

THE ISSUE OF BETTERMENT IN CLAIMS FOR REINSTATEMENT COSTS

AVA SIDHU*

The issue of ‘betterment’ is often raised in tort and contract claims for replacement or repair costs. As there are differences of opinion and approach in dealing with betterment, this article discusses this area of law to provide a better understanding of betterment and the predicament it poses as to whether an account for betterment should be allowed or not, and if so when and why.

I INTRODUCTION

In situations where the plaintiff replaces or repairs property destroyed or damaged by the defendant’s tort or breach of contract, it is often alleged that the replaced or repaired property is improved or is better in some way than the original and that the plaintiff’s damages should therefore be reduced to reflect this.¹

Central to the betterment argument is the principle of compensation, aimed at giving effect to the compensatory goal of damages, by requiring the court to award damages, which will place the plaintiff in the same position as if the defendant’s tort or contractual breach did not occur.² Theoretically, allowing the plaintiff the reinstatement costs measure of loss can fulfil the principle of compensation by placing the plaintiff in the same position as if the wrong did not occur. However, it can also potentially place the plaintiff in a better position, if the reinstated property is better or improved in some way when compared with the original. Arguably, the principle of compensation would be infringed if the reinstatement cost is not reduced to account for the alleged betterment.

An important point to make at the outset is that an allegation of betterment giving rise to an issue of betterment triggers two separate and sequential issues or inquiries for the court to determine: a) whether the alleged betterment exists on the facts of any given case (the issue as to the existence of betterment); and if so, b) whether an account for betterment should be allowed or not (the issue as to its accountability or deductibility). There can of course be serious difficulties trying to disentangle the specific findings of the court, if the issues are conflated.

* LLB (Hons) (University of Singapore) LLM (UWA) MPhil (UWA); Lecturer, University of Notre Dame Australia.

¹ See eg, *Hoad v Scone Motors Pty Ltd* [1977] 1 NSWLR 88; *Anthoness v Bland Shire Council* [1960] SR (NSW) 659; *Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd* [2001] NSWCA 313. See also *Harbutt’s Plasticine Ltd v Wayne Tank and Pump Co Ltd* [1970] 1 QB 447.

² *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39; *Robinson v Harman* (1848) 1 Exch 850, 855; 154 ER 363, 365. See also *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 285–6 [13]; *Butler v Egg and Egg Pulp Marketing Board* (1966) 114 CLR 185, 191; *Todorovic v Waller* (1981) 150 CLR 402, 412; *Johnson v Perez* (1989) 166 CLR 351, 371; *Commonwealth of Australia v Amann Aviation Pty Ltd* (1991) 174 CLR 64, 80; *Haines v Bendall* (1991) 172 CLR 60, 63.

The courts have noted that there are ‘differing views’³ or ‘differences of opinion’⁴ on the betterment issue. It has been noted further that the ‘judicial exercise has not been particularly assisted by some undefined notions of the concept of benefit’ and ‘their treatment in some of the cases’.⁵ Commentators have likewise noted that whether the defendant should be given credit for betterment is ‘a controversial question, leading to apparently conflicting answers’.⁶ In a discussion of cases in this area of law another commentator concluded that the ‘authorities do not present an entirely consistent picture’.⁷

In light of differences in opinion and approach in dealing with betterment, it remains to be resolved and settled as to what would fall within the term ‘betterment’, and when and why an account for betterment should or should not be allowed. This article examines this area of law to provide a better understanding of betterment and the issues it raises. This article also argues and provides support for a general approach to account for betterment (‘the principle of accountability’), subject to reasoned exceptions, in order to put in place a principled and just framework of approach in dealing with betterment.⁸

Towards the above end, the article is structured as follows: Part II outlines briefly how damages are assessed; Part III examines the concept of betterment and its constituent elements (which will assist in determining the issue and inquiry as to the existence of betterment on the facts of any given case); Part IV draws upon factors that may possibly have affected the courts’ consideration of the betterment issue concerning its accountability; Part V discusses and provides support for the suggested general approach to account for betterment; and Part VI discusses the basis and scope of potential exceptions to the principle of accountability.

II ASSESSING DAMAGES

Where the context allows, the terms used in this article are as follows: ‘property’ refers to land (including buildings and fixtures) and/or goods; ‘damage’ refers to any impairment

³ *Von Stanke v Northumberland Bay Pty Ltd* [2008] SADC 61 [130] (Lovell J).

⁴ *Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd* [2001] NSWCA 313 [27] (Sheller JA).

⁵ *Optus Networks Pty Ltd v Leighton Contractors Pty Ltd* [2002] NSWSC 327 [1353] (Hunter J). Lovell J had also noted that there were ‘differing views’ on ‘betterment and how it is to be applied’: *Von Stanke v Northumberland Bay Pty Ltd* [2008] SADC 61 [130].

⁶ Harold Luntz and David Hambly, *Torts: Cases and Commentary* (LexisNexis Butterworths, 5th revised ed, 2006) 612. See also M J Tilbury, *Civil Remedies Vol Two: Remedies in Particular Contexts* (Butterworths, 1993) 202, where it was commented that the betterment issue was ‘still controversial’ as to ‘whether or not any deduction is to be made’ for the improved condition of a chattel when claiming for repair cost.

⁷ Catherine Penhallurick, ‘The Principle of “Betterment” in Damages for Contract and Tort’ (2002) 22 *Australian Bar Review* 109, 109.

⁸ This article only deals with the issues indicated above. Other issues concerning betterment (for example, how betterment should be valued in monetary terms, or how matters of proof should be determined in betterment disputes) fall outside the scope of this article and will therefore not be discussed. In relation to the various issues concerning betterment, see Ava Sidhu, *A Critical Examination of the Betterment Predicament in the Assessment of Damages for Damage or Destruction to Property in Tort and Contract Claims* (MPhil Thesis, University of Western Australia, 2014).

to the plaintiff's property falling short of destruction; 'destruction' refers to total destruction, including constructive total loss (where repair is impracticable or uneconomic); and 'reinstatement costs' refer to repair costs and/or replacement costs.

A *Dominance of the Compensatory Goal and Principle*

The principal remedy for breaches in tort and contract is an award of damages, aimed at providing the plaintiff with monetary compensation for damage and loss suffered as a consequence thereof.⁹ The central role played by compensation is well recognised. For example, Windeyer J in *Skelton v Collins* described compensation as 'the cardinal concept'.¹⁰ He referred to the principle of compensation, which gives effect to the compensatory objective, as 'the one principle that is absolutely firm, and which must control all else'.¹¹

The 'principle of compensation' (also commonly referred to as the *restitutio* or indemnity principle) is often traced back to the following two 19th century English authorities.¹² Lord Blackburn in *Livingstone v Rawyards Coal Co* formulated the principle of compensation in the context of tort claims as follows:

[W]here any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.¹³

Parke B in *Robinson v Harman* formulated the compensation principle in the context of contract claims as follows:

The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.¹⁴

What may appear above as different formulae of loss are 'simply the result of the different nature of the rights or interests protected, not of a different purpose of relief'.¹⁵ Lord Diplock's articulation below clarifies the position by unifying both formulae of loss:

⁹ Compensation is not the exclusive purpose and goal of remedies under private law. Non-compensatory objectives are, however, strictly exceptional (and can be found, for example, in exemplary, restitutionary, nominal, contemptuous and vindictory damages).

¹⁰ (1966) 115 CLR 94, 128.

¹¹ *Ibid.* The High Court lately reaffirmed the compensation principle as the 'ruling principle' governing the recovery of damages: *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272, 285–6 [13]. See also other Australian authorities cited at above n 2.

¹² The principle of compensation can also be traced back even further to early English maritime cases, such as *The Gazelle* (1844) 2 W Rob 279, 166 ER 759 (Adm); *The Clyde* (1856) Swab 23, 166 ER 998 (Adm); *The Pactolus* (1856) Swab 173, 166 ER 1079 (Adm); *The Clarence* (1850) 2 W Rob 283 (Adm).

¹³ (1880) 5 App Cas 25, 39.

¹⁴ (1848) 1 Exch 850, 855; 154 ER 363, 365.

¹⁵ Sirko Harder, *Measuring Damages in the Law of Obligations: The Search for Harmonised Principles* (Hart Publishing, 2010) 10.

[T]he measure of damages recoverable for the invasion of a legal right, whether by breach of a contract or by commission of a tort, is that damages are compensatory. Their function is to put the person whose right has been invaded in the same position as if it had been respected as far as the award of a sum of money can do so.¹⁶

B *Where Land is Damaged or Destroyed*

Cases of damage to or destruction of land (including buildings or other fixtures) are prominent in both tort (often made under negligence, trespass or nuisance)¹⁷ and contract. Claims can be made concurrently in tort and contract, as in *Harbutt's Plasticine Ltd v Wayne Tank and Pump Co Ltd*.¹⁸

In cases of damage to or destruction of land (including buildings or other fixtures), application of the compensation principle usually gives rise to two competing measures of loss, either 'the reinstatement costs' measure (representing either repair costs or replacement costs involved), or 'the diminution in value' measure (representing the difference between the value of the subject land or building immediately prior to the damage and its value immediately thereafter).¹⁹ Where the parties disagree as to which measure of loss should apply, the courts usually apply 'the test of reasonableness', requiring consideration as to what in the particular circumstances of the case would most reasonably give effect to the compensation principle.²⁰ The issue is one of fact. In evaluating various indicia of 'reasonableness' the following factors may be relevant: the type of property involved and its usage; the extent of injury to the property; the availability or absence of a market in the property; the proportionality between the different measures of loss; and whether the plaintiff intends to use the money that would be recovered on a reinstatement costs basis to actually do the repair work.²¹ Each of these factors is not in itself exclusive or decisive. Situations involving breaches of

¹⁶ *Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero)* [1977] AC 774 (HL), 841.

¹⁷ Physical damage to land (including buildings or other fixtures) often arises from incidents such as fire, floods, vibrations, or any other impact caused by the defendant's wrongful act or neglect. As land is of a permanent nature, it cannot ordinarily be physically destroyed; however, land can be considered a constructive total loss from physical damage inflicted. Misuse of land, such as by severe erosion of its topsoil, can also result in total destruction of its economic value.

¹⁸ [1970] 1 QB 447 (*Harbutt's*).

¹⁹ *Pantalone v Alaouie* (1989) 18 NSWLR 119, 137; *Evans v Balog* [1976] 1 NSWLR 36, 40; *Bellgrove v Eldridge* (1954) 90 CLR 613, 618; *Westwood v Cordwell* [1983] 1 Qd R 276. The reinstatement costs measure is usually more costly than the diminution in value measure. The same position generally applies to both tort and contract actions: *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd* [2008] FCAFC 38 [29]. There are also other general measures of loss representing different ways of valuing the plaintiff's loss suffered (for example, the market value of the subject property, the cost of a substitute, or the capitalized potential of the subject property). The plaintiff is also entitled to claim consequential losses suffered (for example, loss of profits, loss of use of the land, or cost of alternative accommodation during the period of reinstatement). Injunctive or self-help relief may also be sought if necessary.

²⁰ *Bellgrove v Eldridge* (1954) 90 CLR 613, 618; *Evans v Balog* [1976] 1 NSWLR 36, 39–40, 119; *Pantalone v Alaouie* (1989) 18 NSWLR 119, 137; *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344. The courts consider in particular the reasonableness of the plaintiff's desire to reinstate the property, as judged in part by the advantages to the plaintiff (if reinstatement is allowed), and as weighed against the additional cost to be borne by the defendant in having to pay the reinstatement costs over the diminished value.

²¹ *Ibid.* See also *Unique Building Pty Ltd v Brown* [2010] SASC 106; *Wespoint Management Ltd v Chocolate Factory Apartments Ltd* [2007] NSWCA 253; *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd* [2012] NSWCA 184.

building contracts usually present additional factors to be considered. In *Bellgrove v Eldridge* the High Court held that a building owner is entitled to reinstatement costs, if reinstatement was necessary to produce conformity to the building contract and it was also a reasonable course to adopt.²²

C *Where Goods are Damaged or Destroyed*

Cases of damage to or destruction of goods are more prominent in tort than in contract and are often claimed in negligence, trespass or nuisance.

Where the plaintiff's goods are damaged by the defendant's wrong, the usual measure of damages is 'either the cost of repairing it or of replacing it, whichever is the most appropriate in the circumstances'.²³ The same test of reasonableness as discussed above in relation to land applies to goods. The question as to what would be reasonable is often influenced by what the cheaper alternative would be, unless of course the more expensive option can be justified under the circumstances.²⁴ There are various other indicia, including: difficulties in obtaining similar substitute goods (for example, if the goods involved are unique or rare);²⁵ difficulties in undertaking the repair required (which may be associated with the amount of time, trouble, expense, or risk involved in undertaking such repair); its usefulness to the plaintiff's business; and the condition of the goods before the damage.²⁶

Where the plaintiff's goods are destroyed by the defendant's wrong, the plaintiff's usual loss is the market value of the goods at the time and place of the loss, which usually means the market price of a replacement.²⁷ In exceptional circumstances where an exact replacement is justified and reasonable, the value may be the cost of manufacture of a replacement.²⁸

²² (1954) 90 CLR 613, 617. The High Court also reaffirmed this approach in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* (2009) 236 CLR 272. See also *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344, where it was held that the reinstatement costs measure was not reasonable in the circumstances of the case.

²³ *Jansen v Dewhurst* [1969] VR 421; *Murphy v Brown* (1985) 1 NSWLR 131, 135–136.

²⁴ *Jansen v Dewhurst* [1969] VR 421. Sheller JA remarked that the 'approach is no different whether the destruction of or damage to property results from breach of contract or negligence [under tort]': *Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd* [2001] NSWCA 313 [37].

²⁵ *Anthoness v Bland Shire Council* [1960] SR (NSW) 659 (where a Bristol motor car could not be easily replaced).

²⁶ *Murphy v Brown* (1985) 1 NSWLR 131, 133, 136; *Von Stanke v Northumberland Bay Pty Ltd* [2008] SADC 61 [61]; *Darbishire v Warran* [1963] 1 WLR 1067, 1072 (Harman J), 1077 (Pearson J).

²⁷ *The Clyde* (1856) Swab 23, 166 ER 998; *Hoad v Scone Motors Pty Ltd* [1977] 1 NSWLR 88, 99–100; *Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* [1990] 2 All ER 246; *Liesbosch Dredger v SS Edison* [1933] AC 449, 468. In appropriate circumstances the value may also include the costs of adaptation.

²⁸ *Jones v Port of London Authority* [1954] 1 Lloyd's Rep 489; *Uctkos v Mazzetta* [1956] 1 Lloyd's Rep 209, 216.

III A CLEARER UNDERSTANDING OF THE CONCEPT OF BETTERMENT AND ITS ELEMENTS

It is apparent that an allegation of betterment can only arise where the reinstatement measure of loss applies and the plaintiff claims for the reinstatement costs.

The examination and discussion below will render a better understanding of the concept of betterment and its constituent elements. This will assist in determining the issue and inquiry as to the existence of betterment on the facts of any given case. With betterment premised upon the plaintiff being overcompensated, it will be made clear that the following three elements must be demonstrated before any finding of betterment can be made: a) an improvement in the reinstated property; b) a benefit to the plaintiff; and c) a resultant improvement in the plaintiff's financial position.

A Occurrence of Overcompensation to be Satisfied

1 *The First Element: An Improvement in the Reinstated Property ('the Improved Property' Requirement)*

When a plaintiff repairs or replaces damaged or destroyed property as a consequence of the defendant's tort or breach of contract, the reinstated property is often different not only in appearance, but also in relation to other aspects. Improvements alleged could possibly include any or more of the following: that the reinstated property is new; more valuable; more modern in design or technology; bigger or more spacious; more durable or more strongly built; offers a longer life; offers more efficiency; or is otherwise more productive. Improvements could possibly be the result of improved materials, design or technology used when repairing or replacing the original property. It is apparent that to allege betterment there must exist on the facts an improvement in the reinstated property, whether reflected in its appearance, capacity, or otherwise, when compared with the original property.

Hoad v Scone Motors Pty Ltd is an often-cited case on betterment.²⁹ In this case a fire caused by the defendant's negligence destroyed the plaintiff's farming equipment (namely a tractor and mower). As the farming equipment was unable to be replaced with suitable local second-hand replacements, the plaintiff purchased new ones and claimed the full replacement costs incurred. The defendant argued on appeal that the replacement costs claimed should be reduced to account for betterment. The majority (Moffit P and Hutley JA) took the view that the plaintiff, through the purchase of new equipment to replace the old, had become better off and that this should be accounted for.³⁰ The majority ordered a new trial in order to obtain more information on material events up to the date of the trial (including whether the plaintiff had sold, or would sell, the replaced equipment upon expiry of the plaintiff's farm lease). It appears that the majority were prepared to make a finding of betterment and allow an account for it, if they could obtain such information. This aspect of the majority judgment requires closer scrutiny. On the facts disclosed, other than being new and presumably more valuable as a consequence thereof, the replaced equipment did not exhibit any improvement over the original equipment. The dissenting judge, Samuels JA, also raised this issue,

²⁹ [1977] 1 NSWLR 88 (*Hoad*).

³⁰ *Ibid* 96 (Moffit P).

pointing out that the new equipment ‘was no more than a mere replacement for the old, and as nearly equivalent as the circumstances in which the plaintiffs were placed would permit’ and that it was used by the plaintiff in its business as dairy farmers in exactly the same way as the original equipment.³¹ In the absence of any improvement in the reinstated property (beyond being new and presumably more valuable as a consequence thereof) a finding of betterment would be questionable.

It is apparent from the above discussion that it would be necessary to firstly demonstrate an improvement in the reinstated property before a finding of betterment can be made. As the authorities clearly indicate, the improvement must be beyond ‘new replacing old’.³²

2 *The Second Element: A Benefit to the Plaintiff (‘the Benefit’ Requirement)*

In *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc*,³³ Hely J remarked that in situations where the reinstatement measure of loss is applied, betterment can only be argued if the plaintiff ‘acquired something more than *resitutio in integrum*’. With betterment premised upon the plaintiff being overcompensated, there must consequently be a benefit to the plaintiff (the second element). Such benefit must flow or result from the improved property (that is, the first element discussed above).

In *Nationwide New Ltd v Power and Water Authority* the court questioned whether the superior replacements could ‘confer a benefit’ upon the plaintiff.³⁴ To result in improving the plaintiff’s financial position, there must be *real* benefit to the plaintiff. In *South Parklands Hockey & Tennis Inc v Brown Falconer Group Pty Ltd* the court noted that, notwithstanding the plaintiffs would be ‘getting a new playing surface ahead of time

³¹ *Ibid* 103.

³² In *Optus Networks Pty Ltd v Leighton Contractors Pty Ltd* [2002] NSWSC 327 [1393] (affirmed on appeal in *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333), the court made it clear that there was ‘no general doctrine of betterment’ where merely ‘new replaces old after total loss’. In *Paper Australia Pty Ltd v Ansell Ltd* [2007] VSC 484 [180] (Bongiorno J), the court held that the new MG cylinder being merely ‘the modern equivalent of the old MG cylinder’ was insufficient for betterment to be made out. In *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc* [2004] FCA 1211 [488] (Hely J), the court looked for ‘added extras’ (beyond new replacing old) when considering if a finding of betterment can be made. More directly, Samuels JA in *Hoad* [1977] 1 NSWLR 88 asserted that betterment cannot arise ‘merely because a plaintiff gets new for old’. See also *Harbutt’s* [1970] 1 QB 447, 476, where Cross LJ stated that the defendants were not entitled to claim betterment ‘simply on the ground that the plaintiffs have got new for old’. In *Nan v Black Pine Manufacturing Ltd* (1991) 80 DLR (4th); 1991 CanLII 1144 (BCCA) the court reaffirmed that it cannot be assumed ‘that simply by getting a new house for an old one Mr Nan had enjoyed some element of “betterment”’. See also Denis J Power and Duane E Schippers, ‘Good Intentions, Reasonable Actions: Recovery of Pecuniary Damages for Property Losses’ in Law Society of Upper Canada, *Law of Remedies Principles and Proofs* (Carswell, 1995) 127, 173, which states that the last decision ‘suggests that even where the plaintiff has received new for old this is insufficient to satisfy betterment as there may not be any real tangible financial advantage to the plaintiff in such a case’.

³³ [2004] FCA 1211 [488].

³⁴ [2006] NTSC 32 [120]. The plaintiff claimed damages against the defendant for negligence and breach of statutory duty relating to three electrical disturbances in the electricity grid, which damaged the plaintiff’s electrical and telephonic plant and equipment. Although the court concluded that there were no breaches on the part of the defendant, it went on to consider the issue of damages.

when the surface would have to be replaced', this would be 'of no real benefit' to them.³⁵ Further afield in *Voaden v Champion (The 'Baltic Surveyor' and 'Timbuktu')*, the court questioned whether there was a 'corresponding advantage' to the plaintiff from the reinstated property.³⁶ Also in *McMillan Bloedel Ltd v Canadian National Railway*, the court questioned whether the reinstated property could offer the benefit of increased capacity with more efficiency, productivity and greater profits.³⁷

Some additional observations may be made in regards to the benefit to the plaintiff. References such as an 'advantage to the plaintiff',³⁸ or a 'real benefit to the plaintiffs', may point to a more subjective approach, requiring the benefit to relate specifically to the particular plaintiff involved.

References to a 'real benefit to the plaintiff'³⁹ also imply that such benefit must not be merely speculative. In *Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd*, Sheller JA held that there was no evidence of 'any advantage to the plaintiff beyond the speculative proposition that the new pavement might last longer than the old one would have'.⁴⁰ In *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd*, Giles JA held that the purported benefit 'was no more than speculative'.⁴¹ In *Voaden v Champion*, the same point was made that the benefit must not be 'entirely speculative'.⁴²

A distinction may be made between 'speculative' and 'potential' benefits based upon the degree of likelihood of their occurrence. In practical terms, both types of benefit are likely to fall short of the benefit requirement, because they are both unlikely to achieve the result of improving the plaintiff's financial position (the third element). It would be sensible and prudent to reject outright such speculative or potential benefits to avoid onerous and costly exercises with little benefit to the parties.

There would often be more difficulties if the reinstated property is only part of a bigger item, such as a new engine, or other component, installed in an original car. Rix LJ elaborates on these difficulties:

Take the ordinary case of the repair of some part of a machine. Where only a new part can be fitted or is available, the betterment is likely to be purely nominal: for unless it can be posited that the machine will outlast the life left in the damaged

³⁵ [2004] SASC 81 [126] (Debelle J) ('*South Parklands*'). The defendants in this case rendered negligent advice to the plaintiff's architects and engineers. This resulted in a defective dual-purpose playing-field being constructed for the plaintiff.

³⁶ [2002] EWCA Civ 89 (31 Jan 2002); [2002] 1 Lloyd's Rep 623 [58]. The defendant's negligent mooring of its vessel (the *Timbuktu*) resulted in its sinking, as well as the dragging down of the plaintiff's pontoon and vessel (the *Baltic Surveyor*). The court had to assess the plaintiff's loss.

³⁷ [1989] OJ 1604 (Ont SC) (Unreported, 27 Sept 1989, O'Driscoll J). The plaintiff's aspenite board mill suffered fire damage as a result of the defendant's negligence. The damage necessitated replacement of the damaged electric wiring in the dryer control room, as well as the roof and sliding panels).

³⁸ *Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd* [2001] NSWCA 313 [55].

³⁹ [2004] SASC 81 [126].

⁴⁰ [2001] NSWCA 313 [55] ('*Hyder*'). Referring to this, Hodgson JA in *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333 [262] stated, 'the prospect that, about sixteen years in the future the new pavement would probably continue for four years longer than the original pavement should have done, was considered too remote and speculative'.

⁴¹ [2005] NSWCA 443 [34].

⁴² [2002] EWCA Civ 89 (31 Jan 2002) [58]; [2002] 1 Lloyd's Rep 623.

part just before it was damaged, the betterment gives the claimant no advantage; and in most cases any such benefit is likely to be entirely speculative.⁴³

In *Paper Australia Pty Ltd v Ansell Ltd*,⁴⁴ replacement of a damaged cylinder represented only a part of the whole paper-making machine. The difficulty of satisfying the benefit requirement in such circumstances led the court to conclude that there was no evidence of any ‘relevant benefit’.⁴⁵ It would be necessary in these situations to evaluate how significant such a reinstated part bears to the entire item, or how such a part can on its own be of any real benefit to the plaintiff.

3 *The Third Element: A Resultant Improvement in the Plaintiff’s Financial Position (‘the Improved Financial Position’ Requirement)*

The final element to satisfy the existence of betterment requires proving the plaintiff’s resultant financial improvement, brought about by the improvement in the reinstated property (the first element) and the benefit it generated (the second element). The plaintiff’s superior financial position subsequent to the wrong represents the overcompensation that betterment is premised upon.

This third element requires the benefit accruing to the plaintiff (under the second element) to be both realisable and quantifiable in monetary terms. Thus if an improvement in the reinstated property gives rise to the benefit of an increased value, but the plaintiff cannot realise such benefit (for example, by selling the property), the third element would be found to be absent, unless a sale can be said to be imminent, and not too distant or remote in time. Using another example, if the improvement in the reinstated property delivers the benefit of a bigger property, but the plaintiff, being an owner-occupier, would not be able to realise any increased rental, the third element would similarly be found to be absent.

4 *Definition of Betterment cum Three-Elements Test and its Application*

The above analysis of betterment is grounded upon the principle of compensation and the framework of law underpinning damages awards. It would be useful to go one step further to articulate a definition of betterment reflecting its individual elements, which can then serve as an expedient and reliable test for consistent findings of betterment to be reached. To this end the following definition of betterment is suggested:

‘Betterment’ is the improvement in the plaintiff’s property, which has been reinstated by repair or replacement, as a result of the damage or destruction caused to the property by the defendant’s wrong in tort or contract, which delivers a real benefit or advantage to the plaintiff and leads to an improvement in the plaintiff’s financial position after the wrong.

The efficacy of the suggested definition with its three-elements test can be demonstrated using the factual scenario of *State Transport Authority v Twhiteco Pty Ltd*.⁴⁶ Here, the underside of a railway bridge was struck due to the defendant’s negligence. As a prudent

⁴³ *Voaden v Champion* [2002] EWCA Civ 89 (31 Jan 2002) [58]; [2002] 1 Lloyd’s Rep 623.

⁴⁴ [2007] VSC 484 (Bongiorno J) (*Paper Australia*).

⁴⁵ [2007] VSC 484 [355] (Bongiorno J).

⁴⁶ (1984) Aust Torts Reps 80–596 (*State Transport*).

managerial decision, the plaintiff redesigned and reconstructed a bridge capable of bearing heavier duty trains and requiring less maintenance. The Court found that the plaintiff received not just a 'new [bridge] for an old bridge', but one which was of 'superior physical dimensions, [had] a longer life expectancy and less maintenance costs than that which it replaced'.⁴⁷ In applying the suggested definition cum test, as regards the first element that there must be an improvement in the reinstated property beyond new replacing old, this can be easily fulfilled upon the above finding of 'superior physical dimensions'. The second element, that there must be a real benefit to the plaintiff from the improved reinstated property, can also be fulfilled without too much difficulty given the finding of savings of maintenance costs. However, for the third element, that there must be a resultant financial improvement in the plaintiff's position subsequent to the wrong, the following remarks by the court that point to a lack of evidence, would mean that it remains unfulfilled:

I have strong evidence as to the extended life of the bridge as rebuilt, and I have direct evidence of its superior technical features. Unfortunately, I have no evidence as to the financial advantages accruing to the Railways by virtue of the superior bridge ... In this case I do not have any evidence to assess in monetary terms why the betterment factor itself should be discounted.⁴⁸

The following two examples can also be used to illustrate the interaction of the three elements of betterment. Suppose for example, that a building which is damaged is used as the plaintiff's home. It is reinstated with a more contemporary design using stronger beams and less internal walls, thereby offering the plaintiff more accommodation space. If the plaintiff used the reinstated property in the same way as previously, the improvement and benefit requirements (the first two elements) can be satisfied, but the financial improvement element (the third element) would not be satisfied. Using another example, suppose that the building damaged is used by the plaintiff for investment purposes; it is reinstated in the same manner as in the first example. In offering more accommodation space, which can thereby result in a higher rental than previously, both the first and second elements can be satisfied. If it can be shown further that the plaintiff in fact secured a higher rental, the third element would also be satisfied (thereby confirming that betterment exists in this example).

IV FACTORS POSSIBLY AFFECTING CONSIDERATION OF THE BETTERMENT ISSUE: WHETHER OR NOT TO ACCOUNT FOR BETTERMENT

Having discussed in depth the concept of betterment and its constituent elements, the issue as to its accountability (whether or not to account for the betterment found to exist on the facts) can now be looked into. The discussion below focuses upon three cases to gain more insight into what factors may, have, or can possibly affect the courts' consideration of this issue.

⁴⁷ Ibid 68,622.

⁴⁸ Ibid 68,623.

A *Anthones* (*Inclination to Overcompensate Rather than Financially Disadvantage Plaintiff*)

In *Anthones v Bland Shire Council*,⁴⁹ the defendant caused the plaintiff's car to be damaged. The appeal court affirmed the trial judge's decision to award full repair costs, reiterating the trial judge's concern that a reduction of the repair costs would 'forc[e] the plaintiff to put his hand in his pocket'.⁵⁰ The appeal court also stated that such reduction would be contrary to the plaintiff's 'right against the wrong-doer ... for *restitutio*', which must be effected 'without calling upon the party injured to assist'.⁵¹ It may possibly be inferred that the court appeared more concerned with protecting or securing the plaintiff's interests over that of the defendant's. Possibly, the plaintiff's status as the wronged or innocent party (as opposed to the defendant's as the wrong-doer) may have had some influence. This approach inclines towards overcompensating the plaintiff, rather than disadvantaging the plaintiff financially. It accordingly reflects an inclination not to account for betterment.

B *Hoad* (*Focus upon Plaintiff's True or Net Loss; Inclination to Avoid Overcompensating Plaintiff*)

The majority judges in *Hoad* were in favour of accounting for betterment as long as it can be made out.⁵² They focused strongly on the plaintiff's true or net loss, thereby placing due emphasis upon the compensatory goal of a damages award. Moffit P stressed that the plaintiff should not receive any compensation greater than its 'net loss' or 'net detriment',⁵³ which he saw as representing the plaintiff's 'true loss'.⁵⁴ He added that he found it difficult to accept the concern raised in *Anthones*, that the plaintiff 'should not be forced to invest their money in buying new equipment'.⁵⁵ According to him, an award of damages granted 'upon a basis which would provide greater compensation, or appear to do so, would need critical examination'.⁵⁶ The court's focus upon the plaintiff's true or net loss and its concern to avoid overcompensating the plaintiff reflect an inclination to account for betterment.

⁴⁹ (1960) SR (NSW) 659 (*'Anthones'*).

⁵⁰ *Ibid* 665. The court's focus upon justifying why betterment should not be deducted appears to have been constrained to fully ascertain the existence of betterment. The court appears to have conflated the first issue in determining the existence of betterment with the second issue of its accountability. Although the court did not directly address the question as to what is meant by betterment, it can be inferred that the court was prepared to view an increase in the value of the reinstated property as sufficient to satisfy the existence of betterment. This would only satisfy the first two elements (ie, the improved reinstated property and benefit requirements) of the suggested three-elements test of betterment. The extensive repair works carried out by the plaintiff of the damaged Bristol car could satisfy the first element. That it was consequently presumed to be more valuable would satisfy the second element. The court did not, however, specifically consider if the improved reinstated property and its presumably increased value would in fact result in improving the plaintiff's financial position. This may be demonstrated, if there was perhaps an intended sale of the reinstated property. As indicated above, the third element requires the benefit accruing to the plaintiff (under the second element) to be both realisable and quantifiable in monetary terms.

⁵¹ *Ibid* 666.

⁵² [1977] 1 NSWLR 88.

⁵³ *Ibid* 96.

⁵⁴ *Ibid* 94, 95.

⁵⁵ *Ibid* 95.

⁵⁶ *Ibid* 95.

C Hyder (*To Evaluate 'Material' Considerations*)

In *Hyder*,⁵⁷ the plaintiff replaced defective pavement, which collapsed four years after its construction, with new pavement that offered a similar life expectancy of 20 years as the original. Similar to the approach in *Hoad*,⁵⁸ the majority in *Hyder* acknowledged the concept of betterment. However, the difference in their approaches was that in *Hyder* there was no unequivocal willingness to account for betterment, as appears the case in *Hoad*. In the course of his judgment, Sheller JA (one of the majority judges in *Hyder*) noted that there were 'differences of opinion' on the betterment issue.⁵⁹ According to him, a finding of betterment would not in and of itself trigger an account for betterment, but would be dependent upon 'several considerations' that would have to be 'material'.⁶⁰ He adapted Dr Lushington's approach in *The Gazelle* by shifting his approach from one which does not favour accounting for betterment,⁶¹ to one which favours it, but at the same time takes into account material considerations, such as whether betterment could have been avoided. In Sheller JA's words:

To adapt the words of Dr Lushington, the question is whether on the evidence a greater benefit than mere indemnification could be avoided without exposing the plaintiff to some loss or burden.⁶²

It appears that Sheller JA made an attempt to reconcile two concerns—*not* overcompensating the plaintiff with *not* imposing any undue burden upon the plaintiff. The question of avoidability (including whether there was a choice or not) would be a

⁵⁷ [2001] NSWCA 313. The plaintiff in this case succeeded in its negligence action against its engineer and architect. On appeal, the architect failed in his attempt to have the plaintiff's damages reduced by 20 per cent, on the ground that the plaintiff already had four years' use of the original pavement, or alternatively that the plaintiff would have an additional four years' use of the new pavement. The majority (Sheller and Giles JJA) held that it was not appropriate to reduce damages for the four years' use of the pavement. Sheller JA reasoned, that '[t]he facts in *Hoad* and *British Westinghouse* are distinguishable from the facts in this case. The plaintiff had no choice but to replace the defective pavement with new pavement' and that it 'could not do so by paying less for a four year old pavement': at [55]. In relation to the alleged betterment, Sheller JA stated, that '[t]here was no evidence of any advantage to the plaintiff beyond the speculative proposition that the new pavement might last longer than the old one would have, if it had been properly laid. Moreover as Giles JA has remarked in his reasons for judgment, it is not appropriate to use a "crude percentage discount" to reduce the amount awarded. ... On the evidence in this case, no allowance should be made from betterment': at [55]. Giles JA reasoned, that '[t]he general principle of *restitutio in integrum*, so that a plaintiff should be compensated for its loss but not over-compensated, is undoubted. Its application will vary according to the circumstances. In the present case the owner was entitled to a sound pavement, and from the time it was laid the pavement failed and the owner did not have a sound pavement. It had to be replaced, and the owner could not replace it with a sound four year old pavement': at [107]. As for the alleged betterment, Giles stated that '[a]ny benefit to the owner seems to be that, whereas it would otherwise have had to spend money repairing or replacing the pavement in (say) 2015, having constructed the pavement in 1999 it will now not have to spend money repairing or replacing it until (say) 2020. So the owner will have the use for five years of the money spent on the repair or replacement. If any allowance in favour of the architect is to be made, I do not think it should be by the crude percentage discount suggested by the owner': at [107].

⁵⁸ [1977] 1 NSWLR 88.

⁵⁹ [2001] NSWCA 313 [27].

⁶⁰ *Ibid* [30].

⁶¹ (1844) W Rob 279; 166 ER 759.

⁶² *Hyder* [2001] NSWCA 313 [30].

material consideration to take into account when considering whether or not to account for betterment.⁶³

D *Summing Up*

When dealing with the betterment issue the proper focus should be upon the plaintiff's true or net loss, as apparent in *Hoad*.⁶⁴ This would give effect to the compensatory goal and principle of damages. A focus upon other considerations that stray from the compensation principle (for example, the interests or status of the parties), would be misconceived. In relation to the approach in *Hyder*,⁶⁵ it is not entirely clear as to what the 'several' or 'material' considerations referred to are or should be.

V A GENERAL APPROACH TO ACCOUNT FOR BETTERMENT: THE PRINCIPLE OF ACCOUNTABILITY

It is argued in this article that a general approach to account for betterment, subject to reasoned exceptions, will put in place a principled and just framework of approach in dealing with betterment.⁶⁶ There is strong support and justification for the suggested general approach of accountability. This approach is consistent with and enhances the existing framework of law on damages, in particular the compensatory goal and principle, and the avoided loss rule of mitigation. Policy considerations provide additional support. This approach is further fortified by the corrective justice theory of law.

A *Consistent with Principles under the Law of Damages*

1 *General Approach of Accountability Preferred over Alternative Approach*

A general approach to account for betterment subject to exceptions is preferred to the alternative of a general approach *not* to account for betterment subject to exceptions. Unlike the alternative approach, the suggested approach is fully in accordance with the compensatory goal and principle of a damages award. Under the current framework of the law on damages, where compensation is recognised as the paramount goal, it would be anomalous and unjust to impose a general framework of approach that allows the plaintiff to recover more than the actual loss suffered.

The suggested approach also aligns with the approach gaining favour in regards to compensating benefits where there is a general inclination towards accountability, as Grubb explains:

The better position, it is submitted, is that deductibility of gains should now be the rule, whatever their source ... In so far as a claimant wishes to prevent a benefit being brought into account, he will have to bring himself within a particular exception allowing him to recover more than his actual loss.⁶⁷

⁶³ See above n 57.

⁶⁴ [1977] 1 NSWLR 88.

⁶⁵ [2001] NSWCA 313.

⁶⁶ The reasoned exceptions will be discussed in Part VI.

⁶⁷ Andrew Grubb (ed), *The Law of Damages (Butterworths Common Law Series)* (LexisNexis Butterworths, 2003) 99. 'Compensating benefits' are benefits or gains which arise as a consequence

2 *In Harmony with the Compensatory Goal and Principle*

A general approach to account for betterment is justifiable as a matter of principle. As aptly observed, the courts 'are loathe to award damages which have the effect of overcompensating the plaintiff', and in order 'to address this concern the courts [have] developed the concept of betterment'.⁶⁸ A general approach to account for betterment gives full effect to the compensatory goal and principle, as highlighted by the following passage in the context of reinstating property:

The execution of repairs may make the chattel more valuable than it was before it was injured. Clearly it would be unreasonable in many cases to restore the article to its exact physical condition at the time of the accident, warts and all. Yet in principle it does not follow that the plaintiff should thereby benefit and still recover the full cost of repairs. To be consistent with the general compensatory principle a sum should be deducted from the plaintiff's award for the consequent increase in the 'value' of his article.⁶⁹

In the context of destruction or damage to property, *restitutio* or indemnification means restoring the value of the plaintiff's actual loss.⁷⁰ In *Hoad*, Moffit P described the plaintiff's actual or true loss as its 'net loss'⁷¹ or 'net detriment'.⁷² He accordingly cautioned against awarding damages for 'greater compensation'⁷³ than the plaintiff's actual loss. As has been aptly observed by a commentator, a damages award aimed at providing 'full indemnification' must cap the award to the 'plaintiff's actual loss'.⁷⁴

Replacement or repair expenditure, as *prima facie* measures of loss, serve only as indicators of the value of the plaintiff's loss. These measures of loss should thus be merely seen as the starting point of the damages assessment process. As Tilbury explains, there can be a 'disjuncture' between the 'plaintiff's actual loss' and a 'formulaic general measure of damages based on a model of paradigm loss'.⁷⁵ A deduction from the reinstatement measure of loss to account for betterment, yielding to the notion of compensation, would therefore be appropriate and just.

of the wrong. They are not limited as betterment is to claim for reinstatement costs in situations where property damaged or destroyed is reinstated.

⁶⁸ Power and Schippers, above n 32, 169.

⁶⁹ See A I Ogus, *The Law of Damages* (Butterworths, 1973) 134.

⁷⁰ Although a damages claim for reinstatement costs may appear to replicate relief *in specie*, it remains essentially a damages claim for monetary compensation. The High Court made it clear that a plaintiff cannot recover 'more than [what] he or she has lost': *Haines v Bendall* (1991) 172 CLR 60, 63. In *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333 [260] (Hodgson JA), the court emphasised that the plaintiff should only 'be compensated for its loss, and no more'.

⁷¹ [1977] 1 NSWLR 88, 96.

⁷² *Ibid* 96.

⁷³ *Ibid* 91.

⁷⁴ Robert B Munroe, 'An Overview of Pecuniary Damages in Personal Injury Claims' in Law Society of Upper Canada, *Law of Remedies: Principles and Proofs* (Carswell, 1995) 51, 55.

⁷⁵ Michael Tilbury, 'Reconstructing Damages' (2003) 27 *Melbourne University Law Review* 697, 703.

It has been pointed out that what lies at ‘the heart of the current debate on the meaning of loss’⁷⁶ is the issue of whether a subjective or objective (or as it has been put, concrete or abstract) viewpoint should be applied. Under a subjective approach, damages are assessed by reference to the plaintiff’s actual circumstances. In its pure form under the objective approach, the presumption is applied that the plaintiff’s loss consists of the amount determined on the basis of a fixed formula, such as the reinstatement measure, without reference to the plaintiff’s actual circumstances. While there is certainly a ‘practical need for a simple rule that can be administered in a clear, expeditious and certain way’,⁷⁷ this ought to be counterbalanced by a ‘need to calculate damages in a way that expresses the real loss of the claimant’.⁷⁸ As Bridge points out, there is ‘a policy for damages to express the injured party’s true loss’.⁷⁹ Preference for a subjective approach, allowing adjustments for betterment, is therefore justifiable.

Expressed through the converse of the compensatory principle, the courts have often urged that the plaintiff should not be overcompensated. The courts have also expressed this in terms that the plaintiff should not be enriched by receipt of a windfall gain representing betterment.⁸⁰ For example, a deduction for betterment was urged in *Hyder*, so that the plaintiff would not gain ‘a windfall he was not entitled to’.⁸¹ In *Bushells Pty Ltd v Commonwealth*, the plaintiff’s expenditure for restoring a damaged awning was subjected to an account for betterment as it ‘would [otherwise] enrich the plaintiff’.⁸² In *Stephenson v State Bank of New South Wales Ltd*, the court explained that ‘restoration would bring the appellant an enormous and unmerited windfall advantage’ unless betterment was accounted for.⁸³

In *Anthones*, the court cited various English authorities to infer that the ‘wrong-doer’ ought to ‘bear the cost without deduction’.⁸⁴ Clearly, the overriding dominance of the compensatory goal of a damages award necessitates a sustained focus upon the plaintiff’s loss itself, rather than upon any other extraneous considerations, such as the parties’ moral culpability or blameworthiness. As likewise reasoned in the following passage:

⁷⁶ Djakhongir Saidov and Ralph Cunnington, ‘Current Themes in the Law of Damages: Introductory Remarks’ in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 1, 19.

⁷⁷ Michael Bridge, ‘The Market Rule of Damages Assessment’ in Djakhongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 431, 436.

⁷⁸ *Ibid* 436–437.

⁷⁹ Saidov and Cunnington, above n 76, 20.

⁸⁰ Commentators have made similar observations. For example, one commentator observed that in doing more than restoring the plaintiff to his ‘rightful position’ under the compensation principle, the plaintiff would be ‘confer[red] a windfall gain’: Grant Hammond, ‘The Place of Damages in the Scheme of Remedies’, in P D Finn (ed), *Essays on Damages* (Law Book Co, 1992) 192, 222. Another commentator observed that there is ‘an element of windfall’ conferred upon the plaintiff where ‘damages have been given for reinstatement of buildings without reduction for betterment’: Brian Coote, ‘Contract Damages, Ruxley, and the Performance Interest’ (1997) 56(3) *Cambridge Law Journal* 537, 548.

⁸¹ [2001] NSWCA 313 [22] (Meagher JA).

⁸² [1948] St R Qd 79, 92 (Macrossan CJ) (*‘Bushells’*).

⁸³ (1996) 39 NSWLR 101, 110 (Sheller JA).

⁸⁴ *Anthones* (1960) SR (NSW) 659, 666. The cited English authorities included the following: *The Pactolus* (1856) Swab 173; 166 ER 1079; *The Gazelle* (1844) 2 W Rob 279; 166 ER 759; *The Munster* (1896) 12 TLR 264.

[T]he argument [is] that the defendant deserves to pay, as he is the tortfeasor and wrongdoer, and that as between the plaintiff and defendant any windfall should go to the plaintiff. The new view has laid bare the fallacy in this argument – that this whole approach runs contrary to the basic idea that damages are compensatory and not punitive.⁸⁵

3 *In Harmony with the Avoided Loss Rule of Mitigation*

Situations involving betterment and mitigation often overlap with each other.⁸⁶ As alluded to by Fisher J:

[I]t is worth noting that different labels have been used to describe positive gains flowing from steps taken to rectify an injury caused by a defendant. Sometimes the word ‘mitigation’ has been used ... and sometimes ‘betterment’ ... ‘Mitigation’ may be the more appropriate word when describing a limitation upon the extent of the primary loss itself and ‘betterment’ when describing a positive advantage which can be set off against the primary loss but the two overlap and nothing should turn on the terminology.⁸⁷

In referring to the mitigation principle in his seminal speech in *British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Rly Co of London Ltd*, Viscount Haldane explained that it qualifies the compensation principle, by requiring a plaintiff to take ‘all reasonable steps to mitigate the loss consequent on the breach, and debars him from claiming any part of the damage, which is, due to his neglect, to take such steps’.⁸⁸ The mitigation principle can be broken down into three rules, with only the third rule, which relates to avoided loss (commonly referred to as ‘the avoided loss rule’ of mitigation), of relevance to this discussion.⁸⁹ Under the avoided loss rule, the defendant is required to compensate for actual loss suffered by the plaintiff, to the

⁸⁵ Harvey McGregor, ‘Compensation versus Punishment’ (1965) 28 *Modern Law Review* 629, 632. The explanation which was targeted directly at collateral benefits applies likewise to betterment.

⁸⁶ The factual situation in *Hoad* [1977] 1 NSWLR 88 can help illustrate situations wherein betterment and mitigation can overlap. When the plaintiff’s tractor and mower were destroyed by fire caused by the defendant’s negligence, the plaintiff purchased new replacements to resume its business and mitigate its loss. Assuming that the new replacements exhibited improvements and the plaintiff benefited from the sale of the replacements (upon expiry of its farm lease), the alleged profit from a higher resale price for the replacements can be characterised as arising from both mitigation and betterment.

⁸⁷ [1999] 2 NZLR 99, 105 (Fisher J).

⁸⁸ [1912] AC 673, 689 (*British Westinghouse*). In relation to mitigation generally, see Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 18th ed, 2009) 217; Michael Bridge, ‘Mitigation of Damages in Contract and the Meaning of Avoidable Loss (1989) 105 *Law Quarterly Review* 398, 398; Harvey McGregor, ‘The Role of Mitigation in the Assessment of Damages’ in Djahongir Saidov and Ralph Cunnington (eds), *Contract Damages: Domestic and International Perspectives* (Hart Publishing, 2008) 329, 330–331.

⁸⁹ See generally R G Lawson, ‘Mitigation of Damages: Recent Developments’ [1978] 128 *New Law Journal* 1185; Harvey McGregor, ‘The Role of Mitigation in the Assessment of Damages’ in Djahongir Saidov and Ralph Cunnington (eds), above n 88, 349. The first rule bars the plaintiff from claiming for loss due to his failure to take reasonable steps to reduce his loss (commonly referred to as ‘the avoidable loss rule’). The second rule allows the plaintiff to recover reasonable expenses incurred as a consequence of mitigation.

exclusion of any benefits or savings accruing to the plaintiff from mitigation.⁹⁰ Betterment would fall under such benefits.

Given that factual situations involving betterment can also fall within the avoided loss rule of mitigation, it is essential that these rules harmonise and do not conflict with each other. As the suggested general approach to account for betterment harmonises with the avoided loss rule of mitigation, which deducts benefits accruing from mitigation, consistency under the law of damages is thereby maintained.⁹¹

B *Supported by Policy Considerations*

Policy considerations provide further support for the suggested approach. It can be argued, from an economic rationale, that a general approach to account for betterment can have the desired beneficial effect of deterring the plaintiff from carrying out any unnecessary or excessive repairs, or the replacement of damaged or destroyed property. Making a similar point, Ogus stated that such an approach can ‘deter the plaintiff from executing unnecessary repairs at the expense of the defendant’.⁹² It will ultimately have the desired effect of avoiding or discouraging ‘economic waste’ on the part of the plaintiff. More broadly, it will encourage and result in more careful management of economic resources by society generally.

C *Reinforced by Corrective Justice Theory*

The suggested general approach, requiring gains in the form of betterment to be deducted under the assessment process, is reinforced by the corrective justice theory of law, which underpins the law of damages. The damages award ‘to restore, as nearly as money can do, the injured party to that person’s rightful position’ is grounded upon the corrective justice theory of law.⁹³ As Hammond explains:

⁹⁰ Viscount Haldane in *British Westinghouse* [1912] AC 673 pronounced that when in the course of business the plaintiff ‘has taken action arising out of the transaction, which action has diminished his loss, the effect of actual diminution of the loss he has suffered may be taken into account even though there was no duty on him to act’: at 689. The words ‘arising out of the transaction’ is important, as under the avoided loss rule not all benefits accruing to the plaintiff are taken into account; only those benefits that arise out of the transaction are taken into account. There are difficulties in determining whether the benefit is one that arises out of the transaction. See *Lavarack v Woods of Colchester Ltd* [1967] 1 QB 278; *Hussey v Eels* [1990] 2 QB 227; *Manwelland Pty v Dames & Moore Pty Ltd* [2001] QCA 436; *Brown v Dream Homes SA Pty Ltd* [2008] 102 SASR 93; *Hussain v New Taplow Paper Mills Ltd* (1988) AC 514; *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd* [2005] NSWCA 443. In reducing the plaintiff’s recoverable damages to the extent to which the plaintiff ought to have avoided or had in fact avoided the loss in question, the mitigation principle serves as a necessary corollary to the compensation principle. Based largely upon policy considerations, its benefits include the following: it promotes a more fair and just system of compensation; it reflects a desire to discourage activities which are economically wasteful and to encourage a more prudent management of resources; and it serves as a useful mechanism to reduce the overall cost to society of compensable injuries allowed under the law.

⁹¹ See generally Lawson, above n 89; McGregor, ‘The Role of Mitigation in the Assessment of Damages’ in Saidov and Cunnington (eds), above n 88, 337; David McLauchlan, ‘Expectation Damages: Avoided Loss, Offsetting Gains and Subsequent Events’ in Djakhongir Saidov and Ralph Cunnington (eds), above n 88, 349.

⁹² Ogus, above n 69, 134.

⁹³ Grant Hammond, ‘The Place of Damages in the Scheme of Remedies’, in P D Finn (ed), *Essays on Damages* (Law Book Co, 1992) 192, 222. Corrective justice is ‘based on a simple and elegant idea [that] when one person has been wrongfully injured by another, the injurer must make the injured

The traditional argument for this proposition is based on the straight-forward idea of corrective justice. ... If we restore the plaintiff to her rightful position, she will not suffer. If we did less, part of the harm would not be remedied, and therefore there would be incompleteness of remedy. If we did more, we would be conferring a windfall gain.⁹⁴

Where the plaintiff's property is destroyed, the relationship between right and remedy under the corrective justice theory necessitates accounting for betterment, on the basis that the plaintiff's entitlement and the defendant's obligation must be limited to only 'the

party whole'; it is clear that tort law 'recognises the corrective justice ideal by providing a mechanism through which defendants who have wrongfully injured plaintiffs are required to compensate those plaintiffs for their injuries, and thereby make them whole insofar as this is practically possible': Benjamin C Zipursky, 'Civil Recourse, Not Corrective Justice' (2003) 91 *Georgetown Law Journal* 695, 695. Corrective justice is acknowledged to be the most influential non-economic analysis on tort law. Under it, tort law embodies a system of first-order duties (duties which prohibit conduct or inflicting of injury) and second-order duties (duties of repair). A defendant's duty of repair under corrective justice explains not only why the plaintiff has a right of action but also why the defendant must pay the plaintiff compensatory damages. See generally Ernest J Weinrib, *The Idea of Private Law* (Harvard University Press, 1995); Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 25 *University of Toronto Law Journal* 349; Jules L Coleman, *Risks and Wrongs* (Oxford University Press, 1992); Arthur Ripstein, *Equality, Responsibility and the Law* (Cambridge University Press, 1998); Aristotle, *Nicomachean Ethics*, Book 5.4 (M Ostwald trans, 1962). There are other theories offering explanations of private law, such as distributive justice (which deals with the sharing of a benefit or burden and involves comparing the potential parties to the distribution in terms of a distributive criterion), retributive justice, and economic theories. A strand of thinking, rights-based theory or analysis, has developed in private law scholarship in recent times, with the primary focus upon the law of torts, where there has been intense debate. Rights analysis seeks to develop an understanding of private law obligations driven by the recognition of the rights we have against each other. It is 'strongly associated with anti-instrumentalism and the idea that torts is and should be concerned primarily or exclusively with notions of interpersonal morality, rather than the pursuit of community welfare goals': Donal Nolan and Andrew Robertson, 'Rights and Private Law' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2014) 1, 2. Nolan and Robertson point out that 'not all "rights theorists" rely on the concept of corrective justice in their scholarship, and [that] some are explicitly critical of it': at 26. They also point out that 'the most striking claims of rights theorists, and the most significant implications of rights analysis, may well be those that concern secondary or remedial rights, rather than primary rights', as 'it is in the approach to remedies that the contrast between the rights-based model and rival models of private law is at its most stark': at 20. According to the approach of one rights theorist, Robert Stevens, 'substitutive damages' represent the value of the right infringed. Referring to this, Nolan and Robertson infer that 'in this way the law of damages aims, not to compensate loss, but to give the claimant the "next best" thing to not having the right violated': at 20. They clarify though that 'in addition to an amount representing the value of the right, a damages award may include consequential loss arising from the infringement of the right': at 20. In discussing Stevens' rights-based approach with its substitutive damages, Burrows makes various observations: that the 'substitutive damages' advanced by Stevens for 'all cases of tort and breach of contract is non-compensatory'; that 'the basic award of [substitutive] damages is to provide a substitute for, and hence to vindicate, the right that has been infringed'; that in valuing the right infringed it is 'irrelevant ... whether a claimant has suffered any loss, although, where it has, consequential compensatory damages can be added': Andrew Burrows, 'Damages and Rights' in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law* (Hart Publishing, 2014) 275, 277. In raising a number of objections to Stevens' substitutive damages, Burrows concludes that it 'does not stan[d] up to close scrutiny': at 278. In particular, Burrows states that 'the Stevens approach falls down in imagining that we sensibly can, or would want to put a value on the right that has been infringed rather than the consequential impact of that infringement': at 280.

⁹⁴ Grant Hammond, 'The Place of Damages in the Scheme of Remedies', in Finn (ed), above n 93.

object's equivalent',⁹⁵ to the exclusion of any betterment. Weinrib explains this in greater detail in the following passage:

[T]he defendant who, in breach of her duty, destroys an object belonging to the plaintiff does not thereby destroy the plaintiff's right to the object. The plaintiff remains linked to the defendant through a right that pertains to the object as an undamaged thing ... Even if the object no longer exists as a physical entity, the parties continue to be related to each other through the object's normative connection to the plaintiff and the consequent duty on the defendant to act in conformity with that connection. Instead of being embodied in the object itself, the right and its correlative duty with respect to the object now take the form of an entitlement and have the defendant furnish the plaintiff with its value.⁹⁶

Just as the plaintiff's right is no longer embodied in the specific object, which has been destroyed, but in an entitlement to receive the object's equivalent from the defendant, so the defendant's duty is no longer to abstain from its destruction, which has already taken place, but to provide the plaintiff with the object's equivalent.⁹⁷

Under corrective justice, the two parties to the action are said to be linked by a relationship of correlativity. In linking the plaintiff and the defendant to correct the injustice and in trying to re-establish the initial inequality of the gain and restoring it to the other party, corrective justice ignores considerations extraneous to the notion of compensation, such as the individual interests of the parties involved, or other unilateral considerations favourable or unfavourable to both or either of the parties. Neither party can therefore rightly complain of being sacrificed to advance the interests of the other. In this way, corrective justice reasoning is not composed of what has been described as a 'hodge-podge of considerations applying to the parties individually and then somehow traded off against one another'.⁹⁸

Corrective justice also looks upon the concept of wrongdoing as that of fault within the doing itself, and not within the doer. Therefore, moral culpability of the defendant is not a condition of the plaintiff's claim to repair under corrective justice. Unlike distributive justice, corrective justice entirely disregards the 'worthiness' of a person and does not include as one of its necessary elements a criterion of distribution in light of which a determination of worthiness can be made. Distributive justice, on the other hand, takes into account those determinate features selected by a criterion or criteria of distribution.

Consequently, factors extraneous to the notion of compensation that may be raised by the parties (as apparent in *Anthones*)⁹⁹ would fall outside the scope of compensation and must accordingly be ignored under corrective justice's conception of a damages award. Such extraneous considerations can possibly include references to: the status or worthiness of the parties; the needs of the parties (financial or otherwise); or any other non-compensatory considerations.

⁹⁵ Ernest Weinrib, *Corrective Justice* (Oxford University Press, 2012) 91.

⁹⁶ *Ibid* 90.

⁹⁷ *Ibid* 90–91.

⁹⁸ *Ibid* 3.

⁹⁹ (1960) SR (NSW) 659. See discussion of this case in Part IV(A).

The corrective justice theory of law, with its exclusive focus upon the plaintiff's loss, as explained above, would therefore strongly support the general approach to account for betterment.

D *Summing Up*

As apparent from the above discussion, the suggested general approach to account for betterment is consistent with and fortified by fundamental remedial principles, policy considerations and the corrective justice theory of law. This approach to accounting for betterment will therefore put in place a principled and just framework of approach in dealing with betterment. The general approach is made flexible by the potential of being displaced by reasoned exceptions, as will be discussed in the next Part.

VI SUBJECT TO REASONED EXCEPTIONS (TO THE PRINCIPLE OF ACCOUNTABILITY)

The basis and justification for exceptions that can displace the general approach of accountability, as well as the scope and range of such exceptions, are discussed below. The exceptions, by displacing the general approach, offer a just and reasoned approach for the plaintiff to be overcompensated under circumstances when betterment should not be accounted for. As discussed below, the exceptions reflect 'exceptional' circumstances, including those based upon legal or regulatory requirements, where there is an urgent reinstatement to resume the plaintiff's business to avoid jeopardy, or when reinstating property possessing long life (or property that was never intended to be replaced).

The exceptions can generally be rationalised under the distributive justice theory. They can also be rationalised and justified under the general law: first, through qualifying the mitigation rule of avoided loss where the plaintiff has no choice in the circumstances; and second, through adapting Dr Lushington's remarks in *The Gazelle*¹⁰⁰ to accommodate circumstances where the plaintiff also has no choice.

When considering the scope and range of the exceptions, the following caution by Rix LJ should be noted:

[C]ases where a claimant recovers more than he has lost, as will happen where betterment occurs without a ... deduction, ought as a matter of principle [to] be exceptional.¹⁰¹

Given that the exceptions are 'exceptional' as a matter of principle, two inferences can be made: first, that the exceptions should reflect 'exceptional' circumstances; and second, that the exceptions should not be overly extended.

¹⁰⁰ (1844) 2 W Rob 279; 166 ER 759.

¹⁰¹ *Voaden v Champion* [2002] EWCA Civ 8 [85] (Rix LJ). Cresswell LJ also made a similar observation in *Kuwait Airways Corporation v Iraqi Airways Co* [2004] EWHC 2603 (Comm), that it 'ought to be exceptional not to make a deduction for betterment': at [321].

A *Basis and Support for Exceptions*

1 *The Distributive Justice Theory*

While the general approach to account for betterment can be rationalised under the corrective justice theory, the exceptions, on the other hand, can generally be rationalised under the distributive justice theory of law. As distributive justice can take into account determinate features selected by a criterion or criteria of distribution, it would allow considerations extraneous to the compensation goal as well as unilateral considerations concerning or favouring one party to be taken into account.¹⁰² Distributive justice reasoning allows one party's interest (the defendant's in the case of the exceptions) to be sacrificed to advance the interests of the other (the plaintiff). Unlike corrective justice, distributive justice can be composed of what has been described as a 'hodge-podge of considerations applying to the parties individually and then somehow traded off against one another'.¹⁰³

Distributive justice can thus take into account the exceptional circumstances of the parties, including their needs (financial or otherwise), their worthiness or any other non-compensatory or unilateral considerations. In a general sense, it can be rationalised that under exceptional circumstances the plaintiff, being the worthier of the two parties, can therefore justifiably be overcompensated if betterment is not accounted for.

2 *Qualifying the Mitigation Rule of Avoided Loss (Where the Plaintiff Has No Choice in the Circumstances)*

In *Lagden v O'Connor*,¹⁰⁴ Lord Hope noted that in assessing the plaintiff's damages, benefits (which would include betterment) that have resulted from mitigation would have to be taken into account under the mitigation rule of avoided loss. His Lordship then queried the impact upon the said rule where the plaintiff had no choice when remediating the damage suffered. As his Lordship puts it:

But what if the injured party has no choice? What if the only way that is open to him to minimize his loss is by expending money which results in an incidental and additional benefit which he did not seek but the value of which can nevertheless be identified? Does the law require gain to be balanced against loss in these circumstances? If it does, he will be unable to recover all the money that he had to spend in mitigation. So he will be at risk of being worse off than he was before the accident. That would be contrary to the elementary rule that the purpose of an award of damages is to place the injured party in the same position as he was before the accident as nearly as possible.¹⁰⁵

Lord Hope raised Dr Lushington's statement in *The Gazelle* 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

¹⁰² Weinrib, above n 95, 3.

¹⁰³ Ibid.

¹⁰⁴ [2004] 1 All ER 277 (House of Lords). Nicholls, Slynn and Hope LJ were in the majority, with Lord Hope delivering the leading judgment.

¹⁰⁵ Ibid [30]. Lord Hope delivered the leading speech in the House of Lords.

accident'.¹⁰⁶ He also raised and compared the situation in *Harbutt's*, where there was no choice on the plaintiff's part to avoid the benefit alleged, with that in *British Westinghouse*, where the plaintiff had such a choice.¹⁰⁷ He went on to calibrate and qualify the mitigation rule of avoided loss, that if the plaintiff had no other choice in the circumstances, the resulting benefit should be viewed as being merely incidental to mitigation and it would consequently be inappropriate to deduct such benefit. As reasoned by Lord Hope:

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.¹⁰⁸

Lord Hope also raised policy, by reasoning that where 'the law shows that the lack of choice should be taken into account in the assessment of damages, the policy of the law ought to be to provide the innocent party with that remedy'.¹⁰⁹

Based on the above analysis and reasoning, the general approach to account for betterment should be displaced where, in reinstating damaged or destroyed property in the course of mitigation, 'the claimant had no other choice available to him'.¹¹⁰

3 *Adapting Dr Lushington's Remarks in The Gazelle (to Accommodate Circumstances where the Plaintiff as No Choice)*

Dr Lushington's remarks in *The Gazelle* (mentioned earlier in parts) is set out in full below:

The right against the wrongdoer is for a *restitutio in integrum*, and this restitution he is bound to make without calling upon the party injured to assist him in any way whatsoever. If the settlement of the indemnification be attended with any difficulty (and in those cases difficulties must and will frequently occur), the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party; and if that party 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.¹¹¹

Drawing from Dr Lushington's remarks, it can be reasoned that it would be justifiable under the law not to account for betterment in circumstances where there is an 'impossibility of otherwise effecting such indemnification without exposing' the plaintiff 'to some loss or burden, which the law will not place upon him'.¹¹² As appears from Dr

¹⁰⁶ *The Gazelle* (1844) 2 W Rob 279; 166 ER 759; *Lagden v O'Connor* [2004] 1 All ER 277 [31].

¹⁰⁷ *Harbutt's* [1970] 1 QB 447; *British Westinghouse* [1912] AC 673.

¹⁰⁸ *Lagden v O'Connor* [2004] 1 All ER 277 [34].

¹⁰⁹ *Ibid* [40].

¹¹⁰ *Ibid* [34].

¹¹¹ (1844) 2 W Rob 279; 166 ER 759, 760. Although it may be argued that the plaintiff in the above passage may be seen as *not* having been overcompensated, this should be rejected, as it would unduly extend the concept of indemnification.

¹¹² *Ibid*.

Lushington's remarks, there is an obvious need to balance the concern not to overcompensate the plaintiff, with the concern not to impose upon the plaintiff any undue burden or loss. One way to achieve such a balance is to consider whether the alleged betterment was avoidable or not, or more broadly if the plaintiff had a choice or not in avoiding the alleged betterment. In applying such reasoning and adapting Dr Lushington's remarks, Sheller JA in *Hyder* shifted Dr Lushington's approach from one which does not account for betterment, to one which allows it where the betterment involved is unavoidable:

To adapt the words of Dr Lushington the question is whether on the evidence a greater benefit than mere indemnification could be avoided without exposing the plaintiff to some loss or burden.¹¹³

The reasoning above can be adopted to justify displacing the general approach to account for betterment where it can be shown that the plaintiff had no choice in avoiding the alleged betterment when it reinstated the property. More broadly, the exception here can be used to accommodate circumstances where the plaintiff has no choice. Unlike the preceding exception, the exception here is broader, not being limited to mitigation.

B *Scope and Range of Exceptions (Exemplified by Exceptional Circumstances)*

As mentioned earlier, given that the exceptions are 'exceptional' as a matter of principle, the exceptions should therefore reflect 'exceptional' circumstances. The discussion below will therefore highlight a number of cases which can possibly exemplify the exceptional circumstances required to potentially fall within the exceptions.

1 *Legal or Regulatory Requirements*

In reinstating destroyed or damaged property, the plaintiff may be obliged to comply with certain legal or regulatory requirements. With the plaintiff left with no choice but to reinstate in the manner compelled by the law, any resulting betterment would therefore be unavoidable. Such exceptional situations should be excepted from the general approach of accountability.

In *Bushells*, the awning that was damaged by the defendant was rendered unsafe and the plaintiff was legally obliged to erect a more substantial structure in order to comply with requirements under certain ordinances.¹¹⁴ As a consequence, the plaintiff obtained a better and more valuable fixture than the original it replaced. Although the majority allowed a deduction for betterment on the ground that the plaintiff would otherwise be 'enriched',¹¹⁵ their failure to consider the effect of the obligatory legal requirement imposed upon the plaintiff in carrying out the reinstatement leaves the decision open to question. This point was raised by Stanley J in his dissenting judgement:

In those circumstances the City Architect in the discharge of his duty under the ordinances ordered the plaintiff to repair the awning with the result that the plaintiff had to spend some £500 to comply with the order and overcome the damage caused by the

¹¹³ *Hyder* [2001] NSWCA 313, [30].

¹¹⁴ (1948) St R Qd 79.

¹¹⁵ *Ibid* 92. 'Enriched' is used in the sense of being overcompensated.

driver's negligence. In fact the awning as repaired in compliance with the order was substantially different in design and method of construction from what had existed before the accident; but the plaintiff had no choice. Had it failed to spend the money in compliance with the order it would have been liable to prosecution in addition to a liability that the Council would have done the work at the plaintiff's expense.¹¹⁶

On the above analysis, the circumstances exemplified by *Bushells* should be regarded as exceptional and thus be excepted from the general approach of accountability.¹¹⁷

The factual scenarios in the following cases should also similarly be able to satisfy the type and category of exception discussed. As any reinstatement works to be carried out had to meet the requirements of the Council involved, Campbell J in *Roberts v Rodier* reasoned that in such a situation 'the appropriate way of applying the principle of compensation would be to make no deduction on account of the betterment, because the plaintiff could not be compensated without also providing her with the betterment'.¹¹⁸ In *Gwam Investments Pty v Outback Health Screenings Pty Ltd*, White J, the minority judge, reasoned that it 'would be inappropriate' to make any deduction 'on account of betterment' where 'the plaintiff was left with a mobile testing unit which was unusable' and it had no choice but to acquire a 'bigger and more expensive vehicle' as a consequence of the need to comply with the law.¹¹⁹ In *Harbutt's*, Denning LJ pointed out that town planning requirements current at the time had compelled the plaintiff to redesign and replace the burnt-out factory building.¹²⁰

2 Urgent Reinstatement to Resume Plaintiff's Business to Avoid Jeopardy

An exception should also be recognised in circumstances where there is an urgent need to resume the plaintiff's business in order to avoid it being jeopardised, as any resulting betterment would usually be unavoidable. Two case examples are discussed below.¹²¹

In *Paper Australia*,¹²² the defendant's negligent servicing of the plaintiff's cylinder (used in its paper making machine) led to the cylinder's rubber cover being separated from the cylinder. Unable to secure a second hand replacement, the plaintiff replaced it with a new cylinder. In concluding that the plaintiff was 'not obliged to give credit to the

¹¹⁶ *Ibid.*

¹¹⁷ (1948) St R Qd 79.

¹¹⁸ [2006] NSWSC 282 [151] (New South Wales Supreme Court).

¹¹⁹ [2010] SASC 37 [162] (Full Court of the Supreme Court of South Australia) (Gray, White and Kelly JJ). The majority judges (Gray and Kelly JJ) found that there was 'no real attempt' by the defendant to prove betterment: at [58]. The above reasoning of the minority judge, however, remains instructive (assuming that betterment can be satisfied on the facts).

¹²⁰ [1970] 1 QB 447, 467. Nathan J in *State Transport* described *Harbutt's* as a case where 'as a matter of law and in order to comply with town planning requirements then in force, a factory owner was obliged to replace a burnt-out factory with a superior building to that which was destroyed': *State Transport* (1984) Aust Torts Reps 80-596, 68,622. Campbell JA in *Gagner Pty Ltd v Canturi Corporation Pty Ltd* expressed the view that it would be inappropriate to account for betterment, where as in *Harbutt's*, 'reinstatement of the old factory was not legally permissible, so a new factory was built': *Gagner Pty Ltd v Canturi Corporation Pty Ltd* [2009] NSWCA 413 at [118].

¹²¹ Another possible case example is that of *Harbutt's* [1970] 1 QB 447, where it was clear that there was an urgent need to replace the factory and resume the plaintiff's business in order to avoid jeopardising its business. All three judges alluded to this: at 473 (Widgery LJ); 468 (Lord Denning MR); 475-76 (Cross LJ).

¹²² [2007] VSC 484 (Supreme Court Victoria) (Bongiorno J).

defendant for the better MG cylinder',¹²³ Bongiorno J was influenced by the fact that there was a likelihood of substantial market loss, which could have jeopardised the business.¹²⁴

In the English case of *Bacon v Cooper (Metals) Ltd*,¹²⁵ the defendant in breach of contract delivered to the plaintiff for fragmentation a bale of metal that included a large lump of steel, which broke up the plaintiff's fragmentiser. The fragmentiser included a rotor that was damaged beyond repair. The plaintiff's business came to an abrupt halt and would have been jeopardised if the fragmentiser was not repaired quickly. In light of the possibility of the plaintiff's business being jeopardised and the absence of other options (other than to reinstate as carried out), Cantley J held that the plaintiff was therefore 'entitled to recover the whole cost of the replacement rotor'.¹²⁶ Relying upon Dr Lushington's statement in *The Gazelle*, that 'the law will not place this burden on the plaintiff to relieve the defendant from some of the unavoidable consequences of their wrong',¹²⁷ Cantley J did not think that it would be appropriate to account for betterment under the above circumstances.

3 *Reinstating Items Possessing Long Life (or Never Intended to Be Replaced)*

An exception should also be considered in situations where buildings or chattels with long or unlimited life spans are reinstated. This can be rationalised on the ground that the plaintiff would never have had to replace such property either in the plaintiff's lifetime or that of its business, but for the defendant's default.

As buildings can last indefinitely, the term 'non-wasting assets' is often applied to them. Chattels, on the other hand, requiring periodic replacement, are commonly referred to as 'wasting assets'. Moffit P in *Hoad* raised the distinction between chattels as wasting assets and buildings as non-wasting assets as follows:

To replace the destroyed building [as in *Harbutt's*], capital had to be laid out to erect a like building in the only way it could be, namely with new materials. The plaintiffs were not in the business of buying and selling factories. They needed the replacement factory for indefinite use. There was no question of it being sold. Prior to its destruction there was no contemplation of reconstructing it in the foreseeable future. The facts in the present case are quite different. Farm equipment depreciates rapidly, and it is either written off or is replaced at short intervals. Planned replacement at short intervals was in fact the business practice of the plaintiffs. If this practice would have continued, then the consequence of the fire was merely to accelerate the inevitable capital expense of acquiring a new tractor and mower.¹²⁸

¹²³ Ibid [363]. This assumes that betterment can be satisfied on the facts.

¹²⁴ This was based upon findings that the 'only option available to the plaintiff to replace the cylinder was to acquire a new one' and that '[s]peed was of the essence, as the plaintiff was of the belief ... that its market for MG paper was in danger of being lost, if production was not resumed as quickly as possible': *ibid* at [350].

¹²⁵ [1982] 1 All ER 397.

¹²⁶ *Bacon v Cooper (Metals) Ltd* [1982] 1 All ER 397, 402.

¹²⁷ (1844) 2 W Rob 279; 166 ER 759 (Adm).

¹²⁸ [1977] 1 NSWLR 88, 94.

Importantly, Moffit P added that he did not think that the decision in *Harbutt's* would have been the same, 'if the factory had been fifty years old, and at the time of the fire, there were plans to demolish and rebuild it in a year's time'.¹²⁹ The issue concerning whether there were or could be any planned replacements would therefore be an important factor to take into consideration.

A case in point is *Von Stanke v Northumberland Bay Pty Ltd*.¹³⁰ A collision occurred between the plaintiff's and defendant's vessels owing to the defendant's negligence. Unable to find a second hand vessel to replace the severely damaged vessel, the plaintiff ordered a new vessel to be built to similar specifications as the original. Lovell J stated that generally, 'the plaintiff should credit the defendant for the fact that the plaintiff now receives new goods in place of old except where the plaintiff would never have replaced the chattel in question',¹³¹ as he found to be the situation in this case.

D *Summing Up*

Exceptions to the general approach of accountability, as justified under the law and distributive justice, can offer a just, reasoned and principled approach to allow overcompensating the plaintiff in exceptional circumstances. In considering how the exceptions can be drawn together, the common element or link can be drawn from Dr Lushington's statement in *The Gazelle*:¹³² that it would be justifiable under the law not to account for betterment in circumstances where there is an 'impossibility of otherwise effecting such indemnification without exposing' the plaintiff 'to some loss or burden, which the law will not place upon him'.¹³³ The terms 'unavoidable' or 'incidental' may be used to describe the nature of betterment which can result from such exceptional circumstances.¹³⁴

The situations discussed above exemplify only some of the potential exceptions and are therefore not exclusive. The list of exceptions should remain open so that the court can continue to retain and exercise its discretion on such matters. It is important though that the exceptions be restricted and not overly extended, given that they would run counter to the compensation principle in allowing overcompensation to occur.

VII CONCLUSION

The question as to when and why an account for betterment should or should not be allowed is not fully resolved or settled. This article has therefore closely examined the concept of betterment and its constituent elements to provide a clearer understanding of betterment.

¹²⁹ [1977] 1 NSWLR 88, 95.

¹³⁰ [2008] SADC 61.

¹³¹ *Ibid* [130].

¹³² (1844) 2 W Rob 279; 166 ER 759, 760.

¹³³ *Ibid*.

¹³⁴ Possibly also, the following additional terms may be considered when describing the nature of such betterment: forced; inevitable; or justifiable betterment.

It has also argued and provided support for a general approach to account for betterment, subject to reasoned exceptions. The suggested approach would put in place a principled framework of approach in dealing with betterment, which would in the long run lead to more consistent, reasoned and just outcomes in disputes where betterment is alleged.
