OUTER HOUSE, COURT OF SESSION

[2010] CSOH 53

OPINION OF LORD BANNATYNE

in the cause

ALAN LAW

Pursuer;

A980/08

against

(FIRST) FRANK RONALD

(SECOND) MOTOR INSURERS' BUREAU

Defenders:

Pursuer: Young Q.C., Fitzpatrick; Digby Brown

First Defender: Not Represented

Second Defenders: Jones Q.C., Love; Simpson & Marwick

21 April 2010

Introduction

[1] In this action the pursuer seeks damages from the first defender for injuries which he sustained as a result of a road accident on 30 May 2004. The second defenders are the Motor Insurers Bureau against whom the pursuer seeks a declarator in the following terms:

"For declarator that the second defenders are liable to satisfy any decree awarded against the first defender if said decree is not satisfied in full by the first defender within seven days of the date of said decree."

[2] The pursuer and second defenders were represented at the proof, however, the first defender was not represented thereat.

[3] It was not in dispute that:

a. At the time of the said accident the pursuer was a rear seat passenger in a Vauxhall Vectra motor vehicle registered number S206 LOD which was being driven by the first defender.

b. The accident occurred on the A83 Tarbert to Lochgilphead road.

c. The first defender was convicted of careless driving (Section 3, Road Traffic Act 1988) and driving without insurance (Section 143(1) and (2), Road Traffic Act 1988) in respect of the said accident.

d. Subject to the issue of contributory negligence, primary liability for the said accident rests with the first defender.

e. The first defender is the cousin of the pursuer.

f. At the time of the accident the pursuer and the first defender were close friends.

g. For about a year prior to March 2004 the pursuer and the first defender lived in the same house.

h. They both worked as deckhands on separate fishing boats.

i. Said fishing boats often worked in the same area of the sea although some miles apart.

j. On 29 May 2004 the pursuer spent most of his time at the house of the first defender in the company of the first defender and George Brown.

k. During the course of 29th May 2004 the pursuer and George Brown had a considerable amount to drink and by the time of the accident were drunk.

l. The pursuer, the first defender and George Brown on 29th May 2004 planned to go to a party that night at a farm called Inverneill Farm.

m. The three of them drove to the said party in the first defender's car, namely: said Vauxhall Vectra and that the car was driven by the first defender.

n. After a time at said party they drove back to Tarbert. Again they were driven in the first defender's car by the first defender.

o. They then decided to return to the said party. They again went in the first defender's car and were driven by him. In the course of said journey the said accident occurred.

The Issue

[4] Against that background the issue for the court at the proof was this: had the second defenders proved that at the time of the accident the pursuer was allowing himself to be carried in the said vehicle at a time when he knew or ought to have known that the vehicle was being used without there being in force in relation to its use a contract of insurance as would comply with the Road Traffic Acts?

The Evidence

[5] The evidence was in fairly short compass. On behalf of the pursuer I heard evidence from the pursuer himself and his Aunt (the mother of the first defender) who was his principal carer. I have not detailed her evidence as I did not think she spoke to any matters of particular relevance to the issue before the Court. I note that she was not referred to in the course of either party's submissions.

[6] On behalf of the second defenders I heard evidence from the first defender and George Brown.

[7] The pursuer: He explained that at the relevant time he did not have a driving license. He had sat his driving test once and failed. He had never been involved in (1) taking out road tax; (2) arranging car insurance; (3) obtaining an MOT certificate. On 29th May 2004 which was a Saturday he was staying with the first defender. This resulted from the fact that his flat was being used by others because the day of the accident formed part of the Tarbert Yacht Race weekend. He said that he spent the day with the first defender and George Brown. He said that during the day he had drunk a fair or considerable amount and he was drunk but he could not remember whether the drinking had taken place at the flat or elsewhere. At some point the three of them decided to go in the first defender's car to a party. He believed that the three of them had gone to pick the car up. He thought that the car probably was parked in a four bay parking space near the first defender's flat. He denied that the car was parked in the school car park. He denied that one of the tyres was flat and that this had necessitated going to a garage. After staying at the party he recalled them going back to

Tarbert. There then had been a decision to return to the party. They had returned in the first defender's car, which was driven by the first defender and there was the accident.

[8] He explained that the first defender was happy to drive the car that evening. He did not require persuasion. The first defender had expressed no concerns that he could not legally drive the car. There was no discussion at the first defender's house on the 29th about there being no insurance for the car.

[9] Although his position was that there had been no such discussion he accepted that he was aware prior to that night that the first defender's car had been put off the road at the end of April 2004. He said that when the car was off the road it would be parked in the four bay parking area. He did not know if the situation was that the MOT, road tax and insurance were all out but "something was off". He thought that at most the car had been off the road prior to the accident for about two weeks. He accepted that there had been previous occasions when cars belonging to the first defender had been off the road because they were "not legal". By not legal as I understood it he meant that the car had no insurance or no road tax or no MOT certificate or a combination of some or all of these. He accepted that there had been occasions prior to the accident when the first defender had driven his car when it was not legal. On those occasions however he only drove the vehicle within the village of Tarbert.

[10] George Brown: he explained that he spent 29 May with the pursuer and first defender at the first defender's house. He was friendly with both. He said the intention was that they would go to a party and they were trying to get a lift to go to this because the first defender had no insurance. They were not able to obtain this lift and there then followed a discussion where all three of them were present. This discussion was about taking the first defender's car and during the course of this the fact that the first defender had no insurance had been mentioned. He had been aware that the first defender did not have insurance from approximately the middle of the week before the accident. At that time the first defender had told him about not having insurance and said that he could not afford it.

[11] It was his position that the car was parked at the school car park and that it had been picked up there by all three of them. He said it was parked there so the first defender would not be fined. He described himself as quite drunk by the time the decision was made to go to the party. He also admitted to smoking cannabis in the first defender's house and at the party. He said all three of them were doing this. He was challenged in cross examination that he was making up his evidence that there was a conversation about the lack of insurance on the 29th: he denied this. When asked in re-examination whether it had always been his position that the pursuer knew on the day of the accident that the first defender had no insurance he said yes.

[12] The first defender: he described spending the afternoon of 29 May in his house with the pursuer and George Brown. He said there was discussion about going to a party. He described them seeking to obtain a lift but this not happening so a decision was made to take his car.

[13] He said that his car was at the school car park. It was there as he was concerned that traffic wardens who were particularly alert on the weekend of the Tarbert Yacht Races would note he had no road tax. When asked if the pursuer knew it was off the road as at the 29th he said: "Think so" when asked, as at the 29th did the pursuer know why the car was off the road and that it was uninsured he answered variously - "I think so"; "I thought he would have done"; "Alan might have known not insured"; "I thought he would have known"; "Not 100%". He could not say if there was a specific conversation with the pursuer to the effect that the car was not insured. He did not speak in the course of his evidence to any conversation at his house on the 29th regarding the lack of insurance. He accepted that when a statement was taken from him on behalf of the second defenders he had said *inter alia*:

"I am quite satisfied Alan (the pursuer)...knew not insured..."

He sought to explain in his evidence that when he had given the statement he had forgotten that the pursuer was no longer living at his house, having moved out some weeks before. However a section of his statement

was put to him which contained reference to the fact that Alan had not been living with him at the time of the accident.

[14] He explained that he was aware that the pursuer would not get damages if he was aware that the first defender was uninsured at the time he got into the car.

[15] He was asked certain questions about not giving a statement to the pursuer's legal advisers. He accepted that on four occasions he had been asked to supply statements to them but had not done so, as he understood he was not required to do so.

[16] He described on the evening of the accident going for the car on his own at the school car park and when he got to the vehicle finding that it had a slow puncture. During the course of the evening he had driven one other person and had offered to drive two other persons in his car. He had not told these persons that he was uninsured. He said that he was happy to drive to the party. On the day of the accident he was not drunk. When breathalysed following the accident he was under the statutory limit.

Submissions

The pursuer

[17] Mr Young Q.C. (the pursuer's senior counsel) commenced his submissions by moving that the Court should sustain the first and second pleas in law for the pursuer and grant decree in terms of the third conclusion. He further moved me to repel the first and second pleas in law for the second defenders.

[18] As regards the first plea in law for the pursuer this was in the usual terms in an action for reparation in a personal injuries case. There was an agreement between the pursuers and second defenders in relation to primary liability and so far as the first defender was concerned an extract conviction in relation to Section 3 of the Road Traffic Act had been lodged and accordingly the presumption in terms of Section 10 of the Law Reform Miscellaneous Provisions Act 1968 applied. In these circumstances the court with no difficulty could sustain the first plea in law for the pursuer.

[19] The second plea in law went to the meat of the dispute between the parties and if I upheld the second plea in law then I should uphold the third conclusion.

[20] Lastly in relation to the motions which he was moving, he accepted, that given the agreement between the parties as regards contributory negligence I should uphold the second defender's third plea in law, if I found in the pursuer's favour regarding the declarator.

[21] He then turned to examine the Motor Insurers Bureau (Compensation of Victims of Uninsured Drivers) Agreement 1999 and to highlight the relevant provisions thereof for the purposes of this proof. The main obligation of the MIB, namely: to satisfy compensation claims is as set out in Clause 5 of the Agreement. The exceptions to that base obligation are set out in Clause 6. The one with which the Court is concerned in the current proof is as set out in Clause 6(1)(e)(ii). Said article is in the following terms:

"(1) Clause 5 does not apply in the case of...

(e) A claim which is made in respect of a relevant liability described in paragraph (2) by a claimant who, at the time of the use giving rise to the relevant liability was voluntarily allowing himself to be carried in the vehicle and, either before the commencement of his journey in the vehicle or after such commencement if he could reasonably be expected to have alighted from it, knew or ought to have known that -

(ii) the vehicle was being used without there being in force in relation to its use such a contract of insurance as would comply with Part VI of the 1988 Act,"

He referred me to two further matters within Article 6. First in Article 6(3) where it is stated that the burden of proving that the claimant knew or ought to have known of any matters set out in paragraph 1(e) is on the MIB. Secondly he referred to 6(4) merely to draw to my attention to the fact that that particular paragraph was not relied upon in the second defender's pleadings. i.e. it was not suggested in the pleadings that there was particular information which the pursuer should have had which would have been available to him but for his having taken drink or drugs.

[22] Turning to the specific issue before the court he submitted that the particular phrase within 6(1)(e) which the Court had to have regard to was:

"knew or ought to have known"

[23] The proper construction of the above phrase had been considered by the House of Lords in *White* v *White and Another* 2001 1WLR 481. Lord Nicholls of Birkenhead gave the leading speech and at page 484 and 485 he identified that the MIB Agreement gave effect to the second EEC MI Directive 84/5/EEC. He identified that one purpose of the directive was to make provision for a body to guarantee that the victim will not remain without compensation where the vehicle which caused the accident is uninsured. There was one permitted exception to Article 1(4) which enacts that purpose namely:

"However, member states may exclude the payment of compensation by that body in respect of persons who voluntarily entered the vehicle which caused the damage or injury when the body can prove that they knew (emphasis added) it was uninsured".

He then turned at pages 486 and 487 to consider the proper interpretation of the word "knew" as used in the said article of the directive.

" 15 This, then, is the context in which 'knew' is used in this Directive. In this context, knowledge by a passenger that a driver is uninsured means primarily possession of information by the passenger from which the passenger drew the conclusion that the driver was uninsured. Most obviously and simply, this occurs where the driver told the passenger that he had no insurance cover. Clearly, information from which a passenger drew the conclusion that the driver was uninsured may be obtained in many other ways. Another instance would be when the passenger was aware, from his family or other connections with the driver, that the driver had not passed his driving test ('if he'd taken the test, I would have known'). Knowledge of this character is often labelled actual knowledge, thereby distinguishing other types of case where a person, although lacking actual knowledge, is nevertheless treated by the law as having knowledge of the relevant information.

16 There is one category of case which is so close to actual knowledge that the law generally treats a person as having knowledge. It is the type of case where, as applied to the present context, a passenger had information from which he drew the conclusion that the driver might well not be insured but deliberately refrained from asking questions lest his suspicions should be confirmed. He wanted not to know ('I will not ask, because I would rather not know'). The law generally treats this state of mind as having the like consequences as would follow if the person, in my example the passenger, had acted honestly rather than disingenuously. He is treated as though he had received the information which he deliberately sought to avoid. In the context of the Directive that makes good sense. Such a passenger as much colludes in the use of an uninsured vehicle as a passenger who actually knows that the vehicle is uninsured. The principle of equal treatment requires that these two persons shall be treated alike. The Directive is to be construed accordingly.

17 Thus far I see no difficulty. I consider that it is *acte clair* that these two categories of case fall within the scope of the exception permitted by the Directive. Conversely, I am in no doubt that 'knew' in the Directive does not include what can be described broadly as carelessness or 'negligence'. Typically this would cover the case where a passenger gave no thought to the question of insurance, even though an ordinary prudent passenger, in his position and with his knowledge, would have made inquiries. He 'ought; to have made inquiries, judged by the standard of the ordinary prudent passenger. A passenger who was *careless* in this

way cannot be treated as though he *knew* of the absence of insurance. As Lord Denning MR said in *Cia Maritima San Basilio SA* v *Oceanus Mutual Underwriting Association (Bermuda) Ltd* [1977] QB 49, 68, negligence in not knowing the truth is not equivalent to knowledge of it. A passenger who was careless in not knowing did not collude in the use of an uninsured vehicle, and he is not to be treated as though he did. To decide otherwise would be to give a wide, rather than narrow, interpretation to the exception permitted by the Directive. This also seems to me to be *acte clair*."

[24] Lord Nicholls then at paragraph 23 of his speech at page 488 D-F turned to consider the meaning of knew or ought to have known in terms of said clause of the agreement and opined as follows:

"The phrase 'knew or ought to have known' in the agreement was intended to be coextensive with the exception permitted by Article I of the Directive. It was intended to bear the same meaning as 'knew' in the Directive. It should be construed accordingly. It is to be interpreted restrictively. 'Ought to have known' is apt to include knowledge which an honest person who enters the vehicle voluntarily would have. It includes the case of a passenger who deliberately refrains from asking questions. It is not apt to include mere carelessness or negligence. A mere failure to act with reasonable prudence is not enough."

[25] It was not disputed by Mr Jones Q.C. (senior counsel for the second defenders) that in this section of his submissions Mr Young had fully and correctly set out the relevant parts of the agreement and the law as it applied to the construction of the said phrase which was at the heart of the dispute in this matter.

[26] Mr Young having looked at the agreement itself and having examined the issue of the construction of the said phrase turned to look at the evidence in the case. His position was that I should first hold that there was no conversation in the first defender's house on 29 May in the course of which the issue of the first defender not having insurance was referred to and from which the pursuer gained actual knowledge of the lack of insurance. It was his position that on the evidence there had been no such conversation and accordingly that the pursuer was not aware that when he entered the car it was uninsured.

[27] He submitted that I should prefer the evidence of the pursuer and the first defender on this matter to that of Mr Brown.

[28] He advanced a number of reasons as to why I should find the pursuer to be a credible and reliable witness and in particular a credible and reliable witness on this issue.

[29] He submitted that the pursuer had given his evidence in a straightforward manner. He had not been seriously challenged in relation to the issue of his credibility. He had given evidence some of which was against his interests including that he knew that the first defender's car had been off the road in the past. He did not seek to downgrade his friendship with the first defender. He submitted that I should bear in mind that the pursuer did not drive and therefore had no particular knowledge regarding matters surrounding the insuring of drivers and taxing of vehicles.

[30] He went on to develop his position that I should hold the pursuer to be credible and reliable when he said that there had been no such conversation in the first defender's house on the 29th by referring to the fact that his evidence on this matter did not stand alone. It was he submitted confirmed by the evidence of the first defender who did not speak to any such conversation taking place. He submitted that I could accept the first defender as a credible and reliable witness. In relation to the issue of his credibility he pointed to the evidence that the first defender had on no less than four occasions been asked to provide a statement to the pursuer's agents but had refused to do so. This he submitted pointed strongly away from his being someone who was trying to tailor his evidence to fit in with that of the pursuer. The only persons he had given a statement to were the MIB.

[31] It was his submission that I should reject the evidence of Mr Brown which he gave about this conversation. It was his position that this evidence did not stand up against the evidence of the pursuer and

first defender. He described Mr Brown as a not terribly convincing witness. He pointed to the fact that he had failed to correctly remember certain matters. For example he thought that all of them had walked to the car together, on the other hand the first defender's position was that he had gone to the car on his own.

[32] He submitted that it was of significance that Mr Brown had not put forward any reason why the issue of insurance should have been discussed that night. Mr Brown already knew that the first defender did not have insurance having been told the previous week so why would it be brought up? He said that further support for the pursuer's position could be found in the evidence given by the first defender, which was unchallenged, that the first defender had offered to drive and driven others at the party without a problem and without mentioning his lack of insurance. On the balance of the evidence the first defender did not need to be persuaded to take the car out that evening.

[33] Lastly he turned to the pleadings. He referred to the lack of any specific averment on behalf of the second defenders to the effect that there had been such a discussion in the first defender's house. He submitted that this pointed to Mr Brown making up the evidence on this issue in the box. He had put this specifically to Mr Brown, although Mr Brown had denied it.

[34] He secondly submitted that the pursuer on the basis of the construction of the phrase "knew or ought to have known" in *White* v *White* had not on the evidence had information that the first defender might well not be insured and deliberately refrained from asking questions lest his suspicions should be confirmed. At worst he submitted the pursuer had been no more than careless and in those circumstances the defenders must fail.

[35] In development of his position under this head he submitted that it had not been proved that the pursuer was aware that the car was off the road at the material time. The pursuer's position in evidence had been that he thought when the car was off the road it was put in the four bay space near the first defender's house. On the balance of the evidence the position was that the car was parked in the school car park. Accordingly he submitted that the pursuer was entitled to believe that on the night of the accident that the vehicle was back on the road. It was not parked where it would normally have been parked had it been off the road. There was no evidence to support a practice of putting the car into the school car park when it was not legal.

[36] Secondly and in any event he submitted that on the evidence the pursuer had no knowledge that the reason the car was off the road was due to there being no insurance. The pursuer's understanding was that from time to time the car was off the road and was not legal due to problems relating to tax or insurance or perhaps MOT or a combination of these. What the evidence did not establish was that his understanding was that on the day of the accident the car was off the road and was not legal because there was no insurance.

[37] With regard to this part of his argument he repeated that looking at the matter at its worst the pursuer was no more than careless as he had some information that the car was from time to time off the road but no more than that.

[38] Accordingly it was his position that the second defenders had failed to prove actual knowledge on the part of the pursuer or knowledge in the *White* v *White* sense that the car was uninsured at the material time.

The second defenders

[39] Mr Jones commenced his submissions by moving that I should sustain the second plea in law for the second defenders and repel the second plea in law for the pursuer and accordingly assoilzie the second defenders from the third conclusion of the summons.

[40] Mr Jones then turned to set out two general submissions:

Primary submission
[41] His primary position was that the pursuer had actual knowledge when he agreed to be driven by the first

defender that the vehicle was not insured. This submission was entirely founded on the evidence of Mr Brown.

Secondary submission

[42] It was his position that in any event in the whole circumstances of the case I should find that the pursuer had knowledge that there was no insurance for the car in the *White* v *White* sense.

[43] In expanding upon his primary submission Mr Jones placed particular reliance on this: of the three witnesses who were occupants of the car Mr Brown was the only one who had no interest to lie or to obfuscate or in any other way to tailor his evidence to suit a particular position. He pointed out that Mr Brown in his evidence was clear and unshakeable in his recollection that there was a discussion about using the car and in the course of it the first defender made it clear that there was no insurance for the vehicle.

[44] It was his position that the circumstances which were said to have given rise to that conversation were instructive and of importance. Both Mr Brown and the first defender spoke of the wish to obtain a lift to the party and that this had fallen through. This showed that consideration was being given to the issue of the first defender not being insured in that why else should a lift be sought. Secondly it gave a reason for the discussion about the lack of insurance in that it was necessary to discuss the implications of the first defender taking the car once the lift had failed to materialise.

[45] It was thus his position having regard to the above that I should hold Mr Brown to be a credible and reliable witness generally and in particular in relation to this specific aspect of his evidence.

[46] In relation to his submissions on this aspect of the case Mr Jones made it clear that he was not suggesting that the pursuer was deliberately lying. It was his position that the pursuer's recollection due to consumption of alcohol and his having experienced a very traumatic event could not be relied upon. In addition no doubt the pursuer had no wish to remember discussions about knowledge of the lack of insurance and understandably had persuaded himself that there had been no such discussions.

[47] As regards the first defender's position he pointed out that throughout his evidence he was at pains to say he thought the pursuer knew about the position regarding the lack of insurance but could not be sure. He pointed to the fact that as recently as August last year when he had been precognosed on behalf of the second defenders he had been completely satisfied that the pursuer knew that he had no insurance. The first defender was aware that the consequences to the pursuer should the pursuer be shown to be aware of his lack of insurance at the material time and accordingly it was Mr Jones' position that one could not have confidence in his evidence and that he could not be held to be a credible witness on this particular issue.

[48] In the whole circumstances it was Mr Jones' submission that I should prefer the evidence of Mr Brown to that of the pursuer and the first defender for the reasons above described. It was his position that I should hold that actual knowledge on the part of the pursuer regarding the lack of insurance had been proved.

[49] Turning to his secondary position he looked first at the pleadings and made two specific points: first that it was not pled in this case that when off the road the first defender's car was always parked in the school car park. All that was said in relation to this issue was at page 12 A-B of the record and that averment was as follows:

"As the pursuer well knew, the first defender's car had no road tax. As the pursuer well knew, the first defender's car was not covered by a contract of insurance such as would comply with the Road Traffic Acts. As the pursuer well knew the first defender had parked his car with the intention of putting it back on the road when he could afford it."

[50] Those averments did not mention the school car park.

[51] The second point which he made about the pleadings was that although the pleadings as above set out were to the effect that the pursuer had knowledge of a lack of MOT, lack of insurance and lack of a road tax certificate, the only important matter was of course the lack of insurance.

[52] He then went on to submit that the pursuer's evidence put him in a position that if he did not actually know i.e. there was no conversation in the first defender's house as he contended, he had such knowledge that he was guilty of wilful blindness. He pointed to the pursuer's evidence that he knew that the first defender's car had been put off the road in the past because it was not legal. He then said in his evidence that sometimes there was no insurance, sometimes no road tax and this caused it to be not legal. So he knew on occasions that the first defender's car was off the road because there was no insurance. On the balance of evidence he knew that it was off the road in the period immediately before the accident. He knew that at that time it was not legal. He must have known that it was off the road at the time of the accident. He was aware that the first defender used the car when he needed it, in the village, even when the car was not legal. He submitted that the whole picture in this case is of a period before the accident where the car was off the road because it was not legal and that the pursuer was aware that one of the reasons for the car being not legal would be a lack of insurance. In all of these circumstances to get into the car and not ask the critical question: have you now got insurance amounted to deliberate blindness. This amounted to knowledge in terms of the *White* v *White* test.

[53] Mr Jones also advanced a modified second position and that was even if I held that he knew simply that the car was not legal but did not know that this specifically related to the issue of insurance nevertheless the fact was that he knew the car was off road because not legal and thereafter a failure to ask the question about insurance still amounted to sufficient collusion to bring him within the *White* v *White* test.

Discussion

[54] The first branch of the second defenders' case is based on actual knowledge on the part of the pursuer that on the evening in question the first defender did not have insurance to drive the car. This branch is based entirely on the evidence of George Brown that on 29th May at the first defender's house prior to leaving for the party there was a discussion in the presence of the pursuer and that in the course of that discussion the fact that the first defender did not have insurance was spoken of and was thus known to the pursuer. Accordingly the primary question for the Court becomes this: was Mr Brown a credible and reliable witness in relation to this particular issue?

[55] As regards the witness' credibility I have had no difficulty in holding him to be a credible witness.

[56] First I found him to be a reasonably impressive witness. I at all times during the course of his evidence both from the nature of his answers to questions and the manner in which he gave his evidence was of the clear view that he was doing his best to tell the Court in a straightforward manner what he recalled of the events of that day. He carefully and fully answered all questions put to him. I agreed with Mr Jones that his evidence regarding the central issue was clear and unshakeable. I noted that at no point was he caught out in the course of his evidence either in examination in chief or in cross examination in what could be identified as a lie or a partially truthful answer.

[57] Secondly I could identify no reason for Mr Brown not telling the truth about the critical issue in the case, namely: was there a conversation about the lack of insurance on that night? He has no interest to lie. It does not benefit him in any way to lie. Nothing was identified before me which suggested that there was any basis for him lying to cause the pursuer harm (in the sense of denying him obtaining damages). There was no suggestion in the evidence of any animosity on the part of Mr Brown towards the pursuer. Rather the evidence was that at the time of the accident Mr Brown was a friend of the pursuer. No reason was suggested by Mr Young in the course of cross examination or in his submissions to me as to why Mr Brown should lie about this matter. I could find no reason to hold that he was inventing this conversation. I do not believe that Mr Brown was lying about this conversation taking place.

[58] In my view this lack of any reason for not telling the truth about this matter added considerable support to the witness' credibility.

[59] Thirdly, in a very real sense, he was the only independent witness whose evidence was placed before the Court in relation to this particular issue. Unlike the pursuer and to an extent the first defender he has, as I have said, no interest in the action. The pursuer on the other hand clearly has a very major financial interest in not being shown to have been a party to such a discussion relative to insurance. The first defender given his close family relationship and close friendship with the pursuer may also be said to have a reason for tailoring his evidence on the critical issue to favour the pursuer. This independence of Mr Brown is a further important consideration which favours holding him to be a credible witness and preferring his evidence on the critical issue to that of the pursuer and the first defender

[60] Fourthly it appeared to me that Mr Brown's evidence on this issue rang true. Nothing about his evidence in relation to this particular issue in my view rang false. When looked at as a whole nothing in his evidence rang a false note.

[61] Fifthly, the above view which I formed about the evidence of Mr Brown sharply differed from the view that I formed of the first defender's evidence: in my view it did not ring true in relation to the central disputed issue. I formed the strong impression that in relation to that matter the first defender was to a material extent tailoring his views to support the pursuer and was not telling the whole truth.

[62] In particular I noted that the first defender's views as to whether the pursuer knew he was uninsured on the night of the accident had varied significantly since he had given his statement to the agent for the second defenders. When he gave that statement his position was that he was quite satisfied that the pursuer was aware that he was not insured. He stated in evidence that when he gave that statement he was telling the truth. He sought to explain this difference by referring to the fact that he had forgotten at that time that the pursuer was no longer living with him and had moved to his own house. Thus the pursuer was less likely to know that he was uninsured. However it did appear that at the time at which he gave the statement to the second defenders' enquiry agents he stated that the pursuer had not lived with him for a few weeks before the accident. Thus he appeared to have remembered this at the time of giving the statement.

[63] His position when giving evidence was that he was much less certain that the pursuer was aware that he was uninsured on the day of the accident. He accepted in his evidence that he knew that if it was shown that the pursuer was aware that he did not have insurance that this would mean he did not receive damages which he was seeking.

[64] His whole manner in Court suggested to me that he wished to pull back in his evidence from the position that he had earlier taken in his statement.

[65] Mr Young sought to urge upon me in submission that I should accept him as credible and reliable on this issue in that he had failed on four separate occasions to give a statement to the pursuer's solicitors. Mr Young submitted that a proper inference from this was that he was in no way seeking to support the pursuer or tailor his evidence to favour the pursuer. I have had regard to this factor, however, first it is not clear to me what one should take from this failure and I do not think it is a natural inference that the first defender did not wish to support the pursuer. Secondly even if that were a proper inference to take from this evidence it does not overturn or outweigh the factors to which I have referred which have undermined the credibility of this witness on this issue and caused me to reject his evidence.

[66] Sixthly a further factor which caused me to hold that Mr Brown was a credible and reliable witness on this issue and which cast doubt on the credibility of the first defender was the evidence given by both of them that there was a plan to go get a lift from someone else to go to the party which fell through and then it was decided that the first defender would drive to the party. This evidence in my view fitted in with there then being a discussion about the lack of insurance as spoken to by Mr Brown. This failure of the lift to materialise in my view gave a context for a discussion about the lack of insurance i.e. it gave a reason for this discussion to take place. Thus in my view the evidence of Mr Brown relative to a discussion about the lack of insurance seemed to fit in with that undisputed evidence relative to the failure of the lift to materialise and to be intelligible in the light of it.

[67] I rejected Mr Young's submission that there was no reason for a discussion about the lack of insurance. In my view the circumstances I have referred to in the preceding paragraph quite clearly show a reason why there should have been such a discussion.

[68] As regards the pursuer's evidence that there was no such conversation I do not believe that he has deliberately lied about this matter. However, I accept Mr Jones' submission that: there were clear gaps in the pursuer's recollection of events due to a combination of consumption of alcohol and the very traumatic events of that night. The pursuer's evidence when speaking of the events of 29th/30th was peppered with words and phrases such as: probable; possible; can't remember; not too sure; can't recollect. There were clearly areas where he was mistaken in his evidence e.g. where the car was parked. There were clearly gaps in his recollection of the events of that night. I also accept Mr Jones' submission that in addition to that there was an undoubted and understandable wish on the pursuer's part not to remember any discussion of a type that would have given him knowledge of the uninsured position of the first defender and thus he had persuaded himself unconsciously that there had been no such discussion. I believe against that background that I cannot hold him as reliable in relation to this issue. His evidence therefore cannot cast any doubt on the evidence of Mr Brown on this issue.

[69] As regards the point made by Mr Young that there was no reference in the second defender's pleadings to such a conversation and that this showed Mr Brown was lying I rejected this submission. No such inference arose from the lack of such an averment. I would not have expected such an averment which would in my view have been the pleading of evidence.

[70] Thus for the foregoing reasons I hold that Mr Brown's evidence on the critical issue was credible. As regards the first defender's evidence on this issue I have clearly come to the view that it should be rejected as being incredible for the reasons which I have stated. As regards the pursuer's evidence on this issue for the reasons which I have advanced I find his evidence on this matter not to be reliable.

[71] I now turn to the separate issue of Mr Brown's reliability. On the central issue of whether he was a reliable witness as to whether this conversation had taken place it is again my clear judgment that he was reliable.

[72] It seems to me that it is highly unlikely that he would be mistaken as to whether such a conversation had taken place. The nature of the event which was the subject of the central issue and which Mr Brown was giving evidence in relation to is such that I believe he is unlikely to be mistaken in his evidence that such a conversation took place. There are a number of reasons which in my view support the judgement that he was unlikely to be mistaken.

[73] It is not difficult to understand how witnesses may make a mistake: as to identification; or as to what has happened when giving evidence as to an incident which occurred quickly and unexpectedly; or when asked some considerable time after the event to give evidence as to something about which they attached no importance to at the time. However, no such reasons or similar factors are present in relation to the evidence of Mr Brown on this particular issue. Rather this was a matter of clear significance at the time given what happened later that night and of a somewhat unusual nature which would be expected to stick in the witness' mind. It was not a situation of a fleeting glimpse of a person he was later being asked to identify or a matter of the details of an incident which he was being asked about which had happened suddenly and unexpectedly in front of him, where possible mistakes in evidence are well recognised.

[74] It is difficult to see how the witness could be mixing this conversation up with a different conversation on another occasion at another place. He had only learned about the lack of insurance in the middle of the week before the incident. I could see in those circumstances no reason why the witness should have mixed up a conversation shortly prior to the accident with one which had happened some time before at which it was accepted the pursuer was not present.

[75] That Mr Brown is reliable in his evidence on this issue is in addition supported by a number of other factors:

First, he was clear and definite in his evidence on this issue. He was not shaken in his evidence at all on this issue. He in no way departed in cross examination from the central core of his evidence on this matter. This in my view supported his reliability.

Secondly, it appeared from his evidence that he had consistently expressed the view that the pursuer was aware that there was no insurance. His position in re-examination was that always when asked whether the pursuer knew that there was no insurance he had answered yes. This consistency in my judgement supports his reliability and his credibility. It puts him in a different position from the first defender about this issue in that as I have already said I did not think he had been consistent.

Thirdly, the witness' evidence was intelligible on this issue in that it fitted together with other evidence as I have earlier described when looking at the issue of credibility.

Fourthly, there was nothing in the witness' evidence or in the way he gave his evidence which caused me to think he was unreliable. There were certain matters about which he was unable to remember when asked. These in my opinion were about details and I would have been very surprised if he could have remembered all of the details of that evening accurately. There were also certain matters upon which he differed from other witnesses where I preferred the other witness' evidence. The principal example of this related to his evidence that he went to the school car park with the first defender and the pursuer to get the car. I preferred the evidence of the first defender about this matter to the effect that he had not accompanied the first defender to the car park on that occasion. His being mistaken in his evidence on this matter, however, did not cause me to hold him unreliable on the central issue. Again it would have been surprising if I could have accepted him as reliable on every single detail of the evening. I do not believe that my not holding him reliable in relation to that issue requires me to hold him unreliable on the central core of his evidence regarding the disputed issue. In my view there were considerable factors which outweighed his unreliability on this point and allowed me to be satisfied that he was reliable on the central issue.

[76] Mr Brown had of course been drinking heavily on that Saturday and had taken cannabis. On occasions it is said that the taking of drink and drugs may affect the reliability of a witness. I have considered this issue in relation to Mr Brown although I noted that in his submissions to me Mr Young did not found on this as a factor which should cause me not to accept Mr Brown as credible and reliable. I do not believe that there was sufficient evidence before me to show that either drink or drugs or a combination of both had in any way affected this witness' reliability on the central issue. In my view the other factors which I have relied upon outweighed any question of this having affected to any extent his memory of the said discussion.

[77] Accordingly for the foregoing reasons I hold that Mr Brown is a reliable witness as regards the central issue. In the whole circumstances and for the foregoing reasons I hold that Mr Brown is credible and reliable as regards the central issue. I have for the reasons I have adduced found the first defender to be incredible regarding this issue and the pursuer to be unreliable. In these circumstances I preferred the evidence of Mr Brown to that of the pursuer and the first defender on the central issue and I accordingly hold that the pursuer had actual knowledge of the lack of insurance when he entered the car. Accordingly for this reason the second defenders have established their case.

[78] Although as above stated I have held the first branch of the second defenders' case to be established and that is sufficient to decide the case I require to consider the second branch of the argument put forward on their behalf. This was advanced on the basis that even if I did not accept Mr Brown's evidence on the central issue nevertheless there was sufficient evidence to establish that the pursuer knew the first defender had no insurance in the sense as explained by Lord Nicholls in his speech in *White* v *White*.

[79] The pursuer on his own evidence at the material time knew the following:

"Question: At the end of April - did Frank (the first defender) have to put the car off the road because - tax - insurance - MOT ran out?

Answer: I don't know if they all ran out, but certainly something was off, that he had to put it off the road."

[80] At the time of the accident he thought the car had been off the road two weeks at the most.

[81] The pursuer was aware on the day of the accident that on previous occasions the first defender had put his car off the road because it "was not legal". This phrase had the meaning to which I have earlier referred in this opinion. He was also aware on 29 May that the first defender would drive his car when it was not legal, although it was his position that he would only drive it in those circumstances in the village of Tarbert and not outside.

[82] Against that evidential background in my opinion the pursuer had such information in his possession that would clearly lead him to the view that the first defender might well not have insurance on the night of the accident. On the balance of the evidence he knew the car was off the road on the night of the accident. He was aware at the end of April that it had been put off the road. On the evidence he had no reason to believe that the situation had altered. I did not accept Mr Young's submission that because the car was not in the 4 bay car park on the 29th this entitled him to hold that the car was now legal. It was still parked "off road", namely in the school car park and the only reason on the evidence for it being there was that it was not legal. He knew that the first defender drove his car when "not legal". He knew that one of the reasons the car could be off the road was that there was no insurance. The reasonable inference from this evidence is that on the 29th the pursuer knew that the first defender's car might well not be insured on that night and he was thus deliberately refraining from asking about insurance lest his suspicions should be confirmed.

[83] In my view given the information which he had it was more than mere carelessness on his part not to enquire. Thus I hold even if he did not have actual knowledge, he had knowledge, in the *White* v *White* sense, at the material time that the first defender did not have the necessary insurance.

[84] Accordingly I hold that the second defenders have proved both branches of their case.

Decision

[85] For the foregoing reasons I have found in favour of the second defenders and accordingly sustain their second plea in law and repel the second plea in law for the pursuers. It follows that I accordingly assoilzie the second defenders from the third conclusion of the summons. Lastly it not having been opposed I uphold the pursuer's first plea in law.