Loss and Hire

the two sides of the same coin

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Introduction

The concept of loss and hire have always been intertwined. From my experience, the easiest way to understand hire is to approach it at the outset from understanding whether there has been a loss. If there is a loss, then the hire charges are recoverable. If there has been no loss, then the hire charges are not recoverable.

In this article I am going to explore how understanding hire from the focal point of loss will make it far easier to understand the subject. In many court decisions, the recoverability of hire charges is not even specifically addressed in terms of loss – it's simply stated to be a case of either hire charges are recoverable or not. The reality however is that the court is deciding whether the claimant has suffered a loss for which the tortfeasor should be responsible. This goes back to the purpose of tortious law, namely, to compensate a claimant for his/her loss.

I will address this article in the following way: (1) a selection of non-credit hire cases (before the Consumer Credit Act 1974) which will assist in understanding loss in credit hire; (2) how *all* credit hire cases can be explained simply in terms of whether there was a loss and examples of this; (3) the interesting consequences of analysing all hire claims through loss and (4) summary and conclusion.

Non-credit hire cases (before the Consumer Credit Act 1974) which will assist in understanding loss in credit hire

Parry v Cleaver [1970 A.C.1] and Donnelly v Joyce [1974 Q.B. 454] are two *non-credit hire* cases that are useful in understanding the concept of loss in *credit hire*. It's no coincidence that both these cases are mentioned in the well-known credit hire case of Dimond v Lovell.

Lord Reid in Parry v. Cleaver [1970 A.C.1,14] referred to "the fruits of insurance which the plaintiff himself has provided" and "the fruits of the benevolence of third parties as "apparent exceptions to the rule against double recovery" which were founded on special considerations of policy. In other words, even though there is no loss, damages are still recoverable as an exception to the general rule. There were public policy reasons for these exceptions.

The best example of the "fruits of insurance" would be in the case of Parry v Cleaver itself where it was held that benefits from a contributory disability pension fund should be disregarded in calculating loss of earnings. This is because the claimant had paid for the insurance premium which provided for the pension.

Put simply the following is an example of the exception of "the fruits of the benevolence of third parties": the claimant has an accident and his wife cares for him. The wife does not expect any payment for this as she has provided this voluntarily. So, the claimant is not incurring any loss. The claimant can nevertheless recover the value of those services even though he has suffered no loss. However, he "can sue only if he claims as trustee for the person who provided the services" (Dimond v Lovell). In other words, if he recovers damages at trial, he is holding it on "trust" for payment to his wife. Donnelly v. Joyce is another good example. This was a case where a child received care from his mother following an accident. The fact that he was under no obligation to pay for this care was irrelevant. This is another example of the "fruits of the benevolence of third parties".

How *all* credit hire cases can be explained simply in terms of whether there was a loss and examples of this

In Dimond v Lovell [2000 UKHL 27], the House of Lords were not prepared to extend the two exceptions to the no double recovery rule (in other words the two exceptions to the "no loss" rule) to an irredeemably unenforceable agreement under the Consumer Credit Act 1974. The following argument *was rejected*: it was argued that the Claimant not being liable to pay for the hire charges is irrelevant, following the cases of Parry v Cleaver and Donnelly v Joyce. If the hire charges were allowed then Mrs Dimond would hold the hire charges as "trustee" for the hire company, similar to how a husband would hold any monies obtained for care from his wife on trust. However, the House of Lords refused to create a third exception to the no double recovery rule.

So on loss, Dimond v Lovell can be explained in terms of: (a) the agreement is irredeemably unenforceable, due to the Consumer Credit Act 1974; (b) the Claimant therefore does not have to pay the credit hire company and (c) therefore there is *no loss*.

On loss, Salat v Barutis [2013, EWCA Civ 1499] can simply be explained in terms of (a) the agreement is irredeemably unenforceable, due to the cancellations regulations; (b) the Claimant therefore does not have to pay the credit hire company and (c) therefore there is *no loss*.

In W v Veolia [2011 EWHC 2020 (QB)], it was stated that if it was not for the "payment point" then the hire charges would not have been recoverable, though not much further explanation was given in the formal judgment. W v Veolia can however simply be explained in terms of loss in the following way: (1) the agreement was irredeemably unenforceable, due to the cancellation regulations; (2) notwithstanding this, the Claimant had through his insurance company paid (the claimant and the insurance are for want of a better word, the "same person") for the hire charges; (3) so the position is this: the claimant has paid for the hire charges, *notwithstanding the unenforceability*. If the court were to disallow the hire charges on the basis of unenforceability, then the Claimant will be worse off due to the actions of the tortfeasor. Therefore, there is a loss.

The interesting consequences of analysing all hire claims through loss

There are a number of interesting scenarios.

Is there is a loss or not where the hire agreement is *redeemably* unenforceable? Imagine this situation at the court: the court finds that the agreement is redeemably unenforceable and on this basis finds that the claimant has suffered no loss. The hire charges are dismissed. The hire company then after the trial makes an application for a declaration of enforceability, which is allowed and therefore the agreement can be enforced. Where does this leave the claimant? I identified this problem in my previous article "Does Dimond v Lovell need to be revisited?" Has not the claimant suffered a loss? The answer to this question is unclear. It is however in my view clearly arguable that the claimant has indeed suffered a loss.

Similar interesting scenarios can also be identified in *irredeemably* unenforceable hire agreements. In the absence of payment made by the claimant for the hire charges, in an "irredeemably unenforceable" hire agreement, it is clear that there is no loss according to case law. However, in my view the situation is not as clear cut as it appears at first blush. Imagine the following scenario: Party A hires a car. The hire agreement is irredeemably unenforceable - in other words the court has no discretion to order that the agreement is enforceable. Party A who has not paid the hire charges so far, as she/he is hoping to recover these charges at the trial, is a morally upstanding and religiously devout individual and does not wish to take advantage of the situation. She/He in the witness statement affirms that she/he feels "morally obliged" to pay the hire charges and indeed it would be against her/his beliefs not to pay a debt for a service that has clearly been provided to her/him. Or even if she/he does not state this in his witness statement, this is the oral evidence that she/he gives under cross-examination. Will the court still dismiss the hire charges due to Dimond v Lovell?

In my view the above situation is not too different from W v Veolia. In W v Veolia, payment had already been made and therefore there was a loss, notwithstanding the unenforceability of the hire agreement. In the above situation no payment has been made, however the claimant feels morally obliged to pay for the hire under an agreement which is unenforceable, though it is still a valid agreement. Will the courts really question a claimant who feels morally obliged to pay even though it is an irredeemably unenforceable agreement? I do believe this would be extremely dangerous grounds for any court to venture into.

When the Dimond v Lovell decision was published over 20 years ago, I remember when I read this case, I felt there was "lacuna". It was my view that if a claimant were to say that notwithstanding the agreement being irredeemably unenforceable, he/she does not wish to take advantage of this situation, then perhaps arguably Dimond v Lovell does not apply?

Summary and conclusion

In summary and conclusion: (1) there needs to be more focus on the concept of loss in hire cases, as hire and loss are two sides of the same coin; (2) credit hire cases before the Consumer Credit Act 1974 established two exceptions to the no loss rule, that is even though the claimant had suffered no loss, damages were still recoverable. Those situations were as follows: (i) the fruits of insurance which the claimant himself/herself has provided and (ii) the fruits of the benevolence of third parties. These were largely for public policy reasons; (3) In Dimond v Lovell, the House of Lords was not prepared to create a third exception for public policy reasons, namely for credit hire agreements that were irredeemably unenforceable; (4) *all* reported credit hire cases can be explained through the concept of loss (5) looking at hire through the prism of loss leads to some interesting scenarios, for example: (i) if a hire agreement is redeemably unenforceable, then is there is a loss? (ii) there is also an argument that Dimond v Lovell does not answer whether there is a loss in a hire agreement which is *redeemably* unenforceable, so there is a lacuna in the case of Dimond v Lovell (iii) in an irredeemably unenforceable hire agreement where the hire charges have not been paid, what if an individual either stated in his/her witness statement or gave evidence that notwithstanding the unenforceability he/she felt morally obliged to pay for the hire? Would the courts still say there was no loss?

When hire is looked purely at through the prism of loss, many interesting questions arise...

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Please note this article does not constitute legal advice for any specific case or cases.

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