

Higher onus for hire cars: the requirement to establish 'need' in demurrage claims

Droga v Cannon [2015] NSWSC 1910

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Summary

The NSW Supreme Court has recently determined an appeal from the Local Court regarding a motor vehicle demurrage claim. The decision focuses on the requirement for a plaintiff claiming damages to establish that he/she had a need for a temporary replacement vehicle. In some additional comments, Justice Harrison questioned the previously accepted wisdom that a plaintiff is entitled to a replacement vehicle of equivalent make, model and age. The decision provides insurers defending motor vehicle demurrage claims with further 'ammunition' to call into question excessive amounts sought to be recovered by plaintiffs for temporary replacement vehicles.

Local Court proceedings

The Local Court proceedings involved a dispute as to the quantum of the hire of a temporary replacement vehicle after the plaintiff's BMW X5 four wheel drive was damaged as a result of the defendant's negligence.

The plaintiff, Lisa Droga, claimed for the hire of a BMW 520D sedan for a period of 33 days at the daily rate of \$480, comprising a total of \$15,840.

The defendant asserted that the rate of hire and duration of hire were unreasonable and excessive, arguing that the rate of \$255.29 per day was the relevant 'market rate'.

Magistrate Bradd ultimately awarded general damages to the plaintiff but declined to order that the defendant pay the quantum as claimed as the plaintiff had not proven that she had a need for a temporary replacement vehicle.

As a result, the plaintiff appealed to the Supreme Court on a number of grounds, essentially arguing that she was denied procedural fairness.

The issue giving rise to the appeal followed the defendant successfully objecting to part of the plaintiff's statement (in which she alleged her need for a replacement vehicle), which was in inadmissible form. The plaintiff was not required for cross-examination.

In his closing address, Counsel for the defendant submitted that the plaintiff was not entitled to either special or general damages for the period of demurrage as there was no admissible proof before the Court that the plaintiff ever needed to hire a replacement vehicle.

The plaintiff's Counsel, in view of this evidentiary issue, sought to reopen the plaintiff's case to adduce evidence of the plaintiff's need, which his Honour rejected. In the alternative, she asked the Court to infer need given that the plaintiff immediately attended to having her vehicle repaired following the collision and picked it up as soon as repairs were completed.

His Honour refused to infer 'need' as it is distinct from mere 'convenience' and is one of the elements the plaintiff must prove in order to establish her entitlement to damages.

Issues on appeal

On appeal, Justice Harrison referred to *Anathanasopoulos v Moseley*¹ and the fundamental requirement that the true basis of claims for damages for injury to a non-income producing chattel are based on need. Whilst the defendant's liability to pay general damages does not turn on the question of need, need always remains relevant to the quantum of damages the defendant is liable to pay.

¹ (2001) 52 NSWLR 262

The plaintiff on appeal attempted to argue that the defendant did not put the question of need squarely in issue and that the raising of the matter was tantamount to an ambush. Furthermore, she argued that the refusal of her application to reopen her case was a denial of procedural fairness.

Supreme Court's findings

Justice Harrison did not accept the plaintiff's submissions and pointed out that defendant's objecting to the plaintiff's evidence regarding need ought to have put the plaintiff on notice at that time of need being an issue in dispute.

Furthermore, whilst Magistrate Bradd had discretion to permit the plaintiff to reopen her case, his decision not to do so, factoring in the relatively small quantum of the claim and the time constraints of the Local Court jurisdiction, was not contrary to law.

The appeal ultimately turned on considerations of procedural fairness and the plaintiff's having failed to discharge the onus of proving her entitlement to the quantum of demurrage as alleged. Though it was something of an unfortunate state of affairs for the plaintiff given that she was in a position to give such evidence but was ultimately precluded from doing so, the decision reaffirms the importance of a party seeking damages for a replacement vehicle to establish that they had a need for a temporary replacement vehicle.

Comments regarding need as distinct from desire

Of particular note are Justice Harrison's comments made as 'an aside' at the end of his judgment, wherein he pointed out that the Local Court gave little attention to the distinction between the plaintiff's need for a replacement vehicle on one hand and her desire for a particular vehicle on the other.

His Honour referred to the statement that the plaintiff sought to tender before the Supreme Court, which would have established her need for a replacement vehicle if the Local Court had permitted her to reopen her case. Essentially, the plaintiff needed a vehicle to drive to work, to drop off and collect her children from school and for grocery shopping.

However, even if this had been admitted into evidence, it did not establish that the plaintiff required a BMW 520D or its equivalent. Justice Harrison made the following observations:

... it does seem likely that a far less expensive vehicle could have adequately operated to fulfil her identified needs ... it would surprise me if four door sedans of considerably less impressive specifications could not have been hired for less than \$100 per day and even less on a contract written for a longer period.

Although such comments are necessarily *obiter dicta* and were made in the absence of evidence, Justice Harrison neatly summed up his views as follows:

A far less sophisticated vehicle could have adequately coped with the activities identified by Ms Droga at what may well have been a considerably reduced tariff. The issue would have been a question of what was reasonable to meet Ms Droga's needs, not what was necessary to compensate her for her choice.

Implications for insurers

This decision is a reminder of the fundamental importance of a plaintiff establishing his/her need for a temporary replacement vehicle and that the evidentiary burden of proving the need is on the plaintiff.

Need for a replacement vehicle cannot be inferred as it is distinct from mere convenience, and there must be evidence as to what the vehicle is in fact needed for. Though the evidentiary threshold for proving the need is low, the absence of such evidence will amount to the plaintiff having failed to prove his/her case.

Furthermore, the common sense remarks of Justice Harrison reflect the concept that there is a distinction to be drawn between a plaintiff having a need for a temporary replacement vehicle and the plaintiff having a need for **the** vehicle which was in fact hired.

Consistent with earlier authorities, the plaintiff is only entitled to a like-for-like vehicle at best, otherwise the plaintiff will have failed to mitigate his/her loss.

However, Justice Harrison takes this a step further and comments that in order to establish need for a vehicle even of similar make, model and age to the plaintiff's, the Court will require evidence as to why such a vehicle is necessary. Otherwise, it may be characterised as compensation for a vehicle of one's choosing as opposed to a vehicle essential to the plaintiff's daily needs.

This decision is valuable for insurers as it provides a basis upon which to argue that a plaintiff in a 'demurrage' claim has failed to mitigate his/her loss even when he/she has hired a like-for-like vehicle if there is no evidence establishing why such a vehicle was required.

It must be noted that strictly speaking the *obiter* comments of Justice Harrison are not binding legal authority and, on their face, are contrary to the findings of the NSW Local Court Assessor Olischlager in *Rizk v Chen*² that a plaintiff is entitled to hire a replacement vehicle of similar make, model and age.

However, it remains reasonably open for defendant insurers to challenge a plaintiff as to their alleged need for a vehicle of similar make, model and age to their vehicle.

Therefore, it is important for insurers seeking to recover damages for hire cars provided to their insureds to provide evidence not only as to the insured's need for a replacement vehicle, but also their need for one of the same or similar make, model and age to the plaintiff's.

Equally, in addition to the arguments made available following *Rizk v Chen*'s findings regarding market rates of hire, Justice Harrison's analysis provides some further ammunition for insurers defending apparently exorbitant claims for demurrage (that are often made by 'credit hire demurrage' companies) to argue for a reduction in damages claimed if the plaintiff cannot demonstrate a need for a luxury replacement vehicle in circumstances where a more economic replacement would have been sufficient.

² [2014] NSWLC 8

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