 1981 and died on 1 August 2013 in a road traffic accident which occurred on the A85 road at Connel in Argyll near to the west access road to Old Shore Road. He was the front seat restrained passenger in a Vauxhall Vectra car being driven by the defender, who was his partner. She was driving west towards Oban at a left bend (the second bend in an S bend) when the car began to skid to the left. She steered the car to the right across the road into the eastbound

carriageway and collided with a Honda CRV vehicle as a result of which the deceased and a passenger in the Honda were killed. This action is brought against the defender by the deceased's surviving relatives for the loss, damage and injury suffered by them due to the death of the deceased. They maintain that the accident was caused by the negligence of the defender. The defender avers that it is estimated that she lost control of her car about 50 to 60 metres from the point of impact at a point where the road surface was unusually slippery, that she was driving with due care and attention, and that she was unable to avoid the collision. The claim by the first pursuer in her capacity as executrix of the deceased has been settled extra-judicially.

[2] The case proceeded to proof on the issue of liability. The pursuer led ten witnesses. These were the defender, James Mackenzie (the defender's son), five police officers (Constables Docherty, Burnside, Macphee and Speir and Sergeant Lowe), David Flanagan, Adam Brook and James McCartney. The defender led six witnesses. These were Leslie Butler, Adele Duncan, Constables Young and Campbell, Peter Dixon and James Brunton. There was also a Joint Minute entered into between the parties agreeing certain facts.

[3] The issue in dispute was whether the road surface at the point where the defender lost control of her car was unusually slippery and that that was the sole cause of her loss of control. There was no dispute that she had lost control of her car.

The applicable law

[4] In certain circumstances an inference of negligence arises from the proved facts and it is for the defender to rebut that inference. This is one such case.

[5] In *Richley (Henderson) v Faull* [1965] 1 WLR 1454 at 1457E-H MacKenna J said:

“I, of course, agree that where the defendant’s lorry strikes the plaintiff on the pavement or, as in the present case, moves on to the wrong side of the road into the plaintiff’s path, there is a *prima facie* case of negligence and that this case is not displaced merely by proof that the defendant’s car skidded. It must be proved that the skid happened without the defendant’s fault. But I respectfully disagree with the statement that the skid by itself is neutral. I think that the unexplained and violent skid is in itself evidence of negligence. It seems hardly consistent to hold that the skid which explained the presence of the defendant’s lorry on the pavement or, as here, on the wrong side of the road, is neutral, but that the defendant must fail unless he proves that this neutral event happened without his default. Whether I am right in this or wrong, the conclusion is the same: the defendant fails if he does not prove that the skid which took him to the wrong place happened without his default.”

In *David T Morrison & Co Ltd v ICL Plastics Ltd* 2014 SC (UKSC) 222 Lord Hodge (dissenting)

said at page 245, para [98]:

“Where the facts give rise to an inference of negligence by the defender, the evidential burden shifts onto the defender to establish facts to negative that inference.”

In *Smith v Fordyce* [2013] EWCA Civ 320 Toulson LJ said at para [61]:

“... in order for a claimant to show that an event was caused by the negligence of the defendant, he need not necessarily be able to show precisely how it happened. He may be able to point to a combination of facts which are sufficient, without more, to give rise to a proper inference that the defendant was negligent. A car going off the road is an obvious example. A driver owes a duty to keep his vehicle under proper control. Unexplained failure to do so will justify the inference that the incident was the driver’s fault. In the words of the Latin tag, the matter speaks for itself. In such circumstances the burden rests on the defendant to establish facts from which it is no longer proper for the court to draw the initial inference. To show merely that the car skidded is not sufficient, because a car should not go into a skid without a good explanation.”

[6] Counsel for the defender accepted that the burden rested on the defender to prove a non-negligent explanation for her loss of control upon the balance of probabilities. The defender avers that she estimates she lost control of her car about 50 to 60 metres from the point of impact; that the road surface at the point where she lost control was unusually slippery; that SCRIM values for the road were deficient and that Transport Scotland (or their subcontractor) ought to have erected warning signs detailing the slip hazard on the road

surface; that the road at the locus of the accident was resurfaced in or about July 2014; that she was driving with due care and attention; that she was not travelling at an excessive speed and did not carry out excessive braking having regard to the prevailing conditions; and that she was unable to avoid the collision.

The evidence for the pursuers

[7] The defender had no recollection of the accident. She herself was seriously injured in the accident and was in hospital for five weeks and suffered from memory loss. She knew the stretch of road where the accident occurred well.

[8] The defender's son James Mackenzie, who was born on 21 November 1998, was sitting in the back of the car at the time, with his brother and sister on either side of him. His stepfather (the deceased) was in the front passenger seat and his mother (the defender) was driving. She had picked him up in Benderloch at about 6 pm and then gone to the Lochnell Arms to pick up his stepfather. He was sure that there was no tension between his mother and his stepfather when she picked him up. His mother was going to be working later that night. By reference to the DVD recording number 6/12 of process he indicated the left bend where the car went out of control. The back end of the car slid to the right and his mother tried to correct the skid, but the back end then went in the opposite direction and the car went partly onto the opposite side of the road and collided with an oncoming vehicle. His mother had over-corrected when the car began to slide. He thought it was raining at the time of the collision. His mother was driving at 40mph. She was a very good driver who abided by speed limits. He could not recall any braking or harsh steering movements. He himself was knocked unconscious and woke up at the side of the road with his brother and sister beside him and people around them.

[9] Constable Keith Docherty, aged 46 at the time of the proof and with 20 years police service, came upon the accident scene on his drive from Oban and got out of his vehicle. It had previously been raining and the road surface was damp, but it was dry at the time. He did not look for any contaminant at that time, but did so later and found none. He was familiar with that particular stretch of road and drove it regularly. He had been based at Oban Police Office for 17 years, with short secondments elsewhere. He had never encountered any problem with traction on the road surface.

[10] Constable Daryl Burnside, aged 49 with 29 years police service, had been based at Oban Police Office for 27 years. He required to attend the scene of the collision in the course of his duty. He stopped his police vehicle just prior to the junction with Old Shore Road. He and a colleague had travelled over that stretch of road about half an hour previously when coming from Connel to Oban. He had at that time found no difficulty with traction on the road surface. He had never in the past had any trouble with the road surface. The road surface was damp and he did not recall it raining at the time. He did not check the road surface for contaminants.

[11] Constable Scott Macphee, aged 29 at the time of the proof with 8 years police service, attended the scene of the accident in the course of his duties. He had been based in Oban for roughly a year then. He was familiar with the relevant stretch of road. He drove over it four or five times during each shift. He worked four shifts a week. He never encountered any difficulty with the road surface. Nobody commented to him about the state of the road surface. As far as he could recall it was dry at the time.

[12] Sergeant Cameron Lowe, aged 44 at the time of the proof with 21 years police service, for the last ten of which he had been based at Oban, attended the scene of the accident as a supervisor. The road surface was damp but he did not recall it raining at that

particular time. He did not recall anything else about the road surface. No one complained to him that it was unusually slippery, but he believed that another police officer had said that conditions under foot were slippery. He drove over the relevant stretch of road almost every day and had never encountered any problem with the road surface.

[13] David Flanagan, aged 34 at the time of the proof, was a warehouse supervisor who lived in Oban. He had worked with the deceased, who had been his best friend since about 2007 or 2008. He had seen him on the morning of 1 August 2013 and again just before the accident. The deceased had been doing a couple of jobs in Oban that day and then gone with his boss's son to the Lochnell Arms in Connel, where they had had some drinks. Just before 6pm the witness drove his employers' Ford Transit pick-up truck with rear wheel drive from Connel to Oban and traversed the relevant stretch of road. The road surface was clear and there was nothing to suggest he should change his driving style. He was travelling near the speed limit. He had no difficulty in taking the relevant left bend.

[14] Adam Brook, who was aged 28 at the time of the proof and lived in Oban, was with the deceased in the Lochnell Arms when the defender picked the deceased up. He thought that the defender and the deceased had been arguing in an exchange of text messages during the day. When she turned up in the car park the defender had gone over to her car, had an argument with her and come back to the pub and said that he would have to go. It had until then been the intention of the deceased and his friends to set up a tent and camp in it overnight.

[15] Constable David Speir, aged 39 at the time of the proof and with 15 years police service, had been based in the Road Policing Complex in Glasgow for 8 years. He was involved in investigating the accident as a standard collision investigator. His report was number 7/3 of process. His conclusion was as follows:

“The Honda CRV motor car and the Vauxhall Vectra motor car have collided on the eastbound lane of the A85 at the locus whilst the Honda CRV has been travelling east on the eastbound lane and the Vauxhall Vectra car has been travelling sideways and west on the eastbound lane.”

He produced a plan of the locus which showed that the resultant position of the two cars was about 100 metres from the SLOW sign at the S bend. He carried out skid testing weeks after the accident to establish if the relevant road surface had been a contributory factor to the accident. On a dry road the co-efficient of friction (COF) should be 0.6 to 0.85. On one test the COF on this stretch of road was 0.51, which was lower than he would have expected. He concluded that the cause of the accident was that the defender had “failed to negotiate a gradual left hand bend although the exact reason for this is not known”, but that “in the absence of any vehicle defect, road defect or involvement with any other vehicle the cause of this must be driver error”. The loss of control had occurred at a bend. The skid test was carried out on the straight section of road after the bend as a skid test would not be carried out at a bend. Absolutely no physical evidence had been found at the time of the accident and there was no evidence from which a calculation of the speed of either vehicle could be made.

[16] James McCartney, aged 56 at the date of the proof, was a self-employed accident investigator and had been since 2009. His report on the accident, number 6/11 of process, was dated 9 March 2017. He measured the distance from the SLOW sign at the bend where the defender lost control to the point of impact 30 metres east of the west entrance to Old Shore Road as 70.6 metres. His conclusion in section 10 of his report was as follows:

“10.1 The impact occurred whilst Ms MacKenzie’s vehicle was travelling sideways on the opposing carriageway occupied by Mrs Morris.

10.2 There is no evidence to suggest that high speed was involved. Ms MacKenzie had exited a 30mph speed restricted area a few hundred metres previously before she lost control of the vehicle.

10.3 There is evidence that the amount of grip on the road surface was lower than desirable, when compared to the Investigatory Levels assigned to each stretch of roadway.

10.4 The earlier rainfall is likely to have made the road surface slippery, especially if it followed a prolonged dry spell due to the rainwater mixing with rubber and oil deposits left by previous vehicles.

10.5 It is noted that despite the accident site having an average annual daily flow of over 5000 vehicles daily on the west lane only Ms MacKenzie came to grief on the date in question. This suggests that other drivers negotiating the same stretch of roadway before the collision were able to do so without losing control of their vehicles. The cause of this accident, in my opinion, is that driver error, either as a result of inappropriate speed for the conditions, or coarse steering, induced a skid from which she was unable to regain control."

The evidence for the defender

[17] Leslie Butler, aged 46 at the time of the proof, was a resident of Oban who at the time of the accident drove an Iveco pick-up truck for a builder's merchant over the whole of Argyll. Sometimes he found that particular section of road slippery just after the speed limit sign and before the S bend, depending on the road or weather conditions. He found that the back end of his vehicle could slip on the road. He could not place any dates on this occurrence: it happened just occasionally, when the road was damp, wet or dusty. To the best of his recollection it happened up until 1 August 2013. He could not remember if he drove on the relevant stretch of road on the day of the accident. He gave a statement to the police on 18 September 2013 in which he said the following:

"On 1 August 2013 I think I travelled along that section of road, I can't remember exactly what time, probably early afternoon. I don't recall if it was raining. I don't remember anything unusual about the road surface that day. I know it is slippery in the wet usually so I always exercise more care as I go round there.

I also have a car but I don't travel out there very often in it. I don't recall experiencing the same problem in the car."

[18] Adele Duncan, aged 34 at the date of the proof, was a beauty therapist who lived in Dunbeg. She had heard about the collision on the night of the accident from a friend. She had phoned him that afternoon to say that she found that part of the road slippery. She had been driving her Renault Clio towards Oban about 3pm when the back end of her car skidded out onto the other side of the road. She had to recover her car, the car behind her came close and she had to accelerate. When she looked at her speedometer she was doing between 40 and 45mph. It had been sunny for the previous couple of weeks but raining that day. She later that day telephoned her friend, who told her to check her tyres and brakes. She had known the deceased well at school and attended his funeral. She accepted that at the material time she had been driving for only nine months and that the car in front of her did not skid.

[19] Constable Iain Young, aged 41 at the time of the proof with 16 years police service, was based at the Road Policing Unit in Fort William, but had been based in Oban from 2011 to 2015. On 1 August 2013 he finished work at about 3pm and was driving back to Dalmally in a Mitsubishi 4 x 4 vehicle when he heard over the police radio of the accident. It must have happened about two minutes before he reached the scene. It was not raining, but the road was wet. He met Constable Keith Docherty, checked the vehicles involved in the accident and parked his vehicle in the lane facing Oban. The front of his vehicle was pointing towards Old Shore Road. He thought that the left bend where the defender lost control was probably 200 metres from where he slipped. As he put his right foot down it slipped on the road and he had to grab the handle of his vehicle. The road was wet, but there was no petrol, diesel, oil or things like that on it. He had never had any difficulty with traction on the road surface when he was driving.

[20] Constable Stuart Campbell, aged 42 at the time of the proof with 20 years police service, had been based in Oban and the Road Policing Unit for 15 years. On 1 August 2013 he was phoned at home about the accident and attended the scene at about 8.30pm. It had been raining earlier on, but it was dry by then and the road surface was damp. He walked through the accident scene with Constable Cole from Dunoon to the speed limit sign. He found no contamination on the road surface. He thought the road (he could not remember if it was on the eastbound or westbound carriageway) felt slippery underfoot and mentioned this to Constable Cole. He had never experienced any difficulty with that bit of road when driving over it.

[21] Peter Dixon, aged 64 at the time of the proof, was a chartered civil engineer who had specialised in highway engineering for almost all of his career. He had been asked to provide a report on conditions at the scene of the accident with particular reference to skid resistance. He had visited the scene two or three weeks after the road had been resurfaced on 23 and 24 July 2014. He had been provided with a vast amount of documentation from Transport Scotland about the A85 road covering the period from April 2012 until some point in 2014. He explained that SCRIM was a measure of skid resistance and something completely different from the coefficient of friction. The records showed that skid resistance was very low, the surface was uneven near the scene of the accident, but the roughness of the road was not enough for something to be done. The conclusions in section 5 of his report, so far as relevant, were as follows:

“5.1 Ms Veronica MacKenzie lost control of the Vauxhall Vectra vehicle she was driving as it passed westbound around a left-hand bend on the A85 trunk road. The bend forms the second part of an ‘S’ bend in the westbound direction immediately to the west of Connel.

5.2 The bend was of approximate radius of 215 metres and the road follows a downhill gradient of approximately 1 in 19 or 5.2%. The carriageway is

superelevated at approximately 1 in 17 or 5.9% in a 'positive' direction to assist drivers to negotiate the bend.

5.3 Westbound road users are provided with a warning of the double bend ahead in the form of a triangular warning sign. A 'SLOW' road marking is provided for westbound road users in advance of the left-hand bend.

5.6 It is likely that surfacing at the left-hand bend consisted of a relatively old stone mastic asphalt at the date of the accident.

5.7 Skid resistance standards are set out in HD 28/04 and further guidance is provided by IAN 98/07. Transport Scotland follows that guidance. In addition it has its own detailed guidance policy concerning the application of HD 28/04 and IAN 98/07.

5.8 Transport Scotland undertook skid resistance testing at the locus in 2010, 2012 and 2013. The survey interval of 2 years between 2010 and 2012 is in line with Transport Scotland's policy. I have seen no reason offered as to why the road was tested again in 2013.

5.9 In all three test years the skid resistance was very low, producing a severe deficiency in SCRIM readings when compared against the appropriate skid resistance investigatory level for the bend and its approaches. The investigatory level set for the double bend was 0.5 and this was appropriate in my opinion when considering the road's characteristics and the apparent lack of recorded personal injury accidents.

5.10 Due to the method of testing, the SCRIM readings for the westbound direction would not have been able to take into account the probability of even lower values of skid resistance in the outside wheel track position around the left-hand bend. This would have been due to the increased polishing effect of vehicles, particularly from heavy goods vehicles passing around the bend, when compared to the values obtained for the standard test position around the inside of the bend.

5.11 The Police undertook skid tests at the scene and reported the skid resistance of the road was low but still within acceptable limits. ...

5.12 Although I cannot be certain due to the road having been resurfaced at the bend and on its approaches, the remnants of the existing surfacing which were still evident at the date of my site visit would suggest that the surfacing at the date of the accident exhibited low surface texture. This is an important characteristic for traffic speeds over approximately 30mph.

5.13 Available records indicate that the A85 road was investigated in the vicinity of the locus in 2011 (*sic*), in 2012 and in 2013 although the lengths under investigation were generally different. An investigation was part of best practice guidance as set out in the Highways Agency publication HD 28/04. However, it states that a site

should be investigated where the characteristic SCRIM coefficient is at or below the Investigatory Level which has been set.

5.14 Although I would agree with Transport Scotland's policy that states SCRIM deficient sites should be prioritised for detailed investigation (which does not feature as part of the advice and requirements of HD 28/04), in this case there was little difference in the deficiency values throughout the double bend or between survey years and the risks were at the left-hand bend due to geometry and other factors. As such, it is my opinion that the whole of the double bend should have been investigated in detail following the SCRIM surveys of 2010 and 2012, and not just part of the deficient length following the survey in 2013."

[22] He then went on to discuss Transport Scotland's priority policy which had four categories and expressed surprise that they had not considered and probably implemented some form of surfacing treatment prior to the accident, while at the same time conceding that this would have depended on other competing priorities for parts of the network that might have been in a worse condition and had a worse accident record. The average daily flow of traffic as at the time of the 2013 survey was 7834 in both directions and he accepted that it was reasonable to assume that half that number of vehicles was travelling east and the other half was travelling west. There had been no wet skid accident on the bend since 2007. When asked to explain why there had been no other accidents he replied that the way a vehicle is driven can be a factor and often other factors combined at the same time. While SCRIM values by themselves could cause a driver to lose control that was unlikely.

[23] James Brunton, aged 59 at the time of the proof, was a collision investigator. He produced a report on the accident dated March 2017 (number 7/11 of process). His conclusions are set out at paragraphs 10.18 and 10.19 of his report:

"10.18 There is no evidence to suggest Mrs Mackenzie was distracted within the vehicle; there is no evidence to suggest excessive speed; there appears to have been no defects with the Vauxhall that are thought to have been a causation or contributory factor in this collision. There is no evidence to suggest Mrs Mackenzie lacked driving experience.

10.19 In conclusion, in my opinion, it is more likely than not that Ms Mackenzie's loss of control over her vehicle occurred due to the presence of an unusually slippery road surface. Ms Mackenzie has attempted to correct the situation but, ultimately, was unable to do so. There is nothing I have seen in the evidence to suggest that she ought to have been aware that the road was slippery. Certainly PC Campbell said that he could not see any obvious contamination on the road surface."

[24] Mr Brunton admitted that his report of March 2017 differed in content from the report he had prepared for an earlier criminal trial (which did not take place) in which he had proceeded on the basis that the skid occurred on the right bend which preceded the left bend. In his earlier report he had referred to "the unusually slippery surface on the initial right-hand bend". When confronted with this discrepancy between his earlier report and his later one he said that he just went on the evidence he had and that he thought the whole stretch of road was unusually slippery, due to either contamination or wear and tear. He had placed great weight on the evidence of police officers who had found the road in the region of the collision slippery underfoot. The whole area appeared to have been slippery. I shall not rehearse in detail the evidence of Mr Brunton for the reason given below.

Discussion and conclusion

[25] I have to say at the outset that I dismiss the evidence of Mr Brunton as worthless. There was no proper foundation for his opinion. It was clear from his evidence that he was prepared to say anything that would be of assistance to the defender. He had, without explanation or justification, changed the terms of his report from an earlier report which he had written. He was not unbiased in his approach to his task. He did not fulfil the duties incumbent on an expert witness (*Liddell v Middleton* [1996] PIQR P36 per Stuart Smith LJ at P42-P43; and *Kennedy v Cordia (Services) LLP* 2016 SC (UKSC) 59 per Lords Reed and Hodge at pps 70-77, paras [38] to [61]). I found him to be a wholly unreliable witness.

[26] I also have concerns about the evidence of James Mackenzie. He was the only witness to say that it was raining at the time of the accident. I find his evidence on that point to be unreliable. The vast weight of the evidence, which I accept as being correct, is to the effect that it was not raining at the time of the accident, but that it had been raining earlier and the road surface was damp. He was only 14 years old at the time and he contradicted the unchallenged evidence of the witnesses Flanagan and Brook. I also find his evidence about the defender's mood immediately prior to the accident to be unreliable in light of the evidence of the witness Adam Brook, which I accept.

[27] It was clear from the evidence, and not in dispute, that there was no defect in the defender's car or contaminant on the road which could have caused the accident. It is agreed in the joint minute that the A85 was used by about 5,000 cars a day heading in each direction. There is also the evidence of Mr Dickson that in July 2013 the average daily traffic flow was recorded as 7834, equating to 3917 cars a day in each direction. No other vehicle skidded on the left bend on 1 August 2013 causing an accident, there had been no skid at it in the previous six years causing an accident and none after the accident before the road was resurfaced in 2014. I accept the evidence of Constable Speir and Mr Dickson about the slipperiness of the road surface, but this must be viewed against the fact that they were not speaking of slipperiness at the exact point where the defender lost control on the left bend and also the absence of any other incidents at the left bend before and after the accident in which the defender was involved on 1 August 2013. Mr Dickson accepted that it was unlikely that the road surface alone was the cause of the accident and I accept that view. Neither Adele Duncan nor Leslie Butler experienced a skid at the left bend. The police officers who used that stretch of road regularly had never experienced a loss of traction at the left bend. No other driver experienced a skid causing an accident over a period of about

seven years. That fact is to me is a very strong indication that, at the time of the accident, the road was not so slippery as to be the sole cause of a vehicle going into a skid there.

[28] In these circumstances the defender has failed to discharge the burden upon her of establishing that the cause of the accident was something other than her negligence. It follows that she is liable in damages to the pursuers.

Decision

[29] I shall find the defender liable to make reparation to the pursuers for the loss, injury and damage sustained by them as a result of the death of the deceased and continue the cause for a proof on quantum of damages.