Supreme Court put the brakes on credit hire claims

***Nguyen v Cassim* [2019] NSW SC 1130**

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Overview

With the influx of credit hire claims, a question has arisen over the years regarding the proper assessment of damages where a motor vehicle, damaged in a 'not at fault' collision, is unavailable for use while the 'not at fault' vehicle is being repaired or replaced.

There is no doubt that where a person's vehicle is damaged they are entitled to something, however, the gates of the Local Court have been flooded with claims where a vehicle is provided on credit to the 'not at fault' party.

The business model of credit hire arrangements focuses on the credit hire company providing credit for the cost of the vehicle over the period of hire while taking the expense and responsibility - win or lose - of pursuing the claim. This model has generally resulted in increased hire costs claimed against insurers by such companies when compared to the mainstream rental market.

Several matters were taken on appeal in the hope of resolving this aspect of the assessment of damages for these types of claims. But was this really a novel argument or rather something finally laid to rest?

On 3 September 2019, Basten J of the Supreme Court of New South Wales sought to clarify the position.

Facts

In *Nguyen v Cassim*, Nguyen collided with a 2012 BMW 535i sedan owned by Cassim. Nguyen was the party at fault. In the proceedings issued in the Local Court of New South Wales, Cassim provided evidence that he operated a business and required the vehicle to transport samples for social and domestic purposes.

The BMW was unavailable for use for a period of 143 days. Right2Drive provided an Infiniti Q50 to Cassim during this period. Cassim (or Right2Drive in his name) issued proceedings for the sum of $17,158.02 together with interest and costs. The Statement of Claim sought *"special damages being the actual cost of hiring a replacement vehicle in the sum of $17,158.02 including GST or in the alternative general damages to be assessed."*

The Local Court awarded Cassim the full amount of the claim together with interest and costs.

Nguyen (by his insurer) argued that a Toyota Corolla or Holden Caprice should have sufficed to provide Cassim with the transport he required. These arguments were rejected in the Local Court on the basis that neither vehicle was of *"equivalent value to* [Cassim's] *vehicle".*

The Local Court matter was appealed to the NSW Supreme Court.

The parties' positions

Cassim submitted that:

- once he had established a need for a replacement vehicle, whilst his vehicle was damaged or repaired, he was entitled to the reasonable cost of obtaining a replacement vehicle;
- the replacement vehicle should be as close as reasonably practicable to the class or type of the damaged vehicle;
- the relevant period was a reasonable period for repair or replacement of the damaged vehicle;
- although a cheaper vehicle might have satisfied his needs, there was no basis to require him to use a cheaper vehicle than what he owned.

Nguyen argued that:

- in the case of a damaged chattel, the tortfeasor is required to meet the reasonable costs of repair, or
- if those costs exceeded the value of the chattel, the value of a replacement chattel.
- a temporary loss of use of a chattel during a period of repair or replacement was a form of consequential damage which, in the absence of a chattel with income earning capacity, might be described as inconvenience or loss of amenity.
- the reasonable compensation for that loss required the establishment of the use to which the vehicle had been put prior to the collision; and
- the assessment of the reasonable cost of meeting the inconvenience caused by the temporary unavailability of the vehicle.

The Legal Principles

If Cassim was able to get by using public transport or any other vehicle, why did he need the Infiniti Q50?

Whilst the use of a prestige vehicle might be justified by the needs of a particular business, was it reasonable for Cassim to incur such expense?

There is no appellate decision in Australia that provides a clear basis for resolving these disputes. There was however dicta in authorities such as *Anthanasopoulos v Moseley*, *Wong v Maroubra Automotive Refinishers Pty Ltd, Droga v Cannon* and *Lee v Strelnicks*.

In *Anthanasopoulos v Moseley* Ipp AJA noted:

> *"Whatever the nomenclature to be attributed to the nature of damages represented by a plaintiff's need for services, the damages in question are not to be determined by reference to the actual cost to the plaintiff of having the care or services provided, or by reference to the income foregone by the provider of the services, but, generally, by reference to the market cost of providing them."*

What did the Supreme Court say?

Basten J found that the Magistrate in the Local Court erred in allowing the full invoice amount provided by Right2Drive, having accepted that Cassim's needs would have been met by the hire of a Toyota Corolla.

In coming to his decision Basten J noted that there were two questions in the present case:

1. Is the expense of obtaining a replacement vehicle of similar value or prestige recoverable, where a cheaper alternative would have overcome the inconvenience arising from the temporary unavailability of the damaged vehicle?
2. If recoverable, are the whole of the rental charges billed by the credit hire company recoverable? This question took into consideration the arrangement of credit hire companies providing a replacement vehicle upfront at no cost to the hirer, pursuing the at-fault party to pay the amount of the rental.

> *"It might be expected that the cost of such arrangements would be greater than the cost of hiring a vehicle from one of the many general car rental businesses. That is because the accident car hire company is (i) providing credit over the period of hire, and until the expense is recouped; and (ii) taking on the expense and responsibility of pursuing the claim with any risk of failure, in part or in whole."*

The Appeal was allowed and the amount awarded to Cassim was reduced to $7,476.00 - the cost of the hire of a Corolla.

The same position was adopted by Basten J in the concurrent decisions in *Rixon v Arsalan* [2019] NSWSC 1136 and *Souaid v Nahas* [2019] NSWSC 1132.

What does this mean?

The fight to contain the spread and increased costs of credit hire claims has been a long and expensive one.

Insurers can take some comfort, for now at least, that the test for reasonableness of such claims is not to be measured against some abstract, moral or social code.

Whilst a third party may not *wish* to use a vehicle less expensive than their own, they must minimise the loss incurred by spending no more on the hire car than required to meet their needs.

In general, up to the time of this decision, no adjustment has been made by the Local Court in credit hire cases for the fact that the cost claimed resulted from a credit hire contract. Is there *really* a difference between vehicles provided on credit and those that are not?

In light of the decision, insurers should now settle claims based only on the type of vehicle that satisfies the individual's needs, not their desires. The insurer should now take a closer look at all of the items charged for and not just the daily rate.

Given the significant impact this decision will have on credit hire companies and big players such as Right2Drive, we can expect an appeal to follow shortly.

The legal basis for the decision on Basten J appears solid and it will be interesting to see if the credit hire companies seek to appeal and how the Court of Appeal deals with the issues.

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