Guildhall Chambers Personal Injuries Defendant Seminar
9th June 2010

CREDIT HIRE ANSWERS

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Background Facts

Mr X (a wealthy young novelist) and Mrs Y are involved in a road traffic accident when Mrs Y pulls out from a minor road into the path of Mr X's clapped-out 15-year-old BMW. They exchange details and drive away from the scene of the accident.

Five days after the accident Mr X enters into an agreement with Z Cars (a credit hire company) for a brand-new BMW 4x4 at £150.00 per day.

Mr X uses the replacement vehicle to run his daughter to and from school, to go to the supermarket at the weekends and for getting to and from the odd social event. The school is ten minutes' walk down the road. The supermarket is a few miles from his house.

The day after signing the agreement Mr X receives a message on his answer-phone from Mrs Y's insurer offering to take care of the repairs to his vehicle and to provide him with a replacement vehicle. He ignores the message.

The day after that Mr X receives a letter from Mrs Y's insurer reiterating the offer. He puts the letter in a drawer and forgets about it.

One week after signing the agreement Mr X takes his vehicle in for repairs.

The vehicle is inspected by an engineer 10 days after it goes in for repairs. The engineer estimates that the repairs will take 4 working days.

Two weeks after the vehicle goes in for repairs Mr X calls the garage to ask when it will be ready for collection. The garage tells him that they don't know because they are waiting for a part to be shipped over from Germany.

Five weeks after the vehicle goes in for repairs the garage calls Mr X to tell him that his vehicle will be ready for collection in a week's time. Mr X arranges to collect his vehicle in three week's time. (He is about to go to the USA for a book tour.) He calls Z Cars to arrange for the return of the replacement vehicle on the same day.

Mr X collects his vehicle on the arranged date. Z Cars collect the replacement vehicle one week after the arranged date.

Mr X now wishes to claim the hire charges on the replacement vehicle from Mrs Y's insurer. Liability is not in dispute.

Questions

1. Disregarding the offer from Mrs Y's insurer, what are the prospects of Mr X establishing a need for a replacement vehicle?

   The victim of a tort is entitled to be put in the position which he would have enjoyed but for the accident. However, it is for him to prove that he needed a vehicle, and if he is found to have been tempted into the unnecessary hiring of a vehicle then his claim will fail in its entirety. (*Giles v Thompson* [1993] 3 All ER 321 at 363 and 360-361)

   Here, Mr X appears to have a genuine need for a vehicle: for the school run, to go to the supermarket, and for socialising. However, it may be worth inquiring whether Mr X has access to another vehicle, for instance, whether he has a partner or wife with a car and whether he could have used this instead.

2. Would it have made any difference if Mr X had just used the replacement vehicle to run his daughter to and from school?

   Mr X might have a good reason for wanting to run his daughter to and from school by car: perhaps she has a disability, or perhaps the twenty-minute round trip on foot (twice a day) would take up valuable time which could otherwise be spent working on his latest novel.

3. Would it have made any difference if the replacement vehicle had remained unused in Mr X's garage throughout?

   The examples given in *Giles v Thompson* of scenarios where a claimant would fail to establish need include where he is in hospital or on holiday and so would not have been able to use the replacement vehicle.

   Mr X might have wanted a replacement vehicle to hand, for instance, in the event of an emergency, which would constitute a legitimate need. However, he might have difficulty establishing a need for a replacement vehicle whilst he is in the USA for his book tour. (See 7 below.)

4. What are the prospects of Mr X successfully arguing that he is entitled to a brand-new BMW 4x4?

   A claimant is entitled to hire an equivalent vehicle, but that is subject to the duty to mitigate. (*Clark v Ardington* [2002] 3 WLR 762 at paras 129 to 133, and *Lagden v O'Connor* [2004] 1 All ER 277 at para. 27) If a claimant who drives a 'prestige' vehicle hires an equivalent vehicle and establishes a need for it then the cost of hiring that vehicle is recoverable. If, however, a claimant who drives a 'prestige' vehicle hires an ordinary vehicle and is content with it then he can only recover the cost of that vehicle.

   Mr X, then, must establish that his clapped-out 15-year-old BMW is a 'prestige' vehicle and that he needed another 'prestige' vehicle whilst it was being repaired. If he would have been content with an ordinary vehicle then he should be restricted to the cost of hiring an ordinary vehicle.

   In the former scenario, the question arises how to measure the equivalence of vehicles, i.e., is it a matter of age, retail price, make and model, size? In *Lagden v O'Connor*, the House of Lords indicated that equivalence is a matter of size and power. This may seem unsatisfactory, but it avoids the

awkwardness of measuring equivalence by reference to, say, age or retail price where the claimant's vehicle is likely to be older than the hire vehicle.

On this basis, a brand-new BMW 4x4 is unlikely to be deemed equivalent to a clapped-out 15-year-old BMW.

5. What are the prospects of Mr X successfully recovering damages at the £150.00 daily rate?

   Typically, recoverable damages are limited to the 'spot rate' quoted by non-credit hire companies, e.g., Avis, Hertz, etc. (*Dimond v Lovell* [2000] 2 All ER 897) However, where a claimant is impecunious then recoverable damages include the additional services provided by credit hire companies, e.g., the availability of credit, assistance with repairs, relief from the trouble and anxiety of pursuing a claim, etc. (*Lagden v O'Connor*, para. 6) Impecuniosity is defined as the inability to pay hire charges without making unreasonable sacrifices. (*Lagden v O'Connor*, para. 9)

   Mr X is a wealthy young novelist. He is likely, therefore, to have sufficient financial means to have been able to pay the 'spot rate' without making unreasonable sacrifices, in which case he will be unable to claim at the £150.00 daily rate. However, his age may also be a factor: non-credit hire companies usually have age restrictions, which means that he may have had no choice but to use a credit hire company.

6. What evidence will Mrs Y's insurer require if it is to argue successfully for a reduction of the daily rate? What problems might it encounter in deploying this evidence?

   Mrs Y's insurer will require documents showing Mr X's financial means in order to establish that he is not impecunious. It will also require 'spot rate' evidence in order to show that Mr X could have hired a replacement vehicle more cheaply. In lower value cases, the latter may take the form of internet printouts accompanied by a witness statement from the person who obtained

the evidence. In higher value cases, it should be in the form of a report by a rates investigator, e.g., Autofocus.

Problems with deploying the latter can include: such evidence tends not to show availability and rates for the actual dates of hire, leaving the claimant to argue that the evidence is unreliable (though in practice the courts tend to be sceptical towards this argument); such evidence might show that the CDW may not be reduced to zero, whereas that on the credit hire vehicle may be (though in practice the courts tend to be sceptical towards this argument too.)

7. What are the prospects of Mr X successfully claiming for the full period of hire?

In *Giles v Thompson*, the House of Lords indicated that 'judges should look carefully at claims for hiring, both as to their duration and as to their rate. This will do much to avoid […] inflated claims'. In *Clark v Ardington*, the Court of Appeal gave more practical guidance on the question of duration, specifically in relation to delay. Following *Mattocks v Mann* [1993] RTR 13, it held that there must be a supervening event or failure to mitigate on the part of the claimant or someone for whom she is responsible in order for the defendant to obtain relief of a period of hire. On the question of delay in repairs, it held that where the claimant has acted reasonably and placed her car in the hands of respectable repairers and there are no supervening events, only foreseeable delays in order, say, to obtain parts, then the loss caused by such delays must fall on the tortfeasor.

In the case of Mr X, there are several discrete delays:
One-week delay between the hire period start-date and taking the vehicle for repairs: If Mr X delayed unreasonably in taking his vehicle for repairs then he may be deemed to have failed to mitigate his loss and so prevented from recovering damages for this period. However, he may have a good reason for the delay, for instance, if the repairing garage couldn't take his vehicle immediately and he was concerned that, although he could still drive it, it was not legally roadworthy.

10-day delay before the engineer inspects the vehicle: No reason is given for the delay. It may or may not be the fault of the garage, but it is certainly not Mr X's fault and so he should not be prevented from recovering damages for this period.

The 'delay' arising from the discrepancy between the estimated and actual periods required for repairs: This delay arises from the need to ship a part from Germany. In other words, it is nobody's fault and so Mr X should not be prevented from recovering damages for this period.

Two-week delay between the completion of repairs and collecting the vehicle: Mr X has a good reason for the delay: he is about to go to the USA for a book tour. It may be argued, however, that he should have arranged for the return of the credit hire vehicle during this period. (See *Giles v Thompson* above.) Whether or not this argument would succeed may turn on matters such as the extent of any inconvenience this might cause or the necessity for any replacement transport arrangements whilst he is away, e.g., his partner or wife may need the vehicle for the school run, to go to the supermarket, etc.

One-week delay in collecting the replacement vehicle: This is the fault of Z Cars not Mr X. Accordingly, he should not be prevented from recovering damages for this period.

8. What are the prospects of Mrs Y's insurer successfully arguing that in failing to take up its offer of a replacement vehicle Mr X failed to mitigate his loss?

The general principle: Claimants must take all reasonable steps to mitigate their loss. (*McGregor on Damages*)

The message on the answer-phone: The practice of cold-calling is inappropriate and should not be pursued. (*Copley v Lawn* [2009] EWCA Civ 580 para. 9) Mr X was entitled, therefore, to ignore the message.

The letter: Claimants should send letters of offer to their agents, i.e., solicitors, brokers, insurers, etc., and the court will then consider the combined position

of claimants and their advisers in deciding the question of mitigation. (*Copley v Lawn*, para. 16) Mr X was not entitled, therefore, to put the letter in a drawer and forget about it.

The contents of the offer: Any offer must contain all such information as will be relevant for the claimants and their advisers to make a reasonable response. This includes the cost to the insurer of providing the vehicle. If it is clear that the insurer will be paying less for the vehicle than the claimant would pay for a vehicle from a credit hire company, then *other things being equal* it *may* be the case that a claimant should accept the offer. (*Copley v Lawn*) Why was the Court of Appeal so reticent in its decision ('other things being equal… it may be the case…')? Presumably, because the offer must include further information, e.g., that the offer is for a like-for-like vehicle, that the vehicle will be free for the claimant, the position regarding delivery and collection, additional drivers, collision damage waiver, etc. Also, because the tone of the letter may influence the decision of the court; in *Copley*, the Court of Appeal criticised the letter from KGM Policies at Lloyds for its 'unpleasant threatening tone' and states that '[it] is tempting to say that any recipient should be entitled to ignore it completely.'

The timing of the offer: In *Copley*, the Court of Appeal found that it was positively unreasonable to have expected a claimant to take the initiative, without advice, of cancelling an agreement that she had already made just so that she could get a different free replacement vehicle. Presumably, had she received advice then the position may have been different.

9. Would it have made any difference if the offer of a replacement vehicle had been made before Mr X entered into the agreement with Z Cars?

In *Copley*, the Court of Appeal found that a claimant is not obliged to enter into negotiations with the representatives of a defendant who has negligently damaged his vehicle with a view to clarifying a complicated letter of offer when he has every expectation that he will be able to obtain a free replacement vehicle by other means. Presumably, had the letter of offer not

been so complicated as to require clarification then the position may have been different.

10. If such an argument were to succeed, can Mrs Y's insurer argue that Mr X should be entitled to nothing?

It cannot be correct that a claimant who rejects a defendant's reasonable offer is entitled to nothing, since the claimant has still suffered a loss. (In other proceedings, if a defendant makes an open monetary offer of a sum of money and that offer is (unreasonably) rejected then the usual result is that the claimant will still recover her damages but not the costs of the proceedings.) The claimant is entitled to recover at least the cost which the defendant would have incurred in