CHAPTER EIGHT
REMEDIES

8.4. LOSS OF OR DAMAGE TO PROPERTY

8.4.2. ENGLISH LAW

Introductory Note

Despite differences in approach, the English and German legal systems tend, to a large extent, to reach the same results in this area. But it must be borne in mind that the tort that constitutes the cause of action may affect the appropriate measure of damage.[1]

Court of Appeal[2] **8.E.33.**
Dominion Mosaics and Tile Co Ltd. v. *Trafalgar Trucking Co Ltd.*

MEASURE OF DAMAGES WHEN A CHATTEL IS LOST

Paternoster machines

When the only means of replacement of destroyed chattels is the purchase of new ones, the measure of damages is the cost of purchase.

Facts: The plaintiffs purchased 11 "paternoster" machines[3] which had been used only for display purposes at an exhibition, and which were in nearly new condition, for GBP 13,500. The machines were destroyed in a fire due to the defendants' negligence; the plaintiffs had not replaced them. The cost of replacement (with new machines, there being no second hand market for such machines) would have been GBP 65,000. The plaintiffs claimed GBP 65,000.

Held: The court of first instance allowed GBP 13,500. On appeal, the plaintiffs were held entitled to damages of GBP 65,000.

[1]See H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at Chapters 30 and 31 distinguishing between damage and destruction of goods, mostly as a consequence of the tort of negligence, on the one hand, and misappropriation of goods, as a consequence of the torts of conversion and trespass, on the other.

[2][1990] 2 All ER 246, CA.

[3]Paternoster machines are designed to accommodate carpets in a showroom so that they may be automatically rotated and displayed in a series to prospective customers.

Judgment: TAYLOR LJ:[4] "[The plaintiffs] submit that the judge fell into error in two main respects. First, he valued the lost machines at the price paid for them by the [plaintiffs]. But that was a unique price, which gave them a very favourable bargain. They were entitled to retain the advantage of that. Had the machines been an outright gift instead of a mere bargain, logic could not have denied them any damages at all on the footing that, as they had paid nothing, they had lost nothing. The machines would, in the circumstances, have had to be valued, and the only figure available as a yardstick would be the cost of buying replacements. Restitutio in integrum here does not mean restoring to the [plaintiffs] the amount they paid for the machines. It means putting the [plaintiffs] in the position they held before the fire. They were then not only owners of the machines which would cost GBP 65,000 to buy new, but also in the happy position of only having paid GBP 13,500 for them.

Second, counsel for the [plaintiffs] submits the judge was wrong to take account of the fact that the [plaintiffs] had not replaced the machines even by the date of trial. Their evidence that they would have done had they been in funds was expressly accepted by the judge. In any event, there is no obligation in principle on a plaintiff to deploy damages awarded for loss of a chattel in replacing it. He is free to do whatever he wishes with his damages.

In my judgment, both of counsel's criticisms of the judge's approach are well founded in principle ...

Counsel's arguments both before the judge and before us were based solely on the alternative awards of GBP 13,500 or GBP 65,000. No intermediate figure was canvassed. It was not suggested by the [defendants], either in evidence or by submission, that there was any secondhand source of paternoster machines. The [plaintiffs]' evidence was that no such source existed to their knowledge. Where this is the case and the only way the owner of destroyed chattels can replace them is by buying new ones, the measure of damages is the cost of doing that, unless the result would be absurd [references omitted]...

In these circumstances, I consider that, of the two alternatives contended for, £65,000 was the proper sum..."

Notes

(1) This judgment illustrates the well-established rule that, where goods are destroyed, the normal measure of damages is the market value of the goods,[5] that is normally the sum of money which the plaintiff would have to pay in the market for identical or essentially similar goods.[6] Moreover, as in German law, the judgment

[4]Stocker and Fox LJJ concurring.

[5]At the time and place of destruction: H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at para. 1362.

[6]*Clerk & Lindsell on Torts* at para. 27-57.

acknowledges the plaintiff's freedom to choose whether to use the money received for replacement or not.[7]

The plaintiffs had bought the paternoster machines at a very advantageous price and had not bought replacements after the damaging event. On those facts, the court of first instance had considered that, "consistent with reasonableness and fairness", the plaintiffs were entitled only to the original price that they had paid for the destroyed goods. As is pointed out in the excerpted judgment, that view would lead to the absurd conclusion that no damages would be payable if the destroyed goods had been a gift.

(2) The judgment did not address the issue of "new for old". However, because damages were assessed as the cost of buying a replacement and second hand replacements were not available, the plaintiffs obtained an advantage. The Court of Appeal considered (in a part of the judgment not excerpted) that, had it been argued that a deduction should have been made from the price of GBP 65,000 for new machines to reflect the betterment, the point would have merited consideration. However, other cases[8] show that it is doubtful whether such a deduction would have been made.

(3) The plaintiff is not entitled to the cost of replacement where it is unreasonable to demand an exact replacement. This rule reflects the same idea which underlies the German rule of disproportionality as a limit to *Naturalrestitution.*[9]

An illustration of this rule is provided by *Uctkos* v. *Mazzetta,*[10] concerning a motor-boat of an unusual type which was totally destroyed. To construct a similar boat would have required a very large expenditure, but boats of a comparatively similar design, construction and performance were available. As a consequence, damages were assessed at the reasonable cost of another craft which reasonably met the plantiff's needs and which was reasonably in the same condition.[11]

(4) An oft-quoted authority with regard to the destruction of a chattel is *Liesbosch Dredger* v. *SS Edison.*[12] That case deals with, *inter alia*, consequential loss (expenses and lost profits) sustained as a result of such destruction. In that case the House of Lords laid down the rule that the measure of damages in the case of a

[7]See in the same way, in the case of damage to a building, *Dodd Properties Ltd.* v. *Canterbury City Council* [1980] 1 WLR 433, CA at 450 per Megaw LJ.

[8]See *infra*, **8.E.35.**

[9]See *supra*, **8.G.12.**, Note (2)(a).

[10]*Uctkos* v. *Mazzetta* [1956] 1 Lloyd's Rep 209 cited in H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) atpara. 1364.

[11]Compare with 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.

[12]*Liesbosch Dredger* v. *SS Edison* [1933] AC 449, HL, excerpted *supra*, Chapter IV, **4.E.27.**

profit-earning chattel - there a ship - is the value of the ship to her owner as a going concern at the time and place of the loss. That value must be assessed taking into account her pending engagements, not in the abstract but in view of the actual circumstances.[13] Moreover, expenses made necessary or rendered futile by the tort are recoverable.[14]

The *Liesbosch* was being used for construction work in a Greek harbour when she was lost. The amount of damages included (1) the market price of a comparable substitute dredger; (2) the cost of adapting the new dredger and of transporting and insuring her from her moorings to the Greek harbour; (3) compensation for disturbance and loss in carrying out the contract over the period of delay between the loss of the *Liesbosch* and the time at which the substituted dredger could reasonably have been available for use in the Greek harbour, including in that loss such items as overhead charges, staff costs, and equipment and the like thrown away.[15]

(5) If, despite repairs, the market value of the chattel is diminished, the plaintiff is entitled to the value of the reduction in addition to the cost of repair.[16]

Court of Appeal[17] **8.E.34.**
The London Corporation

MEASURE OF DAMAGES WHERE A CHATTEL IS DAMAGED

Unrepaired ship sold

Where a chattel is damaged the normal measure of damages is the amount by which its value is diminished and this is ascertained by reference to the cost of repair. The mere fact that it is sold unrepaired is an accidental circumstance not to be taken into account.

Facts: The plaintiffs' vessel, the *Benguela*, an old ship built in 1910, was damaged by the defendants' vessel, *London Corporation* while both ships were laid up because the owners of both ships were suffering from an unprecedented slump in the shipping business. After the collision, the *Benguela*, in its unrepaired state, was sold to be broken up and, as a consequence, no repairs were done. The

[13]Ibid. at 463-464 per Lord Wright.

[14]H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at para. 1367.

[15]*Liesbosch Dredger* v. *SS Edison* [1933] AC 449, HL, at 468-469 per Lord Wright.

[16]H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at para. 1326; *Clerk & Lindsell on Torts* at para. 27-58. Compare BGH, 29 April 1958, BGHZ 27, 181 and BGH, 3 October 1961, BGHZ 35, 396.

[17][1935] P 70, CA.

plaintiffs claimed damages amounting to the cost of repair while the defendants contended that the plaintiffs had suffered no loss.

Held: The plaintiffs' claim was successful at first instance, and the decision at first instance was upheld on appeal.

Judgment: GREER LJ :[18] "… Prima facie, the damage occasioned to a vessel is the cost of repairs - the cost of putting the vessel in the same condition as she was in before the collision, and to restore her in the hands of the owners to the same value as she would have had if the damage had never been done; and prima facie, the value of a damaged vessel is less by the cost of repairs than the value it would have if undamaged, though it is true that evidence may establish that the value of the vessel undamaged is exactly the same as her value after she had been damaged. The learned judge decided that it that proposition were going to be established, it was for the owners of the *London Corporation* to establish it. The defendants argued, however, that that basis has no application to this case, because, at the time she was damaged, the *Benguela* was certain to have no saleable value for use as a ship; all that could happen to her was what we know did happen to her after she was damaged, and which would, just in the same way, have happened to her if she had never been damaged. Well, if that be a fact to be taken into account, it seems to me that the learned judge was right in saying that it was for the defendants to establish it. He came to the conclusion that the defendants had failed in that burden because non constat that this vessel would have been sold for breaking up if she had not been a damaged vessel. She might have lived on in the hope that even shipowners sometimes successfully entertain, that an old vessel may have useful service for years to come in a time of boom, which everybody hopes will come some day. Further it was not established that the owners would have parted with their vessel, if she had not been damaged, at the same price as they got for the damaged vessel. It must not be lost sight of that the saleable use of a vessel does not depend merely upon what the purchaser says he would like to pay; it depends also on what the owner may feel that he can successfully hold out for, in the hope that another purchaser will come forward and give him a better price than that which has been offered...

Quite apart from that, however, I agree with the learned judge that in cases of this sort, the prima facie damage is the cost of repair, and circumstances which are peculiar to the plaintiffs - namely, that they have, before the damage has been determined, sold the vessel to be broken up, *is an accidental circumstance which ought not to be taken into account in the way of diminution of damages,* any more than it is in a case of the sale of goods, where the difference in market price and contract price is always allowed, regardless of the fact that having regard to what the purchaser has done, no such damages are in fact suffered by him [emphasis added]. *It is desirable that there should be a measure of damage which can be easily and definitely found* [emphasis added]. In this case, circumstances which are accidental to the plaintiffs of which the defendants have no knowledge, or circumstances applicable to the defendants of which the plaintiffs have no knowledge, need not be taken into account. … It is now clear that the shipowner, who claims damages in respect of injuries

[18]Slesser LJ and Eve J concurring.

to his ship, if it turns out that before he has in fact repaired her he has suffered the loss of the ship by something other than the act of the defendant, can still recover the estimated amount of the cost of repairing the ship, which he would have had to incur if she had not been lost. It seems to me that the [same] principles ... apply equally in this [case]: that *the owners of the Benguela are entitled to recover what has been agreed to be the amount they would have had to expend for repairing their vessel, even though it has turned out, by reason of a subsequent transaction, namely, the sale to shipbreakers, that they never would have to repair her at all* [emphasis added]. Further, it does not by any means follow that the price paid by the shipbreakers would have been the same if the vessel had been fully repaired, as it was in her unrepaired condition."

Notes: (1) This leading case establishes the normal ("prima facie") measure of damages in the case of damage to goods: the diminution in value of the damaged chattel, ascertained by reference to the cost of repair.[19] However, as shown in *Darbishire* v. *Warran*,[20] the cost of repair is appropriate only if it is reasonable to effect the repair. When it is cheaper to buy a replacement, it may be unreasonable to effect the repair.

On the other hand, if a damaged object is unique and there is no comparable replacement for it, the plaintiff may nonetheless be entitled to the cost of repair at a cost considerably exceeding its value, as was decided in *O'Grady* v. *Westminster Scaffolding Ltd.*[21] This view reflects, as under German law, the dominance of a concrete restoration of the *status quo ante*. However, under German law the plaintiff is not entitled to *Naturalrestitution* when it is possible only at a disproportionate cost (§ 251(2) BGB) and it remains to be seen whether such a limit should not apply under English law.[22] In any case, in *Darbishire* v. *Warran* the Court of Appeal did not express its view on the question whether *O'Grady* v. *Westminster Scaffolding Ltd.* was rightly decided. As Pennycuick J stated: "I would prefer not to express any view of the measure of damage which falls on a party unfortunate enough to injure a freak article".[23]

(2) The excerpt also shows that the normal measure of damages does not always apply. In the first part of the court's reasoning, attention is focused on the loss of value of the damaged ship and it is considered that the value of the damaged vessel may be exactly the same as her value before the damaging event because *at the time*

[19]Rogers at 671; H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at para. 1326; *Clerk & Lindsell on Torts* at para. 27-58.

[20]See *supra*, **8.E.8.**

[21]*O'Grady* v. *Westminster Scaffolding Ltd.* [1962] 2 Lloyd's Rep 238 quoted in H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at para. 1327.

[22]Compare with *Uctkos* v. *Mazetta*, *supra*, **8.E.33.**, Note (3).

[23]See *Darbishire* v. *Warran* [1963] 3 All ER 310, CA at 318 per Pennycuick J; compare at 313 per Harman LJ and at 317 per Pearson LJ.

when the ship was damaged, the ship no longer had any value for use as a ship. Thus, if the defendants had been able to establish (*quod non*) that, at the time of the collision, the ship had no value for use as a ship, the plaintiffs would not have been entitled to the cost of repair; in such a case indeed, repair would have been manifestly unreasonable. In the second part, the judgment goes on to decide that the mere fact that *after the damaging event*, the ship was sold to be broken up and never would be repaired, was an accidental circumstance that fell to be disregarded. In this part, the judgment expresses the need for a practicable yardstick to measure the damage, which implies that "accidental" circumstances are not to be taken into account. In this respect, the judgment comes to the same conclusion as that found in German case law with regard to motor-cars (*Ersatz fiktiver Kosten*).[24]

(3) As the excerpted judgment shows, the fact that repairs become impossible because of other circumstances after the collision, e.g. the ship is lost accidentally, does not affect the measure of damages either.[25] However, it remains to be seen whether this rule should always apply. In *Dodd Properties Ltd.* v. *Canterbury City Council*,[26] relating however to damage to a building, Megaw LJ stated *obiter* that "in certain circumstances with which we are not concerned here, such as the building being destroyed by fire before the repairs had been carried out, the amount of the plaintiff's entitlement to damages might have become nil".[27]

Court of Appeal[28] **8.E.35.**

Harbutt's "Plasticine" Ltd. v. *Wayne Tank and Pump Co. Ltd.*

MEASURE OF DAMAGES WHERE A BUILDING IS DAMAGED

Plasticine factory destroyed by fire

The cost of reinstating the damaged factory is the proper measure of damage if it is reasonable for the plaintiff to rebuild the factory. The plaintiff is not required to give credit under the heading of betterment merely because the old building is replaced with a new one of modern design.

[24]See *supra*, **8.G.30.**

[25]The excerpted judgment refers *inter alia* to *The Glenfinlas*, [1918] P 363 (note of a decision of Registrar Roscoe), approved in *The York*, [1929], P 178, CA at 184-185. Under German law, this impossibilty means that the plaintiff is entitled only to *Kompensation*. Another aspect of those cases is the so-called *überholende Kausalität*; Lange at 183-185; see *supra*, Chapter IV, **4.E.29.-30.**, Notes (3) and (4).

[26]*Dodd Properties Ltd.* V. *Canterbury City Council* [1980] 1 WLR 433, CA.

[27]Ibid. at 450. See *infra*, **8.E.35.**, Note (1).

[28][1970] 1 QB 447, CA.

Facts: Due to the defendants' breach of contract in designing and supplying equipment which was unsuitable for its purpose, the plaintiffs' factory burnt down. The plaintiffs were not permitted to rebuild the old factory (which was five storeys high) and had to erect a new factory of two storeys. The cost of reinstatement of buildings, plant and machinery amounted to a larger sum than the difference in value before and after the fire. The plaintiffs claimed damages amounting to the cost of reinstatement.

Held: The court of appeal upheld the judgment at first instance, allowing the plaintiffs' claim.

Judgment: WIDGERY LJ:[29] "The distinction between those cases in which the measure of damage is the cost of repair of the damaged article, and those in which it is the diminution in value of the article, is not clearly defined. In my opinion each case depends on its own facts, it being remembered, first, that the purpose of the award of damages is to restore the plaintiff to his position before the loss occurred, and secondly, that the plaintiff must act reasonably to mitigate his loss [emphasis added]. If the article damaged is a motor car of popular make, the plaintiff cannot charge the defendant with the cost of repair when it is cheaper to buy a similar car on the market. On the other hand, if no substitute for the damaged article is available and no reasonable alternative can be provided, the plaintiff should be entitled to the cost of repair. It was clear in the present case that it was reasonable for the plaintiffs to rebuild their factory, because there was no other way in which they could carry on their business and retain their labour force. The plaintiffs rebuilt their factory to a substantially different design, and if this had involved expenditure beyond the cost of replacing the old, the difference might not have been recoverable, but there is no suggestion of this here. Nor do I accept that the plaintiffs must give credit under the heading of 'betterment', for the fact that their new factory is modern in design and materials. To do so would be the equivalent of forcing the plaintiffs to invest their money in the modernisation of their plant which might be highly inconvenient for them [emphasis added]."

Notes

(1) The principles governing the assessment of damage to land and buildings are not fundamentally different from those which have been developed in the context of damage to chattels. However, it is noted that "their application must take account of the different character of the land. Thus, for example, a plaintiff is more likely to recover the cost of reinstatement where this exceeds the diminution in value of his property than he is in the case of a chattel."[30] Whereas in the case of damage to chattels, the amount by which the value of the chattel is diminished is usually equated with the cost of repair, in the case of land and buildings the distinction between the cost of repair on the one hand, and the diminution in value on the other, is considered more expressly, as the excerpted judgment shows (dealing with a claim

[29]Lord Denning MR, and Cross LJ delivered concurring judgments.
[30]Rogers at 790-791.

for breach of contract, a circumstance being immaterial here with regard to the law of damages).

In considering whether the plaintiff is entitled to the cost of reinstatement rather than the diminution in value, the reasonableness of the plaintiff's course of action is decisive.[31] The excerpted judgment founds this rule on the plaintiff's duty to mitigate the damage.[32] Reinstatement may be inappropriate where the expenditure is out of all proportion to the diminution in value.[33] Another relevant factor may be the plaintiff's need to reinstate the damaged building immediately to keep his business going and to mitigate the loss of profit.[34] The plaintiff's future intentions as to the use of the property and the reasonableness of those intentions are also important. In *Dodd Properties Ltd.* v. *Canterbury City Council*,[35] Donaldson LJ held that if the plaintiff reasonably intends to sell the property in its damaged state, the diminution in value is clearly the true measure of damage while, if the plaintiff reasonably intends to occupy it and to repair the damage, the cost of repairs is the true measure, although he conceded that there may be borderline situations. This case law shows that the measure of damages may be affected by the plaintiff's decision whether or not to use the compensation for reparation, in contrast to damage to chattels.[36]

(2) The cost of reinstatement and diminution in value may diverge considerably, and sometimes damages may be assessed on the basis of the cost of reasonable means of redress other than the reinstatement of the damaged building.

[31]It may be noted that the plaintiff is also bound to accept *reasonable* restoration. See Cantley J. in *Dodd Properties* v. *Canterbury City Council* [1980] 1 WLR 433, QBD, at 441: "... I do not consider that [the plaintiffs] are entitled to insist on complete and meticulous restoration when a reasonable building owner would be content with less extensive work which produces a result which does not diminish to any, or any significant, extent the appearance, life or utility of the building and when there is also a vast difference in the cost of such work and the cost of meticulous restoration". Compare with *Uctkos* v. *Mazetta*, *supra*, **8.E.33.**, Note (3).

[32]Compare *Darbishire* v. *Warran*, *supra*, **8.E.8.**

[33]Rogers at 791; H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at para. 1475. Compare German law, *supra*, **8.G.12.**, Note (2)(a).

[34]See excerpt; see also [1970] 1 All ER 225, at 236 per Lord Denning MR, and at 242 per Cross LJ.

[35][1980] 1 WLR 433, CA at 456-457. In the same way see *inter alia*, *Ward* v. *Cannock Chase District Council* [1986] 1 Ch 546 at 576-577. In that case, it was held that, while the principle to be adopted in assessing damages was *normally* the difference between the value of the building before and its value after the damage was sustained, where the plaintiff could establish that he *reasonably intended to rebuild* and that his was *an exceptional case*, the correct measure of damages was not the diminution in value but the costs of reinstating the building to its former state. For other cases in which the cost of reinstatement was not allowed because reinstatement was not contemplated: see H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at para. 1475; Rogers at 674.

[36]See *supra*, **8.E.34.** and Notes (2) and (3) under it.

Reasonable means of redress may be the purchase of other property. In *Dominion Mosaics and Tile Co. Ltd.* v. *Trafalgar Trucking Co. Ltd.*,[37] the diminution in value amounted to GBP 60,000; to rebuild on the original site would have cost GBP 570,000. The plaintiffs claimed - and were granted - GBP 390,000, the price at which the plaintiffs had purchased the lease of another building. In *Ward* v. *Cannock Chase District Council*,[38] the court decided that, if reinstatement of the damaged buildings was not legally possible because planning permission could not be obtained, the plaintiff was entitled to damages in order to enable him to provide an alternative residence for himself and his family in an adjacent cottage which the plaintiff also owned.[39]

(3) The plaintiff need not give credit for the fact that he gets new for old: where betterment cannot be avoided,[40] the plaintiff may not be compelled, as a consequence of the defendant's wrong, to invest his own money in the modernization of the building.[41]

House of Lords[42] **8.E.36.**
The Mediana

DAMAGE RESULTING FROM THE LOSS OF USE OF PROPERTY HELD IN RESERVE

Standby lightship

The plaintiff is entitled to recover not only the out-of-pocket expenses caused by a collision with a lightship but also damages for the loss of use of the services of the damaged lightship during the time her place was taken by a substitute lightship.

Facts: The *Comet*, a lightship belonging to the plaintiffs, was damaged in a collision with the defendants' ship, the *Mediana*. During repair the *Orion*, another lightship, was used which also belonged to the plaintiffs, who maintained the *Orion* for use in case of such an

[37][1990] 2 All ER, 246 at 249ff.

[38][1986] 1 Ch 546, ChD.

[39]See in greater detail H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at para. 1478.

[40]This was stressed by Cross LJ in *Harbutt's "Plasticine" Ltd.* v. *Wayne Tank and Pump Co. Ltd.* [1970] QB 447 at 476.

[41]Likewise in the case of a damaged ship: *The Gazelle*, (1844) 2 W.Rob.(Adm.) 279, quoted in H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at para. 1328. The same view has been taken in a (contract) case relating to a damaged engine rotor which had to be replaced, resulting in the lengthening of the engine's life: *Bacon* v. *Cooper (Metals) Ltd.* [1982] 1 All ER 397, CA. Compare the opposing view of the BGH, *supra*, **8.G.31.**, Note (1).

[42][1900] AC 113, HL

emergency. The plaintiffs claimed damages for "the loss of use of the *Comet* or hire of the services of the lightship *Orion*".

Held: The court of first instance dismissed the claim. The court of appeal reversed that judgment and the court of appeal's decision was upheld by the House of Lords.

Judgment: EARL OF HALSBURY L.C.:[43] "... [In The Greta Holme [1897] AC 596 Lord Herschell laid down a broad principle] namely, that where by a wrongful act of one man something belonging to another is either itself so injured as not to be capable of being used or is taken away so that it cannot be used at all, that of itself is a ground for damages [emphasis added]...

[T]he broad proposition seems to me to be that by a wrongful act of the defendants the plaintiffs were deprived of their vessel. When I say deprived of their vessel, I will not use the phrase "the use of the vessel". What right has a wrongdoer to consider what use you are going to make of your vessel? More than one case has been put to illustrate this: for example, the owner of a horse, or of a chair. Supposing a person took away a chair out of my room and kept it for twelve months, could anybody say you had a right to diminish the damages by shewing that I did not usually sit in that chair, or that there was plenty of other chairs in the room ? The proposition so nakedly stated appears to me to be absurd ... Here, as I say, the broad principle seems to me to be quite independent of the particular use the plaintiffs were going to make of the thing that was taken, except ... when you are endeavouring to establish the specific loss of profit, or of something that you otherwise would have got which the law recognises as special damage [emphasis added] ... But when we are speaking of general damages no such principle applies at all, and the jury might give whatever they thought to be the proper equivalent for the unlawful withdrawal of the subject-matter then in question."

Notes

(1) This case deals with damages for loss of use, notably in the case of a non-profit-earning chattel for which the plaintiff kept a substitute. English case law on this issue (as well as on other heads of damage in the case of loss of or damage to chattels) has been particularly elaborated with regard to ships.[44] A distinction is drawn in the case law between *profit-earning chattels* and those which are *non-profit-earning* because they are used for utility by public bodies or for pleasure. As to the former, "the normal measure of damages will be the loss of profits calculated at the freight rates prevailing during the period of detention of the ship or, where the hire of a substitute is a reasonable way of avoiding such loss, the cost of that hire."[45]

[43]Lord Shand, Lord MacNaghten, Lord Morris, Lord James of Hereford and Lord Brampton concurring.

[44]H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at para. 1326.

[45]Rogers at 789; see for a detailed overview *McGregor on Damages*, ibid. at para. 1336ff.

In the latter case, since the decision of the House of Lords in *The Greta Holme*,[46] it has been accepted that the plaintiff may be compensated for loss of use even where the ship is not profit-making and the plaintiff does not hire a substitute, that is to say when the plaintiff has not incurred expenses or lost income.[47]

(2) The owner of a non-profit earning chattel who does not hire a substitute (as in *The Greta Holme*) or keeps a substitute for use in case of an emergency (as in the annotated judgment) may recover so-called *general* damages the assessment of which gives rise to many technicalities.[48]

The expression "general damage(s)", in contrast to "special damage(s)", is given various meanings.[49] It may be used - as in the excerpted case - in the context of pleading. General damages are awarded in respect of damage which is *presumed* to be the direct natural or probable consequence of the tort. It must be averred that general damage has been suffered but, unlike special damage, it should *not* be *pleaded specifically*. As noted by W.V.H. Rogers, this rule "has spawned another sub-rule which distinguishes between damages which are capable of *substantially exact pecuniary assessment* and those which are not [emphasis added]".[50] The latter are, from that point of view, general.

In the cited cases, damages for the loss of use are general: the loss of use is a direct natural consequence of the tort and the loss is not capable of substantially exact pecuniary assessment. Conversely, the plaintiff who hires a substitute, is entitled to recover, as damages for the loss of use, the cost of hiring which he must strictly plead and prove as special damage.[51]

(3) In the annotated judgment, general damages resulting from loss of use are allowed independently of whether the plaintiff would have used the chattel or not. Indeed, in *The Astrakhan*,[52] concerning a warship belonging to the Danish State, damages for loss of use were granted although the ship would not have been used during the period required for repair. As a consequence, damage resulting from loss of use is more notional than in German law under which the owner is indeed

[46]*The Greta Holme* [1897] AC 596, HL.

[47]The so-called *abstrakte Nutzungsentschädigung* under German law, *supra*, **8.G.32.**

[48]See and compare H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at para. 1356ff; *Clerk & Lindsell on Torts* at para. 27-62.

[49]See *McGregor on Damages*, ibid. at para. 19ff.

[50]Rogers at 756; compare *McGregor on Damages*, ibid. at para. 21 and 23, distinguishing between the meaning of general and special damage concerning proof on the one hand and pleading on the other and Markesinis and Deakin at 685, combining both meanings: general damages are awarded in respect of damage which is presumed to flow from the wrong *and* refer to inexact or unliquidated losses while special damages are awarded for damage which the plaintiff must specify in his pleadings and prove *and* refer to precisely quantifiable losses.

[51]*Clerk & Lindsell on Torts* at para. 27-60.

[52]*The Astrakhan* [1910] P 172.

required to be willing and able to use the damaged thing.[53] Conversely, in English law, the fact that the owner lost the opportunity of use, independently of any concrete use which he intended, is sufficient to give rise to recoverable loss. But a plaintiff is entitled to damages for *loss of use* only where the defendant's wrong actually affected the possibility of use, as was decided in *The Glenfinlas*,[54] in which the damaged ship sank after having struck a mine before repairs could be carried out so that the collision damage did not entail any actual loss of use. However, it should be noted that, as *The Kingsway*[55] shows, although repairs have not been carried out, if the plaintiff proves with reasonable certainty that they will be done, the plaintiff is entitled to damages for (prospective) loss of use.

(4) The principles with regard to the recoverability of the cost of hire of motor cars have been considered more recently in *Giles* v. *Thompson*.[56] It is unquestionable that a plaintiff must show a reasonable need for a replacement car in order to recover the cost of hire (as special damages). To prove that reasonable need, it will normally be sufficient to show, however, that the plaintiff owns a car which he would have had available if it was not damaged. In the Court of Appeal in *Giles* v. *Thompson*, Steyn LJ said:

> "If it turns out that a plaintiff hired the car for a period when he always intended to be abroad, and was abroad, leaving the car idle in his garage, he will not be able to recover *special* damages for the hire for that period. It is therefore right to say that *a plaintiff must show a reasonable need for a replacement car.* On the other hand, it seems to me that ... where the plaintiffs owned cars which were damaged and therefore unavailable, the burden of showing reasonable need is relatively easily discharged. The need must be assessed in the light of the fact that the particular plaintiff previously had a car available, which was during the repair period not available. It is clearly not necessary in such a case to prove that it was essential for a plaintiff to hire a replacement car. *It is sufficient to show that he acted reasonably*. And he will be assisted by the commonsense inference that a person who regularly uses a car, which is then damaged, does not act unreasonably in

[53] See the German case concerning an ambulance of the *Bundeswehr, supra*, **8.G.32**, Note (3).

[54] *The Glenfinlas* [1918] P 363 (note of a decision of Registrar Roscoe). It may be noted that the *cost of repairs*, although they were not carried out and could no longer be carried out, was recoverable (*supra*, **8.E.34.**, Note (3)). But the damages for loss of use while repairs would have been carried out "were ... clearly inadmissible. Being purely consequential damages they were on a different footing from the estimated cost of repairs for an actual injury to the plaintiff's chattel. The principle to be applied was restitutio in integrum, and to give damages for a loss of time which had not occurred would be to act contrary to this maxim".

[55] *The Kingsway* [1918] P 344, CA; see H. McGregor, *McGregor on Damages*, 16th edn. (London: Sweet & Maxwell, 1997) at para. 1329.

[56] *Giles* v. *Thompson* [1993] 3 All ER 321, CA and HL; [1994] 1 AC 142, HL.

hiring a car of the same type for the period during which he is deprived of his own car [emphasis added]."[57]

In the House of Lords however, the question was answered more reservedly, as it was stressed that there remains ample scope for the defendant, in an individual case, to displace the inference which might otherwise arise.[58]

[57][1993] 3 All ER 321, CA at 337-338.

[58][1994] 1 AC 142 at 167, [1993] 3 All ER 321, HL, at 363 per Lord Mustill with whom all the other Law Lords concurred. The case has raised the question of whether a plaintiff, who has two cars at his disposal, may recover the cost of hiring a replacement when one is damaged. See Rogers at 672-673: *Giles* v. *Thompson* may imply that the cost of hiring a replacement may not be claimed but, as *The Mediana* (*supra*, **8.E.36**) shows, damages for loss of use may be assessed on another basis; compare *Clerk & Lindsell on Torts* at para. 27-61.