

SHERIFFDOM OF LoTHIAN AND BORDERS AT EDINBURGH
IN THE ALL-SCOTLAND SHERIFF PERSONAL INJURY COURT

[2024] SC EDIN 36

PIC-PN2280-23 & PIC-PN2279-23

JUDGMENT OF SHERIFF IAIN W NICOL

in the causes

CALLUM FRASER

Pursuer

against

EVELYN MUNRO

Defender

and

BRYNHILDUR HALLGRIMSDOTTIR

Pursuer

against

EVELYN MUNRO

Defender

Pursuer: Henderson, Advocate; Digby Brown LLP, Solicitors, Edinburgh
First Defender: Thomson, Advocate; Clyde & Co LLP, Solicitors, Edinburgh

Edinburgh, 18 July 2024

Preliminary

[1] This judgment relates to two actions which proceeded to proof under Chapter 36 of the Ordinary Cause Rules. The actions were not conjoined but arose from the same accident so the proofs were heard together over 4 days. For reasons of expediency I have issued one

judgment dealing with both actions and will refer to Callum Fraser as the first pursuer and Brynhildur Hallgrimsdottir as the second pursuer.

The Sheriff, having resumed consideration of the cause, MAKES the following findings in fact:

[2] The first pursuer is Callum Fraser. He is 34 years old. He lives in Iceland with his partner the second pursuer Brynhildur Hallgrimsdottir, age 28.

[3] The pursuers were involved in a road traffic collision on Balgreen Road Edinburgh at its junction with Gorgie Road on 13 February 2022 at approximately 6pm.

[4] The first pursuer was the driver of Audi S4 registration BL18 NKD which was stationary at a set of traffic lights at the junction with Gorgie Road.

[5] The second pursuer was the front seat passenger in the first pursuer's vehicle.

[6] Both pursuers were wearing seat belts.

[7] The first pursuer was intending to turn right onto Gorgie Road. He had been stationary for a matter of seconds. The handbrake had automatically engaged.

[8] The defender was driving a Volkswagen Polo registration number SO12 FXX on Balgreen Road. Her vehicle was directly behind the first pursuer's Audi.

[9] As she approached the rear of the first pursuer's vehicle, the defender was travelling at around 5 mph. She failed to stop in sufficient time to avoid a collision with the Audi. She attempted to steer her vehicle to the left but in doing so the front offside of her vehicle struck the side of the Audi's tow-bar attachment and then the rear of the Audi to the left of the tow-bar.

[10] The collision was of sufficient force to cause injury to both first and second pursuers.

[11] The damage to the Polo caused by the collision consisted of i) displacement of the black trim adjacent to the Polo's black grille; ii) cracking to the area adjacent to the Polo's towing hook aperture; and iii) a mark to the upper edge of the lower bumper.

[12] As a result of the collision, the Audi sustained damage to the black plastic honeycomb grille and white bumper, all situated to the left of the Audi's tow-bar attachment.

[13] Immediately prior to impact, the first pursuer was leaning forward to either change a music track or radio station on the centre console of the Audi. He did not have his hands on the steering wheel. The left side of his back remained against his seat but the right side of his back was off the driver's seat.

[14] Immediately prior to impact, the second pursuer was sitting in a relaxed position with her back against the passenger seat, facing straight ahead.

[15] The collision caused both pursuers to be thrown forward. They were restrained by their seat belts which halted their forward momentum and forced them backwards onto their respective seats. The heads of both pursuers hit their respective headrests. They were both disorientated for several seconds before realising a collision had occurred.

[16] The collision caused the Audi to be pushed forward from its stationary position by approximately 1 to 1½ feet.

[17] The first pursuer alighted from his vehicle to speak to the defender and check she was alright. He asked her to follow him onto Gorgie Road so they could exchange details. After the first pursuer moved onto Gorgie Road, the defender drove away from the scene without providing her details.

[18] The cost of repairing the damage to the first pursuer's vehicle as a result of the collision was £1263.17, paid for by the first pursuer's motor insurers, AXA.

[19] During the time the first pursuer's vehicle was being repaired, he was provided with a Mercedes C Class hire vehicle from Enterprise, for a period of 18 days between 21 February 2022 and 11 March 2022 at a cost of £1189.75. The hire charges were paid for by the first pursuer's motor insurers, AXA.

[20] The first pursuer reported the incident to the police immediately after the defender drove away from the accident locus.

[21] As a result of the collision the first pursuer had moderate neck pain for approximately 2 months. He suffered sleep disturbance. His pain gradually resolved over the next 3 or 4 months and by 6 months post-accident he was asymptomatic. Domestic activities were not curtailed.

[22] Within the first two hours following the collision, and as a consequence thereof, the second pursuer developed a headache. Symptoms were most acute for 48 hours post-accident. She also developed minor neck and upper back pain. She made a full recovery by 2 weeks post-accident. The collision curtailed her pre-accident hobby of yoga for a two week period.

Findings in Fact and Law

[23] The first pursuer having suffered loss injury and damage as a result of the defender's negligence is entitled to reparation therefor.

[24] A reasonable award in respect of the loss injury and damage sustained by the first pursuer is £6563.55 inclusive of interest to 18 July 2024

[25] The second pursuer having suffered loss injury and damage as a result of the defender's negligence is entitled to reparation therefor.

[26] A reasonable award in respect of the loss injury and damage sustained by the second pursuer is £1073.39 inclusive of interest to 18 July 2024.

Summary of Witness Evidence:

The Pursuers:

[27] The pursuers were involved in a road traffic collision on Balgreen Road Edinburgh at its junction with Gorgie Road on 13 February 2022 at approximately 6pm. The first pursuer was the driver of Audi S4 registration BL18 NKD which was stationary at a set of traffic lights. The second pursuer was the front seat passenger in the first pursuer's vehicle. Both pursuers were wearing seat belts.

[28] The first pursuer was intending to turn right onto Gorgie Road. He had been stationary for a few seconds and his handbrake had automatically engaged. He was leaning forward to change the radio station or a music track so the right side of his back was off his seat but the left side was still touching the seat. Neither of his hands were on the steering wheel at the time of impact.

[29] The first pursuer spoke to hearing a huge metallic sounding bang. The second pursuer could not recollect whether she heard anything.

[30] For a few seconds the pursuers were disorientated and then realised their vehicle had been struck from behind by another car.

[31] Both pursuers stated that the impact caused the Audi to be shunted forward a short distance. The first pursuer estimated the distance on one occasion at half a foot and on another occasion 2 feet. The second pursuer was unsure of the distance. The first pursuer estimated the Polo had been travelling at 10 to 20 mph although accepted he was speculating. He considered it to be a substantial impact.

[32] The first pursuer alighted from his vehicle to speak to the driver of the car which had struck his vehicle. He intended to obtain her insurance details and check she was alright. When he spoke to her she became hostile and blamed the first pursuer for causing the accident. As a result, he started filming their interaction. He asked the defender to follow him through the junction and park on Gorgie Road so they could exchange details.

[33] The video footage included views of the front of the defender's car and rear of the first pursuer's car. The Audi was fitted with a retractable tow-bar which was in the down position at the time of the collision. The first pursuer described the damage to the rear of his vehicle and agreed that what is contained in the repair estimate from Estimate Solutions reflects the extent of the damage. The repair costs totalled £1286.57

[34] The pursuers were moving to live in Iceland in March 2022. The first pursuer needed to get his vehicle repaired quickly so he could get it sold before his move abroad. He therefore arranged with his insurers, AXA, to use a repairer of his choice rather than the AXA approved repairer.

[35] The day after the accident the first pursuer gave a statement to PC Beaumont at Corstorphine Police Office. He could not remember attending the police office for that purpose, he thought he may have given his statement over the telephone but did recall attending there in connection with a missing person's enquiry. He described the circumstances of the accident but the statement does not contain any information about any injuries sustained in the accident. He did not think the focus of the discussion was on his injuries and was more to do with what happened at the time of the collision and the immediate aftermath i.e. issues relevant to whether a crime had been committed of leaving the scene of a road accident without providing details and failing to report the accident to police. He did not recall the officer asking about injuries.

[36] The passage of time is the reason why there is a discrepancy in his police statement (where he said the car was shunted forward half a foot) compared to the medical report prepared by Mr Moran on 6 April 2023 (where he said 2 feet).

[37] The first pursuer did not feel any immediate pain or discomfort but pain began to develop an hour or so after the accident. He developed a sore head, pain in the neck, his upper and middle back. Both sides of his body were affected. The neck pain lingered longest. He struggled at work as a self-employed bricklayer the following day.

[38] He contacted NHS Lothian's out of hours service on 15 February 2022 and was advised to attend Edinburgh Royal Infirmary. He was concerned that he had suffered more than muscular damage. He was seen by a doctor. The letter from the A&E doctor to the first pursuer's GP records that the history given was "rear ended up approx. 20mph on Sunday evening, initially very well following this, since Sunday increasing neck pain and pain back of head, no LOC at time, no cabin intrusion, self-extricated, normal ROM. Pain of gradual onset and to right side. Denies hx of other injuries." The impression was one of "muscular pain and advised to take paracetamol, ibuprofen and codeine and to return if worsening or concerned."

[39] Notwithstanding what the medical records recorded regarding the location of pain, the first pursuer was clear that there was pain across his neck and back. It gradually got worse on the right side. His symptoms lasted for 6 months. Both sides of his body were affected. He was working as a self-employed brick-layer at the time and felt awful when he went to work the day after. He was far slower than normal and felt guilty for slowing up the other members of the team.

[40] The pain in his neck lasted for 2 months or so and caused him difficulty with moving, bending and sleeping. He was taking Ibuprofen and paracetamol and possibly

stronger pain killers. He would wake with the pain 2 to 3 times per night. It gradually resolved to the point he was completely symptom free by 6 months post-accident.

[41] Some time was spent in dealing with his insurers, police and repairers.

[42] A repair, unrelated to the collision, was required to the front of his Audi but this had been completed prior to the collision repairs being approved and he was invoiced for the former directly and paid for those repairs himself.

[43] In response to the suggestion the contact between the vehicles was very light, the first pursuer queried how damage could have been done to his bumper where he had a tow bar in position if the contact was light.

[44] The second pursuer thought the vehicle she was in was stationary for maybe 20 to 30 seconds before the impact. She confirmed the automatic handbrake of the Audi was engaged and she was sitting straight. On impact, the Audi was shunted forwards as was she. The seatbelt restrained her and caused her to be thrown back, harshly hitting the seat. She could not recollect how far forward the Audi moved. Her head and neck came into contact with the headrest. She remained in the vehicle whilst the first pursuer spoke to the defender. On his return to the vehicle the first pursuer recounted what was said to him by the defender. Her recollection accorded with what the first pursuer had said in his evidence. The defender did not provide her details and left the scene. The second pursuer provided a statement to the police over the telephone on 14 February 2022. The second pursuer did not know the speed of the defender's vehicle – she estimated it at 5 to 10 kilometres per hour.

[45] Following the accident, the pursuers drove to the first pursuer's parents' house in Inverkeithing. During the journey the second pursuer developed a headache. The headache became more severe that night and was at its worst for 48 hours. She attended Edinburgh Royal Infirmary with the first pursuer on 15 February 2022, was examined and prescribed

pain relief. The note in the medical records states “minimal muscular pain”. The headaches and neck pain persisted for about 10 days and were fully resolved by 2 weeks post-accident.

[46] Under cross examination, the second pursuer was asked if the Audi physically moved forward. She thought so. In her opinion it moved forward. She could feel it go forward.

[47] The medical report from Mr Moran does not outline what allegedly happened. She thought she told the consultant.

[48] She thought the first pursuer went to the police station to give his statement on a different day to when she gave her statement. She was adamant that she sustained injuries.

PC Charles Alexander Francis Beaumont.

[49] He was assigned the crime report for the accident. He did not attend the scene. He took statements from the 2 occupants of the Audi, obtained some video footage from the first pursuer and spoke to the driver of the Polo. Ultimately she was not prosecuted for failing to stop / report or driving without due care and attention as she agreed to surrender her driving licence.

[50] He created the Crash Report and inputted the data as it appears on the report.

[51] The words in the statement of the first pursuer were his. This was taken on 14 February 2022 between 17.01 and 17.24. He could not recall whether he was told by the first pursuer if he was injured. It is something he would normally ask but it’s possible this was overlooked.

[52] He took the second pursuer’s statement over the telephone between 21.11 and 21.20 hrs on 14 February 2022.

Thomas Leitch

[53] His business arranged the estimate for repairs to the first pursuer's Audi through an independent estimator who prepared an Audatex report. The estimate for repairs was £1286.57. AXA approved the estimate and the repairs were undertaken. He spoke to the nature of the repairs. He confirmed all the work required to be carried out and he considered the cost for what was done to be reasonable. The total of the invoice was slightly less than the estimate and amounted to £1263.17. The invoice was dated 15 March 2022 although the customer satisfaction note was signed by the first pursuer on 11 March which might suggest the work was completed a few days prior to the invoice being issued. AXA paid his invoice.

Alan Bathgate

[54] He is a consulting automotive engineer. In his 37 year career he has inspected around 60,000 to 63,000 vehicles of all types. He initially worked in the motor trade starting as an apprentice and working his way up to service manager in after sales. Since joining T&T Technical Services he has obtained further qualifications with the Institute of Automotive Engineer Assessors, gained in 1989 at West Lothian College, and the International Federation of Automobile Experts (no date, place or further details given). He felt able to speak authoritatively about the structure of, and damage to, cars. Part of his IAEA qualification related to accident reconstruction and that included a section on calculating forces. No further details were given.

[55] He is instructed by both pursuers and defenders as a skilled person. He had prepared a report, number 6/1 of process dated 15 January 2024. He adopted the report as

part of his evidence. It did not contain his Curriculum Vitae. It briefly mentioned some professional organisations of which he is a member.

[56] He had physically inspected the VW Polo on 13 January 2024, 23 months post-accident. He had not inspected the Audi. He did not find any areas of repair or refurbishment on the Polo.

[57] Image (b) on page 5 of his report showed a close-up view of a split at the outer edge of the tow eye cover on the Polo. It is possible this is the area that came into contact with the tow-ball attachment on the rear of the Audi. On the model of the Polo involved in the accident, the tow-eye is attached to the chassis leg, not the inner support beam (or, as the first pursuer referred to it, the crash bar). This is contrary to what Mr Vaquerizo says in his report. Mr Vaquerizo has erroneously included a photograph (Figure 20, page 28 of his report) of a more recent model of a Polo where the inner support beam extends further across the front of the vehicle. In particular it extends as far as the towing eye aperture whereas on the defender's Polo it does not. There is a void of several inches behind the tow eye cover on the defender's Polo providing no rigid support at the point of impact.

[58] The inner support beam is part of the crumple zone on a vehicle. There are 3 different parts to the crumple zone. The first is the outer cover. On the defender's Polo, this is the white bumper cover, made of plastic. Its purpose is to absorb impacts up to 5 mph. That is part of the vehicle construction and use regulations which all vehicles have to comply with. The outer cover, on impacts up to 5 mph, will attempt to return to its original shape and position, sustaining only cosmetic damage with no additional damage beyond the outer cover.

[59] The next area of the crumple zone is the inner support beam behind the outer cover in the centre section of the vehicle. On this particular Polo the beam extended across an area

behind the vehicle registration plate in a horizontal line, the ends of which are below the inner edges of each headlight. It is designed to collapse progressively between 5 and 12 mph, absorbing the force of an impact without extending that force rearwards into the chassis structure. It will remain collapsed and damaged after impact i.e. unlike the outer cover, it will not return to its original shape.

[60] The third area of the crumple zone is the vehicle chassis.

[61] The inner support beam was correctly located with no evidence of damage or rearward displacement. This led Mr Bathgate to conclude that the Polo must have been travelling at less than 5mph or else greater damage would have been evident.

[62] From documentation provided and/or from his inspection of the Polo, he observed the following damage to the Polo:

- i. Displacement to the front offside black trim adjacent to the front grille;
- ii. A crack adjacent to the towing eye aperture;
- iii. A scuff mark below the front offside headlight;
- iv. Scuffing to the lower offside bumper;
- v. A dent to the front offside wing.

[63] From photographs provided, he observed the following damage to the Audi:

- i. A split in the black honeycomb trim to the left of the tow ball;
- ii. A contact mark on the white bumper above the damaged area of the honeycomb trim.

[64] The only damage to the Polo probably caused by the impact with the Audi was the crack to the bumper adjacent to the tow-eye aperture.

[65] The damage to the Audi was not caused by the impact with the Polo. It was probably caused as a result of a direct impact from something with a small surface area. The

damage is consistent with the Audi having reversed too far when coupling with a trailer or caravan or the trailer / caravan has rolled forward into the rear of the bumper. There is no corresponding part of the Polo which would cause that.

[66] The Polo first made contact with the tow-ball fitted to the rear of the Audi. The contact between the "soft" front of the Polo and the hard tow ball of the Audi would not be enough to shunt the Audi forward with its handbrake on. The force needed to do that would mean the Audi's tow-ball would extend into the bumper cover of the Polo, destroying the bumper cover which would split and allow the tow ball to access the forward section of the chassis leg on the right of the Polo. Before the front of the Polo could make contact with the rear of the Audi, the Audi tow-ball would have to split, destroy and fully extend into the bumper structure of the Polo to make contact with the chassis prior to the two bumpers coming into contact with each other. There was no sign of that having occurred. The damage to the Polo is slight. The speed of the Polo was certainly less than 5 mph and probably as low as 1 to 2 mph.

[67] If there had been a "collapse and reform" of the Polo's bumper there would be tell-tale signs on the painted surface of both vehicles to indicate where the collapse and reform had been because the paintwork on the bumpers is more elastic than the bumper covers. The force has been insufficient to cause the collapse of the bumper or to disturb it on its mountings.

[68] If the Polo had struck the bumper of the Audi when the Audi was stationary (as opposed to merely striking the tow ball), the damage to the Polo would not just be to the outer cover or the inner support beam, it would extend through that into the structure of the vehicle. The radiator behind the inner support beam would be punctured. Headlights

would be broken and the bonnet would most likely be pushed back with structural damage to the front of the chassis legs and headlamp mounting panels.

[69] Mr Bathgate accepted that the diagram in Mr Vaquerizo's report of the position of the 2 vehicles at the time of impact (Figure 14, page 23) is probably correct but considered that on the balance of probabilities any other scuff marks or damage to the Polo were not consistent with having been sustained in the collision.

[70] Some damage may have been suffered when the Polo struck a kerb on a separate occasion. As shown in photos lodged as pages 46 and 47 of the joint bundle, a mark on the upper edge of the lower bumper of the Polo is evident. Despite photographing the upper external damage, he did not photograph the damage to the underside of the lower part of the bumper because he was of the opinion it was not caused by the collision. He disagreed with Mr Vaquerizo's report which only refers to the damage being to the upper edge of the lower spoiler. Mr Vaquerizo had not inspected the Polo and was working off the photos which Mr Bathgate had included in his report. These did not include a photograph of the lower edge. Images (c) and (d) on pages 5 and 6 of his report supports his theory given the nature and extent of the damage shown. In response to why there is no damage to the front area of the spoiler i.e. the area between the upper and lower areas, he stated there is paintwork damage in the centre of the roughened area.

[71] Figure 10 on page 19 of Mr Vaquerizo's report shows a horizontal mark along from the number plate. Figure 11 shows the misalignment of the front offside bumper. Neither of these areas of damage were mentioned by Mr Bathgate as they were not evident at the time he inspected the Polo. The misalignment may have been as a result of the impact with the Audi but he believes it is more likely to be as a result of the scuffing of a kerb as it is more

likely to be connected to the damage closest to it namely the area of scraping damage on the paintwork to the lower bumper below the headlight.

[72] There was a further area of potential damage not mentioned in Mr Bathgate's report but shown in Figure 12, page 20 of Mr Vaquerizo's report, i.e. situated on the corner of the front offside bumper of the Polo. The image is of poor quality. It was not present when Mr Bathgate inspected the Polo. It may be surface dirt on the bumper cover. He had not seen any evidence of damage or repair to that area and doubted it is connected to the accident.

The Polo would have to have been at a 45 degree angle relative to the position of the Audi to expose that area of the Polo. The position of damage is one thing, the nature of damage is another. The damage caused by the contact between the two vehicles is to the Polo only and comprises the marks and small split below the towing-eye aperture on the Polo's front bumper cover. There is no damage to the Audi which he would attribute to the impact. He disputed any suggestion that he failed to take into account any relevant damage in reaching his conclusions.

[73] In his report Mr Bathgate, at paragraph 8.7, states the speed difference between the vehicles was less than 5mph and probably 2 to 3 miles per hour. No literature had been produced to justify his conclusions. He had not offered evidence as to the weight of the vehicles. His conclusions are based entirely on analysing the damage sustained in the accident. He bases his opinion on his experience of bumper components and how they react in accidents, and assessing the damage sustained is what he relied on in determining the approximate speed difference between the vehicles at the point of contact. An Audi is a larger and heavier car. It would not be possible for the Polo to dislodge it and sustain only light damage.

[74] The distance between the 2 vehicles as evident from the photos is around 15 to 18 inches. He could not explain why that was but was of the view the gap was not as a result of the impact between the 2 vehicles.

Mr Carlo Vaquerizo

[75] Mr Vaquerizo has been a forensic collision investigator for 11 years. He produced a report in relation to the accident dated 4 March 2024 which he adopted as part of his evidence. Appendix 1 of the report sets out his qualifications and experience. This includes a BEng (Hons) degree in motorsport engineering and design gained in 2001 which mainly related to how vehicles were designed and constructed. He undertook various training courses during his time working for the police as a motor vehicle inspector. Some of these related to collision investigation. He has been trained to assess the direction a vehicle was travelling in prior to impact. He has undertaken courses in his foundation degree on advanced damage analysis and the direction of forces applied between vehicles on impact. He has experience of low speed collisions and has used peer reviewed research to assist in determining how damage has occurred and the likely speed involved. He is instructed by both claimants and defenders. He is a member of the Institute of the Motor Industry, an Advanced Motor Engineer, a member of the Chartered Society of Forensic Scientists and the Society of Automotive Engineers.

[76] He had not inspected either vehicle. He considered documentation, as listed in Appendix 2 of the report including the video footage taken by the first pursuer at the scene. The 2 vehicles were slightly offset, the Polo being situated slightly to the left of the Audi. The video showed a gap between the 2 vehicles of a foot or so. The front car in his opinion had been moved forward on impact by the Polo due to the transfer of energy on impact.

[77] The damage to the Audi was confined to the rear of the vehicle where the black honeycomb spoiler, (referred to by the first pursuer as the diffuser) was split to the left of the tow-ball and there is a mark to the white area of the rear bumper above and to the left of that.

[78] The repair invoice, and the items which had to be repaired, were consistent with the damage he had observed and which he attributes to the damage caused by the accident.

[79] Having regard to the damage to the Polo's bumper adjacent to the towing-eye aperture, that is the area of the Polo which connected with the rear of the Audi. The Polo has glanced past the Audi's tow-ball and contacted with the rear bumper of the Audi. The front offside of the Polo has come into contact with the vertical tow-ball and continued into the left area of the bumper. The defender had steered slightly to the left prior to the impact. He bases that on the position of the vehicles and the position of the defender's steering wheel as shown on the video footage.

[80] The horizontal scuff mark below the Polo's headlight could be impact related due to contact with the bottom section of the Audi's tow-ball. The mark was fresh as far as he was aware.

[81] The mark on the lower part of the bumper described at Figure 9 on page 18 of his report as bumper scuffing could be caused by the bottom section of the Audi's tow-ball. If it was due to striking a kerb or something similar he would have expected to see damage to the front edge of the bumper, not just the top part. The damage which is shown in the photo is consistent with having been sustained when contact was made with the lower part of the tow-ball arm.

[82] He had not seen anything to suggest the horizontal scuff mark to the front offside of the Polo was pre-existing so assumed it is as a result of the collision. Figure 11 on page 19 of

his report shows misalignment between the front offside bumper and front offside wing of the Polo. As the bumpers of the 2 cars impacted the Polo's bumper has popped from its mountings.

[83] The mark shown on the front offside corner of the Polo's bumper below the headlight is unclear. It may be collision damage but the quality of the image is poor.

[84] He described the height of the damage to the Polo being the same as the height of the Audi's tow-ball.

[85] Summarising the damage to the vehicles caused by the collision, it was probable that the front offside of the Polo's bumper at the towing eye aperture collided with the Audi's tow-bar causing the Polo to suffer a crack in the bumper, the scuffing to the lower spoiler and displacement of the front offside bumper grille. As the Polo continued forward it is probable that the front offside bumper made contact with the Audi's rear bumper causing the damage to the Audi's plastic trim and bumper.

[86] This, in turn, probably caused the horizontal scuffing found by Mr Bathgate on the front offside bumper of the Polo and the displacement of the bumper from its offside mount.

[87] An image of a VW Polo from the same registration year as the defender's Polo is shown in Figure 20 of his report. The image shows a vehicle whose towing eye aperture forms part of the structure of the inner support beam. The image was obtained from an internet search.

[88] Literature, issued by the Society of Motor Engineers, was referred to relating to low-speed vehicle to vehicle rear ended impacts at speeds of 2.5, 4.9 and 8 miles per hour. No damage to either vehicle was sustained at 2.5 mph, cosmetic bumper damage was sustained to both vehicles at 4.9 mph and progressive central deformation of the rear reinforcement of

the target vehicle was experienced at 8 mph. The Society of Motor Engineers literature is always peer reviewed by 3 people who must agree to publication.

[89] The conclusion based on the damage sustained and the literature is that the Polo was probably travelling at around 5 mph at the time of impact. The evidence of the first and second pursuers that they had both been pushed forward at the time of impact was consistent with this opinion as was their evidence that the Audi had been pushed forward.

[90] If the Polo glanced off the tow-bar of the Audi, it could have caused the Polo to change direction slightly. Alternatively, the defender may have steered to her left and that was the reason for the change of direction. The position of the defender's steering wheel suggested the defender had steered left. It was accepted "glancing" was not mentioned in his report. There had been no direct impact between the Polo and the tow-bar. He was not suggesting that the Polo had changed direction after impact.

[91] In relation to the scuff mark to the top area of the lower spoiler of the Polo, Mr Bathgate had given evidence that there were scuff marks to both upper and lower areas, not just the upper area and that was more consistent with striking a kerb. It was minor damage to that area but he did not accept Mr Bathgate's view that a kerb caused the damage as there was no damage evident to the front edge of the lower spoiler. It was more likely to have been caused by an object i.e. the Audi's tow arm attachment striking it from above.

[92] In relation to the Polo's offside panel misalignment he agreed that if the clips are not broken the panel can simply be pushed back into place.

[93] In relation to research on the position of the Polo's towing-eye aperture and whether that forms part of the inner support beam, he had researched this online. He did not research different variants of the 2012 model of the Polo. He had seen nothing to support Mr Bathgate's contention that the defender's Polo was a different variant to the one pictured

at Figure 20 of his report and it's towing-eye aperture was not part of the inner support beam. He did not believe Mr Bathgate could come to that conclusion without removing the bumper and he had seen nothing to suggest that had been done.

[94] He had not suggested that the Polo had moved through the Audi's tow bar before causing the damage to the rear of the Audi and disagreed that would have to happen before the damage evident at the rear of the Audi was sustained. His position was that the Polo's towing eye aperture made contact with the tow bar of the Audi and slid off to the side because of the angle of impact as a result of the defender steering slightly to the left.

[95] His conclusions would be the same whether the Polo's towing eye aperture was or was not part of the inner support beam.

Mr Matthew Moran

[96] It was accepted by the defender at the outset that Mr Moran could be regarded as qualified and fulfilled all the necessary requirements of a skilled person. He is a consultant orthopaedic surgeon based at Edinburgh Royal Infirmary specialising in trauma surgery. He had prepared separate reports in relation to each pursuer which he adopted as part of his evidence.

[97] He has knowledge and experience of low velocity whiplash injuries. By definition, whiplash injuries are caused by low velocity impacts. His medico-legal practice is approximately 75% related to road traffic accidents. The mechanism of a whiplash injury relates to an initial acceleration of the vehicle occupant due to force being transmitted through the vehicle in which they are seated. This causes the occupant to move forward. Their head and upper cervical spine lags behind very slightly compared to their body and lower spine. There is secondary deceleration due to the seat belt activating and pulling

them backwards. The head lags behind as it is not restrained by the seat belt. The time lag is around 500 milliseconds i.e. half a second.

[98] The relevant structures are the skeleton, intra-vertebral discs, ligaments and muscles. If muscles are taken out of the equation the rest cannot support the head. Muscular tone is critical to maintaining the head in the upright position.

[99] The primary physical problem is due to sudden contraction of muscles. Secondary injury is caused to the ligaments but the predominant injury is a muscle-type strain. In most cases, around 85 to 90%, there is an onset of symptoms within 24 hours with a gradual worsening of symptoms over a short period.

[100] Where the occupant is restrained by a seat belt the upper part of the body is relatively well protected with little movement but the neck and head are, in comparison, free to move. These injuries occur predominantly in low velocity collisions and it is very rare for an individual to complain of whiplash where severe injuries have been sustained. There are some factors which have a bearing on the susceptibility of developing symptoms such as pre-existing neck (including cervical spondylosis) and/or psychological conditions, gender (susceptibility is greater in females), age (the risk is greater in middle age and reduces as we get older) and other biosocial factors. Severity of injury is unrelated to the mechanism of the accident. Both the driver and passenger can suffer whiplash.

[101] Studies have exposed occupants in vehicles to rear impact as low as 2.5 mph and up to 30% report transient symptoms without any vehicle damage having been sustained. He was not aware of a lower limit below which injuries are not sustained but there is no point asking what speed was needed to cause symptoms. The severity of the impact is unique to a particular person in any given situation. The speed of impact itself is relatively unimportant in determining the severity of symptoms which someone develops.

[102] The first pursuer sustained injury as a result of a typical flexion/extension or whiplash mechanism. Serious injury to the vital structures such as skeleton, intervertebral discs, spinal cord or nerve roots was unlikely. Rather, the injury was a soft tissue strain, the effects of which settled at 6 months. The nature of the injury was in accordance with the treating doctor's assessment of his condition on 15 February 2022.

[103] The second pursuer sustained soft tissue or whiplash type injury to her neck. The mechanism that she describes is typical as are her symptoms. There was no evidence that she sustained injury to the vital structures of the affected areas. The injury represents a soft tissue strain, the effects of which rapidly settled within 2 weeks. This was consistent with the treating doctor's assessment of her condition on 15 February 2022.

[104] His impression of both pursuers was that there was no attempt to exaggerate symptoms or hide previous medical problems, indeed the first pursuer had volunteered that he had previously suffered a degree of neck pain which was not recorded in his medical records and which Mr Moran would not have otherwise known about.

[105] On being asked what is the point in seeing claimants who have fully recovered by the time of the interview Mr Moran explained that a) he has come across claimants who are stoical and underplay their complaints so when they are examined an abnormality may be detected and b) consideration is given to whether there is an alternative pathology which may be relevant to the issues being considered. The interview also has the benefit of allowing him to obtain their version of events relating to the accident, their description of symptoms and the time it took for them to resolve and to ask about pre and post-accident medical history.

[106] He accepted that whether the pursuers were moved as a result of the impact is a question of fact for the court to decide.

Pursuer's submissions

[107] The pursuers seek decree for payment by the defender for losses arising from the road accident. The first pursuer seeks compensation for solarium valued at £3800, a sum for inconvenience valued at £250, hire charges in the sum of £1189.75 and repair costs of £1263.17, with interest on each head of claim. The second pursuer seeks an award of solarium in the sum of £1250 plus interest. In the event of success expenses should be awarded with certification of the skilled persons and sanction for junior counsel.

[108] There was no dispute that there was contact between the first pursuer's Audi and the defender's Polo. The principal area of dispute was causation. A finding in fact should be made that the Polo was travelling in excess of 5 mph failing which a finding that the Polo was travelling at sufficient speed to cause injury to the pursuers.

[109] The credibility and reliability of each witness was commented upon along with an analysis of the skilled person evidence on vehicle damage and the largely unchallenged evidence of Mr Moran. Mr Bathgate went beyond his area of expertise to comment on matters which he was not qualified to do.

Defender's submissions

[110] Liability was accepted to the extent that there was no dispute that contact took place between the front of the Polo where it's towing eye aperture is located and the towing arm attachment of the Audi. The issue is what losses if any resulted from that.

[111] The pursuers were not credible. They gave their evidence in a "superficially credible manner" and sources of evidence which are independent provides the court with a better indication of what actually occurred. Mr Moran was not given any clear narration of the

immediate aftermath of the impact by either pursuer. Mr Vaquerizo departed from his original opinion which had suggested there was a square-on impact between the Polo and the Audi's tow bar to introduce a "fiction" of the Polo gliding past the tow-bar to cause the damage to the rear of the Audi. Mr Bathgate's evidence should be preferred when he says that no damage was caused to the Audi – the damage which was evident could only have been sustained if the Polo had travelled through the tow-bar into the back of the Audi which would have resulted in significant structural damage to both vehicles. No such damage existed and therefore any damage to the rear of the Audi must have been sustained at some time other than the accident in question.

[112] When challenged, Mr Vaquerizo repeatedly asked questions and adopted a position of fact finder. He had not researched the different variants of VW Polos and resisted any suggestion that he may be wrong.

[113] In relation to quantum, the proposed sum for the first pursuer was slightly on the high side, by a few hundred pounds. In relation to the hire charges and repair costs there was no evidence as to when the invoices were paid and there was a question mark over whether the period of hire covered the time when the first pursuer was having his front end damage repaired. In relation to the second pursuer, her case should never have been raised as an ordinary action. An appropriate solatium award would be in the range of £500 to £750. No issue was taken with certification of Mr Vaquerizo and Mr Moran nor sanction for junior counsel.

Authorities Referred to:

[114]

- i. *Kennedy v Cordia (Services) LLP* [2016] UKSC 6 (pages 2 – 36)

- ii. *Edward Windsor v NWH Group Limited*, unreported, Edinburgh Sheriff Court, 29 February 2016 (pages 37 – 50)
- iii. *David Brown v Aviva Insurance*, unreported, Livingston Sheriff Court, 22 November 2016 (pages 51 to 58)
- iv. *Julie Brines v Aviva Insurance UK Limited*, unreported, Edinburgh Sheriff Court, 10 January 2018 (pages 59 – 65)
- v. *Darren Smith v Aviva Insurance Ltd*, unreported, Glasgow Sheriff Court, 1 November 2018 (pages 66 – 152)
- vi. *Taylor Rooney v Aviva Insurance Ltd*, unreported, Stirling Sheriff Court, 7 January 2019 (pages 118 – 151)
- vii. *Suresh Balasubramanian v UK Insurance Limited*, ex tempore decision, All-Scotland Personal Injury Sheriff Court at Edinburgh Sheriff Court, 14 July 2023 (page 152 to 155)
- viii. *Cooke v Gaylo Kemp & Kemp: Quantum of Damages Para F1-116*
- ix. *Judicial College Guidelines 17th Edition: Chapter 7 A - Neck Injuries and Chapter 14 – Minor Injuries*

Discussion

[115] These cases relate to what is commonly referred to as a low velocity rear end shunt. The rear of the first pursuer's Audi was struck by the front of the defender's Polo. That much is accepted. The area of dispute is whether the pursuers sustained any losses as a result. Heads of claim included solatium, repair costs, hire charges and inconvenience. Skilled person evidence was led from experts on motor vehicles regarding the nature and cause of damage to the vehicles. The nature and cause of the damage is clearly relevant to

all heads of claim but, as always, the evidence given by the vehicle experts requires to be viewed along with all other evidence in the case e.g. the evidence of the pursuers when speaking about the circumstances of the accident including the movement of vehicles immediately after impact and the injuries which they say they sustained together with the orthopaedic evidence on the mechanism of a whiplash injury and the speeds required to cause such injuries. There was no evidence to contradict Mr Moran's orthopaedic opinion and I accept his evidence as credible and reliable. However, his opinions are predicated on a particular version of events as outlined by the pursuers. So, the real question here is whether the evidence of the pursuers, supported in the main by Mr Vaquerizo, should be accepted or whether the evidence led from Mr Bathgate that should be accepted, thereby discrediting the pursuers and in turn lead the court to hold that no injuries or financial losses resulted from the collision.

[116] Before considering these issues in detail, I will firstly deal with the evidence which was heard under reservation, objections having been made by the defender to particular lines of questioning.

[117] Objection 1: The evidence of Mr Vaquerizo in relation to the gap between the vehicles. The basis of the objection was that Mr Bathgate had not been questioned by pursuer's counsel on the gap between the vehicles and Mr Vaquerizo had not dealt with this in his report. At the end of Mr Bathgate's evidence I indicated that having seen the video footage taken at the locus I felt it prudent to ask Mr Bathgate if he could explain why there was a gap between the vehicles having regard to his evidence that the Polo struck the Audi at less than 5 mph. I wanted to ensure no erroneous inferences were drawn from my viewing of the footage. Mr Bathgate responded by saying that any gap was not as a result of the impact i.e. the Audi was not knocked forward as a result of the Polo striking it from the

rear. He could not explain why there was a gap – it may be the first pursuer drove forward following the collision, it may be the defender reversed but, whatever the explanation, it did not arise because of the impact. Put simply, the Polo's speed was not high enough to have caused the Audi to move forward. Mr Bathgate had previously seen the video footage and would have been aware of the existence of the gap.

[118] I repel this objection. The court is entitled to ask questions of a skilled person to assist the court in its understanding of any technical issues which arise. Everyone could see the gap between the vehicles on the video. The pursuers had stated the Audi had been pushed forward on impact. Mr Bathgate estimated the gap at between 1 to 1 ½ feet. If vehicles collide, depending on the speed of the rear vehicle and the relative weights of the vehicles, the front vehicle may be pushed forward leaving a gap between the two when they come to a halt. If no gap exists, one might infer that insufficient force transferred between the vehicles to cause the front vehicle to move forward from its stationary position. If video evidence does show a gap between the 2 vehicles one might reasonably infer that gap arose as a result of the transferred force on impact, especially if the inference can be justified by other evidence.

[119] As Mr Bathgate was asked about the gap, it was entirely appropriate that Mr Vaquerizo was also asked about it. He suggested the gap was approximately one foot and was of the view that gap was created when the momentum of the Polo pushed the Audi forward during the transfer of energy upon impact. This evidence is consistent with the evidence of both pursuers that the Audi was knocked forward upon impact. Whilst the precise distance mentioned by witnesses varied slightly, the differences were not material.

[120] Objection 2: Mr Vaquerizo's evidence that the Polo glanced the Audi's tow bar attachment. The basis for the objection was that this theory had not been canvassed in his

written report and had not been put to Mr Bathgate. In response, the pursuer contended that a fair reading of Mr Vaquerizo's report gave fair notice that the Polo must have travelled past the tow-bar attachment of the Audi and connected with its rear bumper and honeycomb trim, causing the damage shown in the photographs. Again, I repel the objection. The witness was being asked to explain the opinion in his report i.e. how could there be damage to the area of the Audi to the left of the tow bar attachment. His report made it clear that the rear damage to the Audi was, in his opinion, as a result of the impact. If his evidence varied from the terms of his written opinion that is relevant to his credibility and reliability. It was open to the defender, as indeed was done, to question the witness on why he had not mentioned that the Polo had glanced past the Audi's tow-bar. The question is what weight to place on that evidence, not whether it is inadmissible. The issue of rear end damage to the Audi was not only canvassed in Mr Vaquerizo's opinion but was also on Record and I am satisfied that Mr Vaquerizo was simply elaborating on the opinion which he had expressed in his report rather than introducing something for which no notice had been given. I note that there was no motion made to recall Mr Bathgate to allow him to be questioned further on this point.

[121] Objection 3: The evidence of Mr Vaquerizo when referring to literature. The objection was to the effect that the literature had not been produced and therefore he should not be allowed to make reference to it.

[122] The literature is quoted with full citations in his report. It is true to say that it had not been produced. Again, I repel the objection whilst observing that the weight to be given to skilled person evidence runs the risk of being diminished if the literature is not available to the court to assist with verification of the opinion being expressed. That, however, does

not render the parole evidence inadmissible. He was able to explain that his opinion was based on the studies referred to in his report and had a scientific, peer-reviewed basis.

[123] Given the fact that Mr Vaquerizo's report was available to the defender at the pre-trial meeting, it was open to the defender to have downloaded the literature or, if they had difficulty accessing it, to make a request to the pursuer for copies. Either way they ought to have had the ability to consider it in advance of the proof. It was not suggested that had been done. It was to be expected that Mr Vaquerizo would be asked about the issues to which the literature related namely the level of damage caused to vehicles depending on the speed at impact. Mr Bathgate had given evidence that Vehicle Construction Regulations stipulated that only cosmetic damage to the bumper would be sustained at speeds of up to 5 mph and the inner support beam was designed to protect the vehicle at speeds of up to 12 mph. Those regulations had not been produced and, indeed, were not even referred to in Mr Bathgate's report.

[124] In any event Mr Vaquerizo's evidence on this, taken from the literature which he quoted, as outlined in para [88] above, accords with what Mr Bathgate has said about the bumper being designed to absorb impact at speeds of up to 5 mph and sustain only cosmetic damage. I accept this evidence as being credible and reliable. For the avoidance of doubt, that does not mean that there requires to be a speed of 4.9 or 5 mph before the occupants of the front vehicle suffer injury.

Analysis of evidence relating to whether the collision, on the balance of probabilities, caused the pursuers to suffer loss, injury and damage:

[125] I found both pursuers to be credible. I cannot agree with the defender's criticisms which were tantamount to suggesting their evidence was so good it must be untrue. Their

evidence is backed up by other, independent, evidence which I find to be credible and reliable. I found the first pursuer to be mainly reliable and the second pursuer to be entirely reliable. The first pursuer's evidence that there was a huge metallic bang on impact is probably exaggerating the position slightly albeit nothing turns on that. He had no recollection of attending the police station to give his statement although it seems clear that he did so based on the evidence of PC Beaumont and the second pursuer. He told the police officer that his vehicle had been pushed forward half a foot but told Mr Moran two feet. I accept it is difficult to be precise about such measurements. The passage of time between the accident and being interviewed by Mr Moran no doubt played a part in the discrepancy. It is of note that Mr Bathgate estimated the distance at one to one and a half feet and Mr Vaquerizo estimated the gap at around one foot, both of which are roughly in the middle of the first pursuer's 2 estimates. My impression of the video is that it showed a gap of around 1 to 1 ½ feet.

[126] I accept entirely the evidence of both pursuers in relation to what happened to them on impact. The independent cross checks which exist to satisfy me that their versions are credible and reliable are:

1. The clear gap between the vehicles evident from the video footage, consistent with the Audi having been pushed forward.
2. Mr Vaquerizo's evidence that a) peer-reviewed literature confirms that vehicles involved in a collision at a speed of 4.9 mph will sustain cosmetic bumper damage and that at 2.5 mph no damage will be evident b) that cosmetic damage was in fact sustained to both vehicles and c) the gap between the 2 vehicles arose because of the transfer of energy between the Polo and the Audi on impact which was sufficient to knock the Audi forward.

3. Mr Bathgate's evidence that Vehicle Construction Regulations require bumpers to be able to absorb impacts of up to 5mph to prevent damage to the inner support beam, such speeds causing only cosmetic damage to the bumpers (which includes the cracking to the area adjacent to the Polo's towing-eye aperture).

[127] As explained by Mr Moran, the speed of impact has no direct correlation with the extent of injuries sustained in a low velocity collision. Whiplash injuries, by definition, arise from low velocity collisions. The studies which he is aware of reveal that speeds as low as 2.5 mph have been shown to result in injury. His extensive clinical experience backs that up. He was an impressive witness. I accept his evidence as credible and reliable on this point. It was unchallenged as was his opinion on the nature of the injuries sustained by each pursuer subject to the court accepting that the pursuers' versions of events upon which he based his opinions are credible and reliable. He has, of course, had to take at face value the pursuers' contentions that they were thrown forwards on impact and restrained by the seat belt. There were no lasting injuries which he could objectively assess at the time of interviewing the pursuers but by the same token there was nothing which caused him any concern when considering the medical records and interviewing the pursuers. It is common place for skilled persons to consider the relevant documentation and interview accident victims after they have made a full recovery with a view to preparing condition and prognosis reports.

[128] He clearly described the mechanism of a whiplash injury and, from a medical perspective, was satisfied that both pursuers had suffered whiplash injuries in the accident.

Skilled Person Evidence generally:

[129] Whilst case law was lodged which, in part, was designed to show that Mr Bathgate had been discredited in previous cases, I do not consider that to be particularly helpful to

the considerations in the present case. Each case will turn on its own facts and circumstances. What is relevant is the evidence which the witness offers to the court in this particular case, bearing in mind the need to satisfy the court that the witness does possess the necessary qualifications and expertise on all matters which skilled person testimony is given. As observed by the Supreme Court in *Kennedy v Cordia (Services) Ltd* [2016] UKSC 6 at para 50:

“The skilled witness must demonstrate to the court that he or she has relevant knowledge and experience to give either factual evidence which is not based exclusively on personal observation or sensation, or opinion evidence.”

[130] At para 48 the court stated that “bare ipse dixit” i.e. mere assertion, is worthless.

Quoting from the decision in the Supreme Court of South Africa case of *Coopers (South Africa)(Pty) Ltd v Deutsche Gesellschaft fur Schadlingsbekampfung mbH*:

“An expert’s opinion represents his reasoned conclusion based on certain facts or data which are either common cause or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert’s bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.”

[131] And quoting Lord Prosser in *Dingley v Chief Constable, Strathclyde Police* 1998 S.C. 548:

“As with judicial or other opinions, what carries weight is the reasoning, not the conclusion.”

As outlined below, I do have concerns in the present cases that parts of Mr Bathgate’s evidence are not supported or adequately reasoned and he strayed beyond his area of expertise. I did not have the same concerns in relation to Mr Vaquerizo.

Speed of the Vehicles on impact and the gap:

[132] In his report Mr Bathgate states the speed difference between the vehicles was less than 5 mph and probably 2 to 3 mph. However, this contradicts his parole evidence where he said the speed was probably 1 to 2 miles per hour. No explanation was sought or given as to why there was this difference nor was there any reasoning which the court could rely on to entitle it to accept that evidence. The opinion offered was suggestive of a witness who was trying to justify his position that no damage could have been caused to the Audi without any scientific or authoritative basis. It is entirely speculative. It went beyond the area of expertise of this witness or at least he had not been set up in such a way to satisfy the court that a) he had the requisite qualifications and expertise to offer an opinion on these matters or b) he had carried out any calculations or was relying on authoritative literature which would allow this testimony to be accepted as credible and reliable. His evidence was that the speed of the Polo was insufficient to knock the Audi forward but offered no evidence as to what speed, or indeed level of force, would have been required to do that, speculating that the Audi was heavier and the Polo was incapable of knocking it forward on impact. No evidence was led in relation to the relative weights of the vehicles. The fact of the matter is that a gap between the vehicles was present for all to see, the pursuers spoke to the gap being created when the Audi was knocked forward by the Polo and Mr Vaquerizo spoke to the gap arising from the transfer of energy between the vehicles on impact. For the court to find that these 2 sources of evidence, taken together, should be rejected, realistically something more compelling than Mr Bathgate's evidence that a) there is a gap b) "I can't explain why it exists – it may be down to one or other of the vehicles moving after impact - but it's not as a result of the collision as the speed would not have been enough to move the Audi" would be required. It is of course for the pursuers to prove their case and not for the

defender to disprove but in the absence of credible and reliable evidence to cast doubt on the evidence of the pursuers and Mr Vaquerizo on this issue, I prefer their evidence to what in essence was unreasoned speculation on the part of Mr Bathgate. His evidence may have carried greater weight if he had backed up his opinion by reference to authoritative literature relating to the speed which would be required to shunt the Audi forward a distance of 12 to 18 inches or the level of damage which would result to the vehicles if that force was exerted.

[133] All he can say with any degree of reliability in relation to the speed is that it was unlikely to have been more than 5 mph based on what he said about the Vehicle Construction Regulations and the fact the bumper is designed to absorb impacts of up to 5 mph without structural damage. Mr Bathgate's evidence in relation to both the likely speed of the Polo on impact and why there was a gap is weak and unconvincing.

[134] In short, there are no reliable contradictors to i) the evidence that was given by both pursuers and Mr Vaquerizo that the Audi was forced forward on impact, absent any evidence that either vehicle was moved between the time of impact and the time the video was taken by the first pursuer, or ii) Mr Vaquerizo's evidence, based on the literature quoted in his report, that no damage would be evident when the speed on impact is 2.5 mph and cosmetic damage would be evident at a speed of 4.9 mph.

Damage to Audi

[135] I have a further difficulty with Mr Bathgate's evidence in relation to his theory that the damage to the rear of the Audi was probably caused when the Audi was coupling with a caravan or trailer. If the Audi's tow-ball was in place during a coupling manoeuvre, it is reasonable to infer that it would afford the same level of protection to the rear of the Audi as

it would if the Audi's tow-ball was directly struck by another vehicle. The tow-ball would prevent damage to the rear of the Audi during any coupling manoeuvre. The mechanism of how the damage which he attributed to a coupling manoeuvre could actually arise with a tow-ball in place was not explained and it seems to me that the only 2 realistic explanations for the Audi damage are either: i) the damage was sustained when the tow-ball was not attached to the Audi, or ii) the damage was sustained when the Polo glanced off the tow-ball, striking the area behind and to the left of it. The tow-ball would almost certainly have been in place if the Audi was being coupled to a caravan or trailer. There was no dispute it was in place at the time of being struck by the Polo and therefore the likely explanation, based on the available reliable evidence, is that the damage to the Audi was sustained when the Polo glanced off the tow-ball and struck the rear of the Audi.

[136] Given other evidence to the effect that the defender had steered slightly to the left immediately before impact, the first pursuer's evidence that there was no damage to that area of his vehicle before the impact and the evidence that the damage to the rear of the Audi could not have been sustained if the Polo had hit the tow-bar head on, all of which I accept as credible and reliable, it is probable that the Polo glanced the Audi's tow bar and proceeded forward, striking the area of the Audi which sustained the damage shown in the photographs.

Damage to the Polo's lower spoiler

[137] Mr Bathgate also gave evidence that some damage may have been suffered to the Polo when it struck a kerb on a separate occasion. He based that on having lifted the bonnet. He looked inside where he said he could see damage to both lower and upper sections of the spoiler although he did not photograph the lower section. I have a difficulty accepting that

it was possible to view the underside of the lower spoiler by lifting the bonnet and looking directly down inside the vehicle. It begs the question how the bottom section of this structure could be seen when looking down from the top? Its face would be pointing to the floor and would not be visible from above. Some explanation from Mr Bathgate would have been required. None was given. Mr Vaquerizo stated he did not believe it was possible to detect underside damage by inspecting in this way.

[138] Despite photographing the damage to the upper part of the lower spoiler, Mr Bathgate did not photograph the damage to the underside because he was of the opinion it was not caused by the collision. Yet, he was of the opinion that the upper damage was not caused by the collision either (it was a result of a scuff mark when the Polo had struck a kerb) but had produced a photograph of the upper aspect. In response to being asked why there was no damage to the front aspect of the lower spoiler i.e. the area between the upper and lower aspects, he suggested that there was damage to that area. On close inspection of the relevant photographs, I could not see any such damage to the front aspect. Given the location of the damage to the upper aspect, which is in close proximity to the displaced black trim adjacent to the air grille which in turn is below and slightly to the side of the crack extending from the towing-eye aperture, I am satisfied that all of that damage to the Polo was sustained in the impact with the Audi as the Polo swerved slightly and glanced off the Audi's tow ball.

Quantum

Solatium

[139] The first pursuer sustained a soft tissue injury to his neck. The pain and discomfort was most acute for a period of 2 months. Thereafter there was a gradual resolution and

complete recovery by 6 months post-accident. The first pursuer had a history of neck pain which he had suffered intermittently for 8 years and which prompted visits to a chiropractor when required. However, there was no evidence to suggest any previous condition was causing him any problems immediately before the collision and Mr Moran does not suggest that the accident has exacerbated any pre-existing condition.

[140] The second pursuer developed neck pain and a headache which resolved within 2 weeks.

[141] The authorities on solatium, as listed above, can be summarised as follows:

i. *Windsor v NWH Group Ltd:*

The pursuer suffered a soft tissue injury to his neck and lower back. He was absent from work for 1 week. He took painkillers. His sleep was disturbed. He had made a full recovery by 18 months post-accident. Solatium was agreed in the sum of £4000. Taking inflation into account the award is now worth £5321.

ii. *Smith v Aviva Insurance Ltd:*

The pursuer suffered a soft tissue injury to the lower back and neck. Painkillers were required for 2 weeks and then as required for intermittent back pain. Physiotherapy was undertaken and a full recovery was made just after 4 months post-accident. The solatium award was £3500, now worth £4687.

iii. *Rooney v Aviva Insurance Ltd:*

The pursuer suffered a minor whiplash injury to the neck and upper back. The worst symptoms lasted 2 to 3 days, painkillers were required for 3 weeks, physiotherapy was undertaken and there was a fully recovery by around 2 ½ months post-accident. The solatium award was £750, now worth £931.

iv. *Balasubramanian v UK Insurance Ltd:*

The pursuer sustained a soft tissue neck injury. She had fully recovered by the time she was examined by the orthopaedic consultant instructed in her claim 8 months post-accident. Her pain and discomfort had mostly settled by 2 months. The solatium award was £1800 in July 2023 now worth £1823.

v. *Cooke v Gaylo*:

The pursuer suffered soft tissue injuries to his neck, trapezius muscles and shoulders. He had pins and needles down his arms. Physiotherapy and pain killers were required. There was some restriction in ability to undertake day to day tasks and he required light duties at work for 3 months. He made a full recovery by 6 to 7 months post-accident. The general damages award was £2000 in April 2007, now worth £3274.

vi. *The Judicial College Guidelines 17th Edition*:

a. Chapter 7(c) - minor neck injuries where full recovery takes place between three months and a year has a range of between £2990 and £5310. Where a full recovery is made within three months awards are up to £2990.

b. Chapter 14 – minor injuries where there is a complete recovery within 28 days has a range of awards between £840 and £1680.

Decision

[142] The pursuers have proved, on the balance of probabilities, that they have sustained losses as a result of the road collision with the defender's vehicle. In relation to quantification of those losses, each case turns on its own facts. I am of the opinion that an appropriate award for solatium for the first pursuer is £3500 plus interest at the rate of 4% per annum from 13 February 2022 until 13 August 2022 (£69.81) and thereafter at the rate of

8% per annum to date (£540.82). Interest therefore amounts to £610.63. No separate award of inconvenience is made. The first pursuer's solatium award recognises that he had to deal with car repairers, insurers and police in the aftermath of the accident.

[143] The appropriate award for the second pursuer is £900 with interest at the rate of 4% per annum from 13 February 2022 until 27 February 2022 (£1.38) and thereafter at the rate of 8% per annum to date (£172.01). Interest therefore amounts to £173.39.

Hire Charges and Repair Costs

[144] I am of the view that the sums sought for hire charges (£1189.75) and repair costs (£1263.17) are reasonable and have been incurred as a direct consequence of the accident.

[145] I shall therefore grant decree in case number PN2280-23 against the defender for payment to the pursuer, Callum Fraser, in the sum of £6563.55 inclusive of interest to 18 July 2024. I shall find the defender liable to the pursuer in the expenses of process, as taxed. Mr Carlo Vaquerizo and Mr Matthew Moran are certified as skilled persons and I shall sanction the cause as a suitable for the employment of junior counsel.

[146] I shall grant decree in case number PN2279-23 against the defender for payment to the pursuer, Brynhildur Hallgrimsdottir, in the sum of £1073.39 inclusive of interest to 18 July 2024. I shall reserve the question of expenses in Ms Hallgrimsdottir's case as there may be issues to be discussed given the level of award and the fact two proofs ran together. If parties are unable to agree a position then they should request a hearing on expenses.