SHERIFF APPEAL COURT

[2021] SAC (Civ) 23
PIC-PN3057-19

Version 3 - 29/7/21
Sheriff Principal M M Stephen QC
Sheriff Principal D L Murray
Sheriff Principal D C W Pyle

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL D L MURRAY

in appeal by

GORDON WALLACE

Pursuer/Appellant

against

(FIRST) DAVID ROACHE

and

(SECOND) LIVERPOOL VICTORIA INSURANCE COMPANY LIMITED

Defenders/Respondent

Pursuer/Appellant: Crawford, Advocate; Cycle Law Scotland
Defender/Respondent: Murray, Advocate; Keoghs GHS Scotland LLP, Glasgow

28 July 2021

[1] This action arises from a collision between a bicycle, ridden by the pursuer, and a car driven by the first defender. The second defenders are his insurers. The sheriff in the All Scotland Sheriff Personal Injury Court ("ASSPIC") found that the pursuer had not

established fault and negligence on the part of the first defender at common law, and granted decree of absolvitor against both defenders. The pursuer now appeals that decision.

[2] The sheriff's findings may be briefly stated. On 25 July 2018 at about 16:45 hours the pursuer, an experienced cyclist, was riding his bicycle on the National Cycle Network Cycle Route 1, which runs adjacent to the A91 at St Andrews ("the cycle path"). The pursuer was cycling in a westerly direction towards Guardbridge with the Old Course at St Andrews to the north and to his right.

[3] There is an access road from the A91 to the Balgove Golf Course ("the Balgove Course"), which provided a temporary car park for visitors to the Senior Open Championship. Around 25 July 2018 this championship was taking place on the Old Course. The pursuer was not aware of this fact. The Balgove Course and the temporary car park lie to the north of the cycle path. The access road runs generally south to north from the A91. Access to the A91 is by a wide entrance mouth, through a set of metal gates. There is a second set of metal gates at the entrance to the Balgove Course. These two sets of gates were generally closed, although on 25 July 2018 both sets of gates were open for vehicles to access the temporary car park.

[4] The cycle path runs to the east and west of the access road. For cyclists approaching the access road in either direction there is a prominent give way sign. The cycle path is 2.7 metres wide where it meets the access road. The access road has priority over the cycle path. The pursuer had a view of the give way sign on the cycle path, the access road, and the entrance/exit gates. The pursuer was familiar with the cycle path and had used the cycle path at least 20 to 30 times. He was aware of the two sets of gates at the access road, and of the give way signs in each direction on the cycle path at the access road.

[5] As the pursuer approached the access road he was travelling at a speed of about 20mph. He did not look to his right in the direction of the entrance/exit gates to the Balgove Course, and did not notice that both sets of gates were open. He was cycling approximately in the centre of the cycle path. He did not brake or reduce his speed at any time as he approached the access road. He ignored the give way sign. His bicycle collided with the front nearside of the car being driven by the first defender as it exited the temporary car park heading for the A91.

[6] The first defender was driving at a speed of no more than 15mph as he left the car park. He was either in first or second gear. He drove on the left hand side of the access road heading towards the exit gates and the A91. The first defender was aware of the cycle path warning sign close to a large hedge at the east gatepost of the exit gates. The first defender was looking out for cyclists. He had a view of the cycle path to his right (west) and he wanted to clear the edge of the hedge which runs parallel to the cycle path so that he had a line of sight of the cycle path to his left (east). As the first defender continued moving forward to gain a line of sight he was struck by the bicycle and heard a very loud bang. As soon as he heard the bang he stopped the car. The bicycle travelled across the front nearside and bonnet of his car, and the pursuer ended up on the ground in front of the car. The first defender did not see the cyclist prior to the collision. The car had not reached the midpoint of the cycle path when the collision occurred.

Submissions for the pursuer

[7] There are three grounds of appeal: First, that the sheriff erred in fact and law in finding that the first defender took reasonable care when emerging from the Balgove Course gated exit. In doing so the sheriff failed to take account of relevant factors and was plainly

wrong. Second, the sheriff erred in fact and law in finding it was not reasonable for the first defender to have brought his car to a complete stop, or to have hesitated briefly or edged forward so that the front of the car might be visible to the pursuer. In so finding, the sheriff failed to take account of material factors and was plainly wrong. Third, as a result of the errors found in grounds 1 and 2 the sheriff erred in law in his analysis of causation. Had the sheriff found that the first defender failed to take reasonable care, criticisms of the defender should have been assessed in accordance with section 1 of the Law Reform (Contributory Negligence) Act 1945, applying the principles of causative potency and blameworthiness.

[8] Counsel for the pursuer adopted his written submission. The standard of care was to be measured by the usual factors: what was foreseeable; the magnitude of risk; likelihood of injury; gravity of consequences and practicability. The starting point should be to look at the actions of the first defender and the likelihood of a collision and the severity of injury arising from his actions. From that perspective the first defender was warned that cyclists were likely to be in the vicinity and it was foreseeable that they might make a mistake and ignore the give way sign. Given the prospective risk of serious injury to a cyclist the prudent driver possessed of all the information, exercising reasonable care, should have edged out as slowly as possible: that was the only way that the accident could have been avoided. The slow speed at which the driver emerged from behind the hedge was no precaution at all as evidenced by the accident. Edging out would have maximised the opportunity for a cyclist to be aware of the presence of a car. The sheriff had erred in ignoring the fact that the precautions which the first defender had taken were wholly ineffective in addressing the foreseeable danger of striking a cyclist who failed to comply with the give way sign. The sheriff should have taken account of the fact that the accident happened at an intersection between the access road and a national cycle path. The sheriff

had conflated his assessment of primary liability and causation by focusing on the pursuer's failures. He had erroneously accepted that the first defender's action had fulfilled his duty of care. The first defender should have edged out and paused before edging out further in slow increments; that was a reasonable precaution for him to take to avoid the accident.

[9] The sheriff had erred in reaching the conclusion that no criticism was to be made of the first defender for causing a readily foreseeable collision where a warning sign specifically warned of the presence of cyclists. The action of the first defender to proceed along the access road was a very dangerous act. The first defender was advancing towards the cycle path from behind a hedge which materially restricted visibility. It was foreseeable that he might meet a cyclist and it was reasonable that he should have had in contemplation that any collision would seriously injure the cyclist if he were to be struck by a car. In these circumstances the duty on the first defender was to edge forward incrementally as slowly as possible until he could see past the hedge and allow the cyclist to see the car. If edging out was the action which would have prevented a collision it was the reasonable thing to do especially given that the risk of not edging out might give rise to a fatal collision with a cyclist. The speed at which the first defender was travelling meant he could only stop after the impact.

[10] The sheriff had also erred in not making an assessment of contributory negligence. He had failed to have regard to section 1 of the Law Reform (Contributory Negligence) Act 1945. The sheriff ought to have found that the actions of the pursuer and the first defender were not severable and that both the pursuer and the first defender's failures were relevant to an assessment of contributory negligence. As in *Jackson* v *Murray* [2015] UKSC 5 the first defender's contribution would be high given the level of causative potency in driving a vehicle which strikes a cyclist. The pursuer's momentum was met with the

sudden immoveable presence of a car which caused the pursuer to be thrown from his bicycle over the car to the ground. The first defender, warned of the presence of cyclists, approached the cycle path at a speed which resulted in the pursuer striking his car. It was obvious that a cyclist would suffer greater harm if there was a collision. The first defender's actions were causative and blameworthy. Counsel invited the court to apportion blame 70% on the first defender and 30% on the pursuer.

Defenders' submissions

[11] Counsel for the defenders adopted his written submissions and invited the court to adhere to the interlocutors of the sheriff. He submitted that the pursuer's grounds of appeal essentially advanced the proposition that on the factual findings made the sheriff erred in law in finding that the first defender exercised reasonable care, this being the third category of decision described by the Lord Justice-Clerk in *W* v *Greater Glasgow Health Board* 2017 CSIH 58, paragraph [39], which entitled an appeal court to overturn or interfere with a decision at first instance.

[12] The sheriff had undertaken a careful evaluation of the evidence and paid particular attention to the width of the cycle path, the relative position of the parties, the relevant speed and lines of sight. There was evidence which the sheriff accepted to support his findings in fact, and there is no basis to say that any of the findings were plainly wrong which would entitle this court to interfere with the findings made. The sheriff's findings in fact support his conclusion that the first defender exercised reasonable care. That was evidenced by the findings that the first defender was aware of the cycle path warning sign. He was looking out for cyclists. He was aware that the hedge obstructed his view, and he was driving at a speed slow enough to allow his car to stop almost immediately.

[13] Given that the particular facts and circumstances of one case are rarely, if ever, identical to another authorities are rarely of value in assessing the appropriate standard of care. In this case the first defender was aware only of the possibility of a danger and took the precautions of driving at a very low speed and keeping a lookout. In this case, as in *Lambert* v *Clayton* [2010] RTR 3, the overwhelming cause of the accident was the excessive speed at which the pursuer was cycling. The pursuer's collision investigator had explored the coincidence of the location of the pursuer's bicycle and the first defender's car. This was however the "fallacy of the coincidence of location": *Whittle* v *Bennett* [2006] EWCA Civ 1538, paragraph 24. It cannot matter to the question of breach of duty whether the collision might or might not have occurred had the motorist been going slightly slower or faster. The question is whether reasonable care had been taken by the first defender. In this case the unchallenged evidence of the pursuer's expert was that collision was inevitable, and that it would have made no difference had the first defender been driving at 5mph or at 15mph. The pursuer's contention that the first defender ought to have stopped and edged out in increments was the "counsel of perfection" as described by Phillimore LJ in *Clarke* v *Winchurch* [1969] 1 WLR 69, at page 74, reference to which is made by Laws LJ in *Ahanonu* v *South East London Bus Co* [2008] EWCA Civ 274, at paragraph [23].

[14] The pursuer mischaracterised a number of factual findings of the sheriff. Contrary to the pursuer's assertion that the first defender was emerging "blindly", the sheriff found that he was looking out for cyclists and moving forward slowly. Once he came out beyond the hedge he had a line of sight to the east. He stopped at the point of impact which was not yet at the midpoint of the cycle path. Properly characterised, the cycle path ran to the east and west of the access road, which had priority and it was a mis-expression to describe the access road as running across the line of cycle path. The collision was indeed inevitable, but

that was because of the failure of the pursuer to slow down or stop in response to the give way sign and his road position across the mid-line of the cycle path. The pursuer's expert had accepted that the first defender edging forward was a counsel of perfection and the sheriff was therefore entitled to find that there was no duty on the first defender to move forward incrementally. It cannot be said that the sheriff failed to take account of the pursuer being a cyclist on a cycle path. He found that the first defender was aware of the cycle path and the warning signs as he approached the hedge and was looking out for cyclists (paragraphs [22] and [23]). Given the evidence of the pursuer's expert there was no evidence to support a submission beyond that the driver was emerging from his access road with poor visibility. The sheriff specifically found that the first defender took the following precautions to avoid cyclists proceeding along the cycle way: he took account of the cycle track warning sign; he was looking firstly to the right then to the left for cyclists, and travelling at a sufficiently slow speed that the car could be brought to a halt "immediately". The sheriff records no criticism of the first defender's actions, his speed, or his keeping a lookout to his left for cyclists. The reckless conduct of the pursuer was in contrast to the actions of the first defender who drove at an appropriate speed in the circumstances and kept a good lookout as he emerged. There was no duty on the first defender to take any actions beyond those which he had adopted.

[15] If contrary to the defender's primary position the court found there to have been a breach of duty by the first defender under section 1 of the Law Reform (Contributory Negligence) Act 1945, the court should have regard to the causative potency and moral blameworthiness of the parties' respective actions. Taking all the factors into account if the first defender was in breach of duty a finding of 15% contribution on his part would represent an appropriate level of contribution to the accident.

Decision

[16] The starting point in an accident claim such as this is to establish whether the defender was taking reasonable care. In this appeal that boils down to answering the question whether on the facts found the first defender was taking sufficient precautions as he emerged from the access road at a speed of no more than 15mph to avoid the prospect of colliding with a cyclist using the cycle path and as such fulfilled his duty to exercise reasonable care. The answer to that question also resolves the subsidiary question as framed by the appellant: whether it would have been an exercise of unnecessary, unrealistic caution and a counsel of perfection for the first defender to have stopped and edged out at the point where he was about to cross an unmarked junction with a segregated cycle path.

[17] Some of the propositions made by the pursuer are entirely without merit. His submission failed to recognise that the sheriff concluded that the fundamental cause of the accident was the negligent and irresponsible action of the pursuer in failing to comply with the road sign and to give way. There is no substance to the suggestion by the pursuer that he was less culpable or blameworthy because he was on a leisure path designed to separate him from motor traffic and was only a danger to himself. Counsel for the pursuer was wrong to criticise the sheriff for failing to refer to what he described as a central feature of the case that the action occurred at an intersection of the national cycle path rather than at a road. The legal duty on the pursuer to take reasonable care and to comply with road signs is no less when cycling on a cycle path than on a road.

[18] There is no basis for the suggestion that the sheriff contemplated that the presence of a cyclist was not reasonably foreseeable. The sheriff found that the first defender had identified the foreseeable risk of there being a cyclist on the cycle path and accepted that the

actions of the driver in taking care against that eventuality by driving slowly at less than 15mph and keeping a lookout meant that he was not in breach of his duty of care. We do not accept the pursuer's proposition that the first defender should have edged out. That is the paradigm case of a "counsel of perfection" as described by Phillimore LJ in *Clarke* v *Winchurch* (*supra*). We also note that the sheriff records, at paragraph [112] of his judgment that had the first defender stopped at the hedge and edged out incrementally the pursuer's expert was unable to say on the balance of probability that a collision would have been avoided. It follows that we accept the respondents' submission that the appellant seeks to impose a higher standard of care on the driver than the law requires. The courts have considered similar submissions and we refer to the observations of Laws L.J. in *Ahanonu* v *South East London Bus Co* [2008] EWCA Civ 274 at para [23] cited to us:

> "The judge, … has in effect sought to impose a counsel of perfection on the bus driver Mr Votier. Such an approach I think distorts the nature of the bus driver's duty which was of course no more nor less than a duty to take reasonable care. 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."

[19] We accept therefore that the sheriff had regard to the correct test and considered whether the first defender acted with reasonable care in the circumstances. As explained by Lord Thankerton in *Muir and others* v *Glasgow Corporation* 1943 SC (HL) 3 at 8:

> "… this is essentially a jury question, and, in cases such as the present one, it is the duty of the Court to approach the question as if it were a jury, and a Court of Appeal should be slow to interfere with the conclusions of the Lord Ordinary. The Court must be careful to place itself in the position of the person charged with the duty, and to consider what he or she should have reasonably anticipated as a natural and probable consequence of neglect, and not to give undue weight to the fact that a distressing accident has happened."

The sheriff explains why he reached the view that the first defender fulfilled his duty to act with the care to be expected of a reasonably competent driver exercising reasonable care. The first defender had priority, was driving slowly given the foreseeability of cyclists on the cycle path, and materially slower than the speed at which the pursuer was cycling. The sheriff observes at paragraph [119] "On a balance of probability, the first defender was travelling at less than 15mph at the point of impact." He was looking out for cyclists in contrast to the pursuer who ignored the give way sign and was not looking out for vehicles on the access road. These factors amply justify the sheriff's assessment and do not demonstrate that the findings of the sheriff were plainly wrong. We find no error of law in the conclusion of the sheriff that decree of absolvitor be granted in favour of the defenders. We agree with the sheriff's evaluation that the accident arose from the actions of the pursuer who ignored the give way sign and proceeded at a speed where he was unable to stop at a junction where the roadway had right of way over the cycle path. This should have been apparent to him because of the warning signs which were visible and his knowledge of the cycle path, those errors being compounded by his not riding on the left side of the cycle path.

[20] *Hogan* v *Highland Regional Council* 1995 SC 1 makes clear that the sheriff should have addressed the arguments on the level of contribution to be assessed on the first defender lest he was found to have erred in his assessment of fault. We have of course upheld his assessment of that matter, but for completeness we should address the arguments we heard on contributory negligence. The pursuer before this court accepted that there was fault on his part but suggested that 70% of the liability rested with the first defender. That fails to recognise the level of blame worthiness and negligence on the part of the pursuer who on any view was significantly more culpable and caused the collision. The first defender

denied fault, but in the event that fault was established proposed a figure in his oral submission of 15% for his liability. Had we found there to have been a degree of fault on the part of the first defender we should have assessed his contribution to the accident as 15%. That is because the substantial fault lay with the appellant in his failure to observe the give way sign, the speed at which he was cycling and his position in the middle of the cycle path.

[21] We therefore refuse the appeal and adhere to the interlocutors of the sheriff. Parties were agreed that expenses should follow success and both invited the court to sanction the appeal as suitable for the employment of junior counsel. Given our findings we shall award the expenses of the appeal in favour of the defenders and respondents and sanction the employment of junior counsel in the appeal.