SHERIFFDOM OF LOTHIAN AND BORDERS AT EDINBURGH

JUDGEMENT

of

SHERIFF WILLIAM HOLLIGAN

in the cause

A458 **NIKKI GRAHAM, residing at 78 Fieldfare View, Dunfermline KY11 8LZ**

Pursuer

against

BRIT INSURANCE LIMITED, a company incorporated under the Companies Acts and having their registered office at 55 Bishopsgate, London, EC2N 2AS

Defenders

Act: Sproul, Corries

Alt: Thompson, Andersons

Edinburgh 2nd December 2011

The Sheriff having resumed consideration of the cause finds in fact:-

[1] On 19th April 2009 ("the relevant date") the pursuer was the driver of a Peugeot 205 vehicle registration number SM54 WYC ("the Peugeot").

[2] On the relevant date Douglas McQueen ("Mr McQueen") was the driver of a Ford Focus KF02 AVT ("the Focus").

[3] The defenders were Mr McQueen's insurers in relation to the Focus. On the relevant date, the pursuer was driving in Edinburgh. The pursuer had three passengers in the Peugeot.

[4] The pursuer intended to attend a sporting fixture in Edinburgh. She became lost.

[5] The pursuer was driving along Chesser Avenue, away from the lights at Gorgie Road in a southerly direction.

[6] The pursuer decided to turn right onto a side road to turn the Peugeot in the opposite direction.

[7] The pursuer indicated her intention to turn right. She positioned her vehicle at the right of the carriageway.

[8] The Peugeot was struck by the Focus driven by Mr McQueen. The Peugeot was damaged along its driver's side. The Focus was damaged predominately to its left side.

[9] As a result of the accident the pursuer suffered loss and damage.

[10] The pursuer had to pay a policy excess of £400; she incurred hire charges of £1,512.57; she incurred charges for the repair of the Peugeot of £1,733.19.

[11] The cost of the pursuer's car insurance premium was as follows:- 2009 - £470.30; 2010 - £672.70; 2011 - £559.94.

[12] As a result of the accident the pursuer lost her no claims bonus.

[13] Susan Duncan was a passenger in the Peugeot.

[14] As a result of the accident Susan Duncan suffered a minor injury to her head.

[15] The Peugeot's insurers, Diamond Insurance, contacted Susan Duncan by telephone and offered her the sum of £1,500 in relation to her injury.

[16] Susan Duncan accepted the offer and received the sum of £1,500 from Diamond Insurance.

Finds in fact and in law:-

[1] That the pursuer has suffered loss and damage as a result of negligence for which the defenders are liable and the pursuer is entitled to reparation therefor.

[2] The sum sued for being, in part, a reasonable estimate of the pursuer's loss and damage decree therefor should be granted as craved.

THEREFORE sustains the defender's second plea in law to the extent of holding as irrelevant the pursuer's averments in Article 8 of Condescendence; sustains the first and second pleas in law for the pursuer; *quoad ultra* repels parties' pleas in law; Grants decree for payment by the defenders to the pursuer of the sum of THREE THOUSAND NINE HUNDRED AND THIRTY SEVEN POUNDS EIGHTY PENCE STERLING (£ 3937.80); reserves all questions of expenses and interest and assigns 19th December 2011 at 9.30 am at the Sheriff Court, 27 Chambers Street, Edinburgh as a diet therefor.

NOTE

[1] This is a case about a motor vehicle accident which occurred at Chesser Avenue on 19th April 2009. It involved a vehicle driven by the pursuer (Peugeot 205 SM54 WYC ("the Peugeot")) and a vehicle driven by Mr Douglas McQueen (Ford Focus KF02 AVT) ("the Focus"). Mr McQueen is the defenders' insured. Aside from liability, the case raises two issues as to damages.

[2] I heard evidence from five witnesses: the pursuer; Lindsay Gassner; Susanne Duncan; Alan Bathgate and Douglas McQueen.

[3] Much of the evidence is not in dispute. The accident occurred during the daytime (the precise time was not identified and is not relevant). It was a Sunday. The locus is clearly shown in a series of photographs (5/2/4-7). The accident occurred at a point on the carriageway travelling from traffic lights at Gorgie Road in a southerly direction. Both vehicles were travelling in a southerly direction on the same carriageway. Put shortly, the pursuer says she was in position on the right side of the carriageway intending to turn right into a side road on the opposite side of the road when the Peugeot was struck by the Focus which was travelling behind her. Mr McQueen says he was travelling in a southerly direction with the Peugeot in front of him, to his left, when the Peugeot pulled out in front of him and both vehicles collided. There is no evidence of any adverse road conditions or poor weather. The evidence as to the likely cause of the collision comes principally from two sources: the drivers and the pursuer's passengers; and an expert report from Mr Bathgate.

[4] The pursuer and her three passengers were on their way to a sporting fixture in Edinburgh. None of them was familiar with the city. Immediately before the accident they became lost. It was decided that the Peugeot was going in the wrong direction, hence the need to undertake the manoeuvre. It was the evidence of the pursuer, Ms Gassner and Ms Duncan that the Peugeot was situated on the right side of the carriageway. They all said that the pursuer had, and was, indicating an intention to turn right. They all denied that the Peugeot was over to the left of the carriageway and they also denied that the Peugeot had pulled to the left and was undertaking a U-turn or a sudden turn to the right. The pursuer was adamant she had checked her mirrors before turning right.

[5] Mr McQueen was equally clear that he was progressing along the carriageway when the Peugeot turned across his path. He was unable to avoid colliding with it. The left side of the Focus struck the right side of the Peugeot. The damage to the Peugeot was shown in 5/2/4, photographs 1-3. There is no photographic evidence of the damage to the defender's vehicle. The one item in the defender's inventory is a copy of an invoice from Willowbrae Coachworks which contains a list of parts used to repair the defender's vehicle. A number of these items refer to the items on the left side of the Focus.

[6] Mr Bathgate is an expert witness. He has extensive experience of giving evidence in court in relation to road traffic accidents and I accept that expertise. He prepared a report 5/5/14 to which he spoke. It would appear that Mr Bathgate received a number of witness statements in order to prepare his opinion. Not all the authors of these statements gave evidence and I am not inclined to attach any weight to statements from those who did not. In my opinion, the most important aspect of Mr Bathgate's evidence is the extent to which the damage to the respective vehicles can assist in determining which account of events is more probable. At the end of the day the position of both agents was that this is a case of all or nothing. If the Peugeot was stationary, in the middle of the road, indicating an intention to turn right and was struck by the Focus from the rear then the defenders are liable. If the Peugeot was at the side of the road, to the left, and swung to the right then the defenders are not liable.

[7] It is by no means unusual in road traffic matters, particularly when events happen quickly, for honest witnesses to differ. This is not a case in which I could say that any of the witnesses is obviously lying or attempting to mislead the court. It is for that reason that I look to such independent evidence as there is to assist me in evaluating the evidence overall. The damage to the Peugeot was to the driver's side (offside). The damage to the Focus was predominantly to its left side. It seems to me one can thus rule out a straightforward rear end collision. It also means that both cars were at an angle to each other. That is consistent with Mr Bathgate's evidence, although quite properly, he said he was unable to say what the angle was. In my opinion, a critical aspect of Mr Bathgate's evidence was when he was asked whether the damage to the Peugeot was consistent with the pursuer having pulled out to her right. As I understand his position, his answer was that if the collision had occurred in that way then both vehicles would have been moving and he would have expected to have seen entirely different damage to the Peugeot. Mr Bathgate has very considerable experience in road traffic matters and has reviewed the causes of many accidents. If I were to accept Mr McQueen's version of events then it means the pursuer and both of her witnesses are wrong, as is Mr Bathgate in relation to damage to the Peugeot. I am determining matters on the basis of what is more probable than not. As I have said, I did not find the pursuer and her witnesses as to fact to be incredible. They struck me as honest witnesses doing their best to assist the court. It appears to me highly unlikely that all three of them were wrong in the evidence which they gave and, as I have said, there is some support from the evidence of Mr Bathgate. Accordingly, whereas I do not say that Mr McQueen was in any way deliberately attempting to mislead the court, on a balance of probabilities, it seems to me that the accident occurred in accordance with the pursuer's version of events. The pursuer accordingly succeeds on the issue of liability.

[8] That leads me to the question of quantum. A joint minute was lodged. Parties were agreed as to a policy excess paid by the pursuer amounting to £400; hire charges of £1,512.57; repair costs of £1,733.19. There are two disputed items as to loss: an amount of £292.04 in relation to an increase in insurance premiums which the pursuer is said to have incurred as a result of the loss of her no claims bonus; and the sum of £1,500 paid to Ms Duncan, a passenger in the Peugeot, as a result of an injury she sustained in the collision.

[9] The pursuer's insurance company is known as "Diamond Insurance" ("Diamond"). In terms of letters 5/4/9 and 5/4/10 respectively, prior to the accident the cost of renewal for the pursuer's car insurance policy was £470.30; after the accident it rose to £672.70. 5/4/11 sets out a premium of £559.94 for the year commencing 21st February 2011. As I understand it, as a matter of fact, as a result of the accident the pursuer lost her no claims bonus which led to an increase in her insurance premium. That was her evidence and the same conclusion appears to me to flow from the correspondence referred to. I should also add it appears to me to be a natural consequence of the accident. Correspondence from Diamond (5/6/15 and 5/6/16) narrates that the pursuer would only recover her no claims bonus in the event that she is successful in the present action and that, even then, she would still find herself with a higher premium by reason of the accident. The amount claimed is calculated by reference to the difference between the premium in 2009 and the increased amounts in the following two years (namely £202.40 and £89.64). As a matter of evidence I accept these figures.

[10] The second matter in dispute concerns the sum of £1,500. Ms Duncan was a rear seat passenger seated immediately behind the driver. As a result of the accident Ms Duncan suffered a minor blow to the head. She had a sore head for a few days after which the injury subsided. Ms Duncan made no claim for her injury. She was approached by Diamond, by telephone, in relation to her injuries. Diamond offered her the sum of £1,500 in settlement of this matter (5/4/12 is a copy of the letter from Diamond together with discharge form). Ms Duncan accepted the offer and received the sum of £1,500. I accept this evidence. The pursuer now seeks to recover payment of that sum.

Submissions

[11] I intend no discourtesy to the submissions of Ms Sproul and Ms Thompson if I limit my comments to the matter of damages. The question of liability is largely a matter of my assessment of the evidence to which I have already referred. This matter is a proof before answer. The defenders lodged a Chapter 22 Note which is directed towards part of the damages claimed by the pursuer.

[12] For the pursuer Ms Sproul submitted that the pursuer was entitled to be compensated for her loss in accordance with the general principle of restitutio in integrum. She should be restored to the position she was in before the wrong was committed. She had proved that she had incurred a loss of £292.04. Reference was made to the various documents. The position of the pursuer's insurers is that they wanted an admission of liability on the part of the defenders in order to reinstate the pursuer's no claims bonus. Such a loss was not too remote. It was entirely foreseeable that the pursuer would suffer loss if liability was disputed. In relation to the payment made to Ms Duncan, the pursuer was entitled to recover this on the basis of subrogation. Reference was made to *Stewart* on Reparation at paragraph A32-13; *Caledonian North Sea Ltd v London Bridge Engineering Ltd* 2000 SLT 1123; *Esso Petroleum Co Ltd v Hall Russell & Co Ltd* 1988 SLT 874 and *MacGillivray* on Insurance Law (10th edition) at paragraph 22-24. The payment was made to the passenger in terms of an indemnity policy that the insurers had with the pursuer. The payment was made as a consequence of the collision. The only remedy the pursuer has to put herself back into the position that she would have been had the accident not happened (i.e. without any increase in insurance premium) is to recover the loss. A decree is not a condition precedent to liability. Reference was also made to the case of *W v Veolia Environmental Services (UK) plc* [2011] EWHC 2020 (QB). It was not for the defender to look behind the basis for the claim of a subrogated loss. Reference was made to paragraph [17] of *W v Veolia*. It was a reasonable course of action to sue the third party for recovery of the loss to Ms Duncan. The approach of the pursuer was entirely reasonable.

[13] For the defender, Ms Thompson referred to *MacGillivray* on Insurance Law at paragraphs 22-1 and 22-35. In the present case there was no legal obligation upon the pursuer's insurers to make a payment when liability was in dispute. Ms Duncan was not a party to the action and the insurers had no obligation to make a payment to her. She had a right to raise an action in her own right and she could have chosen either to pursue that claim against the pursuer or Mr McQueen. She chose to accept the offer. Reference was made to paragraph 22-39 of *MacGillivray*. The present pursuer cannot raise a claim in her own name for an injury

suffered by someone else. *Caledonian North Sea* related to a contractual indemnity and in effect, the defenders were being asked to compensate the pursuer for an ex gratia payment made to a third party which the pursuer's insurers had no obligation to undertake. Put another way, the pursuer had no title to pursue Ms Duncan's personal injury claim. Furthermore, the amount of the claim was excessive. In relation to the no claims bonus the pursuer has failed to show that this is a direct consequence of the accident. The letter from the insurers (5/16) suggests that the premium would have been higher by reason of the accident in any event. The pursuer herself did not know how much that extra sum would be. This claim was accordingly too remote.

[14] In reply, Ms Sproul submitted that the insured does have a right to pursue the third party for this loss because that is the only way in which she can recover the loss of her no claims bonus. *Caledonian North Sea* applied. There was no distinction between a contractual liability and a liability in terms of a policy of insurance. *Esso Petroleum* was authority for the proposition that the pursuer has an interest to pursue the claim. Ms Sproul submitted that the sum of £1,500 was reasonable and it was not for the defenders to look behind this settlement. So far as the premiums were concerned these had risen and the pursuer had given evidence as to by how much that had happened. Both agents agreed that I should reserve questions of expenses.

Decision

[15] I shall deal firstly with the matter of the payment to Ms Duncan. The general principles referred to in the authorities are clear and I decide the matter on the application of those principles. As a matter of fact Ms Duncan made no claim for her injury. It was Diamond who approached her. Had she pursued a claim it would lie against the party whom she alleged was at fault: either the pursuer or Mr McQueen. She did neither. It seems to me that the payment of £1500 was a payment which Diamond chose to make. Diamond are the insurers of the pursuer. It is the pursuer's position that she is not liable for the accident; she blames Mr McQueen. The pursuer is thus seeking to recover a loss for which, ex hypothesi, she says she is not responsible and in that I have concluded she is correct. The claim is a claim which Ms Duncan had against the defenders as insurers of Mr McQueen. It may be that, from a practical point of view, Diamond will only reinstate the pursuer's no claims bonus if there is full recovery from the defenders but I do no think that changes the legal structure which underpins the right of recovery. The pursuer seeks to recover a sum of money which neither she nor Diamond has or had any legal liability to pay in the first place. I cannot see that rights of subrogation are of any assistance. Put another way, the claim is one which Ms Duncan had against Mr McQueen and his insurers: the pursuer cannot include that in her claim. The insured (the pursuer) had no liability to Ms Duncan. I therefore hold that the pursuer is not entitled to recover this head of loss. However, I can see that, from the pursuer's point of view, this may seem unfortunate. She had no control over her insurer's decision to compensate Ms Duncan for which she cannot recover and yet she may end up paying a penalty in the future. No doubt her insurers may wish to reflect upon these consequences.

[16] In relation to the pursuer's loss of her no claims bonus I start from the general proposition that the party at fault is liable for such losses as arise naturally and directly from the wrong done. Motorists require to have in force a valid policy of insurance to enable them to drive on public roads. A premium requires to be paid. The existence of a no claims bonus is something which has been in existence for a considerable time and is well within the knowledge of motorists and insurers. The loss of a no claims bonus and the resulting increase in an insurance premium seems to me to be something which flows naturally and directly from the accident. I was not referred to any authority by either agent. However, I drew to their attention the following authorities: *Ironfield v Eastern Gas Board* [1964] 1 WLR 1125 and *Patel v London Transport Executive* [1981] RTR 29 and invited submissions. Put broadly *Ironfield* supports the pursuer in relation to the recovery of the no claims bonus. Ms Sproul relied upon it. Ms Thompson did not comment on it but sought to distinguish *Patel.* I agree that the ratio of *Patel* deals with a slightly different issue. However, it does contain approval by the Court of Appeal of the ratio in *Ironfield* which was then extended to the matter at issue in *Patel.* (I should say that I do not agree with Ms Sproul that *Ironfield* can be used in support of her argument in relation the recovery of the sum of £1500.) I can see no obvious difference between the law of Scotland and the law of

England on this issue. I therefore follow the reasoning in *Ironfield* and *Patel* and hold that, in principle, the pursuer is entitled to recover the no claims bonus. I have considered the latter from Diamond which is 5/16 to the effect that the pursuer will not have all of her no claims bonus reinstated by Diamond as a result of her involvement in the accident, regardless of issues of fault. I am not sure that matters. It is the pursuer who has had to fund the higher premiums for the years in question and that is a loss in her hands which flows from the accident. On one view the difficulty in her recovering this against her insurers strengthens her claim in this action. Accordingly, in my view the pursuer succeeds on this head of claim.

[17] I shall accordingly grant decree in the sum of £3937.80 being the total of the amounts agreed in the joint minute together with the sum of £292.04. Parties invited me to reserve all questions of expenses which I shall do. I have no note of having been addressed on interest. I shall accordingly reserve consideration of that that issue also.