

# Was it worth the Rizk? NSW Local Court reconsiders credit hire demurrage claims

*Rizk v Chen and National Apollo Bathrooms Pty Ltd* [2014] NSWLC 8

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## Summary

The Small Claims Division of the New South Wales Local Court has handed down a rare published decision in which the Court has departed from its previous approach to determining the applicable rate of hire for the recovery of hire car costs from an at-fault defendant.

The decision also provides insight into the circumstances in which a plaintiff will be held liable for contributing to a lengthy period of hire.

The decision provides some guidance for insurers in determining what would be considered fair amounts when dealing with credit hire car claims and offers some respite for insurers faced with seemingly excessive claims.

## Facts

Ms Rizk's 1996 Mitsubishi sedan was damaged in a collision on 23 August 2013.

On 27 August 2013, Ms Rizk hired a Toyota Yaris (**'the Yaris'**) from Compass Claims, a credit hire company. Vehicles hired on 'credit' generally attract a significantly higher rate of hire than those hired from mainstream hire companies.

The base hire rate charged for the Yaris was \$71.82 per day together with \$35.00 per day for a provisional driver's fee and a daily vehicle registration recovery fee of \$6.00 per day. In total, the daily rate was \$124.10 (inclusive of GST).

Evidence was adduced by the defendant providing an estimate for a similar vehicle at \$44.00 per day.

A week after taking delivery of the Yaris, the smash repairer informed Ms Rizk that her Mitsubishi had been declared a 'total loss' and would be written off. Ms Rizk contacted her insurer in order to negotiate a settlement for the total loss of her Mitsubishi.

Ms Rizk returned the Yaris to Compass Claims who issued an invoice for \$9,597.25 for the 87 day hire period.

Ms Rizk received a letter from the defendant's insurer on 15 December 2013 confirming she would receive a cash settlement in the sum of \$1,610.00 for the total loss of her vehicle.

Compass Claims sought to recover the hire car charges from the defendant's insurer, as is the usual course in credit hire cases.

The defendant disputed the quantum of the claim both in respect to the market rate for the Yaris and the duration that Ms Rizk claimed for the loss of use.

## Background

Most disputes about hire car costs arising out of motor vehicle collisions in NSW are litigated in the Small Claims Division of the Local Court and arise out of insurers considering either the rate of hire or the length of hire, or both, to be excessive.

The Local Court's previous approach in similar cases<sup>1</sup> had been that there was no single market rate or "spot rate" but rather a range of rates available within the market at any time.

The Court had consistently applied the principle that, provided that the actual cost incurred by the plaintiff represented a 'market rate' or fell within the range of market rates, the Court would accept that the rate was a reasonable basis for assessment of damages. As such, the plaintiff was not required to hire the cheapest option possible.

## Decision

The Local Court Assessor in *Rizk v Chen and National Apollo Bathrooms* confirmed the established position at law that a party is entitled to be compensated for the loss of use of a vehicle caused by the negligence of another irrespective of whether the vehicle is an income producing vehicle or a non-income producing vehicle, such as a privately owned vehicle.

However, in dealing with the defences raised by the insurer, Assessor Olischlager also introduced some additional principles.

### Rate of Hire

Compass Claims provides hirers with the **non-compensable benefits** of hire on credit as well as assistance in the recovery of hire costs from the at-fault driver or his or her insurer.

The inclusion of these non-compensable benefits in the credit hire rate means that the credit hire car rate cannot, of itself, constitute evidence of a market rate for the hire of a motor vehicle. As a result, the rate of hire charged for credit hire vehicles generally exceeds the rate of hire for vehicles from mainstream hire companies.

Assessor Olischlager held that:

- The Court's previous practice of accepting a range of rates, rather than a single market rate, often results in damages being awarded at the high end of the range and that this was inconsistent with the objective of assessing general damages by reference to "a reasonable sum for the wrongful use" of another's property.
- A reasonable sum should not result in awards that consistently tend towards the high end of the range.
- A new approach would be taken by the Small Claims Division of the Local Court where the cost of the service (being hire of vehicles on credit) is to be determined by the market available to the plaintiff.
- In some cases the market cost may be too high to be the reasonable value of the services and in those cases it might be appropriate for the Court to discount the market cost in any award of damages for loss of use of a vehicle.
- The evidence in this case disclosed only one rate that represented a market rate. The Court accepted the hire rate of \$44.00 per day to be the market rate for Ms Rizk's vehicle.
- In assessing the market rate the Court placed significant weight on the age of Ms Rizk's motor vehicle.

### Length of Hire

The Court has previously held that a defendant remains liable for the duration of the loss of use of a motor vehicle provided that there was no break in the chain of causation.<sup>2</sup>

In the present case, the Court determined that:

- Ms Rizk was not entitled to claim for loss of use of a vehicle until she received payment of the settlement sum from the defendant's insurer. Ms Rizk was aware in early September that her vehicle was deemed 'total loss'.
- Ms Rizk was in a position to consider what arrangements she should make for the permanent replacement of her vehicle and
- The Court determined that the hire vehicle was only required for the period reasonably necessary to organise a permanent arrangement for the

replacement of her vehicle.

- The pre accident value of her vehicle was \$1,690.00 and the burden of proof was on Ms Rizk to prove that she was not reasonably capable of funding a replacement vehicle.
- Ms Rizk did not discharge that onus.

In an important part of the judgment the Court held that the loss suffered **after** Ms Rizk was informed her vehicle was a total loss - being the continuing hire car charges incurred after this information was received - was a loss that was no longer caused by the defendant. Rather, this portion of the hire charges was a loss attributable to the conduct of Ms Rizk personally in electing to continue a temporary arrangement when a permanent replacement could have been arranged.

Ms Rizk was awarded damages only for the period of 14 days at a rate of \$44.00 per day. This was significantly less than the 87 days claimed at a total rate of \$124.10 per day.

## Implications

The decision of Assessor Olischlager has significance to insurers dealing with hire car claims and specifically regarding the often contentious issues of:

- Rate of hire
- Length of hire for replacement vehicles following a collision.

In this case, the Court departed from its previous practice and determined the plaintiff's entitlement to recover the cost of hiring a replacement vehicle on the basis of the market rate for the replacement of the vehicle, rather than ascertaining whether the amount claimed by the plaintiff fell within a **range** of market rates. Whilst this departure did not affect the market rate in the present case, the need to determine the market rate represents a modification to the approach previously taken by the Small Claims Division of the Local Court in cases such as *Harb v Marchbank*<sup>3</sup> and *Fang v Koumoukelis*.<sup>4</sup>

Previously, defendants had been largely prevented from raising defences that would otherwise be available in damages cases, such as 'betterment' and a 'failure to mitigate', where a plaintiff has elected to hire a vehicle at a more expensive rate when a cheaper alternative was

readily available.

This aspect of Assessor Olischlager's decision represents a potential shift in the balance between credit hire companies and subrogated insurers and opens the door for insurers to, in the right circumstances, challenge the:

1. Daily rate of hire charged by credit hire companies; and/or
2. Length of hire claimed based on the plaintiff's conduct.

The Local Court has been quite reluctant to hold any delay in the repair process against a plaintiff in circumstances where the plaintiff has apparently acted reasonably by placing the vehicle in the hands of a competent repairer or insurer. Whilst this decision does not completely depart from the Court's approach in this regard, it does provide insight into the circumstances where the Court might be prepared to reduce damages awarded for loss of use of a vehicle based on excessive rates and/or length of hire.

1. *Harb v Marchbank* [2011] NSWLC 9, *Fang v Koumoukelis* [2013] NSWLC 5.
2. *Miller v Walker* [2011] NSWLC 10.
3. [2011] NSWLC 9.
4. [2013] NSWLC 5.

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