



HIGH COURT OF AUSTRALIA

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Details of Filing

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**IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY**

BETWEEN:

DYLAN NGUYEN

Appellant (S36 of 2021)

and

AZAD CASSIM

Respondent (S36 of 2021)

APPELLANT'S OUTLINE OF ORAL SUBMISSIONS

10 **Part I: Certification.**

1. These submissions are in a form suitable for publication on the internet.

Part II: Propositions to be advanced in oral argument

1. **Findings of fact.** The magistrate in each case found: (a) the Respondent reasonably needed a temporary replacement vehicle while his prestige vehicle was being repaired; (b) that reasonable need would have been satisfied by hiring a Corolla; (c) the Respondent preferred a vehicle of similar prestige or value to the damaged vehicle and hired it at significantly greater cost than a Corolla (AS [9]-[11]).
2. **Appeal on a question of law.** Each appeal to the Supreme Court was limited to the question of law whether, once a need was established for a replacement vehicle, the claimant was entitled to the cost of hiring a vehicle of similar value or prestige,
20 even though the proven need could have been satisfied at a lower cost (AS [12]).
3. **Distinguishing the compensatory principle from compensable loss.** Before applying the compensatory principle, one must identify whether the loss claimed is compensable as an aspect of the injury suffered by the claimant: *Amaca Pty Ltd v Latz* (2018) 264 CLR 505 at [41], [84]-[88]; *Lewis v ACT* (2020) 381 ALR 375 at [3]-[4], [65]-[70], [139]-[141], [150]; cf [31]. Normative judgments are involved, albeit informed by the common sense and pragmatism of the common law.
4. **Compensable loss given for wrongful damage to chattels.** Where A wrongly damages the physical integrity of the chattel of B, the primary head of compensable
30 loss is the diminution in the value of the chattel, usually measured by the cost of repair: *McGregor on Damages*, 21st edition, [37-001]-[37-012].
5. **General damages for loss of use.** Deprivation of liberty to use a chattel, as and when desired during the period of repair, is a further compensable head of loss. The

precise uses to which the chattel would have been put are not central to the entitlement to general damages, although they will be relevant to the essential jury question of “how much”; if the loss of use occasions no practical inconvenience, damages may be assessed at a “trifling amount”: *The Mediana* [1900] AC 113 at 116-118; *Lewis* at [166]-[167]; cf [80]-[84]. Conventional awards, at least in England, are much lower than spot hire charges: CA [5]; *Lagden v O’Connor* [2004] 1 AC 1067 at 1099; *McGregor* [37-045]-[37-062]; AS [28]-[29].

6. **Special damages for cost of hire of a substitute chattel.** While the chattel is under repair, compensable loss also includes expenditure or a liability incurred in hiring a replacement chattel. The claimant must establish a reasonable need to hire a substitute (AS [30]) and that the choice of replacement was also reasonably necessary (AS [31]-[34]; RS [17], [20]). In elaboration:

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(a) Reasonable necessity is determined objectively by reference to the use to which the damaged vehicle would have likely been put during the period of repair: *The Yorkshireman* (1827) 2 Hagg 30; *Watson Norie Ltd v Shaw* [1967] Lloyd’s Rep 515 at 516-517; *Giles v Thompson* [1994] 1 AC 142 at 167; *McGregor* [37-013]-[37-016]; AS [31]-[34];

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(b) The “loss” is better viewed (as per Lords Scott and Walker) as the expenditure or liability being a material adverse consequence incurred because of the defendant’s wrong rather than (as per Lord Hope) through the prism of mitigation: *Lagden* at [77]-[81], [97]-[102]; cf [27]-[29]; AS [44];

(c) The interest protected, giving rise to the relevant counter-factual, is the claimant’s functional use of the vehicle - rather than the idiosyncratic, non-pecuniary disappointments that a claimant might suffer from not being able to use a particular vehicle - during the repair period. Put differently, the scope of duty does not extend to protect subjective preferences divorced from the claimant’s likely use of the damaged chattel during repair (AS [45]);

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(d) This limit on the heads of compensable loss coheres with the limit that damages are not available for the worry and nuisance of having to deal with the consequences of an accident, or (ordinarily) for the additional benefits provided by a credit hire company: *Dimond v Lovell* [2002] 1 AC 384 at 401, *Lagden* at 1094;

(e) Policy considerations, in the light of the ubiquity of credit hire companies, support this conclusion: cf *Lagden* at 1081-1083.

7. **A conceptual approach to the measure of loss of use damages.** The above assumes the traditional distinction between general and special damages: *CSR Ltd v Eddy* (2005) 226 CLR 1 at [89]. A similar result can be reached through the alternative framework (not available in England) which conceptualises the claimant's loss as the need created by the defendant's wrong and the market cost of obtaining goods reasonably to satisfy that need: *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 179; *Anthanasopoulos v Moseley* (2001) 52 NSWLR 262 at 276-277; AS [35]-[38]; AR [10]-[11].
8. **Basten J and Meagher JA were substantially correct.** (AS [40]-[41]).
9. **White JA was in error.** (a) In viewing the question through the prism of mitigation (CA [42]); (b) In extending the interests protected by the tort to including damage to feelings (CA [60]); (c) In dismissing *Watson Norie* as inconsistent with the settled approach in England and Wales (CA [61]-[62]); (d) In his overarching statement of principles (CA [69]); and (e) In drawing support from the way in which general damages *may* be assessed (CA [70]-[73]): AS [44]-[50].
10. **Emmett AJA was in error.** (a) In failing to have regard to the authorities, especially *Watson Norie* (CA [119]-[129]); (b) In regarding *restitutio* as dictating the answer without a more specific analysis of the interests protected by the tort (CA [119]); (c) In drawing a distinction between 'fungible' and 'non-fungible' motor vehicles (CA [121]-[123]); and (d) In assuming that proof of a need for any replacement vehicle necessarily requires the hire of a vehicle of equivalent specification and characteristics (CA [120], [126]-[127]): AS [43], [51].
11. **Relevance of Mr Souaid's matter.** The approaches of White JA and Emmett AJA cannot be reconciled with the result for Mr Souaid (AS [42], [44], [49]; AR [4]).
12. **Relief.** As per the Notices of Appeal (S35/2021 CAB at 95; S36/2021 CAB at 113).



8 September 2021

Justin Gleeson SC