

## DAMAGES WORKSHOP

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### 1. Damages where buyer has lawfully rejected the vehicle

1.1 Section 54 of the Sale of Goods Act 1979 (“SGA 1979”) provides:

“Nothing in this Act affects the right of the buyer or seller to recover interest or special damages in any case where by law interest or special damages may be recoverable, or to recover money paid where the consideration for the payment of it has failed.”

1.2 If the buyer lawfully rejects the vehicle for breach of condition, the buyer is entitled the return of the price paid on the basis of a total failure of consideration plus interest.

1.3 In addition to the return of the price paid, damages are assessed on a basis equivalent to non-delivery of the vehicle under section 51 of the SGA 1979.

1.4 Section 51(2) of the SGA 1979 provides that the measure of damages for non-delivery of goods is the “estimated loss directly and naturally resulting, in the ordinary course of events, from the seller’s breach of contract.”

1.5 Section 51(3) of the SGA 1979 provides:

“Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time ... when they ought to have been delivered...”

As to the meaning of “available market” under this subsection, in ***Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd (No 2) [1990] 3 All ER 723***, Webster J promulgated the following test:

“... First where a seller defaults, and where the market price exceeds the contract price, in assessing the buyer’s recoverable damages a court may take into account, as evidence relevant to the market or current price on the date of default, the price at which a buyer could obtain the goods over a period of days rather than the price that he would have to pay if required to make an immediate purchase, and, second, the court may, or possibly should, adopt the price which would produce the lower of two alternative awards.”

As we will see below, on this definition there is probably an available market in new cars, except where there is a waiting list or where the non-delivered car is of an unusual specification.

1.6 If there is an available market and the contract price and the market price of the vehicle are the same, prima facie only nominal damages are recoverable. If the buyer is able to obtain a replacement vehicle at the same price, prima facie no loss is suffered. The buyer is under a duty to mitigate his loss and buy the replacement vehicle. However this is only a prima facie measure and the court does not need to follow it, if it would give rise to injustice (***Johnson v Agnew [1980] AC 367***).

1.7 In HP cases, where the hirer rejects the vehicle, he is entitled to be refunded the payments he has made under the HP agreement. In ***Farnworth Finance Facilities***

**Ltd v Attryde [1970] 1 WLR 1053**, the hirer did not have to give credit for the use of the 4,000 mile use of the motorcycle because “the value of any use had is offset by the great amount of trouble he had”. In **Charterhouse Credit Co Ltd v Tolly [1963] 2 QB 683**, credit for use of the vehicle by the hirer was conceded.

## 2. Damages for breach of warranty and for accepted vehicles

2.1 Section 53 of the SGA 1979 provides:

“(1) Where there is a breach of warranty by the seller, or where the buyer elects (or is compelled) to treat any breach of condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods but he may

(a) set up against the seller the breach of warranty in diminution or extinction of the price, or

(b) maintain an action against the seller for damages for breach of warranty.

(2) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty.

(3) In the case of breach of warranty of quality such loss is prima facie the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had fulfilled the warranty.

(4) The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage.”

2.2 Section 54 of the SGA 1979 (at 1.1 above) preserves the buyer’s right to recover special damages and interest.

2.3 In **Bence Graphics International Ltd v Fasson UK Ltd [1998] QB 87**, Otton LJ said at p 93F that section 53(2) of the SGA 1979 lays down the basic principles for remoteness of damage in language derived from **Hadley v Baxendale (1854) 9 Exch 341** at p 354, namely:

“Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either as arising naturally, ie according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.”

and that section 54 of the SGA 1979 impliedly accepts the “second rule” in **Hadley v Baxendale** at p 354, namely:

“if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would be reasonable to contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated.”

Auld LJ said at p 102 that the starting point under section 53 of the SGA 1979 is the **Hadley v Baxendale** principle in section 53(2) and that section 53(3) may never come into play.

- 2.4 Under section 53(3) of the SGA 1979, the purchase price of the vehicle is sometimes assumed to be the value of the vehicle if it had fulfilled the warranty. However, it is “the value of the goods at the time of delivery to the buyer”, which may be different to the purchase price. There may have been a change in value between the time at which the price was agreed and the date of delivery of the vehicle, particularly in cases with a long ordering time.
- 2.5 A genuine re-sale price of a defective vehicle to a buyer knowing of the defects may well be the best evidence of the actual value of the vehicle at the time of delivery provided that there is not too long a lapse of time between delivery and re-sale. A theoretical sale to a hypothetical buyer of defective goods will have little evidential value.
- 2.6 Expert valuation evidence will be required, usually a single expert jointly instructed by the parties (see CPR Part 35.1 and 35.7(1)). The Practice Direction to Part 35 states “where possible, matters requiring expert evidence should be dealt with by a single expert.” Valuation evidence is particularly suitable for a single expert. Each party may instruct the expert (CPR 35.8(1)) If the parties cannot agree on the expert, the court will select an expert from a list prepared by the parties or direct how an expert will be selected (CPR 35.7(3)). The parties may put written questions to a single joint expert (CPR 35.6(1)(b)). If any party is dissatisfied with a single joint expert’s opinion after questions have been put and answered and if the reasons for dissatisfaction are not fanciful and a substantial sum is involved, the court may allow the dissatisfied party to instruct its own expert (**Daniels v Walker [2000] 1 WLR 1382**).
- 2.7 An example of a case where the absence of expert evidence would have been fatal if liability had been established. In **Bramhill v Edwards [2004] 2 Lloyd’s Rep 653**, E imported a motor home from the USA. Its width exceeded the maximum permitted under the Road Vehicles (Construction and Use) Regulations 1986 by two inches. It was held by the Court of Appeal that there had been no breach of warranty or misrepresentation. The authorities had been turning a blind eye to widespread breaches of regulations by motor home enthusiasts and insurance could be obtained for the motor home. If there had been a breach of contract, the Court of Appeal said that B ought to have adduced expert evidence as to the value of illegal motor homes in the UK. In the absence of such evidence, B would have been unable to prove loss. B was seeking the difference between the price paid and a zero valuation on the basis that it was an illegal vehicle.
- 2.8 On HP cases, the assessment of damages for breach of warranty is the difference between the hirer’s position if he had entered into such an agreement in respect of a car as warranted and his position with a defective car. In **Yeoman Credit Ltd v Odgers [1962] 1 WLR 215**, the hirer was awarded against the dealer the cost to him of coming out of the HP agreement and the costs of defending the claim brought by the finance company. In **Brown v Sheen and Richmond Car Sales Ltd [1950] 1 All ER 1102**, the hirer had become the owner of the car having paid all instalments and was awarded the difference between the value of the car as warranted and its true value as at the date of the HP agreement. In **Jackson v Chrysler Acceptances [1978] RTR 474**, having initially sought to rescind the HP agreement, the hirer’s

damages were assessed on the basis that he would retain the car and become its owner at the conclusion of the HP agreement. In ***Yeoman Credit Co v Apps [1962] QB 508***, the hirer was awarded the cost of repair, but this decision has been criticised because the car was returned to the finance company.

### 3. Damages for non-acceptance of vehicle

3.1 Section 49 of the SGA 1979 provides for the seller having an action for the price of goods whether title in the goods has passed to the buyer (s 49(1)) or not yet (s 49(2)).

3.2 Section 50 of the SGA 1979 provides:

“(1) Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance.

(2) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer’s breach of contract.

(3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted or (if no time was fixed for acceptance) at the time of the refusal to accept.”

3.3 Section 37 of the SGA 1979 provides:

“(1) When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods.

(2) Nothing in this section affects the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.”

3.4 See also section 54 of the SGA 1979 in 1.1 above.

3.5 In ***Thompson (W.L.) Ltd v Robinson (Gunmakers) Ltd [1955] 1 Ch 177***, the defendant, R, ordered a new Vanguard car from the claimant dealer, T, and then refused to accept delivery. The distributor took the car back from T and supplied it to another dealer at no loss. T claimed its loss of profit on the transaction. It was conceded by R that there was no shortage of Vanguards to meet all immediate demands in the locality. R’s case was that T had suffered nominal loss because it had returned the car to the distributor. It could equally have sold the car to another customer. Upjohn J said at page 187 that the position in the recent past had been that car dealers had long waiting lists for new cars and, in those circumstances, a car dealer would suffer nominal loss if a purchaser dropped out because he could be easily replaced. The judge held that on the conceded facts, T had lost the profit on a sale. The judge went on to find, on the facts, that there was no “available market” under section 50(3) or, if there was an available market, section 50(3) was a prima facie rule that could be displaced if, on an investigation of the facts, it was unjust to apply the rule.

- 3.6 In **Charter v Sullivan [1957] 2 QB 117**, S agreed to buy a new Hillman Minx from C. Subsequently, he got better terms from another dealer and withdrew from the purchase from C. C sold the vehicle to another purchaser at the same price 10 days later. The trial judge awarded C the dealer's profit on the retail price fixed by the manufacturer. The Court of Appeal held that C had failed to prove its loss particularly in the light of the evidence of C's sales manager that it could sell all Hillman Minx that it could get.
- 3.7 The Courts considered the meaning of "available market" under section 50 in the following cases:
- (1) In **Thompson v Robinson, above**, Upjohn J stated:
 

"an "available market" merely means that the situation in the particular trade in the particular area was such that the particular goods could be freely sold, and that there was a demand sufficient to absorb readily all the goods that were thrust on it, so that if a purchaser defaulted the goods in question could be readily disposed of."
  - (2) In **Charter v Sullivan, above**, Jenkins LJ stated:
 

"The Act does not attempt to define a market and it may be conceded that one can exist in a variety of circumstances and apart, of necessity, from a defined place, but, since its trading has to serve as a factor in measuring damages, it must at least be a market in which the seller could, if he wishes, sell the goods left in his hands."
  - (3) In **Shearson Lehman Hutton Inc v Maclaine Watson & Co Ltd, above**, Webster J promulgated the following test:
 

"... if the seller actually offers the goods for sale there is no available market unless there is one actual buyer on that day at a fair price; that if there is no actual offer for sale, but only a notional or hypothetical sale for the purposes of s 50(3), there is no available market unless on that day there are in the market sufficient traders potentially in touch with each other to evidence a market in which the actual or notional seller could if he wished sell the goods..."
- 3.8 In **Lazenby Garages Ltd v Wright [1976] 1 WLR 459**, W agreed to buy a second hand BMW at a price of £1,670. His wife persuaded him not to buy the car. The next day he told the garage he would not be buying the car. Two months later the garage sold the car for £1,770. The garage sued W for damages for the difference between the price they paid for the car and £1,670 on the basis that they had lost the sale of a second hand car. The judge awarded them 50% of the price difference on the grounds that there was a 50% chance that they would have sold another second hand car. It was held by the Court of Appeal that each second hand car is different and that there is no "available market" for second hand cars under section 50 of the SGA 1979. As the car was resold for £100 more, the garage suffered no loss.
- 3.9 **McGregor on Damages** at para 21-012 suggests that the normal measure for damages for non-acceptance in HP cases should be the total amounts due under the HP agreement less the price at which the owner can make a similar HP contract. At para 21-011, it suggests that the normal measure for non-acceptance in hire cases should be the contract rate of hire less the market rate at which the owner can make a substitute hire. In **Yeoman Credit Ltd v Waragowski [1961] 1 WLR 1124**, W repudiated the agreement and Y retook possession of the vehicle and was awarded

unpaid rentals and damages of the all amounts due under the HP agreement, less payments made, the judgment for unpaid and the sale price of the vehicle. In **Yeoman Credit Ltd v MacLean [1962] 1 WLR 131**, credit was also given for accelerated receipt of amounts due under the HP agreement. This was followed in **Overstone v Shipway [1962] 1 WLR 117**. Where the owner retakes the vehicle pursuant to a power in the agreement, his damages are limited up to the date of termination (**Financings v Baldock [1963] QB 104**). This distinction has been upheld in **Lombard North Central Plc v Butterworth [1987] 1 QB 527**.

#### 4. Damages for mental distress, disappointment and inconvenience

4.1 The leading case for damages for mental distress and disappointment is **Farley v Skinner [2001] UKHL 49 [2002] AC 732**. F wished to buy a “gracious country residence” near Gatwick Airport. He retained a surveyor to report on various matters, including the effect of aircraft noise. He received a favourable report and bought the property. In fact, the property was significantly affected by aircraft stacking on the approach to land at Gatwick. Having spent £100,000 on the property before he was aware of the aircraft noise, F decided to retain the property notwithstanding that his “quiet, reflective breakfasts”, early morning walks and pre-dinner drinks on the terrace were badly affected. The trial judge found the surveyor to be in breach of contract. There was no difference between the price paid and the open market value of the property taking into account the aircraft noise. The trial judge awarded F £10,000 for discomfort. The House of Lords approached the case on the basis that the surveyor’s obligation to investigate aircraft noise was a major or important part of the contract. The House of Lords held that it was sufficient for an award of damages for non-pecuniary loss if a major or important part of the contract is to give pleasure, relaxation or peace of mind. As to quantum, the House of Lords considered £10,000 to be at the very top end of a range of possible awards and that “awards in this area should be restrained and modest”. The House of Lords, in obiter, was not prepared to disagree with the judge’s finding that the aircraft noise caused physical inconvenience and discomfort. Lord Scott emphasised that damages in this area must be, as at the date of contract, reasonably foreseeable as liable to result from the breach.

4.2 The leading case for damages for loss of amenity is **Ruxley Electronics and Construction Ltd v Forsyth [1996] AC 344**. There was a contract to build a swimming pool with a deep end of 7 feet 6 inches. In fact, the pool was built with a deep end of 6 feet. The cost of remedy was £21,560. The trial judge awarded £2,500 for loss of amenity as the cost of remedy was disproportionate to the disadvantage of having the swimming pool as built. The Court of Appeal awarded the cost of remedy. The House of Lords restored the trial judge’s award. Although this is a building case, the case has wider implications. In **Farley v Skinner**, Lord Scott said at para 79:

“*Ruxley’s* case establishes, in my opinion, that if a party’s contractual performance has failed to provide to the other contracting party something to which that other was, under the contract, entitled, and which, if provided, would have been of value to that party, then, if there is no other way of compensating the injured party, the injured party should be compensated in

damages to the extent of that value. Quantification of that value will in many cases be difficult and may often seem arbitrary.”

If a vehicle fails to comply with an agreed specification and the cost of making it comply is disproportionate, loss of amenity damages may be awarded.

- 4.3 In **Watts v Morrow [1991] 1 WLR 1421**, the Court of Appeal had said that in cases not falling within the exceptional category of a contract of which the very object is to provide pleasure, relaxation, peace of mind etc, damages are recoverable for reasonably foreseeable physical inconvenience and discomfort during a period of repair (ie housing disrepair cases and surveyor's negligence), even if the repair cost is not recoverable. In **Farley v Skinner**, Lord Scott at para 85 stated that if the cause of the inconvenience or discomfort was a sensory (sight, touch, hearing, smell etc) experience, damages can, subject to remoteness, be recoverable. Query whether having to drive a noisy or smelly defective vehicle (perhaps while waiting for a replacement) would give rise to a claim for physical inconvenience and discomfort.
- 4.4 In **Bernstein v Pamson Motors (Golders Green) Ltd [1987] 2 All ER 220**, B purchased a new motor car, which came to a grinding halt after three weeks and 140 miles. B was held to have accepted the car (that decision is no longer good law: **Clegg v Andersson (trading as Nordic Marine) [2003] EWCA Civ 320 [2003] 2 Lloyd's Rep 32**). B was awarded the cost of making his way back home on the day of the breakdown, the loss of his full tank of petrol, compensation of £150 for a totally spoiled day, comprising nothing but vexation, in which he and his wife had set out from Ealing for a day's shopping in Guildford and had broken down on the way and £50 for five days' loss of use of his car. It is difficult to see which category the £150 falls into. The car broke down in early January and the judge described B as “finally regaining the sanctuary of his own home, cold, angry and disgusted with his motor car”. It could be a physical discomfort award and/or a **Ruxley** award. The purchase of a new Nissan Laurel is not a contract, the major or important part of which is to give pleasure, relaxation or peace of mind. It could well be that such an award would not now be made.
- 4.5 In **Gascoigne v British Credit Trust [1978] CLY 711**, a second hand car bought for “pleasure use” had given nothing but trouble because of its unroadworthy condition. The plaintiff's pregnant wife had to use bus and taxi as more reliable means of attending hospital visits. The plaintiff was awarded £75 for inconvenience and frustration.
- 4.6 In **Jackson v Chrysler Acceptances Ltd, Minorities Garages Ltd (Third Party) [1978] RTR 474**, J entered into an HP agreement for a new, family car, which turned out to be not of merchantable quality and not fit for purpose. Before purchasing the car, J made it clear to the car dealer that he was intending to use the car for a family holiday in France that was due to take place three months after purchase. He already owned other cars, but purchased this car for his family of five to go on holiday. He wished to eliminate any teething problems during that three month period. There were problems with the car before and during the four week holiday in France. The trial judge took the view that J had accepted the car and awarded J damages of £200 for the shortfall in quality in the car and £75 for the detrimental effect on the holiday in France as a result of problem with the car during the holiday. On appeal, J did not pursue his case on rejection. The Court of Appeal awarded J

£750 for both elements of loss, holding that the difference between the holiday as it could reasonably have expected to have been with a car in proper condition and with this car as it was entitled J to “substantial damages” and that he was entitled to substantially greater compensation than £75.

4.7 In **Hobbs v London and South Western Railway Co LR 10 QB 111**, H and his wife and two children had to walk five miles home in the rain because their train dumped them at the wrong station. H was awarded damages for the inconvenience and discomfort to him and his family of the walk home. The fact that his wife caught a cold as a result of the walk was regarded as too remote. This case was described by Lord Scott in **Farley** as a **Ruxley** case because H had been denied the deprived of the contractual benefit of carriage to the correct station.

## 5. Personal injury damages

5.1 Death or personal injury caused by a vehicle sold in a defective state may give rise to a liability against the seller or repairer of the vehicle if it could not reasonably be anticipated that a vehicle would be examined by the party taking it. .

5.2 In **Lexmead (Basingstoke) Ltd v Lewis (Lambert v Lewis) [1982] AC 225**, a defective towing hitch caused a trailer to detach itself from the towing vehicle and collide with another vehicle, killing two occupants and injuring two other occupants of the other vehicle. Proceedings were brought against the owner of the towing vehicle, the seller and fitter of the towing hitch and the manufacturer of the towing hitch. The owner of the vehicle brought third party proceedings against the seller of the towing hitch on the grounds that it was neither of merchantable quality nor fit for the purpose for which it had been supplied. The amount of damages for death and personal injury was agreed. It was held by the House of Lords that the owner’s third party claim against the dealer failed because the owner had become aware, before the accident, that the handle of the locking mechanism was missing and the locking mechanism was broken, but continued to use the towing hitch on the highway. It was said that if the accident had occurred before the owner became aware of the broken locking mechanism, he would have been entitled to have relied on the implied terms as to quality as against the seller, but his knowledge as to the damage to the coupling meant that the contractual warranties could no longer be relied on by him. The explanation for this decision suggested by the editors of **Benjamin’s Sale of Goods** is the owner’s duty to take reasonable steps to minimise his loss by repairing the broken coupling.

5.3 In **Andrews v Hopkinson [1957] 1 QB 229**, A bought a second hand car, through a dealer H, on HP. The steering mechanism failed soon after and A had an accident. A suffered fractured ribs and a fractured wrist. A sued H for breach of warranty: “It is a good little bus; I would stake my life on it; you will have no trouble with it”. Special damages were agreed and general damages were assessed at £400. The judge decided that the whole of A’s loss directly and naturally resulted in the ordinary course of events from the breach of warranty. The judge also held that H was negligent.

5.4 In **Herschtal v Stewart and Ardern Ltd [1940] 1 KB 155**, H was the director of a company, which had entered into an HP agreement for a reconditioned car. After driving for a few miles, the near rear wheel came off because the nuts had not been

properly tightened and the threads were stripped and H suffered nervous shock. It was held that the dealers owed a duty of care to H on the basis of the neighbour test in ***Donoghue v Stevenson [1932] AC 562***, which was breached.

- 5.5 Under section 2(1) of the Unfair Contract Terms Act 1977, a person cannot by reference to a contract term or notice exclude or restrict liability for death or personal injury resulting from negligence, which includes any contractual or common law duty to take reasonable care and skill in the performance of the contract.

## 6. Loss of use of a vehicle

- 6.1 Loss of use a vehicle can either be recovered as general damages or, if a replacement vehicle is hired, as special damages.

- 6.2 In ***Alexander v Rolls Royce Motor Cars Ltd [1996] RTR 95***, A bought a 10 year old Rolls Royce Corniche. It developed a series of irritating faults, which were repaired under a 6 months' warranty, but persisted. He was unable to sell it. Following an accident and further faults, Rolls Royce repaired the car on more than one occasion. A sued the seller of the car for breach of merchantable quality and the repairer for failure to exercise reasonable care and skill in diagnosing engine fault and advising unnecessary repairs. The trial judge held that the car was unmerchantable and awarded damages based on the difference between price paid and its true value. There was no appeal against this. The trial judge also awarded damages against the repairer. As to loss of use of the car, the Court of Appeal said at page 102C:

“Notwithstanding that no substitute vehicle has been hired, judges have awarded compensation for loss of use of a vehicle while it is being repaired where it has been shown that inconvenience has been caused or, for example, that the owner has had to use public transport, or walk or that a family have been deprived of the advantage of a family car where otherwise they would have used the car which had been damaged. In short ... a sum is given which in the circumstances of the particular case would be regarded as compensation for the particular wrong suffered.”

A was awarded no compensation for loss of use because he rarely used the Rolls Royce. For example, he took weeks to collect it after it had been repaired.

- 6.3 In ***Birmingham Corporation v Sowsbery [1970] RTR 84***, Geoffrey Lane J said at p 85:

“The vehicle was off the road for 69 days undergoing repairs. There was no necessity to hire another vehicle because the plaintiffs maintain ... a spare fleet of omnibuses for such emergencies...”

Where the plaintiffs in a case such as this have had to hire a replacement vehicle, or where they are a profit making concern and can prove a financial detriment from the temporary loss of their vehicle, no difficulty arises. The precise figure can be claimed as special damage and will be recovered if proved.

Here, however, by virtue of the fact that the plaintiffs are non-profit making and did not have to hire another vehicle, different considerations apply.”

The judge awarded “substantial general damages for loss of use of their vehicle” of £4 11s a day. This was calculated on the standing charge cost of maintaining and operating the vehicle.

6.4 In **Lagden v O'Connor [2003] UKHL 64 [2004] 1 AC 1067**, Lord Hope of Craighead said at paragraph 27:

“Mr Lagden’s claim was, in essence, a claim for the loss of use of his vehicle while it was in the garage undergoing the repairs which needed to be done as a result of the accident. There was no evidence that he would have suffered financial loss as a result of being unable to use his car during this period. But inconvenience is another form of loss for which, in principle, damages are recoverable. So it was open to him, as it is to any other motorist, to avoid or mitigate that loss by hiring another vehicle while his own car was unavailable to him. The expense of doing so will then become the measure of the loss which he has sustained under this head of his claim. It will be substituted for his claim for loss of use by way of general damages. But the principle is that he must take reasonable steps to mitigate his loss. The injured party cannot claim reimbursement for expenditure by way of mitigation that is unreasonable. So the motorist cannot claim for the cost of hiring another vehicle if he had no reason to use a car while his own car was being repaired... If it is reasonable for him to hire a substitute, he must minimise his loss by spending no more on the hire than he needs to do in order to obtain a substitute vehicle. If the defendant can show that the cost that was incurred was more than was reasonable – if, for example, a larger or more powerful car was hired although vehicles equivalent to the damaged car were reasonably available at less cost – the amount expended on hire must be reduced to the amount that would have been needed to hire the equivalent.”

6.5 In **Giles v Thompson [1994] 1 AC 142**, Lord Mustill said at p 167:

“The need for a replacement car is not self-proving. The motorist .. may have been planning to go abroad for a holiday leaving his car behind... Thus, although ... it is not hard to infer that a motorist who incurs considerable expense of running a private car does so because he has a need for it, and consequently has a need to replace it if, as the result of a wrongful act, it is put out of commission, there remains ample scope for the defendant in an individual case to displace the inference which might otherwise arise.”

6.6 On the issue of betterment, Lord Hope in **Lagden v O'Connor** said at para 34:

“It is for the defendant who seeks a deduction from expenditure in mitigation on the ground of betterment to make out his case for doing so. It is not enough that an element of betterment can be identified. It has to be shown that the claimant had a choice, and that he would have been able to mitigate his loss at less cost. The wrongdoer is not entitled to demand of the injured party that he incur a loss, bear a burden or make unreasonable sacrifices in the mitigation of his damages. He is entitled to demand that, where there are

choices to be made, the least expensive route which will achieve mitigation must be selected...”

6.7 Although the onus is on the defendant to show that the claimant has failed to mitigate his loss, the claimant must specifically set out in his particulars of claim any facts relating to mitigation of loss or damage where he wishes to rely on them in support of his claim (CPR 16 PD para 8.2(8)). Thus, the claimant should plead the factual basis on which he has incurred hire charges and as to the reasonableness of the amount of the hire charges.

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