

What's happening at court?

L v Foundry Company

This was a vibration induced Carpal Tunnel Syndrome case. The claimant alleged that he suffered CTS as a result of exposure to grinders in a foundry. Exposure levels were contested and medical causation remained in issue. Recent epidemiological studies weakened the causative link and the final nail was confirmation from the medical expert that, if, which was denied, CTS could be caused by vibration, the employment with the defendants had not advanced the condition. The claimant discontinued at that stage. Full costs were recovered. The alleged association between vibration and CTS is a hotly contentious issue currently. This case demonstrates the importance of a robust approach with the appropriate experts on side.

A (a bus Company) -v- M and E

Crutes were instructed by A in relation to two significant claims arising out of an alleged road traffic accident. A bus was driving along a single carriageway road in a busy rural town when the first claimant, M, suffered a significant injury to his ankle. He claimed that as he approached the bus coming from the opposite direction, riding his horse and trap, the bus veered over too far and over-revved, spooking the horse and causing it to bolt into a nearby field. He was thrown from the trap and suffered serious injury.

A second claim was made by an alleged "rescuer" E. She was a 19 year old who claimed that she received a request to come and look after the horse post accident. On arrival she took the horse away from the scene of the accident to nearby stables where it again became agitated, kicking her in the shin. She later attended hospital and then claimed to have developed catastrophic reflex sympathetic dystrophy, which meant that she was likely to be confined to a wheelchair indefinitely and potentially for the rest of her life.

Investigations into the background of both claims, to include surveillance, revealed that although undoubtedly M had clearly suffered significant injuries both claimants were suspect and evidence was obtained to undermine their credibility.

The claim of E was struck out on an application for summary judgment by Crutes, following disclosure of the surveillance evidence, and in light of arguments that the alleged injuries were too remote from the initial accident. The claim by M went to trial on liability and was successfully defended. In combination, the claims were potentially worth £500,000. All costs were recovered by Crutes on behalf of A.

F Haulage Company v C

The claimant was an HGV driver. During the course of his employment he collected a consignment of goods which had been transported initially from India, then unloaded on the South coast before being moved to the North East. At its collection point the container, with the goods still intact, was sealed in accordance with the supplier's instructions.

Within a few miles of the collection point, whilst negotiating a roundabout, the claimant's HGV overturned and he suffered significant injuries. He sued his employers and F who had contracted his employers to collect the goods. The claimant's case was that the load had either been inappropriately packed, or it had moved in transit, so that it was unstable and when driving normally this caused the trailer to overbalance.

The employers argued that the claimant was a very experienced driver and they simply received a sealed load. They sought a full contribution from F under the terms of a contractual indemnity. F argued that on collection from the port the load was sealed and their instructions from the importer prevented them from unsealing the load to check its adequacy.

It was also contended that the claimant had driven too quickly around the roundabout. After hearing expert evidence at trial, the judge dismissed the claim against both defendants, finding that the claimant had driven too quickly around the roundabout. F's costs were recovered in full from the claimant's trade union.

Fraudulent Claim

An insurer was recently in the press after pursuing a fraudulent claimant who grossly exaggerated her claim. Joanne Kirk claimed over £750,000 after an RTA. She alleged fibromyalgia. Surveillance showed her to be lying and she discontinued. Not content with that, the insurers brought a private prosecution for contempt of court and the Judge agreed.



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INSURANCE NEWSLETTER JUNE 2009

SERVICES: for Insurers, Brokers, Loss Adjusters and Claims Handlers

Care for care's sake?

Catastrophic claims are often fought between able, experienced and knowledgeable lawyers and this leads to a common sense approach to ensuring the correct package is provided for the claimant. A sticking point is often the cost of care. These figures are often presented by the claimant with the assistance of a nursing care expert and/or occupational therapist who will sometimes provide or suggest far more than a claimant really wants or needs.

An example of this is **Huntley v Simmonds** in which a brain damaged claimant was advised to have care for his legal case. This was jumped upon by Mr Justice Underhill who said:

'It is regrettable that in a situation of this kind the distinction between what is necessary in the interests of a claimant' irrespective of the litigation and what may help to maximise his or her claim may become some what blurred'.

Care costs now form a substantial and contentious part of damages in these higher value claims and are starting to distort the value of claims requiring very limited if any care element. This poses a few questions.

1. How have rises in care costs been allowed to outstrip inflation?

No-one has really taken the matter to task. Courts rely upon the alleged needs as described by experts and not what the claimant really wants. No empirical evidence is used, figures are put forward with little consideration for what the claimant wants and often passing reference to the true medical position. Individuals who need help with certain tasks during the day are being given full days and sometimes overnight assistance (the defendant is paying for a carer to sleep for 99% of the time in effect).

2. Are there any objective models for assessing care?

They do exist, but care experts cannot agree a single model and to do so might well put them out of business! So they will just keep going with their own figures until something is done.

3. On what evidence and with what experience and qualification do care experts put forward substantial figures and packages?

One has to wonder sometimes what evidence is being used as the package

put forward will often greatly exceed the needs described by medical experts. Care experts will have great experience of the regimes, practices, procedures and implementation. However, there is no formal recognised qualification that sets a care expert apart from others or provides a benchmark.

4. Is the focus on enhancing damages or need?

This is the most concerning question. In many cases the needs of the claimant are and will remain paramount. However, it is always tempting to rack up the care element as there are experts who will help do this, there is a wish to secure the best award possible for the claimant and the actual needs, as in Huntley, can sometimes be lost to the calculation, multipliers and multiplicand.

5. Do claimants frequently dispense with paid carers after settlement?

Anecdotal evidence suggests yes and FOIL, certainly, would like to participate in work to explore that possibility. Certainly the sums charged for private care outstrip the public sector and even if the claimant has to pay a contribution to his state care this will still leave a potential residual sum he was never intended to receive, being the difference between his damages for care intended and the actual cost of care. Further, the claimant may well, as in Huntley, wish to reduce his care package post settlement, leaving him with considerably more in damages than intended.

6. Should the claimant be required to turn to the local authority as a statutory provider of care rather than seek it in damages from the defendant?

This was recently answered with a resounding 'no' in **Peters v East Midlands SHA and Nottingham City Council**. The leading judgment of Lord Justice Dyson in the Court of Appeal made it clear that a claimant has every right to seek that the defendant should pay for care as well as every other element of his damages.

In summary, there is a lot of work to be done. The public sector will not fund the care element in these cases, unless the claimant opts for that service. The claimant will not be advised to opt for the public sector as the damages will be reduced and the work of too many people with a financial interest in the claim will be diminished. Work on an agreed approach, agreed empirical evidence, rates and ensuring that the claimant's wishes are paramount will be needed to push the matter to the forefront and achieve a situation where what is needed and what is provided are the same.



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Credit Crunch -

Defeating the Credit Hire Claims



The burning question – how can you defeat credit hire charges? The principles are far from straightforward and often litigation is the only answer as far as the credit hire organisations are concerned.

Credit hire agreements are generally entered into by a non-fault party if they are without the use of their own vehicle, because it is being repaired or was declared as a write-off, and they do not have the financial means to source a replacement temporary vehicle. Credit hire organisations will provide a hire vehicle to the non-fault party on the basis that the cost of the hire will be

replacement vehicle, is offering to put the non-fault party back in the position he/she would have been had it not been for the accident – the very purpose of compensation. The non-fault party's losses would essentially be nil if the at-fault party's offer was accepted. A series of test cases is about to be heard to clarify the law on this point; watch this space!

Next, it would be prudent to obtain at least three spot rates from ordinary hire companies in the non-fault party's local area, for the hire of the same or a similar vehicle for an unspecified period (i.e. a daily rate). The spot rates should specify the cost of any extras such as collision damage waiver, and should specify whether VAT is included.

The earlier the spot rates are obtained the better – and preferably as close to the accident date as possible, because the court will only take into account contemporaneous rates at the time of hire.

The repair period

The next step will be to ensure that the hire period is kept to a minimum. An engineer's inspection of the vehicle should be arranged at the earliest opportunity, so that the repairing garage can commence repair. If the vehicle is drivable and roadworthy, then it is worthwhile trying to agree that hire and repairs will only commence once the necessary parts required for repair are sourced. A claimant may not be willing to agree this, in which case, if repairs commence and it transpires that parts are awaited, it may be worthwhile for the insurer to try and source the parts to keep delays to a minimum. Regular calls to the garage to check the progress are also worthwhile.

The claimant is rarely penalised for delay in repair, if they place their vehicle in the hands of a reputable garage (which most are) and there is no independent cause of the loss of use of the vehicle for that period. In most cases, delays are recoverable and therefore payable by the insurer.

The claimant may, however be in some difficulty if they do not

“ To put this into perspective; the insurer, by offering a replacement vehicle, is offering to put the claimant back in the position she would have been had it not been for the accident. ”

recovered from the at-fault party when the hire period ceases. A premium is generally charged for this service in that the daily/weekly rate for the hire vehicle will be higher than the rates of an ordinary hire company. The agreement will state that the hirer will ultimately be responsible for the hire charges incurred.

Offering a replacement vehicle

It is probably now well known in the motor insurance industry that by offering the non-fault party a replacement vehicle you stand a reasonable prospect of defeating all or part of the claim for credit hire charges, if the offer is refused in favour of a credit hire agreement. It is a question of mitigation and each case will turn upon its own facts. To put this into perspective; the at-fault party/insurer, by offering a

Be pro-active

So, what can be done to strengthen the position? It would be useful if the offer of a replacement vehicle was in writing, but this may not be feasible given that most contact will be over the telephone. In these circumstances, the person making the offer should make a note of the date and time of the offer, as well as exactly what vehicle was offered. It should be queried whether the non-fault party requires a replacement vehicle which is the same or similar to their own i.e. 'like for like'.

If the offer is refused confirm the offer in writing! Then the offer should be made known to the credit hire organisation, preferably in writing and as soon as practicable.

The reason these spot rates should be obtained is that if the court finds that, for example, it was reasonable to refuse the offer of a replacement vehicle, then a secondary argument can be put forward that the claimant should have hired a vehicle from an ordinary hire company at cheaper rates rather than entering into a credit hire agreement. To successfully argue this point, it must be shown that the non-fault party could have afforded to hire a vehicle from an ordinary hire company, by utilising a recognised credit/debit card or similar and without making unreasonable sacrifices – i.e. he is not impecunious. If the court is satisfied that the non-fault party was not impecunious, then it is likely that they will only be awarded a sum in the region of the spot rates.

“...the claimant is rarely penalised for delay in repair, if they place their vehicle in the hands of a reputable garage (which most are) and there is no independent cause of the loss of use of the vehicle for that period.”

contact the garage to chivvy. If the delays are the fault of the garage, then a contribution may be sought from them. It is worthwhile writing to the garage to ascertain exactly what the delays were in order to consider this.

Clearly there are cases where liability is not straightforward, and perhaps the insured party does not advise their insurance company that they have been involved in an accident. This causes delay in responding quickly to the threat of a credit hire case. Even if the defendant

is only made aware that the claimant has entered a credit hire agreement until a few days later, it is still worthwhile offering the claimant a replacement vehicle in order to bring them out of the credit hire agreement and minimise exposure to the excessive costs.



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More Costs Reform on the Horizon: Jackson LJ Reports

The Jackson interim report is 1000 pages long. If sleep cannot be found, it is worth a read. For those of us with competing demands on our time, a few headlines are:

- The small claims limit for injury claims may rise (again I hear you say!) to £5,000. Or will political pressures prevent this once more?
- Feedback shows that referral fees are nearly but not quite universally disliked. This is one evil we need disposing of.
- CFA's come under the microscope. There is quite a surge in some parts for contingency fees (as per the USA). One worry is: would that lead Judges to gradually increase damages awards to ensure claimants receive what they should (as well as having to pay a proportion to their lawyers)?
- Jackson seems keen on the idea that Before the Event insurance should be compulsory, which would mean in theory that no one needs a CFA.
- "One way costs shifting" is suggested. This would mean claimants receiving costs if they win, but defendants not receiving costs when they win. "eh???" I hear you say! Some research actually shows that insurers win so few cases that the costs received in those cases are tiny when compared with the extra costs of CFA's. The argument then is that if there is no risk of the claimant facing a costs order there is no longer a need for CFA's at all. What about spurious and fraudulent claims though?

Watch this space: now starts the consultation stage proper.

A separate proposal would see no disclosure of documents in "smaller" cases by parties unless they wanted to rely upon them. This is not a Jackson proposal. A party therefore does not need to disclose a document detrimental to his case. Once again, where does that leave fraudulent claims?

Recovery of Loss Adjuster Fees

Are Loss Adjusters' fees an expense of the insurers which can never be recovered from the opponent if the claim is successfully defended? The Supreme Court Costs Office have recently reviewed the law on recovery of loss adjuster's fees. Insurers were attempting to include them in a bill raised on the discontinuance of the claimant's action and the work involved was undertaken both before and after proceedings were issued. The amounts involved had both been allowed on the initial assessment of costs but were both disallowed on appeal. If a person acts without a solicitor he cannot recover as a disbursement the fees and expenses paid to a third party for work of a kind which a solicitor could have done.

There were no grounds therefore to recover the costs incurred before solicitors were engaged following service of proceedings. It is clear from the judgment that if the loss adjusters had been instructed to investigate via the insurer's solicitors there is every prospect that the court would have allowed the investigation costs. The insurers failed in the case in question because of the lack of any evidence that a true agency agreement existed between the defendants' solicitor and the loss adjuster.

Insurers who regularly use loss adjusters for investigation purposes after solicitors have been instructed may well wish to consider the advantages of passing those instructions through the solicitors to keep open the prospect of recovering the costs if the claim is successfully defended.