

SHERIFFDOM OF LOTHIAN AND BORDERS
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2021] SC EDIN 65

PIC-PN988-19

JUDGMENT OF SHERIFF CHRISTOPHER DICKSON

in the cause

MARTIN MCKEE

Pursuer

against

ROBBIE TOUGH

First Defender

NATIONAL FARMERS UNION MUTUAL INSURANCE SOCIETY LIMITED

Second Defender

Pursuer: Pilkington, Adv; Lyons Davidson Scotland LLP
First and Second Defender: Macpherson, Adv; DAC Beachcroft Scotland LLP

Edinburgh 30 August 2021

The sheriff, having resumed consideration of the proof, finds the following facts admitted or proved:

FINDS IN FACT

1. The pursuer is Martin Mckee. The first defender is Robbie Tough. The first defender is the holder of a licence which allows him to tow trailers. The second defender is the National Farmers Union Mutual Insurance Society Limited. The second defender is the motor insurer for the first defender in respect of a Toyota Hilux D-4D 4 x 4 motor vehicle, registered number SB11 KUP (hereinafter referred to as "the toyota").

2. On the west side of Carluke is a two lane single carriageway road called Mauldslie Road. Mauldslie Road runs approximately east to west past Carluke Golf Club and links the B7011 in the west and Gasworks Road in the east. The accident location was on Mauldslie Road near to Carluke Golf Club. At the accident location:

- (i) the two lanes of Mauldslie Road were separated by white centre lines;
- (ii) the outer edge of each lane contained a solid white edge line;
- (iii) the width of each lane was about 3.4 metres;
- and (iv) the road was bordered to both sides by a narrow grass verge with trees and bushes beyond.

3. About 19.20 hours on Friday 13 May 2016 the first defender was driving the toyota eastbound along Mauldslie Road towards Carluke Golf Club. The toyota was towing a twin axel Ifor Williams trailer (hereinafter referred to as "the trailer"). The trailer had a 4 foot (1219 millimetres) rear ramp. The trailer was 2.3 metres wide across its mudguards and was about 5.05 metres long. The width of the toyota was about 2.03 metres from wing mirror to wing mirror. If the trailer was centred at the tow bar hitch of the toyota, it would extend about 135 millimetres beyond either side of the toyota. The trailer was loaded with concrete chamber sections and heavy duty drain covers. The first defender was being followed by a grey Hyundai ix35 motor vehicle, registered number L13 LJA (hereinafter referred to as "the hyundai"). The hyundai was being driven by Louise Burden and was travelling eastbound on Mauldslie Road, in the same direction as the first defender. At this time the pursuer was driving a dark grey Audi A3 RS3 Quattro S-A motor vehicle, registered number OV15 XYA (hereinafter referred to as "the audi") westbound along Mauldslie Road (all references will be to this road unless otherwise stated) in the opposite direction to both the toyota and the hyundai. Patrick Donnelly was in the front passenger seat

of the audi. The audi was fitted with an anti-lock braking system (hereinafter referred to as "ABS"). At the time, the weather conditions were dry with daylight hours remaining.

4. Approaching the accident location from the eastbound direction, the road is on a sweeping right hand bend on a gradual downhill gradient before reaching the bottom of a dip where it rises towards Carluke Golf Club. Approaching the accident location from the westbound direction, the road is on a downhill gradient on a sweeping left hand lane and then rises. As the road crosses Whorley Burn at the bottom of the dip, there is an Amco barrier to either side of the road incorporated in the grass verge. The road, at the accident location, was subject to a national speed limit of 60 miles per hour (hereinafter referred to as "mph") for the pursuer and Ms Burden and 50 mph for the first defender, due to the fact that the first defender was towing the trailer.

5. Rule 160 of the Highway Code provides:

- "160. Once moving you should
- [...]
 - Keep well to the left on right-hand bends. This will improve your view of the road and help avoid the risk of colliding with traffic approaching from the opposite direction
 - [...]"

6. The pursuer drove past Carluke Golf Club, on his left, and drove westbound into the sweeping left hand bend (which was the right hand sweeping bend for the first defender). As the pursuer did so the first defender drove the toyota eastbound on the right hand sweeping bend. When the toyota came into the pursuer's view the trailer's offside wheels were fully across the white centre lines and located within the westbound lane. At this time the audi was fully within the westbound lane.

7. As a result of the trailer's offside wheels being fully across the white centre lines and within the westbound lane, a "side long" collision (hereinafter referred to as "the first collision") occurred between the front offside of audi and the rear offside of the trailer. The outer edge of the offside of the trailer was in the region of one fifth of the way into the westbound lane when the first collision occurred.

8. The first defender had not been conducting any sort overtaking manoeuvre immediately prior to the first collision.

9. As a result of the first collision the pursuer lost control of the audi. The audi travelled from the westbound lane, across the white centre lines and into the eastbound lane. The front of the audi struck the front of the hyundai that was travelling in the eastbound lane in the opposite direction to the audi (hereinafter referred to as "the second collision").

10. Following the second collision: (i) the audi rotated 360 degrees and came to rest in the westbound lane facing west; and (ii) the hyundai rotated approximately 135 degrees and came to rest in the nearside side verge of the eastbound lane at an angle of about 45 degrees to the road. The hyundai's resting position was near to the point of the second collision. The audi's resting position was between approximately 20 metres and 33 metres west of the point of the second collision.

11. The audi sustained significant damage across the entire front of the vehicle although it was concentrated more to the offside. The audi's air bags were deployed. The offside doors and roof on the audi were removed by the emergency services. The damage to the hyundai was concentrated predominantly to its offside. The nearside of the hyundai was relatively undamaged. The roof and nearside door of the hyundai were removed by the emergency services. The speedometer of the

hyundai was displaying a speed of about 38 mph when photographed on the grass verge shortly after the second collision. The hyundai was travelling in the region of 38 mph at the time of the second collision.

12. The trailer sustained an impact to both offside wheels and mudguards in the first collision. The trailer's rear offside wheel also sustained damage to its rim having been partially ripped from the wheel. The rear offside tyre of the trailer was torn but remained on the wheel. The rear axle of the trailer was displaced rearwards and the suspension spring had partially dropped from the wheel. The rear ramp was forced away from the trailer body. There was no contact between the toyota and the audi during the first collision and the toyota was undamaged by the first collision. Following the first collision the toyota and trailer stopped in the eastbound lane about 100 metres to the east of Whorley Burn.

13. The second collision resulted in Ms Burden receiving severe injuries. As a result of the first and second collisions: (i) the pursuer suffered significant injuries, including loss of teeth and permanent loss of bone in his upper jaw; and (ii) Mr Donnelly also sustained injuries.

14. Police Constable Jim Dewar attended the accident location on 13 May 2016 when the vehicles remained in their resting positions following the second collision. Pc Dewar took photographs of the accident location using a digital camera. Pc Dewar photographed: (i) all three vehicles involved in the accident; (ii) accident debris; and (iii) tyre marks on the roadway. Production 5/20 is a copy of the photographs taken by Pc Dewar (all future references will be to these photographs unless otherwise stated and all photographs referred to in the findings in facts are reproduced at Annex A to this judgment).

15. Quickly after, and as result of, the first collision, the audi's front offside tyre punctured, deflated and the wheel stopped rotating. This resulted in the weight of the audi pressing down on the two rims of the front offside wheel and caused a long tramline tyre mark to be created on the road surface (hereinafter referred as "the audi long tramline tyre mark"). The audi long tramline tyre mark: (i) commenced shortly after the first collision, near to and west of, gouge marks which were located on the westbound lane road surface (hereinafter referred to as "the gouge marks"); (ii) commenced on the westbound lane, with the outer line (which was caused by the outside rim of the front offside wheel of the audi) being well within the westbound lane and a clear distance from the white centre line; (iii) flowed from the gouge marks in a westerly direction, in a straight line, along the westbound lane and crossed into the eastbound lane; (iv) measured at least 57.4 metres in length; and (v) came to end near to the point of the second collision. The gouge marks in the westbound lane were east of the audi long tramline tyre mark and were located at approximately the same distance from white centre line as the commencement point of the audi long tramline tyre mark. The first collision occurred in the westbound lane at the position of the gouge marks.

16. Photograph A111 is looking west and shows the gouge marks and a tramline tyre mark in the westbound lane. The tramline tyre mark indicates the commencement of the audi long tramline tyre mark.

17. At a point either before or during or shortly after the first collision the pursuer braked. There came a point, after the pursuer commenced braking, when the audi's nearside front wheel locked due to the force of braking applied by the pursuer. This resulted in a skid mark being created on the road by the audi's front

nearside tyre (hereinafter referred as “the audi nearside skid mark”). The audi nearside skid mark: (i) began on the westbound lane further west from where the audi long tramline tyre mark had commenced; (ii) ran in a westerly direction approximately parallel to the audi long tramline tyre mark; (iii) measured at least 30.2 metres in length; (iv) indicated that the audi’s ABS was not functioning at the time the audi nearside skid mark was created; (v) was consistent with the pursuer applying emergency braking; and (vi) came to an end near to the area of the second collision.

18. Photograph A112 is taken looking east and shows part of both the audi long tramline tyre mark and the audi nearside skid mark. Photograph A128 is taken looking west and shows part of the audi long tramline tyre mark and the commencement of the audi nearside skid mark.

19. After the first collision the offside trailer tyres made tyre marks on the road. The trailer made tyre marks on the westbound lane, east of the point of the first collision (the point of the first collision was indicated by the gouge marks) and a long tyre mark in the eastbound lane, which led to the final resting position of the trailer. Photograph A113 is taken looking east and shows the tyre marks made by the trailer in both the westbound lane (which is the right hand lane in the photograph) and the eastbound lane (which is the left hand lane in the photograph). Photograph A109 is taken looking east and shows the tyre mark made by the trailer in eastbound lane leading to the final resting position of the trailer. Photograph A104 is taken looking west and shows the tyre mark made by the trailer in the eastbound lane leading to the final resting position of the trailer.

20. Immediately before the first collision the audi was travelling significantly in excess of the 60 mph speed limit. The speed of the audi, at this time, reduced the pursuer's time to react to the trailer being in the westbound lane.

21. Following the accident the first defender was charged with dangerous driving contrary to section 2 of the Road Traffic Act 1988 (hereinafter referred to as the "the 1988 Act"). The first defender was alternatively charged with careless driving contrary to section 3 of the 1988 Act. The first defender pled not guilty and a trial by jury took place on 18 December 2017 at Airdrie Sheriff Court. The jury found the first defender not guilty.

22. The amount of the pursuer's loss, injury and damage, under exception of subrogated insurance losses and car hire costs is the sum £50,000 (inclusive of interest to 20 July 2021) with interest at the rate of 8% per year from 21 July 2021 until payment.

23. The amount of the pursuer's subrogated insurance loss as regards the vehicle loss and the recovery/storage charges, totals the sum of £18,867 (inclusive of interest to 20 July 2021) with interest at the rate of 8% per year from 21 July 2021 until payment.

24. The amount of the pursuer's subrogated car hire costs is the sum of £762.30 (inclusive of interest to 20 July 2021) with interest at the rate of 8% per year from 21 July 2021 until payment.

25. The amount of the pursuer's subrogated credit car hire charges is the sum of £4,861.30 (inclusive of interest to the date of decree) with interest, after the date of decree, at the rate of 8% per year until payment.

FINDS IN FACT AND LAW

1. That the first defender had a common law duty to take reasonable care to prevent harm to the pursuer or damage to his property.
2. That it would have been apparent to an ordinary reasonable driver in the position of the first defender that a reasonable and probable consequence of the first defender's failure to prevent the trailer crossing into the westbound lane to a significant degree, would be harm to the pursuer.
3. That the applicable standard of care is that of a reasonably competent driver exercising reasonable care (hereinafter referred to as "the applicable standard of care").
4. That the first defender's failure to prevent the trailer from crossing into the westbound lane to a significant degree, resulted in the first defender falling below the applicable standard of care.
5. That but for the first defender's failure to prevent the trailer from crossing into the westbound lane to a significant degree, the harm to the pursuer would not have occurred.
6. That the excessive speed of the pursuer, immediately before the first collision, resulted in him falling below the standard of a reasonably competent driver exercising reasonable care. As such the damage suffered by the pursuer resulted partly from the pursuer's own fault and, as result, his damages shall be reduced, in terms of section 1(1) of the Law Reform (Contributory Negligence) Act 1945, by 25%.
7. That the pursuer is entitled to damages of £52,221.98 (inclusive of interest to 20 January 2021).

8. That the pursuer is entitled to damages of £3,645.98 (inclusive of interest to the date of decree).

FINDS IN LAW

1. That the first and second defenders are liable to make reparation to the pursuer in the sum of £52,221.98 (inclusive of interest to 20 July 2021) with interest at the rate of 8% per year from 21 July 2021 until payment.

2. That the first and second defenders are liable to make reparation to the pursuer in the sum of £3,645.98 (inclusive of interest to the date of decree) with interest, after the date of decree, at the rate of 8% per year until payment.

NOTE:

Introduction

[1] In this action the pursuer seeks damages for injuries he suffered as a result of road traffic accident that occurred on 13 May 2016.

[2] The proof was heard over eight days, namely, 20 to 23 and 27 to 30 July 2021. The parties had agreed quantum, on a full liability basis, at £74,490.60 (with all but one of the heads of the claim being inclusive of interest to 20 July 2021) and had helpfully agreed a number of other matters in a joint minute of admissions. The pursuer called the following four witnesses to give evidence:

1. The pursuer;
2. Pc James Dewar (attended the accident location and took photographs);
3. Patrick Donnelly (passenger in the pursuer's vehicle);
4. Philip Mottram (road traffic collision expert).

The defenders called the following two witnesses to give evidence:

1. The defender;
2. David Loat (road traffic collision expert).

The evidence

The pursuer's evidence

[3] A summary of the pursuer's evidence is as follows. The pursuer was 32 years of age and was currently a property manager for his brother. Prior to that he was employed by a company valeting cars. At the time of the accident the pursuer worked as a trade counter supervisor. The pursuer had purchased the audi, second hand, in January 2016. At that time the audi was about 5 months old and had done about 1,300 miles.

[4] On 13 May 2016 the pursuer had been working during the day. He finished his work at around 17.00 hours. He went home, got changed and then went to pick up his friend, Mr Donnelly. The pursuer and Mr Donnelly were waiting for another friend, Kevin Macfarlane, to finish his work, so they decided to go for a drive while they waited. At that time the weather was dry, bright and sunny. Both the pursuer and Mr Donnelly had their seatbelts on. Music would probably have been on in the audi but would be likely to have been low as the pursuer and Mr Donnelly would have been talking. The pursuer's drive resulted in him driving on Mauldslie Road. Mauldslie Road was about 4 or 5 miles from the pursuer's home and, at that time, the pursuer drove on that road 3 or 4 times a week. The pursuer was travelling westbound on Mauldslie Road roughly between 19.00 and 19.30 hours and estimated that the accident occurred about 20 seconds after he passed Carluke Golf Club (hereinafter referred to as "the golf club") on his left. After passing the golf club the pursuer went down a downhill section of the road and into a left hand bend

where the road rises. That part of the road had a speed limit of 60 mph. The pursuer explained that his speed, at that time, was coming up to about 60 mph because he could not see what was coming round the left hand bend due to the trees. As pursuer went round the left hand bend he saw the first defender's vehicle, namely the toyota. The pursuer was within his lane, namely the westbound lane, and was closer to the nearside of the westbound lane than to the white centre line. Under reference to photograph 36 in Mr Mottram's report (production 5/16) the pursuer estimated that he first saw the top of the toyota when he was around the area of the road sign on photograph 36 and then got a full view of toyota about five yards after the said road sign. The driver's side of the toyota was in the pursuer's westbound lane. The pursuer, under reference to photograph 38 of the Mr Mottram's report and with the aid of a pointer, estimated that the driver's side of toyota was approximately a quarter of the way into the westbound lane and the offside of the trailer, which the toyota was towing, was approximately half way into the westbound lane (although in cross examination the pursuer said he remembered the trailer being on his side of the road but had couldn't say how much into the westbound lane it was). The pursuer thought the toyota was slightly moving back to his correct lane, namely the eastbound lane. As soon as the pursuer saw the toyota he jumped on his brakes.

[5] The pursuer could not recall the first collision. All he could remember was seeing the toyota coming over the hill on the left hand bend, jumping on his brakes and then waking up when the fire brigade were cutting him out of the audi. The pursuer advised that he was knocked out during the first collision. At the time he did not know what he collided with but he now knew that he had come into contact with trailer. The pursuer did not know whether his air bag had deployed and had no recollection of the second collision with the hyundai. The pursuer estimated that it took about 2 or 3 seconds from him seeing the toyota

to the first collision but was not 100% sure about this estimate of time. The pursuer explained her was not good with measurement and was unsure about how far he was from the toyota when he first saw it. The best he could do was say that it was under 200 yards. He could not recall the direction of the sun. The pursuer recalled being in and out of consciousness when the fire brigade were cutting him out of the audi. The pursuer was then taken to hospital and was treated in the maxillofacial department. As a result of the accident the pursuer suffered loss of teeth and permanent loss of bone in his upper jaw.

[6] The pursuer recalled speaking to the police after he had been discharged from hospital. The pursuer accepted that he had said to the police that the toyota had been overtaking a range rover but explained that that was an assumption he had made due to the position that he had seen the toyota and trailer in, on his side of the road, in the westbound lane. The pursuer explained that he said the vehicle being overtaken was a range rover because of the height of the vehicle that he was referring to, but that vehicle he was describing was in fact the hyundai. Therefore, what the pursuer had done was make an assumption that the toyota had overtaken the hyundai due to the position that he had seen the toyota and trailer in, on his side of the road, in the westbound lane. The pursuer confirmed that he did not see the toyota overtake any vehicle.

[7] In cross examination the pursuer explained that the audi could go from 0 to 60 mph in under 5 seconds. He accepted that the audi was a very fast car. The pursuer was referred to extracts from his facebook page (production 6/8) but denied the comments he made were mocking the accident. The pursuer was referred to the following further extract from the pursuer's facebook page where the pursuer was discussing the purchase of a new vehicle after the accident:

[Female]: "Mind keep to the speed limit u [*smiling emoji with halo*]"

Pursuer: "As always [*laughing emoji with tears; smiling emoji with halo*]"

The pursuer accepted that the above exchange could be interpreted that the pursuer drove over the speed limit but explained that they were actually talking about driving on a drag strip. It was suggested to the pursuer that due to lack of marks on road before the first collision that he did not brake before the first collision. The pursuer rejected that suggested. The pursuer maintained his foot was on the brake and explained that there may be no marks on the road prior to the first collision due to the audi's ABS working. The pursuer rejected a suggested that he had not been paying attention and allowed the audi to drift too close to the white centre line. The pursuer rejected a suggested that he had deliberately made up that the toyota was overtaking to avoid responsibility for an accident that the pursuer had caused. The pursuer denied that he was going too fast and said that he would not be here to give evidence if he was going too fast.

Pc James Dewar's evidence

[8] A summary of Pc Dewar's evidence is as follows. Pc Dewar was 39 years of age and had 13 years police service. He currently worked in the road policing department and had joined that department in January 2016. Pc Dewar was an advanced driver, was pursuit trained and had undergone other types of police training. He was not a collision investigator and had not had any training in that regard.

[9] Pc Dewar recalled attending the accident on Mauldslie Road on 13 May 2016. It was one of the first serious accidents he had attended following him joining the road policing department. Pc Dewar thought the accident occurred about 19.20 hours and that it would have taken him and his colleague, Pc William Barr, about 25/30 minutes to arrive at the accident location. On arrival there was already a large number of emergency vehicles in

attendance. Local officers were already in attendance and appraised Pc Dewar of the circumstances of the accident. Pc Dewar was referred to his typed police statement (production 6/7). Pc Dewar explained that he had prepared this statement the day after the accident whilst his memory of events were fresh and clear in his mind. Pc Dewar was taken to the following paragraphs of his statement:

“Upon my arrival at the locus I observed a large number of emergency services vehicles already in attendance including local Police officers. I Observed [*sic*] initially two motor vehicles that were badly damaged with one located on the roadway facing westbound namely VRM OV15 XYA. I observed the driver of this vehicle to be still located within the driver’s seat of the vehicle requiring to be cut free from it due to the damage caused as a result of the impact. I was further advised the passenger of the Audi VRM OV15 XYA was out of the vehicle and being attended to by an off duty paramedic. I then observed motor vehicle VRM L13 LJA Hyundai IX35 located on the grass verge located by the roadside. The driver of this vehicle was also located within the driver’s seat being attended to by Paramedics and Fire fighters. Police witness Paul advised me that a third vehicle had been involved in the collision namely VRM SB11 KUP Toyota Hilux. This vehicle was located further along the roadway near to the entrance to Carluke Golf Club. I observed damage to the trailer with the offside wheels and tyres badly damaged. The Toyota motor vehicle itself was not damaged. The trailer contained a number of concrete surrounds for drains and two drains.

At this time I observed scrape markings on the road about 100 metres from the crash site and two tyre marks leading from there west towards the crash site. These tyre marks appear to have come from the Audi motor vehicle clearly showing the vehicle has having crossed over onto the opposing carriageway. The front offside tyre of the Audi had sustained a puncture and the mark on the road surface was that of two black lines indicating that the vehicle had been driven on the rim of the wheel. The front nearside tyre was clearly shown has having left tyre marks in the road surface.

I also noted that there was marks on the road surface leading to the trailer of the Toyota Hilux.”

Pc Dewar explained that there were two collision and that the crash site referred to in the second paragraph above meant the area of the second collision. He noted that there were scrape marks in the eastbound lane which related to the second collision. These scrape marks were fresh. There was also scrape marks about 100 metres to east of the second collision. These scrape marks were fresh and Pc Dewar, although he was not a collision

investigator, thought these scrape marks may have been from the impact between the audi and trailer.

[10] Pc Dewar explained that he took a number of photographs of the accident location using a digital camera. Pc Dewar was referred to copies of the photographs he had taken (production 5/20; core bundle pages A90 to A142) in some detail. The below summarises Pc Dewar's comments on the key photographs:

1. A102 – showed the toyota and trailer with marks on the road leading to the offside wheels of trailer. The police car shown in the photograph was in the westbound lane.
2. A109 - this photograph was taken from the opposite direction to A102. It shows the trailer in the eastbound lane with marks on the road leading to the rear offside of the trailer.
3. A111 - the white centre line is in the bottom right of the photograph. The photograph shows white marks on the road which would be caused by metal coming into contact with the road. These are the scrape marks Pc Dewar was referring to in his statement being approximately 100 metres from the area of the second collision. The photograph also showed possible tramline tyre marks, which Pc Dewar understood to be caused by the outer edges of a punctured tyre. Pc Dewar thought these tyre marks were caused by either the wheel rim of the audi or the wheel rim of the trailer. He thought they may be from trailer as they were not particularly wide but he could not say for certain. Pc Dewar would not have ignored the scrape marks and thought that this photograph showed where the first collision occurred but he could not be sure. He thought that he had worked backwards from the resting position of the toyota and trailer to the area of the second collision and this led him

to believe that the photograph showed the scrape marks and the tyre marks in the eastbound lane. He thought that the scrape marks had come from the trailer and the tyre marks were a continuation of the trailers tyre marks shown in A109. Pc Dewar noted that the trailer had a slight overhang over the trailer's tyre and thought that it was possible that the trailer was on the centre line. Pc Dewar's belief, based on the road markings, although he stressed he was not a qualified collision investigator, was that there had been a coming together between the audi and trailer near the centre of the road. Pc Dewar conceded that there were other photographs that showed tramline marks that related to the audi and accepted that photograph A111 may in fact show the westbound lane but his memory was that photograph A111 showed the eastbound lane.

4. A112 – this photograph showed the westbound lane to the right of the photograph and the eastbound lane to the left. Pc Dewar agreed that the audi had made the audi long tramline tyre mark following the first collision with the trailer. This photograph showed the audi long tramline tyre mark travelling from the westbound lane (the audi's correct lane), across the white centre line and into eastbound lane. Pc Dewar could not recall where the audi long tramline mark began. The photograph also showed a skid mark from the audi's front nearside tyre in the westbound lane. Pc Dewar noted that it was unusual to see a skid mark from a modern car because most have ABS which prevents a wheel locking up.

5. A128 – this showed westbound lane to the left of the photograph. Photograph A128 was taken from the opposite direction to A112. Photograph 128 showed the audi long tramline tyre mark. Pc Dewar accepted that there was a clear gap, at the bottom of the photograph, between the tramlines and the white centre

line. The audi long tramline tyre mark then ran from the westbound lane, across the white centre line and into the eastbound lane. Pc Dewar accepted that the audi long tramline tyre mark would extended further back on the westbound lane. Pc Dewar noted the debris next to the solid nearside line and advised that this indicated that the accident would have occurred further back (meaning further east on the road).

6. A129 – this showed a close up of the debris shown in A128. Pc Dewar thought that it came from the front grill of the audi.

7. A113 – this showed the eastbound lane to the left and the westbound lane to the right. Pc Dewar conceded that this photograph was blurred. Pc Dewar thought it was possible that the tyre marks shown in this photograph came from the trailer. He did not know if the tyre marks continuously flowed to trailer or whether there was a break in between them. Pc Dewar said the tyre mark on westbound lane could come from the audi or the trailer but that he would defer to the view of experts on these markings. He did not think the tyre mark in the westbound lane looked like tramline tyre marks and agreed that they did not look like the audi long tramline tyre mark in A128. He accepted that the tyre marks in the eastbound lane looked to be curving towards the resting place of the trailer. He agreed that the tyre mark in the westbound lane looked straight. He also agreed that it was possible that the tyre mark in the westbound lane was not the same as the tyre mark in the eastbound lane and that it was possible that there was a gap on the white centre line between the tyre mark in the westbound lane and the tyre mark in the eastbound lane.

8. A123 – this photograph shows the eastbound lane on the left and the westbound lane on the right. However, the tyre marks shown in A113 were not

obvious in this photograph. This photograph was taken for the debris shown in the eastbound lane.

[11] Pc Dewar explained that he was doing his best to record what might be useful at the accident location. However, he had not been given training as regards the best way to preserve evidence. He accepted that there was not an image of entirety of the accident location but noted that accident location was vast and that it had not been possible to capture it in one image. Pc Dewar also accepted that he hadn't noted where the photographs had been taken from. Pc Dewar agreed that if he had identified precisely where the accident occurred he would have photographed that position.

Patrick Donnelly's evidence

[12] A summary of Mr Donnelly's evidence is as follows. He was 30 years of age and worked for the Co-op. On 13 May 2016 he was in the front passenger seat of the audi when the accident occurred. Mr Donnelly explained that he had a clear recollection of the accident. Just prior to the accident he was sitting in the front passenger seat of the audi looking at his mobile phone. The next thing he remembered was the pursuer saying something. He was not sure what the pursuer said but it was maybe "oh no". At this point Mr Donnelly looked up and looked in front of him, through the windscreen of the audi. Mr Donnelly saw the toyota towing the trailer coming round the bend towards them. The driver's wheel of the toyota was about one quarter into the pursuer's lane, namely the westbound lane. The toyota was about 7 to 15 foot in front of the audi when Mr Donnelly first saw the toyota and trailer. The toyota appeared to be moving from the pursuer's lane to its own lane after overtaking. Mr Donnelly did not see the toyota overtaking. The toyota was either overtaking or cutting the corner but Mr Donnelly thought the toyota had been

overtaking. Whatever was the case, Mr Donnelly did not think the toyota should have been in the audi's lane. Mr Donnelly then remembers hearing a bang at the pursuer's door. He thought the bang was a result of the audi hitting the trailer. When the bang occurred the toyota was moving past the audi and was near to the boot of the audi. The time from first seeing the toyota to hearing the bang was a couple of seconds, maybe four to five seconds if that. After the bang Mr Donnelly was getting thrown about in the audi and the audi came to a slow stop. Mr Donnelly had no recollection of the second collision and was not even aware that the audi had crashed into the hyundai until after he saw it off the road. After the accident Mr Donnelly jumped out of the audi and ran round to try and help the pursuer. However, the driver's door of the audi was all bashed in and Mr Donnelly realised he had a dislocated arm. Mr Donnelly lay on the ground. He saw the blue car (which was the hyundai) in the bushes and could hear the female (Ms Burden) screaming. When Mr Donnelly was asked about the speed of the audi he explained that he did not drive but, as far as he was concerned, the audi was being driven at the basic speed limit.

[13] Mr Donnelly could vaguely remember speaking to police at the accident location but noted that he was not in a condition to speak to the police because he was on the ground and had a dislocated arm. Mr Donnelly accepted that he gave a statement to the police at some point after the accident but could not recall the date when he provided the statement. He accepted that he said in his police statement that the toyota should not have overtaken on the bend. Mr Donnelly thought that the toyota had overtaken the woman behind him (meaning Ms Burden in the hyundai).

[14] Mr Donnelly rejected a suggestion that the pursuer was driving too fast. He rejected a suggestion that the pursuer had lost control of the audi and let the audi go to the white

centre line where it collided with the trailer. Mr Donnelly also rejected a suggestion that he had made up that the toyota was overtaking.

Louise Burden's evidence

[15] Louise Burden was the driver of the hyundai. She did not give evidence but it was agreed that her police statement of 4 June 2016 was the equivalent of her oral evidence. The relevant part of her said police statement was in the following terms:

“Between 6.30pm and 7.30pm on Friday the 13th of May 2016 I was travelling towards Carluke on the golf course road. There was a blue jeep with a trailer in front of me and I could see the trailer was unsteady as it was wobbling about. When I saw that I reduced my speed and hung back from it. I saw the trailer going round the bend, I think it was a left hand bend and that when [*sic*] I last seen it. I was a good couple of car lengths behind it.

I drove by a house on the left and then all of a sudden I saw a car coming straight towards me onto my side of the carriageway. Within seconds the car hit me and my windscreen all smashed and my airbags went off. I couldn't see who was in the car.

...

...The vehicle that hit me was definitely speeding, it came at me just so quickly. ...

...I don't think the jeep with the trailer was overtaking because it wasn't going that fast.”

George Gilfillan's evidence

[16] Mr Gilfillan was instructed as the first defender's skilled witness in advance of his criminal trial. Mr Gilfillan did not give evidence during proof but the following was agreed in the joint minute of admissions (the paragraph numbers correspond to the paragraph numbers in the joint minute of admissions):

“53. That road traffic accident investigator, George Gilfillan [*address*], is a skilled witness.

54. That he was instructed by the first defender in relation to the criminal case against him.

55. That Mr Gilfillan stated the following opinion at paragraph 42 of his (undated) report:

“There will be a passage of time between the contact between the offside of the Audi motor car and the offside trailer being towed by [*the first defender*], the tyre deflating and the tyre marks being left on the road surface.”

56. That Mr Gilfillan visited the locus along with the first defender on 25th June 2016. This was 6 weeks and 1 day after the accident on 13th May 2016.

57. Mr Gilfillan made observations and took measurements. His findings included:

- (a) He measured the ‘tramline’ mark made by the front offside wheel of the Audi [*which I have referred to as the as “the audi long tramline tyre mark”*] to be 57.4 metres in length;
- (b) He measured the tyre mark made by made by the front nearside wheel of the Audi [*which I have referred to as the as “the audi nearside skid mark”*] to be 30.2 metres in length;
- (c) He found no visible physical evidence to identify the point on the carriageway where the impact between the Audi and the trailer [*which I have referred to as the as “the first collision”*] occurred.”

The joint minute of admissions

[17] The joint minute of admissions was extensive and ran to 59 paragraphs. As well as agreeing the matters set out above, it included agreement in relation to: (i) the very basic circumstances of the overall accident (without specifying where the first collision occurred); (ii) a description of the accident location including measurements of the width of the road and the speed limit applying to the road; (iii) a description of each vehicle (which included measurements of the totyota and trailer), including the damage each sustained and the basic final resting positions of each vehicle; (iv) the fact that the first defender was charged with dangerous driving but was found not guilty after a jury trial at Airdrie Sheriff Court; and (v) quantum.

[18] The following agreement was reached in relation to the police evidence (again the paragraph numbers correspond to the paragraph numbers in the joint minute of admissions):

41. Police Constable Jim Dewar attended the locus following the accident when the vehicles remained in the post accident position.
42. He photographed black "tram line" tyre marks travelling west towards the impact site between the Hyundai and the Audi.
43. The tyre marks came from the Audi.
44. The tyre marks show the west bound Audi travelling over onto the opposing east bound carriageway.
45. The front offside tyre of the Audi had sustained a puncture following the collision with the first defender's trailer.
46. The two black 'tram line' marks indicate the front offside wheel had then been driven on its rim. The marks were produced by rubber on the deflated tyre that was trapped between the inner and outer rim of the front offside wheel and the road surface.
47. The front nearside tyre of the Audi also left black marks on the road consistent with emergency braking.
48. There were further tyre marks on the road surface leading to the resting position of the trailer and Toyota.
49. These marks were left by the offside trailer tyres following impact damage with the Audi.
50. Pc Dewar took photographs of the locus using a digital camera including photographs of all three vehicles involved in the accident, accident debris and tyre marks on the roadway.
51. PDF images of the photographs taken by Pc Dewar are produced at number 5/20 of process. These are images of prints or copies of the original, digital photographs, which have not been retained. The images lodged represent the best evidence of the photographs taken by Pc Dewar."

Philip Mottram's evidence

[19] Mr Mottram gave evidence over a number of days. What follows is a summary of his opinion as regards how the accident occurred and the reasons why he reached that opinion. Mr Mottram had a BSc (hons) in materials engineering and design from Loughborough University (1985) and was a chartered engineer (1989). Between 1997 and

2006 he was a senior associate at Hawkins & Associates Limited (hereinafter referred to as "Hawkins") where he investigated engineering related accidents and undertook road collision investigation. This often culminated in him providing expert opinion evidence in court. Mr Mottram did not have any of the qualifications that police collision investigators would normally obtain, rather he learned how to undertake road collision investigation through working with other road collision investigators at Hawkins. From 2007 to date he has been the sole director of Sisco Forensic Engineers Limited (hereinafter referred to as "Sisco"). In that role he had conducted a number of forensic investigations into the causes of accidents. Mr Mottram explained that he had been undertaking road collision investigations since 1997 and estimated that about 50% of his work at Sisco was road collision investigation.

[20] Mr Mottram adopted his report (production 5/16), a subsequent briefing note which responded to both Mr Gilfillan's and Mr Loat's report (production 5/17) and a supplementary report which he produced in response to calculations produced by Mr Loat after the proof had commenced (production 5/24). Mr Mottram had visited the accident location and taken photographs of it. In coming to his opinion, Mr Mottram had placed considerable reliance on the photographs taken by Pc Dewar.

[21] Mr Mottram opinion was: (i) that a 'sidelong' collision had occurred in the westbound lane between the front offside of audi and the offside of the trailer (I have already been referred to this collision as "the first collision"); (ii) that the impact from that first collision caused the front offside wheel of the audi to stop rotating and deflate; (iii) that it was likely that the impact from that first collision caused the ABS on the audi to fail; (iv) that following the impact of that first collision the pursuer possibly would have had some ability to steer but that would have depended on the extent of the damage caused to

the audi in the first collision (but the extent of the damaged caused in the first collision could not be ascertained due to the serious damage caused to the audi in both the second collision and the subsequent rescue operation by the fire service); (v) that as result of the front offside wheel of the audi stopping rotating and deflating, the tyre of said wheel produced the audi long tramline tyre mark as result of the weight of audi pressing down on the outer and inner rim of the front offside wheel of the audi; (vi) that the audi long tramline tyre mark started in the westbound lane, headed west, and moved into the eastbound lane; (vii) that the audi nearside skid mark on the westbound lane headed west and had been produced by the front nearside wheel of audi as a result it being locked under hard breaking by the pursuer; (viii) that the audi nearside skid mark could only have been produced if the ABS on the audi had failed (if the ABS had have been working the front nearside wheel of the audi would not have locked); (ix) that when the front nearside wheel of the audi was locked the pursuer would not have been able to steer; (x) that the audi crossed from the westbound lane into the eastbound lane and struck the hyundai that was travelling in the eastbound lane in the opposite direction to the audi; and (xi) that the audi and the hyundai collided, approximately, front offside corner to front offside corner.

[22] Mr Mottram explained his opinion under the reference to the police photographs:

1. A111 – Mr Mottram considered that this photograph had been taken looking west and showed: (i) light coloured gouge marks in the westbound lane, which Mr Mottram considered to be the likely point where the first collision occurred; (ii) the white centre line to the right bottom hand corner of the photograph; and (iii) a tramline tyre mark, which Mr Mottram considered showed the commencement of the audi long tramline tyre mark. Mr Mottram noted that the tramline tyre mark shown on photograph A111 seemed to be at a similar angle to the audi long tramline

tyre mark which was shown on photograph A128 (which was taken looking to the west) and A112 (which was taken looking to the east). Mr Mottram noted that one would expect first to see evidence of the impact (in the form of the gouge marks) and then, after a very short period to allow for the deflation of the front offside tyre of the audi, the commencement of the tramline mark (Mr Mottram noted his opinion on this point was supported by Mr Gilfillan at paragraph 42 of this report – see paragraph 16 above). This would not have occurred the other way around (because it would indicate a deflation before the impact, which made no sense) and fortified Mr Mottram's view that photograph A111 was looking west at the westbound lane. Mr Mottram explained that the gouge marks would have been caused from metal or alloy from either the trailer or the audi coming into contact with the road.

Mr Mottram noted that the trailer had significant damage to the two offside wheels and the suspension (which was shown in photograph A107) and thought that the gouge marks may have been caused by metal components from trailer being pushed down onto the road surface as the trailer was moving. Mr Mottram did not think the tramline tyre mark on A111 was made by the trailer. The rear offside trailer tyre was destroyed and the other offside tyre was deflated and Mr Mottram did not see tramline tyre marks in any other photographs that showed the tyre marks left by the trailer. Mr Mottram explained that if the gouge marks were in the eastbound lane then the only explanation for that would be for photograph A111 to be showing gouge marks from the second collision - because that was the only way the tramline tyre mark before impact could be explained (i.e. photograph A111 would be looking east showing the end of the audi long tramline tyre mark and then the second collision impact point as indicated by the gouge marks). However,

Mr Mottram noted that Pc Dewar was clear that the gouge marks shown in A111 were 100 metres from the second collision and Mr Mottram considered that they were in the westbound lane for the reasons given above.

2. A128 – Mr Mottram considered that this photograph had been taken looking west and showed (i) the audi long tramline tyre mark running in a westerly direction, along the westbound lane towards both the white centre line and the eastbound lane; and (ii) the commencement of the audi nearside skid mark.

Mr Mottram drew attention to the angle that the audi long tramline tyre mark was running and the expanding distance it appeared from the white centre line if one looked from west to east (which was the opposite way the audi long tramline tyre mark had in fact been made). Mr Mottram noted that the typical width of a white centre line was 100mm and estimated that the gap between the white centre line and the outer tramline, at the bottom of the photograph A128, was in the region of 300 to 400mm. Mr Mottram noted that the audi long tramline tyre mark would have been likely to have been further away from the white centre line at its commencement given the angle it was running at. Mr Mottram noted that the debris seen next to the solid white line was likely to be the same as the debris shown in photograph A112. Mr Mottram did not consider that it was the correct approach to pinpoint an impact location from the spread of debris. This was because debris could be moved in all sorts of directions and could be inadvertently moved by the actions of the emergency services. However, he considered that the first collision was likely to have been east of the piece of debris shown in photograph A128 and A112.

3. A112 – Mr Mottram considered that this photograph had been taken looking east and showed (i) the audi long tramline tyre mark heading in a westerly direction from the westbound lane across the white centre line and into the eastbound lane; and (ii) the audi nearside skid mark heading in a westerly direction along the westbound lane.

4. A113 –

(a) Mr Mottram considered that this photograph was blurred and of poor quality. Mr Mottram considered that the photograph was taken looking east and showed a part of the road that was east of where the first collision occurred. Mr Mottram thought that the faint tyre marks that could be seen in both the westbound and eastbound lanes were made by the trailer and were continuous (i.e. it was one tyre mark that flowed from the westbound lane into the eastbound lane). Mr Mottram thought that the faint gap between the tyre mark in the westbound lane and the tyre mark in the eastbound lane, at the point where both reached the white centre line, could be explained by the blurring of the photograph or there being a depression in the road at the point of the white centre line. Mr Mottram did not think the westbound tyre mark looked like a tramline tyre mark.

(b) Mr Mottram did not think Mr Loat's opinion as regards how the accident occurred (namely, that the first collision had occurred on the white centre line resulting in the audi instantaneously making the tyre mark on westbound lane and the trailer instantaneously making the tyre mark in the eastbound lane, with each tyre mark being separated by a slight gap on the white centre line) was physically possible. Mr Mottram drew support from

Mr Gilfillan's opinion that there would be distance between the starting points of two tyre marks made by deflated tyres on two different vehicles that deflated because the vehicles collided (see paragraph 42 of Mr Gilfillan's report, which is set out paragraph 16 above). Mr Mottram explained that for Mr Loat to be correct, the trailer's offside tyre that made the tyre mark needed to have been struck, deflated and started to make the mark on the road at exactly the same point (on the white centre line) as the audi's front offside tyre was struck, deflated and started to make a tyre mark. Given the speeds at which the vehicles were travelling, Mr Mottram considered that it was physically impossible for that to have happened. In addition, Mr Mottram explained that he did not consider that the angle of the tyre mark in the westbound lane in photograph A113 (which was heading to the nearside of the westbound lane if it was made by the audi) correlated with the angle of the audi long tramline tyre mark shown in photographs A128 and A112 (which was heading from the westbound lane to the eastbound lane) and noted that there were no tyre marks that supported a change of direction of the audi. Mr Mottram did, however, accept that if the vehicle making the tyre mark in the westbound lane in photograph A113 was the audi and it continued in a straight trajectory from that tyre mark, it may possibly eventually cross into the eastbound lane as result of the curve of the left hand bend that the audi was negotiating. Mr Mottram also accepted that if the trailer had entered the westbound lane after the first collision, then that could explain the tyre marks in the westbound lane. Finally, Mr Mottram noted that Mr Loat's opinion did not explain the presence of the gouge marks.

[23] Mr Mottram explained that when he visited the location of the accident he had managed to identify the resting positions of the audi and hyundai by comparing identifying features in the vegetation seen in the police photographs with what he found at the accident location. Mr Mottram estimated that the hyundai was 230 metres from the resting point of the toyota and that the audi was 263 metres from the resting point of the toyota. Therefore, Mr Mottram considered that the hyundai and audi were 33 metres apart ($263 - 230 = 33$). Because the second collision had been an offset head on impact it had resulted in the audi rotating 360 degrees with it coming to rest in the westbound lane facing west and the hyundai rotating to its resting position on the grass verge. Mr Mottram noted that after the second collision the police had photographed the hyundai speedometer stuck at approximately 38 mph and accepted that this was good evidence to show that the hyundai had been travelling at that approximate speed when the second collision occurred.

[24] Mr Mottram noted that the driver of hyundai (Ms Burden) had told the police that the trailer had been swaying as she travelled behind it and explained that he considered it was plausible that the trailer had crossed into the westbound lane at the moment it was struck by the audi. Mr Mottram noted that Mr Loat had subsequently followed the first defender towing the trailer (which was unladen at the time that Mr Loat followed it) and had not seen it sway, however, Mr Mottram explained that he would not expect an unladen trailer to sway. The factor that usually caused a trailer to sway was if the load was mostly to the rear wheels of the trailer. However, Mr Mottram did not take issue with how the trailer in this case had been loaded and he made clear that he would not have expected it to sway given how the load had been distributed in the trailer on the day of the accident.

[25] Mr Mottram was referred to his briefing note where he commented on parts of Mr Gilfillan's and Mr Loat's report. Mr Mottram identifies various passages in Mr Gilfillan's

report including where Mr Gilfillan, during his locus inspection on 25 June 2016: (i) had observed that the audi long tramline tyre mark and the audi nearside skid mark travelled to the area of second collision, which was indicated by gouge marks on the eastbound lane (hereinafter referred to as “the second collision gouge marks”); (ii) had observed that the audi long tramline tyre mark ended near to the second collision gouge marks; (iii) had observed on the north verge, very close to the area of the second collision gouge marks, marks on the grass verge, which Mr Gilfillan considered were indicative of the resting position of the hyundai; and (iv) had observed approximately 20 metres to the west of the area of the second collision gouge marks on the eastbound lane, an area of sand on the westbound lane which the first defender indicated was where the audi came to rest.

Mr Mottram did not take issue with Mr Gilfillan’s observations (although Mr Mottram’s opinion was that the hyundai and the audi came to rest about 33 metres apart – see paragraph 23 above) but again pointed out that Pc Dewar had said that the gouge marks shown in photograph A111 were 100 metres from the point of the second collision and therefore Mr Mottram took the view that photograph A111 was not showing the second collision gouge marks as described by Mr Gilfillan but, rather, showed the gouge marks made at the point of the first collision.

[26] As regards the speed of the audi, Mr Mottram did not consider it was possible to calculate, with any certainty, the speed that the audi was travelling, at the point of the first collision. This was due to the fact that there was only limited information available.

Mr Mottram thought that first collision would only have resulted in a minimal loss of speed on the part of the audi, perhaps in the range of 5 to 15 mph. Under reference to his supplementary report (production 5/24), Mr Mottram noted, firstly, that for Mr Loat’s calculations (Mr Loat’s calculations are explained at paragraphs 46 to 49 below) to be valid

the following assumptions would have to be correct: (i) that the audi long tramline tyre mark (measured by Mr Gilfillan to be 57.4 metres in length) was indeed made by the audi; and (ii) that the audi long tramline tyre mark ended at the second collision. Mr Mottram thought it was not safe to assume that the audi long tramline tyre mark ended at the second collision because the police had not identified where the second collision occurred and one of the police officers had said in a statement that there were some gaps in the tyre marks (the officer was not identified, his evidence was not before the court and it was not clear which tyre marks the officer or Mr Mottram was referring to). Mr Gilfillan and Mr Loat were both of the view that it was likely that the audi long tramline mark and audi nearside skid mark (measured by Mr Gilfillan to be 30.2 metres in length) would have been longer than measured by Mr Gilfillan. This was because it was likely that the early stages of both marks would have faded with the passage of time. Mr Mottram disagreed with this opinion and could not understand why the early part of each tyre mark would have faded more quickly than the rest of the marks.

[27] Mr Mottram consider there was a fundamental difficulty with all six calculations performed by Mr Loat. The difficulty being that Mr Loat had used a deceleration rate of 0.7g or 0.8g for the full length of the audi long tramline tyre mark. Mr Mottram explained that even if it was assumed that the audi long tramline tyre mark and the audi nearside skid mark ended at the point of the second collision then approximately 27.2 metres ($57.4 - 30.2 = 27.2$) of audi long tramline tyre mark was made on the road surface before the audi nearside skid mark commenced. Mr Mottram accepted that a deceleration rate of the audi could have been in the range 0.7g or 0.8g once the audi nearside skid mark commenced. However, Mr Mottram noted that it was not known whether the pursuer was braking during the first 27.2 metres of the audi long tramline tyre mark and, even if he was, the extent to which

he was pressing the brake pedal was not known (Mr Mottram considered that it was unlikely that the audi's ABS was working between the first collision and the commencement of the audi nearside skid mark and therefore considered that if the pursuer was braking at that time, he was not braking hard enough to lock the front nearside wheel of the audi). As result, Mr Mottram considered that audi's deceleration during the period of the first 27.2 metres of the audi long tramline tyre mark would probably not have been as high as 0.7g or 0.8g (hereinafter referred to as "the 27.2 metre deceleration issue"). Mr Mottram noted the lower the rate of deceleration, the lower the initial speed, with all things being equal. Mr Mottram also noted that there was no way of establishing whether the pursuer braked prior to the first collision and, if he did, the extent to which he did brake, because at that point the audi's ABS was likely to be working (which meant that the ABS would prevent the audi's wheels for locking and most probably result in no tyre marks being left on the road).

[28] As regards Mr Loat's first and second calculations, Mr Mottram did not consider that these would be of assistance to the court because: (i) of the 27.2 metre deceleration issue; and (ii) that it had been assumed that the audi was going at 0 mph when it reached the hyundai. Clearly, the audi had not being going at 0 mph when it reached the hyundai as there had been a substantial second collision causing serious damage to both vehicles and therefore calculations 1 and 2 were not relevant to the accident.

[29] As regards Mr Loat's third and fourth calculations, Mr Mottram did not consider that these would be of assistance to the court because: (i) of the 27.2 metre deceleration issue; and (ii) that there was nothing to confirm that the pursuer was travelling at 38 mph when the second collision occurred. In order for the audi's speed to be calculated at the point of the second collision Mr Mottram considered that that required an assessment of: (i) the damage

sustained by both the audi and the hyundai; (ii) the distance the audi had travelled from the second collision point to its resting point; and (iii) the deceleration rate of the audi as it covered the distance between the second collision and its resting point. Mr Mottram considered that it was not possible to perform such an assessment because of: (i) a lack of detail about the damage sustained by the audi and the hyundai; and (ii) a lack of detail about the location of the second collision; and (iii) a lack of detail about the distance the audi travelled from the second collision to its resting point. Whilst assumptions could be made, every assumption added to the cumulative uncertainty of the final speed calculated.

[30] As regards Mr Loat's fifth and sixth calculations (which had used a speed of 50 mph for the audi at the point of the second collision), Mr Mottram again did not consider that these would be of assistance to the court for the same reasons as he considered that Mr Loat's third and fourth would not be of assistance to the court.

[31] Mr Loat's view was, given the majority of the debris was located in the area where the hyundai came to rest, that the second collision occurred in eastbound lane adjacent to the resting position of the hyundai. Mr Mottram disagreed with this view because debris was not a reliable indicator of the location of a point of impact for the reasons set he had set out at point 2 of paragraph 22.

[32] In cross examination Mr Mottram accepted that the pursuer would have been going uphill after the first collision and advised that the uphill factor would probably push the decelerate rate upwards towards 0.8g. Mr Mottram accepted that if both the hyundai and the audi were travelling at the same speed, at the point of impact, they would either not have moved much, post impact, or would have moved the same distance away from each other at the point of impact. Mr Mottram accepted that if the audi was travelling faster than the hyundai at the point of impact, the audi may travel further than the hyundai from the

point of impact but noted that the offset alignment of the vehicles at the point of impact would have a bearing on how far the audi travelled.

The first defender's evidence

[33] A summary of first defender's evidence is as follows. The first defender was 39 years of age and had his own plant hire and construction business. He had been driving since he was 17 years old and drove, on average, approximately 20,000 miles per year. The first defender had been towing trailers since he passed his test and in 2011 he required to obtain (and did obtain) a trailer licence due to a change in the law. On average the first defender towed a trailer two or three times per week. The first defender bought the trailer from new. At the time of the accident it was about two or three years old. The trailer was a plant trailer and was used for towing mini excavators and small items of plant. It had a twin axle and therefore had two wheels on either side. The weight capacity of the trailer was 3.5 tons. The trailer was a bit wider than the toyota. When the first defender was towing the trailer with the toyota in a straight line he could not see much of the trailer in his wing mirrors apart from the very outsides of the trailer. If the first defender was going round a bend he would be able to see the wheels of one side of the trailer in one of his wing mirrors. The first defender was familiar with Mauldslee Road and had driven along it most weeks, if not every day.

[34] On 13 May 2016 the first defender had collected two steel manhole covers and nine concrete sections that were used for placing below manhole covers (hereinafter referred to as "the concrete sections"). The manhole covers and the concrete sections were placed in the trailer. The first defender thought that the total weight of these items was about half a ton. The first defender then headed back to his yard. After he left the M74 motorway he heard a

rumble coming from the trailer and thought he had a flat tyre. In the circumstances the first defender stopped the toyota in a layby about two and half to three miles from Mauldslie Road and got out of this vehicle and conducted a physical check of the trailer. The first defender checked the items in the trailer were secure. He checked all the trailer tyres and all the tyres on the toyota. He probably kicked the tyres on the trailer to make sure they were not soft. The first defender could not see any issues with the trailer and so continued with his journey back to his yard. He made his way to Brownlee Road and then turned right onto Mauldslie Road.

[35] As first defender made his way along Mauldslie Road he decided to conduct a further check of the tyres of the trailer. In order to do this the first defender did not stop but simply steered slightly to the left and slightly to the right in order to allow him to get a view of the tyres on each side of the trailer. The first defender conducted this check about a few hundred yards from the location of the first collision (although earlier in his evidence the first defender said he conducted this check about one mile from the location of the first collision). All the trailer tyres seemed in order and the first defender continued along Mauldslie Road in an easterly direction. At that time the sun was out and the road was dry. The sun was quite low and was behind the first defender. The traffic was steady but was not overly busy. The time was about 19.20 hours. The first defender did not have any cars in front of him but he was aware of a vehicle behind him (which the first defender now knows was the hyundai). There was another vehicle behind the hyundai. Because the first defender was towing the trailer, he was the slowest on the road and the two vehicles behind him were following him.

[36] The first defender estimated that he was travelling between 40 mph and 50 mph. The toyota was fully within the eastbound lane. As the first defender was negotiating the

right hand bend on the road the first defender could see the offside wheels of the trailer and could see that the trailer was fully within the eastbound lane but close to the white centre line. The trailer was not swaying about. As the first defender was on the right hand bend he saw the audi coming towards him travelling at "a fair lick". The audi was close to the white centre line. The first defender thought that the audi was travelling at "80 mph plus". The audi was so close to the toyota that the first defender believed that they would have twanged wing mirrors if the audi and the toyota were the same height. In the circumstances the first defender pulled reasonably sharply to the left to get out the way of the audi but the audi struck the offside of the trailer and tore the rear offside corner of the trailer. When the first defender pulled left he did not know what happened to the trailer's road position and did not know whether it crossed into the westbound lane. The first defender felt a jolt as the first collision occurred and then pulled to the right after the first collision. This pull to the right resulted in the first defender crossing into the westbound lane. Both the toyota and the trailer were over the centre white line in the westbound lane at this point. The first defender drove then toyota and trailer in the westbound lane for 5 to 10 seconds. The first defender then made his way along the road and parked on the left hand side of the eastbound lane as soon as it was safe to do so. As the first defender pulled in he saw some debris in his mirror but he didn't know, at that point, what had happened. After he parked he saw that the audi had collided with the hyundai. The first defender then made his way towards the audi and the hyundai. The first defender described what he saw and estimated that the audi and hyundai were about 20 metres apart.

[37] Fortunately a passer-by was either a doctor or ambulance person and were taking charge and asking for debris to be moved to let the ambulance in. As the first defender was returning to the toyota he could see tyre marks on the road which he though were from the

audi. These tyre marks headed straight towards where hyundai would have been travelling on the road. The first defender returned to the toyota and waited for the police to arrive. Once the police arrived the first defender spoke very briefly to one of the officers. That officer was interested in the speed of the audi and the first defender told the officer that the audi was going at "a fair lick". There was also a discussion about what was to happen to the toyota and trailer but eventually the police decided that they would deal with the removal of both. The first defender confirmed that he was subsequently prosecuted for dangerous driving. The prosecution was based on the pursuer saying that the first defender was overtaking a range rover and was on the wrong side of the road. However, prior to the first collision the first defender: (i) had not overtaken any vehicle; (ii) had not overtaken the hyundai; and (iii) had not attempted to overtake any vehicle.

[38] The first defender estimated that the first collision took place at around the markers shown in photograph 12 at page 64 of Mr Loat's report. The first defender explained that he met with Mr Loat after the accident and drove the toyota and trailer at the accident location as he normally would. The defender, under reference to figure 38 of the Mr Loat's report (which is an image taken from behind the toyota and trailer on Mauldslie Road and shows the trailer within the eastbound lane but close the white centre lines), agreed that the position of the trailer shown in figure 38 was similar to the position the trailer was in when the first collision occurred.

[39] In cross examination the first defender was asked to comment on the fact that Ms Burden had said the trailer was wobbling about. The first defender said he did not know if Ms Burden was meaning potholes or manhole covers and explained the only thing he could say was that Ms Burden was talking about was the check he conducted of the trailer tyres on Mauldslie Road when he turned slightly left and slightly right. The first defender

was not sure when he first learned that Ms Burden had said that the trailer had been wobbling about, but thought he may have been told this by the police either when they came to his house, after the date of the accident, to charge him with dangerous driving, or at some point after that. The first defender explained that he provided a statement to a representative of the second defender on 27 May 2016 and he had included in that statement that he had conducted the checks on the trailer that are explained above. The first defender explained that the trailer and toyota were inspected after the accident and no issues were found with either. The first defender accepted what Rule 160 of the Highway Code said and accepted that both the toyota and trailer could have been further to the nearside of the eastbound lane. However, the first defender noted that he was travelling within the speed limit and the audi: (i) was narrower than the toyota and the trailer; (ii) could also have been further to the nearside of the westbound lane; and (iii) could have been travelling at a slower speed. The first defender thought that the tyre mark on the westbound lane on photograph A113 was quite straight whereas the trailer tyre mark on photograph A102 was snaked. It was put to the defender that the tyre mark on the westbound lane of photograph A113 was from the tyre of the trailer. The first defender observed that he did not think that he would have been over the white centre line, after the first collision, to that extent. The first defender did not feel able to comment on photograph A111.

David Loat's evidence

[40] Mr Loat gave evidence over two days. What follows is a summary of his opinion as regards how the accident occurred and the reasons why he reached that opinion. Mr Loat was a retired police sergeant. He had served 30 years with Avon and Somerset Police, retiring in 2014. He had been a traffic officer between 1996 and 2014 and was the supervisor

of the investigation and collision unit between 2003 and 2014. Mr Loat had obtained a number of qualifications during his police service including a City & Guilds in Police Accident Investigation and Reconstruction Techniques (2000) and a Professional Development Certificate in Forensic Accident Investigation from De Montfort University (2000). Whilst serving with the police Mr Loat had provided advice to the Independent Police Complaints Commission on collision reconstruction and had conducted external reviews for other police forces on accident investigations. Mr Loat also had a BSc (Hons) in combined sciences (2014). He had attended numerous other courses related to collision investigation and was a full member of the Institute of Traffic Accident Investigators and a member of The Chartered Society of Forensic Sciences. Mr Loat explained that he had attended at and examined the scenes of numerous road traffic accidents and had been providing expert opinion evidence for 19 years.

[41] Mr Loat adopted his report (production 6/1) and the calculations that he prepared after the commencement of the proof (production 6/10 – the results of these calculations had been included in Mr Loat’s report and the calculations produced were his workings).

Mr Loat had visited the accident location with the first defender and had taken photographs. Mr Loat had also taken a video recording of the first defender driving the toyota and the trailer (which, by that time, had been repaired) eastbound along Mauldslie Road. Mr Loat, like Mr Mottram, had placed considerable reliance on the photographs taken by Pc Dewar.

[42] Mr Loat’s opinion was: (i) that toyota and trailer were travelling along the eastbound lane; (ii) that the toyota was fully within the eastbound lane and the trailer was probably travelling on, or close to the white centre line; (iii) that the audi was travelling along the westbound lane; (iv) that the front offside of audi collided, at a shallow angle, with the trailer, halfway along the length of the trailer (I have already referred to this as “the first

collision"); (v) that the first collision occurred on the white centre line; (vi) that as result of the first collision: (a) the two offside wheels of the trailer with were damaged and the trailer's rear offside tyre was punctured; and (b) the front offside tyre of the audi was punctured; (vii) that the punctured offside tyre of the trailer made an immediate tyre mark on the eastbound lane; (viii) that the punctured front offside tyre of the audi made an immediate tyre mark on the westbound lane; (ix) that the said immediate audi tyre mark continued in a straight line in a westerly direction along the westbound lane and at a point the front offside wheel of the audi became locked, due to emergency braking by the pursuer, and turned the said immediate audi tyre mark into the audi long tramline tyre mark; (x) that the said immediate audi tyre mark and the audi long tramline tyre mark were in a straight line, which, at the point of first collision (on the white centre line), diverged from the white centre line and then began to converged to the white centre line as result of curve of the left hand bend that the audi was negotiating; (xi) that the audi nearside skid mark on the westbound lane headed west and had been produced by the front nearside wheel of audi as a result it being locked under emergency breaking by the pursuer; (xii) that the audi nearside skid mark could only have been produced if the ABS on the audi had failed (if the ABS had have been working the front nearside wheel of the audi would not have locked); (xiii) that the audi crossed from the westbound lane into the eastbound lane and struck the hyundai that was travelling in the eastbound lane in the opposite direction to the audi; (xiv) that in doing so the audi skidded for at least 57.4 metres; and (xv) that the audi retained sufficient momentum to overcome the forward momentum of the hyundai, which resulted in: (a) the hyundai rotating approximately 135 degrees around the area of the second collision; and (b) the audi rotating through and beyond the point of the second collision.

[43] Mr Loat explained his opinion under the reference to the police photographs and, in particular, photograph A113:

1. A113 –

(a) Mr Loat accepted that this photograph was blurred and of poor quality but he had nevertheless based almost the entirety of his opinion on what it showed. Mr Loat considered that the photograph showed two separate tyre marks with a definite gap in between the separate tyre marks on the white centre line. Mr Loat considered that the tyre mark on the eastbound lane was curved and was made by the trailer. Mr Loat considered that tyre mark on westbound lane was straight and made by audi. Mr Loat considered that it could clearly be seen that the tyre mark in the westbound lane was adjacent to the tyre mark on the eastbound lane and he had demonstrated this at figure 42 of his report. Mr Loat noted that photographs A104 (which is looking to the west) and A109 (which is looking to the east) all showed the tyre mark of the trailer and on each occasion it was curved. This tyre mark was caused by the trailer tyre being dragged across the road surface. Because the trailer tyre was no longer inflated and was torn, it would have created an erratic path as the trailer was towed to its post impact resting position. By contrast, the tyre mark in the westbound lane, shown in photograph A113 was straight and photographs A104 and A109 supported the proposition that only the tyre mark in the eastbound lane was made by the trailer. All this led Mr Loat to the conclusion that the front offside of audi collided, at a shallow angle, with the trailer, halfway along the length of the trailer, at about the white centre line.

(b) Mr Loat thought it was possible for both the audi and trailer to make tyre marks at the point of the first collision without there being a need for an interval between the point of the first collision and the making of the tyre mark. Mr Loat considered that the tyre mark in the westbound lane, shown in photograph A113, was caused by the front offside tyre of the audi, during the first collision, as the tyre was punctured and deflated. Mr Loat, considered that there was no physical evidence to show that the trailer had encroached into the westbound lane nor was there any physical evidence that the toyota had been overtaking. Indeed if the toyota had been overtaking and returning to the eastbound lane, Mr Loat would have expected the trailer to be at more of an angle and any collision at such an angle would have probably caused both the audi and the trailer to rotate. Mr Loat accepted that if the tyre mark in the westbound lane, shown in photograph A113, was made by the audi it was nevertheless at an angle that was diverging from the white centre line and moving towards the nearside of the westbound lane. However, Mr Loat explained that he considered that the tyre mark in westbound lane, shown on photograph A113, continued in a straight line and there came a point when it turned into the audi long tramline tyre mark, due to the pursuer locking the front offside wheel of the audi by applying emergency braking (effectively the audi long tramline tyre mark was a continuation of the tyre mark in the westbound lane shown in photograph A113). Due to this part of the road being a curved left hand bend, what had happened was that the tyre mark in the westbound lane, shown in photograph A113, had initially diverged from the white centre line

but there came a point, due to the curve of the left hand bend that the audi was negotiating, when this tyre mark had begun to converge with white centre line. Essentially, Mr Loat explained, a ruler could be placed on the tyre mark in the westbound lane, shown on photograph A113, and it would lead to the point where the front offside of the audi struck the hyundai. Mr Loat did not think there was any suggestion from photograph A113 that there was a depression on the white centre line where the tyre marks on the eastbound and westbound lanes came close together. In any event, the two tyre marks were adjacent to one another. Mr Loat noted that if, contrary to his view, that the court concluded the tyre mark in the westbound lane, shown on photograph A113, was made by the trailer he could not explain why the mark was straight (meaning that he expected it to be curved and erratic in the same way as the other trailer tyre marks).

2. A128 – Mr Loat considered this photograph was taken looking west and showed the audi long tramline tyre mark and the audi nearside skid mark. The audi long tramline tyre mark had been made by the front offside tyre of the audi running on the rim of the wheel. The audi's front offside wheel had also been locked, which was consistent with emergency braking. This same tyre had made the tyre mark in the westbound lane on photograph A113. The audi nearside skid mark resulted from the audi nearside front wheel being locked. That could only have occurred if the audi's ABS had failed or was faulty. Mr Loat considered that the audi's ABS probably failed during the first collision. Mr Loat noted that, generally, if ABS is working properly it could produce padded tyre marks. However, in this case there was no physical evidence of the type of tyre marks that would be produced by the

audi's tyres if the ABS had been working as it should. Mr Loat considered that the physical evidence showed that the pursuer had only braked after the first collision and had applied emergency braking from the point of the commencement of the audi long tramline tyre mark.

3. A112- Mr Loat considered that this photograph was taken looking east and again showed the audi long tramline tyre mark and the audi nearside skid mark. Mr Loat considered that this photograph showed the audi "straight lining" the left hand bend.

4. A131; A132 and A135 - Mr Loat considered that these photographs showed the resting position of the hyundai. Mr Loat noted that there was a concentration of debris around the hyundai at the kerb line and in the bushes and considered, whilst accepting that debris could be moved by third parties including the emergency services, that it indicated that the hyundai came to rest at or near the point of impact of the second collision. By contrast photograph A91 showed the audi in its final resting position with very little debris around the audi.

5. A111 – Mr Loat did not consider this to be a helpful photograph because there no reference point in the photograph to determine where it had been taken or the direction the photograph was looking. Mr Loat acknowledged that the photograph showed gouge marks in the middle of the picture and a tramline tyre mark at the top of the picture. Mr Loat was unable, due to the lack of a reference point, to express a view on those marks. He did not think that photograph A111 was relevant, given his view of what photograph A113 showed (i.e. A113 showed were the first collision occurred). When pressed Mr Loat noted the tramline tyre mark shown in photograph A111 was quite narrow and may not have been made by the

audi. There also seemed to be no interval between the commencement of the tramline tyre mark and the gouge marks (in the same way that there was not an interval between the first collision on the white centre line and making of the tyre marks in the eastbound and westbound lane in photograph A113) and the tramline tyre marks also seemed to stop before the top of the photograph. Mr Loat also noted that Pc Dewar was fairly certain that photograph A111 was taken in the eastbound lane.

[44] Mr Loat explained that when he had followed the first defender along the road when he visited the accident location, he had found that the, albeit unladen, trailer had been stable. Owing to the width of the trailer and narrower width of the road in places, Mr Loat observed the trailer close to, if not on the white centre lines. Mr Loat explained that the trailer was a plant carrying trailer with two axels. The two axels helped to spread the load and helped with stability. There was no suggestion that the trailer was overloaded at the time of the first collision and the trailer would also be less likely to bounce if it was heavily laden (but not overloaded). Mr Loat considered that photograph A98 showed that the load of the trailer looked evenly spread and noted that there may have been some disruption to the load due to the impact of the first collision. Mr Loat considered it would unusual for this type trailer to wobble. Mr Loat considered, in the absence of over-loading or a mechanical defect or excessive speed or deflation of the tyres, that the only explanation for the trailer moving in the way described by Ms Burden was the explanation given by the first defender regarding the moving check of the trailer's tyres.

[45] Mr Loat did not consider that the first defender could be criticised for the manner in which he approached the rumble he heard coming from the trailer after coming off the motorway. Mr Loat did not consider that first defender's approach to the rumble he heard

coming from the trailer and his subsequent check of the trailer tyre wheels by pulling slightly left and right before the first collision was relevant to how the first collision occurred, but conceded he ought to have included this information in his report. Mr Loat accepted that Mauldslie Road was wide enough to allow the toyota and trailer to be fully within the eastbound lane. He also, under reference to Rule 160 of the Highway Code, accepted that it would have been desirable for toyota and trailer not to be on the white centre line. However, he noted that if the trailer was being driven on or close to the white centre line, the audi was also doing so in order for the collision to have occurred. Mr Loat considered there was no reason why the pursuer should have adopted such a position on the road and that the audi could have passed the trailer (even if it was on the white centre line) without incident. Mr Loat also noted that there was no physical evidence that the pursuer braked before the first collision.

[46] Mr Loat considered that the frozen speedometer of the hyundai at approximately 38 mph was a good indicator that the hyundai was travelling at 38 mph at the point of the second collision. Mr Loat considered that the calculation of speed was a fundamental aspect of road collision investigation. In the present case, Mr Loat considered that speed of the audi could be calculated by using the information available and by making reasonable assumptions. Mr Loat had prepared 6 calculations in order to estimate the speed of the audi when the audi long tramline tyre mark commenced. Mr Loat had based his calculation on the audi long tramline tyre mark being 57.4 metres (like Mr Gilfillan, Mr Loat thought that both the audi long tramline tyre mark and the audi nearside skid mark would have been likely to have been longer on the day of the accident because it was likely that the early stages of both marks would have faded by the time they were measured by Mr Gilfillan). In order to complete his calculations, Mr Loat had had to assume the speed of

the audi at the point of the second collision. Mr Loat had also assumed that the hyundai was travelling at 38 mph and that the point of the second collision occurred at the end of the audi long tramline tyre mark. Calculations 1 and 2 assumed the speed of the audi at the point of second collision to be 0 mph (Mr Loat, of course, accepted that the audi's speed was clearly not zero at the point of the second collision but had prepared the calculation for illustrative purposes). Calculations 3 and 4 assumed the speed of the audi at the point of the second collision to be 38 mph. Calculations 5 and 6 assumed the speed of the audi at the point of the second collision to be 50 mph. Calculations 1, 3 and 5 assumed a deceleration rate of 0.7g and calculations 2, 4 and 6 assumed a deceleration rate of 0.8g. Mr Loat considered the decelerations rates selected to be reasonable given that the road had a good macro texture and the fact that the audi would have been braking going up an incline. The results of calculations 1 to 6 were as follows:

1. Calculation 1 (second collision impact speed 0 mph; 0.7 g) – 62.8 mph;
2. Calculation 2 (second collision impact speed 0 mph; 0.8 g) – 67.1 mph;
3. Calculation 3 (second collision impact speed 38 mph; 0.7 g) – 73.4 mph;
4. Calculation 4 (second collision impact speed 38 mph; 0.8 g) – 77.1 mph;
5. Calculation 5 (second collision impact speed 50 mph; 0.7 g) – 80.3 mph;
6. Calculation 6 (second collision impact speed 50 mph; 0.8 g) – 83.7 mph;

[47] Mr Loat noted that these calculations did not take account of the speed the audi lost during the first collision, nor the speed it would have lost as the audi slowed due to the puncture to the front offside of the audi's tyre before the brakes were applied. These factors meant that the audi would be travelling at a higher speed at the point of the first collision.

[48] Mr Loat noted that audi and the hyundai were of similar weights (the audi was 1520 kg and the hyundai was 1427 kg). Mr Loat explained that if the audi had been travelling at the same speed as the hyundai (namely 38 mph) at the point of the second collision, he would, given the weights of the vehicles were similar, have expected them to remain at the point of the second collision because their momentum would be the same (even if it was an offset impact Mr Loat would have expected the vehicles to rotate but remain at the point of impact). Mr Loat explained that if it was accepted that the audi had driven through and beyond the point of impact of the second collision by 20 metres, then the audi must have overcome the forward momentum of the hyundai. Given the similarity of the respective weights of the audi and hyundai, Mr Loat considered, if it was accepted that the hyundai was travelling at about 38 mph at the point of the second collision, that the audi must have been travelling at a greater speed than 38 mph to overcome the momentum of the hyundai and travel beyond it. Mr Loat thought that 50 mph was a conservative estimate of the speed the audi was travelling at the point of the second collision.

[49] Mr Loat was asked about the 27.2 metre deceleration issue. Mr Loat did not think the deceleration value ought to be less than 0.7g or 0.8g because the audi front offside wheel was locked and the amount of surface area of the front offside tyre on the road would have had little bearing on the deceleration rate. However, Mr Loat, as result of Mr Mottram's evidence as regards the 27.2 metre deceleration issue, provided further calculations using the same assumptions but based on the 30.2 metre audi nearside skid mark (with the speed being calculated at the start of 30.2 metre audi nearside skid mark). These calculations produced the following results:

1. Calculation 7 (second collision impact speed 38 mph; 0.7 g) – 59.3 mph;
2. Calculation 8 (second collision impact speed 38 mph; 0.8 g) – 61.8 mph;

3. Calculation 9 (second collision impact speed 50 mph; 0.7 g) – 67.6 mph;
4. Calculation 10 (second collision impact speed 50 mph; 0.8 g) – 69.8 mph;

Mr Loat remained of the view that the calculations performed using the 57.4 metre audi long tramline tyre mark were more likely to be accurate and were consistent with the pursuer's evidence that he jumped on the brakes at the point of the first collision.

[50] In cross examination Mr Loat initially said that it was new information to him that the first defender had pulled onto the westbound lane after the first collision. However, it transpired that Mr Loat did have available to him a statement from the first defender, dated May 2016, that included this information. Mr Loat accepted that he made in error in stating that this was new information. Mr Loat explained that he had simply not recalled it and accepted that he should have put it in this report. Mr Loat noted, however, that there was no physical evidence to support the first defender's assertion that he entered the westbound lane after the first collision. Mr Loat accepted that he should have included the workings for his calculations in his original report. Mr Loat agreed that the calculation of the speed of the audi was only as good as data available, however, he maintained that there was sufficient information to make a reliable calculation. He noted that the calculations were probably an underestimate of the speed that the audi was travelling because both the audi long tramline tyre mark and the audi nearside skid mark would have been longer than what Mr Gilfillan measured them at. If the pursuer had braked prior to the first collision, or after the first collision but prior to the audi long tramline tyre mark commencing, his speed would be higher than that calculated when he started to make the audi long tramline tyre mark. Mr Loat accepted that there was no photograph of the point of the second collision but noted if both the audi long tramline tyre mark and the audi nearside tyre mark came to an end at the same point that would be indicative of them ending at the point of the second collision.

Mr Loat also accepted that it was not known how much speed the audi lost after the second collision.

Submissions

[51] Counsel for the pursuer produced a 35 page written submission. Counsel for the defenders produced a 13 page written submission. Both Counsel for the pursuer and Counsel for the defenders supplemented those submissions with oral submission. What follows is a summary of the submissions made.

Submissions for the pursuer

[52] Counsel for the pursuer, under reference to the Supreme Court case of *Kennedy v Cordia (Services) LLP* 2016 SC (UKSC) 59, contended that Mr Loat had not adopted an impartial role. He had omitted to include in his report what the first defender had said about: (i) hearing a rumble and conducting checks on the trailer; and (ii) crossing into the westbound lane after the first collision. Mr Loat had chosen to ignore these matters because they did not fit with his narrative. Mr Loat had also omitted from his report: (i) his workings to the speed calculations he had performed; and (ii) any analysis of photograph A111. Counsel for the pursuer submitted that in the circumstances Mr Mottram's evidence should be preferred to the evidence of Mr Loat.

[53] Both the pursuer and Mr Donnelly both thought that the toyota was overtaking. However, it was clear from the evidence of each of them that that was simply their understanding given the position they saw the toyota in on the westbound lane. Both were, however, very clear on the core issue, namely that the first defender was not in the eastbound lane and was in the westbound lane.

[54] Pc Dewar prepared a statement very shortly after the incident. He said that photograph A111 was taken 100 metres from the second collision and accepted that the marks shown in photograph A111 indicated the likely point of the first collision. If Pc Dewar's evidence was accepted as regards photograph A111 being taken 100 metres from the second collision, the issue became whether the photograph was taken in the eastbound lane or the westbound lane. Whilst Pc Dewar was clear about the gouge marks being 100 metres from the second collisions he was uncertain whether photograph A111 was taken looking at the eastbound or the westbound lane. However, Pc Dewar said that the audi long tramline tyre mark ran from the gouge marks and that important evidence clearly fitted with the evidence of Mr Mottram. Mr Mottram made clear that if photograph A111 was looking east and looking at the eastbound lane then the marks shown were in the wrong order. It made more sense for photograph A111 to be showing the westbound lane and if Mr Mottram's evidence was accepted (which it ought to be) it was cogent evidence that the first collision occurred in the westbound lane. Mr Loat, despite having Pc Dewar's police statement, made no attempt to analyse photograph A111 in his report and initially stated it was irrelevant. However, Mr Loat then contradicted himself and started to offer some opinion on what photograph A111 showed. The case of *Kennedy* made clear that an expert had to deal with information whether it was helpful or not but Mr Loat had failed to deal with photograph A111 in his report.

[55] Mr Mottram analysed photographs A112 and A128 and explained why they supported the audi being initially in the westbound lane. Photograph A128 showed the audi long tramline tyre mark a measurable distance from the white centre line. If a lay person saw photographs A112 and A128 and were told what the tyre marks were, they would conclude that the something had happened in the westbound lane. Mr Mottram's

analysis of what these photographs showed and his view regarding the audi's ABS failing as a result of the first collision should be accepted. Mr Loat had failed to adequately deal with the tyre marks shown in these photographs and did not clearly set out in his report the point he made in evidence about the tyre mark in westbound lane (shown in photograph A113) initially diverging from the white centre line and then subsequently converging back to the white centre line as a result of the left hand bend that the audi was negotiating.

[56] Photograph A113 was central to Mr Loat's opinion (Counsel for the pursuer then explained Mr Loat's analysis in some detail). Counsel for the pursuer contended that Mr Loat's opinion should be rejected and Mr Mottram's opinion of what photograph A113 showed should be accepted. Mr Mottram said, given the speeds that the toyota and audi were travelling, that it was physically impossible for the rear offside wheels of the trailer and the front offside wheel of audi to make instantaneous tyre marks at the same time at the point of impact. Further, the tyre mark in the westbound lane, shown in photograph A113, did not look like the audi long tramline tyre mark. It was also not clear from photograph A113 that there was a gap between the tyre mark in the eastbound lane and the tyre mark in the westbound lane and any perceived gap could be explained by the photograph being blurred. Any depression in the white centre line could also account for there being a gap. Mr Loat refused to accept that a depression on the white centre line could be a possibility and had completely ignored the fact that the first defender had said in a statement made in May 2016, that both the toyota and the trailer entered the westbound lane after the accident (this remained the first defender's position during his evidence). This provided a possible explanation for the tyre marks in the westbound lane shown in photograph A113 but Mr Loat had ignored this and maintained that the trailer remained in the eastbound lane after the first collision. Mr Loat had subsequently followed behind the trailer, when he

visited the accident location, in order to replicate the circumstances on the day of the accident, however, this had been a flawed exercise because the trailer was unladen. Counsel for the pursuer contended that in order for the court to accept Mr Loat's evidence, the court would have to accept that the audi travelled in a straight line from Mr Loat's suggested point of the first collision on the white centre line to the point of the second collision.

However, Mr Loat had failed to properly analyse this point. In all the circumstances the evidence of Mr Mottram should be preferred to that of Mr Loat as regards how and where the first collision occurred.

[57] The first defender had conceded that he was driving the trailer on the white centre line. That was against a background that there was a gap of 1.1 metres (it was agreed that the trailer had a width of 2.3 metres and the road had a width of 3.4 metres) on the road. When the first defender was referred to Rule 160 of the Highway Code and asked why he drove the trailer so close to the white centre line, he did not really have an answer. The first defender seemed to think that driving the trailer on the white centre line was fine and he admitted he did not know what happened to the position of the trailer when he pulled left when he saw the audi. That was against the background of what had gone before with regard to the first defender hearing a rumble and conducting checks on the trailer. In the circumstances Counsel for the pursuer contended that: (i) the pursuer should have positioned the toyota and trailer fully in the eastbound lane: and (ii) even if the first defender was simply driving the trailer on the white centre line when the first collision occurred, he was not acting with reasonable care and was negligent.

[58] As regards the speed of the audi, Counsel for the pursuer highlighted that Mr Loat had relied on the spread of debris around the hyundai to work out the point of the second collision. However, the first defender had made clear in evidence that debris was moved to

allow the ambulance to access the scene of the second collision and Mr Mottram had explained why debris may not be reliable indicator of a point of impact. Mr Loat had also failed to measure the uphill gradient that the audi was travelling on. This could have been done but was offered as a relevant factor without proper reasoning being supplied. It was also unsafe to assume there had been full emergency braking for 57.4 metre as the front offside audi wheel may have been not rotating due to damage caused in the first collision (which was Mr Mottram's preferred analysis). Counsel for the pursuer contended that there were too many uncertainties to make a confident assessment of the audi's speed and noted that estimates of speed by eye witnesses were notoriously unsafe. Counsel for the pursuer adopted what Mr Mottram had to say as regards the difficulties in assessing the speed of the audi (including the difficulty in identifying where the second collision occurred).

[59] Counsel for the pursuer accepted that if the court held that the speed of audi was as high as calculated by Mr Loat then there may be contributory negligence on the part of the pursuer. That was on the basis that a high speed would reduce the pursuer's ability to react to the situation in front of him. However, if the audi's speed was in the sixties or seventies there would be a much more restricted basis for a finding of contributory negligence because, if there had have been no encroachment into the westbound lane, the pursuer would have still have been able to pass the toyota and trailer safely. If the audi was travelling at higher speed it would reduce the pursuer's thinking time but the majority of the blameworthiness would still be on the driver encroaching into the opposing lane.

Submissions for the defender

[60] Counsel for the defenders submitted that the pursuer had failed prove his case on Record. The pursuer's case was more than the allegation that the trailer was over the white

centre line by a small amount. Rather, his case was that the toyota and trailer were significantly on the wrong side of the road, as if the toyota was overtaking another vehicle. Under reference to *Stewart v Glaze* [2009] EWHC 704 (QB), paragraph 5 to 7, Counsel for the defenders contended that allowing the wheels of a wide trailer to move close to, or even encroach into the opposing lane by a small amount was not negligent unless the conduct could foreseeably give rise to an accident. What amounts to negligence in relation to such driving would depend on factors such as the condition of the road, the presence of other traffic and the behaviour of other road users.

[61] In the present case the pursuer was not a credible or reliable witness. He had previously said that the toyota *was* overtaking (indeed that was what was averred in the initial writ) but had changed his position in evidence and said that he *thought* the toyota was overtaking. This was not credible and the only explanation for his position changing was because he knew, by the time of proof, that it was unlikely that it would be accepted that the toyota was overtaking. The pursuer's evidence had the flavour of story which had been told a number of different times and in a number of different ways. If the court rejected the pursuer's evidence (which it ought to do) then the foundation of the pursuer's case was taken away and it was not the function of expert evidence to rebuild it (see *Stewart* at paragraph 9). If, however, the court was minded to accept some of the pursuer's evidence, then two points ought to be noted. The first point is that the pursuer said he braked as soon as he saw the toyota and trailer. If that is correct then it followed that Mr Loat's calculations of speed (which calculate the audi's speed at the commencement of the 57.4 metre audi long tramline tyre mark (calculations 1 to 6) and at the commencement of the 30.4 metre audi nearside skid mark (calculations 7 to 10)) are likely to be a significant underestimate. The second point is that although the view of the pursuer was obscured to a degree by the

curvature of the bend and the trees on the nearside of the westbound lane, the pursuer ought to have seen the toyota and trailer more than a moment before the collision.

[62] Mr Donnelly was a wholly unreliable and incredible witness. He simply repeated the pursuer's evidence about overtaking. He made no attempt to hide his disdain for any contrary propositions put to him. He did not treat the proceedings sufficiently seriously and the court ought to reject his evidence in its entirety.

[63] The photographs taken by Pc Dewar were not of good quality and did not contain any wide views. Photograph A111 was not helpful. On the one hand the pursuer wished to rely on Pc Dewar's evidence that photograph A111 showed the point of the first collision but, on the other hand reject Pc Dewar's clear evidence that photograph A111 was taken looking at the eastbound lane. There was no other clear evidence to say that Pc Dewar was mistaken about photograph A111 showing the eastbound lane and his evidence ought to be accepted in the round. If the court did consider Pc Dewar was mistaken in that regard he could just as easily be mistaken as to whether the photograph related to the first collision or the second collision. Indeed the tramline tyre marks shown in photograph A111 would also support it being the front offside audi tyre at the second collision. If the court found it impossible to accept Pc Dewar's evidence that photograph A111 was taken looking at eastbound lane at the point of the first collision, the court should follow Mr Loat's approach and say that the photograph does not assist due to a lack of any reference point. Mr Loat also plausibly suggested that the tramline tyre mars shown in photograph A111 looked narrower than would be produced by the front offside tyre of the audi. Most importantly, even if the court accepted Mr Mottram's evidence that the gauge marks were made by either trailer or the audi, it followed, on the weaker alternative rule, that the pursuer could not rely on Mr Mottram's evidence to prove this photograph showed marks that were made by the

trailer. In all the circumstances photograph A111 did not assist the pursuer's case. If the court considered that the police photographs were insufficient to prove a crucial fact that would result in the pursuer failing to prove his case. It was not necessary for the first defender to prove anything.

[64] The first defender was a credible and reliable witness who gave his evidence in a calm and measured manner. It was clear from references made to his statement of May 2016 that he had given a consistent account from the outset. He had no difficulty in accepting reasonable propositions made against him, including that he could have driven more closely to the nearside of the eastbound lane. There was no reasonable explanation for the first defender being in the westbound lane. Ms Burden said in her statement that she was a couple of car lengths behind the trailer but made no mention of the toyota or the trailer being on the wrong side of the road. The first defender's response to hearing a rumble was reasonable. There was an absence of other evidence (whether credible eye witness evidence or evidence in the form of markings on the road) that contradicted the first defender's position. The first defender's moving check of the trailer tyres was not relevant to the assessment of the first defender's driving at the point of the first impact. In the circumstances the court ought to accept the first defender's evidence in its entirety and find that the trailer was on the eastbound lane but close to the white centre line.

[65] As regards the skilled witnesses Counsel for the defenders drew comparisons between the experience and qualifications of Mr Mottram, on the one hand, and Mr Loat, on the other hand, and noted that it was unclear whether Mr Mottram working alongside other road traffic collision investigators was sufficient to allow him to give expert opinion in this case. In any event, Counsel for the defenders submitted that Mr Loat's substantial qualifications and experience should result in the court preferring his evidence to that of

Mr Mottram. Further, Mr Mottram's evidence was based on an incomplete consideration of the facts because he had failed to give any consideration to the speed of the audi. Mr Loat was clear that the calculation of speed was a fundamental factor in any road traffic collision investigation and Mr Mottram's reasons for not considering the speed of audi were difficult to sustain. Whilst it was acknowledged that the available information was limited, there was information available to allow calculations to be done. It was accepted that Mr Loat should have produced his workings for the calculations but once that was done it was clear that the information that was available could be used to make conservative calculations about the audi's speed. Mr Mottram's opinion was limited to the position of the offside trailer wheels at the point of the first collision. Not only did Mr Mottram fail to consider the speed of the audi, he also did not address the complete movement of the audi and the toyota and trailer. Mr Mottram said nothing about the speed of the toyota or anything about how the toyota was being driven. He also appeared to disregard the pursuer's contention that he thought the toyota was overtaking. By contrast, Mr Loat attempted to reconstruct the movement of both the audi and the toyota and trailer. In the circumstances Mr Mottram's conclusion ought to be disregarded.

[66] As regards the alignment of the audi and trailer, at the point of the first collision, Mr Loat's evidence should be preferred. If the trailer had been significantly into the westbound lane and been driven back towards the eastbound lane it seems clear that the damage to the trailer would have been different and the audi may not have gone on to have the second collision.

[67] As regards photograph A113, Counsel for the defenders contended that Mr Loat's interpretation of this photograph should be preferred. Even if the court rejected Mr Loat's evidence photograph A113 did not prove that the trailer was in the westbound lane at the

point of the first collision. There was evidence from the first defender that his trailer was in the westbound lane after the first collision and that evidence could therefore explain the tyre mark in the westbound lane on photograph A113. However, the first collision could have been in the eastbound lane with the trailer moving to the westbound lane after the first collision. In the circumstances photograph A113 did not assist the pursuer's case and it was noteworthy that Mr Mottram chose to exclude analysis of it from his report.

[68] Mr Loat calculations of the audi's speed were calculated in a way that was entirely fair to the pursuer. These calculations produced speeds that were likely to be lower than the speed of the audi at the first collision. This was because: (i) there would have been likely deceleration from the impact of the first collision; (ii) the audi was travelling up an incline; (iii) there may have been braking before the audi long tramline tyre mark commenced; and (iv) the audi long tramline tyre mark and the audi nearside skid mark may have been longer on the day of the accident. Counsel for the defenders contended that Mr Loat's opinion that: (i) there must have retardation for more than 30.2 metres; and (ii) the audi was travelling faster than the hyundai at the point of the second collision; was straight forward and reasonable. As such the higher speed of 80 to 84 mph (produced from calculations 5 and 6) is likely to be the best estimate of the audi's speed at 57.4 metres from the second collision and, in the circumstances, the court could conclude that the audi was travelling in excess of those speeds at the point of the first collision. Such a speed was in line with the first defender's estimate of the speed the audi was travelling at.

[69] Even if the calculations most favourable to pursuer were used, the audi was still travelling at about 60 mph when it was 30.2 metres from the second collision (see calculation 7 and 8). Even on that scenario the court could conclude that the pursuer was travelling in excess of that speed prior to the first collision. The pursuer's speed was not

simply a matter that related to contributory negligence. If the pursuer was driving so fast, or paying so little attention, that he was unable to move out of way of a driver who had encroached onto the opposite lane to a minor degree, that did not mean the driver encroaching in a minor way was at fault. If the court found that the trailer was on the white line, Counsel for the defenders submitted that the first defender would not have been negligent. All the first defender had to do was take reasonable care and it was not negligent to drive a wide trailer onto the white centre line in circumstances where the first defender was not expecting an oncoming vehicle travelling at an excessive speed.

[70] If the trailer did encroach onto the westbound lane there was no evidence to say how far it encroached. A call on the pursuer to state his position on this point went unanswered. In the circumstances there was simply no evidence to allow the court to answer this question.

[71] If the court did decide to find for the pursuer it was submitted that the court should make a substantial finding of contributory negligence. This was based on: (i) the pursuer's speed; and (ii) the pursuer failing to notice the toyota until a split second before the first collision. The level of contributory negligence would depend on the conduct of the pursuer and the first defender. If, for example, the first defender was wholly in the westbound lane, the first defender would be likely to be found substantially at fault even if the pursuer was driving carelessly or too fast. However, if the trailer had only encroached by a small margin, but the court still held this to be negligent, then the pursuer's driving would be an almost complete cause (Counsel for the defenders suggested in those circumstances a finding of contributory negligence of 80% or 90% would be appropriate). As the assessment of contributory negligence depended on the facts that court found proved, it was a matter for the court to determine the appropriate level of contributory negligence.

[72] Counsel for the defenders submitted that all the circumstances decree of absolvitor should be granted, failing which the pursuer should be found to be have been contributorily negligent.

Discussion

Conclusions on the evidence

[73] It is first convenient to deal with the criticisms made of each of the skilled witnesses. Counsel for the pursuer contended, under reference to the case of *Kennedy*, that Mr Loat was partial for the reasons set out at paragraph 52. Counsel for the defenders, whilst not objecting to the evidence of Mr Mottram, questioned whether he had the necessary knowledge and experience to give evidence as a skilled witness. Counsel for the defenders also noted that Mr Loat was being criticised for not considering photograph A111 yet the same criticism could be levelled at Mr Mottram for not considering photograph A113.

[74] In the case of *Kennedy* Lord Reed and Hodge state at paragraph 44:

“44. In *R v Bonython* the court was addressing opinion evidence. As we have said, a skilled person can give expert factual evidence either by itself or in combination with opinion evidence. There are in our view four considerations which govern the admissibility of skilled evidence: (i) whether the proposed skilled evidence will assist the court in its task; (ii) whether the witness has the necessary knowledge and experience; (iii) whether the witness is impartial in his or her presentation and assessment of the evidence; and (iv) whether there is a reliable body of knowledge or experience to underpin the expert's evidence. All four considerations apply to opinion evidence, although, as we state below, when the first consideration is applied to opinion evidence the threshold is the necessity of such evidence. The four considerations also apply to skilled evidence of fact, where the skilled witness draws on the knowledge and experience of others rather than or in addition to personal observation or its equivalent. We examine each consideration in turn.”

[75] In the present case Mr Mottram and Mr Loat were giving limited factual evidence and opinion evidence. The factual evidence came from their respective visits to the accident

location. Mr Loat came from a police background and there was no suggestion that he lacked the necessary knowledge and experience to give skilled witness evidence in this case. Mr Mottram did not have a police background but he had an engineering degree, was a chartered engineer and had learned how to conduct road collision investigations from working with other road collision investigators at Hawkins. Mr Mottram had over 23 years of experience of conducting road collision investigation. Mr Mottram had prepared a detailed report and was able to produce a supplementary report, overnight, in response to the production of the workings to Mr Loat's calculations (he also immediately understood Mr Loat's workings to his calculations). Mr Mottram gave his evidence in a measured way and I considered that he had significant experience and knowledge of road traffic collision investigations. His evidence assisted me to: (i) interpret the markings and other evidence found at the accident location; and (ii) understand what could be done in terms of the calculation of speed with the limited information that was available. Such evidence assisted me in determining: (i) whether the first defender had breached his common law duty of care to the pursuer; and (ii) whether there should be a finding of contributory negligence. In all the circumstances I had no difficulty in concluding that Mr Mottram had the necessary knowledge and experience to give skilled witness evidence in this case.

[76] I considered that both Mr Mottram and Mr Loat were impartial skilled witnesses. It was true that Mr Loat did omit from his report the matters set out at paragraph 52 above. Mr Loat conceded that he should have included these matters in his report. He explained that: (i) he did not think that the moving check that the first defender conducted on the trailer was relevant to how the first collision occurred; (ii) he had overlooked the fact that the first defender had said in a statement in May 2016 that he had crossed into the westbound lane; (iii) he was not aware of the case of *Kennedy* but would definitely be

including his workings to calculations in reports that he prepared in the future; and (iv) that photograph A111 was of no assistance because it didn't have a reference point. Whilst Mr Loat clearly should have produced his workings to his calculations, these were ultimately produced and lodged, without objection, and Mr Mottram was given time and was able to respond to them. I accepted Mr Loat's explanations to the criticisms made of him by Counsel of the pursuer and did not consider that he had deliberately omitted material from his report that was not helpful to the opinion he had reached as regards the mechanics of the first collision. Mr Mottram explained that he had not considered photograph A113 in his original report because the copy he had been supplied with was blurred and of poorer quality than the copy that he was referred to in court and he could not work out what it showed. However, Mr Mottram had considered photograph A113 in his briefing note (production 5/17) that responded to Mr Loat's report. I considered that both Mr Loat and Mr Mottram were doing their best to assist the court. Each had a very different opinion as regards how the first collision occurred but I considered both did their best to answer all questions that were put to them. I considered that Mr Loat's evidence assisted me in same way that Mr Mottram's evidence assisted me.

The first collision

[77] The key issue in this case was where in the road the first collision occurred. The onus of proof was on the pursuer. The eye witness evidence came from the pursuer and Mr Donnelly, on the one hand, and the first defender, on the other hand. There was clearly a significant difference between them. The pursuer and Mr Donnelly said both the toyota and the trailer were within the westbound lane to a significant degree. The first defender said that both the toyota and trailer were within the eastbound lane, with the trailer being

close to the white centre line. The opinion of each of the skilled witnesses was also significantly different. Mr Mottram considered the first collision occurred in the westbound lane and Mr Loat considered that the first collision occurred on the white centre line.

[78] The pursuer gave his evidence in a slightly gruff manner but did appear to do his best to answer all the questions asked of him. I considered that the pursuer's evidence was generally internally consistent. Mr Donnelly was also gruff, confrontational when challenged and did not appear to treat the proceedings with the necessary degree of seriousness. He did, however, consistently maintain that both the toyota and trailer were in the westbound lane and I considered his evidence was internally consistent. The first defender gave his evidence in a calm and measured way and I again considered his evidence was generally internally consistent (apart from the discrepancy regarding the distance from the first collision that the moving check of the trailer's tyres was conducted – see paragraph 35 above).

[79] In any case the court is entitled to accept part of the evidence of a witness and reject other parts (the same applies when evaluating the evidence of a skilled witness). In this case I assessed the evidence of the eye witnesses by comparing and contrasting their evidence with the other evidence that I accepted. In particular, in conducting that exercise, I had regard to the evidence that was gathered on the day of the accident in the form of both the police photographs and the observations of Pc Dewar, which he recorded in his statement (Pc Dewar was referred to this statement during his evidence), the day after the accident.

[80] There was no dispute about what photographs A112 (which was looking to the east) and A128 (which was looking to the west) showed. These photographs clearly showed: (i) the audi long tramline tyre mark proceeding in a westerly direction from westbound lane and crossing the white centre line and entering the eastbound lane; and (ii) the audi nearside

skid mark proceeding in a westerly direction along the westbound lane. Photograph A128 was taken further east of the second collision than photograph A112 and showed that the outer tramline of the audi long tramline tyre mark (i.e. the line closest the white centre line) was well within the westbound lane and a clear distance from the white centre line. Given the angle of the audi long tramline tyre mark I considered it could reasonably be inferred that the outer tramline of audi long tramline tyre mark would have been even further away from the white centre line (i.e. further into the westbound lane) when it first commenced.

[81] It was extremely unfortunate that the entirety of the audi long tramline tyre mark had not been photographed and that there was not a clear photograph showing the location of the gouge marks relative to the audi long tramline tyre mark. Mr Mottram considered that photograph A111 was taken looking west along the westbound lane with the white centre line being shown in the bottom right of that photograph. He considered that the gouge marks shown in that photograph had been made as a result of the first collision and that the gouge marks had been made by metal or alloy from either the audi or the trailer coming into contact with the road surface (although he favoured it coming from the suspension of the trailer (photograph A98 shows the suspension hanging down from the trailer)). Mr Mottram considered that the tramline tyre mark at the top of photograph A111 was at a similar angle to the audi long tramline tyre mark (as shown in photographs A112 and A128) and was in fact the commencement of that mark. Mr Mottram also explained why it made no sense for photograph A111 to be showing the eastbound lane because the sequence of the marks would be in the wrong order (with the correct order being the gouge marks and then, after a very short period, the tramline tyre mark). In all the circumstances, Mr Mottram concluded that photograph A111, taken with photographs A112 and A128, showed that the first collision occurred in the westbound lane.

[82] I considered that Pc Dewar was a credible witness and mainly reliable. During his evidence Pc Dewar explained that he observed gouge marks (Pc Dewar referred to them as “scrape marks”) 100 metres from the point of the second collision (Pc Dewar referred to the point of the second collision in his statement as “the crash site”). Although he was not a collision investigator, Pc Dewar, was clear that the said gouge marks were fresh and he thought that those gouge marks indicated where the first collision occurred. Pc Dewar explained in evidence that he thought that photograph A111 was a photograph of the gouge marks made 100 metres from the second collision and advised that he now thought that photograph A111 was taken looking at the eastbound lane (although he conceded that the photograph may have taken looking at the westbound lane, but his belief was that photograph A111 was taken looking at the eastbound lane). Pc Dewar also noted that the tramline tyre mark shown in the photograph A111 looked narrow and could have been made by the trailer (Mr Loat also said the tramline tyre mark in photograph A111 possibly looked too narrow to have been made by the front offside audi tyre).

[83] I considered that photographs A112 and A128 provided clear evidence that the front offside tyre of the audi was well within the westbound lane when the audi long tramline tyre mark was made. It was a matter of agreement that the front offside tyre of the audi had been punctured during the first collision and had made the audi long tramline tyre mark. I considered that Mr Mottram’s opinion as regards what photographs A111, A112 and A128 showed accorded with logic and common sense. I gave careful consideration to Pc Dewar’s evidence that photograph A111 was showing the eastbound lane. I also carefully considered the observations by both Pc Dewar and Mr Loat regarding the tramline tyre mark in the photograph A111 appearing to be narrow. Indeed I did consider that the tramline tyre mark in photograph A111 did appear to be narrower than the audi long tramline tyre mark shown

on photographs A112 and A128 but I also noted that each photograph was taken from a different perspective. In the end I came to the conclusion that Pc Dewar was mistaken as regards photograph A111 showing the eastbound lane and that the audi long tramline tyre mark did indeed flow from the gouge marks located in the westbound lane for the following reasons. First, Pc Dewar explained, when he was referred to his police statement, that he had prepared his police statement the day after the accident whilst his memory of events were fresh and clear. His statement included the following passage:

“At this time I observed scrape markings on the road about 100 metres from the crash site and two tyre marks leading from there west towards the crash site. These tyre marks appear to have come from the Audi motor vehicle clearly showing the vehicle has having crossed over onto the opposing carriageway. The front offside tyre of the Audi had sustained a puncture and the mark on the road surface was that of two black lines indicating that the vehicle had been driven on the rim of the wheel. The front nearside tyre was clearly shown has having left tyre marks in the road surface.”

[84] I considered that the above passage (hereinafter referred to as “Pc Dewar’s observations”) was made when events were clear in the mind of Pc Dewar and strongly indicated that: (i) the audi long tramline tyre mark did flow in westerly direction from the gouge marks that were approximately 100 metres from the second collision; and (ii) the audi long tramline tyre mark commenced in the westbound lane and crossed into the eastbound lane. I considered Pc Dewar’s observations were: (i) consistent with Mr Mottram’s opinion of where the first collision occurred; (ii) consistent with what was shown in photographs A111, A112 and A128; and (iii) strongly pointed against the gouge marks being in the eastbound lane. Second, I accepted Mr Mottram’s opinion that it would make no sense for the gouge marks to appear after the tramline tyre mark (which would be the case if the photograph A111 was looking east at the eastbound lane (and assuming the tramline tyre mark was made by the audi)). Third, there was no evidence whatsoever to suggest that the

first collision occurred in the eastbound lane (if photograph A111 was taken looking east at the eastbound lane, the gouge marks would indicate the first collision occurred well into the eastbound lane). Fourth, none of the other photographs that showed the tyre marks of the trailer had the appearance of being in the form of tramlines. I did consider whether photograph A111 could have actually been a photograph of the gouge marks at the point of the second collision (for the reasons given by Mr Mottram at point 1 of paragraph 22) but I considered that it was more probable that Pc Dewar would have photographed the gouge marks that he had referred to in his police statement and I accepted Pc Dewar's evidence that photograph A111 showed gouge marks made 100 metres from the second collision. Even if I was wrong about that, it was still clear from Pc Dewar's observations that the audi long tramline tyre mark flowed from the gouge marks, located 100 metres from the second collision, in a westerly direction and crossed into the eastbound lane.

[85] I did not consider that Mr Loat's opinion of how the first collision occurred was convincing. I considered that photograph A113 was a blurred photograph that was difficult to make out what it showed. I considered, on a close analysis of that blurred photograph, that it was possible to see a gap on the white centre line between the tyre mark in the westbound lane and the tyre mark in the eastbound lane, but I considered that it was also possible that that gap was caused by the blurring of the photograph. I did not, however, consider a depression on the white centre line was a plausible explanation for the gap between the tyre marks. Mr Loat's opinion was that the first collision occurred on the white centre line and resulted in both the offside tyres of the trailer and the front offside tyre of the audi making instantaneous tyre marks. I did not find this convincing for the reasons explained by both Mr Mottram and Mr Gilfillan (namely that there would be a short passage of time between the first collision occurring and the tyre marks being left on the road).

When Mr Loat was preparing his report he had been provided with a statement from the first defender that made clear that the first defender had entered the westbound lane after the first collision (the first defender confirmed this in evidence) but Mr Loat had not taken account of this and maintained that there was no evidence to suggest the trailer entered the westbound lane. Clearly this part of Mr Loat's evidence did not accord with the first defender's consistent evidence on this point. Mr Loat had also been provided a statement from Pc Dewar, which included Pc Dewar's observations (indeed Mr Loat referred to Pc Dewar's observations at paragraph 5.6.2 and 5.6.3 of his report), and had also been provided with photograph A111. However, Mr Loat did not explain the significance of the gouge marks and did not feel able to comment on A111 (other than commenting on the narrowness of the tramline tyre marks) because it did not have any reference point to show where on the road the photograph was taken. Mr Loat considered that the tyre mark in the westbound lane in photograph A113 was made by the front offside tyre of the audi and would have: (i) continued in a straight line; (ii) initially diverged from the white centre line and then converged towards the white centre line; (iii) turned into the audi long tramline tyre mark; and (iv) led to the point of second collision. However, he did not conduct any detailed analysis to show that this was possible and I considered that his theory was difficult to accept given: (i) the angle between the tyre mark in the westbound lane of photograph A113 and the white centre line; (ii) the angle of the audi long tramline tyre mark (shown in photographs A112 and A128); and (iii) the failure to explain the gouge marks on the westbound lane (from which the audi long tramline tyre mark flowed from). In all the circumstances I preferred Mr Mottram's analysis of where the first collision occurred, to that of Mr Loat.

[86] I considered that the pursuer's evidence was confirmed and supported by: (i) photographs A111, A112 and A128; (ii) Pc Dewar's observations; (iii) Mr Donnelly's evidence; and (iv) Mr Mottram's analysis of where the first collision occurred. After comparing the evidence of the pursuer and Mr Donnelly against the other evidence I accepted, I came to the view that the pursuer and Mr Donnelly were generally credible and reliable witnesses as regards the position of trailer on the road when the first collision occurred. I considered that the first defender was a generally credible and reliable witness. His evidence regarding the checks that he did on the trailer after hearing a rumble was not contradicted and I accepted his evidence in this regard. I did not consider that his approach to hearing the rumble could be faulted and I considered that his moving check of the trailer's tyre could have explained why Ms Burden thought the trailer was unsteady and wobbling about. Whilst I would accept that evidence of the behaviour of a vehicle shortly before or shortly after an accident can be relevant in action concerning negligent driving (see, for example, *Walker and Walker, The Law of Evidence in Scotland*, 5th Ed, at paragraph 1.5.1) I did not consider that the checks conducted by the first defender, some distance before the first collision, had any bearing on the first collision. The first defender's evidence as regards the position of the trailer on the road at the point of the first collision was, however, contradicted and, for the reasons given for ultimately accepting the pursuer's evidence on that point, I considered that the first defender was not reliable in that regard. I accepted that the first defender's evidence that he had driven on the westbound lane after the first collision for a period of time and considered that the tyre mark in the westbound lane, shown in photograph A113, was caused by the trailer during this period.

[87] After carefully considering all the evidence I found, on a balance of probabilities, amongst other things, that: (i) the gouge marks indicated where the first collision occurred;

(ii) the gouge marks were located in the westbound lane; (iii) that quickly after, and as a result of the first collision the front offside tyre of the audi, punctured, deflated and stopped rotating; (iv) the audi long tramline tyre mark was made by the front offside wheel of the audi and commenced shortly after the first collision, near to and west of, the gouge marks which were located in the westbound lane; (v) that the audi long tramline tyre mark commenced on the westbound lane, with the outer line (which was caused by the outside rim of the front offside wheel of the audi) being well within the westbound lane and a clear distance from the white centre line; (vi) that the audi long tramline tyre mark flowed from the gouge marks in a westerly direction, in a straight line, along the westbound lane and crossed into the eastbound lane; (vii) that the gouge marks were east of the audi long tramline tyre mark and were located at approximately the same distance from white centre line as the commencement point of the audi long tramline tyre mark; (viii) that the first collision occurred as a result of the trailer being in the westbound lane to a significant degree; and (ix) the tyre marks in the westbound lane of photograph A113 were caused by the trailer's offside tyres at some point after the first collision occurred and were to the east of the first collision.

[88] When I considered the evidence of the pursuer and Mr Donnelly as regards how far the trailer was in the westbound lane, against the speed of the incident, the positioning of the gouge mark on photograph A111 and the angle of the audi long tramline tyre mark on photograph A128, I considered, on the balance of probabilities, that the outer offside edge of the trailer was in the region of one fifth of the way into the westbound lane when the first collision occurred. I did not consider it was necessary for the pursuer to prove which of the audi or trailer had caused the gouge marks. I considered it sufficient for pursuer to prove where the first collision took place and that that he had done so by a combination of

evidence which included the evidence from Mr Mottram that the gouge marks were caused by metal or alloy from either the trailer or audi. I therefore did not consider that weaker alternative rule had any application.

[89] There was no evidence to suggest that the toyota had been overtaking and I accepted the first defender's evidence that he had not conducted any sort of overtaking manoeuvre immediately prior to the first collision. However, I did not consider the fact that both the pursuer and Mr Donnelly thought that the toyota had been overtaking adversely affected their evidence. I considered that that was a natural assumption to make given the position which I have found the trailer to be in on the westbound lane. I also accepted the pursuer's explanation that when he had mentioned the range rover he was actually referring to the hyundai. It was a matter of agreement that the audi did not come into contact with the toyota and the toyota must have been substantially passed the audi when the first collision occurred. There was no evidence in the form of tyre marks or other physical evidence to identify where on the road the toyota was when the first collision occurred. In the circumstances, I have not made a finding in fact in that regard.

The speed of the audi at the first collision

[90] As regards the speed of the audi at the first collision, there was again a significant difference between the pursuer and Mr Donnelly, on the one hand, and the first defender on the other hand. The pursuer and Mr Donnelly said that the pursuer was not travelling at an excessive speed. The first defender said that the audi was travelling at "80 mph plus".

Ms Burden in her police statement said that the audi was "definitely speeding".

Mr Mottram was of the view that there was not sufficient information to make a reliable calculation of the audi's speed. Mr Loat thought that there was sufficient information to

conduct calculations and had produced various calculation that potentially showed that the audi was travelling at an excessive speed when the audi long tramline tyre mark, or, alternatively, the audi nearside skid mark, was first made.

[91] In my view there was sufficient information available to allow calculations to be done to estimate the speed of the audi at the commencement of at least the audi nearside skid mark. Mr Mottram considered that the point of the second collision had not been identified. However, Mr Mottram, during his evidence and in his briefing note, referred to a number of observations made by Mr Gilfillan following his visit to the accident location on 26 June 2016. These observations included the measurement of audi long tramline tyre mark at 57.4 metres and the audi nearside skid mark at 30.2 metres but also included the following observations: (i) that the audi long tramline tyre mark and the audi nearside skid mark travelled to the area of second collision, which was indicated by gouge marks on the eastbound lane (I have already referred to these as “the second collision gouge marks”); (ii) that the audi long tramline tyre mark ended near to the second collision gouge marks; (iii) that on the north verge, very close to the area of the second collision gouge marks, were marks on the grass verge, which were indicative of the resting position of the hyundai; and (iv) that approximately 20 metres to the west of the area of the second collision gouge marks on the eastbound lane, was an area of sand on the westbound lane which the first defender indicated was where the audi came to rest. Mr Loat, whilst accepting that debris could be moved by third parties, such as the emergency services, considered that the amount of debris around the hyundai indicated that the hyundai came to rest near to the point of the second collision. Whilst I recognised that debris could have been moved by the emergency services and accepted the first defender’s evidence that some debris had been moved to allow an ambulance access to the accident location, I considered that the hyundai was

surrounded by a significant amount of debris. I considered that Mr Loat's opinion was supported by the observations made by Mr Gilfillan (Pc Dewar also described fresh gouge marks at the point of the second collision in the eastbound lane) and I considered that it could be reasonably inferred that: (i) the audi long tramline tyre mark and the audi nearside skid mark ended near to the area of the second collision; and (ii) the hyundai came to rest near to the point of second collision.

[92] Given that I accepted that hyundai came to rest near to the point of the second collision, I had little difficulty in accepting that the audi had overcome the momentum of the hyundai and had been travelling at higher speed than the hyundai. Mr Gilfillan's observations identified a patch of sand 20 metres west of second collision gouge marks, which the first defender considered was the resting place of the audi. Mr Mottram thought the audi and hyundai were 33 metres apart when in their final resting positions. Both Mr Mottram and Mr Loat agreed that the frozen speedometer of the hyundai was a good indicator that it had been travelling at about 38 mph at the time of the second collision. Therefore, I considered that the audi must have been travelling in excess of 38 mph to have overcome the momentum of the hyundai. Mr Loat had based his opinion on Mr Gilfillan's observation of the audi being approximately 20 metres west of the second collision gouge marks and considered that a reasonable estimate of the audi's speed was 12 mph higher than the hyundai, which resulted in the audi travelling at 50 mph at the point of the second collision (if Mr Loat had considered a 33 metre distance, he would no doubt have selected a higher estimate of the audi's speed). I accepted Mr Mottram's observation that the distance the audi would travel would depend on the nature of the impact of the second collision (with the second collision being offset) and on whether the audi made contact with anything, but I considered the basic proposition advanced by Mr Loat (namely that the audi

overcame the momentum of the hyundai because it was travelling at a higher speed than the hyundai) accorded with common sense and I considered that 50 mph was a conservative estimate of the audi's speed at the point of the second collision.

[93] As regards the 27.2 metre deceleration issue, I could see some force in Mr Mottram opinion that the deceleration rate would have been less during first 27.2 metres of the audi long tramline tyre mark. However, I considered that there would have been some retardation as a result of the front offside tyre of the audi being punctured, deflated, not rotating and running on the rims of the front offside wheel. Both Mr Mottram and Mr Loat were in agreement that the audi nearside skid mark was made under hard or emergency braking and, even if the calculations in relation to that mark (calculations 9 and 10) are looked at in isolation, it shows that the audi was travelling at between 67.6 mph and 69.8 mph when the audi nearside skid mark commenced. The pursuer said that he jumped on the brakes prior to the first collision. There were no tyre marks to support the pursuer's evidence in this regard but that could be explained by the audi's ABS operating as it should prior to the first collision. The pursuer was clearly pressing his brakes hard when the audi nearside skid mark was made and I considered that it was more likely than not that the pursuer was braking prior to when the audi nearside skid mark was made. I accepted Mr Mottram's evidence that the audi would have lost between 5 to 15 mph of speed as a result of the first collision. I also considered that Mr Loat's evidence (which was supported by Mr Gilfillan) that the audi long tramline tyre mark and the audi nearside skid mark were likely to have been longer on the day of accident (as a result of the early stages of the marks having faded by the time Mr Gilfillan attended the accident location), accorded with common sense and I accepted Mr Loat's evidence on that point. It was not disputed that the audi was travelling on an incline. When I considered all these factors (namely, that there

would be some retardation over the first 27.2 metres of the audi long tramline tyre mark, the pursuer braking prior to the audi nearside skid mark being made, the reduction in speed caused by the first collision, the likelihood of the audi nearside skid mark being longer on the day of the accident and the fact the audi was travelling on an incline) against the speed of audi when the audi nearside skid mark was first made (67.6 mph to 69.8 mph), taken with the evidence of both the first defender and Ms Burden, I considered, on the balance of probabilities, that immediately before the first collision occurred, that the audi was travelling significantly in excess of the 60 mph. In the circumstances I rejected the evidence of pursuer and Mr Donnelly in relation to the speed of the audi and broadly accepted the evidence of the first defender.

[94] Finding in facts 1 to 5, 12 to 14 and 21 to 25 are based on the agreed or undisputed evidence. Finding in facts 6, 7 and 16 are based on a combination of the evidence that I accepted from the pursuer, Mr Donnelly, Pc Dewar, Mr Mottram and photographs A111, A112 and A128. Finding in fact 8 is based on a combination of the evidence I accepted from first defender and Ms Burden. Finding in fact 9 is based on the agreed evidence and a combination of the evidence I accepted from the pursuer, Ms Burden, Pc Dewar, Mr Mottram, Mr Loat and photographs A111, A112 and A128. Finding in Fact 10 is based on the agreed evidence and a combination of the evidence I accepted from Mr Mottram (including his evidence regarding the observations made by Mr Gilfillan) and Mr Loat. Finding in fact 11 is based on the agreed evidence and a combination of the evidence I accepted from Mr Mottram and Mr Loat. Finding in fact 15 is based on the agreed evidence and a combination of the evidence that I accepted from the pursuer, Mr Donnelly, Pc Dewar, Mr Mottram, Mr Gilfillan and photographs A111, A112 and A128. Finding in fact 17 is based on the agreed evidence and a combination of the evidence I accepted from the

pursuer, Pc Dewar, Mr Mottram, Mr Loat, Mr Gilfillan and photographs A112 and A128.

Find in fact 18 is based on the agreed evidence and a combination of the evidence I accepted from Pc Dewar, Mr Mottram, Mr Loat and photographs A112 and A128. Finding in fact 19 is based on a combination of the evidence I accepted from the first defender, Mr Mottram and photographs A104, A109 and A113. Finding in fact 20 is based on a combination of the evidence I accepted from Mr Mottram (including his evidence regarding the observations made by Mr Gilfillan), Mr Loat, the first defender and Ms Burden.

The common law case

[95] Counsel for the defenders referred me to the English High Court case of *Stewart* where Coulson J stated:

“2.1. The Reasonable Driver

5. I have to apply to Mr Glaze's actions the standard of the reasonable driver. It is important to ensure that the court does not unwittingly replace that test with the standard of the ideal driver. It is also important to ensure, particularly in a case with accident reconstruction experts, that the court is not guided by what is sometimes referred to as ‘20-20 hindsight’. In *Ahanonu v South East London & Kent Bus Company Limited* [2008] EWCA Civ 274, Laws LJ said:

‘There is sometimes a danger in cases of negligence that the court may evaluate the standard of care owed by the defendant by reference to fine considerations elicited in the leisure of the court room, perhaps with the liberal use of hindsight. The obligation thus constructed can look more like a guarantee of the claimant's safety than a duty to take reasonable care.’

6. In that case, the judge at first instance had found the defendant's bus driver negligent, although the damages were reduced by a finding of 50% contributory negligence. The Court of Appeal concluded that the judge's findings could not stand and they held that the bus driver was not negligent at all. In his judgment, Lawrence Collins LJ disagreed with the judge's finding that the bus driver should have carried on keeping an eye in his nearside mirror to look for pedestrians on a particular part of the carriageway at the entrance to Peckham Bus Station. He said that this was a ‘counsel of perfection and it ignores the realities of the situation’. He concluded that an overall evaluation of the circumstances lead inevitably to a finding that there was no negligence. His conclusion of paragraph 20 was in these terms:

'I accept the submission for the defendants that, taking into account human reaction times for responding, the reality of the situation where the turn takes only seconds is that, given the driver's concentration on the vehicle in front, even if he had by chance looked up and seen the claimant in his nearside mirror after pulling away, it would have been just as the accident was taking place.'

7. By the same token, it is also important to have in mind that a car is 'potentially a dangerous weapon' (Latham LJ in *Lunt v Khelifa* [2002] EWCA Civ 801) and that those driving cars owe clear duties of care to those around them. Compliance with speed limits and proper awareness of potential hazards can often be critical in such situations."

Counsel for the pursuer did not dispute that the above set out the standard of care that was to be applied in this case. I considered that the applicable standard of care was that of a reasonably competent driver exercising reasonable care.

[96] Section 38(7) of the Road Traffic Act 1988 provides:

"(7) A failure on the part of a person to observe a provision of the Highway Code shall not of itself render that person liable to criminal proceedings of any kind but any such failure may in any proceedings (whether civil or criminal, and including proceedings for an offence under the Traffic Acts, the Public Passenger Vehicles Act 1981 or sections 18 to 23 of the Transport Act 1985) be relied upon by any party to the proceedings as tending to establish or negative any liability which is in question in those proceedings."

[97] Rule 160 of the Highway Code provides:

"160. Once moving you should

- [...]
- Keep well to the left on right-hand bends. This will improve your view of the road and help avoid the risk of colliding with traffic approaching from the opposite direction
- [...]"

[98] I have explained at paragraphs 77 to 89 why I considered that the trailer had entered the westbound lane to a significant degree. I considered that such driving was a clear contravention of Rule 160 of the Highway Code. I considered that it would have been apparent to an ordinary reasonable driver in position of the first defender that a reasonable and probable consequence of his failure to prevent the trailer from entering the westbound

lane to a significant degree would be harm to the pursuer. I also considered, in the circumstances, a reasonably competent driver exercising reasonable care would not have failed to prevent the trailer from entering the westbound lane to a significant degree. As such, I considered that the first defender had fallen below the standard of care required of him and had breached the duty of care he owed to the pursuer.

[99] Counsel for the pursuer contended that the first defender would have been negligent even if the first collision had occurred on the white centre line. I have obviously not found that the first collision occurred in that location. Had I done so, I would have not have found that the first defender fell below the standard of a reasonably competent driver exercising reasonable care. It was a matter of agreement that the trailer was 2.3 metres wide and the road was 3.4 metres in width. It was, therefore, clearly possible for the trailer to be maintained fully in the eastbound lane. The trailer was wider than the toyota and, therefore, if the trailer's offside wheels were on the white centre line then the toyota would have been likely to have been just within the eastbound lane. There was nothing to suggest that the trailer had been driven on the white line for a prolonged period. I considered that if the large trailer had come into contact with the white centre line for a very short period it would still have been a minor contravention of Rule 160 of the Highway Code but that, nevertheless, it would not have amounted to negligence on the part of the first defender.

Causation

[100] Having established a breach of duty the pursuer must go on to prove that the breach of duty was the cause of the harm sustained by the pursuer. The pursuer must prove, on the balance of probabilities, that "but for" the first defender's breach of duty the harm to the pursuer would not have occurred. Neither party made any submission as regards causation

and I had little difficulty in concluding, on the balance of probabilities, that the first defender's breach of duty caused or materially contributed to the pursuer's injury.

Contributory negligence

[101] Section 1(1) of the Law Reform (Contributory Negligence) Act 1945 (hereinafter referred to as "the 1945 Act) provides:

"1. – Apportionment of liability in case of contributory negligence.

(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage: ..."

Fault on the part of the pursuer includes negligent actions (see section 5(a) of the 1945 Act).

Therefore, a pursuer will only be contributorily negligent if his act falls below the standard of a reasonable person in the position of the pursuer. The onus lies with the defender to prove that matter. The defender must also prove that the pursuer's fault was a factual cause of the harm he sustained.

[102] In the present case I have found that the pursuer was driving significantly in excess of the 60 mph speed limit immediately before the first collision. In my view the speed that the pursuer was travelling at resulted in his reaction time being reduced. If he had been travelling at or below the speed limit he may have been able to take action to avoid a collision with the trailer. In the circumstances I considered that the pursuer had also fallen below the standard of a reasonably competent driver exercising reasonable care and his damages therefore fall to be reduced. I considered the fact that the trailer was within the westbound lane to a significant degree was the primary cause of the first collision.

However, I considered the fact that the pursuer was travelling significantly in excess of the speed limited was not an insignificant contributory factor to the first collision. In all the circumstances, after having regard to the pursuer's share in the responsibility for the damage he suffered, I considered that a just and equitable reduction was 25%.

Disposal

[103] For the reasons given above, I find that the first defender was in breach of his common law duty of care to the pursuer and that the defenders are liable to make reparation to the pursuer. Quantum was agreed, on a full value basis, in sums of: (i) £69,629.30, inclusive of interest to 20 July 2021, with interest thereafter at the rate of 8% per year; and (ii) £4,861.30, inclusive of interest to the date of decree, with interest thereafter at the rate of 8% per year; Contributory negligence has been assessed at 25%. Accordingly, the agreed amount of damages are reduced to £52,221.98 and £3,645.98. A hearing will be fixed to determine the question of expenses and certification of skilled persons.

Annex A

Photograph A104



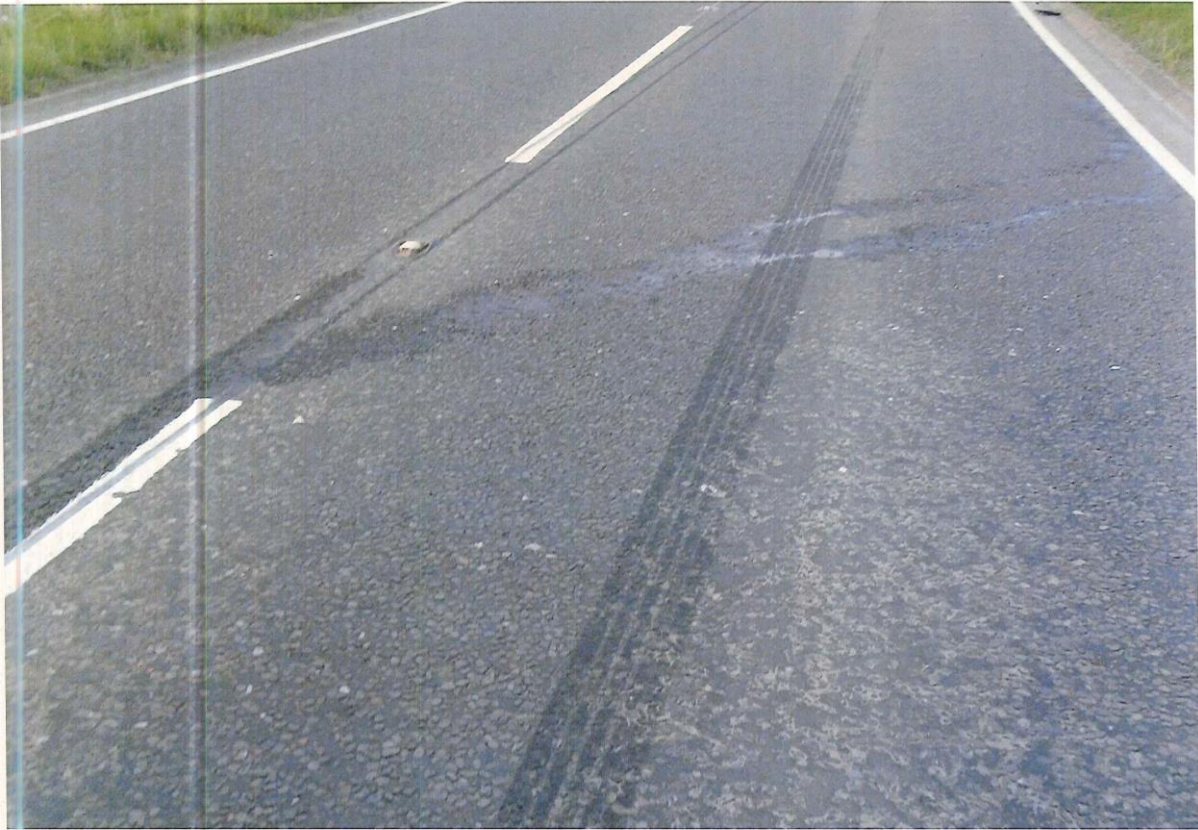
Photograph A109



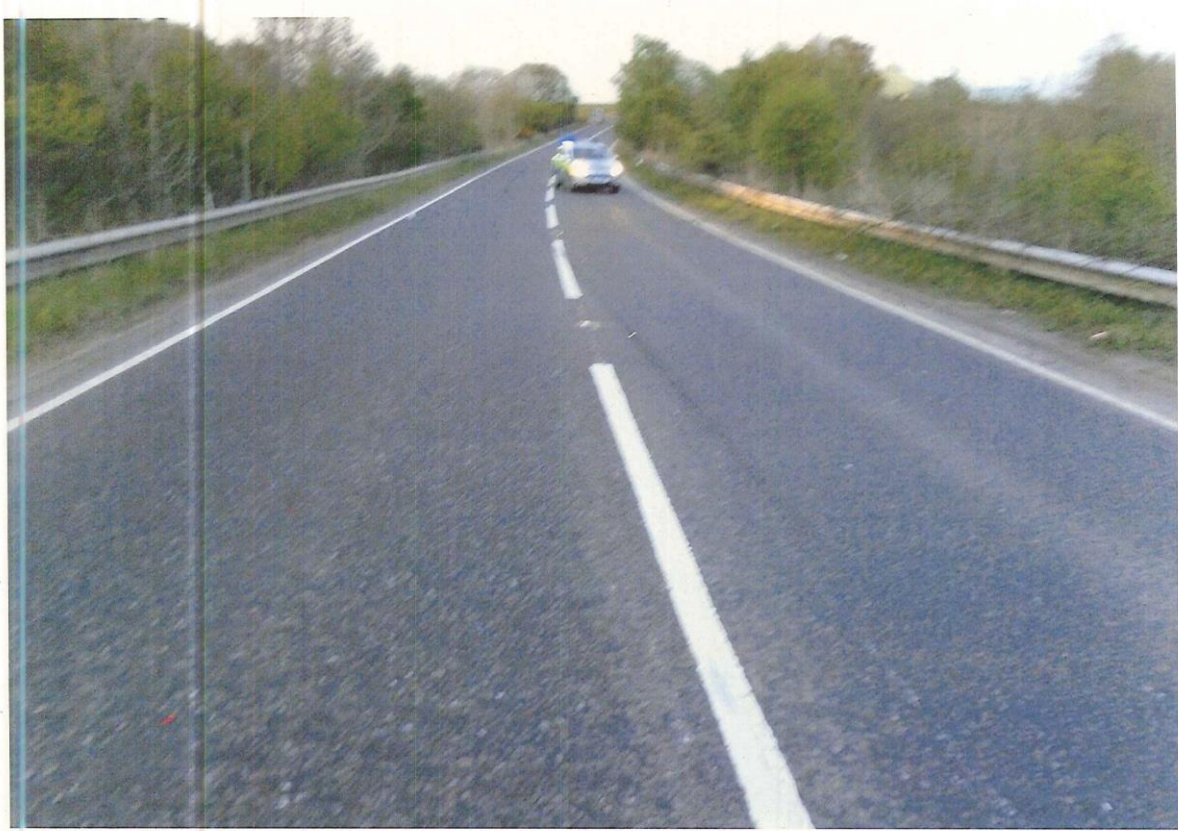
Photograph A111



Photograph A112



Photograph A113



Photograph A128

