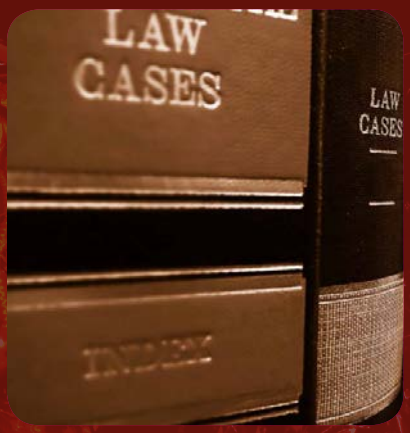
JMK Solicitors



GASLIGHTING II:

Mitigation Arguments in Loss of Use Claims

In the first issue of what is unexpectedly turning into a series on the subject, I raised the spectre of 'Gaslighting' techniques being deployed by Defendant insurers in relation to their mitigation arguments in claims being made by non-fault parties to accidents.

In case you haven't read episode one, I will repeat the definition that I quoted from Brian Duignan at the Encyclopaedia Brittanica[1]:

'…attempting to convince the victim of the truth of something intuitively bizarre or outrageous by forcefully insisting on it or by marshalling superficial evidence;…dismissing the victim's contrary perceptions or feelings as invalid or pathological; questioning the knowledge and impugning the motives of persons who contradict the viewpoint of the gaslighter;…'

Essentially, I was arguing that you have to see past the superficial attractiveness of the insurer's proposition to work out how they have tried to mislead you so that you do fall over in the darkness.

So, in this instalment I am going to look a bit further into a specific area of the law where gaslighting has caused many a practitioner and indeed, Judge, to disappear down a metaphorical 'rabbit hole' in what has arguably become the greatest gaslit war of attrition of the last quarter century.

The area to which I refer is a niche one, namely, the reasonable duration of hire of a vehicle. Duration of hire is often contested by Defendant's insurers in a loss of use of a motor vehicle case in circumstances where the Claimant's car has been repaired.

Despite the legal authority I am about to quote, allegations of a failure to mitigate loss with regards to repaired vehicle hire duration is probably the most frequently raised matter in a defence- and that is gaslighting in action!

Whilst it's a case that is best-known for dealing with intervention offers of hire by insurers, and less known for an admonishment against insurer's practice of telephoning non-fault parties with said offers- which insurers have simply ignored in the decade since- Lord Justice Longmore said the following in Copley v Lawn [2009] EWCA Civ 580:

it's a case that is best-known for dealing with intervention offers of hire by insurers, and less known for an admonishment against insurer's practice of telephoning non-fault parties with said offers

> *"6. Despite Mr Butcher's recognition that the doctrine of mitigation can have a part to play in cases like the present, judges should, in my view, be reluctant to become too readily involved in complicated mitigation arguments since the major protection for the defendant and his insurers is that the claimant can only recover the "spot" or market rate of hire as explained in Dimond v Lovell. One rarely encounters mitigation arguments in ordinary sales of goods cases precisely because the relevant statute provides that damages are to be prima facie assessed by reference to the market value of the goods. The reason is that it is usually open to the innocent buyer or seller to go into the market to acquire other goods or dispose of the contractual goods and that is what he ought to be doing by way of mitigation of his loss. There is no reason why loss of use claims based on the hire of goods should be any different. I would, therefore, look with some scepticism on arguments that an innocent claimant should take further steps (over and above ensuring that he is not hiring a replacement car for more than the market rate) by way of mitigating his own loss or protecting the tortfeasor's position."*

And that's a pretty earth-shattering concept to get your head around if you have spent the last twenty-five years, as I have, fighting issues of duration in vehicle hire claims.

Think of how much worse it is of course, if you already knew what Longmore LJ had said and you see case outcomes where hire days have been deducted from the total period of hire, with the **Claimant/Plaintiff's failure to mitigate being the** supposed justification.

On more than one occasion (in reality, on about twenty) I have felt the urge to head down to the relevant Courthouse and immolate myself in the lobby in protest.

So far I have managed to control myself and the feeling of exasperation and despair burns away as a more positive outlook comes upon me, a proverbial phoenix rising from the ashes in my head!

I recently edited the advice guide issued by Northern Ireland accident management company, CRASH Services Limited[2], entitled 'Your Rights After a Road Traffic Accident'[3]

I think it would be illustrative to reproduce what was said in that document as to what options a person might take in the face of an accident occurring to show that there are a range of possible actions that can be taken. All of which are objectively reasonable avenues to pursue for the person who has had an accident.

The insurer's gaslighting strategy starts off with allegations that one of the other courses of action should have been taken by the injured party, regardless of what they had chosen to do. For example, if you chose to pursue them directly for your losses they will suggest that you should have made a claim from your own funds or your own insurance.[4]

In understanding how best to deal with questions of mitigation of loss of use claims in car repair cases, it is vitally important that one appreciates that the burden upon a Claimant/Plaintiff is low and choosing any reasonable course of action is all that is required. A claim should not be reduced in circumstances where the non-fault party's actions fall into one of those categories, regardless of whether with hindsight some other course of action may have resulted in a lesser claim.

1. When you have an accident in YOUR vehicle it is YOUR choice how you proceed to include:

- Whether you have your vehicle fixed or not;
- Who fixes it;

And

- How you fund those repairs.

2. You can choose -

- To make a claim under your own comprehensive motor insurance policy;
- Or to use the services of an accident management company;
- Or to instruct a solicitor;
- To pursue a claim by yourself against an at-fault driver;
- Or simply to pay for repairs yourself.

3. Those representing you and the insurer of any other driver(s) involved in the accident will usually investigate the accident's circumstances. They may assess with you who they consider to be responsible for the accident.

4. You should make no admission of liability before that process has been properly concluded. This is because it may affect your no claims discount in future years, or you may have to pay a policy excess which may not be recoverable from the insurer of the other driver.

This explains Longmore LJ's comments in ***Copley.***

Delving into the minutiae of each day of the hire will of course flag-up incidents where, in a perfect world, the hire period could have been shortened. With the benefit of hindsight, when hire periods are being picked apart by the Defendant's legal representatives in the rarefied setting of a court, makes this perfectly efficient world seem all the more plausible.

But we do not live in such a world.

Counsels of Perfection do not exist and should not be insisted on by gaslighting insurers. We must be mindful, and remind others to be mindful, and leave provision for the facts, practicalities and inconveniences of living in the real world. This is both a reasonable and pragmatic approach to take, and one that is necessary when considering vehicle hire cases.

So, in terms of vehicle hire, what I am trying to relay is that, unless there is some reason to believe that there is a deliberate or negligent matter that arises when a person has taken an objectively reasonable course of action, rather than one that is merely incidentally avoidable, the hire period should almost invariably be awarded in full. The case law recognises that a Claimant/Plaintiff should not be penalised for placing its vehicle in the hands of respectable repairers, particularly in circumstances where there were no supervening events that have unjustifiably delayed the vehicle repair.[5]

All of the case law that I have studied on the issue points to that inevitable conclusion[6] and the only explanation for the different outcomes that arise in unreported decided cases is answered by the ill-effects of gaslighting making it difficult for Judges to see the law the way Longmore LJ sees it.

As an appendix to this mini-thesis I look at the particular considerations which have been made by the Judiciary in cases where a Claimant/Plaintiff has not had access to a credit repair service of the type offered by CRASH Services.

The remainder of the main body of this article will look at the practical effect on the duration of a hire period where such a service has been availed of.

When I started out my career, over twenty years ago, and issues of timescales of the periods of

[1] https://www.britannica.com/topic/gaslighting

[2] CRASH is a subsidiary of Granite Financial Limited, the totality of the shares of which are owned by GFL-SPV LTD which is 100% owned by me.
[3] https://www.crashservices.com/wp-content/uploads/2020/10/CRASH-Services-Advice-guide-for-accident-victims.pdf
[4] McCauley v Brennan & Anor [2017] NIQB 41 (26 April 2017)
[5] See Burdis v Livsey [2002] EWCA Civ 510 [6] See Mattocks v Mann: CA 2 Sep 1992; Clark v Tull (t/a Ardington Electrical Services) [2002] EWCA Civ 510 ; Stevens v Equity Syndicate Management Ltd [2014] EWHC 689 (QB)

> Following a recent external audit, CRASH Services was acknowledged by experts in the credit hire field as being 'best in class' with hire durations that were on average 43% shorter than other accident management companies assessed.

action and alleged inaction were raised against my clients, Judges had a general rule of thumb that 28 days was a reasonable period of time within which to 'do things.'

This is echoed in the reasoning of the Northern Ireland Court of Appeal in a credit hire case when assessing what they termed 'the maximum period of justifiable hire'[7].

More recently in a judgement, that incidentally had nothing to do with credit hire and mitigation, Master McCorry of the Northern Ireland High Court[8] said the following:

"The defendant acted expeditiously when the default judgment was served on him on 9 August 2017, attending with his solicitor on 14 August 2017 with this summons being issued a month later."

It is forcefully reiterated that it seems to the writer that only in lower level credit hire claims does the 28-day period appear to no longer apply – and only because of gaslighting.

It is my opinion, supported by the legal authorities, that a person acts reasonably in availing of the services of experts in the field in which they require assistance. And further that, if after an accident they take up to 1 month to figure out which service and method of reinstatement to proceed with, they should still be presumed to be reasonable.

Thereafter, they should be prima facie held to be reasonable but, at that stage, they may be required to put forward an explanation for the additional period of time spent in hire.

Where a person puts themselves in the hands of a reputable organisation as expeditiously as possible following their road traffic accident, they are automatically mitigating the justifiable loss by up-to four weeks.

If it is acceptable to choose any such provider of services, regardless of whether they provide credit repair services, then choosing a company which does provide such a service should be a further indication of the reasonableness of the choice made.

What I am suggesting is that if I have a range of options open to me, each of which will result in different, but all reasonable, outcomes; then there is no requirement for a Court to nit-pick over every day of the hire duration of the particular option chosen.

This is because even if there was some extreme view taken to indicate a partial failure of the service provider, if that ultimately would have made no difference to the claim being made via another service provider, then there has been no failure to mitigate and no need to reduce the claim made.

To do so is a Draconian punishment on the Claimant/Plaintiff, and in a credit hire scenario, indirectly the provider of the hire.

Following a recent external audit, CRASH Services was acknowledged by experts in the credit hire field as being 'best in class'[9] with hire durations that were on average 43% shorter than other accident management companies assessed.

It would be a logical assumption therefore that if a person elected to have CRASH arrange their repairs that they can be assured that on most if not all occasions the vehicle will be repaired in a shorter period than had they chose another supplier.

It would not be a failure to mitigate loss to have chosen one of the other options open to the non-fault party.

It is only because of gaslighting that the Defendant insurer manages to convince a Claimant/Plaintiff and the court that they should go through each and every day of the hire duration, asking a Claimant/Plaintiff to justify each day of hire and all of their choices throughout the hire, with a view to convincing the Judge on the day to deduct days from the hire period as the Claimant/Plaintiff could have done more to mitigate their loss.

Claimant/Plaintiffs using CRASH cannot have their hire durations compared against an ideal which is entirely theoretical and which doesn't exist in the real world.

Further, if there is no evidence that another option would have resulted in a lesser hire duration, then it is surely an erroneous approach to argue that the duration of hire should be reduced because a Claimant/Plaintiff has failed to live up to a hypothetical ideal put forward by insurers. An ideal that no one in 'real life' actually performs to, or is able to perform to, and no example of which can be exhibited.

Just because everything did not work perfectly, does not mean it has to be criticised.

Regulated defendant lawyers, as well as members of the judiciary, should be mindful of the psychological impact that such allegations, arguments and decisions have on the individuals who work in accident management companies and who are constantly being criticised and told that their work is poor, inefficient and they are somehow disreputable.

It is a constant 'drip-drip' torture effect that is foisted upon those hardworking individuals by those who have not experienced the internal workings of the industry on the ground and who would likely never personally be able to meet the standards they apparently demand of others.

It is akin to the issue that arises when assessing vehicle repair labour times. Evidence of labour times obtained from computer based estimating systems are created in laboratory conditions, with operatives working on new undamaged cars. This is not comparative to the reality that repairers in a bodyshop face when working on damaged and aged vehicles.

To expect them to meet or beat the computer-generated labour times is to set them up for failure. Some judges have given recognition to the fact that, in some circumstances, repair garages were overworked at the relevant time of repair and that the vehicle could not have been repaired in a more expeditious fashion[10]. However, many Judges will now more readily accept the computer-generated labour time evidence without giving the appropriate weight to the circumstantial evidence of the subject repair.

A lack of empathy by judicial decision makers for people whose job it is to manage claims and repair cars is an oppressive side-effect of gaslighting for which the judiciary cannot presently be blamed.

However, I would like to hope that in some way my efforts at introducing the 'LED' approach are going to help change the situation for the better for all concerned.

Not least of course, to change the Judge's perspectives on the matter, who have to listen to many hours of discussion about vehicle repair duration because they have been convinced into thinking it is actually required of them.

So remember:

L - Look Out for Gaslighting

E - Educate yourself and others that it is happening

D - Develop a confidence in your own version of reality

November 2020

Jonathan McKeown B. Eng (Aero) B Leg Sc. CPLS

JMK SOLICITORS

One Edward Street,
Belfast
BT1 2LS

Law@jmksolicitors.com

[7] See Clarke v McCullough [2013] NICA 50 (19 September 2013), Para 21
[8] First Central Insurance Management Ltd v Singleton [2019] NIMaster 10 (12 December 2019) , para 1
[9] http://crashservices.com/independent-audit-best-in-class-2020/
[10] See 6.

Appendix – Principles of Mitigation of Hire Duration when Liability is disputed – including impecunious, (non-financially resilient) Claimant/Plaintiffs

When a party suffers a loss of their vehicle after an accident, the availability of independent companies who can offer credit hire and possibly credit repair facilities is limited where liability for the accident is not clear-cut. Ultimately liability may be determined in the person's favour, however where the other party or their insurer disputes liability it will leave the aggrieved party at a disadvantage in accessing credit facilities. They may be able to obtain a hire vehicle but not a repair service and as a result of the liability dispute, the insurer of the other party may not make a payment for the total loss of their vehicle even on a without prejudice basis.

The question of how a court should determine the reasonableness of an injured party hiring a vehicle for an indeterminate period of time awaiting liability to be determined has been examined in two Court of Appeal decisions in England and Wales, a Court of Appeal decision in Northern Ireland and a Northern Ireland High Court decision.

The following paragraphs distil the decisions of the various courts, where what appears to matter is the clear communication of the Defendant's view of liability that they have none, and the financial circumstances of the Plaintiff. So whilst the Plaintiff could not be expected to avail of any pre-existing policy of insurance in order to mitigate their loss, if they had the financial resources to replace or repair the vehicle, they may be expected to do so. However, each case is fact specific.

Appendix

- Case A: Opoku v Tintas [2013] EWCA Civ 1299 (p2-6)
- Case B: Clark v McCullough No. [2013] NICA 50 (p7-11)
- Case C: Zurich Insurance Plc v Umerji [2014] EWCA Civ 357 (p12-13)
- Case D: McCauley v Brennan & Coulter [2017] NIQB 41 (p13-18)

Case A:

Opoku v Tintas [2013] EWCA Civ 1299

Judgment

"Lord Justice Beatson:

Factual background

…

After the accident on 18 June 2010, Mr Opoku contacted Matrix. Matrix arranged for him to have a series of replacement cars on hire and for the Seat to be stored in Preston, presumably at or near its base. It extended credit to Mr Opoku and pursued his damages claim on his behalf...The Seat was inspected by an independent assessor, IP Assessors, on 25 June. The likely cost of repairs was assessed at around £3,400 plus VAT and Mr Opoku was informed of this assessment. He did not have the car repaired and the vehicle was, as I have stated, taken for storage in Preston at a daily cost of £25 plus VAT.

Proceedings were issued in August 2010. Zurich disputed liability from the outset... The defence to the claim was that the accident had been caused or contributed to by Mr Opoku's negligent driving, the damage was at least partly due to causes unrelated to the accident …During this period Mr Opoku continued to hire replacement vehicles from Matrix and to sign fresh agreements from time to time... The car was not repaired until Zurich had made its without prejudice payment. The repairs were carried out by a garage in Tottenham between 21 March and 3 April 2012 and on 10 April 2010 Mr Opoku returned the last hire car to Matrix.

The judgment

1. The judge made the following findings:

2. The accident had been entirely caused by the negligent driving of Mr Tintas who had failed to attend at trial.

3. The entirety of the damage to the Seat was the result of the accident on 18 June and was thus damages for which Mr Tintas was liable to compensate Mr Opoku.

…

4. As to Mr Opoku's financial position at the time of the accident, the judge stated his bank account showed a balance of £1,300, he had debts of £20,000 outstanding on a bank loan and £1,026 outstanding on his credit card. She found (8E-F) that because of his financial position Mr Opoku was entitled to recover the full amount of the car hire charges at the higher credit rates charged by companies such as this and not the lower spot rates that are available to a cash payer. She concluded (9A-C) that Mr Opoku's duty to mitigate did not require him to ask family or friends for help or to go into debt in order to mitigate the damage caused by Mr Tintas in respect of car hire. Because Mr Opoku was "legally impecunious" he was entitled to recover vehicle hire charges at the higher credit rate for the allowable period of hire.

5. As to the allowable period of hire, the judge stated (transcript, page 10B-C):

> "as the days, weeks and months went by, he was incurring substantial hire charges on credit. His car was languishing unrepaired 300 miles or more away in Preston, Lancashire, where Matrix's offices are. He was under a continuing duty to mitigate his losses, which by then were huge, at least by comparison with the damage to his car. The car was not a write off, but it could not be driven, still less as a minicab, unless the repairs to the back door had been done, door and bumper."

She concluded that, over the eight months between June 2010 and February 2011, Mr Opoku could have obtained the means to have the car repaired by saving small sums regularly and/or using his credit card facility, and that by late February 2011 he should have decided to have his car taken out of storage and sent for repairs, "It would not have been reasonable to have expected [Mr Opoku] to have called for his car to come out of storage to be repaired until at the earliest Zurich's engineer had visited", but once the engineer had visited and examined the car Mr Opoku "ought to have called for it to be delivered to his local garage, as he did a year later, to be repaired": transcript, 10D-G. The judge concluded (transcript 11A-B) that in her view "it was unreasonable for [Mr Opoku] to have continued to hire a substitute vehicle after" the engineer's inspection. She did not consider that waiting until the insurers advanced the cost of repairs was consistent with Mr Opoku's duty to mitigate given the relatively low cost of repairs and the extremely high cost of credit hire charges.

…

Discussion

…

Ms Georgiou's submissions were focused on the second ground. She submitted that there is inconsistency between the finding that Mr Opoku was "impecunious" in the relevant sense in the context of the cost of car hire on the credit hire rates, but had failed to mitigate by not saving sums of money and extending his credit limit so as to have the car repaired after the insurer's expert had inspected it….There are two elements to this part of the appeal. The first concerned the basic principle of whether there came a point at which Mr Opoku could reasonably be expected to fund the repairs. The second is, if a date did come, when was it reasonable for him to fund them, and was the judge's finding that the date was March 2011 sustainable?... In respect of the particular item of damage claimed it is a question of fact and evaluation as to whether Mr Opoku had no choice and whether what he did was reasonable or whether what was reasonable was for him to fund the repairs.

….

The determination of whether it was unreasonable for Mr Opoku not to make plans to enable him to finance the repairs but to await the resolution of this matter has a significant impact on the damages recoverable. I, of course, accept Ms Georgiou's submission that in determining reasonableness one does not apply the clarity of hindsight reasoning but one determines it at the time. But the judge, in my assessment, did determine, as at the time.

…

In relation to the hire of a car, the judge concluded that seeking family support or a commercial loan would be an unreasonable sacrifice, but in relation to the repair the judge concluded that, within the eight-month period involved, Mr Opoku could and should have made provision to fund the repairs, particularly when the hire charges were mounting and there was no obvious end point to them.

….

On the evidence before the judge, I consider that she was entitled to reach the conclusion that she did in respect of the funding of the repairs. I deal first with the question about whether she was entitled in principle to conclude that there came a time when it was reasonable for him to fund them and I will then deal with the March cut off point.

As to the first, the judge did not say that it would have been reasonable for Mr Opoku to fund repairs straight after the accident. As to whether it was reasonable for him to seek to make some provision to enable him to undertake them once it became clear that the claim was fiercely contested there was evidence before the court as to his means and those of his wife. There was evidence of their earnings, his bank account, his credit card and the increases in the limit on his credit card from £1,200 to £3,200 in November 2010, and to £4,200 in May 2011. … There was also evidence before the judge as to the amount that Mr Opoku was saving because, by using the hire cars, he did not have to pay for the insurance, servicing and maintenance of his own car, although the latter was unquantified. The judge accepted that Mr Opoku was not living an extravagant style….

As to the cut off date, I was at one stage attracted by the submission that there was no justification for the March date. There is no logical connection between the date on which Zurich's engineer inspected the Seat and the date on which Mr Opoku would reasonably have been able, by a combination of saving and borrowing, to fund the repairs. The position after the inspection was that some months passed before Mr Opoku's representatives were informed of the report. During that time Mr Tintas had been subjected to sanctions for non compliance with standard fast track directions for disclosure, and only on 18 August did His Honour Judge Banks give him permission to rely on Zurich's engineer's report. Ms Georgiou's submitted that, assuming her primary argument was not successful, it was only then that Mr Opoku was obliged to consider his position. She contended that in those circumstances he was entitled to wait until his own engineer had inspected the car before repairing it. His own engineer only did so in October 2001, and for those reasons, she submitted, the judge was not entitled to take the March cut off date.

…

Other judges might have considered that the relevant date was November 2010, the date at which it became clear that there was a real dispute and the vehicle was to be subjected to a forensic inspection. …in the light of that background and the evidence as to Mr Opoku's financial position, the judge was entitled to conclude that Mr Opoku could reasonably be expected to have found the means to have the car repaired by a combination of his existing credit card facility, the amount saved by not having to pay for insurance and maintenance, and by saving modest sums over the eight month period.

This was not the case of a person who was being asked to put himself in a debt position where the alternative is not to be in debt, or not to increase his debt….. I have referred to Lord Nicholls' statement that lack of financial means is almost always a question of priorities and I cannot conclude that it was unreasonable and out with the judge's legitimate scope to find that given that position this choice of priorities was not reasonable on the part of Mr Opoku.

By February 2011 Mr Opoku had known for some months that Mr Tintas's insurers wanted to have his car inspected, but did nothing to instruct his own engineer. He was entitled not to do anything. Zurich's inspection took place at the beginning of February. The judge gave a period of four weeks from that time which would have allowed Mr Opoku to arrange or to begin to arrange for his own forensic inspection. At the end of the four weeks there was no indication that the insurers had changed their stance that which was strongly contesting the claim.

For these reasons I have concluded that the learned judge did not fall into error in the ways in which it is submitted that she did, that her order should be undisturbed and that this appeal should be dismissed."

Case B:

Clark v McCullough No. [2013] NICA 50

"GIRVAN LJ (delivering the judgment of the Court)

…

Background to the Case

[4] On Saturday 10 April 2010 the plaintiff was driving his Honda Accord car in Newtownabbey. As he was passing the defendant's parked car, the defendant opened her car door causing damage to the plaintiff's car. Both parties appear to have been amicable at the incident although neither admitted liability. It would appear to be common case that the damage to the plaintiff's vehicle was such as to render it incapable of being driven but it was capable of repair and was fully drivable after repairs were carried out. The defendant's case was that the plaintiff was at fault in driving into her opening door. The plaintiff's case was that the defendant opened her car door and hit his car in circumstances which he could not avoid. The trial judge determined the issue of liability at an earlier stage than the issue of quantum. In an ex tempore judgment given on 10 December 2012 he concluded that the defendant was entirely responsible for the damage to the plaintiff's car.

…

(b) On 14 April 2010 the plaintiff entered into a credit hire agreement with AX for a hire car pending repair of his own vehicle.

(c) On 19 April 2010 the plaintiff emailed AX indicating that he had received a motor accident report form from his insurers and asking whether he should complete it or whether AX would deal with it. AX replied by email saying that the plaintiff could respond to the letter if necessary but to ensure that the insurers did not deal with the claim in relation to the repair to the vehicle as AX were claiming from the at fault insurance company.

d) The fact that the defendant was disputing liability was communicated to AX (on 20 April 2010, on 26 and 28 April 2010). Thereafter liability remained in dispute.

(e) On 13 July 2010 Albany Assistance Limited, an accident management company acting on behalf of the defendant, sent a letter to the plaintiff stating:

> "To prevent us taking legal action, please confirm the full name and address of your insurer together with your policy number and claims reference if known."
>
> The plaintiff passed the letter to AX.

(f) On 14 July 2010 the plaintiff entered into a new credit hire agreement with AX for a hire car pending repair of his own vehicle.

(g) On 28 July 2010 Albany Assistance sent a further letter to the plaintiff stating that there would be no option but to issue legal proceedings against the plaintiff. This letter was again passed on to AX.

(h) On 23 September 2010 the plaintiff entered into a new credit hire agreement with AX for a hire car pending repair of his own vehicle. On this occasion the rate increased.

(i) On 15 October 2010 the plaintiff issued the writ claiming damages for personal injury, loss and damage by reason of the defendant's negligence in and about the driving, management and control of a motor vehicle.

(j) On 22 December 2010 the plaintiff entered into a new credit hire agreement with AX for a hire car pending repair of his own vehicle.

(k) On 31 December 2010, at the request of AX, the plaintiff made a claim under the Accident Protection Policy taken out at the same time as the credit hire agreement. The policy paid out £19,676.66 to AX discharging the amount due from the plaintiff under the credit hire agreement.

….

[8] Repairs to the plaintiff's vehicle were actually effected on 5 March 2011 after the plaintiff invoked his own motor insurance policy, having run out of patience in relation to the delay in relation to the whole process.

[9] From the correspondence it can be seen that at all times the plaintiff requested matters to be dealt with expeditiously and he made clear that he wanted his own car repaired and returned to him as soon as possible. The plaintiff, accordingly, acted in a perfectly proper manner throughout and his attitude represented the viewpoint and reaction of a reasonable driver faced with the problem of having a car damaged in a motor accident, which required repair to make it drivable again and which had to be replaced on a temporary basis while the repairs were carried out.

…

The Parties' Submissions

[12] Mr O'Donoghue QC argued that the plaintiff's duty to mitigate his loss gave rise to an obligation to arrange for the repair of his vehicle as soon as it was made clear to him that liability for the accident was disputed. At the latest this was 28 April 2010, the judge finding as a fact that the plaintiff was aware that liability was disputed by the end of April 2010. Once this occurred there was no reason why the plaintiff could not pay for the car to be repaired himself as the judge found him not to be impecunious. He had the benefit of a credit card limit of £4,500. Whilst the defendant accepts that the plaintiff was entitled to hire a car while the repairs were being carried out, the duty to mitigate obliged the plaintiff to effect repairs to his vehicle within a reasonable period of time. The proper constraints in relation to the vehicle hire are the reasonableness of the period of hire and the rate charged. On the evidence the plaintiff decided in February 2011 to have his car repaired through his own insurance company and the repairs were completed by the first week of March 2011. Counsel argued that the reasonable period of time for the carrying out of the repairs was only 4 weeks. This meant that the plaintiff should have had the car repaired by the beginning of June, 4 weeks after he knew liability was being disputed. The judge erred in finding that there was uncertainty and equivocation surrounding the issue of repairing the plaintiff's vehicle. Even if there was, it was not created by any conduct on the part of the defendant.

….

Discussion

…

[15] In relation to consequential damages there is a duty to mitigate the loss. There is a burden on the defendant to establish that reasonable measures were not taken by the plaintiff to mitigate his loss. When repairs are being made to the damaged car the hiring by the plaintiff of a replacement car is a reasonable step to take to deal with the consequential loss of the vehicle. The plaintiff must act reasonably in the circumstances. To take a simple example, the replacement car should be of a similar quality to the damaged car so a plaintiff could not justify the hiring of a Rolls Royce to replace a Mini. Similarly, he cannot act unreasonably in relation to the length of the period for which he hires the replacement car.

[16] The relevant considerations are neatly brought together by Sheriff Ross in the Scottish case of Whitehead v Johnston [2006] REPLR 25. In that case the pursuer hired a car for nearly a year at a cost of £18,793, the cost of repairs being estimated at £1,750. Those acting on his behalf took no active steps speedily to pursue the claim against the defendant. On the facts of the case the pursuer had a choice when it came to mitigating his loss. He could have paid for the repairs and recovered the use of his car. That would have involved possible additional costs by way of interest charges on borrowing the money or losing interest that could have been earned on the money if it had remained invested. The question in that case was whether, in electing to continue with the hire for a year rather than pay for the repairs earlier, the pursuer acted reasonably. Sheriff Ross pointed out that the issue was always what is reasonable in all the circumstances. He went on to state:

> "There will be cases where for proper reasons liability is disputed. Then there may be no guarantee of early settlement of repair costs although the insurance industry has sensible arrangements between companies (knock for knock agreements) which make that unlikely where both drivers are comprehensively insured. But if a driver is not comprehensively insured and if there is no early acceptance of liability, as in the present case, or again as in the present case the pursuer does not take reasonable steps to establish whether the claim is likely to be met, it cannot in my view be reasonable to continue to hire a replacement vehicle at a cost which far outweighs that of repair. There comes a point when any choice open to a potentially wronged party must be addressed … It seems to me that whether or not a choice exists may reasonably be tested by posing the question – if the potentially wronged party was at fault in causing the damage to his vehicle and so necessitating the car hire while it was repaired what would he be likely to do? Or even, if there was doubt about whether he could recover if the potentially wronged party was at fault in causing the damage to his vehicle and so necessitating the car hire while it was repaired what would he be likely to do? Or even if there was doubt about whether he could recover from the other driver what would he be likely to do? The present pursuer had a choice about the length of the hire period. He could have instructed the repairs and instead of continuing to incur hire charges claimed additional costs by way of interest lost or paid of so doing."

[17] In the present case the plaintiff was found by the judge not to be impecunious. If we leave out of account the conduct of and the arrangements made by AX and consider what the respondent would have done if left to his own devices and protecting his own interest, it is clear that, as a reasonable person, he would have repaired the car as quickly as convenient and hired a car in the intervening period. Without a guarantee of being reimbursed he would inevitably have considered

it improvident and financially imprudent to hire a car on an open-ended basis pending recovery of the costs of repairs from the third party at some indeterminate point in the future, which could be a long time away.

[18] The evidence establishes that once the decision was made to carry out the repairs they were completed within 4 weeks. As noted, Mr O'Donoghue on behalf of the appellant accepted that a 4 week period would be a reasonable period to hire a substitute car, although in his submissions he was also prepared to accept that the repair work could reasonably have been done by the end of June. Clearly time would be taken to arrange a repair appointment and the appellant accepts that the plaintiff was entitled to some time to come to a decision to proceed with repair and have the repairs carried out.

…

[20] We conclude, however, that a straightforward application of first principles leads to the conclusion that Mr O'Donoghue's argument is correct.

…

[21] In the result we conclude that the reasonable period for which the plaintiff was entitled to hire a car as a replacement pending completion of repairs was from 10 April until the end of June 2010, the period which Mr O'Donoghue conceded could properly have been considered the maximum period of justifiable replacement hire.

Case C:

Zurich Insurance Plc v Umerji [2014] EWCA Civ 357

In this case, the claimant/plaintiff was deemed not be able to assert impecuniosity as a reason for failing to replace his written-off vehicle whilst awaiting funds from the Defendant.

"Lord Justice Underhill:

INTRODUCTION

1. The Claimant, who is the Respondent to this appeal, is a train guard. He lives in Bolton. He was the owner of a Mercedes car, first registered in February 2007. It was worth about £8,000. On 19 October 2010 he was involved in an accident and his car was damaged. It was in due course assessed as a write-off….
2. The car was apparently undrivable following the accident. The Claimant…entered into a credit hire agreement … until 2 June 2012 – a total period of 591 days. …the Claimant says that he was unable to afford to buy a replacement vehicle until the Appellants paid him the pre-accident value of his old car. That did not in fact happen until 16 November 2012....
3. [the hire company] also arranged for the recovery of the damaged car and its storage. It remained in store for over four months, until 22 February 2011. The recovery and storage charges came to £3,420.75.

…

I would therefore hold that the Claimant was indeed debarred from asserting that he could not afford to buy a replacement vehicle. It follows that he should only have been entitled to recover hire charges up to the date when he should reasonably have done so. Mr Turner accepted that it was reasonable for the Claimant to wait until the Appellants had responded to the first notification of his claim, which was made through the online portal on 30 November 2010. Under the relevant protocol they had until 16 December to respond, and he said that the Claimant should have acted promptly at that point. He noted that the evidence had been that once the Appellants did eventually pay up the Claimant bought another car within a fortnight. He submitted that he should not be entitled to claim beyond mid-January at latest.

I would approach it rather differently. It was plainly reasonable for the Claimant to wait until an assessment had been made of whether it was economic to repair the damaged vehicle. But in my view it was also reasonable for him to wait until the Appellants had had the opportunity to inspect it and say whether they agreed. The engineer's report that the car was a write-off was received by M&S Legal on 3 November 2010. For reasons which are unclear they did not send it to the Appellants until 11 January 2011 ; but the Appellants were on notice of the claim from 30 November and themselves took no steps to seek inspection or to chase a report. Even when the report had been sent they did not respond, although they were written to by M&S Legal on 28 January and 15 February chasing the question of a without prejudice payment of the pre-accident value. The car was, as I have said, eventually disposed of, presumably for scrap, on 22 February. In my view it was reasonable for the Claimant to wait until that date before deciding to go ahead and buy a replacement. He could have bought a replacement vehicle within a fortnight thereafter – that is, by 8 March 2011. If my Lords agree, I would ask counsel to agree the correct figure for damages on that basis."

Case D:

McCauley v Brennan & Coulter [2017] NIQB 41

"KEEGAN J

Introduction

[1] The plaintiff's claim is in relation to loss and damage arising out of a road traffic collision on 24 April 2010…. The only remaining issue is whether the plaintiff should recover the cost of hiring a replacement vehicle during the time period of 445 days from the date of the accident…. The plaintiff ultimately received the pre-accident value of her vehicle on 18 August 2011….

…

[9] … Firstly there was no issue that the plaintiff was impecunious….

[14] … it is clear that the issue of liability was influenced by the fact that a number of vehicles were involved in the collision. The plaintiff described two shunts and issues of liability arose in relation to the defendant and the third party….

[15] It is also clear…. that there were considerable delays in terms of the insurers dealing with this case. These were issues between Elden Insurance who represented the defendant and Zurich Insurance who represented the third party. There were delays in getting material from the police. There were delays in transferring the file to Northern Ireland solicitors…. It also appears clear that whilst initially repairable, after a process of inspections, the car was eventually written off by the third party's engineer and thereafter the salvage value and the pre-accident value of the car was agreed.

[16] It is against this background that I must determine the case. In particular I bear in mind the following:

(i) This is an impecunious plaintiff.

(ii) The plaintiff did have a comprehensive insurance policy which she did not want to invoke for various reasons which seemed to me to relate to matters of principle and finance.

(iii) There is clearly a lengthy hire period involved in this case. Much of the other issues were agreed in terms of the plaintiff's need for a hire vehicle. This case really comes down to whether it was reasonable for the plaintiff not to invoke her own insurance policy in terms of mitigating her loss. It seems to me that this must be judged at the time of events rather than with the full clarity of hindsight.

Legal context

[17] The issue in this case is in relation to damages for loss of use of a car. The amount of credit hire is being asserted as the proper amount for that. Of course the overarching principle is that the aim of the court is to place the plaintiff back in the position which he would have occupied but for the defendants' tort. It is important to note that the plaintiff in this case is an innocent party. Liability is admitted and so there is an issue about how the tortfeasor should pay for damages.

[18] It is often said that this issue of the need for a replacement vehicle is not self-proving. In this case there is no argument made that the plaintiff did not need the car or that she was incapacitated or away during the period of hire. It is quite clear that a single mother in the plaintiff's position does need a car and so it seems to me that the plaintiff has established this burden in accordance with the various lines of authority as set out in Giles v Thompson [1994] 1 AC 142, Dimond –V- Lovell [2002] 1 AC 384.

[19] The issue then is in relation to whether or not the costs of hiring a car are reasonable. That must be seen in the context of this plaintiff being impecunious. …

The question whether there has been avoidable loss is a question of fact. The test for mitigation of loss has also been described as a relatively low threshold.

Submissions of the parties

[27] On behalf of the plaintiff Mr McCollum essentially made two points. Firstly he said that the delay in this case was due to the dispute between the at fault parties. He said that the plaintiff should not be held liable for that. He said that tortfeasors could have entered an arrangement between themselves to pay out damages at an early stage on a without prejudice basis and then recouped between themselves.

….

So Mr O'Donoghue argued that the plaintiff on the facts of this case had not mitigated her loss and that she was simply entitled to ten weeks hire from April 2010 to July 2010.

Consideration

[30] The issue of credit hire has provided much discussion and jurisprudence emanating from the highest courts. However the three main principles at issue in this case seem to me to be as follows;

(i) In restutitio in integrum, the plaintiff must be placed back into a position as before the incident.

(ii) The plaintiff should take reasonable steps to limit loss following an accident.

(iii) Res inter alia actos, the plaintiff should not have to invoke the benefits accruing from a separate contract.

…. there has been no valid argument made that the plaintiff could have borrowed money for the repairs.

[32] The issue is in relation to the significant hire charges and whether they can be claimed in full against the tortfeasor. The only other option was for the plaintiff to invoke her own policy of insurance. That should be a matter of choice given the privity of contract between the plaintiff and her own insurer. However in this case certain questions arise. Should the tortfeasor be permitted to compel the plaintiff to invoke her own private arrangements to which the tortfeasor is not a party? Should the plaintiff simply claim against the tortfeasor or should the plaintiff invoke her own contractual relationship with her insurer to mitigate her loss?

[33] I note that this plaintiff was aware of costs because she reduced the storage costs by having the car taken out of storage when she was worried that the costs would rise. I note that the plaintiff also considered invoking her own policy at one stage however she ultimately decided against it. There is a difference between choice and compulsion.

[34] If I were to find that the plaintiff should have invoked her own policy that leads to a situation where the conscientious person who takes out comprehensive insurance and pays for that is penalised. The person who takes the other often cheaper option of third party insurance may be placed in a better position. I find it hard to contemplate that the law would intend such an outcome.

[35] I cannot see that the course suggested by the defendant /third party is right in principle….

However it seems to me that the real problem with **this rests with the tortfeasors rather than the plaintiff. That is on the particular facts of this case. Obviously there may be a different issue if the plaintiff was pecunious as a court would look to see how the repairs or a replacement car could be paid for and within what timeframe. Or, even if impecunious the court may consider the potential to borrow but there must be clear evidence as to that…..**

…

[38] A striking feature of this case is the delay in getting the case resolved. If I stand back from the legal arguments in this case I ask myself how could this have arisen? Also, was this a case where the hire was perpetuated by the plaintiff unreasonably? The facts of this case are extremely significant in answering these questions and my overall view of the case has been influenced by the factual matrix.

[39] It seems to me that the insurers on behalf of the tortfeasors have taken a very long time in apportioning liability, getting the documents together, and settling this case. I can understand that an initial period of discussion was needed but it seems to have been interminable and that in itself does not make economic sense. It also seems to me that there were systemic problems in terms of progressing this claim which had nothing whatsoever to do with the plaintiff. It is clear that at a point when the claim could be settled the insurers were objecting to the amount of hire. There was clearly a battle of wills on this point.

[40] In my view the documentation shows that the plaintiff through the credit hire company was continually asking why the case could not be sorted out on a without prejudice basis….I consider that she acted reasonably and that the defendant/ third party has not established that she failed to mitigate her loss. By contrast there were delays and disputes between insurers. The insurers also knew that the hire costs were rising. In this case the accident management company was active in raising that issue. In my view their interventions were appropriate.

[41] I consider that the insurers could have worked out an arrangement between themselves whereby damages were paid to compensate the plaintiff at a much earlier stage which would have reduced the hire. This could be by way of a full or an interim payment. Any issues of contribution could have been settled at a later date. But they chose not to do this. In those circumstances it seems to me to be unsound to shift the burden for the period of hire to the plaintiff and away from the tortfeasor. I am also not persuaded that there is a cut off point for hire which would not of itself be arbitrary on the facts of this case.

[42] I have to decide the case upon the particular facts, the evidence, and binding legal authority. I was not referred to any case which would persuade me to depart from the legal route I have taken. I also consider that the evidence I heard favours the plaintiff's case."

Conclusion: The principles which have been established by the authorities

If a plaintiff wishes to assert that they were unable to repair or replace their vehicle as a result of a lack of funds, their obligation is to assert and prove their impecuniosity.

There is no obligation upon a plaintiff to do anything in respect of arranging an inspection of their vehicle or proceeding with repairs or replacement in advance of discussions with the defendant and consideration of their willingness to inspect the vehicle and compensate the Plaintiff. Indeed it would seem that the Plaintiff who has been proactive in organising his own vehicle inspection and providing a copy to the Defendant has made a reasonable step in mitigating his loss.

The Defendant has an obligation to come forward with their proposals for compensating the Plaintiff. The Defendant's insurers are put on notice of the claim by the Defendant at the time of the accident. They cannot assert a lack of action by the Plaintiff in vouching the damage claim to excuse their own inactions.

It is only when a clear statement of a view of a lack of willingness to compensate a Plaintiff on an interim basis by the Defendant/Defendant's insurer does the burden shift back to the Plaintiff to decide what action to take. The Courts have viewed a period of up to four weeks as an appropriate period of time upon which to make that decision. However, a longer period may be reasonable depending upon the facts of a particular case.

Where a Plaintiff is impecunious, an assessment of whether they can begin to save funds to pay for repairs or replace the vehicle should be made; and money set aside. Hire can reasonably continue until the funds are gathered together and repairs completed or a replacement vehicle obtained.

Where a Plaintiff has the benefit of a pre-existing policy of insurance, availing of the policy to effect repair or replacement, is a mitigation of loss, but they cannot be compelled to avail of it.

Where the Plaintiff is not asserting impecuniosity, there is a lack of authority on whether a plaintiff must expend their own money at the point that there is the firm denial of liability by the Defendant, or whether the obligation is simply one in which the plaintiff is not allowed to sit back and do nothing. There may be reasons why immediately replacing the vehicle or effecting repairs is not possible until a later date.

Faced with a firm denial of liability, there may be practical problems for how the Plaintiff can progress their claim. Prompt issuing of legal proceedings may be difficult where there are injuries if the Defendant does not readily agree to a split trial.

If legal proceedings can be issued to determine the liability this probably should be done. Alternatively put the Defendant clearly on notice that their failure to confirm they will not take issue with two sets of proceedings is the cause of the increase in hire.

Either way, provided the Plaintiff is making all endeavours to move the matter forward, they are unlikely to be criticised.