



Marilyn Raia
San Francisco,
Shareholder

Direct Dial: 415.352.2721
Fax: 415.352.2701
Email Attorney

Loss of Use Damages: Recoverable or Not?

By Marilyn Raia

When a vessel is lost or damaged, the amount recoverable under admiralty law from the party causing the loss or damage may be quite different from what one might expect, particularly with respect to loss of use damages. This column examines the admiralty rules on loss of use damages.

Total Loss of a Vessel

When a commercial vessel becomes a total loss as a result of a collision, a well-settled admiralty rule provides that the vessel owner may not recover for the contemplated profit from the use of the vessel had it not been lost in the collision. There are two reasons for this rule. First, the courts have considered future profits to be too speculative and thus, legally incapable of being the basis for a judgment. Second, the courts have considered vessels to be commodities capable of easy replacement. That is, the owner of the lost vessel can buy a new one to resume the commercial activity the lost one was engaged in at the time of the collision. The courts also reason that an award of prejudgment interest on the value of the lost vessel serves to fully compensate the vessel owner for financial losses.

More than one hundred years ago, the United States Supreme Court decided *The Umbria* 166 U.S. 404 (1897). In that case, the steamship *Umbria* struck the steamship *Iberia* in dense fog off the coast of Long Island, cutting the *Iberia* in two. The *Umbria* was found to be solely at fault due to excessive speed. Two weeks before the collision, the *Iberia* had entered into a charter requiring it to proceed from New York to Spain with a cargo of tobacco. The Supreme Court agreed with the Second Circuit's denial of damages for the loss of use of the *Iberia*, i.e. the net profits of the charter had the vessel been able to undertake it. The court found nothing in the facts to preclude application of the general rule that when a vessel becomes a total loss in a collision, the recoverable damages are limited to the value of the vessel, interest, and freight pending at the time of the collision. The court reasoned if damages for loss of future charters were allowed, there would be no time limit for the damages which "might work a great practical injustice to the owner of the vessel causing the injury."

Occasionally, a court will decide the equities of the situation warrant an exception to the general rule. For example, in *Barger v. Hanson*, 426 F.2d 640 (9th Cir. 1970), Hanson's fishing vessel struck Barger's moored vessel rendering it a total loss. The proximate cause of the incident was the negligent operation of Hanson's boat. At the time of the incident, Barger had been outfitting his boat in preparation for the commercial fishing season and planned to start fishing on June 7. He found a substitute vessel, outfitted it, and began fishing on July 5. Barger sued Hanson. The district court awarded Barger the value of his vessel and lost personal property as well as loss of use damages for the period June 7 to July 4. Hanson appealed the award of loss of use damages. The Ninth Circuit acknowledged the "well-settled" rule that when a vessel becomes a total loss in a collision, its owner is not entitled to recover compensation for contemplated profits or loss of use. However, the court held the particular circumstances of the case warranted an exception to the rule. Those circumstances included prompt action by Barger to mitigate his damages by acquiring another vessel, the lack of an award of prejudgment interest, and the stipulation of the parties to the exact amount of damages resulting from Barger's loss of use of his vessel.

Partial Loss of a Vessel

If the vessel suffers damage in a collision but is not a total loss, the vessel owner can recover



damages for the loss of use of the vessel during the pendency of repairs. However, such damages must be proved with reasonable certainty. And the period for which loss of use damages may be recoverable is limited to the time reasonably necessary for the required repairs.

Great Lakes Business Trust v *M/T Orange Sun*, 2014 AMC 596 (2d Cir. 2013) involved the backhoe excavator dredge *New York*, the most powerful dredge authorized to carry out dredging in United States waters. While the dredge *New York* was engaged in dredging operations, it was struck by a cargo vessel. The cargo vessel's owner admitted liability and paid for the cost of salvage and repair of the dredge. The dredge was out of service for 194 days pending repairs.

The district court awarded \$11 million in loss of use damages incurred while the vessel was out of service. The Second Circuit affirmed the award. It recognized the recoverability of loss of use damages if proven with reasonable certainty and noted the district courts have "a wide range of judgment" in determining the standard of proof to be applied. It also held Great Lakes did not have to show a specific contract or opportunity was lost because the dredge was out of service undergoing repairs. Instead, the district court accepted proof of an active market for the dredge because of its unique capabilities at the time of the incident as well as into the foreseeable future. It also found the dredge would have been used 92% of the time but for the damage suffered in the collision.

Private Pleasure Craft

Admiralty law treats private pleasure vessels differently from commercial vessels with respect to loss of use. As a general rule, it does not allow the owner of a private pleasure vessel to recover loss of use damages.

The Conqueror, 166 U.S. 110 (1897) involved a yacht purchased in England and brought into the United States by a United States citizen for private pleasure use. The yacht was seized by the United States Treasury Department on the ground it was subject to taxation. The yacht owner sued to regain possession of his vessel, and for damages. The district court ordered the return of the vessel to its owner and awarded the owner \$15,000 in loss of use damages. The court of appeals affirmed. The United States Supreme Court affirmed the judgment ordering the return of the vessel to its owner, but reversed the award of loss of use damages. It held there must be a pecuniary loss to the owner of a private pleasure vessel or a reasonable certainty of a pecuniary loss to justify an award of loss of use damages. The court noted: 1) the vessel was purchased for the owner's personal pleasure; and 2) there was "not an atom of testimony" tending to show it was purchased for hire or other commercial purposes.

Like the rule precluding the recovery of loss of use damages for a totally lost commercial vessel, the rule precluding recovery of loss of use damages in connection with a private pleasure craft also has its exceptions. In *Oswalt v. Resolute Industries, Inc.*, 642 F.3d 856 (9th Cir. 2011), Resolute Industries sued the manufacturer of a heater that caught fire on Oswalt's private pleasure vessel during repairs performed by Resolute's employee. Oswalt sued Resolute and recovered, among other things, \$4,110 for hotel expenses he incurred while his vessel was being repaired. The record showed Oswalt was a flight attendant whose work assignments began and ended in Oakland, California. He had to pay for hotel stays in Oakland before and after his work assignments. To save expenses, Oswalt brought his vessel to Oakland to be used as his second home when working. At the time of the fire, Oswalt was getting ready to take the boat from Washington to Oakland. Because of the unavailability of his



boat during repairs, Oswalt had to incur hotel expenses in Oakland.

Resolute appealed from the judgment awarding the loss of use damages. While recognizing the rule from *The Conqueror* case, the Ninth Circuit explained that Oswalt was not seeking damages for the lost recreational use of his vessel. Rather, he was seeking compensation for his inability to use his vessel to defray work-related expenses. The Ninth Circuit affirmed the award of loss of use damages noting the alleged damages were neither speculative nor unsupported by documentation.

Loss of Use Summed Up

When a vessel owner is deprived of the use of his vessel, loss of use damages may be recoverable. As a general rule, loss of use damages are not recoverable when a commercial vessel becomes a total loss in a collision. Loss of use damages may be recoverable when a commercial vessel is partially damaged in a collision and unavailable for use due to repairs if they are proven with reasonable certainty. As a general rule, loss of use damages are not recoverable for the loss of use of a private pleasure vessel. A court may, however, allow exceptions to the general rules under certain circumstances.