

Crash course in LVI claims

Boyd Morwood and **Matthew Snarr** examine recent Court of Appeal guidance on low velocity impact claims, an emerging area of motor insurance litigation

- *Kearsley*, expert evidence and case management
- how to establish a defence without alleging fraud?

ephemeral. These claims involve an analysis of both foreseeability and causation. The origins of this argument can perhaps be traced to the dissenting judgment of Lord Jauncey of Tullichettle in *Page v Smith* [1995] AC 155, [1995] 2 All ER 736 [NOTE TO AUTH: pls confirm cite?].

Traditionally the court has been asked to reject claims for personal injury in road traffic accidents where no apparent damage was occasioned to either vehicle. This approach found judicial sympathy but lacked consistency and predictability. Recently, insurers have deployed expert evidence in an attempt to create an irrefutable defence.

The task of putting into practice the LVI concept has proved troublesome. Claimants have sought to argue that in these low value cases defendants ought not to be permitted to obtain or rely on expert engineering evidence or expert medical evidence. This stance led to a plethora of fiercely contested interlocutory hearings and an attempt by the lower courts to provide case management guidance.

In *Earith v Arriva Bus Company* 6 October 2003 (unreported) and *Rooney v Graves and Hartley* 7 April 2004 (unreported) HHJ Stewart QC, at first instance, sitting as the designated civil judge in Liverpool, held that in LVI claims where the defendant alleged fraud it would be proportionate and necessary to permit the defendant to rely on both expert engineering and expert medical opinion, and that such cases should be transferred to the multi-track.

The court has refused to be confined by a purely scientific approach to the causation of injury. In *Armstrong* HHJ Stewart QC answered the supposedly unanswerable by accepting the single joint expert evidence that there would have been no occupant displacement due to the low velocity of the impact but found that the claimants had sustained injury nonetheless. The Court of Appeal held that the court has discretion to reject expert evidence even where it does not appear deficient, particularly with regard to emerging fields of expertise. To hold otherwise would leave cases in the hands of expert witnesses rather than judges.

Kearsley

Kearsley was a standard LVI claim subject to case management directions. Shortly before trial, the claimant sought permission to ad-

Introduction

In *Armstrong v First York Limited* [2005] EWCA Civ 277, [2005] All ER (D) 107 (Jan) and *Kearsley v Klarfeld* [2005] EWCA Civ 1510, [2005] All ER (D) 98 (Dec) the Court of Appeal adjudicated on arguments designed to stem the flow of low velocity impact (LVI) claims. The court identified particular problems arising from this area of litigation and recommended that

a group of test cases be collated to provide definitive guidance at High Court level.

Genesis of revelations

LVI claims are actions for personal injury defended on the basis that the velocity of the impact was so minor that it could not cause injury to a person of normal fortitude. In the alternative, the impact was so minor that the personal injury suffered would have been

duce evidence from a consultant orthopaedic surgeon rather than a general practitioner. The defendant had already obtained its own orthopaedic evidence, maintaining an allegation of fraud. HHJ Tetlow granted the application to vacate the trial date and permit the claimant to rely on orthopaedic evidence, to ensure that the parties were on a level playing field. He commented specifically: "It seems to me fairness dictates in a fraud case it be investigated properly. No one should lose his name merely because the rules seem to say otherwise. They are not our masters. They are to help matters progress if things go wrong then they must be put right."

The defendant sought to appeal HHJ Tetlow's order. The Court of Appeal dismissed the appeal. In the leading judgment, Lord Justice Brooke approved HHJ Tetlow's approach by commenting that it was necessary to grant the claimant's application to achieve parity of arms. He added further that the case was not one suited to disposal by way of a paper exercise and the issues demanded that expert oral evidence be provided to protect the interests of justice.

It appears that a major motivating factor behind the appeal was the desire to gain appellate guidance on the case management of LVI claims. Before *Kearsley*, the courts' approaches often varied from region to region.

The Court of Appeal in *Kearsley* identified the following:

- LVI claims cause particularly complex legal and practical issues due to a lack of developed jurisprudence.
- Until there is some authoritative guidance from the higher courts, the court ought to allocate LVI claims to the multi-track.
- Despite the low value of many LVI claims the court, for the time being, ought to grant each side their own engineering and medical experts together with permission for oral evidence.
- Provided the defence sets out its case on causation in compliance with CPR 16.5, fraud or fabrication need not be expressly pleaded.
- The facilitation of a more economic approach to LVI claims would be assisted by adopting the following steps:
 - claimants should offer access to their vehicle for inspection purposes;
 - claimants should provide early disclosure of relevant medical records; and
 - defendants should inform claimants that they are treating their case as a LVI claim.

Tactical advantages of Pt 36

The outcome of this type of litigation has traditionally been all-or-nothing. However, faced with LVI claims, courts now seem to be pragmatic and, in finding that some exaggeration has occurred, offer a partial victory to both claimant and defendant. An important consideration for the parties, therefore, is who bears the costs bill.

Kearsley promoted the practice of making Pt 36 offers of settlement for claimants. There is also a tactical advantage to Pt 36 offers and payments for defendants. The cases of *Painting v University of Oxford* [2005] PIQR Q5 [AUTH: [2005] EWCA Civ 161, [2005] All ER (D) 45 (Feb)?] and *Devine v Franklin* [2002] EWHC 1846 QB provide for costs protection where a party has suffered some injury but exaggerated its extent.

Quandaries and conundrums

Pleadings and case presentation

Despite the welcome guidance *Kearsley* offers to practitioners litigating LVI claims, there remain some quandaries. *Armstrong* and *Kearsley* provide no substantive advantage to the defendant. Pleading fraud is unnecessary, provided there is compliance with the requirements of CPR 16.5. However, if a claimant did not sustain an injury, the court will ask, what explanation can be given for the cause of his/her symptoms? Either s/he must evidence the cause or risk compounding the allegation of dishonesty. Even if fraud is not pleaded, the nature of the LVI defence encourages judicial scepticism. Therefore, it seems difficult for the trial judge to isolate these issues in the manner proposed by the Court of Appeal. The danger is that the courts will simply use the lack of explanation as proof of the claimant's authenticity.

In light of the guidance in *Kearsley* it would be prudent for the defendants' legal advisors in existing LVI claims to reconsider their pleaded defences to determine whether an allegation of fraud is warranted. The defendant's legal team should reflect upon how it is going to answer the question the court will inevitably ask itself, and the parties, namely, if this is not a case of fraud, what is the cause of the claimant's symptoms other than the accident? The danger is that, once the defendant has accepted that an allegation of fraud per se is unjustified, the courts will use this as proof of the claimant's authenticity—using a negative to prove a positive.

Expert evidence

Armstrong identified that LVI was an unusual

field of personal injury litigation requiring opinion evidence drawn from an emerging body of expertise both medical and engineering. The Court of Appeal in *Kearsley* has made comment in relation to the reception of such evidence particularly looking at *Armstrong*, at first instance, and *Liptrot v Charters* 6 April 2005 (unreported) [AUTH: pls confirm cite]. The modern incarnation of LVI as a discrete body of cases is inextricably tied to expert evidence and consequently its success or failure may be dependent on the quality of such expert evidence. Tactical considerations in litigating LVI claims inevitably include the expert's presentation at court and their qualifications in their field of expertise. There is a growing trend to expert shop; in particular, parties are trying to instruct experts who are more qualified or advanced in their fields to obtain victory by default. Legal advisors would be well advised to ascertain the qualifications and experience of the proposed opposing expert before instructing their own.

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Back to the future

The field of LVI litigation remains in a state of flux. Claimants face uncertainty in gauging the strength of their cases while defendants continue to 'crystal-ball gaze' to determine how well their arguments will be received at court. It is envisaged that over time more authoritative guidance will arise. It has yet to be seen whether the higher courts will adopt the general consensus of defendant expert evidence in this area and determine, for example, whether the minimum threshold for a soft tissue neck injury requires a speed change of 5mph. This litigation may be central in establishing national minimum thresholds for the payment of damages in motor claims. Should the higher courts not be persuaded of the possibility of establishing such thresholds, they are likely to centre decisions on the parties own evidence, absent unilateral opinion evidence—a 'volt-fast' turn from the expert evidence trend.

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