

OUTER HOUSE

(Lord Grieve)

11 May 1979

50. SUTHERLAND v. GARDINER

Reparation — Negligence — Driver temporarily stopping his car on bend in slip road forming obstruction to following vehicles — Obstruction avoidable by exercise of reasonable care — Whether driver of car negligent to any extent.

The driver of a motor cycle was driving on a slip road leading from one road to another road when he collided with a stationary car. The slip road was slightly downhill and curved to a driver's left as he proceeded down it. As the motor cycle rider rounded the bend he had found himself confronted by a car on his near side. The car had been reversed out of the car park across the road and stopped about four feet out from the kerb on the opposite side of the road. The car driver had stopped temporarily meaning shortly to park it elsewhere along the road. The car driver in evidence accepted that he should not have "parked" his car where he had "stopped" because in that position it was a hindrance to other road users and was an obstruction to traffic entering from the slip road. The car driver had been executing a simple manoeuvre and was doing it in a housing estate where little traffic was to be expected and only traffic from inside the housing estate had access to the slip road. He had thought that he was acting perfectly prudently and not endangering other road users.

Held, that road users cannot assume that other road users will always drive with reasonable care. The position of the car clearly presented an obstacle to a motor cyclist coming down the slip road and one which he might find it difficult to avoid as his view of his approach on the bend would be somewhat obscured. The fault lay in the car driver stopping his car where he did. For practical purposes no distinction could be drawn between the halting temporarily of a car on a bend and its being parked on a bend. Having regard to the fact that the defender's car could have been passed in safety by someone in the slip road who was keeping a proper look-out, the motor cycle driver's failure to keep such a proper look-out was the major factor which had contributed to the accident but that the car driver was 40 per cent to blame.

Charles Sutherland raised an action for reparation concluding for damages against Alexander Daniel Liddell Gardiner.

Cases referred to:

Rouse v. Squires [1973] Q.B. 889.

Waller v. Lois Levoi (1968) 112 S.J. 865.

On 11 May 1979, after proof, the Lord Ordinary (Grieve) found in favour of the defender and apportioned damages by finding the pursuer

60 per cent to blame for the accident and the defender 40 per cent.

Lord Grieve.—On the 29 July 1975, about 7.45 p.m. the pursuer, who was the owner of a Yamaha motor cycle, was on his way to his garage when he met with a serious accident, as a result of which he is now paralysed from vertebra D5 downwards. At the time of the accident he was 18½ years of age and had had his Yamaha motor cycle for 18 months. He was accustomed to ride it every day and had a provisional licence for it. For some time prior to the accident, and at the date of it, the pursuer was living with his brother Gordon in Macintosh Road, Inverness. Macintosh Road is situated in a housing estate, and there is no "through" traffic in it.

The pursuer's route to his garage was via a slip road leading to King Duncan's Road, off which his garage was situated. The pursuer was very familiar with the route which he was taking to his garage and traversed it regularly.

The slip road which leads from Macintosh Road to King Duncan's Road is slightly downhill and bends to a driver's left as he proceeds towards King Duncan's Road. There are, and were, shops on the near-side of the slip road and an island on its off-side. At the time there was a stob fence at the roadside in front of the shops and some greenery behind it.

The pursuer, who was wearing his crash helmet, said that he entered the slip road at a speed of about 25 m.p.h. and that he reduced his speed to about 20 m.p.h. as he approached the bend in the slip road. At that time he said he was about three feet out from his near-side. As he got nearer the crown of the bend he moved out towards the centre of the slip road — about five feet from his near-side or thereby — because normally there were cars parked round the corner of the bend in the vicinity of a lamp post. The clear implication of that evidence was that the pursuer wanted to be in a position to go round the off-side of any such vehicles without having to alter his own course very much, if at all. In his evidence-in-chief the pursuer said that as he came onto the bend he looked to his right to see if there were any vehicles coming into King Duncan's Road from that direction, and in his cross-examination added that seeing there were none, he was prepared to sweep round the bend without stopping. As he began to round the bend the pursuer said he found himself confronted by a car on his near-side which was reversing very slowly. At that moment he was just past the shops. The rear of the car, which was a red Rover car, was, he said, three to four feet out from the near-side kerb. Its front off-side was near the centre of the road and its rear off-side about a foot to the near-side of the centre line of the road. At that date there were no markings on the slip road. When the pursuer first saw the red Rover the pursuer said he was possibly three bicycle lengths away from it. In order to avoid it he swerved to his right. The pursuer does not remember anything after

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swerving to his right to avoid the red Rover. At the end of his evidence-in-chief the pursuer said he did not expect to find a car where the Rover was, a piece of evidence which to my mind was contradictory of his earlier evidence-in-chief, and his later evidence in cross-examination to the effect that as he approached the bend he had pulled out towards the centre of the road in order to be in a position to avoid vehicles which, as he knew, might be parked in the vicinity. In cross-examination the pursuer said that the Rover car was either stopped or reversing into his path. The car's near-side wheels were about four feet out from the kerb. According to the pursuer's evidence, both in chief and in cross, he had in mind as he approached the bend that there might be a car or cars in the vicinity of where the red Rover car was. If that was so one would have expected him to keep that possibility in mind and not to be surprised when he found the Rover parked where it was. The pursuer's evidence to which I have referred was, to my mind, equivocal and the inference which I drew from it was that as the pursuer approached the bend at the junction of the slip road with King Duncan's Road he was not keeping a proper look-out, and in particular he was not keeping a proper look-out for cars which might be parked in the vicinity of the lamp post [opposite which the accident occurred]. The action which the pursuer took, and the results that flowed from it, also suggested to me that when he first saw the red Rover the pursuer was going faster than he said he was, and faster than he should have been. Such evidence as there was relative to the pursuer's speed, supported the pursuer's assertion that he was going about 20 m.p.h. just prior to the accident, and for that reason I cannot hold that he was going any faster. If the pursuer was where he said he was as he approached the corner, e.g. some five feet out from his near-side and the Rover car was where the pursuer said it was, i.e. three to four feet out from the kerb it should have been visible to him for a distance in excess of three cycle lengths if he had been keeping a proper look-out.

As the whereabouts of the Rover car on the roadway in King Duncan's Road at the time of the accident is important for the purpose of assessing fault I now proceed to examine the other evidence relating to it. [His Lordship considered that evidence and concluded that the pursuer's version of events was correct.]

The defender in his evidence-in-chief explained that on the night of the accident he had arrived at the Observer Corps H.Q. intending to stay there for about five to 10 minutes. On arrival at the car park he saw his deputy Cowieson arriving and decided to give up his parking place to him as he knew Cowieson would be at Headquarters for most of the evening. The defender reversed out of the car park across King Duncan's Road and stopped his car about 18 inches to two feet out from the kerb on the opposite side of the road, so he says. He stayed in the car for the purpose of

parking it in King Duncan's Road after Cowieson had put his car into the car park. At this point the defender said his car was in a straight line on the road. In his cross-examination the defender insisted that his car was stopped only 18 inches to two feet out from the kerb and not three or four feet out from the kerb but he agreed with the cross-examiner that he should not have "parked" his car where he had "stopped" because in that position it was a hindrance to other road users. The defender frankly admitted that with the benefit of hindsight it would have been more satisfactory if he had not stopped his car where he did and that in doing so he had not given any thought to traffic in the slip road which might not get a clear view of his car in its stopped position. The defender accepted that had his car not been stopped where it was there would have been no accident. In so doing he accepted, as I think was inevitable, that in its stopped position his car was taking up road space so as to form an obstruction to traffic entering King Duncan's Road from the slip road, and an obstruction, which at any rate for part of the journey down the slip road, was obscured by the greenery behind the stob fence. I think this evidence suggests that the pursuer's estimate of the position of the defender's car is more likely to be correct than his own.

Having reached the conclusion that the defender's car obstructed, at least to some extent, traffic coming down the slip road into King Duncan's Road the next point to be decided is whether or not the defender was negligent in stopping his car where he did when he did. The defender was executing a very simple manoeuvre and he was doing it in a housing estate where little traffic was to be expected. Moreover only traffic from inside the housing estate was to be expected in the slip road. No main road traffic had access to Macintosh Road. The defender said that at the time he had not thought that in stopping where he did he was putting any other road user into danger. I noted him as saying "I didn't think I'd be in an unsafe position". His position was not all that different from the position he would have had to take up in King Duncan's Road if he was going into the car park but had to stop outside it in order to let oncoming traffic get past. I am prepared to accept that the defender thought at the time that he was acting perfectly prudently and was not endangering other road users. I think it very likely that many motorists would have acted just as he did and it was tragic that during the very short time the defender's car was stopped where it was that the pursuer came down the slip road on his motor cycle keeping less than a proper look-out. It is well settled however that road users cannot assume that other road users will always drive with reasonable care. Experience has shown that such is not the case. As Cairns L.J. put it in *Rouse v. Squires* at p. 894, "It is not reasonable to expect every user of the highway will use it in a reasonable manner". I have found it difficult to decide whether or not the defender in this case

was negligent in stopping his car where he did, but I have, not without some hesitation, reached the conclusion that he was. I prefer the evidence of the pursuer and the witness Kay as to the position on the road of the defender's car relative to the pavement and in that position it clearly presented an obstacle to a motor cyclist coming down the slip road and one which he might find it difficult to avoid as his view of his approach on the bend would be somewhat obscured. The fault lay, to use the defender's own words which I cannot ignore, in stopping his car in the position in which it should not have been parked because if it had been it would have been a hindrance to other road users. A similar view in somewhat similar circumstances was taken by the Court of Appeal in England in *Waller v. Lois Levoi*.

Counsel for the defender sought to draw a distinction between the halting temporarily of a car on a bend and its being parked on a bend. The defender in this case had only halted his car temporarily. For practical purposes with regard to this case I can see no reason for drawing a distinction between the two concepts. For the time it was stopped the defender's car was indistinguishable from a parked car except perhaps in the sense that the defender was in the driving seat, but that fact had no bearing on the question as to whether the car presented an obstacle to users of the slip road.

Having reached the conclusion that fault on the part of the defender has been established I have now to consider whether, and if so to what extent, that fault made a material contribution to the accident.

Once it has been decided that the defender was at fault in stopping his car where he did it seems to me impossible not to conclude that the presence of the defender's car in the position in which it was stopped made a material contribution to the accident. It was because of its presence in the roadway that the pursuer had to take action to avoid it, and it was the action which he took which resulted in the serious injuries he sustained. The pursuer swerved to his right in the direction, he said, of the gateway to the Observer Corps H.Q. car park near which he saw a white car which was Cowieson's car. The witness Davidson said that the pursuer swung out to avoid the defender's car by going between it and another car on the other side of the road which must have been Cowieson's car. Davidson also said that it appeared to him that the pursuer did not see the defender's car until it was too late, and by that he must have meant too late to avoid it in safety. The defender described the pursuer's journey to the other side of the road and in so doing said it appeared to him that the pursuer had gone onto the grass verge and pavement on the opposite side of King Duncan's Road by which time he had lost control of his motor cycle. There was some evidence that the pursuer had collided with one of the gate posts at the entrance to the Observer Corps car park there being a white mark on it and without considering the

evidence in detail it would appear that the loss of control of his motor cycle suffered by the pursuer had at any rate in part been occasioned by the speed at which he was approaching the corner of the slip road and King Duncan's Road. The pursuer maintained that he was keeping a proper look-out but I have already given my reasons for concluding that he was not, and the evidence of Sergeant Cameron supported the view which I hold, namely that had he been keeping a proper look-out he would have been able to see the defender's car in time to pass it on its off-side in safety. I think that at what proved to be the critical time the pursuer's attention was on possible traffic in King Duncan's Road if it was on anything at all. Having regard to the fact that in my opinion the defender's car could have been passed in safety by someone in the slip road who was keeping a proper look-out and travelling at the speed at which the pursuer said he was I consider that the pursuer's failure to keep such a look-out was the major factor which contributed to the accident. I have not found it easy to assess the respective contributions of the pursuer and the defender to the accident. After much thought I have reached the conclusion that justice will be done by finding the defender 40 per cent to blame and the pursuer 60 per cent.

Counsel for Pursuer, Hope, Q.C., Targowski; Solicitors, Miller, Thomson & Robertson, W.S. (for Munro and Noble, Inverness). — Counsel for Defenders, MacLean, Q.C., Macgregor; Solicitors, Russell and Dunlop, W.S. (for Davidson Scott & Co., Inverness).

D. A. S.

OUTER HOUSE

(Lord Wylie)

2 December 1980

51.

SLOAN v. BRITISH RAILWAYS BOARD

Reparation — Negligence — Master and servant — Exposure to noise — Knowledge by employer of risk.

A railway's employee who had qualified as a driver of diesel locomotives in 1966 and who had thereafter driven diesel locomotives suffered hearing loss. The hearing loss was a fairly severe neuro-sensory type deafness involving both ears. The noise which was held to have caused the deafness was noise experienced while driving locomotives. The evidence established that the employee had been

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