

**Neutral Citation No.: [2009] NIQB 39**

Ref: **STE7485**

*Judgment: approved by the Court for handing down  
(subject to editorial corrections)\**

Delivered: **23/04/09**

**IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND**

\_\_\_\_\_  
**QUEEN'S BENCH DIVISION**  
\_\_\_\_\_

**SARAH KELLY**

**Plaintiff/Appellant:**

**-and-**

**MARTIN MACKLE**

**Defendant/Respondent:**

\_\_\_\_\_  
**STEPHENS J**

**Introduction**

[1] This is an appeal in respect of the assessment of damages. The issues in the County Court and on appeal related to the hire of a replacement vehicle used by the plaintiff whilst her damaged vehicle was being repaired following a road traffic accident for which the defendant is liable. In respect of the replacement vehicle the plaintiff/appellant ("the plaintiff") claimed a daily hire rate of £227.00 + VAT for a hire period of 34 days. The learned County Court judge awarded a daily hire rate of £110.00 plus VAT for 34 days. The plaintiff has appealed seeking the claimed rate throughout the hire period. The appeal is by way of rehearing and the defendant has contended that the award was excessive as it was unreasonable for the plaintiff to have hired a replacement vehicle either at all or for the period claimed. The defendant also contends that the rate of hire is unreasonable.

[2] Mr Orr QC and Mr Connor Cleland appeared on behalf of the plaintiff. Mr Montague QC and Mr Cartmill appeared on behalf of the defendant/respondent ("the defendant"). I acknowledge with gratitude the assistance that I received from both sets of Counsel.

**Background facts**

[3] The plaintiff, Sarah Kelly, the owner and driver of a Volkswagen Caravelle eight seater taxi ("the vehicle") was involved in a road traffic

accident which occurred on Carrigan Road, Toomebridge on 20 April 2007. As a result of damage sustained in the road traffic accident the vehicle was not capable of being driven. The repairs to the vehicle were carried out by Loughshore Autos Limited of Ardboe, Dungannon, at a cost of £4,767.05 between 20 April 2007 and 30 May 2007.

[4] The plaintiff lives in Toomebridge and works some 7 miles away in Magherafelt in a bank between 9.00 am and 5.00 pm 5 days a week. In addition she does approximately 20 hours work per week in her husband's taxi business. This was a business which her husband had started approximately 2 years prior to the road traffic accident and it was his full time business. At the time of the accident that business used the vehicle, another 8 seater taxi and a saloon taxi, namely a Toyota Avensis. In 2007 the business made a profit of approximately £18,000-£19,000. One of the 8 seater taxis was used by the plaintiff's husband, Sean Kelly, on a daily basis but the second 8 seater taxi was used predominantly at the weekend from Friday night through to the early hours of Monday morning. For the rest of the week in practical terms the second 8 seater taxi would not be used. It is also relevant to note that at the date of the road traffic accident the plaintiff and her husband were attempting to build up the taxi business. They had 3 taxis but 2 drivers.

[5] The vehicle was bought by the plaintiff from Loughshore Autos Limited. It is an unusual vehicle having 8 passenger seats and a driver's seat. It has a public service vehicle certificate. It has a reinforced sub floor so that it can carry a wheelchair.

[6] The replacement vehicle was hired by Crash Services from Loughshore Autos Limited. Loughshore Autos Limited does not hire vehicles to the general public or to taxi businesses. It hires only to insurance companies or to hire companies. It would not hire the replacement vehicle to the plaintiff. The hire rate charged by Loughshore Autos Limited to Crash Services in respect of the replacement vehicle was £55 per day.

### **The hire of the replacement vehicle**

[7] The hire of the replacement vehicle was organised by the plaintiff's husband, Sean Kelly. He contacted Crash Services on the advice of his insurance broker. He didn't discuss the rate of hire with Crash Services but rather the replacement vehicle was delivered and the plaintiff signed the hire agreement paying no attention to the daily rate. Accordingly the plaintiff was unaware as to whether the charges were reasonable and took no steps to determine whether alternative hire rates were available. I conclude that the plaintiff and her husband were indifferent as to the amount to be charged.

[8] The written hire agreement signed by the plaintiff is dated 27 April 2007. Under this agreement the plaintiff hired a Ford Transit 8 seat vehicle ("the replacement vehicle") between 26 April 2007 and 30 May 2007, a period of 34 days from Crash Services which is the trade name of Granite Financial Limited. That company carries on business in Newry, County Down, as a credit hire company. The daily rate of hire (that is credit hire) in the original agreement was expressed to be:-

"£175 if settled under the Association of British Insurers general terms of agreement otherwise: £227.00".

[9] 34 days at £175 amounts to £5950 and at £227 amounts to £7,718.00. At the same time as she signed the credit hire agreement in respect of the replacement vehicle the plaintiff also signed a document entitled "Association of British Insurers - General Terms of Agreement. Mitigation questionnaire/statement of truth". The document also purported to be "without prejudice" but Mr Orr did not seek to claim privilege in relation to it. That document contained a number of statements on behalf of the plaintiff including the following:-

- (a) Prior agreeing to enter into the hire agreement my duty to keep my losses to a minimum have been explained to me and I had not received an offer for a replacement vehicle from the at fault insurer.
- (b) I have had credit hire explained to me.
- (c) I need to hire a vehicle because I need a replacement vehicle for work purposes.

In fact credit hire had not been explained to her nor had any explanation been given to her as to her duty of mitigation.

**The sequence in relation to the charges made by Crash Services.**

[10] The hire period ended on 20 May 2007 and a rental advice note dated 6 June 2007 was sent by Practical Car and Van Rental to the defendant's insurance company making a claim for a 34 day period of hire at a daily rate of £175 amounting to £5,950 plus VAT of £1,041.25, a total of £6,991.25. At the bottom of the rental advice note it was stated:-

"This advice note is issued under the terms of the Association of British Insurers General Terms of Agreement and is subject to increase if not paid

within the timescales laid down in that Agreement and detailed above.”

[11] The Association of British Insurers General Terms of Agreement is a reference to an agreement between subscribing insurers and certain credit hire organisations. Crash Services Limited was, but is no longer, a party to that Agreement. The plaintiff is also not a party to that Agreement. Credit organisations who are parties to it can claim interest at 7 ½ % if payment is delayed between 1 and 2 calendar months and 15% if payment is delayed between 2 and 3 calendar months. The rental advice note purported to claim those rates of interest for the first three months. However no payment was made and Crash Services thereafter have sought recovery at the daily rate of £227 as opposed to £175.

[12] The rental advice note was not sent to the plaintiff, the person who hired the vehicle. Rather it was sent to the defendant’s insurance company. It was entitled “without prejudice – for use only in the ABI GTA”. Handwritten alterations were made to the document by a representative of the defendant’s insurers reducing the daily rate from £175 to £125 with consequential amendments to the totals. It is apparent that an offer was then made to pay £5,145.88 to Practical Car and Van Rental.

[13] The rental advice note also stated that “a VAT invoice will be issued when amount due is settled”. The rental advice note was in the name of Practical Car and Van Rental with an address of “Granite House”, Newry. The case proceeded on the basis that this was a part of the business of Granite Finance Limited. The rental advice note which was introduced in evidence did not comply with the provisions of Article 6(1)(a) of the *Business Names (Northern Ireland) Order 1986* in that it did not state the corporate name of Granite Finance Limited. This is potentially a criminal offence under Article 6(6) of that Order.

[14] Mr Orr claimed privilege for the rental advice note on the basis that it was headed “without prejudice”. Though it is not necessary for my decision in this case I reject that claim. The rental advice note is a statement of account implementing the terms of the daily rate in the credit hire agreement. It reflects the credit hire agreement and charges a daily rate of £175.00 if settled under the Association of British Insurers General Terms of Agreement. It is not a suggested compromise of a claim but it is the implementation of the charges set out in the credit hire agreement.

[15] There was a further rental advice note dated 6 June 2007 issued by Crash Services a division of Granite Financial Limited. I will refer to this as “the Crash Services rental advice note” to distinguish it from the earlier rental advice note. This document claimed the daily rate of £227.00 for 34 days amounting to £7,718.00 plus VAT. There was no evidence as to the actual date

upon which this was issued or indeed as to whether it was sent by Crash Services to the plaintiff. I infer that it was in fact issued after the defendant's insurers did not agree to pay upon the rental advice note issued by Practical Car and Van Rental.

### **Reasonableness of hiring the replacement vehicle**

[16] In considering the reasonableness of hiring the replacement vehicle I take into account two aspects of its commercial utility. First the amount of revenue that it would generate. The second the need to maintain and expand the taxi business. This second aspect being seen in the context that it was a relatively new business seeking to establish itself in the market place and having to compete. Mr Sean Kelly whose business this was was aware of both these aspects and bore them in mind when answering questions as to the reasonableness of hiring the replacement vehicle.

[17] The evidence of Mr Sean Kelly was that the gross income per week for the second 8 seater taxi was approximately £300. That figure was earned at the weekends. Accordingly to earn £300 over 3 or 4 days at the weekend the plaintiffs were hiring a replacement vehicle at either £175 plus VAT or £227 plus VAT per day for the entire week. To hire per week was respectfully £1,439.37 inclusive of VAT or £1,867.07 inclusive of VAT. To hire for 3 days at the weekend would cost £616.87 or £800.17 both figures inclusive of VAT. If the weekend required the plaintiff to hire the replacement vehicle for 4 days rather than 3 days then the latter figures should be increased.

[18] Mr Kelly stated that these figures didn't stack up and if he was paying the hire charges himself he would not have dreamt of doing it.

[19] I conclude that the plaintiff is not entitled to charge against the defendant the claimed cost of hiring the replacement vehicle for the purposes of the taxi business when the claimed cost is many times the gross income. If as here the plaintiff chooses to be extravagant that extravagance is not at the expense of the defendant see *Derbyshire v. Warren* [1963] 1 WLR 1067. I find that the venture that was entered into was economic folly.

### **General damages**

[20] A claim for the cost of hiring a replacement vehicle can be regarded as either a claim for general damages, in relation to which a fair approach to quantum would be to award a sum based upon the spot hire charge for a comparable vehicle or a special damage claim based upon the costs of hire. I have rejected the special damage claim based upon the cost of hire as economic folly but by doing so I do not consider that means that the plaintiff is not entitled to any compensation for the loss of use of the vehicle during the hire period see *Bee Jensen* [2007] 4 All ER 791 at paragraphs [15]-[16] and [20]-[21]

and see also *Alexander v. Rolls Royce Motorcars Limited* [1996] RTR 95. Where as here the plaintiff needed the use of the vehicle one method of calculation of general damages is that the plaintiff is entitled to what would have been a reasonable amount for the hire of a replacement vehicle. The claimed rate was not a reasonable rate given the circumstances of the taxi business. The hire charge paid by Crash Services to Loughshore Autos Limited was £55 per day. That hire rate was not available to the public and could be viewed as a rate restricted to a limited number of trade organisations. However I take it as a reference as to the damages which ought to be paid for the unjust and unlawful withdrawal of the vehicle from the plaintiff's use. Ordinarily the trade rate should be adjusted to a spot hire rate but I was not assisted by the plaintiff as to what the difference should be between the trade rate and the spot rate or as to any of the costs that would have been incurred. In principle I consider that some uplift should be allowed but in the absence of evidence I can either confine the award to the trade rate see *Giles v Thompson* [1993] 3 All ER 321 at 363 or I can approach the matter in a broad way and make some adjustment to it. In this case there was a total absence of evidence as to the spot rate. I decline to make an adjustment and fix the rate at £55 per day.

[21] The vehicle was not available to the plaintiff for a period of 40 days between 20 April 2007 and 30 May 2007. However for 6 days the plaintiff would not have used the vehicle in any event due to a family bereavement and I do not consider it appropriate to award general damages for that period. I also add that there was no claim made by the plaintiff for that 6 day period.

[22] I consider that the plaintiff is entitled to an amount of general damages for 34 days at £55 per day, a total of £1,870.

[23] Another potential method of assessing the plaintiff's loss is by reference to loss of profits. A very rough estimate was given of £300 loss of gross income each weekend throughout the hire period of 34 days. There were 5 weekends during that period. Accordingly the total loss of gross income was £1,500. No evidence was given as to the profit levels from that gross income. There was in addition the second commercial aspect affected by the loss of use of the vehicle namely the ability to build up a fledgling business. I consider that the loss of profits taking into account the second commercial aspect very roughly approximates to the figure of £1,870 that I assess is an appropriate amount to be awarded in relation to general damages.

## **Conclusion**

[24] I reduce the award in relation to the replacement vehicle to one of £1,870.00. I will hear counsel in relation to costs.