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Précis Paper

The Reasonableness of Replacement Hire Cars

A discussion about the recent Court of Appeal decision of *Lee v Strelnicks; Souaid v Nahas, Cassim v Nguyen; Rixon v Arsalan* (2020) NSWCA 115.

Discussion Includes

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The Reasonableness of Replacement Hire Cars

In this edition of BenchTV, Sam Ghassani (Lawyer Director, Spectre Law, Sydney) and William Richey (Barrister, 8th Floor Garfield Barwick Chambers, Sydney) discuss the recent decision of *Lee v Strelnicks; Souaid v Nahas, Cassim v Nguyen; Rixon v Arsalan* (2020) NSWCA 115.

Credit Hire

1. *Lee v Strelnicks; Souaid v Nahas, Cassim v Nguyen; Rixon v Arsalan* (2020) NSWCA 115 was a case involving four matters which were heard concurrently about the assessment of damages for a non-income producing chattel.
2. The case was part of a long standing dispute between insurance companies and hire care companies centered around the idea of credit hire.
3. A credit hire company will give a person a car that is usually similar to the car that was damaged. That person will be at least notionally charged for the car however the collection of the charges will be deferred or waived and instead, for exchange for the car the person will allow the credit hire company to try to recover those costs from the at fault party.
4. Usually the money is recovered by way of negotiation and if it comes to it, the credit hire company will sue the other driver in your name by virtue of an authority of some kind that you will sign when hiring the car, claiming damages for loss of use.
5. One of the issues with credit hire as an idea is that it gives rise to somewhat perverse incentives. Legally speaking, the customers to a credit hire arrangement technically have a liability to pay for the hire car charges. However, the entire business model is predicated on the idea that the money will be extracted from an insurance company somehow. Under those conditions, very few customers care about how much they are being charged to hire the cars and this can lead to a situation where the rates charged to hire the car a credit hire care can be vastly in excess of hiring a car from credit hire companies than in the mainstream market.
6. On the other hand however, it is a legitimate service and these people are put in a situation where through no fault of their own, they are without access to their cars and for one reason or another, insurance companies are often unwilling to pay for that person to have a replacement car. This has given rise to a lot of litigation in inferior courts.

Facts

7. Three of the cases were appeals from the general division of the local court, however the *Lee v Strelniks* matter began life as a judicial review application from an assessor of the small claims division of the court.

8. The three appeal matters involved people who were involved in an accident and liability was admitted. In each of those matters, the plaintiff owned a luxury car and in each matter the plaintiff had hired a like for like car, that is they got a car substantially similar to their own which was damaged by the negligence of the defendant. The claimed amounts were small ranging from $10,000 - $15,000 in damages sought by the Plaintiffs. In the matters of *Rixon v Arsalan* and *Souaid v Nahas*, the magistrates at first instance refused the full amount of the hire car charges claimed by the plaintiffs and the plaintiffs received a much smaller tariff.
9. In *Cassim v Nguyen*, the magistrate awarded the full amount claimed. This matter was appealed by the defendant.

Background

10. Up until this case, the local courts had adopted an approach that in matters such as these, the plaintiff would be compensated for the market rate only of hiring a suitable car that the local court found they should have hired. That is, the Court viewed the damages by reference to a plaintiff's need to hire a replacement car.
11. The basis of that argument was a construction of an earlier Court of Appeal case, *Anthanasopoulos v Moseley* (2001) 52 NSWLR 262; [2001] NSWCA 266.
12. The facts of the case were that many years ago the NRMA had established a courtesy car program. In that program, if a car was damaged and the owner happened to be an NRMA customer, the owner would be provided with a courtesy replacement vehicle organised by Hertz. Hertz would provide a car, render and invoice and ultimately NRMA would pay the bill for the invoice. NRMA would then try to pursue the other party to recover the car charges.
13. The major issue in the case was whether the individual plaintiffs were even entitled to claim the hire car charges because they were provided gratuitously. That is, because the cars were not hired by the plaintiffs, there was an open question as to whether they were entitled to those hire car charges at all.
14. NRMA's argument in that case was by reference to *Griffiths v Kerkemeyer* (1977) 139 CLR 161; [1977] HCA 45 which was a case that held that where somebody requires domestic care services and have a family member who provides those services free of charge, this is not a bar to them recovering damages for those services. Normally, those damages are assessed with regard to the market cost.
15. The lead judgement in *Anthanasopoulos v Moseley* noted that in line with old English shipping cases such as *The Owners of No. 1 Steam Sand, Pump Dredger v The Owners of SS "Greta Home"* [1897] AC 596, the mere loss of a use of a thing, a chattel entitles someone to claim damages..

The Local Court's Approach

16. The local courts had adopted the approach adopted in the decision of Anthanasopoulos v Moseley (2001) 52 NSWLR 262; [2001] NSWCA 266.
17. At paragraph 80 His Honour noted that in the English matter of *The Owners of No. 1 Steam Sand, Pump Dredger v The Owners of SS "Greta Home"* [1897] AC 596 the plaintiffs had incurred costs in keeping and maintaining the ship that was damaged and it was one justification for saying that the mere loss of the use of the ship entitled them to damaged.
18. In *Anthanasopoulos v Moseley*, His Honour went on to note that underlying the measure of damages in the Greta Home case was the plaintiff's need for the chattel and by parity of reasoning in the *Griffiths v Kerkemeyer* case, the need for services.
19. As a result, the argument that ended up being accepted for a time in the local court was that this had a bearing on how one would assess damages in a case for the loss of the use of a motorcar. It was noted in *Anthanasopoulos v Moseley*, that in the case of claims for damages for injury for a non-income producing chattel there is no substantive significance in the difference between special and general damages. Where, by reason of need, the plaintiff is required to hire a replacement chattel, the damages are to be measured by the market rate of hiring the replacement.'
20. The local court also latched on to obiter remarks by Justice Ipp in *Anthanasopoulos v Moseley* to formulate a test for assessing damages in these cases.

<u>Test used by the Local Court</u>

21. It was not a test that examined what a plaintiff actually did in hiring a car. Although the cases were always run on the basis that a plaintiff was suing for the invoiced amount of hiring a car, the evidence of the cost incurred tended to fade into obscurity.
22. The reason for that is because the court adopted a view that it was compensating a plaintiff for what they needed the replacement car for so the first step was fixing upon the suitable car that a plaintiff should have hired by reference to their evidence of what they needed the car for.
23. The court would then determine the market cost for hiring that particular car, which was often not the car actually hired and normally that was the cheapest cost to hire that hypothetical car. This was an approach based in hindsight and had little regard to a plaintiff's conduct. Usually the court would look at internet advertisements for hire car prices to arrive at a dollar value.
24. The credit hire companies challenged this approach, and this was generally the major issue on appeals.

<u>Argument advanced on behalf of credit hire companies</u>

25. The argument advanced on behalf of the credit hire companies was that the local court's approach really did not do justice to the compensatory principle which is an overarching principle in the area of damages that the object of an award of compensatory damages at least is to put a plaintiff back into a position they would have occupied if the negligence of the defendant had not occurred.

Argument advanced on behalf of insurers

26. The insurers attempted to justify what they called the 'Anthanasopoulos measure of damages' by reference to a series of cases and argued that loss of use damages in this field were being awarded to compensate the inconvenience of being without a car and the court should fix an award of damages by reference to the cost of hiring a car that would cater for the inconvenience of being without a car.

Decision at First Instance

27. At first instance, the appeal matters were all held by Justice Bastan in the Supreme Court. Justice Bastan upheld the local court's approach. Whilst, His Honour recognised that Justice Ipp's remarks in the *Anthanasopoulos v Moseley* were obiter, he noted that they were nevertheless obiter remarks from a Court of Appeal judge and Justice Bastan held that they should be applied.
28. His Honour also noted that other judges sitting at first instance in the Supreme Court had adopted this approach so his Honour declined to interfere.

Court of Appeal

29. On the legal point, Justices White and Emmett essentially agreed with the decision advanced by the credit hire businesses. Justice Meagher dissented and preferred the needs based approach that had been adopted at that point.
30. At paragraph 38, Justice White said *Anthanasopoulos v Moseley* does not support the contention that damages for loss of use of the damage to vehicle are confined to the necessities for which the damaged vehicle was used, that was not the sense in which Justice Ipp used that term 'need'. *Anthanasopoulos v Moseley* was not concerned in any sense with identifying the precise need for a replacement vehicle or with the determination of the market rate or market cost of providing a replacement vehicle.
31. At paragraph 69 of His Honour's Judgement, Justice White sets out an eight point plan for the principles involved in determining a so-called credit hire case
    a. The first is restitutio; overarching principle is that damages in tort are intended to compensate the plaintiff for loss actually suffered to put the plaintiff in the same position as he or she would have been in had the tort not been committed. That is through no fault of their own the plaintiff's in these cases lost their car and if they

had proved that they truly needed a replacement, it seemed unjust that they would have to 'make-do' with another minor car.

b. The second is that the plaintiff has the onus of establishing that he or she suffered some loss by reason of being deprived of use of the vehicle for a period.
c. Thirdly, the plaintiff is entitled to recover as special damages expenses reasonably incurred to mitigate the loss of use of the damaged vehicle. This recasts the focus that these cases are truly cases for an actual cost incurred by a plaintiff and not on the basis of an inconvenience suffered
d. Fourthly, the plaintiff will be entitled to recover as special damages for the loss of use of the vehicle while it is under repair the reasonable cost of hiring a replacement vehicle, if the plaintiff reasonably needs to hire the replacement vehicle. If the plaintiff does not need a replacement vehicle, he or she does not suffer a loss from being temporarily deprived of the use of the vehicle for which special damages for the cost of hire of a replacement vehicle are payable. General damages for any inconvenience suffered may still be recoverable.
e. Fifthly, a reasonable need for the replacement vehicle is not to be assessed by only considering what vehicle would be adequate to meet the inconvenience to the plaintiff of his or her vehicle being off the road. This means that need in this context means need to replace the thing in question, it is not a need to justify having it in the first place and a good example of this is shown in *The Owners of Steamship "Mediana" v The Owners, Master and Crew of Lightship "Comet"* [1900] AC 113.
f. Prima facie, it can be inferred that the plaintiff will have a reasonable need for a "commensurate" vehicle, or a "reasonably equivalent" vehicle, or a "reasonable substitute", or a "broadly comparable" replacement vehicle.
g. This is because the loss suffered by a plaintiff who has lost the use of a prestigious vehicle is not merely the inconvenience of not having a vehicle to transport the plaintiff and his or her family, friends and associates, from A to B, but the loss of his or her ability to do so in a vehicle which has the safety, luxury and prestige of the damaged vehicle.
h. Although the plaintiff has the onus of establishing a reasonable need for a replacement vehicle, once that onus is discharged, the onus of establishing that the hire of the particular replacement vehicle was unreasonable lies on the defendant. This shows that once a plaintiff proves need and the like for like issue, the defendant will then bear the onus of showing what the plaintiff did was actually unreasonable, particularly if they are advancing a failure to mitigate contention.

Lee v Strelnicks appeal

32. This case was slightly different to the others as began life as a decision of an assessor in the small claims division of the local court. In that case, the plaintiff, Mrs Lee had given evidence about what she needed a car for. The Assessor found that her evidence lacked a certain probative value and rejected the evidence. The assessor's treatment of the evidence was challenged and the basis of the judicial review application was that the assessor did not need meticulous evidence about what the car was being used for or what it was intended to be used for as that is not what the word 'need' means. This was an application for judicial review seeking relief only on the basis that there was an error of law on the face of the record
33. Justice Wilson at first instance found that an error of law was not apparent on the record before her and it was an issue of fact that should not be interfered with by way of judicial review.
34. The Court of appeal agreed that there was no error of law apparent on the face of the record and Mrs Lee lost for that reason.
35. However the Court of Appeal did confirm that the word need does not mean that one has to justify their need for a particular replacement car, His Honour stating that the loss the claimant suffers which gives rise to the relevant need is the deprivation of the use of the damaged vehicle not simply the deprivation of the use of a means of transportation
36. Proving need is a relatively low bar. One of the seminal cases on this is *Giles v Thompson* [1994] 1 AC 142; [1993] UKHL 2 where it was said that it is true that need is not self-proving but it is close. He noted that people rarely sink costs into owning motor vehicles if they do not actually need them.
37. Also, the very fact that the chattel in question, the motor vehicle was actually in use at the very moment that the tort was committed in a typical motor accident case means that it is not difficult to infer that a person would require a replacement

<u>The Like-for-Like issue</u>

38. The ultimate question will be was it reasonable for a plaintiff to incur these costs?
39. Normally, somebody will not be acting unreasonably in hiring the same or similar type of car that they had to begin with.
40. This is not always the case as shown in the case of *Souaid v Nahas* [2020] NSWCA 115 whereby Mr Souaid admitted in cross examination that he was perfectly fine with any old car and was not fussed about the car he hired. This shows if a plaintiff disavows any preference or desirability of having a kind of replacement car then it may be unreasonable to hire that type of car.
41. The like-for-like issue was also addressed in the English case of *Bent v Highways and Utilities Construction Ltd* [2010] EWCA Civ 292 in which it was said that 'normally the

replacement need to be no more in the same broad range of quality and nature as the damaged car

42. It is not an enquiry into what the reasonable person would have done in the abstract, but it is an enquiry into whether on the facts of the particular case the plaintiff acted reasonably as per *Banco de Portugal v Waterlow & Sons Ltd* [1932] AC 452; [1932] UKHL 1. In that case, it was noted when someone is taking remedial measures to overcome a breach created by a defendant, one cannot assess the plaintiff's conduct in dealing with the problem easily. It was also said that a plaintiff will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest other measures less burdensome that may have been taken

BIOGRAPHY

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