University of Miami Law Review

Volume 23 | Number 1 Article 12

10-1-1968

Recovery for the Loss of Use of a Pleasure Vehicle

Robert A. Freeman

RECOVERY FOR THE LOSS OF USE OF A PLEASURE VEHICLE

Subsequent to an automobile accident for which the defendant admitted liability, the plaintiff was deprived of the use of her car for fourteen days while the vehicle was being repaired. Unrefuted testimony was given by a representative of a rental car agency regarding the cost to rent a car comparable to the one which was damaged. Although a substitute vehicle was not rented, nor any expense incurred for transportation during the period of necessary repairs, and even though the car was used primarily for pleasure with no real commercial purpose, the trial court awarded damages to the plaintiff for her loss of pleasure-use in an amount approximating the rental value of a substitute vehicle. On appeal to the District Court of Appeal, Second District, *held,* affirmed: Even though no substitute was hired, compensation is to be awarded for the reasonable value of the loss of use of a pleasure vehicle during the period of repairs, with the rental value of a substitute car being indicative of the loss-of-use value and not necessarily the conclusive measure of the damage. *Meakin v. Dreier,* 209 So.2d 252 (Fla. 2d Dist. 1968).

In an evolutionary manner, a wide majority of jurisdictions have concluded that damages for the loss of use of an automobile may be allowed against one who negligently injured it, with the recovery for loss of use not limited solely to those cases in which the vehicle was used for commercial purposes.[1] The general trend today is that such damages may be awarded to the owner of a pleasure vehicle notwithstanding his failure to hire another vehicle to temporarily replace the damaged car.[2] Although damages for loss of use have previously been awarded in Florida,[3] the instant case is the first reported decision in which a Florida court has granted damages for the loss of use of a pleasure vehicle.[4]

Initial awards of damages for deprivations of use were concerned with the reimbursement of pecuniary loss suffered as a result of tortious

1. There are 27 states in which courts have held this way: Alabama, California, Connecticut, Delaware, Georgia, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, New Jersey, New York, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Carolina, Tennessee, Texas, Washington and Wyoming. *See* Harris v. Keller, 84 Ohio L. Abs. 45, 170 N.E.2d 305 (Springfield Mun. Ct. 1960).

2. Cook v. Packard Motor Co., 88 Conn. 590, 92 A. 413 (1914).

Dettmar v. Burns Bros., 111 Misc. 189, 181 N.Y.S. 146 (Sup. Ct. 1920). *See also* Malinson v. Black, 83 Cal. App. 2d 375, 188 P.2d 788 (1948); Pittari v. Madison Ave. Coach Co., 188 Misc. 614, 68 N.Y.S.2d 741 (N.Y. City Ct. 1947); Scott v. Southern Ry., 231 S.C. 28, 97 S.E.2d 73 (1957); Holmes v. Raffo, 60 Wash. 2d 421, 374 P.2d 536 (1962).

3. A. Mortellaro & Co. v. Atlantic Coast Line R.R., 91 Fla. 230, 107 So. 528 (1926); Wajay Bakery, Inc. v. Carolina Freight Carriers Corp., 177 So.2d 544 (Fla. 3d Dist. 1965). *See also* Allen v. Hooper, 126 Fla. 458, 171 So. 513 (1936).

4. 209 So.2d at 253.

injury to commercial vehicles.[5] Historically, throughout the country such awards go as far back as horse-and-buggy days.[6] Almost all jurisdictions have at least recognized a right to recover for the loss of service of a commercial vehicle.[7] Moreover, the period of time qualifying as a basis for recovery is the period of deprivation during which the owner was necessarily deprived of the vehicle while it was actually undergoing repairs or could have been repaired with ordinary diligence.[8] The reasonableness of the time consumed in making repairs is generally a matter largely dependent upon the circumstances of the case. Although it has been widely accepted in almost all jurisdictions that loss-of-use damages may be collected when the period of deprivation results in a pecuniary loss, compensation for this type of damage has not been so easily obtainable in the past when pleasure vehicles were involved.

However, damages should have been awarded in such cases, for once it has been established that a person is liable in fact for an accident, that person may be held responsible for all the consequences that reasonably and naturally flow from his wrongful act.[9] The *Restatement of Torts* provides for compensation for the reasonable value of the loss of use of a pleasure vehicle during the time of repairs.[10] The soundness of the rule is reflected in its acceptance by an overwhelming number of jurisdictions.[11]

An important issue in the instant case was whether or not damages could be collected for loss of use when no substitute car had in fact been rented. There is a difference in opinion whether damages for loss of use can be collected in this situation.[12] Substantial authority holds that the use value may be recovered regardless of whether another vehicle was actually hired during the repair interval.[13] This is the view of the *Restatement*[14] and represents the present trend in most jurisdictions.[15]

5. *See* Allen v. Hooper, 126 Fla. 458, 171 So. 513 (1936); A. Mortellaro & Co. v. Atlantic Coast Line R.R., 91 Fla. 230, 107 So. 528 (1926).

6. Brown v. Southbury, 53 Conn. 212, 1 A. 819 (1885); Shelbyville Lateral Branch R.R. v. Lewark, 4 Ind. 471 (1853); Monroe v. Lattin, 25 Kan. 351 (1881); Johnson v. Holyoke, 105 Mass. 80 (1870); Wheeler v. Townshend, 42 Vt. 15 (1869).

7. Arkansas is the only exception. *See* Kane v. Carper-Dover Mercantile Co., 206 Ark. 674, 177 S.W.2d 41 (1944).

8. Cook v. Packard Motor Car Co., 88 Conn. 590, 92 A. 413 (1914); Allen v. Hooper, 126 Fla. 458, 171 So. 513 (1936).

9. Hanna v. Martin, 49 So.2d 585 (Fla. 1950).

10. RESTATEMENT OF TORTS, § 931, illustration 2 at 672 (A.L.I. 1939).

11. *See* the states cited note 1 *supra.*

12. Alabama and Louisiana require that a substitute vehicle must have actually been rented in order for the plaintiff to collect damages for the loss of the use of his car. *See* Bates v. General Steel Tank Co., 36 Ala. App. 261, 55 So.2d 213 (1951); Goode v. Hantz, 209 La. 821, 25 So.2d 604 (1946). Early New York cases also so held. *But see* Dettmar v. Burns Bros., 111 Misc. 189, 181 N.Y.S. 146 (Sup. Ct. 1920).

13. Myers v. Bradford, 54 Cal. App. 157, 201 P. 471 (1921); Cook v. Packard Motor Car Co., 88 Conn. 590, 92 A. 413 (1914); Pittari v. Madison Ave. Coach Co., 188 Misc. 614, 68 N.Y.S.2d 741 (N.Y. City Ct. 1947); Perry v. Harris, 95 Ohio L. Abs. 21, 197 N.E.2d 416 (1964); Scott v. Southern Ry., 231 S.C. 28, 97 S.E.2d 73 (1957); *e.g.*, Holmes v. Raffo, 60 Wash. 2d 421, 374 P.2d 536 (1962).

14. RESTATEMENT OF TORTS, § 931, illustration 2, at 672 (A.L.I. 1939).

15. *See* Cook v. Packard Motor Car Co., 88 Conn. 590, 92 A. 413 (1914); Dettmar v.

The language used by the Florida courts in the past has been rather obscure regarding this issue. In *A. Mortellaro & Co. v. Atlantic Coast Line R.R.* the court stated that the amount necessary for the plaintiff to expend to temporarily replace a truck would be recoverable. However, the court did not say that such an amount had to be actually expended.[16] Nevertheless, the instant case very distinctly places Florida with the majority in not requiring that a substitute vehicle actually be rented before an owner can collect damages for the loss of use of his car.[17]

A few jurisdictions do maintain that a replacement vehicle must have been hired as a prerequisite for recovery, or else evidence must be shown that a reasonable effort was made to procure a substitute.[18] Frequently, where recovery is contingent upon the plaintiff's actually renting a replacement, the requirement is closely allied with the problem of finding a proper and adequate measure of the damages for the loss of use. A court in such an instance usually reasons that if other vehicles of a like kind are available, then the cost of the rental of the replacement vehicle is a good means of determining the amount of damages.[19] However, this rationale has been rejected by the majority of jurisdictions where it has been held that the rental value of a substitute vehicle should only be indicative of the loss-of-use value and not conclusive evidence of the amount of the damage.[20] The *Restatement,* however, goes so far as to indicate that the injured party should collect "at least" the rental value of a substitute car whether a replacement is actually rented or not.[21] There is substantial authority contrary to the *Restatement* on this point. Several jurisdictions maintain that the amount of damages to be awarded for loss of use should be less than the entire rental price of a substitute vehicle.[22] *Cook v. Packard Motor Car Co.*[23] is the leading case in which the court reasoned that the rental value of a substitute car was not the conclusive measure of damages for loss of use because this amount

Burns Bros., 111 Misc. 189, 181 N.Y.S. 146 (Sup. Ct. 1920); Holmes v. Raffo, 60 Wash. 2d 421, 374 P.2d 536 (1962).

16. 91 Fla. 230, 232, 107 So. 528, 530 (1926).

17. 209 So.2d at 254.

18. *See* Bates v. General Steel Tank Co., 36 Ala. App. 261, 55 So.2d 213 (1951); Carkuff v. Geophysical Service, 179 So. 490 (La. App. 1938); Conley v. Kansas City R.R., 259 S.W. 153 (Mo. App. 1921); Cincinnati Traction Co. v. Feldkamp, 19 Ohio App. 421 (1924).

19. *See* Chesapeake & Ohio Ry. v. Elk Refining Co., 186 F.2d 30 (1950); Meyers v. Bradford, 54 Cal. App. 157, 201 P. 471 (1921); Perry v. Harris, 95 Ohio L. Abs. 21, 197 N.E.2d 416 (Mun. Ct. 1964); Somerville v. Dellosa, 133 W. Va. 435, 56 S.E.2d 756 (1949).

20. Consolidated Nat'l Bank v. Cunningham, 28 Ariz. 518, 238 P. 332 (1925); Anderson v. Gengras Motors, Inc., 141 Conn. 688, 109 A.2d 502 (1954); Cook v. Packard Motor Co., 88 Conn. 590, 92 A. 413 (1914); Lonnecker v. Van Patten, 179 N.W. 432 (Iowa 1920). *See* Larson Bros. Wholesale Grocery Co. v. Kansas City, 115 Kan. 589, 224 P. 47 (1924); Dahlstrom Metallic Door Co. v. Evatt Constr. Co., 256 Mass. 404, 152 N.E. 715 (1926); *e.g.*, Perkins v. Brown, 132 Tenn. 294, 177 S.W. 1158 (1915).

21. "The owner of the subject matter is entitled to recover as damages for the loss of the value of the use, at least the rental value of the chattel . . . ." RESTATEMENT OF TORTS, § 931, Comment (b) at 671 (1939).

22. *See* cases cited note 20 *supra.*

23. 88 Conn. 590, 92 A. 413 (1914).

would include a substantial allowance for depreciation, repairs, overhead expenses and profits of carrying on the business of renting cars.[24]

In considering the measure employed in awarding damages in the instant case, it is important to note that although the award of damages for loss of use coincided with the amount of the rental value of a substitute vehicle, the court followed the general rule and stated that the rental value was to be regarded as highly relevant evidence. Such rental value, however, was not necessarily the conclusive measure of the damages; it was only indicative of the loss-of-use value.[25] The concurrence of the rental value and the amount of the damages awarded appears to be due to the fact there was unrebutted testimony by an unimpeached witness supporting the plaintiff's claim that the rental value of a substitute vehicle represented the value of the loss of use to the plaintiff.[26] The defendant's unsupported objection was overruled,[27] and the defendant offered no evidence to refute the claim,[28] resulting in an award of damages approximating the rental price of a substitute vehicle. Florida may yet follow the *Cook* case in allowing an amount to be deducted from the rental price of a substitute vehicle for maintenance, depreciation, and the lessor's profit to arrive at a net value to the plaintiff of the loss of the use of his car.

A problem which usually arises in this type of case is the extent to which a court can go in awarding damages for loss of use. The greater weight of authority is that a total award of damages composed of the loss-of-use value plus the cost of repairs to the injured vehicle cannot exceed the value of the vehicle before the accident.[29] Nevertheless, there is some authority allowing recovery for deprivation during repairs, even though this combined with the amount allowed for a depreciation of value exceeds the reasonable market value of the vehicle before the injury.[30]

Two jurisdictions[31] maintain that the loss of the use of a pleasure vehicle damaged in an accident is not a proper element of damages, nor is there an effective basis for measuring such damage. The loss of use of an automobile pending repair is not a proper element of damages in Arkansas regardless of whether the vehicle is used for pleasure or

24. *Id.* at 592, 92 A. at 415.

25. 209 So.2d at 254.

26. Brief for Appellee at 5, Meakin v. Dreier, 209 So.2d 252 (Fla. 2d Dist. 1968).

27. 209 So.2d at 255.

28. Brief for Appellee at 5, Meakin v. Dreier, 209 So.2d 252 (Fla. 2d Dist. 1968).

29. Globe Motors, Inc. v. Noonan, 106 Ga. App. 486, 127 S.E.2d 320 (1962); Harlan v. Passot, — Iowa —, 150 N.W.2d 87 (1967); Lester v. Doyle, 165 Kan. 354, 194 P.2d 917 (1948); *e.g.*, Harris v. Keller, 84 Ohio L. Abs. 45, 170 N.E.2d 305 (Springfield Mun. Ct. 1960).

30. Anderson v. Gengras Motors, Inc., 141 Conn. 688, 109 A.2d 502 (1954); Cook v. Packard Motor Car Co., 88 Conn. 590, 92 A. 413 (1914); Cook v. Southern Farm Bureau Cas. Ins. Co., 124 So.2d 183 (La. App. 1960); Kopischke v. Chicago, St. P.M. & O.R.R., 230 Minn. 23, 40 N.W.2d 834 (1950).

31. Arkansas and Colorado do not allow recovery of damages for the loss of use of a pleasure vehicle.

for commercial purposes.[32] Although allowing damages to be collected for the loss of use of commercial vehicles, Colorado has held that damages for the loss of use of a pleasure vehicle are too speculative even to be considered.[33] These courts do not acknowledge that the difficulty of establishing a measure for these damages is certainly no greater than attaching a price tag to pain and suffering in a personal injury case.

To be recoverable in Florida damages must be certain in both their nature and in respect to the cause from which they proceed.[34] There may be a recovery for the loss of use of property provided that the use was lawful, the deprived person was in a position to use the property, and the damages are established with reasonable certainty and are not left to speculation.[35] It is sufficient if there is at least a reasonable basis of computation. There is no strict requirement of 100% certainty. The rule against contingent damages applies only to those damages which are not the certain result of the wrong and not to those that are indeed certain results, but are only uncertain in amount.[36]

The owner of a car has an investment in it, and this investment gives him the right to use that car whenever and however he so chooses.[37] If that right is interrupted through no fault of his own, he should be able to recover for the damage to his right caused by that interruption.[38] The fact that a vehicle may be used more often if used commercially does not eliminate the fact that damage does exist at the moment of interruption, even if the use is for pleasure only.[39]

The fundamental principle of the law of damages is that the person injured shall have a fair and just compensation commensurate with the loss sustained in consequence of the defendant's tortious act.[40] An inherent value of ownership of property rests in the owner's right to use, enjoy and convey the property at any time and in any way in which he deems appropriate.[41] This right to use and enjoy is in the manner of an *in rem* right against all other persons that they should not invade or interfere with one's use and enjoyment of a thing. The value of the use of personal property is not the value of its intended use, but

32. Kane v. Carper-Dover Mercantile Co., 206 Ark. 674, 177 S.W.2d 41 (1944); Madison-Smith Cadillac Co. v. Wallace, 181 Ark. 715, 27 S.W.2d 524 (1930).

33. Buchanan v. Leonard, 127 F. Supp. 120 (1954) (applying Colorado law); Hunter v. Quaintance, 69 Colo. 28, 168 P. 918 (1917).

34. McCall v. Sherbill, 68 So.2d 362 (Fla. 1953).

35. Mahanna v. Westland Oil Co., 107 N.W.2d 353 (N.D. 1960).

36. McCall v. Sherbill, 68 So.2d 362 (Fla. 1953).

37. Harris v. Keller, 84 Ohio L. Abs. 45, 48, 170 N.E.2d 305, 307 (Springfield Mun. Ct. 1960).

38. The owner of a pleasure vehicle should be allowed to recover for the loss of the enjoyment of his car, because the owner's ability to use his car has temporarily been lost; hence, it is his *right* to use his car that has been damaged, and that loss is directly attributable to the accident.

39. Harris v. Keller, 84 Ohio L. Abs. 45, 48, 170 N.E.2d 305, 307 (Springfield Mun. Ct. 1960).

40. Hanna v. Martin, 49 So.2d 585 (Fla. 1950).

41. SEDGWICK ON DAMAGES § 243(a), at 493, 494 (9th ed. 1920).

rather the value of its present use and availability to the owner.[42] The damage being compensated in an award for the loss of use is the present usable value of the property to the plaintiff; therefore, it should make no difference whether the owner uses his car for business or pleasure. He should collect damages for the loss of use of either.[43]

Although not at issue in the instant case, but certain to arise in the future with an increased demand for loss-of-use damages, is the question of whether such damages are in the nature of general damages or special damages. There is authority going each way in other jurisdictions.[44] It can be inferred from *City of Alachua v. Swilley* that damages for loss of service are in the nature of special damages in Florida and must be specifically pleaded.[45] Loss of use is certainly a direct and natural consequence of a substantial injury to a car; however, whether that use is for pleasure or for commercial purposes could greatly affect the amount of the damages. A claim for special damages is sufficient if it notifies the defendant of the nature of the special damages claimed.[46]

This writer agrees with the court in the result obtained in the instant case. The court has applied the existing law[47] with commendable discretion and effected a clarification in the law which reaches toward just compensation. In view of the staggering number of automobile accidents each month in Florida, the instant case should soon be relied upon frequently as more plaintiffs include a claim for the loss of use of their pleasure vehicles.[48]

ROBERT A. FREEMAN

42. *Id.*

43. Cook v. Packard Motor Co., 88 Conn. 590, 592, 92 A. 413, 415 (1914); *e.g.*, Holmes v. Raffo, 60 Wash. 2d 421, 374 P.2d 536 (1962).

44. Asserting that such are special damages: Bates v. General Steel Tank Co., 36 Ala. App. 261, 55 So.2d 213 (1951); Hunter v. Quaintance, 69 Colo. 28, 168 P. 918 (1917) (for commercial vehicles only); Elliot v. Ticen, 78 Ind. App. 14, 134 N.E. 778 (1922); Herring Motor Co. v. Myerly, 207 Iowa 990, 222 N.W. 1 (1928); Louisville & N.R.R. v. Hill, 307 Ky. 846, 212 S.W.2d 320 (Ct. App. 1948); Antokol v. Barber, 248 Mass. 393, 143 N.E. 350 (1924); *cf.* Holmes v. Raffo, 60 Wash. 2d 421, 374 P.2d 536 (1962).

45. 118 So.2d 88 (Fla. 1st Dist. 1960). *See* FED. R. CIV. P. 9(g); FLA. R. CIV. P. 1.120(g).

46. Augustine v. Southern Bell Tel. & Tel. Co., 91 So.2d 320 (Fla. 1956); Arcade Steam Laundry v. Bass, 159 So.2d 915 (Fla. 2d Dist. 1964).

47. 150 So.2d 465 (Fla. 3d Dist. 1963).

48. Even though petition for certiorari has been filed, this writer is of the opinion that it will be denied.