

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH

IN THE ALL-SCOTLAND PERSONAL INJURY COURT

[2019] SC EDIN 14

PN393-18

JUDGMENT OF SHERIFF R D M FIFE

in the cause

DEREK SMILLIE, 57 Middle Park Crescent, Saltcoats, Ayrshire, KA21 6LL

Pursuer

against

ZENITH INSURANCE, 45 Westerham Road, Bessels Green, Sevenoaks, Kent, TN13 2QB

Defenders

Edinburgh, 21 February 2019

[1] A proof in this action proceeded on 22 and 23 January 2019. Mr Crawford, advocate, appeared for the pursuer. Mr Edward, solicitor, appeared for the defenders. Damages inclusive of interest to the date of proof were agreed at £11,675 in terms of a joint minute.

[2] The following authorities were referred to by parties:

1. *Walker & Walker: The Law of Evidence in Scotland, 4<sup>th</sup> Edition* para 5.13
2. *Souadali v Al-basri* [2004] EWHC 2608 (QB) para 127

[3] The sheriff, having resumed consideration of the cause, finds the following facts to be admitted or proved.

**Findings in fact**

[4] On or about 7 July 2016 at about 6.30pm the pursuer left his house in Saltcoats intending to cycle to the cycle club in Dunlop.

[5] The route took the pursuer from Saltcoats through Kilwinning then on the A736 to Burnhouse before turning right along the B706 to Dunlop. It was a dry and sunny evening with clear visibility. The pursuer was travelling at a speed of about 15 mph.

[6] At about 7.00pm the pursuer was cycling northeast on the A736, known as Lochlibo Road, at a point around one mile north of the junction of Lochlibo Road with the B778, all referred to as "the locus". That junction is the Auchentiber junction which is close to The Blair Inn, all referred to as "the Blair junction". A car also heading northeast on Lochlibo Road passed by very close to the pursuer at the locus, about a foot away from him. The car was travelling at a speed of at least 60mph.

[7] The pursuer made a rude gesture with his hand to show his annoyance at the car driver. The driver made a similar gesture in reply as the car headed away from the pursuer. The car disappeared over a hill ahead of the pursuer and out of view.

[8] The pursuer continued cycling northeast on Lochlibo Road and a short distance later as he came round a bend in the road he saw the same car parked at the bottom of the road on the left-hand side at an entrance to a farm. The car then turned round and came back towards the pursuer, heading southwest on its correct side of the road.

[9] Suddenly and without warning, when the car was a distance of about 50m from the pursuer, the car swerved from its correct carriageway and crossed over into the opposite carriageway in which the pursuer was cycling. The pursuer continued to cycle keeping as close to the verge on his left-hand side as he could. The car then straightened up and kept

coming towards him. The car drove at the pursuer in the middle of the pursuer's carriageway. The car was being driven in a reckless and dangerous manner.

[10] There was contact between the car, the pursuer and his bicycle causing the pursuer to be thrown off his bicycle, landing on the ground and sustaining injury. The car was travelling at least 30mph at the point of contact. The car then returned to the correct carriageway and drove off in a south-westerly direction.

[11] The car involved in the incident was a red Seat Ibiza registration number WG59 WEW owned by Miss Mandy Pattison who stayed in Kilwinning.

[12] On 7 July 2016 Miss Pattison was working at her hairdressing business in Barrhead called "Clip Salon". The last customer arrived for an appointment with one of her staff, Irene, at 4.30pm. The customer left the salon at around 5.50pm. Irene left the salon by around 6.00pm.

[13] After completing preparations for the following day Miss Pattison left the salon no later than 6.15pm to drive to her home in Kilwinning in her Seat Ibiza registration number WG59 WEW.

[14] Miss Pattison drove the same route home from work each day. After leaving Barrhead Miss Pattison drove southwest on the Lochlibo Road before taking a right turn at the Blair junction onto the B778 then into Kilwinning and home.

[15] The journey from the salon in Barrhead to Miss Pattison's home took around 25-30 minutes depending on traffic and weather conditions. The journey from the salon to the Blair junction took around 15-20 minutes. The journey from the Blair junction to her home took about 10 minutes.

[16] Miss Pattison passed the locus driving southwest on Lochlibo Road at around 6.35pm, more than 20 minutes before the index incident. She arrived at her home around 6.45pm.

[17] On arriving home Miss Pattison parked her car in the driveway and did not go out again that evening.

[18] At no point around 7.00pm did Miss Pattison drive northeast on Lochlibo Road at the locus nor did she drive northeast, turn round, then drive southwest in the direction of the pursuer on the pursuer's side of the carriageway resulting in an incident whereby the pursuer sustained injury. Miss Pattison was not involved in an incident with the pursuer on 7 July 2016.

[19] The driver of Seat Ibiza registration number WG59 WEW that was involved in an incident with the pursuer on Lochlibo Road was not Miss Pattison.

[20] The pursuer sustained upper limb injuries and his bicycle was damaged in the incident.

### **Findings in Fact and in law**

[21] The pursuer not having proved on the balance of probability Miss Pattison was the driver of Seat Ibiza registration number WG59 WEW involved in an incident with the pursuer on Lochlibo Road on 7 July 2016, the defenders are assoilzied.

[22] In any event the pursuer not having suffered loss, injury and damage as a result of any fault or negligence on the part of Miss Pattison, the defenders are assoilzied.

[23] Expenses are expressly reserved. The sheriff clerk will fix a hearing on expenses.

**Witnesses**

[24] The following is a summary of each of the witnesses who gave evidence.

**1. Derek Smillie**

[25] The pursuer was aged 46 at the date of proof. He was employed as a draughtsman. The pursuer was a regular cyclist covering about 100 miles a week, mostly road cycling. On 7 July 2016 the pursuer left his house in Saltcoats in the early evening intending to cycle to the cycle club in Dunlop.

[26] At the beginning of examination in chief the pursuer said he left the house at around 6.30pm. At the beginning of cross examination the pursuer said he left the house about 6.00pm and all the pursuer's timings then flowed from 6.00pm.

[27] The pursuer said he expected to be at the cycle club around 6.45pm. He had allowed about 45-50 minutes for the journey. The pursuer was averaging a speed of about 15mph. The cyclists would leave from Dunlop cycle club at 7.00pm. His route to Dunlop was to stay off main roads so far as possible. The route took him from Saltcoats through Kilwinning then on the A736 Lochlibo Road to Burnhouse before turning right along the B706 to Dunlop.

[28] It was a dry and sunny evening with clear visibility. At the time of the incident the pursuer had been cycling for about 30 minutes. The pursuer was cycling northeast at a point around one mile north of the junction of the A736 with the B778, all referred to as "the locus". That is the Auchentiber junction close to The Blair Inn, all referred to as "the Blair junction". The A736 is known as Lochlibo Road. A car also heading northeast at the locus passed very close to the pursuer, about a foot away from him.

[29] The pursuer made a rude gesture with his hand towards the car driver to show his annoyance. The driver of the car made a similar gesture in reply as the car drove away from the pursuer. The car disappeared over a hill ahead of the pursuer and out of view. The car was travelling at a speed of at least 60mph when overtaking the pursuer.

[30] The pursuer continued cycling on Lochlibo Road and a short distance later, as he came round a bend in the road, he saw the same car parked at the bottom of the road on the left-hand side at an entrance to a farm. The pursuer thought there was going to be a confrontation with the car driver.

[31] The car then turned round and came back towards the pursuer heading southwest on its correct side of the road. Suddenly and without warning the car swerved from its correct carriageway into the opposite carriageway in which the pursuer was cycling. The pursuer estimated the car was about 50m or so away when the car crossed over into his carriageway. The pursuer cycled as close to the left of the road as he could. The car then straightened up and kept coming towards him. The car was being driven at the pursuer, head on in the middle of the pursuer's carriageway. The car was being driven in a reckless and dangerous manner.

[32] The pursuer said there was contact between the car and the pursuer. The pursuer gave an elaborate description of this contact, at one point suggesting that he was a part of the bicycle being clipped into the pedals. The pursuer disputed there was contact between the car and his bicycle notwithstanding that was the case on record. The pursuer was thrown off his bicycle landing on the ground and sustaining injury and causing damage to the bicycle. The car drove off. The car was travelling at a minimum of 30mph at the point of contact.

*Description of car*

[33] The pursuer described the car as being a red Seat Ibiza. The pursuer said he knew about cars in general. He had a friend who had a red Seat Ibiza in July 2016. Whilst lying on the road he tried to clock the registration number of the car as the car was driving away. He managed to note part of the registration number:

WE59 -EV or WG59 -EV.

[34] The pursuer did not get a look at the driver. The pursuer only got a look at the car. As the pursuer was overtaken the driver was on the opposite carriageway. When the car came towards him the pursuer did not see the driver. He could not see inside the car. The pursuer was more aware of the situation he was in at the time rather than the driver. The pursuer assumed the driver was a male. In his evidence the pursuer said:

“I couldn’t see a woman doing that kind of thing”.

[35] Following the contact the car returned to its correct carriageway and drove off travelling southwest. The pursuer thought the car might have been about 20m further along the road when he noted part of the registration number. There were no other cars about at the time. The pursuer had a clear view of the car.

[36] The pursuer reported the incident to the police. The police came to see him the following day, 8 July 2016, at about 4pm/5pm to take a statement from him. The pursuer gave the partial registration details of the car to the police. He told the police it was a male driver.

[37] There were inconsistencies in the evidence of the pursuer. The pursuer described how the car came into contact with himself and not the bicycle, contrary to what was

averred on record that the car came into contact with the bicycle. That difference put into question the reliability of the pursuer about what happened at the time of the incident.

[38] The pursuer changed the timing of when he left home from about 6.30pm to about 6.00pm. That was not explained. That difference in time put into question the pursuer's reliability about timing.

[39] The pursuer would have had to leave the house at around 6.00pm in order to reach Dunlop for about 6.45pm/6.50pm and be ready to leave the cycling group from Dunlop at 7.00pm. Leaving the house at around 6.00pm would put him at the locus around 6.30pm when he said the incident happened, and about 15-20 minutes from Dunlop. If the pursuer left the house at around 6.30pm the incident at the locus would have happened at about 7.00pm.

## **2. PC Andrew Hamilton**

[40] PC Hamilton was aged 32 at the date of proof with three years' service as a police officer. In 2016 he was based at Saltcoats, and is currently based at Kilmarnock.

[41] On 8 July 2016 PC Hamilton attended at the home of the pursuer with PC Clayton at around 6.00pm and obtained a statement from him about the incident on 7 July 2016, see notebook entry production 6/1/4. The pursuer signed the statement.

[42] The pursuer told PC Hamilton that the car hit his bicycle and his lower legs causing the pursuer to fall off the bicycle and sustain injury.

[43] The pursuer provided PC Hamilton with a description of and partial registration number for the car involved in the incident:

“A red Seat Ibiza possible Reg WE59 -EV or WG59 -EV”.

[44] PC Hamilton followed up the interview with the pursuer by going to see PC Douglas Booth an Intelligence Officer at Saltcoats Police Station. PC Booth ran through the VOD system and managed to identify a vehicle with a similar registration, model and colour being a red Seat Ibiza with the registration number WG59 WEW. PC Hamilton received information from PC Booth that vehicle was based in Kilwinning. There were two named drivers Mandy Pattison and her partner.

[45] PC Hamilton called at Miss Pattison's address sometime between 8 July 2016 and 20 July 2016. The red Seat Ibiza registration number WG59 WEW was parked in the driveway. When police officers first attended at the address it was just a general enquiry. It was quite late, about midnight. PC Hamilton spoke to Miss Pattison's partner. Miss Pattison was in bed.

[46] PC Hamilton came back the following day and spoke to Miss Pattison. Miss Pattison explained she did drive on the A736 on a daily basis. A request was made of Miss Pattison as to who was driving the vehicle at a certain time on 7 July 2016. Miss Pattison was unable to give an accurate answer as she had to check her diary at her place of work in Barrhead.

[47] PC Hamilton came back to see Miss Pattison a further time on 20 July 2016. A requirement was made of Miss Pattison to name the driver in terms of section 172 of the Road Traffic Act 1988 ("the 1988 Act"). PC Hamilton explained the circumstances of the incident to Miss Pattison and that the incident had happened in the direction of Barrhead at 7.00pm on 7 July 2016, before making the requirement under section 172 of the 1988 Act. Miss Pattison said she was driving the vehicle but in the opposite direction, see production 6/1/5. PC Hamilton noted the route Miss Pattison said she drove home, which was southwest and not northeast.

[48] Miss Pattison was subsequently detained on 27 July 2016 and interviewed at Saltcoats police station, see production 6/1/6. PC Hamilton and Miss Pattison appended their signatures in the officer's notebook at the end of the interview.

[49] During the police interview Miss Pattison told the police she and her partner were insured to drive the car.

[50] At the conclusion of the police interview Miss Pattison was charged with a contravention of section 2 of the Road Traffic Act 1988, as amended. Miss Pattison replied:

"I know I've not hit anyone."

[51] PC Hamilton described Miss Pattison as being very relaxed at all times with the police including the police interview under detention. It was explained to her the charge was serious but she was not fazed. It was the first time Miss Pattison had been in a police station but she was not nervous, just quite relaxed.

[52] PC Hamilton inspected her vehicle. There was no sign of obvious damage. PC Hamilton reported the case to the procurator fiscal but heard nothing further.

[53] Asked if he was satisfied Miss Pattison was the driver of the car at the time of the incident on 7 July 2016 PC Hamilton said he was confident it was her car; the evidence was pointing towards Miss Pattison; that was why he charged her with the offence of dangerous driving under section 2 of the 1988 Act.

[54] In order to put that reply into context, in the course of the interview of Miss Pattison PC Hamilton noted the following questions and answers:

"Q: I put it to you that your partner William Watts was driving the vehicle at the time of the incident and you are taking responsibility, is that correct?

A: That is not true.

Q: Did William take the car back out after you returned home that day after 6.45pm?

A: He could of but it wouldn't of been till after 7.00pm."

It is apparent from that passage PC Hamilton had some suspicion Miss Pattison was not the driver of the car at the time of the index incident but that was not followed up in evidence.

### **3. PC Douglas Booth**

[55] PC Booth was aged 43 at the date of proof and based at Saltcoats Intelligence Department where he had been for 8 years. Before then he had been at Paisley for about 21 years.

[56] PC Booth described the process of a vehicle online description search (VOD). A VOD search covered every registered vehicle in the UK: make, model, colour, location (postcode where vehicle registered) and age.

[57] A search covering Glasgow, Renfrewshire and Ayrshire resulted in one hit, one vehicle being a red Seat Ibiza with the registration number WG59 WEW registered in the name of Miss Pattison in Kilwinning.

### **4. Mandy Pattison**

[58] Miss Pattison was aged 41 at the date of proof. She was the owner of a hairdressing business in Barrhead called "Clip Salon". She employed five staff, all as hairdressers, on a part-time basis. Her usual hours of work were 9am to 5pm but she did work late/nights when requested and if available.

[59] Thursday, 7 July 2016 was first day back at work after a back operation for one of the staff, Irene. Her last customer, Hannah, was at 4.30pm. Irene was running late and did not get finished with her last customer until 5.50pm. Miss Pattison was in the salon making sure

Irene was not in the salon on her own while she finished. Miss Pattison prepared for the following day. Irene left the salon about 5-10 minutes later, at about 6.00pm.

[60] Miss Pattison mopped the floor and completed the set up for the following day. It was about 6.20pm when she put on the alarm. She remembered looking at the clock. She always looked at the clock before leaving the salon. The time was 6.20pm. Miss Pattison described having a good memory:

“My memory really is quite good.”

[61] Miss Pattison then drove home in her car, a red Seat Ibiza registration number WG59 WEW. She had had the car from when she started learning to drive. She passed her driving test in December 2015. She still owned the car.

[62] Miss Pattison described herself as not being a confident driver; she liked to take time; she would keep a distance in front or behind another car; she would indicate out and in when overtaking cyclists; and she did not really do reverse parking or turns in the road. Generally she drove her car just back and forth to work and for shopping locally.

[63] The route she took home was to leave Barrhead, drive straight down the A736 to the Blair junction then turn right and drive into Kilwinning and home. That was the route she drove every day from work. The journey would usually take her about 25-30 minutes to get home depending on traffic and weather conditions. It would usually take about 15-20 minutes to get to the Blair junction and a further 10 minutes to get home from the Blair junction. There were variable speed limits along the route, from 30mph to 60mph. At around the Blair junction the speed limit was 60mph. Miss Pattison would be travelling at about 60mph then slow down to 30mph as she approached the Blair junction.

[64] On the evening of 7 July 2016 nothing unusual happened on her journey home from work. There was no incident with a cyclist. She parked the car in the driveway at about 6.45pm, went into the house and prepared dinner. She did not go out again. She remained in the house for the rest of the night.

[65] Some days later she was made aware of an incident when police officers turned up at her door during the early hours of 11 July 2016. The police spoke to her partner about an incident which was supposed to have happened on the A736. Miss Pattison was in bed when the police arrived. She got out of bed. She could hear voices outside but not what was being said. Her partner came back into the house and told her about the incident. The police came back the following night after work to speak to her about the incident. Miss Pattison said: "I didn't think anything of it as nothing happened on the drive home".

[66] On 12 July 2016, the police came back to the house making enquiries about an incident on the A736 involving a cyclist. The police asked Miss Pattison if she had been on that road at about 7.00pm. She explained she came back from work and was in the driveway by 6.45pm so she could not have been on the A736 at 7.00pm.

[67] Miss Pattison was asked if she had been driving on that road or out again that night. She repeatedly asked the police what direction the car was travelling. She was told by the police the car was heading up to Barrhead, northeast on the A736. Miss Pattison told the police it could not be her as she was heading home from work in Barrhead, in the opposite direction, and not going to Barrhead.

[68] On 27 July 2016 Miss Pattison was detained and taken to the police station at Saltcoats where she was interviewed at around 9.15pm, see production 6/1/6. She was asked by the police if she wanted a solicitor. She declined as she had nothing to hide. She had not done anything wrong. She felt perfectly fine at the police station. She was answering

questions. She said she had not hurt anyone in her life: "I have not got a bad bone in my body to do that to somebody". After the interview Miss Pattison was charged with dangerous driving. She was later sent a letter to attend Kilmarnock Sheriff Court but the day before the hearing she received a letter stating the case was not going ahead.

[69] Miss Pattison had no penalty points on her driving licence; she had never been charged before for any motoring offence; and she had never even received a parking ticket.

[70] When the police first spoke to Miss Pattison it was a general enquiry. It was alleged a man had mowed down a cyclist. Miss Pattison explained she would need to check her records, her appointment book, to see if she was working late that night.

[71] It was put to Miss Pattison that the requirement under section 172 of the 1988 Act related to her driving at 7.00pm, see production 6/1/5. Miss Pattison said she never agreed that she was driving at 7.00pm. She was in her drive by 6.45pm/6.50pm at the latest.

[72] Production 6/1/6 was a record of the interview on 27 July 2016. At 6/1/6/2 it was noted Miss Pattison had said:

"When I looked at my book I was working till 6.10pm. I left the salon at 6.10pm/6.15pm and headed home".

[73] It was put to Miss Pattison that if she had such a great memory why had she said in examination in chief that when she looked at the clock before leaving the time was 6.20pm when she had told the police in July 2016 that she had left the salon at 6.10pm/6.15pm? Miss Pattison replied: "I'm 10 minutes out." She had said she had a pretty good memory.

Regardless, she said she was in her house by 6.45pm/6.50pm. She was not driving on the road at 7.00pm. Sometimes she could be on the road at 7.00pm. She could be at appointments until 8.30pm. On the evening of 7 July 2016 she was home at her drive no later than 6.45pm/6.50pm.

[74] Miss Pattison did not have her partner as a witness at court as he was in the house with their 11 month daughter. None of her staff from the salon were at court as witnesses. Miss Pattison ran a busy salon. She was the last person in the salon. Irene had left about 5.55pm/6.00pm. Miss Pattison did not need anyone to support her. She had shown to the police the appointment book and that the last customer was at 4.30pm.

[75] Miss Pattison maintained she was not travelling on the road at the same time as the pursuer. The police only gave her snippets of where the incident had happened on the road. The police never told her where on the road the incident had occurred. She did not know the locus until she saw the photographs in court when giving evidence.

[76] At the end of her evidence Miss Pattison volunteered she had seen another red Seat Ibiza travelling regularly on the A736 Irvine road with a registration number beginning with "W" but she was not able to provide any further information about that car. The inference to be drawn from that evidence was that the pursuer was mistaken about the car he saw. This was the first mention of another red Seat Ibiza car. This passage of evidence was unconvincing and not credible.

## **5. James McCartney**

[77] Mr McCartney was a Collision Investigator and principal of Road Incident and Solutions Limited, aged 58 at the date of proof. Mr McCartney adopted as his evidence a report dated 9 August 2018, production 6/2/12. This was a desktop report.

[78] In the absence of any evidence of damage to the Seat Ibiza registration WG59 WEW it was the opinion of Mr McCartney that there had been no contact between the car and the pursuer's bicycle or the car and the pursuer on the evening of 7 July 2016. If there had been contact Mr McCartney would have expected some physical trace of damage on the car such

as scuffmarks. If there had been contact between, say, the mirror of the car and the pursuer's right arm he would have expected the bicycle to turn to the right, that is the handlebar and wheel to the right into the car causing damage to the car. There was no damage to the car.

### **Submissions**

[79] Both parties lodged written submissions which were expanded upon in oral submissions. The written submissions are referred to for their terms.

#### *Submissions for pursuer*

[80] The pursuer adopted the written submissions. The motion for the pursuer was for decree for £11,675 and expenses.

[81] It was not in issue the pursuer was involved in some form of incident with an unknown car on Lochlibo Road on 7 July 2016. The pursuer was able to note the make, model and colour of the car and remembered part of the registration number. On investigation by the police through a database of millions of cars the car owned by Miss Pattison was identified as the only car that fitted the description and registration number details which were available. Miss Pattison admitted she was driving that car on Lochlibo Road early evening. The court was being asked to rely on a bare assertion by Miss Pattison that: "I just didn't hit him". Miss Pattison may genuinely have believed she had not hit the pursuer. That may explain when she said "I know I've not hit anyone". Miss Pattison was not a credible witness.

[82] In evidence Miss Pattison had sought support from others who could corroborate her account including her partner and staff at the salon, but she did not call any other witnesses.

The court should not draw any inferences when the court had not heard from these witnesses. Miss Pattison had said "I don't need anyone to support me" and the employees had left the salon before her. These employees could have informed the court of Miss Pattison's direction of travel. Miss Pattison had a very high regard of what she had to say to the court. In short, she had an answer for everything. Miss Pattison described herself: "I've not got a bad bone in my body". She asserted she had a very good memory. She had looked at the clock in the salon as she left and saw the time was 6.20pm but that was not consistent with what she told the police some days after the incident, that she left the salon at between 6.10pm-6.15pm.

[83] Miss Pattison said she had seen another red Seat Ibiza car regularly driving on the A736, apparently with a registration number beginning with "W". That was an attempt to deflect blame. That evidence was not credible.

[84] The evidence from Mr McCartney was unhelpful. Mr McCartney's experience relied on residential courses which looked at totally different types of collisions to the present case. Mr McCartney conceded that while he thought there may be scuffmarks left with a glancing side-by-side collision, he did not insist that there had to be and, in any event, there may be scuffmarks which could be rubbed off. Mr McCartney relied on inspections of the car by police officers who were not incident reconstruction experts for his desktop report. Mr McCartney's opinion should not be accepted.

[85] The pursuer's account was consistent with the evidence. No credible explanation had been provided by Miss Pattison for the identification of her car by the pursuer at the time of the incident. Miss Pattison was the driver of the car involved in the incident with the pursuer. Decree with expenses should be granted.

*Submissions for the defenders*

[86] The defenders adopted the written submissions.

[87] The evidence of the pursuer that the car struck his foot without any injury was unsatisfactory. It was within judicial knowledge that if a vehicle travelling at 30mph hit a pedestrian or part of the body of a cyclist there would be some sort of soft tissue injury. The pursuer made no mention of injury to his foot or lower leg injuries. The pursuer said any injuries he did sustain were when he landed on the road not while on the bicycle.

[88] The court should accept the evidence of PC Hamilton that there was no damage to Miss Pattison's car. On the evidence of Mr McCartney, there being no damage to the car, there could not have been a collision between Miss Pattison's car and the pursuer's bicycle or the pursuer. The pursuer's description of the incident had changed and developed as the evidence came out. The pursuer had not proved on a balance of probability the car involved in an incident with the pursuer was Miss Pattison's car.

[89] If the court accepted the evidence of Miss Pattison that she did not deliberately drive at the pursuer on the wrong side of the road and collide with him; the evidence of PC Hamilton that there was no damage to the car; and that on the evidence of Mr McCartney there could be no collision between the car and the bicycle, the only conclusion was that the pursuer was mistaken about the car with which he had an incident.

[90] PC Hamilton confirmed in evidence that during the police interview, despite being a serious matter, he thought Miss Pattison was relaxed and not nervous. Miss Pattison was not fazed as she had done nothing wrong. That was a reasonable explanation.

[91] The last customer had left the salon at 5.50pm. Miss Pattison had tidied up and prepared for the following day before leaving the salon. Miss Pattison drove home southwest. That was a very reasonable explanation as opposed to her travelling southwest,

then northeast, then southwest again or going home between appointments and then travelling northeast then southwest. That was unlikely in all the circumstances.

[92] The pursuer had suggested Miss Pattison had a high regard for herself and was promoting her good character. Miss Pattison was a 40 year old mother. It was being suggested to her by the pursuer that she had driven in an incredibly reckless and dangerous manner. Very serious allegations were put to her. It was not arrogant of Miss Pattison to reply to that accusation by saying: "I've not got a bad bone in my body..." That was not the reply of an arrogant witness. While Miss Pattison became a little defensive in cross examination giving evidence was undoubtedly a very stressful experience for her.

[93] In order for the pursuer to succeed the court would have to make findings in fact that Miss Pattison drove northeast, overtook the pursuer about one foot away, then in reply to a rude gesture by the pursuer she herself put down the window of the car and gesticulated back, drove on further up the road, stopped the car, carried out a U-turn, then headed back southwest towards the pursuer, drove on the wrong side of the road for about 50m before coming into contact with the pursuer. The pursuer could not "cherry pick" these findings in fact. This was an all or nothing case. The pursuer had failed to prove on a balance of probability Miss Pattison was involved in an incident with the pursuer while driving her Seat Ibiza. The defenders should be assolized. Expenses should be reserved.

#### **Note**

[94] The pursuer offers to prove that on the evening of Thursday 7 July 2016 at about 6.30pm – 7.00pm Miss Pattison was the driver of a car that was involved in an incident with the pursuer as he was cycling northeast on the A736 Lochlibo Road in the direction of Burnhouse, that Miss Pattison was at fault and as a result the pursuer sustained injury.

[95] It is not disputed by the defenders that there was an incident between the pursuer and an unknown car causing the pursuer to sustain injury. The driver of the car was reckless and at fault for the incident. It is disputed that car was the Seat Ibiza registration number WE59 WEW owned by Miss Pattison and in any event it is disputed Miss Pattison was driving her car at the time of the incident. Miss Pattison denied being involved in any incident with the pursuer.

[96] The onus of proof is on the pursuer on the balance of probability. There is no onus of proof on the part of Miss Pattison.

*Seat Ibiza car WE59 WEW*

[97] On a balance of probability the car involved in the incident was the red Seat Ibiza registration number WE59 WEW owned by Miss Pattison (“the Seat car”). The evidence of the pursuer and police officers Hamilton and Booth was persuasive. I prefer that evidence to the opinion of Mr McCartney and the limitations of a desktop report. Mr McCartney’s opinion was based on (a) inspection of the Seat car by others for a different purpose, being for possible criminal proceedings; (b) a number of assumptions; and (c) a degree of speculation.

*Issue to be determined*

[98] The pursuer told the police about 24 hours post-accident that the Seat car came into contact with him and the bicycle. That account is more reliable than the evidence of the pursuer some 2.5 years later that the car struck him but not the bicycle. I have accepted that evidence. The issue to be determined by the court is whether Miss Pattison was the driver of the Seat car at the time of the incident.

### *Timings*

[99] It is necessary to first consider the time of the incident which is of crucial importance in this case.

[100] The pursuer initially said in evidence he had left home at about 6.30pm then changed his position to leaving home about 6.00pm at the beginning of cross examination. That is a significant difference in time. It was thereafter the pursuer's evidence the incident with the Seat car occurred at around 6.30pm; the pursuer had intended to be at Dunlop cycle club around 6.45pm/6.50pm, allowing 45-50 minutes for the journey; the cyclists would leave from the club at 7.00pm; it would take about 15/20 minutes to cycle from the locus to Dunlop and the cycling club.

[101] The pursuer was interviewed by PC Hamilton at around 6.00pm on Friday 8 July 2016 about 24 hours post-incident. PC Hamilton noted a statement from the pursuer, production 6/1/4, which included the following passage:

About 1900 hrs on 7/7/16 I was out a cycle. I left my house at 1830 hrs and headed towards Dunlop. I was going to meet guys from the Dunlop cycling club. At 1900 hrs I was on the A736 heading towards Dunlop. I was cycling on the road..."

[102] When the requirement to name the driver under section 172 of the 1988 Act was subsequently made of Miss Pattison by PC Hamilton the time of the incident was noted as 7.00pm on 7 July 2016, production 6/1/5.

[103] When Miss Pattison was interviewed by PC Hamilton at Saltcoats police station on 27 July 2016 the first question put to Miss Pattison after being cautioned was:

"I am investigating an incident that was reported to me regarding a dangerous driving offence committed at 1900 hrs on 7/7/16. Is there anything you can tell me about this?"

[104] PC Hamilton was a completely independent witness. The evidence of PC Hamilton on the timing of the incident is preferred as reliable, that the incident happened at about 7.00pm. That time was noted by PC Hamilton less than 24 hours after the incident in a statement obtained from the pursuer and which the pursuer signed. That account from the pursuer is more reliable than an account given some 2.5 years after the incident. The pursuer's evidence of the incident happening at about 6.30pm is unreliable and rejected.

[105] As the incident occurred at about 7.00pm all the other timings spoken to by the pursuer in evidence are rejected as unreliable.

[106] I then turn to the witness Miss Pattison and timings. There is a discrepancy between her evidence and what she told the police in July 2016. In examination in chief Miss Pattison said:

"It was 6.20(pm) when I put the alarm on to leave (the salon) as I looked at the clock.  
Q: How do you remember that day?  
A: My memory really is quite good. It remembers stuff."

[107] During the police interview with PC Hamilton on 27 July 2016, production 6/1/6 Miss Pattison said:

"When I looked at my book (appointments book) I was working till 6.10pm. I left the salon at 6.10pm/6.15pm and headed home. As I headed down the road..."

[108] Challenged in cross examination about her great memory Miss Pattison replied:

"I'm 10 minutes out. I said I had a pretty good memory. Regardless I was in my house at 6.45pm/6.50pm."

[109] The unchallenged evidence of Miss Pattison was that (a) to drive from the salon in Barrhead to her home in Kilwinning would take around 25-30 minutes depending on the traffic and weather conditions; (b) to drive from the salon to the Blair junction would take

around 15-20 minutes; and (c) to drive from the Blair junction to her home would take about 10 minutes.

[110] The difference in timing from Mrs Pattison leaving the salon at 6.10pm-6.15pm and 6.20pm is not significant, somewhere between 5 and 10 minutes. The times noted by PC Hamilton from Miss Pattison in July 2016, within weeks of the index incident, are more reliable than an account given some 2.5 years after the incident.

*What is the assessment of Miss Pattison's credibility and reliability?*

[111] Miss Pattison left the salon not later than 6.15pm.

[112] There was nothing unusual about Miss Pattison's journey home. The journey time home for Miss Pattison was about 25-30 minutes. Miss Pattison arrived home at around 6.45pm.

[113] The journey to the Blair junction took around 15-20 minutes. Miss Pattison arrived at the Blair junction at around 6.35pm. The locus was about a mile to the north of that junction so Miss Pattison would have reached the locus about a minute or so earlier.

[114] Miss Pattison passed the locus travelling southwest more than 20 minutes before the incident at around 7.00pm.

[115] In assessing Miss Pattison's evidence and her demeanour when giving evidence it is necessary to consider all the circumstances of the incident as described by the pursuer. This had been a reckless and dangerous act of driving by whoever was driving the Seat car.

[116] I formed a reasonably favourable impression of Miss Pattison as a witness. At times Miss Pattison was robust in answers to questions and she may have been defensive at times. Any questions of her reliability were not material. The allegations of reckless and dangerous driving were very serious and giving evidence would have been an unnerving experience.

Further, PC Hamilton had noted Miss Pattison's demeanour throughout his dealings with her as being very relaxed and not fazed despite the serious nature of the allegations.

[117] Miss Pattison's evidence on crucial matters of fact was credible and reliable. I accepted that Miss Pattison left the salon in Barrhead not later than 6.15pm and had then driven southeast on the A736 Lochlibo Road then the B778 to Kilwinning arriving home around 6.45pm. Miss Pattison arrived at the locus around 6.35pm, more than 20 minutes before the index incident.

[118] On the balance of probability Miss Pattison was not driving her Seat car at the locus at around 7.00pm. I do not accept Miss Pattison was driving her Seat car in a reckless and dangerous manner as described by the pursuer such as to cause the index incident with the pursuer. At no point around 7.00pm did Miss Pattison drive northeast on the Lochlibo Road and, for the avoidance of doubt, Miss Pattison did not drive northeast on the Lochlibo Road then southeast and in the direction of the pursuer on the pursuer's side of the carriageway causing the index incident.

[119] On the balance of probability the driver of the Seat car on Lochlibo Road that was involved in an incident with the pursuer was not Miss Pattison.

[120] The pursuer has failed to prove that it was Miss Pattison who was driving the Seat car at the locus causing the index incident at about 7.00pm on 7 July 2016.

### **Decision**

[121] The pursuer has failed to prove fault at common law on the part of Miss Pattison and therefore the pursuer has failed to establish fault on the part of the defenders.

[122] The defenders are entitled to decree of absolvitor.

[123] At the conclusion of the proof expenses were expressly reserved. The sheriff clerk will fix a hearing on expenses.