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Case Study
Lee v Strelnicks [2019] NSWSC 526

Need for a replacement vehicle

On 10 May 2019 the Supreme Court of NSW handed down its decision in the matter of Lee v Strelnicks.

The decision has generated some commentary from those in the world of minor 'crash and bash' claims. As much of that commentary has noted, the case is at first blush an oddity in that it was a fight about a Local Court decision awarding $30.73. Yet both sides had senior and junior counsel and the proceedings took two days to be heard.

Perhaps because it was so unusual, some inaccuracies have crept into the commentary surrounding the case. It did not decide whether 'credit hire' claims were compensable, nor was it an appeal. The decision of the Court did not result in any reformulation of the law or bring any greater clarity about important issues debated in the Local Court every day.

The purpose of this article is only to clarify misunderstandings and articulate the issues with clarity.

THE CASE BELOW

Mr. & Mrs. Lee are a married couple with two young children who live in Westmead. Like most of the population of Sydney, they use a car to get around. On a day in 2017, Mr. Lee was driving the family car when it was damaged in a collision with another driver. Mr. Lee insisted he was not at fault. He says the other driver ran a red light colliding with the side of his car causing serious damage.

After the collision, the Lees took their car to be repaired. They only had access to one car. They hired a replacement car for 15 days while the repairs to their own car were being undertaken.

The other driver involved in the collision had insurance. The Lees asked the insurer to pay for their costs of hiring the replacement car. They said the insurer should pay because the only reason they were forced to hire a replacement was because the insured driver rendered their own car unusable. The insurer refused to pay and so legal proceedings were commenced in the Small Claims Division of the Local Court to recover a few thousand dollars in hire car charges from the other driver (in reality, from the other driver's insurer).

The Local Court found that the other driver was 80% at fault. The Court held that Mrs. Lee was entitled to be paid damages for being deprived of the use of her car while it was off the road being repaired. However, the insurer argued that the amount of those damages should not reflect the cost to hire the replacement car. That was because the insurer said Mrs. Lee hadn't shown that she really 'needed' a replacement car at all.

This was in spite of the fact that Mrs. Lee gave evidence in the case that she used the car to travel to and from work, to ferry her two young children around, and to visit family and friends when she could.

None of what Mrs. Lee said about what she used her

car for was disputed by other evidence. The insurer did not suggest that Mrs. Lee was lying. Her own car was obviously being used as a form of transport when it was involved in the crash. Yet the Court found that Mrs. Lee had not proven that she really needed to hire a replacement at all. An Assessor of the Local Court described her evidence about needing a replacement as nothing more than "glib motherhood statements."[1]

Mrs. Lee lost the ability to use her car through no fault of her own. Yet instead of awarding her hire car costs by way of special damages (i.e. for mitigation expenses incurred), the Assessor only gave Mrs. Lee interest on the capital value of her own car: a 2016 Toyota Camry. That was calculated as $30.73. That was all the other driver's insurer had to pay to Mrs. Lee (plus a small amount of costs).

JUDICIAL REVIEW

Mrs. Lee was dissatisfied with the decision of the Assessor. She remained potentially liable for the balance of the hire car charges that were not recovered. The decision left it unclear why the focus should be on 'need', or precisely how one could ever prove they 'needed' a replacement car.

In subsequent cases, plaintiffs would sometimes recover hire car charges with basically the same evidence Mrs. Lee gave. On other occasions, Defendants successfully argued that same kind of evidence was unsatisfactory.

Mrs. Lee's case was funded by the company who provided her with the replacement car. The credit hire company was the driving force behind her case (much in the same way, Ms. Strelnicks on the other side was said by Wilson J to be "supported by her insurer"[2]). The credit hire company thought the Assessor misunderstood what 'need' really means in this context and was in error as to the extent of evidence a plaintiff must lead to prove the reasonableness of the decision to hire. It decided that these errors required correction.

> ***Contrary to what has been reported, no appeal was brought from the Small Claims decision. That was not possible.***

There is no right to appeal from a decision of the Small Claims Division of the Local Court to correct an error of law. Contrary to what has been reported, no appeal was brought from the Small Claims decision. That was not possible. Rather, judicial review proceedings were initiated in the Supreme Court alleging that there was an error of law "on the face of the record."

Unlike some other states, in New South Wales "the record" includes the reasons for a decision. A unique feature of Mrs. Lee's case was that the Small Claims Assessor read large portions of her evidence about 'need' verbatim into his reasons for the decision. Thus, the Assessor's treatment of that evidence was readily susceptible to judicial review. The case presented a unique opportunity to have a superior court clarify an issue of law causing uncertainty in Small Claims cases.

THE ISSUES

The proceedings in the Supreme Court raised many issues, some of which were not pursued.

While it is beyond the scope of this article, a significant issue which did feature in the case, but ultimately did not need to be determined, was the proper way to characterise Mrs. Lee's claim for damages. Namely, was it really one for 'special damages'? The issue was relevant in the context of 'need' because it raised questions about the level of importance the Court should place on the fact that Mrs. Lee had actually

incurred costs in hiring a replacement. That issue is central to a number of other credit hire matters

> ***...Mrs Lee was required to show that she 'needed' a replacement car. But what does 'need' actually mean in this context?***

The focus of this article is on the Plaintiff's main argument: the so-called 'need test'. Whilst described and explained in different ways, particularly in the United Kingdom cases, it has been repeatedly held that for damages to be awarded on the basis of 'replacement car costs', Mrs Lee was required to show that she 'needed' a replacement car. But what does 'need' actually mean in this context? What inquiry does it require?

THE ARGUMENTS ON NEED

1 CHARACTERISING THE EVIDENCE

The Assessor held that Mrs. Lee's evidence about using her car to travel to and from work, to take her children to school, and to visit family and friends 'meant nothing.' In the Supreme Court, Mrs. Lee's argument was that the Assessor could only reach that conclusion by asking the wrong legal question - because her evidence did mean *something*.

What the Assessor was really saying is that Mrs. Lee could not recover hire car costs as she had failed to give detailed evidence as to the nature and extent of the pre-accident use of her car and the post-accident use of the replacement car. That is, her 'glib' evidence as to use was not good enough. Wilson J saw no error in this approach.

An unanswered question not addressed by either the Assessor or Wilson J is *why* a Plaintiff must give detailed evidence about the nature and extent of their use of the replacement car and indeed their own car. What purpose does that evidence serve?

The unchallenged evidence was that Mrs. Lee used her own car to meet her personal needs and desires, and through no fault of her own she was deprived of the ability to do so for 15 days. Hiring a replacement car was the obvious way to mitigate or 'fix' that problem.

The Assessor's approach seemed to require a Plaintiff to prove a "minimum usage" of the replacement car before hire costs would be awarded. Mrs. Lee argued that approach was unworkable. Any decision about what level of usage of the hire car was 'acceptable' would be entirely arbitrary, and contrary to the compensatory principle.

2 THE COMPENSATORY PRINCIPLE

In the Supreme Court, Mrs. Lee argued, in effect, that the 'minimum usage' test was not the right legal test because it was contrary to the "compensatory principle."[3] That principle says that when awarding damages, courts should try to put the victim of a wrongdoing back in the same position they were in as if the wrongdoing didn't happen (so far as money can do that).

Mrs. Lee gave evidence that she used her car before the accident. She lost the ability to continue doing so because of the Defendant's negligence. She argued that hiring a replacement car was reasonable because it put her back in the position she was in before the accident. Further details do not matter, particularly if Mrs. Lee's evidence about the position she was in before the accident was not rejected.

For example, a plaintiff might give evidence that she only drove three blocks to get to work three days a week. That was how the plaintiff led her life before the defendant's wrongdoing. It was argued that it would be contrary to the compensatory principle to deny hire car costs as damages only on the basis that such evidence would reveal that the plaintiff did not use her car very much and that she could have "made do" with catching a bus or walking to work while her car was being repaired.

3 HINDSIGHT REASONING

The Assessor's decision observed that there was no evidence about how far the replacement car had actually been driven. The Assessor seemed to be saying that he might have been able to infer the replacement was 'needed' if the evidence showed it was used a lot.

However, Mrs. Lee argued that this sort of 'hindsight reasoning' highlighted the fact that the Court was asking the wrong legal question by focusing on 'need' and post-accident use, rather than on asking whether the use of her car at the time of the accident (and her likely ongoing use of it, but for the accident) made it reasonable for her to hire a replacement car when she did.

More specifically, the argument was that it is not open or sensible to analyse the nature and extent ('degree') of Mrs. Lee's actual use of the replacement car after the collision as the basis for deciding whether the decision to hire was reasonable in the first place. Furthermore, it was argued that the untenability of such an approach is revealed when one asks: even if this were legitimate, how much use would be enough? The reasonableness question can logically only be examined by reference to facts in existence at the time the decision to hire was made, such that if at the time of hire Mrs. Lee intended to drive the replacement car to work every day, it would not make the decision to hire unreasonable if, thereafter, she was struck down by illness and so did not use the replacement car for a few days or used it less than it would otherwise have been used.

4 THE RIGHT TEST

Relying on various authorities on loss of use, Mrs. Lee argued the issue of "need" was really an inquiry into whether it was reasonable for her to have hired the replacement in all circumstances. Rather than embarking on a detailed examination of whether Mrs. Lee could have done without the replacement, that inquiry involves asking some fairly simple questions:

WAS THE VEHICLE IN USE?
Before the accident, did the Plaintiff actually make use of her car to drive around?

WOULD IT CONTINUE TO BE USED?
If the accident did not happen, is it likely that she would have continued to do so during the period when her car was out of action?

Mrs. Lee argued those questions constituted a fairly 'low bar' because the authorities have made clear that - in this day and age - most people depend on having a car avaliable.

In rare cases the bar won't be reached. A defendant might prove that the plaintiff was hospitalised as a result of the crash and so could not use a replacement car at all. Alternatively, there might be evidence that the Plaintiff went overseas, and wouldn't be around to use a replacement car. In those situations it would be entirely unreasonable to hire a replacement.

To take another example: if a plaintiff's dining room chair is negligently damaged by a Defendant, she will be entitled to *some* damages for the loss of use of the chair while it is being repaired. Whether it is reasonable to hire a replacement chair during that time (and then recover the hire costs as special damages) would foremost depend on whether the chair was 'in use' when it was damaged. If it was packed-away in a basement it would obviously be unreasonable to hire a replacement. However, once the Plaintiff proves the chair is actually 'in use' it would be absurd to scrutinise how often (and for how long) people sat in the chair.

> ***... a plaintiff does not need to prove that her stated need for the replacement car was justified or 'right.'***

If the insurer's arguments in Mrs. Lee's case were applied in this context, it would involve the application of an arbitrary "minimum chair usage" threshold. Courts would be met with arguments from wrongdoers that plaintiff's should have eaten their meals while sitting on their couch rather than hire a replacement chair.

The important point, and the crux of the argument in *Lee*, was that a plaintiff does not need to prove that their stated uses were sensible, routine, or even 'necessary' in the strict sense of that word. We all commonly say we *need* things that are not bare necessities ("I need a phone" or "I need new shoes"). Properly understood, these are statements of preference, choice or desire. Yet they lose no legitimacy owing to a strict application of language.

A plaintiff has to prove that her car was in use at the time of the collision, such that it was reasonable to hire a car to continue with that use (or indeed any other). Detailed evidence about the nature of the use of the replacement car is immaterial. Need is not defined by that which is obtained.

DECISION OF THE COURT

Ultimately, the Court agreed with Ms. Strelnicks that there was no error of law apparent on the face of the Record of the Local Court proceedings.

Whilst the Court accepted that the 'bar' of proof on the question of 'need' was low in this context, Wilson J nevertheless went on to consider the evidence provided by Mrs. Lee (as read on to the Record below) and observed that there was no evidence of:

- Whether the replacement vehicle was actually used during the hire period;
- How far the replacement vehicle was driven;
- Whether there was any alternative means of transport conveniently available.

However, Her Honour did not find that evidence of these issues was central to a determination of 'need', but simply accepted the Assessor's views of the evidence did not disclose irrational reasoning warranting review, nor a failure to apply the correct legal test.

The Court also accepted the Defendant's contention that the issues complained of were merely conclusions of fact and hence there was no basis for the Court to intervene to correct an error of law. It seems that it was for this reason that the Court did not go on to consider Mrs. Lee's arguments about what the 'needs test' actually entails or to articulate with clarity the correct test to be applied.

A Notice of Intention to Appeal has been filed.

ENDNOTES

1 Lee v Strelnicks [2019] NSWSC 526, [21]
2 Lee v Strelnicks [2019] NSWSC 526, [13]
3 i.e. *restitutio in integrum*

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