Insurance Insights

Can My Replacement Vehicle be a Beamer? Damages for Loss of Use for Tortious Damage to Property

Damages for 'loss of use' of a chattel has for many years been an unsettled area of the law, pleaded inconsistently by plaintiffs and, at times, miscategorised by the Courts resulting in conflicting judgments. The issue is particularly important in claims for damages involving replacement car hire when a person's car is damaged by the negligence of a third party.

The High Court of Australia's recent decision in *Arsalan v Rixon* and *Nguyen v Cassim* [2021] HCA 40 confirms that the cost of a replacement hire vehicle can be recovered as damages where damage has been caused by the negligence of another person. The decision also clarifies how and when such damages will be recoverable. While the facts of the case involved negligent driving, the principles set out by the High Court are likely to have wider application and extend to claims for damages for 'loss of use' of other chattels following negligent damage.

Facts

The facts concern two unrelated proceedings brought by owners of prestige vehicles which were damaged due to the negligence of other drivers. The owners sought recovery of costs incurred in hiring replacement vehicles. The two proceedings were heard together in the Supreme Court of NSW and the Court of Appeal, before also being considered together by the High Court.

Rixon

Mr Rixon owned an Audi A3 which was damaged in a collision with a car driven negligently by Mr Arsalan. The repairs to Mr Rixon's car took approximately 8 weeks, during which Mr Rixon hired a replacement car of the same make and model at a cost of $12,829.91.

Mr Rixon filed a proceeding in the Local Court of NSW and gave evidence that he needed a replacement car to travel to work, to drop off and collect his child from school and for other general errands. He also gave evidence that he required a European car for reasons of safety.

The Local Court accepted that Mr Rixon had a need for a replacement car but that his safety concerns were a *preference* rather than a *need*, and so he was not entitled to recover the cost of the particular car that he hired. The Local Court also found that the hire costs incurred were based on a credit hire rate which did not represent market rate (a separate issue which was not determined by the High Court). The Local Court awarded damages of $4,226.25 which was the market rate of hiring a Toyota Corolla for the period in question.

Mr Rixon appealed.

Cassim

Mr Cassim owned a BMW 535i which was damaged in a collision with a car driven negligently by Mr Nguyen. Repair of Mr Cassim's car took nearly 5 months, during which he rented a Nissan Infiniti Q50 for $17,158.02.

Mr Cassim filed a proceeding in the Local Court and gave evidence that he required the car for ordinary domestic purposes such as shopping, and taking his children to school and sporting events. Mr Cassim gave evidence that while he preferred a luxury replacement car, any car with 5 seats would have been feasible.

The Local Court held that while Mr Cassim had established a *need* for a replacement car, a Toyota Corolla would have met that need for a lower sum of $7,476. However, the Local Court rejected a submission from Mr Nguyen that the claim for recovery ought to be limited to the market rate of hire for a Toyota Corolla, because a Toyota Corolla was not of equivalent value to his BMW. Mr Cassim was awarded the full amount of hire costs he had incurred.

Mr Nguyen appealed.

Other Cases

Two other cases with similar facts, which were appealed to the Supreme Court and Court of Appeal were also considered by the High Court. Those cases were:

1. *Lee v Strelnicks* – Ms Lee's Toyota Camry was damaged by the negligent driving of Ms Strelnicks. Ms Lee hired a replacement car for 15 days while her car was being repaired. She used the car to visit family and friends and to take her children to and from school. The Local Court held that Ms Lee had not demonstrated a '*need*' for the replacement car and so her hire costs were not recoverable as damages. Instead, she was awarded $30.75 in general damages which represented interest on the capital value of her damaged car for the 15 days in question.
2. *Souaid v Nahas* - Mr Souaid's Lexus IS 250 was damaged as a result of negligent driving by Mr Nahas, and was unavailable for 40 days. Mr Souaid hired the same make and model car for part of that period and a BMW 318i for the remainder, at a cost of $11,128.41. The Local Court held that Mr Souaid had a '*need*' for a replacement car for domestic and social purposes, but that he did not need a luxury car for that period (on Mr Souaid's own admission) and so awarded him damages of $2,805.60, being the rate of hire for a Toyota Camry.

Supreme Court of NSW

Mr Nguyen appealed to a single judge of the Supreme Court. Basten J heard the appeals and affirmed the reasoning of the Local Court in Rixon, that damages were available to the plaintiffs if they could establish a 'need' for a replacement vehicle, but the measure of damages was limited to alleviating that need (i.e. any replacement vehicle would do). His Honour accordingly dismissed the appeal of Mr Rixon and upheld the appeal of Mr Nguyen (in respect of Mr Cassim's claim).

Mr Rixon and Mr Cassim appealed.

Court of Appeal of NSW

The Court of Appeal took a different approach, and held in favour of both Mr Rixon and Mr Cassim. The Court of Appeal held that Mr Rixon and Mr Cassim were entitled to damages in respect of the reasonable amount of hire of an equivalent vehicle to their vehicles.

Mr Arsalan and Mr Nguyen appealed to the High Court of Australia.

Decision of High Court

The High Court considered the approaches taken by the Supreme Court and Court of Appeal, and identified the key differences as being:

1. The Supreme Court focussed on the *inconvenience* which had been caused to Mr Rixon and Mr Cassim arising for the loss of use of their cars, which gave rise to the alleged need for a replacement. Based on that focus, the Supreme Court concluded that it was unreasonable for either of Mr Rixon or Mr Cassim to claim damages for hire costs that went beyond what was reasonable to alleviate the inconvenience they had suffered (i.e. beyond the costs of a replacement vehicle with 4 wheels and 5 seats); and
2. The Court of Appeal focussed on the *adverse consequences* experienced by Mr Rixon and Mr Cassim beyond simple inconvenience or need. That led the Court of Appeal to conclude that Mr Rixon and Mr Cassim had suffered a loss of the intangible benefits stemming from their ownership of prestige cars and a deprivation of the use of a car having their specifications and performance. On this basis, the Court concluded that it was not unreasonable for them to hire equivalent cars to mitigate their loss.

The High Court observed that the division of opinion was reflective of the lack of clear recognition in Australian law of a loss of amenity in the use of a chattel as a recoverable head of damage for a tort involving negligent damage to a chattel. Further issues also arose from authorities requiring proof of a 'need' for a replacement vehicle before hire costs became recoverable.

The High Court unanimously dismissed the appeals, upholding the decisions of the Court of Appeal. It held that Mr Rixon and Mr Cassim were entitled to damages being the reasonable cost of hiring a replacement vehicle equivalent to their own, as a result of the physical inconvenience and loss of amenity resulting from the negligence.

The High Court went on to hold that:

- The principle of 'loss of use' was inadequate and insufficient to reflect the loss suffered by Mr Rixon and Mr Cassim. Instead, the correct heads of damage were (as noted above) 'physical inconvenience' and 'loss of amenity';
- Damages for physical inconvenience and loss of amenity ought to be recognised as a valid head of damage as a result of negligent damage to a chattel, as has been recognised in other instances of damage to property;
- There ought to be no requirement for a plaintiff to identify a 'need' for a replacement vehicle. That is a distraction from the proper focus;

- It will not often be difficult to discharge the onus of proof in establishing the heads of damage of physical inconvenience and loss of amenity. Broadly speaking "*it will usually be sufficient for a plaintiff to identify a past suite of purposes for which the damaged vehicle was used.*";
- In respect of 'prestige vehicles' such as those owned by Mr Rixon and Mr Cassim, it is sufficient for a court to infer that plaintiff's derive amenity from the various functions of their vehicles; and
- Once the heads of damage has been established, the onus shifts to the defendant to prove the extent to which a plaintiff failed to mitigate their loss.

The Court also noted, albeit obiter, that the matters of *Lee v Strelnicks* and *Souaid v Nahas* ought to have been determined differently (given the similarity of their facts). Of particular note was the Court's conclusion that Mr Souaid's evidence that 'any car would do' was insufficient for a defendant to establish that the hire of an equivalent vehicle was unreasonable.

Significance of the Decision

The decision brings clarity to a long unsettled area of the law in Australia, and is likely to have wide ranging effect for individuals whose vehicles are damaged as a result of negligent driving. While the decision is likely to apply primarily in circumstances involving damage to vehicles, the principles established and clarified by the High Court could potentially have wider application to claims in relation to negligent damage to chattels more broadly.

This article was written by Principal Robert Crittenden and Associate Peter Brownless and was first published in the LexisNexis Australian Civil Liability Newsletter, 2022, Volume 17 Number 1. Please contact Robert if you have any questions or would like more information.

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