

SHERIFFDOM OF GLASGOW AND STRATHKELVIN AT GLASGOW

PD519-18

JUDGEMENT OF SHERIFF PAUL ANTHONY REID

in the cause

Natalie Harper

PURSUER

against

(FIRST) Matthew Kitching

and

(SECOND) UK Insurance Limited

DEFENDERS

Act: Mr Markie, Advocate

Alt: Mr Murray, Advocate

GLASGOW, 21 December 2020. The Sheriff having resumed consideration of the cause,
finds the following facts admitted or proved:

NOTE:

[1] A proof in this action proceeded on 12 and 17 November 2020. Mr Markie, Advocate, appeared for the pursuer. Mr Murray, Advocate, appeared for the defenders.

At the outset of hearing evidence, I brought to the attention of the parties the absence of a shorthand writer. Parties were content to proceed without the shorthand writer.

Findings in fact

[2] Having resumed consideration of the cause, the sheriff finds the following facts to be admitted or proved:

- (1) The pursuer is Natalie Harper. She is designed in the instance.
- (2) The first defender is Matthew Kitching. He is designed in the instance.
- (3) The second defender is the motor vehicle insurer of the first defender in terms of section 143 of the Road Traffic Act 1988.
- (4) On 20 November 2017, the pursuer was driving her motor vehicle registration number SA14 HKB. She stopped her vehicle at a set of traffic lights on Ruchazie Road, Glasgow. She indicated her intention to turn left onto Edinburgh Road.
- (5) At the traffic lights in front of the pursuer's vehicle was a white Audi A5, convertible motor vehicle with a black roof bearing the registration number B7 BOY. The first defender was the driver of the said vehicle. Both vehicles turned left into Edinburgh Road, Glasgow. The pursuer's vehicle was driving behind the Audi.
- (6) For a distance of approximately half a mile the Audi was being driven erratically along Edinburgh Road. It accelerated then decelerated repeatedly. The pursuer was driving her vehicle behind the Audi. Given the manner of the driving of the Audi she drove at a safe distance behind the vehicle.

(7) As the Audi approached the junction of Edinburgh Road with Southernness Road it moved sharply to turn left into Southernness Road. The pursuer indicated to move right into the outside lane. As the pursuer passed the Audi motor vehicle, suddenly and without indication the Audi veered back onto Edinburgh Road and collided with the pursuer's vehicle.

(8) *As a result of the collision the pursuer's vehicle was pushed onto the central reservation. The Audi was left on the carriageway. Immediately following the accident, the Audi was driven away from the scene of the accident.*

(9) The first defender was the owner and registered keeper of the Audi at the time of the accident. He was the insured policy holder of the vehicle. The individuals insured to drive the vehicle were the first defender, his father and mother. The first defender did not report the vehicle as stolen at the time of the accident. The first defender did not provide the vehicle to an uninsured driver at the time of the accident.

(11) The first defender was the driver of the white Audi vehicle at the time of the accident. He drove the vehicle carelessly. In particular he failed to indicate his driving intentions and to keep a proper look out, and failed to take reasonable care for other road users such as the pursuer. His driving caused the collision with the pursuer's vehicle. As a result, the pursuer suffered loss, injury and damage.

FINDS IN LAW:

(1) The pursuer having proved the first defender was the driver of the Audi motor vehicle registration number B7 B0Y, and having suffered loss, injury and damage as a result of negligence on the part of the first defender, is entitled to decree as craved for the sum of £7,750 Sterling with interest at the rate of eight per centum per annum from 20 November 2017 until payment.

(2) Finds the pursuer entitled to the expenses of the cause as taxed. A pursuer's offer was lodged in terms of Rule 27A.2. Said pursuer's offer was for the sum of £7,000. Said offer is for less than the sum awarded as a consequence the pursuer is entitled to an increase in expenses as provided for in terms of Rule 27A.9; certifies the witnesses for the pursuer, Scott Taylor and Graham McMillan as skilled witnesses; Certifies the cause as suitable for the employment of junior counsel.



NOTE:

Summary of evidence

Pursuers witnesses

The pursuer

[3] The pursuer gave evidence that on 20 November 2017 at approximately 945pm, she was driving home from her place of employment. She had dropped off a colleague.

She first encountered the motor vehicle of the first defender at the junction of Ruchazie Road with Edinburgh Road. She was driving behind the vehicle of the first defender. Her attention was drawn to the vehicle as at that time she was interested in purchasing a new vehicle and this vehicle was of interest to her. It was a white Audi convertible with a black roof. Her attention was also drawn to the registration of the Audi which was distinctive in that it read B7 B0Y. The Audi moved off from the junction and turned left into Edinburgh Road without indicating. The pursuer followed the vehicle along Edinburgh Road. At this point the road comprises three lanes. The inside lane is a bus lane. The pursuer followed the first defender's vehicle in the middle lane. She described the driving of the vehicle as erratic. It accelerated and decelerated repeatedly. She gained the impression the vehicle was being driven by an individual who was lost. She kept her vehicle a safe distance from the Audi as she drove along. As the Audi approached the junction of Edinburgh Road with Southernness Road it slowed and then moved to the left without indicating, clearly to turn left into Southernness Road. The pursuer was driving behind the first defender's vehicle. As the Audi sought to turn left onto Southernness Road, she indicated to overtake the vehicle in the outside lane. She had passed the Audi when suddenly and without indication the Audi abruptly averted the manoeuvre into Southernness Road and turned back onto the main road colliding with the pursuer's vehicle forcing it onto the grass verge which separates the north and south carriageway. The Audi vehicle was left on the carriageway. The pursuer got out of her vehicle. As she did so the Audi drove away from the scene. The pursuer had noted the

registration of the vehicle as B7 B0Y. She noted the make of the car was a white Audi convertible with a black roof. Of this she was certain. She could not identify the driver of the Audi. She flagged down a passing police vehicle and provided information concerning the accident to the officers. In particular she provided them with the registration details of the vehicle involved.

Craig Wilson

[4] Craig Wilson was a witness who resided in Southernness Road. At the time of the accident, he was outside his dwellinghouse affecting a repair to his own vehicle. He heard a loud bang. He looked down to the junction of Southernness Road and Edinburgh Road. He saw the pursuer's vehicle on a grass verge. He saw a white Audi with a black roof in the middle of the junction. He observed the Audi drive off. At the time of hearing the bang he had a clear line of sight to the locus of the accident. He was approximately 100 yards from the accident. He drove to the locus to assist the pursuer. He arrived moments after the accident and found the pursuer, who was upset, and who immediately asked him to note down the registration of the white Audi as B7 B0Y. He described the pursuer presenting as being fearful that she would forget it. He typed the registration into an application on his phone which identified the vehicle bearing that registration as a white Audi convertible with a black top. This was consistent with the vehicle he saw as being involved in the aftermath of the accident and which drove off

from the scene. Along with the pursuer he flagged down a police car and gave details to the police.

PC Ashley Morris

[5] PC Ashley Morris was 28 years of age with six years' service. She is based at Jackton, East Kilbride. On the evening in question, she was on duty with her colleague PC Clinton. They were driving along Edinburgh Road when they were flagged down by the pursuer. She spoke to the pursuer and obtained details of the circumstances of the accident. She noted a statement from the pursuer. The pursuer confirmed to her that she had been in a collision with a white Audi A5 convertible, registration number B7 B0Y. PC Morris checked with the Police National Computer which identified the first defender as the registered keeper of the vehicle. She tried to contact the first defender repeatedly to take a statement from him. She had attended the address of the first defender on two prior occasions but had been unable to speak with him. She had left her details with the mother of the first defender. Eventually, he telephoned her and she arranged to attend at his address. She arranged to meet with the first defender at his home address on 7 March 2018. At this meeting she advised the first defender of the nature of her enquiries. In terms of section 172 of the Road Traffic Act she requested that the first defender identify who was the driver of the vehicle on the date of the accident, namely, 20 November 2017. The first defender replied that he could not remember and that he had no knowledge of his vehicle being in an accident. In light of

this the officer decided to charge the first defender with a failure to report a road accident. The officer did not consider the first defender had a reasonable excuse not to provide information as to the identity of the driver at the time of the accident. The Audi vehicle was parked at the address of the first defender. At the meeting on 7 March 2018, the officer glanced at the vehicle and could not identify any damage.

PC M Clinton

[6] PC M Clinton is 41 years of age with 11 years' service. On 20 November 2017, he was on uniform mobile patrol with PC Morris. They were flagged down at the locus by the pursuer. He took a statement of Craig Wilson. He read out the statement during the course of the proof which was consistent with the evidence given by Mr Wilson.

Notice to admit and joint minute

[7] Following the evidence of this witness counsel for the pursuer made reference to the notice to admit no. 2 of process. This confirmed that the defenders admitted the first defender was the owner and registered keeper of the white Audi motor vehicle with registration B7 BOY at the time of the accident; that the first defender was the policy holder for the insurance policy on the Audi at the time of the accident; that three persons were insured to drive the vehicle, namely the first defender and his parents, at the time of the accident; that the first defender had not reported the vehicle stolen at the time of

the accident and that the first defender had not provided the vehicle to an uninsured driver to drive the vehicle at the time of the accident. Counsel for the pursuer also made reference to the joint minute of pre-trial meeting no. 27 of process. This identified that parties had agreed damages at a figure of £7750.00 in the event I found for the pursuer. And thereafter closed the case for the pursuer.

Defence witnesses

Matthew Kitching

[8] The first witness for the defence was the first defender Matthew Kitching. He was 26, he resided with his parents at the address in the instance. He worked for his father in the family business based in Stirling. As at 20 November 2017, he was the owner and registered keeper of a white Audi A5 convertible motor vehicle with registration number B7 B0Y. He had owned the car from August 2015 until March 2020 when it was traded. He spoke of an accident in 2016. He was travelling back from Birmingham. He had become momentarily distracted and collided with a vehicle in front. He referred to production 6/2 which was a report from Audatex dated 5th May 2016, identifying the repairs required to the vehicle following this accident. Apart from that accident he advised that during his period of ownership of the vehicle neither he nor the vehicle had been in any other accident, even of a minor nature. In March 2018 he heard from the police. He arranged a meeting with them. He was asked who the driver was on 20 November 2017. He said he was not involved in a road traffic accident on 20

November 2017. He did not know where he was on 20 November 2017. He told the police he did not know who was driving on that day. He did not provide any background or detailed information regarding what efforts he had made to ascertain what he was doing on that day. He confirmed the vehicle registration was distinctive. It had a private plate. His parents were insured to drive the vehicle. Very occasionally they would drive the vehicle. They both had their own vehicles. He was baffled as to why the pursuer had identified his vehicle as being in the accident. He thought that she may have explored social media and identified the vehicle from these enquiries. The 20

November 2017 was a Monday. The first defender remembered nothing specific about that date. He had tried to work out where he was on 20 November 2017. Nothing specific had occurred at that time to assist him. Nothing occurred out of the ordinary. He did discuss with his parents the police coming to the address. They asked him if he was involved in the accident and he said no. He confirmed that no repairs had been effected to the vehicle between November 2017 and March 2018.

Kenneth Kitching

[9] The father of the first defender Kenneth Kitching gave evidence. He confirmed his son drove the motor vehicle. He vaguely remembered the police coming to meet his son. He did not think anything of it at the time. His son had mentioned to him it was to do with an accident. His son had said he knew nothing about it. He was unaware of any damage to the Audi motor vehicle. He would have known if there had been

damage to the vehicle because every Sunday he washed the family cars including the Audi.

Mrs Aliya Kitching

[10] Mrs Aliya Kitching gave evidence. She is the mother of the first defender. She remembered vaguely the meeting with the police. It was to do with the white Audi. She could not recall dates. She could not recall if she was at the meeting when the police arrived. She first heard about the allegation when someone tried to make a claim. Before contact with the insurance company she had not spoken about the matter to her family. She confirmed the white Audi was not damaged.

Alan Bathgate

[11] Alan Bathgate gave evidence on behalf of the defender. He was 65 years of age. He was a motor engineer. He spoke to the terms of his curriculum vitae lodged as production 6/3. He was content to adopt the terms of that curriculum vitae. He had been a mechanic since 1972. He had given evidence in court settings for the last 20 years. He advised he gave evidence on average 10 times per month. He produced a report dated 30th April 2019 a copy of which was lodged as production 6/1. He was content to adopt the terms of that report as his evidence. He inspected the white Audi on 3 April 2019. At this inspection he noted a repair to the offside front of the vehicle. At that moment the first defender told him of the 2016 accident and subsequent repair at

that time. Until then he had had no knowledge of this accident or repair. His inspection in his opinion did not show evidence of any recent repairs. Given the damage to the pursuer's vehicle in his opinion he would have expected damage to the offside area of the Audi. If there had been a subsequent repair, he would have expected to notice differences to the paintwork, evidence of dismantling or disassembling of parts of the vehicle. He mentioned the accumulation of road dirt and grime which would indicate whether a recent repair had been effected. He accepted the accumulation of road dirt and grime could depend upon a number of variable factors such as terrain, weather conditions and mileage of the vehicle. He concluded from his inspection that the Audi could not have been involved in the accident.

[12] Following this witness having concluded his evidence the defenders closed their case.

Submissions for the pursuer

[13] Counsel for the pursuer invited the court to accept the version of events given by the pursuer as credible and reliable. He invited the court to find the vehicle involved in the accident was the white Audi which the first defender was driving at the time. He invited the court to find the vehicle was being driven erratically, carelessly and negligently by the first defender and at the material time he had failed to keep a proper look out or indicated his intentions and that as a result he was responsible for the collision. He submitted that there was a presumption the first defender was the driver.

That the presumption is rebuttable if the first defender proves he is not the driver. He made reference to *Barnard v Sully* 1931 TLR 557 as his authority for this submission. The first defender offered no explanation as to what he was doing on the date of the accident. He offered no explanation as to why his vehicle should be identified by the pursuer as being responsible other than some social media enquiry. The first defender made no effort to establish where he was on the day of the accident. He offered no detail as to what efforts he had made to ascertain his whereabouts on the day of the accident. His invitation was to reject the evidence of the defence witnesses in particular to reject the evidence of Mr Bathgate who, without a firm basis, had reached what he described as a sweeping conclusion. Mr Bathgate's opinion was based upon speculation and was unreliable. He made reference to the matters admitted by the defenders in terms of the notice to admit as supporting his submission the first defender was the driver of the vehicle.

Defender's submissions

[14] Counsel for the defender's submissions identified two issues to be addressed. Firstly, was the collision with the Audi and secondly was there sufficient evidence to support the inference the first defender was the driver. He reminded the court that if the first defender was lying then there must be some form of conspiracy along with his parents who must also be involved in the lie. He challenged the reliability of the pursuer as a witness. In particular making reference to a report from a medical

practitioner. He commended to the court the evidence of Mr Bathgate who in his opinion supported the contention that the Audi had not been involved in an accident as it did not bear the marks of repair which would have been required if it had been involved. He submitted it was necessary for the pursuer to prove either by direct evidence or inference that the first defender was the driver of the Audi. If not so proved, then her claim lay with the MIB. He accepted the presumption outlined in *Barnard v Sully* applied. Counsel made reference to a number of authorities which provided guidance as to how a court should approach assessment of the credibility and reliability of witnesses. I considered these carefully and had regard to them when reaching this decision. He also made reference to *Chisolm v Mehmood* 2019 SCEDIN 79. I did not consider this authority to be of direct relevance to the issue here. In that case the factual circumstances were particular and the averments advanced by that pursuer were found wanting. This is not the case here.

Decision

[15] The issue to be determined by the court is whether the white Audi registration number B7 B0Y was in a collision with the pursuer's vehicle on the date of the accident and whether there is sufficient evidence to support the inference that the first defender was the driver of the vehicle at the time.

[16] I found the pursuer to be a credible and reliable witness. She did not seek to exaggerate in her evidence. She was an experienced driver. She held a HGV licence.

She was formerly employed in the Armed Forces in a driving capacity. At the time of the accident she had an interest in vehicles. She was attracted to the defender's vehicle and paid particular interest to its distinctive registration. I accept her identification of the vehicle involved in the collision with her vehicle as being a white Audi convertible with the registration B7 BOY. I do not accept the suggestion that the vehicle was identified by an enquiry made by the pursuer on social media. Reference was made to information supposedly given by the pursuer to a medical practitioner whilst being examined for the purposes of providing a report. What is referred to in that report is information translated by the author of the report following discussion with the pursuer and is not evidence by the pursuer. I accept her version of circumstances regarding the erratic driving of the Audi. It was clear from her account that the driver of the Audi was paying no attention to the road or other road users at the material time. It was clear the vehicle was being driven by someone who was unfamiliar with the area. I accept that the driver of the Audi aborted a manoeuvre and returned to the main carriageway without looking or indicating. From her version the driver of the Audi was clearly at fault and responsible for the accident.

[17] The version given by the pursuer was supported by the independent witness Craig Wilson. I found Mr Wilson to be credible and reliable. He was a bystander. He observed the immediate aftermath of the collision. He identified the vehicles involved as being the pursuer's vehicle and a white Audi convertible. He identified the vehicle of the first defender as fleeing from the scene. He spoke to the pursuer providing the

registration details to him immediately after the accident and after a search on his phone the result of which was consistent with what he had observed, namely, the other vehicle was a white Audi convertible with a black top. The information was given by the Pursuer immediately after the accident leaving no time in my opinion for any possible social media enquiries.

[18] The significance of the evidence of the police officers was twofold. Firstly they arrive at the locus moments after the accident and are provided with the registration details by the pursuer. Such immediacy does not support the contention of social media enquiries by the pursuer. Secondly, in the weeks following PC Morris sought to interview the first defender with regard to the accident and to enquire as to who was the driver. She sought to arrange an interview with him on a number of occasions but was unable to do so. She left messages with the mother of the first defender for him to contact her. Eventually a meeting was arranged and at that interview the first defender did not accept he was the driver. The police officer did not accept his version of having no knowledge of as to who the driver was.

[19] I found the first defender to be incredible and unreliable. He gave evidence in a fashion expressing little concern at the accusation levelled of him. Indeed, his explanation that he was a victim of some form of Facebook enquiry by the pursuer was incredible. Contact had been made by police officers wishing to speak to him and in advance of their meeting he was made aware as to the nature of their enquiry. At the meeting he was unable to recollect what he was doing on the date and time of the

accident. I found this to be incredible. He gave no evidence explaining as to what efforts he had made to ascertain what he had been doing on the date and time of the accident. The passage of time between the accident and the meeting with the police was 107 days. It was not of such length that it would be unreasonable to expect an individual to recall where he was on a particular date and time. He was unable to *provide information as to where he might have been at the time of the accident*. His parents spoke to him being an avid attendee at a gym, attending on a nightly basis. The first defender had made no enquiry of the gym or friends he trained with to assist as to where he was that evening. I found him to be deliberately evasive in this regard.

[20] I found the evidence of the father of the first defender to be unreliable. Again, I made the observation of an apparent lack of interest in the accusation made. The visit by the police accusing a member of his family of fleeing the scene of an accident was passed over fairly quickly despite the police officers repeatedly contacting his son for information. The mother of the first defender added little to the proceedings given her inability to recall events.

[21] I found the evidence of Mr Bathgate to be unreliable. I have no doubt he is a man of considerable experience in the field of motor vehicle mechanics. I found his conclusion that following his examination of the Audi vehicle that it had not been repaired recently and therefore not involved in the accident to be unreliable and to be without foundation. The mechanism and process involved by Mr Bathgate in observing the vehicle where he thought damage might have occurred in the Audi impressed me as

being unreliable and speculative. No evidence was led as to where the Audi was struck. He examined an area of the Audi which he thought might be damaged if a collision had occurred consistent with the area of damage to the pursuer's vehicle. The examination of the vehicle occurred some 17 months after the accident. It was unclear as to how precise and accurate the information concerning the circumstances of the accident was which was given to him by those instructing him. His report made reference to a letter of instruction which appeared to contain inaccurate information surrounding the circumstances of the accident. He sought to rely upon his observation as to the extent of dirt and grime on certain parts of the vehicle and the absence of tool marks or scrapings.

In his opinion what he saw did not indicate recent repairs. His concept as to what he meant by recent was not explained by him despite being invited to do so. I considered this a significant omission given the passage of time which had elapsed between the accident and his inspection. It is clear on any view that over a passage of time the marks and signs which he relies upon could accumulate for a variety of reasons and road related variables. I found his approach to be speculative. It did not take into account the passage of time and how that passage could influence or affect the factors he relied upon. He identified a repair to the Audi which he opined was consistent with the repair required in 2016. Other than his observation he was unable to provide a more reliable basis as to how he was able to age that repair and exclude a more recent repair. In particular his inability to expand upon his use of recent left me considering his opinion as unreliable and have therefore disregarded his conclusion.

[22] It was agreed that the first defender was the owner of the vehicle at the time of the accident. That the first defender was the registered keeper of the vehicle. That the first defender was the policyholder for the vehicle at the time of the accident. That the first defender had not allowed an uninsured driver to drive the vehicle at the material time. I found the evidence of the pursuer credible and reliable. I found her evidence regards the identification of the make of the vehicle and its registration credible and reliable. I found her evidence regarding the circumstances of the collision to be credible and reliable. Following *Barnard v Sully* the presumption is that the owner of the vehicle is the driver unless there is evidence to the contrary. In this case I find there is no such evidence. I find the first defender to be the driver of the vehicle. I find that the vehicle at the material time was being driven erratically, carelessly and negligently. I find that the vehicle that collided with the pursuer's vehicle was the white Audi registration number B7 B0Y, and at the time of the collision was being driven by the first defender. As a result of the driving of the first defender he was responsible for causing the collision and as a consequence the pursuer suffered loss, injury and damage and that the first defender is responsible to the pursuer for the loss occasioned to her. The pursuer is entitled to decree.
