SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2019] SCEDIN79

PN2426/18

JUDGMENT OF SHERIFF PETER J BRAID

in the cause

MISS MICHELLE CHISHOLM

Pursuer

against

(FIRST) MR MOHAMMED MEHMOOD and (SECOND) ERS CORPORATE MEMBER LIMITED

Defender

Pursuer: Kelly; Thorntons Law LLP
Defender: Hastie; DAC Beachcroft Scotland LLP

Edinburgh, 2 October 2019

The sheriff, having resumed consideration of the cause, makes the following findings in fact:

Findings in fact

1. The pursuer is Michelle Chisholm, date of birth 1 December 1982. She is designed in the instance.

2. The first defender is Mohammed Mehmood, who now resides at an address in Glasgow ("address B"). He previously resided at a different address in Glasgow ("address A"). In particular, he resided there as at October 2016.

3. The second defender is the first defender's motor vehicle insurer in terms of section 143 of the Road Traffic Act 1988.

4. On 31 October 2016 the pursuer was driving her vehicle, a Vauxhall Agila ST58 HSF, in Bankhead Road, Rutherglen, Glasgow.

5. It was not yet dark.

6. The pursuer slowed, then stopped, to avoid colliding with a pedestrian who was crossing the road from her right.

7. Whilst she was stationary a vehicle ("the other vehicle") collided with the rear of her vehicle.

8. The pursuer and the driver of the other vehicle exchanged details. The other driver gave his name as Mr M Mehmood and his address as address C in Glasgow. (Addresses A, B and C all bear a certain similarity, but neither the numbers nor the street names are the same).

9. The identity of the driver of the other vehicle is unknown.

10. The driver of the other vehicle failed to keep a proper look out.

11.

Finds in fact and law

1. This court has jurisdiction.

2. The driver of the other vehicle failed to take reasonable care for the pursuer, thereby causing her loss, injury and damage.

3. The pursuer having failed to establish the identity of the driver of the other vehicle is not entitled to reparation from the defenders.

THEREFORE, assoilzies the defenders from the craves of the initial writ; assigns 21 October 2019 at 10.00am as a hearing on expenses.

Note

[1] This action called before me for proof on 10 July 2019 (having initially called on 9 July and been continued for one day, to allow another proof to proceed). Although the proof was assigned as a proof at large, the pursuer's solicitor advised me at the outset that an essential witness for the pursuer, Mr Rohit Samuel, was unable to attend, having been signed unfit for work. He was to give evidence in relation to quantum only. The pursuer's solicitor therefore moved for the proof to be restricted to liability. Counsel for the defenders expressed some reservations about that course of action, stating that he might have wished to ask Mr Samuel about various statements made by the pursuer regarding the circumstances of the accident, which might have a bearing on the pursuer's credibility and reliability. In the event, a joint minute was entered into agreeing that Mr Samuel's report, number 5/1 of process, contained an accurate record of what the pursuer told him at the consultation on 22 October 2017; that 5/2 of process are hospital records relating to the pursuer for the period after 31 October 2016 and are an accurate record of the pursuer's consultation, assessment and treatment at that hospital; and that 5/3 of process are GP records relating to the pursuer for the relevant period and are an accurate record of her consultations, assessment and treatment at her GP. On that basis I granted the pursuer's motion, and the proof duly proceeded as one on liability only.

[2] Thereafter, counsel for the defenders moved that the record be amended in terms of minute of amendment number 14 of process (which I had allowed to be received on 9 July 2019) and answers thereto which the pursuer had lodged, number 15 of process. That motion was opposed by the pursuer. The proposed amendment was to add the following paragraph to the end of answer 4:

> "Explained and averred that the first defender was not involved in any accident on 31 October 2016. He was involved in a road traffic accident on 17 August 2016 when he was not at fault. His vehicle was damaged in that accident. Separately, on or about 28 October 2016 a woman entered the first defender's private hire taxi. She was not his intended passenger. He refused to take her as a hire and asked her to leave his cab. She became verbally abusive. She took details from his taxicab badge which was hanging within his taxi. She took photos. She stated she was going to make a complaint. The woman was about 25-35 years old, of medium build and around 5'6" in height".

[3] To understand the import of the proposed amendment, it is necessary to have regard to the existing state of the pleadings. In statement of claim 4, the pursuer avers that she was driving her vehicle on 31 October 2016, in Bankhead Road, Rutherglen, Glasgow when (reading short) she slowed down to allow a pedestrian to cross the road. She was stationary when suddenly and without warning the first defender's vehicle collided with her vehicle at the rear. These averments are met with the following:

> "The precise circumstances of the alleged incident occurred on or about 31 October 2016 and are not known and not admitted. *Quoad ultra* denied".

[4] Counsel for the defenders conceded that the proposed amendment came late in the day. However, he submitted that the first defender had consistently told the second defender that it was not he who had been involved in any accident with the pursuer. Counsel had recently become involved and had reached the view that the answers should be amended in line with the proposed minute. He could not explain why counsel previously involved had not reached the same view.

[5] The ground of opposition was that the amendment came too late in the day and that it raised collateral issues which the pursuer would require time to investigate. I considered that the opposition was largely well founded, particularly since the minute of amendment did seek to introduce an issue which I regarded as collateral. I therefore refused the minute

of amendment except for the first sentence which I considered was a legitimate clarification of the defenders' position.

[6] As may be perceived from the minute of amendment to the extent it has been allowed, the issue focussed at the proof is unusual, in as much as the first defender denies that he was the driver of the car which the pursuer avers drove into the rear of her vehicle. A further peculiarity of the case is that, when one examines the record closely, the pursuer does not aver that the first defender was driving the other vehicle. Rather, it is simply averred that it was the first defender's vehicle which drove into the rear of hers. As a matter of law, mere ownership of a vehicle which is involved in an accident is insufficient to pin liability on the owner, even where the driver is negligent. It has to be shown either that the owner was driving, or that the vehicle was being driven by someone for whom the owner was vicariously liable (such as an employee acting in the course of employment). While this may simply be down to sloppy pleading, nonetheless, in the absence of a positive averment that he was driving, it is perhaps not altogether surprising that, until the minute of amendment, there was no positive averment for the first defender that he was not involved in any accident on 31 October 2016.

[7] Turning to consider the evidence briefly, the pursuer's evidence was that on 31 October 2016 she was driving her car in Rutherglen, Glasgow. She described the route she had taken, after leaving an Aldi store. After various turns, she found herself in Bankhead Road, Rutherglen. She was alone in the car, having previously dropped a passenger off. As she was driving along, she saw a pedestrian cross the road from her right. She thought that he was going to cross in front of her so she stopped. While she was still stationary, a taxi drove into the rear of her vehicle. Although she said the time of the accident was just after 6.00pm, she also said that it was just starting to get dark. When the taxi drove into her car,

she heard a thud and a crunching sound. She put her handbrake on and moved her car to the side of the road to assess the damage. When she did so, she observed that the boot lid was dented in at least a foot and the back bumper was crumpled. The side wheel arch was also crumpled. She described the other vehicle as being a dark navy black/blue car. She could see a taxi sticker on it. She was shown the defender's production 6/2, which was the photograph of a vehicle, which she identified as the other vehicle involved in the collision. She wrote the registration down at the time. She spoke with the driver who was maybe 5'8 or 5'9" tall. He looked Asian or Indian maybe. She thought he had a beard but wasn't sure. He had dark clothes on. She asked him to write down his name and address. He gave his name as Mr M or W Mehmood and his address as address C, although she wasn't sure. The other driver said he could get her car fixed by tomorrow, which she found strange. He seemed a bit edgy about giving his details. She got back into her car and phoned her mother, to calm herself down. She then drove her vehicle home. She reported the accident to her insurance company. In the event the damage to her car was such that it was a write-off.

[8] The pursuer was closely cross-examined by counsel for the defenders. The thrust of the cross-examination was essentially that the pursuer was lying and that she had not been involved in an accident at all. It was put to her that she had made various inconsistent statements to the various medical professionals whom she had seen after the alleged accident and in that regard she was referred to Mr Samuel's report, to the hospital records and to the GP records. In relation to the injuries sustained, it is fair to say that there is a certain inconsistency in what the pursuer has said from time to time. However, it is also clear that just over 24 hours after the accident is said to have occurred, the pursuer presented at the hospital, complaining of certain injuries and that she said that she had been

stationary when struck by another car to the rear (5/2 of process, page 4). Further, the GP records (5/3 of process, page 4) also record that the pursuer was in an RTA "*last night*". The pursuer also told Mr Samuel that she had been driving her Vauxhall Agila, and had come to a stop on the road, when she was hit from behind by another vehicle. That report (at 3.4) goes on to say that "she is unsure of the make, model or speed of the vehicle behind".

[9] The first defender then gave evidence. He gave his current address as address B. He is aged 45 and self-employed. He has been a taxi driver for 5-6 years. At the time of the alleged accident, 31 October 2016, he said he was driving a Ford vehicle VO11 EVP which he confirmed was blue. It was a taxi but is now a private vehicle. He said that shortly after 31 October 2016 he got a call from his insurance company (the second defender) who told him that someone was blaming him for an accident. From the outset he had denied to them that he had been in an accident. He was told that the accident had occurred around 6.00pm on 31 October 2016, but on that day he had been at a friend's house. He arrived there between 5.00pm and 5.15pm and stayed until between 9.00pm and 9.15pm. He flatly denied having been involved in any accident. He said that his vehicle was not damaged. It had been in a previous accident but had been repaired. He was referred to 6/2 of process, which was an engineering report in relation to his vehicle. That report described pre-incident damage and also stated that no damage had been caused by the incident in question. Although the first defender's evidence was not always easy to follow (partly because English is not his first language) it would appear that at least to some extent the descriptions of pre-incident damage, and damage sustained in the incident, were based upon what he had told the engineer who had been sent by the second defender to inspect his vehicle (some months after October 2016).

[10] In submissions, the solicitor for the pursuer invited me to find that the pursuer had been involved in an accident and that her vehicle had been struck by a Ford Mondeo VO11 EVP which was being driven by the defender. I should prefer the pursuer's testimony to that of the defender. It was clear that an accident had happened. Her vehicle had been damaged. The pursuer gave her evidence in a clear and consistent manner. The description given by the pursuer of the other driver matched the defender's appearance. The first defender was not credible or reliable. He was very intense in his position. The record did not allow him to plead a positive defence of being elsewhere. No good reason had been advanced as to why the pursuer would make a claim against the first defender, unless he had in fact been driving his vehicle on the date in question and it had been involved in a collision with her vehicle.

[11] Counsel for the defenders invited me to grant decree of absolvitor and expenses. The pursuer's pleadings in the record were sketchy. Statement of claim 4 avers the date and time but there was no real detail in the pleadings of the first defender's vehicle. It was for the pursuer to prove that the accident happened in the way that she said it happened. The issue came down to credibility and reliability. The first defender had consistently denied his involvement throughout. The pursuer was vague and evasive and there were internal consistencies in what she told different people at different times.

[12] As regards my assessment of the witnesses, dealing first with the pursuer, as already observed, there were certain inconsistencies in the detail of her evidence. However, on the fundamental issue as to whether or not she was involved in a road traffic accident on 31 October 2016, I am in no doubt that she was. Certainly on the pleadings as they stand, no reason was given as to why she would fabricate an accident and incriminate the first defender as the driver of a vehicle in an accident which simply did not happen. Whatever

other inconsistencies there may have been, she has consistently maintained since 31 October 2016 that she was involved in a road traffic accident on that day when a vehicle drove into the rear of her vehicle. Her vehicle was damaged. For the claim to have been entirely fabricated from beginning to end, the pursuer would not only have had to lie about having been in an accident to her GP, to the hospital, to Mr Samuel and to this court, but would also have had to have brought about the damage to her vehicle in some way, which would have involved a course of deception and planning to an extraordinary degree. There is no foundation for believing that the pursuer did, or even was capable of, that. Accordingly, I am satisfied that she is telling the truth about her car being struck by a vehicle from behind, on 31 October 2016, in the way that she described. Where the evidence becomes less reliable is in relation to (a) the time of the incident and (b) the pursuer's description of the other vehicle. As regards timing, the pursuer said, both, that the accident occurred just after 6.00pm, basing this on her Aldi till receipt (not produced) and also that she did not have her lights on as it was not yet dark. Both cannot be correct since (as is within judicial knowledge) the clocks change on the last Sunday in October and (the accident having occurred on a Monday), it would have been dark well before 6.00pm on 31 October. The pursuer is more likely to be correct about the amount of light that there was, than about the time of an accident three years ago (and the till receipt may well have contained the wrong time in any event), and so I think it likely that the accident occurred considerably before 6.00pm (which of course has implications for where the first defender was at the material time, although the case he faced on record, and which he had to meet, was that the accident happened at about 6.00pm). As regards the description of the other vehicle, as counsel for the defenders pointed out, the pursuer's evidence in court was considerably more detailed than in the record and for that matter contained details which she was unable to provide

Mr Samuel with. I was also unclear how, three years on she was now able to have an accurate recollection of the registration number of the other vehicle, when she previously could not remember the vehicle's details. For example, the piece of paper on which she was said to have written down the details was not produced. I therefore discount, as unreliable, her evidence about the detail of the other car, and I have taken a conscious decision not to make any finding in fact about that car. However, I do have to accept that the other driver gave her the first defender's name and an address which approximated to his (although was not exactly correct) and also details of the first defender's insurance company which indicates that the other driver, if not the first defender, was at least someone known to him, who may or may not have been driving the first defender's car.

[13] Pausing there and turning to the first defender's evidence, not only did he maintain in evidence that he was not the driver of the vehicle, he has maintained that position throughout to his insurance company. His evidence was also that his vehicle did not show any signs of having been damaged in a collision on 31 October. I can find no reason to disbelieve any of that evidence, particularly when there was no positive identification by the pursuer of him as the driver of the other vehicle.

[14] On that basis alone, there being no reason to disbelieve the defender, the pursuer's case must fail. However, the matter goes slightly deeper than that. While, at first blush, the case turns on credibility and reliability, on closer scrutiny the positions of the pursuer and the first defender, and their evidence, are not mutually exclusive. There is room for them both to be telling the truth. The pursuer says that she was driven into by a car, which I believe. Not only did she not identify the first defender as the driver of the vehicle, nowhere in her pleadings does she aver that the first defender was the driver. The first defender, for his part states that he was not driving. While the pursuer gave a description of the driver

which loosely matched that of the defender, there has been no positive identification of the first defender as the driver. Usually in civil proceedings, of course, identification is not an issue because usually the identity of the driver involved is not in dispute. However, that should not obscure the fact that in civil cases, no less than in criminal ones, it is necessary to aver and to prove, albeit to a lesser standard of proof, that the person sued is the person who caused damage to the pursuer. I was not referred to any presumptions which might apply. In the present case I do not consider that it has been proved, on a balance of probabilities, that the first defender was the person who was driving the car which collided with the pursuer's car; and as I have pointed out, nowhere in the pleadings is it averred that he was. Strictly speaking the action could have been dismissed as irrelevant. As it is, however, not being satisfied that the first defender was the driver of the vehicle, and having no reason to disbelieve the first defender's assertion that he was not the driver, the defenders are entitled to absolvitor.

[15] I have assigned a hearing on expenses, lest any issues arise, but it may be that these can be resolved by joint minute if the normal rule is to apply.