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LOSS OF USE DAMAGES FOR INJURIES TO INTERESTS IN COMMERCIAL CHATTELS

I. Introduction

When a chattel used for either commercial\(^1\) or noncommercial\(^2\) purposes is damaged\(^3\) or destroyed\(^4\) by a defendant’s wrongful conduct,\(^5\) a frequently litigated issue has been the appropriate measure of damages\(^6\) for the period of time that the owner has been deprived of the use of his chattel.\(^7\)

The issue arises most frequently when a negligent driver damages

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1. See infra notes 210-35 and accompanying text.
2. See infra notes 229-48 and accompanying text.
3. See infra notes 212, 221-25 and accompanying text.
4. See infra notes 188-206 and accompanying text.
5. These tortious injuries include: negligent damage to the chattel, see Rogers v. Nelson, 97 N.H. 72, 80 A.2d 391 (1951); destruction of the chattel, see Stevens v. Mid-Continent Invs., Inc., 257 Ark. 439, 517 S.W.2d 208 (1974); conversion, see Brown v. Southwestern R.R., 36 Ga. 377 (1867); wrongful detention, see Buckley v. Buckley, 12 Nev. 423 (1877); breach of contract, see Northern Petrochemical Co. v. Thorsen & Thorshov, Inc., 297 Minn. 118, 211 (N.W.2d 159 (1973); breach of warranty, see Salmon Rivers Sportsman Camps, Inc. v. Cessna Air Co., 97 Idaho 348, 544 P.2d 306 (1975), as well as any other tort that deprives the owner of the property’s beneficial use.
or destroys a chattel, such as the plaintiff’s motor vehicle, in an accident. Assuming, for the purposes of this Note, that the driver was solely responsible, the issue is what damages may the plaintiff recover? It is universally accepted that he is entitled to compensation for the physical damage to his vehicle, but awarding this amount alone fails to take into account that the vehicle cannot be repaired or replaced immediately. Thus, in addition to the cost of repair, most courts award the plaintiff compensation for this period of lost use. Although seemingly a simple enough proposition, courts have struggled with measuring the value of the lost use, and have as yet failed to adopt a wholly satisfactory resolution. The problem is exacerbated in cases dealing with more complex chattels such as a commercial aircraft, cargo shipping containers, or a private pleasure yacht. The problems increase in these cases because of the absence of a readily obtainable replacement chattel or market by which the value of use can be measured, as it could be on the car rental market.

The traditional rule at common law allowed the owner of the damaged property to recover only the difference between the market value immediately before the damage occurred and immediately after. Eventually, courts began to award owners interest on the pre-accident market value of the chattel as an additional element of damages.

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8. A chattel is defined as “an article of movable property as distinguished from real property: furniture, automobiles, livestock, etc. are chattels.” WEBSTER’S NEW WORLD DICTIONARY 127 (concise ed. 1969).
9. See infra note 184.
10. See infra notes 325-32.
11. See id.
12. Brownstein, What's The Use? A Doctrinal and Policy Critique of the Measurement of Loss of Use Damages, 37 RUTGERS L. REV. 433 (1985) [hereinafter Brownstein]. The author suggests that although courts have come to award loss of use damages routinely, the rationale for these awards is neither consistent nor wholly coherent as a body of law. See id.
15. See, e.g., Snavely v. Lang, 592 F.2d 296 (6th Cir. 1979).
16. See infra note 222.
17. The traditional common law rule is discussed in Part II of this Note. See infra notes 51-57 and accompanying text.
18. See infra note 51.
Gradually, courts in most jurisdictions relaxed the traditional rule and offered loss of use as an alternative to simple diminution in value plus interest: first, for damaged commercial chattels; then for damaged non-commercial, or pleasure, chattels; and finally for total destruction of commercial and pleasure chattels. Although the primary emphasis of this Note will be placed on loss of use of commercial chattels, reference will necessarily be made to non-commercial chattels to delineate the different policy considerations applicable to the recovery of damages in each situation.

In the broadest sense, courts award loss of use damages to compensate the plaintiff for the defendant’s wrongful interference with the plaintiff's right to use or enjoy his property as he chooses. Although some courts remain reluctant to award damages for an injury so esoteric as the “right to use,” the modern trend is clearly toward allowing recovery for loss of use whenever a tortious act deprives an owner of the use of his chattel.

Within New York, no uniform rule of law definitively establishes allowed as of right from the time when compensation ought to have been made (generally the time of the wrong), if the values destroyed are ascertainable with reference to known market prices. Interest as damages is sometimes awarded for the loss of use of land or chattels where the plaintiff has been wrongfully deprived of the use of his property for a period but not permanently. Here interest on the value of the property for the period of deprivation may be given as a substitute for an attempt to measure the rental value or the value of the use of the property.

Id. at 220-21.

20. See Annotation, Recovery for Loss of Use of Motor Vehicle Damaged or Destroyed, 18 A.L.R.3d 497, 519 (1968), for jurisdictions that follow the modern trend discussed more extensively in Part III.

21. Loss of use has been defined as follows: “[t]he value of the use during the period of detention or prevention or the value of the use of or the amount paid for a substitute . . . .” RESTATEMENT (SECOND) OF TORTS § 931 (1977).

22. See infra notes 212, 221-25 and accompanying text for a discussion of partial destruction of a chattel, and notes 187-205 and accompanying text for a discussion of loss of use of commercial chattels.

23. See infra notes 229-50 and accompanying text.

24. See infra notes 186-206 and accompanying text for a discussion of the distinction drawn between loss of use of a damaged chattel and a chattel that has been totally destroyed.

25. Id.

26. Id.

27. See, e.g., KLM, 610 F.2d 1052 (2d Cir. 1979).

28. See infra notes 236-37 and accompanying text.

29. See id.

if, and when, courts should award loss of use damages. In the absence of guidance from the Court of Appeals, the lower New York courts have been required to analyze and apply the doctrinal and policy considerations that underlie the award or denial of loss of use damages. Two distinct interpretive rules have emerged. The Third Department has refused to award such damages, at least when no substitute chattel has actually been rented. In direct contrast to this rule, and on indistinguishable facts, the Second Department has allowed recovery for loss of use regardless of whether or not a substitute was actually obtained.

These cases involved damage to a commercial vehicle when the plaintiff had a substitute on hand to replace the vehicle he had lost. Different considerations may, of course, arise when no substitute was on hand and a certain period of time had elapsed before the owner was able to obtain a substitute. In addition, loss of use damages are more difficult to measure when the chattel lost was used merely for pleasure, and not in some commercial venture.

This Note will examine the evolution of the loss of use doctrine from its early common law days to the present and suggest the adoption of a universal rule for New York courts in cases involving loss of use of a commercial chattel. Part II of this Note reviews the traditional common law rule that denied recovery of loss of use, and the reasons for refusing such recovery. Part III traces


31. See supra note 20.
32. In Mountain View I, the New York State Court of Appeals declined to review the Third Department's refusal to grant loss of use damages. 47 N.Y.2d 710, 393 N.E.2d 1050, 419 N.Y.S.2d 1026 (1979). "Denial of leave to appeal by the Court of Appeals is, of course, without precedential value." Mountain View III, 102 A.D.2d 663, 665, 476 N.Y.S.2d 918, 920 (2d Dep't 1984).
33. See infra notes 251-319 and accompanying text.
34. See infra notes 63-116 and accompanying text.
35. See Mountain View III, 102 A.D.2d 663, 476 N.Y.S.2d 918 (2d Dep't 1984).
37. See supra note 30.
38. See supra note 36.
39. See supra note 35.
40. See infra notes 51-57 and accompanying text.
41. See infra notes 58-116 and accompanying text.
the modern trend, examining: (1) the socioeconomic policy considerations that underlie the denial of recovery; (2) admiralty law and its influence on the development of the loss of use doctrine; (3) the total destruction-partial destruction paradox; and (4) the commercial-pleasure distinction. A survey of the various methods courts commonly use to measure the amount of damages will also be undertaken. Part IV sets out to establish what proof is required to justify an award for loss of use. Part V examines the development of the loss of use doctrine in New York. Finally, Part VI of this Note concludes that courts should not deny a plaintiff recovery of loss of use damages when he is wrongfully deprived of the use of a commercial chattel, simply because he had used a substitute he owned for just such an emergency to replace the damaged chattel, instead of a replacement rented on the open market.

II. The Traditional Rule

Prior to the modern development of the loss of use doctrine, an owner of a damaged or destroyed chattel was not entitled to recover damages for the loss of its use. The owner’s recovery was limited to the difference between the market value immediately before and after the injury. If the chattel was amenable to repair, the owner

42. See infra notes 58-319 and accompanying text.
43. See infra notes 61-116 and accompanying text.
44. See infra notes 117-24 and accompanying text.
45. See infra notes 185-206 and accompanying text.
46. See infra notes 207-50 and accompanying text.
47. See infra notes 251-319 and accompanying text.
48. See infra notes 320-54 and accompanying text.
49. See infra notes 355-417 and accompanying text.
50. See infra notes 418-25 and accompanying text.
51. See, e.g., Madison-Smith Cadillac Co. v. Wallace, 181 Ark. 715, 717-18, 27 S.W.2d 524, 525 (1930) (measure of damages is difference between value before and after collision); Morgan Millwork Co. v. Dover Garage Co., 30 Del. 383, 386, 108 A. 62, 64 (Super. Ct. 1919) (difference in value before and after, no loss of use allowed); Moll & Reiners v. Bark "George," & G.B. Post & Co., 1 Haw. 270, 271 (1856) (damages owner entitled to recover limited to interest on value of vessel at beginning of wrongful detention plus compensation for any depreciation in value during such detention); McLaughlin v. City of Bangor, 58 Me. 398, 400 (1870) (recovery limited to cost of repair); Fredenburgh v. Allied Van Lines, Inc., 79 N.M. 593, 596, 446 P.2d 868, 871 (1968); Baker v. Drake, 53 N.Y. 211, 217 (1873) (award of damages for loss of use contrary to rule that plaintiff has no right to be placed in better position than had wrong not occurred); Averett v. Shircliff, 218 Va. 202, 207, 237 S.E.2d 92, 95-96 (1977) (measure of damages is difference in value before and after accident or reasonable cost of restoring property to its pre-accident condition).
52. See Kane v. Carper-Dover Mercantile Co., 206 Ark. 674, 680, 177 S.W.2d
was entitled to the cost of repair and, if the chattel could not be fully restored to its pre-accident condition, any diminution in its value after repair. Several courts that have followed the traditional rule have added the further limitation that if the chattel can be restored to its pre-accident condition and the cost of repair would be less than the diminution in market value, the amount recoverable is the cost of repair.

Courts justified this restrictive damage formula on the theory that an award of loss of use, in addition to diminution in market value, would place the plaintiff in a better position than he would have been in had the wrong never occurred at all. Furthermore, it was felt that loss of use damages were of such "uncertain a character," as to make accurate valuation of such loss impossible. One court justified the denial of loss of use for a damaged automobile on the ground that the car had no usable value while it was being repaired. This rationale conveniently ignored the fact that it was defendant's tortious conduct that rendered the chattel useless in the first place.

III. The Modern Trend

The premise of the traditional common law rule was that when a plaintiff recovered the cost of repairing a damaged chattel, the diminution in market value or the full value of a destroyed chattel, he had been fully compensated. This Section will set forth the rationales advanced to support the traditional rule in early loss of use cases and then examine admiralty decisions involving loss of

41, 43 (1944) (measure of damages is difference in value before and after; does not include loss of use as element of damages); Morgan Millwork Co. v. Dover Garage Co., 30 Del. 383, 388, 108 A. 62, 64 (Super. Ct. 1919) (same); Fredenburgh v. Allied Van Lines, Inc., 79 N.M. 593, 596, 446 P.2d 868, 871 (1968) (either difference in market value or cost of repair); Averett v. Shircliff, 218 Va. 202, 207, 237 S.E.2d 92, 95-96 (1977) (same); Purington v. Newton, 114 Vt. 490, 494, 49 A.2d 98, 100 (1946) (difference in market value immediately before and immediately after accident); Adkins v. Hinton, 149 W. Va. 613, 621, 142 S.E.2d 889, 895 (1965) (measure of damages for lost or destroyed chattel is fair market value thereof at time of loss or destruction).

56. McLaughlin, 58 Me. at 400.
57. See Madison-Smith Cadillac Co. v. Wallace, 181 Ark. 715, 716, 27 S.W.2d 524, 525 (1930) (measure of damages is difference in value before and after collision).
58. See McLaughlin, 58 Me. at 400.
59. See infra notes 61-116 and accompanying text.
use, which greatly influenced the general development of the loss of use doctrine. 60

A. Socioeconomic Policy Considerations

Various socioeconomic policy considerations were advanced at early common law to deny or limit recovery of loss of use damages. 61 Some courts have continued to rely on these antiquated doctrines in refusing or limiting the award of loss of use damages. At least one commentator maintains that, in a modern context, these arguments have become archaic. 62

1. Speculative Nature of Loss of Use Damages

According to one argument, the absence of a basis for reasonably ascertaining the monetary value 63 of the lost use of a chattel justifies the denial of recovery. 64 Allowing recovery would “[open] the courts to imagination and speculation” 65 in determining damages. Under the traditional rule, courts held that this particular element of the damage equation was of such uncertain character that allowing recovery would be “a step in the wrong direction.” 66

Nevertheless, one authority has noted that there is no logical reason to assume that calculating damages will necessarily be overly speculative. 67 For instance, there is nothing speculative about the cost of renting a car for the period during which the owner repairs a damaged vehicle or replaces a destroyed vehicle. 68 In other areas of tort law, computing damages with absolute certainty is not re-

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60. See infra notes 117-206 and accompanying text.
61. See infra notes 63-115 and accompanying text.
63. Hunter v. Quaintance, 69 Colo. 28, 30, 168 P. 918, 920 (1917) (involving loss of use of an automobile used solely for noncommercial purposes).
65. Snavely v. Lang, 592 F.2d 296, 300 (6th Cir. 1979).
66. See, e.g., McLaughlin, 58 Me. at 400, wherein the court stated:
If the article was wholly destroyed, we presume no one would think of claiming damages for loss of the use of it, in addition to its full value. And we see no reason why a different rule should prevail where the loss is only temporary. It will take no longer to supply the loss in one case than the other.

Id.
68. See id.
provided.\textsuperscript{69} Provided that the plaintiff proves the existence of damages\textsuperscript{70} mathematical certitude is not required.\textsuperscript{71} There seems to be no logical reason why this universal damage principle should be inapplicable in the loss of use context. Accordingly, it has been held that notions of fairness and equity will not deprive the plaintiff of his remedy when it is clear that he has suffered damages.\textsuperscript{72} Determination of the amount of the damage award lies within the sound discretion of the trier of fact.\textsuperscript{73} If there is a sufficient quantity of reliable evidence upon which the jury can make a fair and reasonable determination, the objection of uncertainty should not be available.\textsuperscript{74} Accordingly, in the vast majority of situations in which a plaintiff has lost the use of personal property, courts have allowed recovery of damages for the loss of its use.\textsuperscript{75}

\textsuperscript{69} For example, in Cope v. Vermeer Sales & Serv. of Colo., 650 P.2d 1307 (Colo. App. 1982), the plaintiff claimed that the defendant had negligently maintained the plaintiff's truck; which rendered him unable to carry on his business. The court stated: "As a general rule a party is entitled to recover those damages which naturally and probably result from the negligence of another. The principle of making the injured party whole underlies all negligence cases. Difficulty or uncertainty in determining the precise amount does not prevent an award of damages." \textit{Id.} at 1308-09 (citations omitted).

\textsuperscript{70} See Nisbet v. Yelnick, 124 Ill. App. 3d 466, 476, 464 N.E.2d 781, 784-85, (1984); see also notes 326-27 for a discussion of proof of loss of use damages.

\textsuperscript{71} Brown v. Zimbrick Logging, Inc., 541 P.2d 1388, 1391 (Or. 1975). "Exact mathematical calculation of damages is not a prerequisite to recovery. 'It is sufficient if, from the proximate estimate of witnesses, a satisfactory conclusion can be reached . . .'" \textit{Id.} at 1391 (citation omitted).

\textsuperscript{72} Standard Supply Co. v. Carter & Harris, 81 S.C. 181, 62 S.E. 150 (1908). To refuse compensation on the grounds that there is no market rental value by which damages may be definitely ascertained "would be unjust and absurd." \textit{Id.} at 181, 62 S.E. at 151.

\textsuperscript{73} Johnson v. Flammia, 169 Conn. 491, 496, 363 A.2d 1048, 1053 (1975).


\textsuperscript{75} An analogous situation to traditional loss of use cases occurs when an owner suffers the loss of use of agricultural crops. Although, in such a case, plaintiffs are not seeking to recover "lost rental value of the chattel" but the value of a commercial asset. Courts consistently deny an owner recovery for "loss of use" on the grounds that such an award would be speculative. See, e.g., Gila Water Co. v. Gila Land & Cattle Co., 28 Ariz. 531, 238 P. 336 (1925); Jay Clutter Custom Digging v. English, 181 Ind. App. 603, 393 N.E.2d 230 (1979); Nizzi v. Laverty Sprayers, Inc., 259 Iowa 112, 143 N.W.2d 312 (1966). Because of the vagaries which are peculiar to raising crops, \textit{i.e.}, floods, drought, pestilence and the vicissitudes of the marketplace, customary loss of use damages are deemed inappropriate in these cases. Plaintiffs, however, are not left wholly uncompensated. Rather than allowing recovery of the value of the crops, courts award the rental value of the land upon which the plaintiff planted or planned to plant. See Gila, 28 Ariz. at 532, 238 P. at 337; Gregory, 239 Ark. at 418, 389 S.W.2d at 895; \textit{Jay Clutter}, 181 Ind. App. at 606, 393 N.E.2d at 234; Nizzi, 259 Iowa at 115,
2. Pecuniary Loss Required

Other courts, while stopping short of placing a blanket prohibition on loss of use damages, require the injured party to sustain the burden of proving actual pecuniary loss as a prerequisite to recovery. Actual pecuniary loss” in effect means loss in a “commercial sense.” The underpinning of this theory is that the award of such damages would reward, rather than compensate, the injured party, resulting in a windfall to the plaintiff, particularly when the injured party had a spare chattel on hand. The import of this argument is that when a plaintiff recovers damages for the physical injury to his chattel, the award necessarily takes into account the fact that repairs cannot be made immediately. Thus, the argument runs, to award damages for loss of use would result in a double recovery. These courts, relying on the fact that the owner has no right to be placed in a better position than he would have been in had the wrong not occurred at all, therefore refuse to award loss of use damages.

The argument that the plaintiff would be put in a better position if he were awarded loss of use damages while his chattel is undergoing repairs has been criticized as conceptually flawed and unrealistic.

143 N.W.2d at 317. This remedy provides little solace to the farmer who expected large profits on his crop in an area where rental value of land is likely to be moderately low.

76. See, e.g., CTI Int'l, Inc. v. Lloyds Underwriters, 735 F.2d 679 (2d Cir. 1984) (CTI decision is analyzed infra notes 389-95 and accompanying text).

77. The Conqueror, 166 U.S. 110, 133 (1897).

78. See Mountain View I, 99 Misc. 2d 271, 272, 415 N.Y.S.2d 918, 918 (Greene County Ct. 1978) (“Damages are to restore injured parties, not to reward them”); 79. See Young v. Servair, Inc., 33 Mich. App. at 645, 190 N.W.2d at 317. In Young, the court held that a plaintiff is only entitled to the fair rental value of a substitute actually rented, absent proof of an attempt to rent and inability to do so. Allowing recovery for an airplane not actually rented would be a windfall. Id., 190 N.W.2d at 317.

80. Mountain View I, 99 Misc. 2d at 272, 415 N.Y.S.2d at 918. “Plaintiff would not be made whole by recovering loss of use but would be paid for the use of a bus that would otherwise have stood idle. Surely the law requires every citizen to minimize damages and this case is no exception.” Id.

81. Dobbs, supra note 67, § 5.11, at 383.

82. Id.


84. As one commentator has noted:

But, of course, this argument has very little to do with the realities that face a man who must get to work in the morning. And since real and not merely theoretical compensation is the policy of the law, courts today generally permit a loss of use recovery in appropriate cases, in addition, of course, to the depreciation or repair costs of the chattel. Dobbs, supra note 67, § 5.11, at 383.
Adherence to such a standard fails to recognize that ownership of a chattel carries with it the right to use or control the use of that chattel.\textsuperscript{85} When an owner has been deprived of such use, he has lost a valuable interest in the property itself.\textsuperscript{86} Failure to compensate the plaintiff for such loss leaves him with an inadequate remedy.\textsuperscript{87}

Thus, failure to prove pecuniary loss in a commercial sense should not necessarily bar recovery for loss of use damages.\textsuperscript{88} The loss itself should be compensable.\textsuperscript{89} It has been held that such recovery should not be contingent upon whether the owner actually obtains

\textsuperscript{85} See 22 AM. JUR. 2D Damages § 152 (1965); see also Note, Damages: Objective Determination of The Value of The Use of a Chattel, 39 HARV. L. REV. 760 (1926) [hereinafter Value of Use], wherein the author stated:

The theory of compensation for the objective value of the plaintiff's right of use, which is followed by most American authorities, seems to be the sounder. The value of the chattel lies in the value of the rights incident to its ownership. Thus an owner who is deprived of the use of his [chattel] has had taken from him one of such rights, and should recover the objective value of this right. The liability of the wrong-doer results from his putting it out of the power of the owner to use his [chattel] as he sees fit, and the fact that the owner would not actually have used it does not affect the value.

\textit{Id.} at 761; see also KLM, 610 F.2d 1052 (2d Cir. 1979). The court in KLM stated:

The theory behind the allowance of damages for loss of use is that it is not the actual use but the right to use that is compensable . . . . It is no answer then to say to the victim of the tort: since you have failed to prove that you would have made a net profit from use of the damaged property, you may take nothing. For it is the right to use that marks the value.


86. Tobin Constr., 207 Kan. at 531, 485 P.2d at 1281. Ownership of an item of property carries with it the right to use, or to control the use of that item of property. If one is deprived of that use he has lost a valuable item of property—the right to use. \textit{Id.}

87. \[W]here the defendant tortiously injur[es], destroys, or takes an item of property, there has been a loss of one of the valuable rights or interests in property—the right to use the property. Awarding plaintiff only the cost of repair or the decrease in market value fails to recognize that he has lost the use of the property item during the time reasonably needed to repair or replace it.

22 AM. JUR. 2D Damages § 152 (1965).

88. Brooklyn E. Dist. Terminal v. United States, 287 U.S. 170, 175 (1932). This case involved the loss of use of a vessel, and is discussed in greater detail, \textit{infra} notes 125-44 and accompanying text.

89. KLM, 610 F.2d at 1056.
a substitute, because it is the deprivation of enjoyment that alone justifies compensation. The mere fortuitous circumstance that the injured party has had the foresight to have a spare on hand for just such an occasion should not preclude recovery. Awarding the plaintiff only the cost of repair or the decreased value of the chattel fails to compensate the plaintiff during the period of deprivation.

Of course, although this principle appears sound in a philosophical sense, it may, as a practical matter, be difficult to apply. Some rational basis must underlie the determination, in real dollar terms, of the actual pecuniary loss. For example, when a defendant wrongfully detained a plaintiff's construction equipment, one court held that the plaintiff could recover for loss of use of that equipment only if he presented evidence that he was in a position to use it in fact, not merely that he had a "right to its use."


91. See Brooklyn Eastern, 287 U.S. at 176-77 (result same whether spare acquired before event or after); accord Mountain View III, 102 A.D.2d at 665, 476 N.Y.S.2d at 920 (no reason to draw distinction between cases in which substitute is actually hired and those in which plaintiff uses spare); cf. Wheeler v. Chadwell, 343 S.W.2d 825, 827 (Ky. 1961) (loss of use allowed over defendant's objections that plaintiff had spare on hand and no substitute needed). See infra notes 140-44 and accompanying text for a discussion of the "spare boat" doctrine.


94. See id.

95. See Korb v. Schroedel, 93 Wis. 2d 207, 212, 286 N.W.2d 589, 592 (1980). This rule is also stated in texts discussing the remedy of replevin: "The party claiming the use must show that he was in a position to use it, and that he had a right to use it, and would have used it if not interfered with by the unlawful taking." J. COBBEY, THE LAW OF REPLEVIN § 897, at 478 (2d ed. 1900). "This rule, allowing the value of the use . . . only applies in cases where the party claiming the use is in a situation to use it, and has a right to use it, and only applies to cases where the property can be put to use." T. WELLS, THE LAW OF REPLEVIN § 580, at 492-93 (2d ed. 1907) (citation omitted).
3. Insurance and Operational Costs

At least one court has argued that the award of loss of use damages would have a detrimental impact upon both insurance costs and operating expenses of motor vehicles. Courts have relied on the burden these increased costs would pose as a rationale for denying recovery for loss of use damages. Although the escalation of insurance rates and operational costs is a matter of universal concern, denial on these grounds is contrary to basic principles of tort law. Given a choice between a culpable party and an innocent party, the wrongdoer should bear the burden. Furthermore, it is a basic tenet of the law of torts that no injury will be denied compensation.

4. Litigation Expenses

Opponents of loss of use damages have also argued that the time and effort required to arrive at an approximation of loss of use damages unnecessarily increases litigation expenses. In lieu of litigating the loss of use issue, it has been suggested that courts should use the interest on the value of the chattel as the proper measure of damages in loss of use cases. This method has the advantage of being the simplest and least expensive to prove. The interest rate could be based on either an established index or the legal state rate for prejudgment interest. Although the plaintiff would still have to prove the value of the chattel at the time of the injury with reasonable certainty, this approach would avoid the difficult

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96. See Mountain View I, 99 Misc. 2d at 272, 415 N.Y.S.2d at 918.
97. See id.
98. Id.
100. Cope v. Vermeer Sales & Serv. of Colo., 650 P.2d 1307, 1308 (1982). "As a general rule a party is entitled to recover for those damages which naturally and probably result from the negligence of another. The principle of making the injured party whole underlies all negligence cases." Id. (citation omitted).
101. Liljengren Furniture & Lumber Co. v. Mead, 42 Minn. 420, 422, 44 N.W. 306, 307 (1890) (plaintiff may recover for all injuries so long as they are direct, necessary and natural effects of the other’s actions).
102. Knapp v. Styer, 280 F.2d 384 (8th Cir. 1960) (measure of damages is amount which will compensate for all detriment proximately caused thereby, whether it could have been anticipated or not).
103. Brownstein, supra note 12, at 531-34.
104. Id. at 531.
105. Id.
106. Id.
problems of determining: (1) the reasonableness of time to repair or replace;\textsuperscript{107} (2) the extent to which the owner would have used the chattel;\textsuperscript{108} (3) in commercial cases, the estimation of lost profits;\textsuperscript{109} and (4) the question of whether the substitute actually rented was of approximately similar quality and performance.\textsuperscript{110}

Although loss of use damages have been characterized as “abstract,”\textsuperscript{111} courts have, nonetheless, consistently found judicially acceptable means for awarding such damages.\textsuperscript{112} While it is true that the right of use\textsuperscript{113} may be difficult to quantify with precision,\textsuperscript{114} it is equally true that there “would be very few cases where the interest would give the owner a fair or adequate indemnity . . . .”\textsuperscript{115} An owner should not be denied complete compensation\textsuperscript{116} merely for reasons of simplicity and decreased litigation expenses.

B. Admiralty Law\textsuperscript{117}

While it is true that admiralty generally draws its damage remedies from the common law,\textsuperscript{118} state courts reversed this process by turning to early British and American admiralty opinions\textsuperscript{119} to resolve early automobile loss of use cases.\textsuperscript{120} Accordingly, an understanding of the principles underlying those decisions is important to comprehend the current state of the law of loss of use damages.

\begin{footnotes}
\footnotetext[107]{Id. at 532.}
\footnotetext[108]{Id. at 534.}
\footnotetext[109]{Id. at 533.}
\footnotetext[110]{Id. at 532.}
\footnotetext[112]{Id. at 108.}
\footnotetext[113]{See supra note 85.}
\footnotetext[114]{See supra notes 67-74 and accompanying text.}
\footnotetext[115]{Allen v. Fox, 51 N.Y. 562, 566 (1873).}
\footnotetext[116]{Id.}
\footnotetext[117]{See Brownstein, supra note 12, at 483-99; Admiralty Cases, supra note 62, for discussions of loss of use of maritime vessels. The latter article asserts that the refusal to award loss of use damages in admiralty cases is an archaic view and should, accordingly, be discarded. See id. at 313.}
\footnotetext[118]{Admiralty Cases, supra note 62, at 311.}
\footnotetext[119]{Brownstein, supra note 12, at 483. See, e.g., The Umbria, 166 U.S. 404 (1897); The Potomac, 105 U.S. 630 (1882); The Baltimore, 75 U.S. 377 (1869); The Redwood, 81 F.2d 680 (9th Cir. 1936); The Hamilton, 95 F. 844 (E.D.N.Y. 1899); The Mediana, 1900 A.C. 113; The Greta Holme, 1897 A.C. 596; The City of Peking, 15 App. Cas. 438 (P.C. 1890); The Black Prince, 167 Eng. Rep. 258 (Adm. 1862).}
\footnotetext[120]{Brownstein, supra note 12, at 496.}
\end{footnotes}
1. *The Conqueror*\(^{121}\)

Admiralty courts have consistently drawn a distinction between vessels used for commercial purposes\(^{122}\) and those used strictly for pleasure\(^{123}\) when awarding loss of use damages. They usually deny recovery in the latter case.\(^{124}\)

The seminal case in the area of loss of use of a pleasure craft is the Supreme Court decision in *The Conqueror*.\(^{125}\) In *The Conqueror*, a steam yacht was illegally detained.\(^{126}\) In denying loss of use damages, the Court noted that the mere fact that the vessel was tortiously detained did not alone entitle the owner to demurrage.\(^{127}\) Loss of use damages were justified only when the owner incurred some pecuniary loss, not simply inconvenience as a result of his inability to use the vessel for purposes of pleasure.\(^{128}\) Rather, there must be loss of use in a commercial sense\(^{129}\) to justify recovery. Applying this standard to a yacht used exclusively for recreational

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\(^{121}\) *The Conqueror*, 166 U.S. 110 (1897).


\(^{123}\) See, e.g., Snavely v. Lang, 592 F.2d 296, 300 (6th Cir. 1979); Oppen v. Aetna Ins. Co., 485 F.2d 252, 257 (9th Cir. 1973); Thomson v. United States, 266 F.2d 852, 856 (4th Cir. 1959). These cases all held that loss of use is not a proper element of damages for pleasure crafts. *But see* Finkel v. Challenger Marine Corp., 316 F. Supp. 549 (S.D. Fla. 1970); The Vanadis, 250 F. 1010 (S.D.N.Y. 1918).

\(^{124}\) In *Oppen*, the court stated, "Under federal maritime law loss of use of a private pleasure boat is not a compensable item of damages." 485 F.2d at 257 (citing *The Conqueror*, 166 U.S. 110 (1897)). The court disagreed with the plaintiff's contention that the doctrine of *The Conqueror* prohibiting recovery of loss of use damages for pleasure vessels was limited by the holding in *Brooklyn Eastern*. *Id.* at 257. The court noted that the *Brooklyn Eastern* Court's criticism of *The Conqueror* holding was merely dictum: "In our view it takes a new and contrary holding of the Supreme Court before we are relieved of our obligation to follow previous holdings of that Court." 485 F.2d at 257 n.12. In *Finkel*, however, the court stated:

Earlier cases seem to hold that the owner of a private pleasure yacht is not entitled to recover for loss of use of the vessel when it is detained due to the wrongful act of another party [citing *The Conqueror*]. The more modern view, however, seems to be that a private pleasure yacht falls in the same category as any other repairable chattel, such as an automobile, even though no substitute vessel is chartered to take its place during the period of detention [citing *Brooklyn Eastern*].

316 F. Supp. at 555.

\(^{125}\) *The Conqueror*, 166 U.S. 110 (1897).

\(^{126}\) 166 U.S. at 111.

\(^{127}\) *Id.* at 133. Demurrage is an action for "the loss of profits or of the use of a vessel pending repairs or other detention, arising from a collision, or other maritime tort ...." *Id.* at 125.

\(^{128}\) *Id.* at 133.

\(^{129}\) *Id.*
purposes, courts must deny loss of use damages, since such a loss does not justify "substantial compensation." Despite dictum in a subsequent Supreme Court decision disapproving of the holding in *The Conqueror*, the Court has yet to overrule that decision and federal courts must still afford it precedential value for loss of use cases in a maritime context. More recent decisions, however, have indicated that a refusal to grant loss of use damages for non-commercial chattels is a deteriorating doctrine. This deterioration has occurred even in recent decisions applying the "iron-clad" rule of *The Conqueror*. One such decision was *Snavely v. Lang*. In *Snavely*, the court was careful to point out that it did not decide whether such damages would never be appropriate. *The Conqueror*, however, is still considered the seminal case on this point, at least insofar as pleasure vessels are concerned.

2. *Brooklyn Eastern District Terminal v. United States*

A subsequent Supreme Court decision seemed to have alleviated

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130. *Snavely*, 592 F.2d at 300.
131. *Id.* "[A]n award of damage[s] for such a loss opens the courts to imagination and speculation in evaluation of damages . . . which render too 'highly speculative and immeasurable' an award for demurrage in the case of a vessel used purely for recreation." *Id.* (quoting Thomson v. United States, 266 F.2d 852, 856 (4th Cir. 1959)).
132. *Id.* at 299. "The loss of one summer season of occasional yachting certainly is an inconvenience, but cannot be considered a deprivation sufficient to justify a substantial award of damages." *Id.* at 299.
134. *The Conqueror* has been interpreted as creating an iron clad rule that under federal maritime law demurrage is not an allowable item of damage for loss of use of a private pleasure craft. . . . [Even in light of *Brooklyn Eastern Terminal*] the court is constrained to view *The Conqueror* as retaining its full vitality.
135. *Id.* at 299.
136. See infra notes 207-29 and accompanying text.
137. *Snavely v. Lang*, 592 F.2d at 298.
138. 166 U.S. 110 (1897).
139. *Snavely*, 592 F.2d at 296.
140. *Id.* at 300. In a caveat to its opinion the court stated, "[t]he Court does not herein decide whether pecuniary loss is an absolute requirement for recovery of demurrage. The facts of this case, showing loss of intermittent use of a vessel utilized solely for pleasure, certainly do not justify such an award." *Id.*
141. 166 U.S. 110 (1897).
142. See *supra* note 135 and accompanying text.
143. 287 U.S. 170 (1932).
144. *Id.*
145. 166 U.S. 110 (1897).
some of the strictures *The Conqueror* had placed on recovery for loss of use of a pleasure vessel.\(^{145}\) In *Brooklyn Eastern District Terminal v. United States*,\(^ {146}\) the owner of three tugboats lost the use of one of his boats in a collision.\(^ {147}\) Rather than replacing the boat, however, the owner avoided lost work time by using his other vessels overtime.\(^ {148}\) Although the Court denied recovery because the owner had suffered no "real" damages,\(^ {149}\) it noted that courts could allow recovery for loss of use of a commercial vessel regardless of whether the plaintiff had incurred the cost of acquiring a replacement,\(^ {150}\) as long as the damages were actual and the measurement of damages was based in reality.\(^ {151}\) The Court recognized that the fair market value of hiring a substitute was a proper "element of damages resulting from a collision, whether such substitute was actually procured or not, where a vessel has been employed in a business of such a nature that for the avoidance of loss there is need to employ a substitute."\(^ {152}\) The Court also implied that it was relaxing the prohibitive standards that *The Conqueror*\(^ {153}\) had imposed in cases involving pleasure vessels. The Court stated that courts may award loss of use damages even if the vessel were a yacht employed solely for pleasure, when a substantial impairment of the enjoyment of the vessel had occurred.\(^ {154}\) This finding by the Court would seem to resolve the issue in favor of recovery of loss of use for a pleasure vessel. Nevertheless, the Court declined to overrule *The Conqueror* explicitly.\(^ {155}\)

As a result, a conflict\(^ {156}\) as well as uncertainty remains today,

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\(^{145}\) 287 U.S. 170 (1932).
\(^{146}\) Id. at 173.
\(^{147}\) Id.
\(^{148}\) Id. at 174.
\(^{149}\) Id. at 175.
\(^{150}\) Id. at 175-76.
\(^{151}\) Annotation, *Cost of Hire of Substitute During Period Disabled Vessel Was Out of Service as an Element of Damages Recoverable for Collision*, 77 L. Ed. 244, 249 (1932).
\(^{152}\) 166 U.S. 110 (1897).
\(^{153}\) 287 U.S. at 175.
\(^{155}\) In reaching its decision in *Brooklyn Eastern*, the Court noted that its decision might be in conflict with *The Conqueror*, but it was not necessary to resolve that conflict in reaching its decision in the instant case. 287 U.S. at 175. The Court stated: "There are statements in *The Conqueror* that may be in conflict with [this] view, [allowing loss of use damages for pleasure vessels] but they . . . are unquestionably in opposition to a strong current of authority." Id. The Court interpreted *The Conqueror* as holding only that there could be no recovery for the loss of use of a pleasure vessel if such recovery was based on imaginary rental. Id.
\(^{155}\) The *Snavely* court followed *The Conqueror* rather than *Brooklyn Eastern*
over which standard the courts should apply: the standard of *The Conqueror* or that of *Brooklyn Eastern*. Commentators have criticized the *Brooklyn Eastern* decision for its failure to overrule *The Conqueror* explicitly. This criticism is well deserved in that the *Brooklyn Eastern* Court noted that the holding of *The Conqueror* was in conflict with the strong current of authority. Nevertheless, *The Conqueror* still mandates refusal of loss of use damages for a pleasure vessel.

3. The Spare-Boat Doctrine

The "spare-boat" doctrine arises in cases in which an owner of vessels keeps a substitute vessel available specifically to meet the contingency of an accident that damages one of his vessels. In such a case, the courts are willing to consider the value of the use of the damaged vessel as an element of loss of use damages. It seems anomolous that the owner who had not been so prepared would be allowed to recover loss of use but a diligent owner would be left without an equivalent remedy. The Court noted that it should make no difference that the owner obtained the substitute before the injury rather than after. The applicability of the doctrine is limited, however, to situations in which the owner maintains the "spare" solely for emergencies, and not to substitutes that are used in the general operations of the business.

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in reaching its decision. "While appreciative of the reasoning in *Brooklyn Eastern District Terminal*, . . . the Court is constrained to view *The Conqueror* as retaining its full vitality." 592 F.2d at 299. Though the Snavely court's opinion was faithful to the holding of *The Conqueror* it ignored the explicit disapproval in *Brooklyn Eastern* of the inflexible refusal of loss of use damages for pleasure vessels. *Id.* at 298-99.

157. See *id.* (court attempts to weigh merits of two views).

158. See MCCORMICK, *supra* note 19, § 124, at 475 (1935); see also Value of Use, *supra* note 19, at 760-62.

159. See *supra* note 155.

160. See Snavely v. Lang, 592 F.2d 296 (6th Cir. 1979).

161. 287 U.S. at 176-77. The doctrine of the "spare boat" applies as follows: Ship owners at times maintain an extra or spare boat which is kept in reserve for the purpose of being utilized as a substitute in the contingency of damage to other vessels of the fleet . . . [I]n such conditions the value of the use of a boat thus specially reserved may be part of the demurrage.

*Id.*

162. *Id.*

163. *Id.* at 177. "If no such boat had been maintained, another might have been hired, and the hire charged as an expense." *Id.*

164. *Id.*

165. *Id.*
4. Totally Destroyed Vessels

Although admiralty law served as the impetus for the early development of the loss of use doctrine, in cases involving total destruction of the chattel admiralty law has lagged behind most state courts. The rationale of these admiralty decisions sheds light on why state courts initially denied recovery for loss of use damages in non-admiralty cases involving totally destroyed chattels.

Courts traditionally advanced four reasons as justification for denial of loss of use damages when a vessel was totally destroyed. First, such damages were deemed to be speculative. Second, such vessels were, allegedly, easily replaced. Third, recovery of full value plus interest was seen as full compensation, and loss of use would thus be a windfall. Finally, denial of loss of use damages was thought to encourage mitigation of damages.

166. See supra note 119.
167. See infra notes 184-209 and accompanying text.
169. In The Amiable Nancy, 16 U.S. 546 (1818), the Court reasoned as follows:

The probable or possible benefits of a voyage . . . can never afford a safe rule by which to estimate damages in cases of a marine trespass. There is so much uncertainty in the rule itself, so many contingencies which may vary or extinguish its application, and so many difficulties in sustaining its legal correctness, that the court cannot believe it proper to entertain it. Id. at 560.

170. In The Hamilton, 95 F. 844 (E.D.N.Y. 1899), the court stated, “the market abounds in ships awaiting purchase, so that . . . the [plaintiffs] may at once substitute a new ship for the one lost.” Id. at 845. While this may have been the case in 1899, it is unrealistic in modern society. To replace a vessel, particularly a large commercial one, requires a tremendous amount of capital and, most likely, a good deal of time. Delay problems may be further exacerbated by the time required for insurance claims to be investigated and the proceeds forwarded, without which it would be economically unfeasible for the owner to replace the destroyed vessel. It seems inequitable that the owner should have to bear this entire burden.


172. For example, in The Umbria, 166 U.S. 404 (1897), the Court stated:

In cases of partial loss there is no injustice in allowing the probable profits of a charter for the short time during which the vessel is laid up for repairs, but in cases of a total loss the recovery of such profits is limited to the voyage which the vessel is then performing, since, if the owner were entitled to recover the profits of a future voyage or charter, there would seem to be no limit to such right so far as respects the time of its continuance; and if the vessel were under a charter which had months or years to run, the allowance of the probable profits of such charter might work a great practical injustice to the owner of the vessel causing the injury.
Today, however, admiralty law may finally be willing to award loss of use damages for a totally destroyed vessel\textsuperscript{173} in appropriate circumstances.\textsuperscript{174} In \textit{Barger v. Hanson}, the owner's fishing vessel was completely destroyed in a collision with the defendant's vessel.\textsuperscript{175} The court allowed recovery for one month's lost use,\textsuperscript{176} contrary to traditional admiralty law. The court emphasized that it would not reach the question of whether loss of use was a proper element of damages for destroyed vessels.\textsuperscript{177} After asserting several justifications, however, the court in fact allowed recovery for the lost use.\textsuperscript{178} The court justified its result by noting that: (1) the parties had stipulated to the amount of damages and thus had avoided speculation problems; (2) the vessel was not easily replaced; (3) no interest was awarded, so that the double recovery problem would not arise; and (4) the plaintiff had made diligent efforts to replace the vessel in an attempt to mitigate damages.\textsuperscript{179}

The guidelines set up by the \textit{Barger} court present a possibly viable alternative to the Court's absolute refusal under the traditional rule to award loss of use damages whenever a vessel is totally destroyed. Commentators have argued that the \textit{Barger} decision is the proper application of the loss of use doctrine for a destroyed vessel.\textsuperscript{180} The primary advantage of the analysis lies in the fact that the plaintiff receives full compensation and the defendant is liable for only those injuries proximately caused by his actions.\textsuperscript{181} Nevertheless, most admiralty cases continue to follow the old rule,\textsuperscript{182} and still deny recovery for loss of use when a vessel has been destroyed.

\textit{Id.} at 422. This reasoning has been criticized for "presuppos[ing] that the injured party is not required to make diligent efforts to replace or rent a substitute for his lost vessel." \textit{Admiralty Cases}, supra note 62, at 315.

\textsuperscript{173} \textit{See} \textit{Admiralty Cases}, supra note 62, at 323-28.

\textsuperscript{174} \textit{Barger v. Hanson}, 426 F.2d 640, 642-43 (9th Cir. 1970).

\textsuperscript{175} \textit{Id.} at 642.

\textsuperscript{176} \textit{Id.}

\textsuperscript{177} \textit{Id.}

\textsuperscript{178} \textit{Id.} at 643.

\textsuperscript{179} \textit{Id.} at 642-43.

\textsuperscript{180} \textit{See} \textit{Admiralty Cases}, supra note 62, at 325.

\textsuperscript{181} \textit{Id.}

\textsuperscript{182} \textit{See}, e.g., \textit{King Fisher Marine Serv. v. The NP Sunbonnet}, 724 F.2d 1181, 1185 (5th Cir. 1984) (replacement cost awarded); \textit{A&S Transp. Co. v. The Tug Fajardo}, 688 F.2d 1, 2-3 (1st Cir. 1982) (measure of damages for totally destroyed vessel is value at time of loss plus interest, loss of use not allowable); \textit{Alkmeon Naviera S.A. v. M/V Marina L.}, 633 F.2d 789, 797-98 (9th Cir. 1980) (present market value awarded); \textit{O'Brien Bros. v. The Helen B. Moran}, 160 F.2d 502, 506 (2nd Cir. 1947) (no loss of use awarded for totally destroyed vessel); \textit{The President Madison}, 91 F.2d 835, 845-46 (9th Cir. 1937) (value is measure of damages in case of total loss); \textit{The Redwood}, 81 F.2d 680, 685-86 (9th Cir. 1936) (same).
C. The Total Destruction-Partial Destruction Paradox

The concerns expressed in admiralty cases that denied recovery for a totally destroyed vessel\(^{183}\) carried over into early common law cases which similarly denied recovery for a totally destroyed chattel.\(^{184}\) Some jurisdictions continue to adhere to this antiquated doctrine.\(^{185}\)

\(^{183}\) See supra notes 117-81 and accompanying text.

\(^{184}\) See, e.g., Fort Pitt Gas Co. v. Evansville Contract Co., 123 F. 63 (3d Cir. 1903) (measure of damages for negligent destruction of boat is its value, and owner is not entitled in addition to recover value of its use during such time as would be required to rebuild it); Hunt v. Ward, 262 Ala. 379, 385, 79 So. 2d 20, 26 (1955) (if owner of damaged truck abandons it and buys another for his own use, he has thereby mitigated his damages and may only recover amount of depreciation in value of damaged truck); Fuller v. Martin, 41 Ala. App. 160, 164, 125 So. 2d 4, 8 (1960) (recovery cannot be had for both total loss of automobile and loss of use of same vehicle); Morgan Millwork Co. v. Dover Garage Co., 30 Del. 383, 388, 108 A. 62, 64 (1919) (recovery cannot be had for both total loss of automobile and loss of use of same vehicle); Skaggs Drug Centers v. Idaho Falls, 90 Idaho 1, 10, 407 P.2d 695, 699 (1965) (value of chattel at time and place of destruction); Kohl v. Arp, 236 Iowa 31, 33, 17 N.W.2d 824, 826 (1945) (in case of total destruction, measure of damages is reasonable market value of automobile before its destruction, damages for loss of use are not allowed); Goutierrez v. Travelers Ins. Co., 107 So. 2d 847, 852 (La. Ct. App. 1959) (no recovery allowed for loss of use damages when vehicle has been totally destroyed); McLaughlin v. City of Bangor, 58 Me. 398, 400 (1870) ("If the article was wholly destroyed, we presume no one would think of claiming damages for loss of use of it, in addition to its full value."); Weishaar v. Canestrile, 241 Md. 676, 684-85, 217 A.2d 525, 530 (1966) (market value at time and place of destruction); Hansen v. Hall, 202 Minn. 381, 388, 279 N.W. 227, 237 (1938) (income derived from chattel's use at time of tort); Orr v. Williams, 379 S.W.2d 181, 189 (Mo. Ct. App. 1964) (recovery of full value excludes recovery of loss of use of chattel); Neil v. McGinn, 175 Neb. 369, 373, 122 N.E.2d 65, 68 (1963) (difference in reasonable fair market value before and after accident); Baker v. Drake, 53 N.Y. 211, 217 (1873) (same); Foard v. Atlantic & N.E. Ry., 53 N.C. 235, 237 (1860) (interest on fair market value of chattel); Hayes Freight Lines v. Tarver, 148 Ohio St. 82, 83, 73 N.E.2d 192, 193 (1947) (one who recovers full value of motor vehicle completely destroyed by negligence of another, may not also recover for loss of use of vehicle); Glass v. Miller, 51 N.E.2d 299, 301 (1940) (same); Magnolia Petroleum Co. v. Harrell, 66 F. Supp. 559, 561 (W.D. Okla. 1946) (applying Oklahoma law) (recovery limited to value of property); Cogbill v. Martin, 308 S.W.2d 269, 271 (Tex. Ct. App. 1957) (when chattel is totally destroyed, proper measure of damages is difference in market value immediately before and after injury, and no additional recovery can be had for loss of use of chattel while it is being replaced); Purington v. Newton, 114 Vt. 490, 494, 49 A.2d 98, 100 (1946) (difference in market value before and after); Averett v. Shoreliff, 218 Va. 202, 204, 237 S.E.2d 92, 95-96 (1977) (same); McCurdy v. Union Pacific R.R., 68 Wash. 2d 457, 469, 413 P.2d 617, 624 (1966) (if car is totally destroyed plaintiff cannot recover for loss of use because in recovering full value of chattel, owner has been made whole); Spencer v. Steinbruch, 152 W. Va. 490, 497, 164 S.E.2d 710 (1968) (market value of chattel at time of destruction); Wilcox v. Herbert, 75 Wyo. 289, 300, 295 P.2d 755, 760 (1956) (same).

\(^{185}\) The proposition exists in Alabama, see Fuller v. Martin, 41 Ala. App. 160, 166, 125 So. 2d 4, 7 (1960); Illinois, see Cunningham v. Crane Co., 255 Ill. App.
Courts denied loss of use for the totally destroyed chattel for reasons analogous to those relied on in admiralty law. First, courts were of the opinion that when the owner received the full market value of the chattel as of the date of its destruction, he had been made whole. Second, they presumed that the owner had the ability to enter the market place and purchase a replacement. Third, most courts adhered to the view that such damages were too speculative to make reasonably accurate awards. Finally, courts advanced the theory that once the chattel was destroyed, the owner no longer had any valuable interest in the property. Thus a distinction was drawn between the repairable and the irreparable chattel, a distinction analogous to those relied on in admiralty law.

373, 374 (1930); Missouri, see Orr v. Williams, 379 S.W.2d 181, 189 (Mo. Ct. App. 1964); Nebraska, see Neil v. McGinn, 175 Neb. 369, 373, 122 N.W.2d 65, 68 (1963); Ohio, see Hayes Freight Lines v. Tarver, 148 Ohio St. 82, 83, 73 N.E.2d 192, 193 (1947) (compare Tri-State v. Geupel, No. 84B-337, slip op. at 4 (Ohio Ct. App. Aug. 15, 1985) (wherein Ohio's continued adherence to the total/partial distinction was criticized by Ohio Court of Appeals)); Texas, see Cogbill v. Martin, 308 S.W.2d 269, 271 (Tex. Civ. App. 1957); Washington, see McCurdy v. Union Pacific R.R., 63 Wash. 457, 467, 413 P.2d 617, 623 (1966).

186. See infra notes 107-82 and accompanying text.

187. See, e.g., Hayes Freight Lines v. Tarver, 148 Ohio St. 82, 83, 73 N.E.2d 192, 193 (1947) (damages for rental value in addition to cost of repair would place plaintiff in better position than before the injury); Kintner v. Claverack Rural Elec. Coop. Inc., 329 Pa. Super. 417, 424, 478 A.2d 858, 861 (1984) ("rule denying recovery [for total destruction] seems to be based on the idea that the plaintiff has been made whole upon receiving the full market value of the property as of the date of destruction and has the presumed ability to enter the marketplace and purchase a replacement").

188. See Kintner, 329 Pa. Super. at 424, 478 A.2d at 861 (citing Allanson v. Cummings, 81 A.D.2d 16, 18-19, 439 N.Y.S.2d 545, 547 (4th Dep't 1981)).


190. Madison-Smith Cadillac Co. v. Wallace, 181 Ark. 715, 717, 27 S.W.2d 524, 525 (1930) (car had no usable value when being repaired; therefore, correct measure of damages was difference in value before and after accident), overruled, Sharp v. Great Southern Coaches, Inc., 256 Ark. 773, 510 S.W.2d 266 (1974).

In Fort Pitt Gas Co. v. Evansville Contract Co., 123 F. 63 (3d Cir. 1903), the court reasoned as follows: the award of loss of use damages for the total destruction of a chattel would amount to the "award of two-fold compensation for the same loss. The right to use [the chattel] was incident to its ownership, and therefore compensation for its destruction, which of course extinguished the ownership, would necessarily be compensative of the consequent deprivation of its use." Id. at 64 (emphasis added).

191. In Johnson v. Scott, 258 Iowa 1267, 142 N.W.2d 460 (1966), the court set out three accepted methods for the determination of damages to a motor vehicle:

1. When the automobile is totally destroyed, the measure of damages is its reasonable market value immediately before its destruction.
tinction that is difficult to explain.\textsuperscript{192} Commentators have hypothesized that the distinction is an anachronistic carryover from the common law action of trover\textsuperscript{193} and have criticized it as a doctrine no longer in harmony with modern principles of jurisprudence.\textsuperscript{194}

Accordingly, the modern trend has been toward eliminating this archaic distinction.\textsuperscript{195} The approach of the majority of modern

\begin{itemize}
\item \textbf{2.} Where the injury to the car can be repaired, so that, when repaired, it will be in as good condition as it was before the injury, then the measure of damages is the reasonable cost of repair plus the reasonable value of use of the car while being repaired with ordinary diligence not exceeding the value of the car before the injury.
\item \textbf{3.} When the car cannot by repair be placed in as good condition as it was in before the injury, then the measure of damages is the difference between its reasonable market value immediately before, and immediately after the accident.
\end{itemize}

\textit{Id.} at 1270, 142 N.W.2d at 462 (citation omitted). The distinctions drawn by the court seem highly arbitrary. For example, even if one supports the proposition that an award of loss of use damages should be denied when the chattel has been totally destroyed, it seems anomalous to award such damages for a vehicle which can be returned to its pre-accident condition and deny recovery for a car which cannot be restored to as good condition as before the accident. To adhere to this view affords the more seriously injured plaintiff an inferior remedy than is available to his less seriously injured counterpart.

\textsuperscript{192} 22 \textsc{Am. Jur. Damages} § 153 (1965).
\textsuperscript{193} Allanson v. Cummings, 81 A.D.2d 16, 18-20, 439 N.Y.S.2d 545, 546-47 (4th Dep't 1981). In an action for trover, the owner abandons his property and pursues the value of the property in lieu thereof. The measure of damages is the value at the time of conversion and interest thereon until the time of trial, and "it would have to be a very special case that would authorize greater damages."

\textsuperscript{194} Allen v. Fox, 51 N.Y. at 563 (1873).

\textsuperscript{195} See, e.g., Knapp v. Styer, 280 F.2d 384, 390 (8th Cir. 1960) (plaintiff may recover for loss of use for time necessarily consumed in repairing damage caused by collision, or if any part of unit was beyond repair, for time necessarily required to obtain adequate replacement); Chesapeake & Ohio Ry. v. Elk Refining Co., 186 F.2d 30, 32-33 (4th Cir. 1950) (rental value reasonably and necessarily paid for use of other property to take place of that which has been damaged, until it can be repaired or replaced, constitutes fair measure of damages); Guido v. Hudson Transit Lines, 178 F.2d 740, 743 (3d Cir. 1950) (when personal property is taken or injured special damages necessarily and proximately attendant upon such loss
cases\textsuperscript{196} in which a chattel is completely destroyed may be stated as follows. The plaintiff must first prove that despite his good faith efforts, he was unable to acquire a replacement vehicle within a reasonable period of time.\textsuperscript{197} Upon such proof, the plaintiff may then recover damages for the loss of use of the destroyed chattel,\textsuperscript{198} which is usually the reasonable rental value of a substitute during

\textsuperscript{196} See id.

\textsuperscript{197} See Allanson, 81 A.D.2d at 21, 439 N.Y.S.2d at 546.

\textsuperscript{198} See id.
the time reasonably necessary to obtain a replacement, had one been available.\(^{199}\)

This approach necessarily raises the question of what is a "reasonable" time for replacement? Is the owner required to make the effort or should it be sufficient for the owner to prove how long it would have taken to replace the chattel had the good faith effort been made? Perhaps a reasonable time span would be the time period necessary to replace the chattel had the owner made good faith efforts to replace, provided that the owner suffered pecuniary loss from the deprivation. If in fact the owner makes a good faith effort, however, the time necessary to replace the chattel should be \textit{prima facie} evidence of reasonableness and the owner should be entitled to recover for the time reasonably necessary to determine that the chattel could not be repaired and then to replace the chattel.

There is no practical reason for allowing recovery when loss of use of the chattel is temporary but denying recovery when the damage is permanent.\(^{200}\) It makes little sense to recognize loss of use as an element of damages on one hand, and then, on the other hand, deny recovery simply because the chattel has been destroyed.\(^{201}\) Loss of use is a loss different in kind from actual physical injury to the property itself.\(^{202}\) It is directed at compensating the owner for the

\(^{199}\) See \textit{id.}.


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 we have concluded that when the owner of a negligently destroyed commercial vehicle has suffered injury by being deprived of the use of the vehicle during the period required for replacement, he is entitled, upon proper pleading and proof, to recover for loss of use in order to "compensate for all the detriment proximately caused" by the wrongful destruction. \textit{Id.} at 50, 345 P.2d at 927 (citation omitted in original). \textit{Accord} Gamble v. Smith, 386 A.2d 692, 695 (D.C. 1978); New York Cent. R.R. v. Churchill, 140 Ind. App. 426, 430, 218 N.E.2d 372, 376 (1966); Nashban Barrel & Container Co. v. G.G. Parsons Trucking Co., 49 Wis. 2d 591, 600, 182 N.W.2d 448, 452 (1971).


We fail to see any valid reason for the distinction between repairable or irreparable damage which would justify loss of use for the former and not the latter. In what manner can we justify the recognition of loss of use as a property right incidental to ownership in one instance and not the other? Have not both property owners lost the same thing, i.e., the use of such property? To hold to the contrary would be to effectuate a legal principle without a valid reason.

\textit{Id.} at 430, 218 N.E.2d at 376.

economic loss he has suffered because of the loss of his property. Thus, limiting the owner’s recovery to actual physical damage leaves him without adequate compensation. Furthermore, since the cost of repairs or replacement of the chattel may not exceed the pre-accident value of the chattel, courts should not aggregate the amount of loss of use damages with the amount awarded for physical injuries in deciding the ceiling on damages, when the owner has reasonably undertaken to repair the chattel.

The rationale of the modern trend seems more in harmony with accepted principles of compensation and equity, and is accordingly the more appropriate measure of damages.

D. **The Commercial-Pleasure Distinction**

Some courts have also drawn a distinction between the allowance of loss of use damages for commercial vehicles and pleasure vehicles. Traditionally, courts have granted recovery for loss of use of a commercial chattel with greater frequency than recovery for loss of use of a chattel used merely for pleasure.

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203. See id.
205. See McCormick, supra note 19, § 125, at 476-77.

It is stated in numerous opinions that, in case of injury, the recovery for cost of repair and loss of use must not exceed the value of the property at the time it was injured. The greater includes the less, and it seems that ordinarily the damages for injury should not exceed those for destruction. If the repairs have not been made, this rule should hold good as a limit upon any recovery for the anticipated cost of restoration. But, where repairs have been prudently undertaken, under circumstances where repair seems the reasonable course, then, if in fact the cost of repair, including loss of use, exceeds the value of the chattel, there should be no hard and fast rules fixing that value as the maximum recovery.

Id.

206. The paradox presented by the older rule is obvious and, to a certain extent, disturbing. A tortfeasor faced with the prospect of having to pay for repairs to a chattel as well as damages for loss of use, could put himself in a more favorable position by totally destroying the chattel in order to limit his liability. This is a result which the law surely would not hope to encourage. This problem would not arise if the particular jurisdiction limited a plaintiff’s total recovery to the total value of the vehicle.

207. For the purposes of this Note, the definition of a commercial vehicle is any vehicle used primarily for business purposes.

208. A pleasure vehicle may be not only a vehicle used for recreational purposes, but also one used for general, non-business activities. Husebo v. Ambrosia, Ltd., 204 Neb. 499, 500, 283 N.W.2d 45, 47 (1979).

209. See, e.g., Sharp v. Great Southern Coaches, 256 Ark. 773, 774, 510 S.W.2d
It is widely accepted\textsuperscript{210} in American jurisprudence that an owner of a commercial chattel is entitled to recover not only for the necessary repairs\textsuperscript{211} to his damaged chattel, but also for the deprivation of its beneficial use\textsuperscript{212} during the time necessary to make

\textsuperscript{266, 267} (1974) (holding that loss of use of damaged commercial motor vehicle is compensable, and abrogating prior law of Arkansas, which did not allow for recovery of loss of use—but only insofar as commercial vehicles are concerned).


211. \textit{KLM}, 610 F.2d at 1055 (when chattel is damaged, difference in market value before and after injury is recoverable).

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repairs\(^{213}\) or to replace\(^{214}\) the totally destroyed chattel. The rationale behind allowing such recovery is that the owner has suffered not only physical injury\(^{215}\) to his property, but has also been deprived of the means to generate income.\(^{216}\) Under these circumstances, damages are more readily apparent in a pecuniary sense.\(^{217}\) By contrast, loss of a chattel used merely for pleasure does not hinder profit-making operations.\(^{218}\) It is difficult to deny that an owner who has been deprived of an integral item of property necessary to the production of income should be allowed to recover for that loss.\(^{219}\) Therefore, it is almost universally accepted\(^{220}\) that, in addition to recovery for physical damage to the commercial chattel, the owner may recover for its loss of use.

Courts can measure the amount of recovery by the value of the

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213. See supra notes 183-95 and accompanying text for a discussion of chattels that have been damaged but not totally destroyed.

214. See supra notes 195-209 and accompanying text for a discussion of chattels that have been completely destroyed.


217. The Conqueror, 166 U.S. 110, 133 (1897).

218. See supra notes 103-24 and accompanying text for a detailed discussion of The Conqueror, the seminal Supreme Court decision on the loss of use of a pleasure craft. See supra notes 206-24 and accompanying text for a discussion of the loss of use of a non-commercial chattel.

219. See supra note 189.

220. A few jurisdictions apparently do not allow recovery for loss of use of a commercial chattel. See Moll and Reiners v. Bark "George," & G.B. Post & Co., 1 Haw. 270, 272 (1856) (interest on value of vessel wrongfully detained plus compensation for any diminution in value); McLaughlin v. City of Bangor, 58 Me. 398, 400 (1870) (cost of repairs); Fredenburgh v. Allied Van Lines, Inc., 79 N.M. 593, 596-97, 446 P.2d 868, 871 (1968) (recovery limited to either difference in market value before and after damage, or cost of repairs plus any diminution in value); Averett v. Shircliff, 218 Va. 202, 204, 237 S.E.2d 92, 95-96 (1977) (difference in market value or cost of repair, whichever is less).
use of the chattel,\textsuperscript{221} or the cost of a replacement,\textsuperscript{222} \textit{i.e.}, rental of a substitute. In cases in which rental value is the accepted measure 


of damages, some courts require actual rental of a substitute\textsuperscript{223} to be entitled to recovery. Other courts do not.\textsuperscript{224} A final measure of damages, in appropriate circumstances, is lost profits\textsuperscript{225} as a result

Credit Ass'n v. Nowatzski, 90 Wis. 2d 344, 356, 280 N.W.2d 118, 124 (1979); FHA v. Redland, 695 P.2d 1031, 1038 (Wyo. 1985).

\textsuperscript{223} See, e.g., Wheeler v. Chadwell, 343 S.W.2d 825, 827 (Ky. 1961) (plaintiff awarded cost of substitute over defendant's objection that plaintiff had spare and substitute not needed); Borey v. Manno, 19 La. App. 270, 272, 140 So. 109, 111 (1932) (plaintiff needed truck in business and actually hired another while his was unavailable, plaintiff entitled to recover cost of substitute); Antokol v. Barber, 248 Mass. 393, 396, 143 N.E. 350, 352 (1924) (plaintiff entitled to cost of hiring replacement in open market); Young v. Servair, Inc., 33 Mich. App. 643, 645, 190 N.W.2d 316, 317 (1971) (good faith effort to replace and inability to do so required before recovery of loss of use will be allowed); Rogers v. Nelson, 97 N.H. 72, 75, 80 A.2d 391, 393 (1951) (cost of other reasonable means of transportation in excess of what plaintiff's vehicle would have cost to run during that period); Norvell & Wallace v. Lester, 14 Tenn. App. 62 (1931) (plaintiff entitled to cost of substitute actually hired).


of the deprivation.226 Except in a distinct minority of jurisdictions,227 the owner of a damaged commercial chattel is entitled to recover one of these measures of loss of use in excess of the interest on the value of the chattel.228

Courts have applied the theories advanced for denying recovery for the loss of use of a pleasure craft in admiralty law229 to non-admiralty cases involving automobiles used exclusively for non-commercial purposes.230 These courts reason that for loss of use damages to be awarded, they must be reasonably ascertainable.231 This theory has led some courts to deny loss of use damages for pleasure vehicles under any circumstances,232 because the pecuniary loss is not as readily apparent as in the commercial context. Other courts, while employing a more restrictive standard233 than that used for com-

226. The measure of damages is discussed in greater detail, infra notes 251-309 and accompanying text.
227. See supra note 220.
228. See supra notes 221-25.
229. See supra notes 121-42 and accompanying text.
commercial vehicles, have not gone so far, choosing instead to allow recovery for loss of use damages only when the owner has shown particular circumstances indicative of pecuniary loss.

Despite the stubborn adherence of some jurisdictions to refusing loss of use for pleasure vehicles, the trend in this area is toward expansion of recovery. The compelling rationale behind these de-

suffered); DiGiovanni v. April, 261 So. 2d 360 (La. Ct. App. 1972) (plaintiff did not rent substitute; therefore, no recovery).

234. See supra note 233.

235. See supra notes 230-35 and accompanying text.

236. See id.


cisions is that one is entitled to use his property for any legal purpose, for pleasure as well as for business. The arguments advanced for denying recovery for lost use of a pleasure vehicle were addressed by the court in Hannah v. Brown. The court in Brown stated that:

In this day a personal automobile is no longer a mere luxury but is a necessity for the comfort, entertainment, and personal business and enterprise of every person, especially a family. It would be an anachronism to say its deprivation of use during the reasonable time for repair is not a compensable loss in addition to the loss of its market value after wrongful damage.

According to the Brown court, when the owner is deprived of such use, he should be allowed to recover loss of use damages irrespective of whether the property is used for pleasure or for business. An award of loss of use damages for a pleasure vehicle is appropriately reduced by the amount of operating costs saved, but not necessarily in a case in which a commercial vehicle is involved. The reason

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243. Anderson v. Rexroad, 180 Kan. 505, 513, 306 P.2d 137, 144 (1957) (value of vehicle's use is not mere value of its intended use but of its present potential use, whether availed of by its owner or not).

244. Rogers v. Nelson, 97 N.H. 72, 75, 80 A.2d 391, 393 (1951) (lost value would be cost of other reasonable substitute means of transportation in excess of what expense of operation of plaintiff's own car would have been).

245. KLM, 610 F.2d at 1057 (although saved operating costs and depreciation are normally deductible from rental value for loss of use of automobile, such costs need not be deducted where commercial vehicle is involved, because any operating
for this distinction is that had the chattel been available for the production of income, revenues generated may have offset depre-
ciation and operating costs. When a court actually awards rental value, the issue of whether revenue would have been earned should be resolved against the plaintiff because of uncertainty.

Some courts have recognized that the right to use one's chattel is a valuable property right in and of itself and allow an owner to recover for the loss of that interest, even when he used the chattel solely for pleasure. The problem, however, of accurately valuating the loss of use of a totally destroyed private pleasure chattel that has no readily available market rental or replacement value may prove insurmountable. For that reason, the only feasible measure of damages may be interest on the pre-accident fair market value of the chattel prior to deprivation. This method has the advantage of providing a readily ascertainable damage figure while avoiding a denial to the plaintiff of justly deserved compensation.

E. The Measure of Damages

The allowance of loss of use damages leads, inevitably, to the question of how to measure the reasonable value of the use of the damaged chattel while it is being repaired or replaced. At least four different measures for loss of use exist, these measures are not necessarily mutually exclusive.

The first formula addresses the cost, either actual or potential, of renting a substitute. The second formula, commonly referred

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246. Id.
247. Id.
248. See Harris v. Keller, 170 N.E.2d 305, 307 (Ohio 1960), wherein the court stated:

The owner of an automobile has an investment in it and has a right to its use. . . . If it is not used in the production of income, his right to its use is no less. If he is forced to expend additional funds to provide like transportation, should he be penalized merely because it is not a productive use?

Id. at 47, 170 N.E.2d at 307.
249. Brownstein, supra note 12, at 541.
250. Id.
to as the "value of use," is a more subjective measure, which depends upon the particular use to which the owner put the chattel. The third formula, "lost profits," is peculiar to commercial chattels. The fourth formula is simply the interest on the fair market value of the chattel during the period of deprivation.

1. Cost of a Substitute or Rental Value

Some courts have taken a very broad view on the allowance of rental value as loss of use damages. When a chattel is damaged, courts permit the injured party to recover not only the difference in value before and after the injury, but also the rental value of the chattel. The courts permit recovery of the rental value regardless of whether or not a substitute has actually been hired. When the owner does not actually obtain a substitute, the correct measure of

254. See Dobbs, supra note 67, at 387; accord Brandon v. Capital Transit Co., 71 A.2d 621 (D.C. 1950); Mahanna v. Westland Oil Co., 107 N.W.2d 353 (N.D. 1960); Holmes v. Raffo, 60 Wash. 2d 421, 374 P.2d 536 (1962); see also supra note 221.

255. Mahanna, 107 N.W.2d at 359 ("measure of damages is the value of the loss of use to the person wrongfully deprived of the property . . . not the earning capacity of the property in the abstract").


257. See Dobbs, supra note 67, at 387-88; accord Foard v. Atlantic & N.C.R. Co., 53 N.C. 235 (1860); see supra note 204. As a general rule, this measure of damages is no longer favored and has long been criticized as inadequate:

There would be very few cases where the interest would give the owner a fair or adequate indemnity, and thus two of the fundamental rules of damages would be violated. The owner would not be completely or fully indemnified for the loss of use of his property, and the wrong-doer who had had the use of it would make a profit out of his own wrong, which the law does not tolerate.

Allen v. Fox, 51 N.Y. 562, 566 (1873). In a recently published article, however, the author stated that interest is preferable to the other generally accepted measures for loss of use where no substitute has actually been obtained. See Brownstein, supra note 12, at 531-34.

258. See, e.g., KLM, 610 F.2d 1052, 1056 (2d Cir. 1979); Longworth v. McGrath, 108 Conn. 738, 739, 143 A. 845, 846 (1928); Naughton Mulgrew Motor Car Co. v. Westchester Fish Co., 105 Misc. 595, 597-98, 173 N.Y.S. 437, 438 (1st Dep't 1918) ("correct rule would be to allow the rental value of the car, irrespective of whether another car had actually been hired to take the temporary place of the car damaged and undergoing repairs").

259. KLM, 610 F.2d at 1055 ("This difference may be measured by the cost of repairs").

260. Id. at 1055; see supra note 222.

261. Id. at 1055-56; see also supra notes 223-24.
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Damages is the amount that does not exceed the fair rental value of a vehicle of a like or similar nature and performance for a reasonable length of time, while the owner repairs the damaged chattel with due diligence. If the owner hires a substitute, the correct measure is the amount actually paid. The court should not necessarily deny the owner the cost of the substitute simply because the rental value of the damaged vehicle is less than the cost of the substitute. For example, when a vehicle used for commercial delivery, or by an individual commuter, is damaged, a substitute must be obtained to avoid lost income. In such a case, awarding only the reasonable rental value of the damaged vehicle fails to take into account the additional expense incurred by the plaintiff attributable to the defendant’s negligence.

Other courts, while allowing recovery of loss of use even when no substitute has been hired, make such recovery conditional on the plaintiff’s reasonable efforts to replace the damaged chattel. Attempts that prove unsuccessful, through no fault of the plaintiff, do not preclude recovery. Alternatively, recovery may be limited to the cost of a substitute means of transportation only in excess of what the expense of operating the plaintiff’s own vehicle would have been, but for the defendant’s interference. Finally, when the plaintiff has failed to rent a substitute a court may completely deny recovery.

2. Value of Use

According to "the great weight of authority," the owner of a vehicle that is negligently damaged by another is entitled to recover the reasonable cost of repair together with the value of its use during the period reasonably required to repair it. Furthermore, in de-

262. See Husebo v. Ambrosia, Ltd., 204 Neb. 499, 502, 283 N.W.2d 45, 47 (1979); see also supra note 224.
263. See id.
264. Id.
265. Id.
270. Id. On this point, the Restatement (Second) of Torts is in agreement. See RESTATEMENT (SECOND) OF TORTS § 927 (1977) (for conversion); id. § 928 (for damage to a chattel, provided it is not totally destroyed); id. § 931 (for wrongful detention); see also supra note 198.
terminating the value of use, it is not the earning capacity of the chattel in the abstract that is to be the standard by which damages are measured.271 Rather, it is the value of the loss of use to the particular person wrongfully deprived of the property.272 It is on this measure of loss of use that opponents' arguments on the speculative nature of the damage award are perhaps, most appropriate.273 Because it is the value of the use to the particular owner274 that is deemed the appropriate measure of damages, value of use is necessarily a more subjective measure than actual rental value. Courts have attempted to alleviate this problem by allowing recovery of the value of use only if the chattel has no rental value275 or by directing that rental value is a relevant factor to be considered in determining the value of use.276

Other courts, in an effort to avoid overcompensation or speculative damage awards, have held that the ceiling on awards for total compensation, including lost use, is the pre-accident market value of the chattel.277 The market value limitation is inconsistent with the very notion of loss of use damages. Loss of use damages are separate in kind from physical damages to the property itself.278 Compensation for loss of use is directed at the economic loss suffered by the owner that is due to his inability to use his chattel; thus market value should have no bearing on the recovery of that component of the damage award.279 Accordingly, the better view is that,

272. Id.
273. See supra notes 63-75 and accompanying text.
275. Id.
279. Id.
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in an action for value of the use of a chattel, the plaintiff's compensation should not necessarily be limited to the market value of his chattel, if in fact the damages incurred from the lost use are greater than that amount.\(^{280}\)  

Under the appropriate measure of damages, a court would not aggregate the amount for loss of use for a reasonable time with the cost of repairs in making comparisons with the market for the purpose of deciding the ceiling on damages.\(^{281}\) To hold otherwise would be to confuse the two elements of the damage formula and leave the plaintiff without full compensation.\(^{282}\)  

3. Lost Profits  

Courts use the loss of profits\(^{283}\) measure of damages only in cases involving the loss of a commercial chattel.\(^{284}\) These courts require actual pecuniary loss\(^{285}\) in a commercial sense.\(^{286}\) Thus, the plaintiff must prove the amount\(^{287}\) of lost profits with evidence of sufficient probative value to establish such loss adequately and clearly.\(^{288}\) The plaintiff need not prove such profits exactly,\(^{289}\) but  

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\(^{280}\) See, e.g., Anderson v. Gengras Motors, Inc., 141 Conn. 688, 693, 109 A.2d 502, 504 (1954) (it is even possible that compensation for injury and loss of use may exceed reasonable market value of chattel); Gamble v. Smith, 386 A.2d 692, 694-95 (D.C. 1978) (amount for loss of use should not be aggregated with cost of repairs); Long v. McAllister, 319 N.W.2d 256, 259 (Iowa 1982) (no logical reason for cutting off loss of use damages when total reaches vehicle's market value before injury); Bos v. Dolajak, 167 Mont. 1, 8, 534 P.2d 1258, 1262 (1975) (replacement value allowed even though it exceeded amount originally paid); Paguio v. Evening Journal Ass'n, 127 N.J.L. 144, 145, 21 A.2d 667, 668 (N.J. Sup. Ct. 1941) ($500 loss of use awarded for dancing dog whose cost was $100); Nelson v. Coleman Co., 249 S.C. 652, 659, 155 S.E.2d 917, 921 (1967) (awarding owner only secondhand market value of wearing apparel and household goods held not to be adequate compensation).  

\(^{281}\) See Gamble v. Smith, 386 A.2d 692, 695 (D.C. 1978); see also McCormick, supra note 19, § 55, at 476-77 (value at time of injury as limit of recovery).  

\(^{282}\) See Gamble, 386 A.2d at 695. "[The owner] would not be made whole without recovery for the damages he suffered as a result of being without any vehicle for a period of time reasonably necessary to replace or repair his damaged auto." Id.  

\(^{283}\) See supra note 225.  


\(^{285}\) 22 AM. JUR. 2D Damages § 152 (1965) (as opposed to mere loss of right to use or enjoy use of property).  

\(^{286}\) The Conqueror, 166 U.S. 110, 133 (1897).  

\(^{287}\) Id. at 125.  


\(^{289}\) Williams v. Eckert, 643 P.2d 991, 996 (Alaska 1982) (not necessary to prove lost profits with exactness, if actual loss is shown and there is reasonable basis upon which to compute award); Interpool Ltd. v. Universal Maritime Serv. Corp.,
mere speculation is inadequate. A court will include lost profits as an element of damages when the plaintiff has established them by reliable evidence.

Because of the speculative nature of lost profits, the courts generally disfavor using them as a measure when another adequate measure is available. Consequently, if the owner could have hired a replacement, thus establishing the amount of his damages, courts generally deny recovery of lost profits, on the ground that the plaintiff failed to mitigate damages. Furthermore, when the owner is in the business of renting out the chattel, the court may reduce the loss of use award by the amount saved in overhead or depreciation while the plaintiff is making repairs. When the plaintiff uses the chattel in his own business, however, any saved depreciation and overhead may have been offset by the revenues that were lost because of the deprivation. Thus, in these cases the courts should not reduce the amount saved in overhead or depreciation.

4. Interest During Deprivation

A fourth measure of loss of use damages allows only the cost of repair or replacement and interest on the value of the property while the owner is deprived of its use. Historically, courts usually awarded

1983 A.M.C. 1082, 1083 (N.J. Super. Ct. App. Div. 1982) (lost profits awarded without proof of specific rentals which could have been made, when plaintiff presented proof of 90% utilization rate of its chattel).


293. Id. at 571 (lost profits not favored but allowable if no substitute available); National Dairy Prods. Corp. v. Jumper, 241 Miss. 339, 343-44, 130 So. 2d 922, 923 (1961) (same); Stahl v. Farmer’s Union Oil Co., 145 Mont. 106, 113, 399 P.2d 763, 768 (1965) (if plaintiff could have but did not hire substitute, he is not entitled to lost profits); Somerville v. Dellosa, 133 W. Va. 435, 445, 56 S.E. 2d 756, 763 (1949) (if not possible to get replacement, then earnings of vehicle are relevant on question of damages).

294. See infra notes 310-19 and accompanying text.

295. Oil Screw Noah’s Ark v. Bentley & Felton Corp., 322 F.2d 3, 8-9 (5th Cir. 1963).

296. KLM, 610 F. 2d at 1055-56.

interest in trover cases for conversion of a chattel.\(^{298}\) In an action for trover, the owner of the property abandoned it and pursued the value of the property instead, along with interest on the value of the chattel from the date of the conversion until trial.\(^{299}\) In essence, the view was that the owner had lost title to the property, and had in effect “sold” it to the defendant.\(^{300}\) Thus, interest on the value of the chattel is not really “loss of use,” as that term has come to be known, but loss of its monetary equivalent.\(^{301}\)

This measure of loss of use\(^{302}\) is no longer favored.\(^{303}\) In jurisdictions that allow recovery for loss of use\(^{304}\) (and the great majority does),\(^{305}\) or in jurisdictions that allow the owner to choose between interest and loss of use,\(^{306}\) it would be highly unlikely\(^{307}\) that interest during the period of deprivation\(^{308}\) would compensate the injured

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299. Allen v. Fox, 51 N.Y. 562, 564 (1873).
300. Brownstein, supra note 12, at 438.
301. Id.
302. The Restatement (Second) of Torts states that interest is an appropriate remedy for conversion of a chattel, but is not the sole remedy available to the owner:

Ordinarily there is no recovery for loss of use of a chattel after the point of time at which the plaintiff has fixed the loss, since in the measure of damages is included interest on the subject matter as well as damages for losses proximately resulting from the loss of use. On the other hand, as an alternative to interest during the period of detention, the damages can properly include an amount for expenses in procuring a necessary substitute or for the value of the use of a substitute until a replacement of the subject matter can be made.

Restatement (Second) of Torts § 927 comment o (1977).
303. Allen v. Fox, 51 N.Y. 562, 566 (1873). The court posed a hypothetical situation to illustrate the inadequacy of the remedy. If an owner purchased a carriage for $1,000 and a defendant wrongfully detained it for his own use for an entire year, interest on the owner’s $1,000 would hardly be a sufficient allowance for the defendant’s wrongful use for the year. Id.
304. See generally notes 210-50.
305. Id.
306. See Production Credit Ass’n v. Nowatzki, 90 Wis. 2d 344, 356, 280 N.W.2d 118, 124 (1979). The general rule for conversion of a chattel is that the plaintiff may recover the value of the property plus interest from the time of conversion to the time of trial. Nonetheless, “rental value of the property is as appropriate a measure of damages as the interest.” Id.
307. See Allen v. Fox, 51 N.Y. 562, 566 (1873); see supra note 231.
308. In denying plaintiff’s claim for lost profits, the court in Foard v. Atlantic & N.C. Ry., 53 N.C. 235 (1860) expounded on the rationale for limiting recovery
party as fully as one of the alternative measures for loss of use.\footnote{309}

5. Mitigation

As in all areas of tort law,\footnote{310} a plaintiff seeking to recover loss of use damages has a duty to minimize the amount of damages suffered, if possible.\footnote{311} When a plaintiff can repair a chattel, the duty of mitigation requires that the plaintiff exercise ordinary diligence.\footnote{312} If the plaintiff fails to make the repairs within a reasonable time, recovery will nonetheless be limited to that time period in which an ordinarily diligent plaintiff could have repaired the chattel.\footnote{313}

Although the duty is one of positive action, it has its limitations. It requires the plaintiff to take only those steps a reasonably prudent person would take to limit his loss.\footnote{314} This duty does not require the plaintiff to do what is "unreasonable or impracticable."\footnote{315} The duty does not demand that a person take actions that would be a danger to his health,\footnote{316} nor actions that would violate normal sen-
If mitigation would require monetary expenditures on the part of the plaintiff, he should not be denied recovery for failing to do so if he is financially incapable of making those expenditures. If, however, a plaintiff does incur those expenses in a reasonable attempt to minimize damages, those costs are a proper element of damages, even if the attempt was to no avail.

IV. Proof of Damages

A majority of courts today has recognized that a plaintiff is entitled to recover for the loss of use of a chattel for a period of time reasonably necessary to make repairs or find a replacement, while exercising ordinary diligence. The terms "reasonable time" and "ordinary diligence" have been subject to various interpretations. This section will examine the meaning of those terms as well as what elements of proof will be admissible in establishing damages with reasonable certainty.

A. Reasonable Time and Ordinary Diligence

When a court allows recovery for loss of use, the damages that the plaintiff may recover are limited to the period of time for which

319. O'Brien Bros. v. The Helen B. Moran, 160 F.2d 502, 506 (2d Cir. 1947) (expenses incurred in raising a barge in order to ascertain extent of damages are properly recoverable as element of damages).
321. See B1ashfield, Automobile Law and Practice § 429.2 (1977) ("a period of time reasonably necessary for repair") [hereinafter Blashfield]; see also Valencia v. Shell Oil Co., 23 Cal. 2d 840, 844, 147 P.2d 558, 560 (1944) (period of time reasonably required to make repairs); Husebo v. Ambrosia Ltd., 204 Neb. 499, 502, 283 N.W.2d 45, 47 (1979) ("reasonable time of repair is time to ascertain extent of damages").
322. A person seeking to recover for loss of use "is bound, however, to exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts and expenditures on his part." Valencia, 23 Cal. 2d at 844, 147 P.2d at 560.
323. See supra notes 333-40 and accompanying text.
324. Nisbet v. Yelnick, 124 Ill. App. 3d 466, 472, 464 N.E.2d 781, 785 (1984) ("[a]bsolute certainty concerning the amount of damages is not required to justify recovery where existence of the damages is established").
he has been deprived\(^{325}\) of use while restoring\(^{326}\) or replacing\(^{327}\) the Chattel, when the deprivation is a proximate result\(^{328}\) of the defendant's wrongful conduct. Failure to exercise diligence\(^{329}\) in effectuating


\(^{326}\) See supra note 325.

\(^{327}\) Id.

\(^{328}\) Brandon v. Capital Transit Co., 71 A.2d 621, 622 (D.C. 1950) ("recovery for loss of use is limited to the reasonable time the owner is deprived of the use as the proximate and natural result of [defendant's negligence]").

\(^{329}\) See, e.g., Knaus Truck Lines, Inc. v. Commercial Freight Lines, 238 Iowa 1356, 1366-67, 29 N.W.2d 204, 210 (1947); Nolan v. Auto Transp., 226 Kan. 176,
repairs or replacement, for an undue length of time, will either reduce or wholly eliminate the owner's recovery for loss of use.

B. Elements of Proof

One commentator has listed several types of evidence courts should use in determining the objective value of lost use, and has recommended that courts admit only the most probative type of evidence available. First, if the chattel had a market rental value, this figure would be the best evidence of the value of use and all other evidence would be inadmissible. Second, if there is no such market, i.e., there is no standard for measuring damages, a court may receive evidence of former net earnings as bearing on the value of use, provided those earnings were sufficiently regular and constant. Use of net earnings presupposes that credible evidence exists to support the proposition. Finally, in the absence of evidence concerning prior earning capacity, a plaintiff's last resort would be evidence of the interest on the value of the asset during the period of deprivation. This last measure is, in all likelihood, outmoded.

C. Valuation

Loss of use problems arise most frequently when a negligent defendant deprives an owner of the use of a motor vehicle. In


330. Schweitzer, 19 Md. App. at 544, 313 A.2d at 102 (plaintiff made no effort to effect repairs for eleven months following collision and repairs could have been completed by a competent mechanic in eighteen hours).

331. Id.

332. Young, 33 Mich. App. at 645, 190 N.W. 2d at 317 (plaintiff only entitled to recover loss of use for substitute actually rented absent proof of good faith attempt to rent and failure to do so through no fault of plaintiff).

333. Value of Use, supra note 85, at 760.

334. Id. at 762. Other authorities have not gone so far, holding that while market rental value is relevant in determining the amount of loss of use damages, it is not necessarily dispositive. See, e.g., Brandon, 71 A.2d at 622.

335. The obvious problem with this element of proof is that it is applicable only where the chattel had been used for some commercial purpose.

336. See Value of Use, supra note 85, at 762.

337. Id.

338. Urico, 708 F.2d at 856.

339. See Value of Use, supra note 85, at 762.

340. See supra notes 297-309 and accompanying text.

these cases, a readily ascertainable market rental value exists which a plaintiff can use to measure the value of lost use.\textsuperscript{342} The testimony of a representative of an automobile rental agency\textsuperscript{343} or one in the automobile leasing business\textsuperscript{344} is competent evidence to prove actual cost to the plaintiff for renting a vehicle similar to his own during the time required to make repairs.

An owner may thus prove loss of use by evidence of the chattel’s rental value during the period reasonably necessary to complete repairs.\textsuperscript{345} Not all chattels, however, have such a readily ascertainable market rental value.\textsuperscript{346} In such a case, the owner may have more difficulty in proving the extent of his loss.\textsuperscript{347} Although courts have used this concept of “no [reasonable] basis for estimating the damage”\textsuperscript{348} to deny loss of use altogether,\textsuperscript{149} mere difficulty in sustaining the burden of proof\textsuperscript{350} does not justify a \emph{per se} rule denying recovery.\textsuperscript{351}

Circumstances will arise that will make it difficult to formulate a specific rule to guide the trier of fact in arriving at the value of lost use.\textsuperscript{352} When the typical methods of measuring loss of use are difficult to apply because the property in question lacks a readily ascertainable market value, “it may be necessary to formulate a measure of damages that is more uniquely adapted to the plaintiffs’ injury.”\textsuperscript{353} The mere fact that determining the amount of damages

\textsuperscript{342} \textit{Nisbet}, 124 Ill. App. 3d at 471, 464 N.E.2d at 784 (reasonable rental value of similar property for period of deprivation).

\textsuperscript{343} Meakin v. Dreier, 209 So. 2d 252, 253-55 (Fla. 1968).

\textsuperscript{344} Graf v. Don Rasmussen Co., 39 Or. App. 311, 317, 592 P.2d 250, 254 (1979) (testimony of individual in business of leasing automobiles for twenty-three years as to cost of leasing a replacement is competent proof, even though no substitute was in fact rented).

\textsuperscript{345} 11 Blashfield, \textit{supra} note 321, § 492.2.

\textsuperscript{346} See, e.g., Snively v. Lang, 592 F.2d 296 (6th Cir. 1979) (pleasure yacht).

\textsuperscript{347} For this reason some courts have been reluctant to award loss of use damages where the chattel was used merely for pleasure as opposed to a commercial purpose, holding that such damages would be “speculative.” See \textit{supra} notes 122-68 and accompanying text.

\textsuperscript{348} Hunter v. Quaintance, 69 Colo. 28, 30, 168 P. 918, 919 (1917).

\textsuperscript{349} Id.

\textsuperscript{350} See O’Brien Bros. v. The Helen B. Moran, 160 F.2d 502, 504 (2d. Cir. 1947) (“burden is on the owner to prove the amount of his loss”).

\textsuperscript{351} See \textit{supra} notes 199-202 and accompanying text.


\textsuperscript{353} Jarrett v. E.L. Harper & Son, Inc., 160 W. Va. 339, 403-04, 235 S.E.2d 362, 365 (1977). “[A]nnoyance and inconvenience are properly considered as elements in the measure of damages that plaintiffs are entitled to recover, provided that these considerations are measured by an objective standard of ordinary persons acting reasonably under the given conditions.” \textit{Id}.
will be more difficult in some cases than in others should not operate to deprive the plaintiff of his proper compensation, although actual determination of the bottom line damage figure may be fraught with difficulty.  

V. Conflict in New York

At one time, the law of New York prevented an owner of a chattel from recovering for loss of its use unless he actually hired a substitute. The overwhelming majority of case law later rejected this rule in New York, at a time long before the automobile was even invented. The modern rule is applicable whether the owner intended to use the chattel for business or for pleasure. Recovery does not depend upon whether the owner has, in fact, rented a

354. What are the rules of this new process? How should it work out in practice and how do we adjust for abuses by plaintiffs? These are all complex issues which must ultimately be worked out on a case by case basis, developing a new body of law which I hope will make dealings among people far more equitable. 

Id. (Neely, J., concurring). 


356. See, e.g., Nicholas v. J.F. Mellon Constr. Co., 242 A.D. 771, 771, 270 N.Y.S. 516, 517 (2d Dep't 1934) (although denied in this case for lack of proof, plaintiffs are entitled to recover usable value of chattel during period they are wrongfully deprived of it by defendant's actions); Denney v. Pasarella, 230 A.D. 707, 242 N.Y.S. 888 (2d Dep't 1930) (award of loss of use justified by evidence); Rapp v. Mabbett Motor Car Co., 201 A.D. 283, 287, 194 N.Y.S. 200, 203-04 (4th Dep't 1922) (damages are allowable for deprivation of use); Moore v. Metropolitan Street Ry., 84 A.D. 613, 616, 82 N.Y.S. 778, 780 (2d Dep't 1903) (owner of wagon was allowed to recover for time fairly needed to rebuild his wagon—ninety-five days); Smith Motor Car Co. v. Universal Credit Co., 154 Misc. 100, 104, 275 N.Y.S. 538, 543, aff'd, 154 Misc. 105, 275 N.Y.S. 544 (1st Dep't 1934) (measure of damages for wrongful detention of chattel that has usable value is rental value of property during deprivation); Dettmar v. Burns Bros., 111 Misc. 189, 192-93, 181 N.Y.S. 146, 148 (2d Dep't 1920) (familiar rule of damages in actions brought to recover a wrongfully detained chattel is that plaintiff may recover value of chattel for period of detention); Schalscha v. Third Ave. R.R., 19 Misc. 141, 142-43, 43 N.Y.S. 251, 252 (1st Dep't 1897) (general rule for injury to personal property is compensation commensurate with loss which includes cost of repair, loss of use, and difference in value before and after repair). 

357. See Sellari v. Palermo, 188 Misc. 1057, 1058, 70 N.Y.S.2d 554, 556 (Chautauqua County Ct. 1947); accord Allen v. Fox, 51 N.Y. 562 (1873) (allowing recovery for loss of use of horse). 

358. Rapp v. Mabbett Motor Car Co., 201 A.D. 283, 287, 194 N.Y.S. 200, 203-04 (4th Dep't 1922) (although car was pleasure automobile, damages are allowable for deprivation of use of such car as well as of any other chattel); Dettmar v.
substitute. The loss of use of the chattel is as natural a consequence of the defendant's wrongful acts as the physical damage itself. The rule of these cases, long established, is that in New York, when an owner is deprived of the use of personal property he is entitled to recover for loss of use. Despite the seemingly universal acceptance of the rule in the past, however, recent New York decisions suggest that the issue is not so well settled.

A. Koninklijke Luchtvaart Maatschappij, N.V. v. United Technologies Corp.

In Koninklijke Luchtvaart Maatschappij, N.V. (KLM) v. United Technologies Corp. (UTC), the plaintiff brought an action for damage to a leased DC-8 aircraft that, after an engine explosion, was disabled for forty-two days. KLM, in its products liability action, had advanced two damage theories: (1) actual financial loss; and (2) loss of use damages based on the rental value of a substitute aircraft. In deciding whether loss of use was a proper element of damages, the Second Circuit took a liberal view of the standard to be applied. Construing New York law, the court found that an

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Burns Bros., 111 Misc. 189, 194, 181 N.Y.S. 146, 149 (2d Dep't 1920) (damages for loss of use of automobile may be allowed against one who negligently injures it, although owner's intended use is only for pleasure, not for rent or profit). 359. Pittari v. Madison Ave. Coach Co., 188 Misc. 614, 616, 68 N.Y.S.2d 741, 742 (N.Y.C. Civ. Ct. N.Y. County 1947) ("[t]he general rule is that damages for loss of use of an automobile may be allowed against one who negligently injures it... despite the failure of the owner to hire [a replacement]"); Naughton Mulgrew Motor Car Co. v. Westchester Fish Co., 105 Misc. 595, 599, 173 N.Y.S. 437, 439 (1st Dep't 1919) ("[s]urely it would be unjust to compel the owner of [a chattel to hire a replacement] in order to entitle him to claim compensation for the loss of the use of his own car. He might, for example, not be financially able, or have sufficient credit to hire a car."); Murphy v. New York City Ry., 58 Misc. 237, 239, 108 N.Y.S. 1021, 1023 (Sup. Ct. App. T. 1908) (Bischoff, J., concurring) (owner should be entitled to recover for loss of use, "notwithstanding that he did not actually procure another automobile, by hire, during the interval"). 360. Wellman v. Miner, 19 Misc. 644, 647, 44 N.Y.S. 417, 419 (1st Dep't 1897). 361. KLM, 610 F.2d 1052 (2d Cir. 1979). 362. Id. 363. "When the chattel is leased, authority is sparse. Yet the actual rental paid should be no less a measure than a rental that is hypothetical." Id. at 1056. 364. Id. at 1054. 365. It should be noted that federal courts are constrained to apply state law regarding damages: It is an anomaly of federal jurisprudence that in an age of intercontinental air travel we must resort to state law which is historically based upon the loss of use of a horse. Under Erie R.R. v. Tompkins, we must apply a state law of damages when an aircraft is put out of use by the
owner or lessee of a commercial vehicle may recover loss of use damages, in addition to actual physical damages to the property. The court found the appropriate measure of damages to be based on rental value and held that the owner or lessee need not prove that a substitute was required to cover the loss of the damaged chattel. In rejecting the defendant’s argument that *Brooklyn Eastern Terminal* prohibited the recovery of rental value without showing either that the plaintiff hired a substitute or that it suffered financial loss by not hiring a substitute, the court held that the case before it was distinguishable and that *Brooklyn Eastern* was therefore not controlling. The court reasoned that the injured party has the right to use the property, and that this right of use means that ownership of an item of property carries with it the right to use and control it. Therefore, if a defendant tortiously injures, interferes with, destroys or takes a chattel, the plaintiff has suffered negligence or breach of warranty of the manufacturer. . . The principles of law, though scarcely immutable, do tend to survive the advances of technological improvement in their answer to the perennial questions of how damage should be compensated. *KLM*, 610 F.2d at 1055 (citations omitted).

366. See id. at 1055-56.
367. 287 U.S. 170 (1932).
368. See 610 F.2d at 1057.
369. The court distinguished the *KLM* case on the following facts: (1) there was no static number of passengers unlike the situation in *Brooklyn*, see id.; (2) it was uncertain whether KLM was able to make up for the loss of use by carrying as many passengers as before, whereas in *Brooklyn*, the plaintiff lost no passengers because they were able to work two other tugboats overtime, see id.; (3) there was no proof that KLM had worked its remaining aircraft overtime, unlike the plaintiff in *Brooklyn*, see id.; (4) in *Brooklyn* there was a limited number of passengers (car-floats), but in *KLM*, the number of potential passengers was far greater and more cyclical, see id.; (5) the court also relied on the fact that the facts before it in *KLM* were far more complex than those in *Brooklyn*. See id.

It is a relatively simple matter to determine whether two tugboats are able to tow the same number of car-floats as three tugboats. It is far more complex to determine whether an airline was able to carry all of the potential passengers after the loss of one of its aircraft.

*Id.*
370. *Id.*

The theory behind the allowance of damages for loss of use is that it is not the actual use but the right to use that is compensable. This is as true when the damaged property was employed in a commercial enterprise as when it was devoted to use for pleasure. . . . It is no answer then to say to the victim of the tort: since you have failed to prove that you would have made a net profit from use of the damaged property, you may take nothing. For it is the right to use that marks the value. *Id.* at 1056 (emphasis in original).

371. *Id.*
a loss of the use of one of the valuable rights or interests in property—the right to use the property. Thus, a court that awards the plaintiff only the cost of repair or the decrease in market value fails to recognize that the defendant has deprived the plaintiff of this property interest during the time reasonably needed to repair or replace. The court concluded that the appropriate measure of damages for lost use was rental value, but neglected to set forth how rental value was to be measured if the plaintiff had not actually rented a substitute.

B. Mountain View Coach Lines v. Hartnett

In Mountain View Coach Lines v. Hartnett (Mountain View I), the New York Appellate Division, Third Department took a drastically different approach to the issue of loss of use damages than did the court in KLM. The case involved damages to and consequent loss of use of a commercial bus. The court, in denying recovery for loss of use, placed emphasis on the fact that the plaintiff had spare buses on hand and had not in fact hired a replacement. The court denied loss of use damages because the evidence indicated the absence of financial loss. The court therefore rejected the KLM "right to use" rationale on the ground that this reasoning would overcompensate the plaintiff.

372. 22 Am. Jur. 2d Damages § 152 (1965); accord Executive Jet Aviation, Inc. v. United States, 507 F.2d 508, 513 (6th Cir. 1974) (right to use is compensable element of damages); Ohio Oil Co. v. Elliott, 254 F.2d 832, 835 (10th Cir. 1958) (same); Finn v. Witherbee, 126 Cal. App. 2d 45, 48, 271 P.2d 606, 609 (1954) (same); Pope's Adm'r v. Terrill, 308 Ky. 263, 266, 214 S.W.2d 276, 278 (1948) (same); Schmeet v. Schumacher, 137 N.W.2d 789, 791 (N.D. 1965) (same); see also Value of Use, supra note 85, at 761 ("liability of the wrongdoer results from his putting [the chattel] out of the power of the owner to use [it] as he sees fit, and the fact that the owner would actually have used it does not affect [that] value").

373. KLM, 610 F.2d at 1057. Since the plaintiff in KLM was actually paying rent to the defendant, the court did not have to address this problem. The court therefore apportioned the rent paid by defendant as the appropriate measure of damages. The court stated: "There is, accordingly, a measure of damages that the District Court should not have rejected out of hand—a measure based upon rental actually paid during the 42-day period." Id.


375. Id.
376. KLM, 610 F.2d at 1056.
377. Id.; see also 99 Misc. 2d at 271, 415 N.Y.S.2d at 918.
378. 99 Misc. 2d at 271-72, 415 N.Y.S.2d at 918.
379. Id.
380. See supra notes 233-40 and accompanying text.
381. This Court does not accept that measure of damages. Damages are
C. Mountain View Coach Lines v. Gehr

In Mountain View Coach Lines v. Gehr (Mountain View II), a case factually identical to Mountain View I, the plaintiff sued for loss of use of its bus, which was damaged in a collision with the defendant's automobile. The Third Department reaffirmed its Mountain View I holding on the same grounds—i.e., that the plaintiff: (1) had not hired a replacement; (2) had not lost profits; and (3) had suffered no diminution of services during the time the bus was being repaired.

D. CTI Int'l Inc. v. Lloyds Underwriters

Confronted with these two unequivocal renunciations of the loss of use doctrine, the Second Circuit retreated from its holding in KLM. The court made its retreat in the case of CTI Int'l, Inc. v. Lloyds Underwriters (CTI), in which CTI suffered loss and damage to approximately 1,000 cargo shipping containers. On appeal, the primary issue considered was whether CTI was entitled to lost rental income in addition to physical damage to its property as a result of the accident. The trial court had determined that CTI had suffered no lost rental income. In affirming, the Second Circuit determined that at all times after the accident CTI had empty containers available and accordingly ruled that CTI's contention that it had suffered lost income was unpersuasive. The court held that CTI had failed to prove that the demand for containers during the period of detention exceeded the availability of containers.

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383. Id.
384. Id. at 949, 439 N.Y.S.2d at 633.
387. Id.
388. CTI Int'l, Inc. v. Lloyds Underwriters, 735 F.2d 679 (2d Cir. 1984).
389. KLM, 610 F.2d at 1056-57.
390. CTI, 735 F.2d at 679.
391. Id. at 680.
392. Id. at 681.
393. Id. at 682.
394. See id.
395. Id. at 683 n.4.
court noted that the potential demand for cargo shipping containers is "not as fixed as the car-floats in Brooklyn Terminal though not as open-ended as the passenger traffic in KLM. And the evidence here negates financial loss more clearly than in KLM though perhaps not as conclusively as in Brooklyn Terminal." The deciding factor in the court's decision was the development of New York case law since KLM was decided.

The court pointed out that the two Mountain View cases made clear, contrary to what the KLM court had anticipated, that New York law did not establish a conclusive presumption of entitlement to damages every time an owner of commercial property has been prevented from putting that property to a lawful use.

The court interpreted the two state court opinions as requiring pecuniary loss for recovery of loss of use damages. Without evidence from either party as to actual financial loss caused by the defendant's wrongful deprivation of the plaintiff's chattel, the owner may recover for loss of use. Nevertheless, when a defendant presents probative evidence tending to prove the absence of actual pecuniary loss, the presumption of entitlement to loss of use damages is negated. The burden then shifts to the plaintiff, who then must persuade the court that deprivation of the use of the property resulted in financial loss.

E. Mountain View Coach Lines v. Storms

While the CTI case was pending, the Second Department of New York's Supreme Court had the opportunity to decide the identical issue decided in the first two Mountain View cases. In Mountain View III, 102 A.D.2d 663, 476 N.Y.S.2d 918 (2d Dep't 1984).
tain View Coach Lines v. Storms (Mountain View III), the court considered the propriety of awarding loss of use damages when the plaintiff was deprived of the use of its bus. The court reached the exact opposite conclusion from the first two Mountain View cases—on identical facts. The court held that loss of use damages are recoverable for a damaged commercial vehicle, even when the plaintiff had failed to hire a replacement, but had instead utilized a spare that it had maintained in reserve.

The court took exception to the first two Mountain View opinions, labeling them "little more than a 'conclusory assertion of result'" in conflict with settled principles, and [we therefore] decline to follow them. Accordingly, the court criticized the Second Circuit for adhering to the rule set forth in the Third Department. In the court's opinion, there is no logical reason for allowing recovery when the owner hires a replacement and denying it when he uses a spare.

408. Mountain View III, 102 A.D.2d at 663, 476 N.Y.S.2d at 918.
409. Id. at 663, 476 N.Y.S.2d at 919.
410. Id.
411. Id. at 665, 476 N.Y.S.2d at 920. The court placed some degree of emphasis on the "spare boat" doctrine set forth in Brooklyn Eastern, 287 U.S. 170 (1932) (discussed more fully supra notes 190-94 and accompanying text). Under the facts of the Mountain View cases, since the plaintiff maintained the spare for just such an emergency, it would appear that the plaintiff would be entitled to recover loss of use damages under the "spare boat" doctrine. The court in Mountain View III duly noted and relied upon this fact in reaching its decision. Id. at 666, 476 N.Y.S.2d at 920-21.
412. See supra note 259.
413. The assertion that the first two Mountain View cases were mere "conclusory assertions of result" is well taken. In Mountain View I, the court cited no authority to support its opinion. In Mountain View II, the only authority cited in support of its decision was Mountain View I.
415. After this opinion was filed we became aware of CTI Int'l v. Lloyds Underwriters . . . in which the Second Circuit retreated from [its KLM decision] on constraint of Mountain View Coach Lines v. Gehr, [Mountain View II] . . . and Mountain View Coach Lines v. Hartnett [Mountain View I . . .]. As we have previously explained, these decisions are contrary to settled New York authority.
Mountain View III, 102 A.D.2d at 666 n.2, 476 N.Y.S.2d at 921 n.2.
416. See supra note 259.
417. Mountain View III, 102 A.D.2d at 665, 476 N.Y.S.2d at 920. The Restatement (Second) of Torts is in accord:

The owner [may] recover as damages for [loss of use], at least the rental value . . . during the period of deprivation. This is true even though the owner in fact has suffered no harm through the deprivation, as when
F. Resolving the Conflict

The present state of the law on loss of use damages is unsatisfactory and unnecessarily complex. The modern trend in these cases has been toward allowing recovery for loss of use as well as for physical damage to commercial and pleasure chattels. Problems arise when one seeks to apply the esoteric principle of the “right to use” to a real world situation in which a plaintiff has actually been deprived of his chattel as a result of a defendant’s negligence. None of the previously mentioned damage formulas seems completely satisfactory. Interest on the value of the chattel during the time for repair or replacement has the advantage of certainty and simplicity. Adoption of a pure interest approach, however, has the disadvantage of potential undercompensation for plaintiffs who have in fact suffered obvious damages, over and above simple interest on the value of the asset, but in an amount that is not readily ascertainable. The alternative remedies have the advantage of taking into account the “right to use” element, but a bottom-line damage figure is not quite so readily determined. In the face of these conflicting considerations, New York’s Second and Third Departments have reached divergent conclusions on the appropriate measure of damages. The Third Department’s position is unjustifiably restrictive in its refusal to grant loss of use damages, under any circumstances, when the owner has a spare on hand. Thus, courts should adopt the position of the Second Department, with certain modifications along the lines expressed in the RESTATEMENT (SECOND) OF TORTS § 931 comment b (1977).
plaintiff. When the plaintiff has a replacement available, his right to recovery should not be diminished solely on that basis, as long as he maintained a replacement for just such an emergency. For chattels of a noncommercial nature, courts should limit recovery to interest on the value of the chattel, unless the plaintiff has presented probative evidence tending to prove damages over and above that amount. Although it may be argued that plaintiffs may thereby be undercompensated, this measure seems a reasonable compromise in setting an ascertainable measure of damages.

VI. Conclusion

The overwhelming quantity of judicial precedent in New York, as well as in most other jurisdictions, points toward recovery of loss of use damages when a defendant wrongfully deprives an owner of the use of his chattel. A tortfeasor should not escape liability, nor a plaintiff be left without a satisfactory remedy, merely because the plaintiff has had the foresight to have a spare on hand in anticipation of potential lost use. Accordingly, the law of New York should be reconciled to allow recovery of loss of use damages, irrespective of whether the plaintiff hired a substitute.

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424. See supra note 222.
425. This approach would obviate the concerns expressed in Mountain View I and Mountain View II regarding overcompensation of plaintiffs in loss of use cases. See supra notes 372-87 and accompanying text.
426. See supra notes 161-65 and accompanying text.
427. See Brownstein, supra note 12, at 541.
428. Id.