**FIRST DIVISION, INNER HOUSE, COURT OF SESSION**

**[2020] CSIH 67**
PD59/18

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion by

ALLEN WOODHOUSE

Pursuer and Reclaimer

against

LOCHS AND GLENS (TRANSPORT) LTD

Defenders and Respondents

---

**Pursuer: Milligan QC, M Crawford; Digby Brown LLP**
**Defenders: Primrose QC, G S Middleton; Brodies LLP**

30 October 2020

**Introduction**

[1] The pursuer was one of several passengers on a tour bus driven by an employee of the defenders. It was heading northwards along the A83 when it left the road and rolled over. Although he accepted that the maxim *res ipsa loquitur* applied to the circumstances, the Lord Ordinary assoilzied the defenders on the basis that negligence on the part of the driver had not been established. The principal question is whether, on the primary facts which he

found, he was correct to do so. Subsidiary questions include whether the Lord Ordinary misunderstood the effect of the speed of the bus on its handling capabilities and the evidence on that and whether the Lord Ordinary failed to have regard to the evidence of a driver who had been observing the bus before the accident.

**The Pleadings**

[2] It is admitted on record that, on 26 March 2015, the pursuer was a passenger on a Lochs and Glens tour bus which was being driven by the defenders' employee, Elizabeth Gallon, northwards on the A83 "Rest and Be Thankful". The bus party had been at the Ardgartan Hotel, near Arrochar, for lunch. The bus set off towards Inveraray. It stopped at a viewpoint to enable passengers to take photographs. At about 2.00pm the bus was in the vicinity of the junction with the B828 Glen Mhor road at a point where a predominantly straight stretch of road leads to a left hand, then a right hand, "S" bend. The bus's "nearside wheels went ("rode") over the roadway's edge" and on to the sloping grass verge causing the bus's nearside to be "downhill of its offside". The bus tipped and rolled over. The pursuer pled a breach of the defenders' duty at common law to take reasonable care for the pursuer. As the case proceeded under the rules for abbreviated pleadings in the sheriff court (OCR Rule 36.B1(1)), prior to it being remitted to the Court of Session, no further specification of fault was given. In due course, although not expressly foreshadowed in his pleadings, the pursuer was to rely on the maxim *res ipsa loquitur*.

[3] According to the defenders, after the departure from the viewpoint, the driver stopped again some 500 metres further on, in order to close the bus's door. She continued for another 100 metres, at a maximum speed of between 34 and 42 mph, when:

> "the nearside of the coach was struck by a sudden extraordinary and exceptionally severe gust of wind, which caused the coach to drift to its offside, to the point where the offside of the coach was just over the centre line of the road. The driver applied the brakes and steered the coach gently back towards its normal driving position in the centre of the northbound lane. At that point, the offside of the coach was then struck by a second extraordinary and exceptionally severe gust of wind, the force of which caused an overturning moment… causing the rear of the coach to drift and yaw at an angle to the nearside. The driver unsuccessfully tried to steer the coach back to its offside, but its nearside tyres left the road surface and went onto the sloping grass verge at a speed of less than 34 to 42 mph."

The defenders maintained that the phenomenon of the two gusts of wind could not reasonably have been anticipated nor could the driver have taken "any reasonable or effectual precautions" against it. The cause of the accident was *damnum fatale*; that is an inevitable accident.

**The Lord Ordinary's Findings in Fact**

[4] The stop at the viewpoint had been fairly brief, because the weather had taken a turn for the worse. Very few of the 51 passengers had ventured off the bus. After the stop to close the door, the bus set off again; the accident occurring less than a minute later some 150 metres further on. By that time there was a very strong northerly wind, which was hitting the bus virtually head on. The driver described the wind as quite normal for this location. She was an experienced driver who had driven this road many times. She was used to winds of that strength and the gusts that came with it. She had not come across gusts from different directions. Professor Rae, who spoke to the meteorological data, described the conditions as "a nasty blustery day… with swirling wind from any direction". Such winds were not exceptional.

[5] The Rest and Be Thankful weather station, which took readings every ten minutes, indicated that the wind was generally west-north-west with a mean speed of over 20 mph

and gusts of up to 40 mph. In the vicinity of Loch Restil, where the accident occurred, the direction was northerly. The mean wind speed over the 10 minute interval at the material time was 18.1 mph with a maximum recorded gust of 38.3 mph. In the following 10 minutes there was a mean of 15.9 mph with a maximum gust of 50.3 mph. The Lord Ordinary concluded that, although the gusts were strong, near gale force, they were not so exceptional as to be unforeseeable.

[6] The driver maintained that she had accelerated normally from the layby. She thought that she had reached a speed of between 20 and 30 mph when the first gust hit the bus from the nearside, pushing it towards the middle of the road and over the centre line. The driver braked. She estimated that her speed had reduced to between 10 to 15 mph. She turned to the left. No sooner had she regained her proper position on the road when the second gust hit the offside, lifting up the front of the bus and forcing it to the left and off the road, despite her attempts to brake and steer to the right. The Lord Ordinary interpreted this as meaning that the effect of the wind had been to take the weight off the front wheels of the bus, causing the bus to yaw to the left, despite efforts to correct its alignment. The bus ran along the verge, gouging into the grass and mud and slowing it down rapidly. As the Lord Ordinary put it, once the left front wheel hit the verge, the bus "was doomed".

[7] On speed, the Lord Ordinary accepted that, as a generality, a driver will underestimate the speed at which he or she is driving. The experts who gave evidence had carried out calculations which were broadly in alignment. They showed that, at the moment when the front wheel left the road and went onto the verge, the bus must have been travelling at in excess of 30 mph and possibly as fast as 40 mph. The Lord Ordinary held that, taking all the evidence into account, the bus was travelling at between 35 and 40 mph when the front wheel left the road. He reasoned that, assuming that the driver had braked

after the first gust and again after the second, the driver had been travelling at a rate considerably in excess of 35 mph when the first gust hit. The Lord Ordinary concluded that the bus was travelling at between 40 and 45 mph when it was hit by the first gust and between 35 and 40 mph when it was hit by the second. On the basis of his findings on speed, the Lord Ordinary considered that the time between the second gust hitting the bus and the wheel striking the verge would have been "very short". The driver could not be criticised for failing to react in time by braking and/or steering the bus, given the estimated reaction times.

[8] The Lord Ordinary held that, had the bus come to a halt even some yards before it did so, it would have been on relatively level ground and would probably not have rolled over. The speed at which the bus had been travelling took it further along the verge to a point where the verge sloped down towards Loch Restil. It was leaning towards its left and that, and the continuing wind, caused it to roll over. The driver was not charged with any offence. The police took the view that the driver had not being going too fast. They did not extract the data from the bus's tachograph for what the Lord Ordinary describes as "some unexplained reason".

**Extracts from the Transcription of Evidence**

***The Driver***

[9] The driver was examined in chief by the pursuer. It is worth recording precisely what she said about speed. She initially testified that she had been driving at 20 mph, later modified to between 20 – 30 mph, when the first gust hit. She had then slowed down to between 10 – 15 mph, although she was not really sure. Her normal reaction would have

been to slow down significantly. The transcription of her examination-in-chief then reads as follows

> "… if you were hit by a gust of wind strong enough to move your coach, to drive on after that at 34 to 42 miles an hour would be obviously dangerous, wouldn't it? – Hm mm.
>
> It would be a really silly thing to do? – Yeah.
>
> … If you were going 34 to 42 miles an hour after you've already been hit by a gust of wind that's moved the coach and then it happens again, the accident would be your fault, wouldn't it? – No, it wasn't my fault.
>
> But you've already said it would be silly to drive at that speed? – Yeah, but I don't think I was because I'd already braked so I'm going to be going slower… I don't think it would have been going any more than 20 mile an hour because I'd already braked prior to getting hit by that second gust of wind.
>
> ... I would have been going about 20 miles an hour.
>
> Yes, well I think you've said that but the important question is in your experience as a very experienced coach driver, do you think that going at more than 20 miles an hour would be sensible in those weather conditions you've described? – No."

***Douglas McArthur***

[10] Mr McArthur and his wife had left Glasgow for a scenic drive in their Citroen C3 on what had begun as a beautiful sunny day. The weather deteriorated as they reached Arrochar; with winds buffeting their car mostly from the offside but from the front as well. Mr McArthur slowed to 30 mph. At one point, he had seen the bus in front of him, but its power had enabled it to pass a set of traffic lights regulating the Rest and Be Thankful before he had been able to follow. The bus had disappeared around a corner. When Mr McArthur next saw it, the accident had happened. Mr McArthur commented on the power that the bus had been able to use, especially in comparison to that of his modest C3. He had thought that 30 mph was safe for his car, which he had kept in second gear in order to maintain the power at a constant level in the weather conditions.

[11] Mr McArthur had been an HGV driver in the past. The following exchange took place at the end of his examination-in-chief:

> "Right. So you're going about 30 miles an hour and you're in second gear. – In second gear.
>
> And that was because of the weather conditions. – Because of the weather conditions.
>
> If you had been back in the day driving an HGV would you have driven faster or slower? – Oh no, my training tells me to slow down in conditions like that. The slower you go the heavier the vehicle becomes and there's less wind to get underneath it, that's all basic training."

*Christina Holland*

[12] Ms Holland, who was the defenders' road traffic expert, was cross-examined in relation to the speed of the bus at the time it left the road. She said:

> "All I can say is that if [the driver] accelerated continuously at a typical rate for a bus or coach driver to the point where the… accident occurred, where she left the road, the range of speeds likely would be 34 to 42 miles per hour.
>
> Yes, that's if she accelerated continuously from start to finish. Yes. The gouge mark and the length of the gouge mark indicates that the speed of the coach when it left the road was 30 miles per hour or more. From that I have estimated a range of 30 to 40 miles per hour for the maximum speed of the coach."

In relation to the accident, the following exchange took place:

> "It was, an accident was inevitable? – Yes
>
> Regardless of the speed of the bus? – No …If the speed of the coach was 30 miles per hour it would be, yes.
>
> Exactly. So it all depends on the speed of the coach. – Yes.
>
> And if the coach had been going at a significantly lower speed, say 15 miles per hour, the accident would not have been inevitable. – It might not have been, I haven't done the calculations…
>
> Ultimately… if the coach had been travelling at a slightly lower speed than it actually was travelling it would still have been possible to avoid the accident by braking. – Probably."

**Lord Ordinary's Reasoning**

[13] The Lord Ordinary accepted that the burden of proof had switched to the defenders to prove that the accident had occurred without their negligence. He cited his *dicta* in *Morton* v *West Lothian Council* [2006] Rep LR 7 (para [70] following *Elliott* v *Young's Bus Service* 1945 SC 445 at 456) that the maxim *res ipsa loquitur* applied when the circumstances causing the loss were within the control of the defenders. Where the facts were eloquent of negligence, it was for the defenders to prove at least the existence of other facts or circumstances which may have caused the accident without their negligence (*O'Hara* v *Central SMT Co* 1941 SC 363 at 378); or possibly that the accident was not in fact caused by their negligence (*Moore* v *R Fox and Sons* [1956] 1 QB 596 at 614-5). The Lord Ordinary rejected the defenders' submission, which had been based upon a dissent in *Ballard* v *North British Railway Co* 1923 SC (HL) 43 (at 54), that the defenders could satisfy the onus simply by proffering a reasonable explanation of how the accident could have occurred without negligence (*O'Hara* v *Central SMT Co* (supra).

[14] The Lord Ordinary accepted that the defenders could avoid liability by proving that the accident was not caused by their negligence, notwithstanding that they could not point to any specific non-negligent cause. He reasoned that:

> "[30] … the considerations mentioned in …[*Morton* v *West Lothian Council* (*supra*)] all point to the onus shifting to the defenders to prove a non-negligent cause of the accident or at least to disprove negligence on their part. A coach travelling along an A road in the Highlands should not ordinarily come off the road. The fact of it having done so gives rise to a *prima facie* inference of negligence. It is for the defenders to rebut that *prima facie* inference… I have no difficulty in holding that… the burden shifts onto the defenders to show that the accident occurred without their negligence".

The Lord Ordinary observed that onus seldom mattered, once evidence had been led.

[15] The Lord Ordinary concluded that the defenders had discharged the burden upon them. He explained that:

> "[32] … The only challenge, the only suggestion of fault advanced by the pursuer, was in relation to the actions of the driver. What was said, in short, was this: if she was driving at the speed at which she said she was driving (20-30 mph before the first gust, 10-15 mph before the second) then she had plenty of time to enable her to react to the gust and should have been able to prevent the coach leaving the road; whereas if she was driving faster than that (40 mph, plus or minus) then she was driving too fast, cutting her reaction time so that she could not react in time to prevent the accident. I have already found that the coach was being driven at a speed of about 40-45 mph before the first gust hit it, and at a reduced speed of 35-40 mph when the second gust struck. Accordingly the pursuer's first alternative criticism can be excluded. That leaves only the second alternative criticism for consideration.
>
> [33] The pursuer's case is that if the coach was being driven at a speed of 40-45 mph then it was being driven too fast was not supported by any expert or independent evidence to that effect. It was not said, by anyone, that at that speed the coach would be less easy to handle in the prevailing conditions, or less responsive to directional control, or in some way less stable, more vulnerable to the impact of the wind, more prone to being deflected off course. The pursuer's case that the coach was being driven too fast was periled on the evidence [the pursuer's counsel] led … from the driver… ."

[16] The Lord Ordinary narrated the evidence of the driver as including the following:

> "Witness: I don't think I was going any more than 20 mph [when the first gust struck]. I think if I braked I'd be going slowly.
>
> Counsel: Do you think that going more than 20 mph would be sensible in those conditions?
>
> Witness: No.
>
> Counsel: Your relative speeds. You were going at 30 mph, then you dropped down?
>
> Witness: Yes
>
> Counsel: It would be dangerous to keep going at the same speed after a gust caused you to move?
>
> Witness: Yes.
>
> Counsel: If you were hit by a gust, to carry on at 34 – 42 would be dangerous.
>
> Witness: Yes."

[17] The Lord Ordinary interpreted the driver's evidence as meaning only that it would not have been sensible to maintain, or resume, a particular speed once the first gust had hit.

She was talking about relative speeds. She had considered her speed both before and after the first gust to have been sensible and safe. The fact that she was wrong about her estimate of speed was not to be taken as meaning that she had accepted that, now that her true speeds had been pointed out, she had been going too fast at 40 – 45 mph, reducing to 35 – 40 mph.

[18] The Lord Ordinary continued:

> "[35] … Nor is it directly relevant that driving at a certain speed means that there is minimal time available for an effective reaction in the event of the coach being blown off course by an unexpected and violent gust of wind. Such considerations are too far removed. Absent any proved connection between the coach's speed and its vulnerability to being blown off course, absent any evidence that the particular speed of the coach made an accident of this sort reasonably foreseeable or in some way more likely, then the question of how to react in such circumstances, and whether the speed of the coach allows sufficient time to react, does not arise…
>
> [36] … I do not accept the pursuer's case that the driver was at fault. No other fault is raised as an issue. But I am left with this concern. My finding on the evidence is that the weather conditions were unpleasant and the wind was strong – but there was nothing exceptional about the conditions, winds of that strength were foreseeable, and extreme turbulence, being a feature of the topography of that area, could also be foreseen. For that reason I would have rejected the defence of *damnum fatale*, had it been necessary to consider it. If, as I have also found, the driver was not at fault, how can the accident be explained? It is possible that the combination of two gusts of wind from opposite sides of the bus was unique, though the fact that [the meteorological expert] could readily explain the phenomenon suggests otherwise. It may be that occurrences such as this, occurring without fault on any side, though mercifully rare, are inevitable…".

**Submissions**

***Pursuer***

[19] The pursuer did not dispute any of the Lord Ordinary's primary findings in fact, but he did challenge the inferences which he had drawn from them. It was not necessary for the pursuer to show that the Lord Ordinary had been "plainly wrong", when what was challenged was the application of the law to the primary facts (*Stephen* v *Scottish Boatowners*

*Mutual Insurance* 1989 SC (HL) 24 at 61; *Anderson* v *Imrie* 2018 SC 328, at paras [38]-[51]; *AW* v *Greater Glasgow Health Board* [2017] CSIH 58, para [44]). The Lord Ordinary had nevertheless been plainly wrong.

[20] The Lord Ordinary had correctly determined that the defenders' driver was *prima facie* negligent. He had then found against the pursuer because the pursuer had failed to prove that the speed of the bus had been excessive (see para [33] quoted *supra*). He had effectively required the pursuer to prove negligence twice. Had the Lord Ordinary asked the correct question, of whether the defenders had shown that the bus had been driven at an appropriate speed, he would have been bound to find in favour of the pursuer (*Mars* v *Glasgow* 1940 SC 202 at 206-208; *O'Hara* v *Central SMT Co* (*supra*) at 375). The circumstances required the defenders to explain why the bus could not be controlled when hit by the gusts of wind. It should have been for the defenders to prove a non-negligent explanation (*Smith* v *Fordyce* [2013] EWCA Civ 320, at para [61]). The Lord Ordinary's analysis focused (at paras [32] and [33]) on "The only challenge, the only suggestion of fault advanced" and "The pursuer's case", whereas the reversal of the burden required the focus to be on the defenders' explanation for creating the danger; ie the speed of the bus. The Lord Ordinary downplayed the significance of the reversal of the burden, under reference to authorities, including *Gibson* v *British Insulated Callenders Construction Co* 1973 SC (HL) 15, which supported the pursuer's case.

[21] If the correct analysis had been adopted, the Lord Ordinary ought to have found that, since the weather conditions were, as he held, foreseeable, the bus's speed called for an explanation. By inference, the speed was excessive for the conditions. The inference had not been rebutted. It had been supported by Mr McArthur's evidence. The driver had not modified her driving for the conditions. She had taken no precautions for the prevailing

windy conditions. She had driven at the maximum speed and acceleration possible from her last stationary point, according to the unchallenged evidence of the defenders' expert. The defenders had offered no justification for the driver selecting a speed which left insufficient time for reaction. Adverse weather conditions were not sufficient to rebut the presumption of negligence. Drivers must drive according to the conditions (*Weatherstone* v *T Graham & Sons* [2007] CSOH 94, at para [16]; *MacDonald* v *Aberdeenshire Council* 2014 SC 114, at paras [64] and [70]).

[22] The Lord Ordinary erred in holding that the bus had not been driven at excessive speed. It had been driven at the maximum possible speed. It was faster than the driver had acknowledged to be safe. It was faster than the speed of the only other witness to give evidence about speed, namely Mr McArthur. There was no evidence to show that the driver had taken any precautions to deal with the weather conditions. It was a matter of agreement between the experts that, had the bus been driven at even a slightly lower speed, the accident would have been avoided. The driver testified that 20 mph was the sensible speed. The Lord Ordinary had been wrong to consider that her evidence had only been concerned with relative speeds. Her evidence was that she had been travelling at 20 mph, but it had been established that that was at best half of her actual speed. That discrepancy required explanation. Even if she had been talking about relative speeds, had she realised her true speed, on her own evidence she would have slowed down considerably. The ignorance of her own speed could not provide a non-negligent explanation for the accident; rather, it reinforced the implication of negligence. Forty five miles per hour was only 5 mph less than the maximum legal speed at the *locus*. In order to reach that speed the driver would have had to have accelerated at the highest rate possible. Mr McArthur, who had been driving a

small car, said that 30-35 mph was the speed at which he felt comfortable and that, as an HGV driver by trade himself, he would not have driven faster in a larger vehicle.

[23] There was no reasoning on why these factors had been outweighed. The finding that the driver did not know in advance that she was going to be called upon to react to anything was inconsistent with the finding that the conditions were foreseeable. The finding that there was no "proved connection between the coach's speed and its vulnerability to being blown off course" was inconsistent with the finding that the speed of the bus provided no opportunity to react and ignored the obvious point that, by travelling more slowly, the driver would have given herself a greater opportunity to react. Her speed led to the bus being blown into the opposite carriageway and then off the road completely.

[24] The Lord Ordinary erred in holding that there was no evidence that the speed of the bus made the accident reasonably foreseeable or more likely. This failed to take account of the uncontroversial evidence that, but for the speed of the bus, the accident would not have occurred. This did not need expert evidence, but even if it did, it was there: the defenders' expert stated in her report that "The speed at which the coach deviates from its path is directly proportional to the forward speed of the coach." The reasoning is inconsistent with the earlier finding that speed was causally connected to the ability to respond to the effects of the wind. As one commentator (Sanders) put it (2020 Greens Rep B 153, 7-8): "It seems difficult to conceive of how no liability could attach when a healthy driver, driving a defect free coach encountered foreseeable road conditions".

***Defenders***

[25] The defenders submitted that the Lord Ordinary had been correct to find that the defenders had provided a non-negligent explanation for the accident. That explanation was

the weather conditions. It was not undermined by the pursuer's unsuccessful criticism of excessive speed. The Lord Ordinary's conclusion was open to him on the evidence and based upon a correct evaluation of it. The pursuer had to show that the Lord Ordinary had gone "plainly wrong" in his application of the law to the primary facts (*Anderson* v *Imrie* (*supra*) at paras [35], [36], [98] and [99]; *AW* v *Greater Glasgow Health Board* (*supra*) at paras [53] and [54]; *George Mitchell (Chesterhall)* v *Finney Lock Seeds* [1983] 2 AC 803 at 815-6; *Biogen* v *Medeva* [1997] RPC 1 at 45).

[26] The contention, that the Lord Ordinary erred by requiring the pursuer to show that the speed of the bus was excessive, was misconceived. The Lord Ordinary held that the onus of proof had switched to the defenders. Thereafter he concluded that the defenders had led sufficient evidence to establish that the accident had not been caused by their fault and could be explained by the wind. The driver had not failed in her response to the sudden impact of the wind. If there had been any failing, her actions and reactions should not be judged by too high a standard. They were not negligent. The Lord Ordinary concluded that the defenders had discharged the burden by proving that the accident happened without any negligence on the part of the driver. This was not to place the onus back on the pursuer, but to find that his challenges to the defenders' non-negligent explanation, specifically on the issue of speed, were unsuccessful. There was no expert or independent evidence that the manner in which the driver drove had been negligent.

[27] The Lord Ordinary came to the view that the driver's speed had been reasonable. It was never suggested to the driver that she ought to have known that there would be vulnerability to an accident above any particular speed; nor was there any evidence from any other source to that effect. The assertion that the driver had accelerated at maximum speed did not accurately reflect the evidence. The driver had been able to react to the first

gust by braking and correcting the path of the bus, bringing it under control and back into the centre of the lane. It was only after being hit by an unexpected and violent gust from the opposite side that the accident occurred. The driver had never before experienced the phenomenon of two sudden, extremely strong gusts from opposite directions. The occurrence of such an event, leading to a situation where the bus would leave the road at 40-45 mph, was not reasonably foreseeable. The Lord Ordinary applied the correct test; whether a reasonable driver would have had in contemplation that an accident would be likely to result if she drove at the speed at which she did (*Muir* v *Glasgow Corporation* 1943 SC (HL) 3 at 10; *Whippey* v *Jones* [2009] EWCA Civ 452, paras 16 and 17).

[28] The Lord Ordinary did not err in holding that the driver had not been negligent. The evidence was that she had been driving at an appropriate speed for the conditions. The available reaction time after the second gust was such that the driver could not be criticised. Nothing could have been done to avoid the bus rolling over. The driver was certain that she had taken appropriate action by slowing down after the first gust and that her speed both before and after that gust had been appropriate. The contentions that she conceded she ought to have been travelling at 20 mph, and that this was the safe speed for the road under the prevailing conditions, were entirely wrong. The Lord Ordinary was correct that the driver's evidence was about relative speeds. Whether there was a connection between speed and vulnerability to being blown off course was a different consideration from the reaction time after the gust had occurred. The Lord Ordinary's reasoning did not say that the driver's ignorance of her own speed provided the defenders with a non-negligent explanation. There was no evidence about any need for the driver to monitor her speed, accelerating from a standing start over a distance of only 150 metres, or any failure by the driver to do so.

[29] Mr McArthur's evidence as to the speed at which he felt comfortable did not infer negligence on the part of the driver. He had agreed in cross-examination that: his car was very light compared to the bus, which had a much more powerful engine; the bus was not affected by the wind in the same way; and whether the wind affected his vehicle or not had no bearing on the bus. He had said that the bus was being driven normally. Whilst the wind conditions were foreseeable, the pursuer failed to lead evidence and to prove a connection between the bus's speed and its vulnerability to being blown off the road. In the absence of proof that the driver ought to have known that, above a certain speed, there was a likelihood of the bus going out of control if it was hit by an unexpected gust of wind, the accident was not reasonably foreseeable. There was no evidence that a speed of 40-45 mph was negligent. It was irrelevant that, if she had been driving even slightly slower, the driver would have had time to avoid the accident.

[30] The finding that the bus would probably not have rolled over had it been going slightly slower was an issue of causation, not negligence. Negligence required to be considered first, as the Lord Ordinary had done. The Lord Ordinary recognised the relationship between speed and reaction time. The point he made (at para [33] (*supra*)) was that there was nothing to indicate that the driver ought to have known that at a particular speed the bus was more vulnerable to being blown off the road. The Lord Ordinary was entitled to reach the finding that he did as to the foreseeability of the accident on the evidence (*Jolley* v *Sutton London Borough Council* [2000] 1 WLR 1082 at 1088-9).

**Decision**

[31] A determination of whether an employee has been negligent is one of law. It is nevertheless heavily dependent upon primary findings of fact. In reviewing the latter, an

appellate court must exercise appropriate caution, especially where the Lord Ordinary's decision has been based on determinations on credibility or reliability. Where this occurs, the appellate court must be satisfied that the findings of the Lord Ordinary were "plainly wrong" (*Clarke* v *Edinburgh and District Tramways Co* 1919 SC (HL) 35, Lord Shaw at 37, approved in *Thomas* v *Thomas* 1947 SC (HL) 45, Lord Thankerton at 55, Lord Macmillan at 59). These words mean that, in the view of the appellate court, the Lord Ordinary reached a decision which no reasonable judge could have reached (*Henderson* v *Foxworth Investments* 2014 SC (UKSC) 203 Lord Reed at para [62]). This in turn is explained as meaning that the decision cannot reasonably be explained or justified (*ibid* para [67]).

[32] "Plainly wrong" is not the only ground for review. The Lord Ordinary may have made "some other identifiable error" including:

> "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 " (*ibid*).

[33] The turns of a witness's eyelid (Lord Shaw (*supra*)) may, at least in theory, be significant in assessing credibility or reliability. Certainly the advantage, which a court of first instance may have had in having seen and heard the testimony, should not be underestimated (*McGraddie* v *McGraddie* 2014 SC (UKSC) 12, Lord Reed at 22). An appellate court must have due regard to the limitations of the appeal process, with its narrow focus on particular issues rather than the evidence as a whole (*ibid*). However, when the court is not reviewing primary facts but inferences from them (secondary facts), it can more easily reverse a first instance conclusion, especially one which has not involved a finding of credibility or reliability (*Stephen* v *Scottish Boatowners Mutual Assurance* 1989 SC (HL) 24, Lord Keith at 61). This is even more so when what is under review is the application of the

law to the facts; whether primary or inferential (*SSE Generation* v *Hochtief Solutions* 2018 SLT 579, LP (Carloway) at para [282]; *Anderson* v *Imrie* 2018 SC 328, Lord Drummond Young at para [44]). In that situation, it may be that the benefits of the larger appellate bench can play a significant part in arriving at the correct decision (*ibid*, citing *Appellate courts parts 1, 2 and 3* 2015 SLT (news) 125, 130 and 138 at 127). When engaging in the intellectual process of applying the law to the facts, or in drawing inferences from primary facts, an appellate court may be more objective in its approach and be less influenced by the Lord Ordinary's perception of, and maybe even sympathy for, the witness (*AW* v *Greater Glasgow Health Board* [2017] CSIH 58, LJC (Dorrian) at para 44). The unitary nature of the Court of Session as the reviewer of the delegated decisions of the Lords Ordinary is not without significance either in relation to the traditional scope of a Division's role (*Clippens Oil Co Ltd* v *Edinburgh and District Water Trustees* (1906) 8 F 731, LP (Dunedin) at 750).

[34] With all these matters firmly in mind, the court has concluded that, despite the care which he has clearly taken in his assessment of the testimony the Lord Ordinary,:
(i) misapplied the maxim *res ipsa loquitur* to the facts; (ii) was plainly wrong in holding that the speed of the bus did not make it less easy to handle; (iii) failed to consider relevant evidence; (iv) has misunderstood the driver's testimony on speed; and (v) reached a conclusion which cannot be explained or justified.

[35] The most problematic flaw is the Lord Ordinary's application of the maxim *res ipsa loquitur*. The use of the maxim in the context of road traffic cases is a familiar one. It was a central feature in *O'Hara* v *Central SMT Co* 1941 SC 363. As the Lord President (Normand) pointed out (at 377), under reference to Lord Shaw's speech in *Ballard* v *North British Railway Co* 1923 SC (HL) 43 (at 54), *res ipsa loquitur* is not a legal principle. It is a presumption of fact, whose force depends on the circumstances of each case. When it applies, the defender must

demonstrate that the accident occurred without fault on his part. It is not enough to proffer a possible alternative non-negligent explanation. The defender must establish facts from which it is no longer possible to draw the *prima facie* inference (*Smith* v *Fordyce* [2013] EWCA Civ 320, Toulson LJ at para [61], cited in *David T Morrison & Co* v *ICL Plastics* 2014 SC (UKSC) 222, Lord Reed at para [37] agreeing with Lord Hodge at para [98]).

[36] The Lord Ordinary correctly determined that the maxim applied. Buses which are driven in a safe and proper manner and at a reasonable speed do not leave carriageways of major trunk roads in winds of the relatively common velocity present at the time of this accident. The defenders thus required to prove, on the balance of probabilities, that the accident had occurred without negligence on the part of their driver. Unfortunately, the Lord Ordinary did not approach the matter in this way. A different Lord Ordinary had declined to ordain the defenders to lead at the proof. Such an order would perhaps have reflected with greater clarity the correct application of the maxim in the circumstances admitted on record. Be that as it may, the Lord Ordinary, in his approach to the proof, returned the onus to the pursuer to prove what the Lord Ordinary described (at para [32] of his opinion) as his only suggestion of fault; that being, according to the Lord Ordinary, the actions of the driver, and in particular the speed at which the bus was being driven. That was not the manner in which the pursuer's case was pled or presented. The pursuer did not need to advance any suggestion of fault. A *prima facie* inference of negligence existed by virtue of the facts admitted on record. As the pursuer submitted, the Lord Ordinary effectively required the pursuer to prove negligence twice.

[37] In these circumstances, the question which the Lord Ordinary ought to have asked himself was whether the defenders had proved that the bus had been driven in a manner which was not negligent. It was not for the pursuer to prove that the speed of the bus was

excessive for the conditions. It was for the defenders to prove that it was not and, in any event, that the driver had not failed to take reasonable care to keep the bus on the carriageway. Speed may have contributed to the accident, but it was the driver's loss of control of the bus which was the ultimate operative cause. The defenders had the task of proving that that loss of control was not negligent. For this reason alone, the Lord Ordinary's decision cannot be sustained.

[38] A second difficulty with the Lord Ordinary's approach is his statement (at para [33] of his opinion) that it was "not said" that, at the speed at which the bus was travelling, it "would be less easy to handle in the prevailing conditions, or less responsive to directional control, or in some way less stable, more vulnerable to the impact of the wind, more prone to being deflected off course". There are matters that do not need to be spoken to in evidence. Central to any consideration of negligence is the self-evident fact that a lower speed improves vehicle handling, especially in cross winds. A static bus, or one which is driven at a slow speed, will not be blown off a main road by these winds. The faster a vehicle is driven, the greater the impact of the dynamic forces on it will be. The less traction there will be on the roadway. The less reaction time will be available when an unexpected, but foreseeable, event occurs. This is not a matter which requires expert testimony, but one of ordinary everyday experience. The slower a bus is driven in windy conditions, the easier it will be to keep on the carriageway. The faster it is driven, the more unstable it will become and the less reaction time there will be. The Lord Ordinary was plainly wrong in holding that this had not been established.

[39] Thirdly, the effect of speed had been described in evidence. It is what Mr McArthur was referring to at the end of his examination-in-chief (*supra*). This is a further problem with the Lord Ordinary's reasoning. He appears to have ignored this testimony. There is no

obvious explanation for this evidence, which emanated from an experienced driver with HGV experience and who had been subjected to the same conditions as the bus, being left out of account. Mr McArthur had reacted to the conditions by slowing to a speed of 30 mph which he could maintain in second gear. The discounting of Mr McArthur's testimony also has the effect of vitiating the Lord Ordinary's decision.

[40] The importance of speed was also accepted by Ms Holland under cross-examination. She had already alluded to it when mentioning speed restrictions which are imposed on bridges when wind velocity exceeds certain limits. A bridge may only be closed to high sided vehicles when the wind velocity exceeds 70 mph, but speed restrictions will be imposed on vehicles when it is much less than that. There was no evidence that the driver's speed, and hence her ability to react, was not negligent. Such evidence as there was pointed in the opposite direction.

[41] A fourth difficulty with the Lord Ordinary's analysis is his understanding of the import of the driver's testimony. He dismissed the driver's account of her speed as unimportant; explaining that she was simply mistaken in her underestimation of the rate of travel and that what she had said had been in the context of a discussion of relative speeds before and after the first gust. Although there may be some force in these considerations, the fact is that the Lord Ordinary correctly recorded the driver as accepting that driving at more than 20 mph in the prevailing conditions, when the first gust hit, would not have been sensible. The question and answer according to the transcription were: "…do you think going at more than 20 miles an hour would be sensible in those weather conditions you've described? – No". As already noted, this was a reference to the conditions that existed at the first gust, after which the driver said that she had braked and thus reduced her speed to 10 to 15 mph.

[42] The Lord Ordinary concluded that, on the basis of the expert evidence, the bus was actually travelling at between 40 and 45 mph, when it was hit by the first gust, and between 35 and 40 mph, when it was hit by the second. It was thus going at more than twice the speed which the driver herself considered to be sensible when the first gust hit and possibly even when the second gust did so too. The driver's testimony amounted to an admission against interest that, if the Lord Ordinary's findings on speed were correct, she was not driving sensibly. Her position, which was rejected by the Lord Ordinary, remained that she was not driving at the speeds which were ultimately proved. Even when read in the whole context of the examination, and bearing in mind the limits of an appellate review, this admission is not capable of being glossed over in the manner adopted by the Lord Ordinary. The bus was being driven at twice the speed which the driver maintained she was doing and twice what she herself regarded as sensible for the conditions. It is extremely difficult, if not impossible, to see how the driver could nevertheless be held not to be at fault when the consequence was that she was unable to react in sufficient time to control the bus and avoid the accident. The Lord Ordinary's conclusion in this regard cannot be explained or justified.

[43] According to Ms Holland, the driver's acceleration from the layby to the point at which the first gust hit was typical. The bus accelerated to between 40 to 45 mph in the space of 150 metres. This is at least strongly indicative of the driver adopting the rate of acceleration which she would have applied in normal circumstances, as distinct from the prevailing conditions. The acceleration was almost the maximum which was possible. If the question is asked of what steps the driver took to adapt to these conditions, the answer on the evidence would appear to be "none". This is, as is often said when the maxim applies, "eloquent of negligence".

[44] The only defence put forward by the defenders was that what had happened was *damnum fatale*. Since the conditions which the bus encountered were not out of the ordinary, this defence was bound to fail. The Lord Ordinary would, had it been necessary to do so, have rejected this defence. The problem with that approach is that it was the only defence which was advanced to rebut the inference of negligence which followed the application of the maxim. Once it was rejected, that inference was almost inevitable.

[45] The Lord Ordinary's residual concern (in para [36] of his opinion) is a curiosity. Having said that he would have rejected *damnum fatale*, he went on to suggest that what had occurred had been without fault and was "inevitable". *Damnum fatale* is usually defined as loss arising from inevitable accident (Traynor's *Latin Maxims*; Guthrie Smith: *Reparation* 410; cf Walker: *Delict* (2nd ed) 331). A finding of inevitability is inconsistent with the evidence that the wind conditions were foreseeable and could be coped with by the expedient of reducing the speed of the bus. As Ms Holland accepted (*supra*), an accident was not inevitable. It depended on the speed of the bus. If the bus had been travelling "at a slightly slower speed than it actually was travelling it would still have been possible to avoid the accident by braking".

[46] For these reasons, the decision of the Lord Ordinary cannot be sustained. The inference of negligence was not, on the evidence, rebutted. In so saying, the court is not deciding the case on the basis of onus. As the Lord Ordinary recognised, once all the evidence is out, onus seldom matters (*SSE Generation* v *Hochtief Solutions* (*supra*) LP (Carloway) at para 45 and *Gibson* v *British Insulated Callenders Construction* 1973 SC (HL) 15, Lord Reid at 22). Rather, the evidence, notably that of the driver, Mr McArthur and Ms Holland, was eloquent only of negligence. The reclaiming motion must be allowed. The interlocutor of 18 December 2019 will be recalled. The court will find the defenders liable to

make reparation to the pursuer in respect of the accident of 26 March 2015. In terms of the parties' agreement on *quantum*, this will be in the sum of £15,000, with interest thereon at the judicial rate from the first day of the proof (30 October 2019).