Seminar: Low Velocity Impact Claims

ó á [¢ An Overview

By Navjot Atwal

24th October 2012

Navjot Atwal, Barrister
3 Hare Court, Temple, EC4Y 7BJ
T: 020 7415 7800 | E: navjotatwal@3harecourt.com | W: www.3harecourt.com

SPEAKER PROFILE
Year of call: 2002

Main Practice Areas

Personal Injury, Constitutional Law (including Public Law and Administrative Law), Civil liberties and Human Rights, Commercial and Business Law, Appellate Work (including Privy Council), Insolvency and Restructuring, Product Liability, Immigration, Travel Litigation, Judicial Review

Profile

Navjot Atwal has an extensive civil/common law practice with particular focus on personal injury claims, contractual claims and insolvency.

bI·Ø℅2úΩă Ô2yãλŘŜ№I·ōfŜ LJŜ№ă2yl·f λy℅dz№è LJ№I·ÔúλÔŜ λyŎftdzŘŜă I·ÔúλyƎ Ŧ2№ /fI·λY I·yűă I·yŘ 5ŜŦŜyŘI·yűă λy I·ff úèLJŜă 2Ŧ ŎfI·λY ă λyŎftdzŘλyƎ ăŜ№λ2dză №2I·Ř úN№I·ŦŦλÔ ÔI·ăŜăΣ ŜY LJf2èŜ№ăΩ flability and travel related litigation. He has experience in inquests arising out of workplace accidents.

bI·Ø℅2ű KI·ă ōŜŜy I· Y ŜY ōŜ№ 2Ŧ úKŜ ! úű2№yŜè DŜySŜ№I·fΩă / t I·ySf 2Ŧ Wdzyλ2№ /2dzyãŜf ú2 úKŜ Crown since March 2008. He has substantial experience of public and human rights law. He regularly appears on behalf of all government departments in a wide range of judicial review proceedings in the Administrative Court and the Court of Appeal. Navjot has particular experience of death in custody cases and has appeared in Article 2 ECHR inquests before juries. He has experience of all types of civil liberties work including prison, parole, assaults, malicious prosecution and false imprisonment claims.

In addition to cases involving the UK government, Navjot appears on behalf of and against a range of Caribbean and other Commonwealth governments in civil and criminal cases in the Privy Council.

Navjot Atwal, Barrister
3 Hare Court, Temple, EC4Y 7BJ
T: 020 7415 7800 | E: navjotatwal@3harecourt.com | W: www.3harecourt.com

Before joining chambers Navjot worked as an intern at the European Commission in Brussels dealing with internal market policy within the European Union. He also worked as a parliamentary researcher in the House of Commons.

bl·Ø¢2ű ƛă l· {ʤyſŜèΣ I l·ℕŘøƛŎ]Ŝ l·yŘ / l·ăăŜf ăŎK2fl·ℕ 2₸ [ƛyŎ2fyℚă LyŸ℗

Publications and LecturesNavjot has been published in the Solicitors Journal and contributes to client bulletins. He provides lectures/ seminars on all his main areas of practice.

Memberships

COMBAR; LCLCBA; PIBA.

Qualifications

LLB (First Class); LLM (with Merit) (Commercial and Corporate Law) University College, London

Contact detailsE-mail: navjotatwal@3harecourt.com

T: 020 7415 7800

Slide 1

General features of LVI claims

- Road traffic accident usually involving a low speed rear-end shunt or a moment of inadvertent driving by the Defendant
- The Claimant typically suffers from whiplash type injuries to the spine although more serious injuries are also commonly encountered
- Defendant insurer accepts primary liability but not causation of loss or damage based on expert evidence
- Defendant insurer has concerns about the veracity of the claim
- A claim of low value but with a specific procedural protocol to be complied with if raised as a defence to a claim

Slide 2

Bio-mechanical evidence

- First considered in Armstrong v First York Limited [2005] EWCA Civ 277
- The Defendant insurer sought to rely on the report of a forensic engineer (who was appointed as a single joint expert). The forensic engineer's evidence was unopposed and to the following effect: -
    - The accident was of such a low speed that no distortion had been caused to the panels of the Claimant's vehicle;
    - In order for the Claimant's vehicle to have moved on its springs distortion ought to have been present to the vehicle panels;
    - If there was no distortion to the vehicle panels and the vehicle did not move on its springs there would therefore be no occupational displacement of the occupant of the vehicle;
    - If there was no occupational displacement of the occupant then no injury could have been suffered;

Navjot Atwal, Barrister
3 Hare Court, Temple, EC4Y 7BJ
T: 020 7415 7800 | E: navjotatwal@3harecourt.com | W: www.3harecourt.com

- The fundamental argument is that there is a level of physical force upon a vehicle's occupant below which no injury can be sustained by the occupant. The measure of force transmitted to the struck vehicle is expressed as the Delta V which is the change in velocity (i.e. acceleration or deceleration of the Claimant's vehicle).

- The LVI arguments run by Defendants purport to take into account variable factors such as the susceptibility of the Claimant and vehicle design.

Slide 3

Counter-arguments

- Whiplash associated disorder is a recognised consequence of low speed impacts, particularly when the Claimant is a driver or front seat passenger, when there is no anticipation or bracing, and when the collision comes from the rear;

- Vehicle damage is not a good indicator of injury risk because modern cars are equipped with bumper systems that will often prevent property damage at speeds well above the notional speed threshold for harm;

- Delta V (the estimated change of velocity in the struck vehicle) is only one factor implicated in injury risk, and the modern understanding of the kinematics of whiplash injury requires many other factors to be taken into account;

- Many of the factors relevant to energy transfer are not available to 'auto crash reconstructionists', especially when the only evidence that is available to them comes from a superficial examination of one or both of the vehicles sometime after the event. The notion that an engineer can determine Delta V and injury risk in such artificial circumstances is absurd.

- If engineers use a validated method for determining the Delta V it is necessary to know the margin for error in the estimation and to have access to peer-reviewed literature supporting this method of assessment.

- Comparative stiffness of the vehicles and the alignment of bumpers also comes into play.

Navjot Atwal, Barrister
3 Hare Court, Temple, EC4Y 7BJ
T: 020 7415 7800 | E: navjotatwal@3harecourt.com | W: www.3harecourt.com

Slide 4

Conclusions in *Armstrong*

- In *Armstrong*, the Court of Appeal rejected the contention that judgment should be entered for the Defendant in the absence of a logical finding in the expert evidence, however honest the Claimant:

"In my judgment there is no principle of law that an expert's evidence in an unusual field – doing his best, with his great experience, to reconstruct what happened to the parties based on the second-hand material he received in this case – must be dispositive of liability in such a case and that a judge must be compelled to find that, in his view, two palpably honest witnesses have come to court to deceive him in order to obtain damages, in this case a small amount of damages, for a case they know to be a false one."

- The trial judge found that the Claimants were honest witnesses who had given their evidence in a logical and consistent manner.

- Expert evidence on occupational displacement is therefore not, of itself, determinative of liability but may be obtained by a Claimant in order to meet a Defendant insurer's assertion that the Claimant was unable to suffer from an injury as a result of the index accident.

- Much will, as always, turn on credibility of the Claimant.

Slide 5

Kearsley v Klarfeld [2005] EWCA Civ 1510

- A decision of the Court of Appeal in circumstances where there was no uniformity of approach in dealing with LVI cases in the county court.

- Bear in mind that *Kearsley* was considered when it was envisaged that there would be a High Court test case to deal with the respective bio-mechanical issues;

- Laid down guidance for the conduct of LVI claims: -

  - Both parties should follow the pre-action protocol.

  - When intimating a claim, the Claimant's advisors should offer access to their client's vehicle to the Defendant's insurer for an early examination (if they wish) and give early disclosure or contemporaneous GP or other relevant medical notes.

Navjot Atwal, Barrister
3 Hare Court, Temple, EC4Y 7BJ
T: 020 7415 7800 | E: navjotatwal@3harecourt.com | W: www.3harecourt.com

- Defendant insurers should make it clear from an early stage that they regard the claim as an LVI claim.

- LVI claims are likely to have, as features, competing medical and bio-mechanical evidence justifying allocation to the multi-track;

- Both sides will usually have permission to rely on their own consultant orthopaedic surgeon;

- In the absence of agreement between the respective experts it is likely that oral evidence will be required;

- The Defendant does not have to put forward a substantive case of fraud in order to succeed. All that is necessary is for particularisation of the speed of impact and reliance on the fact that it was very unlikely that a Claimant suffered an injury based on the expert evidence.

- Consider making an early Part 36 offer to the Defendant insurers in case LVI is raised

Slide 6

Casey v Cartwright [2006] EWCA Civ 1280

- LVI appeal in which the Circuit Judge revoked permission previously given to the parties to rely on the evidence of a joint expert orthopaedic surgeon. The orthopaedic surgeon had provided an opinion favourable to the Defendant and was found to lack objectivity.

- The Defendant was granted permission to appeal as to the correct approach to the giving of permission to adduce expert evidence on questions of causation in low-velocity impact cases.

- The test cases envisaged in *Kearsley* had not been brought. The Circuit Judge had noted a number of issues with LVI claims. The claims were fact sensitive with an abundance of variable factors. The assessment of lay witnesses was proving to be crucial and there were often problems with expert reports not addressing the range of opinion and making no mention of the variables. Legal costs were very high.

Navjot Atwal, Barrister
3 Hare Court, Temple, EC4Y 7BJ
T: 020 7415 7800 | E: navjotatwal@3harecourt.com | W: www.3harecourt.com

Slide 7

- The Court of Appeal considered the following: -
  - *Kearsley* was intended to provide guidance on the permissibility of expert evidence pending the hearing of test cases before a High Court judge.
  - Some experts were of the view it could never definitively be said that an injury was impossible below a certain Delta V. There were too many variables such as the Claimant's age, gender, previous medical history, whether he/she was braced at the time of impact, the position of the head and neck at impact, the presence of a head restraint and car design.
  - However, some experts remained of the view that below a certain Delta V injury was impossible or very unlikely.
  - The attempt to set out guidance in *Kearsley* had been unsuccessful.

Slide 8

- The Court of Appeal held: -
  - Case management decisions were ultimately a matter for the discretion of the Court. The Court of Appeal's 'guidance' was simply that.
  - If the Defendant wishes to raise the causation issue it should satisfy certain formalities: -
    - The Defendant should notify all other parties in writing that it considers the claim to be a low velocity claim and that it intends to raise the causation issue;
    - The Defendant should raise the issue within 3 months of the receipt of the letter of claim;
    - The issue should be expressly identified in the defence supported by a statement of truth;
    - Within 21 days of serving a defence raising the causation issue the Defendant should serve on the court and the parties a witness statement identifying the grounds on which the issue is raised and

Navjot Atwal, Barrister
3 Hare Court, Temple, EC4Y 7BJ
T: 020 7415 7800 | E: navjotatwal@3harecourt.com | W: www.3harecourt.com

to deal with the Defendant's evidence on the issue including the accident circumstances and damage;

- On receipt of the witness statement, the court will, if satisfied that the issue has been properly identified and raised, generally give permission for the Claimant to be examined by a medical expert nominated by the Defendant.

- If, on receipt of the medical evidence, the court is satisfied on the entirety of the evidence submitted by the Defendant that it has properly identified a case on causation which has a real prospect of success then it will generally give the Defendant permission to rely on such evidence at trial.

- There may be cases in which the overriding objective merits refusing permission for expert evidence including (i) the timing of notification by the Defendant that he intends to raise the causation issue, (ii) if there is a factual dispute which is likely to resolve the causation issue and expert evidence is likely to serve little or no purposes and (iii) where the injury and damage is so small and the nature of the Defendant's expert evidence to be adduced is so extensive as to be disproportionate to the issues.

- Judges should be slow to direct expert evidence on a single joint basis pending consideration of test cases at the high court level.

Slide 9

Mahmood v Shaw [2008] HC (Akenhead. J) 29.02.2008

- Two appeals brought by Defendants against case management decisions in which it was said that the guidance in *Kearsley* and *Casey* had not been followed. The first instance judges had refused the Defendant's application to rely on their own orthopaedic evidence because of concerns over the objectivity of their chosen expert and doubts over the prospect of establishing the LVI defence.

- Mr. Justice Akenhead provided further guidance as follows: -

Navjot Atwal, Barrister
3 Hare Court, Temple, EC4Y 7BJ
T: 020 7415 7800 | E: navjotatwal@3harecourt.com | W: www.3harecourt.com

- If it is not necessary to plead that a claim is fraudulent or dishonest under the guidance in *Kearsley* then the court should not order a Defendant to do so.

- If the Defendant's advocate wishes to cross-examine on the basis that the Claimant is lying, dishonest or fraudulent or is otherwise deliberately exaggerating or inventing his or her injuries then professional conduct demands a reasonable basis for doing so. If the Defendant does plead fraud or dishonesty it will be open to the court to require proper particularisation prior to doing so. This protects against specious cross-examination.

- *Kearsley and Casey* are authoritative cases which should be followed in substance and spirit unless there are 'exceptionally' good reasons for not doing so.

- Each party (as is recognised by the overriding objective and Article 6 ECHR) should have equality of arms even in an LVI case involving relatively minor sums of money.

- It cannot be disproportionate to grant a Defendant permission to obtain a report in circumstances where there can be cost sanctions for raising unfounded LVI arguments.

Slide 10

Recent LVI cases

Golden v Dempsey [2010] (Manchester CC, HHJ Holman, 1 December 2010)

- A costs ruling by HHJ Holman against a Claimant who failed to comply with the procedural guidance in *Casey* by failing to disclose medical records at an early stage and opposing the Defendant's request for a medical examination when the LVI requirements were clearly made out.

- HHJ Holman provided further guidance: -

  - Too many cases were reaching the Manchester County Court where time had been wasted in between causation being raised and the first directions hearing.

  - The parties ought to co-operate with each other.

Navjot Atwal, Barrister
3 Hare Court, Temple, EC4Y 7BJ
T: 020 7415 7800 | E: navjotatwal@3harecourt.com | W: www.3harecourt.com

- Medical records should be disclosed to the Defendants at an early stage (especially when the Claimant's expert has seen the records).

- There is an expectation that the Defendant will put questions to the Claimant's expert before deciding on whether to obtain its own evidence. This should be done as soon as possible.

- It is 'particularly important' to establish whether the Claimant's expert is willing to accept that if the Defendant's version of events is accepted at trial, then injury is unlikely.

- The Court should be informed of the identity of the Defendant's expert at the first hearing.

- The judge noted that 'defence requests for expert engineering evidence had ceased to feature that often, but they appear to be on the increase again with the re-emergence of a tendency towards undue prolixity and to go outside proper remit'.

- Part 35 questions should not amount to cross-examination.

- The judge stated that '*there is a need for a proactive and common sense approach from both sides with a view to avoiding delay and controlling costs*'.

- Practitioners are reminded to issue in Manchester County Court if possible as that is where the LVI judges sit.

Slide 11

Ali v Stagecoach [2011] EWCA Civ 1494

- Insurers sent the Claimant a cheque for £3,200 as an interim payment without

Navjot Atwal, Barrister
3 Hare Court, Temple, EC4Y 7BJ
T: 020 7415 7800 | E: navjotatwal@3harecourt.com | W: www.3harecourt.com