

AUSTRALIA / JUDGMENT

Hayes v Navre [2024] NSWLC 10

Source: caselaw.nsw.gov.au · Research copy typeset by Esheria. Not court-issued or certified.

Local Court

New South Wales

Medium Neutral Citation: Hayes v Navre [2024] NSWLC 10

Hearing dates: 17 April 2024

Date of orders: 13 December 2024

Decision date: 13 December 2024

Jurisdiction: Civil

Before: Farnan LCM

Decision: Verdict for the plaintiff

Catchwords: Motor vehicle hire; credit hire

Cases Cited: Arsalan v Rixon; Nguyen v Cassim [2021] HCA 40

Cassim v Nguyen [2018] NSWLC 28

Lazicic v Rossi [2024] NSWSC 777

Dimond v Lovell [2002] 1 AC 384

Category: Principal judgment

Parties: Kylie Hayes Plaintiff

Ketki Navre Defendant

Representation: Counsel:

C Carter (plaintiff)

K Oliver (defendant)

Solicitors:

RTN Law (plaintiff)

MCK Lawyers (defendant)

File Number(s): 2023/00016841

Publication restriction: No

1. On 21 May 2021 the plaintiff was driving her 2019 Toyota Kluger on Canberra Crescent Campbelltown NSW when the defendant unexpectedly opened the driver's door of his parked vehicle striking her vehicle. It is not in dispute that the defendant was negligent. Although Ms Hayes' vehicle was driveable, it required significant repair. For reasons that are explained in her affidavit, the vehicle remained with the repairer for 77 days. There is now no dispute that the period of repair was reasonable, nor that she has standing to sue.
2. Ms Hayes gave evidence that the weekend after the collision she spoke to another mother at a children's soccer game, who told her about the services provided by Right2Drive. That other person had used Right2Drive when she had been without a vehicle after an accident. On the day that Ms Hayes dropped her vehicle at the repairer she called Right2Drive telling them that she needed a seven seater vehicle similar to her own, as she had four children she needed to drive around. A seven seat Isuzu MU X was delivered to her that evening, on the Monday following the Saturday collision.
3. Ms Hayes entered into an agreement to hire the vehicle. Annexed to her affidavit of 23 January 2024 is a copy of what she described as "the rental agreement and authority to act that I signed" (at para 26).
4. These proceedings concern the defendant's liability to pay for a total of 77 days' hire of that replacement vehicle at a total all inclusive cost of \$325.85 per day. The defendant says there was an alternative appropriate vehicle available which could have been hired from Hertz at Campbelltown for \$158.77 per day. There were also other alternative vehicles available at a lower rate of hire than that agreed to by Ms Hayes.
5. Although evidence was apparently served by the defendant in the proceedings, at the close of the plaintiff's case no evidence was led by the defendant.
6. The remaining issues that have been identified in the Statement of Agreed Facts and Issues dated 17 April 2024 are relevantly (and retaining the original numbering) as follows:
 4. a. Is it open to the defendant to dispute the quantum of the plaintiff's claim on the ground that the invoice sum is an unreasonable amount of hire costs for the reason that the entirety of the charges comprising it cannot be said to have been incurred in mitigation of the plaintiff's actual loss; and if so
 - b. Is the invoiced sum an unreasonable amount of hire costs for that reason.
5. If the answer to question 4 is in the affirmative, what part of the charges comprising the invoiced sum can be said to have been incurred in mitigation of the plaintiff's actual loss?

6. Is the invoiced sum an unreasonable amount of hire costs by reason of the replacement vehicle supplied, in light of the range of vehicles that might fairly be regarded as equivalent to the damaged vehicle?
 7. If the answer to question six is in the affirmative, what amount of hire costs would the plaintiff have incurred had she taken such steps in mitigation of her actual loss as would have been reasonable in her circumstances?
 8. Was the daily rate agreed between the plaintiff and Right2Drive ("R2D Daily Charge") a sum that fell within the range of daily rates at which vehicles that might fairly be regarded as equivalent to the damaged vehicle were offered for hire in the Sydney geographic region on the day on which the R2 D daily charge was agreed?
 9. If the answer to question 8 is in the affirmative, is each or either of question 4 and/or question 6 for that reason to be answered in the negative?
1. The plaintiff was put to proof in respect of four issues, however following the evidence in the plaintiff's case there is now no issue that the plaintiff was the owner of the vehicle and has standing to sue, and that the temporary unavailability of the damaged vehicle pending repair caused the plaintiff physical inconvenience and loss of amenity of use of the vehicle. Loss of amenity of use of a chattel has been recognised by the High Court as a recoverable head of damage (*Arsalan v Rixon*; *Nguyen v Cassim* [2021] HCA 40)
 2. The defendant accepts that the plaintiff is entitled to recover as special damages hire costs that:
 - (a) "are shown to have been 'incurred in an attempt to mitigate loss caused by wrongdoing'; and
 - (b) are not shown by the defendant to have been incurred by actions on the plaintiff's part that were unreasonable". (DWS at para7)
 1. There is no issue that the vehicle provided by Right2Drive was an appropriate vehicle for the plaintiff, in terms of its physical characteristics. Noting that, it does not seem to me that question 6 as articulated above arises for determination.
 2. The replacement vehicle was supplied to the plaintiff on credit hire terms. That is clear from the agreement that was signed by the plaintiff. There is an issue as to whether the plaintiff is entitled to be compensated for what the defendant describes as "non-compensable benefits", which include the hire of the vehicle on credit, and other services provided by Right2Drive that may not have been provided by a standard hire car company.
 3. The plaintiff says that the onus is on the defendant to establish that the plaintiff has acted unreasonably, and that no evidence has been served by the defendant in that regard.

4. There is no question that the plaintiff took steps to mitigate her loss by hiring a replacement vehicle through Right2Drive. As a result of that she incurred a legal liability for hire charges.
5. The plaintiff did not undertake any investigation at all of possible alternatives to the use of Right2Drive. In particular, she did not consider herself hiring a vehicle from a hire car company such as Hertz, or make any enquiries about the cost of doing so herself. She did not have a credit card but had a Visa debit card. The plaintiff did not plead that she was impecunious.
6. The cross examination of Ms Hayes on the issue of enquiries made was as follows (TP 14):

Q. So, there was a period of a few days during which you had an opportunity to gather information about your options for obtaining a replacement vehicle, wasn't there?

A. I would like to just refer you back to one of my statements in my affidavit, that following the accident, immediately after I attended soccer with my son, and a parent at the match was the one to say a similar situation had happened to her, and to contact Right2Drive as they ordered her a vehicle immediately.

Q. I understand you've given that evidence, ma'am. During those few days that were available to you, you did get information provided to you about Right2Drive by one of the mothers at your son's soccer match, didn't you?

A. Yes.

Q. The more general question I was putting to you was, you would agree, that during those few days before you took your vehicle to the repairer, you had an opportunity to gather any information you wanted about your options for obtaining a replacement vehicle? You agree?

A. No. No, I don't agree.

Q. Why would you not agree that you were able to gather information from any source you wanted?

A. Just in the sense that I am very time poor with my, you know, responsibilities as a parent. That was quite a stressful situation. So no, I don't agree that I had unlimited ability.

Q. I'm not suggesting you had unlimited ability, ma'am. All I'm suggesting to you is that had you wanted, say, to look on the internet to see what vehicles are available for hire near you, there was that period of three days in which you did have the opportunity to do that if you wanted to.

A. I still don't agree. No.

Q. Do you tell her Honour, ma'am, that because the collision had occurred and your vehicle was damaged, it was simply impossible for you in the space of three days to find any time to look on the internet for information?

A. Potentially. I don't know.

Q. You seriously tell her Honour that?

A. I'm not telling any lies.

Q. I suggest you, ma'am, that--

A. Okay, I'll agree with you and say, yes. I had every opportunity. Don't say I'm a liar. That's not nice.

Q. Ma'am, I'm not suggesting you're a liar. All I'm asking you to do is accept that had you wanted to do so, you could have gone on the internet and looked for information. During those three days, that was an opportunity for you to do that if you wanted. Do you accept that?

A. I'm not sure what I'm accepting right now. Perhaps I need a break.

After the witness had a break the following evidence was given (TP 18):

"Q. What I was seeking to establish from you was that it would have been possible for you during those days, had you wanted to, to make inquiries about the options that were open to you for obtaining a replacement for your vehicle. I was suggesting simply to you that it would have been possible for you to do that.

A. Yes.

Q. You accept that?

A. Yes."

1. Further at TP 20 she said:

"Q. You've already given evidence that before you signed this rental agreement, you didn't undertake any research into the price of hiring cars from other suppliers in your area, did you?

A. That's correct.

Q. Before you signed the agreement documents with Right2Drive, did you actually give any consideration in your mind at all to whether Right2Drive's daily rate was a reasonable rate, or a competitive rate, to pay for hire of a vehicle of the kind that was being provided to you?

A. No. I did take the time to speak with Right2Drive representatives on the phone, and then when they brought the vehicle and I signed those documents, to absolutely assure me that I would not be paying for anything, that this would go through my insurer. I remember asking those questions. But no, I did not ask about price comparisons in the market.

Q. Before you signed these documents, you didn't check out what was available from other car hire companies operating in Campbelltown to see how their rates compared with Right2Drive, did you?

A. No.

Q. You could have done that if you had wanted to, but you didn't.

A. I was led to believe that this was what people did after they were at - in an accident, and it wasn't their fault. So, I had gathered information on that Saturday and felt quite confident that that was the thing to do when you weren't at fault.

Q. But the answer to my question is that you could easily have made some comparisons with companies operating in Campbelltown if you had wanted to, but you didn't, did you?

A. If I hadn't have felt confident with the information I gathered on the Saturday from the person who had been in a very similar situation with same-age children - everything, if I didn't have such a, like, confident, I guess, certainty that that was the right thing to do and that was the service to use, I would have then looked into other options.

Q. You say that you were confident - and I think you used the word, you had "certainty" - that the course you took was the one to take in the circumstances. Whose advice, if any, were you relying on in forming that view?

A. The - the other soccer mum.

Q. So, this isn't something that your insurer told you, is it?

A. The insurance company doesn't make themselves available anymore. All communication was online on the Saturday night after the accident with a chat app.

Q. But what I'm asking you is, can we conclude, therefore, that the confidence or certainty that you've described was not based on anything your insurer had told you, was it?

A. Not from my..(not transcribable)..no."

1. During cross examination the plaintiff became quite upset, and in particular sought to be reassured that Right2Drive would not be looking to her to pay the \$25,000 involved in this claim. Indeed, she went so far as to say that she had been assured that she would not have to pay anything. That assurance was given by counsel for Right2Drive.
2. She gave evidence that she did not read the documents she signed from Right2Drive, and that she did not consider the dollar amount specified for the rental and related costs. (TP 24)
3. The plaintiff was a credible and honest witness. On the basis of this uncontested evidence I am satisfied that the plaintiff hired the vehicle she did from Right2Drive without making any inquiries about alternative rates of car hire. She did that because she was "very time poor", she was unable to contact her own insurer except through a "chat app", she had spoken to an acquaintance who had shared her experience of using Right2Drive, and she believed it was "the right thing to do". I also find, having regard to the whole of the plaintiff's evidence, that her belief she would not herself have to pay anything for the rental car was a significant factor in her use of Right2Drive, as was the convenience of the service, which provided a vehicle delivered directly to her, the cost of which would be claimed by insurance without further action by her. She did not consider other options because "that was the service to use".

4. There is no suggestion that the defendant, or Ms Hayes' own insurer, offered to provide her with a replacement vehicle at any time.
5. The Hertz car rental agreement which is in evidence specifies that either a credit card or a deposit is required on hiring of a vehicle. The plaintiff was not asked any questions about whether she was in a financial position to pay a deposit, and there is no evidence as to what the quantum of any such deposit may have been. There is no evidence at all as to her financial circumstances, although it does appear that she was employed (no doubt contributing to her "time poor" circumstances with four children).
6. Had a rental car agreement required a credit card to hire a vehicle she could not have done so as she did not have a credit card. However, there is no evidence she turned her mind to that.
7. There was no cross-examination of Ms Hayes as to her understanding of what are submitted to be "non-compensable benefits".
8. The agreement Ms Hayes signed is in evidence. That document is headed "Rental Agreement". All of the charges it contains relate to the hire of the vehicle delivered to Ms Hayes. Although the agreement clearly contemplates the vehicle being provided on credit, it does not contain any itemised charge for that service and the front page of the agreement makes no reference to credit hire. It specifies a start date for the hire but no end date. Ms Wood gave evidence that she was aware that mainstream car hire providers require an end date before a car will be supplied.
9. On the evidence of Ms Wood, an employee of Right2Drive, the cheapest comparable vehicle available at the time of this hire was provided through the Hertz car rental company. That vehicle was available through their Smithfield, Bankstown, Five Dock, Castle Hill or Parramatta office. Those vehicles (including collision damage waiver) were available at \$144.88 per day. There was a Pajero available from Campbelltown for \$174.27 per day, and a Kluger available in Campbelltown for \$158.77 per day (see page 94 of the Court Book in Ms Wood's affidavit of 12 April 2024). Four other comparable vehicles were available at a daily hire rate ranging from \$427.27 from two Sydney city locations, up to \$452, from Sydney airport through Europcar.
10. In cross examination Ms Wood accepted that she was aware that Sydney airport was a premium location, however she did not know what additional rate was applicable to vehicles hired from the airport. There is no other evidence about that.
11. On the basis of this evidence I accept that had Ms Hayes made enquiries of the Hertz car rental company about hiring a 7 seater equivalent vehicle on 24 May 2022 she could potentially have found that there was a 7 seater Toyota Kluger available from Hertz at Campbelltown for \$158.77 per day. That vehicle would have been an appropriate vehicle to overcome the inconvenience of being without her own vehicle. She would have had to hire the vehicle for a specified period, and pay a deposit to secure the total hire charges. She

would have had to then claim the cost of that vehicle back from the defendant's insurer (there is no evidence as to whether Ms Hayes' own insurance covered the cost of a replacement vehicle, however the clear inference is that it did not).

12. Ms Wood was cross examined about other benefits provided by Right2Drive. She agreed that it was a credit hire company, that it recovered charges from the at-fault party, that ordinarily a client would not be asked to pay anything no matter how long recovery might take, and that their services included liaising with insurers and appointing solicitors where necessary.
13. There is no quantification of these benefits in the hire contract itself, and there was none in the evidence. I accept that those services must have some monetary value. One might hypothesise that for many plaintiffs (such as the time-poor Ms Hayes) not having to try to deal with insurance companies oneself might be among the most valuable of them. There can be no question that for a wronged driver whose vehicle has been made unavailable to them through another's negligence, the service provided by Right2Drive is a very different service to that provided by a mainstream car hire company. Arguably it places a plaintiff much more closely in the position they would have been in had they not been wronged by the defendant. However, that is not what was argued in this case.
14. As in Lazicic (see below), the claim in this case is for car hire only, not any other benefits, valuable though they might be.
15. Oral submissions were made on the hearing date in April on behalf of the plaintiff. I have been provided with a number of lengthy written documents by both parties. The "Plaintiff's summary of legal principles" applies generally to cases of this type, which remain regular fixtures in the Local Court lists. The document "Plaintiff's opening summary" is another 8 pages.
16. The defendant's written submissions (DWS) filed 26 June 2024 are extensive, and I have been provided with three volumes of authorities. The plaintiff's submissions (PWS) filed 28 August 2024 are also extensive. The defendant then filed further substantial submissions in reply (SDR). I have read and considered all of that material although much of it adopts an academic approach to issues that largely are to be determined on the facts.
17. The High Court has fairly recently considered areas of the law arising from providers of accident replacement vehicle services such as Right2Drive. As it happens one of the decisions considered in that decision was a decision made by me at first instance (*Cassim v Nguyen* [2018] NSWLC 28). Although it appears that the contract involved in this case is the same as the contract involved in that case, one issue sought to be determined in this matter was not even argued in that case, and accordingly was not the subject of any authoritative determination by the High Court although reference was made to it. That is the issue which the defendant describes in their submissions as the "Prior Limitation" issue (DWS para 13).

18. What is argued is that some of the expenses sought to be recovered were not in fact caused by the wrongdoing of the defendant. Those expenses include as I understand it the costs of providing credit to the plaintiff as well as the other benefits referred to above. To compensate the plaintiff for these expenses, it is argued, would be to compensate her for something greater than what she has lost.
19. The defendant submits "the rules and principles that limit the circumstances in which, and extent to which, credit hire charges are properly recoverable as special damage have not to date been the subject of authoritative consideration by any Australian superior court" (DWS paragraph 21). That is not for lack of any cases which could have been argued on this basis. There are what are properly described as obiter dicta in *Arsalan* on which the defendant however relies, which are unquestionably authoritative.
20. The defendant points to the decision of the House of Lords in *Dimond v Lovell* [2002] 1 AC 384 to argue that the damages awarded to a plaintiff who enters into a credit hire arrangement should be reduced to "the sum that the evidence showed it would have cost the plaintiff to hire on non-credit hire terms a replacement vehicle equivalent to the one that she had in fact hired on credit hire terms" (DWS para 23). As I understand the plaintiff's response to this submission, it is that a plaintiff "need not seek out the cheapest rate solely in order that they provide a monetary benefit to the wrongdoer defendant" (PWS para 119), and that the relevant rate is the range of rates applicable to the plaintiff's broad geographic region, which in this case is the Sydney metropolitan area (PWS 120). It is argued that "the Right2Drive daily rate is well below the normal mainstream hire top rate" (PWS at 165).
21. In *Arsalan* at para 36 the High Court said:

"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 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."
1. The other more recent decision of the Supreme Court which is of assistance is *Lazicic v Rossi* [2024] NSWSC 777 where Kirk JA allowed an appeal in a factually similar case to this, involving Right2Drive and the NRMA, as does this, on the basis of inadequacy of reasons. In that case the plaintiff had also made no enquiries before accepting a vehicle provided by Right2Drive at a hire rate of about \$345 per day for what was described as a "pretty ordinary little \$22,000 car". On the evidence, that was higher than the second highest rate available that day in the Sydney region from traditional car hire companies. His Honour said:

"Put shortly, thus, the legal question is whether the claimant has acted reasonably in incurring the costs that they did. The defendant bears the onus to prove to the contrary [my emphasis]. Whether or not the claimant acted reasonably is to be assessed in all the circumstances. A possible outcome is that a lesser amount is awarded than what is claimed. ... significant factors in assessing the reasonableness of the claimant's claim will be what inquiries they made in filling their need for a replacement vehicle, and the availability of other cheaper rates in doing so." (para 26)

1. His Honour went on to say (at paras 28 – 30)

"One authority cited was *Stocovaz v Fung* [2007] NSWCA 199, where Handley JA said, in relation to an issue of the cost of repairing a vehicle:

"[37] ... [T]here may not be a single fair and reasonable cost for repairing a damaged motor vehicle, especially a Mercedes costing \$95,563 new. There is likely to be a range of costs all of which are fair and reasonable. In such a case acceptable evidence that a lower cost would be fair and reasonable cannot of itself establish that a higher cost was outside the range and not fair and reasonable.

[38] The true question would be whether the cost incurred was outside the range. In my judgment this is only another way of asking whether the cost incurred was extravagant or unreasonable."

His Honour appears to have been speaking in a kind of shorthand directed to the particular case. The reference to the "true question" being "whether the cost incurred was outside the range" has the potential to mislead if taken out of context. That is not the legal test. To speak of a cost being outside the reasonable "range" is at best the language of conclusion. Rather, the test is whether or not the claimant acted reasonably in acting as they did such as to incur the cost for which they are claiming reimbursement. That principle is not only reaffirmed by *Arsalan*, it has long been the case: see eg *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London Ltd* [1912] AC 673 at 689; *Watts v Rake* [1960] HCA 58; (1960) 108 CLR 158 at 159. *Stocovaz* certainly should not be taken to suggest that a claimant will win simply by pointing to a range of market prices and saying the rate chosen was not the most expensive one.

Neither excessive diligence nor perfection is required of a claimant: note eg *Karacomina v Big Country Developments Pty Ltd* [2000] NSWCA 313; (2000) 10 BPR 18,235 at [187]. As was said in *Lodge Holes Colliery Company Ltd v Wednesbury Corporation* [1908] AC 323 at 325 by Lord Loreburn LC:

Now I think a Court of justice ought to be very slow in countenancing any attempt by a wrong-doer to make captious objections to the methods by which those whom he has injured have sought to repair the injury. ... Errors of judgment may be committed in this as in other affairs of life. It would be intolerable if persons so situated could be called to account by the wrong-doer in a minute scrutiny of the expense, as though they were his agents, for any mistake or miscalculation, provided they act honestly and reasonably."

Thus a defendant will not necessarily be entitled to have a claim for hire of a replacement vehicle reduced simply because they can point to one cheaper rate being available in the market. The issue is whether the claimant acted reasonably in acting as they did. But nor, conversely, can it be said that a claimant will have acted reasonably simply because they can point to one more expensive rate in the market than the one that they agreed to pay."

1. His Honour at para 39 said:

"In the end, here there was only one issue between the parties requiring determination: whether the claimant had acted reasonably in mitigating his loss by hiring the car from R2D in the circumstances in which he did."

1. At 40 he went on to say

"The issue of non-compensable benefits was the subject of attack by the claimant. But no such issue arose, as the claim was for car hire alone and not for additional benefits such as credit or litigation fees".

1. Later, at para 48, his Honour described the issue as "whether the claimant acted unreasonably in incurring the charges that he did".
2. These comments by his Honour are strictly obiter dicta, however I accept that they are authoritative and I should give them appropriate weight. Mr Carter for the plaintiff says that his Honour reversed the onus of proof and that some of these obiter comments should not be followed. I do not accept that is correct, particularly having regard to what is extracted above from paragraph 26 of his Honour's reasons.
3. The agreement with Right2Drive into which Ms Hayes entered did not specify any particular charge for the provision of credit. Cross examination of Ms Wood did not take that issue any further. She gave evidence about the way in which Right2Drive sets its rates for hire of vehicles, having regard to rates available in the market on the day of the hire.
4. Mr Oliver for the defendant puts that there are "two distinct limitations on the recovery of hire costs actually incurred by a plaintiff ..." He names them the "Prior Limitation" and the "Subsequent Limitation", although as far as I am aware that is nomenclature that has not been adopted in any of the cases decided in this forensically productive area of law. He argues that the Prior Limitation requires the plaintiff to prove that "the cause of the plaintiff incurring that particular expenditure, and the entirety of it, was in fact an endeavour to mitigate Actual Loss suffered as a consequence of the defendant's wrongdoing, and not some other cause or motive that cannot properly be found to have been directly related to mitigation of a loss for which the defendant is liable to compensate the plaintiff" (DWS para 14). It is only after the plaintiff has done this that the Subsequent Limitation where the onus lies on the defendant arises, that is that expenses may not be recovered where they have been shown to be unreasonable.

5. I do not propose to analyse the extensive submissions made in support of these propositions, except to say that I accept as a general principle applicable to this case that a plaintiff cannot recover more than they have lost. Mr Oliver's submissions are detailed and rely on cases from the United Kingdom for support. Some of those cases are, in my view, inconsistent with the decision in *Arsalan* and dicta in *Lazicic* quoted above, particularly the extract from *Arsalan* paragraph 36. The "extent of the costs included in the hire charge" was included by the High Court as an example of something the defendant might seek to argue was unreasonable, not something amounting a Prior Limitation as argued by the defendant here. However I do not consider that question arises for determination here for the reasons that follow.
6. This case is a claim for car hire. The invoice claimed on is for car hire. The fact that other services were provided does not prevent this plaintiff suing on this invoice. Ms Hayes lost the use of her vehicle for the period of repair. She suffered physical inconvenience and loss of amenity of use. It was reasonable for her to hire a replacement vehicle. That is what she did. She hired it from a company that was clearly known in the community for providing accident replacement vehicles and was clearly in the habit of hiring cars. That was reasonable.
7. The issue is whether the defendant has discharged its onus of proving on the balance of probabilities, on the facts of this case, that Ms Hayes acted unreasonably in hiring the vehicle that she did, at the rate that she did, in the circumstances in which she found herself. In seeking to mitigate her loss the plaintiff cannot act with complete disregard for the defendant's interests.
8. Relevant to that issue is the fact that Ms Hayes made no inquiries at all as to other alternatives. Had she done so she may have discovered that there was indeed an alternative vehicle available from Hertz in Campbelltown for \$158.77 per day, significantly less than the amount of \$325.02 she agreed to pay to Right2Drive. Clearly at the time Right2Drive was determining its rate for the 7-seater vehicle which it hired to Ms Hayes it had that information available to it.
9. It may be that if Ms Hayes had made those inquiries there would have been reasons for her to still have made the choice that she did in hiring the vehicle from Right2Drive. The evidence did not explore that. That she made no other inquiries at all, however, assists the defendant to discharge its onus of proving that the plaintiff's conduct was unreasonable in seeking to mitigate her loss.
10. There are two matters that give me some pause in determining this case in the defendant's favour, at least to the extent of only permitting the \$158.77 per day.
11. The first is the submission made for the plaintiff that the requirement in the Hertz contract for an upfront deposit of indeterminate amount where the hirer did not have a credit card made it not unreasonable for Ms Hayes to hire from Right2Drive. The fact that the plaintiff made no enquiries at all about alternative solutions to her transport dilemma, and the way

in which this case was run, means that there was no evidence at all about her financial circumstances. I would draw an inference that Ms Hayes preferred not to incur the upfront costs of an alternative cheaper vehicle, given her evidence that the only issue of concern to her was that she would not have to pay anything and that everything would go through insurance. It makes sense that any person in Ms Hayes' position, not knowing how long her vehicle would be unavailable to her, would prefer not to have to pay \$158 per day up front for vehicle hire, in the hope that she could herself recover it later from the defendant's insurer. However, there is no evidence to that effect. I do not consider that in the circumstances this fact assists the plaintiff.

12. The second is the relevance of the "range" of rates available in the market on the day of hire. On the evidence I have heard that range extended from \$144.68 per day to \$452.00 per day. Clearly the amount claimed is within that range. Mr Oliver embarks on extensive analysis of *Stocovaz v Fung*, which related to the cost of parts for repair which does not appear to me to be of assistance here, noting the discussion of it in *Lazicic* extracted above.
13. The defendant accepts that the position which it argues in relation to "range" is inconsistent with my own decision in *Cassim v Nguyen* at first instance. As they were also involved in that case, they have gone to the trouble of extracting oral submissions made to me then. I must say that I do not find that helpful. I accept that my own decision in the past is not binding on me. However, I do not accept that it has now been disapproved by the Supreme Court in *Lazicic* except to the extent that his Honour pointed out that the ability to point to one cheaper rate, or one more expensive rate, will not necessarily defeat or allow a claim (see above). My decision was the subject of review by the Supreme Court, the Court of Appeal and the High Court. This particular issue was not challenged by the defendant. Mr Oliver says that is because, on the argument there being put by the defendant, the finding was irrelevant.
14. In that case, as in this, there was evidence of market rates of hire. The plaintiff says I should draw a *Jones v Dunkel* inference against the defendant in respect of its failure to call evidence of other rates of hire of 7-seater vehicles on the relevant date (at par 157). I do not accept that submission. The defendant is entitled to rely on evidence in the plaintiff's case to prove its defence. That is the only evidence of other rates available on the relevant date.
15. The evidence in *Cassim v Nguyen* was quite different to this. It was not a case where there was available a virtually identical vehicle at a location very convenient to the plaintiff at a significantly lower rate. The plaintiff in that case had actually made enquiries about alternatives, and had hired a car in the market himself for a period before going to Right2Drive. His vehicle was off the road for far longer than he had expected. His damaged vehicle was a prestige vehicle, and the range of comparable vehicles was in dispute. All of those factors distinguish that case from this.

16. The onus remains on the defendant to prove that the plaintiff acted unreasonably in hiring the vehicle she did in the circumstances she was in at that time. The significance of the market rates available goes to assessing, with the benefit of hindsight, the reasonableness of the plaintiff's conduct where she in fact made no enquiries as to alternatives.
17. The issue therefore requires determination of the mainstream hire market in the "broad geographical area" of the plaintiff (PWS paras 49-51). I accept that this is not limited to the location closest to the plaintiff's residence, or even closer to the plaintiff's residence than other options. However, in this case, the only rates higher than the rate agreed to by the plaintiff were for vehicles hired from the Sydney airport and Sydney city. Those locations were not locations that one would expect Ms Hayes (who lived in Campbelltown which is in outer south western Sydney) to choose, unless the vehicle she required was not available elsewhere, or she happened to be conveniently in one of those locations. There was no evidence of either of those things. In the circumstances of this case, the relevant geographic region does not extend to the whole of the Sydney metropolitan area.
18. While I remain of the view that there will be cases where the range of prices for available equivalent vehicles will determine whether a defendant has discharged its onus of proving unreasonableness, this is not one of them. In this case there was a virtually identical vehicle to Ms Hayes' damaged vehicle available in the suburb where Ms Hayes lived that Ms Hayes could have found had she looked for it. The rate of hire of that vehicle was not the lowest rate in the market. There were a number of other equivalent vehicles available in the general western Sydney region at a lower price. The difference in price between the vehicle Ms Hayes could have hired and the rate charged by Right2Drive is significant.
19. Having regard to the requirement for Ms Hayes to pay some attention to the interests of the defendant, I accept that the defendant has proved on the balance of probabilities that the amount agreed to by Ms Hayes was unreasonable as a result of her failure to make any other enquiries at all. On the limited evidence before me, a reasonable rate would have been that available to hire a Kluger in Campbelltown. The total hire cost of that vehicle would have been \$12,329.79.
20. For the reasons given I answer the questions set out at para 6 above in the Statement of Facts and Issues as follows:
 - 4a No
 - 4b No
 - 5 Unnecessary to answer
 - 6 No
 - 7 For the reasons given above, and notwithstanding that question 6 is answered in the negative, \$12,329.79

8 No, the relevant geographic area is not the whole of the Sydney metropolitan area

9 Unnecessary to answer

1. As a I result I order judgment and verdict for the plaintiff in the sum of \$12,329.79.
2. The order that I would propose as to costs is that the defendant pay the plaintiff's costs as agreed or assessed. If the parties seek a different order as to costs they should approach the Chief Magistrate's Office to list the matter for that purpose.

Magistrate C Farnan

13 December 2024

DISCLAIMER - Every effort has been made to comply with suppression orders or statutory provisions prohibiting publication that may apply to this judgment or decision. The onus remains on any person using material in the judgment or decision to ensure that the intended use of that material does not breach any such order or provision. Further enquiries may be directed to the Registry of the Court or Tribunal in which it was generated.

Decision last updated: 10 February 2025

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.caselaw.nsw.gov.au/decision/194ed47cdd728ffc3743e085>

CASE PAGE <https://chat.esheria.ai/case-law/australia/hayes-v-navre-2024-nswlc-10-2024>

Prepared on 28 October 2026 · Esheria