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## **Recovery of Damages for Contamination of Private Property: The US Perspective**

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### INTRODUCTION

In the United States today much so-called environmental litigation involves claims for damages resulting from contamination of private property. These claims are usually based on common-law theories of relief, namely negligence, strict liability, trespass and nuisance.<sup>1</sup> In toxic tort property damage cases in the United States, a plaintiff would typically seek to recover damages for the contamination of its property under one or more of those claims for relief. Essentially the same measures of property damages apply under each of the claims. The damages potentially available depend generally on whether the injury is one which can be repaired and is appropriate to repair. *If repair is possible and appropriate*, the principal measure of damages would be based on the cost to repair the property and could include damages for loss of use and annoyance during the time when the property is contaminated and undergoing remediation. Damages for loss of use are generally based on the loss of rental value or, for business property, the loss of income, which the contamination has caused the property owner. Damages for annoyance are generally awarded to the occupant for the annoyance, discomfort and inconvenience the injury to the property has caused him to experience. *If repair is not possible or is inappropriate* because, for example, an award of cost of repair damages will give the plaintiff a windfall, then the measure of damages is the permanent diminution in value of the property due to the contamination.

These two measures, cost of repair and permanent loss in value, are often considered to be mutually exclusive. The rationale is that if the injury can be repaired, then repair restores the property's value and there can be no permanent loss in value. However, there are some environmental contamination cases where the courts award both cost of repair damages and damages arising from permanent or continuing loss in value of the property after repair is completed. Proof of the latter kind of damages depends on evidence of a 'stigma' such as an appraisal of the property showing that its market value has been and continues to be adversely affected.

This article discusses the principal kinds of damages which, generally speaking, can be recovered in the United States resulting from injury to private property from contamination by another party.<sup>2</sup>

**THE GOAL OF THE COMMON-LAW MEASURES OF PROPERTY DAMAGES IS TO FULLY COMPENSATE THE PRIVATE PLAINTIFF**

Traditionally, United States courts have looked to loss in market value and the cost to repair the injured property as the two principal measures of damages for injury to property.<sup>3</sup> In determining which measure to use, the courts seek to compensate the landowner fully for the injury to his property. One court stated that the goal is as follows:

The trial court must take as its principal guidance the goal of reimbursement of the plaintiff for losses actually suffered, [and] must be vigilant not to award damages that exceed the goal of compensation and inflict punishment on the defendant or encourage economically wasteful remedial expenditures by the plaintiff.<sup>4</sup>

The trial judge must determine as a matter of law which measure of damages the jury should apply.<sup>5</sup> That selection clearly turns on the facts of the particular case. Facts which courts have found to be important include: the nature of the injury to the property, particularly whether it is repairable and, if so, at what cost; whether the cost of repair is disproportionate to the loss in value caused by the defendant; the nature of the owner's use of the property; and whether the owner has any unique personal reasons for having his property returned to its original condition.<sup>6</sup> There is no complete list of relevant factors. As one court has stated, the relevant considerations are not 'susceptible to a set list and . . . no formula can be devised that will produce litmus-test certainty, and yet retain the flexibility to produce fair results in all cases'.<sup>7</sup>

#### Award of Loss in Market Value in Lieu of Cost of Repair Damages

An award of damages based on loss of market value is clearly preferred when the injury to property is not repairable.<sup>8</sup> It is also preferred when the property owner will not be making repairs.<sup>9</sup>

Some jurisdictions in the United States also cap the amount of property damages by allowing the property owner to recover only the lesser of the cost of repair or the loss of market value.<sup>10</sup>

#### Award of Cost of Repair Damages

Obviously, the injury must be considered to be one that can be repaired for cost of repair damages to be considered. The critical issue with respect to an award of cost of repair damages is whether an award of that amount will exceed the goal of compensation and instead 'inflict punishment on the defendant or encourage economically wasteful remedial expenditures by the plaintiff'.<sup>11</sup>

In addition to those jurisdictions which cap the amount of property damages by allowing the plaintiff to recover only the lesser of the cost of repair or the loss of market value, other jurisdictions limit cost of repair damages so that they do not exceed the pre-tort market value of the property or the depreciated value of the property: for example, *L'Investments, Ltd v Lynch*<sup>12</sup> (restoration costs may not be greater than market value of property immediately before the injury) and *Schneberger*<sup>13</sup> (recovery of restoration costs limited to the depreciated value of the property). Many other US jurisdictions do not impose any absolute limit on cost of repair damages.<sup>14</sup>

However, as a general matter those jurisdictions without an absolute limit tend to find an award of lost

market value to be more appropriate when the cost of repair is disproportionate to the loss in value caused by the wrongdoer.<sup>15</sup> Nonetheless, it is still possible for a plaintiff to recover cost of repair damages exceeding loss in value in those jurisdictions. One court described the plaintiff's burden as follows:

[D]eciding whether restoration costs are an appropriate remedy requires analysis of all the surrounding circumstances. Disproportionality between restoration costs and diminution in value is the central consideration. *For an injured party to recover restoration costs in excess of diminution in value, however, it must show sufficient personal reasons supporting restoration and that repairs actually will be made . . .* Even upon a showing of personal reasons supporting restoration, *the restoration costs still must be reasonable in light of the special considerations presented* -- that is, given those considerations, they must not be disproportionate to diminution in value . . . Furthermore, a mere subjective preference for the land in its pre-tort condition is not a sufficient personal reason in support of allowing restoration costs in excess of diminution in value.<sup>16</sup>

Also, there are property contamination cases in which the courts favour cost of repair damages even though they exceed the loss in market value. For example, where a government regulatory agency requires the property to be cleaned up to meet certain standards, costs of repair damages will be awarded; for example *Terra-Products, Inc. v Kraft General Foods, Inc.*<sup>17</sup> (government agencies required PCB contamination to be cleaned up regardless of cost, so proper measure of damages was cost of repair). In addition, if the property has 'a significantly unique characteristic or [if] it is put to [a] special use sufficient to justify allowing recovery in excess of diminution in value', the courts allow recovery of cost of repair.<sup>18</sup> As an example of a special use, the court selected cost of repair as the measure of damages for contamination of a city's well field in *Davey Compressor Co. v City of Delray Beach*,<sup>19</sup> because '[u]nlike a private landowner, a municipality responsible for supplying drinkable water to a city of over 50,000 residents is not justly compensated by the diminution in value'.<sup>20</sup>

Nonetheless, courts are cautious in awarding cost of repair damages where they might exceed the loss in market value caused by the wrongdoer because of, among other things, the possibility that the plaintiff will thereby receive a windfall.

Obviously, to the extent that a property owner is allowed to recover costs of restoration that are greater than the diminution in market value, there is the possibility that the owner will receive a monetary windfall by choosing not to restore the property and by selling it instead, profiting to the extent that restoration costs recovered exceed the diminution of market value. The problem is no different, except in degree, if restoration costs are allowed in an amount exceeding the pre-tort value of the property. These possibilities suggest the need for careful evaluation by the trial court to assure that any damages allowed in excess of either of these two measures [diminution in market value and pre-tort value] are truly and reasonably necessary to achieve the cardinal objective of making the plaintiff whole.<sup>21</sup>

Award of Both Cost of Repair and Loss of Market Value

It is not unusual for a plaintiff in a property contamination case to seek both cost of repair damages and loss of market value damages. On its face, such a request appears to be an effort to obtain a duplicate recovery. The plaintiff typically justifies this request by asserting that even after remediation, the property will still be worth less than it was before it was contaminated because (1) the remediation will not completely remove all contamination or (2) even if the remediation is fully successful, the value of the property will continue to suffer because of the fact that the property was once contaminated. Each of these examples is a variation of 'stigma' damages.<sup>22</sup> The courts in the United States struggle with this type of request for relief because it does not fit within the traditional parameters of relief for injury to property.

Traditionally, courts in the United States have relied on whether the injury is temporary or permanent to determine the type of relief to which a plaintiff is entitled.<sup>23</sup> If the injury is not capable of repair, then it is a permanent injury and loss of market value damages will be the plaintiff's relief. If the injury is capable of repair, then it is a temporary injury and the court awards abatement or cost of repair damages unless there are other reasons weighing against such an award.

An award of both cost of repair damages (or abatement) and loss of market value damages implies that the injury to property is both temporary and permanent. Some courts find such an award theoretically impossible. To those courts, the injury must be either temporary or permanent but it cannot be both. As a result, these courts absolutely reject the notion that, if contaminated property is remediated its value can still be impaired. If these courts award cost of repair damages or abatement, then they refuse to award damages based on any permanent or continuing loss of value: see for example, *Santa Fe Partnership v ARCO Products Co.*<sup>24</sup> (post-remediation stigma damages precluded when injury was temporary); *Gendreau v C.K. Smith & Co., Inc.*<sup>25</sup>; *T&E Industries, Inc. v Safety Light Corp.*<sup>26</sup> ('[w]hen the property has been decontaminated, it will be restored to full value', and therefore no damages beyond cost of clean-up can be recovered).

Other courts acknowledge the possibility that contaminated property can be remediated and still suffer some continued loss in market value. These courts acknowledge that contamination may be both a temporary injury and a permanent injury to the same property. However, before allowing recovery of lost market value, these courts require evidence that the impairment to value actually continues after the remediation is completed.<sup>27</sup>

Important evidence to prove such a continued loss in value includes proof of: the nature and level of contamination on the plaintiff's property before and after remediation; how the post-remediation level compares to government health and safety standards; whether the government health agency will certify the property as safe; restrictions on the use of the property after remediation; ongoing risk to persons living or working on that property; an appraisal of the value of the property before the contamination occurred and after remediation is complete and which shows the amount of any post-remediation decline attributable to stigma.<sup>28</sup>

### Award of Loss of Use Damages

If cost of repair damages are awarded, the courts often also award damages for the loss of use of the

property which the plaintiff experiences prior to and during the repair.<sup>29</sup> For these damages to be awarded, the owner must prove substantial interference with the use of the property in the usual manner.<sup>30</sup> Typically, loss of use is conceived of in terms of a loss of the owner's ability to receive rent or the loss of an ability to carry on an economic enterprise on the property, measured in terms of a hypothetical loss of rental value'.<sup>31</sup> As a result, loss of use damages are often based upon the 'reduction of the rental or useable value of the property.'<sup>32</sup>

Often damages awarded based on the permanent reduction in market value reflect, at least to some extent, the loss of the property's rental value due to a permanent injury. Nonetheless, loss of use damages may still be awarded as a separate item even if damages based on a permanent loss of market value are awarded. Although loss of use damages are not necessarily subsumed within the loss of market value, the courts must carefully scrutinise the evidence to ensure that the losses are separate and distinct to avoid any duplicate award of damages.<sup>33</sup>

### Award of Annoyance Damages

The occupant of the property may recover damages for annoyance, inconvenience, and discomfort in his use of the property in addition to cost of repair damages.<sup>34</sup> For example, the annoyance and discomfort from the smell of a flooded basement is compensable,<sup>35</sup> and 'several years of inconvenience and aggravation' due to barium contamination is compensable.<sup>36</sup>

However, in the case of property which is considered to be permanently injured, some commentators consider discomfort to be something which is reflected in the permanent loss in value of that property.<sup>37</sup> These commentators would not award both loss in market value and annoyance damages. However, a number of courts have awarded both.<sup>38</sup>

## PROOF AND QUANTIFICATION OF DAMAGES

In the United States plaintiffs typically rely heavily on expert testimony to prove and quantify most categories of damages in property contamination cases. Experts employed for this purpose include experts in the types of injuries which have occurred, experts in the types of remedial activities which are anticipated, real estate appraisers, and economists. In addition to the expert testimony, plaintiffs also testify in United States property contamination cases regarding the annoyance, inconvenience and discomfort caused by the contamination.

### Cost of Repair Damages

In an environmental contamination case, remediation is often complex, time-consuming and expensive, and as a result, damages based on cost of repair are often quite large. As noted above, the cost of repair in these cases can easily exceed the permanent loss in market value of the property.

Proof of cost of repair damages in property contamination cases requires an elaborate and extensive evidentiary presentation. For example, in a case involving an injury to a stream or groundwater, plaintiffs usually present expert testimony regarding the water quality before and after the spill, the

impact of the change in water quality on uses of the plaintiffs' private property, and the clean-up level for the contaminant at issue which would allow the pre-spill uses of the plaintiffs' private property to resume.

Plaintiffs would also offer one or more experts in the types of remedial work being contemplated. These experts may overlap with the water quality experts. This group of experts testifies regarding the work to be done, the targeted clean-up level to be achieved (whether it is total decontamination, a government health and safety level, or something else), the reasons why that clean-up level is appropriate, the time it will take to complete the work, the monitoring required to determine the effectiveness of the remediation in reaching the targeted clean-up level or restoration goal, and the cost of the remedial work and monitoring. Some aspects of the testimony of the remediation experts also bear on other categories of damages. The testimony on the nature and duration of any disruption, in particular, is important to establish loss of use damages and inconvenience damages.

### Loss of Use Damages

In private environmental contamination cases based on common law theories, courts in the United States routinely allow recovery of damages for lost use of the property during the period of time when its use is impaired due to contamination and performance of remedial work- In such cases an economist determines whether there is a basis for business damages (the nature of which depends on the use to which the property has been put) and, if so, presents that evidence at trial.

### Permanent Loss of Property Value

As noted above, some US cases acknowledge that even after remediation, a property may still be adversely affected by the fact that it was and may still be contaminated. These cases award so-called 'stigma' damages for permanent loss of property value following remediation. Even if the remediation is successful, there may still be a residual injury to the property due to the fact that it was formerly contaminated or has not been completely decontaminated. That residual injury may be described as a loss in the value for which the property could be sold, namely its market value. Whether such a loss in market value in fact exists requires an analysis of the market value of the property before the contamination and after the remediation. In the United States a relatively large body of appraisal literature has been developed on the issue of post-remediation loss in value. Sometimes economists are also asked to address loss in market value.

### Inconvenience Damages

Recovery of these damages is ordinarily limited to those people who reside at the affected property. Damages for inconvenience and annoyance reflect a jury's view of what is appropriate compensation to a plaintiff for the burden of living with the contamination and then the remediation. By their nature, these damages are not subject to expert testimony or any particular formula or test. Instead, they depend on the subjective reactions of the jury to the plaintiff's testimony regarding his or her experience. In US cases where such damages have been awarded, the amount of the award varies widely from a few thousand dollars to tens of thousands of dollars per plaintiff.

## CONCLUSION

The general principles of property damages for contamination of private property in the United States are as described above. However, a word of caution to non-US lawyers seems appropriate. There are variations, some subtle and some less so, among the courts in the 50 States with respect to the law governing these damages. And, because there is so much litigation involving claims for damages due to property contamination, the law in various jurisdictions is evolving. Accordingly, it would be prudent, if one needs to get beyond general principles, to consult local counsel before giving definitive opinions in this area of damages law.

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### Notes:

1. Where the injured resource is not privately owned, but rather is owned by the US Government, a State or local government, or an Indian tribe, the owner looks to the provisions for recovery of natural resources damages in the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. ' ' 9601 onward ("CERCLA") or other applicable federal statutes. The federal programme for natural resources damages is sketched out in similar language in section 107(f) of CERCLA, 42 U.S.C. § 9607(f), section 311(f)(4) to (5) of the Federal Water Pollution Control Act, 33 U.S.C. ' 1321(1)(4) to (5), and section 1002(b)(2) of the Oil Pollution Act, 33 U.S.C. ' 2702(b)(2). The methods for quantifying those damages are the subject of regulations promulgated by the US Department of the Interior and by the Department of Commerce's National Oceanic and Atmospheric Administration. See 43 C.F.R. Part 11 (1997); 15 C.F.R. Part 990 (1998). Those regulations have been very controversial and the subject of several appellate court rulings. See, for example, *Kennecott Utah Cooper Corp. v. US Dept. of the Interior*, 88 F.3d 1191 (D.C. Cir. 1996 ); *State of Ohio v. US Dept. of the Interior*, 880 F.2d 432 (D.C. Cir. 1989).

2. The authors wish to point out that they have not reviewed every case in every US jurisdiction. To do so would be beyond the reach of this article.

3. See, for example, *Scribner v. Summers*, 138 F.3d 471, 472 (2d Cir. 1998); *Johansen v. Combustion Engineering, Inc.*, 834 F. Supp. 404, 412 (S.D. Ga. 1993), *aff'd*, 67 F.3d 314 (11th Cir. 1995), *vacated and remanded for reconsideration of other issue*, 517 U.S. 1217 (1996); *Board of County Comm'rs of Weld County v. Slovek*, 723 P.2d 1309, 1314 to 1315 (Colo. 1986). See generally Restatement (Second) of Torts ' 929 (1979).

4. *Slovek*, 723 P.2d at 1316. See generally Restatement (Second) of Torts ' 901, cmt. a (1979).

5. *Slovek*, 723 P.2d at 1315 to 1316.

6. *FDIC v. Jackson-Shaw Partners No. 46. Ltd*, 850 F. Supp. 839 (N.D. Cal. 1994); *Slovek*, 723 P.2d at 1315; *Miller v Cudahy Co.*, 567 F. Supp. 892, 899 to 906 (D. Kan. 1983); *Schneberger v. Apache Corp.*, 890 P.2d 847, 852 (Okla. 1994). *But see Johansen*, 834 F. Supp. at 409 to 410 (a mere personal attachment to land owned by the plaintiff's family for many years is not sufficient by itself to support an award of cost of repair damages). See generally Restatement (Second) of Torts ' 929(l), cmts. b and c.
7. *Slovek*, 723 P.2d at 1315 to 1316.
8. *Slovek*, 723 P.2d at 1315 to 1317.
9. See, for example, *Zwick v. Simpson*, 193 Colo. 36, 572 P.2d 133, 134 (1977) (owner sold property before trial).
10. See, for example, *Safeco Ins. Co. of America v. J&D Painting*, 17 Cal. App. 4th 1199, 21 Cal. Rptr. 2d 903 (Cal. App. 1 Dist. 1993); *Heninger v. Dunn*, 162 Cal. Rptr. 104, 106 to 107 (Cal. App. 1 Dist. 1980); *Scribner*, 138 F.3d at 472.
11. *Slovek*, 723 P.2d at 1316.
12. 212 Neb. 319, 322 N.W. 2d 651, 656 (1982).
13. 890 P.2d at 852.
14. See, for example, *Slovek*, 723 P.2d at 1316 to 1317; *Miller v. Cudahy Co.*, 858 F.2d 1449, 1456 to 1457 (10th Cir. 1988), *cert. denied*, 492 U.S. 926 (1989). See generally Dan B. Dobbs, *Handbook on the Law of Remedies* ' 5.1 (1973).
15. See, for example, *Johansen*, 734 F. Supp. at 409; *Slovek*, 723 P.2d at 1315. See generally Restatement (Second) of Torts ' 929(l), cmt. b.
16. *Johansen*, 834 F. Supp. at 409 (citations omitted) (*emphasis added*).
17. 653 N.E. 2d 89, 92 (Ind. App 1995).
18. *Johansen*, 834 F. Supp. at 409 to 410.
19. 639 So. 2d 595 (Fla. 1994).
20. *Ibid.* at 596 to 597.
21. *Slovek*, 723 P.2d at 1317.

22. There is also a variation of 'stigma' damages based solely on the proximity of the plaintiff's uncontaminated land to contamination. In some cases, courts have permitted plaintiffs to seek damages based solely on proximity to contamination. *See, for example, Sterling v. Velsicol Chemical Corp.*, 855 F.2d 1188, 1212 to 1213 (6th Cir. 1988); *MHE Associates Ltd Partnership v. United Musical Instruments, USA, Inc.*, 1995 U.S. Dist. LEXIS 5808 (N.D. Ohio, 24 March 1995); *DeSario v. Industrial Excess Landfill, Inc.*, 68 Ohio App. 3d 117, 587 N.E. 2d 454 (Ohio App. 5 Dist. 1991) (class included owners of uncontaminated property, and appellate court did not reverse class certification); *Allen v. Uni-First Corp.*, 151 Vt. 229, 558 A.2d 961 (1988) (prejudicial error for court to limit jury's consideration to areas of present contamination). Other courts have applied the economic loss doctrine to bar recovery of loss of value without a present physical injury: *See Adams v. Star Enterprise*, 51 F.3d 417 (4th Cir. 1995); *Berry v. Armstrong Rubber Co.*, 989 F.2d 822, 829 (5th Cir. 1993), *cert. denied sub nom. Cooper v. Armstrong Rubber Co.*, 510 U.S. 1117 (1994); *O'Neal v. Department of the Army*, 852 F. Supp. 327, 336 (M.D. Pa. 1994); *Good Fund. Ltd - 1972 v. Church*, 540 F. Supp. 519, 534 to 535 (D. Colo. 1982), *rev'd on other grounds sub nom. McKay v. U.S.*, 703 F.2d 464 (10th Cir. 1983); *Adkins v. Thomas Solvent Co.*, 440 Mich. 293, 487 N.W. 2d 715, 724 to 727 (1992); *Leaf River Forest Products, Inc. v. Ferguson*, 662 So. 2d 648 (Miss. 1995). Further discussion of the proximity cases is beyond the scope of this article.

23. *See, for example, Rudd v. Electrolux Corp.*, 982 F. Supp. 355, 372 (M.D.N.C. 1997).

24. 46 Cal. App. 4th 967, 54 Cal. Rptr. 2d 214, 220 to 224 (Cal. App. 2 Dist. 1996).

25. 22 Mass. App. Ct. 989, 497 N.E. 2d 16, 17 to 18 (1986).

26. 123 N.J. 371, 587 A.2d 1249, 1263 (1991).

27. *See, for example, In re Paoli R.R. Yard PCB Litigation*, 35 F.3d 717, 795 to 798 (3d Cir. 1994), *cert. denied sub nom. General Electric Co. v. Ingram*, 513 U.S. 1190 (1995); *Bradley v. Armstrong Rubber Co.*, 130 F.3d 168, 176 (5th Cir. 1997); *Bisson v. Eck*, 40 Mass. App. Ct. 942, 667 N.E. 2d 276, *rev. denied*, 423 Mass. 1107, 671 N.E. 2d 951 (1996); *Nashua Corp. v. Norton Co.*, 1997 WL 204904, \*6 (N.D.N.Y. 1997).

28. *See, for example, Paoli*, 35 F.3d at 795 to 798; *Scribner*, 138 F.3d at 473 to 474; *Bradley*, 130 F.3d at 176; *Terra-Products*, 653 N.E.2d at 94 to 95.

29. *See generally* Restatement (Second) of Torts ' 929(l)(b), cmt. d.

30. *See, for example, Allison v. Smith*, 695 P.2d 791, 795 (Colo. App. 1984); *Burt v. Beautiful Savior Lutheran Church of Broomfield*, 809 P.2d 1064, 1069 (Colo. App. 1990).

31. *Slovek*, 723 P.2d at 1317 to 1318.

32. *See, for example, Scribner*, 138 F.3d at 472; *Miller v. Carnation Co.*, 39 Colo. App. 1, 4 to 5, 564 P.2d 127 (1977).

33. *Slovek*, 723 P.2d at 1318 n.8.
34. See generally Restatement (Second) of Torts ' 929(l)(c); *Slovek*, 723 P.2d at 1318.
35. *Burt v. Beautiful Savior Lutheran Church of Broomfield*, 809 P.2d 1064, 1069 (Colo. App. 1990).
36. *Scribner*, 138 F.3d at 472.
37. See Dan B. Dobbs, *Law of Remedies* ' 5.6(2) at 758 (2d ed. 1993).
38. See, for example, *Exxon Corp., USA v. Dunn*, 474 So. 2d 1269 (Fla. App. 1 Dist. 1985) (plaintiff awarded lost value of house and \$100,000 in 'personal damages'); *Fletcher v. City of Independence*, 708 S.W. 2d 158 (Mo. App. W.D. 1986); *Coty v. Ramsey Associates, Inc.*, 149 Vt. 451, 546 A.2d 196, cert. denied, 487 U.S. 1236 (1988); *Wilson v. Key Tronic Corp.*, 40 Wash. App. 802, 701 P.2d 518 (1985).