

CHAPTER EIGHT
REMEDIES

8.4. LOSS OF OR DAMAGE TO PROPERTY

8.4.3. FRENCH LAW

Introductory Note

It has been repeatedly noted that in French law the assessment of damages is largely a matter for the trial judge's *pouvoir souverain* and this may explain the paucity of case law on the issue of loss of use. Whether the appropriate means of assessment of damages is to be found in the cost of repairs, the cost of replacement (*valeur de remplacement*), the sale value (*valeur vénale, valeur de vente*) or the loss in value, has however received greater attention in the case law. The excerpted cases show that the question may not always receive the same answer.

*Cass. crim., 17 December 1969*¹

8.F.37.-38.

Amey

and

*Cass. civ. 2e, 31 March 1993*²

Thévenin v. Les Cars bleus Brossard et autres

MEASURE OF DAMAGES WHERE A CHATTEL IS DAMAGED

Where a car is damaged, the measure of damages is the cost of repair or the cost of replacement. It remains an open question whether the plaintiff may be entitled to the cost of repair when it exceeds the cost of replacement. In any event, there is no obligation on the plaintiff to use the damages received to repair or replace the damaged chattel.

¹D 1970.Jur.190. Translation by Y. P. Salmon.

²Bull.civ. 1993.II.68. Translation by Y. P. Salmon.

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1. Cass. crim., 17 December 1969

8.F.37.

Damaged car (1)

Facts: The plaintiff's car was damaged in a collision; the cost of repair exceeded its sale value before it was damaged.

Held: The judgment of the court of appeal, allowing the plaintiff the cost of repair, was upheld by the criminal chamber of the Cour de cassation.

Judgment: "As to the second plea ... the contested judgment, having established that the cost of repair of [the plaintiff's] car ... would exceed the sale value (*valeur vénale*) of the car before the accident, nonetheless allowed the plaintiff's claim in full under this head holding that she was entitled to demand the restoration (*remise en état*) of her car. The judgment is criticized on the ground that the obligation [of the defendant] to restore objects to their condition before the accident consists in providing the plaintiff with an identical vehicle of the same brand, type and age; that the plaintiff would be allowed to realize a profit contrary to the law, if she were awarded the cost of a repair which she did not in fact have to undertake, since in such a way the plaintiff would be allowed to realize a benefit by the purchase of a car identical to the damaged vehicle, for a much lower price [the cost of replacement]; and that it is a matter of principle that the victim of a wrong should make neither a loss nor a gain (*ni perte, ni profit*) from the award of damages.

However, with regard to the material damage occasioned to the plaintiff's vehicle, the contested judgment states that the plaintiff, who proved that the repairs had been carried out, is entitled to obtain the restoration of her car even if the cost exceeds its sale value (*valeur vénale*), and that consequently it is right to award the full cost of those repairs ... as evaluated by an expert, whose assessment did not give grounds for any objection on the part of [the defendant].

In justifying their decision, the judges rightly found that, if the compensation of harm should not profit the victim in any way, nor should it cause him a loss and that the damage sustained should be fully compensated, from which it follows that the appeal should not succeed."

2. Cass. civ.2e, 31 March 1993

8.F.38.

Damaged car (2)

Facts: The plaintiff's car was damaged in a road traffic collision. The plaintiff neither repaired nor replaced his car.

Held: The judgment of the court of appeal, allowing the plaintiff the sale value of the car before it was damaged, was quashed by the second civil chamber of the Cour de cassation.

Judgment: "In limiting the compensation of the material harm sustained by [the plaintiff], the appeal judgment held that she did not prove that repairs ... were carried out nor that she

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acquired a similar vehicle, and that the judgment at first instance should be confirmed in that it assessed the material harm on the basis of the sale value (*valeur de vente*) of the vehicle.

In so ruling, without having established the replacement cost (*valeur de remplacement*) of the vehicle, the court of appeal failed to apply [Arts. 1381 and 1382 C.civ.] correctly.”

Notes

(1) The *first* excerpted case and a case reproduced earlier³ provide an illustration of the uncertainty which results from the divergent case law of the Cour de cassation with regard to the appropriate measure of damages where the *cost of repair* of a damaged car exceeds the *cost of replacement*.

First, it must be noted that recent case law shows the need to distinguish the *cost of replacement* (*valeur de remplacement*) from the *sale value* (*valeur vénale*, *valeur de vente*) whilst in earlier case law that distinction was not always made.⁴ The *sale value* of a damaged car corresponds to the price that the car owner could have obtained if he had sold his car in its undamaged state before the accident whilst the *replacement cost* is the price to be paid when buying a car of the same brand, type and age and in the same condition.⁵ Sale value and replacement cost do not correspond to each other since it will ordinarily cost the owner of vehicle more to buy a second-hand car than what he would have received for the vehicle in its undamaged state.⁶ Moreover, the replacement cost includes the (irrecoverable) value-added tax.⁷

It has also been said that the *sale value* and the *replacement cost* are established by a different method of assessment: the sale value would be assessed *in abstracto* and would correspond to the average market value of a car of the same brand, type and age, in an average condition, whilst the replacement cost should reflect the cost of purchase of a car in exactly the same condition.⁸ However, doubts have been expressed as to whether in everyday practice the replacement cost is really assessed *in concreto* and it has been said that in insurance practice both notions are deliberately muddled up.⁹

As to the question whether the plaintiff is entitled to the cost of repair where replacement is possible and less onerous than repair, the *second civil chamber* of the Cour de cassation, in several judgments, has taken the position that the principle of full compensation entitles the plaintiff to “the reimbursement of the costs of repair of

³*Supra*, 8.F.16.

⁴See for instance Cass. civ. 2e, 5 October 1961, Gaz. Pal. 1961.2.276 (discussed further in the text): the defendant argued that the trial court erroneously awarded damages exceeding the level of the *valeur vénale de remplacement*.

⁵Cass. civ. 2e, 12 February 1975, D 1975.IR.107.

⁶Viney, *Effets* at 139-140, para. 98.

⁷F. Chabas, Comment on TGI Créteil, 26 May 1981, JCP 1982.II.19745.

⁸F. Barbieri, Comment on Cass. civ. 2e, 4 February 1985, JCP 1982.II.19894. Compare the concept of “market value” under English law, see *infra*, 8.E.8. and Note (2) thereafter.

⁹H.-V. Amouroux, “Évaluation et indemnisation des dommages causés aux véhicules automobiles” Gaz. Pal. 1989.Doctr.95 at 97.

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the thing or ... the payment of a sum of money representing the value of its replacement, *the victim only being able to demand the less onerous of the two means of reparation* [emphasis added]¹⁰, since the two modes of reparation (repair or replacement) are regarded as equally satisfactory.

In a later judgment of 14 February 1982, reproduced in Section 2,¹¹ the second civil chamber repeated the first part of the statement omitting the rider that the victim is able only to demand the less onerous mode of reparation. The prevailing view is, however, that the 1982 judgment did not signal a change in the case law of the second civil chamber.¹²

In contrast to the principle adhered to by the second civil chamber, the first excerpted judgment shows that the *criminal chamber* of the Cour de cassation is not opposed to an award of damages amounting to the cost of repair in excess of the replacement cost,¹³ if the plaintiff can prove that the repairs have been carried out. The criminal chamber considers such an award to be in line with the principle of full compensation and, therefore, does not result in the enrichment of the plaintiff. However, that is so only if repairs have been carried out, which means that the plaintiff's freedom to choose whether to carry out repairs or not (see Note (3) below), does not allow him to claim the cost of repair where it exceeds the replacement cost when he does not have his car repaired.

The divergent case law of the second civil chamber and the criminal chamber of the Cour de cassation shows that the principle of full compensation remains subject to a balancing of interests (the plaintiff's interest in having his damaged chattel repaired rather than replaced versus the defendant's interest in not being burdened with excessive costs).

(2) Where replacement is impossible, the second civil chamber of the Cour de cassation is not opposed to an award of damages equal to the cost of repairing the vehicle.¹⁴ It upheld a court of appeal judgment which allowed a plaintiff the cost of repair, even though it exceeded the sale value of the damaged chattel, after having found that no similar substitute was available for it.¹⁵

In the same way, the first civil chamber of the Cour de cassation upheld a judgment entitling a plaintiff, whose antique piece of furniture – one of a pair of unique “Louis XV” armchairs – was completely destroyed, to the cost of production

¹⁰*Inter alia* Cass. civ. 2e, 17 December 1959, JCP 1960.II.11493 annotated by P. Esmein; see further Viney, *Effets*, at 137, para. 96.

¹¹*Supra*, **8.F.16**.

¹²Compare J.F. Barbieri, Comment on Cass. civ. 2e, 4 February 1985, JCP 1982.II.19894; Starck, Roland and Boyer at para. 1296-1297; Viney, *Effets* at para. 96.

¹³Although the Cour de cassation, in the annotated judgment under **8.F.37** mentions the term “sale value”, it may be thought that “sale value” means actually “replacement cost” since, in that judgment, the Cour de cassation considered that the “sale value” allows the plaintiff to buy an equivalent car. In the same way see Viney, *Effets* at para. 96.

¹⁴Cass. civ. 2e, 5 October 1961, Gaz. Pal. 1961.2.276, in that case an outdated van

¹⁵The court of appeal had emphasized that the sale value did not allow the plaintiff to buy a vehicle that could render the same services as the damaged van.

of a replica which substantially exceeded the cost of purchase of a comparable, but not identical, antique.¹⁶

(3) The *second* excerpted case acknowledges the plaintiff's freedom to use the sum of money which he receives, as he sees fit. The contested judgment had assessed the damages award at the sale value of the undamaged car on the ground that the plaintiff did not establish that the damaged car had been repaired or replaced. The Cour de cassation quashed that judgment: the plaintiff's decision neither to repair nor to replace the damaged car does not mean that the award of damages must be limited to the sale value of the car before the accident. That judgment, when read in conjunction with the case law of the second civil chamber referred to in Note (1), must be held to mean that the plaintiff is always entitled to damages allowing him or her to effect restoration, either by replacement or by repair (whichever is lower),¹⁷ and that the sale value of a damaged thing, before it was damaged, can never in itself be an appropriate measure of damages.

Because of the plaintiff's freedom to use the sum of money which he receives, French case law also entitles the plaintiff to an amount including the value-added tax as a part of the cost of repair, albeit that the plaintiff is placed under no obligation to have repairs carried out.¹⁸

(4) As under German and English law,¹⁹ the plaintiff is entitled, in addition to the cost of repair, to damages amounting to the diminution in value of the object (*indemnité de dépréciation*) where, despite repair, its market value is less than before the accident. Such damage is regarded as actual, and not just hypothetical.²⁰

(5) Under French law, the plaintiff is not responsible for the sale of the wrecked car with its attendant financial risks.²¹ The defendant is therefore entitled to sell the wrecked car and keep the proceeds ("*laissé pour compte*").²²

¹⁶Cass. civ. 1re, 11 January 1989, discussed by P. Jourdain in RTD civ. 1989, 565-566. Compare with the English case *Uctkos v. Mazzetta*, *supra*, **8.E.33.**, Note (3) and the German case of a unique scale model of a boat: BGH, 10 July 1984, BGHZ 92, 84, JZ 1985, 39, annotated by D. Medicus.

¹⁷Compare Cass. civ. 2e, 17 March 1977, D 1977. IR.329.

¹⁸Cass. civ. 2e, 21 October 1987, Bull. civ. 1987.II.116.

¹⁹See *supra*, **8.E.33.**, Note (5).

²⁰*Inter alia* Cass. civ. 2e, 6 October 1966, D 1967.Jur.5.

²¹See Cass. civ. 2e, 4 February 1985, *supra*, **8.F.16.**; in the same way Cass. civ. 2e, 17 December 1959, JCP 1960.11493, annotated by P. Esmein.

²²This is also the view under German law but is rarely applied in practice: Lange at 408-409; see for a thorough discussion of this issue W. Marschall v. Bieberstein, "Zur Berücksichtigung von Fahrzeugresten bei Ansprüchen wegen Totalschadens eines Kraftfahrzeugs" in *Festschrift für Fritz Hauß zum 70. Geburtstag* (Karlsruhe: Verlag Versicherungswirtschaft, 1978) at 241ff.

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*Cass. civ. 2e, 9 May 1972*²³ **8.F.39-40.**
Société Bonneau v. Ponce
and
*Cass. civ. 2e, 23 November 1988*²⁴
SMAC Acieroid v. Perrot

MEASURE OF DAMAGES WHERE A BUILDING IS DAMAGED

Where a building is damaged, the measure of damages is either the cost of reconstruction, without taking into account the wear and tear of the damaged building, or its replacement cost, i.e. the sum needed to allow the plaintiff to purchase a building equivalent to the damaged one.

1. *Cass. civ. 2e, 9 May 1972* **8.F.39.**

Collapse of wall

Facts: A wall of the plaintiff's house collapsed due to the defendant's negligence. The plaintiff claimed damages, with a view to the reconstruction of the house.

Held: The Cour de cassation upheld the judgment of the court of appeal, holding that the expert assessing the cost of reconstruction need not take into account the worn state of the damaged building.

Judgment: "The appealed judgment... held that the expert commissioned to assess the cost of reconstruction should not take into account the worn state (*vétusté*) of the damaged building [and] is criticized for not having limited the level of damages to that of the worsening of the plaintiff's financial position and for allowing the latter to benefit from an enrichment which, represented by the difference of value between the old and the new, was not inseparable from the method of redress.

However, the purpose of tort law is to restore as exactly as possible the *status quo* that was disturbed by the harm and to restore the victim to the situation in which he would have been if the wrongful act had not occurred.

The [appealed] judgment observes that redress by the award of compensation to the victim on the basis that the destroyed property could be replaced by another object of identical value, available on the market, was not possible in this case and states that to make a deduction from the cost of reconstruction on account of the worn state of the damaged object would result in [the plaintiff] himself bearing a part of the harm which he sustained.

Having regard to those findings, the judgment, which is not vitiated by any contradiction in reasoning, is justified in law."

²³Gaz. Pal. 1972.Jur.540. Translation by Y.P. Salmon.

²⁴Bull.civ. 1988.II.123; discussed by P. Jourdain in RTD civ 1989 at 339-340. Translation by Y.P. Salmon.

2. Cass. civ. 2e, 23 November 1988

8.F.40.

Buildings irreparably damaged by mining

Facts: The buildings of several plaintiffs were irreparably damaged by mining operations. The plaintiffs claimed damages.

Held: The Cour de cassation upheld the assessment of damages by the court of appeal,²⁵ granting the plaintiffs damages allowing them to purchase a building equivalent in value to that of the buildings concerned before they were damaged, and therefore equal to the replacement cost.

Judgment: “[On appeal to the Cour de cassation], the plaintiffs claim that the court of appeal was wrong in assessing the level of damages by deducting the residual value (*valeur résiduelle*) of the damaged buildings after an expert’s appraisal of their sale value (*valeur vénale*) [i.e. what the buildings would have fetched before the harmful act]. Since full compensation (*réparation intégrale*) for harm caused to property the reinstatement of which is impossible is assured only by the payment of a sum of money representing its replacement cost (*valeur de remplacement*), [the plaintiffs submit:] [i] that in refusing an award corresponding to the cost of purchase of a building plot (*terrain à bâtir*) and the cost of erecting a new building, the court of appeal failed to apply Art. 1382 C. civ. correctly; [ii] further, that the court of appeal could not, without infringing that provision, take as a base the sale value (*valeur vénale*) of the buildings instead of their replacement cost; [iii] thirdly, that the court of appeal did not establish the possibility of the owners purchasing for themselves, houses and land presenting the same benefits as those which they had lost on the market...

However, in holding that the reinstatement of the damaged buildings was impossible, the judgment states correctly in law that *the compensation of the owners should be such as to permit them to acquire a building equivalent to the one abandoned, and should be equal to the replacement value (valeur de remplacement) [of the damaged building]*. The court of appeal, which after an expert survey, in the exercise of its sovereign power assessed the replacement cost for each building without being bound by any method of calculation, does

²⁵Riom, 2 June 1987, unreported, cited in L.-M. Boucraut, *La réparation des atteintes aux biens dans le contentieux des responsabilités civile et administrative* (Paris: Litec, 1993) at 58. The court of appeal held: “The compensation received by the owner should be such as to allow him to acquire a building equivalent to the abandoned one. It is possible to find equivalent buildings to buy on the real estate market and it is therefore not justifiable to allow victims an indemnity permitting the purchase of a building plot and the erection of a new building. The indemnity should therefore be calculated by reference to the cost of replacement, which is taken as the sale value of the abandoned building, uplifted by 30 per cent comprising on a lump-sum basis the costs of search, purchase (estate agent, notary, registration ...), unavoidable moving costs and taking into account the time interval before sale can take place, and the inflationary tendency of the real estate market. Finally the claim of each plaintiff should be reduced by the residual value of his property, a value which will doubtless be only that of a plot of land unsuitable for building.

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not incur criticism on review and the grounds raised in the last [plea] are to no avail [emphasis added].”

Notes

(1) These cases show that under French law damage to buildings is assessed, in principle, according to the same rules as damage to moveable property. The plaintiff is entitled to the cost of reinstatement of the damaged building (in a case where replacement by an equivalent building available on the market, is impossible: first excerpted judgment) or to the replacement cost of the damaged building, allowing the purchase of a similar building (in a case where reinstatement is impossible: second excerpted judgment).

In the second annotated case, the appeal court had dismissed the plaintiffs’ claim for an amount corresponding to the purchase price of a building lot and the cost of putting up a new house and confined the amount of damages to the replacement cost, i.e. the sum required to enable the plaintiffs to purchase a house equivalent to the damaged house. By upholding the judgment of the court of appeal, the Cour de cassation indicated that the construction of an equivalent building on land bought for the purpose does not constitute “restoration”, the cost of which can be recovered. However, in an earlier case²⁶ where the plaintiffs’ damaged building could not be reinstated because of building regulations, and the court of appeal had allowed the plaintiffs merely the sale value of the property before it was damaged, the Cour de cassation held that the plaintiffs *were* entitled to the cost of a building plot plus the cost of building an equivalent building, reduced by (i) the increase in value as a result of the plaintiffs getting new for old and (ii) the residual value of the damaged property.

The second annotated case also shows that the replacement cost may be assessed *in abstracto* rather than *in concreto*. Indeed, the appeal judgment had assessed that cost at the sale value (*valeur vénale*) of the house before it was damaged, increased by 30 per cent to cover different heads of expenses by a lump sum. The Cour de cassation respected the appeal court’s discretion in assessing such cost. In the light of the plaintiff’s argument, it may be doubted whether the sum in question would in fact have enabled the plaintiffs to buy an equivalent house, the sum having been assessed without regard to the actual state of the property market.

(2) In contrast to the earlier view, the first excerpted case shows that the damages, amounting to the cost of reconstruction, need not be reduced because the plaintiffs gets “new for old”, provided that there is no comparable substitute available on the market.²⁷ In balancing the advantage of the plaintiff in having a new building instead of an old one against the principle of compensation in full for all

²⁶Cass. civ. 2e, 1 April 1963, D 1963.Jur.453, annotated by H. Molinier.

²⁷The advantage of getting new for old is similarly not taken into account in case of moveables: see Starck, Roland and Boyer at para. 1326.

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inevitable costs of reinstatement, the Cour de cassation has given more weight to the second consideration. The plaintiff may not be compelled to be unjustly burdened with such costs, as the court stated earlier in a judgment of 1970.²⁸

(3) As is evident from the second annotated judgment, the residual value of the damaged premises must be taken into account by the trial judge (as the appeal court had done) in the assessment of damages. The rule that a damaged chattel is transferred to the defendant does not apply to land and buildings.

*Cass. crim., 6 December 1983*²⁹
SNCF v. Hubert

8.F.41.

DAMAGE RESULTING FROM LOSS OF USE

Damaged railway train

A railway company must be compensated in full for the loss of use of a train.

Facts: A train belonging to the French national railway company was damaged, causing it to be immobilized.

Held: The judgment of the court of appeal, compensating the plaintiff only partially, was quashed.

Judgment : "...The level of damages to be awarded to the [plaintiff] to compensate for the harm sustained by it from the wrong that has been established falls, within the limits of the submissions of the [plaintiff], to the sovereign assessment of the judges, but their decision must be based on the real extent of the harm which they are required to assess in order to compensate it in full.

It is evident from the contested judgment that following the collision, on a level-crossing, between a lorry and a high speed 'turbo-train', Hubert, the driver of the road vehicle, was declared entirely liable for the material harm sustained by the plaintiff SNCF... The SNCF had claimed, in particular, the award of FRF 1,621,191 in damages on account of the fact that the damaged train was put out of action.

To assess the damages granted to the plaintiff under this head, the court of appeal states that the liable party should pay compensation for this element of the harm to some extent (*dans une certaine mesure*), which should be fixed as a lump sum at FRF 500,000.

In so ruling, the court of appeal failed to apply correctly the principle recalled above."

²⁸Cass. civ. 2e, 16 December 1970, Gaz. Pal. 1971.1.156; recently confirmed, by reference only to the principle of full compensation, however, in Cass. civ. 3e, 9 January 1991, Bull.civ. 1991.III.8 (in a contract case) and Cass. civ. 2e, 14 June 1995, Bull.civ. 1995.II.107. See also Viney, *Effets* at para. 100.

²⁹Bull.crim. 1983.851. Translation by Y.P. Salmon.

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Notes

(1) In the excerpted judgment, dealing with the loss of use of a damaged train for which, in all probability, a substitute was kept available, the court of appeal's judgment was quashed because it was inconsistent with the principle of full compensation. No further clarification is offered and reported case law on the issue of loss of use is remarkably scarce.³⁰

(2) The owner of a damaged car is entitled to damages amounting to the cost of hire of a substitute car, reduced by an amount representing the saving made on the owner's car; the reduction is questioned.³¹ Where the plaintiff does not hire a substitute car, he is entitled to damages for wasted expenditure (e.g. on insurance, road tax and so on) as a consequence of not being able to use his car, and for the loss of use as such. However, there is hardly any reported authority on this point.³²

³⁰See Viney, *Effets* at para. 103, citing Cass. civ. 2e, 11 July 1963, Bull.civ. 1963.II.388 in a case in which a transport firm claimed damages for loss of use of a vehicle; the Cour de cassation upheld the judgment assessing damages as a lump sum (*forfaitairement*) at a level in conformity with that generally awarded by the courts in similar cases".

³¹See Viney, *Effets* at para. 103 and H.-V. Amouroux, "Évaluation et indemnisation des dommages causés aux véhicules automobiles", Gaz. Pal. 1989.Doct.95 at 99.

³²Viney, *ibid.* at para. 103, stating that French courts have not as yet been given the opportunity of deciding this point; the author is of the opinion that damages for loss of use may be assessed starting from the cost of hire of a substitute.