

Proving Economic Damages in Property Loss Cases

By John W. Reis

“We paid \$200,000 and your welder admits to causing the fire. Now pay me.” Even the so-called “lay down” subrogation case will involve a battle on damages. Issues particular to subrogation cases involve the differences between the replacement cost, actual case value, and diminution on market value; whether the insured/owner can offer opinion testimony on the value of the property; whether debris removal and code upgrades are recoverable, and many others. To truly delve into the law of all 50 states on the many damages issues would require a full treatise of perhaps several volumes. This article is intended as an overview of those issues.¹

A Hypothetical

Consider the following hypothetical. A house is totally destroyed by fire. It had a fair market value of \$100,000 before the fire but will cost \$200,000 to rebuild, including \$20,000 in code compliance upgrades and \$5,000 in debris removal costs. What are the owners entitled to recover?

- (a) the \$200,000 replacement cost,
- (b) \$100,000 for the diminution in market value,
- (c) \$180,000 for replacement cost less code upgrades,
- (d) \$125,000 for diminution in value plus code upgrades and debris removal, or
- (e) none of the above.

If the owners also incurred \$30,000 to rent another house and furniture during the repairs, are these damages added to the loss of the house and its contents? And what can the owners recover for the invaluable family heirlooms they lost?

The General Rule of Recovery

¹ Most of the case law draws from states in the Southeast, the area of the author’s practice experience.

For both real and personal property losses, the measure of damages in most states is generally limited to the difference between the fair market value of the property immediately before it was damaged and its fair market value immediately after it was damaged.”² Referred to in some states as the “before and after rule,”³ the doctrine generally prohibits the owner from recovering for the full cost to repair or replace damaged property where that damage exceeds the diminution in value. Thus, using our above hypothetical, if the house was worth \$100,000 before the fire and costs \$200,000 to rebuild, the damages will generally be limited to \$100,000. However, because of the occasional harshness of this result, there are exceptions.

Establishing Diminution in Fair Market Value

² Fuller v. Martin, 125 So.2d 4 (Ala. 1960); Ryland Group v. Daley, 537 S.E.2d 732, 738 (Ga. Ct. App. 2000); Ray v. Strawsma, 359 S.E.2d 376 (Ga. Ct. App. 1987); United States Steel Corporation v. Benefield, 352 So.2d 892 (Fla. 2d DCA 1977), *cert. denied*, 364 So.2d 881 (Fla.1978); American Equity Insurance Co. v. Van Ginhoven, 788 So. 2d 388, 391 (Fla. 5th DCA 2001); Bisque Associates of Florida, Inc. v. Power of Quayside No. II Condominium Association, 639 So. 2d 997 (Fla. 3d DCA 1994); Keyes Co. v. Shea, 372 So.2d 493 (Fla. 4th DCA 1979); Airtech Service, Inc. v. MacDonald Construction Company, 150 So.2d 465 (Fla. 3d DCA 1963); Island Creek Coal Company v. Rodgers, 644 S.W.2d 339 (Ky. 1982); System Fuels, Inc. v. Barnes, 363 So.2d 747 (Miss. 1978)(Measure of damages for permanent injury to land is diminution in value; but where the property can be restored to its former condition at a cost less than the value determined by the diminution of the value of the land, the measure of damages is the cost of restoration of the property plus compensation for the loss of its use.); Phillips v. Chesson, 58 S.E.2d 343, 347 (NC 1950) (“[T]he measure of damages recoverable for injury to property is the difference between the market value immediately before the injury and the market value immediately afterwards.”); Huberth v. Holly, 462 S.E.2d 239 (NC Ct. App. 1995) (“[T]he general rule is that where the injury is completed (as opposed to a continuing wrong) the measure of damages ‘is the difference between the market value of the property before and after the injury.’ Huff v. Thornton, 23 N.C.App. 388, 393-94, 209 S.E.2d 401, 405 (1974)”); North Carolina Pattern Jury Instruction – Civil 810.62; Scott v. Fort Roofing and Sheet Metal Works, Inc., 299 S.C. 449, 385 S.E.2d 826 (1989) (“Cost of repair or restoration is a valid measure of damages for injury to a building although compensation may be limited to the value of the building before the damage was inflicted.”); Redbud Coop. Corp. v. Clayton, 700 S.W.2d 551, 560-61 (Tenn. Ct. App. 1985) (“Our appellate courts have uniformly held that the measure of damages for injury to real estate is the difference between the reasonable market value of the premises immediately prior to and immediately after injury but if the reasonable cost of repairing the injury is less than the depreciation in value, the cost of repair is the lawful measure of damages.”); Chambers v. Spruce Lighting Co., 95 S.E. 192 (W.V. 1918).

³ Carolina Power & Light Company v. Paul, 136 S.E.2d 103 (NC 1964).

The term “fair market value” is usually defined as “the amount of money which a purchaser willing but not obliged to buy the property would pay to an owner willing but not obliged to sell it, taking into consideration all uses to which the property is adapted and might in reason be applied.”⁴

Expert Testimony

Courts require that proof of lost fair market value be established by competent, substantial evidence through a “qualified” witness.⁵ However, most courts will allow a non-expert owner to testify to the value of his or her own property.⁶ The rule is “based on the

⁴ American Reliance Insurance Company v. Perez, 689 So.2d 290 (Fla. 3d DCA 1997) (quoting City of Tampa v. Colgan, 121 Fla. 218, 230, 163 So. 577, 582 (1935) and citing 4 Nichols on Eminent Domain § 12.02[1], at 12-62 to 12-70 (rev. 3d ed. 1996)). *See also* Ocean Electric Company v. Hughes Laboratories, Inc., 636 So. 2d 112 (Fla. 3d DCA 1994) (fair market value looks at “the price which would be agreed upon at a voluntary sale between a willing seller and a willing purchaser.”); Charles T. McCormick, *Damages* § 44 (1935) (market value defined as sale by leisurely seller to willing buyer). Three well-recognized guides to appraisal have evolved, all of which take the property’s pre-loss physical depreciation into account: “(1) the cost approach; (2) the comparable sales approach; and (3) the income or economic approach.” American Reliance Insurance Company v. Perez, 689 So.2d 290 (Fla. 3d DCA 1997) (citing McNayr v. Claughton, 198 So. 2d 366, 368 (Fla. 3d DCA 1967); Huff v. Thornton, 213 S.E.2d 198, 206 (NC 1975) (defining fair market value as “the amount which would be agreed upon as a fair price by an owner who wishes to sell but is not obligated to do so, and a buyer who wishes to but is not compelled to [do] so.”); North Carolina Jury Pattern Instruction – Civil 810.62 (“the amount which would be agreed upon as a fair price by an owner who wishes to sell, but is not compelled to do so, and a buyer who wishes to buy, but is not compelled to so.”).

⁵ *E.g.*, Hillside Van Lines, Inc. v. Matalon, 297 So. 2d 848 (Fla. 3d DCA 1974); McDonald Air Conditioning, Inc. v. John Brown, Inc., 285 So. 2d 697 (Fla. 4th DCA 1973). Generally, the use of expert testimony is preferred. Kipps v. Virginia Natural Gas, Inc., 441 S.E.2d 4, 5 (Va. 1994) (“An opinion on value is inadmissible when there is not evidence to support the opinion.”).

⁶ First Interstate Development Corp. v. Ablanado, 476 So. 2d 692 (Fla. 5th DCA 1985) (“The rule has been established in Florida that an owner may testify as to the value of property which he owns.”); Hill v. Marion County, 238 So.2d 163 (Fla. 1st DCA 1970); Harbond, Inc. v. Anderson, 134 So.2d 816 (Fla.2d DCA 1961); Salvage & Surplus, Inc. v. Weintraub, 131 So.2d 515 (Fla. 1st DCA 1961”). *Cf.* Imac Energy, Inc. v. Tittle, 590 So. 2d 163, 168 (Ala. 1991); Jetton v. Jetton, 502 So. 2d 756, 760 (Ala. 1987); Bono v. Hamilton, 669 So. 2d 912, 913 (Ala. Ct. App. 1995); Columbia Gas of Kentucky, Inc. v. Maynard, 532 S.W.2d 3 (Ky. Ct. App. 1975) (owner’s estimate of what lost items were worth to him, unless so obviously preposterous as to be devoid of probative value, is enough to support award by properly instructed jury; that award

owner's presumed familiarity with the characteristics of the property, his knowledge or acquaintance with its uses and purposes, and his experience in dealing with it.”⁷

Replacement Cost as Evidence of Market Value

In some states, not only is the jury free to consider replacement cost as a factor in that determination, but the court is obligated to instruct the jury to consider such cost in certain circumstances.⁸ This broad standard for determining diminution in fair market value appears to be premised on the fact that when property is damaged, the ability to calculate its past worth is often problematical, especially when the property has been totally destroyed.⁹ Cost of repairs

must represent what property was actually worth to him in money, excluding any sentimental or fanciful value that for any reason he might place upon it, is a qualification to be incorporated in instructions.); Goodson v. Goodson, 551 S.E.2d 200 (NC Ct. App. 2001); Appeal of Boos, 382 S.E.2d 769 (NC Ct. App. 1989); Bumgarner v. Tomlin, 375 S.E.2d 520 (NC Ct. App. 1989); Responsible Citizens v. City of Asheville, 302 S.E.2d 204 (NC 1982); Doty v. Parkway Homes Co., 295 S.C. 368, 368 S.E.2d 670 (S.C. 1988)(An owner is competent to testify on his own behalf as to the reasonable value of his household goods.)). See generally 31 Am.Jur.2d Expert & Opinion Evidence, § 142. But see Port Largo Club, Inc. v. Warren, 476 So. 2d 1330 (Fla. 3d DCA 1985) (“Where fair market value is at issue, expert testimony is necessary to prove the value thereof.”); Town of Rocky Mount v. Hudson, 421 S.E.2d 407, 409 (Va. 1992)(landowner’s testimony that taking “ha[d] hurt [him] \$20,000, at least” was insufficient to support damage award.”).

⁷ First Interstate Development Corp. v. Ablanedo, 476 So. 2d 692 (Fla. 5th DCA 1985); Goodson v. Goodson, 551 S.E.2d 200, 205 (NC Ct. App. 2001) (“[T]here is no requirement that an owner be familiar with nearby land values in order to testify to the fair market value of his own property. Rather, an owner “is deemed to have sufficient knowledge of the price paid [for his land], the rents or other income received, and the possibilities of the land for use, [and] to have a reasonably good idea of what [the land] is worth.” Highway Comm. 285 N.C. at 652, 207 S.E.2d at 725 (quoting 5 Nichols, Law of Eminent Domain, § 18.4(2) (3rd ed. 1969)). As an owner of Tract C. Ms. Cobb could therefore competently testify as to its value.”)

⁸ E.g., Huberth v. Holly, 462 S.E.2d 239 (NC Ct. App. 1995) (“Nonetheless, replacement and repair costs are relevant on the question of diminution in value and when there is evidence of both diminution in value and replacement cost, the trial court must instruct the jury to consider the replacement cost in assessing the diminution in value”); North Carolina Pattern Instruction – Civil 810.62 (“Evidence of estimates of the cost to repair the damage to the plaintiff’s property may be considered by you in determining the difference in fair market value immediately before and immediately after the damage occurred.”).

⁹ Phillips v. Chesson, 58 S.E.2d 343, 347 (NC 1950) (“This rule [limiting damages to diminution in fair market value], which can be an approximation to truth in a limited number of cases, is

can inform the jury of the quality of the original construction and the extent of injury to the property.¹⁰

Going Beyond Market Value

Service Value

Many property losses involve damage to land or structures with no appreciable market value but with significant service value, such as hunting reserves, churches, hospitals, utility structures, school buildings, non-profit or charitable buildings, landmark buildings, statues, and lands or structures that have been in the family for generations. When such property is destroyed, the owner naturally desires compensation above the fair market value. Most courts have recognized that the before-and-after rule does not adequately address the damages to such service structures and will allow evidence of the replacement cost where diminution in value does not adequately measure the true value of the property.¹¹

often too remote from the factual pattern of the injury and its compensable items to reflect the fairness and justice which the administration of the law presupposes. For that reason it is applied with caution, and often with modifications designed to relax its rigidity and fit it to the facts of the particular case”).

¹⁰ Fuller v. Martin, 125 So.2d 6 (Ala. 1961); Ryland Group v. Daley, 537 S.E.2d 732 (Ga. Ct. App. 2000) (“This difference in value may be illustrated by the reasonable cost of repair of defects.”) (quoting Eldridge, Georgia Personal Injury & Property Damage – Damages, §§ 8-2 and 8-3); Richard W. Cooper Agency v. Irwin Yacht & Marine Corp., 264 S.E.2d 768 (NC Ct. App. 1980) (“[T]he law recognizes that the cost of repairs has a logical tendency to shed light upon the question of the difference in market value”); Redbud Coop. Corp. v. Clayton, 700 S.W.2d 551, 561 (Tenn. Ct. App. 1985) (“Of course, the trier of fact can also take into consideration the reasonable cost of restoring the property to its former condition in arriving at the difference in value immediately before and after the injury to the premises.”); Averett v. Shircliff, 237 S.E.2d 92 (Va. 1977) (“The reasonable cost of repairs is one of the evidentiary factors in determining the market value of an automobile after it has been damaged.”).

¹¹ Trinity Church v. John Hancock Mutual Life Ins. Co., 502 N.E.2d 532 (Mass. 1987) (church); Newton Girl Scout Council v. Massachusetts Turnpike Auth., 138 N.E.2d 769 (Mass. 1956) (girl scout camp); Leonard Missionary Baptist Church v. Sears, Roebuck and Co., 42 S.W.3d 833 (Mo.Ct.App. 2001) (church); Commonwealth of Pennsylvania v. Crea, 483 A.2d 996 (Pa. Cmmw. 1997) (bridge); *see also* Roman Catholic Church of Archdioces of New Orleans v. Louisiana Gas Serv. Co., 618 So.2d 874, 877-80 (La. 1993); Regal Construction Co. v. West

Loss of Use: Personal Property

In the personal property context, an owner is entitled to recover not only for repairs but also for the loss of use of property, so long as the loss is not total and the owner actually opts to repair.¹² The rule derives from the Restatement of Torts § 928 (1939), which provides:

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 repairs 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.¹³

Loss of Use/Living Expenses: Real Property

Lanham Hills Citizen's Association, 256 Md. 302, 260 A.2d 82, 84 (1970); Carolina Power & Light v. Paul, 136 S.E.2d 103, at 104 (NC 1964) (“ However, if there is no market, there can be no market value. The foundation for the before and after rule is lacking. Cost of repairs is then about the only available evidence of the extent of the loss.”); Huberth v. Holly, 462 S.E.2d 239, 243 (NC Ct. App 1995) (“When, however, the land is used for a purpose that is personal to the owner, the replacement cost is an acceptable measure of damages. Plow v. Bug Man Exterminators, Inc., 57 N.C.App. 159, 162-163, 290 S.E.2d 787, at 789 (termite damage to personal residence), *disc. rev. denied*, 306 N.C. 558, 294 S.E.2d 224 (1982), [Dan B.] Dobbs, [*Dobbs Law of Remedies*] § 5.2(2), 718 [(2d ed. 1983)]; Restatement (Second) of Torts § 929 cmt. B (1979); *see also* Trinity Church v. John Hancock Mut. Life Ins. Co., 399 Mass. 43, 502 N.E.2d 532, 535-36 (1987) (personal purpose doctrine applied to prevent “miscarriage of justice.”)”); Moulton v. Groveton Papers Co., 114 N.H. 505, 323 A.2d 906, 911 (1974).

¹² Florida Drum Company v. Thompson, 668 So.2d 192 (Fla. 1996) (“Any loss of use, deterioration, or other damage that occurs after this reasonable period of time has passed is not the defendant's responsibility.”); Badillo v. Hill, 570 So.2d 1067, 1068-69 (Fla. 5th DCA 1990); Hillside Van Lines, Inc. v. Matalon, 297 So.2d 848 (Fla. 3d DCA 1974) (“A person whose chattel is damaged, but not totally destroyed, is entitled to the difference between the value before and after the damage, or at his election, the reasonable cost of repair with due allowance for the difference between the original value and the value after repair and to be compensated for the loss of use); Huff v. Thornton, 213 S.E.2d 198 at 204 (NC 1975); Newman v. Brown, 90 S.E.2d 649 (SC 1955).

¹³ *Cf.* Averett v. Shircliff, 237 S.E.2d 92 (Va. 1977) (deviating slightly from § 928 of the Restatement of Torts by deeming the measure of damages for an item that can be restored to its former condition to be the reasonable cost of repairs “with reasonable allowance for depreciation.”).

In the real property context, most jurisdictions follow the same rule as with personal property, allowing loss of use of realty if the damage caused the owner to be unable to use the property for a period of time.¹⁴

In the above example of the destroyed house worth \$100,000 before the fire, the owners would not be limited to the \$100,000 pre-loss market value for the house itself, as they would also be entitled to recover for the reasonable rental costs of their new lodging and its furnishings.ⁱ

Code Upgrades

When a structure is damaged, rebuilding it can involve code requirements to which the owner would not otherwise have been required to comply. Of those jurisdictions which have discussed the issue, the majority appear to allow recovery of the additional cost of code compliance.¹⁵

¹⁴ System Fuels, Inc. v. Barnes, 363 So.2d 747 (Miss. 1978)(allowing loss of use expense in addition to the cost restoration of the property); Huff v. Thornton, 213 S.E.2d 198, 204 (NC 1975) (“To stop [at diminution in value] would not fully compensate the plaintiffs for the losses sustained by them as a direct and natural result of the negligence of the defendants. ... [T]he plaintiffs cannot have the use of their house during the time reasonably necessary for its repair or replacement and must obtain lodging elsewhere for such period of time. For this loss they are entitled to recover ...”). Compare Standard Oil Co. v. Dunagan, 171 So.2d 622 (Fla. 3d DCA 1965) (plaintiffs whose land was permanently damaged from discharge of gasoline from defective tanks and who sought diminution in value damages plus loss of use of water supply rather than cost of repairs were not entitled to *add* the loss of use figure to their recovery, but were allowed to *factor* the loss of use into the diminution in value) with Blake v. Hi-Lu Corp., 781 So.2d 1122 (Fla. 3d DCA 2001) (reinstating jury verdict that had awarded damages not only for repair costs of a home damaged by Hurricane Andrew, but also for “loss of use.”) and American Equity Insurance Co. v. Van Ginhoven, 788 So. 2d 388, 391 (Fla. 5th DCA 2001) (in affirming plaintiff’s award for the cost to repair a home, court stated, “Clearly, loss of use damages can be considered as part of the overall damages,” citing to Standard Oil Co. v. Dunagan, 171 So.2d 622 (Fla. 3d DCA 1965); but court actually affirmed the trial court’s *denial* of loss use, on the ground that the trial court’s award of prejudgment interest was an adequate substitute for loss of use.).

¹⁵ Service Unlimited v Elder, 542 N.W.2d 855 (Iowa Ct. App. 1995) (Court properly computed damages for inadequate insulation by using “cost of repair” instead of “reduction in value” where there was insufficient space between ceiling and roof to simply add additional layer of insulation over existing insulation, requiring installation of new insulated roof over existing roof, even

Debris Removal

This author has not uncovered any cases directly addressing the question of whether the cost to remove debris from the land is recoverable *in addition* to the diminution in market value of the structure. In the absence of case law, one way to reason through the issue is to consider the distinct nature of the structure versus the land on which it sits. If the structure is totally destroyed, leaving debris on the land, the owner not only has lost the value of the structure but also will incur lost value to the land itself because of the need to remove the debris. A plot of land with debris is less valuable to the rational consumer than a plot of land without the debris, and the diminution in value to the land should be directly related to the cost of removing that debris. Under this reasoning, the debris removal cost is arguably recoverable as an element of the land damage separate and apart from the damage to the structure.

Finishing the Hypothetical Road Trip to Recovery

though cost of repair was disproportionate to additional heating and cooling costs, where homeowners testified heating and cooling problems continued after larger air conditioner was installed, and they were still unable to maintain second level at comfortable temperature.); *see also* Zindell v. Central Mutual Ins. Co. of Chicago, 269 N.W. 327 (Wis. 1936); Aetna Ins. Co. v. 3 Oaks Wrecking & Lumber co., 382 N.E.2d 283 (Ill. App. 1978); Peluso v. Singer General Precision, Inc., 365 N.E.2d 390 (Ill. App. 1977); and A.J. Jacobson Co. v. Commercial Union Assur. Co., 83 F.Supp. 674 (D. Minn. 1949). *But see* Mercer v J. & M. Transp. Co., 103 Ga. App 141, 118 SE.2d 716 (The proper measure of damages was not the cost of restoration, where a 25 to 30-year-old house was totally destroyed, and did not originally have plumbing, wiring, bathrooms, or modern heating, and where the cost of restoration would be far in excess of the difference in value before and after the injury to the premises.). In the eminent domain context in Florida, owners have been denied compensation for compliance with code upgrades. State Department of Transportation v. Bennett, 592 So.2d 1150 (Fla. 4th DCA 1992); Malone v. Div. of Admin., Dep't of Transp., 438 So.2d 857 (Fla. 3d DCA 1983), *rev. denied*, 450 So.2d 487 (Fla.1984). Note, however, that the owners in Malone had rebuilt their processing plant on an entirely different parcel of land and the owners in Bennett had sought the diminution in value rather than the cost to repair. Arguably, the public policy implications of condemnation proceedings distinguish such cases from tort and breach of contract actions. Eminent domain proceedings provide “just compensation” to the owner for the taking of property. The purpose of the taking is to benefit and protect the public. There is no similar balancing test between “just” compensation and public benefit in tort and breach of contract cases, where the loss originated not for public benefit but by a third party’s breach of duty.

Returning to our hypothetical house fire, we have a house once worth \$100,000 that will take \$200,000 to rebuild, including \$20,000 in code upgrades and \$5,000 in debris removal costs. Assuming the house is not an historic landmark or service building and that there are no significant family heirlooms, our measure of damages will begin with \$100,000 in the lost market value, but the jury will probably be allowed to consider the fact that it will take twice the home's value to repair the house. The jury may also be allowed to consider the \$20,000 in code upgrades and the \$5,000 in debris removal costs the owner incurred. If the homeowner incurred rental costs of \$30,000, that figure will be included in the judgment if the jury believes it to be reasonable. In addition, many states will also award prejudgment interest dating from the date the loss was incurred or the date of the filing of the complaint, depending on the jurisdiction. All of this assumes that there is no "service" or "intrinsic" value to the house or its contents, which could increase the judgment.

Conclusion

Establishing the proper measure of damages in large property losses can be difficult even in so-called "easy" cases. The subrogation professional should be aware of the general rule limiting recovery to the diminution in fair market value, but should also look for the exceptions. The applicable law on these issues can vary depending on the jurisdiction and the case law from the applicable jurisdiction should be read carefully. As with any rough terrain, the road to recovery in property loss cases it should be traveled carefully, cautiously, and with as many guides as possible.

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ⁱ *See also* North Carolina Pattern Jury Instructions, Civil 810.60 n. 1 (Feb. 2000) (“Where the evidence could justify recovery for loss of use, that should be submitted as a separate and additional issue.”)