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MEASURING DAMAGES FOR TORT HARMS TO REALTY

For many centuries man's interest in having land free from interference with his exclusive possession and use has been recognized. The rights protected involve not only the surface but the improvements, crops, minerals, air space above the land, and subterranean areas.

The tort rule generally stated is that damages will be that amount of compensation which, as nearly as possible, restores the injured party to his original position.\(^1\) The purposes of damages listed by the Restatement of Torts are: "(a) to give compensation, indemnity or restitution for harms; (b) to settle disputes as to rights; [and] (c) to punish wrongdoers."\(^2\) Nominal damages are proper where the injury to realty is trivial or where damages have not been established with certainty.\(^3\) Punitive damages are recoverable in addition to nominal or compensatory damages where conduct is outrageous or unreasonable.\(^4\)

While just compensation is the broad purpose of damages, the method of measuring such compensation varies among jurisdictions. Factors considered by the courts when choosing a particular measure of damages are the type of injury, the specific land or appurtenance involved and the degree of permanency of the injury. Questions to be considered are: was the injury permanent or temporary; will the injury recur periodically; was the injury innocently or willfully caused; can the injury be repaired at a reasonable cost? In general the rule for the measure of permanent injury to realty is the diminution in market value,\(^5\) often stated as the difference in the market value before and after the injury. For temporary injury the general rule is the diminution in the rental value, if rented, or the diminution in the use value if occupied by the owner. For repairable injuries, the cost of restoration may be applied if it is reasonable in relation to the diminished value of the property.

TRESPASS AND NUISANCE

Many of the harms to realty fall within the tort theories of trespass and nuisance. Historically the common law actions of trespass and case were distinguished upon directness and indirectness of the injury.\(^6\)

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\(^1\) Hughett v. Caldwell County, 313 Ky 85, 230 S.W.2d 92 (1950).
\(^2\) Restatement, Torts §901(a)-(c) (1939).
\(^3\) Id. §907.
\(^4\) Id. §908.
\(^5\) III Sedgwick, Damages §§932, 947 (9th ed. 1920).
\(^6\) Prosser, Torts §72 (2d ed. 1955).
e.g., boulders rolled upon another's land constituted trespass; boulders rolled into a stream which caused water to flood another's land was a type of wrong within the scope of the action of case. Trespass and nuisance have succeeded the old common law actions with trespass involving rights in the peaceful and exclusive possession of realty and nuisance relating to interests in the use and enjoyment of land.  

Although there is a tendency for actions in the nature of trespass and nuisance to overlap, one practical difference relates to the statute of limitations. The statute begins to run for a trespass at the time of the invasion while the period of limitations may not begin to run for a nuisance invasion until substantial harm has resulted. This problem was illustrated in two recent Oregon cases where airborne matter from the defendant's aluminum plant had sifted intermittently for eight years upon the land of two plaintiffs. The statute of limitations was six years for trespass and two years for nuisance. The plaintiffs successfully sought to recover under the theory of trespass because of the longer statute of limitations. Damages were recovered for the loss of the use of the land in addition to the deterioration of the land.

A completed trespass or a permanent nuisance justifies full recovery for past as well as future injury to the property. Damages are generally measured by the diminution in market value of the property. An 1880 Iowa case allowed this recovery where the defendant railroad diverted a stream which had silted a fill to support its track. The Iowa court held the diversion of the stream to be a permanent injury for which past, present and future damages were recoverable. The Restatement of Torts provides that damages should include compensation for previous injuries, the diminished value of land due to the continuance of the invasion and the reasonable cost to the plaintiff of avoiding future invasions.

Recovery of damages for temporary injuries caused by continuing trespasses or continuing nuisances may be limited to compensation for harms inflicted before the commencement of the action. The injured party may not desire future damages because further recovery is barred, in effect giving the tortfeasor an easement. For continuing trespass, the Restatement of Torts permits the possessor to elect either a succession of actions or a single action treating the con-

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7 I Harper and James, Torts §1.1 (1956).
10 I Sedgwick, Damages §§92, 95 (9th ed. 1920).
12 Restatement, Torts §930 (1939).
13 I Sedgwick, Damages §§91, 92 (9th ed. 1920).
The depreciated rental value or the diminished use value are the measures of damages used for the continuing trespass or nuisance. A Kentucky case presents an illustrative factual situation: the defendant cut timber and erected a building to house dynamite on the plaintiff's property. The court rejected defense counsel's argument that this was a permanent nuisance and indicated that recovery should be based on the theory of a temporary injury, measuring the damages by the diminished rental or use value for a continuing trespass. Recovery on the theory of a permanent nuisance would effectively have granted the defendant an easement in the plaintiff's property. The Kentucky Court of Appeals also has recognized the general rule of damages for permanent injuries in a case where soot and smoke from a defendant's plant sifted upon the plaintiff's property, causing injury to plants and buildings. The proper measure of damages was held to be the difference between the market value of the land before and after the soot and smoke had settled rather than the diminished value before and after the installation of the plant.

**IMPROVEMENTS**

Buildings, fences and other appurtenances of the land are often considered a part of the realty because of their attachment to the land. Proper considerations in measuring injuries to improvements include the degree of destruction and the cost of restoration in relation to the value of the injured land. If the invasion or interference is complete, the measure may be the diminished land value. For partial or temporary injury the landowner may recover damages based on restoration costs, diminished use value or both.

The Kentucky rule was enunciated in a 1906 case, where fire, caused by smouldering cinders negligently hurled from the defendant's locomotive, destroyed three houses.

Market value is not always the measure of damage to property. Compensation is the bottom principle of the law of damages. To restore the party injured, as near as may be, to his former position

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14 Restatement, Torts §161, comment b (1934).
19 For a further statement of the Kentucky rules, see Kentucky-West Virginia Gas Co. v. Laferty, 174 F.2d 848 (6th Cir. 1949); Kentucky-Ohio Gas Co. v. Bowling, 264 Ky. 470, 95 S.W.2d 1 (1936).
20 McCormick, Damages §126 (1935).
is the purpose of allowing the money equivalent of his property which has been taken, injured, or destroyed. If the thing taken or destroyed can be replaced in the market, then obviously that sum of money which will buy another like it will repair the injury. So, if property is injured, but not destroyed, ordinarily the measure of damages, where the property can be repaired so as to be as it was before, is that sum that will restore the former condition. If the injury is such that it cannot be repaired by bestowing something upon, or adding to, the injured property, then the measure of damages would be the value of the property just before its injury and its market value afterward.22

If a building or improvement is restorable, should the injured party be made whole regardless of cost? The Kentucky Court of Appeals has stated:

Of course the injured party may not make a profit out of the injury and is not entitled to have his property restored to its former condition if this is impracticable or cannot be done at a reasonable cost. On the other hand, he is entitled to the improvements he has made and to enjoy them according to his own wishes, even though they may be regarded as fanciful and aesthetic rather than practical. A wrongdoer cannot destroy property and substitute another article of his own choosing in lieu thereof and require the owner to accept it, but upon such destruction should be required to replace the damaged article in the condition it was before the injury, if this can be done at reasonable cost and is practicable. (Emphasis added.)23

The defendant in that case had removed the plaintiff’s stone fence and had substituted a wire fence. The court held that the instructions measuring damages on the relative merits of a stone fence and wire fence as an enclosure were erroneous. The proper consideration for the jury was the present cost of constructing a stone fence less depreciation which the old fence had suffered by reason of age and use. However, recoveries for a building damaged beyond repair by a streetcar24 and a barn destroyed by fire caused by a locomotive’s cinders25 were measured by the difference in value before and after the injury.

Crops

Frequently, litigation involves destruction of or injury to growing crops. Because immature crops have no ascertainable market value, the measure of damages generally applied is the rental value of the land.26 However, if the crop has grown to a point where a reasonable

22 Id. at 154, 97 S.W at 728.
23 Reed v. Mercer County Fiscal Court, 220 Ky. 646, 650, 295 S.W 995, 996 (1927).
24 Kentucky Traction & Terminal Co. v. Baun, 161 Ky. 44, 170 S.W 499 (1914).
26 E.g., Faires v. Dupree, 210 Ark. 797, 197 S.W.2d 735 (1946).
production can be estimated, then the measure of damages is the crop's market value.\(^{27}\)

The measure of damages for destruction of growing crops differs from injury to crops. The Kentucky Court of Appeals held that an instruction for recovery based on the expected yield multiplied by the market price of corn was erroneous and stated the proper measure to be "the value of crops at the time of the loss, which is estimated by determining the market value at the time of maturity and subtracting therefrom the cost of tilling, harvesting, and marketing."\(^{28}\)

When the injury is partial destruction, the measure may be the diminished value of the crop as it stands after the injury\(^{29}\). The Kentucky Court of Appeals has approved this measure where a landlord's representatives partially destroyed a tenant's crops and prevented him from harvesting the crops.\(^{30}\) For injury without destruction, the proper measure was held to be the difference between the value of the crop before and after the injury.\(^{31}\)

Perennials, such as alfalfa and sod crops, may sustain injury beyond one harvest year. Recovery may be based on either the diminution of land value, similar to other permanent injury relief, or the cost of reseeding and re-establishing the crop destroyed with compensation for temporary loss of the use of the land.\(^{32}\) The proper recovery in Kentucky for destruction of a pasture crop was held to be the cost of reseeding plus rental value until the pasture was restored.\(^{33}\) The Kentucky measure is proper where a valuable or productive crop is involved. However, where a valuable or productive crop is not involved, such as in the situation of weed cover, the better measure would be the diminution of land value.

**Trees**

In general two measures may be used to ascertain the damages for harms to trees and timber. These are: (1) the diminished value of the land, or (2) the loss of the value of the trees considered separately from the land.\(^{34}\)

Although the general rule for measuring injury to shade and fruit trees has been the diminished land value, a recent opinion approved an instruction that the restoration cost could be considered by the

\(^{27}\) III Sedgwick, Damages § 937 (9th ed. 1920).
\(^{28}\) Commonwealth v. Masden, 235 Ky 861, 867, 175 S.W.2d 1004, 1008 (1943).
\(^{29}\) McCormick, Damages §126 (1935).
\(^{30}\) Long s Exrs v. Bischoff, 277 Ky. 842, 127 S.W.2d 851 (1939).
\(^{31}\) Ibid., cf., Miller v. Sears, 255 S.W.2d 643 (Ky. 1952).
\(^{32}\) III Sedgwick, Damages §937a (9th ed. 1920).
\(^{33}\) Louisville & N. R.R. v. Jones, 222 Ky. 531, 1 S.W.2d 972 (1928).
\(^{34}\) III Sedgwick, Damages §933 (9th ed. 1920).
jury even though it might exceed the actual value of the lots where the trees had been destroyed. The defendant admitted liability for destruction of the shade trees but contended the proper measure should be the diminished land value. The court held that it was proper to admit a nurseryman's opinion on the replacement cost if the trees could be replaced. However, the trees could not be replaced. This witness then testified that the best way to restore the property would be to reseed and replant at an estimated cost exceeding the value of the lots. Although the verdict was not as high as the witness's estimate, permitting damages slightly exceeding the land value compensated the plaintiff without unduly penalizing the defendant, whose conduct approached wantonness. In order to reflect more accurately the division of damages in cases involving wanton conduct, punitive damages should be determined separately rather than allowing compensatory damages to exceed the diminished value of the land.

Where trees may be separated from the land, recovery may be granted for the value of the trees apart from the land. In a case involving the destruction of an orchard, the Kentucky Court of Appeals allowed damages in terms of the value of the trees apart from the land and announced its broad policy in this area.

The owner of an estate is entitled to have his estate in such condition as he wants it, and to keep upon it such things as he pleases. An aviary, a skating rink, a dancing pavilion, or the like, might in the judgment of the average person add very little to the value of an estate of land and yet these things might represent a considerable investment of money. An orchard cannot be grown in a day. Yet there are not a few persons who would think that the land without the fruit trees would be worth more than with them. Still the person who wants an orchard, and has invested his money in it, cannot be deprived of his property by the act of a wrongdoer, and left without remedy for loss sustained, simply because his land for other purposes or to other people might be worth as much without the orchard as with it.

Measures of damages differ where trees grown for timber are injured or destroyed. If destroyed, the recovery may be either the market value of the timber separated from the land or the difference in the value of the land before and after the timber is removed. The diminished value of the land as a measure is particularly applicable for destruction of small, immature trees which have no present value except as related to the land.

37 McCormick, Damages §126 (1935).
38 Kentucky Stave Co. v. Page, 125 S.W. 170 (Ky. 1910).
For conversion of mature timber the measure of recovery is dependent upon the innocent or willful nature of the taking. Where the taking is innocent the measure is the value of the standing timber, i.e., stumpage value. However, some courts permit recovery of the value of the timber after cutting. Where the taking is willful the measure is the manufactured value, without deduction for the cost of cutting, hauling and processing.

In Kentucky, punitive damages and statutory restraints apply for violations of timber rights. Felonious cutting of timber worth over twenty dollars can subject a violator without color of title to a one year prison sentence; for cutting timber worth less than twenty dollars the penalty may be a fine of not more than one hundred dollars nor less than fifty dollars or confinement in prison up to six months or both. Punitive damages for willful cutting are recognized by statute.

MINERALS

The measure of damages for removal of minerals is determined by the innocent or willful nature of the taking. For innocent trespass and removal, the measure in Kentucky is the value of gross receipts less cost of production. For willful trespass and removal the measure is the aggregate of the gross receipts with interest, without deduction of cost of production.

The measure to be applied is critical where the mineral potential has increased the property value substantially and where, for example, a willful trespasser sinks a well or digs a mine only to discover a dry hole or coal of little or no value. Immediately, the land value decreases. Under the Kentucky rule, little more than nominal damages would be recovered. Under the rule of diminution in value, substantial damages would be recovered. The problem was presented in a Texas case where the plaintiff owned the land and a three-fourths interest in the mineral rights. Oil had been discovered on adjoining property. The defendant, whose three year lease had lapsed, drilled a dry hole on the plaintiff's property. The value of the mineral right

39 Allen v. Ferguson, 253 S.W.2d 8 (Ky. 1952).
40 United States v. McCaskill, 200 Fed. 332 (N.D. Fla. 1917).
41 United States v. Flint Lumber Co., 87 Ark. 80, 112 S.W. 217 (1908);
Tietjen v. Dobson, 170 Ga. 123, 152 S.E. 222 (1930) (dictum); Frampton & Co.
v. Saulsbury, 268 S.W.2d 25 (Ky. 1954) (dictum).
45 Delta Drilling Co. v. Arnett, 186 F. 2d 481 (6th Cir. 1950) (dictum).
46 Ibid.
before the drilling was $1,000 per acre and worthless afterward. The plaintiff recovered $1,000 per acre, the diminution in the value of the land. A contrary result was reached in a Wyoming decision where only nominal damages were recovered.\(^{48}\)

The Kentucky rule, based on gross receipts, is proper where substantial removal of minerals has resulted. However, a technical trespass revealing an absence of minerals would place the full loss on the holder of the mineral rights. If the holder intended to develop the mineral, placing the loss on him would be proper. However, in most instances, the holder intends to sell the rights, transferring the risk to the purchaser. The use of nominal damages coupled with punitive damages is a solution.

### PERSONAL INJURIES FROM HARM TO REALTY

The Restatement of Torts provides that "a trespasser on land is subject to liability for bodily harm caused to the possessor thereof or to members of his household by any act done, activity carried on or condition created by the trespasser while upon the land irrespective of whether the trespasser's conduct is such as would subject him to liability were he not a trespasser."\(^{49}\) Pennsylvania applied this rule to a case in which the defendant dug a hole on the plaintiff's land without his permission. The court held that personal injuries proximately resulting from the plaintiff's fall into the hole were compensable.\(^{50}\)

Discomfort and annoyance also may be compensable personal injuries resulting from harms to realty. In a California case, an action in trespass was brought against the owner of a cotton gin for injuries to person and property from vapors, lint and waste material from the gin.\(^{51}\) Recovery included restoration cost or the diminished market value, whichever was lower, plus such sum as would reasonably compensate the adjoining owners for discomfort and annoyance resulting from the cotton gin. To prevent "double recovery," Kentucky denies separate recovery for annoyance and discomfort.\(^{52}\) But in proving the diminished market value, it is proper to show discomfort and annoyance for assessment by the jury.\(^{53}\)

In an Alabama decision, damages were upheld for mental suf-

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\(^{48}\) Martel v. Hall Oil Co., 36 Wyo. 166, 253 Pac. 862 (1927); Comment, 36 Yale L.J. 1167 (1927); Comment, 11 Corn. L.Q. 416 (1926).

\(^{49}\) Restatement, Torts §380 (1934).


\(^{52}\) Ash v. Kentucky Util. Co., 267 S.W.2d 71 (Ky. 1954).

\(^{53}\) Kentucky-West Virginia Gas Co. v. Lafferty, 174 F.2d 848 (1949).
fering resulting from the willful cutting of two of the plaintiff's oak trees. The court stated that "when trespass is committed under circumstances of insult or contumely, mental suffering may be compensated for, when it a proximate result." This stretches the concept of recovery for harms to realty; few cases have gone this far. Kentucky has refused recovery for mental suffering where a defendant's dogs committed trespass against the plaintiff's land, crops and sheep.

OTHER CONSIDERATIONS

Interests, costs resulting from lost of time, and the expenses reasonably necessary to avert further harm are normally recoverable. However, unless a tort is intentional or reckless, the plaintiff may not recover if the consequences could have been avoided by the injured party in the exercise of due care. Simply stated, the injured party may not idly watch the injury occur and expect compensation if he could have prevented the injury.

When a plaintiff receives a benefit through a tortfeasor's conduct, the value of the benefit may be considered in mitigation of damages if it is a benefit peculiar to the interest harmed. The rule does not apply where the benefit goes to the public in general with incidental special harm to a particular interest, e.g., where a factory benefits the whole community by increasing rent and value of adjoining property, the benefit is not a proper one for mitigation if the factory causes a particular plaintiff's house to shake causing injury to it. In a California case defendant's oil well blew four to seven inches of oil, mud and rock upon the plaintiff's property. Defendant contended that the property had actually been benefited by the discovery of oil. The court properly rejected this contention and stated the test to be the cost of repairing the injury by removing the debris or the diminution in the market value if restoration would exceed that value. This is the better rule. No person should be required to have his property benefited without his consent, particularly where it limits the present use of the land.

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54 Dawsey v. Newton, 244 Ala. 661, 15 So. 2d 271 (1943).
55 15 So. 2d at 273.
57 See Restatement, Torts §§913, 914, 919 (1939).
58 Id. §918.
59 Id. §920.