

WHEN LEGAL FICTION MET COMMON SENSE: HOW THE COURT IN
MORRISON V. CAMPBELL SAID WHAT EVERYONE WAS THINKING

Jeremy Walter*

I. INTRODUCTION

Michael Harrington lives in the greater Houston area with his wife, Karen, and their three children. Although life hasn't always been easy for the young family, they manage their affairs intelligently by taking advantage of sales, clipping the occasional coupon, and cutting out unnecessary expenses. After two sets of braces, dance classes, a youth soccer league, and other family expenses, the last few months have been particularly tight. Luckily, Michael has a decent job downtown to keep everything afloat.

Thanks to traffic and seemingly perpetual construction, Michael's commute is a daily chore which always seems to take longer than it should. While returning from work one evening, another driver runs a red light just as Michael enters an intersection. The ensuing collision sends Michael's car spinning into the intersection where another vehicle makes contact, luckily at a lower speed. The all-too-familiar scene brings emergency services, tow trucks, and onlookers to the intersection. Michael fractures his wrist, among other minor injuries, and the other drivers escape with only a few bumps and bruises. The same cannot be said for Michael's damaged vehicle.

The story is true, although Michael is a fictitious name, and different versions occur all over Texas with alarming frequency. Throughout 2013, the Texas Department of Transportation recorded over 440,000 reported automobile accidents across the state, averaging over 1,200 per day.¹ Add unreported accidents to that number and the figure is staggering. This is where a particular legal fiction in Texas can take an enormous toll on people, especially those like Michael and his family who do not have funds to spare.

*Candidate for Juris Doctor 2015; Baylor Law School. I would like to thank Professor Michael Morrison for his guidance and support. I am also eternally grateful to my wife, Ellen, for her love, understanding, and inspiration in everything I do.

¹TEX. DEP'T OF MOTOR TRANSP. CRASH STATISTICS, http://ftp.dot.state.tx.us/pub/txdot-info/trf/crash_statistics/2013/12-2013.pdf (last visited September 9, 2014).

The long-standing approach of Texas courts assumes that where personal property, like a vehicle, is partially destroyed,² the owner can recover a reasonable value for the loss of use of the property.³ However, where personal property is totally destroyed, the owner is limited to recovering only the difference in market value for the property immediately before and immediately after the damage.⁴ The Austin Court of Appeals identified the legal fiction at issue in the context of an automobile collision through two distinct assumptions.⁵ First, courts assume that where a car is totally destroyed, it can be replaced immediately without any loss of use.⁶ Second, courts assume that where a car is only partially destroyed, it can be repaired after some length of time.⁷ While performing repairs will in fact temporarily prevent the use of a vehicle, assuming an immediate vehicle replacement every time a car is totaled defies common sense.

On January 16, 2014, the Fort Worth Court of Appeals created an exception to the rule in *Morrison v. Campbell* by allowing a party to recover for loss of use where the party's vehicle suffered total destruction.⁸ This comment will address the aforementioned legal fiction in the wake of *Morrison*. Part II will focus on the history of the rule and how it came to apply to modern factual situations. Part III will trace the case law which called the rule into question, culminating in the *Morrison* decision. Part IV will provide examples of how other jurisdictions have handled the issue. Part V will analyze the scope of *Morrison* and how the Waco Court of

²For purposes of this comment, the partial or total destruction at issue will always be the result of negligence or other tortious conduct. An action resounding in contract principles, for example, might vary widely based on the underlying agreement.

³*Cogbill v. Martin*, 308 S.W.2d 269, 271 (Tex. Civ. App.—Waco 1957, no writ); *see also* *Pasadena State Bank v. Isaac*, 228 S.W.2d 127, 128–29 (Tex. 1950) (relying on the Restatement of the Law of Torts to allow loss of use damages where personal property is partially destroyed); *Kan. City S. Ry. Co. v. Frederick*, 276 S.W.2d 332, 334 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e.) (noting the law in Texas is “well established” regarding recovery for loss of use where personal property is partially destroyed).

⁴*Cogbill*, 308 S.W.2d at 271; *see also* *Waples-Platter Co. v. Commercial Standard Ins. Co.*, 294 S.W.2d 375, 376–77 (Tex. 1956) (stating the measure of property damages is the reasonable cash market value of the property at the time it was destroyed); *Isaac*, 228 S.W.2d at 128 (stating the general rule for measuring damage to personal property as the difference in market value immediately before and after injury to the property); *Frederick*, 276 S.W.2d at 334 (holding the correct rule disallows loss of use for totally destroyed personal property).

⁵*Mondragon v. Austin*, 954 S.W.2d 191, 196 (Tex. App.—Austin 1997, pet. denied).

⁶*Id.*

⁷*Id.*

⁸431 S.W.3d 611, 622–23 (Tex. App.—Fort Worth 2014, no pet.).

Appeals has already responded. Finally, Part VI will conclude with a practical emphasis on how attorneys must lead the charge for expanding the *Morrison* decision.

II. HOW ASSUMPTIONS BECAME LAW

A survey of Texas case law reveals precursors to the modern assumptions which predate the Restatement (First) of Torts, the twentieth century, and even the Texas courts of appeals themselves. Given the nature of the *Morrison* case and the prevalence of automobile collisions in shaping the assumptions, it only seems fitting to begin with another mode of transportation.

A. *Better to Kill than Maim*

The old legal adage that it is “better to kill than to maim” stems from English common law, more specifically a decision handed down by Lord Ellenborough in *Baker v. Bolton*.⁹ The decision held that “[i]n a civil Court, the death of a human being could not be complained of as an injury.”¹⁰ Being prior to recognition of a wrongful death cause of action, the decision essentially held that a person’s cause of action ceases with death.¹¹ Courts in Texas, like other jurisdictions which relied upon English common law, applied this concept for decades following *Baker v. Bolton*.¹²

One example of this application, which connects through time to *Morrison*, involved the loss of a wagon and horses at a railroad crossing.¹³ In *Galveston, H. & S.A. Ry. Co. v. Matula*, the Supreme Court of Texas addressed the issue of damages where a train engine collided with the plaintiff’s wagon and team of horses.¹⁴ The court upheld a jury instruction on appeal which measured damages as “reasonable cash value at the time of their loss, with interest thereon at the rate of six per cent. per annum from that date until now,” reasoning that amount would not exceed the more accurate description of damages as “the market value at the time and place

⁹(1808) 170 Eng. Rep. 1033 (K.B.) 1033; 1 Camp. 493, 493.

¹⁰*Id.*

¹¹*Id.* (stating damages for the death of the plaintiff’s wife “must stop with her period of existence”).

¹²*Galveston, H. & S.A. Ry. Co. v. Matula*, 19 S.W. 376, 376–77 (Tex. 1892); *Int’l & G.N.R. Co. v. Carr*, 91 S.W. 858 (Tex. Civ. App.—San Antonio 1905, no writ); *City of Canadian v. Guthrie*, 87 S.W.2d 316 (Tex. Civ. App.—Amarillo 1932, no writ).

¹³*Matula*, 19 S.W. at 376 (Tex. 1892).

¹⁴*Id.*

of injury.”¹⁵ The horses and wagon were totally destroyed, providing a similar measure of damages to the modern approach.¹⁶

The same approach can be found early in the twentieth century in *International & G.N.R. Co. v. Carr*.¹⁷ There, the court found similar facts before it as in *Matula*, but this time a donkey was struck and killed on the defendant’s track.¹⁸ The court confirmed the proper measure of damages as market value, but elaborated that an animal without market value could have a fair and reasonable intrinsic value.¹⁹ Despite this minor expansion of language, the court gave no indication that other types of damages could be recovered beyond the animal’s value.²⁰

To see an illustration of the partial damage rule evolving, the Amarillo Court of Appeals decision in *City of Canadian v. Guthrie* provides clarity.²¹ In that case, an impounded horse was executed by the city of Canadian.²² The court once again held the appropriate measure of damages for the loss of a horse to be market value, but took a moment to note that loss of use damages would be recoverable had the horse merely been injured.²³ This led the court to affirm the lament of the appellee’s counsel that it was in fact cheaper to kill a horse in Texas than to cripple one.²⁴ The court did not cite specific authority for its dicta regarding partial destruction, but other case law developing at the time provides some insight.²⁵

B. From Four Legs to Four Wheels

As automobiles became more prevalent, case law developed across the courts of appeals addressing the total-partial distinction in the context of automobile accidents. A mere two years prior to the *Guthrie* decision, the Fort Worth Court of Appeals had occasion to hear a case involving loss of

¹⁵ *Id.* at 377.

¹⁶ *Id.*

¹⁷ 91 S.W. at 858.

¹⁸ *Id.* at 859.

¹⁹ *Id.*

²⁰ *See id.*

²¹ 87 S.W.2d 316 (Tex. Civ. App.—Amarillo 1932, no writ).

²² *Id.* at 317.

²³ *Id.* at 318.

²⁴ *Id.* (noting the state of the law assessed a lower cost for killing, rather than maiming, both horses and men).

²⁵ *Lone Star Gas Co. v. Hutton*, 58 S.W.2d 19, 20–21 (Tex. Comm’n App. 1933, holding approved).

use damages for a partially destroyed automobile.²⁶ In *Davis v. Mrs. Baird's Bakery*, a collision between two automobiles left the plaintiff without a vehicle for 45 days while repairs occurred.²⁷ The court reversed a dismissal of the plaintiff's case which had been based upon an inability to recover for loss of use damages.²⁸ In so doing, it was not entirely clear if loss of use damages would have stood on their own, but at the very least a shadow of the modern approach took hold in the opinion.²⁹

The *Davis* decision left some questions unanswered and ultimately only represented the view of one Texas court of appeals.³⁰ Fortunately, other Texas courts were wrestling with the same questions both before *Davis* and in the following years. The uniformity of approach seen in the Texas courts provided a solid foundation for the modern rule.³¹ It seems obvious, and this comment does not argue otherwise, that the rule in Texas initially developed to allow recovery for loss of use damages only where property was partially destroyed, but not totally destroyed. However, the Supreme Court of Texas has not issued an opinion solidifying the agreement of the courts of appeals.

Arguably, the closest the Supreme Court came to issuing such an opinion occurred in *Pasadena State Bank v. Isaac*, though the case did not

²⁶*Davis v. Mrs. Baird's Bakery*, 30 S.W.2d 809, 809 (Tex. Civ. App.—Fort Worth 1930, no writ).

²⁷*Id.*

²⁸*Id.* at 810.

²⁹*See id.* at 809–10 (indicating rental value while the plaintiff was deprived of the vehicle and loss of time from the plaintiff's business were aggregated in pleading damages and that segregating the two might cause a different result).

³⁰Although there are fourteen courts of appeals in Texas today, there were only eleven in existence at the time the *Davis* decision was rendered. Then, as now, the decision of one court of appeals did not bind the others. *See* Tex. Const. art. V, § 6.

³¹*See, e.g.,* Chi., R.I. & G. Ry. Co. v. Zumwalt, 239 S.W. 912, 915 (Tex. Comm'n App. 1922, judgm't adopted) (holding the proper measure of damages for a repairable truck to be cost of repairs, loss of use, and remaining diminution in market value; total destruction could be remedied only by difference in market value); Chase Bag Co. v. Longoria, 45 S.W.2d 242, 245 (Tex. Civ. App.—Waco 1931, writ dism'd w.o.j.) (awarding cost of repairs and diminution in market value for partially destroyed automobile; loss of use damages not addressed); El Paso Elec. Co. v. Collins, 10 S.W.2d 397, 400 (Tex. Civ. App.—El Paso 1928, writ granted) (stating the general rule for recovery of partially destroyed property as cost of repairs plus additional diminution in market value; loss of use damages not addressed), *rev'd on other grounds by* 23 S.W.2d 295 (Tex. Comm'n App. 1930, holding approved); Cooper v. Knight, 147 S.W. 349, 351 (Tex. Civ. App.—Dallas 1912, no writ) (holding the proper measure of damages for a repairable automobile as the reasonable cost of repair along with the difference in market value, if any, before and after the repairs).

involve an automobile crash.³² In *Isaac*, an electrical accounting machine suffered partial destruction while in transit.³³ The court echoed the established approach, even quoting the Restatement (First) of Torts as a valid statement of the rule.³⁴ The quoted treatise only addressed a situation of partial destruction, the case presented facts regarding partial destruction, and the court did not venture into extensive dicta regarding total destruction.³⁵ As for precedential effect, the decision essentially ratified the agreement of the courts of appeals regarding partial destruction, but the question of damages for total destruction remained technically, albeit narrowly, open for interpretation. The Supreme Court of Texas has never returned to address the issue directly.

Prior to *Isaac*, while the courts of appeals were reaching similar conclusions among themselves, a Commission of Appeals in Texas applied the same basic rule to injury of real property.³⁶ In *Lone Star Gas Co. v. Hutton*, the defendant gas company diverted natural streams during the construction of a pipeline, flooding the plaintiffs' land.³⁷ There, the court refused to allow recovery of rental value where permanent injury to land occurred, as opposed to temporary injury.³⁸ The court surmised that recovery for permanent injury to land includes lost rental value and to allow said value as a separate measure of damages amounts to a double recovery.³⁹ The court went on to clarify that a temporary injury to land

³²228 S.W.2d 127 (Tex. 1950).

³³*Id.* at 127.

³⁴*Id.* at 128–29. The relevant portion of the Restatement (First) of Torts as quoted by the Court read as follows:

Where a person is entitled to a judgment for harm to chattels not amounting to a total destruction in value, the damages include compensation for

(a) the difference between the value of the chattel before the harm and the value after the harm or, at the plaintiff's election, the reasonable cost of repair or restoration where feasible, with due allowance for any difference between the original value and the value after repairs, and

(b) the loss of use.

RESTATEMENT (FIRST) OF TORTS § 928 (1939).

³⁵*Isaac*, 228 S.W.2d at 127–29.

³⁶*Lone Star Gas Co. v. Hutton*, 58 S.W.2d 19, 21 (Tex. Comm'n App. 1933, holding approved).

³⁷*Id.* at 20.

³⁸*Id.* at 21.

³⁹*Id.*

allows the additional recovery of damages which accrue during the continuance of the injury, such as rental value.⁴⁰ The Supreme Court of Texas then drew an analogy between this case and destruction of personal property in the same year as the *Isaac* decision.⁴¹

In *King v. McGuff*, the defendant's employees used gasoline to clean a kitchen floor without first turning off a nearby pilot light.⁴² An explosion resulted which reduced the value of the plaintiffs' house to roughly one-tenth of its previous value.⁴³ The trial court below had awarded damages based on market value as well as lost rental value for the property.⁴⁴ The court analyzed the state of the law at that point in time and concluded the proper award for the plaintiffs was interest from the time of the fire until judgment, rather than lost rental value.⁴⁵ The court made several preliminary decisions before reaching this conclusion, primarily that a reduction of nine-tenths in value amounted to total destruction of the plaintiffs' house.⁴⁶ The court also found authority regarding an award of lost rental value "surprisingly meagre" in both Texas and other jurisdictions.⁴⁷ Awarding interest in lieu of lost rental value, the court noted that both served the same purpose of compensating for loss of use.⁴⁸ The court in *King* once again tiptoed around the question of lost use for total destruction when analyzing the *Lone Star* case.⁴⁹ According to *King*, the only opinion which prevented loss of use damages for a totally destroyed house was the *Lone Star* decision.⁵⁰ In dicta, the court in *King* mused that it would be "difficult to say" that loss of use damages could be awarded where a house was half destroyed, but not nine-tenths destroyed.⁵¹ Despite this logic and strong language, the final decision replaced loss of use

⁴⁰ *Id.*

⁴¹ *King v. McGuff*, 234 S.W.2d 403, 406-07 (Tex. 1950).

⁴² *Id.* at 404.

⁴³ *Id.*

⁴⁴ *Id.* at 405.

⁴⁵ *Id.* at 407.

⁴⁶ *Id.* at 406.

⁴⁷ *Id.*

⁴⁸ See *id.* (stating the "difference between interest and lost rental value is not as great as it seems").

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ *Id.*

damages with an award of interest and the question remained open in the highest court of Texas.⁵²

The interplay of analogies and related concepts benefits from summation before proceeding into waves of change. The state of the law in Texas, as of 1950, allowed loss of use damages for partially destroyed personal property.⁵³ Conversely, the question of whether loss of use damages would be allowed for totally destroyed personal property technically remained open.⁵⁴ This “loss of use dichotomy” harkened back to English common law⁵⁵ and mirrored both personal property damages⁵⁶ and injury to real property over time.⁵⁷ The underlying approach in Texas appeared to be an aversion to double recovery, whether by substituting interest for loss of use damages or presuming loss of use damages were included where total destruction occurred.⁵⁸ This required analogizing permanent injury to land with total destruction of personal property and equating interest to loss of use damages. After enough years and enough court decisions, these potentially faulty legal assumptions became law with or without a solid foundation. Fortunately, the Austin Court of Appeals began to challenge the status quo.

III. ROCKING THE BOAT

Against the aforementioned backdrop of English common law, Texas court decisions, and treatises, a change in approach seemed neither necessary nor imminent. Despite relative uniformity in approach, one court of appeals rendered decisions which would eventually upset the apple cart.

⁵² *Id.* at 407.

⁵³ *Pasadena State Bank v. Isaac*, 228 S.W.2d 127, 128–29 (Tex. 1950).

⁵⁴ *See King*, 234 S.W.2d at 406–07.

⁵⁵ *Baker v. Bolton*, (1808) 170 Eng. Rep. 1033 (K.B.) 1033; 1 Camp. 493, 493.

⁵⁶ *See City of Canadian v. Guthrie*, 87 S.W.2d 316, 316–17 (Tex. Civ. App.—Amarillo 1932, no writ) (alleging damages to a mare).

⁵⁷ *See Lone Star Gas Co. v. Hutton*, 58 S.W.2d 19, 20 (Tex. Comm’n App. 1933, holding approved) (alleging damages to lands, crops, ditches, etc.).

⁵⁸ *King*, 234 S.W.2d at 406–07 (treating interest as a substitute for loss of use damages where awarding both would be a double recovery); *Lone Star*, 58 S.W.2d at 21 (holding a recovery for permanent injury to land includes lost rental value and a separate award would be a double recovery); *see also Riddell v. Mays*, 533 S.W.2d 910, 911 (Tex. Civ. App.—Waco 1976, no writ) (citing *King* for the proposition that loss of use damages are included in an award of damages for a totally destroyed chattel without need for a separate element of recovery).

A. *Austin Court of Appeals Decisions*

Though the question of loss of use damages for total destruction technically remained open, as previously discussed, most courts adhered to *stare decisis* and continued to deny such awards. Yet in a seemingly innocuous jurisdictional decision, the Austin Court of Appeals reminded the legal community that no rule is settled until the Supreme Court of Texas gives it finality.⁵⁹ In *Reinarz v. Griner*, the appellant asked the court to declare a judgment void without jurisdiction due to an amount in controversy deficiency.⁶⁰ The underlying judgment being attacked involved an automobile collision where one of the cars had been totally destroyed.⁶¹ The dispute arose because the district court which had rendered the judgment had an amount in controversy requirement of \$510.⁶² Appellee's pleadings below only met this threshold by including the claimed loss of use damages, which the district court had not awarded for a totally destroyed vehicle.⁶³ The court noted that "in a case admitting of reasonable doubt as to whether the amount in controversy is within the jurisdiction . . . the case will not be dismissed for want of jurisdiction."⁶⁴ After reviewing some of the authorities already discussed in this comment, the court held that reasonable doubt existed as to whether the Supreme Court of Texas would allow recovery of loss of use damages for a totally destroyed vehicle in the right circumstances.⁶⁵ While the standard of review made the decision easier, the final holding affirmed the notion that an open question remained.⁶⁶ Yet the particular facts of *Reinarz* and the issue of jurisdiction precluded consideration of the answer.

The court in *Reinarz*, seeking a solid rule regarding loss of use damages for totally destroyed property, also touched on an interesting issue raised by the Supreme Court of Texas.⁶⁷ In *Prigdin v. Strickland*, the Court had allowed recovery for loss of use damages in a suit for conversion of a slave,

⁵⁹ See *Reinarz v. Griner*, 401 S.W.2d 274, 276 (Tex. Civ. App.—Austin 1966, no writ).

⁶⁰ *Id.* at 274.

⁶¹ *Id.* at 274–75 (noting the automobile was allegedly "totally damaged, or practically so").

⁶² *Id.* at 275.

⁶³ See *id.* at 274–75.

⁶⁴ *Id.* at 275 (quoting *Dwyer v. Bassett & Bassett*, 63 Tex. 274, 276 (1885)).

⁶⁵ *Id.* at 275–76.

⁶⁶ *Id.* at 276.

⁶⁷ See *id.*

considered legal personal property at the time of the decision.⁶⁸ The court in *Reinarz* relied on this decision in particular to find reasonable doubt in the rule regarding loss of use damages without reaching the question of whether the Supreme Court had altered the general rule.⁶⁹ The judicial-social reactions of the Texas courts are well beyond the scope of this comment, but the decision in *Prigdin* is not based upon a set of facts the courts would like to often revisit. The relevant discussion to this comment is the lack of reference to conversion actions in the cases which discuss totally destroyed personal property. Though other jurisdictions have referenced the ease with which conversion damages apply where property is totally destroyed, Texas courts have not made that analogy with any frequency.⁷⁰ In Texas, the measure of damages for conversion is usually limited to the fair market value of the property at the time and place of the conversion.⁷¹ This could simply be the result of chance and circumstance in plaintiffs bringing actions for negligence rather than conversion, but given that the potentially controversial *Prigdin* decision cuts against the loss of use dichotomy, Texas courts could also have purposely avoided an analogy to conversion.

The most thorough analysis of the loss of use dichotomy occurred over three decades after *Reinarz* by the same court.⁷² In the interim between these two cases, the other courts of appeals continued to adhere strictly to the established rule.⁷³ Some of those same courts also noted that a party's

⁶⁸ 8 Tex. 427, 435 (1852) (allowing recovery for the value of a slave as well as the value of services from which the owner was deprived).

⁶⁹ *Reinarz*, 401 S.W.2d at 276.

⁷⁰ See *infra* Part IV.

⁷¹ *United Mobile Networks, L.P. v. Deaton*, 939 S.W.2d 146, 147–48 (Tex. 1997); see also *R.J. Suarez Enters. Inc. v. PNYX L.P.*, 380 S.W.3d 238, 242 (Tex. App.—Dallas 2012, no pet.) (holding a plaintiff cannot generally recover both market value and loss of use in a conversion action); *Varel Mfg. Co. v. Acetylene Oxygen Co.*, 990 S.W.2d 486, 497 (Tex. App.—Corpus Christi 1999, no pet.) (holding a plaintiff cannot generally recover in conversion for both market value and loss of use).

⁷² *Mondragon v. Austin*, 954 S.W.2d 191 (Tex. App.—Austin 1997, pet. denied).

⁷³ See, e.g., *Hanna v. Lott*, 888 S.W.2d 132, 139 (Tex. App.—Tyler 1994, no writ) (holding that where a chattel is totally destroyed, no recovery is allowed for loss of use while the property is being replaced); *Am. Jet, Inc. v. Leyendecker*, 683 S.W.2d 121, 128 (Tex. App.—San Antonio 1984, no writ) (denying loss of use damages for totally destroyed chattels as such damages are included in an award for the total loss); *Pickett v. J.J. Willis Trucking Co.*, 624 S.W.2d 664, 669 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.) (holding no loss of use damages are recoverable where a chattel is totally destroyed); *Carson v. Bryan*, 532 S.W.2d 711, 713 (Tex. Civ. App.—Amarillo 1976, no writ) (affirming the entire dichotomy by allowing loss of use damages where a chattel is partially destroyed, but not totally destroyed); *Exp. Ins. Co. v. Herrera*, 426 S.W.2d 895, 901 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.) (affirming the

ability to actually replace the totally destroyed chattel had no bearing on recovery for loss of use damages.⁷⁴ This returns to the legal fiction mentioned in the introduction of this comment where courts assume a chattel is capable of immediate replacement, regardless of the practical implications.⁷⁵ As for the reasoning that loss of use is included in an award of damages for total loss, little solace is provided to parties who are financially prohibited from replacing the destroyed chattel until obtaining a judgment months or years later.

In *Mondragon v. Austin*, Chief Justice Jimmy Carroll rendered an opinion buttressed with undertones of fairness from the very first sentence.⁷⁶ The undisputed facts clearly favored Austin, a concerned father who secured financing to purchase a car for his daughter.⁷⁷ Mondragon, on the other hand, was driving backwards down the road while drunk when he collided with Austin's car, all but totaling the vehicle with Austin's daughter behind the wheel.⁷⁸ Mondragon's insurance company denied Austin's subsequent claim, leaving Austin financially unable to repair the vehicle.⁷⁹ Austin eventually sued Mondragon for the cost of repairs, loss of use, and exemplary damages.⁸⁰ On appeal, the court sought to justify an award of \$8,020 on a loss of use theory from the judgment below.⁸¹ This factual and procedural posture set the stage for a fresh analysis of the loss of use dichotomy.

Chief Justice Carroll began the court's legal analysis in familiar fashion, stating the basic dichotomy which allowed loss of use damages only where a car is repairable.⁸² As Mondragon had not alleged the car was totally destroyed, the court proceeded on a theory of partial destruction and elaborated on the practical ramifications of calculating loss of use

validity of the dichotomy by allowing loss of use damages for partial destruction of a chattel, but not for total destruction).

⁷⁴ *Hanna*, 888 S.W.2d at 139; *Carson*, 532 S.W.2d at 713; *Kan. City S. Ry. Co. v. Frederick*, 276 S.W.2d 332, 333 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e.).

⁷⁵ *Morrison v. Campbell*, 431 S.W.3d 611, 615 (Tex. App.—Fort Worth 2014, no pet.); *Mondragon*, 954 S.W.2d at 196.

⁷⁶ 954 S.W.2d at 192 (beginning the opinion by stating, "This case is about making choices and taking chances. It is also about the consequences of choices made and chances taken").

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 193.

⁸¹ *Id.*

⁸² *Id.* (citing *Hanna v. Lott*, 888 S.W.2d 132, 139 (Tex. App.—Tyler 1994, no writ)).

damages.⁸³ First, Chief Justice Carroll referenced the Supreme Court of Texas decision in *Luna v. North Star Dodge Sales, Inc.* to show that plaintiffs often prove loss of use damages through a reasonable rental value of a substitute car.⁸⁴ As the parties had previously stipulated to a rental value of \$20 per day, the dispute became the length of time over which damages could be awarded.⁸⁵ Chief Justice Carroll again referred to the *Luna* decision for the idea that the individual circumstances of each plaintiff should be considered in computing the time frame for loss of use damages.⁸⁶ However, the application of this subjective standard drew a sharp contrast between the two sides of the loss of use dichotomy. The *Mondragon* court applied a subjective standard in part due to the Supreme Court's holding in *Luna*, which allowed a plaintiff to recover loss of use damages regardless of whether that plaintiff actually expended funds to rent a replacement vehicle.⁸⁷ The underlying logic reasoned that a plaintiff's recovery should not be conditioned on the financial ability to actually afford a rental or replacement.⁸⁸ As previously noted, a plaintiff recovering for total destruction on the other side of the dichotomy did not benefit from an inability to finance a replacement vehicle.⁸⁹ Under this approach, a plaintiff reaps the benefits of his or her poor financial situation where personal property is partially destroyed, whereas a defendant reaps the benefit of the same financial situation if the property is totally destroyed.⁹⁰ While this issue was not analyzed by the court in *Mondragon*, the inconsistency illuminates some of the conflict created by the loss of use dichotomy. The court in *Mondragon* did, however, apply this logic and refuse to deny Austin loss of use damages based on his financial situation.⁹¹ *Mondragon*

⁸³ *Id.* at 193–96.

⁸⁴ *Id.* at 193 (citing *Luna v. N. Star Dodge Sales, Inc.*, 667 S.W.2d 115, 118 (Tex. 1984)).

⁸⁵ *Id.*

⁸⁶ *Id.* at 194.

⁸⁷ *Id.* (citing *Luna*, 667 S.W.2d at 118–19).

⁸⁸ *Id.*

⁸⁹ See *Hanna v. Lott*, 888 S.W.2d 132, 139 (Tex. App.—Tyler 1994, no writ); *Carson v. Bryan*, 532 S.W.2d 711, 713 (Tex. Civ. App.—Amarillo 1976, no writ); *Kan. City S. Ry. Co. v. Frederick*, 276 S.W.2d 332, 333 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e).

⁹⁰ See *Hanna*, 888 S.W.2d at 139 (stating the plaintiff could not recover loss of use of the vehicle even though he had been unable to provide the financing for a substitute vehicle); *Carson*, 532 S.W.2d at 713 (concluding that the plaintiff's recovery would be limited to fair market value because the truck was a total loss); *Frederick*, 276 S.W.2d 332, 333–34 (stating the plaintiff could not recover loss of use even though she had not been in a financial position to purchase another automobile).

⁹¹ 954 S.W.2d at 194.

attempted to argue that the *Isaac* decision adopted the entire Restatement provision verbatim, including language which purported to limit loss of use damages to the time during which repairs actually occurred.⁹² Chief Justice Carroll expressed disagreement with this contention, instead adopting the subjective approach of the more recent *Luna* decision.⁹³ This subjective approach is premised on the well-established facet of Texas law that “a tortfeasor takes his plaintiff as he finds him.”⁹⁴ Ultimately, the court in *Mondragon* allowed Austin to recover loss of use damages for more than one year due to the insurance company’s denial of his claim.⁹⁵

With a rate of recovery and a compensable time period determined, two other “defenses” remained before the *Mondragon* court.⁹⁶ First, *Mondragon* claimed that Austin had a duty to mitigate his loss of use damages by repairing the vehicle before meeting other financial obligations.⁹⁷ The court admitted a duty of mitigation applies to loss of use damages, but found no evidence in the record that Austin breached that duty.⁹⁸ Second, *Mondragon* claimed that the total value of a vehicle operates as a cap on loss of use damages, should a plaintiff such as Austin opt to recover the cost of repairs and loss of use damages.⁹⁹ This argument, on its face, seems to hold water; *Mondragon* pointed out that recovery in a case of total destruction is effectively “capped” by the market value of the destroyed vehicle.¹⁰⁰ The court responded by espousing the two legal fictions stated in the introduction of this comment: (1) courts assume that where a car is totally destroyed, it can be replaced immediately; and (2) courts assume that where a car is only partially destroyed, it can be repaired after some length of time.¹⁰¹ The reason behind the historical approach this comment has taken should be clear in light of the *Mondragon* decision. *Mondragon* essentially

⁹² *Id.* at 194–95.

⁹³ *Id.* at 195; *see also* Chem. Express Carriers, Inc. v. French, 759 S.W.2d 683, 688 (Tex. App.—Corpus Christi 1988, writ denied) (awarding higher lost profits as loss of use damages to a particularly successful plaintiff whose business suffered unusually high losses while his airplane was under repair).

⁹⁴ *Mondragon*, 954 S.W.2d at 194; *see also* Coates v. Whittington, 758 S.W.2d 749, 752 (Tex. 1988) (citing *Driess v. Friederick*, 11 S.W. 493, 494 (Tex. 1889)).

⁹⁵ *Mondragon*, 954 S.W.2d at 195.

⁹⁶ *Id.* at 195–96.

⁹⁷ *Id.* at 195.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.* at 196.

argued to the court that it should not be better to kill a man than to maim him, though more precisely stated that it should not be better to destroy a car than to damage one.¹⁰² The fallacy of including loss of use damages as part of an award for total loss is on full display in the case of a man like Austin who did not obtain an enforceable judgment until years after his car was damaged. Substituting interest for loss of use damages would not allow Austin to obtain that judgment any faster.¹⁰³ Should the result truly differ between a car which is nine-tenths destroyed and one that is only six-tenths destroyed?¹⁰⁴ If the car had been fully destroyed, Austin's financial struggles would not have saved him as they did for partial destruction.¹⁰⁵ Given the legal fictions which had developed over decades of case law, plaintiffs in Austin's position stood to suffer potential injustice at a variety of decision points.

In a single paragraph, the court in *Mondragon* attempted to address this problem.¹⁰⁶ The unfortunate truth is that the court faced a set of facts involving partial destruction, meaning commentary on total destruction was relegated to dicta. Chief Justice Carroll indicated the legal fiction regarding partial destruction is more realistic than its total destruction counterpart.¹⁰⁷ Even though other courts had previously held that a plaintiff's financial situation does not allow recovery of loss of use damages in a total destruction situation, Chief Justice Carroll candidly admitted that such a plaintiff might in fact suffer loss of use damages.¹⁰⁸ In further candor, he wrote that the better policy might be reconsidering the total destruction approach, but such a case was not before the court.¹⁰⁹ Instead, the court had to address *Mondragon*'s damage cap argument, holding that the total value of a vehicle does not operate as a cap on loss of use damages.¹¹⁰ This result

¹⁰² See *id.* at 195 (reasoning it nonsensical to limit damages in a total destruction case to the value of the car and simultaneously allow damages in a partial destruction case to exceed the value of the car).

¹⁰³ See *King v. McGuff*, 234 S.W.2d 403, 406 (Tex. 1950).

¹⁰⁴ See *id.*; *Lone Star Gas Co. v. Hutton*, 58 S.W.2d 19, 21 (Tex. Comm'n App. 1933, holding approved).

¹⁰⁵ See *Hanna v. Lott*, 888 S.W.2d 132, 139 (Tex. App.—Tyler 1994, no writ); *Carson v. Bryan*, 532 S.W.2d 711, 713 (Tex. Civ. App.—Amarillo 1976, no writ); *Kan. City S. Ry. Co. v. Frederick*, 276 S.W.2d 332, 333 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e.).

¹⁰⁶ *Mondragon*, 954 S.W.2d at 196.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.*; see also *Metro Ford Truck Sales, Inc. v. Davis*, 709 S.W.2d 785, 790 (Tex. App.—Fort Worth 1986, writ ref'd n.r.e.) (awarding \$74,016 for loss of use from a partially destroyed truck

is consistent with the partial destruction side of the loss of use dichotomy, specifically the aforementioned benefit a plaintiff may receive from a poor financial situation. Even so, other Courts of Appeals continued to apply the traditional loss of use dichotomy in the wake of the *Mondragon* decision.¹¹¹ A survey of case law revealed no opinion after *Mondragon*, but before *Morrison*, which extended the logic of the Austin Court of Appeals.

B. Fort Worth Takes the Next Step

As mentioned in the introduction to this comment, the Fort Worth Court of Appeals rendered its decision in *Morrison v. Campbell* on January 16, 2014.¹¹² The court referenced the history of the rule in Texas, initially reaching the same conclusion as all other courts with the exception of the *Mondragon* decision.¹¹³ Despite acknowledging the loss of use dichotomy, the court stated that even well-established rules must be examined from time to time if continued validity of the rule is in question.¹¹⁴ Justice Lee Ann Dauphinot wrote the *Morrison* opinion and began the analysis with two familiar assumptions.¹¹⁵ The first was one of the underlying justifications for denying loss of use damages for total destruction to avoid a double recovery: the assumption that such damages were included in recovery for total loss.¹¹⁶ The second was one of the initial legal fictions in this comment: the assumption that totally destroyed property can be

worth only \$48,500); *McCullough-Baroid Petroleum Serv. NL Indus. v. Sexton*, 618 S.W.2d 119, 120 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.) (stating that amount of recovery for repairs to a chattel plus loss of use of a chattel is not limited by the fair market value of the chattel prior to the negligent act which caused the damage).

¹¹¹ See, e.g., *Argueta v. Banales*, No. 01-06-00191-CV, 2007 WL 2214862, at *1 (Tex. App.—Houston [1st Dist.] Aug. 2, 2007, pet. denied) (mem. op.); *Nickerson v. Nickerson Design & Constr., Inc.*, No. 07-97-0334-CV, 1998 WL 299321, at *3 (Tex. App.—Amarillo June 9, 1998, no pet.) (not designated for publication).

¹¹² 431 S.W.3d 611 (Tex. App.—Fort Worth 2014, no pet.).

¹¹³ *Id.* at 614.

¹¹⁴ *Id.*; see also *Sw. Bell Tel. Co. v. Mitchell*, 276 S.W.3d 443, 447 (Tex. 2008) (espousing adherence to precedent until a judicially-created rule of law no longer furthers the general interest); *Otis Eng'g Corp. v. Clark*, 668 S.W.2d 307, 310 (Tex. 1983) (considering whether to change a rule regarding employer liability in light of “changing social standards” and “complexities of human relationships in today’s society”); *Wright’s Adm’x v. Donnell*, 34 Tex. 291, 306 (1870).

¹¹⁵ 431 S.W.3d at 615.

¹¹⁶ *Id.*; see also *Am. Jet, Inc. v. Leyendecker*, 683 S.W.2d 121, 128 (Tex. App.—San Antonio 1984, no writ); *Riddell v. Mays*, 533 S.W.2d 910, 911 (Tex. Civ. App.—Waco 1976, no writ).

immediately replaced without any loss of use.¹¹⁷ Using these two assumptions as a foundation, Justice Dauphinot continued through familiar territory.

The first case analyzed by the *Morrison* court was *King v. McGuff*.¹¹⁸ The court addressed the progression from *Lone Star* to *King*, much as this comment did above, to reconcile the Texas approach to the loss of use dichotomy.¹¹⁹ As previously noted, the court in *King* indicated in dicta that awarding loss of use damages on only one side of an arbitrary line—a hypothetical nine-tenths destruction versus six-tenths destruction—was a difficult proposition.¹²⁰ However, Justice Dauphinot took the decision one step further, determining that the court in *King* “set out the rule that interest may be recovered as an element of the measure of damages when property is totally destroyed, but loss of use damages may not be.”¹²¹ Whether or not the decision in *King*, a case involving real property, should be extended to personal property is a matter of interpretation. Regardless of the weight given to *King*, Justice Dauphinot did not let the six-decade-old decision prevent potential change. However, it was under the assumptions of the court, the interpretation of *King*, and the weight of *stare decisis* that the *Morrison* court began narrowing the application of its change.

The court shifted its focus to the facts of the case before it, writing that “[w]hen insurance is involved, the situation changes somewhat but, *in theory*, not enough to merit a different rule.”¹²² Justice Dauphinot called total destruction of a vehicle versus an insurer’s declaration that a vehicle is totaled a “distinction without a difference.”¹²³ The delay caused by an insurer in paying a claim is substantially similar to the delay in waiting for a judgment where a plaintiff cannot afford an immediate replacement.¹²⁴

¹¹⁷*Morrison*, 431 S.W.3d at 615; *see also* Mondragon v. Austin, 954 S.W.2d 191, 196 (Tex. App.—Austin 1997, pet. denied).

¹¹⁸*Morrison*, 431 S.W.3d at 615.

¹¹⁹*Id.* at 615–16.

¹²⁰*Id.* at 615.

¹²¹*Id.* at 616.

¹²²*Id.* at 617 (emphasis in original).

¹²³*Id.*; *see also* Canal Ins. Co. v. Hopkins, 238 S.W.3d 549, 564 (Tex. App.—Tyler 2007, pet. denied) (defining a “totaled” vehicle as one for which repairs are too costly when compared to the vehicle’s value); Glen Falls Ins. Co. v. Peters, 386 S.W.2d 529, 531 (Tex. 1965) (declaring a building a “total loss” where a reasonably prudent, uninsured owner desiring to rebuild would not use the remnant for restoration).

¹²⁴*See Morrison*, 431 S.W.3d at 617; Hanna v. Lott, 888 S.W.2d 132, 139 (Tex. App.—Tyler 1994, no writ); Carson v. Bryan, 532 S.W.2d 711, 713 (Tex. Civ. App.—Amarillo 1976, no writ);

Where an owner cannot afford an immediate replacement vehicle, the owner must await payment of the claim; however, the waiting stops with payment of the claim for even financially challenged owners.¹²⁵ Where repairs will be made, an owner's waiting stops with payment of the claim, but additional time for repairs must be compensated through loss of use damages.¹²⁶ The court acknowledged the logical flaw at issue, particularly for plaintiffs without financial freedom, but admitted that no case in Texas had strayed from the policy of denying loss of use damages where personal property is totally destroyed.¹²⁷ Further, the court found only one court which had questioned the rule, referencing both the *Reinarz* and *Mondragon* decisions covered previously by this comment.¹²⁸ Presented with a case of total destruction, unlike the Austin Court of Appeals, Justice Dauphinot agreed with the *Mondragon* decision and looked to other jurisdictions for guidance on altering the loss of use dichotomy.¹²⁹ This comment will address the approach of other jurisdictions below.¹³⁰

During its survey of other jurisdictions, the court took a moment to acknowledge the Texas policy of compensating plaintiffs for the full extent of an injury.¹³¹ However, by allowing loss of use damages where property is partially destroyed, even where such damages exceed market value, Texas courts admit that recovery of market value alone will not always make a plaintiff whole.¹³² The court also took issue with the *King* decision, denying that interest is an adequate substitute for loss of use damages.¹³³ Where property is only partially destroyed, both interest and loss of use damages are allowed; the two are neither mutually exclusive nor synonymous.¹³⁴ Though the stage seemed set for a sweeping challenge to the loss of use dichotomy, Justice Dauphinot quickly reined in the potential application of

Kan. City S. Ry. Co. v. Frederick, 276 S.W.2d 332, 333 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e).

¹²⁵ *Morrison*, 431 S.W.3d at 617.

¹²⁶ *Id.*

¹²⁷ *Id.* at 617–18.

¹²⁸ *Id.* at 618; *see also supra* Part III.A.

¹²⁹ *Morrison*, 431 S.W.3d at 618.

¹³⁰ *See infra* Part IV.

¹³¹ *Morrison*, 431 S.W.3d at 620; *see also* *Luna v. N. Star Dodge Sales, Inc.*, 667 S.W.2d 115, 119 (Tex. 1984); *Craddock v. Goodwin*, 54 Tex. 578, 588 (1881).

¹³² *Morrison*, 431 S.W.3d at 620.

¹³³ *Id.* at 622; *see also* *King v. McGuff*, 234 S.W.2d 403, 406–07 (Tex. 1950).

¹³⁴ *Morrison*, 431 S.W.3d at 622; *see also* TEX. FIN. CODE ANN. § 304.102 (West 2006 & Supp. 2014).

the *Morrison* decision.¹³⁵ Returning to the presence of an insurer in the case before her, Justice Dauphinot addressed the “limited question of whether such damages should be available when an insurer unreasonably delays paying a claim.”¹³⁶ The court answered in the affirmative, holding that an unreasonable delay by the insurer causes the plaintiff an additional injury, the loss of his or her vehicle, and that loss of use damages compensate such an injury without awarding a double recovery.¹³⁷ Though narrow in language, the holding gave legs to a new application of an old rule which had already been suggested by the Austin Court of Appeals.

IV. THINKING NATIONALLY

Before delving into the potential reach of the *Morrison* decision, it is useful to take a step back and view the bigger picture. The court in *Morrison* relied on cases from six other states in making its ruling, all of which supported a challenge to the traditional Texas approach.¹³⁸ When challenging a well-established legal principle, one might expect the vast weight of legal authority from other jurisdictions to support such a challenge, but forty-three states, and all other United States jurisdictions, go unmentioned by the Fort Worth Court of Appeals.

A. Jurisdictions Conflicting with *Morrison*

While the law of other jurisdictions does not bind Texas courts, an analysis becomes relevant where courts choose to seek guidance from beyond their borders. Even in the small selection of jurisdictions consulted by the *Morrison* court, some courts had already changed their rule from a traditional loss of use dichotomy to a more logical *Morrison*-type construction.¹³⁹ It appears that different jurisdictions have come down all across the spectrum of potential approaches to the loss of use dichotomy.

¹³⁵ *Morrison*, 431 S.W.3d at 622 (stating the court “need not, however, go so far as to hold that loss of use damages are available in every case of destroyed property”).

¹³⁶ *Id.*

¹³⁷ *Id.* at 622–23; *see also supra* Part III.A.

¹³⁸ *Morrison*, 431 S.W.3d at 618–22 (specifically looking at cases from Alaska, California, Hawaii, Iowa, Nebraska, and New Jersey).

¹³⁹ *Morrison*, 431 S.W.3d at 620–21; *see also* *Chlopek v. Schmall*, 396 N.W.2d 103, 110 (Neb. 1986) (expressly overruling prior cases to the extent they limited recovery for damaged personal property to fair market value); *Long v. McAllister*, 319 N.W.2d 256, 261 (Iowa 1982) (applying the new rule to all cases currently pending and all cases tried following the instant case).

In Georgia, for example, a plaintiff cannot recover loss of use damages where property is totally destroyed.¹⁴⁰ In a recent decision, the Supreme Court of Georgia further held that recovery for partially destroyed property, including loss of use damages, is capped by the fair market value of the damaged property.¹⁴¹ The court stated the basic goal of damages under Georgia law as “compensation, not enrichment” and specified that a plaintiff should be compensated without unreasonably burdening the defendant.¹⁴² This approach stands on the extreme end of the spectrum upon which the traditional Texas approach sits, even requiring plaintiffs to prove the fair market value of property prior to the injury where only the cost of repairs is requested.¹⁴³

In the case of *Hayes Freight Lines v. Tarver*, the Supreme Court of Ohio utilized a traditional loss of use dichotomy, espousing the avoidance of double recovery as the underlying logic of its decision.¹⁴⁴ The court reasoned that a plaintiff is made whole by recovering the full value of a vehicle as of the date of total destruction, whereas partial destruction divests a plaintiff of his “capital investment” while repairs occur.¹⁴⁵ A Court of Appeals in Ohio recently had an opportunity to revisit the rule and chose to reaffirm the approach in *Hayes*.¹⁴⁶ One of the parties in that case urged the court to analogize damage to personal property with injury to real property, a result which would allow recovery for loss of use.¹⁴⁷ However, the court stuck to the *Hayes* decision and explained that personal property is generally replaceable with relative ease and speed as opposed to real property.¹⁴⁸ Another Ohio court feared abuse if loss of use damages were available, even in cases like *Morrison* which involve insurers.¹⁴⁹

¹⁴⁰MCI Commc'ns Servs. v. CMES, Inc., 728 S.E.2d 649, 652 (Ga. 2012).

¹⁴¹*Id.* (referencing the root of the rule in cases involving horses and mules). *But see* Fairchild v. Keene, 416 N.E.2d 748, 749–50 (Ill. App. Ct. 1981) (refusing to limit loss of use damages to the fair market value of a partially destroyed car; loss of use damages are unavailable in Illinois for totally destroyed property).

¹⁴²MCI Commc's Servs., 728 S.E.2d at 651.

¹⁴³*Id.* at 652.

¹⁴⁴73 N.E.2d 192, 193 (Ohio 1947).

¹⁴⁵*Id.*

¹⁴⁶*Webster v. Davis*, No. 10CA0021, 2011 WL 1196918, at *4 (Ohio Ct. App. Mar. 31, 2011).

¹⁴⁷*Id.*

¹⁴⁸*Id.*

¹⁴⁹*See* *Stuart v. Nat'l Indem. Co.*, 454 N.E.2d 158, 166 (Ohio Ct. App. 1982) (stating loss of use damages would encourage plaintiffs not to mitigate losses where insurer declared vehicle a total loss).

Jurisdictions which fall squarely within the traditional loss of use dichotomy appear to be fewer and farther between as the years pass, instead replacing the old approach with amalgamations of various recovery principles.

B. Splitting the Baby

In some jurisdictions, it is difficult to classify which side of the dichotomy courts employ due to various exceptions carved out over time or courts punting the issue. While *Morrison* represents an “exception” to the general rule in Texas limited only to “unreasonable delay by an insurer,” some jurisdictions use exceptions to blend the two sides of the dichotomy into one verdict. Other jurisdictions have allowed lower courts to reach different results without a unifying approach or left the question unaddressed.¹⁵⁰

In Louisiana, the general rule states that loss of use damages are not recoverable where property is totally destroyed.¹⁵¹ However, in *Alexander v. Qwik Change Car Center, Inc.*, the court specified that loss of use damages could be awarded for tortious conduct which occurred prior to the total loss.¹⁵² Other Louisiana precedent cited by the court provided a clear example of this hybrid approach.¹⁵³ A Louisiana Court of Appeal had previously awarded loss of use damages for a period of fourteen days following an automobile accident where the subject vehicle had suffered total destruction.¹⁵⁴ The court reasoned this interim period allowed the plaintiff to seek an estimate and determine the extent of damage to his vehicle before declaring it a total loss.¹⁵⁵ In this way, a plaintiff in Louisiana might recover the market value of a totally destroyed vehicle while still recovering loss of use damages for a reasonable period of investigation. Framed in the light of *Morrison*, an insurer’s delay in declaring a vehicle a

¹⁵⁰ See, e.g., *Taylor v. King*, 213 A.2d 504, 507 n.1 (Md. 1965) (stating courts are “far from in accord as to what the rule in this area ought to be” as of 1965; the high court of Maryland has not revisited the issue); *Beverly S. v. Kayla R.*, 718 S.E.2d 224, 226 (S.C. Ct. App. 2011) (Cureton, J., dissenting) (declaring whether loss of use damages can be awarded in a case of total destruction a “novel issue” in South Carolina).

¹⁵¹ *Alexander v. Qwik Change Car Center, Inc.*, 352 So. 2d 188, 190 (La. 1977) (citing *Skinner v. Scott*, 116 So. 2d 696, 699 (La. 1959)).

¹⁵² *Id.*

¹⁵³ *Id.*; see also *Baremore v. S. Farm Bureau Cas. & Ins. Co.*, 147 So.2d 58, 61 (La. Ct. App. 1962).

¹⁵⁴ *Baremore*, 147 So. 2d at 61.

¹⁵⁵ *Id.*

“total loss” might give rise to a significant recovery of loss of use damages in Louisiana on top of recovery for market value, though it appears no Louisiana court has been presented with that particular scenario to date.

In Oklahoma, loss of use damages are generally not recoverable where personal property is totally destroyed.¹⁵⁶ Loss of use damages are allowed where property is partially destroyed, and the cost of repairs does not operate as a cap on damages.¹⁵⁷ The Supreme Court of Oklahoma carved out a rather large exception to the rule after decades of its application which creates two different results in total destruction cases.¹⁵⁸ After interpreting the directive of the Oklahoma Legislature to award only reasonable damages, the court awarded loss of use damages where a commercial vehicle was totally destroyed.¹⁵⁹ The court did not provide much analysis or insight for its decision, but limited the exception to “reasonable” damages and “commercial” vehicles.¹⁶⁰ Though no stated logic separates consumer vehicles from commercial vehicles to qualify for exception, the Court has not returned to clarify or expand its holding in the three decades since that decision.

The approach in Washington is particularly interesting, splitting loss of use recovery along a temporal line rather than assessing the severity of the injury. The Supreme Court of Washington bluntly held that loss of use damages are not recoverable in a case of total destruction as recovery for the value of the vehicle itself makes the owner whole.¹⁶¹ While that might seem to be a final decision, unless overruled, another Washington court was not deterred from carving out an extreme exception.¹⁶² In *Straka Trucking, Inc. v. Estate of Peterson*, a Washington Court of Appeals attempted to limit *McCurdy* to its facts by deciding the Supreme Court meant only to prevent loss of use damages which accrued after payment by the tortfeasor.¹⁶³ The court went on to hold that loss of use damages are recoverable in Washington between the time of the injury to property and payment by the tortfeasor of the full value of the property.¹⁶⁴ The court then

¹⁵⁶ *Marland Ref. Co. v. Duffy*, 220 P. 846, 851 (Okla. 1923).

¹⁵⁷ *Brennen v. Aston*, 84 P.3d 99, 101–02 (Okla. 2003).

¹⁵⁸ *See DST Tank Serv., Inc. v. Vanderveen*, 683 P.2d 1345, 1347 (Okla. 1984) (allowing “reasonable” loss of use damages to be recovered where a commercial vehicle is destroyed).

¹⁵⁹ *Id.*; *see also* OKLA. STAT. ANN. tit. 23, § 97 (West 2008).

¹⁶⁰ *DST*, 683 P.2d at 1347.

¹⁶¹ *McCurdy v. Union Pac. R.R. Co.*, 413 P.2d 617, 624 (Wash. 1966).

¹⁶² *Straka Trucking, Inc. v. Estate of Peterson*, 989 P.2d 1181, 1184 (Wash. Ct. App. 1999).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

declared *McCurdy* as beyond general tort principles, stating the latter controlled rather than the Supreme Court's precedent.¹⁶⁵ General tort principles, as discussed below, appear to favor the *Morrison* approach over the traditional loss of use dichotomy.¹⁶⁶

C. Jurisdictions Siding with Morrison

Having surveyed the jurisdictions which disagree with the *Morrison* decision, nearly all of the Texas Courts of Appeals still falling into that category, it is only fair to address where the decision found support. The Fort Worth Court of Appeals relied upon six jurisdictions within the *Morrison* decision itself, two of which addressed loss of use damages in whole or in part as a question of first impression.¹⁶⁷ It is possible the recent nature of these questions of first impression from state high courts carried greater weight in directing the court's decision in *Morrison* as indicative of a legal trend. Further support for such a trend can be found in the Restatement (Second) of Torts, which supports an award of loss of use damages where personal property is totally destroyed.¹⁶⁸ A majority of

¹⁶⁵ *Id.*

¹⁶⁶ See *infra* note 168.

¹⁶⁷ *Morrison v. Campbell*, 431 S.W.3d 611, 618–22 (Tex. App.—Fort Worth 2014, pet. denied); see also *Alaska Constr. Equip., Inc. v. Star Trucking, Inc.*, 128 P.3d 164, 167 (Alaska 2006) (addressing whether loss of use damages for totally destroyed property could be awarded as a question of first impression); *Fukida v. Hon/Haw. Serv. and Repair*, 33 P.3d 204, 205 (Haw. 2001) (addressing fair market value as a cap on loss of use damages for the first time).

¹⁶⁸ RESTATEMENT (SECOND) OF TORTS § 927 (1977). Section 927, titled “Conversion or Destruction of a Thing or of a Legally Protected Interest in it” reads as follows:

- (1) When one is entitled to a judgment for the conversion of a chattel or the destruction or impairment of any legally protected interest in land or other thing, he may recover either
 - (a) the value of the subject matter or of his interest in it at the time and place of the conversion, destruction or impairment; or
 - (b) in the case of commodities of fluctuating value customarily traded on an exchange to which traders customarily resort, the highest replacement value of the commodity within a reasonable period during which he might have replaced it.
- (2) His damages also include:
 - (a) the additional value of a chattel due to additions or improvements made by a converter not in good faith;
 - (b) the amount of any further pecuniary loss of which the deprivation has been a legal cause;
 - (c) interest from the time at which the value is fixed; and
 - (d) compensation for the loss of use not otherwise compensated.

jurisdictions, though many historically employed the loss of use dichotomy, now use an approach more akin to *Morrison* by allowing loss of use damages whether injured property is susceptible to repair or not.¹⁶⁹

As with the jurisdictions that preclude loss of use damages in cases of total destruction, there is a spectrum of approaches, albeit with less variety, where such damages are allowed. The Supreme Court of Wisconsin adopted an approach which takes the Louisiana hybrid previously mentioned and expands it in favor of recovering plaintiffs.¹⁷⁰ There, the court openly held that loss of use damages were recoverable where personal property is not repairable.¹⁷¹ The court described this as the “modern view” and stated that recovery should be reasonable under the circumstances of each case.¹⁷² After removing the Louisiana hybrid distinction, the law in Wisconsin expressly allows recovery for a reasonable time to acquire a replacement for the destroyed property as well as for a reasonable time to determine if the vehicle is susceptible to repair.¹⁷³ This approach exhibits the most plaintiff-favorable variation of the rule regarding loss of use damages.

The Supreme Court of Wisconsin’s classification of the “modern view” appears to be valid, at least in many jurisdictions. In 2012, the Supreme Court of Alabama expressly overruled its prior opinions which denied loss of use damages in cases of total destruction.¹⁷⁴ While the court used limiting language in describing the rule for “commercial” vehicles, two of the prior opinions it expressly overruled did not involve commercial vehicles.¹⁷⁵ Given the short lapse of time since the decision, it is unclear if that distinction will be raised at some point in the future. Other jurisdictions, such as Missouri, have allowed loss of use damages for some time and recently reaffirmed that approach.¹⁷⁶ Citing every state’s individual authority is unnecessary to find support for *Morrison*, but the availability of

Id.; see also *Reposa v. Buhler*, 770 P.2d 235, 237 (Wyo. 1989) (adopting section 927 of the Restatement (Second) of Torts as a measure of damages).

¹⁶⁹ See *Nashban Barrel & Container Co. v. G.G. Parsons Trucking Co.*, 182 N.W.2d 448, 453–54 (Wis. 1971).

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 453.

¹⁷² *Id.* at 453–54.

¹⁷³ *Id.* at 454.

¹⁷⁴ See *Ex parte S & M, LLC*, 120 So. 3d 509, 516 (Ala. 2012).

¹⁷⁵ *Id.* at 516.

¹⁷⁶ See *Gateway Foam Insulators, Inc. v. Jokerst Paving & Contracting, Inc.*, 279 S.W.3d 179, 187 (Mo. 2009) (en banc) (awarding loss of use damages limited to a reasonable period in which plaintiff had a duty to mitigate its damages by seeking a prompt replacement).

such cases is difficult to dispute after even a cursory inspection on the issue.¹⁷⁷ The vast weight of authority and the modern view favor the *Morrison* decision and the logic contained therein.

V. IMPLICATIONS OF *MORRISON*

Before notions of legal revolution run rampant, it should be emphasized once more that the *Morrison* decision binds only the Fort Worth Court of Appeals and the cases under its purview. However, it is not hard to imagine the Austin Court of Appeals issuing a similar opinion as soon as the proper facts present themselves, given that court's past dicta on the issue.¹⁷⁸ Regardless of what other Texas courts decide, *Morrison* as it stands is further limited to cases in which an insurer unreasonably delays payment of

¹⁷⁷ See, e.g., *Alaska Constr. Equip., Inc. v. Star Trucking, Inc.*, 128 P.3d 164, 169 (Alaska 2006) (allowing loss of use damages for a reasonable period to both determine a chattel is destroyed and seek replacement for it); *Stevens v. Mid-Continent Invs., Inc.*, 517 S.W.2d 208, 209 (Ark. 1974) (applying the “seemingly just approach” of allowing loss of use damages which are reasonable and not too speculative); *Reynolds v. Bank of Am. Nat’l Trust & Sav. Ass’n*, 345 P.2d 926, 927 (Cal. 1959) (en banc) (finding “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”); *Fukida v. Hon/Haw. Serv. and Repair*, 33 P.3d 204, 211 (Haw. 2001) (holding, after extensive discussion, that one “whose vehicle is completely destroyed suffers an indistinguishable inconvenience, during the reasonable period of time necessary to obtain a replacement vehicle, from that borne by a person, whose vehicle is only partially damaged, while he or she awaits the completion of repairs”); *Persinger v. Lucas*, 512 N.E.2d 865, 868 (Ind. Ct. App. 1987) (stating that damages for loss of use of personal property in Indiana “are measured by the reasonable value of the loss of use of the property for the reasonable amount of time required for repair or to obtain a replacement”); *Long v. McAllister*, 319 N.W.2d 256, 261 (Iowa 1982) (applying the new rule to “permit full compensation” by allowing loss of use damages where personal property is totally destroyed); *Lenz Constr. Co. v. Cameron*, 674 P.2d 1101, 1103 (Mont. 1984) (allowing loss of use damages where plaintiff’s forklift had been totally destroyed; replacement took thirty-three months, but recovery was allowed for only three months as a “reasonably necessary” time period for replacement); *Chlopek v. Schmall*, 396 N.W.2d 103, 110 (Neb. 1986) (allowing loss of use damages and expressly overruling prior cases which limited recovery for destruction of personal property to the fair market value of said property immediately prior to the injury); *Bartlett v. Garrett*, 325 A.2d 866, 867–68 (N.J. Dist. Ct. 1974) (allowing loss of use damages for total destruction and indicating storage costs of a destroyed vehicle are also foreseeable damages which might be assessed against a tortfeasor); *Cecere v. Harquail*, 481 N.Y.S.2d 533, 534 (N.Y. App. Div. 1984) (allowing loss of use damages in cases of total destruction in light of modern market forces which might render an immediate replacement impractical); *Kitner v. Claverack Rural Elec. Coop.*, 478 A.2d 858, 861–62 (Pa. Super. Ct. 1984) (allowing loss of use damages regardless of whether personal property is repairable and expressly disapproving of cases which hold otherwise).

¹⁷⁸ See *supra* Part III.A.

a claim.¹⁷⁹ Yet even this limiting language begs a question of scope: what nature of delay in payment is “unreasonable?”¹⁸⁰ The trial court in *Morrison* phrased its interlocutory appeal as a substantial delay and Campbell’s own affidavit declared a delay in excess of eighteen months.¹⁸¹ These factors imply a temporal concern regarding reasonableness. What if the insurance company harbors a good faith belief that liability is in question and warrants further investigation? What if the amount claimed does not comport with what an insurer finds fair and applicable? Where an insurer wishes to pursue a right of subrogation against potentially responsible third parties, is any delay reasonable? Perhaps more importantly, does pending litigation ever give rise to a reasonable delay by the insurance company? These, and many more, are ultimately questions without answers until the Fort Worth Court of Appeals addresses the issue once more. The *Morrison* decision narrowly survived as, on May 8, 2014, the court denied a motion for en banc reconsideration by a four-to-three vote; Chief Justice Livingston and Justices Gardner and Gabriel all voted to grant Morrison’s motion for en banc reconsideration.¹⁸²

By limiting the scope of the exception, the court in *Morrison* actually created a new grey area in the law when it failed to define reasonable delay. The Waco Court of Appeals was the first court to fire back at Fort Worth in the *Davis* decision issued on June 26, 2014.¹⁸³ In that case, the only issue submitted to the jury below involved loss of use damages for a totally destroyed vehicle.¹⁸⁴ The plaintiff was unable to replace the vehicle for three months due to his own financial constraints; though he also claimed the defendant insurance company “low-balled” him on the value of his vehicle.¹⁸⁵ The jury awarded the plaintiff \$28,000 in loss of use damages and the trial court denied the defendant’s motion for judgment notwithstanding the verdict.¹⁸⁶ Thus, on appeal, the case presented a perfect

¹⁷⁹ *Morrison v. Campbell*, 431 S.W.3d 611, 623 (Tex. App.—Fort Worth 2014, pet. denied).

¹⁸⁰ *See id.* at 612–13 (finding a delay unreasonable where the accident occurred on October 23, 2009; the insurance company denied the claim on June 22, 2010; the insurance company offered settlement on January 19, 2011; and final payment was rendered on May 3, 2011).

¹⁸¹ *Id.* at 613.

¹⁸² *Am. Alt. Ins. Corp. v. Davis*, No. 10–13–00275–CV, 2014 WL 2917081, at *4 n.6 (Tex. App.—Waco June 26, 2014, pet. filed).

¹⁸³ *Id.* at *4.

¹⁸⁴ *Id.* at *1.

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

opportunity for a Texas Court of Appeal to rule on loss of use damages, the only issue raised, in the wake of *Morrison*.¹⁸⁷

The court began with a recitation of the loss of use dichotomy before addressing both *Mondragon* and *Morrison* as relied upon by the plaintiff-appellee.¹⁸⁸ Justice Roy Al Scoggins, Jr. wrote the opinion and made quick work of the *Mondragon* decision after emphasizing that neither the Austin nor Fort Worth opinion bound the Waco Court of Appeals.¹⁸⁹ Not only was the *Mondragon* opinion disregarded as unbinding, but it was outright discarded as that case involved only partial destruction of property.¹⁹⁰ As for *Morrison*, the court distinguished the case before it as no unreasonable delay by an insurer was alleged or presented to the jury.¹⁹¹ Further, the court expressly declined to follow the *Morrison* decision and presumed its application would require a jury interpretation of reasonableness which did not occur in the case before it.¹⁹² This line of reasoning by the court speaks in part to the issues raised by this comment regarding reasonableness. Justice Al Scoggins did give the Fort Worth court credit for demanding a factual determination regarding unreasonable delay, though it had not expressly issued such an order.¹⁹³ At the end of the day, however, the Waco court “question[ed] whether an intermediate appellate court in Texas should interpret case law in such a way that could result in a radical, wholesale change” in the law.¹⁹⁴ Claiming judicial restraint, the court finally declared that such a change should be left to the Texas Legislature or the Supreme Court of Texas.¹⁹⁵ Although the word “scathing” is often reserved for particularly pointed dissenting opinions, the court’s remarks toward its sister in Fort Worth could legitimately be described that way.

The Waco court expressly declined to overrule its decision in *Riddell v. Mays*, an opinion discussed previously in this comment.¹⁹⁶ Although not a clear dividing line for where the Courts of Appeals will fall on this issue, it

¹⁸⁷ *Id.* at *4 n.7 (noting the *Morrison* decision issued while appeal was pending in the *Davis* case; the trial court in *Davis* did not have the *Morrison* decision to consider).

¹⁸⁸ *Id.* at *3.

¹⁸⁹ *Id.* at *4.

¹⁹⁰ *Id.* (classifying the references in *Mondragon* to totally destroyed property as dicta).

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.* (referencing insurance law given the facts of the case and the potential for parties to an insurance contract to suffer a result which was unforeseeable at the time of contracting).

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

is worth noting that four other courts have cited to the *Riddell* decision.¹⁹⁷ Meanwhile, only three have cited to the *Mondragon* decision, and none for the dicta of potentially challenging the loss of use dichotomy.¹⁹⁸ For the time being, any attempt to draw conclusions about which courts will join Fort Worth and which will continue to side with Waco would be mere speculation.¹⁹⁹

VI. CONCLUSION

As this comment has already shown, the modern approach falls in line with the *Morrison* decision. In fairness, the modern approach is actually an even broader version of the narrow holding bravely issued by the Fort Worth Court of Appeals. As courts of many jurisdictions have noted, there is no logical reason to distinguish between total and partial destruction if one considers the truth of contemporary markets rather than antiquated legal fictions. A practitioner in Texas seeking loss of use damages for totally destroyed personal property should emphasize that none of the justifications for continuing the loss of use dichotomy withstand scrutiny. Common sense reveals that replacement of a totally destroyed chattel will not always be instantaneous. Allowing reasonable loss of use damages does not result in a double recovery for the plaintiff. Awarding interest as a substitute for loss of use damages is pure fiction so long as both are awarded in cases of partial destruction. Armed with the *Morrison* decision, a sliver of hope remains for parties who are not financially able to replace a valuable chattel immediately. However, the *Davis* decision and over a century of case law still makes a plaintiff's attempt to recover an uphill battle. Attorneys on

¹⁹⁷ See *Hanna v. Lott*, 888 S.W.2d 132, 139 (Tex. App.—Tyler 1994, no writ); *Chem. Express Carriers, Inc. v. French*, 759 S.W.2d 683, 688 (Tex. App.—Corpus Christi 1988, writ denied); *Am. Jet, Inc. v. Leyendecker*, 683 S.W.2d 121, 128 (Tex. App.—San Antonio 1984, no writ); *Pickett v. J.J. Willis Trucking Co.*, 624 S.W.2d 664, 668 (Tex. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.).

¹⁹⁸ See *Helm v. Kingston*, No. 13–10–00224–CV, 2011 WL 6746064, at *7 (Tex. App.—Corpus Christi Dec. 21, 2011, pet. denied) (mem. op.); *Geoscience Eng'g & Testing, Inc. v. Allen*, No. 01-03-00402-CV, 2004 WL 2475280, at *4 (Tex. App.—Houston [1st Dist.] Nov. 4, 2004, pet. denied) (mem. op.); *Nickerson v. Nickerson Design & Constr., Inc.*, No. 07-97-0334-CV, 1998 WL 299321, at *3 (Tex. App.—Amarillo June 9, 1998, no pet.) (not designated for publication).

¹⁹⁹ A petition for review by the Supreme Court of Texas was filed in the *Davis* case on July 25, 2014. *Am. Alt. Ins. Corp. v. Davis*, No. 10–13–00275–CV, 2014 WL 2917081 (Tex. App.—Waco June 26, 2014, pet. filed).

both sides should be aware that a change might be on the horizon, but for now that future remains uncertain.