

THE MEASURE OF DAMAGES

LAWRENCE SAVELL

Generally, when one's property is damaged due to the actions of another, the law provides that the injured party is entitled to be "made whole" by the wrongdoer.

In cases involving a damaged (but not destroyed) collector car, the measure of damages normally consists of two elements. First, at the plaintiff's election, he or she may recover (1) the difference between the value of the car before the harm and the value after, or (2) the reasonable cost of repairs or restoration where feasible, plus any difference in the original value and the value after repairs are made. Second, the plaintiff can also recover for the "loss of use" of the vehicle.

Unless the case is settled (and assuming no insurance applies), the injured party must wait until trial to recover. Normally, he or she will go ahead and make the necessary repairs. But what happens if the injured party cannot afford to make the repairs immediately, and thus incurs greater "loss of use" expenses? Who should have to bear these additional expenses: the wrongdoer or the injured party?

The case of *Hill v. Badillo* presented such a situation. One dark night in May 1988, Morris Hill was driving his 1966 Mustang convertible. He collided with Hector Badillo's unoccupied and unlit car, which had apparently been abandoned in the middle of the highway. Hill's Mustang was severely damaged.

Hill and his wife Joan (who needed the car to drive to work) sued Badillo. At trial, the evidence indicated that, before the accident, the Mustang had a maximum value of \$6000. It was estimated that repairs would cost at least \$2,818.86, and would take at most 21 days.

The Hills testified that, after the accident, they could not afford the nearly \$3000 repair bill, nor afford to finance a new car for Joan. They were thus forced to rent another car. The Hills paid for the rental with credit cards and borrowed funds. During the approximately nine-month period from the accident through the trial, such rental costs totalled \$4,434.21.

The trial judge awarded the Hills \$6,856.77 in damages, including 90% (Badillo's share of responsibility for the accident) of the \$2,818.86 repair and \$4,434.21 rental expenses.

Badillo appealed. On November 29, 1990, the Court of Appeals of Florida, Fifth District, reversed the trial court's decision.

The appellate court based its reversal on two grounds. First, it ruled that damages for "loss of use" were not un-

limited, and that an injured party had to make necessary repairs in a "reasonable time."

The court noted some judicial disagreement over whether the reasonable time to make repairs should be expanded by the particular financial situation of the injured party. For example, courts in New York, Montana, and California had awarded poor plaintiffs the entire amounts requested. However, many of these cases involved defendants who had been at least partially to blame for extending the period of loss of use. The court noted that in *Hill* there had been no evidence that the defendant contributed in any manner to the delay.

The court, seeking to avoid the possibility of abuse, decided to follow the rule limiting loss of use to the time reasonably needed to make repairs. The court thus ruled that the trial judge had erred in allowing nine months of loss of use damages, and limited such damages to a maximum of one month, given the 21-day estimate at trial.

The court noted that it would also have to reverse the trial judge's decision based on the rule that the total amount awarded for repairs and loss of use cannot exceed the "fair market value" of the vehicle before the accident. The rationale for this rule is that damages for simply injuring property should not exceed those for destroying it. Thus, the court ruled that the award for repairs and loss of use could not exceed the maximum \$6000 pre-accident appraisal of the Mustang.

As the court indicated, jurisdictions differ on limiting "loss of use" damages. Indeed, one of the appellate judges in *Hill* filed a dissenting opinion, expressing his unsuccessful disagreement with the court's decision. The dissenter argued that a negligent person should be required to pay for all injuries and losses he or she directly causes. Thus, the dissenter argued, if the victim is a poor person who cannot afford to fix his damaged property right away and incurs additional expenses — assuming the injured party has not acted fraudulently or unreasonably — the negligent party should be responsible for those expenses as well. The dissenter expressed his concern that the *Hill* case would discourage wrongdoers from settling promptly, to the detriment of injured parties lacking means to repair the damage before their "day in court."



Lawrence Savell is an attorney and writer in New York City. This column provides general information and is not intended as a substitute for consulting a lawyer.