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The Quantum of Motor Vehicle Repair Claims in Tortious Credit Hire and Repair Litigation in Northern Ireland

1. The issue of labour rates has been contentious in Northern Ireland since the 2011 decision of Matchett v Hamilton [2011] NIQB 131 (21 December 2011).

The judgement sets out the relevant factors that a court is to consider when assessing the quantum of vehicle damage claims:

*"[4] In **Stokes –v- McAuley [**2010] NIQB 131, where a different issue fell to be determined by the court, I reviewed the relevant authorities in paragraphs [9] – [16] and, having done so, formulated the governing principles in the following terms:*

> *"[17](a) The guiding principle is that of restitutio in integrum.*
>
> *(b) As a general rule, the appropriate measure of damages is the cost of repairing the damaged goods. In common with every general rule or principle, this is not absolute or universal in character.*
>
> *(c) Whether the general rule applies will depend on the evidential matrix in the particular case.*
>
> *(d) The general rule contains a discernible element of objectively assessed reasonableness.*
>
> *(e) In tort proceedings, the onus of establishing his entitlement to damages rests on the Plaintiff and the standard of proof is the balance of probabilities.*
>
> *(f) The court's resolution of disputed issues in litigation belonging to this sphere must give full effect to the burden and standard of proof, while acting on evidence, as opposed to judicial instinct or suspicion. Furthermore, it seems to me that there is limited scope for the operation of the doctrine of judicial notice in this sphere.*
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> *(g) In any litigation context where a Defendant bears an onus of proof, this can be discharged by a variety of media: cross-examination of the Plaintiff, the adduction of agreed documentary evidence, resort to the Civil Evidence (NI) Order 1989 and the calling of witnesses – singly or in combination.*
>
> *(h) It is conceivable that in a particular case the general rule, as formulated above, will be displaced without any evidence on behalf of the Defendant. However, in practice, the more likely scenario is that both parties will adduce evidence and the court will be required to resolve any conflict (as in the present case)."*

> "
>
> The guiding principle is that or restitutio in integrum

These principles were not in dispute in the present appeal.

*[5] Fundamentally, the main issue to be determined by the court is whether, having regard to all the evidence adduced, the hourly rate of £35 for labour services specified in the Crash invoice satisfies the requirement of reasonableness. Both in the lower court and in this court the Plaintiff has acknowledged, and assumed, the burden of establishing the reasonableness of this rate. In both courts, the Plaintiff sought to do so through the evidence of a motor engineer/assessor. At first instance, the Defendant did not adduce any evidence on this issue. Upon the hearing of this appeal, the Defendant led evidence from two motor engineers/assessors. As a result, the framework of the appeal differed significantly from that of the hearing in the lower court. The Plaintiff's case was presented and argued by Mr. O'Donoghue QC (appearing with Mr. Cleland) on the basis that the rate of £35 per hour for labour and painting was reasonable. The Defendant's case was presented and argued by Mr. Montague QC (appearing with Mr. Babington) to the contrary effect, namely that this rate is excessive and, as a matter of law, unreasonable. I remind myself that the burden of proof rests on the Plaintiff, who must prove his case on the balance of probabilities. I should also make clear that no issue of failure to mitigate the Plaintiff's losses - as correctly understood in this sphere of litigation [cf., **Turley** and **Stokes**)] - was canvassed.*

[6] In every claim for the cost of repairing damaged goods, the requirement of reasonableness operates to prevent the Plaintiff from recovering excessive damages. Secondly, it protects the Defendant against unfounded and extravagant claims. Fundamentally, it serves to give effect to the overarching principle of restitutio in integrum, which promotes the twofold purpose of providing the Plaintiff with fair and reasonable redress for the Defendant's tort and, simultaneously, limiting the Defendant's liability. In short, the common law, through the vehicle of this principle and others [such as remoteness of damage and the duty of mitigation], has consistently sought to ensure, in its quest for just solutions, that a tortfeasor's liability is not unlimited.

[7] Of course, common law principles do not entail or reflect matters of exact science, either in their formulation or in their application. Thus, where, as here, the court is required to adjudicate upon the reasonableness of a sum of money claimed, there is no single correct solution. Rather, it is incumbent on the court to decide whether the amount claimed by the Plaintiff exceeds the bounds of what is recoverable in law. In its adjudication, the court does not apply some arithmetical scale. As a result where, based on all the evidence, the differences between competing figures are relatively slight, involving margins of modest dimensions, the court is less likely to conclude that the marginally higher amount claimed is unreasonable and to measure damages on the basis of a lower competing rate which is deemed to be reasonable. This dimension of the legal principles in play may also be viewed as a reflection of the truism that the common law consistently deals with the realities of life. One of these realities is that market forces and profit making activities give rise to differing costs to the consumer for the same product or service. Furthermore, in any given market or industry, there may be a range, or band, of rates or charges composed of differing money amounts which, depending on the context, may satisfy the legal requirement of reasonableness. Thus the common law will not invariably and inevitably condemn as unreasonable a money rate or amount which is higher than a competing rate or amount.

[8] In the present case, …The sole issue for the court is whether this rate is reasonable. How the rate came to be claimed is legally irrelevant and merely serves to distract from the fundamental task of the court.

[9] In the present case, …, the question to be determined is whether £35 is a reasonable hourly rate for labour. … Based on all the evidence adduced, I find as a fact that Crash is the only operator in the car repair industry which claims a labour rate of £35 per hour. I further find that, as contended by the two motor engineers who testified on behalf of the Defendant, the "going" rate averages at £25/£28 per hour and did so at the material time viz. in April 2010 and is available to all 'players' in the car repair industry

[10] The "going" rate, as found by the court, is not automatically determinative of whether the higher rate claimed on behalf of the Plaintiff is reasonable. However, where (as explained above) the differences, or margins, are not insignificant, this will be influential in the court's determination of this question. The effect of the above findings is that in these proceedings the Plaintiff is claiming an hourly labour rate for vehicle repair approximately 25%/30% in excess of the rate charged by a substantial majority of repairers in the motor industry and available – perhaps with the aid of some modest determination and haggling – to every victim of a tortfeasor's negligence. I take into account finally the striking absence of any suggestion in the evidence that the "going" hourly rate is not financially viable for vehicle repairers and I infer that this yields an appropriate level of profit. Giving effect to the findings of the court, I conclude that the Crash hourly rate of £35 is plainly unreasonable.

Conclusion and Disposal

[11] Giving effect to the analysis and findings rehearsed above, I conclude as follows:

> (a) The deputy District Judge was correct to hold that the Plaintiff's recoverable damages in respect of the labour element of the repairs to his damaged vehicle are £832 (based on an hourly rate of £26).
> …

[13] *This judgment will hopefully provide the guidance necessary to further the public interest of resolving disputes without recourse to litigation and the related interest of early resolution of those disputes extant within the litigation system without judicial adjudication."*

2. The effect of the 'Matchett' decision was that the Courts of Northern Ireland in most cases decided to assess all car repair claims at a labour rate of £26 per hour, whether or not any evidence was adduced to support or oppose the rate being claimed.

> This judgment will hopefully provide the guidance necessary to further the public interest of resolving disputes without recourse to litigation and the related interest of early resolution of those disputes extant within the litigation system without judicial adjudication.

3. In the case of Bates v Keegan [2012] NIQB 103 (31 December 2012), Mr Justice McCloskey clarified that this was not the appropriate principle to take from the decision:

"McCLOSKEY J

[4] The general principles operative in this sphere of litigation were expressed by this court in the case of Stokes –v- McAuley [2010] NIQB 131. The decision in Stokes is not to be viewed as authority for any proposition of law because, applying the doctrine of precedent, what the court in Stokes did was to articulate the governing principles to be distilled from various binding authorities of some considerable vintage and pedigree. Thus, as one might do in an early undergraduate law class in the subject of tort, I began with the hallowed principle of restitutio in integrum and advanced from that point.

[5] The second principle to which the Court referred in Stokes is a general principle. It is appropriate to bear in mind that the common law is littered with general principles, one of its outstanding attributes being the absence of exhaustive and rigid canons and precepts. The Court said:

> *"(B) As a general rule the appropriate measure of damages is the cost of repairing the damaged goods."*

Adding:

> *"In common with every general rule or principle this is not absolute or universal in character. Whether the general rule applies will depend on the evidential matrix in the particular case".*

In other words, every case must be decided on the basis of the evidence adduced before the Court. I now progress to principle (F):

> *"The Court's resolution of disputed issues in litigation belonging to this sphere must give full effect to the burden and standard of proof, while acting on evidence as opposed to anything else (for example judicial instinct or suspicion)."*

The Court also observed:

> *"There is limited scope for the operation of the doctrine of judicial notice in this sphere".*

And finally:

> *"The more likely scenario in these cases is that both parties will adduce evidence and the Court will be required to resolve any conflict".*

As in the present case, I would observe.

[6] In that recitation of the governing principles, I also highlighted the consideration of reasonableness, stressing that the general rule, which is that the appropriate measure of damages should generally be the cost of repairing the damaged goods, contains a discernible element of objectively assessed ***reasonableness.*** *To give effect to this principle in any given case requires evidence and/or agreed facts. If there is conflicting evidence then it is a matter for first instance court to resolve such conflict - judicially, clearly, rationally and also giving effect to the burden and standard of proof.*

[7] Later, this Court had occasion to review these principles in the case of Matchett –v- Hamilton [2011] NIQB 131, when some further observations were made. I refer particularly to paragraph [7]:

> *"Common law principles do not entail or reflect matters of exact science either in their formulation or in their application. Thus where, as here, the Court is required to adjudicate on the reasonableness of a sum of money claimed there is no single correct solution. Rather, it is incumbent on the Court to decide whether the amount claimed by the Plaintiff exceeds the bounds of what is recoverable in law. In its adjudication the Court does not apply some arithmetical scale."*

The undercurrent of all these pronouncements is the need for evidence i.e. the evidence which the parties choose to adduce, coupled with the performance of the witnesses, the Court's assessment of what the more convincing and stronger evidence is and the findings and conclusions made accordingly. This is the recurring theme of all these cases. The observation that the Court does not apply some arithmetical scale has a certain resonance in the present context.

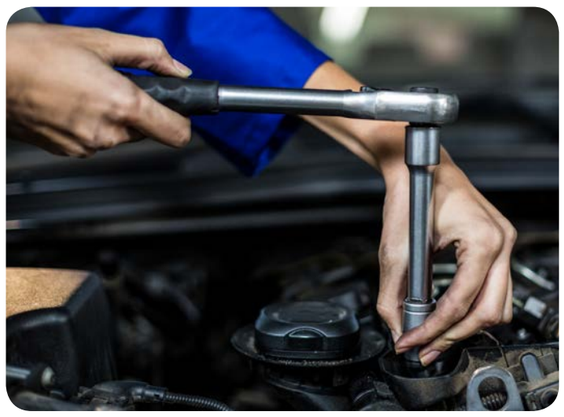
[8] I pose, rhetorically, the elementary question: what were the rationale and outcome of Matchett –v- Hamilton? The answer is simplicity itself. The Court adjudicated on competing hourly labour rates, it gave due weight to evidence which it considered should receive more weight in preference to evidence to which it accorded less weight – for the reasons expressed- and decided accordingly. Its conclusion was that in the particular evidential matrix of Matchett a certain hourly rate should prevail over its competitor.

[9] There is one message stamped all over the judgment in Matchett –v- Hamilton, as in the earlier decision of Stokes –v- McAuley, namely that all cases are decided on the evidence adduced and/or agreed facts and judges make their findings and conclusions accordingly. If one were to try to extrapolate from Matchett –v- Hamilton a ratio decidendi to the effect that the recoverable rate for labour in every claim for damages for the cost of repairing vehicles at this point in time in the evolution of Northern Ireland society is £26 per hour, this would represent a fundamental misunderstanding, firstly, of the court's decision and, secondly, of the doctrine of precedent. That is not what Matchett –v- Hamilton decided.

[10] It was confirmed helpfully to this court by the parties' respective senior counsel that, in the present case, the judge at first instance did precisely what this court did in Matchett: the judge adjudicated upon conflicting evidence regarding what was a reasonable hourly rate for labour for repairing the Plaintiff's damaged vehicle and, in the particular evidential matrix, made a conclusion that one particular hourly rate was to be preferred over the other, applying the burden and standard of proof. This is a paradigm example how all of these cases are to be decided.

[11] If there is one final observation to be made, in parenthesis, it is that citizens are at liberty to compromise their disputes in whatever way they see fit. Thus if, in the industries concerned, i.e. the motor insurance and claims handling industry and the vehicle repairing industry, it is convenient to some or all of the players involved to give effect to a rule of thumb of £X per hour for the labour cost of repairing damaged vehicles, that is to be welcomed, as it is a mechanism for saving court costs and for resolving disputes expeditiously and cheaply. Interest rei publicae ut sit finis litium. This, however, is to be properly regarded as a sensible tool of convenience as opposed to the operation of a principle of law decided by Matchett: a distinction to be noted carefully. If the decision in Matchett has had some further and broader impact, namely, that it provides operators in the industry with a convenient mechanism for resolving disputes at a particular hourly rate - of whatever amount - this, while obviously welcome, is properly to be viewed as a purely incidental effect. Of course, the broader the effect in practice of any judicial decision the greater the promotion of the values of certainty and predictability, with the commensurate promotion of the overriding objective as an added bonus. Ultimately, in avoiding undue and unnecessary recourse to the courts, the players in the industry are themselves the arbiters of reasonableness in its various facets in this sphere of litigation. Reasonableness, of course, is a value, or concept, which, by its very essence, is susceptible to evolution and, in its operation and effect, is invariably contextual in nature."

4. The litigation in relation to Labour rates did not abate and came before the High Court again on a particular nett point, namely whether or not the Court in Matchett and in Bates had been correct to look at the reasonableness of labour rate only as opposed to the reasonableness of the overall charge for



> The undercurrent of all these pronouncements is the need for evidence.

vehicle repairs.

5. This was the argument made in Watson v McCullough [2014] NIQB 90 (26 June 2014):

"GILLEN J

Summary

[1] This case concerns a dispute as to the rate of labour costs of repair of the plaintiff's vehicle, a Toyota Landcruiser, which was damaged in the course of a road traffic accident on 12 December 2012 in Comber, Co Down.

[2] The plaintiff contends that the appropriate hourly rate for repair of the vehicle was £35 per hour whereas the defendant contends that the appropriate hourly rate was £26.

....

[14] Coles case reflects the latest development in the litigation over the recovery of the cost of vehicle repairs. In this case the court found that the measure of loss for damage to a vehicle is not necessarily as straightforward as the figure paid at a garage but can be the reasonable cost of repair assessed by a reference to what the individual claimant could obtain on the open market. The court held that it is neither here nor there whether the insurers put in place a repair company which sub-contracts, contracts directly with a garage or repairs the car itself. The only issue is the reasonable cost of repair to the individual claimant, which can be established by any form of admissible evidence in court. Only if the claim appears to be clearly excessive will the court be justified in investigating whether that sum exceeds the cost that the claimant would have incurred in having the repairs carried out by a reputable repairer.

Conclusion

[15] Applying those tests in this instance, I have come to the conclusion that the gap between the hourly rate claimed by the plaintiff and the comparable figures found by the one motor assessor who gave evidence before me, ..., is so great as to bring this case into the category of a repair cost which is clearly excessive based on what could be obtained in the open market. ... Although, as Coles case suggests, I have considered the modest increase in the overall repair bill, the degree of excess in this aspect is so great that it demands correction.

[16] In all the circumstances therefore I affirm the decision of the County Court Judge. "

6. The labour rate question came before the Court once again in the decision of Morgan LCJ, Chivers v O''Loughlin [2017] NIQB 26 (1 March 2017); where a slightly different rationale for the decision was made to reduce the labour rate claimed:

" **MORGAN LCJ**

Background

[2] The plaintiff had her motor vehicle, a Hyundai IX 35, repaired by Daly''s Garage, Belfast, the garage from whom she had bought the car and to whom she subsequently intended to sell the car in order to trade it in for a new vehicle. The garage placed her in contact with CRASH who then directly negotiated the rates of repair. The charge for labour was £40 per hour for 30 labour hours and the total repair invoice was in the sum of £2,766.81. The defendant at the lower court was arguing for £28 per hour for 25.1 hours but prior to the case being heard it was agreed between the parties to compromise the number of labour hours at 27.5 hours. The lower court, following evidence and submissions, held that the evidence provided by Mr Alan Foster of AXA was not evidence of open market rates and awarded labour costs in the claimed sum of £40 per hour making a total award of £2,646.81.

[3] In this appeal the plaintiff did not call oral evidence but relied on four pieces of documentary evidence. The first was an invoice from Daly''s garage which set out the various components of the repair charge including a breakdown which showed that the total sum for labour was assessed at £1,200 on the basis of 30 hours spent on the work. Secondly, the plaintiff relied upon the Audatex survey which is an analytical tool which assists with the creation of motor vehicle damages estimates. The system benefits from the insertion by those providing estimates of the amounts charged for labour. There are around 2m such items each year, more than any other system in the UK and indeed more than all the other systems combined. The advertising material from Audatex suggests that it gives a highly meaningful in -depth insight into the UK body repair system over the past 10 years.

[4] The plaintiff relies in particular on the fact that the 2015 hourly rate assessed by the analysis of the system was £32.25 and that for 2016 was £33.11. The figures generally indicated that there had been a broad steady increase in the hourly rate over the last 10 years. The material is national in the sense that it applies throughout the United Kingdom and also applies in relation to each and every class of vehicle including commercial vehicles and motorcycles which were the subject of discussion in the course of the evidence. There is no material in relation to regional variations other than the evidence that was adduced of the position in relation to London where costs were estimated, according to Mr Foster, at £40-£45 per hour in relation to the walk-in rate. The third piece of evidence was the document from Mr Bonar, motor assessor. For the reasons that I give later I intend to place no weight on that whatsoever. The fourth was a document from Agnew''s which set out the approach that they took which included a rate of £45 plus VAT in relation to all forms of car with higher rates for specialist vehicles. On the basis of that material it was contended that it could not be said that there was anything unreasonable about the rate of £40 per hour which was charged by Daly''s.

[5] In answer the defendants called Mr Foster who gave his qualifications and then produced a range of examples as to what he said was evidence tending to indicate what the walk-in rate was. He himself indicated in his evidence that he considered that the true rate was somewhere between £26 and £28 and he then went through 15 examples. The first five examples were in evidence in the court below. The bulk of these examples, some 11 out of the 15, involved quotes or submissions that were made directly to AXA. Three were made to brokers and therefore it would have been obvious that there was at least some insurance company involved and one was through a solicitor. It seems to me that one could probably take the view that that also was a case in which the submitting party would have realised that an insurance company was likely to be involved. Mr Clelland pressed Mr Foster on whether this is an open market rate or an AXA rate. The figures, in my view, tend to suggest that the AXA rate was £26 which Mr Foster was, I think, broadly prepared to concede. He gave evidence about the position in relation to Agnew''s and indicated that they had a degree of training and capacity in terms of their machinery which justified their premium rate in relation to the carrying out of such repairs and I have no reason to doubt that. But it is an example of the power of AXA in this jurisdiction, having regard to the degree of business that they have, that they were able to negotiate a rate of £28 per hour with Agnew''s despite the fact that the walk -in rate is some £45 per hour.

[6] I accept therefore that whereas Mr Foster has established that there was an AXA rate of in or about £26 at the time of the completion of these repairs it does not seem to me that it follows that this is cogent evidence of what the walk-in rate was.

[7] The next witness was Mr Bruce who had been maintaining a compilation in relation to walk-in rates for labour since 2014. In his direct evidence he indicated that he believed that the appropriate walk-in rate was £26.80 to £29. He then introduced a document which showed examples from various garages in or about Belfast which suggested a range of somewhere between £25 and £35. I accept his evidence that a figure of £38 had been inserted in error at one point. He noted that the higher rates were reflective of the fact that the rate will vary depending upon the vehicle and he placed this vehicle towards the bottom end. When pressed further on this he said that the walk-in rate he considered to be somewhere between £24 and £29 possibly somewhere between £24 and £30.

Consideration

[8] One of the issues which I had to consider was whether it was proper to draw an adverse inference from the fact that there was no direct evidence from Daly''s as to what their walk-in rate was. All that one knows is that they had charged this particular account in this particular way. I invited the views of the parties in relation to the question of adverse inference and I am satisfied on the basis of the authority R (on the application of Stapleton) v Revenue and Customs Commissioners [2008] EWHC 1968 QB and Lynch v Ministry of Defence [1983] NI 216 that it is proper in an appropriate case to draw an adverse inference. I consider that the matter is helpfully set out by Mann J in Fulham Leisure Holdings v Nicholson, Graham and Jones approved by Briggs J in Polarpark Enterprises Ltd v Rupert Allason [2007] EWHC 22 Ch that the following approach should be taken:

> There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

""(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.

(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.

(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.

(4) If the reason for the witness''s absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.""

In my view that applied in relation to Daly''s in terms of their walk-in rate. If the court concludes that there is evidence of lower rates an adverse inference may go to strengthen the evidence adduced on that issue and weaken the evidence introduced by the party who might reasonably be expected to call the witness.

[9] There must have been some evidence however weak adduced in the matter in question before the court is entitled to draw the desired inference, in other words there must be a case to answer on the issue and in my view the evidence of Mr Bruce, along with that of Mr Foster, but principally Mr Bruce raised a case to answer. There does not seem to me to be any satisfactory explanation for the decision not to call Daly''s and I draw an inference in favour of the defence in terms of weakening the argument in favour of the proposition that a £40 per hour rate was reasonable.

[10] I discount entirely the evidence of Mr Bonar, the Motor Assessor, because it seems to me that if he had an expert or experienced opinion to offer in this matter he should have come to court and been cross-examined in relation to it.

[11] Taking all of those matters into account I have concluded that the reasonable walk-in rate at the relevant time in 2016 was a figure of £30 per hour. I now want to look at how one should approach the legal principles. They were helpfully set out in this jurisdiction by Gillen J in the case of Watson v McCullough where he identified the case law at paragraph 12 and then set out the guiding principles at paragraph 13 and dealt with the case of Coles at paragraph 14.

""[12] Counsel referred me to the now well trammelled authorities and cases dealing with credit hire issues. These included Barry Matchett v Heather Hamilton [2011] NIQB 132, Stokes v McAuley [2010] NIQB 131, Bates v Keegan [2012] NIQB 103 ,McAteer v Kirkpatrick [2011] NIQB 52 and Gilheany v McGovern [2009] NIQB 46. In addition my attention was drawn to a more recent authority in the Court of Appeal in England of Coles and Others v Heatherton and Others [2013] EWCA Civ 1704.

[13] From these cases, I have distilled the following principles:

- *o The guiding principle is that of restitutio in integrum.*
- *o The appropriate measure of damages is the cost of repairing the damaged goods. There is a discernible element of objectively assessed reasonableness in such a test.*
- *o There is limited scope for the operation of the doctrine of judicial notice in this sphere and the courts must carefully adhere to the burden and standard of proof conventionally applied in such cases.*
- *o The requirement of reasonableness operates to prevent the plaintiff from recovering excessive damages.*
- *o There is no single correct solution in such an area. Based upon evidence, the court has to decide whether the amount claimed by the plaintiff exceeds the bounds of what is recoverable in law without applying some arithmetical scale.*
- *o Thus where the differences between competing figures are relatively slight, involving margins of modest dimensions, the court is less likely to conclude the marginally higher amount claimed is unreasonable and to measure damages on the basis of a lower competing rate which is deemed to be reasonable. The common law consistently deals with the realities of life. Market forces and profit making activities give rise to differing costs to the consumer for the same product or service. In any given market or industry there may be a range or band of rates or charges composed of differing money amounts, which, depending on the context, may satisfy the legal requirement of reasonableness.*
- *o Thus the common law will not invariably and inevitably condemn as unreasonable a money rate or amount which is higher than a competing rate or amount.*

[14] Coles case reflects the latest development in the litigation over the recovery of the cost of vehicle repairs. In this case the court found that the measure of loss for damage to a vehicle is not necessarily as straightforward as the figure paid at a garage but can be the reasonable cost of repair assessed by a reference to what the individual claimant could obtain on the open market. The court held that it is neither here nor there whether the insurers put in place a repair company which sub -contracts, contracts directly with a garage or repairs the car itself. The only issue is the reasonable cost of repair to the individual claimant, which can be established by any form of admissible evidence in court. Only if the claim appears to be clearly excessive will the court be justified in investigating whether that sum exceeds the cost that the claimant would have incurred in having the repairs carried out by a reputable repairer.""

[12] This case turned on the approach to paragraph 45 of Coles v Hetherton which was another private hire case in which there were, unlike this, a number of different issues which were being advanced on behalf of the various parties. In particular in paragraph 45 the court said:

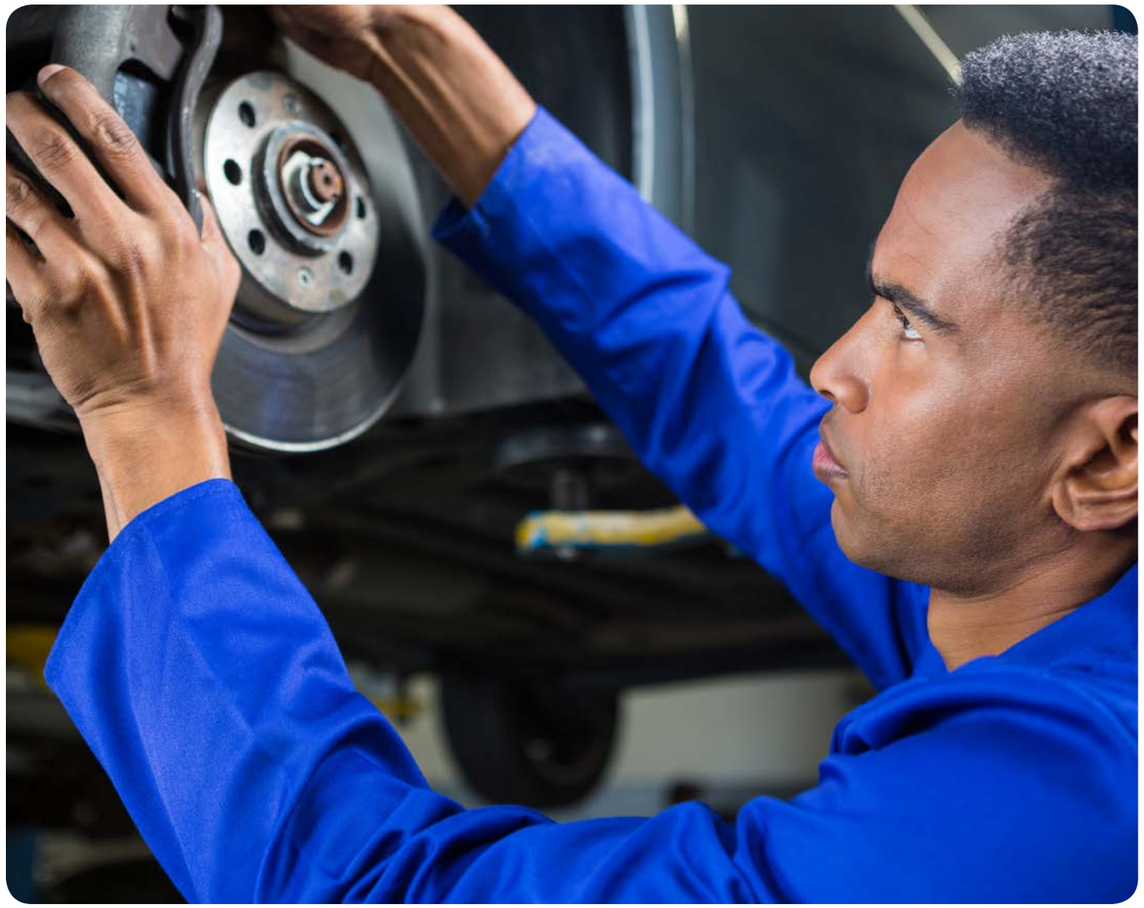
""The appellant''s attack on the specific charges which have been included in the invoice of MRNM to RSAI alleging that the services were not provided or that they are too high or unreasonable or that they do not represent repairs, all miss the point. The question is not whether each of the items actually charged by MRNM to RSAI is reasonable but whether the overall cost charge by MRNM is reasonable. If the total repair cost paid by RSAI is more than the reasonable repair cost that the claimant would have paid if he had arranged the repairs on the open market, then the sum claimed effectively by RSAI will simply be reduced to the notional reasonable repair cost.""

Conclusion

[13] I accept that the approach to the issue of what is the loss suffered in a case of this sort is not necessarily to view the situation item by item. One needs to look at the outcome. Is the outcome reasonable? But the approach to that will vary from case to case. In this case there is only one item in dispute and the issue is, therefore, whether that charge which can be said to be reasonable. Having concluded that the charge ought to have been £30 I take the view that a charge of £40 was unreasonable and that is evidence that the payment made under the repair account was excessive and prima facie evidence that one should interfere. It can be displaced but it seems to me that if it is to be displaced that there is a need for other evidence to indicate that the overall figure still remains reasonable. That might, for instance, be achieved if there was evidence that a part had been discounted in some way, that all of the hours had not been included or there was some other basis upon which some rough and ready calculations had been made within the bill which could have led to a different outcome. But here where one item is in dispute and there is no such evidence I am faced with having to conclude that this is a case in which the total repair cost was more than the reasonable repair cost that the claimant would have paid if she had arranged the repairs on the open market and that the sum claimed should accordingly be reduced to the notional reasonable repair cost."

7. The result of the above principles can be distilled down to the following:

- Where the Defendant wishes to dispute the cost of repairs, they must produce evidence of an alternative rate, whether that be labour or number of hours. *(Bates v Keegan [2012] NIQB 103 Paragraph 8)*
- Where the Defendant has raised a prima-facie case that the costs charged to the Plaintiff are unreasonable, then the Plaintiff should call evidence from the repairer and/or the motor assessor, with the attendant witness expenses, as not doing so can lead to an adverse inference being drawn as to why they have not attended to give evidence. *(Chivers v O''Loughlin [2017] NIQB 26 paras 8-10)*
- Where the Particulars of Defence state that repairs are being challenged, the Defendant should serve evidence on the Plaintiff so that the Plaintiff can decide whether to call live evidence in support of their claim so as to avoid any adverse inference being drawn from not calling such evidence.
- The subjective test in relation to reasonableness of the rate for labour being charged can be influenced by evidence showing that the 'going' rate is not financially viable for repairers, *(Matchett v Hamilton – para 10)* or that the repairing garage has some particular attributes that justify the rate being charged, *(Chivers v O'Loughlin [2017] NIQB 26 para 5).*
- A labour rate in excess of the subjectively assessed 'walk-in' rate is not automatically unreasonable. The court has not yet given guidance on what percentage differential would not be seen as unreasonable, only that 25-30% would be unreasonable, *(Matchett v Hamilton [2011] NIQB 131 para 10).*
- However, it is interesting that following the case of Coles v Hetherton [2011]EWHC 2405 a labour rate of 25% above the repairer's usual rates was ultimately not deemed to be unreasonable.
- Even where the Defendant has adduced evidence to show that the labour rate might be unreasonable, the Plaintiff can still recover the amount claimed in full if they can show that there are items in respect of repair costs that have not been particularised, and where they are then explained in evidence to the court's satisfaction then the repair costs claimed overall will not be deemed unreasonable. *(Chivers v O''Loughlin [2017] NIQB 26 para 13).*



8. **Is the 'going rate'/'walk-in' rate financially viable for repairers?**

8.1 Anecdotally, it is a widely held view in the car repair industry that the labour rates for body work repair is substantially below what the open market rate would be, if it were not for the downward pressure on rates that is brought to bear by the insurance industry as discussed by Morgan LCJ in Chivers:

"But it is an example of the power of AXA in this jurisdiction, having regard to the degree of business that they have, that they were able to negotiate a rate of £28 per hour with Agnew"s despite the fact that the walk -in rate is some £45 per hour."

And indirectly attested to by the Competition and Markets Authority who stated that:

'Competition between repairers to obtain business from insurers is focused on low cost rather than high quality…'[1]

8.2 Additional indications come from labour rate surveys from the car warranty industry, which is primarily for mechanical repairs rather than insurance funded accident repairs. Workers in that side of the car repair industry are arguably lesser skilled employees than car body repairers, and yet their charge out rates are quoted to be as much as £230 per hour in 2017[2]. The press release accompanying that particular survey said the following:

'Overall, the UK average labour rate – combining main dealers, independent workshops and fast-fit outlets – is £67 an hour.'

> "
>
> Competition between repairers to obtain business from insurers is focused on low cost rather than high quality.

8.3 It is worth noting that the ABP, on behalf of UK Body Repair Industry, have produced a "Guide to Retail Charges 2020 – 2021"[3] that sets out that labour rates in the U.K. fluctuate between £50.00 per hour for a standard car, to £75.00 for mechanical or auto electrical work. This will obviously depend on various demographic factors, and the charges are subject to an uplift of 15% to reflect regional cost variations in London and the Home Counties. The labour rate is increasing with the market and is constantly evolving; if one consults the 2018-2019 guide[4] the standard bodyshop labour rate at that time was noted to be £46.00 per hour.

8.4 Given the Covid-19 pandemic, repair shops have had to adapt their service to include "Covid-19 related charges."[5] These charges relate to the necessary services carried out by repair shops to ensure the health, safety and wellbeing of its customers and its employees. These charges, within the Guide, are noted to be, on average, as follows:

i. Sanitising of damaged vehicle - £40.00

ii. Sanitising of courtesy vehicle - £20.00

iii. PPE equipment - £12.00 per job

iv. Vehicle care kit - £8.00 per job

8.5 According to a report[6] of the Northern Ireland Statistics and Research Agency published in October 2017, the median salary in Northern Ireland was £501 gross per week or £26k gross per year. The same survey places the median salary of people working in 'Wholesale and retail trade and repair of motor vehicles and motorcycles' as £20,869, with a mean/average salary in the industry of £23,058. Both substantially below the median for the country. The indication is that salaries range from £13,992 to £27,145 in the car repair industry.

8.6 A calculation can be made from these statistics to give an indication of the cost per chargeable hour of an employee in the car repair industry, using the following assumptions:

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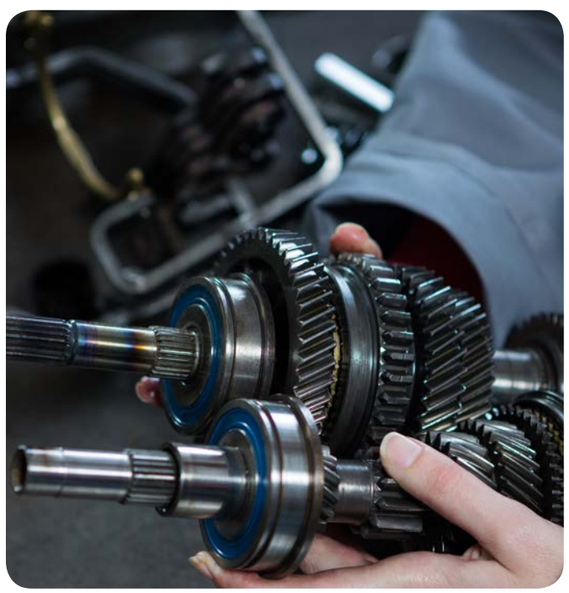
[1] Private Motor Insurance Market investigation 2014
[2] https://www.motoreasy.com/magazine/95/Garage-Labour-Rates-Hit-More-Than-230-An-Hour
[3] https://edition.pagesuite-professional.co.uk/html5/reader/production/default.aspx?pubname=&edid=c4cb4041-66be-4312-8766-cb6e6ab6e957
[4] https://edition.pagesuite.com/html5/reader/production/default.aspx?pubname=&edid=5cfb5cf5-6025-4777-88c5-ed6c2e1860a6
[5] See 3.
[6] https://www.nisra.gov.uk/statistics/labour-market-and-social-welfare/annual-survey-hours-and-earnings

	Assumptions
Weeks in a Year	52
Working days in a Week	5
Total potential Working Days in a Year (52*5)	260
Days holiday per year (4 weeks plus 8 Statutory days)	28
Training Days per year	3
Contingency for Accident, Sickness, Bereavement leave	3
Working Days in a year (ie 260-28-3-3)	226
Productive Hours per day	Productive Hours per year
4 (ie 4*226)	904
5 (ie 5*226)	1130
6 (ie 6*226)	1356

8.7 A normal working day of 9am to 5pm, allows for an employee to be at work for 8 hours. However, workers are normally entitled to two 15-minute breaks and a half hour for lunch. Thus there are a maximum of 7 hours in which a person could be working. It is however logical to assume that a Bodyshop will not be operating to 100% capacity, nor is it feasible that a Bodyshop could reasonably expect to have an operative engaged in fully chargeable activities 100% of the time.

8.8 Anecdotally, Independent engineers for both Plaintiffs and Defendants have stated their belief in the number of productive hours per day in a Bodyshop to be in the range of 4 to 5 hours. For this document we will also show what the number of hours per year assuming 6 productive hours per day.



> Anecdotally, Independent engineers for both Plaintiffs and Defendants have stated their belief in the number of productive hours per day in a Bodyshop to be in the range of 4 to 5 hours.

8.9 The employee's gross salary divided by the number of productive hours confirms the cost per chargeable hour to the bodyshop to employ the operative:

Employee Salary	PAYE, NIC, Pension (@15%)	Gross Employee cost per year (Salary plus PAYE, NIC & Pension)	Cost to Bodyshop per chargeable hour of labour		
			@904 hrs/year	@1130 hrs/year	@1356 hrs/year
£13992 (lowest)	£2099	£16091	£17.80	£14.24	£11.87
£20869 (median)	£3130	£23999	£26.55	£21.24	£17.70
£23058 (average)	£3459	£26517	£29.33	£23.47	£19.56
£27145 (maximum)	£4072	£31217	£34.53	£27.63	£23.02

8.10 It is a well-worn 'rule-of-thumb' that a business should charge a customer an amount for labour that is three times it's employee's labour cost. The logic being that the retail labour rate will be made up of a third for labour, a third for overheads and a third for profit.

8.11 If an average paid employee is costing the repairer between £19.56 and £29.33 per productive hour, then a reasonable charge out rate is between £58.68 and £87.99 per hour using the 'rule-of-thirds'.

8.12 A labour rate of £30 per hour would therefore only provide breakeven cost recovery for labour.

8.13 A car repair Bodyshop will have the normal expenses of any business to include rent, rates; Insurances for Buildings and Contents; motor trade; public and employer's liability; Utilities (water, electric, gas etc), motor vehicle expenses, staff training, printing, postage, stationary, IT, cleaning & maintenance, professional fees, telephone and internet costs.

8.14 A Bodyshop will also reasonably have need for administrative support for example, reception duties, bookkeeping, credit control and invoicing.

8.12 There is also an important item of overhead that is a necessity for a bodyshop in order to be able to stay in business and that is the ability to fund the capital expenditure in premises and equipment to enable the business to be able to keep up-to-date with the technological advances in vehicle repair techniques and materials used in vehicles.

8.16 In October 2020 it was reported in the "*Executive Summary*" of the *"2020 Report on the State of the UK Body Repair Industry"* Report, following a survey across the industry in which 300 repair businesses took part, that the three biggest threats to the repair industry are currently:

i. Low labour rates

ii. Covid-19 Pandemic

iii. Low volume of repairs

8.17 In reading the "Verbatim Comments" of survey participants as set out in the report, the tone is very much one of dissatisfaction with insurance companies imposing low labour rates:

"Disappointing that they [insurance companies] are still unwilling to recognise the cost incurred investing in technology and training to ensure cars are repaired to manufacturers specification with realistic labour rates and specialist charges. Help during lockdown was short-lived and they fail to understand the challenging market for their so called "repairer partners"

"The pressure from insurers to increase excess payments for using main dealer repairs is totally unreasonable and impacting upon correctly repaired vehicles. Insurers must focus on quality and not suppress labour rates and parts discounts in an industry under increasing pressure."

"Insurers need to appreciate the significant investment, ongoing costs and risks involved in running a bodyshop. Right now, repairers are walking a very fine line between success and failure, and insurance companies will destroy livelihoods if they don't treat their supply chain fairly by paying realistic rates and agreeing workable SLA's."

8.18 Unsurprisingly, the COVID-19 pandemic has had a heavy impact on the vehicle repair industry. It was reported from the above survey that bodyshops lost 50% of the volume of their work in the 6 months from March to August 2020. While 74% of bodyshops state that they expect to be back to normal volumes of work by 2021, there is no guarantee of when this might happen due to the level of uncertainty surrounding the ongoing pandemic. The furloughing scheme was used by 99% of shops and 45% of shops are expecting to have to make staff cuts this year. Clearly, the onset effects of the pandemic have been catastrophic for the industry across the board. This will inevitably have an onset effect on labour rate and other charges going forward.

9. Independent support for the 'rule of thirds'

9.1 The issue of what is the appropriate mark-up on labour costs in a repair to cover overheads was dealt with in Northern Ireland in the case of BT (NI) v Sinton [2001] NIQB 12 (23 March 2001), a Judgement of Nicholson LJ, which looked at the uplifts being used by British Telecom when making claims for repairs to its equipment caused by the tortious actions of third parties.

9.2 The outcome of the judgement was an acceptance of an uplift on labour of 126% to cover overheads, although reference is made to that rate of uplift applied to claims arising in 1998. The 2001 uplift that would have been sought by BT was indicated to be 182%. Reference was also made to government bodies seeking 200% uplifts.

9.3 Uplifts of between 126% and 200% merely for overheads, clearly shows that the 'rule-of-thirds' to allow for a profit element is not unreasonable.

9.4 It was also noted that a 10% mark-up on parts was a normal reasonable sum, and one that is anecdotally in keeping with the margins that repairers will charge on parts. Whilst margins on paint are less known, they are unlikely to be more than 30% on the assumption that quality paints are used.

9.4 'BT' were engaged in many cases, in many courts, around the UK and could justify the expense of having detailed forensic accounting expertise to assist in substantiating their claims. Same should not be necessary in the case before the court on vehicle repair costs, when it is evident that a labour rate of between £58 and £88 per hour could not be objectively unreasonable. Coincidentally the average of these rates, £73.00 correlates well with the £67 per hour average indicated by the 'Motor Easy' survey quoted above.

9.5 The above 'Cost to Bodyshop per chargeable hour of labour' table and the principles of the BT NI v Sinton case would seem to answer both the gap in evidence that McCloskey J found in Matchett, in relation to the walk-in rate not being commercially viable. And which Morgan LCJ found lacking in Chivers, in relation to showing that there was elements of the repairers charges that are subsumed within the 'rough and ready' calculation of the quoted repair rate.

10. Further evidence to assist in deciding whether the rate charged is reasonable

10.1 In the Coles case, reference was made to RSAI basing their charge out rates as per the published annual guide of the UK car repair trade body, Auto Body Professionals Club. Their 2016-2017 guide indicates labour rates ranging from £44-£75 per hour depending on the type of repair being carried out. Anecdotally, it is our understanding that these are being deemed reasonable by the Courts of England and Wales.

10.2 In Northern Ireland, the local trade body for independent repairers, NIBA, also produces a recommended retail price list. Their 2017 rates indicate labour rates of £44-£52 per hour depending on whether the repair is standard or prestige.

10.3 Both ABP Club and NIBA suggest that there are charges over and above labour which should be charged or reflected in the charges made by bodyshops. For example ABP club suggests that a garage should uplift their charges to cover administrative costs and the costs of compliance with quality standards such as BS10125. NIBA suggests that their retail rates can be taken to include an allowance for the following:

'Prestige' may refer to either repairs carried out to a vehicle which may generally be regarded as being of a higher than average standard through its particular marque, age etc; or it may refer to a bodyshop which as a result of its investment in training, facilities, manufacturer approvals and or independently audited quality standards is justified in seeking such a level of remuneration for its services, regardless of the type of vehicle being repaired.

Labour rates may include an allowance for contributions to overheads such as office administration, subscriptions to estimating systems or methods research services, time incurred in negotiating with motor engineers or insurance companies in relation to repair costs and methods and taking images, storage and insurance of vehicles while under repair, Data protection subject assess request fees or any of the items in the above price list which it may be too onerous to individually itemise on a final account.

The values are provided for guide purposes only and may require adjustment to suit a repairer's individual requirements, geographic location and market conditions.'

10.4 There are many operations that are carried out by a bodyshop that are not reflected in the labour hours allowed for by the leading computer based estimating system, Audatex, as it only shows the actual labour hours to be spent on repair of the vehicle, having obtained its information on labour times from Motor Insurance Research Institute at Thatcham, ('Thatcham'). It does not give an indication of the labour time or cost to a business in carrying out the ancillary but necessary additional activities such as estimators time, the subscriptions to computer estimating and repair methods research tools, bookkeeping, parts administration, Health and Safety to name but a few.

10.5 Therefore unless a bodyshop makes a specific charge for these items, the cost of these will be borne and absorbed by the bodyshop unless it can charge an appropriate hourly labour rate. It has been suggested by the 'Thatcham', that their times only represent 75% of the labour hours required to repair a vehicle[7].

10.6 In conjunction with Audatex, ABP Club produce an annual report called, Audastats – an analysis of the estimates that are approved through using it's estimating system. The latest report[8], indicates that there are around 16 hours of labour per average on a repair. The average paint cost is £286, which is net of a 15% average discount, therefore the gross amount would be approximately £336. Parts net of a 10% discount are stated to be £716, or £796, gross.

10.7 The amount of profit per average repair on parts and paint therefore can be calculated by reference to these gross amounts and a suggested margin as follows:

Margin	Parts (£796)	Paint (£336)
10%	£80.00	n/a
20%	n/a	n/a

10.8 Therefore on average a repairer will have the potential to earn £181.00 gross from paint and parts sales.

10.9 By reference to the number of repair jobs completed in a year the gross profit can be estimated:

No of repairs carried out	Gross profit
100	£18,100
200	£36,200
300	£54,300
400	£72,400
500	£90,500

10.10 Using the number of productive hours at 8.4 above one can calculate how many repairs of 16 hours average can be carried out per operative in a Bodyshop per year.

Number of Productive hours per year	Number of repairs per operative
904	57
1130	71
1356	85

10.11 Using these figures therefore it can be calculated the likely number of repairs that can be carried out by a Bodyshop based on the number of productive operatives that it has for each level of productive hours per year. Taking 904 hours as an example then we can see the number of repairs as follows:

[7] Letter to Andrew Moody, Retail Motor Law from Peter Roberts, Chief executive, Thatcham, 3rd January 2007
[8] ABP Club – Industry Yearbook 2017-2018

Number of Productive Operatives	Number of Repairs in a year	Gross profit (parts and paint
2	114	£20,634
4	228	£41,268
6	352	£63,712
8	466	£84,346
10	570	£103,170

10.12 The gross profit on labour at various retail charge out rates can also be examined in a similar basis, again assuming 904 hours at an average wage of employee:

Retail Labour Rate	Profit Per Operative per year
£30 (ie £0.67 per hour gross profit)	£605
£35 (ie £5.67 per hour gross profit)	£5,126
£40 (ie 10.67 per hour gross profit)	£9,646
£45 (ie £15.67 per hour gross profit)	£14,166
£50 (ie £20.67 per hour gross profit)	£18,686

10.13 Finally, an estimated average gross profit per Bodyshop can be calculated indicating the likely gross profit within a Bodyshop and from which a Bodyshop must meet its various overheads and expenses, assuming 904 hours per productive being paid the average wage, and the Bodyshop charging £45 per hour:

No of Productives	Gross Profi
2	£48,966
4	£97,932
6	£148,708
8	£197,674
10	£244,830

11. Objective Reasonableness of Repair Costs

11.1 'Fair Market Value' is defined as[9]:

"Probable Price at which a willing buyer will buy from a willing seller when

(1) Both are unrelated

(2) Know the relevant facts,

(3) Neither is under any compulsion to buy or sell, and

(4) All rights and benefit inherent in (or attributable to) the item must have been included in the transfer. FMV is generally the basis for tax assessment and court awards. Also called fair value. See also arm's length transaction."

11.2 An independent assessment of the objective reasonableness of a car repair labour rate is arguably a more reliable basis upon which to carry out the Court's task in a repair quantum dispute; and one in which the concept of Fair Market Value is incorporated. This prevents the evidence being skewed by factors under the control of any of the parties. The specific Northern Ireland jurisprudence in this area of the law supports this as a concept and one which the Courts should consider to bring further clarity to this contentious issue.

11.3 A Court could be assisted by a specific detailed report in each repair case to confirm whether a particular garage has subjectively charged a reasonable rate; or to confirm the additional services provided but not itemised on a repair invoice, but this would seem to be disproportionate to the amounts in dispute which often amount to less than £200.00 and would involve the incurring of witness expenses for two motor engineers and a vehicle repairer.

11.4 However, it would seem obvious that there can be no failure to mitigate loss where the objective valuation of the reasonableness of repairs is similar to , or in excess of, the amount actually being claimed for repairs by the Plaintiff, and where the subjective analysis shows that there is no excessive profiteering by the repairing garage at the Plaintiff's expense.

11.5 Extrapolating this idea further it is worth reminding ourselves of what was said in relation to repair claims in the seminal credit hire and repair authority Clark v Tull (t/a Ardington Electrical Services) [2002] EWCA Civ 510 :

"73. Before Gray J, it was submitted by Mr Harvey McGregor QC (appearing on that occasion for Miss Burdis) that the damage caused by the accident was represented by the diminution in value of the car; which in turn was generally measured by reference to the cost of restoring the car to its former condition; that the damage was suffered immediately the accident happened; ….

76. …

On the other hand, the car repair figure is merely a method of valuing the loss which the plaintiff has undoubtedly suffered, namely the diminution in value in his car.

….

However, as we have said, in our cases, Judge Harris felt constrained to follow Gray J's decision in Burdis, although he did not agree with it. At page 43F of his judgment he said:

> On the other hand, the car repair figure is merely a method of valuing the loss which the plaintiff has undoubtedly suffered, namely the diminution in value in his car.

"In Seddon –v- Tekin and in Taylor-v-Cooke [1999] I found that a century of authority from The Endeavour [1896] 62 LT 840, via Derbyshire-v-Warren [1963] 1 WLR 1069 CA and culminating in James [sic] -v-Stroud [1986] 1 WLR 1141 showed that the measure of damages in cases of damage to property was the diminution in value of the chattel, which was normally measured by, but which was not the same thing as, the cost of repair. Thus the recoverability of the repair charges was irrelevant….

78. Before us, Mr Milligan (for Accident Assistance), adopting a written skeleton argument prepared by Mr McGregor, advances essentially the same submissions as were advanced below by Mr McGregor. He submits that a distinction falls to be made between repair costs and hire charges, in that whereas repair costs represent the measure of the diminution in the value of the car resulting from the accident (i.e. an immediate and direct loss which is suffered when the accident occurs), hire charges are of an entirely different character, in that they represent a consequential and prospective loss which is suffered if and when the charges are incurred. He submits, relying on British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd [1912] AC 673 at 688-692 and other authorities, that where (as in Burdis) the claimant has suffered an immediate and direct loss, the proper question for the court is not whether that loss has been subsequently avoided in circumstances which fall within one of the exceptions to the rule against double recovery, but rather whether it has been reduced or extinguished by a transaction which is collateral to the tort – in other words, which is (to use the traditional expression) res inter alios acta.

[9] http://www.businessdictionary.com/definition/fair-market-value-FMV.html

> "However, since in our judgment repair costs are merely the measure of a direct loss, suffered when the tort was committed, and are not to be regarded as falling within the category of potential future losses claimable as special damage, the general rule identified in Lord Bridge's example in Hunt v Severs, and the exceptions to that general rule to which we have just referred, are of no materiality for present purposes....."

....

84. In our judgment a fundamental distinction must be drawn, for present purposes, between repair costs and hire charges. When a vehicle is damaged by the negligence of a third party, the owner suffers an immediate loss representing the diminution in value of the vehicle. As a general rule, the measure of that damage is the cost of carrying out the repairs necessary to restore the vehicle to its pre-accident condition (see Dimond at page 1139G per Lord Hobhouse)

85. ... Similarly, a claimant's damages will not be affected by the fact that, in the event, the repairs are carried out at no cost to him (see The Endeavour (1890) 6 Asp MC 511, where the vessel was repaired but, due to the bankruptcy of the owner, the repairer was never paid).

88. In a case of direct loss, subsequent events will operate to reduce or extinguish the loss only in so far as such events are referable to the claimant's duty to mitigate his loss, and hence referable in a causative sense to the commission of the tort (see British Westinghouse and The Elena D'Amico. In The Elena D'Amico, Robert Goff J said (at page 88, right hand column):

"[W]hat is alleged to constitute mitigation in law can only have that effect if there is a causative link between the wrong in respect of which damages are claimed and the action or inaction of the plaintiff."

89. Robert Goff J went on to cite Viscount Haldane LC's speech in British Westinghouse, describing it as a "classic statement of the principle of mitigation".

90. The operation of this principle can also be seen in cases concerning breach of a covenant to repair contained in a lease (see, for example, Joyner v Weeks [1891] 2 QB 31 CA and Haviland v Long [1952] 2 QB 80 CA).

91. In our judgment, the authorities to which we have so far referred establish that subsequent events which are not referable in a causative sense to the commission of the tort, that is to say events which, on a true analysis, are collateral to the commission of the tort, or res inter alios acta, or too remote - we regard these expressions as interchangeable - do not affect the measure of a direct loss suffered when the tort was committed. ...

95. However, since in our judgment repair costs are merely the measure of a direct loss, suffered when the tort was committed, and are not to be regarded as falling within the category of potential future losses claimable as special damage, the general rule identified in Lord Bridge's example in Hunt v Severs, and the exceptions to that general rule to which we have just referred, are of no materiality for present purposes.....

99. We turn, then, to Dimond. Dimond was concerned only with hire charges: no issue arose in relation to repair costs. However, Lord Hobhouse placed the issue as to the recoverability of hire charges in a wider context, and in so doing referred to the direct loss which the claimant had suffered when the accident occurred. At page 1139F Lord Hobhouse said this:

"Mrs Dimond was at the time of the accident the owner and person in possession of the vehicle. It was damaged. Its value was reduced. This can be expressed as a capital account loss. This loss can be measured as being the cost of making good the damage plus the value of the loss of its use for a week. Since her car was not unrepairable and was not commercially not worth repairing, she was entitled to have her car repaired at the cost of the wrongdoer. Thus the measure of loss is the expenditure required to put it back into the same state as it was in before the accident. This loss is suffered as soon as the car is damaged. If it were destroyed by fire the next day by the negligence of another, the second tortfeasor would only have to pay damages equal to the reduced value of the car and the original tortfeasor would still have to pay damages corresponding to the cost of putting right the damage which he caused to the car. ...

I mention these cases and the principles they illustrate to demonstrate that persons such as Mrs Dimond do not have to survive in an environment where the law does not recognise the losses which they may have suffered and that the law is not without principles covering the provision of compensation and its assessment. Each case depends upon its own facts but loss of use of the chattel in question is, in principle, a loss for which compensation should be paid. However one of the relevant principles is that compensation is not paid for an avoided loss. So, if the plaintiff has been able to avoid suffering a particular head of loss by a process which is not too remote (as is insurance), the plaintiff will not be entitled to recover in respect of that avoided loss. If the loss has only been avoided by incurring a substituted expense, it is that substituted expense which becomes the measure of that head of loss. Under the doctrine of mitigation, it may be the duty of the injured party to take reasonable steps to avoid his loss by incurring that expense." "

> "...the diminution in value of the chattel, which was normally measured by, but which was not the same thing as, the cost of repair.

11.6 The effect of these principles and discussion would appear to suggest that provided the Plaintiff is seeking an amount for repairs that is no more than the subjective reasonable amount for repairs in any reputable garage in a Plaintiff's legal jurisdiction that the amount claimed should not be reduced.

11.7 In the Chivers case, it was not established that had the Plaintiff had their car repaired at 'Agnews' with an hourly rate of £45 per hour being charged, ie that the rate would not have been less as a result of the type of vehicle that the Plaintiff owned being deemed 'non-prestige', that the claim for repairs would have had to have been reduced to the Courts assessment of a 'walk-in rate'.

11.8 Indeed it is likely that had the Plaintiff had her vehicle repaired at Agnews that what she had been charged would have been unchallengeable as a subjectively reasonable 'walk-in' rate. Therefore it would seem on the basis of what was said in Clark v Ardington; that the Plaintiff in Chivers did in fact mitigate their loss in only incurring a labour charge of £40 per hour.

11.8 It was open to the Court to find that the direct loss incurred at the time of the accident should have been based on a repair labour amount of £45 per hour. The subsequent contractual arrangements between the Plaintiff and her repairing garage being collateral to the tort and irrelevant for the calculation of the Plaintiff's loss which was *'the diminution in value of the chattel, which was normally measured by, but which was not the same thing as, the cost of repair'.*

11.9 The Plaintiff who obtains repairs at a cost below 'Agnews' rate has therefore not incurred an increased expense, they have incurred a loss less than they would have been entitled to have claimed had they not repaired the vehicle at all. It seems incongruous that a Plaintiff who does not repair a vehicle can be in a better position than one who did not.

12. Conclusion

12.1 There is no real arguable question of a vehicle repair industry being able to excessively charge for its services where a vehicle can only be repaired provided the cost of repairs do not exceed the diminution in value of the vehicle in the accident. This acts as a forceable economic cap on repair costs, where it is more likely than not that a repairer's charges will be limited to below the full reasonable cost of repairs lest the vehicle be 'written-off'

12.2 Whilst the quantum of vehicle repairs in a credit hire and repair case is contentious, there are simple ways in which the issue can be resolved that would improve the processes involved in the current litigation in this area and without the need for subjective evidence.

12.3 A Plaintiff is in a difficult position if they have to produce detailed subjective evidence for example in the form of a forensic accountant's report to justify what they have been charged for vehicle repairs, especially when the incontrovertible objective evidence shows that bodyshops must charge £29.33 per hour simply to be able to pay an operative the average wage, even before covering the cost of

overheads and allowing an element of profit.

12.4 It should be remembered again that the median salary in the vehicle repair industry is some £5000 less than the median salary in Northern Ireland, something that is prima-facie inequitable bearing in mind the level of training and skill required to perform well in the motor repair industry where high standards should be a given.

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