SHERIFF APPEAL COURT

[2021] SAC (Civ) 17
PIC-PN2982-17

Sheriff Principal M M Stephen QC
Appeal Sheriff S Murphy QC
Appeal Sheriff N McFadyen

OPINION OF THE COURT

delivered by APPEAL SHERIFF N McFADYEN

in appeal by

DANIELLE WEDDLE

Appellant

in the cause

DANIELLE WEDDLE

Pursuer and Appellant

against

GLASGOW CITY COUNCIL

Defender and Respondent

Appellant: Ms Bain QC, Ms Wray, Advocate; Bonnar Accident Law Ltd
Respondent: Smith QC, MacDougall, Solicitor Advocate; Berrymans Lace Mawer LLP

7 June 2021

Introduction

[1] In a case where the pursuer, who was a pedestrian standing on the pavement at a junction, witnessed the later stages of a road accident, in which a heavy vehicle pushed a car across the road from the opposite side of the junction and collided with a building on her side, where the resultant position of the vehicle which was closer to her was approximately

12 metres to her east and she herself was not exposed to actual danger of physical injury, but thereafter saw the shocking effects of what in fact had been a multiple fatality incident and developed very severe psychological and psychiatric consequences, was the sheriff in error in concluding that she did not suffer fear of physical injury to herself and, if so, was her fear a reasonable one?

[2] The appellant, who was the pursuer in an action raised in the All-Scotland Sheriff Personal Injury Court, sought damages against Glasgow City Council for psychological and psychiatric problems which she attributed at least in part to her witnessing the later stages of a tragic and notorious bin lorry accident in the centre of Glasgow. She accepted that she could only succeed in her claim if she qualified as a primary victim, that is, if she proved that she did in fact fear personal injury to herself during the accident and that fear was a reasonable one.

[3] In particular, it was accepted, as a matter of law, that generally a pursuer who has not been injured physically as a result of an accident but has suffered mental harm in the form of a recognised psychological or psychiatric condition can only recover damages against the person at fault in the accident (or their employer) where she was a primary victim who was directly involved in the accident. That direct involvement can arise by actual exposure to danger of physical injury, where no physical injury followed, but it can also arise through witnessing an accident at close hand and suffering fear of physical injury to oneself, if that fear was a reasonable one: *Campbell* v *North Lanarkshire Council* 2000 SCLR 373, 381 per Lord Reed, applying *White* v *Chief Constable of South Yorkshire Police* [1999] 2 AC 455, in particular per Lord Steyn, at 496-500 (the Hillsborough Disaster). See also *Dulieu* v *White & Sons* [1901] 2 KB 669, 671-674 and *Bourhill* v *Young* [1943] AC 92, 104, 107

and 108. The test for foreseeable injury includes a situation where a person reasonably believed he or she was exposed to danger.

[4] However, persons who are witnesses or bystanders and who did not have a reasonable fear of physical injury to themselves, but suffer mental harm are what are termed secondary victims and they are not entitled to recover damages, unless they satisfy additional criteria, such as having witnessed at close hand the death of a close family member (*Alcock* v *Chief Constable of South Yorkshire Police* [1992] 1 AC 310, also a Hillsborough Disaster case). It was not suggested in this case that the appellant qualified as a secondary victim.

Undisputed facts

[5] The respondent's driver had, during the afternoon of 22 December 2014, apparently because of unconsciousness arising from a medical emergency, lost control of a bin lorry, mounting the pavement while driving northwards in Queen Street, Glasgow, a one-way street, into George Square, running down a number of pedestrians, of whom six died and colliding with street furniture in Queen Street, eventually re-entering the carriageway, while still out of control, on the west side of George Square, also a northwards one-way street driving at 19 mph, and, now heading in a more north easterly (rightwards) direction, colliding with three vehicles which were at or before the junction of George Square and West George Street and thereafter, while now travelling at 5 mph, crossing the junction with West George Street and the north side of George Square in a diagonal north-eastwards direction, while pushing one of those vehicles, a silver Skoda private hire taxi ("the Skoda taxi") and striking and coming to a halt against the Millennium Hotel on the north side of George Square, with the resultant position of the taxi being to the west of the lorry and in

the out-lane for the then vehicle/taxi drop-off and pick-up area ("the vehicle access area") of Queen Street Station.

[6] The appellant, whose home was in France, but whose family was from Scotland and who had been studying at Stirling University and staying in Glasgow, had been visiting Edinburgh and arrived back at Queen Street Station by train, intending to walk south and ultimately westwards towards Jamaica Street to catch a bus. She emerged from Queen Street station by way of the staircase which then led from the concourse to George Square and was located to the west of the then vehicle access area and she took up a position at the pedestrian crossing on the north side of the junction with West George Street, intending to cross that street and then proceed directly southwards along the west side of George Square and Queen Street. She stood to her left (east) of the traffic light control button as she waited for the lights to change. She had her mobile phone in her hand and was composing a text message to a friend.

[7] She observed the last part of the accident, at least to some extent, including the bin lorry and Skoda taxi traversing the junction and the collision with the hotel. The direction of travel of the vehicles - somewhat north-easterly on the part of the bin lorry and more northwards on the part of the Skoda taxi - meant that neither vehicle came straight towards her at any point. She waited where she was for a few moments and then walked southwards, as she had intended; her route unwittingly took her past distressing scenes, including dead bodies, which at first left her confused as to what had happened.

[8] The resultant position of the Skoda taxi, which was the closer of the two vehicles to her and was pushed more or less northerly by the impact with the bin lorry, was 12 metres to her left and east. She was not at actual risk of physical harm where she was positioned at the pedestrian crossing.

[9] She felt panicked and tried to telephone her mother in France, but failed to get her and then telephoned her father, who was also in France. She was extremely distressed and told him that something terrible had happened; she was not hurt but there had been a horrible accident. Her father arranged for her mother to call her and she told her to go to hospital, but she wanted to go home, although she was persuaded to go to a pharmacy. She got her bus in Jamaica Street and went to Cardonald where she visited a pharmacy. She was crying and trembling and clearly needed help. She told the assistant there that she had seen an accident and had then got on a bus; she said that a girl had been knocked down and she had been very close to it. The pharmacy assistant arranged for her to see a doctor from a local practice. She was distraught and was given diazepam. The doctor was concerned about her and called her that night.

[10] She returned to her parents' home in France a day or so later and went for a walk in a forest with her father and told him how she felt. When she returned to Scotland she suffered significant psychological symptoms and was referred by her general practitioner for counselling and was diagnosed as suffering Post-Traumatic Stress Disorder ("PTSD"). During counselling she did not mention that she had been in fear of her safety at the time of the accident. After some alleviation her symptoms returned and she was unable to attend University. Ultimately she moved to Manchester. She was seen by Dr Fraser Morrison, a consultant clinical psychologist, on 30 November 2017, very shortly before the action was warranted, for the purpose of preparing a psychological report. She gave him a very detailed description of what she said had happened and what she had witnessed, including the disturbing things she saw as she walked southwards after the incident. She did not mention seeing vehicles coming towards her or being in fear for her own safety.

[11] She saw Dr Morrison again on 9 January 2019 (a little over a month before the proof) and told him that, when she had later considered the accident, she recalled being extremely worried that one of the vehicles would strike her and she would be either seriously injured or killed.

[12] As at the time of the proof in February 2019 she continued to suffer significant psychological symptoms.

[13] None of that was in dispute at the proof or before us, although the appellant took issue with the sheriff's failure to find further facts established. The sheriff's conclusions and calculations as to quantum of damages (if recoverable) are accepted.

The factual dispute

[14] What was and is in dispute was how much of the later stages of the accident the appellant saw, whether she was in fact in fear of physical injury and whether that fear was a reasonable one. In the consideration of those questions the sheriff was assisted by the evidence of the appellant, the evidence of persons to whom she had recounted the events and real evidence, in the form of measurements and scale plans of the aftermath of the accident, forming part of a police collision investigation report ("the collision report") and CCTV recordings from various fixed cameras and, in particular, a camera located within the Camperdown Public House at the street level in West George Street, near to the junction with the north and west side of George Square.

The appellant's evidence

[15] The sheriff set out the appellant's evidence as to what happened in some detail, in particular at paras [261] to [296] of his judgment, although he also analysed her evidence

alongside evidence of what she had said to others. Her evidence at proof was that, while she was standing at the pavement at the pedestrian crossing and was texting a friend in Edinburgh, she heard a really loud bang and looked up, to see the bin lorry pushing the Skoda taxi forward and thought "oh my goodness, what is going on?" She stated that she felt really scared and did not know if the taxi or bin lorry was going to hit her (at para [262]). The taxi smacked into a pillar. It took a few seconds (at [263]). After the vehicles came to rest, she felt in shock. The passenger and driver got out of the taxi. She thought "he has not hit me". She was really scared. She just wanted to get away from the situation.

[16] She walked forward across the crossing and as she headed south she saw a scraped car and a family with kids hugging each other, but could not relate that to what she had just seen. As she got to the crossing at the bottom of George Square (junction with St Vincent Place) she saw the first body, of a girl on the ground. It was outside a public house and she thought at first she might be drunk. A guy kept trying to pick her up and then she realised the girl was dead. She heard a guy talking on the phone about lots of dead people and she wanted to get away (at [264]). She saw another body, apparently on Queen Street, and turned back to head towards Buchanan Street (via St Vincent Place) (at [265]).

[17] She estimated the position of the bin lorry when she first saw the accident with the Skoda taxi as about one third of the way into George Square from the north (at [268]) and confirmed that by reference to a police scale plan (part of the collision report) which is an appendix to the judgment, on which she had marked as at number "2" the location of the bin lorry when she had first seen it. It was pushing the Skoda taxi forward. The taxi then hit the pillar (it would seem at the exit from the vehicle access area of the station) and the lorry hit the Millennium hotel. The taxi was only a few metres away from her. On the same scale plan, she identified with the number "3" where she had seen the bin lorry and taxi together

(a point to the north of point number "2" on the scale plan) (at [269]). The lorry was going very fast when she first saw it (at [277]).

[18] The reason why she had not mentioned feeling "fear" on a number of occasions was because of her inability to focus on (or discuss) what she had really felt at the time (ie fear that she was going to be struck by the bin lorry or the Skoda taxi) and was because she had been suffering "survivor's guilt" (at [215]).

[19] The appellant accepted, in cross-examination, by reference to images from a camera positioned on the east side of Queen Street looking northwards to George Square, that the bin lorry was moving to the right (ie to the north east) as it crossed the junction and it was not going straight ahead (at [285]). Although it felt to her like the bin lorry was driving directly towards her, she accepted that it was not in fact going directly towards her. It was put to her that the Skoda taxi had not at any time been coming towards her and she said "In my head it was. It had no control. I thought it was going to come towards me" (at [286]).

[20] It was put to her that the bin lorry was pointing away from her across the junction and that it was about six car lengths away. She disagreed and said that the video showed a bad angle and that it was nowhere near as far as that (at [288]). It was put to her that it was clear that the Skoda taxi was going straight ahead and was not moving towards her, but she replied "Maybe not. That's what I remember. Looking at the position it looks pretty bad. From where I was standing you would think it was coming towards you". She said that the taxi "…would have gone into me; on this it looks stretched out, it looks further than it is" (at [289]). She was unable to explain why she then crossed the road and walked straight down in the direction from which the bin lorry had come, other than that had been her intended direction and "why would I keep walking (in that direction) unless I was not

thinking rationally?" (at [292]). She considered that most of her symptoms were "due to being terrified when it was coming towards me" (at [294]).

[21] In re-examination she said that the views on the CCTV from the public house did not properly represent the distances because of the angle. The distances looked a lot longer than they actually were (at [295]).

[22] Other than her evidence and reports of what the appellant recounted to others, the only evidence available to the sheriff as to what happened on the day came from the collision report, CCTV and still photographic footage, which were all agreed by joint minute, and certain distances - 40m between where the appellant said she was standing and first saw the bin lorry and 32m between where she said she was standing and first saw the Skoda taxi hit by the bin lorry (our emphases); and the final stationery position of the taxi, approximately 12m or 39 feet from where she was standing (also agreed by joint minute).

[23] The collision report noted that the bin lorry struck a number of pedestrians on the west footway of Queen Street. It also struck a black metal bin with a metal insert, which was located on the west footway of Queen Street, when it mounted the footway. The vehicle pushed the bin and insert north across the footway and continued north on the west footway of Queen Street, damaging building and street furniture including at the Virgin Money premises and itself sustaining damage and striking further pedestrians, re-joining the carriageway and travelling north on the west side of George Square (a continuation of Queen Street). The bin lorry was travelling at 22 mph at 14:29:35 (as recorded on the vehicle GPS system) as it passed Virgin Money in Queen Street, at 19 mph at 14:29:44 while travelling north on George Square and at 5 mph at 14:30:01 while travelling northeast at approximately the junction with West George Street and the north side of George Square, before coming to a halt against the Millennium Hotel. The bin lorry struck three vehicles -

the Skoda taxi, a black Nissan Juke motor car and a silver Mitsubishi Lancer motor car at the junction of George Square and West George Street. The front offside cab of the vehicle struck the wall of the building of the Millennium Hotel, damaging metal window frames and smashing panes of glass. Corresponding damage was created on the cab of the vehicle. The Skoda taxi was extensively damaged. The black Nissan Juke motor car was extensively damaged to the nearside and the silver Mistubishi Lancer was extensively damaged to the offside.

[24] The three vehicles appear to have been struck while stationary at the junction on the west side of George Square.

[25] Reports of what the appellant said to others are addressed further in the context of submissions and in our decision.

The legal context of the appeal

[26] Just as there was no dispute as to the substantive law on liability, there was no real dispute as to the law with regard to the powers of an appellate court to review the decision of a court at first instance. The circumstances in which an appellate court were entitled to review a judge's decision on findings in fact have been considered relatively recently in the Inner House in *AW* v *Greater Glasgow Health Board* [2017] CSIH 58, at [38]-[39], [41]-[42], [46] and [48]-[52], per Lord Justice Clerk Dorrian and in *Allen Woodhouse* v *Lochs and Glens (Transport) Ltd* 2020 SLT 1203, at [31]-[33], per Lord President Carloway.

[27] Where the decision of the court at first instance on the facts has been based on determinations on credibility or reliability, in order to review that decision,"the appellate court must be satisfied that the findings of the [court] were 'plainly wrong'" meaning that the first instance court:

> "reached a decision which no reasonable judge could have reached (*Henderson* v *Foxworth Investments Ltd* Lord Reed at 2014 S.C. (U.K.S.C.), p.219; 2014 S.L.T., p.784, para. 62). This in turn is explained as meaning that the decision cannot reasonably be explained or justified (ibid p.220 (p.785) para 67)" (*Allen Woodhouse*, at [31]).

As Lord Reed put the matter concisely in *Henderson* (at para [67]):

> "in the absence of some other identifiable error, such as (without attempting an exhaustive account) a material error of law, or the making of a critical finding of fact which has no basis in the evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

[28] That is the context in which the disputed facts in the case must be considered.

Appellant's submissions

[29] In her oral submissions, elaborating on a detailed revised note of argument, itself supplemented by an even more detailed appendix, the appellant challenged the sheriff's findings in fact at paras [23], [24], [29], [32], [34] and [49][1]. These findings are challenged on the basis that they cannot be reasonably explained or justified by the evidence.

[30] It is necessary to set out the challenged findings in fact in full:

> "[23] Prior to the collision between the bin lorry and the silver taxi, the pursuer was looking at her phone. When the bin lorry collided with the taxi, there was a loud bang. The pursuer looked up. At that stage, the bin lorry was about 40m away from her. Both vehicles moved forward to a position about 32m away from her. The pursuer quickly looked back at her phone and immediately back across to her left towards the bin lorry and silver taxi. The bin lorry travelled roughly north east. The silver taxi travelled in more or less a straight line from its starting position. It ended up about 12m from where she was standing. At no stage was either the bin lorry or silver taxi coming directly towards the pursuer. At no stage was she at risk of being

[1] The findings in fact and the finding in fact and in law (at [377]) are incorporated in the body of the judgment and not numbered differently from the consecutive numbering of paragraphs of the judgment, which does not take the normal and preferred form of "(a) an interlocutor giving effect to the sheriff's decision and incorporating findings in fact and law; and (b) a note stating briefly the grounds of his or her decision, including the reasons for his or her decision on any questions of fact or law or of admissibility of evidence" (OCR Rule 12.4(2); *Macphail on Sheriff Court Practice*, 3rd edition, ch 17; and *MN* v *ON* [2019] SAC (Civ) 35, 2019 Fam LR 140, at para [4]).

struck by either vehicle. The pursuer showed no physical reaction to what she had seen occur.

[24] The pursuer saw the passenger and driver get out of the taxi. She thought it was just a road accident and that everyone was okay. The collision had caught the attention of other pedestrians in the vicinity and patrons in the Camperdown Pub, some of whom looked over. Pedestrians continued to walk east along the north pavement towards the position of the bin lorry and silver taxi.

[29] The pursuer then tried to telephone her mum. When she could not reach her, she called her dad. Her dad asked what was happening and she tried to explain. She tried to tell him what had happened. She tried to be coherent. She was crying a lot. She thought he understood. Mr Weddle's impression when he spoke to the pursuer was that she was suffering extreme distress. She told him 'something horrible had happened'. She was almost incoherent. He wanted to know if she was physically unhurt and she confirmed that she was not hurt but said 'there has been a horrible accident'. He told her to call her mum.

[32] She was taken into a private room [by the pharmacy assistant, Mrs Wade] and given some water. She said that she had seen an accident and had then got on a bus. She did not know how she had got to the pharmacy. She told Mrs Wade a girl had been knocked down; she had been very close to it; and she had left the scene quickly to get on a bus.

[34] A day or so later, the pursuer went home to her parents' house in France as planned. While there, she was agitated and emotional. She suffered nightmares. She went for a walk with her father in a local forest and told him how she felt.

[49] In June 2018, the pursuer was seen by Dr Jacqueline Scott, Consultant Psychiatrist for the purposes of a medico-legal report commissioned by the defender. The pursuer did not say to Dr Scott that she had been in fear for her own safety at the point when the collision between the bin lorry and taxi occurred."

[31] Finding in fact at para [23] is the central finding in fact in the case and was attacked on the basis that the sheriff did not have full regard to the available evidence and in particular the appellant's evidence at proof as to what she could and did see and hear and how she reacted to that. It was suggested that the CCTV evidence was to some extent consistent with her evidence but was not an accurate depiction of the proximity of events. Finding in fact at [24] relates to the immediate aftermath of the collision at the hotel and the

sheriff's finding is again attacked on the basis that it does not properly reflect her evidence at the proof, including her account of fear and terror.

[32] Finding in fact at [29] is attacked essentially as incomplete, because the sheriff has failed to find the whole of the appellant's conversation with her father established and to treat it as supporting her account that she was in fear for her own safety. In his evidence he had described her as being in a "state of extreme distress… shock, fear panic" (Appendix, p 195, lines 8-14) and she had told her father that (as she was speaking to him) "I have to get to a place of safety. I have to get away" (Appendix, p 196 lines 16-18).

[33] Finding in fact at [32] is similarly challenged as not having recorded the full significance of Mrs Wade's evidence, in particular as to her being scared for her own safety, as set out more fully by the sheriff at [89]

> "'The pursuer was not making sense. She was very shaky, crying and a terrible colour. She didn't know where she was'; 'She said she had seen an accident'; 'She did not know how she'd got to the pharmacy'; 'I got the impression she was in fear for herself and that she had been very close to the scene and had left quickly'; 'It was as if she was worried for her own safety'".

[34] Finding in fact at [34] is attacked as failing to record all of the appellant's evidence about what she said on the occasion of the walk in the forest. She did not just say how she felt; she told her father about the accident and how she felt at the time. Reference was made to the appellant's evidence (at pp 98-99 of the Appendix).

[35] Finding in fact at [49] is attacked on the grounds that there was no basis for the sheriff to make it on the evidence. Dr Scott did not give evidence and her report was not agreed. However her report referred to a statement from the appellant which pre-dated her report and in this the appellant had expressed a sense of personal fear of injury. The sheriff refused to allow the appellant to be re-examined on the issue of the statement and what in

fact the appellant discussed with Dr Scott and directed that the matter should only be the subject of examination for Dr Scott (Appendix, pp 183-185).

[36] The appellant also attacked inferences drawn by the sheriff as to evidence.

[37] It was complained that the sheriff had approached the evidence of the appellant's father in far too restrictive a manner and failed to accept that his evidence as to her emotional state was referable to the collision and the aftermath; his evidence was consistent with her being in fear at the time she witnessed the collision. That was also consistent with the evidence of Dr Morrison. The sheriff unreasonably rejected her father's evidence that she had used the phrase "survivor's guilt", which was consistent with her evidence and that of Dr Morrison. Her father and Mrs Wade, the pharmacy assistant had described the appellant expressing fear for own safety and the sheriff wrongly held that they were not able properly to distinguish fear from other emotional reactions, such as anxiety and shock.

[38] Dr Morrison gave an explanation as to why the appellant may not have mentioned fear during his first examination and why, because of her extreme distress, he limited his questioning. She was very traumatised and her symptoms were towards the top end of the spectrum for PTSD. He was not surprised that she did not mention all the details, because most likely this would have triggered symptoms of guilt. In considering the appellant's evidence the sheriff had ignored Dr Morrison's evidence as to the reason why she did not express fear in his first consultation. The sheriff was wrong in holding that the addition of fear or terror attributable to the collision would involve not a simple addition to the first account given to Dr Morrison but a complete re-writing of it. Dr Morrison did not consider that her failure to mention these things undermined her account, but rather it explained the development of her symptoms. The sheriff was wrong in holding that the appellant's first account to Dr Morrison fitted better with other evidence, especially the CCTV, because it

was inconsistent with her reports to her father and Mrs Wade. The CCTV did not show the appellant other than from behind.

[39] The sheriff failed to understand that the appellant first saw the bin lorry at a point where it had not yet struck the Skoda taxi and failed to appreciate the significance of numbers 2 and 3 marked by her on the plan - respectively as to where the bin lorry was when she first saw it and where she saw the bin lorry and taxi together. The sheriff placed undue reliance on the CCTV footage which did not show matters clearly and the appellant had given uncontradicted evidence that it did not properly reflect distances because of the angle. It was clear that the appellant looked up before 14.29.45 (on the public house CCTV recording), because of her ability to mark positions on the plan where the bin lorry would have been further back than it was at 14.29.45. The sheriff was wrong in his assessment of where the appellant stated the bin lorry was when she first looked up.

[40] In his findings at paras [333], [336] and [338] of his judgment the sheriff misdirected himself in law and applied an erroneous and far too high a test to the question of reasonable belief. The accident was a very significant one. The appellant was within the proximity of two motor vehicles (one an HGV) both travelling at speed and out of control. The appellant genuinely believed she was at risk of physical injury. She saw the bin lorry travel out of control down past George Square and towards where she was standing. The bin lorry struck and propelled a silver taxi. Both of the vehicles were now out of control and were travelling towards where she stood. She did not demonstrate physical response because she was in fear, and in any event her image was from behind. The vehicles both ended up near to her.

[41] The sheriff failed to appreciate the significance of the size of the vehicles and the consequence of their not being under the control of a driver. The sheriff did not approach

the issue on the balance of probabilities and did not apply his mind to what reasonable belief means. The issue for the sheriff was whether what the appellant concluded was, on the balance of probabilities, reasonable or whether this was quite wrong and her conclusion warranted being characterised as irrational. The sheriff did not direct his mind to this issue. Instead he took an extremely restrictive approach to the evidence and applied an erroneous and far too high a test to the question of the appellant's reasonable belief.

[42] The manner in which the sheriff approached the evidence of the appellant in relation to her reaction to events, the CCTV evidence, the evidence of Mr Weddle, Mrs Wade, Dr Morrison and Dr Scott was erroneous: *Allen Woodhouse* v *Lochs & Glens (Transport)* Ltd at [31]-[33]. The test the sheriff should have applied is described in *Campbell* v *North Lanarkshire Council* at page 376; *Dulieu* v *White & Sons* at pp 671-674 and *Bourhill* v *Young* at pp 104, 107 and 108. The test for the range of foreseeable injury included objective situations and also situations where a person could reasonably believe he/she is in danger. The level of exposure to possible danger does not require to amount to a person requiring to fling themselves out of the path of a vehicle careering out of control.

[43] Had the sheriff approached the evidence in the case correctly and applied the correct test, by considering the question of reasonable belief from the perspective of the appellant, he should have found that the appellant had established her case on the balance of probabilities. Accordingly the sheriff erred in holding that the appellant did not in fact suffer fear of physical injury to herself at the relevant time. The appellant's first ground of appeal should accordingly be sustained and decree should be awarded in her favour.

[44] The sheriff had incorrectly analysed the evidence in relation to the appellant's reaction to events and the evidence of the CCTV and other witnesses. The evidence demonstrated that she was a primary victim, who honestly believed that she was exposed to

the danger of physical injury and reasonably believed she was in fear for her own safety; as such she fell within the range of foreseeable physical injury and was an individual to whom the respondent owed a duty of care. In addition to the authorities already mentioned, we were referred to *McFarlane* v *EE Caledonia Ltd* [1994] 2 All ER 1, itself referred to by Lord Reed in *Campbell* at 381F on the question of situations in which a pursuer could reasonably believe he was exposed to danger.

[45] Having regard to the sheriff's errors in his approach to the evidence in this case and the guidance provided by the Inner House in the case of *Allen Woodhouse*, it was submitted that the court should be satisfied that the findings of the sheriff in relation to the question of whether the evidence did not support the appellant's case on record and whether the defender's employee, Mr Clarke, would not have reasonably foreseen that his driving at the relevant time would have given risk of physical injury to the appellant were "plainly wrong", that he had "reached a decision which no reasonable judge could have reached" and that his decision "cannot reasonably be explained or justified" and the appellant's grounds of appeal 2 and 3 should be accordingly be sustained and decree granted in favour of the appellant.

[46] Further ground of appeal 4 related to the sheriff's approach to the evidence of the appellant's father which, applying *Allen Woodhouse*, should have been held to provide support for the appellant's account of events including her stated fear at the time of the accident, her explanation of the accident the first time she explained to her father what had happened and her explanation of feeling a sense of survivor's guilt. Ground of appeal 5 made similar points as regards the evidence of Mrs Wade, the pharmacy assistant and ground of appeal 6 likewise addressed the sheriff's approach to the evidence of Dr Morrison whose evidence should have been treated as supporting the appellant.

Respondent's submissions

[47] In concise written and oral submissions it was argued that the appellant had failed to meet the test required to allow an appellate court to interfere with the sheriff's findings. The appeal was not properly about errors of law, but rather challenges findings in fact by the sheriff. His findings (supported by the CCTV, and agreement on the plan drawing) indicate that the lorry was moving "laterally" east, towards the pavement at the western edge of George Square, ie in a direction diagonally across the junction, and although generally towards the appellant, moving also from her right to left and the vehicles were both travelling at about 5 mph at the point just after they collided. The sheriff reached a conclusion to the effect that the bin lorry was moving away from the appellant - as it clearly was: neither vehicle was moving towards her. Many of the appellant's attacks on findings by the sheriff were actually attacks on his descriptions of evidence or of his reasoning rather than his findings in fact.

[48] In addition to authorities already mentioned we were referred to *McGraddie* v *McGraddie* [2013] UKSC 58, 2014 SC (UKSC) 12, at [3], per Lord Reed, citing the US Supreme Court in *Anderson* v *City of Bessemer* 470 US 564 (1985); 84 L Ed 2d 518; 105 S Ct 1504, as regards the rationale for deference to the original finder of fact. We were also referred to *Henderson* v *Foxworth*, at [67].

[49] There was no clearly identifiable error on the part of the sheriff. It did not in any event follow that if the sheriff was in error the appellant should succeed, although he had given good reason for every point as to why he rejected the appellant's evidence. It was absolutely clear that the appellant was not, even at the point of collision between the bin lorry and the Skoda taxi, in a position of danger: she was not in the zone of danger or

anything of that kind. It was accepted that fear of injury only had to be a material contributor to the outcome, but as was held in *Campbell*, at 376D, the psychiatric injury must arise from a reasonable fear for one's own safety. The reasonableness must be objectively justified. The lorry was not sufficiently proximate at the time she was aware of it; the sheriff concludes that was pretty well at the point of collision with the taxi, but he was entitled to make findings to that effect. The bin lorry may have been out of control, but it was heading away from her. The sheriff was entitled to place emphasis on the CCTV recording, but he also had the scale plans and the collision report. The appellant's initial account to Dr Morrison fitted in precisely with the sheriff's understanding of what he could view taking place on the CCTV and he properly explained why he rejected the opinion of Dr Morrison as regards why the appellant had not mentioned fear for her safety at his first examination. He was equally entitled to approach the evidence of Mrs Wade as he did and to rely on what the appellant had said to Dr Scott. It had been complained that the respondent had not called Dr Scott, but the decision not to call her was taken after the appellant made the concession that she had not mentioned to Dr Scott that she was terrified.

[50] We were referred to *Piglowska* v *Piglowski* [1999] 1 WLR 1360, 1372, per Lord Hoffman, as regards the danger of analysing too finely the language of a judgment. To the extent that it was suggested that the sheriff did not record all of the appellant's evidence there was no warrant in saying that he did not take it into account. He cannot be expected to narrate every nuance, or impression from the fact finding.

[51] There was no error of fact or in law which would entitle the court to interfere with the sheriff's decision. Indeed, such was the preponderance of evidence that had the sheriff found in favour of the appellant, an appeal by the respondent may well have met the test for

interference with the judgment of the primary fact finder. The court should refuse the appeal and reserve expenses.

Discussion and decision

[52] At our request, and with the agreement of parties, the hearing of the appeal commenced with the playing of CCTV recordings in particular from Queen Street looking northwards and from George Square, including the recording from the Camperdown Public House. The public house was immediately adjacent and southwards to the station concourse and to the west of the pedestrian exit from the station and the camera there afforded a view of the junction, including the pedestrian crossing and the resultant position of the vehicles. The camera was some way behind the appellant and did not show her face; but other than when momentarily obscured by other pedestrians it did show how and where she was standing and showed movements of her head and body, albeit from behind.

[53] It seems to us that a major problem for the appellant at proof was that the CCTV recording appeared to show her still absorbed with her telephone as the bin lorry entered the junction, turning her head towards the area of the ongoing accident at a stage where it appeared she was at no immediate risk, turning her head back to her phone, and then immediately back towards the vehicles; and even after the lorry and taxi came to a halt she did not show any physical reaction to what had happened (finding in fact at [23]). Although the sheriff accepted her evidence that she was aware of the bin lorry some way further back on its northward course on the west side of George Square, as marked by her at point "2" on the scale plan, that is not at all obvious from her appearance on the CCTV recording and if she did, as the sheriff has accepted, have an awareness of the bin lorry at that point it was plainly not such as to hold her attention. Indeed, it seems clear from his discussion (at [307])

that he did not accept, on the basis of the CCTV footage, that the appellant showed any awareness of what was happening until the bin lorry collided with the Skoda taxi:

> "It is clear from the CCTV footage taken from the Camperdown Pub that the pursuer only looked up when the bin lorry collided with the taxi - no doubt in response to the noise: see footage timed at 29:35:47."

[54] The collision report did not deal with precise timings in relation to the overall incident, from the point when the bin lorry mounted the pavement until it struck the Millennium Hotel. Although the incident is largely recorded on various CCTV cameras, they are clearly not time co-ordinated or corrected, with themselves or the bin lorry's GPS, but, from the relevant CCTV recording camera at the Camperdown Public House, the time between the bin lorry coming clearly into view of that camera, pushing the Skoda taxi slowly into the junction (14:29:42 on the recording, judgment at [278])) and it striking the Millennium Hotel (at 14:29:48 on the recording, judgment at [278]) is 6 seconds, during which it is seen crossing north easterly (at [309]).

[55] The bin lorry's GPS recorded a speed of 5 mph at George Square at West George Street, the vehicle having been driving at 19 mph as it proceeded northwards on the west side of George Square. The report does not make clear why the speed of the vehicle reduced, although it had of course been in collision with the three other vehicles and was pushing one of them, which it may be assumed had at least some retarding effect, but at any rate it was proceeding relatively slowly when it traversed the junction, pushing the silver Skoda taxi until it struck the hotel. Five mph is a brisk walking pace and is by no means "very fast", as described by the appellant in her evidence.

[56] The appellant argued that the sheriff had not given sufficient weight to or had misinterpreted the evidence of the appellant. Much of this submission was directed to her evidence that she thought at the time that the vehicles were heading towards her out of

control. That evidence is rehearsed in great detail, and the sheriff has acknowledged that that was her clear position in evidence; but it is at odds with the real evidence, including the evidence of the direction of the comparatively slowly travelling vehicles (the bin lorry and the Skoda taxi) and the evidence of the appellant's reactions and behaviour as we have just described. While terrible things had happened in Queen Street and the west side of George Square - and she came to see the aftermath of these things - the appellant did not witness them happening.

[57] The appellant criticises the sheriff for finding that the appellant: "saw the passenger and driver get out of the taxi. She thought it was just a road accident and that everyone was okay" (finding in fact, at [24]), on the basis that she was in shock and unable to process what she had seen and that it was not what she said in court, but that involves a somewhat circular reasoning which requires all evidence to be seen and only seen through the prism of her evidence to the court as to what happened and previous accounts which are consistent (and only those that are consistent) with that evidence. The sheriff's finding accords entirely with the account given by the appellant to Dr Morrison, shortly before the action was warranted[2]:

> "Ms Weddle told me that following the collision a number of men got out of both vehicles and she assumed that this was a road accident and that all parties were okay" (noted by the sheriff at paras [221] and [232]).

We shall return to consider Dr Morrison's evidence in more detail.

[58] The appellant criticises the sheriff's failure to find the whole content of her father's conversations with her established and to give them appropriate significance; her father's account in particular of the conversation in the forest supported the appellant's account of

[2] The report was instructed on 21 November 2017 and dated 7 December 2017; the present action was warranted on 5 December 2017

being in fear for her own safety. It was complained that he also failed to find the whole of Mrs Wade, the pharmacy assistant's evidence about her interaction with the appellant established. It was argued that her evidence was also of greater significance than that recorded by the sheriff.

[59] The sheriff has explained his reservations as to the father's evidence, which are not about his credibility or reliability, but essentially his qualification to distinguish fear from other emotions, such as shock and panic and the sheriff has carefully explained his approach to that, at para [195] where he concludes: "Mr Weddle formed the impression that the pursuer was suffering 'extreme distress'. But that could be a manifestation of 'horror' rather than 'terror'". We do not accept the criticism of the sheriff's treatment of the father's evidence and indeed what was submitted to us (at para [32] above) is not a full rendering of his evidence as regards shock fear and panic. What he actually said about that was: "she was in a state of extreme, I had the impression it was extreme shock, um, shock, panic, fear, I don't really know. But she was also incoherent…." (Appendix, p 195 lines 8-11).

[60] We would add that there is no doubt that the appellant was greatly distressed after she had viewed the horrific aftermath of the accident - the question was when that distress first arose and what caused it. We agree with the sheriff that her father's evidence did not assist her in that regard.

[61] The sheriff had other reservations about the father's evidence. According to her father, she had said she was not hurt but that "there has been a horrible accident". We do not understand the sheriff's approach to be so much a criticism of the witness as an issue about the use of the expression "horrible accident", which he considered could not be a description of what the appellant witnessed, as opposed to the aftermath (at [196]). We do consider the sheriff is perhaps being somewhat over-analytical there; however much of it

the appellant saw, there had undoubtedly been a horrible accident and that would have been obvious to her before she spoke to her father. We therefore consider that her use of that phrase was neutral.

[62] We do not know why the sheriff concluded that it was unlikely that the pursuer used the phrase "I can't stay, I need to get to a place of safety", when she spoke to her father, but we suspect he is over-analysing the language; we are not convinced that that statement is, as the sheriff states

> "at best indicative of her suffering fear not at the point when she witnessed the collision between the bin lorry and the taxi, but later and further away after she had witnessed the scene" (at [197]),

but rather we consider it is neutral on the whole subject. The accident was over and her reasons for wanting to get to a place of safety at that point are essentially unclear, but may simply be an indication of her level of distress. It seems unlikely that she was in fact in fear for her own safety at that point and there was certainly no rational basis for that, certainly on the evidence considered by the sheriff. There was no suggestion that the appellant was in fear of a further incident, for example as part of a terrorist attack; the incident pre-dated the heavy vehicle terrorist incident in Nice and other vehicle related terrorist incidents which might well have grounded a rational fear of that kind.

[63] The appellant criticises the sheriff's approach to the second conversation with her father in a walk in a forest after she returned to France when she had said "I fear I have got survivor's guilt". The sheriff also recounts that he stated that she told him

> "that she had got off the train and had exited the station. She had been wanting to cross the road. The lorry had come straight towards her. She had said to him that she was terrified and frozen with fear" (at [210]).

The sheriff has explained carefully, at some length and in our view adequately, why he doubted that the appellant would have used the expression "survivor's guilt" at that time

and why he considered that her father's evidence about her being able to discuss her own feelings within a few days of the accident was at odds with her own evidence of being unable to focus on or discuss "what she had really felt at the time (ie fear that she was going to be struck by the bin lorry or silver taxi)" (at [215], and more generally at [212]-[217]). But the sheriff has also, in our opinion correctly, discounted the relevance of the reference to survivor's guilt because the reported version of events as to what gave rise to her fear was not accurate, since the bin lorry did not come straight towards her (at [217]). In that situation, we see little value in going into the detailed analysis of the evidence regarding this particular conversation which is suggested by the appellant.

[64] The appellant offers a similar close textual critique of the sheriff's approach to the evidence of Mrs Wade, the pharmacy assistant, but we do not think this takes the appellant anywhere. The sheriff concludes that she is not reliable as to the appellant's precise emotional state at that time or the reason for it (at [201]), but given the account which Mrs Wade gave of the appellant not making much sense, not knowing where she was and being tearful and trembling, and the fact that the witness expressed herself as only getting the impression that the appellant was in fear for herself and that she had been very close to the scene and had left quickly and "It was as if she was worried for her own safety" [at [89]), it is scarcely surprising that the sheriff did not find Mrs Wade's evidence to be of assistance in addressing what it was had caused the appellant's state of distress. The sheriff is criticised for saying that her evidence was impressionistic, but it was avowedly so.

[65] As regards what the appellant did or did not say to Dr Scott, while Dr Scott did not give evidence and her report was never proved, the appellant accepted in cross-examination that what she was recorded by Dr Scott as having told her did not contain any suggestion that she was terrified, that she was really scared she was going to be struck (Appendix

page 163-4), and that she attributed that to survivor's guilt (p 164 lines 6-11). The sheriff stopped counsel for the appellant pursuing with the appellant the content of what appears to have been a precognition, not the terms of what was said to Dr Scott and we cannot in any event see any basis for the submission that the sheriff was not entitled to make the relevant finding in fact, at [49], given the appellant's concession in cross-examination.

[66] It was complained that the sheriff had sought to apply the appellant's emotional state only to the aftermath of the events, where it was clearly referable to both the collision and the aftermath, but that begs the question which cannot be answered by general - and in one case impressionistic - reports of what the appellant said to others in the aftermath of the accident.

[67] On the other hand, there were available to the sheriff very detailed accounts given, at different times, to Dr Morrison, a consultant psychologist who was instructed for the appellant. The sheriff's treatment of Dr Morrison's evidence was subjected to detailed criticism.

[68] It is convenient to record exactly what Dr Morrison noted that the appellant said about the accident itself when he first saw her, on 30 November 2017 (finding in fact, at [47]), almost 3 years after the accident, but, as already noted, very shortly before the initial writ was warranted (on 5 December 2017):

> "Ms Weddle told me that she was a witness to the 'Glasgow bin lorry accident' which occurred on 22/12/2014. Ms Weddle told me that she had been travelling back from Edinburgh after visiting a friend. She stated that she recalls that she had purchased a hot chocolate due to the cold weather on the day of the accident. Ms Weddle told me that she had been passing a large 'Wetherspoons' type pub that was near Queen Street Station and heard a loud bang. She stated that she looked up and witnessed a taxi being pushed by a bin lorry into a wall. Ms Weddle told me that following the collision a number of men got out of both vehicles and she assumed that this was a road accident and that all parties were okay. She told me that she continued walking towards George Square and witnessed a family huddled together, who were comforting each other" (para [221]).

[69] She then went on to describe to him in great detail very distressing sights, including seeing two dead girls, the first of whom she had assumed was drunk, calling, but having great difficulty speaking to her father, then calling her mother, travelling towards her then home, visiting the pharmacy, being very upset and taken to a GP's surgery where she was given diazepam (para [221]). Her highly detailed account of what happened after she continued walking very substantially matched the evidence given at proof by her and the collision report and CCTV evidence. What was entirely missing from the account given to Dr Morrison on that occasion was any reference to the appellant at any stage being in fear that the bin lorry or taxi might strike her.

[70] Dr Morrison saw her again on 9 January 2019 (very shortly before giving evidence on 12 February 2019) and she told him that when she later considered the accident, she recalled being extremely worried that one of the vehicles would strike her and that she would either be seriously injured or killed (finding in fact, at [50]). Dr Morrison had been provided with what is described as a statement of the appellant, dated 22 March 2018 (which may have been a precognition, but no issue was taken with that) and he stated, in his supplementary report, dated 25 January 2019:

> "I have examined a Supplementary Statement provided by Ms Weddle. I note that she states with regards to the circumstances of the accident (that) 'I heard a loud bang and I looked up. I saw a silver taxi coming towards me with a bin lorry behind it. I could see the taxi was being propelled by the lorry. The taxi was facing forwards. The lorry was going quite fast. It all happened very quickly. I was in shock. I froze. It was a massive lorry. It was out of control. I was scared. I panicked as the taxi and lorry were coming towards me. I was in fear for my own safety.'
>
> During the earlier assessment I completed with Ms Weddle, she had reported that at the time of the accident she had witnessed a taxi being pushed by a bin lorry into a wall and stated that she had assumed that it was a road accident. Ms Weddle later clarified that she felt that she was in shock at the time and was unable to process events. She stated that when she later considered the accident she recalled being

> extremely worried that one of the vehicles would strike her and that she would either be seriously injured or killed" (paragraph 4 of supplementary report, para [97] of Sheriff's judgment).

Dr Morrison, not surprisingly took his own detailed history from the appellant on this occasion (paragraph 5 of supplementary report and repeated at para [99] of Sheriff's judgment):

> "She told me that she can recall hearing a loud bang before looking up as she had been paying attention to her mobile phone. She reported that she saw a bin lorry pushing a silver taxi. Ms Weddle stated that she felt that she was 'in shock' at the time and was worried that the bin lorry or taxi may hit her. When I questioned Ms Weddle about this in further detail, she stated that she ultimately felt that if she was hit by one of those vehicles then she would have been killed. I discussed with Ms Weddle about her self-report during the first assessment I completed with her whereby she had neglected to mention this in detail. She reported that she felt that at that time she was experiencing considerable symptoms of guilt as she had been unable to help a person at the scene of the accident who had been seriously injured (whom Ms Weddle referred to as 'the second girl'). She stated that due to this she had been unable to focus on her own feelings as found that this led to her experiencing difficulties with guilt due to the fact that she had survived the accident and had been unable to help 'the second girl'. Ms Weddle was extremely upset during the first assessment and it was not surprising that she did not mention all details of the index incident when asked, most likely as this would have triggered her symptoms of guilt as noted above."

[71] The appellant complains that the sheriff failed properly to take into consideration her evidence that she was in shock at the time of earlier reports to others and in particular complains that the sheriff did not take proper account of Dr Morrison's explanation as to why she did not mention details of it during his first assessment, when he had, for professional and ethical reasons, not pressed her as to further detail of what had happened. Dr Morrison expressed the opinion that she may have suppressed details of what had happened because of survivor's guilt, or as he expressed it: "generally the guilt about continuing to experience negative emotions when she had not been as severely injured as somebody else" (Appendix, p 272 lines 13-16).

[72] Dr Morrison stated in cross-examination that he had not formed the impression that she was deliberately holding anything back but had done so "maybe" in answering some questions as these were triggering symptoms (sheriff's judgment, at [247]). The appellant criticises the way the sheriff has recorded that part of Dr Morrison's evidence, but it seems to us to be a fair summation of a long passage in cross-examination (Appendix, pp 296-299).

[73] While Dr Morrison's explanation as to why the appellant may not have mentioned being in fear for her own safety clearly had to be taken into account by the sheriff it was not binding on him, especially where there was, on the evidence, a distinct alternative explanation - that the appellant was not in fact at any time in fear that she was going to be hit by a vehicle. That alternative explanation is supported by the real evidence, which negates this "new" account by the appellant - and, inconveniently for her, is entirely consistent with and essentially corroborative of her earlier and highly detailed account given to Dr Morrison.

[74] An expert witness's explanation as to why a witness may say or have said something may in certain circumstances be very compelling - but it is not so when it is contradicted by the real evidence in the case, as was recognised by the sheriff in his careful consideration of the matter (in particular at paras [259] and [260]). Dr Morrison does not appear to have been aware of the contradictory, essentially real evidence - and in particular he had not seen the CCTV footage (at [256]), no doubt advisedly, since his proper purpose was to examine and report on the appellant, her injuries, treatment and prognosis, not to assess evidence in the case (which would probably be objectionable at the very least as "oath-helping": *R* v *Raymond Robertson* (1994) 98 Cr App R 370, 374-5, *McBrearty* v *HMA* 2004 JC 122 at [48] and *HMA* v *A* 2005 SLT 975, at [21]). That contradictory evidence was, however, available to the

sheriff and presents an insuperable difficulty for the appellant in maintaining that the facts and her reaction to them were other than as were demonstrated by that evidence.

[75] The appellant maintained (including in evidence) that the CCTV recording from the public house was misleading as to angle of movement of vehicles and distances and correctly points out that she is shown from behind, but it is a recording of the final stages of the incident, including her behaviour, insofar as it can be seen from behind, and it was open to the sheriff to consider it and reach his own conclusions, taking account of the oral evidence of the appellant, reports of other accounts given by her and the collision report. Even in a criminal trial:

> "except in cases where some particular expertise is required to understand what is going on, the jury are free to make up their own minds about what the tape reveals" (*Steele* v *HM Advocate* 1992 JC 1, 5).

As a Full Bench of the High Court of Justiciary memorably commented in *Gubinas* v *HM Advocate* [2017] HCJAC 59, 2018 JC 45:

> "once the provenance of the images is shown, they become real evidence *in causa* which the sheriff or jury can use to establish fact, irrespective of concurring or conflicting testimony. Even if all the witnesses say that the deceased was stabbed in the conservatory, if CCTV images show that he was shot in the library, then so be it" (at [59]).

The sheriff, at para [185], gave careful consideration to the CCTV footage looking north along Queen Street which clearly showed the direction of travel of the vehicles in relation to the access area, the hotel and the general location where the appellant had been standing.

[76] As we have noted, there is no dispute as to the limitation on an appellate court substituting its judgment for that of the trier of fact. Of course it is possible to find things to criticise - by inclusion or omission - in a judgment by means of the fine textual analysis adopted by the appellant, but as Lord Hoffman observed in *Piglowska* v *Piglowski* [1999] 1 WLR 1360, 1372:

> "The exigencies of daily court room life are such that reasons for judgment will always be capable of having been better expressed. This is particularly true of an unreserved judgment such as the judge gave in this case but also of a reserved judgment based upon notes, such as was given by the district judge. These reasons should be read on the assumption that, unless he has demonstrated the contrary, the judge knew how he should perform his functions and which matters he should take into account. This is particularly true when the matters in question are so well known as those specified in section 25(2). An appellate court should resist the temptation to subvert the principle that they should not substitute their own discretion for that of the judge by a narrow textual analysis which enables them to claim that he misdirected himself."

We also remind ourselves that what is required from a sheriff in a reserved judgment is: "a note stating briefly the grounds of his or her decision, including the reasons for his or her decision on any questions of fact or law or of admissibility of evidence" (OCR Rule 12.4(2). It is not necessary or appropriate for the sheriff to set out or even summarise all the evidence in the case.

[77] As was observed by White J delivering the Opinion of the Court in the US Supreme Court in *Anderson* v *City of Bessemer* 470 US 564 (1985); 84 L Ed 2d 518; 105 S Ct 1504, (pp 574, 575) (cited with approval by Lord Reed in *McGraddie* v *McGraddie* [2013] UKSC 58, 2014 SC (UKSC) 12, at [3]):

> "The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be ''the 'main event' . . rather than a 'tryout on the road.' '' . . .For these reasons, review of factual findings under the clearly-erroneous standard - with its deference to the trier of fact is the rule, not the exception."

[78] In order to succeed in the present case the appellant would require to demonstrate error of law on the part of the sheriff at least to the extent that no reasonable sheriff would have found as he did, ultimately in his finding in fact and in law, at para [377]:

> "that the defender's employee would not have reasonably foreseen that his driving at the relevant time would have given rise to the risk of physical injury to the pursuer; and in any event, that the pursuer did not in fact suffer fear of physical injury to herself at the relevant time; that accordingly, the pursuer does not qualify as a primary victim and she cannot therefore obtain damages for any psychiatric injury suffered by her;"

She would also have to demonstrate that he was in similar error in concluding that if she had such a belief it was not a reasonable one (at [333]).

[79] We cannot find that the sheriff was in any sense in error in finding that the appellant did not in fact suffer fear of physical injury to herself at the relevant time, which in this case was the time up to that when the vehicles same to a halt. Given the compelling real evidence we cannot see how the sheriff could have come to any other conclusion and we do consider there is some weight in the respondent's submission that a decision to the contrary would, in this case, have been one which no reasonable sheriff could have reached.

[80] If we are wrong in that assessment and she did in fact suffer such a fear we cannot see how it could be regarded as a reasonable one, given the direction and slow speed of travel of the vehicles. We cannot see, on the facts found by him and which he was entitled to find on the evidence, how the sheriff's conclusion in this regard is in any way inconsistent with the line of authority, to which we were referred by the appellant: *Campbell* v *North Lanarkshire Council* at p 376; *Dulieu* v *White & Sons* at pp 671 to 674 and *Bourhill* v *Young* at pp 104, 107 and 108. As Lord Reed put it in *Campbell:*

> "one has to identify the range of foreseeable physical injury. This includes not only situations in which the pursuer was in fact objectively exposed to danger, but also situations in which he could reasonably believe that he was exposed to danger (if there is a difference between the two on the facts of the particular case: in this

> regard, the judgment of Stuart-Smith L. J. in *McFarlane* v *E E Caledonia Ltd* at p. 10 is helpful). If the pursuer was within that range, then he can recover for psychiatric injury. If he was not within that range, then he can recover for psychiatric injury only if he meets the *Alcock* requirements" (at 381F).

[81] As Stuart-Smith LJ observed in *McFarlane* (at p 10 b-c):

> "where the plaintiff is not actually in danger, but because of the sudden and unexpected nature of the event he reasonably thinks that he is. An example of this is *Dulieu* v *White & Sons* where the plaintiff was put in fear for her safety when the defendants' runaway vehicle burst into the public house where she was serving behind the bar. She was not in fact at risk of physical injury; but she naturally was put in fear for her own safety. This was something that plainly ought to be in the contemplation of the defendant who negligently allows his vehicle to career out of control. It is not only those who may be able to fling themselves out of its path and so escape physical injury (who would fall into category 1 [ie the actual area of danger], but those in the agony of the moment who reasonably believe they are in danger".

[82] We take from these authorities that an allowance has to be made for the agony or heat of the moment and that a trier of fact must not take too narrow a view as to when a pursuer can be said to have reasonably thought she was in danger, but we can find no evidence that the sheriff has taken an excessively narrow view here or indeed, as maintained, applied the wrong test.

[83] It was for the appellant to demonstrate that any fear was reasonable and the sheriff has carefully and at some length explained, under reference to authority why he concluded that she did not have such a reasonable belief (paras [320] to [333]). Among other factors justifying his decision he has correctly noted that neither vehicle was ever heading straight towards her, the vehicles did not come particularly close to her, the initial collision took place over 30m at least away from her and the vehicles thereafter were moving relatively slowly and came to rest at least 12m away from her. These factors, in our opinion, clearly demonstrated that the appellant had failed to establish that any belief that she did have was a reasonable one.

[84] We have no doubt that the appellant has suffered significant psychological and psychiatric injury in consequence of the terrible things she saw that day, but we cannot conclude that the sheriff was in error in finding that such injury was not in any way referable to a fear of personal injury to her reasonably held by her at the time of the accident. Accordingly, we must refuse the appeal and adhere to the sheriff's interlocutor of 30 April 2019. We shall reserve expenses.