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Judgment: approved by the Court for handing down | *Delivered:* 26/4/2017
*(subject to editorial corrections)**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

QUEEN'S BENCH DIVISION

BETWEEN:

KAREN McCAULEY

Plaintiff;

-and-

FRANCIS BRENNAN

Defendant;

ANTHONY COULTER

Third Party.

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. A figure for personal injuries of £15,000 has been agreed and has been paid. 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. On the Statement of Claim the entire amount claimed is £39,781.47. The plaintiff ultimately received the pre-accident value of her vehicle on 18 August 2011. This was in the sum of £4,850. She also received a salvage figure of £1,500 some weeks before that. Hence the case has been characterised in broad terms as whether a damage claim of some £6,350 should attract a hire claim of nearly £40,000. This involves consideration of issues of fact and law within the sphere of credit hire jurisprudence.

[2] Mr McCollum QC and Mr Fitzpatrick BL appeared for the plaintiff. Mr O'Donoghue QC and Mr Ham BL and Mr Matthews BL appeared on behalf of the defendant/third party. I am very grateful to counsel for their written and oral submissions.

Factual background

[3] The plaintiff gave evidence before me and this highlighted the following facts. She explained that she was a single mother in receipt of State benefits. She said that at the date of the incident she had one child and was expecting her second. She drove a Vauxhall Zafira which she needed for her day to day life. The plaintiff explained that she bought this car by way of hire purchase agreement about a year before the road traffic collision. This was her first vehicle. It was a three year old second hand car.

[4] The plaintiff in evidence explained that she purchased comprehensive insurance from Quinn Direct in relation to the car as her father said that this was advisable. She said that she obtained a loan from the Credit Union to pay for the insurance. The plaintiff explained that on 24 April 2010 she was hit from behind by another car. The collision was not her fault. The plaintiff explained that she was injured as a result and her car was damaged to the rear. In particular the plaintiff said that the boot of the car would not close and there was visible damage at the back so that she could not drive the car.

[5] After the incident the plaintiff said that she contacted her own insurance company. She asked about a replacement car but no offer was made. She spent five weeks with no car relying on family and friends to get around. The plaintiff said in evidence that a friend then recommended Accident Exchange (AEL) to her. She contacted this organisation and they agreed to take over the plaintiff's case.

[6] The plaintiff said that AEL arranged hire. She recalled signing forms but in evidence she said there was no discussion as to cost. The plaintiff said that she was told that the defendants would be paying the costs. The plaintiff explained that a repair bill was provided fairly swiftly after the accident which came to around £3,000. However the plaintiff could not afford to pay that bill.

[7] The plaintiff gave evidence that she needed a car particularly given her child care responsibilities and so she went along with the hire. The plaintiff referred to the fact that the hire purchase on her car was £135 a month. She said that it was difficult to meet this sum and that in some months her father had helped her. She said that this was not every month and it was usually by way of £50 here and there. The plaintiff said that she worked as a sales assistant but that she had been unemployed since the birth of her first child due to post-natal difficulties.

[8] The plaintiff confirmed that she signed various agreements and obtained a number of different cars over the 455 day period with the assistance of AEL. When

asked why she did not claim for her car repairs on her own insurance, the plaintiff simply said that she could not afford the £200 excess. I found the plaintiff to be an honest and straightforward witness and her evidence as to her financial circumstances was persuasive.

[9] The plaintiff was the only witness called. In addition to the plaintiff's evidence I was asked to consider a number of uncontentious matters. Firstly there was no issue that the plaintiff was impecunious. The plaintiff was not asked about finances beyond that for example whether she had a credit card or debts. This explains why there were no interrogatories directed towards these issues or discovery sought in relation to these financial matters. Secondly, it was undisputed evidence that the plaintiff paid hire purchase and upon receiving the settlement monies from the defendants in August 2011 she cleared the debt on her car in the sum of £4,000. She had a balance of about £1,700 and in addition to that she obtained a loan of £3,000 from her father to enable her to buy a new car and pay the tax and insurance for it. I was told that the father's ability to give over that money at that particular time emanated from the sale of a property.

[10] The plaintiff contracted with AEL by way of an agreement which I have read. The agreement is dated 31 May 2010. It has been provided in discovery. This agreement is entitled "ABI General Terms of Agreement Mitigation Questionnaire and Statement of Truth." The document is signed by the plaintiff. The part which is to be signed by the claimant reads as follows:

> "Prior to agreeing to enter into the hire agreement my duties to keep my losses to a minimum have been explained to me and I had not received an offer for a replacement vehicle from the at fault insurer. I have had the credit hire process explained to me. I understand that if I choose to hire on credit I am personally liable for paying for the hire costs which I would not have incurred had I been offered and accepted a suitable courtesy vehicle from own motor insurer or legal expenses insurer. I need to hire a vehicle as I need a car whilst mine is being repaired. I do not have access to another vehicle that I can use. I need a vehicle for getting to and from my social and family commitments. I need a robust and safe car. I believe my own vehicle is unroadworthy and/or unusable and I understand temporary repairs are impracticable or uneconomic. I do not have another suitable vehicle available to me either, being my own or through my immediate family. I have read and understood the above and I believe that the answers I have given are true."

Further agreements are signed by the plaintiff and AEL dated 29 March 2011, 4 August 2011. These coincide with a series of vehicle rental agreements which were signed by the plaintiff and which can be summarised as follows. The first is a hire start date of 31 May 2010 to an end date of 12 October 2010. This is for a Renault Laguna hatchback at a rate of £37.45 per day for 135 days. The second vehicle hire agreement is for a Vauxhall Astra hatchback from 13 October 2010 to 28 March 2011 this is at a rate of £60 per day for 167 days. The third agreement is for the hire of a Volkswagen Golf hatchback from 29 March 2011 to 27 July 2011 at a rate of £80 per day for 121 days. The final agreement is from 4 August 2011 to 25 August 2011 for a Vauxhall Insignia diesel hatchback at a rate of £80 per day for 22 days.

[11] The plaintiff was also given the benefit of an insurance policy which is described as being free of charge. This is referred to as complimentary accident protection policy. It is of note that in the bundle of papers I have the relevant documents in relation to this are dated 4 August 2011 however it may be that there were previous documents sent with each period of hire. In any event this letter states as follows:

> "The charges for the hire vehicle are covered by the hire agreement entered into with you with Accident Exchange Limited and although these charges are your responsibility, we will recover these charges on your behalf from the negligent driver(s) or their insurer(s).
>
> For your protection and also for your added peace of mind, we have arranged a complimentary insurance policy on your behalf. This policy is underwritten by AM Trust Europe Limited and, subject to the terms and conditions of the policy, it protects you from having to pay the hire charges incurred under the hire agreement in the event that they are not recovered from the negligent driver(s) or their insurer(s). It also provides cover for legal costs and expenses which may be incurred in the event that formal legal proceedings need to be taken on your behalf to pursue your claim should the other driver not accept liability or seek to dispute your claim at a later stage."

I pause to observe that in her evidence the plaintiff had no recollection or understanding of the complimentary accident protection policy. Also during the hearing counsel agreed that only the £37.25 rate of hire could be recovered on the basis of a like for like argument. That reduced the amount claimed by the plaintiff to just over £36,000.

[12] I also received a witness statement from Mr Dean Daniels by agreement. This affidavit explains that he is employed by Accident Exchange Limited as an investigation and disclosure officer and that he is authorised by them to make the statement. In this statement Mr Daniels explains the characteristics of AEL. At paragraph 2 he says as follows:

> "AEL is a credit hire organisation. Its principal business activity is the hire on credit of replacement motor vehicles to customers whose own vehicles have been damaged in non-fault road traffic accidents. Each customer enters into a vehicle rental agreement (rental agreement) with AEL under which the customer agrees to hire a replacement vehicle from AEL and grant AEL the exclusive right to pursue the customer's claim for hire charges and other losses against the at fault party (in practice, the fault party's insurer TPI)."

Paragraph 4 states that it is standard practice for AEL as part of the provision of a replacement vehicle and credit hire to issue each customer with a free of charge insurance policy.

Paragraph 7 states that this policy has been considered in a number of cases including at appellate level for example VW v Veolia Environmental Services UK PLC EWHC 2020.

[13] In this case, the defendant obtained the services of a professional to examine the case management notes of the credit hire organisation. This was from Mr Matthew John Sperryn. I received his statement by agreement also. I have considered his witness statement which is comprehensive running to some 274 pages. The statement has been referred to during the course of the hearing. For the purposes of this ruling I do not intend to recite all of the matters within this statement, however I have read it in full.

[14] From my reading of this document 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. It is also clear that the issue of the plaintiff invoking her own insurance policy was raised. It appears that at one stage the plaintiff was willing to consider this course but then two issues arose. Firstly there was apprehension in terms of an increased premium and secondly there was an inability to pay the excess.

[15] It is also clear from the report 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. I note from the documentation that the plaintiff was keen to avoid storage costs and so after the car had been taken into storage she brought the car back to her property and kept it there. 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. That point has been accepted in this case. As such the case of Lagden v O'Connor [2004] 1 AC 384 is relevant. This case establishes that credit hire companies can provide a method whereby a plaintiff can obtain a use of a replacement vehicle. In

Lagden v O'Connor a number of points are made succinctly by Lord Nicholls who gave one of the majority speeches. In particular he said:

> "The law would be seriously defective if in this type of case the innocent motorists were, in practice, unable to obtain the use of a replacement car. The law does not assess damages payable to an innocent plaintiff on the basis that he is expected to perform the impossible. The common law prides itself on being sensible and reasonable. It has regard to practical realities".

[20] Further he continued:

> "Here, as elsewhere, a negligent driver must take his victim as he finds him. Common fairness requires that if an innocent plaintiff cannot afford to pay car hire charges, so that left to himself he would be unable to obtain a replacement car to meet the need created by the negligent driver, then the damages payable under this head of loss should include the reasonable costs of a credit hire company."

[21] This case really comes down to the reasonable costs and that will obviously depend on the facts of each case. Reference has been made to the case of Clarke v McCullough [2013] NICA 50. In this case the Court of Appeal in Northern Ireland cited with approval a Scottish case of Whitehead v Johnston [2006] REPLR 205. In that case there was also a differential between the costs of repairs of a car which was estimated at £1,750 and hire of £18,793. The question was whether in electing to continue with the hire for a year rather than pay the repairs the plaintiff acted reasonably. In that case it was determined that it was not reasonable for the plaintiff to act in the way he did. However the important point to note in that case was that the plaintiff had some resources to pay for the repairs. In Clarke v McCullough a similar factual issue arose.

[22] This leads to a consideration of the doctrine of *res inter alios acta*. The principle emanates from a decision of Parry v Cleaver [1970] AC 1. This is a decision in relation to pension benefits. However the law effectively said in that case that the benefits which the plaintiff contributed to in the disablement pension should not be taken into account in the assessment of damages. In essence the doctrine means that an act done between particular parties should not harm or benefit others. This principle has been applied in credit hire cases such as Giles v Thompson [1994] 1 AC 142 and in the Northern Ireland case of McMullan v Gibney [1999] NIJB 17. It has also been applied in Dimond v Lovell [2002] WLR 1121. It is clear that the principle is of an established nature and has been described as a doctrine of "some potency" in this sphere of litigation by McCloskey J in a series of cases dealing with credit hire.

[23] The issue of the invocation of a comprehensive insurance policy was referred to in the case of Zurich v Umerji [2014] EWCA Civ. 357. That case is fact specific and deals in particular with impecuniosity. However, there is a brief reference to the point about reliance upon a comprehensive insurance policy in the judgment of Lord Justice Underhill at paragraph [43]. He says there as follows:

> "The point is an interesting one and plainly of some general importance. But I do not believe that we should consider it on this appeal. It was not pleaded at any stage, nor indeed was it foreshadowed in any way until Ms Hicks sought to raise it as I have described. No doubt that is not necessarily an absolute bar to the point being taken. Both counsel came prepared to argue it, though in Mr Nowland's case only if his initial objection to it being taken were unsuccessful and we were referred to several authorities …. But I do not think that the issue can be treated as one of pure law which can be decided in a factual vacuum. Even if the Appellants' case that the Claimant should have claimed on his policy is not precluded as a matter of principle – as to which I express no view – it would be necessary to consider the full circumstances, including the terms of the policy as regards excess and/or no claims bonus, before we could reach a view as to whether he had acted reasonably in not doing so. None of this was explored in evidence. This battle will have to be fought, if insurers are so inclined, on another field."

[24] The other case that is relevant in this area is Opoku v Tintas [2013] EWCA Civ. 1299. In this case there was an impecunious plaintiff. He did not have a comprehensive insurance policy, but in any event the issue of impecuniosity did not bar the court looking at whether or not he could afford repairs and the Court of Appeal took the view that it was reasonable to suggest that with some borrowing that he could afford repairs and so the period of credit hire was reduced. This was a view taken on the particular facts. At paragraph [31] of that judgment reference is made to the following:

> "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."

[25] The issue raised at paragraph [24] of the judgment is pertinent because there it states:

> "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."

[26] It follows from authority that the courts are keen to ensure that hire costs are justified. The figures involved are often eye watering and I can well see the concern about spiralling costs. However, there is now an established body of law dealing with the legal principles at play. Each case then turns on its own facts and it goes without saying that the recoverable amounts cannot be determined arbitrarily by a court. It is important to state that courts have stressed the overarching obligation on the part of a plaintiff to act reasonably from cases such as Martindale v Duncan [1973] 1 WLR 574, Maddox v Mann [1993] RTR 13 and Clarke v McCullough. 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.

[28] The second argument Mr McCollum made was rooted in the *res inter acta alios* doctrine. Mr McCollum referred to Parry v Cleaver and subsequent authority. He said that there was clear authority that the plaintiff ought not to have been compelled to invoke her own insurance policy to mitigate her loss. He said that the plaintiff was entitled to the full amount of hire adjusted due to a concession regarding rate that he had made in these proceedings.

[29] Mr O'Donoghue submitted that this case is one of principle versus perversity. He said it was totally disproportionate to allow for nearly £40,000 worth of hire. He said that Parry v Cleaver and subsequent authorities were not dealing with the same type of situation. Mr O'Donoghue referred to the comments in Umerji and stressed that with all due deference *res inter acta alios* could not be an immutable principle. He argued that there could be circumstances where to maintain it would lead to a perverse result as here. 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.

[31] This is a damages claim for loss of use of a car. The law has determined that hire of a car is recoverable and that this may validly involve an accident management company acting on behalf of a claimant. The issue is whether or not the plaintiff is entitled to the full credit hire amount. I begin by reciting a number of factors which were uncontroversial in this case. Firstly it was accepted the plaintiff had a need for a car. Secondly it is important to note that the plaintiff was impecunious. Thirdly, 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. I consider that applying conventional principles the plaintiff's own insurance is *res inter alios acta*. I do not consider that I should depart from that. The issue in this case is understandably one of economics. I can see the issue with the hire figure that is now reached in this case. 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. That was the position in the Opoku v Tintas case. However in this case there was no argument made that the plaintiff could have raised such an amount of money by her own borrowing.

[36] Notwithstanding the point of principle, there are other factual issues in this case which favour the plaintiff's argument. It was put to the plaintiff that she could in some way have funded the £200 excess on her own policy. However there was no clear evidence as to how this would happen. It is important not to rush to create a position whereby benevolence from another party is used to assist the tortfeasor. This point was not established in evidence in any event. It is not enough to say that in October 2011 the plaintiff's father lent her £3,000 from the sale proceeds of a house. It does not necessarily follow that he could have lent her money at the time when she needed it if she was going invoke her policy. There was no evidence adduced that the plaintiff could have saved money over a short period of time. She is clearly a woman on the breadline with a small child at this stage and so impecuniosity is a strong factor in this case. I cannot say that the plaintiff failed in terms of her priorities. She certainly could not afford to pay the car hire so she had to use the credit offered by the car hire company.

[37] Fundamentally the plaintiff must be put back in the position she was in prior to the actions of the tortfeasor. I was not taken specifically to evidence that if the plaintiff were to invoke her own insurance policy she would go back to exactly the same position. It seemed to be accepted that she could recoup her excess. But I was unclear as to whether or not the no claims bonus would definitely remain intact. So there could be other problems for the plaintiff in this case if she were compelled to invoke her own insurance policy. There were some submissions made to the effect that the plaintiff's insurance premium would not rise in the long term. However, the plaintiff was quoted an increased rate and it is not certain that her policy would not be affected. Even if a rise was short term the plaintiff would not be put back in the position she was at the date of the accident.

[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. She also considered the option of invoking her own insurance. She reduced storage costs. 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

[43] Accordingly I prefer the plaintiff's argument in this case. I understand that the parties have reached an accommodation about the rate of hire and so I will ask the parties to conduct the arithmetical calculation on the basis of the full hire period.

Postscript

[44] I am grateful to the parties who have now submitted the figure of £36,210 for hire on the basis of my ruling which along with £15,000 general damages results in a decree of £51,210.