

**1806 PROPERTY: DAMAGE TO A GROWING CROP**

Question \_\_ asks what amount will reasonably compensate (plaintiff) for the damage to (his) (her) (type of crop).

Under normal conditions, a growing crop will mature and be sold for a certain price. When a growing crop is damaged, reasonable compensation to the owner is measured by the difference between the probable market value the original crop would have brought at maturity if it had not been damaged and the amount brought by the actual crop. From this difference, however, you should deduct the expenses the (plaintiff) saved by not having to cultivate, harvest, and market the damaged portion of the crop.

In determining the probable market value of (plaintiff's) original crop, you should consider the crop production figures on the land in other years and the average of these production figures. You may also consider the market value of undamaged (type of crop) from other fields in the same area in the year (plaintiff)'s crop was damaged.

In comparing the damage crop with crop projection figures in other years or crop production from other fields in the area in the same year, you may consider variations in weather conditions, variations in planting and cultivation methods, and any other factors which might affect production.

The determination of damages to growing crops cannot always be made with mathematical precision; you should award as damages, however, an amount which will fairly compensate (plaintiff) for the loss.

**COMMENT**

This instruction and comment were approved by the Committee in 1981 and revised in 1997.

Cutler Cranberry Co. v. Oakdale Elec. Coop., 78 Wis.2d 222, 254 N.W.2d 234 (1977); First Wisconsin Land Corp. v. Bechtel Corp., 70 Wis.2d 455, 235 N.W.2d 288 (1975); Peacock v. Wisconsin Zinc Co., 177 Wis. 510, 188 N.W. 641 (1922). See also Strauss Bros. Packing Co. v. American Ins. Co., 98 Wis.2d 706, 298 N.W.2d 108 (Ct. App. 1980); Kolbeck v. Rural Mut. Ins. Co., 70 Wis.2d 655, 235 N.W.2d 466 (1975).

The first sentence of the instruction is taken from the decision in Peacock, *supra* at 514. In its decision, the court stated that the valuation of damages to growing crops must recognize that "a growing crop as such is valuable mainly by reason of potentialities," and that "its present value is therefore determined very largely by reference to that fact."

Because of this potential for increase in value, the use of replacement cost for the plants at the time of injury to measure the damage is not appropriate. In this regard, animal damage cases provide an excellent analogy. In fact, a court of appeals in Strauss Bros. Packing Co., *supra* at 708, stated that growing crops closely parallel growing livestock in that "each has a reasonable potential for increase in value." As to using replacement cost to value damage to animals, the supreme court has stated:

. . . the proper measurement of value for animals is their replacement cost reflected in the market value at time of loss, unless they are expected to show a marked increase in the future (pelting minks for example). . . .

Kolbeck, *supra* at 709; see also Brunette v. Slezewski, 34 Wis.2d 313, 149 N.W.2d 578 (1967).

In Brunette, the court distinguished, for purposes of measuring damages, between mink being raised as pelters and mink being raised as breeders. The court considered whether damages should be measured on the market value of mink at pelting age or whether such damages would be computed from replacement cost at the time of the wrong. The court held that market value should be based upon the value at pelting age because pelters have a "marked increase in market value." Conversely, because the value of a breeder is more stable, the court said damage from loss of a breeder is measured by the reasonable cost of replacing the mink with a comparable animal. By analogy, therefore, if a crop is comprised of plants which will have a relatively stable value for a period of time, then the replacement cost method would be more appropriate for measuring damages to that crop.

Evidence of crop production in other years is not too speculative or conjectural to be admissible, even though growing conditions vary from year to year. The Wisconsin Supreme Court has stated that differences between years in weather conditions and other factors which impact on productivity do not go to the admissibility of evidence of crop production in other years but only to its weight and sufficiency. Cutler, *supra* at 231. This same evidentiary treatment applies to evidence which seeks to compare the yield of the injured crop with the yield of crops on similar lands in the same locality during the same year.

Although damages must be proven with reasonable certainty, there is no absolute requirement of mathematical precision in measuring crop damage. Where the fact of damages is clear and certain, but there is

uncertainty as to the exact amount of damages, the trier of fact has discretion to fix a reasonable amount. Cutler, supra at 235.

For a discussion of the rule of certainty in determining damages, see Town of Fifield v. State Farm Ins. Co., 119 Wis.2d 220, 349 N.W.2d 684 (1984). In that decision, the court said, at page 230, that even where the rule of certainty is applicable as an ideal in terms of a device to control juries, the following modifications are applicable:

- (a) If the fact of damage is proved with certainty, the extent or amount may be left to reasonable inference.
- (b) Where the defendant's wrong has caused the difficulty of proof of damage, he or she cannot complain of the resulting uncertainty.
- (c) Mere difficulty in ascertaining the amount of damage is not fatal.
- (d) Mathematical precision in fixing the exact amount is not required.
- (e) If the best evidence of the damage of which the situation admits is furnished, this is sufficient. McCormick, Damages, § 27, p.101.

It is also important that the trier of fact consider the cost savings which inure to the plaintiff by reason of being relieved of raising the damaged crops to maturity. Bechtel, supra at 463-64; Strauss Bros. Packing Co., supra at 709-10.

This rule for measuring damages may not apply where there is permanent destruction to perennial plants. See 21 Am. Jur. 2d Crops § 80 (1979). For timber loss, see Miller v. Neale, 137 Wis. 426, 119 N.W. 94 (1909).

For the destruction of ornamental trees, see Otto v. Cornell, 119 Wis.2d 4, 349 N.W.2d 703 (Ct. App. 1984); Gilman v. Brown, 115 Wis. 1, 91 N.W. 227 (1902).

There is no case law in Wisconsin on the specific obligation of a farmer to mitigate damages following an injury to a growing crop. Cases in other jurisdictions hold that a replanting must be undertaken where practical. 21 Am. Jur.2d Crops § 81; 20 Proof of Facts 2d, § 15, n. 80 (1979). In such a case, the defendant would be entitled to have credited to his or her liability the amount of any net gain realized from the second crop. In Wisconsin, however, courts have refused to force an injured party to mitigate losses, if "the effort, risk, sacrifice, or expense which the injured party must incur to avoid or minimize the loss or injury is such that a reasonable person under the circumstances might decline it." Kuhlman, Inc. v. G. Heileman Brewing Co., Inc., 83 Wis.2d 749, 266 N.W.2d 382 (1978); Sprecher v. Weston's Bar, Inc., 78 Wis.2d 26, 44-49, 253 N.W.2d 493 (1977).

**Livestock.** The basic measure of damages for the destruction of livestock is the animal's market value, determined by replacement cost, with an appropriate reduction for any salvage value. Schrubbe v. Peninsula Veterinary Service, 204 Wis.2d 37, 552 N.W.2d 634 (Ct. App. 1996), citing Rosche v. Wayne Feed Division, 152 Wis.2d 78, 447 N.W. 2d 94 (Ct. App. 1989). In Rosche, the court specifically addressed the issue whether the owner was entitled to damages for the loss of their offspring anticipated at the time of their death. The court disallowed damages for the loss of future offspring and limited the damages to the replacement cost at the time of their death less any salvage value. In Schrubbe the court did not address the issue whether the market value of the calves which died should be calculated as of the date it was reasonable to replace the deceased calves. It could be argued the court said in a footnote that the market value of the plaintiff's calves should be calculated at the time it was reasonable to replace them, less the cost to raise the calves to that point. In Schrubbe the trial ©1997, Regents, Univ. of Wis.

court declared that the appropriate measure of damages for the deaths of dairy calves was the market replacement value on their date of death, less any salvage value. The plaintiff contended that because he was financially unable to replace the calves on the date of their death, he was entitled to recover for anticipated lost milk profits the calves ultimately would have produced. The court rejected this argument. The court said the reasons underlying the general rule of damages are at least three fold. First, the market value of replacement animals is based in part upon their expected future productivity. Because future productivity is considered in assessing market value of livestock, additional recovery for the expected future productivity of the livestock would duplicate damages. Once the owner acquires a replacement animal, the loss of future productivity is eliminated. If future productivity were allowed together with the replacement cost, the owner would be twice compensated for the future productivity of the animal. The court in Schrubbe also held that the measure of damages stated in Rosche is also designed to minimize damages and avoid economic waste. The rule excludes recovery for damages that should have been avoided and deemed economically wasteful. By acquiring replacement animals, livestock productivity will be maintained and the damages measured in a way that will not exceed the economic potential of the lost property. Finally, the court in Schrubbe said the rule of damages set forth in Rosche reflects the fact that an animal's value is readily ascertainable and its replacement is readily available in the market. The court in Schrubbe recognized that the rule of damages reflected by Rosche was limited to livestock that is not producing income at the time of the loss. If the plaintiff lost milk-producing cows, some amount of milk production would be lost from the time of death to the time it was reasonable to replace the cows. Although the time to replace may be brief because of the availability of comparable animals in the market, the owner would be entitled nevertheless to the loss of use of the animal during the reasonable time necessary to replace it.