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MEASURE OF DAMAGES FOR INJURY TO REAL SURFACE PROPERTY IN WYOMING

"Damages" are involved in almost every type of litigation and is itself a subject of a considerable amount of litigation. The general subject of damages to real property is much too broad to be covered in a short resume. A complete discussion of the subject would have to cover a multitude of statutory liabilities and causes of action, such as subsurface damage and surface damage in oil and mining law, waste in landlord-tenant relations, eminent domain, nuisance, malicious trespass and many others.¹ This paper will be limited to the subject of the measure of damages to real property.

Neither the fixing of liability for damage by statute nor the nature of the cause of action controls the actual measure of compensatory damages. The rules reflected in Wyoming case law for measuring compensation for damage to real property are applicable in all situations where such a measurement is needed, regardless of the title of the cause of action.

For convenience, measuring damage to surface real property can be broken down into three major areas. First, there is damage to real estate proper which is best exemplified in Wyoming by the destruction of homes. Second, there is the measure of damage to fixtures. Third, there is the area of damage to crops which is always important in an agricultural state.

BASIC RULES

The basic rule of damages to real estate is to compensate the owner for any loss or diminution in value of the real property.² Generally, if the injury is permanent, the measure of damages is the diminution in value of the real property.³ If the part that is damaged is severable from the real estate proper, the diminution in value of the item is sometimes

1. The rule of damages for eminent domain can be found in Wyo. Stat. § 1-755 (1957). Most of the statutory provisions fix liability, but do not fix the amount of the award to be given. They are quite numerous and detailed. But see: damage to landowners caused by drainage, § 41-401, damage caused by hogs, goats or elk running at large, § 11-517, and damage to fences, ferries and flumes, § 6-152.

2. OLECK, DAMAGES TO PERSONS AND PROPERTY § 208 (1961).

3. *Ibid.*

used.⁴ However, these are not absolute rules; they are as flexible as necessary to reach the ultimate goal of compensating for the loss sustained.⁵ For a final award all that is required is that the court or the jury make a reasonable approximation within the limits of the evidence furnished.⁶ The damage only need be susceptible of ascertainment within a reasonable degree.⁷

DAMAGE TO REAL ESTATE PROPER

A fairly comprehensive rule for fixing permanent damages to real property was set out in *Town Council of Town of Hudson v. Ladd*.⁸ The plaintiff alleged permanent damage to an irrigation ditch and the adjoining land. The evidence presented for the measurement of damages was the cost of replacement of the facility or the cost of like facilities. In reversing the lower court's \$750.00 award, the Wyoming Supreme Court held that the measure of damages for permanent injury to real estate is the difference between the value of the property immediately prior to the injury and the value immediately after the injury.

The court further held that the values to be used were the fair market values.⁹ By way of dicta the court added that this was the measure to be used if the injury is permanent or repairable only at great expense. If the damage to real property is of a temporary nature or repairable at small expense, then the cost of repair is often used as the measure of damage. The verdict for the plaintiff on damages was reversed although there seems to be no rationale why replacement cost was not a sufficient measure of damages under the rule set out by the court, for it seems the damage would surely have qualified as temporary or repairable at small expense. The explanation would appear to lie in the fact that plaintiff pleaded irreparable damage but offered only replacement cost as the measure.

4. OLECK, *op. cit. supra* note 2.

5. OLECK, *op. cit. supra* note 2, at § 216.

6. *Wyo. Wool Marketing Ass'n v. Woodruff*, 372 P.2d 174, 181, 3 A.L.R. 3d 802 (Wyo. 1962).

7. *Blakeman v. Gopp*, 364 P.2d 986 (Wyo. 1961).

8. 37 Wyo. 419, 263 Pac. 703 (1928).

9. *Id.* at 426, 263 Pac. at 704, 705.

A departure from the rule for fixing permanent damage to real estate as set out in the *Hudson*¹⁰ case was made in *Phelps v. Woodward Constr. Co.*¹¹ The plaintiff's home was all but destroyed by a gas explosion. The damage was permanent and not repairable except at great expense, a seemingly apt situation for application of the diminution in value rule as set out in the *Hudson* case. However, neither the case nor the rule was mentioned in the opinion, nor was there any reference to diminution in value. Instead, the evidence introduced was the cost of "rebuilding" the structure. From the evidence the total loss was \$6,895.60, but the plaintiff was awarded \$8,395.00.

The Wyoming Supreme Court affirmed the judgment, even though the award was in excess of the loss. The court stated that "opinion evidence" as to cost of replacement was not conclusive and the court or jury could be guided by their own judgment as to the amount of damages.¹² The court, in so holding, essentially approved the cost of replacement as a measure of permanent damage to real property. The holding is not consistent with that of the *Hudson* case, but it is consistent with the general law of damages which gives the plaintiff the election of using replacement cost as the measure of loss.¹³

The rule of diminution in value as the measure of permanent damage to real estate was reinstated, however, in 1962 in *North Central Gas Co. v. Bloem*.¹⁴ Although the fact situation was almost identical to that of the *Phelps* case, the *Phelps*¹⁵ rule of replacement cost was not used. Instead the court cited the *Hudson*¹⁶ case as a precedent and restated the rule that the measure of damage for permanent injury to real property, repairable only at great expense, is the difference between the value of the property immediately before

10. *Town Council of Town of Hudson v. Ladd*, *supra* note 8.

11. 66 Wyo. 33, 204 P.2d 179 (1949).

12. *Id.* at 65, 204 P.2d at 191, citing *Shikany v. Salt Creek Transp. Co.*, 48 Wyo. 196, 45 P.2d 645 (1935).

13. RESTATEMENT, TORTS § 929 (1939) states that the plaintiff may elect either diminution in value or replacement cost.

14. 376 P.2d 382 (Wyo. 1962).

15. *Phelps v. Woodward Constr. Co.*, *supra* note 11.

16. *Town Council of Town of Hudson v. Ladd*, *supra* note 8.

the injury and the value immediately after the injury.¹⁷ The evidence of value introduced was the value of the lot and house before destruction, \$12,500.00, the value of the lot alone, \$1,000.00, and the salvage value of the house after the damage, \$400.00, which is some indication that the court used the principle as set forth in the opinion in determining the adequacy of damages even though the award of \$10,500.00 was \$600.00 less than that which would have been obtained by using the precise formula.

Rather than bind themselves to an ironclad rule, the Wyoming Supreme Court stated, in conclusion, that the primary objective is to determine the loss and whatever rule is best suited to the purpose should be adopted.¹⁸ Generally, however, it appears that a well accepted measure of permanent damage to real property is the diminution of value of the property due to the injury.

DAMAGES TO FIXTURES

Closely akin to measuring damages to real property is the measure of damage to fixtures. What is to be classified as a fixture is in itself a controversial topic, but in the field of damages a fixture is generally considered to be that which has become an accessory to the real estate and part and parcel of it.¹⁹ Fixtures fall into the class of "severable" property. Usually when severable property is removed, damaged or destroyed, the value of the item itself is pertinent to the measure of damages.²⁰ When the property damaged or destroyed has a distinct value the measure of damage is not controlled by the value of the land, except that the measure of damage may not exceed the value of the land.²¹

Wyoming's rule for fixing the measure of damages to fixtures or property with a "distinct" value was set forth

17. *North Central Gas Co. v. Bloem*, *supra* note 14, at 385. The "before and after" method of measuring permanent injury to real estate is applicable in the majority of states. 22 *Am. Jur.2d Damages* § 134 (1965). For cases see *Annot.*, 49 *A.L.R.2d* 253, 260 (1965).

18. *North Central Gas Co. v. Bloem*, *supra* note 14, citing *Slane v. Curtis*, 41 *Wyo.* 402, 286 *Pac.* 372 (1930).

19. *Annot.*, 69 *A.L.R.* 914 (1930).

20. *OLECK*, *op. cit. supra* note 2, at § 211 (1961).

21. *Reed v. Mercer County Fiscal Ct.*, 220 *Ky.* 646, 295 *S.W.* 995, 54 *A.L.R.* 1275 (1927).

authoritatively in *Slane v. Curtis*,²² decided in 1930. A landlord brought suit to enjoin removal of windows, doors, wiring and other fixtures from a theater and sought damages for the value of those fixtures removed.

As to the argument for damages the court rejected the rule measuring damages by the diminution in value of the real estate, as was used in *Town Council of Town of Hudson v. Ladd*²³ and *North Central Gas Co. v. Bloem*²⁴ for the measure of permanent damage. The court held that if the fixtures have a separate value apart from the realty to which they are attached, the loss may be more readily determined by fixing separate values.²⁵ This rule of severability of property in measuring damage to fixtures²⁶ is not, however, really inconsistent with the rules governing damage to real property as set forth in the *Hudson* and *Northern Gas* cases. These rules allow for "severability" or replacement cost if repairable at not great expense. The court cited 4 Sutherland, Damages 2967 (3d ed. 1904) as authority. The citation referred to the severability rule as applied to buildings, but the court stated that what is true of buildings is true of fixtures.²⁷ From the foregoing it can be seen that there is no clear rule as to what type of structure or what value thereof will require use of the severability rule rather than the diminution in value rule. It appears that the value of the item destroyed would be the best guide as to which rule would best be accepted. If the value of the building exceeds the value of the property upon which it is standing it seems that the diminution rule should definitely be applied. Remembering the departure from this guideline in the *Phelps* case, however, this cannot be considered an entirely safe conclusion.

Under modern rules of pleading, perhaps both rules should be considered and evidence introduced accordingly. Although there are no cases in point, it is highly probable that to measure damages to an outbuilding or other structure

22. *Slane v. Curtis*, 41 Wyo. 402, 286 Pac. 372, 69 A.L.R. 906 (1930).

23. *Town Council of Town of Hudson v. Ladd*, *supra* note 8.

24. *North Central Gas Co. v. Bloem*, *supra* note 14.

25. *Slane v. Curtis*, *supra* note 22.

26. See OLECK, *op. cit.* *supra* note 2, at §§ 208, 210 and 211 (1961).

27. *Slane v. Curtis*, *supra* note 22.

of similar nature, the value of the "fixture" as a separate entity from the real property would be well accepted.

Assuming that the item destroyed or injured is severable, the problem still remains as to the measure of damage to be used. In *Slane v. Curtis*,²⁸ the Wyoming Supreme Court held that the value of the property destroyed or cost of restoring or replacing such property could be the proper measure of damage. The court further stated, however, that not only the cost of repair or restoration, but also the depreciation, use and age of the item must be taken into consideration. This measure differs slightly from the mere replacement or repair cost which is used in some jurisdictions.²⁹ This difference was pointed out by the court when it stated that the fixture may have a greater value as attached and therefore its value *in place* must be considered.³⁰ Although it is not clear, presumably the *in place* value would take into account any cost of installation and any value "permanency" may have to the owner. The rule also eliminates second-hand value or market value as the measure.

As confusing and unsettled as the rule of damage to fixtures may be, it does follow the majority rule.³¹ The rule seems to be that damage to fixtures will not be measured by diminution in the value of the real property: the value of the fixture as attached in its then present condition shall be used in determining loss. Original cost, cost of restoration or replacement, depreciation, use and age are all to be considered in fixing the damage.

DAMAGE TO CROPS

Another area related to that of damage to fixtures, but necessarily imposing different standards due to the constantly changing nature of the property, is damage to crops. In *Hatch Bros. Co. v. Black*³² the Wyoming Supreme Court

28. *Ibid.*

29. Annot., 69 A.L.R. 914 (1930): *Kayen v. City Nat. Bank*, 107 Neb. 274, 185 N.W. 413 (1921).

30. *Slane v. Curtis*, *supra* note 22.

31. The weight of authority favors the use of value of the fixtures in their condition at the time of removal or destruction. Annot., 69 A.L.R. 914 (1930); Annot., 54 A.L.R. 1278 (1927).

32. 25 Wyo. 109, 121, 165 Pac. 518 (1917).

stated a simple rule for the determination of damages for the destruction of a crop. The court held that the amount of damage was to be determined by the fair market value of the crop at the time and place of injury or destruction. In the case of a crop such as pasture, the value may be its replacement cost.³³ This simple rule, however, is insufficient if the crop is not mature when injured or destroyed. The crop may have little or no market value at an early stage of development. This situation arose in *Wyoming Cent. Irr. Co. v. La Porte*³⁴ where there was a partial destruction or injury to a crop because of insufficient irrigation water throughout the season. The lower court's instruction was that the damage measurement should be the difference between what the crop would have been worth had it matured and what the actual profits were minus the cost of harvesting and marketing that additional portion. Essentially, this was an instruction to award loss of expected profits. The award was affirmed without approving or disapproving the lower court's instructions.

Two years later in *Bader v. Mills*³⁵ an identical situation arose, *i.e.*, partial destruction of a crop due to lack of irrigation water. In the lower court the defendant asked for an instruction comparable to that used in the *Hatch*³⁶ case, *i.e.*, market value at the time and place of injury. It was rejected and the instruction given was essentially the same as that used in the *La Porte*³⁷ case: the damage should be the difference of value between what the crop did produce and what it *could* have produced. The Wyoming Supreme Court affirmed the instruction, but was disturbed by the use of the word "could." The court stated it should be made to appear that the crop would have been reasonably certain of maturity, and once this was shown, maturity value could be taken into consideration. The court, however, indicated they were not determining the sole measure of damages, but only determining whether the lower court's instruction was "substantially"

33. *Henderson v. Coleman*, 19 Wyo. 183, 115 Pac. 439 (1911).

34. 26 Wyo. 249, 182 Pac. 485 (1919).

35. 28 Wyo. 191, 210 Pac. 1012 (1921).

36. *Hatch Bros. Co. v. Black*, *supra* note 32.

37. *Wyoming Cent. Irr. Co. v. La Porte*, *supra* note 34.

correct.³⁸ Although not set out as a holding, the court did indicate that loss of expected profits could be used as part of the measure of damage.

In *Redwine v. Fitzburgh*,³⁹ decided in 1958, it was firmly established that expected profits could be included in the measure of damage for injury or destruction of a crop. Plaintiff's crop was totally destroyed at a very immature stage. The award was the amount of seed and labor, and it was affirmed. The court went further than necessary in affirming the award and held that the use of market value at the time and place of destruction as set forth in the *Hatch*⁴⁰ case was inapplicable because there was no ascertainable value of the crop at the time of destruction. The court went on to state that there was no reason why the spectrum of damages should not include loss of profits, even for the destruction of a crop at such an immature stage.⁴¹

It appears from the above cases that the market value of crops will only be used as a sole measure of damage if the crop is mature. If the crop is in any other stage the market value at time of destruction is not to be used, but loss of expected profits is the proper measure of damages.

SUMMARY

Even with the paucity of reported Wyoming cases in point and the lack of precise appellate opinions on the measure of damages to compensate for actual injury to real property, a few basic rules can be stated. First, for permanent damage to real estate, the measure of damages is usually the difference between the market value before and after the injury.⁴² Second, for damages to fixtures, the measure of damages is the *actual* value of the fixture *in place*.⁴³ Third, for damage to mature crops, the market value is to

38. *Bader v. Mills*, *supra* note 35.

39. 78 Wyo. 407, 329 P.2d 257, 72 A.L.R.2d 664 (1958).

40. *Hatch Bros. Co. v. Black*, *supra* note 32.

41. This seems to be the generally accepted rule in the majority of the states on the theory that mere value in place would not compensate for loss. Annot., 87 A.L.R.2d 235, 243 (1963). A few cases have allowed the use of the value of land before and after the destruction of the crop. *Cf. Superior Oil Co. v. Griffen*, 357 P.2d 987, 87 A.L.R.2d 224 (Okla. 1960).

42. *Cf. North Central Gas Co. v. Bloem*, 376 P.2d 382 (Wyo. 1962).

43. *Cf. Slane v. Curtis*, 41 Wyo. 402, 286 Pac. 372, 69 A.L.R. 906 (1930).

be used to measure the 'damage. If the crop is immature, loss of expected profits can be used to measure the damages.⁴⁴

Although the word "rule" has been used throughout, a better reference would have been "guideline." These guidelines for measuring damage are not absolute, but are as flexible as necessary in order to reach the ultimate goal of compensating for the actual loss sustained.⁴⁵

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44. *Cf.* *Redwine v. Fitzburgh Co.*, 78 Wyo. 407, 329 P.2d 257, 72 A.L.R.2d 664 (1958).

45. *OLECK, op. cit. supra* note 2, at § 208.