

Determining Recoverable Damages for Tortious Injury to Real Property

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DIMINUTION IN MARKET VALUE: The General Rule

In Massachusetts, the general rule for measuring damage to real property caused by tortious injury is diminution in market value or the cost of repair. See *Hopkins v. American Pneumatic Service Co.*, 194 Mass. 582, 583 (1907); *Trinity Church in City of Boston v. John Hancock Mutual Life Insurance Co.*, 399 Mass. 43, 48 (1987); *Massachusetts Port Authority v. Sciaba*, 54 Mass. App. Ct. 509, 513 – 514 (2002). If the injury to the real property is permanent, the measure of damages is the difference in the fair market value of the injured premises before and after the injury. *Belkus v. City of Brockton*, 282 Mass. 285 (1933). If the damage is curable by repairs, then the expense of those repairs, if less than the diminished market value, is the measure of recovery. *Id.* Because Massachusetts courts have not expressly defined the concept of permanent injury to real property, most courts applying the diminution in fair market test, use repair costs as either the measure of damages or as evidence of the extent of the diminution. In *re Malden Mills Industries, Inc.*, 303 D.R. 688, 698 (1st Cir. 2004). Where diminution in fair market value is the appropriate measurement of damages, fair market value may be established by a variety of methods. The following methods are often employed by real estate experts: (1) the current cost of reproducing a property, less depreciation from deterioration and functional and economic obsolescence, (2) the value which the property's net earning power will support, based upon a capitalization of net income, and (3) the



Trinity Church and John Hancock Towner, Boston, MA

value indicated by recent sales of comparable properties in the market. *Massachusetts Port Authority v. Sciaba*, 54 Mass. App. Ct. 514.

However, on occasion, the general rule of diminution in fair market value does not provide a fair and adequate measure of damages. See *Trinity Church in the City of Boston v. John Hancock Mut. Life Ins. Co.*, 399 Mass. 43, 48 (1987). For unique “service type properties” or “special-use properties,” including, churches, covenants, hospitals, country clubs, schools, college premises, buildings owned by religious and charitable societies, or properties owned by the state, public agencies or public utilities, the general diminution in fair market value rule will not apply. See, e.g., *Trinity Church in the City of Boston v. John Hancock Mut. Life Ins. Co.*, 399 Mass. 43; *Massachusetts Port Authority v. Sciaba Construction Corporation*, 54 Mass. App. Ct. 509. Instead, courts will have flexibility in determining fair compensation for these buildings.

One predicate for application of the diminution of value principal “is the existence of a relevant market in which the property can be freely exchanged or sold.” *Id.* at 514. A second requirement “is that the diminution of fair market value be a fair and reasonable measure of the loss suffered by the owner.” *Id.*

A trial judge will act as the gatekeeper for determining whether diminution in fair market value is the appropriate measure of damages for damage to real property or whether “evidence other than fair market value is relevant to the question of damages.” *Id.* “In exercising this gatekeeping function[,] the judge should take into consideration whether the property is ‘of a type, not frequently bought or sold, but usually acquired by [its owner] and developed from the ground up’; whether the property is ‘adapted for . . . a specialized use’; and whether the property is ‘of a character where, within fairly wide limits, geographical location has less affect on its value than its adaptability for a particular use.’” *Id.* (citation omitted).

The plaintiff has the burden of introducing evidence to “support the inference that diminution in fair market value is not a fair and adequate measure of damages.” *Id.* “Certain types of properties have been recognized as often requiring evidence of damages beyond the usual means: for example, if the property is used for a special purpose or constructed or improved with special features, or located in a particular place which bestows unique value on its owner and the owner would not be fairly compensated by the diminution and what the market would pay the owner after injury or destruction.” *Id.* at 515.

AWARDING DAMAGES FOR INJURY TO REAL PROPERTY THAT CONSTITUTES "SPECIAL PURPOSE" OR "SERVICE-TYPE" PROPERTY: Examining Trinity Church v. John Hancock Mut. Life Ins. Co.

In *Trinity Church in the City of Boston v. John Hancock Mut. Life Ins. Co.*, 399 Mass. 43 (1987), the Massachusetts Supreme Judicial Court considered the issue of property damage sustained by a special purpose property. The plaintiff, Trinity Church in the City of Boston, was damaged as a result of the construction of the John Hancock Tower Building in Copley Square in downtown Boston, Massachusetts. On January 29, 1975, Trinity Church filed a complaint alleging negligence, nuisance and strict liability against John Hancock Mutual Life Insurance Company and seventeen other defendants involved in the construction of the Hancock Tower.

Henry Hobson Richardson designed Trinity Church in 1872 and construction was completed in 1876. Trinity Church is a national historic landmark and a functioning church. "Trinity Church is constructed almost entirely of stone masonry. Stone masonry is heavy and very brittle compared to other construction materials; when placed under stress, it does not deform, but it cracks. When stone masonry cracks, it characteristically breaks throughout its entire



A portion of one of the four granite pyramid's supporting Trinity Church

thickness, and its strength diminishes significantly. Ordinarily, it cannot be repaired except by disassembly, resetting, and reconstruction. The foundation of the Church rests atop more than 4,500 pilings and 4 massive granite pyramids which support the church's main tower." *Id.*

A failure of the excavation system at the Hancock project site in the late 1960s and early 1970s undermined the foundation of the Church. *Id.* at 46. While work was being performed at the site, "the ground immediately surrounding the construction site moved inward towards the excavation." *Id.* "This caused the foundation of the Church to settle unevenly, most dramatically on the south side closest to the Tower site, and to migrate horizontally towards the Hancock Tower excavation. *Id.* "This settlement produced a spray a cracks up the masonry walls of the church which affected the structural integrity of the church." *Id.*

Trinity Church sought compensation for the cost of repairing structural damage sustained to the church. *Id.* at 47 – 48. "Trinity Church quantified these changes in terms of a percentage of the Church's ultimate 'take down' condition." *Id.* at 48. With experts, Trinity Church "introduced evidence to show that the level of structural damage within a masonry structure such as the church can be related directly to the amount of distortion in its foundations caused by differential settlement." *Id.* "At a certain angle of distortion, the structural damage to a building reaches a point where disassembly and reconstruction become necessary." *Id.* "This ultimate level of damage is referred to as 'take down' level of damage." *Id.*

In order to calculate monetary damages, Trinity Church calculated distortion for the years 1968 and

1972. *Id.* at 48. Trinity Church selected these years because construction of the Hancock Towner had not commenced as of 1968, and was completed by 1972. *Id.* at 47. The plaintiff's experts converted the amount of distortion into percentages which represented the takedown condition in corresponding sections of the church. *Id.* at 48. "The percentage difference before and after the tower construction was taken to represent the amount of damage caused to the [church] during the construction." *Id.* "The final dollar value of the claim was established by applying the change in physical damage from 1968 to 1972, expressed as a percentage of the over-all takedown condition, to the estimated cost of takedown and reconstruction for each affected section." *Id.* The judge in the lower court allowed Trinity's evidence concerning damages and the jury returned a verdict for the plaintiff.

The Massachusetts Supreme Judicial Court held that Trinity Church fell within the definition of "special purpose" property and as a result, the general diminution in fair market value rule was not an adequate basis for measuring property damage. The Court then discussed several alternative valuations. "In a number of situations involving special purpose properties, the cost of reproduction less depreciation has been utilized as an appropriate member of damages." *Id.* at 49. In other situations, "[r]eplacement or restoration cost has also been allowed as a measure of damages where diminution in market value is unavailable or unsatisfactory as a measure of damages." *Id.* at 49 – 50. "Where expenditures to restore or to replace the predamage condition are used as the measure of damages, a test of reasonableness is imposed." *Id.* at 50. The reasonable test has two conditions: (1) the cost of replacement or reconstruction must be reasonable; and (2) the replacement or reconstruction itself must

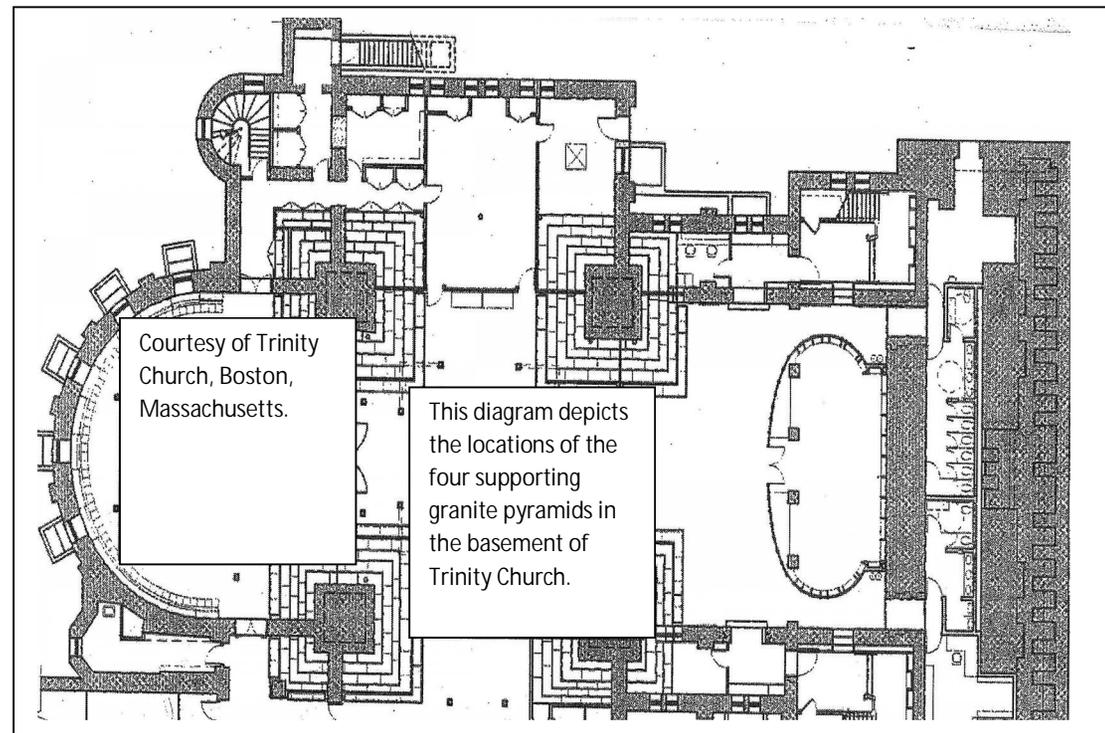
be reasonably necessary in light of the damage inflicted by a particular defendant. *Id.*

The Supreme Judicial Court held that Trinity Church was entitled to compensation for the reasonable cost of restoring the church to the condition it was in prior to the Hancock Tower excavation. Because the Trinity Church was a “special purpose property, it ruled that the method of damage assessment met the test of reasonableness and it upheld Trinity Church’s estimated total takedown and reconstruction cost of \$1,724,457.00.

Avoiding Overcompensation When Calculating Property Damage for “Special Purpose” or “Service Type Properties”

When awarding damages for damage to real property that constitutes a “service-type property” or “special purpose property,” “the fact finder should take into consideration all relevant evidence bearing on the nature of the property, the extent of the injury or loss, and the amount of money that will fairly compensate its owner for its injury or loss.” *Massachusetts Port Authority v. Sciaba Construction Corp.*, 54 Mass. App. Ct. at 513 (the court considered property damage to a pier).¹ However, “care must be taken . . . not to permit the injured party to recover more than is fair to restore him to his position prior to his loss.” *Id.* at 517. When calculating repair or replacement cost, one must account for physical depreciation. *Id.* This means that “evidence of repair or replacement cost must be adjusted, if possible, to take into account the cost of the injured property at the time of the injury or loss.” *Id.* “For example, if the property has deteriorated by the time of the injury,

the plaintiff should not be awarded an amount that would put the property into a condition substantially better than it was at the time of the injury.” *Id.*



¹ “[I]n some circumstances the injured party [may also] suffer consequential damages in addition to damages to the property itself. Consequential damages are recoverable in an action for negligent injury to property so long as they are necessary and reasonable and expenses incurred as a proximate result of the tortfeasor’s actions.” *Id.* at FN 4.

Personal Injury Action Arising from Exposure to Toxic Mold?

In the recent Massachusetts Appellate Court decision of *Doherty v. Admiral's Flagship Condominium Trust*, 80 Mass. App. Ct. 104 (2011), the Court considered whether Massachusetts' three year statute of limitation for tort claims barred the plaintiff's claims of negligence, nuisance and trespass for personal injuries allegedly caused by mold.

In February 2002, the plaintiff purchased a condominium unit. In 2004, the condominium building's roof and other common areas developed leaks. Water damaged the unit's ceiling and loosened plaster in the plaintiff's unit. The plaintiff requested the condominium trust and its management company to repair the damage. In 2005, the property manager noted that the threshold of the door leading from the plaintiff's unit to her deck was rotting. In February 2006, the plaintiff noticed mushrooms and water infiltration on the same threshold and notified the property manager. Later in 2006, the property manager hired a mold testing firm to test the plaintiff's unit for mold. The test results disclosed the presence of hazardous mold in unsafe levels in the plaintiff's unit. The property manager attempted to remediate the mold, but failed. On September 2, 2008, the plaintiff's doctor ordered her to vacate her condominium unit due to the mold. On February 13, 2009, the plaintiff filed suit against the condominium trust, its property manager and the company hired to repair the initial water damage.

Tort-based claims are governed by a three year statute of limitations. Mass. Gen. Laws ch. 260, § 2A. Accordingly, the plaintiff's tort claim had to accrue "within three years of the date she filed her complaint

. . . to be within the statutory limitations period." *Id.* at 107. "The discovery rule tolls the accrual of a cause of action . . . , 'in circumstances where the plaintiff did not know or could not reasonably have known that he or she may have been harmed by the conduct of another.'" *Id.* at 107 – 108. "[U]nder the discovery rule, a cause of action accrues when 'an event or events have occurred that were reasonably likely to put the plaintiff on notice that someone may have caused her injury.'" *Id.* at 108.

In *Doherty*, there was a dispute as to when the plaintiff was on notice of her alleged personal injuries. The defendants argued "that the harm occurred at the time of the initial leak, as the plaintiff 'appreciated the leak, the cause and potential for harm from the leak' at that time." *Id.* The defendants moved to dismiss the case pursuant to Mass. Gen. Laws Ch. 12(b)(6) arguing that the plaintiff's tort based claims were barred by the statute of limitations. *Id.* at 107.

The plaintiff argued the discovery rule tolled tort-based claims and the limitations period began to run not when the water infiltration began, but instead when the mold testing reported the existence of hazardous mold in unsafe levels on March 10, 2006 and she became aware of her potential injury. *Id.* at 108. (The report was issued with the three year period, as the plaintiff filed her complaint on February 13, 2009.)

The Appellate Court rejected the defendant's argument that the plaintiff's personal-injury claim accrued in 2004, when she discovered the initial water leak into her unit. *Id.* at 109 – 110. The Court reasoned that the discovery rule tolls a tort-based claim until a claimant has actual notice of exposure to toxic mold. *Id.* at 110. "To conclude otherwise would encourage, and possibly even require, a plaintiff to

preemptively file suit the moment water starts to infiltrate a dwelling or other building, before any mold or mold-related injury has even occurred." *Id.*



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