

Higher, hire... NSW Local Court looks again at market rate

Azad Cassim v Dylan Nguyen [2018] NSWLC

Michael Adie & Jacqueline Kelly | December 2018 | General Insurance

Overview

This decision, which was handed down by Magistrate Farnan on 6 December 2018, confirms the Court's current position with respect to how the measure of damages for temporary loss of use of a non-income producing chattel is to be determined. The Court ultimately found:

1. The Plaintiff is entitled to the market rate of hiring a vehicle of equivalent value to their own vehicle for the period during which they have established a need for that replacement.
2. The fact that a cheaper vehicle could meet the need for a replacement is not relevant to the measure of damages.

Facts

The Plaintiff was driving his 2012 BMW 535i sedan when it was involved in a collision with the Defendant. Liability was not in dispute and the Plaintiff arranged for the repair of his vehicle. The period of hire was agreed by the parties as being reasonable and the issue in dispute was particularly with reference to the daily rate claimed for the replacement vehicle.

Between 3 April and 8 April the Plaintiff was provided with a RAV4 replacement vehicle at an average daily cost of \$139 (all inclusive). After this he shared his wife's car for a while, an arrangement which he described as "extremely inconvenient" and travelled overseas before obtaining a Nissan Infiniti Q50 from Right2Drive at a cost of \$203 (all inclusive) per day for a period of 84 days.

Arguments raised by each side

The Plaintiff argued that the Court should award the actual cost incurred by the Plaintiff as long as it is within the market range of costs for a vehicle of the type that has been damaged. Whereas the Defendant argued

that the measure of damages should be the market rate of hire of the vehicle the plaintiff needed to hire, not necessarily the vehicle they chose to hire.

The Defendant's position was that, although the Plaintiff owned a luxury vehicle, he did not have a need to hire a luxury vehicle and a less expensive vehicle such as a Toyota Corolla would have met the Plaintiff's needs (being the transporting of product samples for his business and domestic purposes).

Decision

Although agreeing that the Defendant's argument about whether there is a need for that particular level of luxury vehicle "has a great deal of practical appeal", the Court found that it does not clearly represent the law. Her Honour highlighted "the difficulty with using the use of which the vehicle is to be put to determine the appropriate market rate (without reference to its value) is that it invites the inevitably subjective assessment" which would ultimately require the Court to pass judgment as to whether someone with a certain occupation is more entitled to be compensated by reference to an equivalent vehicle than another person.

The Court accepted the correct approach was that taken in *Beamish v Kanakis* [2017] WADC 33 where it was found that the provision to a person of a replacement vehicle of lesser value, even if it was capable of meeting the needs of that person is inconsistent with the purpose of awarding damages which is to put the person in the position they would have been if the damage had not occurred. In adopting this approach, her Honour found it was reasonable for the Plaintiff to obtain the use of a vehicle of equivalent value not just a vehicle capable of transporting him.

In determining whether the vehicle hired was comparable to that owned by the Plaintiff, the Court considered the value of the vehicle owned and the value of the vehicle hired. Given that the value of the vehicle

hired was less than the value of the vehicle owned, the Court accepted that it was a comparable vehicle. Although the Defendant sought to rely upon rates for a Caprice, the Court was not provided with any evidence regarding the value of a Caprice and was therefore unable to determine whether or not it was in fact comparable to the Plaintiff's vehicle.

Ultimately, the rental and associated costs charged by Right2Drive were within the range of market rates for the vehicles considered similar to the Plaintiff's vehicle. The Court therefore found that the hire of the Infinity Q50 was within the range of market rates of a vehicle that was reasonable to meet the Plaintiff's needs. Judgment was ordered in favour of the Plaintiff for the full amount of his claim.

Implications

In contradiction of the dicta of Justice Harrison in *Droga v Cannon* [2015] NSWSC 1910 at [56] - [61], this case supports the current approach in the Local Court which is the approach taken by the Small Claims Assessor in *Lowe v Pearce* [2016] NSWLC 5 and also by the District Court of Western Australia in *Beamish v Kanakis* [2017] WADC 33.

The case confirms that a Plaintiff will be entitled to the reasonable cost of hiring a replacement vehicle of similar value to their own vehicle for the period of time that they can establish they needed the replacement. If the amount claimed is within the range of market rates available for the comparable vehicle, the amount claimed should be awarded. Given the jurisdiction, this judgment is not binding on other Magistrates or Small Claims Assessors; however, it does provide guidance for how courts will likely approach the issue.

This issue is currently being considered on appeal by the Supreme Court in *Gladstone Lazarus Pty Ltd v Tumur* [2018] NSWLC 6 where the original Magistrate found that a Mercedes Benz C200 would be sufficient to meet the needs of a Plaintiff who lost the use of his Tesla and hired a Porsche Macan as a replacement vehicle. The Supreme Court appeal decision is due to be handed down in early 2019 and that determination will provide the binding principle that lower courts in this state will be required to follow.

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