

Geoff Atkins is an actuary by profession, recently retired from full time work after 41 years in general insurance and accident compensation.

With newly available brainspace he writes on current issues in the sector, and this is one such publication.

The cancer of claim farming and credit hire

This article was prompted by reading a judgement from the WA Supreme Court of Appeal on an otherwise unremarkable dispute between a credit hire company and an insurer. It feels like ground hog day.

This case is from Western Australia. After a 2019 crash, the not-at-fault party used CompassCorp for a credit hire vehicle for 39 days.

Compass sent a bill to RAC, insurer of the third party, at \$96 a day. RAC paid Compass at \$45 a day, a typical commercial rate.

Every now and then an insurer will do this and effectively challenge the credit hire company to take them to court (in the name of the not-at-fault owner). The credit hire companies are quite accustomed to this, and have their own legal advisers and standard arguments ready to go.

This has been happening for years in Australia and to me it seems to be incredibly repetitive. Sadly, there has never been a clear-cut Appeal Court judgement that resolves it once and for all, even after visiting the High Court.

All of this follows a similar history in the UK where numerous cases have been to appeal courts including the Supreme Court of England and Wales and the House of Lords.

In 2021 a bundle of cases was put together in NSW, going to the Court of Appeal as a group. One (known as Arsalan) went on the High Court in 2021 which produced a rather unhelpfully vague decision that left unresolved what was a reasonable charge for vehicle rental in these circumstances.

In this particular case (Miller v McKnight), the Compass bill was a little under \$4,000 and RAC paid about half that. Not worth the fight you ask? Well, this scenario gets repeated thousands of times over and in total the stakes are high. Each case in court, however, proceeds one at a time and costs more than it is worth to run.

In this WA case, the Magistrate in the Magistrates Court found in favour of RAC. Compass appealed to the District Court and the District Court found in favour of Compass. RAC then appealed this to the Supreme Court of Appeal, which overturned again and found in favour of RAC. Compass asked the High Court for leave to appeal there, but the High Court refused leave to appeal. It said:

"This application is an unsuitable vehicle for the point of principle it seeks to raise. The application seeks to raise a question of principle concerning the recoverability of credit hire charges for a replacement vehicle payable under car hire agreements (see Arsalan v Rixon (2021) 274 CLR 606). As there was a finding that the hiring costs were unreasonable because they exceeded those payable to "mainstream motor vehicle rental companies", the issue of principle does not arise."

What a circus. The legal arguments are pretty arcane and keep being repeated over and over. It comes down to how one interprets 'reasonable'. The Appeal Court decision is littered with references to other cases, in

Australia and the UK, which seem to me to have no meaningful differences one from another (except for the decisions and the reasons given by judges).

Unsurprisingly the motorist contacted Compass on the recommendation of a tow truck driver at the accident scene. I expect that tow truck driver would get a referral fee from Compass.

What's to be done?

I think this problem cries out for a systemic solution. The idea of going over the same ground in Courts time after time seems crazy.

Would some legislation be possible? Maybe – it could be in the Insurance Contracts Act for example – but it is extremely difficult to get governments to tackle such things.

Could ACCC make some ruling or standard, on the basis of unfair laws? What about ASIC using powers regarding AFSL holders (noting claims management is now covered)?

My starting point would be to see if insurers can come up with a solution. First, what would a system look like? Second, how could it be implemented?

Outline of a car hire system

A person whose car is damaged by the fault of another would be entitled to:

- A rental car for a reasonable period for their car to be off the road for repair
- A car of a similar nature to their own car
- At no cost to themselves.

If the person has comprehensive insurance, their insurer is responsible for obtaining the vehicle and recovering the cost from the third party insurer (as they do any repair cost). Otherwise, the insurer of the third party is responsible for obtaining the vehicle.

Disputes involving the consumer to go to AFCA. Disputes involving two insurers to go to an arbitrator nominated by the ICA.

I would anticipate insurers negotiating contracts with car hire companies. I also expect that insurers would move to include similar benefits in their own comprehensive policies for the party at fault.

Implementing such a system

The legal structure could be a Deed signed by each insurer. Signing the Deed would be a requirement in the GI Code of Practice. ACCC approval would likely be needed because it could be regarded as collusion and a restriction on competition.

Agreed wording for the cover would be included in relevant PDSs, or they could incorporate the cover by reference to a document prepared under the Deed.

What is at stake?

There is no doubt that credit hire, along with similar claim farming activities relating to repair time and cost, result in higher motor insurance premiums.

How much higher? Well, I don't know and I am not aware of any reliable estimates.

And what would be the expected cost to premiums if something like the system described above were to be adopted?

With the high level of community and government anxiety about the cost of insurance premiums, it seems to me to be well worthwhile to explore what the current hidden cost is, and to estimate what costs might be imposed by a revised product offering.

Such a study is a fairly straightforward actuarial task, given access to suitable information, which (at least some) insurers will have in their systems.

Morally, I think of these practices as a cancer on society, though others will not see it the same way, and there are probably equally questionable practices in many areas of commerce. Do you think that with a concerted effort we could eliminate this particular cancer?