SHERIFF APPEAL COURT

[2019] SAC (Civ) 010
FAL-PD31-17

Sheriff Principal D L Murray
Sheriff Principal C D Turnbull
Appeal Sheriff W H Holligan

OPINION OF THE COURT

delivered by SHERIFF PRINCIPAL C D TURNBULL

in the appeal in the cause

PAUL GOURLAY

Pursuer and Appellant

against

AVIVA INSURANCE LIMITED

Defender and Respondent

Pursuer & Appellant: Comiskey, advocate; Slater & Gordon
Defender & Respondent: J G Thomson, advocate; BLM

11 March 2019

Introduction

[1] The appellant raised proceedings against the respondents in Falkirk Sheriff Court seeking reparation for the loss, injury and damage he maintained he had suffered as a result of a minor road traffic accident which took place at the junction of Union Street and King Street in Stenhousemuir in August 2016. The bicycle then being ridden by the appellant was involved in a collision with a car, which was being driven by the respondent's insured.

[2] After sundry procedure, a proof proceeded on 6 February 2018. The appellant was the only witness in his own cause. The appellant's case was closed at the conclusion of his evidence. The respondent's insured then gave evidence. At the conclusion of her evidence, the sheriff enquired if the respondents had any further evidence to lead and, on being advised that there were two further witnesses for the respondents, adjourned the court, stating that "… we will take a break before we deal with the further evidence". The sheriff then indicated that he wished to see parties' representatives in chambers, apparently without further elaboration. At this point it is appropriate to observe that neither counsel instructed in the appeal appeared in the proof before the sheriff.

[3] In relation to what occurred in chambers, we proceed on the basis of what was said by the sheriff in his note of 13 September 2018, read with the note to this court's interlocutor of 30 August 2018, the affidavit by counsel who appeared for the appellant at proof and the statement by the solicitor who appeared for the respondents at proof. Parties were agreed that this was the basis upon which this court required to consider this aspect of the appeal.

[4] At the meeting in chambers the sheriff advised the parties that the case was one which turned on the credibility of the parties; the sheriff thought that the pursuer had "tailored his evidence to suit his case"; the sheriff had misgivings about the appellant's credibility when comparing his evidence to that of the respondent's insured; the sheriff thought that the appellant was exaggerating his injury and the damage to his bicycle; that there being two further witnesses to be called by the respondents they were likely to be supportive of the respondent's case; and that these observations were preliminary. The issue of contributory negligence was also raised by the sheriff.

[5] Following the discussion in chambers, the proof resumed. The respondent led the evidence of their two remaining witnesses and closed their proof. Submissions were

thereafter made by parties, at the conclusion of which the sheriff gave an *ex tempore* decision in favour of the respondents and assoilzied them from the craves of the initial writ. The sheriff subsequently produced a note of his decision in which he stated that the evidence of the pursuer was entirely fabricated and that he accepted the evidence of the respondent's witnesses where it was in conflict with that of the appellant.

Grounds of Appeal

[6] The appellant advances seven separate grounds of appeal (numbered 2 to 8 in the note of appeal). Those grounds can conveniently be considered under two headings. Firstly, as developed in submissions, the allegation that the sheriff displayed apparent bias (ground 6). Secondly, that the sheriff made a number of errors when assessing the evidence and in admitting certain evidence. The parties were agreed that if the former ground of appeal succeeded the appeal should be allowed and the case remitted back for a new proof before a different sheriff. In such circumstances there would be no necessity of considering the remaining grounds. Accordingly, we first consider the issue of apparent bias.

Ground 6 – Apparent Bias

[7] The test for apparent bias is to be found in the speech of Lord Hope of Craighead at paragraph 103 of the decision of the House of Lords in *Porter* v *Magill* [2002] 2 AC 357 at 494: "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased." That test was approved by the House of Lords in the Scottish case of *Helow* v *Secretary of State for the Home Department* 2009 SC (HL) 1. As identified by Court of Appeal in the case of *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 at 726 – 727 (paragraph 85), before asking the relevant question (a slightly different formulation applying at that time),

"The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased."

[8] The circumstances which give rise to the allegation of bias in this case are set out in paragraph [4] above. The appellant contends that the fair-minded and informed observer, having considered those facts, would conclude that there was a real possibility that the sheriff was biased. The respondent maintains that the fair-minded and informed observer would not reach such a conclusion.

[9] The bias alleged by the appellant in this case is not partiality as a result of some matter extraneous to the issues in the litigation, such as a personal interest of the decision maker (an example of such a type of allegation is to be found in *Helow*). What is alleged is that the sheriff made comments, having heard only certain of the evidence and before hearing submissions, which could only be construed as being demonstrative of him having prematurely formed a concluded view hostile to the appellant.

[10] As observed by Peter Gibson LJ in *Southwark London Borough Council* v *Jimenez* [2003] ICR 1176, whether bias is entirely the appropriate label for conduct of the type complained of in this appeal may perhaps be open to question. Although apparent bias and predetermination are sometimes considered together, it seems that they should be regarded as distinct concepts. In this regard the judgment of Beatson J in *R (on the Application of Persimmon Homes Ltd)* v *Vale of Glamorgan Council* [2010] EWHC 535 (Admin), at paragraph 116, is instructive:

> "The starting point … is to recognise that, although in some cases predetermination and the appearance of bias have been treated together (see *National Assembly of Wales v Condron [2006] EWCA Civ 1573*; *R(Lewis) v Redcar and Cleveland BC [2008] EWCA Civ 746, [2009] 1 WLR 83*) they are distinct concepts. Predetermination is the surrender by a decision-maker of its judgment by having a closed mind and failing to apply it to the task. In a case of apparent bias, the decision maker may have in fact applied its mind

> quite properly to the matter but a reasonable observer would consider that there was a real danger of bias on its part. Bias is concerned with appearances whereas predetermination is concerned with what has in fact happened."

While the circumstances of this case are suggestive of predetermination by the sheriff, rather than apparent bias in its true sense, as apparent bias is the term used in the authorities, we use it in this judgment, apparent bias in the context of the present case meaning the premature formation of a concluded view adverse to one party, see *Amjad and others* v *Steadman-Byrne* [2007] 1 WLR 2484 at page 2486H (paragraph 10).

[11] The issue of apparent bias in similar circumstances to those of this case has been considered by the Court of Appeal in three cases, which this court drew to the attention of parties and sought submissions upon.

[12] In *Southwark London Borough Council* the applicant's complaints of disability discrimination and unfair dismissal against his employer, the respondent council, had been heard by the Employment Tribunal for ten days and most of the evidence completed when the hearing was about to be adjourned for two months until a further witness for the council could attend. The chairman invited counsel to attend the next day for the tribunal to give some "preliminary thoughts" on matters on which it would particularly want to be addressed in submissions. The following day the chairman made a number of comments, said to be the tribunal's preliminary views, about the council's treatment of the applicant, which he described as "appalling". He concluded by encouraging the parties to settle the matter. There was no settlement and, following the resumed hearing, the tribunal upheld the applicant's complaints. The council appealed alleging that the tribunal had formed a concluded view hostile to the council on the evidence before hearing submissions and by its comments showed a closed mind, amounting to apparent bias. The Employment Appeal

Tribunal, without providing the Employment Tribunal with an opportunity to comment on the council's allegations in accordance with the relevant Employment Appeal Tribunal Practice Direction, allowed the appeal, holding that the use of the word "appalling" could only sensibly have been applied to the council's conduct if the tribunal had already reached a fixed, strong adverse view of the council; that a clear attempt had been made to put heavy pressure on the council to compensate the applicant; and that a fair-minded and informed observer would conclude that there was a real possibility that the tribunal was biased in the sense of having reached firm and final conclusions against the council before its case was concluded.

[13] The Court of Appeal, having obtained the comments of the Employment Tribunal on the allegation of bias, allowed the appeal, holding that the prior failure to obtain those comments was a material error which entitled the court to look at the issue of bias afresh. The Court of Appeal held that, although the premature expression of a concluded view or the manifesting of a closed mind by a tribunal might amount to the appearance of bias, the chairman's explanation of the tribunal's concerns and his reiteration that those were the matters with which the tribunal wished the council to deal, was entirely consistent with and supported the genuineness of the chairman's offer of "thoughts" that were only "preliminary". Notably, the court also concluded that there was no reason why a strongly expressed view could not be a provisional view, nor was there any impropriety in a tribunal encouraging the settlement of proceedings.

[14] The case of *Amjad and others* has certain similarities to the present case, and certain notable differences. It too related to a personal injury action, heard before a district judge, arising out of a low-velocity motor collision, however, it was one in which, firstly, the trial judge reached a quite different view of the credibility and reliability of the claimants;

secondly, he expressed that view at a different stage in the proceedings; and, thirdly, he found in favour of the claimants. The Court of Appeal noted that the district judge's decision would have been an unappealable end to an unremarkable case but for what had happened half-way through the trial. At the conclusion of the claimants' evidence, the district judge adjourned and invited counsel for the parties into his room where he said, in substance:

> "(1) Having heard the claimants give evidence, he believed them. (2) He had considered the manner in which they gave their evidence and in particular the quickness with which they responded to questions. (3) He had warned each one of them of the consequences of his deciding that they were pursuing a fraudulent claim and had seen their reply. He did not consider the men to be dishonest. (4) He accepted that he had not yet heard the defendant give evidence, but in view of his decision that the claimants were honest he could not see how the defendant could win. (5) He wanted to give both counsel an indication of his thoughts. (6) It was "flavour of the month" for insurers to prosecute claimants with "Asian sounding names". (7) He would, if necessary, say something about that in his judgment. (8) Insurance companies were trying to send out a message about fraudulent claims to the Asian community, if there was such a thing. (9) There were some discrepancies in the evidence given by the claimants but not such as to make him think that this was a fraudulent claim. (10) He noted that the defendant worked for the police. (11) Someone with a police background "always thinks that they are right" (or "never thinks that they are wrong") "and find it difficult to accept that they might be mistaken". (12) The defendant might or might not have been mistaken, but he believed that he saw two people in the car and might have concluded that the claimants were "at it". (13) He would continue to hear the case, but the defendants' counsel might wish to take instructions over the lunch break."

[15] The Court of Appeal allowed the appeal, holding that whilst a judge may begin forming views about the evidence as it goes along, and may legitimately give assistance to the parties by telling them what is presently in his mind, it is not acceptable for a judge to form, or to give the impression of having formed, a firm view in favour of one side's credibility when the other side has not yet called evidence which is intended to impugn it.

[16] In *Singh* v *Secretary of State for the Home Department* [2016] 4 WLR 183, the appellant appealed against a decision of the Secretary of State refusing his application for indefinite

leave to remain. His appeal was dismissed by a judge of the First-tier Tribunal (Immigration and Asylum Chamber) (referred to below as either "the FTTJ" or "the Immigration Judge"). The appellant appealed on the ground of apparent bias. That appeal was dismissed by the Upper Tribunal who determined that the appellant had had a fair hearing. Permission to appeal having been granted by the Court of Appeal, the appellant appealed on the grounds that the FTTJ had made remarks at the outset of the hearing before him which indicated that he had a closed mind and/or had prejudged the appeal and so the hearing was unfair; and that on appeal to the Upper Tribunal the judge failed to apply the correct legal test to the issue raised and therefore failed properly to address the relevant points.

[17] The Court of Appeal opined that, on the face of it, the determination of the FTTJ was a thorough and properly reasoned one, which had made unassailable findings of fact and which had drawn conclusions appropriate to those findings of fact. Of particular relevance was the issue of documentary evidence, as set out in paragraph 8 of the decision of the Court of Appeal thus:

> "In the course of his determination the FTTJ noted that the appellant had produced no documentary evidence to support his claim that he had arrived in the United Kingdom in 1997. The FTTJ said that there would be at least some documentation to support the claim of arrival before 2005. He said: 'I find the fact that there is not to be indicative of the fact that the appellant simply did not come to the UK in 1997 as claimed by him.'"

[18] The conduct of the FTTJ giving rise to the allegation of bias is set out in paragraph 14 of the decision of the Court of Appeal thus:

> "After the hearing before the FTTJ and for the purposes of the proposed appeal (counsel for the appellant) made a witness statement. ... It reads as follows:
>
> 1. I was the advocate at the above appellant's hearing on 19 February 2014 at Hatton Cross before (the) Immigration Judge …

> 2. At the beginning of the hearing I handed my skeleton argument to (the) Immigration Judge ... He addressed the appellant in the usual way and introduced himself. During his introduction he stated to the appellant that he did not agree with my skeleton argument that documentary evidence was of lesser importance in such appeals. In his view documentary evidence was of utmost importance and the absence of documentary evidence could not satisfy him that the appellant had been in the UK. He went on to say that if I did not agree with him then I could appeal his decision.
>
> 3. In my view the Immigration Judge's comments were wholly inappropriate as he was addressing the appellant before hearing any evidence and giving a clear indication that he had already made his decision. The Immigration Judge's comments visibly unsettled the appellant."

[19] The Court of Appeal refused the appeal. In particular they rejected the assertion that the FTTJ's comments were in any way inappropriate, observing that such statements sometimes can positively assist the advocate or litigant in knowing where particular efforts may need to be pointed.

[20] The appellant advances three separate arguments in relation to the facts and circumstances of the present case. Firstly, he contends that the present case can be distinguished from the decisions of the Court of Appeal above considered, standing the application of the Civil Procedure Rules ("CPR") in England and Wales. Secondly, he contends that as the comments made by the sheriff were made in private, within the sheriff's chambers, there has been a contravention of Article 6 of the ECHR and / or the common law principle of open justice. Thirdly, he contends that, properly interpreted, the sheriff's comments amounted to a predetermined view, contrary to the interests of the appellant which could not be overcome by describing the comments as preliminary. The respondent does not accept any of those propositions, which we deal with in turn.

[21] As the test for apparent bias is well established and each case turns on its own facts and circumstances (see paragraph [7] above), the observations of the Court of Appeal in *Amjad and others*, *Southwark London Borough Council* and *Singh* are, in fact, only of assistance

in relation to the application of the general observations of the court to cases of this type. To suggest, as the appellant does, that those general observations have no application due to the terms of the CPR is, in our view, misconceived, for two reasons.

[22] Firstly, only one of the three Court of Appeal decisions was subject to the provisions of the CPR at first instance, namely *Amjad and others*. *Southwark London Borough Council* emanated from the Employment Tribunal; and *Singh* from the First Tier Tribunal (Immigration & Asylum Chamber). The terms of the CPR had no application in the first instance proceedings in these two cases.

[23] Secondly, whilst the advent of CPR may well have formalised the position in relation to the role of the judiciary in England and Wales on matters such as case management and helping the parties to achieve a settlement, at least in so far as relevant for cases such as that presently before us, the position in relation to the disclosure by a judge of his or her current thinking is unchanged from that which pertained prior to the introduction of the CPR. That much is apparent from the decision of the Court of Appeal in *Arab Monetary Fund* v *Hashim* (1994) 6 Admin LR 348 and, in particular, the remarks of Sir Thomas Bingham MR (giving the judgment of the court) at page 356:

> "In some jurisdictions the forensic tradition is that judges sit mute, listening to advocates without interruption, asking no question, voicing no opinion, until they break their silence to give judgment. That is a perfectly respectable tradition, but it is not ours. Practice naturally varies from judge to judge, and obvious differences exist between factual issues at first instance and legal issues on appeal. But on the whole the English tradition sanctions and even encourages a measure of disclosure by the judge of his current thinking. It certainly does not sanction the premature expression of factual conclusions or anything which may prematurely indicate a closed mind. But a judge does not act amiss if, in relation to some feature of a party's case which strikes him as inherently improbable, he indicates the need for unusually compelling evidence to persuade him of the fact. An expression of scepticism is not suggestive of bias unless the judge conveys an unwillingness to be persuaded of a factual proposition whatever the evidence may be."

In our view, the observations of the Court of Appeal in *Arab Monetary Fund* accord entirely with practice in the Scottish courts.

[24] The appellant's argument based upon Article 6 of the ECHR and / or the common law principle of open justice is, in essence, that no part of the proceedings can ever be held in private. It is difficult but to conclude that this submission is an opportunistic one. As noted in *Reid & Murdoch: Human Rights Law in Scotland* (4th ed) at paragraph 5.162, it is clear that Article 6 does not require that every step in proceedings must be conducted in public. The mere fact of calling a meeting in private cannot of itself be unfair and a breach of Article 6; see *Hart* v *Relentless Records Ltd* [2003] FSR 36 at paragraph 47. Such a meeting might be for any number of reasons, such as explaining to parties a personal reason that required the court to rise early, or an administrative matter in relation to the progress of the case. We agree with what is highlighted in paragraph 47 of *Hart* that: "What must matter is what the meeting is for and what happens at it." As to the view of Jacob J (as he then was) that informal meetings of the type which occurred in that case did not fall within Article 6 (see *Hart* at paragraph 50), we were not addressed on the correctness or otherwise of that view and offer no opinion upon it.

[25] It cannot, however, be the case that the discussion of an innocent administrative matter in private constitutes a contravention of Article 6 and / or the common law principle of open justice and has the effect contended for by the appellant, namely, vitiating the judgment. The issue at large requires an examination of what unfolded. As observed in *Amjad and others* at paragraph 11, it does not matter if the remarks were made in the confines of the judge's room, the same test has to be applied as if the words had been spoken in open court. Appropriately made remarks do not acquire a sinister connotation by virtue of where they were made. We do, however, consider that the fact of the remarks being made in

chambers rather than open court is a matter which may colour the view of the fair-minded and informed observer. We readily accept that there may be circumstances where administrative matters can be dealt with other than in open court, but would strongly commend that case management matters should as far as possible be addressed in open court. That said to interpret Article 6 and the common law principle of open justice in the manner contended for by the appellant would, in our view, have serious consequences for the proper administration of justice. It is notable that the appellant's argument in this regard is unsupported by relevant authority. We should add that different considerations apply in criminal cases, as can be seen from *Allan* v *HM Advocate* 2009 SCCR 331, albeit there is a distinction between matters intrinsic to the trial on the one hand and administrative matters relating to it on the other (see *Mackay* v *HM Advocate* 2015 SCCR 275).

[26] In considering the appellant's contention that, properly interpreted, the sheriff's comments amounted to a predetermined view, we remind ourselves that the test to be applied when considering such an assertion is an objective one and that this court must conduct an objective appraisal of all the material facts. That appraisal must be conducted through the eyes of a fair-minded and informed observer. The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. Those circumstances are set out above at paragraphs [2] to [5]. The observer in the present case must be assumed to have been present throughout the proof and in chambers when the comments were made by the sheriff. The observer would be aware that the appellant had closed his proof and that, at the time of the comments, the sheriff had heard the evidence of the only two eye-witnesses to the accident (that is the appellant and the respondent's insured).

[27] The starting point of a consideration of the circumstances in the present case is the comment made by the sheriff when adjourning the court, namely, "… we will take a break before we deal with the further evidence" (see paragraph [2] above). The sheriff thus made clear his expectation that he would hear that evidence and his subsequent comments require to be viewed in that context. It is far from clear why the sheriff decided to make the comments he did in chambers. There is no obvious reason why he chose to do so and we are in no doubt that any observation of the type made by the sheriff, if to be made at all, should ordinarily be made in open court.

[28] The sheriff's comments in chambers are set out in paragraph [4] above. It is a matter of agreement that these comments were said to be preliminary. An expression of preliminary views may be helpful and is not in itself an indication of bias, however, what is expressed to be a preliminary view may not truly be a preliminary view and may amount to a concluded view. That may be so for a number of reasons, such as the strength of the language used or the context in which the views are given (see *Southwark London Borough Council* at paragraph 24).

[29] In *Harada Ltd* v *Turner* [2001] EWCA Civ 599 Pill LJ, giving the judgment of the court, said at para 31:

> "[Counsel] for Harada accepts that judges may make remarks at the beginning or in the course of hearings which indicate the difficulties a party faces upon one or more of the points at issue. Provided a closed mind is not shown, a judge may put to counsel that, in the view of the judge, the counsel will have difficulty in making good a certain point. Indeed, such comments from the Bench are at the very heart of the adversarial procedure by way of oral hearing which is so important to the jurisprudence of England and Wales. It enables the party to focus on the point and to make such submissions as he properly can."

[30] In our view, such observations apply equally to the jurisprudence of Scotland. Appropriately made, such an approach assists the efficient disposal of business and is

indicative of proactive case management. As observed in *Harada Ltd*, it enables parties to focus on the relevant issues; and can obviate the perceived necessity of addressing the court on matters which are either not truly in issue or are immaterial to the determination of the case.

[31] As explained in *Amjad and others* at paragraph 10:

> "… it is well established not only that a judge may and commonly will begin forming views about the evidence as it goes along, but that he or she may legitimately give assistance to the parties by telling them what is presently in the judge's mind."

[32] A further, relevant, example is to be found in what the Employment Appeal Tribunal said in *Project* v *Hutt* (unreported) 6 April 2006 , at para 22:

> "There are, of course, occasions when a judge or tribunal can quite properly explore difficulties that have become apparent from the evidence in a case, prior to the point at which all evidence has been led and submissions made, whether with a view to encouraging parties to consider settlement or narrowing the issues between them, or otherwise. … Moreover, if minded to make such a comment, it is plain that the risk of giving an impression of prejudgment will arise if it is not made clear to the parties that any views expressed are but provisional, that the tribunal's mind is not yet made up and that it remains open to persuasion."

[33] The appellant argues that the comments made by the sheriff were trenchant to a point which "overpowers any expression of 'preliminary'". We have some difficulty in the categorisation of the sheriff's comments as trenchant. As noted in *Southwark London Borough Council* at paragraph 38, a strongly expressed view can be a provisional view, leaving it open to the party criticised to persuade the sheriff as to why that view was wrong. The more trenchant the view, the more the attachment of the label "preliminary" may need scrutiny to see whether the view was truly preliminary and not a concluded view. In the present case, the appellant had closed his proof; all the eye-witness evidence had been heard; and the sheriff was well aware of the impression made on him by that evidence. Looking at the

sheriff's comments objectively, through the eyes of the fair-minded and informed observer, they were intended to be helpful to the parties, providing them with an indication of the sheriff's preliminary views so that the submissions yet to be made could properly focus on the sheriff's concerns and on the possibility of contributory negligence. In such circumstances, the fair-minded and informed observer would not conclude that the sheriff had reached a concluded view.

[34] The comments made by the sheriff would not, in our opinion, reasonably be understood by the fair-minded and informed observer as meaning that the sheriff had already formed a concluded view hostile to the appellant on matters which fell for decision at the conclusion of the case after hearing all the evidence and arguments. In our view, the fair-minded and informed observer, having considered the facts of this case, would not conclude that there was a real possibility that the sheriff was biased. Accordingly, we reject the sixth ground of appeal.

[35] Before leaving the question of bias, it is appropriate that we offer certain further observations on what occurred in this case. Whilst we have concluded that the fair-minded and informed observer, having considered the facts of this case, would not have concluded that there was a real possibility that the sheriff was biased, it is difficult to escape the conclusion that the sheriff's decision to offer comments when and where he did was ill advised, it leading to sundry procedure which, in all probability, would simply not have arisen had the sheriff kept his thoughts to himself and issued his judgment in due course (whether *ex tempore* as he did or at a later date in writing). Discussions in chambers ought only to take place in circumstances in which the administration of justice requires that it should be so. Such discussions should be very much the exception and should be objectively justifiable. The sheriff clerk should be present. If a sheriff asks to see parties' representatives

in chambers they are entitled to enquire of the sheriff clerk the reason why and they are also entitled to decline to do so if they consider such a meeting to be inappropriate.

[36] We commend to sheriffs the observations of Peter Gibson LJ in *Southwark London Borough Council* at para 40:

> "In conclusion I would add a word of caution for tribunals who choose to indicate their thinking before the hearing is concluded. As can be seen from this case, it is easy for this to be misunderstood, particularly if the views are expressed trenchantly. It is always good practice to leave the parties in no doubt that such expressions of view are only provisional and that the tribunal remain open to persuasion."

It is appropriate to add to this the observation that, before electing to make comments of the type made in the present case, a sheriff should carefully consider whether the comments he or she is inclined to make are likely to positively contribute to the efficient disposal of the case, or whether they might give rise to the type of controversy that has arisen in this case. Clearly, if the sheriff concludes that the latter is a possibility, he or she should refrain from making the comments. If he or she elects to make comments, they should be made in open court.

[37] It is also appropriate that we make certain observations on the timing of the allegation of bias in this case, coming as it did on appeal with the possibility of recusal not being canvassed before the sheriff at the proof after the comments in question were made. It was not argued on behalf of the respondents that the appellant had waived his right to argue bias. Accordingly, it was unnecessary for us to determine the issue. It is, however, a matter which has been the subject of judicial comment in both Scotland and England.

[38] In *Richardson* v *Forrester* [2011] HCJAC 71A the respondent, a chief inspector of police stationed at Aberdeen, was charged on a summary complaint at the instance of the appellant with dangerous driving. The case called for trial over four separate days, during which the

evidence was not completed. On the fifth day of the trial, the sheriff was anxious to know what progress was being made. He called the appellant's depute, counsel for the respondent and counsel for the co-accused into chambers. The depute advised the sheriff that, amongst other witnesses remaining to be called, there were the police officers who had investigated the incident and interviewed the respondent. Upon hearing this, the sheriff remarked: “Oh! That will be the Gestapo!” Perhaps sensing that others may not have shared his sense of humour, the sheriff added “I didn't say that”. No action followed immediately upon the sheriff's remark. In particular, no objection to the sheriff's continued involvement in the case was taken when the trial proceeded on that day or on a subsequent day, when evidence of the interview of the respondent was adduced. Nothing was said by the appellant's depute about the effect of the remark when the trial again called on two further days, when she answered the respondent's “no case to answer” submission. The submission was based, in part, upon the inadmissibility of the evidence of the interview on the ground of unfairness (objection having been timeously taken earlier). The sheriff sustained that submission and acquitted the respondent.

[39] The Crown appealed. For present purposes, it is their contention that that the remark made by the sheriff, had it been overheard by the informed and independent observer, would have carried with it an inference of bias on the part of the sheriff that is of relevance. Rejecting the Crown appeal, and holding that there was no prospect of a fair-minded and informed observer concluding, on hearing the words used in chambers in the context of the trial proceedings, that the sheriff was biased against the appellant, the now Lord President (Carloway) said this in relation to the timing of the allegation of bias:

> “An allegation that a judicial office holder is biased against the Crown, in the form of the local procurator fiscal, and investigating police officers is an extremely serious one. It should only be made where there is evidence to

> support it. Such evidence is not present in this case and the court is bound to comment that it is regrettable that the appellant appears to have lacked a sense of perspective in this matter. The court notes in this regard that the appellant's depute took no action at all in relation to the remark until after the sustaining of the respondent's submission. If the depute had seriously considered that the remark displayed bias, then she ought to have taken action at the time. Her failure to do so strongly suggests that no such bias was inferred and the court notes that the Advocate Depute did not submit that the appellant's depute had, in fact, so regarded the remark at any time."

[40] In *Amjad and others* at paragraph 17, the Court of Appeal said this:

> "We would, however, stress that the time to draw the attention of a tribunal to a clear manifestation of bias on its part is ordinarily when it occurs. There is no reason why a judge to whom it is courteously pointed out that he or she may have overstepped the mark should not accept that it may be so and stand down. Equally, however, it is only in a clear case that an advocate can responsibly take this course and a judge accede to it, both because such applications have been known to be made opportunistically and because of the expense that a recusal will inevitably throw upon one or both parties, neither of whom will ordinarily be to blame for what has happened. The law of waiver is not simple, but appellate and reviewing courts tend not to look favourably on complaints of vitiating bias made only after the complainant has taken his chance on the outcome and found it unwelcome. In the present case, however, there is no criticism of the course adopted at trial by the defendant's counsel."

[41] We commend these observations to practitioners. As observed in *Richardson*, an allegation that a judicial office holder is biased is an extremely serious one. If circumstances justify such an allegation, the presiding sheriff should be invited to recuse him or herself at the earliest possible opportunity. It is quite inappropriate to wait for the outcome of the case and to then raise it when the complainant is visited with an unwelcome outcome.

Remaining Grounds of Appeal

[42] In light of the conclusion we have reached on the question of apparent bias, it is necessary for us to consider the remaining grounds of appeal, upon which we heard lengthy submissions from counsel for the appellant. The essence of the remaining grounds is that the

sheriff made a number of errors when (a) assessing the evidence; and (b) admitting certain evidence.

[43] As observed in Macphail, "*Sheriff Court Practice*" at para 18.74, in the case of an appeal following proof, the appellant should identify which numbered findings in fact he wishes the court to vary or recall, and the text of any findings which he wishes the court to add. Rule 7.12 of the Act of Sederunt (Sheriff Appeal Court Rules) 2015 now regulates the position. A note of argument must state the points the party intends to make. If the court is to be invited to make additional findings in fact; or to vary the terms of the sheriff's findings, the precise terms of any proposed additional finding or amendment should be expressly set out in the note of argument. Similarly, if a party intends to invite the court to quash any of the sheriff's findings, such findings should be clearly identified in the note of argument.

[44] In neither his note of argument nor in the oral submissions made on his behalf by counsel did the appellant invite the court to quash or amend any of the findings in fact made by the sheriff, or to substitute alternative findings in fact. Whilst, for the reasons set out below, we have concluded that we cannot interfere with the findings in fact made by the sheriff, had we been persuaded to do so it would have been left to the court to identify additional findings in fact which would have been a wholly unsatisfactory state of affairs.

[45] Before turning to consider each of the relevant grounds of appeal (grounds 2; 3; 7(b); and 8) there are two preliminary observations that require to be made. Firstly, having had the benefit of seeing and hearing the witnesses, the sheriff did not believe the appellant. Indeed, the sheriff went further, save for his evidence of a collision taking place at the locus on the date in question between the appellant on his bicycle and the respondent's insured driver's car, the sheriff describes the evidence of the appellant as "entirely fabricated". Secondly, the sheriff found (see finding in fact 11) that, following the collision, the appellant

repeatedly told the remaining three witnesses who gave evidence that the collision had been entirely his fault. As is now well understood, this court could have no basis to quash this finding in fact made by the sheriff unless the notes of evidence demonstrated that the sheriff was plainly wrong in making the findings he did (see *Thomas v Thomas* 1947 SC (HL) 45; *McGraddie v McGraddie* 2014 SC (UKSC) 12; *Henderson* v *Foxworth Investments Ltd* 2014 SC (UKSC) 203; and *Royal Bank of Scotland plc v Carlyle* 2015 SC (UKSC) 93).

[46] Ground of appeal 2 relates to issues of the evidence of the respondent's insured's speed. Firstly, it is said that the sheriff erred in rejecting the specific evidence of the respondent's insured driver at the time of the accident. It is appropriate to note that the sheriff made no express finding in fact in relation to the speed of the respondent's insured, all that he found was that she "drove cautiously" and "very slowly" – see finding in fact 8. That finding is not challenged. In any event, the precise speed is immaterial. It was perfectly open to the sheriff to accept parts of a witness's evidence and reject other parts. In any event, the evidence of the respondent's insured was not that she was travelling at between 20 and 25 mph. Considering fully the questions put to the witness in cross-examination and the answers she gave, the high point for the appellant (to be found at page 57 of the notes of evidence) is that the witness accepted travelling at, "Probably 20, 25 (mph) if you are lucky". From that answer, taken with the remaining evidence of the witness on the question of speed and the explanation given by the sheriff on this issue, it cannot be said that the sheriff made an identifiable error in reaching the view he did. The assertion that the sheriff failed to take account of this evidence does not appear to us to raise a different point. The sheriff considered the evidence in question and rejected it. As noted above, the sheriff found that the witness "drove cautiously" and "very slowly". From a proper evaluation of the evidence of the witness, these were findings the sheriff was entitled to make. There is no basis upon

which this court would be entitled to interfere with them. For the foregoing reasons, we are satisfied that there is no merit in ground 2.

[47] Ground 3 can be dealt with briefly. It is argued that in assessing liability, the sheriff erred in failing to take account or to give any weight to the respondent's insured driver's concession that, prior to the accident, she did not look to her right. Whilst superficially attractive from the appellant's perspective, the "concession" requires to be viewed against the backdrop of the whole evidence in the proof, and particularly the evidence which immediately preceded the "concession", that the appellant had come out from behind a parked car in front of the witness. The evidence of the witness was also that she believed she had right of way; and that she was driving cautiously. This evidence also requires to be viewed against the sheriff's finding in fact 9 which is in the following terms:

> "The (appellant) cycled at an excessive speed from the pavement, onto Union Street and emerged from behind the parked car into the path of (the respondent's insured driver's) slow moving car, colliding with it at a point near the south east corner of the south west quadrant of the junction between (Old King Street) and Union Street. (The respondent's insured driver) had no opportunity to take evasive action."

From a proper consideration of the evidence of the witness, the sheriff cannot be criticised for not attaching weight to the perceived "concession". The findings he made that are perceived by the appellant to be affected by this were findings the sheriff was entitled to make on the evidence. For the foregoing reasons, we are satisfied that there is no merit in ground 3.

[48] Ground 7(a) is that the sheriff erred in finding that the pursuer had exaggerated his injuries and the damage to his bicycle, this error impinging upon the assessment of the appellant's credibility. The finding in fact in which this can be found is finding in fact 10, which refers to the appellant sustaining "minor injuries" and which makes no reference to

damage to the bicycle. Whilst it is true to say that the sheriff heard no medical or other relevant skilled evidence to support findings that the appellant's description of his injuries or bike damage were an exaggeration, that is beside the point. Quantum was agreed in the event of the respondent being found liable to make reparation to the appellant in respect of the accident, therefore, the sheriff's assessment on these issues is only relevant to the issue of credibility. In effect, the appellant argues that these are matters upon which the sheriff was not entitled to express a view, having heard the evidence of witnesses. That is a proposition we are unable to accept. The fundamental problem for the appellant is that he was not believed by the sheriff, for a number of reasons of which this ground addresses two. We are satisfied that there is no merit in ground 7(a).

[49] Ground 8 is that the sheriff erred when assessing the appellant's credibility by failing to take account of relevant factors. Quite what the sheriff ought to have done with these factors, said to be material consistencies between the evidence of the appellant and the respondent's insured driver was not specified. One of the perceived "material consistencies" contended for is not supported by the print of the evidence. The respondent's insured driver was unable to say if the appellant was cycling on the pavement or on the road on King Street prior to entering the junction (see page 56 of the notes of evidence). In isolation, the significance, in the context of liability for the accident, of two of the perceived "material consistencies", namely, (a) the fact that the appellant had advanced to more than half way across the junction before the collision took place; and (b) the fact that the respondent's insured driver appeared upset after the accident is difficult to identify. The final perceived "material consistency" appears to be based upon the appellant's interpretation of the evidence of speed (an issue which we have already considered) to the effect that the respondent's insured driver was driving "quickly" at the time of the accident. That assertion

is, in our assessment, contradicted by that witness's own evidence. The significance of the evidence of the witness, Nicola Orr, that the appellant had tried to comfort or console the respondent's insured driver following the accident is also difficult to identify. We are satisfied that there is no merit in ground 8.

[50] In summary in relation to the foregoing grounds of appeal, there is, in our view, no identifiable error on the part of the sheriff. No material error of law was argued for. Whilst it is far from clear which critical findings in fact the appellant actually challenges, there was a clear basis in the evidence to entitle the sheriff to reach the conclusion he did. In light of the sheriff's assessment of the witnesses and the admissions made by the appellant in the aftermath of the accident, the sheriff's decision cannot, on any view, be categorised as one which cannot reasonably be explained or justified.

[51] We turn now to those grounds of appeal which relate, in whole or in part, to questions of admissibility of evidence. Two separate matters relating to the admissibility were raised by the appellant in the course of the appeal. Firstly, it was argued that the sheriff had erred in finding that the appellant was riding on the south side pavement of King Street immediately prior to the accident, the alleged error being in admitting evidence relating to the appellant riding on any pavement of King Street prior to the accident, such evidence having been objected to as inadmissible due to lack of notice (ground 4). Secondly, it was argued that the sheriff had erred in admitting evidence from PC Allen of statements made by the pursuer after the accident, such evidence having been objected to as inadmissible because (a) the terms of any such statement were not put to the appellant in cross-examination; and (b) PC Allen did not refer to his notebook or to the specific wording said to have been used by the pursuer (ground 5). It was also argued that the sheriff had erred in

taking account of the evidence of PC Allen (ground 7(b)), that ground presumably proceeding on the hypothesis that the evidence in question was admissible.

[52] The appellant's assertion that the sheriff erred in finding that the appellant was riding on the south side pavement of King Street immediately prior to the accident is based upon the contention that the sheriff ought not have admitted evidence relating to the appellant riding on any pavement of King Street prior to the accident. The first point to make in relation to this ground of appeal is that the sheriff did not, in fact, make a finding in fact in such terms – see finding in fact 9, the terms of which are set out in paragraph [47] above.

The appellant contends in his grounds of appeal that the evidence in question was objected to as inadmissible due to a lack of notice in the respondent's averment in Answer 5. The appellant argues that the averment *"Immediately before the collision the pursuer was riding his cycle on the pavement of King Street before he entered its junction with Union Street..."* was so lacking in specification as to be incapable of proper investigation by the pursuer prior to proof. The appellant goes on to assert that there were four possible pavements to which the defenders may have been referring and on each hypothesis, the appellant's investigations in advance of the proof would have been different.

[53] In article 4, the appellant makes the following averment in response to the respondent's averment with which issue is taken:

> "Denied that the (appellant) was cycling on the pavement of King Street immediately before he entered its junction with Union Street …"

In light of that averment, the assertion that the appellant's investigations in advance of the proof would have been different is difficult to make sense of. It must also be borne in mind that there is no dispute as to which side of the respondent's vehicle the appellant emerged

from King Street upon. That alone immediately excludes two of the four possible pavements the appellant refers to. The nature of the prejudice the appellant alludes to was not specified. In our view, the respondent's averment is one which gives fair notice and the sheriff was correct to repel an objection to admissibility on that basis.

[54] The appellant maintains that as it was not put to the appellant that he was travelling on the pavement on the south side pavement of King Street, such evidence ought not to have been admitted. The proposition in the grounds of appeal that it was suggested to the appellant in cross-examination (under objection) that he was travelling on the north side pavement of King Street before entering the junction with Union Street is not accurate. That may be a legitimate interpretation of the essence of the totality of the questioning, however, it is not what was, in fact, suggested to the appellant in cross-examination. On two separate occasions in cross-examination (see pages 30 and 33 of the notes of evidence) it was, in fact, suggested that the appellant was cycling on the pavement prior to the accident. It should be noted that no objection is noted as having being taken to the first such question by the respondent. Having regard to the actual terms of the questions asked of the appellant, this ground of appeal is entirely misconceived.

[55] The appellant also maintained that the sheriff erred in failing to take account of the evidence of the respondent's insured that the appellant had not been travelling on any pavement prior to the accident, it being asserted that the respondent's insured's evidence was that the pursuer was travelling on King Street itself prior to the accident, not a pavement adjacent to it. As we have previously observed, the respondent's insured was unable to say if the appellant was cycling on the pavement or on the road on King Street prior to entering the junction (see page 56 of the notes of evidence). Having regard to the

actual terms of the evidence given by the respondent's insured, this ground of appeal is entirely misconceived.

[56] Ground of appeal 5 can be dealt with briefly. It firstly asserts that the sheriff erred in admitting evidence from PC Allen of statements made by the appellant after the accident, which evidence was objected to as inadmissible because the terms of any such statement were not put to the appellant. Two points arise from this. Firstly, the appellant conceded (when questioned by his own counsel) that he had admitted to the respondent's insured that the accident was his fault (see page 28 of the notes of evidence). It was put to the appellant in cross-examination that he had admitted at the scene that the accident was his fault. In answer he accepted that he may have done so, and proceeded to give an explanation as to why that might be so (see page 35 of the notes of evidence). Whilst this question may refer back to the question asked of the appellant by his own counsel, in our view it provides a proper foundation upon which to adduce the evidence of PC Allen which is the subject of this ground of appeal. In any event, even had no such foundation been laid, the modern approach is that such a failure permits of the evidence in question being admitted subject to comment (see Walker & Walker "*The Law of Evidence in Scotland*" at paragraph 12.15.1). We are satisfied that there is no merit in this aspect of ground 5.

[57] This ground of appeal goes on to assert that the sheriff erred in taking the evidence of PC Allen into account (which complaint also forms ground of appeal 7(b)) and in placing any weight upon that evidence. The essence of the appellant's complaint is that no reference was made by PC Allen to a notebook or to the specific words used by the pursuer when admitting liability. The assessment of witnesses is a matter for the sheriff. The absence of a contemporaneous note or a witness's inability to recall the exact words used in a particular discussion are each matters that would be considered by a sheriff in carrying out such an

assessment. Having done so, the sheriff had no hesitation in accepting the evidence of PC Allen. The appellant advanced no basis upon which we would be entitled to interfere with that assessment. We are satisfied that there is no merit in the remaining aspects of ground 5 and ground 7(b).

Disposal

[58] We shall refuse the appeal and adhere to the interlocutor of the sheriff. The appellant will be found liable to the respondent in the expenses of the appeal. We will certify the appeal as suitable for the employment of junior counsel.