Neutral Citation No: [2026] NIKB 36 *Judgment: approved by the court for handing down (subject to editorial corrections)**	*Ref:* OHA13069 *ICOS No:* 24/105707 *Delivered:* 12/06/2026

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

KING'S BENCH DIVISION

Between:

McKINSTRY SKIP HIRE LTD

Plaintiff/Appellant

and

HIGHWAY INSURANCE COMPANY LTD

Defendant/Respondent

Mr P Lyttle KC with Mr S MacGiollaCheara (instructed by JMK Solicitors) for the Plaintiff/Appellant
Mr D Dunlop KC with Mr J Rafferty (instructed by DWF (NI) LLP Solicitors) for the Defendant/Respondent

O'HARA J

Introduction

[1] On 8 October 2024, the plaintiff's vehicle, a skip lorry, was damaged when a vehicle driven by the defendant's insured struck it. The defendant has accepted liability for this accident. The plaintiff's total claim was for £8,739.50 comprised of vehicle repairs in the sum of £5,339.10, a decommissioning and recommissioning fee in the sum of £265.20 and diminution in value of the plaintiff's vehicle in the sum of £2,510. These figures are inclusive of VAT. The figure net of VAT claimed by the plaintiff would be £7,180.24.

[2] For the purposes of these proceedings, the net figure is agreed between the parties and the court is being asked to determine if the defendant is required to discharge any VAT element of the vehicle repair costs and decommissioning/recommissioning fee arising from the plaintiff's claim in circumstances where the plaintiff is VAT registered. The defendant seeks to defeat the plaintiff's claim for recovery of the VAT element by relying on the fact that because the plaintiff is registered for VAT it is entitled to reclaim any VAT

expenditure in the course of its business. It is the plaintiff's case that the defendant tortfeasor is obliged to pay the plaintiff's direct losses which were incurred as a result of the negligence of the defendant's insured and that those direct losses include the amount of VAT.

[3] The defendant accepts that if the plaintiff was not registered for VAT, VAT would form part of the damages. However, says the defendant, since the plaintiff is registered for VAT, the plaintiff can be fully compensated without receiving the VAT element of the claim. For the plaintiff, it is submitted that the defendant's approach, which was successful in the County Court, betrays a misunderstanding of the nature of the claim for damages. The plaintiff contends that its claim is a claim for general damages, not special damages. That being the position, the plaintiff asserts that it is not under a duty to mitigate loss as it would be in a claim for special damages and that it is wrong in principle to make any award for general damages contingent on the plaintiff reclaiming VAT in his quarterly returns so as to reduce the cost of the claim for general damages to the defendant.

[4] As the hearing of this appeal developed, Mr Dunlop KC for the defendant intervened to accept two propositions which had not been accepted by the defendant before District Judge Duncan:

(a) That the nature of the plaintiff's claim is for general damages, not special damages.

(b) That being the case, the plaintiff is not under a duty to mitigate its loss.

The effect of these concessions is that the appeal ran before me on a quite different basis to the way in which it had been run below. Notwithstanding these concessions, Mr Dunlop maintained the submission for the defendant that the plaintiff is entitled only to reasonable damages and that in the circumstances of this case, since this plaintiff is registered for VAT, general damages should not include VAT.

The plaintiff's submissions

[5] Mr Lyttle emphasised that the defendant's eventual concession that the cost of repairs is part of the claim for general damages is fundamental to the proper consideration of whether VAT is included as part of the general damages. In this context, he relied on *Coles and others v Hetherton and others* [2014] 3 All ER 377. In that judgment, the Court of Appeal considered 13 cases involving subrogated claims between claimants with motor vehicle insurance with a large motor insurer (RSAI) whose vehicles had been damaged as a result of admitted negligence of defendant drivers who were insured by two different large motor insurers. The first question for the court was where a vehicle is damaged because of negligence and is reasonably repaired (rather than written off), is the measure of the claimant's loss taken as the reasonable cost of repair?

[5] At para [27] the court referred to the speech of Lord Hobhouse in *Dimond v Lovell* [2000] 2 All ER 897 at 914-915 and continued as follows:

> "Taking Lord Hobhouse's statement together with statements in other cases:
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> (1) where a chattel is damaged by the negligence of another that loss (the "direct" loss) is suffered as soon as the chattel is damaged.
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> (2) The proper measure of that loss is the diminution in value that the chattel has suffered as a result of the negligence of the defendant. This follows the general principle in awarding damages, ie that of restitution. In Lord Hobhouse's phrase, "this can be expressed as a capital account loss."
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> (3) If the chattel can be economically repaired, the claimant is entitled to have it repaired at the cost of the wrongdoer, although the claimant is not obliged to repair the chattel to recover the direct loss suffered.
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> (4) Events occurring after the infliction of the damage are irrelevant to calculating the diminution in value measure of damages. Thus, subsequent destruction of the chattel, or a decision to delay repairs, or an ability to have the repairs done at less than cost or for nothing will not prevent the claimant from recovering the diminution in value of the chattel that has been caused by the negligence of the tortfeasor.
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> (5) Generally, the practical way that the courts have calculated this diminution in value is to ask how much would be the reasonable cost of repair so as to put the chattel back in the state it was in before it was damaged. In general this is a convenient practice which we think the courts should continue to follow. Only if the sum claimed appears to be clearly excessive will the court be justified in investigating whether that sum exceeds the cost that the claimant would have incurred in having the repairs carried out by a reputable repairer."

[6] The court then continued:

> "28. As Cooke J pointed out at [7] of his judgment, the correct jurisprudential analysis of a claim for diminution in value, even if it is measured by the reasonable cost of repairs, is that it is a claim for general damages, not one for "special damages." The diminution in value claim should therefore be pleaded as a claim for general damages. Documents such as an invoice for the cost of the repairs undertaken are no more than evidence of the diminution in value suffered by the chattel as a result of the negligence of the wrongdoer which can be used to make good the claim. Strictly speaking, the cost of the repairs is not itself the loss suffered. In addition to the direct loss represented by diminution in value, there may be other, consequential losses, such as deprivation or "loss of use" of the vehicle, but that constitutes a different head of claim. Once again a claim for simple deprivation, or loss of use, is a claim for general damages. However, if the chattel concerned is one that is normally used in the hope of making a profit, (such as a trading ship, a lorry or a taxi), then a claim for the profits lost because the chattel could not be used for that trading would constitute "special damages." Those damages have to be specifically pleaded and proved.
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> 29. The argument that the claimants cannot recover the full cost of repair to RSAI because they must mitigate their loss by having the repairs done at a lower cost is wrong because mitigation is not relevant in respect of this "direct" loss. As we have already pointed out, the loss to a claimant whose chattel has been damaged by the negligence of another is immediate. That loss cannot be "mitigated" by having the chattel repaired free or for a lower cost, because it is not the cost of the repairs that constitutes the loss; the loss is the diminution in value of the chattel."

[7] These extracts from the judgment in *Coles* explain why the defendant in this case has eventually accepted the claim here is for general damages rather than special damages and that is why there is no issue in respect of mitigation of loss.

[8] Mr Lyttle then referred to *Burdis v Livsey* [2003] QB 36 and, in particular, to paras [84]-[95] in which there is further discussion about how awards of damages are properly to be understood and made. At para [84], the court said:

"84. In our judgment, a fundamental distinction must be drawn, for present purposes, between repair costs and hire charges. When a vehicle is damaged by the negligence of a third party, the owner suffers an immediate loss representing the diminution in value of the vehicle. As a general rule, the measure of that damage is the cost of carrying out the repairs necessary to restore the vehicle to its pre-accident condition: see *Dimond v Lovell*."

[9] The court then continued:

"85. In *Burdis v Livsey* the general rule applied and it was common ground that the repairs restored Ms Burdis's car to its pre-accident value. Nor was there any issue as to the reasonableness of the garage's charges. Thus, at the moment when the accident occurred Ms Burdis was suffered a direct and immediate loss, the measure of which was the cost of the repairs which were, in fact, carried out (£2,981.19). But it was not the condition precedent to the recovery of compensation for that loss that the car be repaired: Ms Burdis's cause of action for the recovery of damages representing the diminution in the value of her car caused by Mr Livsey's negligence was complete when the accident occurred … Similarly, a claimant's damages will not be affected by the fact that, in the event, the repairs are carried out at no cost to him …

86. By contrast, the hire charges which were sought to be recovered in *Dimond v Lovell*, represented a potential future loss, consequent upon the defendant's tort, which was recoverable as damages only if and when it was in fact suffered. In the language of pleading, the hire charges constituted special damage. … Hence, in *Dimond v Lovell* because the credit hire agreement was unenforceable and the hire charges were accordingly irrecoverable from the claimant, the hire charges never formed part of the claimant's loss.

87. The distinction between an immediate and direct loss on the one hand and a potential future loss on the other is of importance for present purposes because it leads to different treatment of benefits derived from a third party after the commission of the tort. In every case

> a claimant's recoverable loss is limited to the loss which he has actually suffered – damages in the tort of negligence are, after all, purely compensatory … But the process of determining in the light of subsequent events what loss the claimant has actually suffered differs according to whether the loss is suffered when the tort was committed (direct loss) or whether it was suffered subsequently (consequential loss).
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> 88. In a case of direct loss, subsequent events will operate to reduce or extinguish the loss only insofar as such events are referrable to the claimant's duty to mitigate his loss and, hence, referrable in a causative sense to the commission of the tort.
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> …
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> 91. In our judgment, the authorities to which we have so far referred establish that causative events which are not referrable in a causative sense to the commission of the tort, that is to say events which on a true analysis are collateral to the commission of the tort, are res inter alios acta are too remote – we regard these expressions as interchangeable – do not affect the measure of a direct loss suffered when the tort is committed."

[10] It then cited *Hussain v New Taplow Paper Mills Ltd* [1980] AC 514, and what Lord Bridge said at pages 527 to 528:

> "Why should the tortfeasor derive any benefit in the one case from the premiums which the plaintiff has paid to insure himself against some contingency however caused, in the other case from the money provided by the third party with the sole intention of benefiting the injured plaintiff?"

[11] The court's conclusion at para [95] was that repair costs are merely the measure of a direct loss suffered when the tort was committed and are not to be regarded as falling within the category of potential future losses claimable as special damage.

[12] Mr Lyttle continued his submission by referring to the judgment of *McCauley v Brennan* [2017] NIQB 41, in which the question for Keegan J was about the cost of hiring a replacement vehicle for 445 days from the date of an accident. One of the issues in that case was the doctrine of res inter alios acta. At para [22] the court said:

> "[22] This leads to a consideration of the doctrine of res inter alios acta. The principle emanates from a decision of

> *Parry v Cleaver* [1970] AC 1. This is a decision in relation to pension benefits. However, the law effectively said in that case that the benefits which the plaintiff contributed to in the disablement pension should not be taken into account in the assessment of damages. In essence, the doctrine means that an act done between particular parties should not harm or benefit others."

[13] Mr Lyttle adapts that principle in the present case by submitting that the plaintiff has an arrangement with HMRC whereby it can claim back from HMRC any VAT which is paid in the course of its business. Even though that is the case, he contends that should not have a bearing on the assessment of general damages because, in effect, reducing the claim for general damages by the VAT element would constitute a windfall for the tortfeasor defendant. And that approach effectively compels the plaintiff to have the repairs carried out when, as has already been made clear, it is entirely a matter for the plaintiff rather than the court if it carries out any repairs, what the extent of any repair work is and whether it finds a less expensive repair service.

The defendant's submissions

[14] For the defendant, Mr Dunlop accepted that the loss is measured by reference to the reduction in value of the plaintiff's vehicle. That is generally assessed, he conceded, by reference to the cost of repairing the vehicle.

[15] However, in this case his submission was that the plaintiff was not entitled to recover the VAT because that is not part of the costs of the repair, rather it is a tax on the cost of the repair. As a matter of law that tax has to be paid and is therefore distinguishable from examples cited in other cases such as insurance policies and premiums etc. On this basis, Mr Dunlop asserted that the true cost of the repair is the invoice less VAT. Even if that is wrong, the alternative argument is that it would be reasonable in this case to recover the costs of the repairs less VAT because if the plaintiff has the repairs carried out, the plaintiff can reclaim the VAT. It would be wrong in principle to allow the plaintiff to claim the costs of repairs plus VAT and then to reclaim the VAT from the HMRC.

[16] In the course of his submissions, Mr Dunlop tendered Ms Lyn Hagan, accountant with Gold Blatt McGuigan Chartered Accountants, who had provided a report for the court. In cross-examination by Mr Lyttle she accepted that whether the repair costs represent general or special damages was a legal matter, not one for her. It did, however, seem to me, for example by reference to para [33] of her report, that it was written on the basis originally advanced by the defendant that these are special damages which the plaintiff is under a duty to mitigate, a point subsequently conceded by the defendant.

Consideration

[17] The question to be decided in this appeal has not been directly addressed in any case law to which I have been referred. The cases which were opened to me and relied on in the helpful submissions of counsel, identify the issues of principle and how those principles have been applied in other circumstances which are not identical.

[18] In the particular circumstances of this case, the plaintiff may on one view have the benefit of a windfall in that it can recover damages including VAT from the defendant and then reclaim that VAT from HMRC. On the other hand, the defendant may have a windfall by being saved the payment of VAT if the repair costs are to be paid without VAT because this specific plaintiff is VAT registered.

[19] As between these two choices, I find the latter to be less attractive. The defendant, in effect, would be saved from paying the full amount of general damages by reason of the plaintiff's VAT registration. That seems to me to be contrary to the principles which have been established in the case law cited above. In particular it fails to recognise or deal with the possibility that a plaintiff might not repair the vehicle at all but rather sell it at some later point for a lower value. And as Mr Lyttle reminded me, it is not for the court to be drawn into any supervisory role in monitoring how damages are spent.

[20] Accordingly, I find that the plaintiff's entitlement to general damages includes the VAT element even though the plaintiff is registered for VAT and can reclaim that amount from HMRC if the repairs are carried out. I therefore allow the appeal and will award whatever precise figure the parties agree as the VAT element.