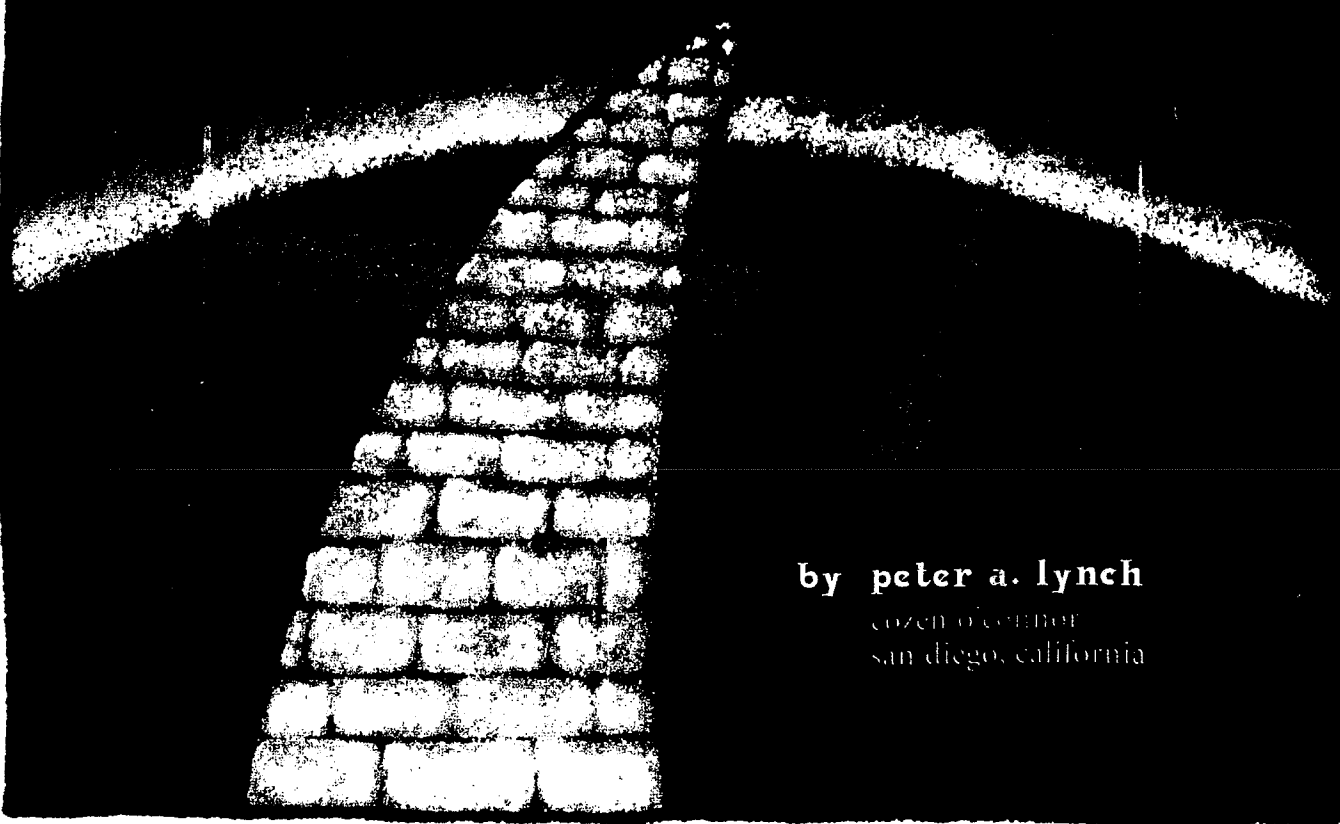


INSURED
DAMAGE
TESTIMONY:

the yellow brick
ROAD

TO BETTER SUBROGATION RECOVERIES



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Prelude Before The Tornado

A successful subrogation recovery requires proof of liability and damages. One half of the recovery effort relates to proving damages. Failure to adequately prove damages leaves a favorable liability verdict but no recoverable damages. Hence, careful preparation of the damage claim is essential to ensure a meaningful subrogation recovery.

In a civil case, there are two possible categories of damages: 1) Economic damages such as verifiable monetary losses that include past and future earnings, loss of use, cost of repair and replacement and loss of business. See Judicial Counsel of California Civil Jury Instructions (2006) CACI No. 3903, et seq. And, 2) Non-economic damages such as pain and suffering, mental suffering, emotional distress, etc. See California Civil Code Section 1431.2(b)(1) and (b)(2).

Subrogation claims should fall under economic damages. The insured's claim is presented after the loss. The policy coverages are evaluated and payments made for the building damage, contents, business interruption, etc. The coverage is based on the express terms of the issued insurance policy. Hence, the loss is evaluated based on the contract between the insured and insurer.

However, the subrogation claim is most often a tort case against a third party identified as being responsible for causing the loss. Therefore, although the insurer pays contract damages to its insured, the potential third party – if proven liable – is responsible for tort damages (absent a contract between the insured and responsible third party).

Tort damages are not based on the insurance contract terms and are recoverable under statutes enacted by various state legislatures and case law issued by state courts interpreting those legislative statutes. Consequently, just because insurance payments are made under a contract of insurance, those payments are not necessarily recoverable under the law of torts.

A subrogation case depends on amounts paid for losses to include real property, personal residence, contents, etc. However, how do you prove what is recoverable in a tort subrogation case?

In Search Of A Heart, Brain, Courage And A Way Home

This article suggests evaluating the insured owner of the damaged property as a potential witness on damages. But will the insured be treated lovingly by the jurors like Dorothy was by the Munchkins? Or will the jurors treat the insured similar to how Dorothy was treated by the Wicked Witch of the West? Answering these questions will likely determine if the insured actually testifies as a witness on damages.

Subrogation cases can be difficult if the jury does not favorably identify with the plaintiff. However, jurors are human and naturally look to right a wrong. Part of that process includes favorably identifying with the plaintiff. Having the insured testify can put a human face on the subrogation case. The insured's damage testimony shows the defendant's conduct caused harm.

State Court Decisions On Owner Testimony

State courts have adopted three general views on owner testimony. An overview of the available states and their general rules are listed at the end of this article. Those views include:

(1) The owner is competent to testify as to estimation of his damages and value based on his relationship as owner. It is not required to show knowledge of value of the property.

(2) A presumption that the owner is competent to testify as to value of the property and damages. If shown he is not familiar with the property and value, or if he bases testimony on improper foundation, his testimony is not permissible.

(3) The owner may be competent to testify with the proper foundation establishing some basis for his opinion on the property value. The trial judge acts as a screener in order to evaluate the competency of the owner to testify on damages.

Federal courts generally follow state law on damages. Thus, subrogation actions filed in federal courts will apply the state law applicable to where the dispute arose.

State law establishes the owner *can* testify under the situations noted above. However, the question becomes, "Should the owner be a witness on damages or not?"

A View From The Cornfield/Battlefield

As Dorothy said in the *Wizard of Oz*, "Toto, I've a feeling we're not in Kansas anymore." You don't want your insured hurting your damage case based on his testimony during cross-examination. You need to evaluate if the insured will advance your damages claim or not. Is he competent to testify about the building, contents, etc.? Some states permit the insured to testify simply because he is the owner. However, just because the owner can testify does not mean he should. Will the jury believe his testimony? Will he present well? Can he speak clearly? Are there bills of sale, receipts, contracts that support the insured owner's oral testimony? It is important to produce documents/photos describing the damaged property for the jury.

If the insured does not present well as a witness, he may do more harm than good. Might the jury not relate to the owner because he is rich, pompous, has a loud mouth or ...? Will the insured be impeached by prior felony convictions? Will the insured be impeached by documents that were submitted with the original claim but which the insurer found to be not credible and inconsistent on value? If the insured has significant drawbacks as a witness, consider using experts, property adjusters or others for your testimony options.

Conclusion

You must carefully evaluate use of the insured to prove your subrogation damages. Presented properly, an insured can substantially enhance potential subrogation recovery when the jury identifies with and likes the insured. Conversely, if the insured is not an appropriate witness, an insured's damage testimony can undermine your subrogation recovery significantly. ►

HAWAII

- *City & County of Honolulu v. Int'l Air Service Co., Ltd.* 628 P.2d 192, 200 (Haw. 1981)

Owner of land is competent to testify as to value of land. Weight of testimony is to be determined by jury. Presumption of familiarity with value does not extend to corporate officer for corporate owned property.

IDAHO

- *Pocatello Auto Color v. Akzo Coatings*, 896 P.2d 949 (Idaho 1995)

Owner of property is a competent witness concerning its value without further qualification. The owner's failure or inability to explain the basis for the value given may affect the weight to be given the testimony, but it does not disqualify the owner's opinion.

ILLINOIS

- *Kim v. Mercedes Benz, U.S.A., Inc.* 818 N.E.2d 713, 722-23 (Ill. App. Ct. 2004)

Lay witness may give opinion as to value only if he has sufficient personal knowledge of property and value. Testimony admitted only upon showing of factor on which witness bases testimony. Factors to be considered include: 1) Familiarity with property, 2) Actual Knowledge of Value, and 3) Basis of Knowledge.

INDIANA

- *Don Meadow Motors, Inc. v. Grauman*, 446 N.E.2d 651 (Ind. Ct. App. 1983)

Owner of property is competent to testify to value of property.

IOWA

- *Beneficial Finance Co. v. Reed*, 212 N.W.2d 454, 459 (Iowa 1973)

Ownership of property in itself qualified owner to give opinion as to its value.

KANSAS

- *Brenneisen v. Phillips*, 45 P.2d 867 (Kan. 1935)

Owner of property presumed to know value even if opinion evidence is not very persuasive.

KENTUCKY

- *Phillips v. Commonwealth*, 679 S.W.2d 237 (Ky. 1984)

Owner of property may give opinion as to value of property.

LOUISIANA

- *Clark v. Clarendon Ins. Co.*, 841 So.2d 1039, 1044 (La. Ct. App. 2003)

Owner is qualified to testify as to value of property. Accuracy of such evidence goes to the weight to be accorded that opinion not the admissibility.

MAINE

- *State v. Edwards*, 681 A.2d 24 (Me. 1996)

Owner can testify to fair market value of property. Weight is for fact finder to determine.

MARYLAND

- *Christian v. State* 500 A.2d 341,343 (Md. Ct. Spec. App. 1985)

Owner of personal property in common use may express opinion as to its value without being qualified as expert.

MASSACHUSETTS

- *Von Henneberg v. Generazio*, 531 N.E.2d 563 (Mass. 1988)

Property owner familiar with it and its uses and characteristics may testify as to value. Shouldn't presume familiarity from ownership alone. Evaluation of competency is for judge.

Where owner was also architect who had cleared land, built house and lived on farm for 28 years, he was competent to testify as to value.

- *Brossi v. Fisher*, 1999 Mass. App. Div. Lexis 39 (1999)

Must lay proper foundation demonstrating owner's familiarity, knowledge and experience of the property and its uses in order to allow opinion testimony.

- *Horwitz v. St. John*, 1998 Mass. App. Div. Lexis 64

Owner could testify to value before, but could not establish she had sufficient knowledge to testify to diminished value of property.

MICHIGAN

- *People v. Watts*, 348 N.W.2d 39, 40 (Mich. Ct. App. 1984)

Owner is qualified to testify to value unless value is based on personal or sentimental belief.

MINNESOTA

- *Bury v. Bury*, 416 N.W.2d 133,137 (Minn. Ct. App. 1987)

Property owner is presumed to be acquainted with value and may testify without any foundation being laid. Credibility determined by trier of fact.

MISSISSIPPI

- *Savage v. LaGrange*, 815 So.2d 485 (Miss. Ct. App. 2002)
Party may testify as to fair market value of his or her own property.
- *Community Bank v. Archie Wayne Courtney*, 884 So.2d. 767 (Miss. 2004)
Owner's testimony on value was not allowed where property had been converted back to bank.

MISSOURI

- *State ex. rel State Highway Commission v. Johnson*, 563 S.W.2d 100 (Mo. Ct. App. 1978)
Owner was permitted to testify to value before and value after. Assumption that he is familiar, as owner, as to value.
Could testify as to affect on farm use and resulting affect of value of land.
- *Shelby County R-IV School Dist v. Herman*, 329 S.W.2d 609, 613 (Mo. 1965)
Testimony of owner not permissible if based on improper foundation or improper elements. Must use market value as computation, can't base estimation on other method of valuing worth.
- *Stockton v. Tester*, 273 S.W.2d 783 (Mo. Ct. App. 1954)
Courts are liberal in allowing property owner to testify as to value of property.

MONTANA

- *State v. Russell*, 18 P.2d 611 (1933)
Owner of property, familiar with original cost, is qualified to testify regarding value independent of knowledge of recent sales.

NEBRASKA

- *Langfeld v. State Dept. of Roads* 328 N.W.2d 452 (Neb. 1982)
Owner who is shown to be familiar with value of land shall be qualified to estimate the value of the land for use without additional foundations. The owner is not qualified by virtue of ownership alone.
- *Nelson v. Metro Utilities Dist.*, 547 N.W.2d 133 (1996)
Whether owner of property is qualified to testify is decided by analysis of owner's familiarity with property.

NEVADA

- *Dugan v. Gotsopoulos*, 22 P.3d 205 (Nev. 2001)
Party may testify as to value of personal or real property when value is an issue in the case, expert testimony not required. Weight to be decided by jury.

NEW HAMPSHIRE

- *McNamara v. Moses*, 781 A.2d 1015 (N.H. 2001)
New Hampshire rules of evidence required lay opinion testimony, including owner testimony to be based on personal knowledge.

NEW JERSEY

- *Lancelotti v. Md. Casualty Co.*, 617 A.2d 296 (N.J. Super. Ct. App. 1992)
Insured owner of damaged or destroyed property may, without being qualified as an expert, testify to his own estimate of value. Basis must not be matter of speculation, must establish grounds for any opinion given.
- *Lane v. Oil Delivery Inc.*, 524 A.2d 405 (N.J. Super. Ct. App. Div. 1987)
Need enough certainty in damages and law foundation to enable trier of fact to make fair and reasonable estimate. Basis for arriving at opinion must not be matter of speculation and witness must establish grounds for any opinion given.

NEW MEXICO

- *Archuleta v. Jacquez*, 103 N.M. 254, 258 (N.M. Ct. App. 1985)
"A plaintiff can give testimony regarding the damages suffered by him...In this case, plaintiffs' valuation of their crops, based on a lifetime of farming experience, was substantial evidence to support the trial court's award. The plaintiffs herein will not be denied recovery if they have produced the best evidence available and it is sufficient to afford a reasonable basis for estimating their loss."
- *State ex rel. State Highway Comm'n v. Chavez*, 80 N.M. 394, 396 (N.M. 1969)
The landowner may be presumed to have sufficient knowledge of the price paid, the rents or other income received, and the possibilities of the land for use, to have a reasonably good idea of what it is worth.
Of course, should it be demonstrated that the witness has no real familiarity with the property about which he offers testimony, or that his estimates of value are predicated upon considerations which are not legally relevant, it would then be proper to strike the testimony and admonish the jury. ➤

NEW YORK

- *Glazer v. Quittman*, 377 N.Y.S.2d 913 (1975)

Owner of property who is familiar with property can testify as to its value, provided he has knowledge of the circumstances that determine value.

NORTH CAROLINA

- *Compton v. Kirby*, 577 S.E.2d 905, 916 (N.C. Ct. App. 2003)

Opinion of property owner is competent evidence as to value of property.

North Dakota

- *Amsbaugh v. Amsbaugh*, 673 N.W.2d 601, 607 (N.D. 2004)

Owner of real property may testify to value without further qualifications or special knowledge.

- *Harwood State Bank v. Charon*, 466 N.W.2d 601 (N.D. 1991)

Owner of personal property is competent to testify to value.

OHIO

- *Valigore v. Cuyohoga County Board of Rev. et. al.*, 825 N.E.2d 604,606 (Ohio 2005)

Owner of real or personal property by virtue of ownership is competent to testify to market value. Weight to be determined by trier of fact. May take all, part or none of witness' testimony.

OKLAHOMA

- *State ex rel. Department of Transportation v. Davis*, 134 P.3d 899 (Okla. Civ. App. 2006)

Owner of real property is competent to testify as to value of property if owner claims to be familiar with land values in area.

- *Poteete v. MFA Mutual Ins. Co.* 527 P.2d 18 (Okla. 1974)

Only qualified to testify to value of property if owner has fair knowledge of property and its value at the time it is destroyed. ►►

OREGON

- *State by and through DOT v. El Dorado Properties*, 971 P.2d 481 (Or. Ct. App. 1998)

Owner may always testify about value of property without demonstrating special knowledge or skill or training. Although it may be possible to disqualify testimony if it is possible to show no knowledge of market value, Oregon courts have never actually disqualified an owner on that ground.

PENNSYLVANIA

- *Shamnoski v. PG Energy a Division of So. Union Co.*, 765 A.2d 297 (Pa. Sup. Ct. 2000)

Property owner is qualified by reason of relationship as owner to give estimation as to value of what he owns regardless of his knowledge of property value. Weight of evidence is for jury to decide.

Owners were allowed to testify to value of property lost when a dam broke after a hurricane and caused severe flooding resulting in loss of real estate, homes and personal property.

RHODE ISLAND

- *Pettella v. Corp Brothers, Inc. v. Union Carbide Corporation* 268 A.2d 699, 705 (R.I. 1970)

Owner generally restricted to give testimony on evidence of differences between before and after fair market value of property.

Some personal property may not have fair market value; thus, courts permit recovery based on actual value lost according to witness, excluding fanciful or sentimental value.

SOUTH CAROLINA

- *Nelson v. Coleman Co.*, 249 S.C. 652; 155 S.E.2d 917 (S.C. 1967)

Owner can give estimate as to value of both personal and real property damage.

- *Waites v. SC Windstorm & Hail Underwriting Association* 307 S.E. 223 (S.C. 1983)

Owner may testify as to value of damage to real property.

- *Hawkins v. Greenwood Dev. Corp.* 493 S.E.2d 875, 880 (S.C. 1997)

Owner is qualified as fact of ownership to give his estimate of value of damage to real and personal property.

SOUTH DAKOTA

- *Behrens v. Wedmore*, 698 N.W.2d 555, 580 (S.D. 2005)

Business or property owner is qualified to testify as to value of business or property.

TENNESSEE

- *State ex. rel. Smith v. Livingston Limestone Co.*, 547 S.W.2d 942 (Tenn. 1997)

Owner of real property is qualified to testify to value of land. It is presumed he knows value and is qualified by showing mere ownership.

TEXAS

- *Waste Disposal Center, Inc.* 74 S.W.3d 578 (Ct.App.Tex. 2002)

Property owner can testify on diminution of real property market value from permanent damage to land, but diminution testimony refers to market value, not intrinsic value of land.

Testimony that real property not worth what owner originally paid for it was sufficient to allow jury to determine diminution in market value. Testimony that market value was \$40,000 and is now zero was legally sufficient.

UTAH

- *State v. Purcell*, 711 P.2d 243, 245 (Utah 1985)

Because owner is presumed to be familiar with value of possessions, owner is competent to testify to present market value of property.

VERMONT

- *Shortle v. Central Vt. Pub. Serv. Corp.*, 399 A.2d 517, 137 Vt. 32, 34 (Vt. 1979)

An owner is a competent witness to testify as to the value of his property while holding title. 12 V.S.A. § 1604. The record discloses that the lay witness owner did not testify as to the cause of the damage, but only as to the damage observed and the cost of repair as of his ownership. This testimony was admissible and there is no error.

VIRGINIA

- *Haynes v. Glenn*, 197 Va. 746, 753-751 (Va. 1956)

"It is generally recognized that the opinion testimony of the owner of property, because of his relationship as owner, is competent and admissible on the question of the value of such property, regardless of his knowledge of property values. It is not necessary to show that he was acquainted with the market value of such property or that he is an expert on values. He is deemed qualified by reason of his relationship as owner to give estimates of the value of what he owns. The weight of such testimony is, of course, affected by his knowledge of the value."

Woman permitted to testify as to her estimation of what her jewelry was worth.

- *Parker v. Commonwealth*, 254 Va. 118, 121 (Va. 1997)

The opinion testimony of the owner of the stolen item generally is competent and admissible on the issue of the value of that property.

Owner could testify as to value of stolen telephone unit.

WASHINGTON

- *State v. Barnes*, 2003 Wash. App. Lexis 1546; *State v. Hammond*, 493 P.2d 1249 (Wash. Ct. App. 1972)

An owner may testify to value whether he is familiar or not. General Rule that foundation must be laid as to witness' knowledge of property does not apply to owner. Weight of testimony may be affected by lack of knowledge but will not disqualify owner.

WEST VIRGINIA

- *Evans v. Mutual Mining*, 485 S.E.2d 695 (W. Va. 1997)

Rules of evidence require opinion testimony to be a) rationally based on perception of witness and b) helpful to clear understanding of testimony or determination of a fact at issue. Owner can give testimony based on personal knowledge; ultimate determination is for trier of fact.

WISCONSIN

- *Mayberry v. Volkswagen of American, Inc.*, 692 N.W.2d 226, 238 (Wi. 2005)

Owner of item competent to give opinion evidence as to value. Testimony may support verdict even if evidence is not corroborated by independent facts or data.

WYOMING

- *Energy Transp. Sys. v. Mackey*, 650 P.2d 1152, 1156 (Wyo. 1982)

An owner is only qualified to express an opinion of value in a reasonable way and in accordance with the proper standards for determining fair market value; what it is worth to him is not a correct basis. If the owner's opinion is not within these rules, it has no probative value in a condemnation case.

Landowner who failed to give before and after value, demonstrate any knowledge of land values, or give any idea how damages were estimated could not give opinion as to damages.

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- *Conner v. Bd. of County Comm'rs*, 54 P.3d 1274, 1284 (Wyo. 2002)

Where owner provided only vague unsupported estimates as to property value and had no particular knowledge or training, she could not testify as to an estimation of damages. ■