

Winn Group – Responses to Private Motor Insurance Market Investigation (Provisional Decisions on Remedies)

(Notified:- 12.06.2014)

Overview Response to Proposed Changes

At present tort law is very clear as to what a non fault (innocent victim) following an accident is entitled to recover from the other side. For hundreds of years the general principle and specific case law has developed following massive frictional costs to create the clear tort law we have in place today. Over hundreds of years the United Kingdom's top Judges have heard argument and have developed the law to be fair to all parties.

The proposals as drafted effectively sweep away that case law and tort rights and replace it with a mixture of regulation (enforcement orders) running in contradiction to and continuing tort law. It is far from clear how this would work in practice and on the face of the information available it is far from clear as to what would take priority i.e. tort law or new regulations. In my respectful submission you can't have both running in tandem as they are contradictory. Where such contradictory situations have occurred before there has been a massive amount of satellite litigation, Court's getting clogged up with cases and massive uncertainty in the law. Either tort law has to be abolished and replaced by regulation or tort law has to remain and new regulation be excluded. Nowhere in the document does it make it clear how the new regulations will interact with and be interpreted vis a vis contradicting tort law. This is a recipe for disaster causing customer detriment on all sides.

Does the Competition Commission have the power to override tort law established for so long over so many centuries? Parliament when they look at tort law or other changes are extremely reluctant to change it within the Parliamentary process as there are always significant unintended consequences and particularly if it is perceived as an attack on the rights of a class of people in this case innocent victims of road traffic accidents.

Even if it is within the powers of the Competition Commission to change the tort rights should they do so given Parliament would normally veer on the side of caution and would be involved in detailed Parliamentary debates before changing such rights. I would submit it isn't.

It is without doubt that the proposals intend to restrict the tort law of the land in relation to innocent victims seeking credit hire services. At present any innocent victim can choose any credit hire company and obtain their services which includes management of the claim, other losses, assessment of the claim, credit hire and credit repair. Customers' decisions are not just made on price but are made on a mixture of price, recommendation, quality of service, management, convenience (delivery to the repairers and awaiting the clients to take the hire vehicle), additional services such as diminution recovery, fighting for pre accident value etc. These proposals seriously affect this freedom and right under English law to obtain these services as the Competition Commission seek to restrict the ability of a customer to choose a supplier based on their criteria. Price alone becomes a dominant factor and the client's choice will inevitably be restricted to a few big players dominated by the monopoly position of large insurers. Small quality credit hire companies who provide a fuller service will inevitably not be accessible for innocent victims moving forward. This is a significant interference with their tort rights. Restricting recovery of current credit hire rates definitely restricts current tort rights.

In relation to recovery of credit hire charges from the other side, case law has been developed over hundreds of years to ensure fairness between all parties. Thousands of Judges including the top Judges in the land have decided over that period on the balance to be achieved between the innocent victim of a road traffic accident and the 'paying party'. The amount to be recovered is part of the innocent victims' tort rights and is enshrined within the legal case law. Does the Competition Commission believe they know better than all the senior Judges in the land who have made these decisions after well argued cases in the past? Does the Competition Commission have power to alter the tort law to restrict recovery against decisions of the House of Lords when they stand as the ultimate arbitrator of what Parliament intended when they made the relevant laws which are enforced by tort. Does the Competition Commission have power to overturn the laws made by Parliament as interpreted by the High Court?

In my respectful submission there should not be an enforcement order which runs alongside the tort law as they are in conflict. Which one takes priority? The enforcement order would have to take priority over the tort law otherwise there is no point? Should the Competition Commission overrule Parliament and the House of Lords' interpretation of the Acts which they have made and are intended to give innocent victims the tort rights they currently enjoy? Leaving the tort law in place to run alongside regulatory change is not an option and would lead to conflict, uncertainty and satellite litigation.

The restriction of rates and the lower and upper cap inevitably restricts tort rights of innocent victims to recover their outlay from the insurer of the party at fault. The approach of having a lower and higher cap directly challenges the existing Parliamentary legislation and case law permitting recovery of hire charges subject to safeguards which includes the charges needing to be on a range of reasonable retail rates.

Subrogation

The regulation is drafted to relate only to 'subrogated claims'. Subrogation is when the insurer pays out to the customer and pursues the other party for any loss incurred i.e. the rights of the customer are transferred to the insurer. I can see that this is perhaps easier to regulate by way of an 'enforcement notice' on the insurance industry, i.e. to stop them claiming more than they have paid out in charges in relation to hire. However, in other parts of the document it is worded to apply to credit hire organisations even though they would not operate 'subrogation'. This needs to be clarified so that it is clear what is caught and what is not. If the enforcement order goes beyond subrogated claims it clearly would have greater collision with the current tort law.

Is the adverse affect on competition so severe as to require overturning the current tort law as established by Parliament and interpreted by the Supreme Court. Is the Competition Commission in a better position of legal training and knowledge compared to the High Court Judges who have heard hundreds of test cases over the years to establish Parliament's will?

The AEC has turned out to be significantly less than the Competition Commission originally thought. The proposals will go into direct conflict with current tort law and are likely to cause chaos in the industry. The regulations will at the very least severely restrict competition and cause a few large insurers to dominate the market. Quality, additional services required by the customer and choice will inevitably suffer. In my respectful submission the current checks and balances within Parliament's laws and case law established by the High Court are sufficient for the protection of third parties.

European and International laws and case law which apply in relation to road traffic accidents apply to other areas of the law and practice. In particular European and International law in relation to shipping allows recovery in accordance with current tort law. The proposed remedy runs contrary to current European and International law permitting recovery by innocent victims of the losses they actually suffer so far as they are reasonable. Reasonableness is tested by case law which this regulation would overturn. Has the Competition Commission looked at the fact that this remedy interferes with legal remedies and breaches their application across borders and within our obligations to the EU and on International law?

If you're not with me in relation to the above observations the next issue is how should the low cap be set?

The proposal appears to relate to setting it at the discounted rates which apply to large supply deals made by insurers where rapid payment is made and huge volumes are delivered. I am sure you are aware that many hire companies enter into these arrangements as loss leaders in order to pay the overheads of their offices with the intention of making a profit on retail work. The High Court have already rejected this approach when insurers have argued this in the past and have confirmed that it is in direct contradiction to the innocent victims' tort rights and Acts of Parliament. They have indicated regularly that the rates agreed between an insurer and their approved hire company are not relevant to the recovery to be allowed via tort. The Courts have concentrated on 'retail rates'. This is because they are fairer (providing it includes all elements that are needed by the client). Thus if the Competition Commission were minded to proceed they should consider 'retail rates' as a basis for setting the low cap. This would have the minimum diversion from tort law and easier to justify. An average of higher 'real' retail rates should be used. I say real retail rates as many hire companies publish a low figure on the internet but there are additional sums payable when the hire is taken or the vehicle advertised as not available and rates are higher for a comparable vehicle. The retail rate would need to take into account the current tort law which allows an innocent victim to hire with a nil excess, cover the drivers who would normally be covered under their policy, automatics where applicable and providing a like for like vehicle in all respects. Adopting an average of higher retail rates moves the tort law from 'being on the range of higher retail rates' to 'being an average of retail rates'. The diversions from tort law are much less than adopting an approach which the House of Lords has repeatedly rejected as being in direct contradiction of tort law i.e. the adoption of rates used between insurers and their supplier. It also prevents other abuses as many insurers will get really good rates on hire from suppliers, given they often have other contracts for hire already in place, i.e. they can artificially keep low the recoverable rates to create an anti competitive environment. Many insurers pay very low rates for intervention/fault work as the CHO can make up losses from non fault work. This artificially enhances the figures for AEC and lowers base hire cost. Retail rates are more independent and fairer.

High Cap

If you're not with me in relation to the general illegality contradicting tort law I would suggest the high cap method of calculation is broadly fair. The GTA has been calculated based on 'being at the upper end of the range of retail rates' and agreed between the parties. Providing this continues to be based on the 'upper end of retail rates' and the figure is upgraded it would be reasonably fair. If it is reasonably fair it is less likely to be challenged even if it does technically contradict tort law.

Arrangements of what falls into low cap and what falls into high cap

In practical terms this depends on how fair or unfair the relevant caps are. If the low cap truly represents an average retail rate plus costs of assessing the claim, managing the claim, administration and risk (that the insurer will withdraw acceptance of the claim) the client may become uncooperative etc. then there may be less opposition even if the regulations breach tort law. However, I have seen no effort within the document to assess costs of these additional items and to incorporate them within the low cap figure.

The procedure is open to abuse by insurers as they could admit all cases initially to benefit from the lower rate until they assess liability and then deny liability which puts the credit hire company at risk of incurring a liability. This would destroy the credit hire companies and make it impossible for customers to gain their tort rights. Insurers must be bound by any admission.

The period of 3 days is too long for allowing the insurer to respond and accept liability. To be fair to Claimants there must be an irrevocable acceptance of liability and the period for a response should be limited to 24 hours to avoid unnecessary delay to the Claimant. On discussions with other credit hire operators many are of the view that the current proposals for the lower cap mean that they will have to wait 3 days for a decision from the third party insurer on liability before they put the customer in a vehicle. This is because the figures referred to in the report for low cap look likely to produce a situation where it is uneconomic for credit hire companies to provide a vehicle unless there is no admission within the 3 day period. This causes me great concern. Not only does this oppose tort law it provides significant dangers for the Claimant and his family. On a number of occasions we have immediately arranged a vehicle for the customer and attendance of an engineer at their home where it has been suspected that the vehicle may be dangerous to occupants (such as rear end damage which could leak carbon monoxide into the vehicle). These inspections have often revealed dangerous scenarios whereby if the client had continued to drive the vehicle their life and health would have been put at risk. Unintended consequence of this delay could be to put the lives of innocent victims and their family at risk. It would be possible in more circumstances to persuade an innocent victim to wait 24 hours for a vehicle but 3 days would tempt them to drive vehicles which should not be driven. The problem does not occur to the same degree if the low cap is based on higher retail rates plus the actual cost of doing the work which is needed.

There appears to be an implication that credit hire companies don't assess liability as this is done by insurers. This is a misapprehension. The majority of credit hire companies undertake their own review of liability and decide whether or not to provide a vehicle. The costs of deciding on liability, losing some cases, settling some cases 50/50 or on a lesser basis, clients who go AWOL, clients who don't cooperate, management costs, delaying payment, legal costs and review costs all have to come out of the sum recovered.

There appears to be a suggestion that credit hire organisations have been achieving excessive profits. A study of the senior players over the last few years quickly shows that this is not the case. Two major players have gone bankrupt and two further major players have only survived by swapping bank debt for equity.

Prohibition of financial inducements from replacement vehicle providers where such inducements are to encourage Claimants to take a replacement vehicle at rates above the rate cap.

I can see why the Competition Commission wish to introduce this 'law'. However, prohibitions on 'commissions/referral fees' have been introduced in relation to personal injury only after lengthy debates within Parliament and introduction against the advice of the Solicitors Regulatory Authority

who were regulating solicitors. Bypassing Parliamentary debate in relation to this interference with normal commercial life does not appear to be appropriate. If a broker has a client who wants a Rolls Royce service provided by a specialist provider who can't operate on the margins suggested within this regulation why shouldn't he make a referral and receive a referral fee that is disclosed to the customer. A broker in such a situation would be prevented from 'treating clients fairly' being prevented from making a referral to the most appropriate provider for that customer. Instead he would have to refer to a credit hire provider that did not meet his client's needs and provided a far inferior service simply because the inferior service meant that an inducement could be made within the restrictions of the law. This interferes with statutory regulation and the rule of law that applies at present. The Competition Commission shouldn't be changing the law; this should be for Parliament to do. It should be of interest to the Competition Commission that the reason the SRA opposed prohibition of financial inducements was because their research had revealed that those paying inducements provided a better service than those that did not. There is no reason to think that the same does not apply to credit hire operators and thus the Competition Commission would be driving business to poorer quality providers by this restriction.

Size of Detriment

Looking at the detriments in relation to credit hire there is an assumption that the detriment is the figure between what would have been achieved on direct hire rates from insurers compared to credit hire rates. I can't see that it includes costs which are necessarily incurred within credit hire i.e. assessment of the case, delayed payment of fees, cases lost or settled on a part basis, cases where client's disappear or fail to cooperate or something else happens, administration, management of the claim, assistance with other heads of claim. If one brings in the costs of these I would respectfully suggest the AEC would be minimal. These are all rights which the client has under current 'tort law' so it is reasonable to bring those costs into play.

2.59

Replacement vehicle claims charged to at fault insurers directly by non fault Claimants who have organised the hire of a replacement vehicle directly themselves without the assistance of an insurer, broker, CMC or CHC.

I note that the Competition Commission acknowledge in relation to this scenario a change of the law would be required in order to prohibit the recovery of hire costs and provision of replacement vehicles. In my respectful opinion the Competition Commission have missed that the same applies in relation to the client's tort rights to obtain a credit hire vehicle from a credit hire company.

The distinction causes issue of bias against the poor/ill/disabled. Wealthy individuals will be able to obtain a replacement hire vehicle and await recovery of the charges from the third party insurer thus allowing them to obtain help to achieve all of their current tort rights. Poorer individuals will have to use the credit hire option whereby they may not be provided immediate access to a vehicle given the low level of the lower cap and may be restricted to provision of a vehicle from the monopolistic suppliers of insurers without the additional benefits that they would wish to receive.

2.139

Assumption that remedy 1c would not impact upon a non fault Claimant's tort rights.

This assumption is wrong. I have spoken to many solicitors and a few barristers and there is no doubt whatsoever within the profession Remedy 1c impacts upon the non fault victim's tort

entitlement to obtain full credit hire services and recover the full credit hire rate if he is impecunious or a rate at the high end of the retail rate if he is not. Remedy 1c interferes with his right and is in direct contradiction to the Supreme Court case law relating to tort rights enacted by Parliament. If remedy 1c is to take effect the current tort law needs to be repealed. It is difficult and dangerous to leave in place current tort law whilst creating remedy 1c over the top. Which takes priority? Does remedy 1c take priority or does the case law enacted by Parliament take priority? The enforcement order should only be put into place if it is crystal clear to all which takes priority over what. As a solicitor I don't want to get into the position whereby I have difficulty advising the client because there is uncertainty as to whether remedy 1c overrides tort law or whether tort law overrides remedy 1c. The discussion within the profession at present is that tort law overrides remedy 1c. It is envisaged that litigation will follow over which takes priority following any implementation of an enforcement order. In our respectful submission it should be clear to all in the market place if the relevant remedies are intended to override tort law and an appropriate Act of Parliament should be debated if the intention is to override tort law, the will of Parliament and High Court authority.

2.156

Customers to recover the cost they incur in the self provision of replacement vehicles at basic hire rate

States that remedy 1f will not require any changes to existing laws and regulations. It is clear that it does. The existing case law allows a self provision of replacement vehicle to be recovered at credit hire rates if the client is impecunious and at top end retail rates if he is not. The regulation contradicts Parliamentary and tort rights and thus is an infringement of his rights. It is an infringement of his rights under European law which allows for losses suffered as a result of negligence by another party to be recovered from the third party with very limited restriction. There is no restriction I have seen which would allow for restricting recovery in the manner prescribed.

Conclusion

As there is a significant view in the market that the current enforcement order proposed would breach Parliamentary and tort case law the Competition Commission must deal with this issue head on. If there is a genuine belief by the Competition Commission that it does not the full basis should be given together with detailed advice from a high level QC confirming the same. If this is not done there will be massive satellite litigation following the enforcement order.

If the Competition Commission believe and demonstrate via a clear opinion to the market that they can override Parliamentary Acts and the House of Lords they should do so. If they cannot they should consider carefully whether the AEC are sufficient to such Parliamentary change when taking into account the other benefits provided to innocent victims.

If the Competition Commission decides to do so they should ensure that the caps and operation are sufficient to prevent a restriction in the companies offering a full credit hire service to a customer. The harsher the rates and harsher the rules on Claimant's and credit hire operators the more likely the innocent victims will suffer severe detriment in restriction of their tort rights. The current proposals in relation to the lower cap are very harsh.