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UNDERSTANDING LOSS OF (RIGHT TO) USE DAMAGES: DEFINING FAIR AND REASONABLE COMPENSATION FOR LOSS OF USE IN LIGHT OF HISTORICAL ORIGINS AND PRACTICAL CONSIDERATIONS

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Abstract

Loss of use is fundamentally about the denial of property rights regardless of its intended use. Property ownership vests the owner with certain intrinsic rights, including the right to use or not use. When they are deprived of that choice through the tortious conduct of another, that deprivation is compensable. This Article reviews the historical origins of loss of use law to determine that tort victims denied the right to use their property must be compensated regardless of how they would have chosen to use their property. Because these damages do not depend on the owner's actual use, loss of use should be thought of as loss of right to

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use. The Article then aims to define fair and reasonable compensation by arguing that the proper measure of damages for loss of right to use is daily market rental value for the period of deprivation. This simplified definition provides courts with a workable measure of damages that alleviates the need for judicial speculation while holding true to the goal of placing tort victims back in their original position.

I. INTRODUCTION

Property ownership includes the intrinsic right to use one's property as desired as long as it is within the bounds of the law. The owner of real property or chattel may choose to use it for pleasure, for profit, or for nothing at all. The choice is theirs to make. When they are deprived of that choice through the tortious conduct of another, that deprivation is compensable. Loss of right to use damages are an attempt to put the property owner back in their original position as if the wrongful conduct never occurred. On the surface, this is a simple task. In practice, however, there have been great debates as to how and to what extent this goal should be met for loss of right to use damages. As with all tort damages, the goal is to provide the victim with fair and reasonable compensation. Courts on both sides of the Atlantic have debated what fair and reasonable compensation means, while worries over preserving fundamental property rights have been met with concerns about overcompensating tort victims.

Formulating a definition for fair and reasonable compensation becomes a much simpler task after one clearly defines the harm for which compensation is being sought. For example, if an automobile is damaged in a collision, it must be repaired. Making such repairs may involve handing over the automobile to a third party, meaning the owner is deprived of its use during such period of time. He may have chosen to let it sit in a vacant lot, drive it around the countryside, or rent it out for a profit. Regardless of what he would have actually chosen to do, he has suffered a loss because that choice has already been made for him. Thus, damages commonly referred to as "loss of use" are more appropriately damages for "loss of right to use." It is the owner's right to use his property that is being compensated as opposed to his real, intended, or prospective use of the property. Because a court can only speculate as to how a tort victim could or should have used their property, courts should adopt a general rule for loss of use damages where no specific loss of profit can be proven. Analysis and trending dictate that a general rule should define fair and

reasonable compensation for loss of right to use as the daily rental value multiplied by the days of deprivation. Unless a plaintiff can show they would have used the property in a more profitable manner—such as part of a business enterprise—rental value represents an easily obtainable and easily understood estimate of the value of a property's use.

This Article proceeds in four parts. After this introduction, Part I reviews the historical origins behind loss of right to use damages. This will demonstrate why the intrinsic right to use one's property is essential to understanding how it should be compensated. Part II discusses the evolution of loss of right to use throughout England and the United States to argue that English admiralty law is responsible for the current state of the doctrine. Part III summarizes loss of right to use in Connecticut, whose loss of right to use law is among the oldest and most cited in the United States. Finally, Part IV aims to provide a clear measure for courts to determine fair and reasonable compensation for loss of right to use based on market rental value. The Article concludes with a summary of the underlying principles supporting a clear measure of damages for loss of right to use.

II. HISTORICAL ORIGINS OF LOSS OF RIGHT TO USE

A. English Admiralty Law & Lord Halsbury's Theory of Property Rights

The concept of recovering damages for the loss of use of chattel originates from English admiralty law. Courts in England have long awarded demurrage charges to compensate shipowners for the loss of use of their vessels due to improper delay or detention.[1] Actions for demurrage were usually the result of a vessel's extended detention for loading or unloading or delays occurring before or during the ship's voyage. Ships held for any time beyond the allowable set of loading days, called lay-days, were subject to demurrage charges based on the number of days the vessel was detained.[2] These were often included as express contractual provisions in the charter-party

1. *See* Theodore M. Etting, *Demurrage*, *in* 6 THE AMERICAN AND ENGLISH ENCYCLOPAEDIA OF LAW 542, 542–43 (John Houston Merill ed., Edward Thompson Co. 1888).

2. *See* EDWARD LAWES, A PRACTICAL TREATISE ON CHARTER-PARTIES OF AFFREIGHTMENT, BILLS OF LADING, AND STOPPAGE IN TRANSITU 129–30 (1813).

or bill of lading but were also awarded under a theory of implied contract.[3]

Under a strict definition, demurrage only arises from contract.[4] However, loss of use damages recovered in tort cases involving vessel collisions or wrongful seizures have also been called demurrage.[5] Courts in England commonly awarded compensation to shipowners deprived of the use of their vessels due to repair or other forms of detention not arising from breach of contract.[6] Regardless of whether the action is one of contract or tort, the reasoning behind demurrage is that any delay or detention in the return of a vessel deprived the shipowner of his right to use the vessel. Such a delay would reasonably be expected to result in a loss of income or in some circumstances the expense of renting a substitute vessel. Thus, demurrage is a mechanism to compensate the shipowner for his losses or added expenses associated with the delay.

English courts were originally split as to whether the shipowner would have to incur an actual loss before recovering for demurrage.[7] Where the shipowner could not show that he would have used the vessel for profit, some courts refused to award demurrage.[8] That is, some courts required that the shipowner show he was deprived of his loss of use, not his loss of the right to use.[9] The law in England was not settled until the turn of the twentieth century when the House of Lords decided *The Greta Holme*[10] and *The Mediana*.[11] Both decisions stand for the principle that compensation is to be awarded based on the value of a vessel's potential use regardless of how the vessel was actually used or if it was used at all.[12] Lord Halsbury illustrated this principle well in *The Mediana*: "Suppose, for example, someone went into my house and took away a chair and retained it for some months,

3. *See* Etting, *supra* note 1, at 543.

4. *See id.* at 542.

5. *See* The Inflexible (1857) 1094–95; Swab. 200; *see also* The Clarence (1850) 166 Eng. Rep. 1, 968–69; 3 W. Rob. 283, 283–87.

6. *See* David R. Owen, *The Origins and Development of Marine Collision Law*, 51 TUL. L. REV. 759, 767–71 (1977).

7. *See* Note, *Damages: Objective Determination of the Value of the Use of a Chattel*, 39 HARV. L. REV. 760, 760 (1926) [hereinafter *Damages*] (discussing the "vacillating course of the English decisions on this point.").

8. *See, e.g.*, The City of Peking [1889] 15 AC 438; The Argentino [1889] 59 LT 1 AC at 914–18.

9. *See Damages*, *supra* note 7, at 760.

10. *See id.* (referring to The Greta Holme [1897] AC 596).

11. *See id.* (referring to The Mediana [1900] AC 113).

12. *See id.*

could anyone say that I as owner am entitled to no reparation on the ground that I have other chairs or that I was not in the habit of sitting upon that particular chair?"[13] Lord Herschell agreed, stating in *The Greta Holme* that he believed it was "clear law that in general a person who has been deprived of the use of a chattel through the wrongful act of another is entitled to recover damages . . . even though he cannot prove . . . [a] 'tangible pecuniary loss.'"[14] *The Greta Holme* and *The Mediana* were highly influential and followed by courts in England and around the world.[15] A few years later, *The Astrakhan*[16] "represented the high point of British admiralty cases endorsing the recovery of the abstract and hypothetical use value of a vessel."[17] There, a Danish warship suffered damage in a collision immediately before three months of scheduled maintenance. The court found that damages were appropriate because the Danish government was deprived of the ship's potential use and would be unable to make use of her if some unforeseen event occurred.[18] In the 1920s, however, in deciding *The Valeria*[19] and *The Susquehanna,*[20] the English Court briefly returned to the old rule requiring actual loss before compensation is awarded. Though Lord Halsbury's argument would eventually prevail,[21] the English Court's lack of consistency had a profound impact on the law of loss of right to use in the United States.

B. Adoption of English Admiralty Law in the United States

Courts in the United States have often turned to English common law when deciding damages for loss of use. *The Apollon* was the first

13. [1900] AC 113 at 117.

14. [1897] AC 596 at 604.

15. *See* Cook v. Packard Motor Car Co. of N.Y., 92 A. 413 (Conn. 1914) (citing and agreeing with *The Greta Holme* and *The Mediana*); C.W. Hunt Co. v. Boston Elevated Ry. Co., 85 N.E. 446 (Mass. 1908) (adopting Lord Halsbury's rule from *The Greta Holme* and *The Mediana*); The King v. Mason, [1933] S.C.R. 332 (Can.) (demonstrating how Canadian courts were influenced by *The Greta Holme* and *The Mediana*); *Pix v Suncoast Marine Pty Ltd.* (Unreported, Supreme Court of Queensland, Holmes J, 8 March 2019) 45 (Austl.) (showing how Australian courts were similarly influenced).

16. *See* [1910] 102 LT 1 P at 539–42.

17. Alan E. Brownstein, *What's the Use? A Doctrinal and Policy Critique of the Measurement of Loss of Use Damages*, 37 RUTGERS L. REV. 433, 488 (1985).

18. *See* The Astrakhan [1910] 102 LT 1 P at 542.

19. *See* [1922] 2 AC 242.

20. *See* [1926] 134 LT 1 AC at 46–50.

21. *See infra* Section II.

demurrage case heard by the United States Supreme Court.[22] Writing for the Court, Justice Story rejected the argument that demurrage could only arise through contract and found it was the proper measure of compensation for the illegal seizure of a vessel because it represents the "ship's expenses, wear and tare, and common employment."[23] Demurrage could therefore be awarded for any improper delay or detention of a vessel.[24] For many years, federal courts followed the original English rule by requiring that plaintiffs show a loss of profits before allowing recovery for loss of use. For example, in *Williamson v. Barrett*, the Court followed the English admiralty court's decision to find that a plaintiff can recover compensation for "the capacity of the vessel to earn freight . . . and consequent loss sustained while deprived of her service" based on the market value of the hire of the vessel.[25] A similar holding was reached in *The Potomac* where the Court found the market price of the vessel's hire or evidence of a loss of profit to be the "test of the sum to be recovered."[26] In *The Conqueror*, the Court described demurrage as a well-settled element of damages in English and American common law.[27] Citing both *The Apollon* and a string of English cases, the Court recognized limits to recovery. For example, under the English rule, stated by Dr. Lushington in *The Clarence*, "two things are absolutely necessary,—actual loss, and reasonable proof of the amount."[28] To the Supreme Court, the best evidence of actual loss was "the sum for which vessels of the same size and class can be chartered in the market."[29]

The Conqueror was decided just months before the House of Lords handed down *The Greta Holme* decision, which rejected the actual loss rule that the Supreme Court cited positively in *The Clarence*.[30] By the time the actual loss rule returned in *The Valeria*, many American state courts had already cited *The Greta Holme* and *The Mediana* in non-admiralty cases to hold that compensation was appropriate when a property owner had been deprived of his right to

22. *See* 22 U.S. 362 (1824).
23. *Id.* at 378.
24. *See* Theodore M. Etting, *Demurrage*, 32 AM. L. REG. 153, 154 (1884).
25. 54 U.S. 101, 111 (1851).
26. 105 U.S. 630, 632 (1881).
27. *See* 166 U.S. 110, 125 (1897).
28. *Id.*
29. *Id.* at 127.
30. *The Conqueror* was decided on March 8, 1897 and *The Greta Holme* was decided on July 29, 1897.

use the property, regardless of whether he would have in fact done so. These early cases often involved automobiles used for pleasure and judges were aware of the important role automobiles played in American society. Unlike a pleasure yacht that may go unused for weeks or months at a time, automobiles quickly became important modes of transportation. Courts took advantage of the changing British authority, and Lord Halsbury's argument was persuasive and "went unchallenged during the period American state courts first confronted the pleasure-auto issue."[31]

The Connecticut Supreme Court, in *Cook v. Packard Motor Car Co. of New York*, examined the conflict between the United States Supreme Court's holding in *The Conqueror* and the House of Lords' decisions in *The Mediana* and *The Greta Holme*.[32] The court distinguished the holding in *The Conqueror* and noted that courts in other states, such as the Massachusetts court in *C.W. Hunt Co. v. Boston Elevated Railway Co.*,[33] have chosen to adopt Lord Halsbury's rule.[34] The Connecticut court decided to follow Lord Halsbury's reasoning and stated, "[w]e fail to see why the character of the intended use should determine the right to a recovery . . . ."[35] It went on to rule that evidence of the automobile's rental value was admissible as to show the value of its use.[36]

Perkins v. Brown involved the loss of use of a vehicle due to an automobile accident.[37] The defendant argued that no damages for loss of use should be awarded because the owner of the vehicle used it for pleasure and had not incurred any expenses in order to use another vehicle. The court rejected this argument, citing Lord Halsbury's opinion in *The Mediana* holding that demurrage was appropriate even where obtaining a substitute vessel did not result in an expense to the shipowner.[38] However, the Tennessee court did limit the use of rental value as a measure of damage to only cover the time the plaintiff would normally use the vehicle. Despite this, courts following the general rule of *Perkins* have ignored that limitation. For example, the Illinois Court of Appeals in *McCabe v. Chicago & Northwestern Railway*

31. Brownstein, *supra* note 17, at 493.
32. *See* 92 A. 413, 416 (Conn. 1914).
33. *See* 84 N.E. 446 (Mass. 1908).
34. *Cook*, 92 A. at 416.
35. *Id.* at 415.
36. *Id.* at 416.
37. *See* 177 S.W. 1158, 1160 (Tenn. 1915).
38. *See id.* at 1159.

Co. cited *Perkins* when awarding loss of use damages when delivery of an automobile was delayed.[39] Even though the automobile owner did not rent a replacement and would not have used it for business purposes, the court decided that his "right of use, enjoyment, possession and disposition of the machine is not limited by the use which he made of it . . . ."[40]

In another early automobile case, the court in *Dettmar v. Burns Bros.* looked to *The Mediana* and *The Greta Holme* to support its finding that an automobile owner may recover for loss of right to use even if the vehicle was only used for pleasure.[41] The court based its decision on the ground that a property owner's right to use their property is not reduced by the manner in which the owner uses it. "The right of an owner of the chattel to the use of his property is not diminished by the use the owner makes of it."[42] The court continued to say that the owner's "right to use [their property], whether for business or pleasure, is absolute, and whoever injures the owner in the exercise of that right renders himself liable for consequent damages."[43]

Similar arguments were also made in state courts in cases involving other forms of property. For example, the Supreme Judicial Court of Massachusetts cited extensively to *The Mediana* and *The Greta Holme* in *C.W. Hunt Co. v. Boston Elevated Railway Co.*[44] The court applied the reasoning of both decisions to decide the railway company was entitled to the rental value of their property even though it was not commonly rented or intended to be rented.[45] The construction company's delays deprived them of the right to use the property and the rental value was an appropriate measure of those damages.

> So long as the Hunt Company was at work on the towers after the time for completion of them had passed, the railway company was thereby deprived of all return from its investment in these four items of

39. *See* 215 Ill. App. 99, 104 (1919).
40. *Id.* at 102.
41. *See* 181 N.Y.S. 146, 147–48 (App. Div. 1920).
42. *Id.* at 147.
43. *Id.*
44. *See* 84 N.E. 446, 450–51 (Mass. 1908).
45. *See id.* at 450 ("A man who has been deprived of his property is not precluded from recovering therefor because the property in question is not 'commonly rented.'").

> property, and to that extent the decisions in The Gr[e]ta Holme and The Mediana are applicable.[46]

More recent cases demonstrate the state courts' widespread commitment to these principles. Additionally, the Restatement (Second) of Torts §§ 928 and 931 have helped push state courts towards the simplified approach advocated by Lord Halsbury over a century ago. Restatement § 928 states that one may recover (a) "the difference between the value of the chattel before the harm and the value after the harm or . . . the reasonable cost of repair or restoration . . . and (b) the loss of use."[47] The commentary to subsection (b) refers to § 931, which provides that when one is entitled to recover for detention or deprivation real or personal property, compensation may include "(a) the 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, and (b)harm to the subject matter or other harm of which the detention is the legal cause."[48] The commentary to subsection (a) of § 931 continues by saying an owner is "entitled to recover as damages for the loss of the value of the use, at least the rental value of the chattel . . . ."[49] This is the case "even though the owner in fact has suffered no harm through the deprivation, as when he was not using the subject matter at the time . . .."[50]

A New York Appellate Court in *Mountain View Coach Lines, Inc. v. Storms* reversed a judgment refusing to award damages for loss of use of a commercial bus where the plaintiff did not hire a substitute bus.[51] Citing the Restatement § 931, the New York court held that "where a motor vehicle is harmed as a result of a tortious act, the plaintiff is

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46. *Id.* at 451.

47. RESTATEMENT (SECOND) OF TORTS § 928 (AM. L. INST. 1979).

48. *See id.* at cmt. b; i*d.* § 931.

49. *Id.* § 931 cmt. b. "A detains B's automobile for a period of one month. The car was used merely for B's pleasure and during this month B does not use another car. The rental value of the car is $50 for that period. B is entitled to damages of $50." Id. at cmt. b, illus. 2.

50. *Id.* § 931 cmt. b. "The same facts as in Illustration 2, except that at the time of the deprivation, B had put the car up for the winter, did not intend to use it and did not discover the loss until after it had been returned. The damages based upon rental value are not diminished by those facts." *Id.* at cmt. b., illus. 3. However, some courts have denied loss of use damages where the owner was already unable to use the property. *See generally* Metz v. Soares, 48 Cal. Rptr. 3d 743 (Ct. App. 2006) (finding the owner of a 1971 Jaguar XKE was not entitled to loss of use damages because the automobile was registered as non-operational and had not been in his possession for four years prior to being damaged).

51. *See* 476 N.Y.S.2d 918, 919 (App. Div. 1984).

entitled to damages for loss of use during the time reasonably required to make repairs . . . ."[52] Similarly, the Colorado Supreme Court in *Koenig v. PurCo Fleet Services, Inc.* overturned a decision that required a commercial tort victim to prove "loss prerequisites"—that it was open for business and that at least one customer wanted to rent its car—for each day that loss of use damages were claimed.[53] Channeling Lord Halsbury's famous chair illustration in *The Mediana*, the court wrote:

> If the court of appeals and Koenig were correct that a commercial entity must prove a lost opportunity to recover loss of use damages, then anyone could wrongfully take possession of a commercially owned or leased chattel—and eventually return it in a similar condition—without liability unless the owner could prove a lost economic opportunity or lost profits.[54]

Instead of turning directly to English authority like many other courts, it cited the § 931 of the Restatement to find "there is an intrinsic loss from the deprivation of property separate and apart from an out-of-pocket expense."[55] It then held that loss of use damages could be estimated by using "the reasonable rental value of a chattel or, alternatively, net lost profits that could have been earned by using the chattel."[56]

The Texas Supreme Court in *J&D Towing, LLC v. American Alternative Insurance Corp.* reviewed more than a hundred years of loss of use jurisprudence from across the country.[57] There, the plaintiff towing company's tow truck had been totally destroyed by another driver's negligence. That driver's insurance settled for the policy limits and the plaintiff filed an underinsured motorist claim with its own insurer for loss of use, which was denied. The issue, as the court put it, was "whether it should be cheaper to totally destroy

52. *Id.* at 920. However, other courts have not imposed such a limitation, especially if there are extenuating circumstances. *See* Guido v. Hudson Transit Lines, Inc., 178 F.2d 740, 743 (3d Cir. 1950) (affirming award of damages for loss of use where owner of destroyed truck was unable to find a replacement for two years due to post-war shortages).

53. 285 P.3d 979, 980–81 (Colo. 2012).

54. *Id.* at 983.

55. *Id.*

56. *Id.* at 983–84.

57. *See* 478 S.W.3d 649, 664–69 (Tex. 2016).

a truck than it is to partially destroy it."[58] The Texas Supreme Court reasoned that the measure of damages in tort cases is "fair, reasonable, and proper compensation . . .."[59] Full and fair compensation is satisfied by compensating a plaintiff for loss of use damages based on the rental value of a comparable replacement during the period of deprivation, even where the vehicle has been completely destroyed. Further, a plaintiff need not actually rent a replacement vehicle in order to recover loss of use damages. The court reviewed the changes made to § 927 of the Restatement (Second) of Torts.[60] The original Restatement required a plaintiff whose property was totally destroyed to choose between rental value or the interest on the market value of their property.[61] The Restatement was later changed to allow a plaintiff to recover both.[62] This means that a plaintiff whose property is completely destroyed may recover the market value of their property, plus interest, as well as the rental value of that property for the period of deprivation.[63]

III. MODERN LOSS OF USE IN ENGLAND AND THE AMERICAN FEDERAL COURTS

A. Lord Halsbury's Argument Prevails in England

The House of Lord's rejection of Lord Halsbury's rule was short lived. Eventually, the English Courts returned to a more lenient loss of use rule that did not require proof of actual loss. As stated by Lord Justice Devlin in *The Hebridean Coast*, the owner of a damaged or detained ship "has lost the use of his vessel; and whether he could

58. *Id.* at 653.

59. *Id.* at 655.

60. *See id.* at 675–77.

61. *See* RESTATEMENT (FIRST) OF TORTS § 927 (AM. L. INST. 1939) ("Where a person is entitled to a judgment for the conversion of a chattel or the destruction of any legally protected interest in land or other thing, the damages include . . . interest from the time at which the value is fixed *or* compensation for the loss of use.") (emphasis added).

62. *See* RESTATEMENT (SECOND) OF TORTS § 927 (AM. L. INST. 1979) (explaining that an award of damages for destroyed property or chattel may include: "interest from the time at which the value is fixed; *and* . . . compensation for the loss of use not otherwise compensated.") (emphasis added).

63. *See id.* at cmt. o (citing cases where plaintiffs whose property has been destroyed may recover the market value plus interest in addition to the rental value for the period of deprivation).

have used her for pleasure or business . . . he is entitled to compensation for loss of use."[64] This is the prevailing view among English courts today. The exact measure of damages may vary according to the circumstances of the case but the intrinsic right recognized by Lord Halsbury to use one's property and to be compensated for the loss of that right has been widely adopted by English courts. As a prominent English treatise states, "[t]he notorious decision of the U.S. Supreme Court in *The Conqueror* . . . would almost certainly not be followed [in England]."[65]

Indeed, English courts today tend to cite to and follow decisions such as *The Greta Holme* and *The Mediana* as opposed to the earlier English decisions the U.S. Supreme Court cited in its admiralty cases. For example, in *Dimond v. Lovell*, the House of Lords found that "even where the chattel is non profit earning . . . there may still be scope for awarding general damages for loss of use."[66] In *Lagden v. O'Connor*, Lord Nicholls stated that a plaintiff's "entitlement to general damages would not have depended on the degree of use to which he would . . . have been likely to put it. He had been deprived of the benefit of having his car available for whatever use he might from time to time decide upon."[67] He then argued that the cost of providing a replacement vehicle "is a convenient yardstick by which to measure the damages payable to the innocent driver for temporary loss of use of his own car."[68]

Later in *Piper v. Hales*, a plaintiff attempted to recover for the loss of use of his replica Porsche 917 after its engine was damaged by the defendant's driving.[69] The court quoted Lord Halsbury to find that "where by the 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 . . . ."[70] Similarly, the Court in *Beechwood Birmingham Ltd. v. Hoyer Group UK Ltd.*, cited the string of cases from *The Greta Holme* to *The Hebridean Coast* and recognized the general principle that damages may be recovered regardless of the owner's use of the

64. [1961] AC 545.

65. REGINALD G. MARSDEN ET AL., MARSDEN ON COLLISIONS AT SEA 579 n.27 (Simon Gault et al. eds., 13th ed. 2003).

66. [2000] 1 AC 384 (HL) (appeal taken from Eng.).

67. [2004] 1 AC 1067 (HL) [76] (appeal taken from Eng.).

68. *Id.* at [2].

69. *See* [2013] EWHC B1 (QB) [1] (appeal taken from Eng.).

70. *Id.* at [48] (emphasis removed) (citing The Mediana).

property.[71] The Court did, however, explain the distinction between awarding loss of use damages to an individual versus a for-profit enterprise, which "constitutes a separate class of case from that in which an individual claims in respect of a private vehicle used for convenience rather than profit."[72] Thus, "[w]here a substitute vessel is hired in to fulfil the role of the damaged vessel, the costs of hiring in are recoverable. Where the claimant's fleet is sufficient to provide a standby, then an award may be made based upon the expenses of keeping that standby . . . ."[73] Otherwise, "the damages awarded are generally to be calculated on the basis of interest on the capital value of the damaged ship at the time of the collision."[74] This is not inconsistent with Lord Halsbury's rule, which also distinguished between claims of lost profit from the loss of use of a for-profit vessel and loss of use of non-profit vessels. In *The Mediana*, he stated that "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 . . . you must [show] it, and by precise evidence . . . ."[75] However, "no such principle applies" to general damages such as loss of use.[76]

Therefore, where a plaintiff wishes to measure damages in a commercial sense, they must provide evidence of lost profits. Without such evidence, the default measure of damages for the loss of use of personal chattel is the cost of a temporary replacement without regard for the owner's actual use. Where the chattel is owned for a commercial purpose or where the plaintiff's fleet provides a standby, the default measure is interest on its capital value or the cost of keeping the standby.

B. Loss of Right to Use in the American Federal Courts

The back-and-forth nature of the English common law had a significant impact on the loss of use rules adopted by courts in the United States. The United States Supreme Court decided *The Conqueror* only months before Lord Halsbury wrote his famous opinion in *The Greta Holme*, which contradicted the decisions relied

71. *See* [2010] EWCA (Civ) 647, [2011] 1 QB 357 (appeal taken from Eng.).
72. *Id.* at [48].
73. *Id.* at [45].
74. *Id.*
75. [1900] AC at 117.
76. *Id.* at 118.

upon by the Supreme Court. In *Brooklyn Eastern District Terminal v. United States*, Justice Cardozo discussed the differing views among English and American courts in cases involving demurrage or loss of use without proof of actual loss.[77] By this time, the Courts in England were following the rules announced in *The Valeria* and *The Susquehanna* rejecting Lord Halsbury's analysis to once again require an actual loss.[78] Justice Cardozo cited *The Susquehanna* five times when deciding that an award for loss of use where no spare vessel was needed or hired was "erroneous and extravagant."[79] However, the Justice acknowledged that determining the reasonableness of loss of use damages requires a review of the specific circumstances.[80] Only then can a court decide "whether the interference with profit or enjoyment is to be ranked as substance or as shadow."[81] The Court went on to hold that damages could not be awarded when the shipowner makes use of other available resources to avoid suffering any actual loss. Quoting Lord Sumner in *The Susquehanna*, Justice Cardozo found that the petitioner could not "get damages based on the use of a standby when in fact they did very well without one."[82]

The United States Supreme Court has not heard an admiralty case involving demurrage or loss of use since *Brooklyn Eastern*. It has not had an opportunity to revisit its holdings in *The Conqueror* or *Brooklyn Eastern* in light of the subsequent developments in English admiralty law or the large body of state law on loss of use damages. Both decisions are a product of the evolving state of English law and reflect views that have been largely rejected by the English courts today. Thus, unlike most state courts, the Supreme Court has never adopted Lord Halsbury's view and lower federal courts hearing admiralty cases are bound by precedent to apply the actual loss rule

77. *See* 287 U.S. 170, 174 (1932).

78. *See* Brownstein, *supra* note 17, at 489–90 n.134; *see also id.* at 490.

79. *Brooklyn Eastern*, 287 U.S. at 174.

80. *See generally Recent Decisions: Admiralty–Damages for Loss of Use Based on Hire of Fictitious Substitute*, 19 VA. L. REV. 411, 411–12 (1933).

81. *Brooklyn Eastern*, 287 U.S. at 174–75. Despite the softened language in Justice Cardozo's opinion, courts generally find it did not alter *The Conqueror*'s holding that loss of use damages are not allowed in admiralty for vessels used for pleasure. *See e.g.*, Oppen v. Aetna Ins. Co., 485 F.2d 252, 257 n.12 (9th Cir. 1973) (finding that Justice Cardozo's opinion in *Brooklyn Eastern* did not alter *The Conqueror*'s holding); Cont'l Ins. Co. v. Muradyan, No. CV 03-351, 2003 U.S. Dist. LEXIS 18643, at *17–18 (C.D. Cal. June 4, 2003) (following *Oppen*'s holding that *Brooklyn Eastern* did not alter *The Conqueror*).

82. *Brooklyn Eastern*, 287 U.S. at 177 (internal quotations removed).

of *The Conqueror*.[83] Courts have expressed disapproval and criticized the rule even when following the Supreme Court's precedent. For example in *Nordasilla Corp. v. Norfolk Shipbuilding & Drydock Corp.*, the court acknowledged that *The Conqueror* remained the law but that its application "strikes one as fundamentally unfair" and "appears on the surface to be draconian."[84] The court had trouble with the idea that a yacht owner could be deprived of the use of their property and be denied damages simply because it was used for pleasure: "[o]ne wonders why the tortfeasor should benefit from the fact that an asset owner chose to forgo commercial operations when there is far less speculative nature or other question concerning ascertainable damages in these circumstances than there is concerning general damages in the run-of-the-mill personal injury case."[85] The court in *Northern Assurance Co. of America v. Heard* criticized *The Conqueror* for "its overreading of prior precedent and its faulty policy basis."[86] It further suggested the rule was based on the Supreme Court's refusal to grant one of the richest men in America damages for the "loss of one of his many recreational diversions."[87] The problem, as the court noted, was that depriving a Vanderbilt of loss of use damages barred many working shipowners from recovering as well.[88]

In non-admiralty cases, such as diversity cases involving state law causes of action, federal courts have been able to avoid the rigid rule of *The Conqueror*. After the Supreme Court's decision in *Erie Railroad Co. v. Tompkins*, federal courts are required to apply relevant state law when deciding state law claims.[89] By the time *Erie* was

83. *See* Ebony v. Dredge Stuyvesant, 804 F. Supp. 898, 902 (S.D. Tex. 1992) (applying the actual loss rule and two-part test from *The Clarence*); *see also* Slater v. Texaco, Inc., 506 F. Supp. 1099, 1112 (D. Del. 1981) (also applying the actual loss rule and two part test from *The Clarence*).

84. 1982 AMC 99, 106 (E.D. Va. 1981), *aff'd*, 679 F.2d 885 (4th Cir. 1982).

85. *Id.*

86. 755 F. Supp. 2d 295, 302 (D. Mass. 2010).

87. *Id.* at 303.

88. *See id.* ("In this, the categorical rule created for a Vanderbilt falls harshly on the [plaintiffs], calling to mind Anatole France's description of the 'majestic equality of the laws, which forbid rich and poor alike to sleep upon the bridges . . . .'").

89. *See* 304 U.S. 64, 78 (1938) ("There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State . . . . And no clause in the Constitution purports to confer such a power upon the federal courts."); RICHARD H. FALLON, JR. ET. AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 646 (7th ed. 2015) ("Once Erie denied the existence of general law unattached to any sovereign, it became necessary to determine whether—and under what criteria—federal or state law would apply in such cases."); Exxon

decided, most state courts had already adopted Lord Halsbury's rule for loss of use damages. This led to a situation where Erie-bound federal courts indirectly followed English common law—as adopted by most state courts—rather than the Supreme Court's reasoning in its admiralty cases. For example, in *Koninklijke Luchtvaart Maatschaapij, N.V. (K.L.M. Royal Dutch Airlines) v. United Technologies Corp.* (hereinafter "K.L.M."), the Second Circuit applied Connecticut's adoption of Lord Halsbury's rule in *Cook v. Packard Car Co. of New York* while acknowledging Justice Cardozo's opinion to the contrary in *Brooklyn Eastern*.[90] The district court followed *Brooklyn Eastern* and refused to consider rental value as a measure of damages because the airline would have been required to make lease payments on the aircraft regardless of when it was in use.[91] However, the Second Circuit reversed, finding that the deprivation of the airline's right to use the aircraft was itself compensable and the actual amount paid under the lease for the aircraft was an appropriate measure of damages.[92]

Thus, most American state courts, lower federal courts, and courts in England agree that damage or detention of chattel that deprives the owner of its use violates an intrinsic right and that such an injury is compensable. The lone exception is in American admiralty law, where the United States Supreme Court has yet to adopt the approach taken by the English courts and American state courts. The strong resistance among lower federal courts as well as the evolution of loss of right to use in English and American state courts suggests it is only a matter of time before the United States Supreme Court applies the modern approach to admiralty as well.

Shipping Co. v. Baker, 554 U.S. 471, 489–90 (2008) ("These restrictions do not apply to federal courts sitting in admiralty because the Constitution's grant of jurisdiction over admiralty and maritime cases implies that federal courts will proceed "in the manner of a common law court . . . .").

90. *See* 610 F.2d 1052, 1055–57 (2d Cir. 1979) (stating that "[u]nder [the *Erie* Doctrine], we must apply a state law of damages" and that *Brooklyn Eastern* "has no direct bearing on the question before us which must be decided under [state] law.").

91. *See id.* at 1055.

92. *See id.* at 1057–59; *see also* Kuwait Airways Corp. v. Ogden Allied Aviation Servs., 726 F. Supp. 1389, 1396–97 (E.D.N.Y. 1989) (stating that "[t]o an airline, ownership of a [Boeing] 747 represents a bundle of valuable opportunities . . . Those opportunities are all temporarily lost when a tortfeasor renders the aircraft unserviceable for a period of time. That opportunity cost *cannot* be valueless; it *must* be worth something.").

IV. LOSS OF RIGHT TO USE IN CONNECTICUT

Connecticut's law on loss of right to use is well-settled and has been cited by courts across the United States.[93] The Connecticut Supreme Court recognized in *Cook v. Packard Car Co.* that property ownership vests the owner with rights and the mere deprivation of his right to use is itself compensable. Thus, plaintiffs need not prove that they actually would have used their property during the time the defendant's negligence made it unavailable. "These are the rights of property which ownership vests in him, and whether he, in fact, avails himself of his right of use, does not in the least affect the value of his use."[94] Like many state court decisions on loss of right to use during the early twentieth century, the decision rested upon the prevailing English admiralty law at the time that recognized the intrinsic rights which property ownership vests in the owner.[95]

A. Damages for Loss of Use Do Not Depend on the Owner's Actual Use

Whether a plaintiff may recover damages for the loss of the right to use his property does not depend on whether the property would have been used profitably. In *Cook*, it was stated that "[a]n automobile owner who expects to use his car for pleasure only, has the same legal right to its continued use and possession as an owner who expects to

93. *See, e.g.,* PurCo Fleet Servs., Inc. v. Koenig, 240 P.3d 435, 445 (Colo. App. 2010) (citing Am. Tel. & Tel. Co. v. Conn. Light & Power Co., 470 F. Supp. 105, 109 (D. Conn. 1979)); Anthony v. Kelsey-Hayes Co., 102 Cal. Rptr. 113, 121 n.7 (Ct. App. 1972) (citing *Cook v. Packard Motor Car Co., 92 A. 413*); Rocha v. McClure Motors, Inc., 395 P.2d 191, 195 (Wash. 1964) (describing Justice Wheeler's concurring opinion in *Cook* as the "definitive statement of the guiding principle involved in [loss of use cases]"); Hanson v. Hall, 279 N.W. 227, 231 (Minn. 1938) (citing Longworth v. McGrath, 143 A. 845 (Conn. 1928)); Rickenberg v. Capitol Garage, 249 P. 121, 125 (Utah 1926) (citing *Cook*); Consol. Nat'l Bank of Tucson v. Cunningham, 238 P. 332, 334 (Ariz. 1925) (adopting the rule from *Cook*); Larson Brothers Wholesale Grocery Co. v. Kansas City, 224 P. 47, 50 (Kan. 1924) (citing *Cook*); Perkins v. Brown, 177 S.W. 1158, 1159 (Tenn. 1915) (citing *Cook* and Brown v. Southbury, 1 A. 819 (Conn. 1885)).

94. *Cook*, 92 A. at 418 (Wheeler, J., concurring); *see also* Ralph N. Blakeslee Co. v. Rigo, 109 A. 173, 175 (Conn. 1920) (finding that recovery for depreciation in value was insufficient to fully indemnify the plaintiff because "where the property has a usable value, the loss of the use is the damage suffered and the value of that use the measure of damage.").

95. *See Cook*, 92 A. at 416 (comparing the United States Supreme Court's decision in *The Conqueror* with Lord Halsbury's ruling in *The Mediana* before following the rule of Lord Halsbury).

rent his car for profit . . . ."[96] The fact that the property owner has not suffered an actual pecuniary loss does not diminish his right to substantial damages because "the legal basis for a substantial recovery . . . is the same in one case as in the other."[97] The slight risk of overcompensating a tort victim who has not shown actual loss is not a sufficient reason for denying recovery, for "[i]f there must be a windfall certainly it is more just that the injured person shall profit therefrom, rather than the wrongdoer shall be relieved of his full responsibility for his wrongdoing."[98]

However, the Connecticut Supreme Court in *Cook* did not provide a sweeping rule to be applied in all cases. "Manifestly, no general rule for this class of cases can be laid down, except that the jury should award fair and reasonable compensation according to the circumstances of each case."[99] In the years since *Cook*, the law on loss of right to use has further developed. In *Hawkins v. Garford Trucking Co.*, the court explained the essential elements to be used when determining what is "fair and reasonable," such as the "market rental value, less the proportion of this rental value which covers the wear and tear, and depreciation in the use of the automobile, and the period of necessary deprivation of use."[100] These cases were followed by *Longworth v. McGrath*,[101] and *Hansen v. Costello*,[102] where the Court again rejected arguments that plaintiffs must show actual loss in order to recover for the deprivation of the right to use their property. In *Banta v. Stamford Motor Co.*, it was made clear that this principle applies equally whether the property is a luxury item used for pleasure or if it is used in a commercial enterprise.[103]

The rental value of property may provide a measure of loss of right to use damages even where a substitute has not been rented. One of the prevalent themes in Connecticut's loss of right to use law is that a plaintiff's right to use their property and their right to recover

96. *Id.* at 415.

97. *Id.*; *see also* Doolittle v. Otis Elevator Co., 118 A. 818, 818 (Conn. 1922) (stating that "it is possible that the cost of repairs plus fair compensation for the loss of use, may exceed the reasonable market value of the car at the time of the accident . . . .").

98. Marciano v. Jimenez, 151 A.3d 1280, 1285 (Conn. 2016) (quoting Saint Bernard Sch. of Montville, Inc. v. Bank of Am., 95 A.3d 1063 (Conn. 2014)).

99. *Cook*, 92 A. at 416.

100. 114 A. 94, 95 (Conn. 1921).

101. *See* 143 A. 845, 846 (Conn. 1928).

102. *See* 5 A.2d 880, 881 (Conn. 1939).

103. *See* 92 A. 665, 667 (Conn. 1914).

damages for its deprivation does not depend on how they choose to use it. Thus, recovery of rental value even where no substitute is procured is not about compensating for a pecuniary loss. For example, the Second Circuit in *K.L.M.* cited multiple Connecticut cases to conclude that "[t]he 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."[104] The court in *K.L.M.* continued by saying, "[i]t 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."[105]

The understanding that loss of use is fundamentally about the loss of right to use is also embodied in modern Connecticut insurance regulations. A 1987 bulletin from the Connecticut Insurance Department clarified that a claimant may recover for loss of use even where no rental costs were incurred.[106] In 2007, another bulletin reiterated that property damage includes "the loss of use thereof" and that claimants may recover for loss of use even where no substitute has been rented.[107] Connecticut insurance regulations define loss of use as "the amount representing the reasonable value to the claimant for the deprivation of the use of the claimant's vehicle during the period reasonably required to make repairs or replace the vehicle, regardless of whether the claimant has incurred expenses."[108]

The period reasonably required in order to make repairs or replace the vehicle is not defined by any Connecticut statute or regulation. It is generally understood to mean the entire period of time for which the owner is deprived of their vehicle while it is under repair or the time which it would take to replace the vehicle using ordinary diligence.[109] This includes the time it takes to determine if the vehicle is in fact repairable, the time spent doing repairs, as well as reasonable delay in procuring necessary parts or supplies. This varies significantly by jurisdiction but most courts hold that even

104. Koninklijke Luchtvaart Maatschaapij, N.V. (K.L.M. Royal Dutch Airlines) v. United Techs. Corp., 610 F.2d 1052, 1056 (2d Cir. 1979).

105. *Id.*

106. Conn. Ins. Dep't Bulletin CL-1 (Mar. 17, 1987).

107. *See* Bulletin CL-1-07, State of Conn. Ins. Dep't (July 20, 2007), https://portal.ct.gov/-/media/CID/bullCL107pdf.pdf [https://portal.ct.gov/CID/Bulletins/Archive-Bulletins.

108. Conn. Agencies Regs. § 38a-10-2(f) (1992).

109. *See* 8 AM. JUR. 2D *Automobiles and Highway Traffic* § 1187, Westlaw (database updated Feb. 2022).

extended delays are reasonable if the owner himself was not responsible for the delay.[110] In *Brooks Transportation Co. v. McCutcheon*, evidence that it took two months to replace a destroyed tractor due to wartime restrictions was allowed to be submitted to the jury.[111] Similarly, in *Lyle v. Seller*, loss of use damages were reasonable where the repair was delayed because parts had to be shipped from the East Coast to San Francisco.[112] Some cases even hold that delays caused by the plaintiff's inability to pay for repairs will justify damages covering the entire period. One example of this is *Rivere v. Bellefonte Insurance Co.*, where a plaintiff was awarded fourteen months of rental costs because he was unable to pay the bill to repair his own vehicle.[113]

The reasoning is similar to that of awarding loss of use damages based on rental value even where there is no rental vehicle due to a lack of resources. The fact that a plaintiff's vehicle repair has been delayed due to something out of their control—whether by wartime restrictions, difficulty in finding parts, or inability to pay—does not absolve the defendant's responsibility to compensate them for losing the right to use their property.[114] "It is a well-settled principle of [tort] law that a tortfeasor takes his victim as he finds him."[115] Allowing a negligent driver to reap the benefit of the victims misfortune violates that principle.

The 2007 insurance bulletin also explains that no loss of use payment is required where a "reasonably equivalent" substitute is provided or where one is offered but refused.[116] The law is not clear on exactly what constitutes a "reasonably equivalent" vehicle but several factors have been considered. For example, *Rigakos v. Oneill* involved a driver of a Mercedes-Benz C300 that was provided a

110. *See* C. C. Marvel, Annotation, *Recovery For Loss of Use of Motor Vehicle Damaged or Destroyed*, 18 A.L.R.3d 497 (2022).

111. *See* 154 F.2d 841, 843 (D.C. Cir. 1946).

112. *See* 233 P. 345, 346 (Cal. Ct. App. 1924).

113. *See* 388 So. 2d 75, 76 (La. Ct. App. 1980).

114. *E.g.*, Mondragon v. Austin, 954 S.W.2d 191, 194–95 (Tex. Ct. App. 1997) (finding that denying damages to a plaintiff that could not afford a rental vehicle would amount to punishing them for their lack of resources).

115. Hopson v. St. Mary's Hosp., 408 A.2d 260, 264 (Conn. 1979). *See also* Vosburg v. Putney, 50 N.W. 403, 404 (Wis. 1891); *Lagden v. O'Connor* [2004] 1 AC 1067 (appeal taken from Eng.) (finding that "a negligent driver must take his victim as he finds him" and allowing damages for plaintiff's cost of using a credit hire company to obtain a rental vehicle).

116. Bulletin CL-1-07, *supra* note 107.

newer-but-still-inferior Dodge Charger.[117] Though the court did not agree with the amount the Plaintiff sought, it did find that the two vehicles were not comparable and awarded the difference in value because the Dodge lacked the amenities and cachet of a Mercedes-Benz.[118] Similarly, in *Leszcynski v. Leblond*, a driver was awarded loss of use damages based on the difference in rental value between her brand new Toyota Highlander and the Nissan Rogue she was provided.[119] Though the disparity between the two vehicles may not be as significant as the difference between a Mercedes and a Dodge, the court decided the two vehicles were not comparable because the Nissan was smaller, had less technology, and did not accommodate the plaintiff's needs.[120]

B. "Fair and Reasonable Compensation" and Deductions for Depreciation

Connecticut law is clear that the right to recover for loss of use derives from the loss of one's right to use their property and does not depend on how they chose to use it. The law is also clear that rental value is an appropriate element of damage even where no substitute was rented. Connecticut law is less clear, however, on whether plaintiffs must take a deduction from the market rental value of the replacement vehicle for depreciation. Some modern cases cite *Anderson v. Gengras Motors, Inc.*,[121] as requiring such a deduction.[122] However, the *Anderson* court only went as far to say that "[n]o definite general rule can be laid down, except that the award . . . should be for fair and reasonable compensation according to the circumstances of each case . . . ."[123] *Anderson* relies heavily on *Cook*, which does not require such a depreciation deduction in all cases. Additionally, the pre-automobile cases upon which *Anderson* and *Cook* are based do not require a deduction for depreciation. In addition to the leading English authorities at the time, the court also looked to *Brown v. Town*

117. *See* No. FST-CV16-6027436-S, 2017 LEXIS 4478, at *3 (Conn. Super. Ct. Sept. 11, 2017).

118. *See id.* at *5–6.

119. *See* No. WWM-CV18-6015594-S, at 2 (Conn. Super. Ct. Oct. 20, 2020).

120. *See id.*

121. *See* 109 A.2d 502 (Conn. 1954).

122. *See, e.g.*, Ramos v. GoAuto Ctrs. of Meriden, LLC, No. 15-CV-00314, 2016 WL 7424119, at *2 (D. Conn. Dec. 23, 2016) (reading *Anderson* as requiring a deduction for depreciation).

123. *Anderson*, 109 A.2d at 504.

of Southbury,[124] in which a horse, carriage, and harness were damaged due to a defect in a town road. The *Brown* court recognized loss of use and ruled that "[t]he loss was the direct and natural consequence of the injury. That it was a proper element of damage is too clear for argument."[125] *Brown* also allowed an award for "depreciation in the market value of the horse" as an additional "proper element of damage to be allowed," analogous to diminution in value.[126]

The court in *Cook* was not concerned with the dollar amount of depreciation, but rather with fundamental fairness. The opinion noted that rental value includes not just depreciation but also "the overhead expenses and the profits of carrying on the business of renting motor-cars."[127] Neither *Anderson* nor any modern court discusses the rental company's overhead and profits, the plaintiff's actual use of a car, or the cost of employing chauffeurs.[128] *Cook* does not preclude a modern, simplified approach, where the plaintiff's loss of use is based on the market rental value of his vehicle, as long as the award is "fair and reasonable compensation."[129] In fact, *Cook* and its progeny suggest that the simplified approach—market rental value for the period of deprivation without deductions for depreciation—is the definition of "fair and reasonable compensation."

After *Cook*, but as far back as 1929, the Connecticut Supreme Court has questioned the appropriateness of a deduction for depreciation. In *Mastrianni v. Apothecaries Hall Co.*, it noted that the trial court had no basis for making a deduction for depreciation for the six Sundays the vehicle was not used.[130] That is true for personal use, however, it may be appropriate for depreciation to be deducted in the commercial context.[131] Calculations for the daily cost of

124. See 1 A. 819 (Conn. 1885).

125. *Id.* at 824.

126. Cook v. Packard Motor Car Co. of N.Y., 92 A. 413, 415 (Conn. 1914) (discussing the holding in *Brown*).

127. *Id.*

128. Some courts have noted that the daily rental rate includes profit, maintenance costs, overhead, and repairs but have not attempted to calculate their value. *See e.g.*, Leszcynski v. Leblond, No. WWM-CV18-6015594-S (Conn. Super. Ct. Conn. Oct. 20, 2020) (assigning a rental value equal to twice the rate paid for the replacement vehicle—a value that fell between the replacement vehicle's daily rate and the market rate for the plaintiff's vehicle—rather than attempting to calculate deductions).

129. *Cook*, 92 A. at 416.

130. *See* 146 A. 819, 819 (Conn. 1929).

131. *See* Koninklijke Luchtvaart Maatschaapij, N.V. (K.L.M. Royal Dutch Airlines)

gasoline and oil as well as depreciation are sometimes made during the normal course of business but similar calculations are not made with respect to property owned for personal use. Deducting depreciation from loss of right to use damages based on rental value would require the court to speculate about the business practices of non-party rental companies. Taken as a whole, the line of historical cases beginning with *Brown* and ending with *Anderson*, contain no bright-line rule that all plaintiffs claiming loss of use damages must deduct that portion of rental value attributable to depreciation. None of the reported cases, historical or modern, contain a full discussion of how plaintiffs should prove depreciation, which is likely to be cumbersome, speculative, and unobtainable for rental car companies that are not parties to the action. This is perhaps one reason why the Connecticut Insurance Department regulations adopt the modern, simplified approach.[132] Deductions for depreciation outside the commercial context are unworkable and unjustified by the historical loss of right to use cases.

V. DEFINING FAIR AND REASONABLE COMPENSATION FOR LOSS OF RIGHT TO USE

Despite two hundred years of English and American jurisprudence, many courts still struggle with determining what amounts to "fair and reasonable compensation" for loss of right to use. From its origins in English admiralty law to its modern understanding in the United States, loss of use is fundamentally about one's deprivation of the right to use. When a property owner is deprived of the right to use his or her property, it is the deprivation itself which is compensable. Whether or not they would have used the property profitably is immaterial when deciding loss of right to use damages. As recognized by Lord Halsbury over a century ago, one cannot escape liability for stealing property if they simply return it and show the owner would not have used it anyway. Similarly, when one's

v. United Techs. Corp., 610 F.2d 1052, 1056 (2d Cir. 1979) (finding that "the damages for loss of use of a commercial aircraft, particularly a leased aircraft, should not be [c]alculated in precisely the same fashion as for an owned automobile."); *see also* Am. Tel. & Tel. Co. v. Conn. Light & Power Co., 470 F. Supp. 105, 108–10 (D. Conn. 1979) (finding it may be appropriate to require evidence of depreciation in the commercial context where plaintiffs have already calculated it).

132. *See* Conn. Agencies Regs. § 38a-10-2(f) (1992); Bulletin CL-1-07, State of Conn. Ins. Dep't (July 20, 2007), https://portal.ct.gov/-/media/CID/bullCL107pdf.pdf.

automobile or other chattel becomes damaged and must be detained for repairs, the wrongdoer may be held liable for that detention. This simplified view of what is actually being compensated allows for an equally simple measure of damages for loss of use that avoids investigation into the owner's intentions.

Having established that loss of use is about the right to use rather than actual use, defining "fair and reasonable compensation" is much easier. The simplest measure of loss of use damages is the daily market rental value multiplied by the number of days the owner has been deprived of its use. This provides courts with a simplified formula for awarding loss of use damages that requires less judicial speculation or investigation into the owner's intentions. This approach is also supported by the Restatement (Second) of Torts §§ 928 and 931, which set the market rental value as the minimum recovery for loss of use damages.[133]

Rental value is typically easy to obtain and is easily understood. Because it represents the amount someone would be willing to pay for the use of property, it is the best estimate of the value of an owner's loss of use.[134] It doubles as a way to measure both the cost the owner would have to pay to temporarily replace their property as well as the value of their opportunity loss since the owner could have chosen to use their property profitably, such as offering it for rent. Absent a showing that the owner of the detained property was actually engaged in a more profitable enterprise, the daily rental value multiplied by the days of deprivation should be the preferred measure of loss of use damages.[135] Employing this method has several benefits. It ensures plaintiffs are fairly compensated for being deprived of the right to use their property and spares courts from having to speculate or make difficult and awkward calculations. As discussed in the comments to § 931 of the Restatement, market rental value also allows for variations depending on the circumstances surrounding

133. *See* RESTATEMENT (SECOND) OF TORTS §§ 928, 931 (AM. L. INST. 1979).

134. Rental value has also been called "usable value." *See* STUART M. SPEISER ET AL., 2 THE AMERICAN LAW OF TORTS § 8:30 (2020).

135. Awarding damages for loss of use does not preclude other damages, such as loss of sales or harm to business. *See* RESTATEMENT (SECOND) OF TORTS § 931 cmt. e (AM. L. INST. 1979) (explaining that "[i]n addition to the value of the use during a period of detention, the owner is entitled to damages for the harm legally caused to the land or chattel or to the owner's business by the deprivation."). The comment further explains that if the owner had a specific use for the property and the use no longer exists due to the detention, compensation may be awarded for that loss. See id. Additionally, illus. 5 shows that an owner is also entitled to damages for business harms if their inability to procure a substitute leads to further harm. See id.

the loss of use.[136] Courts have long been concerned with awarding loss of use damages when the damaged property would not have been used profitably, such as providing rental value to a shipowner during winter months. Market rental value takes care of these concerns automatically by providing only the rental value the property owner could have received at the time of deprivation. The value of seasonal rentals—e.g., ski chalets in the winter, convertible vehicles in the summer, etc.—adjust according to seasonal supply and demand. If the rental rate for a convertible car is much lower in December than in June, courts using market value need not be concerned with overcompensating the owner because this rate would represent the value of his vehicle in the present rental market.

To maintain the simplicity of rental value as a measure of damages, it should not include deductions for depreciation or other costs associated with rental property. Using the market rental value as loss of use damages without deductions is fair because it puts third-party claimants on par with first-party and real property claimants. In first-party insurance claims, the loss of use is determined by the rental cost of a similar vehicle in the plaintiff's geographic area without regard to deductions for depreciation, gas, oil, insurance, or a driver. Deductions for depreciation or other costs may, however, be appropriate for loss of use in the commercial context where the information is readily available and would require little to no speculation. Property owners generally do not make complex calculations regarding depreciation and maintenance and have no method for determining the hypothetical cost of overhead. Such deductions effectively turn a simple measure into a complicated investigation into the business practices of rental companies that are usually not parties to the litigation. This is not a concern in most commercial contexts, such as loss of use of a rental car. In such a case, the rental company would have likely already made calculations for depreciation and other costs. Thus, deducting these from the rental value would require no judicial speculation.

VI. CONCLUSION

The purpose of loss of use damages is to compensate the tort

136. *See id*. at cmt. b. ("The use to which the chattel or land is commonly put and the time of year in which the detention or deprivation occurs are, however, to be taken into consideration as far as these factors bear upon the value of the use to the owner or the rental value.").

victim for the deprivation of the right to use their property. This right does not depend upon the manner in which the owner decides to use the property and, consequently, neither should the measure of damages depend upon the owner's actual use. An owner may choose to use their property in a profitable manner at any time. When a tortfeasor's conduct deprives them of their property, they also deprive the owner of the right to put it towards a profitable or personal use. That deprivation itself is compensable.

These principles are derived from early twentieth century English admiralty law, which recognized this intrinsic right vested by property ownership. To the English courts, whether the property owner would have actually used their property was irrelevant because the right to use the property is what marks the value. American state courts quickly adopted this superior reasoning to award loss of use damages even where no actual loss had occurred. While these courts largely agreed that deprivation of property was itself compensable regardless of how the owner would have used it, if at all, courts have struggled to develop a measure of damages for loss of right to use. Connecticut's loss of right to use law is among the most cited in the United States but even the Connecticut Supreme Court has failed to define what "fair and reasonable compensation" means for loss of right to use. This has left trial courts with little guidance for calculating damages where a plaintiff has been wrongfully deprived of the right to use their property.

Courts need a workable measure of damages that requires little judicial speculation and no investigation into the property owner's intentions. Daily market rental value is the best measure to provide full and fair compensation to property owners because it represents the value of the daily use of their property. This simplified approach should be adopted as a default measure of damages where a property owner has been deprived of the right to use their property but cannot prove actual loss. Tortfeasors should not benefit from the tort victim's decision to forgo a profitable use or failure to obtain a replacement. A simplified approach based on market rental value is an easily workable standard that requires minimal speculation and no inquiry into the owner's intentions. Such a rule awards fair compensation and uses a measure of value directly tied to the harm for which compensation is sought—deprivation of the right to use one's property.