SHERIFFDOM OF SOUTH STRATHCLYDE, DUMFRIES AND GALLOWAY
AT AIRDRIE

[2025] SC AIR 70

AIR-SF8-24

JUDGMENT OF SHERIFF SCOTT PATTISON

in the cause

JOHN GOOD

Pursuer

against

WEST BAY INSURANCE PLC

Defender

Pursuer: Hastings, Solicitor Advocate
Defender: Smith, Advocate

AIRDRIE, 4 June 2025

The sheriff, having resumed consideration of the cause, finds as follows:

1. On the morning of 14 April 2023, the pursuer Mr John Good had parked his employer, Wolseley's DAF lorry on Deerdyke's View within the Westfield Industrial Estate.

2. Mr Good got out of the driver's side of the lorry. He walked round the front of it and climbed up the steps at the passenger's side of the stationary lorry.

3. At this time the defenders' insured Mr Daniel Thomson was riding his motorcycle, with learner L plates, and turned left onto Deerdyke's View.

4. Mr Thomson failed to observe the stationary lorry; his vision being blinded by the sun. He rode his motorcycle into the rear of the lorry.

5. Mr Thomson's motorcycle collided with the rear of the lorry at around 10-15mph. This caused scratches to the rear doors, cracks to the offside rear light and damage to the drop down at the rear.

6. At the point of impact, the pursuer was leaning into the cab of the lorry balancing on one foot as he leaned in to retrieve his boots.

7. The force of the collision caused the lorry to move on its axis, causing the pursuer to lose his balance. He struck his left knee on the steel doorframe of the lorry before falling to the ground.

8. The force of the collision was sufficient to cause the pursuer, who was off balance leaning into the cab of the DAF, to lose his balance and fall to the road.

9. The pursuer suffered pain and soft tissue injuries to his left knee and lower back.

10. The pursuer did not attend his GP, choosing to self-medicate with ibuprofen. He suffered sharp pains in his back which would ache. His left knee ached if he spent all day on his feet. His symptoms resolved within a period of around 3 months post-accident.

Findings in law

1. That the accident was caused by the fault and negligence of Daniel Thomson.

2. That the fault and negligence of Mr Thomson caused the pursuer pain and suffering.

3. That Mr Sinha, Consultant Orthopaedic Surgeon, led by the pursuer, was an independent and impartial witness.

4. That the defenders are liable to the pursuer to the extent that they are liable to Mr Thomson in terms of Regulation 3(2) of the EC (Rights against Insurers) Regulations 2002.

5. That the pursuer is entitled to damages of £3,216 from the defenders, together with interest at the judicial rate of 8% from the date of decree until payment.

THEREFORE:

(1) finds the defenders liable to the pursuer;

(2) grants decree for payment of £3,216 by the defenders to the pursuer together with interest at the judicial rate of 8% from the date of decree;

(3) sanctions the cause as being suitable for the instruction of Junior Counsel / Solicitor Advocate in terms of section 108 of the Court Reform (Scotland) Act 2014; and

(4) certifies Mr Sinha, Consultant Orthopaedic Surgeon as a skilled person in terms of Rule 5.3 of the Act of Sederunt (Taxation of Judicial Expenses) Rules 2019.

Introduction

[1] I heard evidence in this matter over 3 days in Airdrie Sheriff Court as a visiting sheriff. Evidence concluded on 17 December 2024 when I called for written submissions.

[2] There were two key issues for decision. The first being whether the pursuer was standing on the steps of his employer's lorry, as he contends, or whether he was in the cab of the vehicle as the defenders submit. The second issue is whether the defenders' insured Daniel Thomson's motorcycle struck the lorry with sufficient force for it to cause the pursuer to lose balance and fall to his injury.

[3] The pursuer invited the court to (1) find the defenders liable to the pursuer; (2) grant decree for £3,216 together with interest at the judicial rate of 8% from the date of decree; (3) find the defenders liable to the pursuer to the expenses of process on the summary cause scale; (4) fix a Diet of Assessment and Approval; (5) sanction the cause as being suitable for

the instruction of junior counsel / solicitor advocate in terms of section 108 of the Court Reform (Scotland) Act 2014; and (6) certify Mr Sinha, Consultant Orthopaedic Surgeon as a skilled person in terms of Rule 5.3 of the Act of Sederunt (Taxation of Judicial Expenses) Rules 2019. The defender invited the court to pronounce decree of absolvitor in favour of the defender and to grant an award of expenses against the pursuer.

The evidence

The pursuer John Good

[4] Mr Good spoke to parking his employer's DAF (7½ tonne lorry) at the side of the road on Westfield Industrial Estate on 14 April 2023 before exiting the cab and walking round to the passenger's side where he climbed the steps and opened the passenger's door. It was around 11.30am.

[5] He was going in to collect his boots which were in the footwell between the passenger and driver's seats; he intended to change his boots.

[6] He was parked on the right-hand side of the road and his cab was facing that side. The handbrake was on and the engine was off. He was standing on the cab steps leaning into the cab to grab the boots when he heard a noise and felt the truck move. There was not a lot of force but enough to knock him off his balance. He banged his knee off a steel bar. Although he tried to steady himself, he fell off of the van and onto the ground. He estimated that Mr Thomson's motorcycle was travelling at 10-15mph though he was clear that this was a guess based on his view of the damage caused to the motorcycle and the lorry.

[7] He said he saw Mr Thomson's helmet from the rear side of the lorry. He was challenged by the defenders that at the point of impact he had been in the cab of his vehicle.

His evidence was that if he had been sitting in the cab then he would not have been injured but he was given his positioning on the step of the lorry leaning into it on one foot which caused him to lose balance on impact.

[8] He spoke to attending Mr Thomson post-incident to make sure he was alright, providing him with his phone to call his parents.

[9] Mr Good had obviously fallen and landed on his back. He said he injured his knee when it struck the steel door frame on the lorry and when he fell to the ground. He had not noted on the post-collision report form (6/2) that he was injured as he initially felt okay, but the pain developed as the day wore on. He said he began to feel a sharp pain and aching in his back when he slept. He felt his back was stiff when he was walking and on turning. He suffered pain in his left knee when he had been standing on his feet all day.

[10] His evidence was that he worked in a small team and the unspoken rule was that unless you were "dying" you did not take any time off work. His mindset was that he should not go to his GP unless it was an emergency. He did not consider his injuries to be an emergency and chose to self-medicate with ibuprofen. He described taking four ibuprofen tablets per day for 2 months before weaning himself off these.

Issue

[11] An objection was taken to a question put to the pursuer in cross-examination. It was put to him that Paul Hughes's evidence would be that the force involved in the collision would be akin to a wasp striking the lorry. This question was allowed under reservation. The pursuer's response was that he was not saying there was a lot of force but enough to cause him to lose balance and fall off the steps. Objection was renewed to the admissibility of this question in submissions on the basis that it firstly called for the pursuer to speculate

and, secondly, it was not a question he could properly answer, not being a skilled person.

Decision – I rule that the question was competent and relevant. It was straightforward in the sense it was really just asking the pursuer the force involved allowing him to give a further answer as to how it felt. It was clear he was not a skilled person and was not being asked to provide a scientific or expert opinion.

The insured, Daniel Thomson's evidence

[12] Mr Thomson said he had been on nightshift. He had left work around 10.00am that Friday. As he turned the corner in the industrial estate, the sun blocked his vision and the next thing he knew he had crashed right into the rear of the pursuer's truck.

[13] The next thing he was aware of was that he was lying on the road with the motorcycle on top of him. He lay on his side he said, as though paralysed, for 5 to 10 minutes. Someone came to see if he was ok, and he could barely get to his feet. This was when he was aware of Mr Good coming out of his truck asking if he was ok. He said he was. He said that no one was standing on the outside of the vehicle when he hit the truck. He said that 10 to 15 minutes after the collision he walked up to the passenger's side of the truck with the pursuer who said he was changing his clothes at the time of collision.

[14] He was adamant that there was no one outside the lorry when he hit the rear. He was also firm that the pursuer had not come to him immediately when he was on the ground. He said that he was injured and that the top of his right leg was black and blue and that he had pain in his wrist to this day.

Mr S Sinha - Consultant Orthopaedic Surgeon

[15] This witness's evidence was heard under reservation on the defender's motion.

[16] He spoke to being in practice for over 30 years and spoke to preparing 200 to 250 reports per annum. He spoke to his report (5/1 of process). He met with the pursuer in person on 27 September 2023 and examined him for the purposes of his report. He spoke to his assessment, and the pursuer referencing a prior accident in January 2023. He made a clinical judgement on the injuries sustained and said that these were consistent with the circumstances as described and based this on his clinical experience. The pursuer had experienced soft tissue injuries to his left knee and lower back. His report proceeded on the hypothesis that the pursuer had been standing on the passenger steps of the lorry at the point of impact. His evidence spoke to the mechanism of the incident, and he was satisfied that given where the pursuer was standing and how he was standing that he would have fallen, sustaining the injuries claimed. He also stated that individuals may self-medicate especially when getting GP appointments can be difficult, though this was somewhat stating the obvious.

[17] He opined that the knee injury could take up to 12 weeks to heal with the back injury taking up to 6 weeks with 3 months again an upper limit.

[18] For his part he found the injuries consistent with the complainer's account that he had been standing on the steps of the cab as opposed to sitting in the vehicle. Had he been sitting there would have been no injury or no major injury; he said he had been standing on the steps though and the force was like tipping someone over an edge. Falls tend to be more awkward than jumps and the knee can buckle.

Admissibility issue

[19] In cross-examination Mr Sinha was asked the following: "Do you always get paid for every report?" He answered: "No, I think I can get paid when cases get settled." He

said that this was the norm in years of practice and he would not be paid if cases did not settle. He also said later that he simply prepared the reports on the basis of what was presented to him and for the benefit of the court. He did not place weight on the assertions of clients.

[20] In re-examination he confirmed that he would not rubber stamp submissions and would go back to solicitors if he had concerns about what he was being told. He said the outcome of the case did not matter to him and had not done for the last 35 years. He said he would be paid in this case regardless of the outcome and had not been paid as yet. He said he had no vested interest in the outcome of the cases.

[21] The defender invited me to find Mr Sinha's evidence to be inadmissible on the basis he had demonstrated insufficient independence, an essential criterion of an expert witness whose duty is to the court, *Kennedy* v *Cordia (Services) LLP* [2016] UKSC 6.

[22] The defender submitted that by accepting payment only in cases that "settle" (interpreting successful to mean resulting in an award of damages for the pursuer) meant that Mr Sinha was acting in a manner which was akin to a de facto speculative or contingency fee arrangement. My attention was drawn to the Sheriff Appeal Court's decision in the case of *Marshall* v *Berkshire Hathaway International Insurance Company Limited* [2024] SAC (Civ) 13, where the expert in evidence made similar comments to those made by Dr Sinha in the present case, with the Court finding that the expert's evidence was inadmissible by virtue of the fact that he did not possess an appropriate understanding of the full extent of his duties and responsibilities of being an expert witness. The defender invited me to make the same finding in this case and hold his evidence to be inadmissible.

[23] The pursuer accepted that issues surrounding independence were quite properly put to Mr Sinha but noted that it was not put to him in cross-examination what he understood a

case settling to mean. It was submitted that it was not clear if he fully understood what was being put to him. He appeared to be taken aback and perturbed that his independence was being called into question. His evidence was given in good faith. He rejected the defenders' contention that he may have a vested interest in the case. It was submitted that he acted on an independent basis in this case and his evidence should be held as admissible.

Decision on admissibility of Mr Sinha's evidence

[24] I find Mr Sinha's expert evidence admissible. When assessing independence one must assess the entirety of the evidence of the witness. If the matter had been left as it was after cross-examination I may have reached a different view. However in re-examination the witness made clear that the outcome of the case did not matter to him and had not done so in any other case for the last 35 years. He said he would be paid in this case regardless of the outcome and had not been paid as yet. He said he had no vested interest in the outcome of cases. I believed him. This is enough to distinguish this case from *Marshall (supra)*. The defender's submission that what "settling" meant was not put to the witness in cross-examination also weighs with me. When one assesses the remarks made about being paid when cases settle against the rest of Mr Sinha's evidence, namely that he would be paid in this case regardless of outcome then it seems to me that the witness must have been unclear about the meaning of "settle," and may well have meant when cases concluded, irrespective of outcome. I found him to be an independent and impartial witness doing his best to assist the court. He was credible and reliable overall despite the lack of clarity as to the meaning to be ascribed to "settle." I have concluded, based on the substance of his evidence and his demeanour that he was somewhat caught off guard at that point in cross,

did not anticipate the line and did not make his point as clearly as he should have. This was remedied in re-examination. His evidence is available to support the pursuer.

[25] I should say however that even if I had reached the view that Mr Sinha's evidence was inadmissible this would not have been fatal to the pursuer's case. I note the conclusion of the Sheriff Appeal Court in *Marshall (supra)* at paragraph 15 *et seq*. In circumstances where the sheriff accepted the pursuer's description of the injury and the cause and where the sheriff had evidence about the significant nature of the collision, the impact on the pursuer and the subsequent pain caused it was open to that sheriff to find that evidence proved notwithstanding the inadmissibility of the expert evidence in that case. It weighed with the court that the injuries were prima facie consistent with the incident as described and not excessive. Had I ruled Mr Sinha's evidence to be inadmissible I would have reached the same conclusion as the Sheriff Appeal Court in *Marshall* relying on the evidence of the pursuer as to his injuries which were consistent with the incident he described.

The evidence of Paul Hughes for the defenders

[26] Mr Hughes gave evidence for the defenders and his evidence was also heard under reservation due to an objection to its admissibility by the pursuer. This objection ultimately had two foundations, the second of which crystallized in a supplementary written submission for the pursuer seeking to found on the recent case of *Marvin McGill* v *Advantage Insurance Company Limited* EDI-SF211-23 and the Ex-Tempore Note issued by Sheriff Walls in that case of on 11 April 2025 (I believe as yet unreported).

[27] Mr Hughes presented himself as a Forensic Engineer and had prepared a report in the case based on a desktop analysis. He accepted in cross-examination that he was not a qualified engineer.

[28] Mr Hughes gave evidence on the relevance and importance of the co-efficient of restitution. His conclusions were founded upon his understanding of the laws of Newtonian physics. His opinion evidence rested on his views on the co-efficient of friction and the forces involved in the collision being insufficient to cause abnormal occupant displacement. He took the view that the biomechanics of physics meant that the impact involved in the collision could not have transferred sufficient force between the vehicles to cause Mr Good to have fallen from the cab steps. The pursuer would not have felt jolted as there would have been negligible force involved in his view.

First ground of objection – insufficient basis on record

[29] The pursuer argued that, even allowing for the fact that the action was a summary cause and not subject to the level of pleading required in an ordinary cause, the defenders' pleadings did not provide a sufficient basis for the evidence led under reservation from Mr Hughes. The key passage from the defenders' Form of Response was as follows:

> "Explained and averred that vehicle {defender's] is a 125cc motorcycle. [Pursuer's] vehicle is a DAF LF truck. The insured's vehicle is significantly lighter than the pursuer's vehicle. Believed and averred that the insured's vehicle could not have caused unusual movement to the pursuer's vehicle. The pursuer exited the cab of his vehicle after the impact."

[30] The pursuer argued that the use of "believed and averred" was inappropriate where the defenders were in a position to make a definite averment of facts *Partnership of Ocean Quest* v *Finning* 2000 SLT (Sh Ct) 157. The formula should be used with care and in rare cases *Marine Offshore (Scotland) Ltd* v *Hill*, 2018 CSIH 9, at paragraph 17. This was not a rare case and the defenders knew Mr Hughes's evidence was fundamental to their argument on causation.

[31] The pursuer also made a fair notice argument submitting that the fact that this action was a summary cause does not obviate against the requirement for there to be a sufficiency of pleadings to allow the matters spoken to in Mr Hughes's report to be led in evidence.

[32] I prefer the defender's argument on this ground. Their position, though briefly set out, is sufficiently clear from what is stated.

[33] The use of "believed and averred" was not inappropriate in the circumstances. I note that at the time of the finalisation of these pleadings (March 2024), Mr Hughes's final report was awaited. It was not produced until August 2024. Pending a final report from Mr Hughes, the defender could not definitively state the position but had a reasonable basis for making the averment standing the information that was available in May 2024.

[34] The pursuer must have known that the issue was causation and the general basis of the defender's argument. This was in turn amplified by their receipt of Mr Hughes's report.

Second and third grounds of objection – insufficient expertise

[35] The pursuer argued that Mr Hughes's skill lay in forensic intelligence and not in mechanics or the biodynamics of how the human body reacted to forces applied to it or in physics. In addition he had not examined either vehicle and his report did not consider Mr Thomson's evidence, the speed he was travelling or his recollection of the forces involved. Reliance was placed on Sheriff (now Lord) Weir's approach in *Beckham* v *McCabe*, 2019 SC Edin 65 and in particular his remarks at paragraphs 49 and 50:

> "… Mr. Bathgate also reached conclusions which seemed to me to be elevated to a level of certainty which I found impossible to reconcile with the absence of any physical examination by him of the vehicles involved in this collision, never mind the absence of any collision investigation by the police at the time when the accident happened."

[36] The defender made no specific opposing submission on this ground of objection that I can see, perhaps through oversight. I am sure reliance would have been made on Mr Hughes's qualifications and experience and the fact his opinion has been admitted previously in our courts.

Fourth ground of objection – methodology/certainty/usurping the role of the court

[37] The pursuer's fourth ground of objection to the admissibility of Mr Hughes's opinion evidence was that his report did not analyse the pursuer's position to the point that his conclusions are expressed to a point of certainty that they do not merit given the incomplete information from which he was working (also relying on the Sheriff's decision in *McGill (supra))*. It was submitted that the tenor of Mr Hughes's evidence was indicative of him proving an outcome, ie that the coefficient of friction was 0.2 and consequently the pursuer could not have fallen from the lorry. His evidence was given in absolute terms as opposed to him offering opinion evidence for the consideration of the court.

[38] The defender argued that it was unfair to say that Mr Hughes had overstepped the mark and was intruding on the decision-making role of the court. He viewed his role to assist the court and in his straightforward view insufficient force would have been generated to cause any appreciable movement.

[39] If the pursuer wished to place reliance on the failure of Mr Hughes to take into account the speed of Mr Thomson's vehicle then this should have been put to Mr Hughes in terms.

[40] *McGill* could be distinguished as it was a collision between two cars. In that situation it would be inappropriate to assume speed. However in this case the vehicles were very different, a truck and a motor cycle, and there was an estimate (though qualified) of the

speed of Mr Thomson as between 10 and 15mph. I was invited to accept Mr Hughes's opinion and the conclusions that flowed from it.

Decision on admissibility of Mr Hughes

[41] In his report at paragraphs 2.2 *et seq* Mr Hughes states:

> "My specialisation lies in the field of forensic investigation, reconstruction, and reporting of automotive incidents. I have expertise in analysing human factors and identifying potential procedural errors. As part of my work, I conduct comprehensive assessments to ensure the consistency of damage with the laws of physics, documented incident circumstances, and the forces involved.
>
> Continuous professional development is integral. I actively participate in witnessing and appraising scientifically controlled tests involving road vehicles, aircraft, and maritime vessels, along with their associated telemetry.
>
> In addition to my extensive training, I have developed proficiency in employing physics based 3D computer simulation and animation techniques for diagnostic purposes. I also utilise advanced convolutional neural network analyses to enhance my visual data investigations.
>
> Alongside my expertise, developed over more than 20 years as an Expert Witness providing oral evidence in Courts of Law, I actively engage in conference presentations, university collaborations, and consultations with UK Government Departments and car manufacturers."

[42] I will allow Mr Hughes's evidence and repel the pursuer's objection. He has the necessary qualifications and experience in my view to offer opinion evidence in this field and the constituent elements of *Kennedy* v *Cordia (supra)* are satisfied in respect of him. He has been accepted numerous times as a skilled witness in this field in various courts as I understand the position.

[43] It seems to me though that all of the pursuer's objections more properly go to the weight which should be afforded to his evidence and conclusions. The lack of any examination of the vehicles and the failure to factor in the speed of Mr Thomson's vehicle are, in my mind, failures in methodology similar to those found in *McGill (supra)*. The

failure to factor in the estimated speed was clear despite the defender's submission made with a view to distinguishing *McGill* and the reference made to speed in that context. He had started his analysis in this case with an assumed co-efficient rather than by reference to even an estimated impact speed. His expression of his conclusions in absolute terms was unfortunate and gave the appearance of such certainty as though he was the decision-maker. I note he also conceded in cross-examination he had not interviewed either Mr Good or Mr Thomson and that there was a potential that Mr Good may have felt some form of "vibration" though he maintained his basic position that the force would have been negligible. Against this background I do not feel I can afford his conclusions more than minimal weight.

Discussion/decision

[44] I found the pursuer Mr Good to be a credible and reliable witness. He was straightforward and did not exaggerate. I believed him. He was clear his vehicle had moved on its wheels, even if only a little, enough to knock him off balance, strike his left knee on the door frame and fall on the ground. That he took little or no time off work and did not go to his GP initially militates in favour of his credibility.

[45] I was not as sure in relation to Mr Thomson's account. I agree with the pursuer's submission that he was somewhat reluctant to accept fault for the incident suggesting the pursuer should have had his hazard lights on. He accepted the sun was in his eyes as he approached the lorry which could in my view have affected his view of Mr Good being outside on the cab steps leaning inside. He admitted being shaky and unable to speak for a time while he was trapped under his motorcycle after the crash. It was at this time he said that the pursuer exited the cab and came towards him. I find it hard to accept this given the

witness's own situation at the time. I find him overall an unreliable witness and prefer Mr Good's evidence in situations where there is a conflict between their accounts.

[46] I have found Mr Sinha's evidence to be admissible as I have said and have no reason not to place reliance upon it.

[47] I find the defender's insured responsible for the collision and the pursuer's injuries. For completeness if I had found Mr Sinha's evidence to be inadmissible I consider that I could still have found in fact that the pursuer suffered the injuries he did as a result of the actions of the defender's insured, as a matter of common sense and for the reasons set out by the Sheriff Appeal Court in *Marshall (supra)* – absent any finding relating to "soft tissue" injury again similar to the approach in *Marshall*.

[48] I give minimal weight to Mr Hughes's evidence for the reasons stated. It did not cause me to doubt the credibility and reliability of Mr Good. I find that I can rely on the evidence led on behalf of the pursuer and find on the balance of probabilities that the incident took place as the pursuer described and that he was injured as a result.

[49] The pursuer makes a claim for solatium only. In terms of this I was referred to the seventeenth edition of the Judicial College Guidelines which are commonly referenced before the Scottish Courts. Chapter 7 B(c)(iv) concerns back injuries where a full recovery is made within 3 months. In that bracket awards up to £2,990 are made. This falls to be reduced by 0.909 as the guidelines are primarily focused on cases in England and Wales and include a 10% uplift. When abated this would see the award reduce to £2,718.

[50] The injury to Mr Good's left knee was submitted to fall within Chapter 7 K(b)(ii). In that bracket, soft tissue strain injuries or the like which do not significantly impact on daily activities, but which gradually resolve within 6 to 7 months attract an award in the region of £2,750, which falls to be reduced to £2,500 once the 10% uplift is abated. It was accepted

that the pursuer's knee injury would fall to attract an award below this figure given the shorter duration of injury.

[51] Each case turns on its own merits of course but in *Montgomery* v *Direct Line*, 2011 a Sheriff Court decision, £2,675 was awarded for a whiplash type injury causing around 6 months of pain and discomfort. I was advised that award was worth £4,200 in today's terms. In *Xerri* v *Direct Line Insurance*, 2007, a further Sheriff Court decision, £2,244 was awarded (now worth £4,017) for injuries to the ankle, neck and back which resolved after 2 months.

[52] In this case the court is dealing with a period of pain and injury persisting for around 3 months. I was invited to adopt a pragmatic and holistic approach to the assessment of solatium. There was no contrary position put forward in submissions and I am therefore content to give effect to the pursuer's motion that an award of £3,000 plus interest calculated at 4% adding £216.

[53] If expenses are not agreed then I would ask parties for short written submissions within 4 weeks. If expenses are agreed I would ask that parties advise the Sheriff Clerk at Airdrie and I will issue the appropriate interlocutor.