

BETTERMENT BEFORE CANADIAN COMMON LAW COURTS

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An award of damages, measured as the cost of restoration of a plaintiff's property which has been damaged as a result of a defendant's tortious or contractual breach, often places the plaintiff in a better position than the status quo ante the infringement. Until recently, Anglo-Canadian law has not readily reduced the plaintiff's damages to account for this betterment value. Recent decisions of the Ontario Court of Appeal create a path in which the betterment value is deducted from the defaulting party's damages. While this new approach is objectively more just, its practical implementation is not without difficulty.

Les dommages accordés au plaignant comme représentant le coût de la réparation de sa propriété endommagée à cause d'une infraction délictuelle ou d'une rupture de contrat mettent souvent le plaignant dans une position meilleure que celle qui existait avant la violation. Jusqu'à récemment le droit anglo-canadien n'avait pas réduit de bon coeur les dommages pour tenir compte de cette plus-value. Dans certaines de ses décisions récentes la Cour d'appel de l'Ontario a ouvert le chemin menant à la déduction de cette plus-value des dommages à payer par la partie en défaut. Cette nouvelle approche est plus juste d'un point de vue objectif, mais en pratique son application n'est pas facile.

Introduction

Recently the Ontario Court of Appeal dramatically altered the law of damages with respect to betterment. This article describes those changes. In doing so, the question will be raised whether the changes wrought by the court of Appeal are, in practical terms, worth the effort?

The concept of betterment in respect of damage assessment can be readily defined. Betterment is a measure of the extent to which a plaintiff has been placed in a position more advantageous than the position enjoyed by the plaintiff, before the breach of contract or commission of the tortious wrong, in respect of an injury to the plaintiff's property. Betterment arises when a plaintiff, in making good the damages to his or her property, uses new materials in place of old. If the plaintiff receives by way of damages

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the full cost of the new materials then, arguably, his or her position is enhanced. It appears unjust to assess the defendant's damages at this level. On the other hand, if the defendant's damages are reduced by the measure of the betterment, it leaves the plaintiff in the invidious position of potentially having insufficient funds to restore his or her property. The plaintiff will be forced to borrow, or appropriate his or her own resources to restoring the property, at a time when the plaintiff did not anticipate making those same expenditures.

A resolution to this conundrum, and one proffered by Professor Waddams,¹ is to allow a deduction for the betterment, but compensate the plaintiff for any costs incurred in having to make a premature expenditure in restoring his or her property. This seemingly simple solution has dogged both English and Canadian courts. However, recent decisions of the Ontario Court of Appeal have embraced Professor Waddams' solution.

I. *A Preliminary Issue: Cost of Restoration or Diminution in Value*

It is a truism that a plaintiff is entitled to be placed, to the extent attainable by damages, in the same position as if the contract had not been breached or the tort not committed. Where there has been an injury to property, either as a direct, or consequential loss, resulting from either breach, or commission of tort, the plaintiff is entitled to recover fully the value of that loss subject only to the rules relating to remoteness and mitigation. However, just as in insurance law we readily distinguish between an indemnity policy and one with a replacement cost endorsement,² the latter commanding a higher premium, determining a plaintiff's "full value" will differ depending on whether a court awards damages on a market value or reinstatement value approach.

Where a plaintiff has experienced loss either to chattels or buildings two choices of compensation arise: one, cost of replacement and restoration, or, two, the diminution in the market value. Betterment will only become an issue if the former is awarded and not the latter.

The cost of restoration will usually be higher than diminution in market value. The potential for a windfall exists if damages assessed as the cost of restoration are not in fact expended by the plaintiff for that purpose. To avoid this possibility courts have insisted upon some "fixity of intention" to actually restore the property.³ The plaintiff can establish this by (1) at

¹ S. Waddams, *Law of Damages* (2nd ed., 1991), para. 1.2730. See also the helpful casenote by K. Bridge, *Damages—Damages to Property—Betterment—Calculation of Damages—Interest on Sums Expended: James Street Hardware & Furniture Ltd. v. Spizziri* (1989), 68 Can. Bar Rev. 155.

² See C. Brown and J. Menezes, *Insurance Law in Canada* (2nd ed., 1991), chapter 13.

³ This terminology comes from Megarry V.C. in *Tito v. Waddel* (No. 2), [1977] Ch. 106, at p. 333, [1977] 3 All E.R. 129, at p. 317 (Ch. D.).

the time of trial, having completed the work him- or herself; or (2) prior to the commission of a tort or breach, sought some preventative interlocutory remedy;⁴ or (3) in the case of breach of contract, pursuing a specific performance decree; or (4) by giving an undertaking to spend the damages in carrying out the restoration.⁵

There is an over-arching obligation upon the plaintiff to be reasonable in pursuing the cost of restoration. This is more likely to have a bearing in the restoration or repair of a chattel than to real property. If the cost of repair is so excessive when measured against the commensurate gain in value through making the expenditure, the court will not award the higher cost of restoration unless the chattel is unique or has special significance to the plaintiff. Without this quality the plaintiff will be entitled only to the market value of the chattel, it being treated as constructively written off. An objectively rational actor is unlikely to expend money in restoration unless it is accompanied by an equivalent gain in the market value of the property. However, courts are prepared to protect individual subjective values (often referred to as consumer surplus) where the property has a special value to the plaintiff, as in a family home. In these cases the courts will award the cost of restoration even where there is no commensurate gain in market value. The protection of subjective values is more readily acknowledged in cases concerning realty where arguably each property is unique.⁶ For chattels, the availability of a functioning market will make appeals to idiosyncratic values suspect. The overriding principle in all cases is the reasonableness of the plaintiff's conduct and his or her desire for reinstatement.⁷ Of course,

⁴ *Evans v. Balog*, [1976] 1 N.S.W.L.R. 36 (N.S.W.C.A.).

⁵ In *Ward v. Cannock Chase District Council*, [1986] Ch. 546, [1985] 3 All E.R. 537 (Ch. D.), the judge held, without reasons, that an undertaking from the plaintiff would be "inappropriate".

⁶ An interesting aside is the impact of insurance and rights of subrogation. Where an insurer has paid out to the plaintiff on the basis of a replacement cost insurance policy, can the insurer now claim against the tortfeasor for reinstatement on the argument that the plaintiff, by taking a reinstatement policy, intended to restore the property? In *Taylor (Wholesale Ltd.) v. Hepworths Ltd.*, [1977] 1 W.L.R. 659, [1977] 2 All E.R. 784 (Q.B.D.), the court said that the insurer's position could be no stronger than the plaintiff's in spite of the fact that the insurer had paid out on a replacement policy, yet the insured had no intention to replace. The land cleared was in fact worth more than if the plaintiff's billiard hall was rebuilt. The plaintiff was held to the diminution in value.

⁷ Compare *Radford v. DeFroberville*, [1977] 1 W.L.R. 1262, [1978] 1 All E.R. 33 (Ch.D.) and *Evans v. Balog*, *supra*, footnote 4, both reinstatement of buildings, the first arising from breach of contract, the latter arising out of a negligence claim, with, *Deweese v. Morrow*, [1932] 2 D.L.R. 800, [1932] 2 W.W.R. 228 (B.C.C.A.), leave to appeal to S.C.C. refused (1932), 45 B.C.R., at p. 158 (B.C.C.A.); *Darbishire v. Warran*, [1963] 1 W.L.R. 1067, [1963] 3 All E.R. 310 (C.A.); *O'Grady v. Westminster Scaffolding Ltd.*, [1962] 2 Ll. Rep. 238 (Q.B.D.); *Wertman v. Fox* (1923), 24 O.W.N. 401 (Ont. S.C.), aff'd 25 O.W.N. 129 (Ont. C.A.), all dealing with chattels. In the *O'Grady* case, the plaintiff was able to establish that his car had special and unique value and therefore was awarded damages at the highest cost of restoration.

if a market does not exist in which a substitute can be purchased, the plaintiff will be allowed his or her restoration costs.

Once a court has decided to award damages based on the cost of repair or reinstatement, the potential for betterment arises. If, as a result of the reinstatement, the premises or chattel are more valuable than before, the plaintiff should, arguably, account for the betterment. On this issue English and Canadian courts have differed.

A. *Betterment Before English Courts*

At least from the 1800s on English law has not reduced the plaintiff's damages to account for any betterment. In *The Gazelle*⁸ a ship was involved in a collision resulting in substantial damage to the plaintiff's vessel. The plaintiff's action was successful at trial and the action was remitted to the registrar and merchants for an assessment of damages. The registrar gave cost of repairs less a one third deduction on account of new material being used for old. The plaintiff objected to this deduction. Dr. Lushington ruled in favour of the plaintiff stating that if the plaintiff "derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him".⁹ The defendant had argued that such a deduction was justified and was in fact common practice with respect to insurance contracts. Dr. Lushington agreed with this assertion, but distinguished indemnity under an insurance contract where the customary practice of valuing the indemnity was known by the parties when insuring, against the level of damages to be assessed for commission of a tort.

The approach in *The Gazelle* was followed in *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.*¹⁰ Through the defendant's negligent performance of a contract to install heating wrap around piping carrying wax the plaintiff's manufacturing premises were destroyed by fire. The plaintiff built new premises but did not increase the amount of space over the old building. If damages were assessed as the difference in market value of the old building pre and post the fire, they would amount to £42,538, whereas the cost of rebuilding amounted to £67,973. Denning M.R. allowed the full cost of rebuilding without an allowance for betterment. This was seen as the most prudent way for the plaintiffs to mitigate their loss and to return quickly to profitable operations. Only if the plaintiffs had made extra accommodations or extra improvements would they have had their award reduced by a credit. Widgery L.J. agreed. He refuted any need to

⁸ (1844), 2 W. Robb 279, 166 E.R. 759 (Adm.).

⁹ *Ibid.*, at pp. 281 (W. Robb), 760 (E.R.).

¹⁰ [1970] 1 Q.B. 447, [1970] 1 All E.R. 225 (C.A.). See also *Hollebone v. Midhurst and Fernhurst Builders Ltd.*, [1968] 1 Ll. Rep. 38 (Q.B.D.).

account for the betterment on the basis that to do so "would be the equivalent of forcing the plaintiffs to invest their money in the modernising of their plant which might be highly inconvenient for them".¹¹

In *Bacon v. Cooper (Metals) Ltd.*,¹² the plaintiff was a dealer in scrap metal. Part of his operation involved the use of a fragmentizer to fragment scrap steel. An integral part of the fragmentizer was the rotor, which, if used properly, had an average life span of seven years. The plaintiff had contracted with the defendant for the provision of scrap steel. Unfortunately, one of the defendant's consignments contained adulterated material in breach of contract which damaged beyond repair the plaintiff's rotor. At the time of the damage the plaintiff could expect to get another three and three quarters years of use from the rotor. In mitigation of damages the plaintiff purchased a new rotor, there being no market for used rotors. The cost of the new rotor was £41,500. The defendant countered that they should be liable for only £22,232, on the basis that the plaintiff, through purchasing a new rotor, had in fact acquired a further three and one quarter years of use out of the rotor at the defendant's expense.

Cantley J. followed both *The Gazelle*¹³ and *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.*¹⁴ The defendant sought to argue that if the plaintiff's submission was accepted then the defendant would be liable for the cost of a new rotor, even if the damaged rotor only had a few days of remaining useful life. This result, the defendant contended, would be an absurdity. Cantley J. agreed such a result would be absurd and that each case depended on its facts. The facts in this case did not lead to that result. If the defendant's arguments were accepted then the plaintiff would be left in the position of having to make a significant outlay of capital nearly four years in advance of the expected date of making that expenditure. Against a background of the plaintiff's financial stringency and the fact that the steel fragmentizing industry was one in which technology was rapidly changing, this additional burden on the plaintiff was considered unreasonable.

What observations can be made on the above cases? Firstly, the initial reaction to the issue of betterment is to make some accommodation in the assessment of damages. The suggestion in *The Gazelle*¹⁵ to follow the practice adopted in insurance law, where recognition is given to betterment, came from both merchants and the registrar. The current widespread availability of insurance and the advent of the replacement cost endorsement may necessitate a reappraisal of earlier rules. Secondly, where a wasting asset is

¹¹ *Ibid.*, at pp. 473 (Q.B.), 240 (All E.R.).

¹² [1982] 1 All E.R. 397 (Q.B.D.).

¹³ *Supra*, footnote 8.

¹⁴ *Supra*, footnote 10.

¹⁵ *Supra*, footnote 8.

damaged or destroyed there is a recognition that extrapolation from the current English position will lead to absurd results. Thirdly, no middle ground position as suggested by Waddams has been argued before the English courts.¹⁶

B. Betterment Before Canadian Common Law Courts

Prior to the Ontario Court of Appeal's decision in *James Street Hardware and Furniture Co. Ltd. v. Spizziri*¹⁷ Canadian courts exercised some ambivalence towards strict adherence to the English position on betterment. While most courts followed English precedents¹⁸ some did admit to a reduction on account of betterment, particularly in cases involving real property.¹⁹ Unfortunately, when they did account for betterment they did it without discussion of the issues.

¹⁶ The position in the United Kingdom can be contrasted with that in the United States. The American Restatement of the Law, Torts (2d), para. 928(a) states that where there is harm to a chattel not amounting to total destruction, then damage for compensation will be: the difference between the value of the chattel before the harm and the value after the harm or, at his election in an appropriate case, the reasonable cost of repairs or restoration, with due allowance for any difference between the original value and the value after repairs.

Commentary to the section states:

Due allowance is made for increase in value of the chattel as a result of new materials used. This does not require a deduction for the increase in value if the increase has not been realised and is not likely to be realised by the owner, as when, instead of selling it while he retains its increase value, he continues to keep and use it and its usefulness to him is not increased.

A similar position pertains to realty. Only where the property has a special value to the plaintiff will reinstatement damages be awarded above diminution in value. See para. 929(1)(a) of Restatement of the Law, Torts (2d). In application, the majority of courts in the United States have limited the damages for reinstatement to either the value of the original property before the injury or the diminution in value—the before and after test. If a deduction for betterment is made it is deducted from the damages without allowance to compensate for the fact that the plaintiff may be required to expend his or her own resources before originally anticipated. See the cases collected in F.V. Harper, F. James, O.S. Gray, *The Law of Torts* (2d ed., 1986), para. 25.6; C. Chomsky, *Of Spoil Pits and Swimming Pools: Reconsidering the Measure of Damages for Construction Contracts* (1991), 75 Minn. L. Rev. 1445, at pp. 1480 *et seq.*

¹⁷ (1987), 62 O.R. (2d) 385, 43 C.C.L.T. 9 (Ont. C.A.).

¹⁸ See, for example, *The Ship Dumurra v. Maritime Telegraph and Telephone Co. Ltd.* (1977), 75 D.L.R. (3d) 766 (Fed. C.A.), leave to appeal to S.C.C. refused (1977), 75 D.L.R. (3d) 766n; *T. Donovan & Sons Ltd. v. Baker* (1966), 53 M.P.R. 113 (N.B. App. Div.); *Medjuck and Budovitch Ltd. v. Adi Ltd.* (1980), 33 N.B.R. (2d) 271, 80 A.P.R. 271 (N.B.Q.B.); *Sulisz v. Flin Flon*, [1979] 3 W.W.R. 728 (Man. Q.B.); *Petersen v. Fehr* (1988), 53 Man. R. (2d) 210 (Man. Q.B.).

¹⁹ See, for example, *Kinnaird v. C.L. Martin Co. Ltd.* (1969), 7 D.L.R. (3d) 139, [1969] 2 O.R. 817 (Ont. C.A.), 40% deduction for improved position after replacement of a barn; *Jens v. Mannix Co. Ltd.* (1979), 30 D.L.R. (4th) 260, [1986] 5 W.W.R. 563 (B.C.C.A.); *University of Regina v. Pettick* (1987), 51 Sask. R. 270, 38 C.C.L.T. 230 (Sask. Q.B.); *Graham v. Owen* (1987), 25 O.A.C. 280 (Ont. Div. Ct.).

In *James Street Hardware and Furniture Co. Ltd. v. Spizziri*²⁰ the plaintiff had entered into a contract with the defendant welder, to add a steel beam to an existing steel column as part of the plaintiff's renovations of its factory connecting it with an adjoining building. The defendant performed the task negligently, resulting in a fire which damaged the building. The plaintiff rebuilt the damaged part as a different and larger structure. The then operative building code would not have permitted exact restoration. The cost of rebuilding was put at \$340,000. The defendant countered with the argument that the plaintiff's costs for rebuilding were inflated and that it would only cost \$282,000, from which a further \$95,000 should be deducted as depreciation on the materials contained in the plaintiff's premises immediately before the fire. The trial judge awarded \$340,000 less \$34,000 to cover the enhancement reflected in the fact that the plaintiff had received a better building. The trial judge rejected the defendant's evidence on rebuilding costs and disagreed that the enhancement should be determined by looking at depreciation.

On appeal, the plaintiff submitted that no deduction should be made for the enhancement and that a further allowance of \$49,393 should be awarded as the additional cost of compliance with the new building code.

The first issue confronted by the court was whether diminution in value or reinstatement costs should be awarded. If the plaintiff acted reasonably in reinstating the building he should be entitled to the higher damages. The parallel with *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.*²¹ is striking. The court stated that the issue of depreciation is irrelevant where the cost of replacement approach is appropriate, save only where it may relate to the question of betterment, and that depreciation is directly relevant when considering the diminution in value approach.

I suggest that depreciation will assist little in quantifying the diminution in value where the relevant focus is on market value. Market value already has built into it any depreciation on the building. Quantifying replacement costs and deducting depreciation may assist in determining market value, although the latter is likely to be more greatly influenced by other externalities.

Can depreciation assist in determining the value of the betterment? While the Court of Appeal suggested that in some circumstances it may, these are likely to be few. As the court accurately stated, the evidence on depreciation "did not purport to establish the actual increase in the value of the building with the new materials in it or its increased life span, if any".²² Depreciation may assist in characterising the life span of a true wasting

²⁰ *Supra*, footnote 17.

²¹ *Supra*, footnote 10.

²² *Supra*, footnote 17, at pp. 403 (O.R.), 31 (C.C.L.T.).

capital asset, as in *Bacon v. Cooper (Metals) Ltd.*²³ but, it is unlikely to give guidance where realty is involved because the depreciation has little to do with the market value of the property.

After deciding that reinstatement was appropriate the court turned its attention to betterment. In the words of the court:²⁴

... if a plaintiff, who is entitled to be compensated on the basis of the cost of replacement, is obliged to submit to a deduction from that compensation for incidental and unavoidable enhancement, he or she will not be fully compensated for the loss suffered. The plaintiff will be obliged, if the difference is paid for out of his or her own pocket, whether borrowed or already possessed, to submit to "some loss or burden", to quote from Dr. Lushington. ...

These considerations, however, do not necessarily mean that in cases of this kind the plaintiff is entitled to damages which include the element of betterment. As Waddams suggests, the answer lies in compensating the plaintiff for loss imposed upon him or her in being forced to spend money he or she would not otherwise have spent—at least as early as was required by the damages occasioned to him by the tort. In general terms, this loss would be the cost (if he borrowed) or value (if he already has the money) of the money equivalent of the betterment over a particular period of time.

Having embraced Waddams' approach to betterment, the court went on to caution against adoption of a "rule-ridden" approach to the issue. The assessment of damages in every case turns on its own particular facts. As the court stated, there may be instances where, although there has been a replacement of new for old, no enhancement actually arises. The court cited *Barrette v. Franki Compressed Pile Co. of Canada Ltd.*²⁵ and *Jens v. Mannix Co. Ltd.*²⁶ as examples. One can readily see that the addition of a new component, for example a door panel in a car, or a new beam in a building, will not add to either the value of the overall structure or chattel nor to the expected life span of either. In these cases replacement cost may be justified but without any commensurate credit for betterment of which there has been none.

In *James Street Hardware and Furniture Co. Ltd. v. Spizziri*²⁷ the Court of Appeal overruled the trial judge's deduction for betterment, not because it was inappropriate, but because there was a lack of satisfactory evidence on which to calculate the betterment.

In these instances in which betterment is appropriate, the amount has to be calculated. The trial judge in *James Street Hardware and Furniture Co. Ltd. v. Spizziri*²⁸ was Krever J. Prior to delivering judgment in that

²³ *Supra*, footnote 12.

²⁴ *Supra*, footnote 17, at pp. 404 (O.R.), 32 (C.C.L.T.).

²⁵ [1955] 2 D.L.R. 665, [1955] O.R. 413 (Ont. H.C.).

²⁶ *Supra*, footnote 19.

²⁷ *Supra*, footnote 17.

²⁸ (1985), 51 O.R. (2d) 641, 33 C.C.L.T. 209 (Ont. H.C.).

case *Krever J.* had delivered judgment ten days earlier in *North York v. Kert Chemical Industries Inc.*,²⁹ a case also raising a significant betterment issue. The plaintiff, a municipality, brought suit against the defendant for damage to the plaintiff's sewer lines. *Krever J.* found for the plaintiff in negligence. The damage to the sewer necessitated its replacement. The normal life span of the sewer was forty years, meaning its replacement would have taken place in the year 2000. As a result of the defendant's negligence the sewer was replaced in 1974. Thus the expected life span was now through to the year 2014 and the plaintiff had a betterment of fourteen years of life on the sewer. *Krever J.* quantified this betterment by accepting the plaintiff's deferred replacement benefit approach. This approach was based on the fact that the plaintiff had benefited to the extent that it could now contemplate having resources available at the year 2000 which would have previously been used to replace the sewer. The plaintiff has these resources for a period of fourteen years. The plaintiff's actuary gave evidence on the current value of that benefit and quantified it as \$153.69 per \$1000 of 1974 replacement cost, resulting in a deduction of \$25,428 from the plaintiff's damages. The final result is that while the actual true cost of restoration of the sewer line was \$165,766, *Krever J.* awarded \$140,288.

A number of interesting issues arise in *Krever J.*'s award. The first is a determination of how to conceptualise the betterment. The betterment was described as fourteen years use of a sewer line. The difficulties in determining the value of such an item are obvious. No market exists for sewer lines, particularly used ones. *Krever J.* commented upon this aspect when he stated:³⁰

It is not possible in this case, except arbitrarily and irrationally, to strike a figure that would accurately represent the true value of the improvement in the plaintiff's position as a result of the construction of the new sewer.

The choice of valuing the betterment based on deferred benefit was therefore appropriate, and, incidentally, one put forward by the plaintiff. The deferred benefit was a measure of the use value of money which would have been expended in the year 2000 but was not now needed until 2014. The choice made by the actuary of a discount rate of 2 1/2 per cent is subject to the same criticisms that choice of discount rates are exposed to in personal injury litigation, but, it is arguably defensible in light of rule 53.09 of the Ontario Code of Civil Procedure. The greatest problem with the assessment is that the deduction made to the actual costs of restoration at the date of judgment means that the plaintiff will have made an expenditure of his or her own funds to complete the restoration for which he is not immediately compensated. The plaintiff was forced to make an expenditure of \$25,428 (the amount of the deferred benefit deduction) at judgment date.

²⁹ (1985), 33 C.C.L.T. 184 (Ont. H.C.).

³⁰ *Ibid.*, at p. 207.

However, this is a payment that the plaintiff is making in advance of when originally contemplated, which was the date of expiry of the original sewer, namely 2000. Unless the plaintiff received some compensation for the cost of making this expenditure twenty-six years prior to its contemplated occurrence the plaintiff will be under compensated. The additional compensation should have been the cost of borrowing \$25,428 for twenty-six years. This additional compensation may in fact offset completely the valuation of the betterment, and may actually exceed it. Obviously, damages cannot exceed the full cost of restoration. However, the figures may suggest that the initial valuation of the betterment was too conservative.

In *James Street Hardware and Furniture Co. Ltd. v. Spizziri*³¹ Krever J. had deducted ten per cent of the restoration costs as a fair assessment of the betterment. In overruling this award the Court of Appeal pointed out that:³²

... in making the deduction, the trial judge does not appear to have considered the concomitant question of loss flowing to the appellant when its compensation is reduced by the deduction for enhancement.

It would appear that the Ontario Court of Appeal was concerned that in our zeal to make allowance for the plaintiff's betterment we in fact do not lessen the plaintiff's ability to undertake restoration by under-compensating the plaintiff through ignoring the fact that the plaintiff is required to use its own money in advance of the date originally anticipated for replacement of the chattel or realty.

Following *James Street Hardware and Furniture Co. Ltd. v. Spizziri*³³ there were a number of cases throughout Canada which considered similar issues.

The British Columbia Court of Appeal expressed its opinion in *Nan v. Black Pine Manufacturing Ltd.*³⁴ Through the defendant's negligence the plaintiff had suffered fire damage to his house. The plaintiff argued for cost of reinstatement amounting to \$69,809. The defendant countered that the cost of reinstatement of the home should be reduced to reflect the element of betterment.

The British Columbia Court of Appeal's response was to accept the need for some adjustment, either for pre-loss depreciation or post-reinstatement betterment, once replacement cost over diminution in value was accepted as the way of quantifying the plaintiff's loss. However, it was well aware that such response needed to be tailored to the particular circumstances confronting the court. The suggestion was made that such

³¹ *Supra*, footnote 17.

³² *Ibid.*, at pp. 405 (O.R.), 33 (C.C.L.T.).

³³ *Supra*, footnote 17.

³⁴ (1991), 80 D.L.R. (4th) 153, [1991] 5 W.W.R. 172 (B.C.C.A.).

an adjustment may be more appropriate where the property in question was "predominantly commercial in nature, or was clearly held for investment purposes . . .".³⁵ The overriding principle was one of reasonableness. Where the property concerned was the plaintiff's family home, "would it be reasonable to reduce his damages by that amount [the betterment], leaving him and his family to finance that portion of the reinstatement on their own?"³⁶ The court's answer to this rhetorical question was a resounding no. In support, the court reiterated the arguments found in both *The Gazelle*³⁷ and *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co. Ltd.*³⁸

The meaning of the British Columbia Court of Appeal's reference to pre-loss depreciation is unclear. Surely this is nothing more than the pre-accident market value which has built into it any real depreciation. Awarding the plaintiff the full cost of reinstatement enhanced his position. He received a new house costing \$69,809 to rebuild as against the pre-accident market value assessed at \$47,000. There would have been some injustice if the plaintiff had been held to the market figure where he had clearly demonstrated his intent to reinstate. The approach contemplated in *James Street Hardware and Furniture Co. Ltd. v. Spizziri*³⁹ would be to give the plaintiff \$47,000 and the cost of carrying \$22,809 (\$69,809 minus \$47,000) for some defined period of time. The difficulty is determining the length of time for which the carrying costs should be calculated. This is not similar to the wasting capital asset found in, for example, *North York v. Kert Chemical Industries Inc.*⁴⁰ Presumably the period chosen is when the plaintiff intends to sell the property. It is at that time that he will recover the enhanced value resulting from the betterment. If the plaintiff does not intend to sell, arguably the carrying costs should run indefinitely or some other arbitrary period being the notional life span of the house. Perhaps difficulties in determining the period span before which the plaintiff can recover the enhancement justifies the higher full cost of reinstatement award. Of course, the above is premised on there being an actual betterment. However, the

³⁵ *Ibid.*, at pp. 157 (D.L.R.), 177 (W.W.R.).

³⁶ *Ibid.*, at pp. 158 (D.L.R.), 178 (W.W.R.).

³⁷ *Supra*, footnote 8.

³⁸ *Supra*, footnote 10. Wood J.A., delivering the judgment of the court, also opined that he preferred the approach exemplified in McGregor on Damages (15th ed., 1988), paras. 17, 1394-96, basically stating the conclusions from *The Gazelle* and *Harbutt's "Plasticine"*, over Waddams' approach (*op. cit.*, footnote 1), which he described as being inflexible and more traditional. With all due respect Wood J.A. has misunderstood Waddams' approach, which could hardly be described as inflexible or traditional. It is important to disaggregate the issue of diminution in value and cost of reinstatement from the issue of betterment. While the extent of the betterment may tip the court's opinion towards favouring diminution in value and is, therefore, inextricably combined with this preliminary issue, it, nevertheless, still merits separate treatment if cost of reinstatement is favoured.

³⁹ *Supra*, footnote 17.

⁴⁰ *Supra*, footnote 29.

court did question whether the full cost of restoration did result in any actual betterment to the plaintiff. That is to say that the market value of the plaintiff's premises was not increased appreciably following full reinstatement.

Another decision from British Columbia, *Vancouver (City) v. British Columbia Telephone Co.*,⁴¹ has remarkably similar facts to those in *North York v. Kert Chemical Industries Inc.*⁴² The defendant was guilty of negligence in undermining the plaintiff's street after constructing a tunnel for a length of two blocks. The plaintiff repaired the street and sought the full cost of repairs from the defendant. The defendant countered that the respective pre-accident life spans of pavement on a street was twenty years. At the time of the accident one block of the street was 55% through its serviceable life and other 75%. As a consequence of the repairs the plaintiff now had obtained a betterment of 55% and 75% respectively. The cost of paving one block was put at \$13,000; thus, the plaintiff had received a betterment value put at \$7,150 and \$9,750 respectively. Maczko J. simply deducted these amounts from the damages.

The approach favoured in *Vancouver (City) v. British Columbia Telephone Co.*⁴³ is defensible as a way of quantifying the betterment, and is certainly an easier method of quantification than trying to determine the deferred benefit value adopted by Krever J. in *North York v. Kert Chemical Industries Inc.*⁴⁴ However, again, in Maczko J.'s desire to extract the betterment value to the plaintiff he forgot the fact that the plaintiff had to expend the \$16,900 (\$7,150 + \$9,750) in advance of when normally anticipated. To assess the betterment correctly the plaintiff should have been awarded, after the deduction for the betterment, the carrying charges on \$7,150 for eleven years (55% of twenty-year life of the first block) and on \$9,750 for fifteen years (75% of twenty-year life of the second block). In all likelihood these carrying charges would exceed the principal amount, in which case no betterment deduction should have been made.

Three recent cases before Ontario courts merit discussion.

In *St. Lawrence Cement Inc. v. Wakeham & Sons Ltd.*⁴⁵ the defendant negligently grounded the plaintiff's cement barge while towing it on Lake Ontario. The barge itself was beyond repair and the plaintiff replaced it with a barge of superior carrying capacity and twenty-three years newer. At the time of the grounding the plaintiff's barge had a market value of US\$1,100,000, and was insured for US\$1,300,000, based on the Hayes Stuart survey. The replacement cost was put at CAN\$8,000,000. The barge

⁴¹ Unreported, [1991] B.C.J. No. 278, Feb. 11th, 1992 (B.C.S.C.).

⁴² *Supra*, footnote 29.

⁴³ *Supra*, footnote 41.

⁴⁴ *Supra*, footnote 29.

⁴⁵ (1992), 8 O.R. (3d) 340 (Ont. Gen. Div.).

purchased by the plaintiff as a replacement had a market value of CAN\$4,000,000. As expected, the plaintiff argued for the full replacement cost, the defendant for market value of the grounded barge. In arguing for full replacement cost the plaintiff conceded that there may well have been some betterment related to the replacement barge, but that it was up to the defendant to quantify that betterment. *McMurtry A.C.J.O.C.* decided that awarding full replacement cost would be manifestly unfair. The defendant had shown that appreciable betterment would result from such an award and that therefore the plaintiff should be confined to the market value of the barge destroyed.

In this case the element of betterment was used to determine whether cost of reinstatement or diminution in value was the appropriate approach to award damages. The disparity in actual values, the fact that the replacement barge was significantly larger and newer, and the value the plaintiff put on the lost barge as exemplified by the insurance held on it, all supported the court favouring the diminution in value approach. This case is not about making allowance for the betterment but rather about determining whether the plaintiff is entitled to anything above the market value of the lost asset.

In *McMillan Bloedel Ltd. v. Canadian National Railway*,⁴⁶ the plaintiff's aspenite board mill suffered fire damage as a result of the defendant's negligence. The damage caused by the fire necessitated replacing 2% of the metal siding panels, 18-20% of the metal roof panels and replacing the electric wiring in the dryer control room, all at a cost of approximately \$690,000. Ultimately, O'Driscoll J. found no betterment and therefore did not reduce the plaintiff's damages for repairs. The case is interesting for the type of evidence lead by the parties to prove or disprove the presence of betterment.

The plaintiff called an economist who testified that where a business asset needs replacing one either turns to the second hand market or replaces it with new material. If new, then betterment only arises if the operation is made "more efficient, cuts costs, increases profits or production, or cuts maintenance". In this case none of these resulted. The mill was simply restored to its previous capacity. Next, the plaintiff called a professional engineer. He testified that the metal siding panels were of such a small magnitude that there was no betterment. With respect to the roofing panels, the installation had been performed in such an economical manner that in fact there may have been a detriment rather than betterment. With respect to the electrical wiring the amount spent on replacement was inconsequential when viewed against the overall budget allocated to plant maintenance, and therefore did not amount to a betterment. The last witness called by the plaintiff testified that the amount expended on repairs of the fire damage

⁴⁶ Unreported, [1989] O.J. No. 1604, Sept. 27th, 1989 (Ont. S.C.).

was minor compared with the total value of the plant operations and, in fact, had been shown on the company's book as expenses rather than being capitalised.

For the defendant, three witnesses were called. An engineer testified that the replacement sidings and roof extended the life of those portions by some ten years. A second witness, also an engineer, testified that the new electrical wiring was state of the art and would reduce future maintenance costs by somewhere between \$100,000 and \$200,000. The final witness, a business evaluator, indicated that the Income Tax Act capitalization method should be applied for one year leading to a deduction of between 20-25%.

In rejecting the defendant's evidence O'Driscoll J. was clearly influenced by the proportionality argument comparing the cost of repairs to the overall value of the business operation. In replacing what was already there, the plaintiff had not increased productivity or profits. Any savings on future maintenance or deferment in replacing small portions of the building were inconsequential.

The third case in Ontario is *Upper Lakes Shipping Ltd. v. St. Lawrence Cement Inc.*⁴⁷ The plaintiff owned and operated a bulk ore carrier on the Great Lakes. On one shipment it received a cargo of coal and coke breeze from the defendant which, unbeknown to the defendant, contained a piece of steel plate mixed in with the coke. The plaintiff's carrier unloaded through the use of a central conveyor belt in the hold of the ship. The steel plate cut the conveyor belt, necessitating its replacement. At the time of replacement the life span of a conveyor belt was fifteen years. The plaintiff's damaged conveyor belt still had twelve years of useful life at the time of the accident. The cost of replacement of the belt was \$231,460.

Callaghan A.C.J.H.C. found a 20% betterment in favour of the plaintiff. The plaintiff was therefore entitled to \$185,170 (80% of \$231,460). However, accepting the law as laid down in *James Street Hardware and Furniture Co. Ltd. v. Spizziri*,⁴⁸ the plaintiff had to be compensated for being required to make an expenditure of \$46,290 (the betterment) twelve years in advance of anticipated. Callaghan A.C.J.H.C. sought to compensate the plaintiff for the carrying charges, or lost use of this money, by awarding the plaintiff simple interest on the amount for twelve years.

The defendant appealed the assessment of Callaghan A.C.J.H.C.⁴⁹ On the issue of betterment, the Court of Appeal found that the trial judge had erred on the calculation of the betterment. By taking a straight line interest calculation for twelve years Callaghan A.C.J.H.C. had ignored the impact

⁴⁷ Unreported, [1988] O.J. No. 270, March 18th, 1988 (Ont. S.C.).

⁴⁸ *Supra*, footnote 17.

⁴⁹ (1992), 89 D.L.R. (4th) 722 (Ont. C.A.).

of such an assessment, which would be to give the plaintiff all the interest for twelve years at the date of judgment, despite the fact that only part of the interest would accrue in any one year. In this way the plaintiff would be overcompensated because the interest on years two through twelve would be available now to invest and not when it would normally have accrued.

The Court of Appeal amended Callaghan A.C.J.H.C.'s assessment. As the court stated:

... the proper approach in assessing this head of damages is to award to the plaintiff for damages for lost interest, an amount, the present value of which, when invested and amortised over the period from October, 1981 to October, 1993, will produce annually the sum of \$5,323.35 representing interest at the rate of 11.5% per annum on \$46,290.00. The fund would be exhausted at the end of that period. It would, however, have produced for the plaintiff the interest to which he would have been entitled on the premature expenditure of his funds.

The Ontario Court of Appeal's judgment in *Upper Lakes Shipping Ltd. v. St. Lawrence Cement Inc.* completes the transformation of the law of betterment in Ontario. The court has clearly embraced the full ambit of Professor Waddams' initial suggestions and has indicated a method for quantifying the betterment.

From the preceding discussion the following observations can be made concerning the assessment of betterment.

Compensable betterment arises when there has been a true enhancement in the value of the property from its pre-injured state. The enhancement may be as a result of replacing new for old, extending the life span, or increasing the capacity of the property. However, the mere occurrence of any of these states without more does not necessarily mean that a betterment has accrued. The restoration may have simply restored the *status quo ante*. Where the betterment has resulted from an enhanced value, but it is impossible to conclude when that enhanced value would normally have been realised by the plaintiff, it is difficult to calculate a period over which the extension of life span can be determined; and, therefore, the period for which the plaintiff will carry the premature expenditure. For example, if a plaintiff's family home is partially destroyed, replacement with new material for old will enhance the value of the premises. However, over what period is the plaintiff making a premature expenditure of funds? In these cases courts have three choices: (a) not to award a betterment deduction unless the plaintiff has taken the opportunity to expand the size or make the premises more commodious; (b) deduct the full value of the betterment holding the plaintiff to diminution in value; or (c) choose a notional period over which the plaintiff will have been expected to realise the enhancement in value and for which he or she has had to carry premature expenditures incurred in reinstatement of the premises. For example, this period could be the average time a house changes hands in the location. Up to now, courts confronted with this situation have decided either (a) or (b) based

on the preliminary issue of whether to award a plaintiff cost of reinstatement or diminution in value.⁵⁰

Where the betterment has extended the life span of a wasting asset, the assessment process contemplated in *James Street Hardware and Furniture Co. Ltd. v. Spizziri*⁵¹ can be applied. If the betterment has resulted in delaying the time that the plaintiff would normally have replaced the property, a full deduction for the betterment should be credited to the defendant, subject to the defendant paying the carrying charges reflected in the premature expenditure of funds by the plaintiff to replace the property immediately. The carrying charges will result from either foregoing an opportunity to use the funds now absorbed in the reinstatement of the property, or because the plaintiff has had to borrow to complete reinstatement.

The goal of calculating the carrying charges is to give, in present day values, a sum which will equal the interest which would be earned over the period of the premature expenditure, equivalent to the extension of the life span of the property. However, the carrying charges must be amortised over this period to reflect that the interest earned or incurred in any one year would have only become available or liable in that particular year and would not have been available at the time of judgment.⁵² The burden will lie on the plaintiff to call actuarial evidence to prove both future interest rate and rate of amortisation.⁵³ Both pre and post judgment interest is payable on the sum representing the carrying charges.⁵⁴

The new rules on betterment are consistent with the traditional approach to mitigation. That is, benefits arising from the plaintiff's mitigation accrue to the defendant's advantage in reduction of the damages. However, at odds is the issue of improvements made as a consequence of a trespass, conversion, or detainue. Where a defendant or third party either intentionally or unintentionally makes improvements to the plaintiff's goods, no credit is given to the defendant in any ensuing tortious action if it is based on detainue, or an act of conversion after the improvements have been made.⁵⁵

⁵⁰ See, for example, *Nan v. Black Pine Manufacturing Ltd.*, *supra*, footnote 34.

⁵¹ *Supra*, footnote 17.

⁵² A straight line interest calculation multiplied by the number of extended years is therefore inappropriate. See *Upper Lakes Shipping Ltd. v. St. Lawrence Cement Inc.*, *supra*, footnote 49.

⁵³ This will become important for the plaintiff, otherwise the court may simply stop at making the deduction of the betterment from the damages simpliciter, as in *North York v. Kert Chemical Industries Inc.*, *supra*, footnote 29.

⁵⁴ See *Upper Lakes Shipping Ltd. v. St. Lawrence Cement Inc.*, *supra*, footnote 49.

⁵⁵ See, generally, the discussion by G. Stewart and R. Simmonds in the Ontario Law Reform Commission's Study Paper on Wrongful Interference with Goods (1989). This can be contrasted with the position in the United Kingdom where such an allowance is now given for unintentional improvements to the plaintiff's chattels. See Torts (Interference with Goods) Acts 1977, s. 6(1) (U.K.).

The approach adopted by the Ontario courts will, no doubt, add to the evidential burden of the respective parties. The burden of proof lies on the plaintiff to prove all elements of the cost of reinstatement. It is most unlikely that the plaintiff would ever wish to prove the extent of the betterment which ultimately could lessen the damages. However, the plaintiff may wish to identify the extent of the betterment where there is some doubt as to whether the court will compensate at the higher cost of restoration level or, rather, hold the plaintiff to diminution in value. Under this scenario, pleading the betterment is a way of attaining a mid point between these two levels of compensation. The plaintiff may disarm the impact of the proportionality test by confronting the issue of betterment directly in its own proof of loss.

Once the plaintiff proves the damages the burden then shifts to the defendant to prove the betterment proper.⁵⁶ Whether the burden is discharged by simply showing the presence of betterment or whether the defendant must also quantify the betterment is still open to conjecture. However, consistent with a defendant's allegation concerning unreasonable mitigation which must be proven by the defendant in its entirety, logic would suggest that the defendant must provide proof and quantification of the betterment.⁵⁷ Once betterment has been proven the onus shifts back to the plaintiff to prove any loss caused by being required to make an unexpected expenditure.⁵⁸ These additional respective burdens are likely to be significant. Obviously, at some point the cost of expert testimony and commensurate litigation costs associated with proving the betterment will outweigh any reduction in damages the defendant may be ordered to pay. On the plaintiff's side, quantifying the carrying charges should be capable of standardisation according to some formula linked to bank and discount rates, and thus not be an onerous burden to prove. However, until any standardised approach is established, a plaintiff will probably need to call actuarial evidence, particularly where the betterment relates to a prolonged period of time.

⁵⁶ See *James Street Hardware and Furniture Co. Ltd. v. Spizziri*, *supra*, footnote 17, at p. 405; *St. Lawrence Cement Inc. v. Wakeham & Sons Ltd.*, *supra*, footnote 45. Placing the onus upon the defendant is consistent with a similar onus to show that the plaintiff has failed to take proper steps in mitigation of damages.

⁵⁷ In *St. Lawrence Cement Inc. v. Wakeham & Sons Ltd.*, *ibid.*, the court accepted proof of betterment without the defendant being precise about the degree of the improvement in value. However, in that case proof of betterment was being used only to determine the preliminary issue whether diminution in value or cost of reinstatement is to be favoured. In the trial decision of *James Street Hardware and Furniture Co. Ltd. v. Spizziri*, *ibid.*, the judge disagreed with the type of evidence lead by the defendant to prove betterment (the defendant lead evidence on the building's depreciation only), but nevertheless upheld a deduction of 10% of the cost of repairs for betterment. In the Court of Appeal the court said that it was upon the defendant to prove the value of an alleged improvement, and that the trial judge had erred on making this deduction.

⁵⁸ *James Street Hardware and Furniture Co. Ltd. v. Spizziri*, *ibid.*, at p. 405.

Conclusion

The Ontario Court of Appeal has significantly altered the treatment of betterment in Ontario. The new method of assessment may be theoretically more accurate and, therefore, just. However, the question confronting the litigator is whether the evidence needed to prove the presence of and quantifying the betterment and the carrying charges is worth the effort in ultimate outcome.