

ADJUSTING LOSS OF USE CLAIMS

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ADJUSTING LOSS OF USE CLAIMS

I. INTRODUCTION

In cases involving property damage to personal or real property, the plaintiff will often allege that he or she is entitled to damages for the loss of use of their property. While loss of use damages are recoverable under the right set of facts, loss of use damages are not recoverable where the property has been destroyed or is not capable of being repaired. This paper will look at the case law in Texas and other jurisdictions regarding loss of use damages in cases involving both personal and real property. The paper will address when such damages are recoverable, the purpose of this type of damages, how loss of use is measured, and how a plaintiff proves loss of use.

II. DAMAGES THAT COURTS PERMIT PROOF OF IN PROPERTY DAMAGE CASES

The type of property, the extent of damages, and the proof a plaintiff is able to adduce all impact the measure of damages available in a property damage case. This paper will address the damage claims first with respect to the type of property at issue.

A. DAMAGES IN PERSONAL PROPERTY CASES.

Damages for injury to personal property can be classified as valuation damages (typically market value)¹ and repair damages (cost of repair and loss of use).

The general rule for damages to personal property is that a plaintiff is entitled to an award of the difference between the reasonable market value immediately before and immediately after the injury to the property. *Central Freight Lines, Inc. v. Naztec, Inc.*, 790 S.W.2d 733, 734 (Tex. App.—El Paso 1990, no writ); see *City of Houston v. Church*, 554 S.W.2d 242, 246 (Tex. Civ.

¹ In cases where the property's market value cannot be determined, or the property has no real market value, such as in cases involving family heirlooms, other methods of valuation can be used, including replacement value, actual value, and sentimental value.

App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.) (proper measure of damages for destroyed property is market value). Market value is defined as the price that the property would bring if it were offered for sale by a willing but not obligated seller and purchased by a willing but not obligated buyer. *Exxon Corp. v. Middleton*, 613 S.W.2d 240, 246 (Tex. 1981). The cost of the item is not admissible to establish market value at the time of the loss. *Redman Homes, Inc. v. Ivy*, 920 S.W.2d 664, 668 (Tex. 1996).

On the other hand, when personal property is damaged but not totally destroyed and repair is economically feasible, the plaintiff may elect to recover the reasonable cost of repairs. *Central Freight Lines, Inc.*, 790 S.W.2d at 734. In other words, the plaintiff can choose between valuation damages and repair damages in this scenario. The defendant cannot force the plaintiff to repair the property or to choose repair damages. *Id.* at 735.

B. DAMAGES IN REAL PROPERTY CASES

Although the types of damages recoverable in real property damage cases is similar, regardless of whether the injury is to land or to improvements, the courts discuss the damages separately, so likewise will this paper.

1. **Injury to land.**

Whether a plaintiff is entitled to recover valuation damages or repair damages for injury to land depends on whether the injury is characterized as permanent (recovery of lost market value) or temporary (repair cost and loss of use). See *Schneider Nat'l Carriers, Inc. v. Bates*, 147 S.W.3d 264, 270 n.12 (Tex. 2004).²

² It is interesting to note that in this same case, the Texas Supreme Court suggested that it was no longer satisfied with this archaic distinction and that courts would be better served by addressing directly which measure or property damage is reasonable. *Id.*

The character of an injury as permanent or temporary is determined by its continuum. A permanent injury results from activity of such a character and existing under such circumstances that it will be presumed to continue indefinitely. *See Bayouth v. Lion Oil Co.*, 671 S.W.2d 867, 868 (Tex. 1984) (constant and continuing injury, not an occasional, intermittent, or recurring injury). A temporary injury is not continuous, but sporadic and contingent upon some irregular force such as rain. *Id.*

Where the injury to land is permanent, damages are measured by loss in market value. *Porras v. Craig*, 675 S.W.2d 503, 504 (Tex. 1984). Market value is calculated based on the difference in the value of the property immediately before and after the injury. *Id.*

Where the injury to property is considered temporary in nature, the proper measure of damages is the reasonable cost of the repairs necessary to restore the property to its condition immediately prior to the injury plus the loss occasioned by being deprived of the use of the property. *Lone Star Development Corp. v. Reilly*, 656 S.W.2d 521, 525-26 (Tex. App.—Dallas 1983, writ ref'd n.r.e.).

2. **Injury to improvements.**

When an improvement to land is destroyed or permanently injured, a plaintiff is entitled to recover damages for the loss in the improvement's value. *See Union Nat'l Bank v. Moriarty*, 746 S.W.2d 249, 253 (Tex. App.—Texarkana 1987, writ denied) (measure of damages for destruction of home was difference in value before and after its destruction). Valuation is just another way of saying market value. Market value is the price property would bring if offered for sale by a willing but not obligated seller and purchased by a willing but not obligated buyer. *Middleton*, 613 S.W.2d at 246. Damages are measured by the difference in market value of the

improvement immediately before and immediately after the injury. *Moriarty*, 746 S.W.2d at 253.

Where an improvement is only injured, the plaintiff can recover both the cost of repair and damage for loss of use. *See Ortiz v. Flintkote Co.*, 761 S.W.2d 531, 536 (Tex. App.—Corpus Christi 1988, writ denied). However, courts will not permit a plaintiff to recover this measure of damages when the cost of repair is not feasible and involves economic waste. *Hall v. Hubco, Inc.*, 292 S.W.3d 22, 32 (Tex. App.—Houston [14th Dist.] 2006, pet. denied). Where the cost of repair exceeds the value of the property, the plaintiff will only be able to recover the decrease in market value. *Id.*

III. RECOVERY OF LOSS OF USE DAMAGES

This portion of the paper will discuss cases involving claims for loss of use and how those damages are measured and proved.

The primary purpose for allowing loss of use damages is to award the owner of the property actual pecuniary compensation for his loss. *Chemical Express Carriers, Inc. v. French*, 759 S.W.2d 683, 687 (Tex. App.—Corpus Christi 1988, writ denied).

A. CASES INVOLVING DAMAGE TO PERSONAL PROPERTY.

Generally, the measure for loss of use damages is the reasonable rental value of the property or a substitute. *Id.* However, this is not the only means for determining loss of use. *See Bossier Chrysler Dodge II, Inc. v. Rauschenberg*, 201 S.W.3d 787, 809 (Tex. App.—Waco 2006), *rev'd in part on other grds.*, 238 S.W.3d 376 (Tex. 2007) (in approving use of monthly payment as evidence of loss of use, court noted that other courts have approved modified diminution of value calculation, lost profits, and replacement cost as methods of establishing loss of use); *Cessna Aircraft Co. v. Aircraft Network, L.L.C.*, 213 S.W.3d 455, 465 (Tex. App.—

Dallas 2006, pet. denied) (where property is not rentable, plaintiff may resort to proving actual worth of use, but finding that it was error to admit evidence of both rental costs and replacement costs for proving loss of use damages); *French*, 759 S.W.2d at 687-88 (noting that where plaintiff loses opportunity to accrue earning from use of asset in a ready market, he is entitled to recover lost profits as loss of use damages).

Latitude is allowed in determining loss of use damages where there is no precise measurement. *International Great N. R.R. Co. v. Casey*, 46 S.W.2d 669, 670 (Tex. Comm'n App. 1932, holding approved).

As noted, the typical measure for loss of use damages is to establish the reasonable rental value of a substitute. The plaintiff is not required to actually rent a substitute to recover for loss of use. *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115, 118 (Tex. 1984) (plaintiff need not rent a replacement or show any amounts actually expended); *French*, 759 S.W.2d at 687.

If loss of use is measured by the expense for hire or replacement of the property, the cost of maintenance and depreciation that would have accrued during such period had the vehicle not been damaged must be deducted from that amount. *Alexander Schroeder Lumber Co. v. U. F. Merritt*, 323 S.W.2d 163, 166 (Tex. Civ. App.—Texarkana 1959, no writ). If recovery is based on loss of profit from loss of use, then all reasonable costs of maintenance and depreciation should be deducted from income in determining the amount of damages. *Id.*

The period of time that a plaintiff can recover loss of use for will be the amount of time that the plaintiff was deprived of the loss of use of the property. *Mondragon v. Austin*, 954 S.W.2d 191, 194 (Tex. App.—Austin 1997, pet. denied). There is no bright line test for this time period. *Id.* In making this determination, the court and the jury must consider the particular circumstances of the plaintiff. *Id.*

To condition compensation on the financial ability of the plaintiff would deny the plaintiff compensation for damages resulting from the defendant's conduct. *Id.* In that case, the court refused to limit damages to a two week period just because the plaintiff could not afford to repair the vehicle in that amount of time, even though the evidence established that repairs could have been made in that time period. *Id.*

It is important to note that despite the economic waste issue, a plaintiff can recover loss of use damages that exceed the value of their property. *Id.* at 196 (plaintiff can recover loss of use damages in excess of the value of his or her car); *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.) (loss of use is not limited by fair market value of chattel).

B. CASES INVOLVING DAMAGE TO REAL PROPERTY.

Loss of use damages for real property is usually measured by the loss of rental value. *City of Austin v. Teague*, 570 S.W.2d 389, 394 (Tex. 1978); *Reilly*, 656 S.W.2d at 526. Rental value is defined as that amount which, in the ordinary course, of business, the premises would bring or which they could be rented, or the value, as ascertained by proof of what the premises would rent for, and not the probable profit which might accrue from the rental. *Teague*, 570 S.W.2d at 394 (citation omitted).

In a case involving damage to a school, the Texarkana Court of Appeals noted that loss of use damages can be recovered only if the reasonable value of the use can be established with fair certainty. *Goose Creek Consolidated I.S.D. v. Jarrar's Plumbing, Inc.*, 74 S.W.2d 486, 496 (Tex. App.—Texarkana 2002, pet. denied). Absolute certainty is not required, however. *Id.* There is no requirement that the property at issue be unusable for all purposes in order for the plaintiff to recover loss of use damages. *Id.*

Further, a plaintiff is not required to lose the use of the entire property if the portion injured had a valuable use. *Id.* Loss of use damages are determined according to the existing use of the property and not what might have been if it had been put to different uses. *Id.* However, the plaintiff cannot recover for loss of use for a purpose for which the plaintiff did not intend to use the property. *Id.*

Loss of use damages are limited to the time reasonably required to repair the property. *Id.* A plaintiff's inability to have the property fixed for financial or other reasons will be taken into account when determining the reasonableness of the time period. *Id.*

Where the property is not rentable, the plaintiff can prove actual worth of use to establish loss of use damages. *Id.* at 497. The court likewise held that a modified diminished value calculation was an appropriate means of quantifying the value of the loss of use. *Id.* at 498.

IV. THE DAMAGE QUESTIONS PRESENTED TO THE JURY

In this section of the paper, we will present the standard pattern jury charge instructions and definitions that are submitted to juries in Texas in cases in which the plaintiff has alleged that he or she suffered property damage. While each case requires careful consideration of the facts and the law, these are the standard questions and instructions that most judges will submit because they are contained in the Texas Pattern Jury Charges.

The first question submits the measure of damages based on the difference in market value before and after the occurrence. As noted previously, this is the usual measure of damages to personal property. These questions presume that the property in question is personal property. Changes would be necessary if the property in question is real property.

QUESTION NO. _____

What is the difference in the market value in _____ County, Texas,³ of the vehicle driven by *Paul Plaintiff* immediately before and immediately after the occurrence in question?

“Market value” means the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.

Do not reduce the amount, if any, in your answer because of the negligence, if any, of *Paul Plaintiff*.⁴

Answer in dollars and cents for damages, if any.

Answer: _____

Texas Pattern Jury Charges 11.2

The second question submits the alternative measure of damages when the damaged property is susceptible of repair. Where repairs do not completely restore the former value of the property, a plaintiff may also recover the difference between the value before the occurrence and the value after repairs.⁵

QUESTION NO. _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Plaintiff* for his damages, if any, for the repairs to and loss of use of his vehicle resulting from the occurrence in question?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on the amount of damages you find.

³ The county referred to should be the county in which the damage occurred.

⁴ If the plaintiff's negligence is also in question, this instruction is proper. If there is no allegation of contributory negligence on the part of the plaintiff, this instruction should be omitted.

⁵ Of course, this “diminished value” measure of damages is only a proper measure of damages when a claim is brought by a third party. An insurance company does not owe its insured diminished value damages under a first party claim under the policy. See *American Manuf. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154 (Tex. 2003).

Do not reduce the amount, if any, in your answer because of the negligence, if any, of *Paul Plaintiff*.

- a. Cost of repairs.

Consider the reasonable cost in _____ County, Texas to restore the vehicle to the condition it was in immediately before the occurrence in question.

Answer in dollars and cents for damages, if any.

Answer: _____

- b. Loss of use of vehicle.

Consider the reasonable value of the use of a vehicle in the same class as the vehicle in question for the period of time required to repair the damage, if any, caused by the occurrence in question.

Answer in dollars and cents for damages, if any.

Answer: _____

- c. Difference in market value.

Consider the difference, if any, in the market value in _____ County, Texas, of the vehicle in question immediately before the occurrence in question and immediately after the necessary repairs were made to the vehicle.

“Market value” means the amount that would be paid in cash by a willing buyer who desires to buy, but is not required to buy, to a willing seller who desires to sell, but is under no necessity of selling.

Answer in dollars and cents for damages, if any.

Answer: _____

Texas Pattern Jury Charges 11.3

Again, each case must be analyzed separately to determine exactly how the jury charge should read. However, this gives you a general idea of how the questions are submitted to the jury. Seeing how these questions are submitted should assist you in adjusting your claims.

V. A SAMPLING OF CASES FROM OTHER STATES

This paper does not purport to present a fifty state analysis of loss of use claims. Instead, this paper addresses a couple of different states in which we have found differences in the law regarding loss of use damages.

While the majority of courts in this country follow the rule that there may be no recovery for loss of use of property that has been substantially destroyed or is not repairable, you will need to discuss this issue with your defense counsel in each state because the laws may be different and there may be statutory provisions that impact the damage issue.

A. LOUISIANA

Unlike most jurisdictions, Louisiana permits recovery for loss of use damages even where the property in question is totally destroyed or repair is not economically feasible.

In *Whitehead v. Kansas City S. R.R. Co.*, 758 So. 2d 211 (La. Ct. App. 1999), *writ denied*, 759 So. 2d 767 (La. 2000), the court noted that where a vehicle is totally destroyed or where repair is simply not economically feasible, loss of use damages are still recoverable for a reasonable period of time. *Id.* at 221. The court defined this period as the amount of time in which the owner becomes aware that his vehicle is a total loss and secures a replacement. *Id.* The court also spoke in terms of a reasonable time to purchase a replacement. *Id.* The court ultimately held that sixty days to secure a replacement was a reasonable period of time for which the plaintiff could recover for loss of use damages.

In *Neloms v. Empire Fire & Marine Ins. Co.*, 859 So. 2d 225 (La. Ct. App. 2003), the court likewise found that a plaintiff could recover for loss of use damages for a reasonable amount of time after he learns that his car is a total loss. *Id.* at 233.

That court found that thirty days was reasonable and further noted that the period of time was reasonable for purposes of loss of use damages even though the plaintiff did not rent a car during that thirty days.

B. ILLINOIS

In *Cunningham v. Crane Co.*, 255 Ill. App. 373 (Ill. App. Ct. 1930), the court held that the trial court erred in instructing the jury that it could award recovery for loss of use of an automobile where the vehicle could not be repaired. Instead, the difference in market value before and after the accident was the appropriate measure of damages.

In *Harris v. Peters*, 653 N.E.2d 1274 (Ill. App. Ct. 1995), the court held that where personal property is destroyed or rendered useless, the measure of damages is the fair market value of the thing in question immediately prior to its destruction. In making this determination, the court noted that when the plaintiff was awarded the fair market value of the property, he was made whole and this amount necessarily compensated him for the loss of use and enjoyment.

However, there is one case in Illinois that goes against the majority rule. In *Fairchild v. Keene*, 416 N.E.2d 748 (Ill. App. Ct. 1981), the court noted in dicta that a party would be entitled to recover for loss of use for the time reasonably necessary to replace the property that could not or should not be repaired.

This last case is questionable for two reasons. First, the sources the court cited do not support this proposition. Second, the case involved a vehicle that could be repaired so this discussion was completely unnecessary for the court's holding.

VI. CONCLUSION

In the appropriate case, a plaintiff may be entitled to loss of use damages if the plaintiff properly pleads and proves that element of damages.

In cases in which the property is destroyed or is not repairable, however, in most states, including Texas, the plaintiff is not entitled to recover loss of use damages.

Good luck adjusting those property damage claims.

About the Authors:

Douglas D. Fletcher - Founding and Senior Partner, for over 20 years, Doug has successfully litigated over 145 trials to verdict in matters ranging from complex personal injury, transportation, product liability, premises liability, Dram Shop liability and many other matters involving serious exposure to the firm's corporate clients.

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