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Damages -- Loss of Use Recoverable in an Action for the Negligent Destruction of a Chattel

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an unwarranted extension in the face of the accessory statutes. If *A* and *B* should conspire to burn a church, for example, and in pursuance of the conspiracy *A* should burn it, *B* should be guilty as accessory. His maximum imprisonment would be ten years. If he were held guilty as principal, he could be imprisoned for forty years.[237]

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Damages—Loss of Use Recoverable in an Action for the Negligent Destruction of a Chattel.

In *Reynolds v. Bank of America*[1] plaintiff's airplane was abandoned at sea and destroyed as a result of the negligent act of the person to whom it had been leased. In an action against the negligent actor's estate plaintiff sought, in addition to the value of the plane, special damages for loss of use until a replacement could be obtained. The trial court held that loss of use was not compensable where the chattel had been completely destroyed. On appeal the California Supreme Court reversed. The court pointed out that loss of use was compensable where the chattel had been damaged but was repairable and stated,

> There appears to be no logical or practical reason why a distinction should be drawn between cases in which the property is totally destroyed and those in which it has been injured but is repairable, and . . . when the owner of a negligently destroyed commerical vehicle has suffered injury by being deprived of the use of the vehicle during the period required for replacement, he is entitled . . . to recover for loss of use in order to "compensate for all the detriment proximately caused" by the wrongful destruction.[2]

Jurisdictions have not been uniform as to the measure of damages recoverable by reason of the deprication of the use of a chattel through its wrongful injury or its destruction.[3] Furthermore, aside from this conflict where the right to recover is conceded, historically there has been a distinction made between property which is completely destroyed and property which is repairable in determining whether loss of use is an element of damages at all.

Where a chattel has been injured but is repairable, the basic measure of damages is the difference in value before and after the injury.[4]

[237] N.C. GEN. STAT. § 14-62 (1953).

[1] 53 Cal. 2d 49, 345 P.2d 926 (1959), Annot., 73 A.L.R.2d 719 (1960).

[2] *Id.* at 50, 345 P.2d at 927. It should be noted that the CAL. CIVIL CODE § 3333 provides that the basic measure of damages "for the breach of an obligation not arising from contract . . . is the amount which will compensate for all the detriment proximately caused thereby, whether it could have been anticipated or not."

[3] *Compare* Lamb v. Landers, 67 Ga. App. 588, 21 S.E.2d 321 (1942), *with* Kopischki v. Chicago, St. P., M. & O. Ry., 40 N.W.2d 834 (Minn. 1950).

[4] 15 AM. JUR. *Damages* § 124 (1938); 25 C.J.S. *Damages* § 83 (1941).

In addition, a vast majority of jurisdictions allow special damages for loss of use of the chattel.[5] To be compensable these special damages must be the natural and probable result of the wrongful act,[6] though they need not be foreseeable.[7] The loss of use is measured by either the rental value of the property[8] or the resulting loss of profits.[9]

When a chattel has been completely destroyed, the basic measurement of damages is the value at the time of the accident less salvage value.[10] The majority of jurisdictions have not allowed loss of use in a case of complete destruction,[11] but some variations to this rule have been established. Where it was not possible to ascertain immediately whether the injured chattel was repairable, the plaintiff in some instances has been allowed damages for loss of use during the period

[5] *E.g.,* Valencia v. Shell Oil Co., 23 Cal. 2d 840, 147 P.2d 558 (1944); Barr v. Searcy, 280 Ky. 535, 133 S.W. 2d 714 (1939); Hanson v. Hall, 202 Minn. 381, 279 N.W. 227 (1938); 25 C.J.S. *Damages* § 41 (1941); Annot., 169 A.L.R. 1074 (1947).

[6] Reliable Trucking Co. v. Payne, 233 N.C. 637, 65 S.E.2d 132 (1951); Steffan v. Meiselman, 223 N.C. 154, 25 S.E.2d 626 (1943), 25 C.J.S. *Damages* § 23 (1941).

[7] Western Union Tel. Co. v. Guard, 283 Ky. 187, 139 S.W.2d 722 (1940); Johnson v. Railroad, 140 N.C. 574, 53 S.E. 362 (1906).

[8] Rental value is the preferable measure when similar property can be rented, for the plaintiff can mitigate his loss by renting a substitute. Hanson v. Hall. 202 Minn. 381, 279 N.W. 227 (1938); Francischini v. McMullen, 6 N.J. Misc. 736, 142 Atl. 651 (1928); 5A AM. JUR. *Automobiles* § 1116 (1956). Rental value would also be used when the lost profits are too speculative or remote to be ascertained with a reasonable degree of certainty. Buchanan v. Leonard, 127 F. Supp. 120 (D. Colo. 1954); Sledge v. Reid, 73 N.C. 440 (1873).

Loss of use of a pleasure vehicle is compensable in a majority of jurisdictions. See, *e.g.,* Atlanta Furniture Co. v. Walker, 51 Ga. App. 781, 181 S.E. 498 (1935); Newman v. Brown, 228 S.C. 472, 90 S.E.2d 649 (1955). See also 5A AM. JUR. *Automobiles* § 1115 (1956); Annot., 169 A.L.R. 1100 (1947). *Contra,* Hunter v. Quaintance, 69 Colo. 28, 168 Pac. 918 (1917). The measure of damages in these cases is the fair rental value of the automobile. Bates v. General Steel Tank Co., 36 Ala. App. 261, 55 So. 2d 213 (1951); Atlanta Furniture Co. v. Walker, *supra.* It is significant to note that loss of use is allowed even if no replacement was actually hired, according to the majority view. See, *e.g.,* Hansen v. Costello, 125 Conn. 386, 5 A.2d 880 (1939); Pitarri v. Madison Ave. Coach Co., 188 Misc. 614, 68 N.Y.S.2d 741 (New York City Ct. 1947); Glass v. Miller, 44 Ohio L. Abs. 278, 51 N.E.2d 299 (Ohio Ct. App. 1940); Newman v. Brown, 228 S.C. 472, 90 S.E.2d 649 (1955).

[9] Loss or profits may be recoverable if the plaintiff is unable to mitigate his damages. Knapp v. Styer, 280 F.2d 384 (8th Cir. 1960); Reliable Trucking Co. v. Payne, 233 N.C. 637, 65 S.E.2d 132 (1951). It has been held that the plaintiff must show that similar property was not available for rental before he can recover lost profits. Hanson v. Hall, *supra* note 8; Francischini v. McMullen, *supra* note 8. Loss of profits may also be proper when the plaintiff is financially unable to mitigate, Valencia v. Shell Oil Co., 23 Cal. 2d 840, 147 P.2d 558 (1944), and it is commonly recovered when the injury is to real property. See, *e.g.,* Steffan v. Meiselman, 223 N.C. 154, 25 S.E.2d 626 (1943). See generally, 34 N.C.L. REV. 357 (1956).

[10] 15 AM. JUR. *Damages* § 121 (1938); 25 C.J.S. *Damages* § 83 (1941).

[11] *E.g.,* Magnolia Petroleum Co. v. Harrell, 66 F. Supp 559 (W.D. Okla. 1946); Hunt v. Ward, 262 Ala. 379, 79 So. 2d 20 (1955); Pellegrin v. Hebert, 107 So. 2d 853 (La. App. 1959); Helin v. Egger, 121 Neb. 727, 238 N.W. 364 (1931); Hayes Freight Lines, Inc. v. Tarver, 192 Ohio St. 82, 73 N.E. 2d 192 (1947); Cogbill v. Martin, 308 S.W.2d 269 (Tex. Civ. App. 1957); 5A AM. JUR. *Automobiles* § 1115; Annot., 169 A.L.R. 1074 (1947).

necessary for this determination, even if repair subsequently proved impractical.[12] Other cases have held that loss of use was compensable when the chattel was completely destroyed, but the total recovery has been limited to the value of the chattel before the injury.[13] Since the basic measure of value before and after would cover the entire value except the salvage value, this rule would limit the amount recoverable for loss of use to the salvage value.[14]

The refusal to allow loss of use in a case of complete destruction seems to be a holdover from the common law action of trover, which was an action for conversion, and in which loss of use was not allowed. When a chattel was completely destroyed, an imaginary passing of title was effected, vesting ownership in the defendant. The plaintiff then no longer had title, and thus he could not recover for the loss of use of that which he did not own.[15]

In North Carolina the basic measure of damages is the difference in the value of the chattel before and after the injury.[16] In addition, loss of use had been allowed where the chattel was damaged but repairable.[17] But the question of whether the owner of a chattel which has been wrongfully destroyed may recover for loss of use has not been definitely decided. It appears likely, however, that our court would allow loss of use in this situation.

In *Kitchen Lumber Co. v. Tallassee Power Co.*[18] plaintiff's bridge was destroyed through the negligence of the defendant. In addition to the value of the bridge the plaintiff sought a recovery for the loss of profits resulting from his inability to remove his timber without the bridge. The court, while reversing as to proof of the lost profits, stated that both the value of the bridge and the lost profits might be

[12] Morgan v. Hartford Acc. & Indem. Co., 100 So. 2d 279 (La. App. 1958).

[13] Lamb v. Landers, 67 Ga. App. 588, 21 S.E.2d 321 (1942); Kohl v. Arp, 236 Iowa 31, 17 N.W.2d 824 (1945); Anderson v. Rexroad, 180 Kan. 505, 306 P.2d 137 (1957).

[14] Assume that the plane in the principal case, worth $30,000, had crashed on the land and had a salvage value of $500. The difference in value before the accident and that after would be $29,500. If the amount were limited to the value before the accident, loss of use could not exceed $500, as compared to the $5,000 actually claimed.

[15] 1 SEDGWICK, DAMAGES § 178 (8th ed. Sedgwick & Beale 1891). Under this theory, some jurisdictions have held that total damages for *injury* to a chattel, including loss of use, may not exceed the value of the chattel before the injury. Brooks Transp. Co. v. McCutcheon, 154 F.2d 841 (D.C. Cir. 1946); Lamb v. Landers, 67 Ga. App. 588, 21 S.E.2d 321 (1942). These courts reason that since the plaintiff could recover only the value of the chattel had it been completely destroyed, damages in a larger amount should not be allowed where the harm done to the chattel was less. *Ibid.*

[16] United States Fid. & Guar. Co. v. P. & F. Motor Express, Inc., 220 N.C. 721, 18 S.E.2d 116 (1942).

[17] Reliable Trucking Co. v. Payne, 233 N.C. 637, 65 S.E.2d 132 (1951). It is not clear whether loss of use is considered special damages. The safer method is to plead them as such. 1 MCINTOSH, NORTH CAROLINA PRACTICE AND PROCEDURE § 1079(3) (2d ed. 1956).

[18] 206 N.C. 515, 174 S.E. 427 (1934).

recovered. In *Binder v. General Motors Acceptance Corp.*[19] plaintiff sought damages for the *conversion* of his automobile which he used in his business. Even though there was no allegation of lost profits resulting from the conversion, the court held that loss of use was a proper element of damages. As has been noted, the apparent reason some jurisdictions do not allow loss of use for complete destruction is that loss of use was not allowed for conversion at common law. Since North Carolina allows loss of use in actions for conversion, it is arguable that loss of use should be allowed in a case of negligent destruction.

The language used by the court in *Reliable Trucking Co. v. Payne*[20] seems broad enough to allow loss of use for a destroyed chattel. In an action for injury to his tractor-trailer the plaintiff sought property damage and loss of use for two and one half months necessary for repair. The court stated, "Under the modern rule, then, it may be said that lost profits constitute a proper element of damage where such loss is the direct and necessary result of the defendant's wrongful conduct, and such profits are capable of being shown with a reasonable degree of certainty."[21]

As pointed out by the principal case, there seems to be little logic in allowing loss of use for a damaged chattel but not for a destroyed chattel. Refusal to compensate for loss of use may result in a considerable loss to the plaintiff;[22] if the destroyed property is not readily replaceable and the plaintiff suffers a loss from the deprivation, he cannot be fully compensated unless he recovers for the loss of use. The detriment to the plaintiff is no more speculative or remote than that suffered when a chattel is damaged but repairable, and in both instances he is deprived of use of the chattel by the wrongful act of the defendant. The duty of the plaintiff to mitigate will prevent useless delay in replacement.[23] It is urged that North Carolina follow the reasoning expressed in the principal case, the *Restatement of Torts*,[24] and a growing minority of jurisdictions.[25]

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[19] 222 N.C. 512, 23 S.E.2d 894 (1943).
[20] 233 N.C. 637, 65 S.E.2d 132 (1951).
[21] *Id.* at 639, 65 S.E.2d at 133. In this case the amount claimed by the plaintiff for the injury to the trailer plus that claimed for loss of use exceeded the value of the trailer prior to the injury. The court made no mention of limiting the total recovery to the value of the trailer before injury which, as has been seen (*supra* note 15), is the rule of the courts which refuse loss of use for a destroyed chattel on the common law trover theory.
[22] In the principal case the plaintiff claimed $5,000 for loss of profits as a result of the destruction of the airplane.
[23] Howard v. Adams, 246 S.W.2d 1002 (Ky. 1952); Newman v. Brown, 228 S.C. 472, 90 S.E.2d 649 (1955).
[24] RESTATEMENT, TORTS § 927 (1939).
[25] Knapp v. Styer, 280 F.2d 384 (8th Cir. 1960); Guido v. Hudson Transit Lines, Inc., 178 F.2d 740 (3d Cir. 1949); Louisville & N. R. R. v. Blanton, 304 Ky. 127, 200 S.W.2d 133 (1947); Park v. Moorman Mfg. Co., 121 Utah 339, 241 P.2d 914 (1952).