

# Loss of Use

*J & D Towing, LLC v. Am. Alternative Ins. Corp.*

Elliott Cooper  
Lauren Tow



# It is “cheaper to kill a mare in Texas than it is to cripple her.”

- ◆ *City of Canadian v. Guthrie* (Tex.Civ.App.–Amarillo 1932) - one of the earliest loss of use cases
- ◆ In the 1930s a one-eyed mare was caught roaming the city streets in search of food and was placed in the city pound
- ◆ When the owner failed to pay her board bill the city marshal hired a man known as Panhandle Pete to put her out of her misery
- ◆ The owner protested her death and sued for damages, including \$350 for the loss of her services in his occupation of hauling

# *City of Canadian v. Guthrie*

- ◆ The court rejected the claim and held that “[d]amages occasioned by the loss of the use and hire of an animal are recoverable where the animal is *injured*,” “no such damages are recoverable for the *total loss or death* of an animal.”
- ◆ Rather, “[t]he measure of damages in the case of a wrongful killing of an animal is its market value, if it has one, and if not, then its actual or intrinsic value, with interest.”

# *J & D Towing, LLC v. Am. Alternative Ins. Corp.*

- ◆ *J & D Towing, LLC v. Am. Alternative Ins. Corp.*, 478 S.W.3d 649, 652 (Tex. 2016)
- ◆ J&D Towing, LLC owned only one tow truck. On December 29, 2011, the tow truck was rendered a total-loss as a result of the negligence of the defendant
- ◆ On February 29, 2012, the defendant's liability carrier settled for \$25,000, the policy limits for property damage
- ◆ On March 8, 2012, J&D purchased a new truck and resumed its business

# *J & D Towing, LLC v. Am. Alternative Ins. Corp.*

- ◆ J&D filed an uninsured motorist claim with its own carrier, and requested compensation for the loss of use of the truck
- ◆ The claim was denied and a lawsuit was filed
- ◆ AAIC filed an MSJ where it argued because Texas law did not permit recovery of loss of use damages in total-loss cases, and because J&D's vehicle was a total loss, J&D was not legally entitled to recover loss-of-use damages. The court denied the MSJ
- ◆ The jury ultimately entered a verdict, including loss of use damages

# *J & D Towing, LLC v. Am. Alternative Ins. Corp.*

- ◆ AAIC appealed with the issue being whether Texas law in total-loss cases allowed recovery of loss-of-use damages
- ◆ AAIC's position was that Texas law has never allowed recovery of loss-of-use damages in total-loss cases
- ◆ The Court of Appeals agreed, reversing the decision
- ◆ The Supreme Court reversed the Court of Appeals, holding for the first time, that "the owner of personal property that has been totally destroyed may recover loss-of-use damages in addition to the fair market value of the property immediately before the injury."

# Personal Property Partially Destroyed

- ◆ Where personal property has been only *partially* destroyed, Texas law is clear as to direct and loss-of-use damages
- ◆ The default rule for measuring direct damages is “the difference in the market value immediately before and immediately after the injury to such property at the place where the damage was occasioned.”
- ◆ Whether the owner recovers direct damages under the default rule or otherwise, the owner may recover loss-of-use damages, such as the “pecuniary loss of the use of an automobile damaged in a collision”

# Totally Destroyed Personal Property

- ◆ Where personal property has been *totally* destroyed, however, Texas law was less clear.
- ◆ Despite that lack of guidance, some Texas courts of appeals have held that loss-of-use damages are unavailable in total-destruction cases, but other courts of appeals have seriously questioned the validity of that rule.



# Other Cases:

- ◆ Since the 1932 case, six other courts of appeals have expressly stated that, although loss-of-use damages are available in partial-destruction case, these damages are unavailable in total-destruction cases.
- ◆ *Mondragon v. Austin* (Tex.App.–Austin 1997) - The Austin Court of Appeals noted that the problem is the assumption that an owner of totally destroyed personal property does not suffer loss of use damages, because the property can be replaced. The assumption is invalid, because it may be difficult or impossible to replace the car immediately.

# Why did the prohibition on loss of use damages in total loss cases exist?

- ◆ One early judicial assumption centered on judicial competency and the speculative nature of loss-of-use damages
- ◆ Courts operated under the assumption that loss-of-use damages in addition to fair market value of the totally destroyed personal property would amount to a double recovery
- ◆ Another assumption was that, in total-destruction cases, a plaintiff could immediately replace the destroyed property and, thus, did not suffer any loss-of-use damages
- ◆ Despite all of this, the greatest influence may have been the common law system in other parts of the U.S.

# The New Trend

- ◆ Despite the prior case law, the new trend is to allow loss-of-use damages in total destruction cases
- ◆ Sixteen high courts around the country and the District of Columbia Court of Appeals have held that loss-of-use damages are available in total-destruction cases
- ◆ Even a New Mexico appellate court, before holding that it was bound by its understanding of New Mexico supreme court precedent to enforce the prohibition, acknowledged that the “position that loss-of-use damages are available for destroyed property to the same extent as reparable property does seem to be the trending modern rule.”

# Reasoning Behind the Change

- ◆ The first argument is that any distinction between partially destroyed and totally destroyed personal property for purposes of loss-of-use damages is unpersuasive
- ◆ As the Supreme Court of California put it, “There appears to be no logical or practical reason why a distinction should be drawn between cases in which the property is totally destroyed and those in which it has been injured but is repairable”
- ◆ The Supreme Court of Iowa made that point more directly when it stated that “[l]oss of use damages will be incurred as readily when a vehicle is totally destroyed or when it cannot be restored by repair to its prior condition as when the vehicle can be restored by repair.”

# Reasoning Behind the Change

- ◆ The second argument is that loss-of-use damages must be available in total destruction cases pursuant to the principle of full and fair compensation
- ◆ For example, the Supreme Court of Missouri justified allowing loss-of-use damages because “lost profits may be necessary to accomplish fully compensating the claimant for his loss.”
- ◆ Similarly, the Supreme Court of Iowa explained that “[j]ust as loss of use damages are necessary for full compensation when the vehicle can be restored to its prior condition, they are warranted when the vehicle is destroyed or cannot be so restored.”

# Holding in *J & D Towing*

- ◆ The guiding principle of Texas tort law: “*The thing to be kept in view is that the party shall be compensated for the injury done.*”
- ◆ Total-destruction cases are no exception
- ◆ Compensation for the value of personal property may differ depending upon whether the property was partially or totally destroyed. But that is a *direct-damages* question, not a *consequential-damages* question

# Common Sense Rules for the Availability of Loss-of-Use Damages

- ◆ The claimed damages may not be too remote but, rather, must be foreseeable and directly traceable to the tortious act;
- ◆ The damages must not be speculative; and
- ◆ The damages may not be awarded for an unreasonably long period of lost use.

# Cooper & Scully, P.C.

Lauren Tow

[lauren.tow@cooperscully.com](mailto:lauren.tow@cooperscully.com)

(214) 712-9574

Elliott Cooper

[elliott.cooper@cooperscully.com](mailto:elliott.cooper@cooperscully.com)

(214) 712-9552