

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, EDELMAN AND STEWARD JJ

Matter No S35/2021

AHYA-UD-DIN ARSALAN

APPELLANT

AND

ALEX RIXON

RESPONDENT

Matter No S36/2021

DYLAN NGUYEN

APPELLANT

AND

AZAD CASSIM

RESPONDENT

Arsalan v Rixon

Nguyen v Cassim

[2021] HCA 40

Date of Hearing: 8 September 2021

Date of Judgment: 8 December 2021

S35/2021 & S36/2021

ORDER

Matter No S35/2021

- Vary order 6 of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 17 August 2020 by replacing "plaintiff's damages to be assessed in accordance with the reasons for judgment of the Court of Appeal" with "plaintiff's damages to be assessed in accordance with the reasons for judgment of the High Court of Australia and with the magistrate's reasons as to the credit hire costs".*

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2. *Appeal otherwise dismissed.*
3. *The appellant to pay the costs of the respondent.*

Matter No S36/2021

Appeal dismissed with costs.

On appeal from the Supreme Court of New South Wales

Representation

J T Gleeson SC with S Habib SC, K G Oliver and R J May for the appellant in each matter (instructed by MCK Lawyers)

B W Walker SC with J L Gruzman, G E S Ng and W R Richey for the respondent in each matter (instructed by Spectre Law)

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Arsalan v Rixon
Nguyen v Cassim

Damages – Torts – Negligence – Damage to chattels – Consequential loss – Physical inconvenience and loss of amenity of use – Where respondents owned prestige vehicles – Where prestige vehicles negligently damaged and unavailable during periods of repair – Where appellants liable for costs of repairing vehicles – Where respondents deprived of use of prestige vehicles including enjoyment of various functions – Where respondents incurred costs of hiring replacement vehicles of equivalent value to damaged vehicles – Whether costs of hiring replacement vehicles recoverable as damages – Whether respondents required to prove need for prestige replacement vehicles – Whether hiring replacement vehicles of equivalent value constitutes acts taken to mitigate loss – Whether hiring replacement vehicles of equivalent value unreasonable.

Words and phrases – "act in mitigation", "compensatory principle", "concept of need", "consequential loss", "costs incurred in mitigation", "costs of hire", "equivalent replacement vehicle", "equivalent value", "heads of damage", "loss of amenity of use", "loss of pleasure or enjoyment", "luxury vehicle", "mitigation of loss", "negligent damage to a chattel", "physical inconvenience", "prestige vehicle", "proof of loss", "reasonable hire costs", "replacement vehicle".

Introduction

1 Mr Rixon and Mr Cassim, the respondents, were involved in car accidents. The appellants, by their insurers, admitted liability for the accidents. The appellants are liable for the costs of repairing Mr Rixon's and Mr Cassim's damaged cars, respectively an Audi A3 sedan and a 2012 BMW 535i sedan. These appeals concern further liability of the appellants for Mr Rixon's and Mr Cassim's costs of hiring substitute cars while their damaged cars were being repaired. The question is one that has arisen many times in a variety of different circumstances in local courts across Australia. For which, if any, substitute vehicles can victims of negligence recover hire costs incurred during the period that their vehicles are being repaired?

2 The simple answer is that a plaintiff will usually be able to recover from a negligent defendant the reasonable costs incurred in hiring, for the period of repair, a substitute vehicle that is broadly equivalent to their damaged vehicle.

3 The basis for this answer is that it will not usually be difficult for a plaintiff to prove loss against a negligent defendant who causes the plaintiff's vehicle to be unavailable for a period of repair. That loss will commonly consist of (i) the physical inconvenience from the plaintiff's inability to use the damaged vehicle during the period of repair and (ii) loss of amenity or enjoyment of the use of the vehicle. Those heads of damage can usually be inferred from the plaintiff's ownership and past usage of the vehicle and, but for the damage, the plaintiff's ability to continue to use the vehicle during the period of repair. Recovery of damages under these heads of damage will usually be necessary to restore the plaintiff to the position they would have been in but for the defendant's actions that caused the accident. Once the plaintiff acts to mitigate that loss by hiring a substitute vehicle, the onus of proof will lie upon the defendant to show that the costs incurred in mitigation were unreasonable.

4 Although it will not usually be unreasonable for a plaintiff to mitigate physical inconvenience and loss of amenity of use by the hire of a broadly equivalent substitute vehicle at a reasonable price, there may be further consequential issues at the margins: the extent to which the vehicles are broadly equivalent; the extent to which particular hire expenses, such as credit hire charges, can be said to have been incurred in mitigation of the losses; and the extent to which the quantum of hire costs is otherwise shown to be unreasonable. None of those issues arises in these appeals.

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The facts and background to these appeals

Mr Rixon's case

5 Mr Rixon owned an Audi A3 sedan which was damaged in a collision with a car driven negligently by Mr Arsalan. The repair of Mr Rixon's car took around two months. During that period of repair, Mr Rixon hired a replacement car of the same make and model. The hiring charge was \$12,829.91.

6 In the Local Court of New South Wales, the magistrate found that Mr Rixon needed a replacement car to travel to work, to drop off and collect a child at school, and for general errands. Mr Rixon also gave evidence that he needed a European car for reasons of safety but the magistrate found that Mr Rixon's safety concerns were a preference rather than a need. The magistrate also held that the hire costs incurred by Mr Rixon were based upon a credit hire rate which, it was said, did not represent the market rate of hire of the car. Mr Rixon was held to be entitled only to recover a hire charge of \$4,226.25, which was the market rate of hiring a Toyota Corolla.

7 An appeal by Mr Rixon to the Supreme Court of New South Wales was dismissed by Basten J. A majority of the Court of Appeal of the Supreme Court of New South Wales (White JA and Emmett A-JA; Meagher JA dissenting) allowed a further appeal by Mr Rixon, concluding that Mr Rixon was entitled to the reasonable hire charges that he incurred. The matter was remitted to the Local Court for assessment of the reasonable hire charge in accordance with the reasons of the Court of Appeal.

Mr Cassim's case

8 Mr Cassim owned a BMW 535i sedan which was damaged in an accident caused by the negligence of Mr Nguyen. Mr Cassim's case was treated as involving a non-income-earning car, although in addition to the use of his car for social and domestic purposes he used it for his home business, which included transporting toilet seat samples. The repair of Mr Cassim's car took 143 days. For 84 days of that period, Mr Cassim hired a Nissan Infiniti Q50 car for \$17,158.02.

9 The magistrate found that Mr Cassim needed his car for ordinary domestic purposes, including shopping and taking his children to sporting engagements, and that the Nissan car he had hired was of slightly lower value than his BMW. Mr Cassim also gave evidence that he "wanted a nice, luxury car". He accepted that any car with five seats would likely have been "feasible" but said that he "preferred to have a car similar to [his own]". The magistrate also found that a

Toyota Corolla would have met Mr Cassim's needs for a total hire cost of \$7,476, but rejected the contention that Mr Cassim's claim for recovery should be limited to the market rate of hire for a Toyota Corolla on the basis that it was not a car of "equivalent value" to Mr Cassim's BMW. The magistrate awarded Mr Cassim as damages the full amount of hire costs that he had incurred.

10 An appeal by Mr Nguyen to the Supreme Court of New South Wales was allowed by Basten J. His Honour substituted an award of damages for the hire costs of \$7,476, representing the hire costs of a Toyota Corolla for the relevant period. A further appeal by Mr Cassim to the Court of Appeal was allowed by a majority (White JA and Emmett A-JA; Meagher JA dissenting), who reinstated the award of hire costs determined by the magistrate.

Ms Lee's and Mr Souaid's cases

11 The Court of Appeal of the Supreme Court of New South Wales heard two further appeals together with those of Mr Rixon and Mr Cassim. Neither of those further appeals was the subject of an application for special leave to appeal to this Court. However, the facts of those appeals provide useful further illustrations of the application of the principles with which the two appeals before this Court are concerned.

12 In *Lee v Strelricks*, Ms Lee's Toyota Camry was damaged when Ms Strelricks, driving negligently, collided with it. Ms Lee hired a replacement car for \$2,340.09 for a period of 15 days while her car was being repaired. Her evidence was that she had used her car to visit family and friends and to take her children to and from school. An assessor appointed by the Local Court concluded that Ms Lee had not proved that she had a "need" for a replacement car. She was awarded only \$30.73 in general damages, representing the interest on the capital value of her damaged car over the 15-day repair period. Ms Lee's application in the Supreme Court of New South Wales for judicial review of the decision of the assessor was dismissed. Her application for leave to appeal to the Court of Appeal was unanimously refused.

13 In *Souaid v Nahas*, Mr Souaid's Lexus IS 250 sedan was damaged as a result of a collision with a car driven by Mr Nahas, for which Mr Nahas admitted liability. Mr Souaid's car was unavailable during the 40-day period of repairs. He hired a Lexus IS 250 sedan for part of the repair period and a BMW 318i sedan for the remainder of the repair period. The costs of hire were \$11,128.41. In the Local Court, the magistrate held that Mr Souaid "required or needed" a replacement car for domestic and social purposes such as shopping, visiting friends, and family purposes such as picking up and dropping off his children at school. The magistrate

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noted that Mr Souaid had chosen to hire a car that was comparable to his damaged car and found that Mr Souaid did not need a luxury car for the replacement period and would have been happy with any replacement car. His damages for the costs of hire were limited to \$2,805.60, being the "spot rate" costs of hiring a Toyota Camry. Mr Souaid's appeal to the Supreme Court was dismissed and his further application for leave to appeal to the Court of Appeal was refused by majority; Meagher JA would have granted leave to appeal but would have dismissed the appeal.

The central issue in these appeals

14 The central issue on the appeals, as ventilated by counsel in submissions, focused upon the decisions of Basten J at first instance in the Supreme Court and the decision of the Court of Appeal. It is unnecessary to consider the slight variations in approach taken in each of these careful and closely reasoned judgments. The essential difference between Basten J and Meagher JA, on the one hand, and White JA and Emmett A-JA, on the other, can be stated simply.

15 On the one hand, Basten J and Meagher JA focused only upon the inconvenience to Mr Rixon and Mr Cassim arising from the loss of use of their cars, which gave rise to their "need" for a substitute vehicle. With a focus only upon inconvenience giving rise to "need" as the relevant head of damage suffered by Mr Rixon and Mr Cassim, their Honours considered that it was unreasonable for either of the respondents to claim as damages those hire costs that went beyond that which was reasonable to alleviate that inconvenience¹.

16 On the other hand, White JA and Emmett A-JA focused on the adverse consequences to Mr Rixon and Mr Cassim beyond that of inconvenience or "need". White JA held that Mr Rixon and Mr Cassim had lost the intangible benefits of their prestige cars, and he referred to Mr Cassim's preference for a car that had "higher levels of safety and luxury than the Toyota vehicle"². Emmett A-JA held that the loss suffered by Mr Rixon and Mr Cassim was not simply the deprivation of the use of a car as a means of transportation but was also

1 *Nguyen v Cassim* (2019) 89 MVR 347 at 351-352 [15]-[16], 361-362 [53] (Basten J); *Rixon v Arsalan* (2019) 89 MVR 370 at 372 [7], 373 [13] (Basten J); *Lee v Strelricks* (2020) 92 MVR 366 at 372 [17]-[18], 373 [23], 374 [25] (Meagher JA).

2 *Lee v Strelricks* (2020) 92 MVR 366 at 381 [60]. See also at 383-384 [69(5)-(7)].

the deprivation of a car with the specifications and performance of their damaged cars³. The reasoning of White JA and Emmett A-JA thus included in the compensable loss suffered by Mr Rixon and Mr Cassim intangible elements of the loss of pleasure or enjoyment in addition to the physical inconvenience that they suffered from the loss of use of those cars. Hence, their Honours concluded that it was not unreasonable for Mr Rixon and Mr Cassim to hire equivalent cars to mitigate their loss.

17 The essence of this division of opinion reflects the lack of any clear recognition in Australian law of loss of amenity, in the sense of loss of pleasure or enjoyment, in the use of a chattel, as a recoverable head of damage for a tort that involves negligent damage to a chattel. Further uncertainty has been created by authorities that have required that, before hire costs can be recovered as damages, the plaintiff must have a "need" for the substitute vehicle. For the reasons below, the head of damage of loss of amenity of use of a chattel should be recognised and the loose concept of "need" should be eschewed. The conclusion of the majority of the Court of Appeal should be upheld on the basis that Mr Rixon and Mr Cassim suffered heads of damage of physical inconvenience and loss of amenity and it was not unreasonable for them to take steps to mitigate both aspects of their loss by the hire, at a reasonable rate, of an equivalent car for a reasonable period of repair.

"Loss of use" is not a head of damage

18 Where a plaintiff's chattel is damaged as a result of the negligence of a defendant, the plaintiff will generally be entitled to damages for the costs of repair and for consequential loss⁴. Some of the authorities in this field speak of "loss of use" as if that were, by itself, a head of damage. But, putting aside the different considerations raised by cases where a defendant has obtained the benefit of the use of the plaintiff's chattel⁵, the mere reference to the loss of use of a vehicle, or the loss of the availability of a vehicle for use, is inadequate because it does not identify the manner or extent of any loss to a plaintiff. An assessment of

3 *Lee v Strelricks* (2020) 92 MVR 366 at 395-396 [124], 396 [129].

4 *Talacko v Talacko* (2021) 95 ALJR 417 at 427 [45]; 389 ALR 178 at 189; *Sainsbury's Supermarkets Ltd v Mastercard Inc* [2020] 4 All ER 807 at 861 [200]. See also *Dimond v Lovell* [2002] 1 AC 384 at 406.

5 See *Lewis v Australian Capital Territory* (2020) 94 ALJR 740 at 760-761 [83]-[84], 773-774 [147]-[148]; 381 ALR 375 at 394-395, 411-412.

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consequential loss always requires the identification of the manner in which the loss of use of a chattel has adversely affected the plaintiff.

19 A decision relied upon by the parties to these appeals was *The "Mediana"*⁶. In that case, damages were claimed for "loss of use" of the plaintiffs' damaged lightship during a period of repair in which the plaintiffs deployed a spare lightship. Although Lord Halsbury referred to the "loss of the use" of the vessel⁷, he also relied upon the principle that he had articulated in an earlier decision, in which he had focused upon the detriment to the plaintiffs arising from the loss of use, being the delay or impairment of the progress of the works⁸. In *The "Mediana"*, the loss was the inconvenience of no longer having a spare lightship available during the period of repair, the "margin of safety"⁹ which should be valued at the "expense of having [the spare] ready"¹⁰.

20 The loss or detriment to owners from being without a chattel, for which damages were awarded in *The "Mediana"*, can obviously also arise where no substitute or spare is available. As Meagher JA said in the Court of Appeal in these proceedings¹¹, even where no substitute chattel is available or is hired, it is unquestionable that damages can still be awarded. But, in those circumstances, the damages are not quantified by reference to the costs of hiring an alternative vehicle or the costs of maintaining a spare, since they were not incurred and do not reflect

6 *Owners of Steamship "Mediana" v Owners, Master and Crew of Lightship "Comet" (The "Mediana")* [1900] AC 113.

7 [1900] AC 113 at 118.

8 [1900] AC 113 at 115, referring to *Owners of No 7 Steam Sand Pump Dredger v Owners of SS "Greta Holme" (The "Greta Holme")* [1897] AC 596. See especially [1897] AC 596 at 602.

9 See *Admiralty Commissioners v SS Susquehanna* [1926] AC 655 at 665.

10 [1900] AC 113 at 122. See also *Admiralty Commissioners v SS Susquehanna* [1926] AC 655 at 662, 665-666, 668-669; *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2011] QB 357 at 369-371 [33]-[40]; *West Midlands Travel Ltd v Aviva Insurance UK Ltd* [2014] RTR 10 at 132-133 [23].

11 *Lee v Strelricks* (2020) 92 MVR 366 at 369 [3].

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the loss or detriment which the owner sustained¹². In older cases involving the loss of use of a ship where a substitute was not available or hired and no other loss was established, one approach was to award interest on the depreciated capital value of the ship for the period of repair because the detriment from the loss of use was the damaged ship's "capital value [being] infructuous for the time being, even though by special effort more benefit was got out of other ships, in which other capital was invested, than would otherwise have been the case"¹³. That older approach has been refined in some modern cases where the value to the owner is not confined to the "money tied up in the chattel" as interest on the capital value but can include expenses thrown away and an allowance for depreciation¹⁴.

21 The older approach was followed by the assessor in *Lee v Strelricks*, the facts of which are set out above. The assessor made a total award of \$30.73 to Ms Lee for the 15 days that she had no use of her car. Ms Lee's damages were limited in this way because she was held not to have suffered any other loss, including a finding that she suffered no general physical inconvenience of being without a car.

Physical inconvenience and loss of amenity of use of a chattel

22 In the extremely common circumstances that gave rise to these appeals, involving negligent damage to a plaintiff's vehicle which is used for convenience and pleasure, it has been suggested that underlying the extensive case law recognising compensation for the consequences of the loss of use of a vehicle is that the plaintiff has been "deprived of the convenience or pleasure" that they

12 See *The Hebridean Coast* [1961] AC 545 at 578.

13 *Admiralty Commissioners v SS Susquehanna* [1926] AC 655 at 664. See also *Mersey Docks and Harbour Board v Owners of the SS Marpeasa* [1907] AC 241; *The Hebridean Coast* [1961] AC 545 at 578.

14 *West Midlands Travel Ltd v Aviva Insurance UK Ltd* [2014] RTR 10 at 132-133 [23]. See also *Consort Express Lines Ltd v J-Mac Pty Ltd [No 2]* (2006) 232 ALR 341 at 356 [87]; *Vautin v By Winddown Inc (formerly Bertram Yachts) [No 4]* (2018) 362 ALR 702 at 773 [314].

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would derive from that use¹⁵. That simple proposition was, in part, disputed on these appeals. But, for the reasons given below, it should be accepted.

23 It was rightly common ground on these appeals that the consequential loss suffered by Mr Rixon and Mr Cassim included the "inconvenience" of not having access to their cars during the period of repair. A large body of case law supports the recognition of this type of loss, although it is commonly described as "physical inconvenience" to contrast it with "mere inconvenience, such as annoyance and loss of temper, or vexation, or for being disappointed in a particular thing which you have set your mind upon"¹⁶. For property torts, this "mere inconvenience" is generally treated as the basis for damages under the different head of loss of amenity of use of property although the boundary between these heads of "physical inconvenience" and loss of amenity of use is neither clear nor precise because "all inconvenience has to include some mental element"¹⁷.

24 The appellants also accepted that loss of amenity might be available for some torts but they denied that the law recognises loss of amenity as recoverable loss for torts generally, even where that loss is within the scope of the duty and is not too remote. The appellants submitted that loss of amenity of use was not a recoverable type of loss where the plaintiff's chattel was damaged as a result of the defendant's negligence.

25 The appellants' submission should not be accepted. There is no justification to restrict the recoverable heads of damage for consequential loss caused by the negligent infringement of a person's property right so that the lost amenity of use is excluded. In its concern with the consequences of a tortious act, the compensatory principle aims to provide the injured party with "compensation in a sum which, so far as money can do, will put that party in the same position as he

15 Tettenborn, *The Law of Damages*, 2nd ed (2010) at 351 [14.86].

16 *Hobbs v London and South Western Railway Co* (1875) LR 10 QB 111 at 122. See *Athens-MacDonald Travel Service Pty Ltd v Kazis* [1970] SASR 264 at 274; *Watts v Morrow* [1991] 1 WLR 1421 at 1440, 1445; [1991] 4 All ER 937 at 955, 959-960; *Baltic Shipping Co v Dillon* (1993) 176 CLR 344 at 361-363, 381, 383, 398-399; *Moore v Scenic Tours Pty Ltd* (2020) 268 CLR 326 at 350 [68]-[69].

17 *Athens-MacDonald Travel Service Pty Ltd v Kazis* [1970] SASR 264 at 274.

or she would have been in if ... the tort had not been committed"¹⁸. This general principle has the basic goal to undo, by monetary equivalent, the consequences of the wrong experienced by the plaintiff so far as is reasonable¹⁹. The lost amenity of use of a negligently damaged chattel can be experienced as a consequence of a wrong. The course of precedent and the close relationship between the heads of damage of physical inconvenience and loss of amenity also support the principled basis for recognition of loss of amenity of use as a head of damage for negligent damage to a property right.

26 As a matter of precedent, loss of amenity of use of property has been recognised for negligent damage to land, where damages for physical inconvenience have been coupled with damages for the loss of amenity where the wrong caused the plaintiffs' lives to be "disrupted and their enjoyment of their home significantly reduced"²⁰. The same principle has been recognised in damages for conversion involving loss of enjoyment of a hobby²¹. Further, in a decision subsequently followed in Australia²², the House of Lords recognised that, for the tort of nuisance, the loss of the amenity value of use of land to a plaintiff was recoverable separately from the diminution in market value of the land²³.

27 Although no clear authority has recognised loss of amenity of use consequent upon negligent damage to the plaintiff's chattel as a head of damage in

18 *Haines v Bendall* (1991) 172 CLR 60 at 63. See also *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185 at 191, citing *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25 at 39.

19 Descheemaeker, "The Standardisation of Tort Damages" (2021) 84 *Modern Law Review* 2 at 2.

20 *Muirhead v Kingborough Council [No 2]* [2000] TASSC 127 at [14]-[15]. Cf *Perry v Sidney Phillips & Son* [1982] 1 WLR 1297; [1982] 3 All ER 705; *Campbelltown City Council v Mackay* (1989) 15 NSWLR 501.

21 *Graham v Voigt* (1989) 89 ACTR 11 at 20-21.

22 *Roberts v Rodier* (2006) 12 BPR 23,453 at 23,473-23,474 [119]-[123]; *Quick v Alpine Nurseries Sales Pty Ltd* [2010] NSWSC 1248 at [336]-[338].

23 *Hunter v Canary Wharf Ltd* [1997] AC 655 at 694, 696, 698, 706, 724. See also *Lawrence v Fen Tigers Ltd* [2014] AC 822 at 862 [157].

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addition to physical inconvenience, such recognition is consistent with the broad recognition of loss of amenity of use in other instances of damage to property. Indeed, the lack of any clear boundary between the heads of damage for physical inconvenience and loss of amenity means that it is often convenient to quantify physical inconvenience and the loss of amenity of use of property together as part of a single award of general damages²⁴.

The irrelevance to these heads of damage of any concept of "need"

28 The magistrate in Mr Rixon's case focused upon whether the plaintiff had a "need" for a replacement car. The magistrate did not identify Mr Rixon's heads of damage as physical inconvenience and loss of amenity of use of the car. Instead, the magistrate's focus on Mr Rixon's "need" naturally directed attention away from loss of amenity of use as a head of damage.

29 The magistrate's focus upon "need" derived from, and followed, the decision of the Court of Appeal of the Supreme Court of New South Wales in *Anthanasopoulos v Moseley*²⁵, in which, as the magistrate observed, Beazley JA had drawn an analogy with damages that make "provision for the injured plaintiff's needs" in the context where those needs have been met by the provision of gratuitous services of a third party. The discussion of this point by Beazley JA was reinforced by the reasoning of Ipp A-JA (with whom Handley JA agreed). Ipp A-JA in *Anthanasopoulos*²⁶ held that, like the decisions concerning damages for care and services provided to an injured person gratuitously, the "true basis of claims for damages for injury to a non-income producing chattel is also based on need".

30 The primary judge in these appeals, Basten J, also followed that approach from the Court of Appeal in *Anthanasopoulos*. But the principles of damages concerned with the "need" for services in circumstances in which services have

24 *Muirhead v Kingborough Council [No 2]* [2000] TASSC 127 at [15]; *Willshee v Westcourt Ltd* [2009] WASCA 87 at [79], citing *Nouvelle Homes Pty Ltd v Smargiassi* [2008] WASC 127 at [76]-[104]. See also *Hunter v Canary Wharf Ltd* [1997] AC 655 at 694: "discomfort or inconvenience"; *Bone v Seale* [1975] 1 WLR 797 at 804; [1975] 1 All ER 787 at 794: "inconvenience, discomfort and annoyance".

25 (2001) 52 NSWLR 262 at 273-274 [57]-[58].

26 (2001) 52 NSWLR 262 at 276 [80].

been provided gratuitously by another cannot be transplanted to replace an analysis of the real loss that has been suffered as a result of damage to a chattel, especially in circumstances in which a gratuitous replacement is not available. Indeed, in a case in which a plaintiff obtained an equivalent replacement vehicle from a hire company without any costs, it was held that the plaintiff was not entitled to damages for the notional hire costs²⁷.

31 The scope of the concept of "need" is also highly uncertain. Does a plaintiff have a "need" to drive to work if leaving earlier to walk to work could make them healthier and happier? Or, to use the example given by senior counsel for the respondents, does a "need" extend to having a radio in the hire car? Or power steering, ABS brakes, and air-conditioning? Would a tiny car with three wheels suffice for the convenience of transport for a week? The import of this loose concept of "need" into questions of recovery of the hire costs incurred is a distraction from the proper focus upon the heads of damage identified by the plaintiff – such as physical inconvenience and loss of amenity of use – and the onus upon the defendant to establish the unreasonableness of the plaintiff's steps to attempt to mitigate that damage by the hire of a substitute vehicle.

Mitigation of loss

32 Where a plaintiff acts in an attempt to reduce a loss, the onus shifts to the defendant to show that the acts actually taken by the plaintiff were unreasonable acts of mitigation²⁸. Unless the plaintiff's actions are shown to be unreasonable, costs that are incurred in an attempt to mitigate loss caused by wrongdoing become, themselves, a head of damage that can be recovered²⁹. Even if the costs incurred by the plaintiff are greater than the loss that was attempted to be mitigated,

27 *Dimond v Lovell* [2002] 1 AC 384.

28 *Watts v Rake* (1960) 108 CLR 158 at 159, 163; *TC Industrial Plant Pty Ltd v Robert's Queensland Pty Ltd* (1963) 180 CLR 130 at 138.

29 *Talacko v Talacko* (2021) 95 ALJR 417 at 430 [60]; 389 ALR 178 at 193, citing *Gray v Sirtex Medical Ltd* (2011) 193 FCR 1 at 11 [24], [26], in turn quoting *Berry v British Transport Commission* [1962] 1 QB 306 at 321.

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those costs will be recoverable other than to the extent that they are shown to be unreasonable³⁰.

33 These principles were applied in *Lagden v O'Connor*³¹ in the context of a claim for damages for the consequences of the loss of use of a car. Mr Lagden's ten-year-old Ford Granada car was damaged as a result of Ms O'Connor's negligence. While his car was being repaired, Mr Lagden hired a Ford Mondeo car with the assistance of a credit hire company. The decision of the House of Lords concerned a question which these appeals need not resolve, namely the recoverability by an impecunious plaintiff of the costs of credit hire which exceed the spot rate for hire. Relevantly, however, Lord Hope of Craighead explained that a plaintiff's act of hiring a substitute car was an act in mitigation of loss. Echoing the approach earlier taken in *Dimond v Lovell*³² by Lord Hoffmann (with whom Lord Browne-Wilkinson agreed) and Lord Hobhouse of Woodborough, Lord Hope said that although there was no evidence that Mr Lagden would have suffered financial loss as a result of the inability to use his car during the period of repair, "inconvenience is another form of loss for which, in principle, damages are recoverable"³³. His Lordship continued³⁴:

"[I]t was open to [the plaintiff], as it is to any other motorist, to avoid or mitigate that loss by hiring another vehicle while his own car was

30 *Wilson v United Counties Bank Ltd* [1920] AC 102 at 125, explaining *Leyland Shipping Co v Norwich Union Fire Insurance Society* [1918] AC 350 especially at 366. See also *Esso Petroleum Co Ltd v Mardon* [1976] QB 801 at 821; *Ferneyhough v Westpac Banking Corporation* (unreported, Federal Court of Australia, 18 November 1991) at 63-64; *Thai Airways International Public Co Ltd v KI Holdings Co Ltd* [2016] 1 All ER (Comm) 675 at 684-685 [32]. See further Burrows, *Remedies for Torts, Breach of Contract, and Equitable Wrongs*, 4th ed (2019) at 131.

31 [2004] 1 AC 1067.

32 [2002] 1 AC 384 at 401-402, 406. See also *Dimond v Lovell* [2000] QB 216 at 238-239 [93]-[95], 239 [99]; *Giles v Thompson* [1994] 1 AC 142 at 167.

33 [2004] 1 AC 1067 at 1077 [27].

34 [2004] 1 AC 1067 at 1077-1078 [27].

unavailable to him. The expense of doing so will then become the measure of the loss which he has sustained under this head of his claim."

Proof of loss and proof of unreasonable steps in mitigation

Legal principles for proof of loss and mitigation

34 Although a plaintiff must prove their loss, it will not usually be difficult for a plaintiff to establish heads of damage of physical inconvenience and loss of amenity of use consequential upon their lost ability to use their vehicle. There will, however, be exceptional cases where such loss to the plaintiff will be non-existent or so slight that the hire of a replacement vehicle will not be accepted to be a step in mitigation. Such exceptional cases might include where the plaintiff was hospitalised or abroad during the relevant period of repair³⁵, or where the damaged vehicle could have been replaced from idle stock within the plaintiff's fleet of vehicles³⁶.

35 Apart from such cases, it will usually be sufficient for a plaintiff to identify a past suite of purposes for which the damaged vehicle was used in order to justify an inference that the plaintiff would have put the vehicle to the same uses during the period of repair and would be otherwise inconvenienced. As Lord Mustill recognised in *Giles v Thompson*³⁷, it will not be hard to infer that a plaintiff who incurs the considerable expense of running a private vehicle does so for reasons of convenience. Similarly, it will usually be sufficient to infer that a plaintiff derives amenity from the various functions used in their vehicle, particularly an expensive, prestige vehicle in circumstances in which the plaintiff incurred significant capital or ongoing expenditure on that prestige vehicle.

36 Once a plaintiff has proved heads of damage of physical inconvenience and loss of amenity of use, it will usually be difficult for a defendant to prove that the plaintiff acted unreasonably by seeking to hire a replacement vehicle. In some cases, a defendant might instead seek to establish that the *amount* of the hire costs

35 *Giles v Thompson* [1994] 1 AC 142 at 167; *Lagden v O'Connor* [2004] 1 AC 1067 at 1078 [27].

36 *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* [2011] QB 357 at 368-369 [28]-[29]; *Singh v Yaqubi* [2013] RTR 15 at 232 [33], 233 [39].

37 [1994] 1 AC 142 at 167.

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incurred was unreasonable for various reasons: the replacement vehicle hired, in light of the range of vehicles that might fairly be regarded as equivalent to the damaged vehicle; the period of hire, having regard to the reasonable period of time for repairs; or the extent of the costs included in the hire charge. But none of those matters of quantum arises on these appeals.

37 The usual ease with which a plaintiff may establish heads of damage of physical inconvenience and loss of amenity of use explains why in *Dimond v Lovell*³⁸ and in *Lagden v O'Connor*³⁹ their Lordships assumed that it would generally be reasonable for a plaintiff to hire an equivalent vehicle, subject to any dispute about the unreasonableness of the quantum of the hire costs. For instance, in *Lagden v O'Connor*, Lord Hope assumed that a plaintiff would generally be able to recover as damages the costs of hire of an equivalent vehicle, but if "a larger or more powerful car was hired although vehicles equivalent to the damaged car were reasonably available at less cost – the amount expended on the hire must be reduced to the amount that would have been needed to hire the equivalent"⁴⁰.

38 The appellants on these appeals submitted that a different conclusion was supported by the earlier decision of the Court of Appeal of England and Wales in *Watson Norie Ltd v Shaw and Nelson*⁴¹. Properly understood, however, that decision is consistent with the general position that it is reasonable for a plaintiff to hire an equivalent vehicle. In that case, the plaintiff company had hired a replacement prestige car for the managing director, initially a Rover 100 and then a Jaguar 3.8. The car was hired at a cost of £400 to replace the plaintiff's Jensen car which had been damaged by the defendants' negligence. The Court of Appeal held that the plaintiff could recover only £185, which was the hire costs of a Ford Zephyr.

39 The conclusion of the Court of Appeal was not due to the unreasonableness of the plaintiff in hiring the Jaguar or the Rover. To the contrary, Sellers LJ held that it would not have been unreasonable for the plaintiff to have hired those cars

38 [2002] 1 AC 384 at 401-402, 406. See also *Dimond v Lovell* [2000] QB 216 at 238-239 [93]-[95], 239 [99]; *Giles v Thompson* [1994] 1 AC 142 at 167.

39 [2004] 1 AC 1067.

40 [2004] 1 AC 1067 at 1078 [27].

41 [1967] 1 Lloyd's Rep 515.

at a reasonable price⁴². Instead, the finding by the County Court judge, which the Court of Appeal accepted to have been open, was that the defendants had established that the plaintiff had acted unreasonably in circumstances including: (i) the plaintiff's hire from a company that was not in the habit of hiring cars; (ii) the plaintiff's failure to make any real enquiry about price; and (iii) the plaintiff's failure to avail itself of a 20 per cent hire discount by paying cash⁴³.

Mr Rixon and Mr Cassim

40 As senior counsel for the appellants correctly submitted in oral argument, the proper description of the loss in terms of physical inconvenience that was suffered by each of Mr Rixon and Mr Cassim consequent upon the damage to their cars was "the loss of the availability of the vehicle for the suite of purposes or uses for which it was likely to be put during the repair period". Those purposes included domestic, household, and family purposes. But that did not exhaust the respondents' consequential loss. Each of Mr Rixon and Mr Cassim also suffered a loss of amenity of use of their cars from their deprivation of the use of their prestige cars, including their enjoyment of the safety features, pleasurable functions, and other specifications of those cars.

41 There was no dispute that each of the cars hired by Mr Rixon and Mr Cassim was equivalent to the car that each had owned. Subject to the conclusion of the magistrate about the credit hire charges in Mr Rixon's case, a conclusion which was not the subject of any appeal, the appellants did not establish that either Mr Rixon or Mr Cassim acted unreasonably in incurring any of the hire charges for the replacement cars during the period of repair.

Ms Lee and Mr Souaid

42 Although there is no appeal before this Court in the matters of *Lee v Strelricks* and *Souaid v Nahas*, which were heard together with the present appeals in the Court of Appeal, it is necessary to explain why, in light of the principles set out in these reasons, each of those cases should have been decided differently. Indeed, as senior counsel for the appellants properly accepted in oral argument on these appeals, it is difficult to understand why Mr Souaid should not succeed if

42 [1967] 1 Lloyd's Rep 515 at 516.

43 [1967] 1 Lloyd's Rep 515 at 516-517.

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Mr Rixon and Mr Cassim are entitled to the reasonable hire costs of a car equivalent to that which was damaged.

43 As to Ms Lee's case, an inference that Ms Lee suffered the head of damage of physical inconvenience should have been readily established by her general evidence that she used her damaged car to visit family and friends and to take her children to and from school. More detailed particulars should not have been required to establish her head of damage of physical inconvenience. And there was no basis upon which the defendant could have established that it was unreasonable for Ms Lee to mitigate that loss by the hire of an equivalent replacement car for use for her suite of purposes.

44 As to Mr Souaid, the decision of the magistrate in *Souaid v Nahas*, from which the appeals were dismissed, involved reasoning that Mr Souaid did not *require* or *need* a luxury car for his domestic, social, or family purposes. The magistrate accepted that Mr Souaid had told an officer of his insurer, in response to being asked whether he would have been "okay with just a Holden sedan or a Camry", that he would have been okay with "any car, just as long as I have a car there for my wife, for the kids and stuff", and that he "wasn't fussed at all"⁴⁴. But none of this evidence was sufficient for the defendant to establish that it was unreasonable, in the objective sense required for expenses incurred in mitigation to be refused as damages, for Mr Souaid to *prefer*, for reasons of amenity that would otherwise be lost, a Lexus or BMW sedan that was equivalent to his damaged car.

Conclusion

45 In the *Nguyen v Cassim* appeal, the appeal should be dismissed with costs. In the *Arsalan v Rixon* appeal, order 6 of the orders of the Court of Appeal made on 17 August 2020 in relation to remittal of the matter to the Local Court should be varied to replace the words "plaintiff's damages to be assessed in accordance with the reasons for judgment of the Court of Appeal" with "plaintiff's damages to be assessed in accordance with the reasons for judgment of the High Court of Australia and with the magistrate's reasons as to the credit hire costs", and otherwise the appeal should be dismissed with costs.

44 *Lee v Strelricks* (2020) 92 MVR 366 at 391 [106], 398 [137].

