HIGH COURT OF AUSTRALIA

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IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY

BETWEEN: **DYLAN NGUYEN**
Appellant

and

AZAD CASSIM
Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification as to Publication on the Internet

1. These submissions are in a form suitable for publication on the internet.

Part II: Concise Statement of the Issues

2. These submissions are identical to those filed in the related proceedings of Arsalan v Rixon (S35/2021).

3. This appeal calls for consideration of the nature of the interest being compensated in a specific, but nevertheless recurring, set of circumstances, namely, where:
   (a) damage has been occasioned to a chattel that is not used for generating income (in this case, a private motor vehicle), *and*
   (b) it is accepted that a temporary replacement was required while the damaged vehicle was unavailable for use, *and*
   (c) a plaintiff has incurred the cost of hiring a replacement that is broadly comparable or equivalent to the damaged vehicle, *and*
   (d) there is no issue that the cost of the replacement did not reflect the market cost for chattels of that kind (that is, there is no suggestion the cost of the replacement was extravagant in price).

4. In that indicative set of facts, and when damages for the loss of use of the chattel are to be assessed, what is the significance of the fact that a replacement was procured on a "like for like" basis?

5. The respondents contend that fact must be central to the principle of *restitutio in integrum*. In an analysis of whether the cost of the replacement was reasonably incurred, the compensatory principle requires an acknowledgement that the position occupied by the plaintiff before the loss involved the use of *a particular* chattel. In contrast, by observing that the relevant head of loss is the lost *use* of the chattel, the appellants contend that damages should be assessed by reference to a less expensive kind of substitute that could have adequately satisfied the intended usages to which the replacement might have been put. While the appellants frame the issue on appeal as involving the existence of an alternative substitute that "was available at a significantly lower cost" (AS [2]) that is to overstate matters. The difference in price between the replacement vehicles vied for by each party in these cases was a few thousand dollars. In Mr. Cassim's case, for example, it was the difference between a car hired out at $204 per day compared to a different model at $89 per day.[1]

6. Although each of the matters involved what has been described as the "credit hire"[2] of a motor vehicle, the appeal does not generate any issue concerning the incidents of that transaction.

Part III: Section 78B Notice

7. Notice under s78B of the *Judiciary Act 1903* (Cth) is not required.

Part IV: Material Facts

8. The relevant facts as summarised at AS [9] - [17] are not contested, save that the following matters require clarification:

   (a) In the *Rixon* matter, the learned Magistrate found that, as the replacement was hired on credit terms, the hiring charges included costs associated with the pursuit of litigation[3] which were non-compensable benefits.[4] However, the amount of those benefits was never stated. The market cost of the vehicle hired was not in issue in the Court of Appeal (CA [135]).

[1] *Nguyen v Cassim* (2019) 89 MVR 347; [2019] NSWSC 1130 (*Cassim* CAB p6) ("**SC2**") [15]
[2] James Edelman, *McGregor on Damages* (Sweet & Maxwell, 21st ed, 2021) [37-018]. See too: CA [85]
[3] Local Court of NSW, Keogh LCM 22 November 2018 (*Rixon* AFM at p6) ("**LC1**") [4]
[4] *Ibid* [62]

(b) In the *Cassim* matter, the finding of the Local Court was that Mr. Cassim needed a vehicle for a business that he ran from home, which *sometimes* involved carrying around toilet seat samples (Cf AS [10]).[5]

(c) The claims brought by Mr. Rixon and Mr. Cassim were not for damages "in sums that corresponded to" the relevant hire costs (*contra* AS [11]). In each proceeding, the claim was for special damages for the costs actually incurred in hiring a replacement car.[6]

Part V: Argument

The Interest Infringed

9. The appellants contend that Meagher JA's approach is to be preferred because it "focusses squarely on the interest that has been lost, namely the use that the claimant has lost by reason of the defendant's wrong" (AS [26]). It is not clear why that 'use' should not encompass, at least on a *prima facie* basis, the use of the *particular* chattel that a plaintiff has actually been deprived of - as distinct from the use of *any* chattel that could reasonably perform the tasks to which the damaged chattel was put.

10. As Edelman J has written extra-curially, the identification of a loss is often best served by asking what undesired consequences flowed from the infringement from the perspective of a plaintiff.[7] In these cases, the undesired consequence was that each plaintiff was "no longer able to use *his car* in whatever manner he chooses."[8] For Mr. Cassim, that meant the unexpected inability to continue to use the BMW, which he considered a "nice, luxury car."[9] Mr. Rixon wished to meet his daily transport requirements in *his* car with its perceived safety advantages.[10]

11. In neither case were the undesired consequences of the wrong simply the loss of certain functionality associated with 'a car.' That is too narrow a conception of the use of the chattel and fails to have regard to the reality of the undesired consequences of the wrong *viz.* the pre-accident position occupied by each plaintiff. By analogy, in *The Mediana* the loss suffered by the plaintiff Harbour Board could not be described in terms only of the (avoided) inability to perform the functions

[5] Local Court of NSW, Farnan LCM, 6 December 2018 (*Cassim* AFM at p5) ("**LC2**") [14]
[6] LC1[2], SC2 [13]-[14]; LC2[4]
[7] James Edelman, *The Law of Unjust Enrichment* (Oxford University Press, 2009) 213
[8] *Ibid* (emphasis added) – referring to the loss sustained in *Bee v Jenson* [2007] EWCA Civ 923
[9] LC2 [16]
[10] LC1 [42] – [44]

served by the damaged light ship.[11] In circumstances where a spare ship was used to perform those functions, the real undesired consequence was the unavailability of the spare vessel in circumstances where the plaintiff was desirous of maintaining that ship as a spare.[12]

12. There is no authority for the proposition that the 'use' that the plaintiff has lost in these circumstances should not encompass the qualities of thing that is lost. Contrary to what is asserted by the appellants at AS [48], when Sir Mark Potter P spoke of the inconvenience of being deprived of the use of a personal vehicle in *Beechwood*[13] he was not referring to the loss of "a car" only in the sense of a mode of conveyance.[14] To similar effect, Flanagan J observed in *Rider & Anor v Pix*,[15] that in claims for loss of use damages "what is being compensated is the deprivation of *the chattel* per se."[16]

13. By sundering the functional 'use' of a chattel from the chattel itself, Meagher JA's approach gives rise to several incongruities. For one, if no replacement is hired, a claim for general damages for loss of use will often be assessed on several conventional bases (interest on capital value,[17] standing costs,[18] or wasted lease payments).[19] All of those bases are directly referable to the damaged chattel itself, rather than some "no-frills" substitute that might be put to the same uses. As White JA noted at CA [71], an award of interest on the capital value of a prestigious car will reflect the value of *that* damaged vehicle. But if a replacement were hired, the approach of Meagher JA would not invite any regard to the characteristics of the chattel that the plaintiff has been deprived of. The answer to this conundrum cannot be that such measures as interest on the capital value of the chattel are applied only for want of a better alternative and reflect a kind of "rough and ready" proxy for the value of the lost use in simply having *the chattel* available (*contra* AS [46]). The point remains that on the appellants' approach, in a 'no-hire' situation the value of

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[11] *The Mediana* [1900] AC 113
[12] Edelman, above n7, 216
[13] *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* (CA) [2010] QB 357
[14] *Ibid* at [48]-[49] per Sir Mark Potter P, citing *Lagden v O'Connor* [2004] 1 AC 1067 at [76]
[15] *Rider & Anor v Pix* [2019] QCA 182
[16] *Ibid* at [44] – [45] per Flanagan J (Soronoff P and Morrison JA agreeing) (emphasis added)
[17] *Ibid*, citing *Admiralty Commissioners v SS Susquehanna* [1926] AC 655 and *The Hebridean Coast* [1961] AC 545. See too: *McGregor on Damages*, above n2, [37-057]
[18] *McGregor on Damages*, above n2, [37-062]
[19] CA [72] (per White JA). See too: *Midlands Travel Ltd v Aviva Insurance UK Ltd* [2013] EWCA Civ 887 at [28]-[29] (per Moore-Bick LJ).

the use is to be measured by reference to attributes of the chattel lost, whereas in a replacement scenario, the value of the 'use' is entirely independent of all those attributes. There is no cogent justification for that distinction.

14. Meagher JA's analysis also gives rise to an unnecessary asymmetry between the task of compensating the loss of use of a chattel compared to the destruction or damaging of that very same thing. In those latter contexts, it could never be suggested that restoring a plaintiff to their original position should be moderated by an examination of what *other* kinds of less expensive chattel might achieve the same purposes for which the original was procured and kept for. It is true that destruction or damage involves different interests and heads of loss (AS [40]). However, the only qualitative difference in the case of the temporary deprivation of a chattel is the impermanent nature of the loss. A 'temporary' loss may nevertheless be enduring. The principles to be applied must apply with equal force to the loss of a chattel for 3 weeks as they would in respect of a loss of 3 months (or even years). Whether the interest infringed is a direct loss or otherwise, the compensatory principle must control the assessment of damages.[20] That requires a recognition that each plaintiff below lost a particular item of personal property that they had chosen to own. Theirs was a deprivation loss not radically dissimilar to the loss of the vehicle by way of destruction. To observe that different interests are in play is not sufficient to justify a radically different approach to the task of compensation (cf CA [18]).

15. Meagher JA's approach conceives of the 'use' of a vehicle only in Spartan, functional terms (but curiously leaves open the possibility of a car being used exclusively for the 'function' of enjoyment at CA [21]). Such an analysis is pitched at too high a level of abstraction. An excess of metaphysical reasoning in the law should be avoided where possible.[21] Like many abstractions, the appellants' conception of "use" risks losing sight of the reality it seeks to describe in general terms. At a level of generality, a modern bespoke oven is, functionally speaking, an expensive heating device. Conceptualised in that way, its temporary loss of use

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[20] *Haines v Bendall* (1991) 172 CLR 60 at 63 per Mason CJ, Dawson, Toohey and Gaudron JJ; *Hoad and Another v Scone Motors Pty Ltd* (1977) 1 NSWLR 88 per Moffitt P, Hutley and Samuels JJA. See too: CA [119] (per Emmett AJA).

[21] *Melway Publishing Pty Ltd v Robert Hicks Pty Ltd t/as Auto Fashions Australia* (2001) 205 CLR 1 at [97] per Gleeson CJ, Gummow, Hayne and Callinan JJ*; Alphacell Ltd v Woodward* [1972] A.C. 824 at 847 per Lord Salmon

could be fairly restored by a campfire. The intuitive unattractiveness of that conclusion serves to demonstrate that the loss of use of goods must involve intangible benefits beyond bare utility (as recognised by White JA at CA [60]).

16. To suggest that Meagher JA's approach is preferable because it focusses on that which the plaintiff lost is to beg the question as to how that loss should be conceptualized of (AS [39]). The abstraction of 'use' could be described in rising levels of generality such that *restitutio in integrum* can be supposedly achieved in increasingly parsimonious ways - to the benefit of the wrongdoer. There is no principled reason to conclude that the majority in the Court of Appeal erred by not adopting the level of abstraction commended by the appellants (which is not precisely the same as that endorsed by Meagher JA, who did not endorse a wholly 'conceptual' approach). No other common law jurisdiction has conceived of the interest infringed in those terms.[22]

Reasonable cost of hire and "need"

17. The respondents accept that they were required to establish that their choice of substitute chattel was of a kind whose cost it was reasonable to incur (AS [35]). However, it would again obscure the nature of a plaintiff's loss in cases such as these to simply suggest that the plaintiff is required to establish that their particular choice of replacement motor vehicle was reasonable, and that this is an instance of the plaintiff's onus to make good the reasonableness of its asserted measure of damages where a choice between 'alternative measures of damages' must be made (AS [35]).

18. The loss is the plaintiff's use of a particular vehicle, not some platonic chattel whose features represent the bare minimum of what is required for a mode of transportation to fit a category such as "car." Thus, the hire of a Toyota Corolla to replace a damaged BMW does not meet that loss. The cost of hiring a Toyota Corolla cannot be a measure of the plaintiff's damage. There is accordingly no analogy between, on the one hand, the choice either to replace a damaged BMW with another BMW or to replace the BMW with a Toyota Corolla and, on the other,

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[22] England & Wales: *Lagden v O'Connor* [2004] 1 AC 1067 - New Zealand: *Frucor Beverages Ltd v Ilan Blumberg* [2019] NZCA 547 - Canada: *Miller v. Brian Ross Motorsports* 2017 BCCA 166 at [2]; *Willowbrook Motors Ltd. v. Coast Cylinder Dispatch Ltd.* 2014 BCSC 2129 at [29] - United States: American Law Institute, *Restatement (Second) of Torts* § 931 – Other Australian jurisdictions: *Fallon v Johnston* [2018] VSC 273 per Bell J; *GEC Marconi Systems Pty Ltd v BHP Information Technology* (2003) 128 FCR 1 at [1059], [1569-1578] per Finn J;

the choice, when quantifying the direct loss constituted by the diminution in value to a damaged vehicle, between adopting as a measure of damages the reasonable cost of repair or the reasonable cost of replacement.

19. It follows, then, that any inquiry into the "selection of a replacement vehicle" should be regarded simply as an incident of a broader analysis of whether a particular *cost* was reasonable to incur in all the circumstances (including the market) confronting the victim of a tort (CA [39]-[40], [69](4) per White JA). If the hired vehicle is comparable to (or certainly no better than) the damaged article, that would strongly point to a conclusion that the cost was not unreasonably incurred by reason *only of car hired* (CA [42] per White JA). The central issue, however, is that of cost. If by some masterful negotiation, a plaintiff were able to secure the hire of a slightly "upgraded" replacement model but at a substantially reduced tariff, that would have some bearing on the calculus of reasonable expenditure. Conversely, and as Emmett AJA noted, if a stupendous price had to be paid to hire something 'equivalent' to a rarefied antique, that may have a bearing on whether the cost was nevertheless reasonably incurred (CA [125]).

20. In the present cases, each of the respondents satisfied the Local Court that they had a 'need' to replace their damaged vehicles.[23] It was then incumbent on the respondents to establish that it was reasonable to incur the cost of hiring the kinds of replacements they procured. However, in both cases, that was established by the following uncontested facts:

    (a) the replacements were not "bigger or better" than that which was lost (CA [69](6) per White JA, [124] per Emmett AJA).[24]

    (b) the cost incurred for the particular replacements was not outside the market range of prices (CA [125] per Emmett AJA).

    The appellants called no specific evidence to demonstrate that the chosen replacements were unreasonable in the circumstances. Instead, their arguments were that neither plaintiff was entitled to any more than the market cost of a make of car that 'corresponded' to their respective needs.[25]

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[23] LC1 [28], LC2[15]

[24] See too: *Frucor Beverages Ltd v Ilan Blumberg* [2019] NZCA 547 at [91]-[92]; *Pattni v First Leicester Buses Ltd*; *Bent v Highways and Utilities Construction Ltd* [2011] EWCA Civ 1384 at [30] per Aiken LJ;

[25] LC1[60]; LC2 [30]

21. This sets up the reasonableness of a plaintiff's choice of replacement vehicle as a question separate from, and possibly anterior to, the reasonableness of the hire costs incurred. In justifying this, the appellants assert that a plaintiff must establish an objective need for a particular kind of replacement car as an axiomatic consequence of the requirement to establish a need to replace the chattel in the first place. This is to overload the concept of "need" in this context.

22. The word "need" tends to evoke notions of subsistence. It is a somewhat unhelpful expression (CA [38] per White JA). However, when properly understood, it becomes apparent that "need", in this context, is a shorthand for "reasons to use"[26] a replacement. The question is whether the damaged article, if not damaged, was at least "susceptible of being used" during the period of deprivation.[27] A positive answer to that question gives rise to a conclusion that incurring the cost of *a* replacement would be reasonable.

23. In *Giles v Thompson*,[28] the examples provided by Lord Mustill of "no-need" situations involved instances in which there would be no opportunity at all to make *any* practical use of a substitute vehicle.[29] Thus, the focus of the inquiry is whether there would have been a reason to use the damaged vehicle had it not been damaged, not the particular uses to which the vehicle would have been put and the cost of the most affordable means for meeting those needs.

24. As Basten JA observed below, if a plaintiff drove to work every day, it would be no answer to the question of whether a replacement was needed to point to the existence of public transport.[30] That is undoubtedly correct. The choice to drive to work is part-and-parcel of the position occupied by a plaintiff before the tort and amenable to the restorative purpose of the compensatory principle. *A fortiori*, it could not be said that a replacement car was not "needed" because the plaintiff's trip to work was only short.

25. This may be contrasted with the appellants' preferred mode of analysis. If, as the appellants assert, a plaintiff must show the 'need' to use, say, the same model car as that which had been lost, to make exactly the same kinds of trips, then why, as a matter of logic, should the plaintiff not also be required to show that these trips

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[26] *Lagden v O'Connor* [2004] 1 AC 1067 at [27]
[27] *The Greta Holme* [1897] AC 596 at 602 per Lord Halsbury LC
[28] *Giles v Thompson* (HL) (1994) 1 AC 142
[29] *Ibid*, 167 per Lord Mustill
[30] *Nguyen v Cassim* [2019] NSWSC 1130 at [54] per Basten JA

could not have been made by means other than a car driven by the plaintiff – for example, by means of public transport? This would follow inevitably from a conception of the plaintiff's loss that focusses, not on the loss of the particular vehicle damaged in the relevant accident, but on the specific purposes for which the vehicle was used.

26. Moreover, requiring a plaintiff objectively to establish the 'need' for a particular model of car to achieve a specific set of purposes is redolent of a kind of sumptuary law. That is particularly pronounced when a plaintiff's "intended uses" (AS [40]) of the replacement are simply the continuation of pre-accident life choices. An approach steeped in proving a 'need' for a particular model of car would tend to give rise to idiosyncratic value-judgments between cases where clarity would be desirable.[31] For example, in *Rixon* the learned magistrate accepted that the plaintiff had a genuinely held desire for his "like for like" substitute vehicle for reasons of perceived safety. However, those perceptions were insufficient to establish an objective 'need' for that particular model vehicle. Yet, the same magistrate also speculated that a (so-called) luxury vehicle might be objectively 'needed' to satisfy the use of a vehicle to impress others.[32] It is not easy to see why one of these scenarios is a mere preference or desire yet the other is accepted as a "need."

27. The appellants' approach further complicates matters in respect of the temporal aspect of the hire. They contend that the loss should be viewed as the intended use of the chattel *during the period of repair* (AS [40]). However, frequently the duration of the repair period will not be known at the point when a replacement is hired.[33] Consequently, as Pill LJ observed in *Singh v Yaqubi,* a private motorist will frequently be unable to predict with any certainty what exact uses will be made of their car during the period of hire.[34] On the approach favoured by the appellants, a plaintiff would be required to forecast their specific uses for a vehicle over a potentially indeterminate period when considering what model of vehicle to hire. Having engaged in such speculation, the plaintiff must then grapple with the

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[31] *Van Gervan v Fenton* (1992) 175 CLR 327 at 336: "But the common law should seek to reduce, where possible, the uncertainty involved in the assessment of damages." Compare the remarks of the Magistrates below at LC1[6], LC2[8]

[32] LC1 [43] – [44]

[33] For example, because of delays with the supply of parts required for repair: LC2 [3]

[34] *Singh v Yaquibi* [2013] Lloyd's Rep IR 398 at [37]

imponderable question of whether a particular model of vehicle could be said properly to meet those temporary uses enumerated (AS [31]). This form of inquiry is likely to occur in circumstances where the replacement may be needed on short notice. These difficulties lends the flavour of unreality to the appellants' submissions.

28. On the approach adopted by the majority below (and in particular Emmett AJA at [127]) what is lost to the plaintiff is the capacity to use the damaged vehicle as and when desired.[35] Showing the need to use a vehicle during the period of repair simply establishes the reasonableness of incurring the cost of a replacement to cover that loss, rather than informing the nature of the interest infringed. It follows that the nature of the infringed interest is not altered by the temporal aspect of the loss. Questions about the duration of the hire become subsumed into an examination of the reasonableness of the cost incurred. For example, if a replacement were needed but the time for repairs was known by the plaintiff to be triflingly short (eg an hour) then the hiring charge that might have to be paid to obtain an equivalent vehicle might be determined to be unreasonable in the circumstances (CA [125]). However, that conclusion would arise without the need to value the 'worth' of a particularly short use of a motor vehicle by reference to makes and models of various replacements.

Griffiths v Kerkemeyer & Hire Car Costs

29. The appellants invite this Court to adopt a so-called "conceptual approach" to the assessment of damages for loss of use of non-income producing chattels "in appropriate cases" (AS [24], [38]). That the appellants do not proffer any criterion for determining what constitutes an appropriate case for the deployment of such an approach suggests immediately that their preferred analytical framework is not securely grounded in principle, and is rather directed to producing a skewed outcome that avoids proper regard to the costs actually incurred by a plaintiff in procuring a replacement vehicle.

30. It should also be observed that to adopt the conceptual approach, which looks to "needs created or capacity lost",[36] is to obscure the nature of the loss suffered in a case such as this, namely, the loss of the use of a particular non-income producing

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[35] See too: *Naru Local Government Council v New Zealand Seamen's Industrial Union of Workers* [1986] 1 NZLR 466 at 481-482; Edelman, above n7, 213

[36] *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 180.

vehicle, as distinct from the creation, by the negligent conduct of the party at fault, of some need. The fact that a plaintiff's need may be expressed at varying levels of generality - each of which is as valid as the other - points to the instability of the very concepts that would underpin the approach urged upon this Court by the appellants.

31. To the extent that the relevant need is the need for a vehicle to carry out various non-income producing purposes – or, as Lord Hope put it in *Lagden v O'Connor*,[37] a "reason to use a car while [the plaintiff's] own car was being repaired" – such need is not created by the negligence of the party at fault. Rather, what is lost to the plaintiff is the use of a particular vehicle to meet that need. Thus, even if his BMW had not been damaged in an accident, Mr. Cassim would have still needed a car to engage in his business-related tasks to and drive his children to their sporting commitments. His loss was the lost use of his BMW to satisfy those pre-existing needs. On this conception of the relevant need, there is simply no analogy between cases such as the present appeals and *Griffiths v Kerkemeyer*, and therefore no justification for a conceptual approach. In particular, there is no occasion for treating the actual cost incurred in hiring a replacement vehicle merely as evidence of the market cost of the "need to hire a car to drive children."

32. It might be said, however, that the need may and should more specifically be described as the need to hire a replacement motor vehicle that can be used in the way in which the plaintiff would otherwise have used her own car. However, it is not obvious why the "nature of the need" created in the plaintiff should be characterised in terms of specific uses of a motor vehicle, as distinct from a specific motor vehicle. The damage suffered by Mr. Cassim, for example, could just as readily be conceptualised as the need to replace his BMW (CA [38]). There is no principled basis for restricting the conception of his damage to the need for a replacement motor vehicle as a *means to achieve* some specific functional ends (AS [31]).

33. As Tilbury has noted, conceptual reasoning based on indeterminate concepts like "need" tends to beg questions about how those concepts are defined.[38] Such reasoning may conceal evaluative judgments that otherwise might be dealt with

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[37] *Lagden v O'Connor* [2004] 1 AC 1067 at [27].

[38] M Tilbury 'Damages for Personal Injury: Delimiting The Economic Loss' (1982) 14(4) *University of Western Australia Law Review* 469, 471-472

according to the standard of reasonable conduct the common law demands of plaintiffs in the assessment of damages.

34. To speak of a 'need' to hire a replacement motor vehicle rather exposes the absence of any problem which cannot be dealt with or accommodated by a conventional approach to damages. Meagher JA observed below (CA [6]-[7]) that the cost of hire can either be seen as expenditure in mitigation, such that it is substituted for the claim for loss of use by way of general damages, or as reasonably foreseeable expenditure incurred as a result of the defendant's negligence, and thus recoverable as special damages. If that were correct, there would be no justification for an approach to damages that describes the plaintiff's loss in terms of the need to hire a replacement vehicle and disregards the actual costs of hire. Put simply, there is no gap in the law that requires filling by the adoption of a conceptual approach which has itself been described as "anomalous in departing from the usual rule that damages other than damages payable for loss not measurable in money are not recoverable for an injury unless the injury produces actual financial loss".[39] As this Court recognized in *Kars v Kars*, the conceptual basis for what was decided in *Griffiths v Kerkemeyer* represented a departure from the compensatory principle in its pure form.[40] For that reason alone, concepts and approaches informed by *Griffiths v Kerkemeyer* should not readily be transposed into different fields of discourse.

35. That there is no occasion, in this area, to depart from a conventional approach to damages is reinforced by the law's recognition that in circumstances where there is no proof of hire costs having been incurred (which is not this case), general damages might still be quantified by reference to hire fees.[41] This serves to highlight the extent to which a conventional approach can accommodate the multiple contingencies and exigencies that might attend cases involving loss of use of a motor vehicle. It also suggests the perils in attempting to replace the conventional approach, with its attention to the circumstances of each case, with a grand unified theory of the sort for which the appellants contend. Thus, it does not fit with the quantification of general damages by reference to hire fees in the market, where no replacement vehicle has been hired, that where there *is* proof of

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[39] *CSR Limited v Eddy* (2005) 226 CLR 1 at [27] per Gleeson CJ, Gummow and Heydon JJ.
[40] *Kars v Kars* (1996) 187 CLR 354 at 371 per Toohey, McHugh, Gummow, Kirby JJ
[41] *Anthanasopoulos v Moseley* [2001] NSWCA 266; *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* (CA) [2010] QB 357

hire costs being incurred, the assessment of damages should nevertheless proceed along the formula developed by the appellants on their conceptual approach, paying little heed to the actual costs of hire.

36. Such reasoning has not been adopted in other common law jurisdictions to define the interest infringed when a chattel is unexpectedly rendered unavailable. It is contrary to the weight of historical authority dealing with loss of use of ships.[42] Nonetheless, the appellants urge it upon this Court because it is said to avoid having to address the problem of so-called "non-compensable benefits" in credit-hire arrangements dealing with motor cars identified by the House of Lords in *Dimond v Lovell*.[43]

37. That problem did not arise, and thus was expressly not dealt with, below (CA [87]). Contrary to what was decided by a bare majority in *Dimond*, and for the reasons given in *McGregor* at [9-069], there is no basis for concluding that credit-hire companies necessarily levy a higher charge than other providers.[44] As Basten JA rightly identified in the related matter of *Souaid*, whether a particular hiring charge includes collateral benefits (and the identification of the quantum of those benefits)[45] must be a question of fact in each case.[46]

38. The potential issue of "non-compensable benefits" will normally be avoided by a simple analysis of whether the cost of the hire was reasonable in price (CA [87], [125]). In the *Cassim* matter no complaint was made about the price of the car actually hired (CA [134]). In *Rixon*, the issue of whether the price paid for the hired vehicle was excessive did not arise (CA [135]). If the hiring charges fell within the market range, there would typically be no occasion to 'strip-out' collateral benefits. In any event, the possibility of a factual contest arising in a limited class of cases is not a compelling justification for the advancement of the appellants' "conceptual approach."

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[42] *The Mediana* [1900] AC 113 at 122 (claim could have been for special damages), *The Susquehanna* [1926] AC 655 at 661 (special damages), *Lord Citrine v Owners of The Hebridean Coast* [1961] AC 545 at 560 (same effect)

[43] *Dimond v Lovell* [2002] 1 AC 384

[44] In *Dimond* there was a finding in the County Court at first instance that rate charged by the credit-hire provider would always be higher than the local 'spot' (or market) rates (*Vanessa Dimond v R Lovell* 1998 C.L.Y. 2505).

[45] *Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd* (1991) 33 FCR 1 at 29 per Burchett J, citing *Vischer (Simonius) & Co v Holt* [1979] 2 NSWLR 322

[46] *Souaid v Nahas* [2019] NSWSC 1132 at [18] – [19]

39. Nor could it be said that the appellants' conceptual approach is to be preferred because it avoids the complexities that attend the distinction between reasonably foreseeable expenditure and expenditure incurred in mitigation (AS [41]).

40. Though it is unnecessary for the resolution of these appeals, it may observed that the preponderance of authority regards hire-costs incurred on the 'humble facts' below as a form of expenditure to avoid or mitigate the damage that would otherwise be compensable for the loss of use of the vehicle in question.[47] There was no difference of opinion in the Court of Appeal as to the appropriateness of treating the hire charges in that way (CA [8]-[11], [58], [69], [113]).[48] Nor did Basten JA take issue with that understanding in the appeals from the Local Court.[49]

41. In contrast, characterising the hiring charge as a foreseeable consequence of the wrongdoing, tends to add to the already "knotty problem"[50] of remoteness of damage in tort. As Jagose J explained at first instance in *Blumberg*, there is some difficulty in viewing the *hiring charge itself* as a reasonably foreseeable consequence of the wrong.[51] The better view is that only the loss of use of the vehicle after the accident was damage of a kind that was reasonably foreseeable. And had the plaintiffs below *not* hired a replacement, it may have been open for the defendants to argue that their failure to do so represented a failure to mitigate.[52]

42. In any event, the complexities that attend these questions can be avoided without recourse to a conceptual approach to damages. Meagher JA was, with respect, correct to conclude below that, in the context of a case about hire car costs, the analysis on either framework will converge on a question of reasonable expenditure (CA [8]). In practical terms, a plaintiff will be required to prove a reasonable need to hire (CA [69](3)) and that the expense incurred was reasonable (CA [69[4], [125]). For that reason, questions that might otherwise arise about the onus of proof on a remoteness versus mitigation footing are deprived of any real significance.[53] The possibility of some unstated difference of significance between the two

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[47] *Frucor v Blumberg* [2019] NZCA 547 at [11]; *Lagden v O'Connor* (2004) 1 AC 1067 at [27] (Lord Hope); *Dimond v Lovell* [2002] 1 AC 384 at 406G (Lord Hobhouse), 401E (Lord Hoffmann, with whom Lords Browne-Wilkinson and Nicholls agreed on this point); *Pattni v First Leicester Buses Ltd* [2011] EWCA Civ 1384, [2012] RTR 17 at [29]–[41]; *McGregor*, above n2 256 [9-069]

[48] See too: *McGregor on Damages*, above n2, [9-102]

[49] SC2 [47] – [49]

[50] *McGregor on Damages*, above n2, [8-059]

[51] *Blumberg v Frucor Beverages Ltd* (2018) 3 NZLR 672 at [33]

[52] *Pattni v First Leicester Buses Ltd* [2011] EWCA Civ 1384, [2012] RTR 17 at [30](1)

[53] *McGregor on Damages*, above n2, [6-020].

frameworks (contrary to Meagher JA's analysis) is not a justification for adopting the appellants' conceptual approach to damages (Cf AS [41]).

No Errors in the Majority

43. Both White JA (at [42]) and Emmett AJA (at [126], [129]) rejected the suggestion that damages for the loss of use of a particular chattel are directed merely to compensating for "inconvenience." Their Honours, moreover, agreed that, if a replacement chattel were needed, the hiring of an equivalent item and the assessment of damages by reference to such hire would serve the purpose of an award of damages in tort, namely, the restoration of the plaintiff to the position in which he or she would be if the relevant tort had not occurred.

44. The appellants point to differing expressions of equivalency used throughout the majority judgments to suggest that different approaches in principle were developed in relation to the kind of replacement car that could be hired. Neither of the majority developed an exacting calculus by which one could compute the exact kind of car a plaintiff is "entitled" to be provided with (*contra* AS [36],[42]). As both Emmett AJA (at [121]) and White JA (at [68], [73]) held, the question will be whether it was reasonable to hire a particular replacement in all the circumstances. That proposition, itself, was accepted by Meagher JA (at [8]).

The Souaid Decision

45. There is no appeal in the cognate matter of *Souaid*. However, the rhetorical questions posed by the appellants about the outcome of that matter can be easily answered (AS [42]-[44]). Unlike the other two cases, the finding of fact in *Souaid* was not merely that a cheaper vehicle might have adequately met the 'needs' of the plaintiff (AS [42]). The unchallenged finding in *Souaid* was that the plaintiff had hired an upmarket vehicle, despite expressly disavowing the idea that he placed any value whatsoever on the use of the 'luxury' aspects of that car (Basten JA [7], CA [137] [37]). Under cross-examination Mr. Souaid was said to have essentially divested himself of the 'intangible benefits' of using a prestige car of which White JA spoke (CA [60]). Assuming that finding was accurate, it would have been open to conclude that Mr. Souaid's hire costs were therefore not expenses reasonably incurred (AS[69](4), [125]). Mr Souaid's situation was similar to that of the

claimant in *Alexander* who suffered no undesired consequences for the loss of his Rolls Royce because he did not care about its loss of use.[54]

White JA

46. White JA's reasoning was not "illusory" for drawing parallels with the assessment of damages for loss of use of the vehicle if the vehicle were *not* replaced (e.g. wasted lease payments or interest on capital value). The parity of reasoning appearing to White JA at CA [70]-[73] was apt. The capital value of a vehicle will inherently embrace the fact of the vehicle being a so-called 'luxury' model. The appellants do not advance any compelling reason why the value of the same chattel "in use" should not also incorporate that same reality, even if only on a *prima facie* basis (cf AS [45]). Were it otherwise, conventional methods for assessing damages for loss of use touching upon the capital value of the chattel would not only be 'imperfect estimates' (AS [45]) but would be wholly irrational.

47. White JA was not in error in rejecting the notion that the value of the lost usage of a chattel should be constrained in utilitarian terms. (AS [26]). As his Honour observed at AS [60], the very existence of "luxury goods" demonstrates that chattels (and it might fairly be said motor vehicles in particular) are self-evidently not coveted *only* for reasons of 'practical convenience' (AS [26] [45]). The fact that White JA's reasons speak of the feelings or intangible benefits tied to chattel ownership and usage, therefore, should not be troubling as the appellants contend (AS [42]). As Burrows has observed, the loss suffered in *The Mediana* might be thought of as the upsetting of the peace of mind in no longer having a spare ship.[55]

48. Nor was White JA in error for suggesting that the settled approach in England did not *require* a plaintiff to put up with a less expensive vehicle (AS [50]). A cursory examination of recent authorities shows that the approach taken by English courts primarily focusses on the equivalency of the replacement vehicle.[56]

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[54] *Alexander v Rolls Royce Motor Cars Ltd* [1996] RTR 95 at 102E-F per Beldam LJ. See too Edelman, above n7, 215

[55] Andrew Burrows, *Remedies for Torts*, *Breach of Contract and Equitable Wrongs* (Oxford University Press, 4th ed, 2019) 216

[56] *Putta v Royal Sun Alliance Insurance Plc* [2020] EWHC 117 (QB) at [17], [60]; *Bunting v Zurich Insurance Plc* [2020] EWHC 1807 (QB) at [2], [10], [12]; *McGregor on Damages*, above n2, 1151 [37-016]

Emmett AJA

49. It is not accurate to say that the "controlling matter" for Emmett AJA was the identification of the make, model and year of the damaged vehicle in contradistinction to White JA's analysis (cf [51]). Emmett AJA simply acknowledged that in each case under consideration the vehicle was "fungible" (at [126]). His Honour recognized the fact that some cars are, by and large, interchangeable in certain terms. For most people, a 2014 Audi A3 is as good as another 2014 Audi A3. That uncontroversial attribute of motor vehicles as chattels will inform the reasonableness of the replacement decision. Although White JA was not prepared to describe that phenomenon as true fungibility (CA [27]), his Honour clearly embraced the commutable nature of motor cars in the same way (CA [40], [42], [60], [68]).

50. Nor did Emmett AJA regard the make, model and year of the damaged vehicle as conclusive, without regard to the circumstance of a particular plaintiff (cf AS [51]). That self-evidently cannot be so. Emmett AJA also found that it was unreasonable for the appellant in the *Souaid v Nahas* matter to hire a "like for like" vehicle in circumstances where he disavowed deriving any intangible benefit from the use of the replacement compared to a lesser model ([137], cf [31] per White JA).

51. Both White JA and Emmett AJA accepted that it would be *prima facie* reasonable to hire a broadly comparable vehicle if a replacement were needed. Contrary to what the appellants assert at AS [51], Emmett AJA did not develop any "special rules" for comparing 'non-fungible' vehicles. Emmett AJA's comments at [122] were in the context of ascertaining how *restitutio in integrum* could be achieved where equivalency of replacement is impossible. A unique chattel is, by definition, irreplaceable. The question of whether it was reasonable to replace it with another chattel cannot, therefore, therefore turn solely on strict considerations of shared characteristics like make, model or year. In comments that were clearly *obiter*, Emmett AJA considered that in such a situation (which did not arise in these cases) the functionality of the damaged article *may* be a relevant consideration that must be resorted to. In that scenario, any 'intangible benefits' going beyond mere functionality may not be accounted for as in the case of a "like for like" replacement (potentially giving rise to a residual claim for general damages).

52. Despite what is said by the appellants at AS [51], the common law is perfectly up to the task of comparing whether two motor vehicles are broadly equivalent. Emmett

AJA's reasons provide instructive guidance for the inferior courts that would normally be tasked with that exercise.

53. What is far from obvious is how a court is objectively to match likely patterns of proposed 'use' (and the concomitant "efficacy or enjoyment" of those uses (CA [21]) to particular kinds of motor vehicle. A focus on "likely uses and capabilities" would also see courts delve into considerations about how reliable individual plaintiffs were in their forecasting of "likely uses." Yet, as Emmett AJA correctly recognised private motor vehicles are generally owned to use as and when the need arises and not for clearly demarcated purposes (Emmett AJA at [127]).

54. To assess damages only by reference to what is objectively necessary to "ameliorate practical inconvenience" (AS [45]) only begs the question of what a *practical* convenience is. The appellants have never defined it. It is not easy to see how, otherwise than arbitrarily, the court is to do so.

Part VII: Estimate of Time

55. The respondent estimates it will require 2 hours for oral submissions.

Dated: 28 May 2021

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