STATEMENT OF DECISION

by

SHERIFF SUSAN M DUFF

in the cause

SF14-22

JAMES TOMAS
Pursuer

Against

QBE UK Ltd
Defender

The pursuer has proved on the balance of probability that the defender's insured was at fault at common law for failure to take reasonable care.
The pursuer is entitled to payment by the defender of the sum of £4072.

Note:

The Evidence

The evidence in this case was in short compass. I heard from two witnesses, Mr Tomas the pursuer and Dr. Bumrah about his examination and conclusions as to injuries sustained by Mr. Tomas.

The pursuer, Mr Tomas gave evidence that he had been in a restaurant for lunch on 22 October 2021 at a time between 1200 hours and 1500 hours. He had parked his car, a black Ford Fiesta registration mark FP15 LEJ, directly outside the restaurant in a parking bay between the butcher's van and a white car as seen in defender's inventory of process photograph 6/2/2. While in the restaurant, he heard a shout from the butcher and on looking saw the defender's insured's van as it was rolling. He panicked and ran out. He said "I could see it (the van) was going to pass my vehicle, I ran out and decided to try to hold the van."

It was his first instinct to do so. He said that the van could have collided with a pedestrian or vehicle. He felt it was his responsibility to try to prevent hurt. He held the van for 5-10 minutes as people were trying to find the owner.

In cross-examination, he said that the butcher and 2 members of staff from the restaurant were trying to find the owner. The butcher had been trying to get into the van to get to the handbrake but then went to get the owner. The owner was found in a shop up the road.

Mr Tomas said that he had originally had his shoulder against the rear of the van but once it had stopped moving it was not that heavy and it was easier to hold. He was holding it as can be seen in pursuer's photograph 5/2/4 of process.

Mr Tomas explained that the back of the van had been sticking out of the parking space hence why it was able to roll down the hill. He was concerned that the van would make contact with the hairdresser's premises or the footpath that can be seen on the left of photograph 6/2/3 of process. Mr Tomas said that he had panicked when he saw it roll and hit the car. He ran out and stopped it and held it for 5-10 minutes until the driver returned. He acted fairly quickly to stop it moving then held it in position. He was not pushing it up the hill, he was just holding it.

He was concerned that someone would get hurt as a consequence of the van rolling down the hill because no-one was in control of the van.

Evidence of Injuries

Mr Tomas said that his right elbow, shoulder and back were sore after he had held the van and that prevented him from training which was something he enjoyed. He said that persisted for months although he could not specify how many months. He said that he had put on weight. He required assistance with household tasks and his parents used to clean the house and shop for him once per week for between 1- 3 hours and that lasted for about a month after the accident.

Mr Tomas said that he had now fully recovered from the injuries.

Dr. Bumrah adopted his medical report as his evidence in chief. He narrated that the pain from the shoulder injury was originally 5 out of 10. That at the time of his examination of Mr Tomas on 10 January 2022, the shoulder was pain free.

Dr Bumrah narrated that the pain from the right elbow injury was originally 8 out of 10 and by the time of the examination, it was down to 4 out of 10. That was due to an exacerbation of a pre-existing condition and had resolved to its pre-accident level after 4 weeks.

Dr Bumrah narrated that the back pain was initially 7 out of 10 and at the time of the examination, it was down to 4 out of 10. He noted that Mr Tomas had used over the counter painkillers and was continuing to do so.

He noted that in relation to the shoulder and right elbow injury, Mr Tomas's symptoms had settled within 4 weeks of the accident. At the time of his examination of Mr Tomas, the back injury was still ongoing and he would expect that to settle within 5 months from the date of the accident. He recommended physiotherapy with the number of sessions being determined by the treating practitioner.

Mr Tomas gave evidence that at the time of the proof, all his symptoms had settled.

Quantum

Mr Briggs for the pursuer submitted that quantum should be a cumulo figure of £4,000 in relation to all three injuries and that the figure for services should be £72.

Mr Masters for the defender submitted that if the pursuer were to succeed at all, there ought to be a deduction for contributory negligence. That was within my discretion and fact specific. On the basis of the evidence, Mr Masters proposed a figure of £2,000 with services at £50.

Reasons for Decision

As stated by Lord Rodger in *Simmons v British Steel 2004 S.C. (H.L) 94* once liability is established, any question of the remoteness of damage is to be approached in the following way:

(1) The starting point is that a defender is not liable for a consequence of a kind which is not reasonably foreseeable;
(2) While a defender is not liable for damage that was not reasonably foreseeable, it does not follow that he is liable for all damage that was reasonably foreseeable, depending on the circumstances, the defender may not be liable for damage caused by a novus actus interveniens or unreasonable conduct on the part of the pursuer, even if it was reasonably foreseeable;
(3) Subject to the qualification in (2), if the pursuer's injury is of a kind that was foreseeable, the defender is liable, even if the damage is greater in extent than was foreseeable or it was caused in a way that could not have been foreseen
(4) The defender must take his victim as he finds him;
(5) Subject again to the qualification in (2), where personal injury to the pursuer was reasonably foreseeable, the defender is liable for any personal injury, whether physical or psychiatric, which the pursuer suffers as a result of his wrongdoing.

Applying parts one and two to the circumstances of the present case.

Was it reasonably foreseeable that a failure to secure a vehicle on an incline might cause injury?

I consider that it was reasonably foreseeable that injury might be caused. It was also reasonably foreseeable that a person or persons would try to stop a vehicle which had started to roll on an incline before it gathered momentum and presented a greater danger.
It is obvious that an unoccupied vehicle, beginning to roll on an incline presents a danger to people in the vicinity and to property such as other vehicles and shops.

Mr Tomas gave evidence that the area was busy at the time, his attention was drawn by the butcher shouting. He instinctively ran out to try to stop the van. The butcher was trying to get into the van to get to the handbrake. Both were trying to stop the vehicle before it gathered momentum on the incline and presented a greater danger to those in the vicinity and to property.

In *Steel v Glasgow Iron and Steel Company Limited 1944 SC 237*,LJ Clerk (Cooper) in the first full paragraph on page 74 of the Scots Law Times report stated this:
"There is no doubt that, from the first of the "rescue" cases, strong emphasis has been laid upon the beneficial instinct to save human life and the moral compulsion to do so which not only impart merit to altruistic efforts at rescue but may make such attempts the natural consequence of the wrong which imperils the victim. "The law does not think so meanly of mankind as to hold it otherwise than a natural and probable consequence of a helpless person being put in danger that some able-bodied person should expose himself to the same danger to effect a rescue""

I consider Mr Tomas was effecting a "rescue". He acted to stop the van from gathering momentum and presenting a greater danger to others in the vicinity and to property.

I conclude that there was a breach of the duty of care by the defender's insured in failing to properly secure the vehicle.
That someone might sustain injury in attempting to prevent a more serious accident is within the scope of the duty of care.

<u>Was this a novus actus interveniens or unreasonable conduct on the part of the pursuer?</u>

The defender contends that the actions of Mr Tomas amounted to a novus actus interveniens and that he is responsible for his own injuries.

I accepted Mr Tomas's evidence that when he heard the butcher shout, he panicked, acted instinctively and ran out to try to assist. I have decided that the action Mr Tomas took in trying to halt the progress of the vehicle by putting his weight against it using firstly his shoulder and then his hand and arm was a minimal, reasonable intervention aimed at addressing the obvious danger posed by the uncontrolled moving vehicle. Mr Tomas did not do anything excessive or unnecessary. I have already concluded

that such actions by a person were reasonably foreseeable. The injuries sustained by Mr. Tomas are directly linked to the breach of the duty of care by the defender's insured.

Volenti non fit injuria and contributory negligence

I am satisfied that the defender's insured owed a duty of care to the pursuer and that he breached that duty.

In *Steel v Glasgow Iron and Steel Company Limited 1944 SC 237* the plea of *volenti* was said to be equivalent to an argument that the voluntary act of the injured person was a *novus actus interveniens* which broke the legal chain of causation started by the defenders' negligence.

The same paragraph from *Steel* quoted above applies equally here.

Mr Tomas acted as a rescuer. The defence of Volenti non fit injuria must fail.
There is no basis for any finding of contributory negligence.

The pursuer has proved on the balance of probability the defender's insured was at fault at common law for failure to take reasonable care.

The pursuer is entitled to payment from the defenders in the sum of £4072.

4.1.23