

# IS SUBROGATING CARRIER ENTITLED TO REPAIR OR REPLACEMENT COST?<sup>1</sup> MA, ME, NH, RI

by  
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## OVERVIEW

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There is often confusion between “replacement cost” and “actual cash value” under insurance policies and what the subrogating insurers are legally entitled for compensation from tortfeasors.

Generally, the compensable tort damages to property losses depend on the extent and nature of the damage; that is, whether it is total loss which cannot be repaired or partial loss which can be repaired. Where there is a total loss rendering the damaged real property unreparable or unrestorable, the measure of damages is the diminution in market value of that property. Where the real property is repairable or restorable, the measure of damages is the cost of repair or restoration without reduction of depreciation. There is legal support in all four states, Massachusetts, Maine, New Hampshire and Maine, that where the damaged property can be repaired or replaced, the measure of damage is the cost to repair or replace without reduction for depreciation.<sup>2</sup>

## MASSACHUSETTS LAW

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“A basic premise of tort law is that the plaintiff is entitled to that sum of money which will place him in the position in which he was immediately before the defendant's negligent act or omission.” J.R. Nolan & L.J. Sartorio, *Tort Law* § 13.1 (3d ed. 2005). The general rule for determining real property damage is diminution in market value. However, “market value does not in all cases afford a correct measure of indemnity, and is not therefore ‘a universal test.’” *Wall v. Platt*, 169 Mass. 398, 405-406 (1897).

Replacement or restoration costs have also been allowed as a measure of damages in other contexts where diminution in market value is unavailable or unsatisfactory as a measure of damages. *Trinity Church in the City of Boston v. John Hancock Mut. Life Ins. Co.*, 399 Mass. 43, 49, 502 N.E.2d 532 (1987). Where expenditures to restore or to replace to predamage condition are used as the measure of damages, a test of reasonableness is imposed. Both the cost of repair or replacement and the repair or replacement itself must be reasonably necessary in light of the damage inflicted by the defendant's negligence.” *Wyman v. Ayer Properties, LLC*, 469 Mass. 64, 65 (2014); *Hopkins v. American Pneumatic Serv. Co.*, 194 Mass. 582, 583 (1907); *Glavin v.*

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<sup>1</sup> / This white paper does not include measure of damages for personal property, which has a different analysis. The general rule of damages as applied to personal property is the difference between the market value immediately prior to the accident and the fair market value thereafter.

<sup>2</sup> / Property that is permanently damaged and unreparable are subject to a myriad of other consideration for valuation; broad evidence rule, fair market value, diminution in value, etc., concepts that are not addressed in this white paper.

Eckman, 71 Mass. App. Ct. 313, 881 N.E.2d 820 (2008)(Plaintiff awarded restoration cost of the damaged trees); ACE Am. Ins. Co. v. Riley Bros., 2016 Mass. App. Unpub. LEXIS 674, 89 Mass. App. Ct. 1131, 54 N.E.3d 607 (Replacement and repair cost to the damaged steam line appropriate measure of damages, without any reduction)

The Supreme Judicial Court of Massachusetts held in *Wyman v. Ayer Properties, LLC*, 469 Mass. 64, 65, 11 N.E.3d 1074, 1076 (2014) held that “The proper award of damages was the actual and projected repair and replacement costs, without any reductions.” The Supreme Judicial Court commented on the lower court, “It is not clear from the record why the judge concluded that the actual costs of repair and replacement that he found had already been incurred or were likely to be incurred were an unreasonable remedy. At the time the damages were awarded, the trustees already had contracted for the roof repair at a cost of \$132,240. Absent any finding that this cost was excessive, we discern no basis to conclude that the trustees should not be entitled to the costs they already had incurred. Similarly, while work apparently remains to be done on the window frames and masonry, there is no finding that the costs of their repair and replacement, as determined by the judge, were unreasonable.” *Wyman v. Ayer Properties, LLC*, 469 Mass. 64, 73, 11 N.E.3d 1074, 1082 (2014).

## **MAINE**

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A plaintiff suing for damage to real property is entitled to the cost of replacing the property or restoring it to its original condition unless the cost of restoration is disproportionate to the diminution of the market value of the property caused by the defendant, in which case the measure of damages is the market value. See *Leavitt v. Continental Tel. Co.*, 559 A.2d 786, 788 (Me. 1989) (“restoration costs have been deemed an appropriate, although not exclusive, remedy for injury to real property.”); *Nat’l Wrecker v. Progressive Cas. Ins. Co.*, 2019 Me. Super. Lexis 8 (Super. Ct. of Me. 2019); *Lerman v. Portland*, 675 F.Supp. 11, 18-19 (U.S.D.C. ME 1987) (stating “the general rule in Maine...the measure of damages for injury to property is the difference in value of the property before and after the injury” but recognizing an exception where the cost of replacement is not disproportional to market value measure of damages).

## **NEW HAMPSHIRE**

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A plaintiff suing for damage to real property is entitled to restoration/replacement cost unless the cost of replacement is disproportionate to the diminution of value of the land, unless there is a reason personal to the owner for restoring the property to its original condition. See *Moulton v. Groveton Papers Co.*, 323 A.2d 906, 911 (Sup. Ct. of NH 1974) (“If it can be found on the evidence that these properties can and will be restored to their prior conditions without costs disproportionate to the actual injury, the cost of such restoration is the measure of damages.”); *A.B.C. Builders v. American Mut. Ins. Co.*, 661 A.2d 1187, 1191 (Sup. Ct. of NH 1995) (“The cost of restoration may be a proper measure of damages, even if greater than the diminution of the property's value, where ‘there is a reason personal to the owner for restoring the original condition’ of the property.”).

## **RHODE ISLAND LAW**

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Under Rhode Island tort law, the measure of property damages compensable to the injured party depends on whether the damage is permanent or temporary. The Supreme Court of Rhode Island in Banville v. Brennan, 84 A.3d 424 (R.I. 2014) and Tortolano v. Di Filippo, 115 R.I. 496, 502, 349 A.2d 48, 52 (1975) held that, “in computing damages to property, the law will generally distinguish between permanent damage and temporary damage to it . . . the general rule is that where the damage is temporary the cost of repair measure is proper and where the damage is permanent, the diminution in value measure is more appropriate.” See Newstone Dev., LLC v. E. Pac., LLC, 140 A.3d 100, 2016 R.I. LEXIS 92(

In Tortolano v. Di Filippo, 115 R.I. 496, 349 A.2d 48 (1975), the Supreme Court of Rhode Island held that “the reasonable cost of repairing the property was an appropriate measure of the landowners' recovery.