Washington University Law Review

Volume 5 | Issue 1

January 1920

May a Plaintiff, Whose Pleasure Automobile Has Been Injured by the Negligence of the Defendant Recover, As a Measure of Damages, for the Use of the Car During the Time that It Is in the Garage for Repair?

MAY A PLAINTIFF, WHOSE PLEASURE AUTOMOBILE HAS BEEN INJURED BY THE NEGLIGENCE OF THE DEFENDANT RECOVER, AS A MEASURE OF DAMAGES, FOR THE USE OF THE CAR DURING THE TIME THAT IT IS IN THE GARAGE FOR REPAIR?

The text writers[1] seem to incline to the view that there is a right of recovery in such a case.

The New York decisions seem to give the most difficulty along this line so I will now review some of them. Thus in Floey[2] v. the Forty-second St., Manhattanville & St. Nicholas Ry. Co.,[3] the suit was for an injury to an automobile where there was no evidence to show that plaintiff used his automobile for any *business* purpose whatever, and no evidence to show that he hired any other vehicle to take its place. The court remarked, "The inference from the evidence is that he used it for his pleasure and recreation." The verdict of the jury included an item of $150.00 damage for the loss of the use of the car, based upon expert testimony as to the value of the use of an automobile like the plaintiff's. The court reversed this finding upon the ground that such damage was highly speculative and therefore not recoverable. Also in Bondy v. N. Y. City Ry. Co.[3] where evidence as to the rental value of such a car was admitted at the trial, the court, citing the Foley case, supra, reversed the judgment. In this case Erlanger, J., said, "That the use of an automobile may, upon being shown to have been used for the purposes of *business* or as a source of *profit,* have a marketable value, or a value capable of being estimated without indulging in mere conjecture, is undoubted, but *nothing of the kind was proved* in the case at bar."

These two New York decisions, however, seem to have been modiged to a great extent by the remarks of Judge Bischoff in the subsequent case of Murphy v. N. Y. City Ry. Co.[4] Here the court held that evidence of the rental value of an automobile during the period while the machine was being repaired was inadmissible where the plaintiff neither used nor had need of one. In this case Judge Bischoff

1. Babbitt on, "the law applied to motor vehicles." 2nd Ed. Sec. 1745 P. 1104. Berry on Automobiles. 2nd Ed. Sec. 551.
2. 52 Misc. (N. Y.) 183.
3. 56 Misc. (N. Y.) 602.
4. 58 Misc. (N. Y.) 237.

said: "For the purpose of the new trial, it may be noted that the plaintiff, if deprived of the usable value of his automobile for a time, *through the defendant's negligence,* would be entitled to compensation for the loss, notwithstanding that he did not actually procure another automobile by hire during the interval, and although the use of the thing injured may have been *for pleasure wholly and not for profit.*" He then cites the Bondy case, supra, and says that proof would have to be given upon the question whether the automobile had a *usable value* and what the value was.

Thus in New York it would seem that damages have been disallowed because they were speculative, or not capable of being proved with any degree of certainty. In other words, even in New York, the difficulty seems to be in the proof required to sustain a verdict for such damage while recognizing the right to recover it, provided the amount can be fairly ascertained.

The cases in other states seem to be rather harmonious in recognizing the right. Thus in Latham v. Cleveland, Cincinnati, Chicago and St. L. Ry. Co.,[5] which was a case of negligent injury to an automobile, the court says at P. 563, "When personal property has been injured by the negligence of another and can be repaired the proper measure of damages is the cost of the repairs and the value of the loss of the use *of it while it is being repaired.* If the property cannot be repaired then the measure of damages is the difference between the market value of the property before the injury and the value of the wreckage."

Gilwee v. Pabst Brewing Co.[6] was a similar case. The lower court gave an instruction to the effect that if they found for the plaintiff they might allow him the difference between the reasonable market value of the car just before the accident and immediately thereafter, also all reasonable expenses incurred by plaintiff in a reasonable effort to preserve or *restore* the property injured.

On appeal this was held to be reversible error as allowing double damages, but the court at P. 489 said, "Plaintiff if he had asked for it in his instructions, was also entitled to damages for the loss of use, if any, of the car, for a reasonable period of time until the car could have been repaired."

Cook v. Packard Motor Car. Co.[7] was an appeal by plaintiff from a judgment of the city court of Hartford directing a verdict in his favor for nominal damages only, in an action brought to recover dam-

5. 164 Ill. App. 559.
6. 195 Mo. App. 487.
7. 88 Conn. 590 L. R. A. 1915 C. 319.

ages for the loss of the use of his automobile due to the negligence of the defendant, and to recover wages paid to his chauffeur during the time. Judgment set aside. In support of its decision the court said, "On this appeal the question arises on an exception to the exclusion of evidence of the rental value of the plaintiff's car, on the ground that the plaintiff used and intended to use his car for *pleasure only*, and not for rent or profit. Stated more generally, the question is whether the right to recover substantial damages for being deprived of the use and possession of a chattel as a result of a tortious injury to the chattel itself depends on the character of the use which the owner intended to make of it, during the period of detention. We fail to see why the character of the intended use should determine the right to a recovery, although it will, of course, affect the amount of recoverable damages."

Here follows a paragraph in which the court discusses the relation between the rental value and the recoverable damages and then continues: "On the other hand, it is equally clear that such considerations as these affect only the amount of compensatory damages which ought to be awarded in this case, and do not touch the underlying question whether the plaintiff is entitled to compensatory damages so far as they can be ascertained. We think there can be no doubt on this point. An automobile owner who expects to use his car for pleasure only has the same legal right to its continued use and possession as an owner who expects to rent his car for profit; and the legal basis for a substantial recovery, in case of a deprivation of the use of the car, is the same in one case as in the other."

Perkins v. Brown,[8] also, was a case of negligent injury to a pleasure car. The whole question was concerning the measure of damages. The trial judge instructed the jury that the plaintiff was entitled to recover the *rental value* of an automobile similar to the one injured during the period of detention and loss of use. This was held to be error on appeal and the *rental value* was held not to be the true measure of damage for the loss of use, but that the plaintiff was entitled to recover for the loss of the usable value.

The writer is unable to see why damages may be recovered for the loss of use of a business car and may not be recovered when the car is one which the family uses for pleasure or social calls. The car has a usable value in either case to which the plaintiff is entitled, and for the loss of which he should be compensated. I am led to this conclusion by the further fact that every pleasure car is also poten-

8. 132 Tenn. 294; L. R. A. 1915 F. 723.

tially a business car. The plaintiff may go to the station in it when starting upon a business trip, or ride in it to the office, or may use it in any number of business ways.

I have dealt with this subject for the purpose of showing that, according to the decisions, a right of recovery exists in such a case; and have not attempted to give a rule whereby the exact damage may be measured. Even those states, which have expressly recognized the right to recover, have given us no rule to guide the jury in assessing the damage. The New York court in the cases cited above did not allow a recovery upon the ground that the damages were speculative; and it is true that they may be hard to measure. However, courts have recognized the right to recover, and will in the future, no doubt, fix upon some workable rule for ascertaining the amount of the damage.

P. F. P.