Compensating for the lost pleasure of using goods

Clare Langford reports on *Arsalan v Rixon; Nguyen v Cassim* [2020] HCA 40

The High Court has held unanimously that a plaintiff can recover from a negligent defendant the reasonable costs incurred in hiring, for the period of repair, a substitute vehicle that is of equivalent luxury to their damaged vehicle. In so doing, the court recognised that loss of the amenity, enjoyment or pleasure of using a chattel is a head of damage recoverable in an action in negligence.

Background

In separate, unrelated circumstances during 2017, four cars were damaged in collisions with negligent drivers. The damaged cars were: Mr Souaid's 2014 Lexus IS 250 F Sport Prestige sedan; Mr Cassim's 2012 BMW 535i sedan; Mr Rixon's Audi A3; and Ms Lee's Toyota Camry. Each driver used their vehicle for domestic, non-commercial purposes. (Mr Cassim also used his BMW for business purposes.) Each of the vehicles required repairs and were temporarily unavailable. Accordingly, each owner hired a replacement vehicle for all or part of that period. Ms Lee opted for a non-luxury sedan, while Messrs Souaid, Cassim and Rixon hired luxury vehicles.

Local Court's decisions

In Local Court proceedings, each owner claimed the full cost of hiring each replacement vehicle as damages against each negligent driver.

In relation to Mr Cassim, the court was satisfied that a vehicle of lesser value would not restore him to the position that he would have been in, but for the collision; the damages awarded reflected the cost of hiring the luxury substitute. Mr Souaid and Mr Rixon were less fortunate: the court held that a non-luxury vehicle would have met their 'needs' adequately, and their damages were limited to the market rate for the hire of such a vehicle. Ms Lee fared still worse: having failed to satisfy the assessor that she 'needed' a replacement car, she recovered only an amount reflecting the interest on the capital value of her Toyota for the period it was unavailable.

Supreme Court's decisions

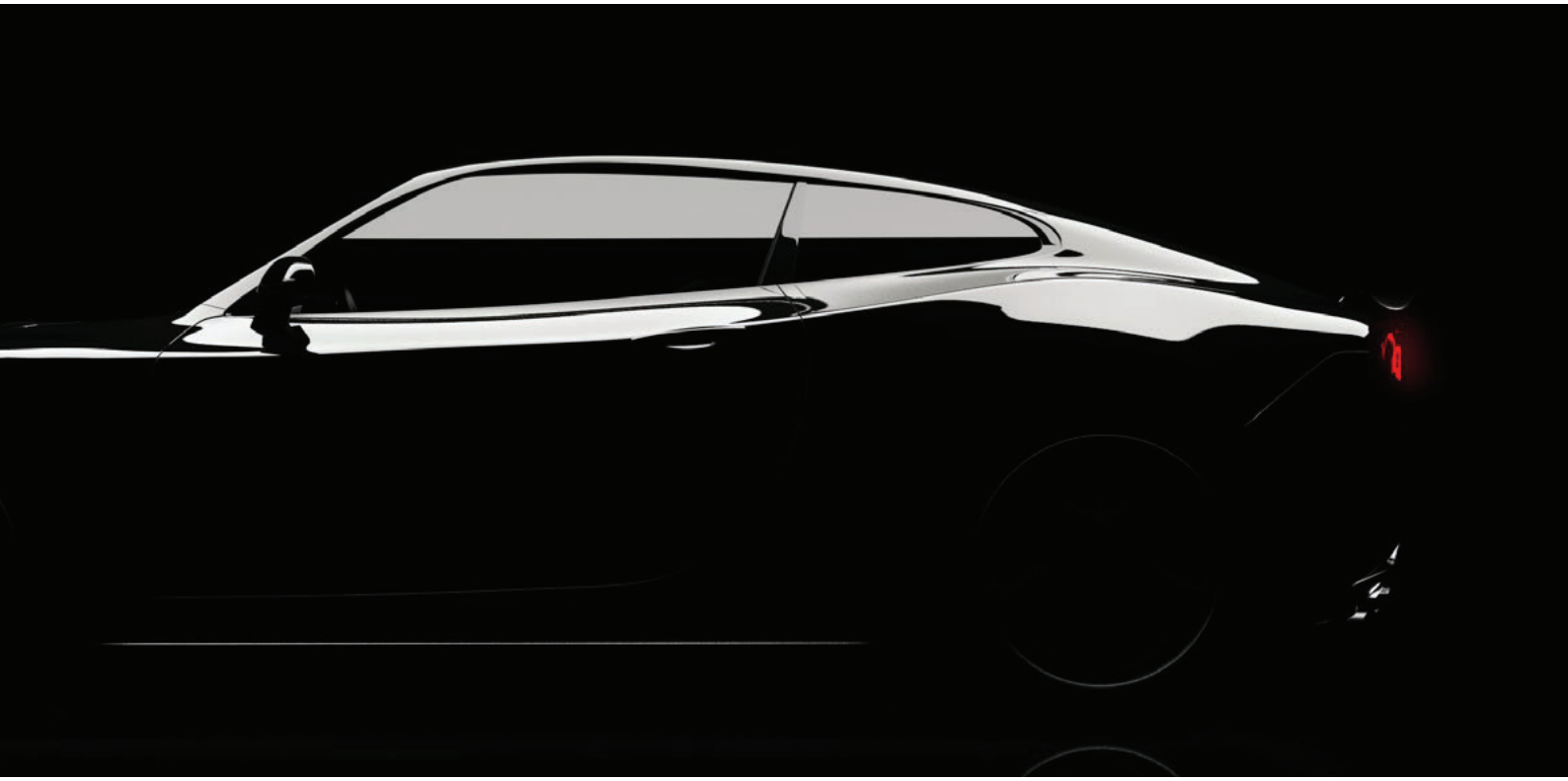
An appeal by the defendant in Mr Cassim's case succeeded before Basten J, who held that Mr Cassim's identified 'needs' would have been met by a non-luxury vehicle; his damages should have been limited to an amount reflecting the market rate for the hire of a Toyota Corolla: *Nguyen v Cassim* [2019] NSWSC 1130. Consistently with that reasoning, Basten J also dismissed appeals by Mr Souaid and Mr Rixon. An application for judicial review by Ms Lee likewise foundered before Wilson J.

Court of Appeal's decision

Each claimant sought leave to appeal to the Court of Appeal and the applications were heard together: *Lee v Strelnicks; Souaid v Nahas; Cassim v Nguyen; Rixon v Arsalan* [2020] NSWCA 115 (Meagher and White JJA, Emmett AJA). The court was unanimous in holding that, where a claimant sought damages for temporary loss of use of a non-income producing vehicle, they had to demonstrate a need for a replacement vehicle in the relevant period. Leave was therefore refused to Ms Lee: she had not demonstrated any such 'need'.

In relation to the other claimants, the court split as to how reasonable expenditure on a replacement vehicle should be determined. White JA and Emmett AJA held that a claimant first had to establish, as a threshold matter, that they needed a replacement vehicle while their regular vehicle was unavailable. If that matter was established, then the measure of damages was, *prima facie*, the cost of hiring an equivalent vehicle in the relevant market. An equivalent vehicle was the appropriate comparator, rather than any vehicle that could be turned to the same use. A claimant who lost the use of a prestige vehicle lost the intangible benefits of driving a car with higher levels of safety and luxury, in addition to losing a mode of transport. Mr Cassim and Mr Rixon were thus entitled to recover an amount reflecting the cost of hiring a vehicle of equivalent value. By contrast, Mr Souaid conceded he would be content with any car; the measure of his loss was, accordingly, the cost of hiring a substitute of lesser value.

In dissent, Meagher JA agreed with Basten J's view that the purpose of compensation in this context was to alleviate the inconvenience suffered by a claimant as a result of being deprived for his or her vehicle. This could be achieved by hiring a substitute vehicle, which would meet the particular 'needs' that were previously met by the claimant's car: e.g., a need to travel to and from work, or to drop off and pick up school children. A claimant was not entitled to recover expenditure exceeding that which was reasonably necessary to mitigate their loss: in other words, it was unreasonable to recover the cost of a Lexus when a Corolla would serve the same ends.



High Court's decision

In a single judgment, Kiefel CJ, Gageler, Keane, Edelman and Steward JJ dismissed appeals by the defendants in the cases of Mr Rixon and Mr Cassim. Although the High Court determined only those two claims, perhaps unusually, the court said it was 'necessary to explain why, in light of the principles set out in [the reasons],' the claims by Mr Souaid and Ms Lee 'should have been decided differently': [42].

While their Honours agreed with the conclusion reached by the Court of Appeal, they disagreed with its reasoning in important respects. Their Honours also disagreed with the conclusions reached in relation to Mr Souaid and Ms Lee.

The court attributed the difference in approach (between, on the one hand, Basten J and Meagher JA and, on the other hand, White JA and Emmett AJA), to the absence 'of any clear recognition in Australian law of loss of amenity, in the sense of loss of pleasure or enjoyment, in the use of a chattel, as a recoverable head of damage for a tort that involves negligent damage to a chattel': at [17].

The court rejected the premise that, as a threshold matter, the plaintiff had to demonstrate a 'need' for a replacement vehicle during the repair period: at [17]. The court noted that that asserted requirement had its origins in an analogy drawn, in an earlier decision of the Court of Appeal, between damages for loss of a non-income-producing chattel and *Griffiths v Kerkemeyer* damages for lost services: at [29]–[30]; see *Anthanasopoulos v Moseley* (2001) 52 NSWLR 262. The analogy was imperfect, and the loose concept of 'need' was apt to distract from the 'proper focus', which lay with the particular heads of damage claimed by the plaintiff: at [31].

Turning to those heads of damage, it was insufficient for a plaintiff simply to allege 'loss of use' or 'loss of the availability of a vehicle for use'. That language described what happened, but it did not identify 'the manner or extent of any loss': at [18].

Adopting that lens, it was uncontroversial that the 'physical inconvenience' of not having access to one's own vehicle during the repair period was a compensable loss: at [23]. However, the critical question was whether a plaintiff could *also* recover compensation for losing the amenity, enjoyment or pleasure of using their chattel during that period. There was no principled justification for excluding that category, given loss of such amenity could be experienced as the consequence of the wrong: at [25]. That type of loss had been recognised in relation to: negligent damage to land; conversion resulting in lost enjoyment of a hobby; and nuisance resulting in loss of the amenity value of land: at [26]. Therefore, recognising loss of amenity as a recoverable head of damage in a case of negligent damage to a chattel was 'consistent with the broad recognition of loss of amenity of use in other instances of damage to property': at [27].

Their Honours held that in order to prove physical inconvenience and loss of amenity, it would generally be sufficient for a plaintiff to identify a 'past suite of uses' and the 'various functions used in their vehicle': at [35]. This would allow a court to infer that the plaintiff would have put the vehicle to the same uses during the repair period (i.e., he or she was physically inconvenienced) and that the plaintiff would otherwise have derived some amenity from using the vehicle in that period, particularly where it was an 'expensive, prestige vehicle' in relation to which the plaintiff incurred 'significant capital or ongoing expenditure': at [35].

If those heads of damage were established, it would generally be difficult for a defendant to establish that hiring a substitute vehicle was an unreasonable act in mitigation of the plaintiff's loss: at [36]. However, a defendant may be able to contend that the *amount* of the hiring charges was unreasonable where, e.g.: the hired vehicle was fairly regarded as more valuable than that which was damaged; the vehicle was hired for longer than was reasonably necessary; or the hiring charges included unreasonable costs: at [36].

The court concluded that it was reasonable for Mr Rixon and Mr Cassim to hire vehicles of equivalent luxury to those damaged: at [40]–[41]. Similarly, Mr Souaid should have succeeded; his concession, that he would be content with any car, did not establish that it was unreasonable for him to hire a luxury replacement and thereby avoid loss of amenity: at [44]. Ms Lee's evidence, that she used her car to visit family and friends and to pick up and drop off her children from school, should have been sufficient to support an inference that she would have been physically inconvenienced during the repair period: at [43]. BN