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Richard D. Hall

LOSS OF USE AS AN ELEMENT OF DAMAGES

RICHARD D. HALL
of the Denver Bar

Last year 54,157 vehicles in Colorado were involved in auto accidents according to the records of the Colorado Department of Revenue. The use of almost all of these cars was lost for some period of time while they were being repaired, and undoubtedly the owners of about one-half of these cars made some claim for damages. In view of this large number of liability claims which include, or could include, a demand for loss of use as well as other elements of special damage, one would reasonably expect there would be an extensive body of law on the subject. The very reverse, however, is true in Colorado, and as a result attorneys making loss of use claims usually find themselves uncertain as to the law in this state.

Regarding the pleading of this loss of use element of damages, it is well settled in Colorado that such loss of use is an item of special damages and must be specially pleaded.[1] Similarly, it is clear that in proving his claim for loss of use of a vehicle, a plaintiff must prove that the vehicle was necessarily unavailable for use during the period of time reasonably necessary for the repair of the vehicle with ordinary diligence.[2] Such period of time does not, however, include the time during which the vehicle was unnecessarily unavailable because the owner failed to reach a decision promptly as to whether or not to have the vehicle repaired, or as to where the repair work was to be done.[3]

Assuming the plaintiff has properly pleaded his claim and has proven the period for which the loss of use is claimed, there is presented the difficult problem of proving with a reasonable degree of certainty the amount of such loss of use damages. In *Hunter v. Quaintance,*[4] the plaintiff's Oakland automobile was badly damaged in an accident, and as part of his proof of damages the plaintiff offered evidence at the trial as to the value of its use for the two months during which it was being repaired. The trial court instructed the jury that:

> The correct measure of damage in this case is the reasonable cost of repairing said Quaintance's automobile in order to put it in as good condition as it was in before the injury complained of . . . plus any direct loss the said Quaintance may have sustained by reason of the loss of the use of said automobile during a reasonable length of time for its repair . . .

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[1] Rule 9(g), Rules of Civil Procedure; Hunter v. Quaintance, 69 Colo. 28, 168 P. 918 (1917).

[2] Allen v. Brown, 159 Minn. 61, 198 N.W. 137 (1924); Kohl v. Arp, 236 Iowa 31, 17 N.W. 2d 824 (1945); Magnolia Petroleum Co. v. Harrell, 66 F. Supp. 559 (D. Okla. 1946); Adams v. Burnett, 150 So. 403 (La. App. 1932).

[3] See cases in n. 2, *supra.*

[4] 69 Colo. 28, 168 P. 918 (1917).

After a verdict and judgment for plaintiff, defendant appealed to the Colorado Supreme Court which, in considering the submission to the jury of the plaintiff's loss of use claim, stated:

> It is urged that, the evidence showing that the car was used only for purposes of pleasure, there is no basis for estimating the damage from the loss of such use. Cases are cited which hold that the damage from such a source is too speculative to be considered. We are inclined to agree with that opinion.

The court then proceeded to point out that the alleged loss of use damage had not been pleaded and that the issue of negligence submitted to the jury had not been confined to acts of negligence alleged in the complaint and then reversed the judgment "for the reasons above given."

Although the supreme court certainly could have been more positive in its statement, this case in the writer's opinion does establish for Colorado the doctrine that a party who loses the use of a vehicle used by him solely for pleasure and general family purposes and who sustains no specific out-of-pocket expense as a direct result of such loss of use, cannot recover compensation for such loss of use. In the writer's opinion this doctrine still applies in Colorado although the plaintiff can prove a definite rental value for vehicles of the type damaged in the accident, and although the majority rule in other jurisdictions would seem to be to the contrary.[5]

Since a car owned for pleasure and family purposes may sit in the garage all day or be used for only a few minutes in a day, it would seem improper to apply a full day's rental value as a measure of damages resulting from loss of use in such a case. Also, the rental value of such a car is not a measure of the inconvenience caused by the loss of use of a car used for such purposes, and such evidence in such a case would still leave a judgment for a sum of money up to speculation and conjecture. This rule has been objected to as placing at a disadvantage a plaintiff who lacks the credit or available cash to rent a replacement vehicle,[6] though finds minority support in other jurisdictions besides Colorado.[7]

Damage Cannot Be Speculative

This case of *Hunter v. Quaintance* does not in the writer's opinion establish as a rule that the loss of use of any vehicle used "only for purposes of pleasure" is not recoverable under any and all circumstances. Since the reason given for the disallowance of

[5] Atlanta Furniture Co. v. Walker, 51 Ga. App. 781, 181 S.E. 498 (1935); Parilli v. Brooklyn City R. Co., 260 N.Y.S 60 (1932); Longworth v. McGrath, 108 Conn. 738, 143 A. 845 (1928).

[6] Naughton Mulgrew Mtr. Car Co. v. Westchester Fish Co., 173 N.Y.S. 437 (1918); Pittari v. Madison Ave. Coach Co., 68 N.Y.S. 2d 741 (1947).

[7] Goode v. Hantz, 209 La. 821, 25 So. 2d 604 (1946); Adams v. Burnett, 150 So. 403 (La. App. 1933); Kane v. Carpet-Dover Merc. Co., 206 Ark. 674, 177 S.W. 2d 41 (1944).

such item in this case was the highly speculative nature of the damages in the case, the court could very logically hold that a plaintiff who, for example, is a tourist using his car solely for purposes of pleasure and who rents a substitute car during the time the use of his own is necessarily lost can recover the amount of the car rental bill actually incurred by him. Similarly, where the plaintiff has used the car solely to go to and from work and for general pleasure purposes and has rented a substitute car or incurred bus fares while his own car was laid up for repairs, he should be able to recover the amounts actually so expended by him. This latter set of facts is found in the case of *Longo v. Monast* [8] in which the Supreme Court of Rhode Island did allow such a loss of use claim.

In the writer's opinion, *Hunter v. Quaintance* does not hold by implication that the loss of use of a vehicle used solely for commercial or business purposes is always recoverable. In *Interurban Transp. Co. v. F. Strauss & Sons*,[9] the plaintiff's bus was damaged in an accident, and the bus company lost the use of it while necessary repairs were being made. However, in view of the fact that the plaintiff owned an extra bus which it kept for such emergencies and used in this case, the court held that the alleged damages for loss of use of the larger and more comfortable damaged bus were too speculative under the evidence to support a recovery. From these examples it can be seen that the real issue in these cases is not whether a so-called "pleasure" use or "commercial or business" use is involved, but whether the evidence as to the damages arising from the loss of use is sufficiently definite and certain to warrant a recovery.

Where the plaintiff can prove actual disbursements for rental of cars or trucks, taxicab fares, bus fares, or train or airplane fares as a direct result of the loss of use of a vehicle, such disbursements are by the vast weight of authority recoverable by the plaintiff.[10] Many difficult questions arise, however, when the alleged direct financial loss is claimed to be a loss of personal earnings or profits because of the loss of use of the vehicle or other property. In *Parks v. Sullivan*,[11] the surveying instruments belonging to the plaintiff were damaged beyond repair by the defendant's wagon, and it allegedly took the plaintiff 20 days to procure a new set. The judgment of the trial court allowing plaintiff damages in the sum of $5.00 per day for 20 days to cover his loss of earnings allegedly resulting from the loss of use of such instruments was reversed on appeal by the Colorado Supreme Court which noted that the testimony failed to show that plaintiff was unable to perform any other work than surveying during the 20 day

[8] 70 R. I. 460, 40 A. 2d 433 (1944).
[9] 196 So. 467 (La. App., 1940).
[10] See cases collected in 169 A.L.R. 1087, 1117; 5 Am. Jur. (Automobiles) § 750; 25 C.J.S. (Damages) § 41.
[11] 46 Colo. 340, 104 P. 1035 (1909).

period, and further noted that the accident did not necessarily prevent his employment in work other than that requiring the use of the surveying instruments. However, if the plaintiff had clearly proven that he attempted to find other employment but was unsuccessful, that other surveying instruments could not be obtained on a rental basis, and that he procured a new set of instruments as soon as possible, the judgment in favor of plaintiff presumably would have been upheld.

Wherever recovery is sought for diminished earnings or profits because of the loss of use of a vehicle, it would seem that the plaintiff would be required to establish as part of his proof the unavailability of a temporary replacement on a rental basis.[12] This would follow from the duty of the plaintiff to mitigate damages. Also the plaintiff would be required to prove an established business under the law setting forth this limitation on any recovery for loss of profits or earnings based on commissions.[13]

The case of *Parks v. Sullivan*, supra, is important too in that the Colorado Supreme Court in that case by implication accepted the view that damages for loss of use are allowable not only for the period during which an article is being repaired, but also for the period necessarily spent by the plaintiff in replacing a non-repairable article with a new one. This is probably the minority rule,[14] but in the writer's opinion it is much more reasonable and logical than the majority rule.

Where the plaintiff is seeking recovery for the loss of use of a vehicle during the period it was necessarily being repaired, the majority of courts have limited the total recovery for repairs and loss of use to the difference between the value of the vehicle before and after the accident.[15] However, other courts limit the total recovery only to the value of the vehicle before the accident, without deduction for the value of the vehicle in its damaged condition after the accident.[16] The first rule appears more desirable to this writer, for the plaintiff in making his decision as to whether to repair or to sell the car in its damaged condition for salvage should be required to take into consideration the amount of his prospective loss of use claim plus repair bill as opposed to the difference in the value of the vehicle before and after the accident, and should be required to follow the course which keeps his total damages, including all elements, to the minimum possible.

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[12] Hanson v. Hall, 202 Minn. 381, 279 N.W. 227 (1938); Jellum v. Grays Harbor Fuel Co., 160 Wash. 585, 295 P. 939 (1931); Francischini v. McMullen, 6 N. J. Misc. 736, 142 A. 651 (1928).

[13] Diamond Rubber Co. v. Harryman, 41 Colo. 415, 92 P. 922 (1907); Milheim v. Baxter, 46 Colo. 155, 103 P. 376 (1909); 15 Am. Jur. p. 819.

[14] Glass v. Miller, 51 N.E. 2d 299 (Ohio App. 1940); Colonial Mtr. Coach Corp. v. New York C. R. Co., 228 N.Y.S. 508 (1928); *Contra:* Helin v. Egger, 121 Neb. 727, 238 N.W. 364 (1931); German v. Centaur Line Co., 295 S.W. 475 (Mo. App. 1927); Kohl v. Arp, 236 Iowa 31, 17 N.W. 2d 824 (1945).

[15] Missouri P. R. Co. v. Qualls, 120 Okla. 49, 250 P. 774 (1926); Cunningham v. Crane Co., 255 Ill. App. 373 (1930).

[16] Lamb v. Landers, 67 Ga. App. 588, 21 S.E. 2d 321 (1942); Atlanta Furniture Co. v. Walker, 51 Ga. App. 781, 181 S.E. 498 (1935).