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Car accidents and credit hire agreements

Philip Rawlings and Joanna Rudd***

A motorist whose car is damaged by the negligence of another may recover for the loss suffered, but must take reasonable steps to mitigate that loss. Where a replacement car is hired the charges can be recovered, if the car is needed for use and is similar to the damaged vehicle. Real difficulties arise if the motorist hires on credit. The agreement must comply with regulations applicable to credit agreements and constitute an enforceable contract, and, even then, full recovery of the charges is possible only if the motorist is impecunious. In spite of attempts to calm conflict over these matters, credit hire has prompted a flood of litigation that has often confused issues and created difficult distinctions, which, in turn, have increased tensions in the industry and caused bafflement among motorists.

I. THE CREDIT HIRE INDUSTRY

Damages in tort are meant to put the claimant into the same position as if he or she had not sustained the wrong.¹ A motorist whose car is damaged by the negligence of another is entitled to recover for the loss suffered as a result of the vehicle's being out of use during the period it is being repaired, or a new car obtained, if repair is not economically viable.² But the simplicity of these propositions is deceptive. This paper will reveal a story of apparently endless litigation, uncertain definitions, procedural strategies, baffled motorists, aggrieved insurers, bitter differences of opinion, a footballer's broken supercar and even a conviction for contempt of court. These problems have arisen because the law has struggled to keep pace with the rapid development of an industry that has exploited gaps in the response to accidents by insurers.

The aggrieved motorist will, typically, want to hire a replacement car and, as long as he or she acts reasonably, these charges can be recovered from the defendant.³ The real problems arise when the claimant does not have access to sufficient funds to carry this expenditure and so hires on credit, perhaps as part of a broader accident management

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1. *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39.

2. *Giles v Thompson* [1994] 1 AC 142, 154, *per* Lord Mustill; *Pattni v First Leicester Buses Ltd* [2011] EWCA Civ 1384, [30].

3. *Martindale v Duncan* [1973] 1 WLR 574; [1973] 1 Lloyd's Rep 558; *Lagden v O'Connor* [2003] UKHL 64; [2004] 1 AC 1067; [2004] Lloyd's Rep IR 315; *Pattni v First Leicester Buses Ltd* [2011] EWCA Civ 1384, [30].

agreement in which repairs are also undertaken on credit.⁴ If satisfied that the accident was the fault of the defendant, a credit hire company provides a car on terms whereby the claimant assumes liability for the charges, but payment is deferred until the defendant pays damages, and insurance covers the possibility that damages cannot be recovered. Although any action is brought in the name of the claimant, the hire agreement provides for the company to control the litigation. Such arrangements appear to have obvious advantages for the motorist, who can shed much of the worry associated with the accident. The defendant's insurers, on the other hand, are likely to be less enthusiastic: the claimant might have chosen to do without a car if he or she had had to bear the cost upfront, in which case, although damages might still be awarded for loss of use of the car, these would probably be less than the ordinary rate of hire; hire charges are substantially increased by the cost of providing credit and associated administrative expenses; and there is a suspicion that charges are inflated by slow repair times and the hiring of cars that do not match the damaged vehicle.⁵

Much of the conflict and negotiation is hidden from view. Nevertheless, there has been a good deal of litigation. Relatively few cases reach the senior courts, so for a better sense of how the law is interpreted and applied it is necessary to look at the appeals heard in the county courts, and indeed the senior courts now commonly refer to these decisions.⁶ Certain legal issues arise in the cases. Is the hire agreement enforceable against the claimant? If it is not, the claimant has suffered no loss and the defendant is not liable for the hire charge. Did the claimant need to hire a car? Was the hire car a suitable replacement for that which was damaged? Was it hired for longer than necessary? Was it reasonable for the claimant to enter into a credit hire rather than pay the charges upfront?

II. ENFORCEABILITY OF CREDIT HIRE AGREEMENTS

The defendant's insurer may argue that the hire agreement is unenforceable because it is illegal or does not constitute a binding contract.⁷ In *Giles v Thompson*,⁸ the House of Lords rejected the argument that credit hire agreements are champertous or contrary to public policy. The profit obtained by the hire company arose from the hiring of the car and not from the litigation, and the actions of the company did not amount to intermeddling. The company did not obtain direct rights over the fruits of that part of the damages representing the credit hire charges: the payment of damages merely put the motorist in the position of being able to repay the company. Lord Mustill remarked, "I can see no convincing reason for saying that as between the parties to the hiring agreement, the whole transaction is so unbalanced, or so fraught with risk, that it ought to be stamped out. The agreement is one which in my opinion the law should recognise and enforce".⁹

4. The principles applied are similar: *Lagden v O'Connor* [2003] UKHL 64; [2004] 1 AC 1067; [2004] Lloyd's Rep IR 315.

5. *Accident Exchange Ltd v George-Broom* [2012] EWHC 207 (Admin), [2].

6. *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2010] EWCA Civ 647; [2011] QB 357.

7. Attempts were made to have claims struck out as an abuse of process, but this strategy seems to have been dropped some time ago: *Giles v Thompson* [1994] 1 AC 142, 155.

8. [1994] 1 AC 142.

9. *Ibid.*, 165.

Nevertheless, credit hire agreements have been rendered unenforceable by a failure to comply with particular formalities. This argument succeeded in relation to the Consumer Credit Act 1974 in *Dimond v Lovell*.¹⁰ The House of Lords held that the hire contract was a credit agreement and it had not been executed in accordance with the Act. This meant the motorist was not liable for the hire charges and had, therefore, suffered no loss and could not recover from the defendant. She had not been unjustly enriched by not being obliged to pay the hire charges because the Act contemplates the possibility of a debtor benefiting from an unenforceable credit agreement. The objective of the Act is to penalise those who do not properly execute credit agreements and the fact that this may benefit debtors is irrelevant. Furthermore, the court did not permit recovery by the motorist as trustee for the hire company because this would, in effect, render the credit agreement enforceable, contrary to the intention of the Act. Yet, Lord Hoffmann went on to say, "The unenforceability of the agreement is a technical defect which more sophisticated drafting can easily correct".¹¹ Hire companies took the hint. By ensuring no more than four payments are required and all payments are to be made within 12 months, the agreements become "exempt contracts" under the Consumer Credit (Exempt Agreements) Order 1989,¹² Art.3(1)(a) and, therefore, not subject to the Act. Subsequently, the Court of Appeal rejected the argument that a redrafted agreement was unenforceable as a sham designed to avoid the effect of the 1974 Act.¹³

In *W v Veolia Environmental Services (UK) Plc*,¹⁴ the High Court considered the effect of the Cancellation of Contracts Made in a Consumer's Home or Place of Work etc Regulations 2008,¹⁵ which require the hire company to give a consumer notice of cancellation rights. Following an accident, W signed a credit hire contract at his home, but no cancellation notice was provided, so the agreement was unenforceable.¹⁶ A second hire agreement, which was entered on the expiry of the first, did not fall within the Regulations because it was not signed at the home address. Other cases have focused on whether the agreement was subject to the Regulations where it was made over the telephone before the paperwork was signed at the motorist's home.¹⁷ This is a question of mixed fact and law concerning the point at which the contract is formed, but the tendency of hire contracts to include in documents an entire agreement clause in order to protect against disputes concerning terms or misrepresentation suggests that any oral agreement has been superseded by the written agreement, so that the obligations rest on the latter, which, if signed at home, must comply with the Regulations. There has also been some dispute between county court judges as to the status of a notice of cancellation that is separate from—but delivered with—the main agreement. In *Orley v Viewpoint Housing Association*,¹⁸ the Gateshead County Court held that the requirement for the notice of cancellation

10. [2002] 1 AC 384.

11. *Ibid.*, 400.

12. SI 1989/869. See *Dimond v Lovell* [2002] 1 AC 384, 396; *Thew v Cole* [2003] EWCA Civ 1828; [2004] RTR 25.

13. *Burdis v Livsey* [2002] EWCA Civ 510; [2003] QB 36 (affd [2003] UKHL 64; [2004] 1 AC 1067; [2004] Lloyd's Rep IR 315).

14. [2011] EWHC 2020 (QB).

15. SI 2008/1816, which came into force on 1 Oct 2008.

16. For other reasons, which are discussed later, W (and so the defendant) was, nonetheless, liable for the hire charges.

17. *Chen Wei v Cambridge Power & Light Ltd* LT 11 Oct 2010 (Cambridge Cty Ct).

18. LT 7 Dec 2010 (which cites in support *Lawford v Pacey* (26 Aug 2010) Unreported (Lewes Cty Ct)).

to be “incorporated in the same document”¹⁹ was not breached even though the separate sheet of paper containing the cancellation notice was not mentioned by the agreement and that agreement contained an entire agreement clause. The court held that the purpose of the regulation was to ensure that the right to cancel was brought to the motorist’s attention at the time of the contract, but this did not mean it had to be part of the contract. Cancellation is a right that exists as a result of the Regulations, irrespective of its contractual status. Alternatively, the judge held that the notice was incorporated: it referred to the agreement and the test was whether a reasonable consumer would consider it part of the agreement. The difficulty is that in reaching these conclusions the judge expressly declined to follow the decision of the Swansea County Court in *Guerrero v Nykoo*,²⁰ in which on similar facts it had been held necessary for the cancellation notice to be incorporated in the main agreement and, while this could be achieved by two separate pieces of paper each referring to the other, it had not happened.

Insurers have also argued that particular credit hire agreements are not enforceable contracts under the general principles of contract law. They rarely succeed since, although the burden of proof is on the claimant to show that a contract has been formed, it is easily discharged; indeed, the practice of bringing claimants into court to give evidence of their understanding of the arrangement has been deprecated.²¹ The courts take a commercial view of the dealings between the parties. In *Carson v Tazaki Foods Ltd*,²² C hired a car from H after being involved in an accident, which had been caused by T’s negligence. The hire was arranged by telephone and the written agreement only arrived at her address a few days after the car was delivered. C did not sign the agreement until long after the car had been returned. The court rejected the argument that there was no contract of hire, remarking that contracts were often concluded over the telephone on the understanding that standard terms would apply. Even if the contract had not been agreed over the telephone, there was a contract when the agreement arrived and C failed to object to its terms.

Nevertheless, occasional successes in the county courts have encouraged insurers to continue with such challenges. Typically, the problems arise from poor practice at the hire company. In *Company Call Centre Technology Ltd v Sheehan*,²³ a claim for hire charges of £4,250 was dismissed because the claimant did not see the terms until after the hire period had expired and the car returned and, therefore, it was held that the agreement was based on past consideration and not enforceable. The distinction between this case and *Carson v Tazaki* is that in the latter there was evidence that the claimant had been informed of the liability to pay charges, while in *Sheehan* the court was presented with no evidence of any contact, or that the claimant believed he was going to be liable for the charges. There is some reason to think that over-enthusiastic or misguided employees may on occasion actively give motorists the impression that no contractual liability arises, rather than explain that the liability is covered by insurance—and, in truth, the distinction is, perhaps, too subtle for many non-lawyers. In *Tyrell v Staniforth*,²⁴ the motorist

19. Reg 7(4).

20. LT 25 Oct 2010.

21. *Carson v Tazaki Foods Ltd* 2005 WL 3464411 (QB).

22. *Ibid.* See also *Borley v Reed* (12 Dec 2005) Unreported (Winchester Cty Ct).

23. LT 17 Apr 2009 (Birmingham Cty Ct).

24. (2009) Unreported (Northampton Cty Ct); noted in *Post Mag*, 8 July 2009.

provided an electronic signature to acknowledge receipt of the car and this was later imported into a credit agreement form. The court concluded that the contract was enforceable, but reports suggest that, when faced with an appeal, the company repaid the charges. An attempt to argue before the Northern Ireland High Court that hire agreements were unenforceable by the principle *non est factum* not surprisingly failed, as this defence requires a fundamental mistake as to the character of the document and is seldom available to a literate adult, who is not suffering from a significant incapacity.²⁵ A rather different challenge was successful in *Salt v Helley*,²⁶ where the firm that managed the plaintiff's claims also owned the hire company, but failed to disclose this fact. The court held that this constituted a breach of the duty owed by an agent to a principal, and, since the court treated the hire company and the claims company as one, the hire contract was not enforceable against the plaintiff and the plaintiff could not recover the charges from the defendant. In *Agheampong v Allied Manufacturing (London) Ltd*,²⁷ the claim relating to the hire charges was rejected, not because the hire contract was unenforceable, but because the *ex turpi causa* principle applied to deny the claim for the loss of the use of the car after it was shown that the claimant had not insured the damaged car, had intended to drive without insurance and had obtained a road tax disc while not insured.

In spite of strong contrary authority, insurers have tried to argue that the presence of insurance in a credit hire scheme means that the claimants cannot suffer loss and, therefore, cannot claim. In *W v Veolia Environmental Services (UK) Plc*,²⁸ HHJ Mackie QC remarked that, even though payment may come from the insurer, the law treats it as coming from the claimant, adding that "The risk of a windfall to a claimant who obtains payment from the defendant but then declines to pay the hire car provider on legal grounds falls away. The insurer is subrogated to the position of the claimant both as a matter of contract and of the general law".²⁹ The case had a curious feature in that the insurer paid for the entire hire charges even though these exceeded the policy's limit of £100,000. Mackie J said that the excess was not "a good faith payment of a claim made under the policy";³⁰ but the motorist had a claim for the full amount against the defendant and, since the insurers had paid, they were able to exercise the right of subrogation and recover the full amount. Noting the speed with which the credit hire insurer paid, HHJ Mackie QC wryly observed that "Cheerful, prompt and knowing overpayment of claims by insurers is unheard of, at least in this Court".³¹ The tactic was used to get around the consequence of the claim's failing because a court might rule that W had no obligation to pay the charge on the first agreement (as the court did), but the motive for the action was irrelevant.

III. SHOWING NEED

If the motorist enters into a hire agreement, a claim for the charges incurred is a claim for special damages, which must be proved, since "[t]he need for a replacement car is not

25. *Smyth v Diamond* [2010] NIQB 3.

26. [2009] NIQB 69.

27. [2009] Lloyd's IR 379 (Central Lond Cty Ct).

28. [2011] EWHC 2020 (QB). See also *Bee v Jenson* [2007] EWCA Civ 923; [2007] 4 All ER 791, [9].

29. [2011] EWHC 2020 (QB), [37].

30. *Ibid.*, [40].

31. *Ibid.*

self-proving”,³² and the claimant must mitigate loss by acting reasonably as between himself or herself and the wrongdoer.³³ Strictly, hiring a car does not constitute mitigation since it does not reduce the loss, but it is generally described as such.³⁴

Did the claimant need to hire a car? In *Giles v Thompson*,³⁵ having pointed out that the need to hire was not self-proving, Lord Mustill went on to say: “although I agree with the judgments in the Court of Appeal that it is not hard to infer that a motorist who incurs the considerable expense of running a private car does so because he has a need for it, and consequently has a need to replace it if, as the result of a wrongful act, it is put out of commission, there remains ample scope for the defendant in an individual case to displace the inference which might otherwise arise”. In *Park Lane BMW v Whipp*,³⁶ the Oxford County Court held there was no need to hire where a motor dealer failed to show that a limousine, which had been damaged, would have been used during the repair period. The defence was strengthened by the fact that the replacement hired was a two-seater sports car. The Court of Appeal came to the same conclusion in *Beechwood Birmingham Ltd v Hoyer Group Ltd*.³⁷ The claimant was a motor dealer. When one of its cars was damaged by the negligence of the defendant, instead of taking another from stock, which was the dealer’s usual practice if a car was being repaired, a replacement was hired. Yet, although the courts will look at the claimant’s access to a replacement, this does not shift the burden of proof. The issue is whether the defendant can cast doubt on the need to hire a replacement and then whether the claimant can show such need. There is no need if, during the period of repair, a suitable second car is available, or the claimant is in hospital as a result of injuries sustained in the accident, or, more happily, on holiday.³⁸

Assuming that the claimant needs a replacement, was it reasonable to enter a credit hire agreement? In *Lagden v O’Connor*,³⁹ the House of Lords effectively overruled *The Liesbosch*.⁴⁰ In that case Lord Wright had concluded that the poverty of the plaintiff was not a relevant consideration in determining damages. This was not an issue of mitigation or causation.⁴¹ Lord Wright had not suggested that a plaintiff, who did not have sufficient funds to mitigate the loss, acted unreasonably by failing to mitigate, and equally the courts had never denied recovery where there were causal links between the tort, the impecuniosity and the loss. For Lord Wright it was an issue of remoteness. He distinguished between the immediate consequences of the negligence and the effect of extraneous circumstances, such as impecuniosity. He thought that impecuniosity was not to be treated in the same ways as a physical weakness (the “egg-shell skull”) or the possibility that the victim was a rich person, either of which could aggravate the loss

32. *Giles v Thompson* [1994] 1 AC 142, 167, per Lord Mustill.

33. *Evans v TNT Logistics Ltd* 2007 WP 919548; [2007] Lloyd’s Rep IR 708 (Pontypridd Cty Ct). Generally, *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways of London Ltd* [1912] AC 673; *Darbishire v Warren* [1963] 1 WLR 1067; [1963] 2 Lloyd’s Rep 187.

34. *Dimond v Lovell* [2002] 1 AC 384, 401–402.

35. [1994] 1 AC 142, 167.

36. LT 2 May 2009.

37. [2010] EWCA Civ 647; [2011] QB 357. See also *Whitworths Ltd v Crenoon Ltd* LT 11 Aug 2006 (Northampton Cty Ct).

38. *Giles v Thompson* [1994] 1 AC 142, 167.

39. [2003] UKHL 64; [2004] 1 AC 1067; [2004] Lloyd’s Rep IR 315.

40. [1937] AC 449; (1933) 45 Ll L Rep 123. See B Coote, “Damages, *The Liesbosch*, and impecuniosity” (2001) 60 CLJ 511.

41. Coote (2004) 120 LQR 382.

suffered. Since *The Liesbosch*, the test of remoteness has become a matter of reasonable foreseeability and, in *Lagden*, three of their Lordships took the view that “a negligent driver must take his victim as he finds him” and this included the victim’s impecuniosity.⁴² Lord Hope of Craighead argued that a lack of resources deprived the motorist of the opportunity to minimise the loss of use by hiring a replacement.⁴³ It was reasonably foreseeable that some motorists would not be able to hire from an ordinary rental company because they were “impecunious”. In other words, the standard against which the reasonableness of the claimant’s behaviour is judged is different where that claimant is impecunious. Lord Nicholls of Birkenhead defined impecuniosity as the “inability to pay car hire charges without making sacrifices the plaintiff could not reasonably be expected to make”.⁴⁴ The county courts seem to have preferred this to the stricter test of Lord Hope, who suggested drawing a line between those who did and those who did not have a debit or credit card which would provide access to sufficient funds to cover the market (or “spot”) rate hire charges.⁴⁵ Lord Nicholls was relaxed about the difficulties in determining whether someone is impecunious, believing that insurers and hire companies would reach an accommodation.⁴⁶ He was a little optimistic. The case stoked further litigation and made the issue of financial resources a routine part of the enquiries by lawyers on behalf of the defendant’s insurers.

The county courts have had to draw fine distinctions. Some cases seem fairly clear: there is little surprise in finding that Darren Bent, a highly-paid Premier League footballer, and Kevin Tkachuk, a well-paid professional rugby player, are not impecunious.⁴⁷ More difficult is *Thompson v Vincent Haulage Ltd*,⁴⁸ where a claim was not allowed even though the motorist’s resources seemed relatively meagre: he was self-employed with a net annual profit of just over £13,000, a credit card with a £1,000 credit limit, which he said he did not use, and savings of £2,000. At first sight the decision in *W v Veolia Environmental Services (UK) Plc*⁴⁹ is also surprising. When his 21-year-old Bentley was damaged, W, who was an actuary, entered a credit hire agreement for a modern Bentley. He satisfied the court of his need for a prestigious car to project a “successful and professional” image to his clients and at his golf club, and also that he could not afford the spot rate, which was around £380 per day cheaper than the credit rate. The total charges reached £138,308.43, which was about £10,000 more than the cost of a new car. Regarding W’s financial situation, HHJ Mackie QC asked, “Does the evidence show that the claimant was ‘impecunious’ so that he ‘had no choice’ but to take the credit hire car because he could not afford to pay the spot rate of £485 per day?”⁵⁰ This is a tougher test than required by Lord Nicholls. Nevertheless, HHJ Mackie QC found that the claimant was impecunious: his finances were “in a bit of a mess” and he “had difficulty with credit

42. [2003] UKHL 64; [2004] 1 AC 1067, [6]; (also [61]).

43. *Ibid.*, [43].

44. *Ibid.*, [9].

45. However, in *Patni v First Leicester Buses Ltd* [2011] EWCA Civ 1384, [30], Aikens LJ preferred Lord Hope’s approach. He also preferred the term “basic hire rate” to spot rate, although this battle for precision may already have been lost.

46. Lord Hope agreed: [2003] UKHL 64; [2004] 1 AC 1067, [43].

47. *Bent v Highways & Utilities Construction Ltd* [2010] EWCA Civ 292 (but see *Patni v First Leicester Buses Ltd* [2011] EWCA Civ 1384); *Tkachuk v Stevenson* 2010 SLT (Sh Ct) 238.

48. LT 15 Apr 2008 (Preston Cty Ct). See also *Clelland v Quinn Direct* 2011 GWD 2–91 (Sh Ct).

49. [2011] EWHC 2020 (QB).

50. *Ibid.*, [60].

cards at the time of the hire and these would not have withstood anything like the spot rate for more than a very brief period".⁵¹ He did add, almost apologetically, that, while it was curious to define a Bentley owner as impecunious, this was an old car worth no more than a modest new one, although that is surely irrelevant since the key issue is not W's capital assets, but his reasonable access to sufficient liquid funds to hire at the spot rate.

By ordinary standards anyone who drives even a 21-year-old Bentley is not impecunious, but impecuniosity is judged by the ability to afford the replacement car which the claimant is entitled to hire and which he or she has hired. But the comparison does lead to some interesting conclusions. If the motorist is entitled to hire a new replacement for the damaged car, it seems more likely that someone who drives a prestige car will be impecunious. A motorist who bought a three- or four-year-old Bentley for around £60,000 will presumably be entitled to hire a new model, but it is likely that this person would not be able to afford a long period of hire at a cash charge of around £400 per day. The owner of a brand new Ford Focus, which cost around £13,000, is more likely to be able to afford hire costs that would run to about £40 per day. Hence, Mr Thompson, who earns £13,000 and drives a relatively cheap car, is not impecunious, while W, who has a pension of £20,000, savings between £50,000 and £100,000 and an overdraft limit of £30,000 and drives a prestige car, is impecunious.

Of course, impecuniosity does not mean that a court will award the credit hire charges where there is no need to hire in the first place. In *Singh v Aqua Descaling Ltd*,⁵² the Walsall County Court held that the claimant, who rented taxis to drivers, did not need to hire a replacement at a cost of £1,300 per week when one of the vehicles was damaged; instead, the negligent motorist was liable to compensate for loss of profit, which was £35 per week. The judge suggested that the result would have been different if the taxi had been owned by a driver who also used it for personal trips.

While impecuniosity will normally be a precondition for claiming credit hire charges, a driver who is not impecunious should also be able to recover such costs where credit hire provides the only means by which a replacement vehicle can be hired. It may not be possible to hire in the ordinary rental market because of the driver's age or profession, but credit hire may be available because the criteria tend to be more relaxed.

IV. HIRE PERIOD AND TYPE OF CAR

The defendant may challenge the length of the hire period if it exceeds what is reasonably necessary⁵³ and the claimant has not taken reasonable steps to ensure the early completion of repairs.⁵⁴ In *Mattocks v Mann*,⁵⁵ Mrs Mattocks took the damaged car to a reputable garage, but the repairs took 12 weeks instead of the expected six and the car was retained for a further four months pending payment by the defendants. The Court of Appeal held that the defendant was liable for the cost of hire during this entire period because Mrs

51. *Ibid.*, [61].

52. (2008) 106 (12) LS Gaz 17 (Walsall Cty Ct).

53. *Bent v Highways & Utilities Construction Ltd* [2010] EWCA Civ 292; *Clark v City of Edinburgh Council* [2010] CSOH 144; 2011 Rep LR 11.

54. *Mattocks v Mann* [1973] RTR 13,18; *Mason v TNT UK Ltd* LT 19 Apr 2009 (Reading Cty Ct); *Clark v City of Edinburgh* [2010] CSOH 144; 2011 Rep LR 11.

55. [1973] RTR 13.

Mattocks had acted reasonably and the delay was the fault of others for whom she was not responsible. It may, of course, be possible for the defendant to obtain a contribution from the party responsible for the delay, such as the repairer, but this is a separate issue.⁵⁶ Where the car is damaged beyond repair, the claimant may not claim for the cost of hire beyond the date on which payment in settlement of the claim is made.⁵⁷

The replacement hired must be “broadly equivalent” to the damaged vehicle.⁵⁸ Does this mean a similar model or something of similar value? The claimant cannot recover the cost of hiring a sports car worth £18,000 to replace his damaged, 14-year-old, high-mileage car which cost £1,700.⁵⁹ In *Boardman v Byrne*,⁶⁰ the claimant refused the offer of what he regarded as “ordinary” Porsches, such as the 911 or 966, to replace his Porsche GT3 and instead hired a Mercedes at more than twice the rate for the Porsches. The court awarded the spot rate for an ordinary Porsche. The grouping of cars into categories is a normal part of the car rental business,⁶¹ and it may assist judges to maintain objectivity, whether or not they know anything about cars. But what happens where the damaged car is old? The motorist has no option but to hire a new or nearly new replacement. The issue of whether a new Bentley is “broadly equivalent” to a 21-year-old one was not properly aired in *W v Veolia Environmental Services (UK) Plc*,⁶² although HHJ Mackie QC did observe that, had the claimant been paying the hire charge himself, “it is unimaginable that he would have hired a replacement car as new and valuable as the one supplied”.⁶³ In a Scottish case,⁶⁴ Lord Turnbull remarked that in determining what constituted a suitable replacement reference should be made to the age and value of the damaged car as well as its make and model. Yet, there should be no requirement to hire a lesser car merely because it might satisfy the claimant’s needs.

One of the appeals settled at the Court of Appeal stage in *Lagden v O’Connor*⁶⁵ concerned whether a motorist, who hired a saloon car to replace a sports car, was entitled to damages equivalent to the cost of hiring a sports car. The court followed a well-established principle that a defendant is only liable to compensate for the loss suffered,⁶⁶ which in this case was the cost of the hire of the saloon car and not the hire charge that might have been paid for a sports car. The court, however, went on to suggest that the claimant might not have been acting reasonably—and, therefore, might have failed to mitigate his loss—if he had refused to hire a saloon car and insisted on a sports car.⁶⁷ Again, this does not follow on from the established principle. There are two separate issues. First, is there a need to hire a replacement? This involves, among other things,

56. *Burdis v Livsey* [2002] EWCA Civ 510; [2003] QB 36 (affd [2003] UKHL 64; [2004] 1 AC 1067; [2004] Lloyd’s Rep IR 315); *Park Lane BMW v Whipp* LT 20 May 2009 (Oxford Cty Ct). See also *Liddle v Brit Insurance Ltd* [2011] CSOH 145.

57. *Greenlees v Allianz Insurance Plc* [2011] CSOH 173.

58. *Bent v Highways & Utilities Construction Ltd* [2011] EWCA Civ 1384.

59. *Clark v City of Edinburgh Council* [2010] CSOH 144; 2011 Rep LR 11.

60. LT 18 Apr 2008 (Walsall Cty Ct).

61. A scheme of classification is used in the General Terms of Agreement, discussed below.

62. [2011] EWHC 2020 (QB).

63. *Ibid.*, [61].

64. *Clark v City of Edinburgh Council* [2010] CSOH 144; 2011 Rep LR 11.

65. [2002] EWCA Civ 510; [2003] QB 36; [2002] Lloyd’s Rep IR 524.

66. *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways of London Ltd* [1912] AC 673, 689, 690.

67. [2002] EWCA Civ 510; [2003] QB 36; [2002] Lloyd’s Rep IR 524, [129–133] (affd [2003] UKHL 64; [2004] 1 AC 1067; [2004] Lloyd’s Rep IR 315).

asking if it will be used during the period that the damaged car is off the road. Second, is the replacement is “broadly equivalent” to the damaged car? If the claimant is able to pass those tests, it is not relevant additionally to ask whether the car is necessary for the uses to which the claimant will put it.⁶⁸

V. RECOVERABLE CHARGES

Where the claimant did not act reasonably in entering into a hire agreement (for cash or credit), damages will still be available for loss suffered. In *Beechwood Birmingham Ltd v Hoyer Group Ltd*,⁶⁹ damages were calculated on the basis of interest on the capital value of the car at the date of the accident for the period of repair plus any depreciation in that value. Damages are recoverable where the claimant, although able to make an ordinary hire agreement, has taken up credit hire. The claimant cannot recover any “additional benefits” associated with the provision of credit,⁷⁰ but it is for the defendant to show that there was a difference between the costs under the credit hire and the spot rate reasonably available to the motorist at the time.⁷¹ In *Burdis v Livsey*,⁷² the Court of Appeal looked at three ways in which damages might be calculated. First, the credit hire charge could be broken down and additional elements, such as credit costs and claim handling, stripped out.⁷³ The court rejected this as too cumbersome and disproportionate where small claims were involved, but did not preclude the use of direct evidence, such as the credit hire company’s published spot rate,⁷⁴ although in that situation the defendant must be allowed also to bring evidence that the rate was unreasonable when compared with rates offered by other hirers which the claimant might reasonably have used. Second, the court considered using a reasonable discount to the credit hire charge, but rejected this as arbitrary. The third method is the preferred one.⁷⁵ This involves looking at local hire charges for the car hired and not necessarily simply charging the highest rate in the range. The motorist is not expected to go further than obtaining a replacement from a local hire company, but must act reasonably in selecting where there are several companies.

If the claimant is impecunious and, therefore, may obtain a replacement vehicle only by entering into a credit hire agreement, what part of the charges can be recovered? Although in *Dimond v Lovell*,⁷⁶ the House of Lords disallowed “additional benefits” above the market rate of hire, that case involved an unenforceable credit agreement, so a majority in

68. In *W v Veolia Environmental Services (UK) PLC* [2011] EWHC 2020 (QB), the court discussed W’s need for a prestige car for business and the golf club rather than simply his need for a car. See *Pattni v First Leicester Buses Ltd* [2011] EWCA Civ 1384, [74].

69. [2010] EWCA Civ 647; [2011] QB 357. See also *Agheampong v Allied Manufacturing (London) Ltd* LT 1 Sep 2008 (Central Lond Cty Ct); *Whitworths Ltd v Crenoon Ltd* LT 11 Aug 2006 (Northampton Cty Ct).

70. *Dimond v Lovell* [2002] 1 AC 384, 402. Lord Hoffmann’s view was endorsed by Lord Browne-Wilkinson and Lord Hobhouse of Woodborough; Lord Nicholls favoured recovery of all the costs, and Lord Saville preferred not to comment.

71. *Beechwood Birmingham Ltd v Hoyer Group Ltd* [2010] EWCA Civ 647; [2011] QB 357, [35].

72. [2002] EWCA Civ 510; [2003] QB 36 (affd [2003] UKHL 64; [2004] 1 AC 1067; [2004] Lloyd’s Rep IR 315).

73. *Dimond v Lovell* [2002] 1 AC 384, 401.

74. *Pattni v First Leicester Buses Ltd* [2011] EWCA Civ 1384, [38–41].

75. *Ibid.*, [41]. On the method of calculation, see *Bent v Highways and Utilities Construction Ltd* [2010] EWCA Civ 292.

76. [2002] 1 AC 384, 402.

*Lagden v O'Connor*⁷⁷ felt able to conclude that the motorist, who had reasonably entered into a credit hire agreement, could recover the charges in so far as they were not “beyond losses for which he is properly compensatable”.⁷⁸ Lord Nicholls (with whom Lord Slynn of Hadley agreed) went on to explain that the cost of providing credit and of pursuing the defendant’s insurers for payment could be recovered. Lord Hope thought, “the cost of paying for the provision of additional services by a credit hire company must be attributed in law not to the choice of the motorist but to the act or omission of the wrongdoer”.⁷⁹ On this basis, the cost of checking the liability of the defendant and of insurance to cover the risk of damages not being recovered will also be recoverable. More controversial are referral fees paid to those who pass business to the credit hire company. These might not be allowed as part of the general costs of running a business, like advertising, rather than arising from the particular accident. Damages may also be recoverable for that part of the hire charge relating to motor insurance, including excess waiver fees, even if it leads to cover more favourable than provided by the claimant’s own policy.⁸⁰ In *Bee v Jenson*,⁸¹ Morison J, *obiter*, thought that to assert that the claimant, whose ordinary insurance involves an excess, is better off as a result of a nil excess in a hire contract ignores the detriment otherwise suffered by being obliged to use a hire car that must be returned in the same condition as received without the option of not carrying out repairs or of deferring them, and the liability to the hire company for the loss of profit while the car is repaired. But, where an excess waiver is not a mandatory part of hire contracts, there is an argument for saying that, even if the cost of such charges should be compensated, the reasonable claimant would investigate the possibility of obtaining separate insurance for excess charges from a specialist insurer rather than simply taking the cover offered by the hire company, which is normally more expensive.

Where the motorist enters into a spot hire contract and pays with a credit card or other facility, the interest incurred should be recovered, although the motorist must take reasonable steps to minimise the amount. Where, on the other hand, the motorist does not reasonably need to use a credit card and so could not recover interest incurred if he or she did use a card, some interest may be recovered to compensate for being out of pocket. The picture is rather different in credit hire. In *Corbett v Gaskin*,⁸² the county court rejected a claim for interest on damages which the motorist sought to recover from the defendant insurer because of its delay in making payment. The motorist had not been kept out of the money, and so suffered no loss, because payment came from the credit hirer. In *Pattni v First Leicester Buses Ltd*,⁸³ it was argued that interest charges included in the credit hire contract to cover the period of credit between the end of the hire and the date of the final settlement of the claim were recoverable as part of the foreseeable losses arising from the negligence. The Court of Appeal accepted that such charges could be claimed if the driver were impecunious, but not otherwise, because they were an “additional benefit” provided

77. [2003] UKHL 64; [2004] 1 AC 1067; [2004] Lloyd’s Rep IR 315.

78. *Ibid.*, [6], per Lord Nicholls.

79. *Ibid.*, [37].

80. *Marcic v Davies* [1985] CLY 12.

81. [2006] EWHC 3359 (Comm); [2007] Lloyd’s Rep IR Plus 32, [15]. Decision affirmed at [2007] EWCA Civ 923; [2007] 4 All ER 791, without this point being discussed.

82. (21 Apr 2009) Unreported.

83. [2011] EWCA Civ 1384.

by the credit hirer,⁸⁴ namely the benefit of delayed payment of the hire charge. It was also argued that the court should assume that the claimant would have hired a replacement and award a sum to compensate for being out of pocket. This was rejected on the ground that, even though such a claim could have been made where the claimant entered into an ordinary hire contract, here he had entered into a credit hire agreement and had, therefore, not suffered any loss because he had made no payments under that agreement. It was not relevant that the credit hire company might have suffered this loss because a subrogated party cannot be put into a better position than the claimant.⁸⁵ The court also rejected a claim for interest under the County Courts Act 1984, s.69 because the motorist had not paid out any sums upon which interest might be charged.

VI. FREE CARS

A free or courtesy car may be offered under the terms of the claimant's motor policy, or by the defendant, or by the defendant's insurer. What effect does such an offer have on the defendant's liability? Confronted by offers from different parties, which, if any, is the claimant obliged to accept?

The claimant's refusal to accept a car under his or her own motor policy will not affect a claim for hire charges because, as has been seen, benefits available under the claimant's own policy are not taken into account in assessing the defendant's liability.⁸⁶ Yet, in practical terms it is difficult to distinguish between this situation and one where the motorist is expected to use an alternative vehicle from company stock. In *Whitworths Ltd v Crenoon Ltd*,⁸⁷ HHJ Mayor QC, sitting in Northampton County Court, held that there had been a failure to mitigate where the damaged car was supplied under a lease and the claimant had not taken up an entitlement to a replacement under that contract. The judge also held that the employee, who drove the car, could have used one of the claimant company's other cars.

Where the defendant or the defendant's insurer offers a "free" car, then, according to the Court of Appeal in *Copley v Lawn*,⁸⁸ the claimant does not act unreasonably in rejecting an offer from the defendant unless aware that this increases the burden on the defendant, irrespective of the effect on the claimant. This seems curious since mitigation is usually concerned with minimising the loss to the victim, not the costs of the defendant. There were also *obiter dicta* in that case to the effect that where a refusal constitutes a failure to mitigate, the claimant is not left without a claim, but can recover a sum

84. *Dimond v Lovell* [2002] 1 AC 384, 402.

85. *Pattni v First Leicester Buses Ltd* [2011] EWCA Civ 1384, [64–69]. Another claim for statutory interest was also rejected ([70]).

86. *Mason v TNT UK Ltd* LT 19 Apr 2009 (Reading Cty Ct). See *Parry v Cleaver* [1970] AC 1; [1969] 1 Lloyd's Rep 183; *Dimond v Lovell* [2002] 1 AC 384, 399; *Rose v The Co-operative Group* LT 7 Feb 2005 (Poole Cty Ct); *Copley v Lawn* [2009] EWCA Civ 580; [2010] Bus LR 83; [2009] Lloyd's Rep IR 496; *Salt v Helley* [2009] NIQB 69. The contrary was held in *Marler v Gibbings* [2002] CLY 933 (Oldham Cty Ct), but *Parry* may not have been cited and the case was expressly not followed in *Daniels v Farish* [2003] CLY 942 (Mold Cty Ct).

87. LT 11 Aug 2006 (Northampton Cty Ct).

88. *Copley v Lawn* [2009] EWCA Civ 580, [22]. See *Evans v TNT Logistics Ltd* 2007 WP 919548; [2007] Lloyd's Rep IR 708 (Pontypridd Cty Ct); *Mason v TNT UK Ltd* LT 19 Apr 2009 (Reading Cty Ct); *Steadman v TNT Express Ltd* LWT 19 Jun 2008 (Dudley Cty Ct).

equivalent to the cost of hire that would have been incurred by the defendants' insurers.⁸⁹

The defendant must show that the claimant was aware, not only of the offer of a courtesy car, but also of the relative costs of the different choices. In *Copley v Lawn*,⁹⁰ the claimant refused to exercise an option to cancel a courtesy car, which had been provided by her insurer, and accept a free car from the defendant. The court held the defendant liable for the cost of the hire car provided by the claimant's insurer. Longmore LJ observed that mitigation was a question of fact, evaluation and judgement and, therefore, could be overturned on appeal—although, in practice, the courts are reluctant to interfere.⁹¹ He did not regard the claimant as acting unreasonably in rejecting one free car when she had already been supplied with another because she had not been informed that accepting a car from the defendant's insurers would entail a lower cost to them than the cost of the car hired by the claimant's insurers. This may create a problem for the defendant's insurers and hire companies in that it involves revealing commercially sensitive information about rates.⁹² Longmore LJ went on to say that in such cases the interests of the claimant and those of the claimant's insurers and brokers should be combined because, while the claimant, who is fully covered, may not be interested, the other parties may be. The judges also deprecated the way Mrs Copley had been put under pressure to accept the defendant insurer's offer: she was cold-called soon after the accident and the offer was repeated in a letter, which contained dire warnings about the consequences of a refusal. Longmore LJ was severe on these practices, referring to the letter as having adopted "an unpleasant threatening tone" and both contacts as "inappropriate".⁹³ This has created some uncertainty in the industry, but he cannot have intended to prevent insurers from contacting the claimant, only that such approaches should not be bullying in tone and should take into consideration the circumstances, including the fact that the claimant has just been involved in an accident.

Some features of *Copley* have been put in doubt by *Sayce v TNT(UK) Ltd*.⁹⁴ At the trial, it was held that the claimant failed to mitigate by refusing a free car offered by the defendant and, instead, entering into a credit hire agreement. On appeal, HHJ Harris QC observed that, if she had accepted, there would have been no claim for hire costs, so the refusal increased the loss. He pointed out that to order the defendant to pay losses determined by the spot rate "seems more like an attempt to punish a defendant than to provide an answer which fulfils the elementary rule that the purpose of an award of damages is to place the injured party in the same position as he was before the accident as nearly as possible, viz, in this case, with a car for which no rental is payable by her".⁹⁵ He was unimpressed by the reasoning of the Court of Appeal in *Copley* to the effect that the claimant, who could not claim credit hire charges, could recover a sum equivalent to the cost of hire which would have been incurred by the defendant if the courtesy car had been accepted. He thought this confused the duty of the claimant to mitigate by choosing

89. *Copley v Lawn* [2009] EWCA Civ 580, [25–31].

90. [2009] EWCA Civ 580; [2010] Bus LR 83; [2009] Lloyd's Rep IR 496.

91. *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2010] EWCA Civ 647; [2011] QB 357, 368.

92. Some of this information may be required to be disclosed by virtue of the Consumer Credit (EU Directive) Regulations 2010 (SI 2010/1010).

93. [2009] EWCA Civ 580, [9].

94. LT 25 Jan 2011 (Oxford Cty Ct).

95. *Ibid.*, [20].

the cheapest option with the costs involved where offers made during litigation are refused. Instead, he referred to the decision in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd*,⁹⁶ where the House of Lords set out the traditional view that a plaintiff who does not take reasonable steps to mitigate cannot claim the part of the loss that would have been avoided had such steps been taken. On this basis the judge said, “If a claimant is offered a car free of charge to him he can and should avoid incurring the expense of hiring one himself”.⁹⁷ Not surprisingly, the claimant appealed, and the Court of Appeal overturned HHJ Harris QC’s decision.⁹⁸ The most important ground was procedural irregularity, because during argument the judge had not given any indication that he might refuse to follow *Copley v Lawn* and so counsel had not been able to address the point. The court did, however, go on to grapple with what *Copley* decided, which proved more contentious. Moore-Bick LJ dealt first with the issue of whether an appellate court could interfere with findings about mitigation. He construed Longmore LJ as having said, not that the appellate court would routinely interfere with findings of primary facts, but that it could evaluate those facts, distinguishing between whether Sayce had declined the free car and whether she acted reasonably in so doing. Moore-Bick LJ next considered the *ratio* of *Copley*, which he took to be that “a claimant does not act unreasonably for the purposes of mitigation in rejecting an offer from the defendant unless he is aware that by doing so he will increase the ultimate burden on the defendant regardless of the effect on his own position”.⁹⁹ But he expressed doubt as to the proposition that a claimant who rejects a reasonable offer is still entitled to some damages since (as HHJ Harris QC suggested) this seemed to ignore the principle that a claimant cannot recover a loss that could have reasonably been avoided. He also found it hard to accept Longmore LJ’s view that the claimant could recover the cost of hire that the defendant would have incurred had the offer been taken up. Nevertheless, he concluded that none of this provided grounds upon which the county court could reach its decision: a lower court must follow principles set down by a higher court, even if they do not form part of the *ratio*. However, there are areas of uncertainty, which the Court of Appeal thought needed clarification by the Supreme Court, although not in this case, because the appeal was decided on the procedural irregularity, so a further hearing would have served no purpose as far as these parties were concerned.

Finally, the court provided some clarification on the issue of whether a victim acted reasonably in rejecting a courtesy car. Pill LJ said that it was not acceptable for the wrongdoer to dictate how the victim must mitigate the loss. This is an issue to be tested objectively. The fact that this car may be cheaper to the defendant is not necessarily the only consideration that should affect a court’s view as to whether the claimant acted reasonably in rejecting that offer. It was, as in *Copley*, important to consider whether the claimant was pressured when in a vulnerable state of mind following the accident; it may be reasonable for the claimant to deal with another hirer in which he or she has confidence, perhaps based on previous dealings; the insurance cover provided with the free car may differ from that which the claimant has for the damaged car; and there must be an opportunity for the claimant to consider whether the free car constitutes a reasonable

96. [1912] AC 673.

97. *Sayce v TNT(UK) Ltd* LT 25 Jan 2011 (Oxford Cty Ct), [25].

98. *Sayce v TNT (UK) Ltd* [2011] EWCA Civ 1583.

99. *Ibid.*, [21].

replacement. In sum, the court will take a broad view of whether the claimant has acted reasonably in the circumstances.

VII. GENERAL TERMS OF AGREEMENT

In 1999, the Association of British Insurers attempted to resolve some of these issues by brokering the General Terms of Agreement (“GTA”) between insurers and credit hire companies. The latest version was launched in 2009.¹⁰⁰ There is no obligation on firms to subscribe to the GTA and firms are free to withdraw, and, of course, the claimant motorist is not a party. Among other things, the GTA deals with competing offers of vehicles made by insurers and credit hire companies. Its “overriding principle . . . is that whoever is first to a customer and obtains their agreement should provide the service and all subscribers should not seek to intervene”¹⁰¹ but only if the offer is in terms the customer can understand. This casts doubt on schemes whereby companies supply their drivers with cards that carry the offer of a free car, which are handed out in the event of a fault crash, since such cards may not provide sufficient information; but this can easily be cured by a rapid follow-up letter with full information, including the cost of the hire, as required by *Copley v Lawn*. The GTA obliges credit hire companies to provide information to the defendant’s insurers and “an appropriate class of replacement vehicle based upon the customer’s need”.¹⁰² If the damaged car is a prestige vehicle, the company must ensure that the claimant needs a prestige replacement; and, where the car is more than six years old, “it is the exception, rather than the rule, that a similar prestige replacement is required”,¹⁰³ although, as has been seen, this does not necessarily represent the law. Subscribers to the GTA are obliged to adhere to set rates.¹⁰⁴ Although these are not binding, reference has been made to them in the courts,¹⁰⁵ and they do provide some guidance on whether or not a car is broadly equivalent to that which was damaged. They include an allowance for 24-hour breakdown cover,¹⁰⁶ though, following the observations of Lord Hoffmann in *Dimond v Lovell*,¹⁰⁷ this might be viewed as an addition that cannot be claimed, unless the claimant has breakdown coverage which does not cover the replacement vehicle. The GTA also restricts to £5 the charge for “necessary extras”, such as tow bars and baby seats, which are part of the damaged car; but the full cost of hiring these items should be recoverable, assuming it is reasonable.

100. ABI General Terms of Agreement (GTA) between Subscribing Insurers (Insurers) and Credit Hire Organisations (CHOs) (Aug 2009). See Decision of the Office of Fair Trading under the Competition Act 1998, No CA98/04/2004 (22 Apr 2004).

101. Para.3.1.

102. Para.4.4.

103. Para.4.5.

104. Para.5.1.

105. *Clark v City of Edinburgh Council* [2010] CSOH 144; 2011 Rep LR 11. See also *Bee v Jenson* [2006] EWHC 3359 (Comm); *Thompson v Vincent Haulage Ltd* LT 15 Apr 2008 (Preston Cty Ct).

106. Para.5.3.

107. [2002] 1 AC 384, 402. His view was endorsed by Lords Browne-Wilkinson and Hobhouse; Lord Nicholls seemed to suggest that all the costs could be recovered, and Lord Saville preferred not to comment.

VIII. CONFUSION AND DECEPTION

Lord Nicholls' expectation was that insurers and credit hirers would reach an understanding over credit hire agreements, but "the furnace of litigation"¹⁰⁸ still burns. In the last decade more than a dozen cases have gone to the Court of Appeal, two to the House of Lords and other issues await resolution by the Supreme Court. The situation is worse lower down the judicial ladder: a senior county court judge has written of county courts clogged up with credit hire claims and struggling to cope, as "limitless bundles of authorities" spawn "commercial opportunity for car hirers and lawyers . . . [,] bedevil the courts and put a further squeeze on more urgent work".¹⁰⁹ Judges have expressed irritation and bewilderment at unexplained delays in the completion of repairs or the charging of excessive fees. Recently the Court of Appeal upheld the refusal of a county court judge to award costs to a successful claimant, in part, on the ground that the hire company, which in effect conducted the case, had engaged in what amounted to reprehensible conduct by viewing the litigation as simply a means of generating revenue without regard to the duty to mitigate losses.¹¹⁰ But more often the judges are unable to give concrete expression to their annoyance, because the poor quality of evidence produced means they are unable to get to the root of the problems, and this indicates that there are issues on both sides.¹¹¹

The courts have played their part in the confusion, with uncertainty as to what car a motorist can reasonably hire and the meaning of impecuniosity. Yet, the real problems are generated by a business that has been called "dysfunctional"¹¹² because it has grown so rapidly in the last decade, creating vested (but often contradictory) interests and complex relationships. The size of the credit hire industry is difficult to measure:¹¹³ it is said to be worth between £500 million and £1.2 billion annually, with 800,000 vehicles, including private cars, taxis and other commercial vehicles, and motorcycles; the Credit Hire Organisation, which represents credit hirers and repairers, accident management firms and lawyers working in this area, has 68 full and 40 associate members; referral fees paid by credit hire companies to insurers, brokers, breakdown services and accident management firms, which pass details of eligible motorists, are estimated to average between £200 and £300, perhaps more, and total as much as £100 million; insurers report that claims which included an element for credit hire have more than doubled since 2005, as have the hire charges incurred; and it has been estimated that the costs involved add £30 to each motor policy premium.

Insurers have long suspected—rightly or wrongly—that referral fees increase the number of motorists taking up credit hire, and that credit hire companies inflate their charges by encouraging claimants to hire cars that are not needed or are superior to the

108. *Carson v Tazaki Foods Ltd* 2005 WL 3464411, [2.1], per HHJ Mackie QC.

109. District Judge Monty Trent, "Roadrunner" (2010) 154(42) SJ 21.

110. *Abbott v Long* [2011] EWCA Civ 874; [2012] RTR 1.

111. Eg, *Park Lane BMW v Whipp* LT 20 May 2009 (Oxford Cty Ct); *Liddle v Brit Insurance Ltd* [2011] CSOH 145.

112. House of Commons Transport Committee, *The Cost of Motor Insurance: Fourth Report of Session 2010–11* (HC 591), Vol I, Ev 47, submission from Lloyd's Market Association.

113. *Ibid.*, Vol I, p.19, Ev 15, 45–49, 74 and 78, and Vol II, Ev W12, Ev W15; Office of Fair Trading, *Private Motor Insurance: Summary of Responses to the OFT's Call for Evidence* (OFT1397) (Dec 2011). Not all insurers accept there has been an impact on premiums: C Akomah, "Credit hire: two sides to the story" Postonline.co.uk, 24 Jan 2012 (available at <http://tinyurl.com/7qwco6n>).

damaged vehicle, or by delaying the decision process on repairs, thereby extending the repair period. Such criticism has been reinforced by a recent report on credit hire fraud produced by DAC Beechcroft, lawyers specialising in the field.¹¹⁴ The point has not been lost on the judges, and not untypical was the frustration expressed by one county court judge, who spoke of the courts' familiarity with cases in which "repairs seem often to take a surprisingly long time while an expensive hire car is obtained at the ultimate expense of the defendant's insurer".¹¹⁵ On the other hand, insurers might be regarded as facilitating the growth of the industry by their perceived failure to respond quickly to motor claims, or by offering an inappropriate replacement for a damaged car. Moreover, some have vested interests at stake in credit hire. In December 2011, the Office of Fair Trading, launching its market study into motor insurance, observed that, while defendant insurers complained at having little control over the choice of credit hire provider or the charges, when acting for the victim some insurers saw credit hire as an opportunity to generate revenue through referral fees.¹¹⁶ Insurers have reported that the GTA has had a beneficial effect, and some have instituted their own measures, including intervention pricing whereby an insurer pre-arranges car hire in order to be in a position to offer a car quickly and so avoid the necessity for a motorist to enter a credit hire agreement.

On its side, the credit hire industry is facing difficult times: insurers seem firmer in their resistance to claims; and the recession has brought a fall in the resale value of hire cars, as well as lower mileage and fewer road accidents, which in turn have led to a drop in rentals and shorter rental periods because less repair business means garages complete work more quickly. Moreover, it is argued that, once the referral fee and the credit costs have been deducted, the profit margins enjoyed by hire firms are low.¹¹⁷ The industry has its grievances. They have disputed evidence of hire rates used by insurers to challenge claims. Credit hirers failed to convince the courts that "there is no such thing as a 'spot rate'"¹¹⁸ or that evidence as to rates is insufficient unless it can also be shown that a particular car was available at that rate at the relevant time.¹¹⁹ However, in 2009 a leading credit hirer, Accident Exchange, adopted a more direct approach, by alleging that 13 employees of Autofocus, a company that provided evidence of rates for defendant insurers, had falsified figures, resulting in under-recovery of hire charges.¹²⁰ Autofocus went into administration.¹²¹ Subsequently, Accident Exchange obtained recovery of the full credit hire charge in one of these cases after the defendant insurer settled prior to a hearing in Newcastle County Court¹²² and then was granted leave to appeal out of time in four sample cases from 2008 to 2009. The company has said that in total its losses might

114. DAC Beechcroft, Press Release, 7 Oct 2011 (tinyurl.com/7re8f9z).

115. *Park Lane BMW v Whipp* LT 20 May 2009 (Oxford Cty Ct), [4].

116. Office of Fair Trading, Press Release, 14 Dec 2011.

117. C Akomah, "Credit hire: two sides to the story" Postonline.co.uk, 24 Jan 2012 (available at tinyurl.com/7qwc6bn).

118. *Bent v Highways & Utilities Construction Ltd* LT 24 Feb 2011 (Cambridge Cty Ct), [5].

119. *Bransgrove v Vermorel* Case Check 25 Jul 2008 (Southend Cty Ct).

120. *Accident Exchange Ltd v Autofocus Ltd* [2010] EWCA Civ 788, "Accident Exchange vs Autofocus case continues after appeal rejection" Bodyshopmag.com, 14 Jul 2010 (available at: www.bodyshopmag.com/news-accident-exchange-autofocus-limited-hire-charges.aspx).

121. It was acquired by another company.

122. "Accident Exchange recovers hire charges" Postonline.co.uk, 24 Sep 2010 (available at: tinyurl.com/6houbmh).

amount to as much as £50 million.¹²³ An application to institute proceedings for contempt against ex-employees of Autofocus has been granted, which, if the allegations are made out, “would be perjury on an industrial scale”, involving at least 4,500 cases and perhaps as many as 18,500.¹²⁴ Meanwhile, in Northampton County Court HHJ Waine handed down a prison sentence of 28 days suspended for one year to a former senior employee following her admission that reports on rates, which she presented in evidence as her own, had been produced by other employees.¹²⁵ Some insurers quickly reached settlements over disputed cases, but others have been criticised for appearing to stand by the figures produced by Autofocus.¹²⁶ More generally, the Credit Hire Organisation bitterly complained to the House of Commons Transport Committee of “continual frustration in . . . attempts to work with the insurance industry to identify and deal with suspect claims”.¹²⁷

The pools of money, controversy and litigation generated have given birth to support industries and all with their vested interests to defend. Brokers and accident managers may find it difficult to maintain objectivity in advising clients in the face of tempting referral fees. Lawyers have also stepped in. They may also enjoy referral fees, as well as fees for work pursuing or defending insurers. Certainly, there has been a rapid increase in the number of law firms specialising in credit hire claims and more than 20 are members of the Credit Hire Organisation. All of these advisers run certain risks since collecting referral fees might constitute a breach of the fiduciary duty owed by an agent to a principal; and, where a fee is collected for improperly performing a function (for example, not giving objective advice about whether the motorist should take credit hire or what credit hire company to use), there may be an offence under the Bribery Act 2010.

What of the motorist? The objective of credit hire schemes is that motorists will not become liable to pay charges and, more generally, the hire company will take away many of their other problems. Imagine the consternation when reality hits and they find themselves trapped between the hire companies, the insurers, the lawyers and the courts.¹²⁸ Motorists, whose cars have been damaged by the negligence of another driver, may feel entirely justified in obtaining a replacement through a credit hire agreement rather than paying out large sums of their own money in an uncertain expectation of repayment. In a recent Scottish case, Sheriff Clark said:¹²⁹

“In his evidence the pursuer agreed in cross examination that having been told that he would not have to pay for the hire, he did not give any thought to any alternative to hiring from Accident Exchange. Had he thought that he would have had to pay for the hire of a replacement vehicle, he would have considered making inquiries to secure a hire of a vehicle at a reasonable price. Clearly he did not do so. The choice which the pursuer made was therefore, in my opinion, driven by the

123. *Purushothaman v Malik* [2011] EWCA Civ 1734.

124. *Accident Exchange Ltd v George-Broom* [2012] EWHC 207 (Admin), [7], per Irwin J. The matter is with the Attorney-General. See “Autofocus legal action” Postonline.co.uk, 7 Feb 2012 (available at tinyurl.com/6n4gfft).

125. “Former Autofocus employee handed suspended sentence” Postonline.co.uk, 17 Mar 2010 (available at tinyurl.com/6yydfc).

126. “Autofocus Legal Action” Postonline.co.uk, 7 Feb 2012 (available at tinyurl.com/6n4gfft).

127. House of Commons Transport Committee, *The Cost of Motor Insurance: Fourth Report of Session 2010–11* (HC591), Vol I, p.18, Ev 74 and 78.

128. Some sense of which can be gathered from discussions on sites such as Pistonheads.com

129. *Tkachuk v Stevenson* 2010 SLT (Sh Ct) 238, [31]. Similarly *Greenlees v Allianz Insurance Plc* [2011] CSOH 173.

fact that he did not have to pay rather than any question of impecuniosity or sacrifice on his behalf. It was clearly a case where the selection had been made on the grounds of convenience.”

And what, the motorist might legitimately ask, is wrong with that? Having been put to so much inconvenience by the defendant's negligence, why should motorists not look to their own convenience? But, of course, the law of tort often parts company with what many might see as reasonable behaviour. Reported cases suggest that motorists believe there will be no cost or inconvenience involved—it is a separate issue whether they are misled or simply ignore the terms of signed agreements.¹³⁰ They are unlikely to appreciate that the emphasis placed on mitigation means that, while they may not have to pay anything, it is probable that they will be subject to extensive pre-trial inquiries. These may cover: whether there was a need to hire a replacement, which will include matters such as the use to which the damaged car could reasonably have been expected to be put during the repair period and the availability of other cars; whether an appropriate replacement was hired for a reasonable period and rate; whether the claimant needed a particular type of car; and, most intrusive of all, whether the claimant had access to sufficient resources to hire at the spot rate. The inexperienced claimant may feel that he is being treated, not as the wronged party, but as the wrongdoer. In *Singh v Aqua Descaling Ltd*,¹³¹ the claimant had to swear three statements and answer 106 questions under Part 18 of the Civil Procedure Rules. Of course, what the insurers and the courts focus on is not the plight of the motorist, but the credit hire company. In *Whitworths Ltd v Crenoon Ltd*,¹³² HHJ Mayor QC explained that “in these credit hire cases the nominal claimant has entered into a contract at extravagant daily rates of hire because he is assured that he does not have to pay and so the litigation is conducted for the profit of the credit hire company, who are thus enabled to let out motor vehicles at excessive daily rates”. Nevertheless, the motorist is caught in the crossfire between hire companies and insurers.

This is an area of practice that raises extreme views and even the briefest glances at the many blogs about the subject on the internet is enough to suggest that the GTA, while a noble effort, has failed to calm these troubled waters. At its root this conflict is fired by the revenue generated. Wherever one's sympathies lie, to some extent the credit hire industry has arisen from the failure—or, at least, a perception among motorists of the failure—of motor insurers to deal with claims promptly. While clarification of the law would undoubtedly ease some of the problems, the real issue lies in industry practices and, in particular, the complexity of the relationships and the confusion of vested interests. Insurers complain about the conduct of credit hirers, while seeing referral fees as a source of revenue, and about the way opposing insurers ramp up a claimant's costs, while engaging in the same behaviour themselves in other cases.¹³³ If nothing else, credit hire seems to have prompted insurers to some sort of action. Aside from the GTA, they have begun to offer better management of repairs, courtesy cars and intervention pricing, but all of this tends to be rather unsystematic.

The scope for external intervention—assuming it is thought desirable in an area of private contract law—may be limited. The ban on referral fees in personal injury

130. Eg *Salt v Helley* [2009] NIQB 69.

131. (2008) 106(12) LS Gaz 17 (Walsall Cty Ct). See Civil Procedure Rules 1998 (SI 1998/3132).

132. LT 11 Aug 2006 (Northampton Cty Ct), [33].

133. Office of Fair Trading, *Private Motor Insurance: Summary of Responses to the OFT's Call for Evidence* (OFT1397) (Dec 2011).

litigation, which the Jackson report recommended,¹³⁴ will not touch the credit hire industry. The Office of Fair Trading has included the whole field of credit hire, including referral fees, in its market study on private motor insurance, which will be completed in 2012.¹³⁵ The key issue of public policy seems to be the impact of credit hire on premiums, but the problems are deeper and broader than this and their solution lies within the industry. Although the Autofocus affair may be deepening divisions for the present, it must provide the basis for negotiating an efficient working relationship.

134. Sir Rupert Jackson, *Review of Civil Litigation Costs: Final Report* (2010), ch.20.

135. Office of Fair Trading, *Private Motor Insurance: Summary of Responses to the OFT's Call for Evidence* (OFT1397) (Dec 2011).