



COPLEY v LAWN (2009): THE POST-MORTEM

Kiril Waite

1 Chancery Lane
London WC2A 1LF

0845 634 6666

kwaite@1chancerylane.com

This paper and the associated talk are provided for training purposes only. They do not constitute legal advice and liability for any reliance placed on them is disclaimed.

Disclaimer

It is assumed that the audience has an intermediate to advanced level of knowledge of credit hire litigation and is familiar with the leading authorities in this arena.

Introduction

1. One could not be accused of hyperbole in saying that the day the Court of Appeal handed down their judgment in the conjoined appeals of Copley v Lawn & Maden v Haller [2009] EWCA CIV 580 was a very dark one for defendant insurers. Whilst many were surprised at the outcome of the decision on the pure question of law, few had anticipated that their Lordships would have gone as far as they did in criticising the defendants' operational tactics in offering innocent claimants a car at no cost to themselves in order to limit their liabilities in paying out large and often unjustified amounts to credit hire companies.
2. For those insurers who operate similar schemes to the one in Copley, the ghost is yet to be given up. The defendants have petitioned the Supreme Court for permission to appeal. At the time of writing the petition is still under consideration. It is hoped that permission will be given, not least because of (a) the ramifications to the insurers' direct intervention schemes and (b) if the decision on the point of law were to stand it would, in effect, create an unwarranted exception in credit hire litigation on the law on mitigation of damages.
3. In this talk I will look at the decision in Copley, the effects on defendant insurers and the practical lessons to be learned in the short term. Whilst the discussion on Copley will be of particular interest to insurers and their advisors who operate these schemes, I will also touch on some of

the other important areas in the credit hire litigation where there are likely to be developments within the next year or so.

Pre Copley

4. The starting point is to look at the way that the direct intervention schemes developed and the cases that lead up to the Copley decision.

5. For a number of years defendant insurers had operated schemes where they would offer (subject to liability) the non-fault claimant an equivalent car at no cost to himself. Most notably of these were the TNT schemes, which had been tried and tested in a number of test cases before Copley was heard. Although these schemes were designed to squeeze the credit hire companies out of the picture, they were generally desirable for the public at large. Claimants were relieved of having to sue for car hire charges. Insurers would reduce the amount they would have to pay out and this in turn would be a positive thing for the cost of the following year's premiums.

6. The first of the reported cases was Evans v TNT [2007]. In this case the trial judge, having found that the claimant had received and understood the defendant's offer of an equivalent car, decided that Mr Evans had not acted unreasonably in ignoring the offer because he was advised by the credit hire company to do so. On the question of fact, namely whether the judge was correct to reach this conclusion, the appellate judge (HHJ Wyn Rees) disagreed and reversed the decision instead finding the claimant to have failed to mitigate his loss. However on the second question, the pure question of law, HHJ Wyn Rees agreed with the claimant's submission that even if he could have avoided the loss in its entirety by taking up the defendant's offer he was still entitled to what it would have cost them to have hired him a car. The upshot of the

decision was that even though the defendant won on the facts of the case, they lost on the law.

7. From the anecdotal accounts of fellow practitioners, Evans was seldom followed in subsequent cases involving the same issues. Instead courts would apply first principles of mitigation. Namely, that you can't recover for loss that you could have avoided, and if you could have avoided your loss in its entirety you don't recover anything.
8. Next came Steadman v TNT. This case was a claimant appeal solely on the point of law. There was no appeal against the finding that Mrs Steadman had failed to mitigate her loss by not accepting the defendant's offer. The case was heard over the course of two days with leading counsel on both sides. Here the appellate court agreed with the defendant on the analysis of law. Namely, the cost to the defendant was not relevant to the question of whether the claimant could have avoided her loss and she was not entitled to recover for loss which, on the facts, she could have avoided in toto.
9. Steadman was applied almost universally at first instance and at junior appellate level. Indeed HHJ Langan QC applied and followed Steadman when he heard the appeals in Copley. Many considered that the Court of Appeal would uphold his decision on this issue.

Copley

10. Copley was a second appeal. The facts, like the previously cited cases, were similar. The defendants' insurers had made offers to the respective claimants before or around the time that they had entered into hire. In the case of Capt. Madden the offer was ignored and in the case of Mrs Copley she passed it on to her solicitor but nothing more was heard.

Both claims for hire charges failed at first instance and on appeal to the circuit judge.

11. The claimants challenged both the judge's finding that they had failed to mitigate their loss in failing to make enquires about and/or take up the defendants' offer of a free car; and his finding that, having failed to mitigate their losses in their entirety, they were entitled to no damages for loss of use (the question of law).
12. Concerning the findings on the first issue, their Lordships were very critical both as to the contents of the letters containing the offers, and in the case of Mrs Lawn, the very fact that the insurer had taken it upon itself to telephone her directly. This censure of the operational side of communicating such offers is what defendant insurers find most alarming about the judgment.
13. As to the finding of fact, their Lordships with unanimity held that both the first instance judge and the junior appellate judge were wrong to have found either claimant to have acted unreasonably in not availing themselves of the defendants' offers. Pausing there for a moment, it is apposite to comment that the Court of Appeal has always shown a great reluctance in interfering with a trial judge's finding as to whether an individual had failed to mitigate his losses. Yet they were quick to do so here.
14. However the "error" in the judges' decision below was that they had conflated the position of the individual claimant with his advisor or insurer. In other words the correct test was to look at how the uninformed individual would respond to such an offer. Again pausing there for a moment, in insurance cases the law has never distinguished between the actions of the insurer, the advisors and the insured. If, say

for instance, an imprudent or unreasonable step was taken on the advice of the insurer or the advisor, the individual is saddled with the consequences. The Court of Appeal recognised this “traditional view” but commented obiter that such an approach would be correct in circumstances where the defendant insurer had informed the claimant in its offer what the cost to itself would be in providing the car. In neither case did the insurer tell the claimant what it would have cost them to hire an equivalent vehicle.

15. On the second point (the pure question of law), the Court of Appeal held again with unanimity that in circumstances where a claimant should have accepted the defendant’s offer because they could have provided the same or equivalent vehicle for cheaper price; he would be entitled to what it would have cost them. It was wrong to say that the claimant could recover nothing.
16. In their analysis of the law, the loss of use of the vehicle was immediate when the claimants’ vehicles were damaged, even though it was not quantifiable. Thus it could not be said that the acceptance of the defendants’ offer would have extinguished the claimants’ loss. Their Lordships held that the two principal cases cited in support of each side’s contention as to the law on the measure of loss were distinguishable. The defendants relied on *The Solholt* and the claimants on *Strutt v Whitnell*. The former was a claim for loss of profit in the sale of a ship. The latter a claim for the diminution in the value of a property sold with a secured tenant. Both were contractual cases. In their judgment the claim for car hire charges was more analogous to a diminution in value than a loss of profit!

Lessons To Be Learned

17. When one stands back and looks at the wider picture after the dust has settled, the consequences of the ruling on the pure question of law are not as damaging to insurers as they may appear at first blush. It was always going to be a windfall for the insurers if *Steadman* was upheld in *Copley*: they would be better off if the claimants had acted unreasonably rather than taken up the offer. Thus if the insurer was always prepared to pay, say, £25 per day for hiring the claimant a car; it couldn't be said that it would be a loss to them if the court were to award the claimant £25.
18. On the other hand the criticisms of the operational side are of greater and more immediate concern to the industry. Direct intervention was not only proven to work but was generally seen by the courts below to be a desirable thing.
19. It would appear that in argument their Lordships were not made aware of the true picture of what is really happening below and the large sums that the insurers are being asked to meet. It is to be hoped that if permission were granted by the Supreme Court, this deficit could be redressed in the appeal.
20. More surprisingly, when claimants at trial are asked in cross-examination whether they consider it more reasonable to accept the offer of an equivalent car from the tortfeasor's insurer as opposed to incurring a liability (albeit a theoretical one) to the credit hire company, most would agree. To this extent the adverse criticism is almost counterintuitive.
21. So what lessons are to be learned in so far as the future of direct intervention is concerned?

22. The short answer is that in the same way that the schemes were perfected over the course of time by a process of trial and error, so too will the future initiatives follow.
23. Their Lordships described the letters sent by the insurers as confusing. That is puzzling because again most claimants admit in the witness box that they understand the letters. Insurers may wish to consider getting their letters approved by the "Plain English Campaign"!
24. There is some comfort from certain passages in the judgment that courts could and should find a failure to mitigate in circumstances where both the claimant and his advisors are told of the cost to the defendant in hiring the claimant a vehicle and that cost is less than what the credit hire company are charging.
25. This is a difficult task for the insurers; as it is often the case that insurers only find out about the hire after the vehicle was returned. Hence why "offer cards" are handed over at the scene of the accident.
26. In the short term the systems will have to be adjusted so that information is provided as early as possible to all parties concerned i.e. the claimant, his solicitor, insurer and even credit hire company. Whilst the insurer will have the third party's personal details, it is hoped that direct communication with the third party's insurer will reveal who is representing the claimant in respect of his uninsured losses. A letter or email or both with the relevant information as to cost cannot be denied as an invalid offer.
27. It is also hoped that the county courts will have sympathy with defendant insurers, as they have done in the past, and recognise these

efforts when considering whether a claimant has acted reasonably in not taking up the offer.

28. If *Copley* does not go up to the Supreme Court or if the appeal is dismissed where does this leave the industry in defending credit hire? There are still other issues to fight over.

Other Matters

29. Permission has been granted in one unreported county court case on the vexed question of “what amounts to impecuniosity”. The appeal is yet to be heard and not much can be said at this stage other than ‘watch this space’. Most county court judges will admit that guidance is very much needed in providing a working test as to when a claimant is impecunious as many of the decisions on similar facts have come to different conclusions.
30. For example, a wealthy commercial solicitor in *Baker v First Yorkshire* (2007) (unreported) was found to be impecunious because it was unreasonable for him to have been expected to pay spot rate charges where he was the innocent victim of a no-fault accident. In *Boardman v Byrne* (2008) (unreported), a wealthy businessman was found not to be impecunious. Notwithstanding that he was the innocent victim of a no-fault accident as he could have paid upfront for the charges. It is not possible to see any parity in the reasoning between these two cases.
31. There is an appeal underway on that other vexed question of the standard that defendants are asked to meet in proving the spot rate for car hire charges. Again little can be said, as there is an appeal pending.
32. In the same vein as ‘impecuniosity’ there are inconsistent decisions on rate evidence. In particular whether a defendant has to establish, which

is often evidentially impossible, what it would have cost the claimant to have hired the vehicle on the spot market on the very day that he entered into credit hire.

33. On a different issue altogether, it is time for a test case on “contribution claims” against garages in cases where the garage has unreasonably delayed the repair of the claimant’s vehicle. Leaving aside the evidential difficulties often encountered by defendant insurers in establishing the delay, it is the legal basis that needs to be tested. Certainly since the first instance decision by HHJ Charles Harris QC in Mason v TNT & Groupama (2009) (unreported) it would appear that contribution claims against the claimant’s own insurer for delaying the repair are unlikely to succeed. Although the case was never appealed, the decision would appear to be a sound one on its own facts.

34. In closing, there are still issues to be fought for defendants in the credit hire arena.

KIRIL WAITE
1 CHANCERY LANE
LONDON
15th September 2009

© Kiril Waite