

1804 PROPERTY: DAMAGE TO REPAIRABLE PROPERTY

When property, such as (type), has been damaged and can be repaired, the loss to the owner is determined by one of two measures of damage. The first measure is the "Fair Market Value" rule. This rule measures the difference between the fair market value of the property immediately before the _____ and its fair market value immediately after the _____. "Fair market value" is the amount property will sell for where the owner is willing but not required to sell the property to a buyer willing but not required to buy the property.

The second measure of damage is the "Cost of Repair" rule. If the property can be restored to its condition before the _____, compensation to the owner is measured by the reasonable cost of the repairs necessary to restore the property to its prior condition. The measure under this second rule is the reasonable cost to restore the property to its former condition, not what may have been the actual cost of repair. [**Note: In a case involving loss of value following repairs, give the following:** If repairs (will) (did) not restore the (property) to its pre-injury value and (plaintiff) proves that (he) (she) (will be) (has been) harmed by a loss in value, then (plaintiff) is entitled to damages for this loss in value and you should add the loss in value to the cost of repairs in determining the total loss to (plaintiff). [The total damages cannot exceed the pre-injury fair market value of the (property.)]]

If the evidence allows you to apply both of these rules, and if in applying them you arrive at two different figures, your answer to question ____ should be the lower of the two figures.

[If the (property) had no market value at the time of the _____, you should apply the cost of repair rule. Your answer to question ____ should be the reasonable cost of the repairs necessary to restore the property to its condition just prior to the _____.]

COMMENT

This instruction and comment were approved in 1977 and revised in 1997 and 2010.

Real Property and Personal Property. The committee concludes that the rule of damages explained in this instruction applies to both destroyed real property and personal property. See Hellenbrand v. Hilliard, 2004 WI App 151, 275 Wis.2d 741, 687 N.W.2d 37.

A. WHERE PROPERTY HAS MARKET VALUE

If there is evidence both as to cost of restoration and as to diminution in market value, use paragraphs one, two, and three.

Where property is not destroyed, one measure of damages is the difference between the value before and the value after; a second measure is what it would reasonably cost to put the property in such condition as it was before the _____ – not the actual cost of repair. Chapleau v. Manhattan Oil Co., 178 Wis. 545, 190 N.W. 361 (1922); Vetter v. Rein, 203 Wis. 499, 234 N.W. 712 (1931); Steel v. Ritter, 16 Wis.2d 281, 114 N.W.2d 436 (1962).

The correct rule in case of partial loss is either diminution in value of the property damaged or the cost of restoration. The plaintiff may introduce evidence as to either measure. If the defendant wants another theory applied, it is his or her duty to offer evidence on it. Engel v. Dunn County, 273 Wis. 218, 77 N.W.2d 408 (1956).

The owner of a damaged building may recover the entire cost of restoration to its former condition but not in excess of the diminution in value. Zindell v. Central Mut. Ins. Co., 222 Wis. 575, 269 N.W. 327 (1936).

The court received evidence of the cost of repairs of the building and the diminution in value and adopted the lesser of the two. This was the correct rule. Hickman v. Wellauer, 169 Wis.18, 28, 171 N.W. 635 (1919).

The plaintiff offered proof as to the cost of repairs. The defendant offered no proof. "This state of the evidence furnished the Circuit Court but one basis on which to calculate the damages, namely, the cost of repairs." This was not error. Mueller Real Estate Inv. Co. v. Cohen, 158 Wis. 461, 149 N.W. 154 (1914).

Where only a portion of a machine is damaged and repairs are necessary before any of it can be used, the reasonable cost or value of the repairs is the proper measure of damages. The Mueller case and the Zindell case are cited. L. L. Richards Mach. Co. v. McNamara Express Co., 7 Wis.2d 613, 97 N.W.2d 396 (1959).

Where a luxury item is being taken into a special market for resale and is damaged in transit, the loss of market value, rather than the cost of repair, is the proper measure of damages. Cruis Along Boats, Inc., v. Standard Steel Prods. Mfg. Co., 22 Wis.2d 403, 123 N.W.2d 85 (1964).

B. WHERE PROPERTY HAS NO MARKET VALUE

If there is a partial loss, but the property has no ascertainable market value, use paragraph four only with appropriate introduction. The measure of damages is the reasonable cost of making such repairs as will restore the property to its former condition. Nashban Barrel & Container Co. v. Parsons Trucking Co., 49 Wis.2d 591, 182 N.W.2d 448 (1971).

C. WHERE PROPERTY HAS NO LOCAL MARKET VALUE

The fact that no market existed in the place of use is immaterial if a market existed nearby; the jury in figuring the damages should have allowed the market value as it actually existed at the time of destruction, plus the cost of transportation from the market to the place of use. Weber v. Wisconsin Power and Light Co., 215 Wis. 480, 255 N.W. 261 (1934).

In such a situation, the following paragraph may be used:

If the property under consideration had no market value at the time and place where it was damaged but had a market value at a location within a reasonable distance away, you will consider such market value, together with the costs of transportation from such location to the place of damage, in determining the difference between the market value of the property before and the market value after the damage occurred.

D. DIMINISHED VALUE AFTER REPAIRS

If repairs to damaged property have not restored the property to its preinjury value, the plaintiff is entitled to damages for the lost value in addition to damages for the reasonable costs to repair the property. Hellenbrand v. Hilliard, 2004 WI App 151, 275 Wis. 2d 741. This concept was added to the instruction in 2010 when the bracketed language in the second paragraph was added. This note assumes that the cost of repairs and diminished value after repair are less than the diminishment in fair market value after the accident.