

**SHERIFFDOM OF LoTHIAN & BORDERS AT EDINBURGH**  
**IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT**

[2025] SC EDIN 20

PN4908-23

JUDGMENT OF SHERIFF M PETER ANDERSON

in the cause

STEPHEN LYONS

Pursuer

against

QBE UK LIMITED, an insurance company with registered office at 30 Fenchurch Street,  
London, EC3M 3BD

Defenders

**Pursuer: R Conway, solicitor advocate**

**Defender: S Kirk, solicitor**

Edinburgh, 12 March 2025

The Sheriff, having resumed consideration, finds, admitted or proved:

1. The Pursuer is Stephen Lyons. He is 28 years old and is employed as a Groundworker, a job he has done from the age of 17. This involves general physical labour and work on construction sites including preparation of foundations for buildings.
2. The Defenders are an insurance company with a registered office at 30 Fenchurch Street, London and on 22 January 2021 were the insurers of a Ford Transit van, registered number SL70EOV being used by Advance Construction (Scotland) Limited and driven by their employee Mr Lorenzo Tortolano.
3. The court has jurisdiction. The accident which gives rise to this case happened in Scotland. There are no proceedings involving the parties in any other court. Reference was

made to another case, PN3487/23 at the instance of Lorenzo Tortolano against Lauren Sands and it does appear to have arisen out of the same accident. I have no information about the status or outcome of that action. Apparently it is not otherwise connected or relevant to the present case. There is no agreement prorogating jurisdiction to any other court.

4. On 22 January 2021 at approximately 4pm, the Ford Transit van with registration number SL70EOV was being driven by the Defenders' insured, Mr Lorenzo Tortolano. Mr Tortolano was employed by Advance Construction (Scotland) Limited as a Ganger. Mr Tortolano's home address is in Moodiesburn, Glasgow.

5. Mr Tortolano was driving three other Advance Limited employees including the Pursuer who were travelling home to Airdrie from a construction site in Moodiesburn. Johnny Mitchell was sitting in the front forward facing seat, the Pursuer was sitting behind the two front seats in a seat facing backwards. He was wearing a seatbelt. A further colleague, Colin Moss, was in another seat further back in the vehicle than the Pursuer, looking forwards, facing the Pursuer.

6. The Ford Transit van was driving on the A73 Stirling Road approaching Riggend heading towards Airdrie. This is a dual carriageway. The van was travelling in the outer lane of the dual carriageway at a speed of approximately 70mph.

7. Ahead of the van, the inside lane was occupied by a Vauxhall Astra motor car, registered number LL56REN driven by Lauren Sands, an off duty police officer. She was driving at approximately 65 to 70mph. The speed limit applicable to the dual carriageway is 70mph.

8. The distance between the Ford Transit van in the outside lane and the Astra car in the inside lane was closing and Mr Tortolano intended to continue to overtake the Astra. There was no other relevant traffic.

9. Ahead of both vehicles was a slip road on their left-hand side. An ambulance driven by Mr Thomas McLaughlin was travelling up the slip road towards the junction with the A73 southbound at the time the Ford Transit van and the Vauxhall Astra were also approaching that junction. The blue light was operating on the ambulance and also its siren was sounding. The ambulance came to a halt at the junction of the slip road with the dual carriageway A73 southbound, ahead of and in the vision of the drivers of the Vauxhall Astra and the Ford Transit. By the time it stopped, the Astra and the Ford Transit were approximately 100 metres away from the slip road junction.

10. Both Mr Tortolano, the driver of the Ford Transit van, and Ms Sands, the driver of the Vauxhall Astra, became aware of the ambulance as it approached the slip road junction. The view of approaching motorists is partially obscured on the left hand side by a banking and trees with other foliage. Mr Tortolano saw the approaching ambulance at or shortly before he reached the isolated trees on his left hand side approximately 150 metres from the junction. Ms Sands was aware of the ambulance from an earlier point at or about the Give Way sign on the left hand side approximately 250 to 300 metres from the junction.

11. A short distance beyond the slip road junction with the A73 southbound, the road ceases to be a dual carriageway and is reduced to two lane traffic. The dual carriageway has a central reservation and towards the centre of the raised reservation there is a line of small bollards joined at the top by fencing material. At a distance of approximately 200 to 300 metres before the slip road there is on the nearside of the road a sign indicating that traffic is becoming two way. At a distance of approximately 100 metres to 150 metres from the slip road there is a road sign indicating the slip road approaching from the left hand side.

12. Mr Tortolano did not reduce the speed of the Ford Transit on seeing the ambulance approaching the slip road junction. He did not reduce speed in anticipation of the end of the dual carriageway section of the A73 a few hundred metres ahead.

13. When the Vauxhall Astra was approximately 50 metres from the slip road, the driver, Ms Sands moved to the right, changing lanes in to the path of the Ford Transit van, driven by Mr Tortolano. Ms Sands did not signal that move to the right.

14. At a place approximately level with the Give Way sign shortly before the beginning of the slip road junction, there was impact between the rear offside and rear of the Vauxhall Astra car and the front nearside and front of the Ford Transit van. As a result of the impact, the Vauxhall Astra driven by Ms Sands went out of control and spun ending up on the northbound carriageway beyond the end of the dual carriageway section of the A73. Both vehicles were significantly damaged in the areas of impact. The Ford Transit van required repair/replacement to front bumper, front lower bumper, left head lamp assembly, left front wing and the other damage as more fully set out in production 6/6/1 and invoice dated 8/4/2021. The Vauxhall Astra is shown in the report from LV Repair Services Limited following inspection on 25/1/2021 when it was assessed as a total loss all as set out in the report production 6/7/1-31.

15. The damage to the Vauxhall Astra shows impact in two directions, a heavy impact from offside to the centre from the collapse of the offside body work. There is also damage consistent with impact from rear towards the front. This is shown in photographs at page 99 and page 107 (production 6/7/6 and 6/7/14). The damage to the Ford Transit van is shown in production 6/6 and in particular the two photographs 6/6/8 (page 72) showing the nearside front corner of the bodywork pushed in in front of the tyre; in production 6/6/9 (page 73) showing front to rear distortion damage to the nearside bumper and headlamps and the

bumper frame, damaged from left to centre. On Production 6/6/10, page 74 the tyre is shown with the extent of body impact to the left and the front wing impacted rearwards.

16. The Pursuer was 24 years old when he was injured in the incident. He attended hospital the next day. He had been wearing a seatbelt in the van. As a result of the accident impact, the Pursuer had pain radiating into both shoulders together with low back pain and he was diagnosed as having sustained a neck sprain and back strain injuries consistent with the impact collision. The neck injury had no continuing effects. He was off work for one week and then returned to light duties for approximately two weeks after that. Light duties involved tidying up, brushing etc. He was not fit to lift slabs and the other heavy manual tasks associated with his employment as a Groundworker. The effects of the back strain diminished over time. Pain and stiffness radiated into both shoulders. The effects of the shoulder injury pain resolved within 3 months. The limitations of movement and further pain resulting from the back strain injury persisted noticeably until at least August 2021 and thereafter resolved by 9 months after the accident on 22 January 2021.

17. The Pursuer's net loss of earnings was £346.76 inclusive of interest. The value of the Pursuer's claim for the past services is £115.15 inclusive of interest.

18. The driving of both the Defenders' insured driver, Mr Tortolano, in the Ford Transit van, and of Ms Lauren Sands in the Vauxhall Astra, each made a material contribution to the collision.

#### **FINDS IN FACT AND LAW THAT:**

1. The Pursuer has sustained loss, injury and damage as a result of fault and negligence to a material extent on the part of the Defender's insured driver.
2. The net loss of earnings and value of past services total £461.91.

3. A reasonable award for solatium for pain, suffering and inconvenience is £3,700 plus interest.

**THEREFORE:**

1. Grant decree for payment by the Defenders to the Pursuers of the sum of SIX THOUSAND AND EIGHT POUNDS AND NINETY ONE PENCE (£6,008.91) STERLING with interest to follow at the rate of eight per centum per annum from the date of decree until payment.

**PRELIMINARY ISSUES - PROCEDURE**

1.1 This case called for Proof before me in Edinburgh Sheriff Court, All Scotland Sheriff Personal Injuries Court, on Tuesday 4 February 2025. The Pursuer was represented by Mr Ronald Conway, Solicitor Advocate and the Defenders by Mr Stephen Kirk, Solicitor. The Pursuer had a Motion together with a late Inventory of Productions and a Motion to have that received, to which no objection was taken and the late Productions were accordingly received. The parties also produced for the Proof a Joint Minute of Admissions which deals with a number of matters which were not controversial and agreement of the medical report and medical records. It further agrees that the net loss of earnings is £346.76 and past services for the Pursuer at £115.15.

1.2 The Defender had lodged a Minute of Amendment and moved that the Record be amended in terms of it. The amendment, although relatively brief in its wording does have significant effect. In particular, the Defender's position is varied so that instead of saying that the Vauxhall Astra "was joining the southbound carriageway from a slip road" the Defender's position was now that the Astra was "proceeding in the inside lane". In support

of this, Mr Kirk said that it had always been known that the Vauxhall Astra, driven by Lauren Sands, and which has been referred to in the pleadings as “the third party vehicle” was travelling in the inside lane and had never been in the slip road. Accordingly, he said there was no prejudice to the Pursuer.

1.3 Mr Conway objected to the amendment. He made reference to the established tests for amendment procedure found in particular in *Sheriff Court Practice - MacPhail - 4<sup>th</sup> Edition* Chapter 10. He acknowledged that this is a matter for the discretion of the Sheriff and that various factors are identified to assist in that exercise including the stage which the action has reached and the procedural history of the action, the nature of the amendment and any prejudice. He pointed out that the Defenders had maintained skeletal Defences until after the expiry of the three year limitation period. It was only after that date that the Defences were expanded and suggested that liability for the accident rested with the Vauxhall Astra and Ms Sands (the third party vehicle) although this created the wrong description of the driving of the Astra. No third party proceedings had taken place. He did accept there would be no actual prejudice to the Pursuer because the factual circumstances of the road traffic accident were broadly understood and acknowledged on both sides. Nevertheless until now the Defenders had been stating that Ms Sands’ Astra emerged from the slip road. The new version is very different.

1.4 I allowed the amendment reluctantly because any amendment of this significance on the morning of a Proof is highly undesirable and potentially unfair. Ultimately, the absence of any actual prejudice to the Pursuer and the prospect that the Proof without the amendment would hear evidence which everyone knew was not consistent with the Defender’s written pleadings, and the desirability of having a Proof which dealt with reality rather than some construct which was erroneous, led me to the view that the amendment

should proceed. However, the Defender's pleadings do the Defenders and solicitors no credit. Even if the defence as expressed in adjustments managed to confuse the ambulance which was using the slip road, and the Vauxhall Astra, (perhaps relying unwisely only on information in the accident report prepared by the Pursuer), someone in the Defender's solicitors should have read the pleadings earlier than the day or so prior to the Proof and realised that the position in Answer 4 was wrongly described when the totality of the evidence was considered. I understand that Mr Kirk inherited this case at a relatively late stage for the purpose of the Proof and there is no criticism directed at him. He had to correct the problem. Whoever was in charge of the pleadings prior to February 2025 had made a significant and apparently careless error. There are further errors in the pleadings for both parties which should not have been left uncorrected.

1.5 In Cond 3, jurisdiction is claimed by reason of the place of the accident stated as "Stirling Road, Glasgow". That is wrong. The accident happened on the A73, possibly known as Stirling Road, near to Riggend, which is near Airdrie, ML6. In Cond 4 the Pursuer describes the vehicle being driven by Ms Sands as being a "Ford Focus" - it was a Vauxhall Astra. In Answer 4 the Ford Transit van is described by the Defenders as being "owned by Advance Construction (Scotland) Limited". Given the wording of the repair invoice I think that is unlikely to be correct. Notwithstanding the Joint Minute of Agreement, it looks as though the van may have been owned by "JMS Plant Hire" to whom the repair invoice is addressed and this suggests that the van was on contract hire, although painted with the Advance name on it and insured by the Defenders. Throughout Answer 3 the Vauxhall Astra is described as "the third party vehicle". Whilst it may be that no technical significance arises from this wording, it does suggest that Ms Sands was a third party to the proceedings. She was not. At the end of Answer 4, the Defenders say, referring to the

history set out by Mr Ian Anderson, the Pursuer's medical expert at page 2 of production 5/1 that the accident happened "when, without warning a car which had been proceeding along a slip road failed to give way and as a result crashed in to the passenger side of the works van". That statement could and should have alerted the Defender's solicitors to the inaccuracy of the position they had wrongly set out in the pleadings and they must have known that this was not what Mr Tortolano was describing in his witness form, production 6/9. It may be that pleadings are now relegated to a bit part in litigation, particularly personal injuries litigation, but they remain important as seen from Practice Note number 3, 2016 Personal Injury Actions for the Sheriffdom and paragraph 3. They ought to have had better attention than happened here. There was also a degree of unreality in a case being run on behalf of an innocent passenger only against one driver in a two driver collision where liability was not straight forward. There may have been reasons for this although I have difficulty in understanding what they might be, even allowing for expiry of the limitation period. Similarly, I have difficulty in understanding why in the situation where there could be blame attaching to both drivers, the Defenders did not make that position clear and then also direct third party proceedings against Ms Sands and her insurers. I appreciate that there are expenses implications in all of this and there may have been tactical reasons. However the court has been left with the unsatisfactory situation of trying to assess liability of two drivers when only one of them was expressly criticised for their driving and represented.

## 1.6 EVIDENCE

Having allowed the amendment to the pleadings, I then heard evidence as follows:

1. Stephen Lyons - the Pursuer
2. Lauren Sands - the Vauxhall Astra driver (third party vehicle)
3. Thomas McLaughlin - paramedic driver of the ambulance

All of these witnesses were led for the Pursuer.

For the defence I heard evidence from:

1. Lorenzo Tortolano - the driver of the Defender's insured vehicle, the Defender's Ford Transit van.
2. Alan Bathgate - Automobile Engineer.

## 2. PURSUER'S SUBMISSIONS

2.1 Mr Conway adopted his Written Submissions. Firstly, he stated that the driving of Ms Sands who was not a "third party" since she was never introduced into the action by the Defenders, is not criticised in the Pursuer's case. The Pursuer's case is directed only against the insurers of the Ford Transit van as driven by Mr Tortolano. His proposition was reduced to the short point that the driving of Mr Tortolano amounted to a negligent and material contribution to the accident. He referred me to the well known decision *Wardlaw v Bonnington Castings* 1956 SC (HL) 26 and the speech of Lord Reid at page 31 that the claimant

"must in all cases prove his case by the ordinary standard of Proof in civil actions; he must make it appear at least that on a balance of probabilities the breach of duty caused or materially contributed to his injury".

He derived further support for the “material contribution” from page 32 of Lord Reid’s speech and that

“what is a material contribution must be a question of degree. A contribution which comes within the exception of de minimis non curat lex is not material but I think that any contribution which does not fall within that exception must be material. I do not see how there can be something too large to come within the de minimis principle but yet too small to be material”.

2.2 Mr Conway added the recent decision in *Holmes v Poeton Holdings Limited* 2023 EWCA Civ 1377 and in particular paragraphs 44 and 58 of the Judgement of Lord Justice Stuart-Smith which discussed the *Bonnington* principles as well as other industrial disease cases which have followed on from *Bonnington*. In paragraph 58 Lord Justice Stuart-Smith quotes Lord Rodger of Earlsferry in *Simmons v British Steel plc* 2004 UKHL 20 2004 SC (HL) 94, who described the decision in *Bonnington* as “the classic authority for the proposition that, to succeed and recover damages in full against any defendant, a plaintiff need prove no more in that the defendant’s wrongful act materially contributed to his injury: “but it is also hard - and settled law - that a defendant is held liable in *solidum* even though all that can be shown that he made a material, say 5% to the claimant’s indivisible injury.”

2.3 In seeking to persuade me that the driving of Mr Tortolano amounted to a “material contribution” Mr Conway then referred to the Highway Code 16<sup>th</sup> Edition 2015 (production 5/4) at paragraph 219 (which had been put to witnesses) and which is referred to emergency and incident support vehicles. It reads:

“You should look and listen for ambulances..... When one approaches do not panic. Consider the route of such a vehicle and take appropriate action to let it pass while complying with all traffic signs. If necessary, pull to the side of the road and stop, but try to avoid stopping.....before..... narrow section of road. Do not endanger yourself, other road users or pedestrians..... Do not brake harshly on approach to a junction..... as a following vehicle may not have the same view as you”.

In Mr Conway's submission this meant that Mr Tortolano should be making "some kind of accommodation" for the presence of the ambulance ahead and for the possibility that the Vauxhall Astra in the inside lane would move out.

2.4 He relied on the decision in *Griffin v Mersey Regional Ambulance* 1998 PIQR - 34, a case which does involve an ambulance but where the ambulance came in to collision with another vehicle, at page 35/36

"the Judge found the plaintiff to have been negligent in three respects: first for failing to hear the ambulance; second for failing to see it; and third for failing to appreciate that the white box van was not stopping so as to turn right, but rather for some other purpose which itself should have put a reasonably prudent driver on alert."

Mr Conway founded on all of three respects and argued the driving of Mr Tortolano failed in all of them. The Court of Appeal in England in the Judgment of Simon Brown LJ used that formulation and together with what was then Rule 76 of the Highway Code, which had very similar wording to para 219 of the present Code. The Road Traffic Act 1988 Section 30(7) provides that

"a failure in the part of a person to observe a provision of the Highway Code..... may in any proceedings (whether civil or criminal) ..... be relied upon.....as tending to establish or negative any liability which is in question....."

On the facts in that case, the appeal against the decision which apportioned liability 60:40 in the Defender's favour was rejected. It was held that the plaintiff was plainly negligent and by analogy Mr Conway argued that the same should apply here because of the breaches of the Highway Code. In particular Mr Tortolano should have been on the alert to anticipate Ms Sands changing lane. He maintained his speed at 60 to 70 mph and did not slow down. He did not hear the ambulance siren. On his own evidence he did not see the ambulance approaching the entrance to the dual carriageway until he was at a point level with the trees showing in photograph page 58. The ambulance would have been visible for a significant

distance before then. The only way in which Ms Sands could give priority to the ambulance was to change lanes which Mr Tortolano should have anticipated. Whilst it would have been unwise to stop on a dual carriageway, Mr Tortolano's decision to drive on and pull over later did not give sufficient priority to the ambulance.

2.5 Mr Conway relied upon the observation of Lord Uthwatt in *London Passenger*

*Transport Board v Upson* 1949 AC 155 at page 173:

“.....I desire to only to register my dissent from the view expressed by the Master of the Rolls that drivers 'are entitled to drive on the assumptions that other users of the road, whether drivers or pedestrians, will behave with reasonable care'. It is common experience that many do not. A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take”.

Mr Conway adopted the passage in *Clerk and Lindsell* on Torts - 24<sup>th</sup> Edition, para 7-214 which repeats that quotation and adds “failure to anticipate carelessness on the part of others is regarded as carelessness in itself”. Mr Conway repeated that it was not his position that Ms Sands had necessarily been negligent.

2.6 In summary he submitted that the accident was caused at least to a material extent by the failures of Mr Tortolano:

1. He did not see the ambulance until late; he did not slow; he did not anticipate the change of lanes by Ms Sands;
2. The damaged vehicles were more consistent with Ms Sands' explanation and the sketch provided by Mr Tortolano in his initial witness form dated 24 January 2021 (production 6/9) made no sense and gave no indication of the place of impact.
3. Mr Conway also pointed to the complete change in the Defender's pleadings and the earlier version must have been based on something which presently

remained unexplained by the Defenders and solicitors. Mr Conway also doubted whether there had been no discussion amongst those in the transit van after the accident and that Mr Lyons contradicted this.

## 2.7 Quantum

For solatium Mr Conway pointing to the agreed medical report from Mr Ian Anderson, Consultant in Accident & Emergency Medicine and, invited the conclusion that an injury which extended to approximately 9 months (as spoken to by Mr Lyons in his evidence) with lower back and shoulder pain should attract an award of solatium of £6,000. He reached that figure as a midpoint in the range given by the Judicial College for the two injuries sustained - ie back and separately shoulder with allowance for overlap in pain and limitation of movement, and then also by reference to the decision in *Faragen Akrim v UK Insurance Limited* 2024 SC Edin 53 where £2,000 was awarded by Sheriff KJ Campbell KC, and in *Callum Fraser v Evelyn Munro & Others* 2024 SC Edin 36 where Sheriff Nicol awarded £3,500 for strain/soft tissue injuries lasting approximately six months.

## 3. DEFENDER'S SUBMISSIONS

3.1 In response, Mr Kirk adopted his rather more extensive Written Submissions. In answer to points raised by Mr Conway, Mr Kirk rejected the submission in relation to the material contribution saying that *Bonnington* and the other cases relied upon were dealing with Pursuers with industrial diseases and therefore a very different situation. He submitted that in asbestos cases, the rule is that one fibre exposure is *de minimis* and anything under 5% would similarly be characterised also as *de minimis*. He did not venture

an opinion as to the level of contribution at which shared responsibility for an accident such as this would begin.

3.2 His interpretation of the Highway Code para 219 was that there was no positive requirement on either of the drivers on the dual carriageway to give way to the ambulance. In any event Mr Tortolano had considered the presence of the ambulance and decided to deal with this by driving past the junction with the intention of later pulling over to allow the ambulance to pass on the two way stretch of road.

3.3. By reference to the argument presented by Mr Conway relying on the three-fold test in *Griffin*, Mr Kirk argued that there was no breach of the first two factors but even if there was they did not give rise to any consequences. It was only the third factor which could be relevant. But the facts in *Griffin* were very different. By reference to Lord Uthwatt's description of driver "follies" Mr Kirk submitted strongly that Ms Sands late move in to the off side lane was not just folly but something well beyond that and not something which could have been anticipated by Mr Tortolano.

3.4 As is expressed in para 2.2 and 2.3 of the written submissions, Mr Kirk summarised the Pursuer's case as alleging failure on the part of the Defenders' insured driver to pay adequate attention to the road ahead or consider the route of the ambulance and failure to take appropriate action to let the ambulance pass safely by adjusting his speed. He further pointed out that the Pursuer in his evidence did not blame the Defenders' insured driver, Mr Tortolano, and that severely undermined any case made for the Pursuer. Mr Kirk then argued that the Pursuer had failed to discharge the onus of Proof to show on a balance of probabilities that there was any fault on the part of the Defenders' insured driver.

3.5 Mr Kirk invited me to find that the Pursuer was an unreliable witness. He had not been able to see what happened and in his claim for injuries there was no indication of

what household duties he said he was unable to undertake. He then also pointed to the information provided by the Pursuer to the medical expert, Mr Ian Anderson, which gave an entirely incorrect version of how the accident happened. He also pointed to the witness form which suggests fault on the part of the driver of the Astra rather than any fault on the part of the Defenders' insured driver. But that was not consistent with the position now being adopted in pursuing a case which blames the Defenders' insured driver.

3.6 So far as Ms Sands is concerned, Mr Kirk argued that her version of the immediate build up to the accident was highly improbable. This was the first time she had said that the van had tried to overtake her and this was not something which had been pled by the Pursuer. In para 6.14 of his written submissions he makes the point that on Ms Sands' evidence, the Ford Transit van must have attempted to overtake at a point further back than the end of the slip road, but that the photographs of the road show that there was nowhere for the van to attempt such an overtaking manoeuvre. Therefore, Ms Sands' account was factually impossible. He further challenged her account of the accident by reference to her evidence about where she braked, approximately 100m back from the slip road. But then she later explained that in her evidence she had also said that at the point she braked, the van swerved and collided with her car - in line with the slip road which she had said was 100 metres away. He then also pointed to the photograph at page 60 which shows that the central reservation and bollards are still in place. Importantly, the driver of the ambulance Mr McLaughlin did not see the van try to overtake the Vauxhall Astra nor did he see the impact.

3.7 Accordingly in Mr Kirk's submission Mr Tortolano took the safest course of action. Even if he had slowed there was nothing to say that the accident could have been avoided given the late movement of the Astra into his path. Accordingly, there was no breach of

the duty of reasonable care proved against Mr Tortolano and the Defenders should be assolized.

### 3.8 Quantum - Solatium

By reference to the decision in *Ashton v Skews* 2009 WL289344 (Sheriff Principal EF Bowen QC) - an award of £2000 - Mr Kirk argued that £3,400 is an appropriate award as at today's date taken together with the Judicial College Guidelines Chapter 7 with particular reference to back injuries.

## 4. EVIDENCE IN SUMMARY

4.1 The Pursuer – Stephen Lyons. Mr Lyons confirmed his personal details and that at present he is again employed by Advance Construction Scotland Limited as he had been at the time of the accident. Mr Tortolano was his foreman on 22 January 2021 and at about 4.00pm they were travelling from the building site in Moodiesburn in a works Ford Transit van which Mr Tortolano was driving. Mr Johnny Mitchell was in a front passenger seat. The Pursuer was behind them in a seat facing backwards and he was wearing a seatbelt. Another colleague Colin Moss was in a third row seat but facing forward directly in front Mr Lyons. The Pursuer did not see the collision although he felt it. He felt the van start to brake and then a thud followed by a second thud.

4.2 After the accident, Mr Lyons recalled that Mr Tortolano checked on all of his passengers and then went to see the other car on the opposite side of the road some distance down. The Pursuer only saw the ambulance after the event and by then it was parked near the car driven by Ms Sands. He said that there had been no real discussion among the Ford Transit van's passengers about what had happened but Mr Tortolano gave an "insight".

The Pursuer then walked the distance back home to Airdrie. He felt shocked and went to bed and the next morning because of pain in his right shoulder and lower back he went to Monklands General Hospital where he was seen. He then had a week off work but because of financial needs went back to work. He received some sick pay. When he returned to work he was capable only for light duties and this continued for a couple of weeks. Light duties consisted of just tidying up, brushing and related work. He was not able to lift slabs or do the heavy work which typically he did. He had painkillers obtained on prescription over the counter from the Pharmacist. A friend had given him stronger pills. He described continuing pain and discomfort particularly with his back which continued for some weeks and months after the accident.

4.3 Production 5.1 is the medical report by Mr Ian Anderson, Consultant in Emergency Medicine by video consultation on 17 August 2021. The Pursuer explained the version of the accident circumstances in Production 5/1/2 that “a car had been proceeding along the slip road and failed to give way” as something he had been told by Mr Tortolano.

4.4 In describing his condition symptoms, Mr Lyons said that as at the date of seeing Mr Anderson he still did suffer discomfort as noted. He thought he did recover within nine months as predicted by Mr Anderson. The pain was mostly in his lower back and he could “deal with” the shoulder pain.

4.5 In cross-examination, Mr Lyons was asked whether he was blaming Mr Tortolano (the Defender’s insured driver) for the accident. Mr Lyons said, “no”. He was referred to production 6/12/1 and 6/12/2 a “witness form” apparently prepared for his employers. Question 6 asks whether he heard “any admission by either driver” and the reply is “yes the woman said to ambulance”. Mr Lyons said he obtained that information from Lorenzo. Question 7 asks - “whom do you consider was to blame.....?” The reply is “the woman

because she said to the ambulance". Again he explained that answer by saying this information had come from Lorenzo. He was cross examined about the effect of his injuries, but insisted that his earlier description in evidence in chief was accurate.

#### 4.6 Lauren Sands

The Pursuer's second witness was Lauren Sands. She is now 33 years old and has five years service as a Police Officer meaning that at the time of the accident in January 2021 she was fairly recent into that occupation. After describing her police experience and background, including driving police vehicles, using flashing lights and siren, she said that on 22 January 2021 she was driving to her home in Airdrie. By reference to Productions 6/4/1/2/3/4/5 (photograph pages 56-60), she confirmed that these show the dual carriageway from Cumbernauld to Airdrie. They also show the central reservation with bollards.

Production 6/4/1 (page 56) shows an approach to the slip road junction and has a warning sign showing that two way traffic is about to commence following the end of the dual carriageway stretch. The remaining photographs show the approach to the slip road until Production 6/4/5 (page 60) which shows the edge of the slip road junction. She confirmed that the accident happened at about 4pm when she was driving her Vauxhall Astra LL56REN. She was not on duty. From photograph Production 6/4/1 (page 56) she described her car as being in the left hand inside lane and approaching the slip road. The speed limit is 70 miles per hour and she was doing 65 to 70 miles per hour. By the time she was at about the road sign shown in Production 6/4/2 (page 57) (the slip road sign) she could see the ambulance approaching the end of the slip road ahead and coming to a halt. Blue lights and a siren were operating. She said she then checked her mirror and saw the van behind her. She checked her offside mirror for anyone in the outside lane. She said she was

thinking she would give the ambulance a clear exit and moved right. She thought she then travelled to the Give Way sign seen in Production 6/4/4 (page 59), and braked, although not heavily. The ambulance did move out but she described then being struck by the other vehicle. This was just as they were approaching the end of the dual carriageway and the return to single lane traffic in each direction. She was hit by the Ford Transit van on the rear offside of her car. Her car then spun on to the opposite side of the carriageway and stopped about 100 metres further on.

4.7 She denied ever saying to the ambulance driver that she had been on her mobile phone or that the accident was her fault. She denied saying to the van driver that the accident was her fault. She denied that the van had been established in the outside lane prior to impact and also that she swerved without warning. She denied that the van could not have avoided the impact saying that it could have braked. She denied any suggestion that she could be at fault. When asked about the vehicle damage shown in Production 6/7 she said that this had occurred because the van driver tried to swerve and to go round her - overtaking on the right hand side which meant on the central reservation. The van was trying to overtake her and the collision happened at about the Give Way sign whilst the ambulance was still at the slip road end. She then modified that to say that the collision had happened further on and at a point where the central bollards end. She denied saying in answer to the ambulance driver or Mr Tortolano that "this is a civil matter" meaning that police did not need to be involved. She explained that in her view, police involvement was not necessary.

4.8 She stated that she had moved in to the outside lane just beyond the traffic sign seen in Production 4/6/4/4/2 (page 57), and at that time there was a distance of one and a half car lengths between her vehicle and the approaching van. She insisted she signalled.

By reference to photograph Production 6/4/4 (page 58), she said she braked at approximately half the distance shown between the front of the photograph and the slip road. She did that because she considered a hazard existed from the ambulance and also they were approaching the end of the dual carriageway. In re-examination she said that the van carried out its overtake manoeuvre in the section of diagonal lines after the bollards had ended.

#### 4.9 Thomas McLaughlin

Mr McLaughlin was driving the ambulance as a paramedic, now with ten years' experience. He confirmed it had blue lights operating and the siren was sounding. He came up the slip road approaching the A73 and stopped at the white line. He saw the car in the left hand lane move in to the right hand lane as he approached the junction but before he had stopped. He then saw the van collide with the back of the car.

4.10 He thought that the car had moved from the inside lane to give way for him. That is something he regularly experienced driving in urgent responses. He confirmed that the car after the collision spun across the road into the opposite northbound carriageway beyond the end of the dual carriageway section. He then moved to block the road with the ambulance and check for injuries. He spoke to the car driver, a police officer and she said, amongst other things, that this was a civil matter, meaning that police did not need to be called.

4.11 He thought that the car was approximately 50 metres back from the junction when it moved lanes. Impact took place shortly before the two vehicles reached the junction. He did not see any attempt by the van to overtake the car.

#### 4.12 Lorenzo Tortolano

The Defender's first witness was Mr Tortolano. He is now a contracts manager and no longer works for Advance Scotland Limited. He confirmed that on Friday 22 January 2021 he and the others in the van had been working at a site in Chryston and he was taking them to Airdrie to drop them off. He agreed that the accident happened somewhere between 3.30 and 4.00pm on the A73. He knew the junction and did regard it as "dangerous". He drove it twice each day and knew that after the junction there are access roads to farms and offices etc.

4.13 By reference to the photograph Production 6/4/4 (page 59) he indicated the slip road and road sign, and then described his van as being in the right hand lane. The collision was beyond the sign when the van was in line with the slip road end. He knew the ambulance was in the slip road.

4.14 As he approached the slip road he had seen the ambulance and the car ahead. He planned to continue past the slip road and then later give the ambulance space to overtake him if necessary.

4.15 Mr Tortolano described the car as switching lanes and smashing in to the side of the van at its front. This was done without signalling. He slammed on the brakes but hit the front wheelarch of the car ahead. The car ended up on the other carriageway at about where the distant car can be seen in the photograph.

4.16 He went to the car and had a conversation with the driver. He recalls her saying that it was "a civil matter". He was taken aback by this statement because it was not something he expected. He said she said she was on the phone to her partner who was "raging because of the crash".

4.17 He confirmed the vehicle damage as shown in the photographs. Subsequently police officers did attend because they had been passing. He confirmed his passengers walked home although the van could be driven.

4.18 In cross examination and by reference to the photograph Production 6/4/4 (page 59) that Mr Tortolano said that by the time he approached the Give Way sign the ambulance was just arriving at the white line of the junction. He had seen it on the road up to the junction with its lights on but had not heard any siren. He disagreed that the car had to move to accommodate the exit of the ambulance. In his view it was better to drive past the junction because otherwise he would have had to brake hard. He could then have allowed the ambulance to pass him later. Mr Tortolano denied that he had hit the rear corner of the Astra but rather it had hit him crossing the lane at a late stage. It had not occurred to him the Astra might move over to allow the ambulance out. He confirmed that he had not slowed his speed at all. He estimated his speed at being 60 to 70. He confirmed that the Ford Transit was travelling faster than the Astra. He denied swerving right or trying to overtake the Astra.

4.19 From the photograph Production 6/4/3 (page 58) Mr Tortolano thought that he had reached the trees on the left hand side of the road seen in the middle distance of the photograph when he first saw the ambulance. The ambulance then stopped at the junction. He estimated that there were 300 to 500 yards of dual carriageway left beyond the junction.

#### 4.20 Alan Bathgate

Mr Bathgate was the final witness. He is 69 years old and an automobile engineer. His skill, knowledge and experience is set out in his report production 6/5. He is a very experienced witness in road traffic accident litigation. He is not a road traffic accident reconstruction

specialist and his knowledge and experience relate to vehicle damage and repair and related costs. He adopted his report and the photographs of the vehicle damage and the descriptions which the report contains together with the appendices which are production. He also made reference to the invoices and other related photographs in production 6/6. He described the damage to the Vauxhall Astra as being heavy from offside to centre with collapsed panels. The photographs also show damage exposing the tyre, impact forward of the rear wheel and the extent of damage to the rear corner of the Astra with the body impacted inwards.

So far as the van is concerned, Mr Bathgate described the bodywork damage to the nearside front corner, the body pushed in in front of the tyre, then front to rear distortion, damage to the nearside front bumper and headlamps, the bumper frame damaged from the left hand side of the van to its centre. The Astra damage was from the right hand side inwards.

## 5. CREDIBILITY AND RELIABILITY

I keep in mind that all of the witnesses were telling me events that happened almost exactly four years earlier, so inevitably some elements of their recollection were going to lack accuracy, detail and precision.

5.1 I found the Pursuer to be generally credible. I had no reason to disbelieve anything he said about the injuries he sustained and the nature and consequences of them. He seemed to me to minimise the overall effect and my assessment is much the same as that expressed by Mr Ian Anderson in his medical report production 5/1. I do not accept Mr Kirk's submissions that to some degree the Pursuer was overstating his injuries and that it was far from clear that he had suffered an inability to provide services or required services done for him. The amount involved is modest and the Defenders had already

agreed a payment for that element of loss as set out in the Joint Minute but even without that agreement I would have found his evidence to be entirely believable. He went back to work, for economic reasons and after two weeks or so of light duties which he described, he did go back to working as a groundworker as he had done previously. He did describe two impacts, each one a “thud”, and I accept that evidence. I do find it to be consistent with a first impact between the front nearside of the Ford van with the rear offside of the Vauxhall Astra and then a subsequent impact further along the offside of the Astra. His evidence about the accident circumstances and the version he gave to Mr Anderson and separately in the Witness Form Production 6/12/1 and 2 is very unsatisfactory. But it was the version derived from Mr Tortolano. I mean no disrespect to the Pursuer in describing his interest in and knowledge of the events as being generally very limited. I attach no significance to his limited recollection and understanding. He did not see the accident himself. There does not seem to me to be any significance in his own absence of blame directed against Mr Tortolano. Finally, that is a question for the court to decide based on all of the evidence.

5.2 I did not find Lauren Sands to be reliable in her description of events. My view is reached firstly and primarily because of her description of the Ford Transit attempting to overtake her Astra. There is no suggestion of that in the written pleadings. It was not something she said in the course of her evidence in chief. It only emerged when she had to explain the vehicle damage which was not consistent with her description that she had moved out in time allowing a space behind her in the right hand lane and that she became established there leaving sufficient room for the Ford Transit to slow down. This suggestion of an overtaking attempt by the Ford Transit had never been mentioned before.

Mr Tortolano denied it. Mr McLaughlin did not see it happen as he almost certainly would

have done since it was directly in front of him. I find it to be wrong. Rather than treat this as a deliberate lie, I think it could just be consistent with an impression she formed as the impact happened, all of which would have been within no more than a second or two given the speed at which the two vehicles were travelling. So, I make no express finding about credibility as such. But additionally, Ms Sands said that the ambulance had begun to move out by the time the impact occurred. Mr McLaughlin said the ambulance had not moved. Mr Tortolano said the same. I do not accept Ms Sands' version which again seems to me an attempt to justify her move by suggesting that the ambulance responded to it by then also moving out onto the main carriageway. I am also satisfied that the evidence from both Mr Tortolano and from Mr McLaughlin indicated when she was talking about the accident after the event Ms Sands did say that this was to be treated as "a civil matter". She denied that. I do not accept her evidence. That in turn leads to a question as to why she was insisting it should be a civil matter. I appreciate that post accident, reactions may very well be troubled by the shock and disturbance of what has just happened and I can appreciate that Ms Sands may not have wanted to be embarrassed in front of police colleagues. But if the accident had happened as she described in evidence to me - ie when the van was overtaking her, it seems to me she would have wanted police officers to attend because such driving could be described as just careless but probably reckless given the layout of the road at that point. It seems to me that she was reluctant to have the presence of police officers at least possibly because she was aware that her driving was not free from criticism. Accordingly, I do not accept her evidence that she had moved out leaving a car and a half car length for the van. If she had moved when the Ford Transit was some distance back, then it is more likely that impact would have been square on the front of the van to the rear of the car rather than a corner to corner impact that did occur. I find that she did move out

at a late stage very possibly shortly before the commencement of the slip road junction and its Give Way sign. In doing so, she did not leave sufficient space. I consider that her driving was a material cause of the accident.

5.3 In general, I did find Mr Thomas McLaughlin, a paramedic ambulance driver, to be credible and largely reliable although unfortunately his recollection was relatively poor.

Similarly, I found Lorenzo Tortolano to be generally credible and reliable in his description of what happened, the speed of his vehicle and the layout of the road.

5.4 For the avoidance of doubt, I do not find that there is evidence to say that Ms Sands was using her mobile phone when the accident happened. If anything I suspect that by the time conversation was being had with her after the accident she had phoned her partner.

There is no evidence that she accepted the accident was her fault. All she did was to express reluctance to have formal police involvement, although it seems that did happen at a later stage because officers were passing by.

5.5 Mr Alan Bathgate's evidence was entirely credible and reliable within the limitations of his expertise.

## 6. DECISION AND REASONS

6.1 I find that the accident was caused to a material extent by the driving of Mr Tortolano, the Defender's insured. It was also caused to a material extent by the driving of Ms Sands in the Vauxhall Astra.

6.2 For reasons I explained in para 5.2, I have rejected entirely the version of events described by Ms Sands except where that is supported by other evidence. I have accepted her impression that she was at about the road sign for the slip road - approximately 250 to 300 metres before the slip road junction when she first saw the ambulance. That looks

probable from the photograph 6/4/2 (page 57) and fits with the evidence from Mr McLaughlin, the ambulance driver. I have in large part accepted the version provided by Mr Tortolano which is in its essentials supported by the recollection of Mr McLaughlin in his evidence. There was no accurate measurement of the stretch of the A73 dual carriageway which is in issue in this case, but judgment can be made from the photographs Productions 6/4/1 to 6/4/5. The road sign showing the slip road and junction ahead in Production 6/4/2 (page 57) is approximately 250 to 300 metres from the junction. Two isolated trees referred to by Mr Tortolano are approximately 150 metres from the junction as shown in Production 6/4/3 (page 58). The Give Way sign at the beginning of the junction road markings is in Production 6/4/4 and is approximately 30-50 metres from the beginning of the junction roadway itself at the end of a stretch of road which has hatched markings. The evidence indicated that after the impact, Ms Sands' Astra ended up on the north facing carriageway beyond the end of the dual carriageway at approximately the place where the further distant car is seen in Production 6/4/4 (page 59) - a distance of approximately 100 to 200 metres beyond the end of the dual carriageway section. The impact happened at about the Give Way sign seen in that photograph which is 30 to 50 metres from the start of the roadway section of the junction - where the ambulance was stationary. Mr Tortolano said that he first was aware of the ambulance as he approached the trees seen in Production 6/4/3 (page 58) on the left-hand side of the carriageway, a distance of approximately 100 to 150 metres from the Give Way sign.

6.3 The Pursuer's pleadings attributing fault to Mr Tortolano are brief and do not represent all of the evidence. But in particular in para 4 it is said that Mr Tortolano

“failed to pay adequate attention to the roadway ahead of him or to consider the route of the emergency vehicle. He failed to take appropriate action to let it pass safely, namely by adjusting his speed”.

Then in cond 6 it is said “he failed to keep a proper lookout and to slow down notwithstanding the visible presence of the ambulance with lights flashing and siren sounding. His vehicle struck the rear of the vehicle driven by Lauren Sands. Reference is made to the Official Highway Code 2015 Rule 219 ‘emergency and incident support vehicles’”.

6.4 In his submissions to me, Mr Conway for the Pursuer placed heavy emphasis on speed and the failure on the part of Mr Tortolano to slow down as the Ford Transit got closer to the slip road with the Astra in front of him and the ambulance approaching the end of the slip road with lights flashing and siren sounding. The emphasis was directed to speed because of the presence of the ambulance. In answer, Mr Kirk denied there was a duty to slow down, but then that even if such a duty did exist, he challenged whether slowing down would have prevented the accident because the sole cause was the move by Ms Sands driving her Astra into the path of the Ford Transit shortly before the slip road junction and giving the van driven by Mr Tortolano no opportunity to avoid the impact.

6.5 I find that the accident was caused at least in part by the speed of Mr Tortolano. In his evidence to me he said very frankly that he did not reduce speed at all. He did not describe lifting his foot off the accelerator or covering the brake in anticipation of any event that might result from the presence of the ambulance. I find that to be a breach of the duty of reasonable care. It seems to me that a reasonable driver seeing the ambulance approaching the slip road junction with lights flashing and the siren operating and aware of a car in front in the inside lane could and should have reacted to what was unusual. I consider the careful driver could and should have slowed sufficiently given the traffic situation unfolding in front of him, so that he could react to a problem that might emerge.

What happened - the late move to the right towards the outside lane by the Astra driver was folly, but it was not out with reasonable care to anticipate that it might happen and to slow down against that possibility. I find that it was his duty to alter his speed so that he stayed behind the Astra, which was travelling at an ordinary legitimate speed of 60 mph or more just in case the presence of the ambulance created a change in traffic conditions which might provoke an otherwise unlikely response from the Astra. This is different from the situation if there had been some other non-emergency vehicle approaching the slip road end.

6.6 I find further that Mr Tortolano's driving was also too fast at that place because the end of the carriageway, as marked by the earlier road sign, was only a short distance away. He had decided he was going to complete his overtaking manoeuvre of the Astra even although the end of the dual carriageway was not far beyond the slip road junction and his overtaking speed of the Ford Transit was at most 10mph higher than the speed of the Astra. This driving was a material contribution to the accident. It was the end of work on a Friday. He was transporting colleagues to Airdrie and then returning home. He should not have continued in the overtaking manoeuvre at the speed he was doing when the end of the dual carriageway was not far ahead. Finally, it seems to me on the evidence that Mr Tortolano could and should have been aware of the approach of the ambulance up the slip road sooner than he was. There is no obvious reason why it should have only been as he approached the isolated group of trees seen in Production 6/4/3 that he became aware of the approach of the ambulance. On the evidence of Mr McLaughlin as well as that of Ms Sands, the ambulance had been in view from a point somewhere between the road sign and the end of the first group of trees seen in Production 6/4/2 (page 57). The late recognition of the approach of the ambulance may also have affected the decision of Mr Tortolano to continue at the speed he was doing and to overtake the Astra.

6.7 It is entirely clear from the evidence I heard that a further and probably principal cause of the accident was the decision by Ms Sands to change lane going to the right into the outside lane when she was only a short distance ahead of the overtaking van. She should not have done that. That was negligent. On the evidence I accepted from Mr Tortolano and from Mr McLaughlin, Ms Sands moved into the right-hand lane without signalling and at a point which was approximately 50 metres from the beginning of the slip road junction. At that point she was only a short distance ahead of the Ford Transit. She moved when the Ford Transit had no opportunity to brake sufficiently or to avoid the impact. The collision happened before she had established herself in the outside lane. From the impact damage, her car was still at an angle entering the outside lane. That is the most obvious explanation of the damage to the rear offside and rear side panel of the Astra and the corresponding damage to the front nearside of the Ford transit van. It is also consistent with the Pursuer's description of two impacts, the two "thuds" with the first of those being probably the front nearside of the van hitting the rear offside of the car and then a further strike by the front of the van to the rearward side panel of the car as it began to spin after the first impact.

6.8 Although it was not cited to me in argument, I find that the starting point for consideration of driving conduct in accidents is as expressed by Lord du Parc in *Searle v Wallbank* 1947 AC 341 at 361 where he said: "an underlying principle of the law of the highway is that all those lawfully using the highway.....must show mutual respect and forbearance." In the modern world that might best be described as "defensive driving". This is a style of driving which means looking out for the possibility that someone will do something careless or worse and being ready to guard against that. Mr Conway for the Pursuer relied upon the passage from *Clerk and Lindsell on Torts* 24<sup>th</sup> Edition - para 8 - 201 to the effect that "failure to anticipate carelessness on the part of others is regarding as

carelessness in itself". That is derived from a series of cases which I have considered but will not quote or cite here. I do however find the observations of Lord Uthwatt in *London Passenger Transport Board v Upson & Another* 1949 AC 155 p 173 indicate an early adoption of that point of view when he said that he disagreed with the views expressed by the Master of the Rolls (Lord Greene) "that drivers are entitled to drive on the assumption that other users of the road, whether drivers or pedestrians will behave with reasonable care." As Lord Uthwatt expressed

"it is common experience that many do not. The driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take".

In that House of Lords appeal, Lord Du Parcq also disagreed with Lord Greene (Page 175). At page 176 he repeated his earlier observation in *Grant v Sun Shipping Limited* 1948 AC 549 at 567 that "a prudent man will guard against the possible negligence of others when experience shows such negligence to be common". The judges in these cases were expressing views 75 years ago when traffic conditions were very different and the volume of traffic much less. But even then, a majority of the House of Lords was making clear that drivers are not entitled to assume that other drivers will behave with reasonable care. The increase in vehicle numbers coupled with much higher potential speeds means this is even more essential in the 2020s so that reasonable care for all road users properly requires the reasonable driver to adopt defensive driving where it is needed.

6.9 If the danger was no more than a mere possibility, which would not have occurred to the reasonably careful driver, armed with common sense and experience, then there is no obligation to take extraordinary precautions. (*Foskett v Mistry* 1984 1RTR1). The Defender is not judged by the standards of an ideal driver nor with the benefit of 20/20 hindsight.

(*Stewart v Glaze* 2009 EWHC704 (QBE)). Drivers must always bear in mind that a motorcar is potentially a dangerous weapon (*Lunt v Khelifa* 2022 EWCA Civ 801). My conclusion is that although many drivers may have done exactly what Mr Tortolano did, that does not make it safe or even reasonably careful. The reasonably careful driver is defensive in his driving and prepares for situations that may never arise.

6.10 Turning to the paragraph of the Highway Code - para 219 of the 2015 edition (Production 5/4), it seems to me that it has no direct application to the facts and circumstances of this case. It is of course guidance and not a rule of law or of the road.

In line 6 it says

“when one (i.e. emergency vehicle) approaches, do not panic. Consider the route of such a vehicle and to take appropriate action to let it pass while complying with all traffic signs. If necessary, pull to the side of the road and stop...do not endanger yourself, other road users...do not break harshly on approach to a junction...as a following vehicle may not have the same view as you.”

This guidance does not merit a strict interpretation approach. There is a general direction to consider an emergency vehicle and its road position and where appropriate to take action to let it pass. The passage does not consider directly the prospect of an emergency vehicle entering into a main road from a side road as here. But I take the general guidance to operate which is basically not to panic or do anything in a sudden way which would endanger other road users. The advice not to “brake harshly” is given in the context of another vehicle having a less clear view. In this case, neither vehicle did break harshly. The one thing which Ms Sands did was to move her road position in a way which did then put the following van into difficulties and danger. To that extent therefore, I think she did fail to comply with para 219. But similarly, it could be said that Mr Tortolano also failed to comply. He could and should have slowed down, which would have allowed the ambulance then to emerge. Doing that would not have created danger for other traffic since

it seems no other vehicles were nearby. It does not take hindsight to see that this was always a better option to allow the ambulance a clear route ahead when it was responding to an emergency rather than face the prospect of having to travel behind the Transit van until Mr Tortolano could have found a place to slow down and let it pass. Mr Tortolano could and should have put the Ford Transit in a position which was behind the Astra and should not have moved from that until he knew that the emergency vehicle had become established in its road use, or both the Astra and the Ford Transit had safely passed the slip road. Although finally I do not require the special knowledge of Mr Tortolano about the junction to set up the basis of my decision, there is an added requirement for caution on his part because he said in evidence that he knew the junction to be “dangerous” although he was not asked to expand upon what he meant by that.

6.11 Expressly, I decline to make any formal assessment of contribution as between the Defenders’ insured driver, Mr Tortolano, and Ms Sands, the driver of the Astra. I do that for several reasons. Firstly, it is enough for me to find that there has been a material contribution set out in the driving of Mr Tortolano which I have criticised. I am of the opinion that there has been such a material contribution. It does not seem to me that I need to become involved in any of the detail of what may be a fascinating philosophical discussion as to what is or is not material or *de minimis*. I do not need to spend time discussing whether or not the *Bonnington* principles are properly carried over from disease cases into other forms of negligence actions, although for what it is worth, I do consider that they are so properly translated and the objection from Mr Kirk could not be upheld. But it is in any event my view that the law is clear, and has been for very many years, at least since the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 Section 3 that two or more contributors to any accident which causes loss, provided each of them is responsible to some

material extent, can be found liable in damages even if, as here, only one potential wrongdoer is sued. At least in the first place, a single Defender can be held solely liable for full compensation to the Pursuer. It can then be for that wrongdoer person to decide whether or not they want to try to recover a contribution or all of the award from some other person. It is not appropriate to set out a precise allocation of responsibility on the part of Ms Sands since she was not a party to this action and was not represented. I have heard no submissions on her behalf nor was she given the benefit of representation when she was giving her evidence. It is presently sufficient for me to find comfort in the views of Lord Reed in *Jackson v Murray* 2015 UKSC 5 at page 28 when he said “the apportionment of responsibility is inevitably a somewhat rough and ready exercise”. For me in this case, that exercise is satisfied by finding that there is a material contribution from the Defenders’ insured driver, Mr Tortolano. I may have the impression from what I have heard that the majority of the responsibility rested with the Astra driver, Ms Sands, but I make no specific finding about that.

## 7. QUANTUM – SOLATIUM

7.1 The only issue about damages is the level of award for the pain and suffering sustained by Mr Lyons as a result of the accident. The medical report of 17 August 2021 is little more than a narrative of the symptoms which Mr Lyons has described to Mr Ian Anderson, the Consultant in Accident & Emergency. No independent examination was carried out. Mr Anderson’s report is not clear about the “documentation” which he says he reviewed, but which would seem to have included the brief records of Monklands Hospital Emergency Department and the Pursuer’s GP. The actual medical treatment was brief - advice and pain reducing medication. The medical report does mention “a neck

sprain and back strain injuries". It also mentions treatment "along conventional lines with neck care and back care advice together with analgesics and anti-inflammatory agents."

Mr Lyons did not describe any significant or continuing neck injuries. He did describe back injuries which continued to affect him, and the medical report describes "residual discomfort over the midline between both shoulder blades overlying his dorsal spine and also over the midline over his lower lumbar spine". The shoulder pain was not a problem after 3 months. As at August 2021, 7 months post-accident, the major impact of the injuries had diminished. On examination by Mr Ian Anderson in August 2021, any shoulder pain had resolved. There was no significant neck pain and none was mentioned by Mr Lyons in his evidence to me. By that date only occasional limitation and problems with lower back continued. Thereafter, any residual pain or difficulty reduced further until about 8 to 9 months after the incident when all of the symptoms had resolved. My starting point is the Judicial College Guidelines, Chapter 7 - Orthopedic Injuries, and in particular Minor Back Injuries - (c)(ii) - full recovery without surgery between three months and one year. (Page 43 of the Guidelines). This establishes a range of £2,990 to £5,370. The Judicial Guidelines Section (C) - Shoulder Injuries subcategory (d) Minor (ii) resolving within a year has a range £2,990 to £5,310. The decisions of Sheriff Campbell KC and Sheriff Nicoll in *Ackrim v UK Insurance Limited* and in *Callum Fraser v Evelyn Munroe* respectively were helpful, but ultimately the injuries they were dealing with were different from those in the present case in material respects. In *Ackrim*, the injuries had resolved within 3 months placing the award in a different category in the guidelines.

7.2 As in all cases of this type, the starting point for assessment is the severity of the original injury, the duration of the symptoms, the degree of pain experienced and the extent to which continuing symptoms are of a minor nature only. It seems to me that from his own

evidence and the report of Mr Ian Anderson, the Pursuer's shoulder injuries would not fall within (ii) but rather within category (iii) - they resolved within three months. The Pursuer indicated that he attributed any significant continuing difficulty to his back and that he could cope with any difficulty or pain in his shoulder. There is always difficulty in trying to add together two categories of injury because the overlap is obvious. The injuries I have outlined and as set out in the Pursuer's evidence together with that of Mr Anderson, the Consultant, lead me to the view that the appropriate figure is £4,300. I reached that figure because it seems to me that the primary effect had resolved fairly swiftly for Mr Lyons allowing him to return to work and then to resume his ordinary duties within 3 to 4 weeks. I accept however that he continued to suffer particularly lower back pain which caused him difficulties and he is entitled to have that recognised. The shoulder injury played only a minor part in the pain and suffering and limitation of movement experienced by the Pursuer. I attribute £600 of the award to that element. Taking it together with the back injury, I therefore find that applying the guidelines leads to an award of £4,300 for solatium in this case. Interest on that for nine months at 4% is £129. Interest on £4,300 at 8% from October 2021 to the present is  $3.25 \times 8\% = £1,118$ . Accordingly, the total award for solatium is £5,547 inclusive of interest. Adding in the wage loss and payment for services (£346.76 plus £115.15), the total award is £6,008.91. I grant Decree for payment of that amount to the Pursuer by the Defenders.

7.3 I reserve meantime all questions of expenses having not so far been addressed on those, although the likely outcome seems predictable.