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Damages--Vehicle--Recovery of More Than Actual Physical Damage When the Vehicle is Partially Destroyed

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with the guarantees of the fourteenth amendment, and especially action in some manner sanctioned or authorized by a state, other extensions may arguably be warranted.

John Charles Lobert

**Damages—Vehicle—Recovery of More Than Actual Physical
Damage When the Vehicle is Partially Destroyed**

D negligently damaged the taxicab of *P*. The cost to repair the taxicab was \$1,349 while the difference in market value before and after the collision was \$415. *P* claims that under the special circumstances of a city ordinance he is not permitted to buy a used car and convert it to a taxicab. *P*, therefore, contends he must have the *cost of repair* to make him whole. The lower court held he was entitled only to the *difference in fair market values*. *Held*, affirmed. The general rule for damages to personal property partially destroyed is that the *difference in fair market values* before and after the accident is the proper element of recovery where such is less than the *cost of repair*. Here *P* failed to show the necessary special circumstances which would have made this general rule inapplicable, *i.e.*, *P* failed to show that he could not buy a used taxicab which would satisfy the city ordinance. In the absence of such a showing he was completely compensated by recovering the difference in fair market values. *Norview Cars Incorporated v. Crews*, 156 S.E.2d 603 (Va. 1967).

The rule of damages in the principal case is a widely accepted one used in many jurisdictions.¹ It focuses on the actual physical damage inflicted. However, it is but one of several elements of recovery available to the injured party who might also be able to obtain recovery for loss of use or rental value, loss of profits, removal and storage, and interest.

The purpose of compensatory damages is to compensate the person wholly for the losses sustained concurrent with the least burden to the wrongdoer. In cases of personal property where there has been total destruction, this objective is achieved by awarding the fair market value, at the time of the accident, of the item destroyed less any salvage value. Where there has been partial destruction, the

¹ 22 AM. JUR. 2d *Damages* § 145 (1965).

general standard for measuring physical damage is the difference in fair market value immediately before and after the accident, or the reasonable cost of repair whichever is less.² The West Virginia courts follow this standard.³

An extension of usual standard for measuring physical damage to partially destroyed personal property exists when there is no market value for the property because of its peculiar nature. Examples of such property are clothing, heirlooms, luggage, and portraits. In such situations the cost of repairs will be the proper measure of physical damage,⁴ and each case must be considered according to its peculiar circumstances.⁵ In case of total destruction, the value placed upon these items by the owner can be used to measure physical damage so long as it is not unreasonable.⁶ One jurisdiction in contrast to the general rule holds the cost of repairs is the proper measure of damages in all cases so long as the property can be repaired.⁷

There is no difference in the application of the previously discussed *physical damage* standard to any class of vehicles. However, when considering the other possible elements of recovery it may become necessary to divide vehicles into two classes, commercial and pleasure.

² Riddle v. Baltimore & O.R.R., 137 W. Va. 733, 751, 73 S.E.2d 793, 803 (1952); Cato v. Silling, 137 W. Va. 694, 720, 73 S.E.2d 731, 746 (1952); 22 AM. JUR. 2d DAMAGES §§ 145-48 (1965).

³ McMicken v. Province, 141 W. Va. 273, 282, 90 S.E.2d 348, 354 (1955); Riddle v. Baltimore & O.R.R., 137 W. Va. 733, 751, 73 S.E.2d 793, 803 (1952).

⁴ Spackman v. Ralph M. Parsons Co., 414 P.2d 918, 922-923 (Mont. 1966); see Cincinnati & Suburban Bell Tel. Co. v. Carter Constr. Co., 35 Ohio Op. 212, 213, 216 N.E.2d 885, 887 (Ct. App., Hamilton Co. 1966). In the principal case the plaintiff failed to satisfy the requirements of special circumstances. It could have been shown that to satisfy the city ordinance a used taxicab had to be purchased and that none was available either because his own taxicab was peculiar and could not be replaced, or all other taxicabs were in use and not available for sale. The RESTATEMENT OF TORTS § 928 (1939) and comments thereto are in support of the special circumstances allowing recovery for repairs instead of the difference in market values, and reference to it will yield other circumstances when this recovery is proper.

⁵ Ripley v. C.I. Whitten Transfer Co., 135 W. Va. 419, 422, 63 S.E.2d 626, 628 (1951); Max Biederman, Inc. v. Henderson, 115 W. Va. 374, 377, 176 S.E. 433, 434 (1934). The courts have varied in the application of this general rule, but these variations have simply been different evidentiary methods of arriving at the amount necessary to give the injured party a car equal in value to his vehicle prior to the accident.

⁶ Spackman v. Ralph M. Parsons Co., 414 P.2d 918, 923 (Mont. 1966); see Cincinnati & Suburban Bell Tel. Co. v. Carter Constr. Co., 35 Ohio Op. 212, 213, 216 N.E.2d 885, 887 (Ct. App., Hamilton Co. 1966).

⁷ Chambers v. Cunningham, 153 Okla. 129, 130, 5 P.2d 378, 379 (1931).

The West Virginia Supreme Court has not clearly defined these additional elements of recovery, although there is a recognition that such do exist. In *Riddle v. Baltimore and Ohio Railroad Company*,⁸ the court referred to "necessary and reasonable expenses incurred by the owner in connection with the injury."⁹ There was a similar reference made in another case.¹⁰ An attempt will be made here to differentiate and define these additional areas of compensation.

In a commercial vehicle the idea behind *loss of use* is that the injured party should be compensated for not being able to use his vehicle for a reasonable time while repairs are being made.¹¹ If the injured party uses the damaged vehicle as a trade-in, then the period for measuring compensation is a reasonable time until the repairs would have been made or when he receives his new vehicle, whichever is shorter.¹² The usual method for determining the amount recoverable for loss of use is the cost of renting a vehicle to take the place of the one damaged.¹³ In *Chesapeake and Ohio Railway Company v. Elk Refining Company*¹⁴ the United States Court of Appeals, applying West Virginia law, held that the cost of renting another vehicle is a proper element of damages and that "recovery therefor must be allowed if plaintiff is to be made whole."¹⁵ The West Virginia court has recognized that recovery for the amount necessary to replace the damaged vehicle while being repaired is a proper element of damages.¹⁶ Another standard sometimes used to calculate the loss of use is the *loss of profits* (where the amount of such profits can be made reasonably certain) caused by the fact that plaintiff could not use his vehicle during the reasonable period of repair.¹⁷ Some courts have allowed evidence of loss of profits

⁸ 137 W. Va. 733, 73 S.E.2d 793 (1952).

⁹ *Id.* at 751, 73 S.E.2d at 803.

¹⁰ *McMicken v. Province*, 141 W. Va. 273, 282, 90 S.E.2d 348, 354 (1955).

¹¹ *Plyar v. Jones*, 207 Ala. 372, 373, 92 So. 445, 446 (1922); *Pelican Trucking Co. v. Rossetti*, 170 So. 2d 573 (Miss. 1965); *Moore v. Metropolitan Ry.*, 82 N.Y.S. 778, 780 (App. Div. 1903); *Rock Island & Gulf Refining Co. v. Zumwalt*, 239 S.W. 912, 915 (Tex. Com. App. 1922).

¹² *Glass v. Miller*, 44 Ohio L. Abs. 278, 282, 51 N.E.2d 299, 301 (1940).

¹³ *Plyar v. Jones*, 207 Ala. 372, 373, 92 So. 445, 446 (1922); *Pelican Trucking Co. v. Rossetti*, 170 So. 2d 573, 574 (Miss. 1965).

¹⁴ 186 F.2d 30 (4th Cir. 1950).

¹⁵ *Id.* at 32.

¹⁶ *See Somerville v. Delloso*, 133 W. Va. 435, 445, 56 S.E.2d 756, 763 (1949).

¹⁷ *Koren v. George*, 159 Pa. Super. 182, 185, 48 A.2d 139, 140 (1946); *see Caso v. Haboni*, 55 Cal. App. 601, 602, 203 P. 1025 (1921).

to be shown only where it is proved that an adequate substitute for the damaged property could not be obtained.¹⁸

Another element of recovery for commercial vehicles is the *cost of removing* the vehicle from the scene of the accident.¹⁹ *Storage*, for a reasonable time, while waiting on a decision whether or not to repair a damaged vehicle has also been held to be compensable.²⁰ An additional component damages which has been allowed in order to make the injured party whole is the *interest* on the amount of loss from the date of the injury to the trial. This applies where the damages are reasonably ascertainable at the time of the accident.²¹ In *Chesapeake and Ohio Railway Company v. Elk Refining Company*²² the court discussed all the pertinent West Virginia cases and held that in a commercial vehicle case "[t]he great weight of authority is to the effect that full compensation for damage to or destruction of property requires that, even in the case of unliquidated demands, account be taken of the period that has elapsed between the damage and the award and that allowance be made for *interest*."²³

The second aspect of this problem is the recovery of additional elements of damages for pleasure vehicles. It has been recognized that recovery may be allowed for the *loss of use* of a pleasure vehicle where it can be shown that the vehicle was needed to go to and from work,²⁴ or that money was spent to rent a substitute for the damaged automobile.²⁵ Other cases go much further by allowing recovery for the loss of use of a pleasure vehicle without requiring

¹⁸ *Hanson v. Hall*, 202 Minn. 381, 388, 279 N.W. 227, 231 (1938); *Cincinnati Traction Co. v. Feldkamp*, 19 Ohio App. 421, 423 (1924).

¹⁹ *Universal Carloading & Distrib. Co. v. McCall*, 107 Ind. App. 479, 481, 25 N.E.2d 253, 254 (1940); *Interurban Transp. Co. v. Strauss & Sons*, 196 So. 367, 370 (La. Ct. App. 1940).

²⁰ *Adam v. English*, 21 So. 2d 633, 638 (La. Ct. App. 1945); *Moore v. Metropolitan St. Ry.*, 82 N.Y.S. 778, 780 (App. Div. 1903).

²¹ *Chesapeake & O. Ry. v. Elk Refining Co.*, 186 F.2d 30, 33-34 (4th Cir. 1950); *Hill Grocery Co. v. Caldwell*, 211 Ala. 34, 35, 99 So. 354, 355 (1924); *Hawkins v. Garford Trucking Co.*, 96 Conn. 337, 340, 114 A. 341, 342 (1921); *Mayflower Investment Co. v. Stephens*, 345 S.W.2d 786, 795 (Tex. Civ. App. 1960).

²² 186 F.2d 30 (4th Cir. 1950).

²³ *Id.* at 33 (emphasis added).

²⁴ *Longo v. Monast*, 70 R.I. 460, 465, 40 A.2d 433, 435 (1944).

²⁵ *Hansen v. Costello*, 125 Conn. 386, 389, 5 A.2d 880, 881 (1939).

any special qualifications.²⁶ The *Restatement of Torts*²⁷ supports the position that damages are recoverable for loss of use where a chattel has been partially destroyed.

While the cases found dealing with recovery for *removal* and *storage* involved commercial vehicles,²⁸ their holdings were not predicated on this fact and there is no reason why removal and storage should not be recoverable in the proper circumstances, when the damage is to a pleasure vehicle. *Interest* from the date of injury is another element of damages which should apply equally as well to pleasure vehicles. In *Chesapeake and Ohio Railway v. Elk Refining Company*,²⁹ the decision to include interest as an element of recovery was not based on the fact that a commercial vehicle was involved, but on the fact that in order to make the injured party whole, interest must be a proper element of damages.

In ascertaining the proper method of recovery for damages to personal property, it is necessary to look at the particular circumstances of each case to ascertain which elements of damages apply. Since the object of compensatory damages is to compensate the injured party fully for the injury, there should be included in the measure of damages more than just the actual physical damage to the property involved. The elements of recovery when commercial or pleasure vehicles have been damaged include the difference between the fair market value immediately before and after the injury, the loss of use, cost of removal and storage, and interest on the amount of loss from the date of the accident. When a commercial vehicle is involved the loss of profits may be an additional element of damages. Although the West Virginia case law does not clearly define these elements of damages, the background has been set whereby they can be recognized in the proper circumstances.

Richard Edwin Rowe

²⁶ McCoy v. Fleming, 153 Kan. 780, 783, 113 P.2d 1074, 1077 (1941); Pittari v. Madison Ave. Coach Co., 68 N.Y.S.2d 741, 742 (Misc. 1947); Oklahoma City v. Wilcoxson, 173 Okla. 433, 436, 48 P.2d 1039, 1042 (1935); Newman v. Brown 228 S.C. 472, 480, 90 S.E.2d 649, 653 (1955).

²⁷ RESTATEMENT OF TORTS § 928 (1939). "Where a person is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for . . . (b) loss of use." In neither the Restatement nor the comments thereto is there any differentiation noted between commercial and private chattels.

²⁸ Cases cited notes 19 & 20 *supra*.

²⁹ 186 F.2d 30, 33-34, (4th Cir. 1950).