SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2023] SC EDIN 17

PIC-PN1930-18

JUDGMENT OF SHERIFF JOHN K MUNDY

in the cause

PAUL GULLIFORD

Pursuer

against

ANDREW GRAY & CO (FUELS) LTD

Defender

and

MACLEAY MOTOR ENGINEERING LTD (THIRD PARTY)

Pursuer: Cowan, Advocate, instructed by Kennedys Scotland, for the defender
Defender: Thomson, Advocate, instructed by Clyde & Co (Scotland) LLP, for the third party

EDINBURGH, 25 June 2023

The sheriff, having resumed consideration of the cause, finds as follows:

Findings in fact

1) The pursuer was formerly employed by the defender as a fuel tanker driver.

2) The defender is a limited company having its registered office in Kilmarnock. Its business includes the transport of fuel by tanker.

3) The third party is a limited company with its registered office in Kilmarnock. It is a motor engineering company.

4) On 24 November 2015, the pursuer was driving a DAF fuel tanker registration number A10 AGF ("the tanker") in the course of his employment.

5) At a point on the B473 road near Greenock Mains Farm, Muirkirk, Ayrshire, the rear nearside double wheel came off the tanker.

6) At the material time, the tanker was owned and operated by the defender.

7) In terms of a contract between the defender and the third party, the third party had carried out a service of the tanker between 26 and 28 October 2015.

8) The contract between the defender and the third party was a contract falling within s.11A of the Supply of Goods and Services Act 1982.

9) During the service of the tanker between 26 and 28 October 2015, the work undertaken by the third party included removal and refitting of the rear nearside double wheel, and the replacement of the rear nearside hub assembly.

10) In this action, the pursuer sought damages for loss, injury and damage suffered by him as a result of the accident on 24 November 2015.

11) The claim for damages settled upon the pursuer accepting a tender in the sum of £59,000 lodged by the defender. Upon the tender being accepted, the court found the defender liable to the pursuer for damages in the sum of £59,000 and the expenses of the action up to the date of the tender. On 21 January 2021, the defender paid the said sum of £59,000 to the pursuer in full and final settlement of the claim. On 29 April 2022, in satisfaction of the award of expenses up to the date of the tender, the defender paid the sum of £28,000 to the pursuer's agents.

12) The settlement reached between the pursuer and the defender represented a reasonable settlement of the pursuer's claim for damages.

13) The sum of £28,000 represented a reasonable assessment of the pursuer's entitlement to expenses up to the date of the tender.

14) At the material time, the tanker was the subject of a safety inspection and service carried out by the third party at intervals of around six weeks. The service of the tanker carried out between 26 and 28 October 2015, was one of those services.

15) If, in between services, tyre repair or replacement were required then this would be carried out by one or two tyre fitting companies, not the third party.

16) It was the responsibility of the driver of the tanker to carry out daily checks of their vehicle prior to use. This would be done by the driver walking around the vehicle to check for any obvious defects such as movement in the wheel nuts. This would be indicated if the wheel nut markers were out of alignment.

17) On the day of the accident, wheel nut markers were fitted to the wheel in question. It was the responsibility of the pursuer prior to driving the vehicle that day to conduct a walk round check of the vehicle. He did not do so.

18) The inspection and servicing of the vehicle prior to the accident was carried out by Hector Macleay, the Managing Director of the third party. He was very experienced in a task of this kind. Amongst other work, he removed both nearside and offside rear wheels. There was found to be excessive wear on the discs and pads. The hub bolts were corroded and broken into the hubs. The brakes and hubs were removed from the vehicle. Both hub assemblies required to be replaced and new brake discs fitted. The hubs fitted were new DAF truck hubs. The hubs came with disc, wheel studs and bearings fitted. Each hub was inspected on arrival from the manufacturer for any damage. There was no damage. He checked the seating of the studs. Mr MacLeay cleaned the contact surfaces of the wheels so that there was no contaminants between the mating faces which might affect the clamping

force and in particular the clamping force between the wheel nave and the hub flange. He used inter alia a needle gun, fibre discs and grease as appropriate. New wheel nuts were used and the surfaces where the wheel nuts met the wheel were checked so that they were free from contaminants.

19) The initial clamping force is achieved by tightening the wheel nuts correctly and this is maintained where there is intimate contact between meeting parts that those parts are flat, undamaged and free from contamination such as corrosion products, grease, paint or foreign material.

20) At the time of the service between 26 and 28 October 2015, Mr MacLeay tightened the wheel nuts on the rear nearside wheel appropriately. He followed the torqueing procedure, which is generally recognised as appropriate within the industry. In addition to published guidance, the third party had strict in house torque procedures, which accorded with the general and safe practice at the time. Prior to torqueing, new wheel nuts were used. He used a torque wrench, which was properly calibrated and certified. Air wrenches were used for the initial stage of tightening. A torque wrench was used for the final tightening. The torque wrench was set in accordance with the manufacturer's instructions. After a period of around 30 minutes, the wheels were re-torqued to ensure that there had been no alterations in tension over that period due to settlement in the threaded fasteners.

21) Following this procedure Mr MacLeay prepared a torque tag, which was handed over to the driver on completion of the service.

22) The wheels, including the rear nearside wheel was torqued at 680 Newton metres (Nm). Wheel nut markers were fitted.

23) The procedure adopted by Mr MacLeay was in accordance with industry practice and guidance and in particular the Best Practice Guide issued by the FTA/IRTE (Freight

Transport Association/Institute of Road Transport Engineers) published in September 2015, with which he was familiar.

24) While it is likely that the event was initiated by looseness in the components, including loosening of wheel nuts, the cause of that and so the root cause of the loss of the rear nearside wheel on 24 November 2015, is not known.

25) Road wheels on large commercial vehicles are subject to a wide variety of forces from the vehicle itself, vibration, cornering forces, heat effects, acceleration and braking. If one wheel nut loosens then these forces are distributed over the remaining nuts. The majority of the forces are spread to the adjacent nuts causing them to loosen as well. As more nuts become loose, the process accelerates as the overall clamping force decreases (clamping force being the loading that is created by the studs and wheel nuts compressing/pinching the wheel(s), hub and drum together. When the clamping force is less than the forces on the wheel, it will move relative to the hub. This results in side loading and a loosening of the remaining nuts which, if not spotted in time, leads to elongated stud holes, fatigue failures of studs, fretting fatigue cracks and wheel separation. Relaxation of wheel clamping force can occur due to a loss of tension in the stud and a reduction of clamping force. Wheel fixings can loosen due to a variety of reasons including the use of damaged components or the manner in which components are fitted such as damage caused during assembly, insufficient initial clamping force, inadequate tightening of the wheels and inadequate re-torqueing.

26) In a large number of cases where there is loss of a wheel from a heavy goods vehicle, the cause of the loss is not established. The nature and extent of the use of the vehicle between the service on 26-28 October 2015 and the date of the accident on 24 November 2015 is not known.

27) Whether any work was done to the tanker and in particular involving, the rear nearside wheel between the said service and the date of the accident is not known. In particular, it is not known whether or not the said wheel was removed for the purpose of repairing or replacing tyres, which accordingly remains a possibility. The defender has no records for the tanker. The tanker was scrapped prior to the raising of the present action.

28) It is likely that wheel nuts on the rear nearside wheel of the tanker were loose prior to the tanker leaving the defender's premises on the morning of the accident and that that would have been evident to the pursuer had he inspected the wheel prior to setting off as wheel nut indicators would be out of alignment.

Findings in fact and law

29) It is not established that the cause of the loss of the wheel from the tanker on 24 November 2015 was as a result of any breach of contract or negligence attributable to the third party.

30) In the circumstances, it cannot be reasonably inferred that the cause of the wheel loss arose through breach of contract or negligence on the part of the third party and in particular that it, in the person of Mr MacLeay, failed in its duty to exercise reasonable skill and care in carrying out the service and repair of the tanker between 26 and 28 October 2015.

31) The circumstances do not give rise to the application of the evidential principle *res ipsa loquitur,* nor do they otherwise give rise to a *prima facia* case of negligence on the part of the third party.

32) In any event, it is established that Mr MacLeay of the third party carried out the service and repair of the tanker between 26 and 28 October 2015 in such a manner as to

negate any inference of negligence on his part. He adopted all reasonable skill and care in the carrying out of his task.

Findings in law

33) The defender having failed to establish breach of contract *et separatim* fault and negligence on the part of the third party is not entitled to damages from the third party, it being entitled to decree of absolvitor.

34) In the circumstances, the defender is not entitled to a contribution from the third party under s.3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940.

Interlocutor

THEREFORE, assoilzies the third party from any liability to the defender for the damages and expenses paid to the pursuer; finds the defender liable to the third party in the expenses of the cause in so far as those relate to the proceedings as between the defender and the third party, except in so far as otherwise and previously dealt with; allows an account thereof to be given in and remits same, when lodged, to the auditor of court to tax and report; sanctions the cause as suitable for the employment of junior counsel; certifies Daniel Pointon of Burgoynes, Consulting Scientists and Engineers, as a skilled person; and decerns.

NOTE

Background

[1] This is an action of damages for personal injury suffered by the pursuer in an accident at work on 24 November 2015. The pursuer was at the time working in the course of his employment with the defender as a fuel tanker driver. He was driving a DAF fuel

tanker ("the tanker") on a road between Sorn and Muirkirk, Ayrshire. The tanker was transporting kerosene. At a point in the road near Muirkirk the rear nearside double wheel came off the fuel tanker. As a result the pursuer sustained loss, injury and damage.

[2] The pursuer's claim for damages against the defender in this action settled upon the pursuer accepting a tender in the sum of £59,000 and the defender being found liable in expenses. The principal sum was paid by the defender to the pursuer on 21 January 2021 with expenses in the sum of £28,000 being paid to the pursuer's agents on 29 April 2022. It is agreed in the joint minute that the settlement reached between the pursuer and the defender represented a reasonable settlement of the pursuer's claim for damages and that the expenses were a reasonable assessment of the pursuer's entitlement to expenses.

[3] The remaining issue in the case and the matter which came before me for proof was the defender's claim against the third party to recover those damages and expenses on the basis that the third party were in breach of contract *et separatim* negligent in the performance of their task in the service and repair of the tanker as a result of which the accident occurred. There was a separate case that the third party was in breach of s.11D(2) and 11D(6) of the Supply of Goods and Services Act 1982 in the event that it was established that there was pre-existing damage in the components used by the third party.

[4] The focus of the proof was therefore the nature of the work carried out by the third party in their service and repair of the tanker between 26 and 28 October 2015, some four weeks prior to the accident. That work involved the third party removing and refitting the rear double wheels including the rear nearside double wheel and the replacement of the rear nearside hub assembly.

[5] At the proof the defender was represented by Mr Cowan, Advocate and the third party by Mr Thomson, Advocate.

[6] Evidence was led from two witnesses for the defender and two witnesses for the third party. For the defender the first witness was James Gray, formerly an employee of the defender company and a company director, although his main role was as tanker driver. The second witness was John Holland a Forensic Mechanical Engineer. For the third party evidence was led from Hector Campbell MacLeay, Managing Director of the third party company and the person who carried out the relevant service and repair on the tanker. Secondly, evidence was adduced from Danny Pointon of Burgoynes, Consulting Scientists and Engineers. Both the experts Mr Holland and Mr Pointon produced reports.

The pleadings

[7] In answer 4 for the defender in response to the pursuer's pleadings it is averred that there was a system of daily inspections and that drivers were instructed to check their vehicles daily prior to use. In particular it is averred:

> "Had he inspected the vehicle on the morning of the accident, the pursuer would, or at least ought to, have identified that the wheel nut indicators on the rear nearside wheel were out of alignment. Had he reported that, he would not have been required to drive the vehicle prior to the cause thereof being investigated".

[8] In the same answer dealing with the case against the third party the defender avers:

> "Explained and averred that it was an implied term of the contract between the defender and the third party that in carrying out the service on 28 October 2015, the third party would exercise reasonable skill and care. *Separatim*, the third party owed duties to the pursuer and the defender to exercise reasonable skill and care in carrying out the repairs. In the exercise of reasonable skill and care, the third party ought to have checked for pre-existing damage to the components used in the replacement hub assembly. When rebuilding the assembly, it ought to have taken reasonable care not to cause damage thereto. If the third party fitted wheel studs to the hub by drawing the studs through the holes in the hub flange, it ought to have taken reasonable care not to apply excessive torque. It knew, or ought to have known, that applying excessive torque when drawing through the studs could damage the hub. When refitting the wheel the third party ought to have taken reasonable care to ensure that the wheel naves and the hub flange ('the mating surfaces') were flat, undamaged and free from contaminants such as corrosion,

grease or paint. It knew or ought to have known that if the mating surfaces were not flat, undamaged and free from contaminants, the initial clamping force may not be sufficient. The third party ought to have taken reasonable care to ensure that the initial tightening of the wheel was adequate. It ought to have taken reasonable care to ensure that the wheel was adequately re-torqued prior to returning the tanker to the defender. The precise defect, which caused the wheel to come off the tanker on 24 November 2015, is not known. The possible defects are pre-existing damage to the components used in the replacement hub assembly; damage to the assembly caused during its rebuilding; insufficient initial clamping force; inadequate initial tightening of the wheel; and inadequate re-torqueing. Regardless of the precise defect which caused the wheel to come off the tanker, it was caused by the third party's breach of contract *et separatim* fault and negligence. There are no other credible possible causes of the wheel coming off which would not be attributable thereto. *Separatim*, the repairs carried out on 28 October 2015, were under the exclusive control and management of the third party. The tanker was under the exclusive control and management of the third party at the time of the repairs being negligently carried out. Absent negligence in the carrying out of the repair, the wheel would not have come off the tanker on 24 November 2015. Nothing done to the tanker whilst it was in the possession of the defender between 28 October 2015 and 24 November 2015 could have caused the defect which caused the wheel to come off the tanker. *Res ipsa loquitur*. *Separatim*, the contract between the defender and the third party was a contract falling within s.11A of the Supply of Goods and Services Act 1982. In the event that there was pre-existing damage in the components used in the replacement hub assembly, the components were not of satisfactory quality *et separatim* were not reasonably fit for their purpose. In that event, the third party was in breach of s.11D(2) and s.11D(6) of the 1982 Act".

[9] In the same answer the defender further avers:

"In the exercise of reasonable skill and care, the third party ought to have re-torqued the wheel nuts prior returning the tanker to the defender. *Esto* it did not re-torque the wheel nuts (which is not known and not admitted), the third party is in breach of contract in failing to do so".

[10] In answer 4 for the third party it is averred *inter alia*:

"Explained and averred that the third party carried out an inspection service and repairs on 28 October 2015. During said service the third party removed the nearside rear and the offside rear wheels due to excessive wear on the discs and pads. The third party stripped all brakes and removed hubs from the wheel as the hub bolts had been corroded and broken into the hubs. As part of this repair they required to place (sic) both hub assemblies and refit new brake discs and rebuild all assemblies. They also required to refit the hubs to the vehicle and remove and replace the speed sensors. Following the repairs the wheels were replaced and the wheel nuts tightened to the correct torque setting using a calibrated torque wrench. In accordance with their usual and normal practice, after a suitable period, the third party re-torqued the wheel nuts to the correct setting. Thereafter, the third party

> fixed markers to the wheel nuts, which would indicate on a visual inspection by the owner or driver thereafter if any of the nuts had loosened or moved. A Torque label is attached to vehicles confirming that the wheels had been torqued and re-torqued… Any loss arising from the wheels detaching was not as a result of any actions of the Third Party. *Esto* there had been any issue with the removal and refitting of rear nearside wheel unit, which is denied, the wheel unit would have detached at an earlier date than 24 November 2015. Further explained and averred it is not unknown for wheel nuts to come loose while a vehicles (sic) such as the tanker are used and driven. Occasionally, if the tightness of the wheel nuts are not checked regularly by the owner or driver of a vehicle, this can lead to the wheel coming off, as in fact occurred in the present case. The nuts on the nearside rear wheel or wheels on vehicles such as the tanker are particularly susceptible to loosening due to the forces acting on them in normal use. It is for this reason that operators and drivers such as the defender and pursuer are advised to check the nuts for movement or tightness on a regular basis. The principal of *res ipsa loquitur* has no application… Wheel nuts can loosen, and wheels can come off, even where they are fitted without negligence on the part of the mechanic who fits them. The vehicle had been in exclusive control of the defender and its employees between 28 October 2015 and 24 November 2015 when the accident occurred… Explained and averred that *esto* the third party did not properly torque the nearside rear wheel nuts, (which is denied), the wheel unit would have detached at an earlier date than 24 November 2015".

[11] The third party, in its averments, places various calls upon the defender, including calls to aver what in fact caused the wheel to come off and to aver the basis for the contention that the third party's actings fell below the requisite standard of a competent motor vehicle engineer.

The Evidence

[12] Mr Gray confirmed that the arrangement whereby the tankers, including the one in question, would be the subject of a six weekly service with the third party and that there was a system of daily walk around checks undertaken by the drivers. However, he had checked the CCTV for the date of the accident and it was apparent that the driver, the pursuer, had not in fact carried out any such check prior to using the vehicle. He was shown an example of a Defect Report which at that time it would be filled in by the driver, should any defects be observed. One of the items to check was "Tyres and Wheel Nuts". One of the things to

check would be that the wheel nut indicators were not out of alignment. If a driver had any suspicion that a wheel nut was loose he would not expect that the vehicle would be driven out of the yard. He did not know whether or not a Torque label had been provided following the service on 28 October 2015. He was not able to say to what extent the tanker had been used between the date of the service and the date of the accident other than to indicate that the tanker was in active use. He did not know anything about the averment of the defender to the effect that had the pursuer inspected the vehicle on the morning of the accident the pursuer would or at least ought to have identified that the wheel nut indicators on the nearside wheel were out of alignment.

[13] The other witness as to fact was the first witness for the third party Hector Campbell MacLeay. He indicated that his company had been running for around 33 years and he had been Managing Director for around 25 years. He had a City and Guilds qualification in heavy vehicles and was a member of the Institute of Road Traffic Engineers. He worked on a variety of commercial vehicles and his customers included large public and private concerns. He did a lot of work on DAF vehicles. He had a number of employees including mechanics. The defender was a client and his company still did work for the defender. Notwithstanding that he was Managing Director he was still "on the tools" every day. In relation to the service, which took place between 26 and 28 October 2015, Mr MacLeay carried out the work himself. He described in detail how that was done and I have recorded this in the findings in fact. The hub assembly was a new DAF part, which came complete with the disc, wheel studs and bearings already fitted. It came in a metal crate and was inside a plastic bag and coated with wax. He checked the seating of the studs. He checked that the replacement parts were free from any damage. He cleaned all parts including the wheels so that the meeting faces were sitting properly. He used needle airgun, fibre discs,

cleaning fluids and grease. He used torque wrenches, which were calibrated and certified for the final tightening. Air wrenches were used but only for the initial stage and not for the final tightening. Wheel nut markers were fitted. He observed that there was excessive wear on the brake pads and discs. In fact on the nearside wheel there was no brake pad left and it was down to the metal. He indicated that in his view the vehicle had been "driven to destruction". When fitting the wheels he ensured that the wheel nuts were tightened correctly to 680 Newton metres (Nm). A second torque was carried out after around 30 minutes. 680Nm was the recommended torque for this vehicle. He was familiar with the published guidance and best practice including the FTA/IRTE (Freight Transport Association/Institute of Road Transport Engineers) Best Practice Guide published in September 2015. The company also had very strict in house torque procedures and re-torque labels were provided. He visually inspected the studs. New wheel nuts were used and all surfaces were checked including the surfaces where the wheel nuts met the wheel. Mr MacLeay was cross-examined as to why, if a re-torqueing procedure was in fact carried out, the invoice for the work simply referred to "Torque" while the later invoice for post-accident work referred to "Torque and 30 mins and Re-Torque". Mr MacLeay explained that this was as a result of the way the invoice had been typed in the office and it was not an indication that there had been no re-torqueing in the service prior to the accident. He also indicated that he had a log that indicated a torque sheet was given to the driver.

[14] The defender's expert Mr Holland is a Consultant Engineer involved with forensic investigation of scientific and technical matters of interest to the insurance and legal professions. His full CV was lodged in process. For the purpose of the present investigation he prepared three reports, the third being in response to the report produced by Mr Pointon for the third party. All reports were "desktop" reports there being no physical examination

of the vehicle in question. He spoke to his reports and also referred to published guidance including the said guidance published by the FTA/IRTE. In the circumstances of the case Mr Holland was of the view that there were a number of possible causes of the wheels falling off on the date of the accident. Those were:

1. Pre-existing damage to components used in the replacement hub assembly;
2. Damage to the assembly caused during its re-building;
3. Insufficient clamping force;
4. Inadequate tightening of the wheels and;
5. Inadequate re-torqueing.

In other words the possible causes related either to pre-existing damage to component parts or the manner in which the wheels were fitted. As I understood his evidence, Mr Holland thought it unlikely that there was any other cause. His evidence was therefore that the likely cause was attributable to deficiencies in the procedures adopted by the third party when the work was done in October 2015. His evidence was also that had the procedures been followed correctly then one would not expect any wheel loosening after a period of only four weeks. He referred in support to a research paper by TRL Ltd published in August 2006, which referred to a requirement to check/tighten wheel nuts every six months in relation to Volvo Truck and Bus Services Information. He disagreed with Mr Pointon's position that four weeks was indeed a significant period in the context of wheel loosening. He suggested that wheel loosening may not be evident or necessarily detectable visibly prior to a wheel detachment. He acknowledged the relevance of adequate checks such as daily driver inspections but suggested that such a failure in the wheel would not necessarily be linear in nature but could be sudden and not necessarily detectable on visual inspection. He

did not accept it likely that there was "some other reason" other than those he mentioned that would cause wheel detachment.

[15] Mr Pointon is a Chartered Physicist and Senior Partner in Burgoynes. He has considerable experience in investigations of accidents including investigation of mechanical failures including wheel loss incidents. He spoke to his report. His CV was also lodged in process. Again, this was a paper exercise in the sense that, like Mr Holland, he did not have the opportunity to inspect the vehicle in question. He spoke to his report. He along with Mr Holland had been provided with photographs of the tanker, its nearside hub and the detached nearside double wheel taken by the pursuer on 24 November 2015 after the accident. From the evidence it was clear that the nearside wheels had separated from the vehicle. In his experience separation of wheels from a vehicle, whilst a rare occurrence, is normally due to loss of tightness of the wheel nuts leading to the nuts either falling off or to the studs being damaged by a grossly loose wheel resulting in the studs breaking. The failure of the hub components as has occurred here was much more unusual. As such the event was not a "typical" loss of wheel nut tightness. He noted that the two wheels had stayed together meaning that at least one and probably two or more of the stud/nut arrangements had stayed connected. That meant that two or more had remained intact but had pulled from that hub. He indicated that there was clear evidence of the wheel rubbing on the spigot indicating a longstanding gross looseness of the wheels. There was elongation of the stud holes meaning that the studs had been forced back and forth by the wheels for a considerable time. He indicated there was evidence, in the form of crescent shaped wear, of relative movement of components against the mating service of the hub around each stud hole. He could not identify the cause of that. While there were unexplained aspects, it appeared that there had been rubbing between the wheels and the hub and relative

movement of the studs which was clear evidence of a relatively longstanding problem with the rightness of the wheels/nuts/studs/hub. He indicated that the lack of tightness could be the result of:

(a) defects in the components;

(b) some error in the arrangement/fitting;

(c) loss of clamping force due to poor quality surfaces or the presence of contaminants such as corrosion or paint;

(d) loss of clamping force for some other reason;

(e) lack of correct tightening/torque arrangement during the refitting processes by the third party in the service or;

(f) lack of adequate checks during the daily driver inspections (although that was not a direct factor in initiating looseness it was significant in its detection).

His evidence was that it appeared likely that the event was initiated by looseness in the components and that it was unlikely that there had been any inherent defect in the components (aside from corrosion, long-term wear and other damage).

[16] It was possible, he said, that the looseness had been the result of poor quality meeting surfaces, a common problem. Whether this had been adequately assessed by the third party was a matter of evidence. However, in his experience where looseness could occur even when this is completed to a high standard due to virtually unidentifiable defects in the mating surfaces. In addition, some wheel losses appear to have occurred following looseness for unexplained reasons. I pause to observe that, in relation to the factors (a) to (f) it should be noted that these were put to Mr Holland who agreed with these suggestions with the exception of (d) which he indicated he did not understand. As regards (f) he accepted that as a proposition although suggested that it would only be relevant if there was

something for the driver to see on visual inspection which was not necessarily the case. Mr Pointon was aware of the published guidance including the FTA/IRTE Best Practice Guide and agreed with the information as to why and why wheel fixings loosen. He said however that the risk of wheel loss cannot be entirely eliminated. On the evidence available to him, which was limited, there was no coherent evidential basis to explain this event. He stood by the conclusions in his report which was that it was likely that the event was initiated by loose wheel nuts although this did not explain all the evidence seen in the photographs. Loose wheel nuts could occur for a number of reasons including poor quality or contaminated meeting surfaces on the wheel. However, even when these factors are avoided by the installer wheel nut loosening is still experienced albeit infrequently and this can only be adequately addressed by effective daily checks. A failure to carry out a daily check would be a very significant factor in this event. In cross-examination, he indicated that any looseness in the nuts on the wheel ought to have been visually detectable at least one day beforehand. There were no statistics on how quickly wheel nuts loosen.
He maintained that a period of four weeks was a significant period of time for problems to develop. He indicated that the fact that the wheel had stayed on for so long after the service was in itself indicative that the work carried out by the third party was competently done. While he agreed with Mr Holland that the development of any problem was not necessarily linear in nature he maintained that it would have been detectable prior to the accident.

Submissions for the defender

[17] For the defender Mr Cowan moved the court to grant decree against the third party for payment of the said damages and expenses paid to the pursuer and sought expenses

against the third party in relation to the proceedings insofar as directed against it. He also sought sanction of counsel and certification of Mr Holland as an expert witness.

[18] Counsel submitted that Mr Gray was a credible and reliable witness. He spoke of the defender having a system of daily walk around checks but that the pursuer had not carried out any checks on the morning of the accident. As regards Mr MacLeay, while he indicated that a re-torque label had been provided to the defender following the service, Mr Gray had said that he was not sure whether a re-torque label had been provided. As regards Mr MacLeay, he portrayed him as an extremely defensive witness, he would not accept any possibility of an error having been made during the refitting of the wheels. He claimed that his evidence was grossly exaggerated for example in relation to his ability to recall the work which had been carried out in the service and Mr MacLeay's claim that the tanker had been "driven to destruction" prior to the service in October 2015. Also, Mr MacLeay's explanation for the post-accident work order invoice referring to "torque and await 30 mins and re-torque" whereas the work order invoice dated 26 October 2015, simply had "torque" was unconvincing. The difference in wording was more consistent with Mr McLeay having failed to re-torque the wheels in October 2015. Perhaps because, according to Mr McLeay, there was "very rarely" a variation after initial torqueing. I was invited in the circumstances to treat Mr McLeay's factual evidence with caution. With regard to the expert witnesses Mr Cowan submitted that Mr Holland had experience of working with HGV axels whereas Mr Pointon's relevant experience was more limited. Mr Pointon's evidence was it was said much more superficial than Mr Holland's. Where there was a difference between the experts I was invited to prefer the evidence of Mr Holland.

[19] Mr Cowan submitted that the exact cause of the wheel failure was not known but that in this case that was not an essential prerequisite. The first question was whether on the

balance of probabilities the accident was caused by a breach of contract on the part of the third party. The defender's position was that there are no possible credible causes of the wheel failure which would not be attributable to the third party's breach of contract. The contractual term relied on by the defender was the duty to exercise reasonable skill and care in carrying out the service and the common law duty of care relied on was in the same terms. Reliance on the terms of sections 11D(2) and 11D(6) of the Supply of Goods and Services Act 1982 was in the event that it was found that damaged parts were fitted. Counsel mentioned the five possible causes of the wheels falling off as spoken to by Mr Holland, each of which would be attributable to the third party's breach of contract, either the implied term to exercise reasonable skill and care or in the event that there was pre-existing damage to the hub the terms implied by the 1982 Act. He founded on the evidence of Mr Holland. It was not credible to suggest, as the third party did, that wheels sometimes just fall off particularly where the incident occurred only four weeks after the service when the wheels in question were refitted and hub assembly replaced. I was asked to prefer the evidence of Mr Holland as to whether or not the four week period between service and accident was a significant one. I was asked to reject the evidence of Mr Pointon on that matter and to reject the suggestion by Mr Pointon that wheel looseness can occur even when meeting surfaces have been cleaned to a high standard due to virtually unidentifiable defects in the mating surfaces. Only three of the four wheel surfaces were cleaned on Mr MacLeay's evidence. It was submitted that in the circumstances the defender had proved on the balance of probabilities that the wheels came off the trailer due to breach of contract on the part of the third party.

[20] In relation to the case based on negligence it was accepted that the onus of proving negligence lay on the defender. However, references made to *Clerk and Lindsell* on Torts,

23rd Edition at paragraph 7-202 to the effect that the question in each case was - what is the reasonable inference with the known facts? That question had to be approached on a common sense basis and where the evidence relating to negligence was particularly within the control of the defendant, little affirmative evidence may be required from the claimant to establish a *prima facie* case, which will be then for the defendant to rebut. The case of *Binnie* v *Rederij Theodoro BV* 1993 SC 71 was an example of the approach being applied. Reference was also made to *Walker* & *Walker* the Law of Evidence in Scotland 5th Edition at paragraph 2.8.1. In the present case the reasonable inference was that there was carelessness on the part of the third party because in the absence of such carelessness the wheels fitted by the third party should not after only four weeks have come off the tanker. The facts proved and inferences to be drawn from them were more consistent with negligence on the part of the third party than with any other causes.

[21] Counsel also prayed in aid the maxim *res ipsa loquitur* which was said to be a "special application of the rule principle that there is evidence of negligence if the facts proved are more consistent with negligence on the part of the defendant than with other causes" (*Charlesworth & Percy* on Negligence, 15th Ed. At para 6-22). Reference was also made to *Clerk & Lindsell* at para 7-203 which in turn referred to the case of *Scott v London & St. Katherine Docks* (1865) 3 H & C 596, per Erle CJ at 601. In this case the three conditions set forth therein were met:

(1) Wheels coming off a tanker only four weeks after they have been fitted is an occurrence that would not happen without negligence (2) at the relevant time the thing that inflicted the damage was under the sole management and control of the third party and (3) the precise cause of the wheels coming off the tanker is not known. As regards the first condition, common experience suggests that in the absence of negligence wheels do not come off

tankers. As regards the second condition it was in the third party's control at the time the wheels were fitted and hub assembly replaced that was the relevant time (*Clerk and Lindsell* at paragraph 7-205 and *McDyer* v *The Celtic Football and Athletic Co Limited* 2000 SC 379 at page 383I). Reference was also made to *Charlesworth and Percy* at paragraph 6-25. The possibility that the tyre or tyres at the rear side double wheels had been changed by a third party between the service and the date of the accident was improbable. Not only were the tyres checked as part of the service in October 2015, new tyres had been fitted to the nearside rear wheels on 29 August 2015. With regards to the third condition, the precise cause of the wheels coming off is not known. It was accordingly submitted that the principle applied. However, even if it did not, the general presumption of negligence applied.

[22] In the event that the court was satisfied and a *prima facie* inference of negligence arose it was for the third party to demonstrate that the accident occurred without fault on its part. In other words the evidential burden shifted to the third party (*David T Morrison and Co Limited* v *ICL Plastics Limited* 2014 SC (UKSC) 222 per Lord Reid at paragraph [4] and Lord Hodge at paragraph [98]. Reference was also made to *Devine* v *Colvilles* 1969 SC (HL) 67 per Lord Guest at page 100 and *Walker* and *Walker* at paragraph 2.10 and footnote 93. It was submitted it was normally necessary for a "defender" to establish the cause of the accident before he could dissociate it from his negligence (*Walker* and *Walker* paragraph 2.8.1). It was not enough in this case for the third party to "proffer a possible alternative non-negligent explanation" (*Woodhouse* v *Lochs and Glens (Transport) Ltd* 2020 SLT 1203 at paragraphs [35] and [36]. As at put by *Clerk and Lindsell* at paragraph 7-207 "the defendant cannot hope to redress the balance in this way merely by putting up theoretical possibilities: his assertion must have some colour of probability about it". In this case, the third party simply put theoretical possibilities. Mr Pointon's theory based on the presence

of "virtually unidentifiable defects" on the mating surfaces lacked any "colour of probability". It was submitted that where a "defender" is unable to provide a specific cause for the accident, the onus may be discharged if the defender proves that it used "all reasonable care" (*Morrison* at paragraph [98]). However in the present case that had not been proved. It was not credible that Mr McLeay could recall the detail of the service carried out in October 2015. At best he was relying on what his normal practice would have been but that would be insufficient to prove that "all reasonable care" was actually taken. In any event on Mr McLeay's own evidence all reasonable precautions were not taken. In particular the outer/outer face of the wheel was not cleaned and he did not speak to any steps being taken to prevent contamination of the meeting surfaces during the refitting process. In the circumstances, it was submitted that the third party had failed to rebut the presumption of negligence.

[23] In relation to the third party's case of contributory negligence on the part of the pursuer and defender it was submitted that this should be rejected. The case flowed from the averments that the pursuer had a duty in his daily inspection to check the top of the wheel nuts. However, there was no evidence to the effect that a driver would reasonably be expected to check the torque of wheel nuts (as opposed to carrying out the visual inspection). It was also averred that the pursuer ought to have been alerted by "significant noise and vibrations" to there being a problem with the wheels. However, there was no evidence made in that regard either. Mr Gray had accepted that the pursuer had not carried out a walk-around check on the morning of the accident. However, causation is an essential element for contributory negligence and the experts did not agree as to whether there would have been anything for the pursuer to have seen had he carried out a check. I was asked to

prefer the evidence of Mr Holland in this respect to the effect that it was not possible to say whether there would have been any identifiable defects on the morning of the accident.

[24] In relation to quantum, this was effectively agreed and interest fell to be applied to those sums at the judicial rate from the dates of payment on the basis that those were the dates upon which the losses were suffered by the defender.

[25] As regards the claim for contribution under s.3(2) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1940 it was an essential re-requisite of a claim that there has been a finding against the defender. In this case there has been such a finding upon the defender's tender being accepted by the pursuer and the defender being found liable for the principal sum and expenses. The subsection provided that a party may recover "such contribution, if any, as the court may deem just". In determining the apportionment the court required to consider the serious or moral blameworthiness of the respective faults of the parties and the respective causative relevance or potency (*A-R* v *Eljamel* 2022 SLT 881 at paragraph [23]). For the same reasons argued that there should be no reduction for contributory negligence the defender's position was that the third party should be found liable to contribute 100% of the damages and expenses to be paid to the pursuer.

Submissions for third party

[26] Mr Thomson for the third party submitted that the court should pronounce decree of absolvitor with expenses and sought certification of his expert witness, Mr Pointon. In common with Mr Cowan for the defender he lodged a written submission. In his introduction, he submitted that the defender offered to prove that it had a system of inspection in place and that on the day of the accident the wheel nut markers on the fuel tanker were out of alignment. However, in evidence the defender did not attempt to prove

that in relation to the tanker or that any system of inspection was adhered to, nor did the defender attempt to prove that the wheel nut markers were out of alignment. The remaining issue was whether the cause of the wheel coming off could only be attributable to the third party's breach of contract or fault and negligence. It was submitted that the defender had failed to prove its case. Further, the maximum *res ipsa loquitur* had no application in this case. There was no evidence of any defect in the parts used in the works. There was no evidence of any negligence on the part of the third party. Further, there was no attempt to lead evidence such as would establish what the standard of the common law duty of care was.

[27] In relation to the factual witnesses, Mr Gray spoke to the service of the vehicle every six weeks. He had checked the CCTV which showed that the pursuer had not carried out any check on the day of the accident. He spoke to the fact that the third party's ATS and Strathclyde Tyres were used for tyre repairs and replacements. If he had any suspicion that the wheel nut was loose he would not drive it out of the yard as the vehicle would not be fit to drive. It was said that he agreed that when the tanker came back from the third party it had wheel nut markers fitted. He did not know anything about the averment in relation to the pursuer that had he inspected the vehicle on the morning of the accident he would have or ought to have identified that the wheel nut indicators on the rear nearside wheel were out of alignment. No documents were produced regarding a system of inspection by the defender. The only explanation for that being that the tanker was scrapped prior to the raising of the present action and that the defender does not retain any re-torqueing records in respect of the vehicle (answer 4(d) – an admission in relation to averments of the pursuer). As regards the fitting of the wheel Mr MacLeay's evidence was that all mating surfaces were cleaned including the outer surface of the wheel and that his evidence in that regard should

be looked at in its totality. All surfaces were checked including the surface where the wheel nuts met the wheel. His evidence as to the manner in which he fitted the wheel should be accepted. The hub assembly was new and it was checked for any damage. Parts were cleaned so that the meeting faces were sitting properly. The wheel was properly torqued in accordance with the generally recognised guidance with a re-torqueing carried out appropriately. His evidence did not disclose any negligence on his part.

[28] The defender, he submitted, offered to prove three matters:

1. That the work was carried out by the third party on 26-28 October 2015 and that the rear nearside wheel came off on 24 November 2015;

2. That there was a system whereby vehicles were inspected daily, that on the day of the accident wheel nut markers were out of alignment and that had this been reported the tanker would not have been driven and;

3. The cause of the wheel coming off could only be attributable to the third party's fault of negligence.

[29] As regards the first matter, it was not disputed that the wheel came off. What is in dispute was why the wheel came off and whether the third party was responsible. As to the second matter, while Mr Gray gave evidence that there was a system of daily inspection there was no evidence that the tanker had ever actually been inspected by the pursuer or any other driver between 28 October 2015 and 24 November 2015. No inspection records were produced. No other driver gave evidence. The court could not conclude that the tanker was ever inspected by employees of the defender. Mr Gray accepted in cross-examination that wheel markers were fitted by the third party and Mr MacLeay gave evidence to that effect. There was no evidence that the wheel markers were in the correct

alignment at any time after the service. Had they been out of alignment the lorry would not have been driven if an inspection regime had been followed.

[30] As regards the third matter, according to the evidence of Mr Gray, between visits to the third party for service the tanker could be taken to either ATS or Strathclyde Tyres if there was a tyre issue. Mr Gray did not know how often a tyre problem occurred. It was not established in evidence what mileage had been covered by the tanker after it had been to the third party for the relevant service. It was not established under what conditions the tanker was used. Mr Gray did not know whether third parties were used in relation to tyre repair or replacement between the service and the date of the accident. Mr MacLeay spoke to the condition of the brake pads at the time of the service. The defender did not attempt to prove what had happened to the tanker between 28 October and 24 November 2015, during which time the tanker was under the exclusive control of the defender. Third parties, other than the third party in the action, may have undertaken work requiring torqueing of the wheels. These matters were important as the defender offered to prove that, regardless of the precise defect which caused the wheel to come off the tanker it was caused by the third party's breach of contract or negligence, there being no other credible possible causes of the wheel coming off. The defender pled *res ipsa loquitur.*

[31] Mr Thomson submitted that the burden of proof rested with the party who alleges the affirmative and that the defender had not discharged the burden in this case. The maximum *res ipsa loquitur* did not apply in this particular case. It:

> "only applies where the incident suggests negligence on someone's part and, because of exclusive management and control in the defenders at the time or times when the negligence occurred, it can be presumed that it was the defenders who were negligent".

(*Murray* v *City of Edinburgh District Council* 1981 SLT 253, per Lord Maxwell at page 256, cited with approval by the Lord President delivering the *opinion of the court in McDyer* v *The Celtic Football and Athletic Co Ltd supra*). In the present case, beyond the admission that the rear nearside wheel came off the tanker there was no other evidence or admitted facts available to the court. The driver did not give evidence and no other employee gave evidence. The failure to lead evidence about what took place between the date of the service and the date of the accident meant it had not been proved that there had been negligence of any sort which was the cause of the wheel coming off. The defender's case at its highest was that the wheels came off and that negligence may have been a cause. The defender had not proved when such negligence had occurred. Whilst each case involving the maximum was fact dependent it remained necessary to aver and prove more than simply an accident. As Lord Maxwell said the maximum "only applies where the incident suggests negligence on someone's part…" In *McDyer* a piece of wood fell from the stadium canopy. The pursuer in that case also averred that wood did not ordinarily form part of the structure, that the canopy was inaccessible to the public, that wood had been used in temporary works, that the weather was calm and there was no wind. In these circumstances and taken together with the averments that the defender had exclusive management and control of the stadium, the Inner House held that the pursuer had pled enough to justify a finding of negligence under the maximum. In this case there were no such averments or evidence. In the absence of proof as to when negligence occurred it could not be said that the third party had exclusive management and control.

[32] It was pointed out by Mr Thomson that neither expert Mr Holland nor Mr Pointon had examined the vehicle. Both worked from photographic images. Neither expert knew anything about what had happened to the vehicle between 28 October and 24 November

2015. The primary difference between the experts centred on whether there was a residual category of cases where the cause of a wheel or wheels coming off could not be identified. When referred to the Best Practice Guide issued by the FTA/IRTE and when referred to the reasons for wheel fixings becoming loose and in particular "settlement from any other factor eventually causing the clamping load to become inadequate" Mr Holland did not accept that this category precluded negligence. He accepted in cross-examination that the guidance admitted the possibility that a cause of a wheel coming off might remain unknown. His explanation for that was that the incident had not been investigated or satisfactorily investigated. It was admitted that this illustrated the deficiencies in the defender's case. By failing to investigate and explore what had happened in the vehicle between the service and the accident meant that the defender could not rule out a non-negligent cause or a negligent cause attributable to parties other than the third party. Both experts Mr Holland and Mr Pointon agreed that they were approaching the matter from a theoretical viewpoint. Mr Pointon agreed that the guidance demonstrated what he understood to be accepted that sometimes the cause of a wheel coming off could not be identified. This was why the use and monitoring of wheel markers were so important. In any event, even if it could be concluded that "something" had happened during the repair of the vehicle by the third party, there was no evidence that this "something" was negligent. Mr Holland's suggestion of pre-existing damage was contrary to Mr MacLeay's evidence who was clear that new hubs were fitted. The suggestion by Mr Holland that there were assembly errors in the hub was again contrary to the evidence of Mr MacLeay who was clear that the hub arrived fully assembled and was thoroughly checked over by him. Similarly, there was no evidence that there was any rebuilding of the hubs. Accordingly, on the evidence there was no basis for a suggestion that the parts he used were unfit for purpose. The hub arrived fully assembled

and was fully checked. It came with new studs and Mr MacLeay checked the seating of the studs. Mr MacLeay gave very clear and thorough evidence. He was highly skilled and experienced. He showed a good knowledge about the structure, dismantling and reassembly of a wheel and hub. Mr Holland was not asked and did not identify whether anything that occurred could be categorised as a failure on the part of the third party. The duty incumbent upon the third party was to take reasonable care. Absent evidence that there was a defect on the hub or a deficit in the standard of care could not be said that the third party failed in any of the duties owed to the defender. It was submitted that Mr Pointon addressed this aspect of the case in a more considered way than Mr Holland. Mr Pointon correctly framed the issue as being one of law and that he indicated that in the absence of an identifiable problem with the work carried out by the third party how could it be said that there was a defect or deficit. Mr Pointon indicated that the fact that the wheel had stayed on so long after the third party had carried out the service was in itself indicative that the work had been carried out competently.

[33] It was submitted that the court could properly conclude that proper parts were used and that no errors were made by Mr MacLeay. In the circumstances, even if the court found that *res ipsa loquitur* was capable of being applied in this case the evidence was that Mr McLeay took reasonable care in what he did. Accordingly, the defender's case failed.

[34] Finally, it was submitted in the event that the court was not with the third party, then had the wheels been checked on the morning of the accident, the import of the evidence of Mr MacLeay and Mr Pointon was to the effect that the wheel nut markers would have been seen to be out of alignment. As recognised by Mr Gray it was an essential prerequisite that before driving the tanker wheels should be checked. There was no system in place that ensured the checks actually occurred. Had they been checked the accident would not have

happened. The defender bore at least 90% of the responsibility on the basis of contributory negligence.

Discussion

[35] There is no issue in this case that on 24 November 2015 the rear nearside double wheel fell off the tanker, which the pursuer was driving. As a result the pursuer suffered loss, injury and damage and it is agreed that the settlement between the pursuer and the defender in this action was a reasonable one. The issue is whether the loss of the wheel can be attributed either to the breach of contract or fault and negligence of the third party. In that context it is clearly relevant to consider and if possible identify the cause of the loss of the wheel. The defender alleges in this action that while the precise cause of the loss of the wheel cannot be identified it was nonetheless attributable to such breach of duty. The breach of duty, whether in contract or in delict, was said to have occurred in the deficient performance by the third party of the repair and maintenance of the tanker and in particular the removal and refitting of the rear nearside double wheel and replacement of the rear nearside hub assembly on 26-28 October 2015. The accident occurred some four weeks later on 24 November 2015.

[36] It was I think accepted that the breach of duty, whether it be in contract or delict involved the same standard of care. In other words the third party owed a duty to the defender to exercise reasonable skill and care in the carrying out of their task. Further, it is common ground that the court would require to be satisfied on the balance of probabilities that the accident, in the case the loss of the wheel, was caused by breach of duty on the part of the third party.

[37] The onus of proof rests on the party seeking to establish the breach and also that it caused the loss.

[38] Turning first to the case based on breach of contract, as noted, I was asked to accept the evidence of Mr Holland that there were a number of possible causes of the wheels falling off each of which would be attributable to the third party's breach of contract. Where the precise cause was not known it was a matter of inference that there must have been either a breach of the implied term to exercise reasonable skill and care or in the event that there was pre-existing damage to the hub fitted, the terms implied by the 1982 Act.

[39] The problems I have with this approach are threefold. Firstly, it appears clear from the published guidance from the FTA/IRTE that there are a variety of reasons for wheel fixings coming loose including "settlement from any other factor eventually causing the clamping load to become inadequate". Both experts acknowledged that passage. Mr Holland however accorded it little importance in the absence of identifying the factor involved, while Mr Pointon placed emphasis on it as supporting the idea that the list of causes ought not to be restricted in the way that Mr Holland sought to do. I preferred Mr Pointon's more open-minded approach, which I think rightly acknowledged that there may be causative factors which were unidentified, particularly in a situation where there was some four weeks between the service and the accident with possible intervention by other third parties. Without satisfactory evidence to support the exclusion of other factors, I find it totally artificial to restrict the causes to Mr Holland's list, their commonality being that, whichever one it was, it can be laid at the door of Mr MacLeay and therefore the third party. The difficulty for both Mr Holland and Mr Pointon was of course that neither had the opportunity of inspecting the tanker and had to conduct their investigations as purely paper exercises with limited photographic evidence. They could only theorise on the facts

presented. They were therefore both at a serious disadvantage and this must be reflected in the weight given to their evidence.

[40] Secondly, and in any event, the evidence of Mr MacLeay, which I have accepted as credible and reliable, is that he performed his task in a way, which conformed with good industry guidance. I accept his evidence that he adopted all reasonable care in ensuring that there was no pre-existing damage to components used in the replacement hub assembly, that he did not cause any damage during the assembly and that he adopted all reasonable measures required of him to ensure that there was adequate clamping force, tightening of the wheels and appropriate torqueing, including re-torqueing. I accept the evidence that he gave in these respects. He gave his evidence on the matter clearly and confidently. I didn't find that he exaggerated the condition of the wheel assembly as he described it nor that he exaggerated his recall of the service and repair he carried out. He of course had reason to remember it well given later events. I got the impression that he was a man who was both thorough and careful in his job. I did not get the impression that he was anything other than truthful in his account, and that, notwithstanding the passage of time, his account was reliable. My conclusions as regards his evidence clearly have a bearing on both the cases in contract and delict.

[41] Thirdly, there is the time gap of around 4 weeks and the accident, during which time it is not known whether there was another third party intervention in relation to the wheel. I am unclear as to why this might be regarded as improbable, even if a new wheel or tyre was relatively recently fitted.

[42] Those conclusions effectively put an end to the case under breach of contract including that on the 1982 Act and it will be appreciated that they will have a bearing on the

case based on negligence, there being a considerable overlap between the two cases. I refer to my reasons in the negligence case.

[43] In relation to the case based on negligence, clearly the onus of proving negligence lies on the party alleging it. However, whether a reasonable inference of negligence can be drawn from the known facts depends on the circumstances of each case. As indicated in *Clerk and Lindsell* at paragraph 7-202:

> "Courts approach matters of inference on a common sense basis and where the evidence relating to negligence is particularly within the control of the defendant, little affirmative evidence may be required from the claimant to establish a *prima facie* case which will then be for the defendant to rebut".

[44] It was said on behalf of the defender that in this case there was a reasonable inference of carelessness on the part of the third party because in the absence of such carelessness the wheels fitted by the third party should not, after only four weeks, have come off the tanker. The facts proved and the inferences to be drawn from them were more consistent than negligence on the part of the third party than with any other causes. I understood this to be essentially the same argument as that put in relation to the alleged breach of contract.

[45] However, in the context of negligence reliance was placed on the maxim *res ipsa loquitur.* In this context it is perhaps useful to quote from *Clerk and Linsdell* at paragraph 7-203 where it is stated *inter alia*:

> "A further circumstance in which the court may infer carelessness on the part of the defendant is where the claimant can show that the nature of the accident suggests both negligence and the defender's responsibility. Drawing the inference in such a circumstance is often described as an application of *res ipsa loquitur.* However, it is important to note that this label represents a rule of evidence and states no principle of law… It is only a convenient label to apply to a set of circumstances in which a claimant proves a case so as to call for a rebuttal from the defendant, without having to allege and prove any specific act or omission on the part of the defendant. He merely proves a result, not any particular act or omission producing the result. Res ipsa loquitur, which stems from the judgment of Erle CJ in *Scot* v *London and St*

> *Katherine Docks* applies where: (1) the occurrence is such that it would not have happened without negligence and; (2) the thing that inflicted the damage was under the sole management and control of the defendant, or of someone for whom he is responsible or whom he has a right to control. If these two conditions are satisfied it follows on a balance of probability, that the defendant, or the person for whom he is responsible, must have been negligent. There is however, a further negative condition: (3) there must be no evidence as to why or how the occurrence took place. If there is, then appeal to res ipsa loquitur is inappropriate for the question of the defendant's negligence must be determined on that evidence."

[46] It was said on behalf of the defender in this case that those three conditions were met. I disagree. As regards the first condition, the proposition was that wheels coming off a tanker only four weeks after they were fitted is an occurrence which would not happen without negligence. In order to agree with that proposition I would require to reject the evidence of Mr Pointon that there can be causes of wheel loss which are not identified and that a period of around four weeks is a significant period of time in the context of a wheel on a tanker lorry, which of course necessitates that the wheels are checked on a daily basis. I am not prepared to reject that evidence. I refer to my conclusions in relation to the breach of contract case. I found Mr Pointon to be more convincing in that respect. For Mr Holland to categorise five factors in this case and exclude the likelihood of all others is something, which I find not to be supported on the evidence. It seems to me to place the focus of all consideration on the service that was carried out in October 2015 to the exclusion of all other possible causes. It ignores the possibility that there were other factors involved including the intervention of other third parties in relation to the rear nearside double wheel for example for the purpose of changing or repairing tyres. The fact is that in this case there is no evidence as to what occurred between the service and the date of the accident. There are no records and further there was no physical evidence for the experts to assess. At the very least, I find Mr Pointon's explanations that there may have been other causes or unidentified causes of the wheel loss in this case to be at least as plausible as the restriction Mr Holland

sought to put on the list of causes. As already indicated, this was a paper exercise in which both experts were at a considerable disadvantage in not being able to examine the physical evidence.

[47] That brings me to the second requirement, which is related to the first, that the thing that inflicted the damage was under the sole management and control of the third party. The thing namely the tanker was clearly under its control at the time of the service. However, it ceased to be under the control of the third party after it was released to the defender following upon the service and there was an interval of some four weeks prior to the accident. It was said of course on behalf of the defender that the relevant time for management and control was the time of the negligence but that begs the question of what the negligence was. I do not consider that the second requirement is satisfied in these circumstances.

[48] As to the third condition it was submitted that the "precise cause" of the wheels coming off the tanker was not known. I think that that is self-evident in this case.

[49] However, I am not persuaded that the first two conditions apply in this particular case. It seems to me that this is a case where there is neither a *prima facie* case of negligence whether by operation of the maxim *res ipsa loquitur* or otherwise so that the burden of proof remains with the defender in this case to establish negligence on the part of the third party.

[50] Before I leave this topic I think it is useful in the present context to refer to the judgment of Lord Hodge in *David T Morrison* v *ICL Plastics supra* at paragraph [98] who in turn referred to the judgment of Toulson LJ in *Smith* v *Fordyce* [2013] EWCA Civ 320 who (at paragraph 61) stated:

> "The doctrine expressed in the maximum *res ipsa loquitur* is a rule of evidence based on fairness and common sense. It should not be applied mechanistically but in a way, which reflects its underlying purpose. The maximum encapsulates the

> principal that in order for a claimant to show that an event was caused by the negligence of the defendant, he need not necessarily be able to show precisely how it happened. He may be able to point to a combination of facts, which are sufficient, without more, to give rise to a proper inference that the defendant was negligent. A car going off the road is an obvious example. A driver owes a duty to keep his vehicle under proper control. Unexplained failure to do so will justify the inference that the incident was the driver's fault. In other words, the Latin tag, the matter speaks for itself. In such circumstances the burden rests on the defendant to establish facts from which it is no longer proper for the court to draw the initial inference. To show merely that the car skidded is not sufficient, because a car should not go into a skid without a good explanation. In *Barkway* v *South Wales Transport Co Ltd* [[1949] 1 KB 54] the court took the same view about a tyre burst. A properly maintained vehicle ought not to suffer a tyre burst. It is therefore not surprising that the court held in such circumstances:
>
> > '… the defendants must go further and prove (or it must emerge from the evidence as a whole) either (a) that the burst itself was due to specific cause which does not connote negligence on their part but points to its absence as more probable, or (b) if they can point to no specific cause, that they used all reasonable care in and about the management of their tyres'"

[51] In this case if I am wrong on my conclusion on the application of *res ipsa loquitur* I have in any event come to the conclusion, accepting as I do the evidence of Mr MacLeay, that the third party in his person used "all reasonable care" in the carrying out of his task of removing and refitting the rear nearside double wheel and the replacement of the rear nearside hub assembly. Accordingly, even if the maximum applies or because there is otherwise a *prima facie* case which shifts the evidential burden to the third party, I am persuaded that the third party has discharged that burden and that in the whole circumstances of this case negligence has not been proved.

[52] In light of my conclusions, no issue of contribution either under the Law Reform (Miscellaneous Provisions)(Scotland) Act 1940 or the Law Reform (Contributory Negligence) Act 1945 Act arises.

[53] If I am wrong on my primary conclusion on liability, it is my view that, had the pursuer checked the wheel prior to driving on the day in question, he would or ought to have noted that the wheel nut indicators were out of alignment and, on the evidence of

Mr Gray, which I accept, ought not to have driven it. I accept Mr Pointon's evidence that there was a brewing problem which was detectable at least at that stage. I have preferred his evidence on this matter to that of Mr Holland, and it is supported by the photographic evidence. The photographs show evidence of damage in the form of elongated stud holes and wear, indicative relative movement of components and of wheel loosening over a period of time. I refer to his evidence recorded above. While he accepted, as suggested by Mr Holland, that failure was not necessarily linear in nature and could be sudden, I was persuaded that a problem was evident. In the circumstances, I would have regarded it appropriate to make an apportionment of 50% under the 1940 Act and, for the same reason, would have made the same adjustment to account for contributory negligence under the 1945 Act.

[54] I have pronounced an interlocutor in accordance with my conclusions in this case. There was nothing in the submissions to suggest that I reserve the question of expenses and I have awarded expenses in favour of the third party in so far as not otherwise and previously dealt with. There being no opposition I have certified the cause as suitable for the employment of counsel and certified the third party's expert witness Mr Pointon.