COMMERCIAL BETTERMENT:

WHY CLIENT MONEY SHOULDN´T GROW ON TREES.

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Commercial Betterment: Client money doesn´t grow on trees.

Often in practice, one comes across a fact scenario where the case hinges not on questions of liability but rather on compensation. Compensation involves a multifaceted analysis of the loss and necessarily incorporates degrees of contributory negligence and failure to remediate. Unfortunately, though, the analysis is further complicated in cases of commercial loss where the compensation of the loss may result in a net gain to the Plaintiff. As good advocates, lawyers representing clients in a commercial tort should insure that if compensation yields the possibility of a unwarranted Plaintiff gain that the court approaches damages assessment with (potential) betterment in mind. After all, even lawyers representing commercial clients with deep pockets need not render the money tree bare if an assessment of damages properly incorporates unwarranted benefit to the Plaintiff.

In cases involving damage to property whether residential or commercial "it is a well recognized principle that the Court must take into account the depreciation or wear of any replacement item when considering the reasonable damages to assess."[1] In arriving at an assessment of damages, Courts are guided by the general principle of **restitution in integrum:** the goal of the law is to restore the injured party, so far as money can do so, to the position in which he would have been had the damage not occurred.

In *Halsbury's Laws of England*[2] the author presents the basic rule of damages:

> Chattels: the basic rule. The basic rule is that the measure of damages in the case of damage to a chattel is the cost of repair, but if it is unreasonable from a business point of view to repair the article, or if the article is damaged beyond repair, then the basic measure is the cost of replacement in an available market.

However, there is a case to be made that the measure of damages for commercial property should be distinguished from that for residential or noncommercial property.

[1] *Waldram v. Thomson (c.o.b. Rod's Moving),* 2007 SKPC 59 (CanLII) at 25.
[2] *Halsbury's Laws of England* vol. 12 (4th ed.), at p. 456, para. 113.

In *Nan v. Black Pine Manufacturing Ltd*.[3], Wood J.A. dismissed the appeal of the Defendant and held that the appropriate award to the respondent was the full amount of the cost of replacing his home without any associated discount for depreciation or betterment.[4] On its face, this holding seems to deny the possibility of reducing damage awards in cases where betterment exists. However, on a close reading of the judgment, one notes that Wood J.A. opines that a flexible approach should be taken to damage assessment. He draws on a ruling of the New South Wales Court of Appeal where in upholding an award for damages for the full cost of reinstatement, Samuels J.A. asserted that the cost to a defendant is but one ingredient in calculating the reasonableness of a Plaintiff´s claim.[5] Thus, rather than denying discounts for dimunition in value or betterment, he advocates a flexible approach that may incorporate these considerations as long as they result in **reasonably** providing fair compensation to the plaintiff. This fair compensation, in the words of Samuel J.A., is the general principle: that they be given back what they had before.

The Betterment Principle

The established Common Law rule was that no deduction should be made from the plaintiff's damages to offset necessary betterment. The general principle was set out in *Harbutt's Plasticine v Wayne Tank and Pump Co Limited* [6]: "the plaintiff should be entitled to the full replacement cost without deduction for betterment if due to the defendant's wrongdoing, the plaintiff had no other option but to purchase the substitute item that it did."

In modern common law judicial approaches to betterment, at one end of the spectrum, no allowance for betterment is made; however, at the other, it can be held to be appropriate to deduct in full the increase in value of the restored or substituted asset with little or no recognition of the cost of the unplanned and unwelcome investment of capital forced upon

[3] *Nan v. Black Pine Manufacturing Ltd.* (1991), 55 B.C.L.R. (2d) 241. (C.A.).
[4] *Supra* note 4 at 14.
[5] *Evans et al v. Balog* [1976] 1 N.S.W.L.R. 36.
[6] *Harbutt's Plasticine v Wayne Tank and Pump Co Limited* [1970] 1 All ER 225 (EWCA).

the plaintiff.[7] Although **inconvenience** to the plaintiff is central to the *Harbutt* analysis, subsequently in *Bacon v Cooper (Metals) Limited*[8], Cantley J. opined that such an approach would be inappropriate where it would lead to an "**absurd**" result. Clearly in cases where the question of betterment arises, the inconvenience of an unanticipated investment on the part of the plaintiff should be balanced with the potential absurdity of the defendant paying the full replacement cost.

In the leading New Zealand case of J *& B Caldwell Limited v Logan House Retirement Home Limited*[9], Fisher J. framed betterment as "the unexpected improvement in the [plaintiff's] position" adopting a "middle ground", which deems a deduction for betterment appropriate only after allowance to the plaintiff for any disadvantages associated with the involuntary nature of any additional investment that has been made.

The Canadian approach has traditionally advocated the *Harbutt´s* line of reasoning, but the leading case on betterment in Ontario, *James Street Hardware & Furniture Co. & Spizziri*[10] affirms Professor Waddam´s placement of the onus of proof on the defendant to establish that betterment has occurred. In *Nan*, Wood J.A. views Professor Waddams conception of betterment as too rigid and inflexible to be applied on the facts of this B.C. case. However, the Waddams conception of the Canadian approach is in agreement with the United Kingdom´s McGregor´s in that the plaintiff should be restored *in integrum.* Waddams places more importance on an involuntary "unwanted investment" whereas McGregor focuses on "the reasonableness of the plaintiff´s desire to reinstate the property." In either case, Wood J. agrees that there are many ingredients to damages assessment, and the reasonableness of the plaintiff´s claim is the end result of this calculation. However, within the flexible *Nan* approach, the involuntary and unexpected nature of the plaintiff´s investment and the value of the improvement of his position per Waddams should also factor into a more flexible calculation of damages.

[7] Julia Batchelor-Smith & Minter Ellison Rudd Watts, "Betterment – A Balancing Act" 131 *New Zealand Lawyer*.
[8] *Bacon v Cooper (Metals) Limited* [1982] 1 All ER 397.
[9] *J & B Caldwell Limited v Logan House Retirement Home Limited* [1999] 2 NZLR 99.
[10] *James Street Hardware & Furniture Co. & Spizziri* (1987), 62 O.R. (2d) 385 (Ont. C.A.).

In *Laichkwiltach Enterprises Ltd v F/V Pacific Faith (Ship)*[11] one of the most recent British Columbia Court of Appeal rulings on betterment, the Court refused to follow traditional admiralty principles of 'new for old' which they noted have been modified by "the commercially more realistic betterment concept" in applying a rate of depreciation against the repair costs to a vessel damaged by a collision, to account for betterment. The Court stated that betterment is a question of fact to be determined on the evidence and with regard to what is reasonable in a particular case, and later reaffirmed this in *Madalena v. Kuun*.[12]

The same principle has been applied in Ontario cases involving negligent construction where damages were reduced to allow for betterment.[13]

Best Evidence Available and the Onus of Proof

It is still good law in Canada that, "the court must, as always, having in mind the circumstances, decide what is the best evidence available, and the kind or degree of proof required."[14] As the trier of fact, the judge assesses the evidence before her and passes judgement on the best evidence presented to her by the opposing sides.

Nan does not stand for the principle that in damage to property, the quantum of damages is the full replacement cost. Wood J.A. held for the respondent not based on an analysis of whether betterment was present or not. He was constrained by the limits of an appellate court and deferred to the original trier of fact and her analysis of the facts put to her. In the court of first instance, the trial judge "did not have before her any "direct evidence of ´betterment´".[15] Thus, she awarded the full replacement cost of the home in the absence of the defendant discharging its onus of proving betterment. As such, neither the trial decision nor the appellant review takes a negative position on pre-damage dimunition or post-

[11] 2009 BCCA 157.
[12] Madalena v. Kuun, 2009 BCSC 1597 (CanLII).
[13] *Reed v. Garbutt*, [2003] O.J. No. 4201 (S.C.J).
[14] *Ares v. Venner*, [1970] S.C.R. 608 at 619.
[15] *Nan* at p. 5.

replacement betterment but rather reinforces the defendant´s onus to prove such betterment occurred. In its most recent approval of the *Nan* test, the B.C. Supreme Court further clarified that "replacement cost will at least be the starting point, but may be adjusted on the basis of considerations like betterment and deprivation, but not for sentimental value."[16] In *Nan*, Wood J.A. did not create new law and this decision should be narrowly read as an appellate review of a trial decision made where the defendant failed to discharge its onus of proof of any change in market value in a residential property resulting in betterment.

In Ontario, the Superior Court decision in *McMillan Bloedel Ltd. v. Canadian National Railway*[17] in assessing damage to a commercial mill held that, on the evidence, damage including among other things the electrical wiring in the dryer control room did not constitute betterment. O´Driscoll J. favoured a proportionality argument based on the plaintiff's evidence that the replacements did not increase productivity or profits and any savings on future maintenance or deferment in replacing such small portions of the building were inconsequential.[18] This ruling could have some application in this scenario where the damage in question constitutes only a small percentage of the hotel's property but can be countered by the essential cyclical nature of its operation, repair and replacement.

The Commercial Lifespan of Property

In Wood J.A.´s analysis of the case law, he stresses that the full replacement cost is not the end result of a damages assessment but rather the starting point. In all cases, damages assessed should be "on what is reasonable in the circumstance"[19] and accurately reflect

[16] *Smith v. British Columbia*, 2011 BCSC 298 at 45.
[17] *McMillan Bloedel Ltd. v. Canadian National Railway* (unreported), (1989) O.J. No. 1604, Sept 27, 1989 (Ont. S.C.) as quoted in Berryman J., "Betterment Before Canadian Common Law Courts" (1993),72 Canadian Bar Review at 72.
[18] Berryman J., "Betterment Before Canadian Common Law Courts" (1993),72 Canadian Bar Review at 67.

[19] *Nan* at p. 9.

"the actual value of the loss to the plaintiffs."[20] As such, the adjustment of damages should not be made by rote but "turn on the facts peculiar to the case being considered."

In the House of Lords analysis of betterment in *Lagden (Respondent) v. O'Connor (Appellant)*[21], Lord Nicholls of Birkenhead affirms that *The Gazelle* forced investment principle is "that it is not open to the wrongdoer to require the injured party to bear any part of the cost of obtaining such indemnification for his loss as will place him in the same position as he was before the accident."[22] Furthermore, they frame the test of betterment as:

> It has to be shown that the claimant had a choice, and that he would have been able to mitigate his loss at less cost. The wrongdoer is not entitled to demand of the injured party that he incur a loss, bear a burden or make unreasonable sacrifices in the mitigation of his damages. He is entitled to demand that, where there are choices to be made, the least expensive route which will achieve mitigation must be selected. So if the evidence shows that the claimant had a choice, and that the route to mitigation which he chose was more costly than an alternative that was open to him, then a case will have been made out for a deduction. But if it shows that the claimant had no other choice available to him, the betterment must be seen as incidental to the step which he was entitled to take in the mitigation of his loss and there will be no ground for it to be deducted.

This line of reasoning is especially germane to cases where commercial equipment is near the end of its lifespan and would have been replaced in the upcoming years. Such cases should not lend themselves to the notion of Dr. Lushington´s focus on forced investment in *The Gazelle*. Near-expire equipment damage scenarios often involve a Plaintiff who was fully cognizant of the upcoming replacement cost that would have been involved in keeping its equipment functional. The cost of replacement would thus be neither unanticipated nor involuntary just slightly premature. Premature replacement resulting from the Defendant's actions is not a forced to invest in more modern equipment but an anticipated investment a few years in advance of routine replacement. Clearly, commercial lifespan should be an important ingredient to the flexible approach advocated by Wood J.

[20] *Nan* at p. 8.
[21] *Lagden (Respondent) v. O'Connor (Appellant)* [2003] UKHL 64.
[22] *Lagden* at 31.

In *Penn West Petroleum v. Koch Oil Co.*[23] Fruman J. applauds the ruling in *Upper Lakes* and illustrates how the assessment of damages turns on the facts and that although betterment has a role, it must be proven:

> In this case it has not been demonstrated to me that the replacement of the prior facility with the new has increased the value of the property as a whole. The old battery was expected to last for the useful life of the field, as is the new. I find that the substitution of new for old in this case does not constitute betterment and therefore no depreciation should be charged against the Plaintiff's claim.

The important role of lifespan of the destroyed property is discussed further in *Lamont Health Care Centre v. Delnor Construction Ltd.*[24], where Macklin J. declined to follow the ruling in *Nan* and denied the plaintiff the full replacement cost of its fire damaged hospital wings. Instead, the Queen's Bench after reviewing the damages principles to a family home in *Nan* held that it was not reasonable for the defendant's to pay the cost of replacement in light of the hospital's intent to demolish the 48 and 28 year old buildings. The test laid out by the Alberta court uses the replacement cost as its starting point as suggested in *Nan* but factors in not only the lifespan of the damaged property but the commercial plaintiff's cognizance of an impending replacement and its intent to do so. These facts are identical to the case at hand and the commercial nature of *Lamont* is more directly applicable to cases of quantum of damages in fire damaged non-residential property.

Thus, betterment and lifespan (reflected as market value at the time of damage) are also integral parts of potential reductions to the full replacement cost.

Commercial v. Residential Properties

Nan supports and does not reject the notion that there is a difference between the assessment of damage in cases involving residential or commercial property. Wood J.

[23] *Penn West Petroleum v. Koch Oil Co.,* [1994] 4 W.W.R. 630, at para. 115.
[24] *Lamont Health Care Centre v. Delnor Construction Ltd*., 2003 ABQB 998.

advises that discounting of damages is appropriate and should be taken into account on the facts of the case, where "the property in question had a predominately commercial nature."

In Nan, there was no reduction made for depreciation, but this case, unlike Nan, involves a building and facilities that were used for commercial purposes.

In *Prince George (City) v. Rahn Bros. Logging Ltd*.[25] a B.C. case involving a commercial zoning dispute, the British Columbia Court of Appeal clarified that *Nan* should be construed narrowly and only to residential buildings: "The decision in Nan v. Black Pine Manufacturing Ltd. , supra , in which full replacement cost of a house was found to be appropriate in a fire loss case is not of assistance here… this case, unlike Nan, involves a building and facilities that were used for commercial purposes."

In *Slocan Forest Products Ltd. v. Trapper Enterprises Ltd.,*2009 BCSC 1175, McEwan J. of the B.C. Supreme Court lays out the reasoning that should be applied:

> While the burden of demonstrating betterment falls to the defendants, it is not a complete answer to suggest that there is no evidence that in the remote future the new camp will be worth more than the old camp would have been….While it was said to be in good shape there were clearly elements of it that had significantly deteriorated over time. There is therefore some betterment.

In the Ontario case of *Reed v. Garbutt*[26], Morin J. awarded the plaintiffs damages to their commercial building "after proper reductions for upgrades and betterment".[27] He further reduced the award to incorporate the life span of the subject roof finding that "it would be fair and equitable that the plaintiffs recover two thirds of the net cost of replacement."[28]

Clearly, the plaintiff is not entitled to be placed in a better position; only the same position he was in before the damage occurred. A damages award which does not reflect betterment, especially in the commercial scenario which is devoid of the unique *domus familial* aspect of

[25] Prince George (City) v. Rahn Bros. Logging Ltd., 2003 BCCA 31 at 89.
[26] Reed v. Garbutt, 2003 CanLII 49356 (ON SC).
[27] *Ibid.* at 158.
[28] *Ibid.*

the dwelling house will likely overcompensate the plaintiff at the expense of the defendant. In *Nan,* Woods J.A. does not disagree in his assessment of commercial betterment cases that a different standard of analysis including reductions for betterment are applicable in the commercial scenario.[29] He merely clarifies that betterment reductions turn on the facts and "what is reasonable, both to the plaintiff and to the defendant tortfeasor." In his analysis, where a family home is "**destroyed** through the negligence of a third party" there should be a lower threshold of reasonableness than in damage to a commercial property. Cases, where, *contra* the scenarios in *Harbutt´s "Plasticine" Ltd.* and *James Street Hardware*, the commercial property was not destroyed in its entirety and there is simply damage to an aspect of the commercial operation will not fall into the *domus* exception as framed by Wood J.

The Benefit of the Tort

In many cases, the commission of the tortuous act confers a benefit on the plaintiff. If a plaintiff would have had to expend funds had the wrong not been committed and that expenditure was avoided by the tortuous act that savings must be taken into account in calculating damages.[30] Cases such as *Rodocanachi v. Milburn*[31] and *Hussey v. Eels*[32] stand for the principle that if the plaintiff received a benefit arising from the wrong; this benefit must be taken into account in assessing damages.

The Ontario Court of Appeal clarified its approach early on in *Male v. Hopmans*[33], where it found that "mitigation of damages claimed as a result of a benefit to the plaintiff is permissible only where the benefit directly results from the wrong committed and, of course, the onus of proof is on the defendant."[34]

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[29] *Nan* at 9.
[30] James C. MacInnis, *Damages Continuing Legal Education Society of British Columbia* September 2009.
[31] *Rodocanachi v. Milburn* (1886), 18 Q.B.C. 67 (C.A.).
[32] *Hussey v. Eels*, [1990] 2 Q.B. 227 (C.A.) at 241.
[33] *Male v. Hopmans* (1967), 64 D.L.R. (2d) 105 (Ont. C.A.).
[34] *Ibid.* at 115.

In the case of Clarke v. Bustard, 87 N.B.R. (2d) 115 at page 117 Stevenson, J. said:

> "I accept the plaintiff's evidence that the damage to the frame rendered the car a constructive total loss for his purposes. The normal measure of damages when property is damaged so as to be a constructive total loss is its market value less salvage plus any allowance for loss of use."

Cleary, an improvement of the plaintiff's circumstances arising from the loss should be taken into account in its relation to the arising of betterment. The perceived windfall that the plaintiff has received as a result of the award against the defendant must be weighed against the cost to the plaintiff of that unplanned investment, which is often a difficult and emotionally fraught task.[35]

Betterment in Ontario

Although, Ontario courts have acknowledged that there are instances in which the replacement cost is not the final award and must be reduced for betterment, there are few cases where this reduction has actually been awarded. The Western Provincial courts seem much more amenable to the concept of betterment and its role in reducing damages. However, as in *Nan* and in the leading Ontario Court of Appeal decision in *James Street Hardware & Furniture Co. & Spizziri,* courts have refused to reduce the damages award not because they disapprove of betterment reductions but because the defendant had not provided the requisite evidentiary basis to discharge his onus of proof: "there was no satisfactory evidence on the life expectancy of the building, either before the fire or what is would have been after being repaired – nor was there any evidence as to the amount of the increase in value, if any, after the fire."[36]

The Ontario case of *North York v. Kert Chemical Industries Inc.* where Krever J. delivered his judgement ten days before his subsequent trial judgment of a 10% betterment reduction in *James Street*, involved damage to the plaintiff's sewer lines fourteen years in advance of their anticipated replacement. Krever J. quantified this as a betterment of fourteen years

[35] *Supra* note 8 at 1.
[36] *Supra* note 11.

and utilized the deferred replacement benefit approach to assess the use value of money which had been expended prematurely.[37] This approach was also utilized in British Columbia in *Vancouver (City) v. British Columbia Telephone Co.*[38] and in Ontario in *St. Lawrence Cement Inc. v. Wakeham & Sons Ltd.*[39] where Maczko J. quantified percentage betterment as the already utilized pre-accident life span of the damaged property, awarding a discount of 55% and 75% respectively on the damaged street blocks while in *St. Lawrence*, McMurtry A.C.J.O.C awarded the market value of the destroyed barge.

Finally in *Upper Lakes Shipping Ltd v St Lawrence Cement Inc*.[40] the Ontario Court of Appeal solidified the approach to betterment in Ontario, reducing the plaintiff's damages award for betterment: A 20% reduction to reflect the utilized lifespan of the damaged property + an 11.5% rate of interest per annum on the betterment amount to reflect forced expenditure in advance of the anticipated life span replacement.

Conclusion

It is good law that the defendant must return the plaintiff to the position he was in before the harm occurred. In some cases this will result in an award of the replacement cost as the best assessment of restitution or in some cases despite betterment existing the defendant fails to meet the evidentiary threshold. In *Lamont*, however, the court offers a new quantum of damages that awards neither the replacement cost nor the market value pre-accident. The court elects to deflect the possibility of unjust enrichment through an award for the "loss of use of money" in cases where the "components of this facility have outlived their physical and functional value." This analysis is most apt in the case at hand where the replacement

[37] *Ibid.* at p. 207.

[38] *Vancouver (City) v. British Columbia Telephone Co.* (unreported), (1991) B.C.J. No. 278, Feb. 11th, 1992 (B.C.S.C.) as quoted in Berryman J., "Betterment Before Canadian Common Law Courts" (1993),72 Canadian Bar Review at 65.

[39] *St. Lawrence Cement Inc. v. Wakeham & Sons Ltd.* (1992), 8 O.R.- (3d) 340 (Ont. Gen. Div.); McMurtry A.C.J.O.C. opined that awarding the full replacement cost of the destroyed barge would be manifestly unfair.

[40] *Upper Lakes Shipping Ltd. v. St. Lawrence Cement Inc.*(1992), 89 D.L.R. (4th) 722 (Ont. C.A.) at para 9.

cost was an anticipated expense of the plaintiff as the equipment “could not have carried on it its…condition indefinitely”.

In *Upper Lakes Shipping Ltd v St Lawrence Cement Inc*.[41] the Ontario Court of Appeal affirmed the suggestions of Professor Waddams and the principles in *James Street* namely, that the plaintiff should have deducted from its award the amount by which its property had improved, but also be compensated to the extent that it had to put out money prematurely to obtain the betterment.

Thus *strictly* speaking of the damage to commercial equipment nearing its anticipated replacement date, the direction in *Upper Lakes Shipping* is apt:

> "*Betterment is a question of fact to be determined on the evidence and with regard to what is reasonable in the particular case. The starting point is the cost of repair. In some cases, that will also be the end point. In other cases, betterment will be proven and it will fall to the trier of fact to assess the extent of the betterment.*"

In *Upper Lakes Shipping* the Court of Appeal took umbrage with the utility of imprecise evidence of unavoidable future repair in proving betterment. Their ruling reaffirms that the analysis of betterment must involve a determination of what is reasonable and what is fair to both parties **and** the defendant must prove significant and immediate betterment. They affirmed that the law in Ontario is “that the plaintiff should have deducted from his award the amount by which his property is improved (betterment) but is compensated to the extent he has had to put out money prematurely to obtain that betterment.”[42] In light of the imprecise evidence, the appeal was allowed, and the Court reduced the betterment assessment to 33% and the plaintiff's damages award for the repairs increased accordingly.

From the analysis of the case law and the distinguishing of *Nan,* Courts will first require the plaintiff to prove the damage flowed from the defendant’s tortuous act. The onus then shifts to the defendant to prove betterment. Finally, the onus shifts back to the plaintiff to prove their loss by unexpected expenditure. Canadian courts have calculated betterment in many

[41] *Upper Lakes Shipping Ltd. v. St. Lawrence Cement Inc.*(1992), 89 D.L.R. (4th) 722 (Ont. C.A.) at paras. 6-9.
[42] *Ibid.* at para. 9.

ways: the deferred benefit value of betterment (*North York*), as a discount based on the percentage of serviceable life remaining (*Vancouver (City)*), and as in Ontario's leading case – a discount based on the percentage of serviceable life remaining + damages for lost interest amortized over the premature expenditure period (*Upper Lakes*).

As the leading Ontario case, though, *Upper Lakes* offers good guidance the replacement cost is not the end point; the full betterment should be credited to the defendant subject to the net financing cost for the replacement equipment, which is the loss of use of the money in the time span between post-accident replacement and anticipated routine replacement. Counsel representing a client in a tort involving damage to commercial equipment should heed the analytical guidance of *Upper Lakes* and advocate the appropriate damages assessment to properly compensate for loss suffered and not an inflated replacement cost. After all, even in litigation, money doesn´t grow on trees.