A CRITICAL EXAMINATION OF THE BETTERMENT PREDICAMENT IN
THE ASSESSMENT OF DAMAGES FOR DAMAGE OR DESTRUCTION TO
PROPERTY IN TORT AND CONTRACT CLAIMS

Ava Sidhu
LLB (Hons) (University of Singapore), LLM (University of Western Australia)

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This thesis critically examines what is often described as ‘betterment’ when damages are sought for repair or replacement cost in tort and contract claims involving damage or destruction to property. The predicament as to when betterment should or should not be accounted for when assessing the plaintiff’s damages remains a contentious issue. In addition to the betterment predicament, the court needs to address a number of other important issues in disputes concerning betterment, including the following: how betterment should be identified and defined; how betterment should be appropriately valued in monetary terms; and how evidential and proof-related matters concerning betterment should be dealt with and allocated between parties to the action. The legal principles to be applied to these matters are in need of clarification. In relation to the betterment predicament this thesis argues and proposes for a general approach to account for betterment, subject to reasoned exceptions. This approach will ensure more just and reasoned outcomes in the assessment of damages for damage or destruction to property. This thesis provides an in-depth analysis and evaluation of the law relating to betterment and proposals for changes and reform, in an area of law where currently there is a lack of comprehensive scholarly attention. By contributing to a theoretical and practical understanding of the law relating to betterment this thesis will benefit the general legal community. It will also, in particular, benefit and assist litigating parties and counsel faced with betterment disputes, as they will generally be in a better position to address and resolve these disputes more effectively and expeditiously.
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CHAPTER 1
INTRODUCTORY CHAPTER

I THE ‘BETTERMENT’ PREDICAMENT

In Harbutt’s Plasticine v Wayne Tank and Pump Co Ltd \(^1\) (‘Harbutt’s’), an old factory building used by its owner, the plaintiff, for manufacturing plasticine, was completely gutted by fire caused by the defendant’s negligence. The plaintiff replaced the destroyed building with a new building and sued the defendant for the replacement costs incurred. Under the assessment process, the plaintiff satisfied the court that it was entitled to the replacement cost measure of damages (instead of the diminution in value measure), based upon an application of the principle of compensation. The defendant argued that the plaintiff’s damages for replacement cost should be reduced to account for ‘betterment’, as reflected by the improved new building replacing an old one. \(^2\) The English Court of Appeal rejected the defendant’s argument, awarding the plaintiff the full replacement cost amounting close to £68,000. \(^3\) If the defendant’s argument on betterment was accepted, there could potentially have been a reduction of a considerable sum of £30,000 from the plaintiff’s damages, representing the purported value of the betterment. \(^4\)

The scenario in Harbutt’s \(^5\) is typical of many others, where a plaintiff’s act of replacing property destroyed by a defendant’s tort or breach of contract gives rise to the betterment argument that the replaced property is improved or better than the original property, and that the plaintiff’s damages should consequently be reduced to account for such betterment. In this situation the court is faced with what can be described as ‘the betterment predicament’, that is, having to address the crucial question as to whether betterment should or should not be accounted for in the assessment of the plaintiff’s

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\(^1\) [1970] 1 QB 447. The defendants contracted to design and install equipment in the plaintiff’s factory for storing and dispensing a heavy wax, which had to be liquefied under heat for the manufacturing process. In carrying this out, the defendant’s negligence caused a fire which gutted the plaintiff’s factory. The plaintiff sued the defendant in contract and tort based upon the defendant’s negligence claiming the reinstatement cost incurred for the new factory building.

\(^2\) Ibid 453-54.

\(^3\) Ibid 475. The actual replacement cost was £67,973.

\(^4\) Ibid 456.

\(^5\) Ibid.
damages for replacement costs. This is a contentious issue, particularly where the betterment value involved is considerable as in *Harbutt’s*.  

Luntz and Hambly view the betterment predicament as a ‘controversial question’ with ‘conflicting answers’ as they explain in the following passage:

> Where it is reasonable to repair or replace the damaged property, the plaintiff can ordinarily recover the full cost of such repair or replacement. This may, however, leave plaintiffs in a better position than they were in before, since it may be impracticable to replace the damaged property with old materials. Must defendants be given credit in the assessment of the damages for the ‘betterment’, that is, must an allowance be made on account of ‘new for old’? This has been a controversial question, leading to apparently conflicting answers.

This thesis critically examines ‘betterment’ in situations where damages are sought for repair or replacement cost in tort and contract claims involving damage or destruction to property. The legal principles to be applied to betterment are in need of clarification. In relation to the betterment predicament, this thesis argues and proposes for a general approach to account for betterment subject to reasoned exceptions, as this approach will ensure more just and reasoned outcomes to the parties involved.

It should be noted that the betterment predicament arises not only in situations where the plaintiff’s property is destroyed as in *Harbutt’s*, but also in situations where the plaintiff’s property is only damaged and the plaintiff’s claim is for the repair or replacement cost incurred.

The principle of compensation that governs the plaintiff’s recovery of damages under both tort and contract actions is central to the betterment argument. Essentially, the compensation principle requires the court to award the plaintiff an award of damages that will place the plaintiff in the same position as if the wrong, whether a tort or breach

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6 Ibid.  
7 Harold Luntz and David Hambly, *Torts: Cases and Commentary* (LexisNexis Butterworths, 5th revised ed, 2006) 612. See, M J Tilbury, *Civil Remedies Vol Two: Remedies in Particular Contexts* (Butterworths, 1993) 202, where the betterment predicament is also described by Tilbury as ‘controversial’. Tilbury’s remark is still valid, notwithstanding the lapse of time.  
8 Luntz and Hambly, above n 7, 612.  
of contract, committed by the defendant against the plaintiff did not occur.\textsuperscript{10} Theoretically, granting the plaintiff an award of damages for replacement or repair cost incurred by the plaintiff, based upon the reinstatement measure of loss, can fulfil the principle of compensation, as it can place the plaintiff in the same position as if the wrong did not occur. However, this can also factually place the plaintiff in a better position, for example, if the reinstated property is more efficient and can deliver a greater profit to the plaintiff. Arguably in this situation, unless the sum claimed is reduced to account for betterment, the principle of compensation would be infringed.

The term ‘reinstatement cost’ is used in this thesis to refer to either ‘repair cost’ or ‘replacement cost’, or to both where applicable.

A closer look at \textit{Harbutt’s}\textsuperscript{11} will reveal that in addition to the betterment predicament, there are a number of other important issues which a dispute concerning betterment raises. For example, even before there can be a dispute over the accountability for betterment, the question as to whether betterment exists on the facts of a case needs to be settled. On a more fundamental level, this calls into question what betterment means and how it can be identified. After a finding of betterment is made, there is often a dispute as to how its monetary value should be assessed. The parties may also dispute their obligations relating to matters of proof. This thesis examines all of these issues pertaining to betterment. It will be seen that the legal principles to be applied to these matters are in need of clarification.

Although the betterment predicament is often raised in tort actions, it can also be raised in contract actions. For example, it can be raised in a contractual action similar to \textit{Harbutt’s},\textsuperscript{12} where the defendant in the course of performing its obligations under a contract with the plaintiff to design and install certain equipment in the plaintiff’s factory building, negligently caused the plaintiff’s factory to be destroyed. In this situation the plaintiff’s claim for recovery of reinstatement cost under a contractual action would fall under consequential damages. Another example where the betterment issue can be raised in a contractual action, is similar to that in \textit{British Westinghouse Electric and Manufacturing Co Ltd v Underground Electric Railways Co of London}

\textsuperscript{10} \textit{Livingstone v Rawyards Coal Co} (1880) 5 App Cas 25, 39; \textit{Robinson v Harman} (1848) 1 Exch 850, 855; 154 ER 363, 365.
\textsuperscript{11} [1970] 1 QB 447.
\textsuperscript{12} Ibid.
Ltd\textsuperscript{13} (‘British Westinghouse’), where owing to the defendant’s default under the contract to deliver certain goods (turbines in this case) of the required quality, the plaintiff finds itself in the situation where it has to restore or replace the defective good supplied. In this situation, the plaintiff’s claim for reinstatement cost under a contractual action would usually be recovered as part of its main loss. In referring to this type of situation, Hunter J in Optus Networks Pty Ltd v Leighton Contractors Pty Ltd stated that a plaintiff may be forced by the defendant’s default to restore or replace a contracted item with something of ‘greater value than that which it had expected to receive under the contract’, or which is ‘more efficient or useful than the original’.\textsuperscript{14} His Honour added that ‘the unexpected improvement in the plaintiff’s position may be usefully described as “betterment”’\textsuperscript{15} and questioned whether the plaintiff would be ‘entitled to the bonus of an increment in value as well’.\textsuperscript{16}

II THE NEED FOR CLARITY AND COHERENCE

In Section A below, three appeal cases which straddle a period of about 40 years are singled out to provide an overview to reflect the state of the law on the betterment predicament. These cases present different views and approaches to dealing with the betterment predicament. Notwithstanding some attempts made to try to rationalise the different views and approaches taken on the betterment predicament, the cases in this area of law do not render sufficient explanation and guidance. Some judicial observations and academic commentary relating to betterment are set out in Section B to further reflect the lack of clarity and coherence affecting this area of the law.

A Overview of State of the Law: Review of Three Appeal Cases

1 Anthoness: Deduction Denied

\textsuperscript{13} [1912] AC 673.
\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid.
Anthoness v Bland Shire Council\textsuperscript{17} (‘Anthoness’) is a unanimous decision of the Full Court of the Supreme of New South Wales, delivered in 1960. Reflecting an unwillingness to recognise the concept of betterment, the Full Court was therefore unwilling to allow an account for betterment. This is evident from the following view the Full Court expressed:

The fact that in special circumstances the result of complete repair of all damage done may render the property damaged worth more than it was before the collision is not an answer to the plaintiff’s claim.\textsuperscript{18}

The Full Court cited a line of English and Australian authorities to support its view and approach to the betterment predicament:

The fact that a chattel is more valuable after being repaired than it was before it was damaged by the wrongful act of a defendant, does not constitute a valid objection to the amount of [the] plaintiff’s claim. If it is necessary, for instance, to replace old parts by new, the wrong-doer must bear the cost without deduction. The right against the wrong-doer is for \emph{restitutio in integrum} and this restitution he is bound to make without calling upon the party injured to assist him in any way whatsoever: \textit{The ‘Pactolus’; The ‘Gazelle’; The ‘Munster’}. See also \textit{Genders v South Australian Railway Commissioner; Rockhampton Harbour Board v Ocean Steamship Co Ltd.}\textsuperscript{19}

The Full Court reiterated the trial judge’s reasoning that ‘even if the vehicle were more valuable after the necessary repairs’ there should be no account for betterment, as ‘otherwise he would be forcing the plaintiff to put his hand in his pocket for repairs due to the [defendant’s] wrongful act.’\textsuperscript{20}

It appears from the judgment in \textit{Anthoness}\textsuperscript{21} that the Full Court was not prepared to envisage any betterment resulting from a situation where the reinstatement measure of loss was accepted as the proper measure of the plaintiff’s loss. Acceptance of the reinstatement measure of loss was therefore viewed as precluding any betterment from

\begin{itemize}
\item \textsuperscript{17} (1960) 60 SR (NSW) 659 (Full Court of the Supreme Court of NSW). The court consisted of Evatt CJ, Herrron and Sugerman JJ. The plaintiff in \textit{Anthoness} claimed the replacement cost of a car, damaged as a consequence of the plaintiff’s negligence. This case is discussed in again in Chapter 3 (Part III A 1).
\item \textsuperscript{18} Ibid 666.
\item \textsuperscript{19} Ibid. (The references to the cases cited in the above passage are as follows: \textit{The Pactolus} (1856) Swab 173; 166 ER 1079; \textit{The Gazelle} (1844) 2 W Rob 279; 166 ER 759; \textit{The Munster} (1896) 12 TLR 264; \textit{Genders v South Australian Railway Commissioner} (1928) SASR 272; \textit{Rockhampton Harbour Board v Ocean Steamship Co Ltd} (1930) QSR 343; (1931) QSR 254).
\item \textsuperscript{20} Ibid 665.
\item \textsuperscript{21} Ibid.
\end{itemize}
arising. In adopting such an approach the Full Court unduly limited its consideration of the betterment concept and the predicament it presents.

2 Hoad: Deduction Allowed

Hoad v Scone Motors Pty Ltd\textsuperscript{22} (‘Hoad’) is a majority decision of the New South Wales Court of Appeal delivered in 1977. The majority in Hoad\textsuperscript{23} adopted a different approach to that articulated in Anthoney.\textsuperscript{24}

Moffit P, with whom Hutley JA agreed, showed a clear willingness in Hoad\textsuperscript{25} to recognise the concept of betterment and to account for betterment, as long as it can be confirmed on the facts. Moffit P reasoned that ‘the measure of [the plaintiff’s] loss is not the gross cost of replacement of the equipment’\textsuperscript{26} but ‘the nett detriment arising from acquisition of the new equipment’.\textsuperscript{27} The reasoning reflects not only an unequivocal recognition of the concept of betterment, but also an unequivocal willingness to account for betterment as long as it can be satisfied on the facts.

In rejecting the plaintiff’s argument that ‘[a]ny betterment, advantage or profit ... has to be ignored’\textsuperscript{28} in a claim for reinstatement cost, Moffit P expressed concern that this would be contrary to the principle of compensation upon which the plaintiff’s loss should be assessed. His Honour emphasised the overriding importance of the role and function of the principle of compensation in guarding against over-compensation, or as he put it, any ‘greater compensation’ beyond the plaintiff’s loss. As Moffit P explained:

[I]t seems to me that there are some difficulties in principle in supporting the general propositions asserted. The overriding principle in assessing damages is to compensate a plaintiff for his loss. An award upon a basis which would provide greater compensation, or appear to do so, would need critical examination.\textsuperscript{29}

\begin{flushleft}
\textsuperscript{22} [1977] 1 NSWLR 88. The plaintiff in Hoad claimed the replacement cost of farm equipment (a tractor and mower) destroyed by a fire caused by the defendant’s negligence.
\textsuperscript{23} Ibid.
\textsuperscript{24} (1960) 60 SR (NSW) 659.
\textsuperscript{25} [1977] 1 NSWLR 88.
\textsuperscript{26} Ibid 96.
\textsuperscript{27} Ibid.
\textsuperscript{28} Ibid 91.
\textsuperscript{29} Ibid.
\end{flushleft}
In adopting an approach to recognise betterment and account for it when assessing the plaintiff’s claim for reinstatement cost, Moffit P questioned the reasoning relied upon in *Anthoness*\(^{30}\) that the plaintiff should not be forced to put his hand in his pocket:

\[\text{[I]t seems to me a little difficult to say that the plaintiff should receive the total moneys spent, without deduction for any associated benefit received, and that the reason for this is that they should not be forced to invest their money in buying new equipment that they did not want.}\(^{31}\)

The different approaches to the betterment predicament adopted in *Hoad*\(^{32}\) and *Anthoness*\(^{33}\) warrant closer analysis.

3 *Hyder: Material Considerations to be Weighed Up*

*Hyder Consulting (Australia) Pty Ltd v Wilh Wilhelmsen Agency Pty Ltd*\(^{34}\) (‘*Hyder*’) is a majority decision of the New South Wales Court of Appeal, delivered in 2001.

The majority in *Hyder*\(^{35}\) recognised the concept of betterment, which in this respect is similar to the approach in *Hoad*.\(^{36}\) However, the approach in *Hyder*\(^{37}\) differs from *Hoad*\(^{38}\) in that there was no unequivocal willingness to account and deduct for betterment, as was the case in *Hoad*.\(^{39}\)

Sheller JA, in delivering the leading majority judgment in *Hyder*,\(^{40}\) took the approach that notwithstanding that betterment can be confirmed on the facts of the case, this will not of itself trigger an account and deduction made for betterment. His Honour noted that there were ‘differences of opinion’\(^{41}\) on the betterment issue. He referred to

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\(30\) (1960) 60 SR (NSW) 659.

\(31\) *Hoad* [1977] 1 NSWLR 88, 94.

\(32\) Ibid.

\(33\) (1960) 60 SR (NSW) 659.

\(34\) [2001] NSWCA 313. The plaintiff in *Hyder* claimed the replacement cost of a new pavement that collapsed four years after its construction, owing to the defendant’s negligence. This case is discussed again in Chapter 3 (Part III A 4).

\(35\) Ibid.

\(36\) [1977] 1 NSWLR 88.

\(37\) [2001] NSWCA 313.

\(38\) [1977] 1 NSWLR 88.

\(39\) Ibid.

\(40\) [2001] NSWCA 313.

\(41\) Ibid [27].
commentaries on the issue which he found to contain differences of opinion. He then expressed the view that the question as to whether betterment should or should not be taken into account depended upon ‘several considerations’, noting further that these considerations must be regarded as ‘material’. On this point Sheller JA explained:

Several considerations are material. The most significant is whether there is evidence that the plaintiff had a reasonable choice between adopting a less expensive course of repair or reconstruction which would mitigate its damage and the course it chose which would not. A plaintiff may decide for good business reasons to use the occasion not merely to repair or rebuild but to improve its facilities. 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.

It is not clear from Sheller JA’s judgement as to what the ‘several considerations’ are or should be, and what would be necessary before a consideration can satisfy as a ‘material’ consideration. In other words, the key question remains unanswered, what considerations or circumstances can justify allowing an account to be made for betterment? Or conversely, what considerations or circumstances can justify denying an account for betterment? These questions remain unsettled, notwithstanding that Hyder was decided sometime ago.

There is clearly a need to examine this area of the law more closely, given the availability of different approaches, and with questions still remaining unsettled as to what guiding principles can be drawn to determine the approach to adopt on the betterment predicament.

B Judicial Observations and Academic Commentary

There are numerous judicial observations and academic commentary which reflect and acknowledge that there are differences in approaches and views in dealing with the betterment predicament and other issues associated with it.

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43 Ibid [30].
44 Ibid.
For example, in *Optus Networks Pty Ltd v Leighton Contractors Pty Ltd*, Hunter J recognised that there were unresolved questions concerning the concept and treatment of betterment. He observed 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’. The following passage from his judgment explains in more detail the context of his observations and the extent of the difficulties and areas of contention a betterment dispute raises, not only in relation to the betterment predicament but also concerning other aspects of betterment, which the courts have yet to resolve or provide adequate guidance:

> From its inception, these proceedings have been beset by widely diverging views as to the nature and application of the relevant principles upon which quantum should be assessed. Part of the problem has arisen from the conflicting concepts of mitigation and, related to that, disagreement upon where the onus of proof lay in respect of particular areas of claim. Overshadowing those issues and intermingled with them was an inability of Tyco and Optus to reach any common ground as to a) the correct quantification of loss involving, what Tyco labelled, capital expenditures and b) whether the allowance of claims would result in a betterment to Optus: if so, whether that betterment was to be taken into account and, if betterment should be accounted for, where the onus lay in evidencing and quantifying such betterment. The judicial exercise has not been particularly assisted by some undefined notions of the concept of benefit and mitigation and their treatment in some of the cases.

In reviewing the case law in this area, Sheller JA in *Hyder* highlighted ‘differences of opinion’ on the betterment predicament. More recently, in *Von Stanke v Northumberland Bay Pty Ltd* Lovell J observed that there were ‘differing views’ on ‘[b]etterment and how it is to be applied’.

In a review of the case law in this area, Penhallurick reached the conclusion that the ‘authorities do not present an entirely consistent picture.’ Tilbury observed that it was

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45 [2002] NSWSC 327 (Supreme Court of NSW) (Hunter J, 24 April 2002). The plaintiff in this case claimed (inter alia) damages for the cost of acquiring new equipment when the plaintiff’s premises and equipment were damaged by contaminated water discharged from a fire suppressant system designed by the defendant.

46 Ibid [1353].

47 Ibid.

48 [2001] NSWCA 313 [27].

49 [2008] SADC 61 [130].

50 Catherine Penhallurick, ‘The Principle of “Betterment” in Damages for Contract and Tort’ (2002) 22 *Australian Bar Review* 109, 109. Penhallurick states that although from *Hoad v Scone Motors Pty Ltd* [1977] 1 NSWLR 88 the proposition can be drawn that ‘there will be occasions when an account for betterment will be appropriate’, the decision in *Hyder* [2001] NSWCA 313 ‘shows that such a deduction
‘still controversial’ as to ‘whether or not any deduction is to be made’ \(^{51}\) for the improved condition of a chattel when claiming for repair cost. Luntz and Hambly similarly observed that the question as to whether the defendant must give credit for betterment in the assessment of damages for the repair or replacement of damaged property is a ‘controversial question’, which has led to ‘conflicting answers’. \(^{52}\) They also stated that Australian authority on this point ‘is divided’. \(^{53}\)

Although this thesis focuses mainly upon the position in Australia, no doubt it would be useful to also note the commentary in other common law jurisdictions, where the situation appears similar that there is a need for greater clarity and coherence in this area of the law. In commenting on the position in Canada, Bridge observed that in few areas concerning the assessment of damages ‘has more confusion and unpredictability arisen than on the question of betterment of damaged property through its repair or replacement’. \(^{54}\) He also commented, more strongly, that the ‘inconsistent approaches to this problem which have been taken in the past are irreconcilable and largely unjustifiable in principle’. \(^{55}\) In commenting on the position in New Zealand, Beck observed that ‘[o]ver the years the courts have acted inconsistently in addressing the problem’ relating to betterment. \(^{56}\) Referring to difficulties concerning betterment, Beck commented, in a subsequent note, that there was ‘simply no easy way of dealing with a betterment claim’ and that it was ‘always going to be a question of swings and roundabouts’. \(^{57}\) As to the position in England, Champion commented that English law has taken a ‘somewhat extreme position – permitting recovery of the full cost of

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\(^{51}\) Tilbury, \textit{Civil Remedies Vol Two}, above n 7, 202. Tilbury cited the following cases as authorities, \textit{Anthoness} (1960) 60 SR (NSW) 659, 666 and \textit{Eastern Construction Co Pty Ltd v Southern Portland Cement Ltd} [1960] NSW R 505, 506. His commentary remains valid as the situation remains unchanged, despite the lapse of time.

\(^{52}\) Luntz and Hambly, above n 7.


\(^{55}\) Ibid.

\(^{56}\) Andrew Beck, ‘\textit{Review – Contract}’ 2000 \textit{New Zealand Law Review} 83, 96. Although the comment was made in relation to the assessment of contractual damages the betterment predicament affects both contract and tort actions.

\(^{57}\) Andrew Beck, ‘\textit{Review – Contract}’ 2005 \textit{New Zealand Law Review} 53, 64-65. Beck commented further that it ‘may be very difficult to decide … what the real extent of any benefit is, and whether it is appropriate to make any allowance for it at all’: at 64-65.
replacement’, which according to him ‘can lead to perverse and unjust results’. He therefore concluded that it would be ‘instructive to review’ the law in England concerning betterment. In reviewing English cases in relation to whether ‘compensating advantages and subsequent gains’ should reduce the plaintiff’s damages, McLauchlan commented that it is one of the ‘most intractable areas’ of the law and that the cases are ‘difficult and replete with fine distinctions, and many of them are irreconcilable’.

The recognition of unresolved questions concerning the concept and treatment of betterment in the above observations and commentary reinforces the need to closely examine this area of law.

III AIMS OF THE STUDY AND ITS CONTRIBUTION TO LEGAL SCHOLARSHIP

With unresolved questions and legal principles in need of clarification concerning the concept and treatment of betterment, currently prevailing under the law, this thesis aims to critically examine this area of law relating to betterment when assessing damages for damage or destruction to property. It will evaluate and discuss the state of the law, including any weaknesses, deficiencies and uncertainty, and where necessary offer clarification and suggestions for a more reasoned and principled approach towards resolving betterment disputes. This will bring greater clarity, coherence, consistency and certainty to this area of law, and deliver more reasoned and just outcomes to parties involved in betterment disputes.

The in-depth analysis and evaluation of the law relating to betterment and clarification and suggestions for changes and reform in this thesis will make an important contribution to legal scholarship and knowledge in this area, where there is currently a lack of comprehensive scholarly attention. In contributing to a theoretical and practical understanding of this important area of law this thesis will benefit the general legal

59 Ibid.
61 Ibid.
community. It will be of particular benefit and assistance to litigating parties and their
counsel when faced with disputes concerning betterment as they will be in a better
position to address and resolve these disputes more effectively and expeditiously.

IV METHODOLOGY AND STRUCTURE OF THE THESIS

A Methodology of the Thesis

The study under this thesis is essentially carried out through a critical examination and
analysis of the principles of law affecting the assessment of damages for damage or
destruction to property where betterment is alleged. Although the study is focussed
mainly upon Australian law, it will also draw upon the experience of other common law
jurisdictions where it is useful and can in some way assist or add to the analysis under
this thesis.

This thesis is doctrinally-based. It is primarily concerned with analysis of legal
principles relating to the assessment of damages and how they are or should be applied
when betterment is raised. The analysis of legal principles extends beyond the law of
damages to other areas of law, which can in some way affect or impact upon the subject
of betterment. For example, it would extend to include analysis of principles under the
law of evidence relating to burden of proof, as this would be relevant to betterment
disputes on questions of proof.

The primary source of law which affect the areas of examination and analysis under this
thesis comes predominantly from case law. Legislation is not generally relevant.
Secondary sources of law affecting the areas of examination under this thesis include
written commentaries, journal articles and treatises relating to the case law, and other
matters and subjects covered under this study.

In relation to the doctrinal analysis of the cases itself, this involves reading closely and
comparing the judgments, with a view to identifying ambiguities or inconsistencies,
drawing distinctions, or reconciling holdings. Principles are drawn and rationalised
from the analysis, and where possible integrated into a coherent framework. Where
appropriate, suggestions are put forward, aimed at promoting a more reasoned,
principled and coherent approach to resolving the betterment predicament and the other
issues associated with betterment.

The research methodology in this thesis is descriptive, analytical and evaluative. The
legal research and scholarship carried out in this thesis provides not only an analysis,
exposition and clarification of the law relating to the assessment of damages for damage
or destruction to property where betterment is alleged, but also a critique with
suggestions for change and reform where appropriate.

The doctrinal analysis under this thesis is both positive and normative. It not only
analyses what the law is, but also advocates change or reform to make it conform better
to the central concepts and principles of the law, in particular those under the law of
damages.

The analysis in this thesis is also driven by a quest for greater justice and more reasoned
outcomes to be delivered to parties involved in betterment disputes, as supported by
substantive explanations of general law, particularly the justice theory of law. It is
argued that the rules concerning betterment can be made more determinate with
connecting principles in place, supported by the justice theory of law. For example, it is
argued that the betterment predicament should generally be assessed for compliance
predominantly with corrective justice reasoning. A general approach to account for
betterment, which complies with corrective justice reasoning, is therefore proposed in
this thesis. It is further proposed and argued that exceptions (to the general approach of
accountability) should be assessed for compliance with distributive justice reasoning.
This thesis also refers to other jurisprudential perspectives, for example, the law and
economics perspective, as and when any of these other jurisprudential perspectives may
be relevant to the analysis and discussion under this thesis.

The analysis in this thesis is also driven by certain values. In particular, it is driven by
values of coherence, certainty and predictability. It is argued that the principles of law
concerning betterment should be clear, coherent, certain and predictable and that this
can be achieved if there are determinate rules with connecting principles in place. The
current state of the law indicates otherwise. Consistency is important to the civil law of
damages as it allows for reliable and predictable verdicts and outcomes. It ensures that
the law assesses the defendant’s liability to pay the quantum of compensation under a damages award according to the same rules, or according to consistent rules.

B Structure of the Thesis and Outline of the Chapters: The Four Major Inquiries

This thesis is structured into four major inquiries, focussing upon the key aspects of betterment. Within each inquiry, which will be dealt with under separate chapters, the issues concerned are analysed and clarified and where appropriate proposals for changes or reform are put forward. The suggestions, aimed at promoting a more principled and reasoned approach to resolving betterment disputes, will deliver more just and reasoned outcomes to the parties involved.

The four major inquiries into betterment generally mirror the four key inquiries which the court must undertake when dealing with a betterment dispute: firstly, to ascertain the existence (or non-existence) of betterment on the facts; secondly, to determine if an account for betterment should or should not be allowed; thirdly, to assess and assign a monetary value to the betterment involved; and fourthly, to determine if the parties have satisfied their respective obligations relating to matters of proof. Although generally the inquiries should as a matter of practice and prudence be treated as sequential inquiries, particularly the first three inquiries, the court can choose to deal with them as it deems fit. The court may choose to highlight and deal with more problematic or difficult issues initially, to try to arrive at a quicker determination of the betterment contention. It is important though that there should not be any conflation of inquiries, particularly of the first and second inquiries.

1 The Theoretical Framework to Assessing Damages

Before carrying out any the four major inquiries into betterment, it would be necessary to set out in a preliminary chapter the theoretical framework to the assessment of damages in claims for an award of damages generally, as well as within the context of this study where the plaintiff’s property is damaged or destroyed and betterment is alleged. These matters are found in Chapter 2, titled ‘Theoretical Framework to Assessing Damages’. The foundational concepts and principles affecting the law of damages, including those relevant to the discussion and analysis of betterment are explained and discussed in this chapter. This will render a better understanding of the
principle of compensation and its relationship and interaction with the concept of betterment. Theories of private law are also explained as these can assist and offer guidance to the analysis of betterment and how its principles can be clarified, developed further, or refined.

2 The First Inquiry: Identifying and Defining Betterment

The first inquiry into betterment is addressed in Chapter 3, titled ‘Identifying and Defining “Betterment”’. As the title suggests, this inquiry deals with the question as to what the meaning of betterment is or should be and how this can be applied to determine the existence of betterment on the facts of any given case. The analysis of cases in this chapter reveals differences in the courts’ expectations as to what would be sufficient to constitute as betterment. This inquiry aims to specifically identify the individual elements of betterment and to articulate and propose a definition of betterment that fully reflects the various elements of betterment, and which can further serve as a test or yardstick to identify the existence of betterment.

3 The Second Inquiry: The Betterment Predicament as to whether Betterment Should be Accounted for or Not

The second inquiry into betterment addresses the question whether betterment should be accounted for or not, and if so, when and why. As discussed in Part II A above, there are different views and approaches to dealing with the betterment predicament, with the law currently reflecting a need for greater certainty and clarity as to the appropriate approach to adopt. In addressing the betterment predicament, this thesis argues and proposes that there should be a general approach to account for betterment, subject to reasoned exceptions. In other words, the general approach of accountability can be displaced in exceptional circumstances. In dealing with the first segment of the inquiry, Chapter 4 (titled ‘Justifying a General Approach to Account for Betterment’) puts forward the proposed general approach to account for betterment, together with the rationalisation and justifications for it. Chapter 5 (titled ‘Exceptions to the General Approach of Accountability’) puts forward the various exceptions to the general approach of accountability, together with their rationalisation and justifications.

4 The Third Inquiry: Valuing the Betterment

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Upon an initial finding of betterment, followed by a determination that the betterment should be accounted for, the court must deal with the question as to how the betterment should be valued in monetary terms. This falls within the third inquiry into betterment, dealt with in Chapter 6 (titled ‘Valuing the Betterment’). The cases in this area of law are examined to identify the various approaches upon which betterment has been or can be valued. The inquiry extends to examining the particular circumstances, applicability, strengths and weaknesses of the various approaches and bases which can be used to value betterment.

5 The Fourth Inquiry: Proving the Betterment

Issues relating to proof of betterment can have a dramatic impact on the outcome of a case, affecting ultimately whether betterment is accounted for or not. Parties to a betterment dispute must therefore carefully evaluate this aspect of their case before commencing proceedings. This fourth inquiry into betterment is carried out in Chapter 7 (titled ‘Proving the Betterment’), where questions relating to evidential and proof-related matters are addressed. As the analysis of cases under this chapter reveals differing judicial views as to which party should bear the burden of proof and the type of burden involved, the chapter also puts forward and provides justifications for the preferred approach.

6 Final Chapter

The concluding chapter of this thesis, Chapter 8 (titled ‘Conclusion: A General Approach to Account for Betterment’), summarises the analysis, findings and conclusions under the four major inquiries. It reaffirms the research hypothesis, highlights the role of the justice theory to the general approach of accountability, and the benefits of the approach.

V CONCLUSION

The subject of betterment and the predicament whether it should be accounted for or not has challenged the courts. As disputes concerning betterment are usually heavily fact-laden, the courts have often asserted that each case should be decided upon its own
facts. Although some degree of flexibility is necessary when trying to resolve such disputes, particularly in order to accommodate diverse circumstances, there is a need for the law on betterment to be reasoned, coherent and clear and to offer disputing parties sufficient guiding principles upon which they can assess and resolve their cases. The critical examination of betterment under this thesis, through four major inquiries focusing upon the key issues of a betterment dispute, will render a better and more comprehensive understanding of this area of law.
CHAPTER 2
THEORETICAL FRAMEWORK TO ASSESSING DAMAGES

I INTRODUCTION

II ‘RIGHTS’ AND ‘REMEDIES’
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   C ‘Primary’ and ‘Secondary’ Rights (/Duties /Interests) Distinguished

III THEORETICAL EXPLANATIONS OF PRIVATE LAW
   A Justice Accounts: Corrective Justice and Distributive Justice
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IV REMEDY OF ‘DAMAGES’: GOVERNED BY THE PRINCIPLE OF COMPENSATION
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CHAPTER 2
THEORETICAL FRAMEWORK TO ASSESSING DAMAGES

I INTRODUCTION

This chapter provides the theoretical framework relevant to the assessment of tortious and contractual damages in claims for an award of damages generally, and within the context of this study where the plaintiff’s property is damaged or destroyed and betterment is alleged. In particular, it explains the foundational concepts and principles underpinning a damages award and matters relevant to the analysis of betterment. This will assist in drawing out the relationship and interaction between the principle of compensation and the concept of betterment. The chapter also draws upon and discusses theories of private law that can offer some insight and guidance as to how principles relating to betterment can or should be rationalised and developed further. The exposition in this chapter essentially provides the necessary knowledge and understanding to enlighten and assist with the analysis of betterment under this thesis.

II ‘RIGHTS’ AND ‘REMEDIES’

A Preliminary Questions under Private Law

Tort and contract fall within the narrower rubric of the law of obligations, and the broader rubric of private law. Under private law the parties are connected through the nexus of wrongdoing and bound by an award of damages as a medium of compensation.
Three preliminary questions come into play under private law when a wrong is committed. The first queries as to who should pay and why. Simply answered, it is the defendant who must pay upon being adjudged the person responsible for the wrong and who must therefore ‘make good’ the legally recognisable harm caused to the plaintiff. From a philosophical perspective in terms of private law’s bilateral structure, this is the idea that the ‘claimant can sue and recover damages only from the party or parties who caused their harm and, correlative, that the perpetrator of the harm must, if liable, pay only the victim in order to correct the harm done.’ This bare legal obligation to recompense can be seen as deriving its ‘power from, and perhaps, map[ping] onto, a more general moral and political obligation of some kind.’

The second question, the ‘elder and much larger sibling’ of the first question, seeks a fuller explanation of the nature and basis of the putative obligation to make recompense in private law. It essentially queries the normative basis of private law. This has attracted various explanations from legal jurists, with corrective and distributive justice explanations being the most commonly adduced. As explained by the legal philosopher, Lucy:

> The considerations most commonly adduced by jurists to fulfil the role of normative basis of private law form a very limited class: they consist of one or other of the two ‘forms’ of justice. The two forms are corrective and distributive justice.

The final question queries why correction should be by monetary compensation. Monetary compensation is well recognised and accepted as the dominant form of remedy under private law. The answer though appears ‘less obvious’ if it is sought under the normative foundations of private law.

B Different Ways of Conceptualising Remedies

extends to include the law of contract, torts, restitution, property, equity and statute. The obligations are ‘private’ in the sense that they are exclusively enforceable by individuals. In contrast, public law refers to the body of law which deals with the relationship between individuals and the state and between states. See, Heffey, Peterson and Robertson, above n 62, 34-35.

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65 Ibid.
66 Ibid.
67 Ibid 250.
68 Ibid 251.
69 Ibid 251-252.
Legal theorists have explored different ways of conceptualising remedies and their relationship with rights, or what can also be described as liability or the causative event. For Aristotle ‘the causative event is a reason for the remedy because it is an injustice that the judges, as justness ensouled, must reverse’, as Weinrib describes it. In contrast, Kelsen, is concerned not with justice, but with the posited nature of law. For Kelsen, ‘the event counts as causative only because it is the condition of a remedy’, as Weinrib describes it. The injustice that is paramount for Aristotle is therefore irrelevant to Kelsen. The juxtaposition of Aristotle’s and Kelsen’s views reflects the contrast between relating the causative event to the remedy as a reason, or as a condition. The American jurist, Learned Hand, characterized a remedy as ‘an obligation destined to stand in place of the plaintiff’s right, and be, as nearly as possible, equivalent to him for his rights.

According to Blackstone, remedies ‘redress the party injured, by either restoring to him his right, if possible, or by giving him an equivalent.’ Blackstone’s formulation is a paradigmatic expression of corrective justice, a normative regime of rights and their correlative duties. According to Weinrib, by awarding a remedy, the law removes the inconsistency with the plaintiff’s right through having the defendant restore what is rightfully the plaintiff’s. Weinrib describes the diversity of remedies as reflecting the different ways of impairing and restoring what is rightfully the plaintiff’s. The distinction between monetary damages and specific remedies (such as, specific performance and injunctions) reflects the different ways through which the plaintiff’s right can be restored.

As can be seen from Blackstone’s formulation, the plaintiff’s right can be restored in two forms, through a qualitative or quantitative form. The qualitative form restores to the plaintiff the very thing or object that is the subject matter of the right; in this way, the plaintiff is allowed to have and enjoy the object’s specific qualitative character. Here, the law grants specific relief (for example, specific performance of a contractual

70 Ernest J Weinrib, Corrective Justice (Oxford University Press, 2012) 82-83.
72 Weinrib, Corrective Justice, above n 70, 84, quoting Learned Hand, ‘Restitution or Unjust Enrichment’ (1897) 11 Harvard Law Review 240, 256.
74 Ibid 94.
obligation, or specific delivery of a unique chattel) or an injunction. The quantitative form restores to the plaintiff the monetary equivalent of the injury though an award of damages. As this serves as a substitute for the right infringed, the term ‘substitutive damages’ is sometimes applied.75

C ‘Primary’ and ‘Secondary’ Rights (/Duties and Interests) Distinguished

Private law protects a variety of interests, such as interests in property, a person’s physical or psychological integrity, as well as a contracting party’s entitlement to have his contract performed according to its terms. The principal method of protecting these interests is by imposing legal duties or obligations upon individuals that require them to respect these interests. For example, duties are imposed upon individuals to abstain from causing physical injury or damage to another or to his property.

The law recognises what Austin describes as ‘primary’ rights and duties and ‘secondary’ rights and duties.76 Primary rights and duties specify the conduct that the law requires of individuals; for example, an individual has a duty not to trespass another’s land, and the land-owner has a corresponding right to be free of such trespasses. When individuals infringe primary duties imposed upon them, the violations of primary rights and duties give rise to secondary rights and duties. In other words, where there is a breach of a primary right that constitutes a civil wrong (either a tort or breach of contract), the law recognises the ‘secondary’ right of the plaintiff, which is most commonly effected by a right that the defendant must compensate the plaintiff for any resulting losses. On this analysis, ‘primary’ rights are distinct from ‘secondary’ rights as they protect and give effect to different interests. A secondary right should not therefore be considered as an alternative means of enforcing the primary interest. This point is particularly important in relation to contracts, as the discussion below reveals.

On the above analysis, a contract creates a primary obligation to perform (for example, to render services or deliver goods), with the obligation to pay damages (upon

75 Ibid 95.
76 Campbell, Robert and John Murray (eds), John Austin, Lectures on Jurisprudence (5th ed, 1885), Lecture XLV.
occurrence of a breach) viewed as a secondary obligation. Al-Tawil accordingly provides the following explanation:

[T]here are two main and quite distinct contractual interests constitutive of a contract. First, the interest in securing the contracted-for performance [in other words, the primary performance interest]; secondly, the interest in ensuring, if that performance is not completely (but substantially) secured or not secured at all, that one is not left worse off as a result thereof [in other words, the secondary compensation interest]. The claimant can bring a claim to give effect to their performance interest and/or can claim to give effect to their compensation interest. The secondary compensation interest is a separate interest, not merely an alternative or substitute formulation of the primary performance interest.

Webb uses similar terms, namely, the primary performance interest and secondary compensation interest, to describe the two interests under contract. He appropriately points out that ‘the notion of the “expectation interest” is in fact an unwarranted and misleading conflation of [these] two separate interests’. A significant consequence of this analysis is that, of the above two contractual interests recognised, ‘it is only the compensation interest that should properly be regarded as being concerned with the issue of loss.’ As Webb points out, when a plaintiff asserts his compensation (/compensatory) interest ‘the gist of his claim is that the defendant has breached the duty owed to him thereby causing him loss and that this loss should be made good.’ Such loss, which is often based upon the defendant’s defective performance, but can also extend to non-performance of the contract, can be the subject of the plaintiff’s direct or consequential loss.

77 In Photo Production Ltd v Securicor Transport Ltd [1980] AC 827, 849 Lord Diplock explained in the House of Lords that ‘[e]very failure to perform a primary obligation is a breach of contract. The secondary obligation on the part of the contract breaker to which it gives rise by implication of the common law is to pay monetary compensation to the other party for the loss sustained by him in consequence of the breach’.
79 Webb, above n 78, 45.
80 Ibid 52.
81 Ibid. Webb explains further that where a plaintiff ‘asserts his performance interest the notion of loss is superfluous’: at 54.
82 Ibid 53.
This thesis adopts the above analysis and terminology concerning interests protected under a contract. As this thesis is concerned with the issue of loss, it is therefore the secondary compensation interest which would be relevant.

In the case where the obligation is a strict obligation which promises a result, the damages must consequently reflect the lost value of the promised result. However, if the obligation is, or includes, a contractual duty of care, the measure of damages must be calculated to put the plaintiff in the position he would have been in had the defendant taken due care. In such a case, the measure of loss must be calculated on the same ‘out of pocket’ measure as a tort claim. This is the appropriate measure of damages in cases where there is a breach of a duty of care, for example under a contract to provide services and/or goods. Harbutt’s is an example, where the defendants contracted to design and install equipment in the plaintiffs’ factory for storing and dispensing a heavy wax, which had to be liquefied under heat for the manufacturing process. In carrying this out, the defendants’ negligence caused a fire which gutted the plaintiffs’ factory. The plaintiffs sued the defendants concurrently in contract and tort, based upon the defendant’s negligence, claiming the reinstatement cost incurred (that is, the plaintiff’s out-of-pocket expenses) for the new factory building. The performance and compensation interests, being relevant to the discussion in Chapter 4 (Part IV A 4), will accordingly be raised again.

III THEORETICAL EXPLANATIONS OF PRIVATE LAW

The three dominant accounts of private law, namely, the justice, economic and consequential accounts are detailed below. Legal theorists have not, however, referred much in their writings to the remedial aspects of private law, in particular the compensation principle and its application to the assessment of the plaintiff’s loss under a damages claim.

A Justice Accounts: Corrective Justice and Distributive Justice

Justice accounts have in common ‘some sense of objective norm against which justice is administered.’ Such norm can be ‘inspired by the divine, posited by the state, or found in some metaphysical concept of personhood.’ Notwithstanding disagreements among justice theorists, they agree, however, with the idea that private law is best understood non-instrumentally, as a relatively autonomous universe of normative discourse based on concepts such as rights, wrongs, responsibility, and justice.

The two major strands under justice accounts are corrective justice and distributive justice. Both offer different ways of ordering legal relations in providing a normative basis of private law. Corrective justice is the most ‘predominant strain’ of justice accounts. Since their formulation centuries ago by Aristotle, legal theorists have discussed, proposed and refined different conceptions of corrective and distributive justice.

It is generally accepted that the essential distinction between corrective and distributive justice lies in the nature of the parties’ relationship and the way in which they construe equality. According to Weinrib, corrective justice is ‘the theoretical construct that highlights the role of correlativity as the organizing idea implicit in the relationship between plaintiff and defendant’. Corrective justice therefore refers to those principles that directly govern private transactions between individuals, which seek to maintain and restore the notional equality with which parties enter the transaction. The equality consists in the parties having what lawfully belongs to them. An injustice takes place, when relative to this base line, one party realises a gain and the other a corresponding loss. Under corrective justice reasoning the law corrects the injustice by

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87 Ibid 95.
88 Ibid.
89 See, Cane, ‘The Anatomy of Private Law’, above n 85, 205.
92 See generally, Weinrib, Corrective Justice, above n 70, 2; Feinberg and Coleman, above n 90, 526. As to differences among legal theorists, it has been said that Aristotle and Thomas Aquinas understood corrective and distributive justice in one way, Hobbes and Grotius in another, and Kant and Hegel in still another. This remains true of contemporary legal theory. See also, Berryman, ‘The Compensation Principle in Private Law’, above n 85, 91.
94 Weinrib, ‘Corrective Justice in a Nutshell’ above n 93, 351.
95 Ibid 349. See also, Weinrib, Corrective Justice, above n 70, 16.
re-establishing the initial equality through depriving one party of the gain and restoring it to the other party.

In contrast, distributive justice refers to those principles that ought to regulate the fair distribution of common burdens and benefits among individuals or groups of individuals. Distributive justice divides a benefit, or burden, in accordance with some criterion or criteria that compares the participants’ merits. It thus embodies a proportional equality, in which all the parties in the distribution receive their shares according to their respective merits under the criterion in question.\textsuperscript{96}

The passage below highlights the vital distinction between the concepts of ‘correlativity’ under corrective justice, and ‘comparison’ under distributive justice:

The categorical distinction between correlativity and comparison is made clear in the difference between the numbers of parties that each admits. Corrective justice links two parties and no more because a relationship of correlativity is necessarily bipolar. Distributive justice admits any number of parties because, in principle, no limit exists for the number of persons who can be compared and among whom something can be divided.\textsuperscript{97}

There are ‘two mutually complementary movements of thoughts’\textsuperscript{98} under corrective justice reasoning. The first is the positive idea, that reasoning about liability operates through concepts that are themselves correlative. Every right therefore implies that others are under a duty not to infringe it, and no duty stands free of its corresponding right. The second is the negative idea, ‘that corrective justice disqualifies any reasoning inconsistent with its relational structure.’\textsuperscript{99} This means that considerations that refer to the position of only one of the parties, such as a party’s deep pocket, or insurability against loss, are excluded on this ground. Thus the ‘worthiness’ of persons is completely disregarded. The irrelevance to corrective justice of moral considerations, such as the notions of evil, virtue or need, is made clear in the following explanation provided by Weinrib:

\textsuperscript{96} Weinrib, ‘Corrective Justice in a Nutshell’ above n 93, 349. See also, Weinrib, \textit{Corrective Justice}, above n 70, 16.
\textsuperscript{97} Weinrib, ‘Corrective Justice in a Nutshell’ above n 93, 351-352. See also, Weinrib, \textit{Corrective Justice}, above n 70, 16.
\textsuperscript{98} Weinrib, \textit{Corrective Justice}, above n 70, 4.
\textsuperscript{99} Ibid. There are, however, criticisms of Weinrib’s theory of private law. For example, Cane is of the view that Weinrib’s ‘expulsion of distributional considerations from his theory is unnecessary in order to achieve his main aim, namely to demonstrate the inadequacy of certain explanations of private law (such as economic efficiency, compensation and deterrence)’: Peter Cane, ‘Corrective Justice and Correlativity in Private Law’ (1996) 16(3) \textit{Oxford Journal of Legal Studies} 471, 487-488.
Evil and need are moral considerations that may well figure in other contexts, but they are not pertinent to liability [under corrective justice]. It may make sense as a matter of distributive justice, for instance, to divide benefits or burdens on the basis of a comparison of relative virtue or need. Virtue and need, however, do not connect any two particular persons as correlatively situated [under corrective justice].

Instrumental considerations, such as, the promotion of economic efficiency, are similarly excluded. As Weinrib explains, corrective justice’s approach to liability reflects its conceptual structure and modes of reasoning ‘not as surrogates for unacknowledged goals of public policy but as discourse that one should try to understand in its own terms.’

Corrective justice reasoning offers a number of advantages. First, it can be said that corrective justice is fair, with the structure of corrective justice reasoning focusing appropriately on the relationship between the parties, than on each individually. Based on this reasoning the individual interests and unilateral considerations of each party play no role; neither party’s interests can therefore be sacrificed to advance the interests of the other. Second, it can be said that corrective justice is coherent, as it is not made up of a ‘hodge-podge of [individual] considerations’ and ‘traded off against one another.’ With corrective justice directed towards treating the relationship as a unified whole, it would as a consequence produce ‘reasons that coherently interlock with one another’. Third, drawing upon the aforesaid qualities of fairness and coherence, it can therefore offer a standpoint for criticism internal to the relationship; it cannot be ‘dismissed as irrelevant to the controversy between the parties or beyond the institutional competence of the court.’ Fourth, the same qualities of fairness and coherence can in addition offer a standpoint for criticism internal to the law, as it is consonant with the law’s aspirations and with the doctrinal and institutional arrangements that reflect these aspirations.

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100 Weinrib, ‘Corrective Justice in a Nutshell’, above n 93, 352.
101 Although these considerations refer to both parties, they relate the parties not to each other, but to the goal that both parties serve.
102 Weinrib, ‘Corrective Justice in a Nutshell’, above n 93, 356.
103 See Weinrib, Corrective Justice, above n 70, 3.
104 Ibid.
105 Ibid.
106 Ibid.
107 Ibid.
This thesis recognises and applies corrective justice reasoning to the analysis of betterment. It argues, however, that this should not be taken to mean that distributive justice, or other explanations, ought to be excluded from consideration. This thesis also recognises and applies distributive justice, arguing that it would be reasonable and sensible to adopt a stand which allows accommodation of certain goals of distributive justice, including other explanations or considerations where justifiable. This view accords with Cane’s view that private law can sometimes serve ‘a number of different and sometimes conflicting goals’.  

Berryman holds a similar view and justifies its application to a damages award in the following passage, which discusses the remedial perspective of a damages award:

I suggest that, through the distinctly remedial perspective, it is legitimate for courts to advance some goals of distributive justice, while still adhering to a formalist account of corrective justice as governing judicial practices. By doing so, the courts can avoid the pitfalls of excessive judicial activism. This argument is obviously heretical to many, akin to trying to fit square pegs into round holes, but I posit it answers the following conundrum: how can a court claim to be acting justly if it orders compensation that simply perpetuates an obviously unjust distribution of entitlements?  

B Economic Instrumentalist Accounts

Economic instrumentalist accounts, with law and economics being the most predominant strain, explain law as ‘serving some other purpose’. The economic analysts view law ‘as a means to achieve ‘desired social goals established independently of the law’, They may, for example, explain law in terms of the incentive effects of remedies or penalties, or in terms of efficiency theories aimed at promoting efficient behaviour. Efficiency theorists see a legal rule or decision as efficient ‘if it promotes behaviour of a kind that leads to an overall increase in the satisfaction of individual

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110 Ibid 96. There are essentially three applications of economics to the law. The first approach uses economics to discover the effect of laws (ie, positive or predictive economics). It involves an analysis of how legal rules affect human behaviour (for example, resource use). The second approach applies economics to explain the legal system as it is (ie, descriptive economics). It seeks to explain why the laws are the way they are. The third uses economics (the normative theories) to recommend changes that might improve the law (ie, normative or prescriptive economics). It therefore embodies value judgments as to what the law ought to be, with the most common being that rules should seek to maximise social welfare and that to achieve this rules should be evaluated primarily in terms of their allocative efficiency. See Stephen Bottomley and Stephen Parker, Law in Context (Federation Press, 2nd ed, 1997) 294-296.
111 Cane, ‘The Anatomy of Private Law Theory’, above n 85, 204.
preferences of human welfare. Efficiency can be promoted by establishing appropriate incentives and disincentives.

Numerous criticisms have been levelled against economic analyses. Calabresi, for example, stresses the limits of economic analysis as a tool for understanding law.\textsuperscript{113} Cane points out that economic analysis is open to objection on the ground that it marginalize[s] law’s arguably most distinctive and important feature: its normativity or, in other words, its role as a source of reasons for action.’\textsuperscript{114} Criticisms extend to the lack of ‘appropriate theory on the role of adjudication and the actors within the legal system.’\textsuperscript{115} Weinrib regards economic analyses of private law as bound to fail owing to the inadequacy of external explanations of private law.\textsuperscript{116} The economic approach is further faulted for its ‘parochial concern with efficiency and wealth maximization as explanatory and prescriptive criteria’.\textsuperscript{117} The economic approach is also claimed to be too technical and therefore inaccessible to lawyers.\textsuperscript{118}

In discussing and evaluating the effect of economic approaches on the compensation principle as applied under remedial law, Berryman raises an important point which reflects their limited application:

> Economic instrumentalism is indifferent to the plaintiff’s actual compensation because it is focused on determining the right incentives to deter forms of behaviour.\textsuperscript{119}

Being more preoccupied with sending appropriate market signals, economic instrumental accounts ‘ignore the compensation principle and the need for correlativity’.\textsuperscript{120} They can therefore give only a ‘contingent role to the compensation principle’.\textsuperscript{121}


\textsuperscript{114} Cane, ‘The Anatomy of Private Law Theory’, above n 85, 211.


\textsuperscript{116} Ibid.

\textsuperscript{117} Ibid.

\textsuperscript{118} Ibid.


\textsuperscript{120} Berryman, ‘The Compensation Principle in Private Law’, above n 85, 97. Berryman further highlights that the ‘fruit of Craswell’s research is that the compensation principle has no role to play in economic instrumentalism’.

\textsuperscript{121} Ibid 108.
It is argued in this thesis, that although economics can provide some insights into private law, its value to the analysis of betterment is limited and would lie mainly in drawing in policy arguments.

C Consequentialist Accounts

The third strand of private law theory, the consequentialist accounts, is linked by ‘a critique of the ways in which private law affects the distribution of risk, wealth and power within society.’ Instead of adopting one particular critical perspective, the various approaches adopt a general critical attitude to the law. The approaches represent outgrowths of the realist movement and see law as a product of other social phenomena. Examples of consequential theories include the critical and feminist theories. Critical scholars tend to focus on only one perspective, for example, gender, race, sexual orientation, or poverty. With many sources and varieties of disadvantage, the consequentialist approaches are more diffuse than justice and economic instrumentalist accounts.

Consequentialist accounts are generally not relevant to the analysis of betterment under this thesis. Economics plays a limited role as indicated above. The justice theories, both corrective and distributive justice, are relevant to the analysis of betterment under this thesis, particularly in relation to the second inquiry into betterment that addresses the betterment predicament and the approach to adopt, which will be dealt with in Chapters 4 and 5.

IV REMEDY OF ‘DAMAGES’: GOVERNED BY THE PRINCIPLE OF COMPENSATION

The principal remedy for breaches in tort and contract is an award of damages, with the common aim to provide the plaintiff with pecuniary compensation for damage.

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123 Ibid 206.
124 ‘Damage’ (which is distinct from ‘damages’) is used in the sense of ‘loss, harm or injury’ by Luntz and Hambly, above n 7, 547. ‘Damage’ is defined as ‘loss or harm’ by Elizabeth A Martin (ed), *Oxford Dictionary of Law* (5th ed, 2002).
suffered as a consequence thereof.\textsuperscript{125} Damages are assessed once-and-for-all in a lump sum.

The plaintiff’s loss or losses comprise firstly, his main loss (also referred to as his direct, basic or normal loss) and secondly, his consequential losses.\textsuperscript{126} His main loss is the loss which any person in the plaintiff’s position would suffer as a result of the defendant’s wrong. His consequential losses comprise the additional items of loss which arise and flow on because of circumstances peculiar to the plaintiff in question. Consequential losses are recoverable only if they are considered to be not too remote in law. This means that consequential losses must be reasonably foreseeable in the case of a tort, or within the reasonable contemplation of the parties in the case of a contract.\textsuperscript{127}

In an action where the plaintiff’s main claim is for damage or destruction to his property, his loss and claim for compensatory damages is often represented by the cost of reinstatement (be it repair or replacement cost incurred, or to be incurred); this would be the plaintiff’s main loss. Consequential losses refer to other losses suffered by the plaintiff, for example, any loss resulting from his inability to use his property during the period of reinstatement, or any loss of profits if the property is a profit-earning chattel. However, the plaintiff’s claim for damage or destruction to his property can be a consequential loss, if his main claim relates to other damage or injury suffered.

\textit{A Dominance of the Compensatory Goal}

\textsuperscript{125}Mahony v J Kruschich (Demolitions) Pty Ltd (1985) 156 CLR 522, 527. A damages award is ‘the sum of money which is awarded by a court to a successful plaintiff as compensation’ for breaches in tort or contract: M J Tilbury, \textit{Civil Remedies Vol One: Principles of Civil Remedies} (Butterworths, 1990) 40. ‘Damages’ is ‘the pecuniary compensation, obtainable by success in an action, for a wrong which is either a tort or a breach of contract, the compensation being in the form of a lump sum awarded at one time, unconditionally’ and in the prevailing currency: Harvey McGregor, \textit{McGregor on Damages} (Sweet & Maxwell, 2009, 18\textsuperscript{th} ed) 3. Some of the earlier works described ‘damages’ and its object as follows - ‘the recompense that is given ... to the plaintiff ... for the wrong the defendant hath done unto him’: Sir Edward Coke, \textit{The First Part of the Institutes of the Laws of England} (first published 1832, 1979 ed) Vol 2, [257a]; that ‘given to a man ... as a compensation and satisfaction for some injury sustained’: Sir William Blackstone, Commentaries on the Laws of England (1\textsuperscript{st} ed, 1766) vol 2, 438; ‘to give compensation’ to the party injured for the loss sustained’: Theodore Sedgwick, \textit{A Treatise on the Measure of Damages: Or an Inquiry into the Principles which Govern the Amount of Compensation Recovered in Suits at Law} (2\textsuperscript{nd} ed, 1852) 28-9.

\textsuperscript{126}Tilbury, \textit{Civil Remedies Vol One}, above n 125, 37.

\textsuperscript{127}Ibid 79.
In the early days of common law development, without clear articulation of the function of damages, awards of damages were granted in practice to serve a number of purposes. However, with the changing roles and functions of judge and jury and greater judicial control of juries, judges began to identify the function of damages to assist juries to properly perform the task of assessing damages. The principled development of the law of damages thus became evident in the 19th and 20th centuries when damages ceased to be a jury question and as juries began to disappear from civil trials. With the emergence of modern tort and contract law where the basis of civil liability fell mostly outside of statute, the purpose and rationale of such liability was more often explained instrumentally in terms of compensation and deterrence. Compensation, however, eventually emerged as the preferred and dominant aim of civil liability. In 1966 the High Court in *Uren v John Fairfax & Sons Pty Ltd* described compensation as ‘the dominant remedy if not the purpose of the law of torts’, which statement applies with equal force to contract law.

The central role played by compensation under the law of damages is well recognised today. The Australian courts have repeatedly endorsed the compensatory goal as fundamental to the recovery of damages in tort and contract. Windeyer J in *Skelton v Collins* described compensation as ‘the cardinal concept’, and the compensation principle as ‘the one principle that is absolutely firm, and which must control all else.’ More recently, the High Court in *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd* strongly endorsed the compensatory objective and principle, describing it as the ‘ruling principle’ governing the recovery of damages. Commentators have acknowledged that a ‘very significant development in Australian law in the second half

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128 Lawson observed that ‘English judges, in contrast to American judges, have in the past been content to treat the quantum of damages as a question of fact’: F H Lawson, *Remedies of English Law* (Butterworths, 2nd ed, 1980) 54. McCormick pointed out that ‘English judges are inclined to use loose and general standards of compensation and to hand over to the jurors quite casually a rather full responsibility for assessment of the damages. Distinctions, such as the distinction between compensatory and exemplary damages, which with us are sharp and clear, are vague and unanalysed with them’: C T McCormick, *Handbook on the Law of Damages* (West Publishing, 1935) v (preface).

129 (1966) 117 CLR 118, 149.


of the twentieth century’ is the ‘clear emergence of compensation not only as the
governing principle of the law of damages’ but also as ‘the express goal of civil
liability’.

In current times, deterrence is viewed as a ‘problematic’ explanation, as it runs counter
to the compensatory goal. It is reasonable, however, to argue that at some residual
level, monetary awards are deterrent in a weak sense, in that they act as a sanction on
conduct. This should not therefore diminish the dominance of the compensatory
function of damages.

It must also be noted that compensation is not the exclusive purpose of remedies under
private law, as there are other remedial objectives which are non-compensatory. These
non-compensatory objectives are, however, strictly exceptional and can be found in
exemplary, restitutionary, nominal, contemptuous and vindicatory damages. These
are recognised categories of cases where a monetary award, or part of it, serves some
object other than, or in addition to, compensation. They are seen as exceptions to the
compensation principle, with the most significant being exemplary damages, whose
main goal is to punish and deter. The High Court in Gray v Motor Accident
Commission stated that exemplary damages can only be recovered ‘in exceptional
circumstances’ and upon ‘a principled basis by reference to its rationale’.

The historical evolution of exemplary damages has resulted in its restriction to
situations where it must be shown that the defendant’s conduct amounted to ‘conscious

133 Gary Davis and Michael Tilbury, ‘The Law of Remedies in the Second Half of the Twentieth Century:
An Australian Perspective’ (2004) 41 San Diego Law Review 1711, 1722-1723. See also, Michael
134 If a more stringent minority view which regards non-compensatory goals as ‘anomalous’ (rather than
merely ‘exceptional’) is accepted, these goals could be argued to be illegitimate and should therefore be
rejected. This view, however, goes beyond the current consensus that non-compensatory objectives are
‘exceptional’ rather than anomalous.
135 Restitutionary damages are those monetary awards measured by the expenditure saved by the
defendant as a result of the wrong done to the plaintiff. Nominal damages represent a trivial sum of
money awarded to the plaintiff who has established a cause of action but has not established that he is
entitled to compensatory damages. Contemptuous damages indicate that the plaintiff has suffered no loss,
but in the opinion of the court he ought not to have brought the action. Vindicatory damages make good
the plaintiff’s legal rights by the grant of an adequate or effective remedy. See generally, A I Ogus, The
Law of Damages (Butterworths, 1973) Chapter 2; Pearce and Halson, above n 78.
See further, Davis and Tilbury, above n 133, 1722-1723; Tilbury, ‘Reconstructing Damages’, above n 133, 697. The current Australian position relating to exemplary damages differs from that in England,
where the position is as laid down in Rookes v Barnard [1964] AC 1129, as set out in Lord Devlin’s
speech.
wrongdoing in contumelious disregard of another’s rights’. In other words, it is subject to the fulfilment of certain pre-conditions. The authorities reveal that exemplary damages are available in tort for certain actions such as trespass, or nuisance, but not for negligence. In relation to contract actions, the guiding principle is that the compensatory measure of damages is not affected by considerations such as ‘the motive or intention of the defendant in breaching the contract.’ A number of authorities indicate a reluctance to grant exemplary damages in contract.

B Formulation and Application of the Principle of Compensation

Cartwright explains how the compensatory goal of a damages award can be effected, through what is commonly referred to as ‘the principle of compensation’ as follows:

The underlying purpose of an award of compensatory damages, whether the claim is brought in contract or tort, is the same: by means of an award of money, to place the claimant as far as possible in the position that he would have been in if the wrong had not been committed.

The principle of compensation is often traced back to two 19th century English authorities, Livingstone v Rawyards Coal Co (involving a tort action) and Robinson v Harman (involving a contract action). It can, however, be traced back even further to the early English maritime cases.

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138 Uren v John Fairfax & Sons Pty Ltd (1966) 117 CLR 118; Gray v Motor Accident Commission (1988) 196 CLR 1. See also, Tilbury, ‘Factors Inflating Damages Awards’, above n 137, 104; Tilbury, Civil Remedies Vol Two, above n 7, 253-254. Although it is possible to satisfy the conscious reprehensible conduct pre-condition in tort actions of trespass or nuisance, it is unlikely to be satisfied in tort negligence actions, given that there would be an absence of conscious wrongdoing in negligence actions.
139 Carter, Peden and Tolhurst, Contract Law in Australia, above n 62, 808. See, Butler v Fairclough (1917) 23 CLR 28, 89.
141 Cartwright, above n 83, 3-4.
142 (1880) 5 App Cas 25.
143 (1848) 1 Exch 850, 855; 154 ER 363.
144 The early English maritime cases include the following, 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).
In *Livingstone v Rawyards Coal Co*, Lord Blackburn framed the compensatory principle for application in tort cases 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 at 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.\(^{145}\)

When applied to tort actions, the compensatory principle seeks to put the plaintiff in the position he would have been in, as if the tort had not been committed. This reflects the pre-tort, or pre-wrong position of the plaintiff.

In *Robinson v Harman*, Parke B framed the compensatory principle for a breach of contract 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 is can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.\(^{146}\)

When applied to contract actions, the compensatory principle seeks to put the plaintiff in the position he would be in as if the contract had been satisfactorily performed; in other words, as if the wrong had not been sustained. This reflects the post-contract position of the plaintiff.

Notwithstanding that what appears to look like different formulae of loss in tort and contract, this is in fact ‘simply the result of the different nature of the rights or interests protected, not of a different purpose of relief’.\(^{147}\) Lord Diplock merged both the tort and contract formulae of loss to reflect their identical function:

\(^{145}\)(1880) 5 App Cas 25, 39.
\(^{146}\) (1848) 1 Exch 850, 855; 154 ER 363, 365. See, *Commonwealth v Amann Aviation Pty Ltd* (1991) 174 CLR 64, [80] (Mason CJ and Dawson J) where the High Court reiterated Parke B’s formulation of the compensation principle. It should be noted that although as a general rule contract damages are assessed on an expectation basis, other exceptional bases of assessment, such as the reliance basis, may be claimed where it can be justified’ the discussion on expectation and reliance damages (and their availability): at [80].
The 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.148

Lord Diplock’s statement above also makes it clear that the function of the compensation principle, in trying place the plaintiff in the position as if the wrong had not been committed, is to be measured in pecuniary terms (as far as this can be achieved). In other words, the aim under the compensation principle, to try to restore the plaintiff to the position as if the wrong had not been committed, is not restoration in the physical sense, but restoration in a pecuniary sense. The discussion below under Part V, relating to similar usage of the terms ‘compensation’, ‘restitutio’ and ‘indemnity’ explains further the pecuniary aspect of the compensation principle.

The Australian courts have continually endorsed the compensation principle as the fundamental principle governing the recovery of damages in tort and contract.149 Referring to it as ‘settled principle’ the High Court in Haines v Bendall echoed both Lord Blackburn and Parke B, that the plaintiff should receive ‘compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed’.150 Mason CJ in Johnson v Perez referred to the compensation principle as the ‘guiding principle in the assessment of damages’ aimed at awarding the plaintiff ‘an amount of money that will, as nearly as money can, put him in the same position as if he had not been injured by the defendant.’151 As mentioned earlier, Windeyer J in Skelton v Collins described compensation as ‘the cardinal concept’ and the compensation principle as ‘the one principle that is absolutely firm, and which must control all else.’152 Also as mentioned earlier, more recently, the High Court in Tabcorp Holdings Ltd v Bowen Investments Pty Ltd strongly endorsed the compensation principle as the ‘ruling principle’153 governing the recovery of common law damages.

148 Albacruz (Cargo Owners) v Albazero (Owners) (The Albazero) [1977] AC 774 (HL) 841.
149 The authorities are as set out in above n 130.
150 (1991) 172 CLR 60, 63 (joint judgment of Mason CJ, Dawson, Toohey and Gaudron JJ, with Brennan J agreeing).
152 (1966) 115 CLR 94, 128.
The compensation goal and principle are particularly relevant to the analysis of betterment under the inquiry into the meaning of betterment (in Chapter 3) and the inquiry as to how the betterment predicament should be resolved (in Chapters 4 and 5).

C Limitations upon the Operation of the Compensation Principle

There are a number of principles under the law of damages which can reduce or extinguish, the damages that a plaintiff can recover under the compensatory principle. These limitations placed upon the operation of the compensation principle are commonly referred to as ‘limiting factors’. They include principles relating to mitigation, remoteness of damage causation, certainty and policy.

The principle of mitigation 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’, as pointed out by Viscount Haldane in his seminal speech in British Westinghouse. The mitigation principle can be reduced to three rules: the first rule bars the plaintiff from claiming for loss due to his failure to take reasonable steps to reduce his loss (often referred to as ‘the avoidable loss rule’); the second rule allows the plaintiff to recover reasonable expenses incurred as a consequence of mitigation; and the third rule requires the defendant to only compensate for actual loss suffered by the plaintiff, to the exclusion of any benefits or savings accruing to the plaintiff from mitigation (often referred to as ‘the avoided loss rule’).

155 Remoteness of damage as a limiting factor prevents the plaintiff from recovering for any loss which is either not reasonably foreseeable in a tort action, or not within the reasonable contemplation of the parties in a contract action.
156 Causation as a limiting factor prevents the plaintiff from recovering damages for any item of damage or loss not caused by the defendant’s wrong.
157 The limiting factor of certainty prevents the plaintiff from recovering damages for any loss which the plaintiff either cannot establish or quantify with the degree of certainty that the law requires.
159 In reducing the plaintiff’s recoverable damages to the extent to which the plaintiff ought to have avoided or have 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 includes the following, it promotes a more fair and just system of compensation; it reflects a desire to discourage
The ‘avoided loss rule’ of mitigation is relevant to the analysis of betterment and is discussed in Chapter 4 (Part IV C) to support the proposal for a general approach to account for betterment.

Policy, or public policy, can prevent the plaintiff from recovering damages for a particular item of damage in issue.\(^{160}\) The scope of policy is extensive,\(^{161}\) with its content varying from time to time. It has been described as ‘never [being] static’.\(^{162}\) The categories of policy are also ‘never closed’.\(^{163}\) Policy considerations are discussed in Chapter 4 (Part IV E), in support of the proposal for a general approach to account for betterment.

V SIMILAR USAGE OF TERMS: ‘COMPENSATION’, ‘RESTITUTIO’ AND ‘INDEMNITY’

As the three terms, ‘compensation’, ‘restitutio’ (in full, *restitutio in integrum*) and ‘indemnity’ are often used interchangeably in the context of the compensatory goal and principle, it is useful to examine these terms more closely to obtain a better understanding of them as well as of the compensatory goal and principle.

Referring to usage under maritime law, Snyder observed that for ‘more than a century, from *The Baltimore* to *The Em Ford*’ the term ‘restitutio’ has embodied the philosophy of the admiralty law of collision damages’, and that it is ‘the maxim cited in over 120 reported decisions in support of the computation of an award of money damages that will restore the maritime property owner to the same pecuniary position it enjoyed prior to the casualty, no better, and no worse.’\(^{164}\) The observation appropriately highlights the pecuniary (and not the physical) aspect of *restitutio*. It also highlights the relevant pre-wrong position of *restitutio*.
In *Liesbosch Dredger v SS Edison*, Lord Wright referred to the *restitutio* principle in similar terms to the compensation principle, that the plaintiffs ‘should recover such a sum as will replace them, so far as can be done by compensation in money, in the same position as if the loss had not been inflicted on them’. 165 The articulation highlights the pecuniary aspect of the *restitutio* or compensation principle. Dr Lushington’s ruling in *The Gazelle*, that the ‘right against the wrongdoer is for a *restitutio in integrum*’, 166 also draws a clear link between *restitutio* and compensation. In a subsequent case, *The Clarence*, Dr Lushington referred to the *restitutio* principle in similar terms to how the compensation principle is framed, but added the limitation of practicality, that the ‘party who has sustained a damage by collision is entitled to be put, as far as practicable, in the same condition as if the injury had not been suffered’. 167

Further afield in the United States, in *Standard Oil Co v Southern Pacific Co (Proteus-Cushing)*, 168 the court traced the *restitutio* principle to the early maritime case of *The Clyde* 169 and referred to it in similar terms to the compensation principle, highlighting both the pecuniary aspect as well as the limitation of practicality, ‘that, as far as practicable, the owner is to be restored to the same pecuniary position as if no collision had taken place’. 170

Clearly, from the above discussion, the term ‘*restitutio*’, as used under the *restitutio* or compensation principle, must be distinguished from usage in the sense of restoration or restitution to the previous or original condition. 171 The latter usage refers to the previous condition in the physical sense, rather than being restored to the same *pecuniary* position as used under the compensation principle.

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165 [1933] AC 449, 454.
166 (1844) 2 W Rob 279, 281; 166 ER 759 (Adm), 760. Here, a vessel was damaged by collision and its owner sought compensation for its repair.
167 (1850) 166 Eng Rep 968, 969 (Adm).
168 268 US 146, 1925 AMC 779 (1925) (US Supreme Court). In this case, two vessels, *Cushing* and *Proteus*, collided at night when they were running without lights under World War I regulations. As *Proteus* was a total loss, the Commissioner fixed her value at $750,000. Her owner appealed against this decision.
169 (1856) Swab 23; 166 ER 998, 998-99 (PC, 1856).
171 See, for eg, Robert Allen (ed), *The Penguin English Dictionary* (Penguin Group, 2nd ed, 2003) 1192, where ‘restore’ is defined as (inter alia) ‘to bring (something) back to its former or original state, eg, by repairing damage’; and ‘restitution’ is defined as (inter alia) ‘the return or restoration of something to a former or its original state, shape or position’.
The meaning of ‘compensation’ is clearly distinguished from physical restoration or restitution by Goodin in the following passage:

It is one thing to restore the object itself to its proper owner. That is what we (and the Oxford English Dictionary) call ‘restitution’. It is quite another thing to compensate the person for its loss. Such compensation is characteristically a matter of providing something which will, in the words of the Oxford English Dictionary, ‘counterbalance, neutralize or offset’ the loss. What all those terms suggest, in turn, is not the restoration of the object itself, but rather the provision of something else altogether.172

Goodin explains ‘the function of compensation’, from a moral perspective, as one of ‘serv[ing] to right’ the ‘wrongful injuries to persons or their property’.173 Moving from the ‘why’ (a function-based query) to the ‘how’ (a measure-based query) of compensation, Goodin explains the idea of compensation, through the concept of equivalence measured against a baseline of well being, clarifying at the same time as to what is meant by ‘over-compensation’ and ‘under-compensation’:

To compensate someone for something is ... to provide that person with a ‘full and perfect equivalent’ for that thing. If he is given more than that, we would say he has been ‘over-compensated’; if less, ‘under-compensated’. Being bracketed as it is between these two other notions, the notion of compensation per se clearly implies the providing of the exact equivalent – neither more nor less. ... The aim is to bring him up to some baseline of well-being. That baseline to be used for reckoning the adequacy of compensation will typically be identified by reference to some status quo ante, ie, some position that the individual himself actually enjoyed at some previous time. Thus, in the law of torts, the baseline for compensatory damage calculations is the position that the injured party was in before the tort was committed against him.174

In linking compensation to a baseline of well-being, measured by reference to a previous status quo, Goodin’s explanation reflects Lord Blackburn’s formulation of the compensation principle in Livingstone v Rawyards Coal Co.175

With the concept of ‘compensation’ being closely associated with the term ‘indemnity’, the compensation principle has also been called the indemnity principle. Bonbright, for

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173 Ibid 56.
174 Ibid 59.
175 (1880) 5 App Cas 25.
example, equates ‘compensation’ with ‘indemnification’ in the context of compensatory damages:

Used in a strict and narrow sense, the word [compensation] is an exact synonym for ‘indemnification’ or ‘indemnity.’ When so used, it refers to a payment no more and no less than sufficient to make good the loss for which compensation must be paid. This is the sense in which it is used in the phrase ‘compensatory damages’. 176

Indemnification, which is also in the insurance context, extends to cover the insured’s actual loss from the insured risk, with the insured required to be restored to the financial position which he enjoyed immediately before the realisation of the insured risk.177

It appears from the above discussion that the terms ‘compensation’, ‘restitutio’ and ‘indemnity’ have all been used in the same sense, and they can therefore continue to be used interchangeably. The discussion above provides greater insight to the pecuniary aspect of the compensation principle and its limitation concerning practicality.

VI ASSESSMENT OF DAMAGES WHERE PROPERTY IS DAMAGED OR DESTROYED

This Part examines how damages are assessed in situations where the plaintiff’s property is damaged or destroyed.178 The term ‘property’ extends to include both goods and land. Buildings and fixtures fall within the term ‘land’. ‘Damage’ refers to any impairment to the plaintiff’s property, falling short of destruction. ‘Destruction’ refers to total destruction, including constructive total loss (where the property is in such condition to make repair impracticable or uneconomic).

177 See, Legal & General Insurance (Aust) Ltd v Eather (1986) 6 NSWLR 390; Bengston v Thomson (1987) 4 ANZ Insurance Cases 60-764. See also Tarr, Liew and Holligan, Australian Insurance Law (Law Book Co, 2nd ed, 1991) 245. Terms imposed under the insurance policy itself would have to be taken into account.
178 Property can be injured or affected in the following three ways, through damage, destruction or misappropriation. See generally, Ogus, above n 135, 120-121; Tilbury, Civil Remedies Vol Two, above n 7, 191. This thesis is only concerned with the first two instances.
The assessment of damages is discussed under separate heads of land and goods. It will, however, be seen from the discussion that less significance is now attached to the distinction.\(^{179}\)

### A Application of the Principle of Compensation

In assessing damages for both damage and destruction to land and goods, it must firstly be emphasised that ‘one must return to the basic principle of compensation for loss’ as this principle ‘underlies the recovery of compensatory damages in all branches of the law’.\(^{180}\)

Secondly, it must be emphasised that whenever ‘specific rules for the assessment of damages are created’ they can only ‘be justified if they give effect’ to the principle of compensation and its compensatory goal.\(^{181}\) Lord Wright made this clear in *Liesbosch Dredger v SS Edison* when he declared that the ‘dominant rule of law is the principle of *restitutio in integrum*, and subsidiary rules can only be justified if they give effect to that rule.’\(^{182}\)

Where the defendant’s wrong in tort or contract causes damage or destruction to the plaintiff’s property, an attempt to put the plaintiff in the same pecuniary position as if such wrong did not occur as dictated by the principle of compensation, can arguably translate to trying to put the plaintiff in the position as if such property was not damaged or destroyed. In a tort action, this means trying to put the plaintiff in his pre-tort position, with the property in its original or undamaged condition.\(^{183}\)

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\(^{179}\) Tilbury observed that ‘in an era in which land is no longer the single most important form of wealth, any differences in the treatment of land and goods which do not flow from their inherent natures require more than historical justification: Tilbury, *Civil Remedies Vol Two*, above n 7, 191. Although the courts tend to make a distinction, Cooke and Oughton observed that there appears to be ‘no logical distinction between damage to a building and damage to a chattel’: P J Cooke and D W Oughton, *The Common Law of Obligations* (Lexis Law Publishing, 2nd ed, 1993) 269. Clarke LJ observed a similarity of approaches: ‘[A] similar approach applies to the measure of damages for the tortious destruction of chattels as it applies to the measure of damages for both the tortious destruction of real property and for breach of contract in circumstances such as those in *Ruxley*: The Maersk Colombo [2001] EWCA Civ 717 [43]; [2001] 2 Lloyd’s Rep 275. These observations indicate a move towards generalisation of principles, not only in relation to the assessment of damages for land and goods, but also in relation to breaches in tort and contract.


\(^{181}\) Ibid.

\(^{182}\) [1933] AC 449, 463. See also, Ogus, above n 135, 127-128.

\(^{183}\) *Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39.
In the case of contract, where in the course of performing the contract the defendant’s negligence (or other wrongful conduct) results in the plaintiff’s property (whether it is the subject matter of the contract or otherwise) to be damaged or destroyed, the plaintiff’s loss would generally be similar to the claim in tort, in the sense that an attempt to apply the compensation principle would arguably also translate to trying to put the plaintiff in the position as if such property was in its undamaged or original condition (or in its contracted quality where applicable).\textsuperscript{184}

It must be emphasised again (as discussed in the previous Part), that although the compensation principle is framed in trying to place the plaintiff in the position as if the wrong had not been committed, this must be measured in pecuniary terms. The focus under the compensation principle is restoration in a pecuniary sense, and not restoration in the physical sense. The compensatory nature of a damages award emphasises its pecuniary aspect as appears in this passage:

\begin{quote}
The damages award is substitutionary relief, that is, it gives the plaintiff money mainly by way of compensation, to make up for some loss that was not, originally, a money loss, but one that ordinarily may be measured in money. For example, if the defendant damages the plaintiff’s property, the damages remedy does not give the plaintiff back his property in its original condition, but does give him a money substitute. Or, if the defendant refuses to perform a contract with the plaintiff, the damages award does not give the plaintiff the performance to which he is entitled, but does attempt to furnish a money substitute.\textsuperscript{185}
\end{quote}

Rules concerning damages are usually associated with some concept of ‘value’. This ties in with the idea that the law objectifies damages measurement. The standard against which value is measured may vary with the purpose for which it is to be made. For example, the cost of repairing a house damaged by the defendant’s tort or breach of contract may be argued to reflect the best measure of compensation, and the court may accept this as the best evidence of value. It must be recognised that ‘value’ is not a single monolithic idea and that its meaning must depend upon the purpose for which the valuation is to be made.\textsuperscript{186} The concept of ‘market value’ is one of the primary concepts of value.

\textsuperscript{184} See also the discussion in Part II C above in relation to claims in contract involving the secondary compensation interest.  
\textsuperscript{186} See, Bonbright, above n 176, 11-39. Bonbright observed that the concepts of ‘market value’ (ie, the price at which the owner can sell it) and ‘value to the owner’ are the primary concepts of value: at 38.
Where the plaintiff’s property is damaged or destroyed, whether in tort or contract, usually two competing measures of loss are considered: firstly, ‘the diminution in value’ measure (also referred to as ‘the difference in value’ measure); and second, ‘the reinstatement cost’ measure which would reflect either ‘the repair cost’ or ‘the replacement cost’ involved.

Notwithstanding that the compensation principle expresses unequivocally the compensatory object of damages, with its aim to place the plaintiff in the position as if the wrong was not committed, problems still arise in practice, more so where competing measures of loss are available. Central to such problems is the question of the plaintiff’s precise loss and how it should be properly measured and valued. It has been acknowledged that much of the legal debate in this area involving damage or destruction to property is concerned with ‘how best to define the “value” of the property’. As to how the value of any property is to be fixed in each case the following passage provides some guidelines:

The value of any property will be fixed in each case, as seems to be appropriate, in light of all the circumstances and the nature of the property in question. The current market price or the diminishment in market value of the property at the time of the tort may be the best measurement of loss in many cases. In respect of property for which there is no market or for which at the time of the loss there is not truly equivalent property available, the plaintiff may be awarded an amount to allow for the full restoration or reconstruction of the damaged or destroyed property.

It is acknowledged that the tendency to overemphasise reinstatement cost as a measure of value ‘is sometimes due to a recognition by the courts, that for many legal purposes, cost is a better legal standard than value itself would be’ if it can be accurately ascertained.

Measures of loss, such as the diminution in value or reinstatement cost measures, represent general formulae used to identify and measure the plaintiff’s loss. Used as

Bonbright also distinguishes between ‘value’ and ‘replacement cost’: 18-19. See also, Dobbs, above n 185, 135.
187 Tilbury, Noone and Kercher, above n 154, 152.
188 Ibid.
189 Bonbright, above n 176, 20.
general formulae of loss, based upon models of paradigm loss, these measures may not therefore necessarily reflect the plaintiff’s actual loss in question. It is therefore argued in this thesis that if used as general formulae of loss, these measures should serve only as rules of practice and their application should ultimately depend upon the extent to which they can give effect to the principle of compensation under the particular circumstances at hand. On this reasoning, the extent of any difference between the general formula of loss and the plaintiff’s actual loss, if it can be more precisely ascertained, should be taken into account. In the context of this thesis, the difference involved would represent the element of betterment. This is discussed further in Chapter 3 in relation to the meaning of betterment, and also in Chapters 4 and 5 relating to how the betterment predicament should be resolved.

In practical terms, the existence of general formulae of measures of loss can also operate to impose qualifications upon the principle of compensation in a number of ways. First, it can place the burden of establishing any other measure of loss sought, upon the party seeking it. Second, the advantages of certainty and convenience resulting from the availability of general measures can potentially outweigh arguments which seek to put in place a more accurate application of the compensation principle, where adjustments to the general measure can be made if necessary. Third, where it is desired, it can potentially promote any policy chosen.

B Land, Building and Other Fixtures Damaged or Destroyed

Physical damage to land, buildings or other fixtures often arise 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 destroyed. Although physical destruction of the land surface therefore appears factually impossible, land can, however, be considered a constructive total loss as a result of physical damage inflicted upon it. Misuse of land, such as by severe erosion of its topsoil, can also result in total destruction of its economic value.

Cases of damage to or destruction of land, building or other fixtures are prominent in tort, with claims often made under negligence, trespass or nuisance. Such a claim can
also be made in contract, as was the case in *Harbutt’s*.\(^{190}\) Plaintiffs can sue concurrently in tort and contract where both actions can be supported by the same set of facts, but recovery would only be allowed once under one cause of action. Although self-help and injunctive relief are important remedies in such situations, the alternative or additional remedy for an award of compensatory damages is much sought after.

In cases of damage to or destruction of land, building or fixtures, application of the compensation principle usually gives rise to two competing measures or formulae of loss. As explained by Tilbury:

> The normal loss in the case of damage to land [including buildings and fixtures] is often presented as a stark choice between two measures, namely, diminution in value of the land or cost of reinstatement of the land – the first alternative being the oldest; the second, generally, a modern and more or less exceptional measure'.\(^{191}\)

The ‘diminution in value’ measure represents the difference between the value of the subject land or building immediately prior to the damage and its value immediately thereafter.\(^{192}\) The ‘reinstatement cost’ measure refers to repair cost for cases involving damage to the subject property, or replacement cost in cases involving destruction of the subject property.\(^{193}\) As indicated earlier (in Chapter 1, Part I) the term ‘reinstatement cost’ (or words to similar effect) will be used to refer to either repair or replacement costs, or to both as the context requires.

In *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd*, the court made it clear that the above position applied not only to tort actions, but also to contract actions:

> Speaking generally in cases of ... damage caused to property in breach of contract, the bases for assessing damages are: (a) the cost of reinstatement; or (b) the diminution in the value of the property due to the breach of contract. The correct measure is whatever is reasonable for the wronged party to recover.\(^{194}\)

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\(^{190}\) [1970] 1 QB 447. The defendant’s breach of contract through its negligence resulted in the plaintiff’s factory building being destroyed in this case.

\(^{191}\) Tilbury, *Civil Remedies Vol Two*, above n 7, 242.


\(^{194}\) [2008] FCAFC 38, [29].
In a recent case, *Powercor Australia Limited v Thomas*, Osborn J in the Victorian Court of Appeal stated that ‘in general, the basis of assessment of damages in respect of the loss of or damage to farm fixtures due to negligence is the reasonable commercial cost of repairing and/or reinstating the damaged fixtures’.

Although both the diminution in value and reinstatement cost measures may be appropriate in the majority of cases, they are not exhaustive. There are other general measures of loss, such as, the market value of the subject property, the cost of a substitute, or the capitalized potential of the subject property. These potential measures of loss represent different ways of valuing the loss suffered by the plaintiff as a result of the defendant’s wrong. While all these potential measures of loss can theoretically satisfy the compensatory principle, the reinstatement cost measure appears to be the closest to achieving the compensatory objective of placing the plaintiff in the position as if the wrong was not committed.

The question as to which measure of loss should apply is often contentious, particularly where the monetary difference involved is substantial. More often than not, the reinstatement cost measure is more costly than the diminution in value measure. Where there is a dispute between the parties as to which measure is more appropriate, the court usually resolves this issue based upon what would in the particular circumstances of the case most reasonably give effect to the compensation principle. This is commonly referred to as a test of ‘reasonableness’ and provides the guiding principle upon which the choice will be made. The courts have indicated that under the test of reasonableness they would consider the reasonableness of the plaintiff’s desire to reinstate the property; this will be judged in part by the advantages to the plaintiff if reinstatement is allowed, as weighed against the additional cost to be borne by the defendant in having to pay reinstatement cost over the diminished value. This issue

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196 Ibid [13] (with Warren CJ and Bongiorno JA agreeing). The farm fixtures involved were fencing, sheds and stockyards.
198 See, *Bellgrove v Eldridge* (1954) 90 CLR 613, 618; *Evans v Balog* [1976] 1 NSWLR 36, 40; *Pantalone v Alaouie* (1989) 18 NSWLR 119, 137; See also, Tilbury, *Civil Remedies Vol Two*, above n 7, 243-244.
199 See, *Bellgrove v Eldridge* (1954) 90 CLR 613, 618. See also, Tilbury, *Civil Remedies Vol Two*, above n 7, 243-244.
200 *Evans v Balog* [1976] 1 NSWLR 36, 39-40 (Samuels JA, with whom Moffit and Hutley JJA agreed); *Pantalone v Alaouie* (1989) 18 NSWLR 119, 137. See also, Tilbury, *Civil Remedies Vol Two*, above n 7, 243-244.
would be dealt as one of fact.\textsuperscript{201} The courts would consider and evaluate various indicia of ‘reasonableness’, including the following, 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 and the proportionality between the different measures of loss.\textsuperscript{202} However, each of these factors is not in itself exclusive or decisive.\textsuperscript{203}

In \textit{Evans v Balog}, Samuels JA observed that while the cost to the defendant of competing measures is ‘a significant factor’ it is ‘but one ingredient in the calculation of whether the plaintiff’s claim is reasonable or not’.\textsuperscript{204} In \textit{Harbutt’s}, Widgery LJ found that it was ‘reasonable for the plaintiffs to rebuild their factory, because there was no other way in which they could carry on their business and retain their labour force.’\textsuperscript{205}

Situations involving breaches of building contracts often present additional factors to be considered. In \textit{Bellgrove v Eldridge}\textsuperscript{206} it was held that a building owner is entitled to reinstatement cost over that of the diminution in value measure, if it can be satisfied that reinstatement was not only necessary to produce conformity to the building contract, but that it was also a reasonable course to adopt. As the High Court put it:

\begin{quote}
[T]he respondent was entitled to have a building erected \textit{upon her land} in accordance with the contract and the plans and specifications which formed a part of it, and her damage is the loss which she has sustained by the failure of the appellant to perform his obligation to her. This loss cannot be measured by comparing the value of the building which has been erected with the value it would have borne if erected in accordance with the contract; her loss can, prima facie, be measured only by ascertaining the amount required to rectify the defects complained of and so give to her the equivalent of a building on her land which is substantially in accordance with the contract.\textsuperscript{207}
\end{quote}

In addition to the plaintiff’s normal loss as discussed above, the plaintiff is entitled to claim for any consequential losses sustained. Consequential losses can include the

\textsuperscript{201} Tilbury, \textit{Civil Remedies Vol Two}, above n 7, 244.
\textsuperscript{202} \textit{Evans v Balog} [1976] 1 NSWLR 36, 39-40; \textit{Pantalone v Alaouie} (1989) 18 NSWLR 119, 137. See also, Tilbury, \textit{Civil Remedies Vol Two}, above n 7, 244-246.
\textsuperscript{203} \textit{Evans v Balog} [1976] 1 NSWLR 36, 119; \textit{Pantalone v Alaouie} (1989) 18 NSWLR 119, 137. See also, Tilbury, \textit{Civil Remedies Vol Two}, above n 7, 243-244.
\textsuperscript{204} [1976] 1 NSWLR 36, 119 [40]. In this case the plaintiff’s house was badly damaged due to the defendant’s excavation works on his adjacent land.
\textsuperscript{205} [1970] 1 QB 447, 272-73.
\textsuperscript{206} (1954) 90 CLR 613.
\textsuperscript{207} Ibid 617. More recently the High Court in \textit{Tabcorp Holdings Ltd v Bowen Investments Pty Ltd} [2009] HCA 8; (2009) 236 CLR 272 affirmed the approach applied in this case.
following, loss of profits, loss of use of the land, or cost of alternative accommodation during the period of reinstatement.\textsuperscript{208}

\section*{C Goods Damaged or Destroyed}

Cases of damage to or destruction of goods are more prominent in tort, often claimed under negligence actions, or even in trespass or nuisance, but they can also be claimed in contract.\textsuperscript{209} The principles developed and expounded in cases of damage to or destruction of ships generally apply to other chattels as well. As explained by Pickford LJ in \textit{The Kingsway}, there is ‘no special measure of damages applicable to a ship different to any other chattel’ and that although the nature of the thing damaged may give rise to ‘more difficult questions’ in the assessment of damages, ‘it does not change the assessment in any way.’\textsuperscript{210}

\subsection*{1 Goods Damaged}

Where the plaintiff’s goods are damaged by the defendant’s wrong, the normal measure of damages, is ‘either the cost of repairing it or of replacing it, whichever is the most appropriate in the circumstances.’\textsuperscript{211} As to which measure of loss would be most appropriate to apply to the case at hand, similar to the situation concerning land and buildings, the court selects the particular measure which is the most reasonable under the circumstances.\textsuperscript{212} Thus the same test of ‘reasonableness’ as discussed above for land applies to goods. The issue of ‘reasonableness’ is one of fact.\textsuperscript{213} The question of what would be considered ‘reasonable’ is often influenced by what the cheaper alternative would be; unless of course the more expensive option can be justified in the circumstances of the case.\textsuperscript{214}

\begin{thebibliography}{99}
\bibitem{209} See, Tilbury, \textit{Civil Remedies Vol Two}, above n 7, 200-202; McGregor, \textit{McGregor on Damages}, above n 125, 1148-1149.
\bibitem{210} [1918] P 344, 356. See also, McGregor, \textit{McGregor on Damages}, above n 125, 1148; Ogus, above n 135, 124, observed that the ‘great majority of cases formulating principles of compensation has been concerned with the damage to, or destruction of, ships.’
\bibitem{212} Tilbury, \textit{Civil Remedies Vol Two Remedies}, above n 7, 200-201.
\bibitem{213} \textit{Jansen v Dewhurst} [1969] VR 421, 426. See also, Tilbury, \textit{Civil Remedies Vol Two}, above n 7, 200.
\bibitem{214} \textit{Jansen v Dewhurst} [1969] VR 421; See also, Tilbury, \textit{Civil Remedies Vol Two}, above n 7, 200-201.
\end{thebibliography}
There are also various other indicia affecting the test of reasonableness, including the following: if there is any difficulty in obtaining similar substitute goods, for example the good involved may be unique or rare and no available substitute can be found;\(^{215}\) or if there is any difficulty in undertaking the repair required, for example, there may be difficulties associated with the amount of time, or trouble, or the expense or risk involved in undertaking such repair. Other possible considerations include its usefulness to the plaintiff’s business and the condition of the goods before the injury.\(^{216}\) The plaintiff’s sentimental attachment to the property is, however, an irrelevant consideration.\(^{217}\)

In reviewing the cases dealing with damage and destruction to property and the approach taken in relation to the test of reasonableness, Sheller JA in *Hyder*\(^{218}\) stated that the ‘approach is no different whether the destruction of or damage to property results from breach of contract or negligence [in tort].’\(^{219}\)

If repair cost is accepted as the appropriate measure, the plaintiff must not only show that the repair arose from the defendant’s wrong to satisfy the requirement of causation, but also that the repair cost is reasonable and not extravagant.\(^{220}\) If after the property is repaired, its market value is less than what it was just prior to the wrong, this diminution in value is also recoverable from the defendant.

Where repair cost is used as the appropriate measure of the plaintiff’s loss, consequential loss would flow from the plaintiff’s inability to use the property during the period of repair. The law is the same in principle where replacement cost is the appropriate measure of damages, with the difference being that the consequential loss would flow from the delay in obtaining a substitute. If the property concerned is of a profit-earning nature, the plaintiff can seek loss of profits.

2  **Goods Destroyed**

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\(^{215}\) *Anthoness v Bland SC* [1960] SR (NSW) 659 (involving a Bristol motor car).

\(^{216}\) *Civil Remedies Vol Two*, above n 7 200-201.

\(^{217}\) *Darbishire v Warran* [1963] 1 WLR 1067, 1072 (Harman J), 1077 (Pearson J); *Murphy v Brown* (1985) 1 NSWLR 131, 133, 136; *Von Stanke v Northumberland Bay Pty Ltd* [2008] SADC 61, [61]. See also, *Civil Remedies Vol Two*, above n 7, 201.

\(^{218}\) [2001] NSWCA 313.

\(^{219}\) Ibid [37].

\(^{220}\) *The Pactolus* (1856) Swab 173.
Where the plaintiff’s good is destroyed by the defendant’s wrong, the plaintiff’s normal loss is the market value of the good, at the time and place of the loss. The scrap value of the destroyed good is deducted if applicable. ‘Market value’ usually means the market price of a replacement. But in appropriate circumstances the value may also include the costs of adaptation. If the chattel is of special use to the plaintiff in its business, the value may consequently exceed market value. In exceptional circumstances where an exact replacement is justified and reasonable under the circumstances, the value may be the cost of manufacture of a replacement.

In considering the measure of damages to award the plaintiff for the destruction of a profit-earning ship, Lord Wright took what appears to be a different approach, by referring to its value ‘as a going concern’ or as its ‘capitalised value’ in a speech delivered in the House of Lords in Liesbosch Dredger v SS Edison:

The true rule seems to be that the measure of damages in such cases is the value of the ship to her owner as a going concern at the time and place of the loss ... [T]he figure of damage is to represent the capitalized value of the vessel as a profit-earning machine, not in the abstract but in view of the actual circumstances.

Instead of adopting the traditional distinction between normal loss (that is, the market value of the property) and consequential loss (that is, the loss of profits) the Liesbosch approach fuses these two separate heads of loss. The Liesbosch approach therefore poses a potential danger for duplication of damages to occur which even Lord Wright acknowledged, as he cautioned that the approach required ‘some care in its application’.

Tilbury, however, explained that what Lord Wright was trying to do was ‘to deny the automatic application of a generalized formula and to stress that the formula chosen

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221 The Clyde (1856) Sw23, 166 ER 998; The Philadelphia [1917] P 101; Electricity Trust of South Australia v O’Leary (1986) 42 SASR 26; Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd [1990] 2 All ER 246. See also, Tilbury, Civil Remedies Vol Two, above n 7, 208-209.
222 The Clyde (1856) Sw23, 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.
223 Liesbosch Dredger v SS Edison [1933] AC 449, 468.
224 The Harmonides [1903] P 1.
227 Ibid 464.
must reflect the overall circumstances of each particular case.\textsuperscript{228} Although the Liesbosch approach appears to confer ‘much greater freedom’\textsuperscript{229} on the court, with a shift in the concept of value from market or selling price to capitalised potential, the dominant \textit{restitutio} principle must, however, always prevail. As Lord Wright himself puts it, the ‘dominant rule of law is the principle of \textit{restitutio in integrum}, and subsidiary rules can only be justified if they give effect to that rule’.\textsuperscript{230}

As appears from the above account, the principles governing the assessment of damages concerning land (including buildings and fixtures) and goods are generally similar. The dominant rule of law to observe is the \textit{restitutio} or compensation principle, with other subsidiary rules justified only if they can give effect to that principle.

\textbf{VII CONCLUSION}

This chapter set out the theoretical framework to the assessment of damages generally, and within the context of this study where the plaintiff’s property is damaged or destroyed and betterment is alleged. These matters are relevant to the analysis of betterment in this thesis.

To conclude this chapter, three important preliminary points can be emphasised from the above account. First, it is only when the reinstatement measure of loss (be it repair or replacement cost) is applied that the issue of betterment can potentially arise; in other words, where it can potentially be argued that an account should be taken of any purported improvement arising from the reinstatement of the plaintiff’s damaged or destroyed property.\textsuperscript{231}

Second, from the remedial perspective of a damages award and the compensatory principle which underpins it, there is no doubt that corrective justice plays or should

\begin{flushright}
\textsuperscript{228} Tilbury, \textit{Civil Remedies Vol Two}, above n 7, 208.
\textsuperscript{229} Ogus, above n 135, 127-128.
\textsuperscript{230} \textit{Liesbosch Dredger v SS Edison} [1933] AC 449, 463.
\textsuperscript{231} Berryman explains that ‘[b]etterment will only become an issue if the former [the replacement measure] is awarded and not the latter [the diminution in value measure]’ and that ‘[o]nce a court has decided to award damages based on the cost of repair or reinstatement, the potential for betterment arises’: J Berryman, ‘Betterment Before Canadian Common Law Courts’ [1993] \textit{72 Canadian Bar Review} 54, 55, 57. See also, Penhallurick, above n 50, 110, where she states that it is ‘only in cases where the cost of repair or replacement of property is used as the measure of damages that the question of betterment will arise.’
\end{flushright}
play a significant role. The damages remedy as ‘recompense for loss’, clearly serves as ‘a paradigm of corrective justice’.  

Third, notwithstanding corrective justice’s significant role, the conceptualization of what the plaintiff has actually lost can still provide an avenue for distributive justice to play a role, that is, by ameliorating or moderating the influence of corrective justice on the quantum of the damages award. From a remedial perspective, it would be legitimate for courts to advance some goals of distributive justice, while adhering to a formalist account of corrective justice.  

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CHAPTER 3
IDENTIFYING AND DEFINING ‘BETTERMENT’

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II COMPENSATION PRINCIPLE AND ITS COROLLARY: RAISES THREE ELEMENTS OF BETTERMENT

III ANALYSIS OF CASES: JUDICIAL VIEWS ON MEANING OF ‘BETTERMENT’

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2 Emphasis of a Subjective Approach
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CHAPTER 3
DEFINING AND IDENTIFYING ‘BETTERMENT’

I INTRODUCTION

In any dispute concerning betterment, the court must initially address a fundamental question, as to whether betterment can be satisfied on the facts. The first inquiry into betterment, which is addressed in this chapter, deals with the question as to what the meaning of betterment is or should be, and how this can be applied to determine the existence of betterment on the facts of any given case. The inquiry seeks to specifically identify the individual elements of betterment and to articulate and propose a definition of betterment which fully reflects the various elements of betterment, so that it can serve as a test or yardstick to identify the existence of betterment.

In Part II below, a discussion of the principle of compensation and its corollary (not to over-compensate the plaintiff) provides a clearer understanding of what betterment means and what its elements are or should be, in the context of a claim for the reinstatement measure of loss. In Part III, an analysis of cases in this area of law draws out the various views the courts have expressed in relation to the meaning of betterment and evaluates these against the preceding discussion. The analysis provides an account of the state of the law and reveals differences in the courts’ expectations as to what would be regarded as sufficient to constitute betterment. Based upon the analysis, Part IV clarifies and rationalises the individual elements of betterment, in addition to articulating and proposing a comprehensive definition of betterment which clearly reflects these various elements.

The analysis in this chapter discloses that the courts have, at times, conflated what ought to be an initial independent inquiry to ascertain the existence of betterment, with the subsequent independent inquiry to determine whether to account for betterment. Conflation of these two independent sequential inquiries means that the court’s decision can be challenged. It is possible in such a case for the court’s decision not to account for betterment, to reveal on closer analysis of the facts, an absence of betterment. The case of Anthoness,234 which is discussed in Part III A 1 below, is one such example. The reason for this state of affairs can be partly blamed upon the lack of clear

234 (1960) SR (NSW) 659.
articulation from the courts as to what ‘betterment’ means and what must be satisfied before the court can make a finding of betterment.

II COMPENSATION PRINCIPLE AND ITS COROLLARY: RAISES THREE ELEMENTS OF BETTERMENT

Under the principle of compensation, as explained in detail in Chapter 2 (Part IV B), the plaintiff is entitled to be compensated with a monetary sum that will place the plaintiff in the same position as if the wrong did not occur. The principle of compensation not only embodies the plaintiff’s right to compensation, but also serves as a measure of loss upon which such right can be calculated.

In situations of damage or destruction to property, if the plaintiff is granted damages based upon the reinstatement measure of loss, the plaintiff may be said to be placed in the position as if he did not suffer the wrong, as the compensation principle dictates. However, application of the compensation principle through the reinstatement measure of loss has the potential to place the plaintiff in a superior or better position, if the reinstated property is improved and it results in the plaintiff being over-compensated. Under such circumstances, an allegation of betterment can be raised. As pointed out by Hely J in *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc*, where the reinstatement measure of loss is applied under the compensation principle, betterment can be argued if the plaintiff ‘acquired something more than *resitutio in integrum*’.235

When carrying out reinstatement of damaged or destroyed property, the plaintiff may make decisions based upon various reasons or grounds, including necessity, practical reasons, or available options, which can result in the reinstated property being different in appearance and/or functionality. The reinstated property can thus be far from being a mere replica or substitute of the original property. For example, the following may be alleged in relation to the reinstated property and its purported improvement, with the potential to result in the plaintiff being over-compensated:

- that it is completely new, possibly due to a complete replacement or the use of new materials;

235 [2004] FCA 1211, [488].
that it is more contemporary in design, due perhaps to the use of modern materials or design;
- that it offers more space or accommodation which could be dictated by new building regulations;
- that it is stronger, perhaps the result of using better quality materials;
- that it is longer lasting or more durable, owing perhaps to new, better quality, or more modern materials used; or
- that it is more efficient and therefore more productive, owing perhaps to the use of new design, materials or technology.

It may be argued that betterment can be avoided if the plaintiff is granted the diminution in value measure of loss, instead of the reinstatement measure of loss. Clearly, it would not be sensible or reasonable to unduly limit the plaintiff’s right to full and complete compensation through claiming reimbursement of reinstatement costs incurred. If the plaintiff seeks reinstatement costs and is able to satisfy the test of reasonableness (as explained more fully in Chapter 2 under Part VI B) the better option would be to provide a way of dealing with any over-compensation through recognition of the concept of betterment and accounting for this under the assessment process. Recognition of betterment, based upon a clear understanding of what betterment means and how it can be consistently determined on the facts of any given case, offers a principled approach to dealing with any over-compensation which can potentially occur when the reinstatement measure of loss is applied.

There are numerous statements made by the courts to caution against allowing the plaintiff to be over-compensated, whether through application of the reinstatement measure of loss or otherwise. The High Court in Commonwealth v Amann Aviation Pty Ltd referred to what it called ‘the corollary’ of the compensation principle, ‘that a plaintiff is not entitled, by the award of damages upon breach, to be placed in a superior position’;\(^{236}\) in other words, the plaintiff should not be over-compensated. This was affirmed recently by Gzell J in St George Fertility Centre Pty Ltd v Clarke, who also affirmed the compensation principle as the ‘leading principle with respect to the assessment of damages’.\(^{237}\) Giles JA in Hyder also made clear that ‘a plaintiff should

\(^{236}\) (1991) 174 CLR 64, 82 [28] (Mason CJ and Dawson J).
be compensated for its loss but not [be] over-compensated."\(^{238}\) Nathan J held similarly in *State Transport Authority v Twhiteco Pty Ltd*\(^{239}\) ("State Transport") that the compensation principle, aimed at putting the plaintiff ‘back into the position prevailing prior to the damage’, ‘cannot, in its ordinary sense, mean being advanced or placed in a better position than previously.'\(^ {240}\) These statements clearly caution against the occurrence of any over-compensation in applying the reinstatement measure of loss.

The essential elements of betterment must be clearly identified for these to be reflected in any proposed definition of betterment. Physical improvement of the reinstated property would be an obvious element. However, more would be required by the principle of compensation, or more particularly its corollary, that the plaintiff should not be over-compensated in pecuniary terms. The corollary dictates that the following essential linkage must be satisfied for betterment to be made out: between the improvement in the reinstated property and the plaintiff’s comparative financial well-being subsequent to the wrong.

On the above analysis, this thesis argues and puts forward the proposition that for betterment to exist the following elements must be satisfied: firstly, an improvement in the reinstated property; second, the delivery of a real benefit or advantage to the plaintiff (from such improvement); and third, a resultant improvement in the plaintiff’s financial position.

This offers a ‘three-elements’ test which can be applied to cases to assist with determining the existence or absence of betterment. The analysis of cases in the next Part will show that there is support for the above proposition within the judgement of the dissenting judge, Samuels JA, in *Hoad*\(^ {241}\) (discussed below under Part III A 6).

### III ANALYSIS OF CASES: JUDICIAL VIEWS ON MEANING OF ‘BETTERMENT’

Six selected cases, with the earliest and the latest spanning over a period of more than half a century, are analysed below. The analysis draws out views expressed by the

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\(^{238}\) [2001] NSWCA 313 (NSW CA), [107].


\(^{240}\) Ibid 68,622.

courts as to the meaning of ‘betterment’ and evaluates them against the elements of betterment identified in the preceding discussion. The cases are analysed, not in chronological order, but in accordance with how they can be more logically correlated with the elements of betterment in the order as set out above.

A. Analysis of Six Selected Cases

1. Anthoness: Inquiry into Existence of Betterment Constrained by Conflation of Issues

In Anthoness, a motor car of an unusual make, a Bristol, was extensively damaged due to the negligence of the defendant. As there was difficulty in replacing it at its pre-accident price of £490 with another car of the same make, the plaintiff elected to repair it at £816 with a number of expensive imported parts. This improved its condition and presumably rendered it more valuable. The defendant argued that it was ‘ridiculous’ for the plaintiff ‘to suggest spending £816 [as repair cost] and finish up with an article worth only £490’. The jury awarded the plaintiff the repair cost. The defendant sought leave for a new trial on the ground that the damages awarded was too excessive. When the court refused to grant a new trial the defendant appealed this decision. The Full Court of the Supreme Court of New South Wales dismissed the appeal. It held that having regard to the ‘special features’ of the car and ‘the difficulty’ of replacing it with another one of the same make at the pre-accident price, the plaintiff ‘cannot as a matter of law be held to be disentitled to insist on repairing it’. The reinstatement measure of loss (the repair cost in this case) was affirmed as the proper measure of loss.

The Full Court reiterated the following portion of the lower court’s judgment:

It is of course, unfortunate for the defendant that the car was such an unusual one and the parts so expensive but even if the vehicle were more valuable after the necessary repairs than it was before the wrongful act the defendant is not entitled to any deduction from the cost of the repairs.

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242 (1960) SR (NSW) 659 (Full Court of Supreme Court of NSW) (Evatt CJ, Herron and Sugerman JJ).
243 Ibid 665.
244 Ibid.
245 Ibid 666.
otherwise he would be forcing the plaintiff to put his hand in his pocket for repairs due to the wrongful act.246

It added the following:

The fact that in special circumstances the result of complete repair of all damage done may render the property damaged worth more than it was before the collision is not an answer to the plaintiff’s claim.247

It appears from the above statements made by the court that it conflated the first inquiry into the existence of betterment with the second inquiry as to whether betterment should be accounted. This is evident when the court reasoned that ‘even if’ the repair rendered the reinstated property more valuable, a deduction of the repair costs is not warranted, as this would ‘force’ the plaintiff to use his own financial resources to remedy the defendant’s wrong. The court’s focus upon justifying why betterment should not be accounted constrained its inquiry to ascertain the existence of betterment. Conflation of what should have been independent and sequential inquiries means that the court’s decision can be challenged.

Although the court did not directly take up 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 can be inferred where the court stated that even if the vehicle was ‘more valuable after the necessary repairs’ the defendant is not entitled to any deduction of the repair cost.248 Evaluating against the proposed elements of betterment, as discussed and set out in the preceding Part, reveals that the aforesaid falls far short of what is required.

2 Bushells: Physical Improvement and Presumed Increase in Value

In Bushells Pty Ltd v The Commonwealth of Australia249 (‘Bushells’) the plaintiff’s awning, attached to the plaintiff’s building, was damaged when the defendant’s tank transporter collided into it. Immediately prior to the collision in 1944, the awning was in a state of disrepair, as it was about 30 years old (having been erected with the

246 Ibid 665.
247 Ibid 666.
248 Ibid 665.
249 [1948] St R Qd 79 (Full Court of the Supreme Court of Queensland).
building in 1913). The damage required the plaintiff to replace 80 feet of awning, out of the total of 145 feet (which was attached to the entire building).²⁵⁰

The trial judge, Philp J, who accepted the reinstatement cost as the applicable measure of loss, stated as follows:

"Every case must depend upon its own circumstances. Where the building has been totally or almost totally destroyed, the normal (but not the only) basis of damage would be the difference in the land values before and after the destruction; but where, as here, the practical thing to do is to repair the damaged part, then fair repair cost is the basis with, I should think in a case such as this (but not in all cases) a reduction of the damages on account of ‘new for old’.²⁵¹

It appears from the final statement in the above passage that the trial judge found betterment to exist simply by new replacing old, or in his words ‘on account of “new for old.”’²⁵² However, the trial judge did not follow through with making an order to deduct the plaintiff’s damages to account for betterment, because he felt bound to follow the Full Court’s decision in *Rockhampton Harbour Board v Ocean Steamship Co Ltd*,²⁵³ where he noted that reinstatement cost was awarded without any deduction for betterment.²⁵⁴

The defendant appealed the trial judge’s decision to award the plaintiff the reinstatement cost without any deduction for betterment. The defendant’s appeal was allowed by the majority of the Full Court of the Supreme Court of Queensland. The Full Court accordingly reduced the reinstatement cost by £255 to account for betterment, found to exist in the case.²⁵⁵ Macrossan CJ (with Mansfield SPJ agreeing) reasoned that a deduction for betterment should be granted in this case so as not to ‘enrich the plaintiff’.²⁵⁶ The majority judges agreed with and accepted the trial judge’s finding of betterment. Macrossan CJ referred to the physical improvement of the reinstated awning, stating that it was ‘substantially better’²⁵⁷ and stronger than the old one, being made of a stronger steel structure. It appears that Macrossan CJ assumed

²⁵⁰ The awning was recognised by the parties to be part of realty.
²⁵¹ *Bushells* [1948] St R Qd 79, 82 (where portions of the trial judge’s judgment was set out).
²⁵² Ibid.
²⁵³ [1930] St R Qd 343.
²⁵⁴ *Bushells* [1948] St R Qd 79, 82, 83, 87 (where portions of the trial judge’s judgment was set out).
²⁵⁵ Ibid 92.
²⁵⁶ Ibid. Macrossan CJ explained that payment of £500 would enrich the plaintiff to the extent of £255 above the value of the subject property at the time it was damaged.
²⁵⁷ Ibid 87.
from the physical improvement of the reinstated property that it would consequently be ‘more valuable’\(^{258}\) than the old one.

Arguably, the trial judge’s finding of betterment and the majority appeal judges’ confirmation of it is questionable. This is because the inquiry to ascertain the existence of betterment in this case was limited to a consideration of only the physical improvement of the reinstated property, followed by an assumption that such improvement would make it more valuable. This falls short of the elements of betterment identified earlier. There was clearly a failure by the court in this case to inquire further as to the particular benefit or advantage to the plaintiff, and the requisite linkage between the improvement in the reinstated property and the plaintiff’s comparative financial position before and after the wrong. As discussed in the preceding Part, a consideration of this linkage is required by the compensatory principle. Without over-compensation to the plaintiff being satisfied, betterment cannot be said to exist on the facts of the case. A presumption of a consequent increase in the value of the new replacement is insufficient to show the occurrence of actual over-compensation to the plaintiff.

3  Westwood: Physical Improvement and Consequent Increase in Value

In *Westwood v Cordwell*\(^{259}\) (‘*Westwood’*) the plaintiff’s 30-year old house was completely demolished when the defendant’s truck negligently collided with it. The plaintiff replaced it with a new house. McPherson J, in the Supreme Court of Queensland, felt bound by *Bushells*\(^{260}\) to find betterment in a situation where the ‘reinstatement would result in a new structure’ and it was, as a consequence, ‘more valuable than the old one’\(^{261}\). He therefore concluded that the plaintiff’s claim for the costs of reinstatement must ‘be discounted on the “new for old” principle’.\(^{262}\) He reduced the reinstatement costs by 20%, based upon taking into account that a new

\(^{258}\) Ibid.

\(^{259}\) [1983] 1 Qd 276.

\(^{260}\) [1948] St R Qd 79, 278.

\(^{261}\) *Westwood* [1983] 1 Qd 276, 277.

\(^{262}\) Ibid 278.
house would be ‘some 20% to 25% more valuable’ than the old one. In following Bushells, McPherson J reasoned as follows:

*Bushells* ... is in this respect contrary to the more recent decisions of courts of appeal in England in *Harbutt’s* and New South Wales in *Evans v Balog*. It is also contrary to the current authority in the United States as exemplified in *Koch v O’Brien & Nye Cartage Co* ... where the Ohio Court of Appeals regarded the value of the property after repair as immaterial in the assessment of damages ... For my part, I would have preferred to follow the later line of authorities, but consider myself bound by the decision of the Full Court in *Bushells*, which is not distinguishable from the present case. It follows that the cost of reinstatement must be discounted on the ‘new for old’ principle ...

Although McPherson J felt bound by and applied a similar approach to that in *Bushells*, in considering only the physical improvement of the reinstated property and its consequent increase in value, this approach suffers from the same criticisms as raised in the above analysis of *Bushells*. As in *Bushells*, the court in this case conducted a limited inquiry into the existence of betterment and failed to consider the requisite linkage between the improvement in the reinstated property and the plaintiff’s comparative financial position before and after the wrong. An inquiry into the existence of betterment which is only limited to the test of ‘new for old’ is far too undemanding.

4 *Hyder: Physical Improvement and an ‘Advantage to the Plaintiff’*

In *Hyder* a pavement with a life expectancy of 20 years collapsed, after only four years of use. The plaintiff replaced it with a new pavement with a similar life expectancy. The plaintiff succeeded in its negligence action against its engineer and architect. On appeal in the New South Wales Court of 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

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263 *Westwood* [1983] 1 Qd 276, 278. Upon accepting the valuer’s evidence that ‘a new house would be some 20% to 25% more valuable than the old one’ McPherson J then deducted 20% of the increased value from the reinstatement cost: at 277-278.
264 [1948] St R Qd 79, 278.
265 *Westwood* [1983] 1 Qd 276, 277-278.
266 [1948] St R Qd 79.
267 Ibid.
268 Ibid.
269 [2001] NSWCA 313 (New South Wales Court of Appeal). This was a majority judgement of Sheller and Giles JJA, with Meagher JA dissenting.
270 The defective pavement resulted from the architect’s negligence in failing to pass on information to the engineer regarding the plaintiff-owner’s requirement for increased load capacity.
the plaintiff would have an additional four years’ use of the new pavement. The
majority judges, Sheller and Giles JJA, expected more to be shown to satisfy the
existence of betterment and were not swayed by the replacement pavement being new,
having a longer life, and being presumably more valuable.271 Sheller JA looked for an
‘advantage to the plaintiff’ before betterment can exist:

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, if it
had been properly laid.272

Arguably, the reference to an ‘advantage to the plaintiff’273 should signify both a
subjective and objective approach. This would mean that not only must there be an
advantage or benefit from an objective viewpoint, which would satisfy more market-
based expectations, the benefit or advantage must also relate specifically to the
particular plaintiff involved. In other words, when determining if betterment exists in a
case, there must be an extended consideration as to whether there is any actual or
personal advantage or benefit to the plaintiff. Being merely of general benefit or use to
others would be insufficient.

In articulating that the advantage must be beyond a ‘speculative proposition’274 Sheller
JA expects the advantage to the plaintiff to be a certainty, rather than one of chance.
Although the reference to an ‘advantage to the plaintiff’ would fit the second element of
betterment, it would also at the same time straddle the third element of betterment, that
there must be a resultant improvement in the plaintiff’s financial position. Giles JA’s
reference to the compensation principle and its corollary, that the plaintiff ‘should be
compensated for its loss but not [be] over-compensated’,275 indicates that merely ‘new
replacing old’ would not be able to satisfy the ‘over-compensation’ requirement of
betterment.

In dissenting, Meagher JA expressed the view that the plaintiff had ‘gained a windfall to
which he was not entitled’ in having ‘lost an old pavement and gaining a new one’. On
that basis he concluded that ‘[s]ome allowance must be made in this regard’ and added

271 Hyder [2001] NSWCA 313, [55].
272 Ibid.
273 Ibid.
274 Ibid.
275 Ibid [107].
that the 20% figure appears reasonable. Meagher JA was prepared to find betterment simply based upon new replacing old, contrary to the majority’s reasoning. Meagher JA’s reasoning can be challenged by questioning how the plaintiff can purportedly gain a windfall simply by ‘new replacing old’, without further consideration as to how this affects the plaintiff’s comparative financial position.

5 South Parklands: Physical Improvement and Delivery of a ‘Real Benefit’ to the Plaintiff

In South Parklands Hockey & Tennis Centre Inc v Brown Falconer Group Pty Ltd (‘South Parklands’) the defendants rendered negligent advice to the plaintiff’s architects and engineers. This resulted in a defective dual-purpose playing-field being constructed for the plaintiff. Although Debelle J, in the Supreme Court of South Australia, acknowledged that the plaintiffs would be ‘getting a new playing surface ahead of time when the surface would have to be replaced’, he regarded this to be ‘of no real benefit to the plaintiffs’. Debelle J expected more to be satisfied before betterment can be found. He looked for a ‘real benefit to the plaintiff’, beyond the reinstated property being newly replaced, having a longer life and presumably being more valuable, to satisfy betterment.

The court in this case adopted an approach similar to that in Hyder, where it was also held that to satisfy betterment there must be a ‘real benefit to the plaintiffs’. This would mean that the benefit must:

- be of particular use to the plaintiff;
- also satisfy as being of actual or genuine benefit, as opposed to being merely superficial; and
- further satisfy as being a substantial benefit, as opposed to being merely an insignificant or trifling benefit.

6 Hoad: Dissenting View Reflects the Three Elements of Betterment

276 Ibid [22].
278 Ibid [126]. Notwithstanding that this case later went on appeal as Brown Falconer Group Pty Ltd v South Parklands Hockey & Tennis Centre Inc [2005] SASC and the reinstatement measure of loss was replaced with that of wasted expenditure, the analysis of Debelle J as to what would satisfy as betterment remains instructive.
279 [2001] NSWCA 313.
In *Hoad*,281 a fire caused by the defendant’s negligence destroyed the plaintiff’s 7-year old tractor and 3-year old mower, which were used in the plaintiff’s business as dairy farmers. Unable to purchase suitable second-hand replacements locally, the plaintiff purchased a new tractor and mower and claimed their replacement cost. The trial judge found that the plaintiff had taken reasonable steps to mitigate its loss by buying the new equipment. He declined, however, to award as damages the replacement cost of the new equipment (which was in the sum of $5,774.50). Instead, he assessed the plaintiff’s loss at $4,000, on the basis that this represented the plaintiff’s loss, if the plaintiff had not purchased the new equipment.

In the defendant’s appeal to the New South Wales Court of Appeal, the plaintiff conceded that the trial judge’s award was made upon a wrong basis, as it ought to have been assessed on the basis of reinstatement cost. The plaintiff argued that it was entitled to the full reinstatement cost, because reinstatement was carried out to mitigate the plaintiff’s loss. The defendant, however, argued that if the reinstatement cost was granted, it must be reduced to account for betterment.

The majority judges, Moffit P and Hutley JA, held that the application of the compensation principle meant that the plaintiff, through the purchase of new equipment to replace old ones, had become better off, and that this should therefore be taken into account when assessing the plaintiff’s damages. The measure of damages was held by the majority judges to be ‘the nett detriment arising from acquisition of the new equipment’;282 that is, after taking into account all ensuing events connected with the plaintiff’s loss, including mitigation, and any gains connected with or arising out of such events. The majority judges, however, ordered a new trial, for the purpose of obtaining information on material events occurring up to the date of the trial, including whether the plaintiff had sold (or would sell) the replaced farming equipment upon expiry of the plaintiff’s farming lease.

It is clear from the majority’s judgement that they were prepared to make a finding of betterment, if they could obtain confirmation that the replaced farm equipment was in fact sold at a higher resale price upon expiry of the plaintiff’s farm lease.

282 Ibid 96 (Moffit P).
It is, however, important to note that on the facts disclosed in the case, other than being new and presumably more valuable as a consequence thereof, the replaced farm equipment did not exhibit any improvement or superiority over the original equipment, whether in its capacity to perform or otherwise. This was made clear by the dissenting judge, Samuels JA, 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.’

The replaced equipment was used by the plaintiff in its business as dairy farmers in exactly the same way as the original equipment was used. This calls into question whether a finding of betterment can in fact be made, even if any subsequent confirmation can be obtained in a new trial that a higher resale price can be achieved and realised upon expiry of the farm lease. In other words, although the appeal court was keen to investigate the comparative financial position of the plaintiff before and after the wrong, the non-fulfilment of the first element of betterment, that there must be an improvement in the reinstated property, would make the investigation unnecessary.

A further point made by Samuels JA in his dissenting judgment is also important. As regards the intended sale of the replaced equipment, his Honour remarked that on the evidence before the court, there was no firm finding that the plaintiff had determined to sell its farm equipment upon expiry of its farm lease:

I think that it may be inferred that the plaintiffs did not intend to replace their old tractor and mower, because they had not decided what they were going to do when they left the farm. But here there was no evidence to sustain a firm finding that they had determined to sell up.

The absence of any firm intent to sell the replaced equipment would mean that the third element of betterment, that there must be a resultant improvement in the plaintiff’s financial position, would also be unfulfilled.

Samuels JA expressly rejected the ‘new for old’ concept as being too undemanding a test for betterment. He explained that there was ‘no rule’ which ‘require[d] a plaintiff to

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283 Ibid 103.
284 Ibid 99.
account for any advantage or betterment which he has obtained by repairing an old article with new materials, or by acquiring a new article for old in the case of total replacement after total loss’. 285 He added that there was ‘undoubtedly a rule’ which ‘require[d] a plaintiff to bring to account in reduction of his damages, any savings or profits which he has made by his use of the new article’, 286 which can possibly occur ‘if the new tractor had been of greater capacity than the old, or of superior performance’. 287

On Samuels JA’s analysis in this case, before a finding of betterment can be made, there must be an improvement in the reinstated property, which is of benefit to the plaintiff, and which must result in an improvement to the plaintiff’s financial position after the wrong. This lends support to the proposition put forward in this thesis for the aforesaid three elements of betterment to be satisfied before a finding of betterment can be made.

IV PROPOSED DEFINITION OF ‘BETTERMENT’: A ‘THREE-ELEMENTS’ TEST

A Proposed Definition of ‘Betterment’ Reflects the Three Elements

Although a definition which describes betterment will no doubt assist the inquiry into the existence of betterment, it will be of greater assistance if it can also serve as a convenient and practical test against which the existence of betterment can be ascertained. To achieve this, it is necessary for all the essential elements of betterment to be clearly and sequentially set out in the definition. Towards this end, this thesis proposes that the following definition of ‘betterment’ be used in situations where the plaintiff’s property is damaged or destroyed and the plaintiff seeks damages in tort or contract for repair or replacement costs:

‘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 proposed definition clearly reflects that betterment is based upon the plaintiff being financially over-compensated.

286 Ibid.
287 Ibid 103.
The proposed definition, with its utility as a convenient and practical test, is a first step to paving the way towards a more principled approach that can lead to more consistent and predictable outcomes in disputes concerning betterment.

The three elements of betterment identified in the above definition are individually analysed below, through a broader reach of cases.

B First Element: Improvement in the Reinstated Property

In relation to the first element that there must be an improvement in the reinstated property, numerous statements in the cases make it clear that the improvement in the reinstated property must extend beyond ‘new replacing old’.

1 Must Extend Beyond ‘New Replacing Old’

In *Paper Australia Pty Ltd v Ansell Ltd*[^288] (‘Paper Australia’) which involved the replacement of a new MG cylinder in the plaintiff’s M2 paper-making machine, Bongiorno J ruled that the new MG cylinder, being merely ‘the modern equivalent of the old MG cylinder’[^289] was not sufficient to satisfy as betterment. Samuels JA in *Hoad* similarly expressed the view that betterment does not arise ‘merely because a plaintiff gets new for old’.[^290] In *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc*, Hely J in the Federal Court, in rejecting the idea of new replacing old being sufficient, looked beyond to see if there were any ‘added extras’[^291] which could be taken into account. On a similar note, Hunter J in *Optus Networks Pty Ltd v Leighton Contractors Pty Ltd* expressed the view that there was ‘no general doctrine of betterment’ where merely ‘new replaces old after total loss’.[^292]

[^288]: [2007] VSC 484 (Supreme Court of Victoria) (Bongiorno J).
[^289]: Ibid [180].
[^290]: [1977] 1 NSWLR 88, 107F. Although Samuels JA made this remark in his dissenting judgment, this has been accepted and reiterated by other cases.
[^291]: [2004] FCA 1211, [488].
[^292]: [2002] NSWSC 327, [1393]. It went on appeal as *Tyco Australia Pty Ltd v Optus Networks Pty Ltd* [2004] NSWCA 333. On appeal, the New South Wales Court of Appeal also expressed the same view, that more than just new replacing old was required to satisfy as betterment.
There are similar views in other common law jurisdictions. One example is the English Court of Appeal case of *Harbutt’s*, 293 which involved a new factory replacing an old one which was destroyed. Cross LJ held that the defendants were not entitled to deduct for betterment ‘simply on the ground that the plaintiffs have got new for old’.294 Lord Denning MR reasoned that, ‘[t]rue it is that they got new for old; but I do not think the wrongdoer can diminish the claim on that account’.295 Widgery LJ also did not think that the plaintiff ‘must give credit under the heading of “betterment” simply because its “new factory is modern in design and materials”’.296 Clearly, the English judges required more than merely ‘new replacing old’ before betterment can be found to exist.

Another example is the Canadian case of *Nan v Black Pine Manufacturing Ltd*, where Wood J (in the British Columbia Court of Appeal) agreed with the trial judge that it cannot be assumed ‘that simply by getting a new house for an old one Mr Nan had enjoyed some element of “betterment”’.297

2 Causal Link between Improvement to Reinstated Property and Plaintiff’s Financial Improvement

The improvement to the reinstated property must lead to an improvement in the plaintiff’s financial well being subsequent to the wrong, to establish betterment. This means that all the three elements of betterment, namely, the improvement in the reinstated property, the delivery of a real benefit to the plaintiff and the consequent improved financial condition of the plaintiff, must be causally linked. A break in the causal nexus linking the three elements would mean that betterment cannot be made out.

C Second Element: Actual Delivery of a Benefit or Advantage to the Plaintiff

294 Ibid 476.
295 Ibid 467. Lord Denning MR added that ‘[i]f they had added extra accommodation or made extra improvements, they would have to give credit’: at 468.
296 Ibid 473.
297 (1991) 80 DLR (4th); 1991 CanLII 1144 (BC CA). 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 stated that this 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.’
The courts have expressed in a number of cases that the improvement in the reinstated property must result in a delivery of a benefit or advantage to the plaintiff.

1 Must be of Real Benefit or Advantage to the Plaintiff

The South Australian Supreme Court in *South Parklands* emphasised the need for a ‘real benefit to the plaintiffs’ and made the point that even though the plaintiffs would be ‘getting a new playing surface ahead of time when the surface would have to be replaced’ this would be ‘of no real benefit to the plaintiffs’.  

In *Nationwide New Ltd v Power and Water Authority*, Southwood J reasoned as follows, when considering the plaintiff’s claim for damages for the replacement and repair of the plaintiff’s telephone system and other plant:

> [T]he depreciation issue aside, will the plaintiff receive an unfair advantage if full replacement cost is awarded to the plaintiff because the plaintiff has improved its position by the replacement of old and inferior plant and equipment with new and superior equipment? Apart from the PABX, all replacement plant and equipment was both new and of superior specification and quality.

His Honour reasoned further that if this ‘confers a benefit in excess of the [plaintiff’s] true loss then the benefit is to be brought into account when assessing damages.’ New and superior replacements should therefore deliver a ‘benefit’, which can represent the ‘excess’ above the plaintiff’s true loss, before betterment can be said to exist.

In the English Court of Appeal, in *Voaden v Champion (The ‘Baltic Surveyor’ and Timbuktu’)*, which involved having to assess damages for the plaintiff’s loss of its

298 [2004] SASC 81, [126] (Debelle J). Notwithstanding that this case later went on appeal as *Brown Falconer Group Pty Ltd v South Parklands Hockey & Tennis Centre Inc* [2005] SASC and the reinstatement measure of loss was replaced with that of wasted expenditure, the analysis of Debelle J as to what would satisfy as betterment remains instructive.

299 [2006] NTSC 32 (Supreme Court of the Northern Territory) [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 no breaches on the part of the defendant, it went on to consider the issue of damages.

300 Ibid [121].

301 [2002] EWCA Civ 89 (31 Jan 2002); [2002] 1 Lloyd’s Rep 623. In this case, the defendant’s negligent mooring of its own vessel (the Timbuktu) resulted in its own vessel sinking, as well as dragging down the plaintiff’s pontoon and vessel (the Baltic Surveyor).
pontoon and vessel, Rix LJ used the term ‘advantage’ and ‘corresponding advantage’ to describe the nature and type of benefit required for betterment to be satisfied:

I would suspect, however, that the true principle is that in the relevant cases the betterment has conferred no corresponding advantage on the claimant. 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 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. So in the case of replacement buildings: the building may be new, but buildings are such potentially long-lived objects that the mere newness of a building may be entirely by the way.  

McMillan Bloedel Ltd v Canadian National Railway,303 a case from another common law jurisdiction, can assist in illustrating the nature of the benefit which is required to flow from the improvement in the reinstated property. The plaintiff’s aspenite board mill suffered fire damage as a result of the defendant’s negligence. This necessitated replacing the electric wiring in the dryer control room and roof and sliding panels. O’Driscoll J in the Ontario Supreme Court looked beyond ‘new for old’ for a benefit to emerge from the new replacements, for example, an increase in the new mill’s capacity, with the possible result that the plaintiff’s operation is ‘more efficient, cuts cost, increases profits or production, or cuts maintenance’.304 He found that the replacements did not increase productivity or profits, and any savings on future maintenance or deferment in replacing small portions of the building were also inconsequential. The replacements simply restored the mill to its previous capacity. Betterment was therefore found to be absent, without the new replacements delivering any benefit to the plaintiff.

2 Emphasis of a Subjective Approach

In addition to emphasising the need for a ‘benefit or advantage’, the cases reflect that the benefit must relate personally ‘to the plaintiff’. The courts’ references to an ‘advantage to the plaintiff’ and a ‘real benefit to the plaintiffs’ in Hyder305 and South Parklands306 respectively reflect that a more subjective approach should be applied, as

302 Ibid [58] (emphasis in italics added).
304 Ibid.
305 [2001] NSWCA 313, [55].
306 [2004] SASC 81 [126].
opposed to an objective approach. In other words, the plaintiff must be able to realise to his own advantage the benefit resulting from the reinstated property.

3 Must not be Trivial or Insignificant

The requirement of a ‘real’ benefit to the plaintiff implies that such benefit must not be insignificant or trivial. The de minimis rule (in full, de minimis non curat lexis non curat), which means that the law does not take account of trifles, lends support to this. Consequently, if terms such as trivial, insignificant, negligible or trifling, can be used to describe the benefit flowing from the reinstated property, this is unlikely to fulfil the benefit requirement.

To fulfil the benefit requirement, the benefit involved must satisfy as a material and significant benefit. This must be recognised in both a physical and pecuniary sense. In Tyco Australia Pty Ltd v Optus Networks Pty Ltd 307 (‘Tyco’) Handley JA refused to make a finding of betterment on the ground that the resulting benefit was what he described as some improvement which could not be realistically measured. As his Honour put it:

[T]here had been some improvement in the standard of the pool kit equipment [which had to be acquired to clean the computer equipment damaged by the defendant’s negligence] over the leftover equipment, but realistically it could not be measured ... On the evidence there was no basis for a finding of betterment.308

4 Must not be Merely a Chance (or Speculative in Nature)

The requirement of a ‘real’ benefit to the plaintiff also implies that such benefit must not be merely a chance. Put in another way, the benefit must not be speculative in nature.

In looking for betterment, Sheller JA in Hyder sought an ‘advantage to the plaintiff’ which was beyond a ‘speculative proposition’.309 He reached the conclusion that there was no evidence of ‘any advantage to the plaintiff beyond the speculative proposition

308 Ibid [22].
309 [2001] NSWCA 313, [55].
that the new pavement might last longer than the old one would have. In the following passage taken from *Tyco*, Hodgson JA explained why the disputed benefit in *Hyder* was considered to be too speculative or remote:

[T]he 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.

In *Ruthol Pty Ltd v Tricon (Australia) Pty Ltd* Giles JA also sought an actual benefit beyond mere speculation. He remarked that the purported benefit ‘was no more than speculative’. In the English Court of Appeal in *Voaden v Champion*, Rix LJ also made the point that the benefit or advantage involved should not be ‘entirely speculative’.

In *Tyco*, Handley JA explained that the principle that the plaintiff can recover damages for the loss of a chance is ‘well established’, with the law not allowing the difficulties of estimating such loss to diminish the plaintiff’s right to claim such damages. His Honour then distinguished this right from a betterment situation where it is the defendant who is seeking to have the damages payable by him to be reduced:

A defendant seeking to have its damages reduced because of a chance that the plaintiff derived a benefit from the wrong is not in this favoured position. In such a case, unlike the cases where a wronged plaintiff has lost the benefit of a chance, the Court does not have to do the best it can ...

The above reasoning supports the proposition that the benefit flowing from the reinstated property must be more than a mere chance, to satisfy the benefit requirement of betterment.

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310 Ibid.
312 [2001] NSWCA 313.
313 Ibid [262].
315 Ibid [34].
317 [2004] NSWCA 333, [195].
318 Ibid [197].
Arguably, a distinction can be made between a ‘speculative’ and ‘potential’ benefit, based upon the degree of the likelihood of their occurrence. However, in practical terms, both are likely to fall short of the benefit requirement. The need for the benefit to be ‘real’ and ‘substantial’ is based upon its link to the third element, that is, that the benefit must result in an improvement in the plaintiff’s financial position. A speculative or potential benefit is unlikely to be able to achieve this result.

Notwithstanding, it is still possible to argue that the degree of certainty or probability attached to any potential or speculative benefit, should remain a relevant factor to consider. A high likelihood of occurrence can possibly make a difference. It is, however, also arguable on practical grounds, that it would be more sensible and prudent to reject outright such speculative or potential benefits, in order to avoid what can be onerous and costly exercises, with little benefit to the parties involved. This issue should of course ultimately be decided on the basis of the sum involved. It is only where the sum at stake is significant, that questions concerning the degree of probability or certainty of any benefit involved may be worth pursuing.

5 More Difficult to Satisfy if the Reinstated Property Forms Part of a Bigger Item

The reinstated property may be only a part of a bigger item, for example, a new engine installed in the original car, or a new component or part installed in the original machine, or a new wall erected in the original building. In such situations, it would be necessary to consider how important or significant such part which is being reinstated bears to the entire item, and further if such part can by itself be of any real benefit to the plaintiff. It would usually be more difficult to satisfy the benefit requirement if the reinstated property forms only part of a bigger item.

A case in point is *Paper Australia*, 319 which involved the replacement of an MG cylinder, which is one part of a whole machine, being the M2 paper-making machine. When the original cylinder was damaged due to the defendant’s negligence in servicing the machine, the plaintiff replaced the damaged cylinder with a new one. The court raised the question whether the plaintiff actually ‘gained a benefit’. 320 It found that although the replacement cylinder was potentially capable of improving the plaintiff’s

[319] [2007] VSC 484.
[320] Ibid [355] (Bongiorno J).
paper-making production capacity and could thereby potentially increase the plaintiff’s business profits, there was no evidence of any ‘relevant benefit’. Usually, it would be more difficult to satisfy the benefit requirement where the replaced property only forms part of a machine or equipment, as the causal link would be difficult to satisfy.

One explanation as why it is often more difficult to satisfy the benefit requirement where only one part of a machine is reinstated instead of the entire machine, is provided by Rix LJ in *Voaden v Champion*:

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 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.

D Third Element: Resultant Financial Improvement in the Plaintiff’s Position after the Wrong

The third element requires proving that the improvement in the reinstated property and its consequent benefit has led to a monetary yield which the plaintiff is able to realise. This places the plaintiff in a superior position after the wrong, when compared with the plaintiff’s position immediately before the wrong. The plaintiff’s superior financial position represents the extent of his over-compensation.

The need for betterment to be both realisable and quantifiable in monetary terms is implicit under the third element. Thus, for example, 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 arguably a sale can be said to be imminent or not too distant or remote in time. Taking 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 be found to be absent.

321 [2007] VSC 484, [352]. Bongiorno J pointed out that ‘this new cylinder is better and, other things being equal, capable of improving the M2 machine’s production capacity with consequences for the profit derived by the plaintiff from its business’:

322 Ibid [369].

323 [2002] EWCA Civ 89 (31 Jan 2002), [58]; [2002] LLloyd’s Rep 623. This passage was also quoted in the preceding section relating to the benefit having to be a ‘real’ benefit.
Where it can be shown that the plaintiff’s improved financial position is minimal or insignificant, it would be open to the plaintiff to argue for the *de minimis* rule to be applied, under which trifles can be ignored.

**E Application of a ‘Three-Elements’ Test of Betterment**

The case of *State Transport* [324] can be used to illustrate the fulfilment and inter-relationship of all the three elements to establish the existence of betterment. In this case the underside of a railway bridge was struck due to the defendant’s negligence. As a matter of prudent managerial decision, the plaintiff redesigned and reconstructed a bridge capable of bearing heavier duty trains and requiring less maintenance. Nathan J accepted that the plaintiff in this case received not just a ‘new [bridge] for an old bridge’, [325] but one which was of ‘superior physical dimensions, has a longer life expectancy and less maintenance costs than that which it replaced’. [326] The first two elements of betterment were therefore fulfilled. In looking for fulfilment of the third element, Nathan J found that the parties failed to present evidence upon which he could assess in monetary terms the resultant improvement in the plaintiff’s financial condition. Without satisfaction of the third element, betterment was found to be absent in the case:

> 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. [327]

A number of other examples are also set out below, to illustrate how the three elements of betterment interact with each other, and how they may or may not be satisfied, depending upon the circumstances involved.

First, suppose that the damaged building is used as the plaintiff’s home and it is reinstated with a more contemporary design, perhaps with stronger beams and therefore

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[325] Ibid 68,622.
[326] Ibid 68,622.
[327] Ibid 68,623.
with less internal walls, which consequently offers the plaintiff more accommodation space. If the plaintiff uses the reinstated property in the same way as previously, the improvement and benefit elements can be satisfied, but the financial improvement element cannot be satisfied.

Second, suppose that the damaged building is used by the plaintiff for investment purposes and it is reinstated in the same way as in the first example. In offering more accommodation space, which can consequently attract and result in a higher rental than previously, both the first and second elements can be satisfied. Further, if the plaintiff also secures a higher rental, the third element can also be satisfied, thereby confirming the existence of betterment.

Third, suppose that the damaged building is used by the plaintiff as a factory to manufacture goods and it is reinstated in the same way as in the above examples. In offering more accommodation space, which can consequently be used by the plaintiff to generate greater production than previously, both the first and second elements can be satisfied. However, if the plaintiff’s other business resources (such as its current machinery and employees) cannot cope with generating a higher production, the third element would therefore not be satisfied.

Fourth, suppose that the situation is similar to the third situation, with the only difference being that the plaintiff’s other business resources are in a position to cope with such increased production, and consequently a higher profit can in fact be realised. This would mean that the third element can be satisfied.

The above examples, with their different factual scenarios, provide a better understanding of the three elements and their interactions with each other.

V CONCLUSION

This chapter, in discussing, clarifying and proposing a comprehensive meaning of betterment, with its elements clearly identified, and in further emphasising the need for the courts to conduct independent and sequential inquiries to firstly ascertain the existence of betterment, and thereafter determine the appropriateness of whether to
account or not account for betterment, will help to put in place a more principled framework of approach to addressing betterment disputes.

With the proposed definition of betterment being able to serve as a reliable and consistent test or yardstick, against which the existence of betterment can be ascertained in disputes concerning betterment, this will lead to more consistent and predictable outcomes in betterment disputes.

The proposed definition of betterment highlights the element of an improvement in the reinstated property, which must not only result in a benefit to the plaintiff, but must also put the plaintiff in a better financial position than before the pre-wrong position, before a finding of betterment can be made. New replacing old would certainly not suffice. Potential or speculative benefits would also not suffice.

A separate and independent inquiry into the existence of betterment is an important first step to take, before a further step is taken to determine the appropriateness of whether betterment should be taken into account. If the court finds an absence of betterment, there would obviously be no need to proceed any further on the betterment dispute. Proceeding further, without initially satisfying the existence of betterment, conflates the two inquiries and can lead to unnecessary difficulties in trying to disentangle specific findings of the court.

The next chapter takes up the second inquiry into betterment, that is, to address the betterment predicament and how it should be resolved.
CHAPTER 4
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CHAPTER 4

JUSTIFYING A GENERAL APPROACH TO ACCOUNT FOR BETTERMENT

I INTRODUCTION

In addressing the betterment predicament as to whether betterment should be accounted for or not, this thesis suggests and argues for the proposition that there should be a general approach to account for betterment, subject to reasoned exceptions. The inquiry into the reasoned exceptions, which can displace the general approach, will be dealt with in the next chapter.

This chapter presents the arguments, rationale and justifications as to why the proposed general approach to account for betterment is an appropriate approach to adopt and apply to betterment disputes. It is essentially argued that the proposed approach is a principled and just approach, consistent with and supported by the dominant compensation goal and principle governing damages awards and the corrective justice theory of law.

Given the availability of different approaches to the betterment predicament (as identified earlier in Chapter 1), Part II below carries out a closer analysis of the cases concerned to draw out and explain in greater detail the concerns and considerations which can affect the betterment predicament. Part III evaluates these concerns against the compensation goal and principle of a damages award, and against the corrective justice theory of law. Part IV summarises the analysis, arguments and justifications which can provide strong support to the proposed general approach to account for betterment.

II NATURE OF CONCERNS AFFECTING THE BETTERMENT PREDICAMENT

The courts have raised various concerns and considerations when dealing with the betterment predicament as to whether betterment should be accounted. A closer
analysis of Anthoness,⁴²⁸ Hoad⁴²⁹ and Hyder⁴³⁰ (discussed earlier in Chapter 1) will help to draw out what these concerns and considerations are, or are likely to be.

A Anthoness: Inclination to Over-Compensate Rather than Financially Disadvantage the Plaintiff

In Anthoness,³³¹ a case involving damage to the plaintiff’s car, the appeal court affirmed the damages awarded by the trial judge for full repair costs. It affirmed and reinforced the trial judge’s reasoning, that a reduction of the repair costs would ‘forc[e] the plaintiff to put his hand in his pocket’.³³² It reasoned that this would be contrary to the ‘right against the wrong-doer … for restitutio’,³³³ which must be made ‘without calling upon the party injured to assist him in any way whatsoever’.³³⁴ This reveals the court’s inclination to allow the plaintiff to be over-compensated, rather than financially disadvantage him, when determining the betterment predicament.

Some significant observations are set out below, against the express and implied concerns and considerations drawn from the analysis of Anthoness,³³⁵ concerning the betterment predicament.

Firstly, there is the concern that the plaintiff, as the innocent or wronged party, must not be financially disadvantaged by being forced to put his hand into his pocket and use his own financial resources to help remedy the defendant’s wrong. Although there is here a focus upon the plaintiff, it does not properly focus upon the plaintiff’s loss itself, as the compensation goal and principle requires. The focus upon the plaintiff’s status as the innocent or wronged party, as opposed to the defendant’s status as the wrong-doer, is misdirected. A focus upon the virtue of the parties, or on their needs, is also misdirected, as these matters are not relevant to the issue of the plaintiff’s loss.

Second, there is the concern that if a financial burden is imposed upon the plaintiff, this can be seen as the innocent or wronged party assisting the wrong-doer to pay for his

₃²⁸ (1960) SR (NSW) 659.
₃³₀ [2001] NSWCA 313.
₃³¹ (1960) SR (NSW) 659.
₃³² Ibid 665.
₃³³ Ibid 666.
₃³⁴ Ibid.
₃³⁵ Ibid.
wrongful act and that this should therefore be discouraged. Again, it can be observed that the focus is not upon plaintiff’s loss itself, but on other matters.

Third, there is the implied concern or consideration, that if there are competing interests between the parties to an action, the plaintiff’s interest must be preferred and must prevail over the defendant’s, given that the plaintiff is in the position of an innocent victim, as opposed to the defendant’s position as a wrong-doer. Again, it can be observed that references to the parties’ status are not relevant to the issue of the plaintiff’s loss. Arguably, references to the parties’ status can possibly give rise to a hint of the punitive element exerting some influence. In the case of compensatory damages, this would of course be improper.

B  Hoad: Paramount Concern Not to Over-Compensate the Plaintiff

In Hoad,336 where the plaintiff replaced its tractor and mower destroyed by the defendant’s negligence with new ones, the majority judges indicated that they were prepared to account for betterment, as long as this can be made out. The majority were clearly not swayed by the concerns and considerations expressed in Anthoness337 on the issue of whether to account for betterment. In favouring an approach to account for betterment, Moffit P indicated that he found it difficult to accept as legitimate, or significant, the particular concern expressed in Anthoness338 that the plaintiff ‘should not be forced to invest their money in buying new equipment’.339

Moffit P rejected the plaintiff’s attempt to rely upon the English Court of Appeal’s decision in Harbutt’s340 to advance the following argument:

[That] where a plaintiff expends moneys in proper mitigation of his damage, he is entitled to recover in full the moneys expended, without any allowance for any betterment, which accrues to him from the expenditure. Any betterment, advantage or profit, it is argued, has to be ignored.341

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336 [1977] 1 NSWLR 88. The majority judges were Moffit P and Hutley JA.
337 (1960) SR (NSW) 659.
338 Ibid.
Moffit P further distinguished Harbutt’s,342 based upon differences in the nature of the properties involved, which raised the question whether capital expense incurred by the plaintiff to replace the property was in fact an expense which ‘would not otherwise have been incurred’.343 The property destroyed in Harbutt’s344 was a building, which would last indefinitely and would also not be easily replaced or substituted. Moffit P pointed out that the farming equipment destroyed in Hoad345 were chattels, which would depreciate rapidly and require to be periodically replaced, as well as be more easily replaceable.346 Moffit P’s judgment therefore reveals that the following factors can possibly affect the court’s decision whether to account for betterment or not: the nature of the property involved in terms of its longevity; how easy or difficult it would be for the plaintiff to replace or substitute it; and whether capital expense to replace it would not otherwise be incurred by the plaintiff.347 However, these factors were only regarded by Moffit P as secondary factors, as the discussion below shows.

Moffit P made it clear that the crucial question upon which the appeal turned was the proposition whether the plaintiff could in fact be considered to be ‘better off’.348 His Honour made clear his concern that there would be ‘some difficulties in principle’349 in supporting the plaintiff’s argument that mitigation would pre-empt betterment from arising, given that the ‘overriding principle in assessing damages is to compensate a plaintiff for his loss’,350 and that therefore an award of damages granted ‘upon a basis which would provide greater compensation, or appear to do so would need critical examination’.351 Moffit P emphasized that the plaintiff should not receive any greater compensation other than its ‘net loss’352 or ‘net detriment’,353 which in his view represented the plaintiff’s ‘true loss’.354 As Moffit P put it:

343 Hoad [1977] 1 NSWLR 88, 94.
346 Ibid 94.
347 The question as to whether the plaintiff would renew the lease of its farm upon its expiry, which would in turn result in the plaintiff having to incur the periodic planned capital expense of replacing its farm equipment, was therefore a relevant consideration.
349 Ibid.
350 Ibid.
351 Ibid.
352 Ibid 96.
353 Ibid.
354 Ibid 94, 95.
The measure of loss is not the gross cost of replacement of the equipment... The measure of damage … is the nett detriment arising from acquisition of the new equipment. 355

Moffit P found that the issue of the plaintiff’s nett loss or detriment was not properly litigated and a new trial was therefore ordered for further consideration of certain material facts, as he explained in the following passage:

As there will be a factual issue contested after the time when the farming was expected to cease, the judge on a retrial will have the benefit of what has in fact occurred. Either the equipment will have been sold, or kept in substitution for the new, which by then would have had to be purchased. Any gains of the plaintiffs, and hence their nett loss, including any detriment following from the outlay of their capital, eg interest or otherwise, can probably be determined by events rather than inferences. 356

It is therefore clear that the majority judges were of the view that the plaintiff could possibly be better off as a result of the purchase of the new farming equipment and the events which followed it, if these matters could be more conclusively determined.

The analysis of Hoad 357 shows that the court was particularly concerned by the following consideration which it regarded to be of primary importance to determining whether to account for betterment, that the plaintiff must not be over-compensated. Moffit P explained that the ‘overriding principle’ 358 in assessing the plaintiff’s damages is to ‘compensate a plaintiff for his loss’, 359 with loss taken to mean ‘true loss’ 360 or ‘nett loss’ 361 or ‘nett detriment’. 362

Given that the paramount consideration is not to over-compensate the plaintiff, with the focus firmly centered upon the plaintiff and his loss, other concerns and considerations which are extraneous or unrelated to the compensation goal should therefore be regarded as irrelevant, or alternatively as secondary considerations. Consequently, considerations such as those relating to the status of the parties (for example, whether it concerns an ‘innocent’ injured plaintiff or a ‘wrong-doer’ defendant), or whether the

355 Ibid 96.
356 Ibid.
357 Ibid.
358 Ibid 91.
359 Ibid.
360 Ibid 94, 95.
361 Ibid 96.
362 Ibid.
plaintiff may be forced to invest or use his own money as a result of the defendant’s wrong, should be regarded as irrelevant, or of secondary importance to the issue whether betterment should be accounted. This renders strong support to the proposal for a general approach to account for betterment.

As for the other matters raised by Moffit P which relates to the nature of property, such as its longevity or whether it can be replaced, even if these are relevant, they would only be regarded as secondary to the compensation goal.

Other cases have also referred to a similar concern not to over-compensate the plaintiff as expressed in *Hoad*. For example, in *Bushells* Macrossan CJ supported a deduction for betterment based upon the concern not to ‘enrich the plaintiff’; in other words, not to over-compensate the plaintiff. Reference was also made to English authorities where this concern not to over-compensate the plaintiff was evident, including *Lukin v Godsall* where Lord Kenyon directed that the jury ‘should make a reasonable and proper allowance for the benefit which the plaintiff would receive by having a new house instead of an old one’ as ‘otherwise the plaintiff would be a gainer by the accident’, with the word ‘gainer’ used in the sense of the plaintiff being over-compensated.

One further important point concerning *Hoad*, relates to the reasoning of the dissenting judge, Samuels JA, set out below, who in rejecting the defendant’s argument for the right to claim a deduction for betterment labelled it a ‘self-destructive’ argument:

[Counsel] for the defendants, said that, assuming that measure of damages to be right, the plaintiff must still give credit for the supposed advantage which they have obtained by acquiring it, at the defendant’s cost, new machines for old. It seems to me that, in principle, the argument must fail. Since it assumes the correctness of the plaintiffs’ initial recovery of the cost of the new machines, it is self destructive. If that was the proper measure, then it must be that sum to which the plaintiffs are entitled rather than some other sum, based on other considerations such as the age or the condition of the old equipment. … If the plaintiffs did act reasonably in buying new machines, then that cost must prima facie represent their damages …

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363 Ibid.
364 (1948) St R Qd 79, 92(with Mansfield SPJ agreeing).
365 [1795] Peake Add Cas 15; 175 ER 178.
366 Ibid.
The above reasoning of Samuels JA will be valid only if the reinstatement measure is regarded as conclusive and not open to any adjustments, which is not the case. As the reinstatement measure serves only as a prima facie measure of loss there should be no objection in principle for an adjustment to be made for betterment, if this can be justified and made out. In addition, the law of damages permits adjustments to be made to the plaintiff’s damages, for example where limiting factors apply, such as the principles relating to mitigation and remoteness.

C  *Hyder: Over-Compensate if Unavoidable (A Balancing of Concerns)*

It was held in *Hyder*[^368] that it would be inappropriate to account for betterment. In this case the plaintiff replaced defective pavement, which collapsed four years after its construction, with a new pavement which offered a life expectancy of 20 years, similar to the original pavement. The majority judges, Sheller and Giles JJA, although supportive in principle of an approach which would account for betterment, were of the view that it would be inappropriate to account for betterment in this case[^369]. Sheller JA found differences of opinion in the cases[^370] and conflicting text commentaries[^371] on the betterment issue.

Sheller JA, in adapting (rather than adopting) Dr Lushington’s approach in *The Gazelle*,[^372] shifted the approach from one which does not account for betterment, to one which allows it, but at the same time calls into question whether the alleged betterment could have been avoided:

> 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[^373].


[^369]: Ibid [22]: The minority judge’s (Meagher JA’s) primary concern was not to over-compensate the plaintiff with what he termed a ‘windfall’ if betterment was not accounted for.

[^370]: *Hyder* [2001] NSWCA 313, [27], [26]-[29].


[^372]: (1844) W Rob 279, 166 ER 759. This case was also approved and applied in the case of *Anthoness* (1960) SR (NSW) 659, as discussed earlier.

[^373]: *Hyder* [2001] NSWCA 313, [30].
Sheller JA’s approach attempts to reconcile, or counter-balance, the concern not to over-compensate the plaintiff, with the concern not to impose upon the plaintiff any undue loss or burden. It is argued in this thesis that the question whether the betterment was avoidable, or unavoidable, can serve as a test, or as a material consideration, when considering the appropriateness of whether to account for betterment or not. As Sheller JA explained:

The facts in *Hoad* and *British Westinghouse* are distinguishable from the facts in this case. The plaintiff [in this case] had no choice but to replace the defective pavement with new pavement. It could not do so by paying less for a four year old pavement.374

In the above passage Sheller JA raises the issue of ‘choice’, whether the plaintiff had a choice, or had no choice, in carrying out the replacement.

What is clear is that Sheller JA did not find it appropriate to account for betterment, because he found it to be ‘unavoidable’, following his adaptation of Dr Lushington’s statement and approach concerning the question of whether the betterment was unavoidable or not, or as he also put it where there was ‘no choice’.375 Giles JA, the other majority judge, also reached the same conclusion as Sheller JA, that it would be inappropriate to account for betterment. His reasoning set out in the passage below echoes Sheller JA’s ‘no choice’ approach:

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.376

The above analysis of *Hyder*377 shows that the majority judges were particularly concerned and influenced by the following considerations which they regarded as material in determining if betterment should be accounted: firstly, that the plaintiff must not be over-compensated; and second, that it would be necessary to reconcile the concern not to over-compensate the plaintiff with the concern not to impose upon the plaintiff any undue loss or burden.

374 Ibid [55].
375 Ibid. It is also possible to argue that in this case, betterment was found not to exist on the facts adduced, based on Sheller JA’s statement, 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’.
376 Ibid [105]-[107].
377 Ibid.
It is arguable that the required reconciliation can possibly be carried out by ascertaining whether the betterment was ‘unavoidable’; or in other words, if the plaintiff had ‘no choice’. This can be termed as either ‘the unavoidable test’ or ‘the no-choice test’. It can serve as a useful test, reflecting the material considerations to be taken into account, and can thus assist in determining whether it would be appropriate to account for betterment or not.

III EVALUATING THE CONCERNS AGAINST THE COMPENSATION GOAL AND CORRECTIVE JUSTICE THEORY

As explained earlier in Chapter 2, in assessing damages for damage and destruction to property in tort and contract actions, there is a need to always return to the basic goal and principle of compensation for loss, given that this goal and principle underlies the recovery of compensatory damages. Also, as explained earlier in Chapter 2, given that the remedial perspective of a damages award is to provide recompense for loss, it would accordingly serve as a paradigm of corrective justice.378

With the compensation goal and principle, as well as the corrective justice theory of law, playing significant roles in the conceptualization of the plaintiff’s loss to be assessed under a damages award, the various concerns and considerations raised in the previous Part should therefore be evaluated and assessed as to their relevance and significance to the aforesaid matters.

Concerns and considerations which are not consistent with or do not further the objectives of the compensation goal and principle, or the corrective justice theory of law, should be rejected as irrelevant considerations to the determination of the betterment predicament and the general approach to adopt on the issue whether there should be an account for betterment. However, some of these concerns and considerations may possibly be argued to be relevant as secondary considerations, when considering the exceptions to the proposed general approach to account for betterment, which will be taken up in the next Chapter dealing with the exceptions.

A Concerns Not Centred around the Compensation Goal

378 See, Tilbury, Reconstructing Damages, above n 133, 698.
The analysis of Anthoness\(^{379}\) reveals that the court’s concerns and considerations were not exclusively confined to the compensatory goal of a damages award. For example, the court expressed the concern that the plaintiff should not be forced to use his own financial resources, or be in some way financially disadvantaged. There are also other cases, such as The Gazelle,\(^{380}\) The Pactolus\(^{381}\) and Harbutt’s,\(^{382}\) where the courts in expressing reluctance to support accounting for betterment, raised similar concerns that the plaintiff should be protected from being compelled to use or invest his own capital against his will. Widgery LJ in Harbutt’s\(^{383}\) raised the concern that if an account for betterment was made it would be ‘the equivalent of forcing the plaintiffs to invest their money in the modernising of their plant which might be highly inconvenient for them’.\(^{384}\) While it may be laudable to try to protect the plaintiff’s interest, it is questionable if such consideration can be permitted to take precedence to, or even override the compensation goal which underpins the damages award.

In relation to the above concern expressed by the courts, that the plaintiff should not be forced to use his own financial resources, it can be argued that the restitutio principle must serve to protect the defendant from what would be an almost certain over-compensation to the plaintiff, as opposed to protecting the plaintiff from only a possibility of compelling the plaintiff to invest capital in his property against his will. Notwithstanding that the defendant must be made to bear the risk of compensating the plaintiff in full, it would be contrary to the compensation principle to expose the defendant to the risk of having to bear excessive compensation, or over-compensation. Ogus advances the same argument in similar terms:

> The difficult choice [whether to account for betterment or not] lies between an almost certain over-compensation of the plaintiff and the possibility of compelling the plaintiff to invest capital in his chattel against his will. … Not only is it more consistent with the restitutio in integrum doctrine (there is just a hint of the ‘punitive’ approach…) but it would also deter the plaintiff from executing unnecessary repairs at the expense of the defendant. In short, the defendant should bear the risk of complete but not excessive compensation.\(^{385}\)

\(^{379}\) (1960) SR (NSW) 659.
\(^{380}\) (1844) 2 Wm Rob 279.
\(^{381}\) (1856) Sw 173.
\(^{382}\) [1970] 1 QB 447.
\(^{383}\) Ibid.
\(^{384}\) Ibid 473.
\(^{385}\) Ogus, above n 135, 134.
Ogus also makes an important observation in the above passage, that an approach to account for betterment which potentially exposes the plaintiff to having to resort to his own funds, would have the beneficial effect of deterring the plaintiff from executing unnecessary repairs at the expense of the defendant. The deterrent effect here is based upon an economic rationale, aimed at the plaintiff taking steps to avoid unnecessary repairs, in other words, avoiding what can be called ‘economic waste’. This deterrent effect arising under the law of damages is separate and distinct from deterrence aimed at discouraging the defendant from committing a tortious or contractual wrong.

Other concerns or considerations raised or inferred from *Anthoney*,\(^{386}\) include the view that the defendant be regarded as a ‘wrong-doer’, as opposed to the plaintiff’s position as an innocent victim, and consequently the plaintiff’s interest must be preferred over the defendant’s, with the defendant to be held solely responsible and having to bear the full financial costs of his misconduct, without any financial assistance from the plaintiff. A related concern also raised in *Anthoney*\(^{387}\) was that imposing a financial burden upon the innocent injured party may be seen as assisting the wrong-doer to pay for his wrongful act and that this must be discouraged.

An evaluation of the aforesaid concerns and considerations reveals that although there is a focus upon the plaintiff, it does not properly focus upon the plaintiff’s *loss* itself, as the compensation goal and principle dictates (as discussed more fully in Chapter 2, Part IV). There is a misdirected focus upon the parties’ status, virtues and needs, which are all not relevant to the issue of the plaintiff’s loss as conceptualized by the compensation goal and principle.

It can also be argued that the punitive element appears to surface and exert some influence from the desire to impose a greater burden on the defendant because of his status as a wrong-doer. If so, this would be inconsistent with the compensation goal and principle, which requires the focus to be upon the plaintiff and his loss and not upon the defendant.

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\(^{386}\) (1960) SR (NSW) 659.

\(^{387}\) (1960) SR (NSW) 659.
A further point to emphasise is that the punitive goal is recognized only through an award of exemplary damages, which is available only in a limited number of tort actions upon fulfillment of certain preconditions, and rarely available (if at all) in contract actions. This is explained in some detail in Chapter 2 Part IV A. The role and function of exemplary damages, with its punitive goal, must not be usurped, or allowed to intrude or affect the assessment of compensatory damages. It is only with a clear distinction maintained between exemplary and compensatory damages that the law of damages can continue to develop on a principled basis.

In making a similar point that punitive considerations should be excluded from compensatory damages, Burrows also adds that if punishment is desired it should be delivered through a separate award of exemplary damages:

[M]uch of the traditional inconsistency in this area of the law appears to stem from the courts’ willingness to punish the defendant, rather than merely to compensate the claimant. Hence there is often reference to the defendant being a wrongdoer who ought to pay and who does not deserve to be benefited by the compensating advantage. But, if punishment is desired, it is surely better to administer it through punitive damages [that is, through awards of exemplary damages], where punishment is explicit and where the amount awarded can be fixed in accordance with the extent to which it is felt the defendant deserves punishment.³⁸⁸

Fleming’s explanation to exclude punitive considerations from compensatory awards is also relevant here, notwithstanding that it was made in the context of collateral benefits:

Traditionally, the principal general defense of the collateral source rule has been that for the sake of both deterrence and equity vis-à-vis his victim, a wrongdoer should not escape the full cost of the injury he has caused. The argument is now, however, widely discredited. Evocation of punishment for the defendant, who is perjoratively stigmatized as ‘the wrongdoer’, is incompatible with the exclusively compensatory purpose of tort damages …³⁸⁹

The above analysis supports the argument that considerations which are not confined to the compensation goal or principle should be excluded from consideration. Alternatively they may be given secondary consideration if this is required for some reason, for example where this may be necessary when considering exceptions to the

proposed general approach to account for betterment, to be discussed in the next Chapter.

By excluding non-compensatory considerations, this would reinforce the compensatory goal and make it clear that the focus remains upon the plaintiff’s loss and not the defendant’s moral culpability. The above analysis would render strong support to the proposed general approach to account for betterment as a matter of principle, based upon its consistency with the compensation goal and principle.

As indicated above, corrective justice also plays a significant role in the conceptualization of the plaintiff’s loss, to be assessed under a damages award. Therefore, the concerns and considerations raised by the court in Anthoness should also be evaluated and assessed against the corrective justice theory of law. It will be recalled from Chapter 2 (Part III A), that corrective justice accounts have, in common, some sense of objective norm against which justice is administered. It was further explained in Chapter 2 (Part III A) that there were two mutually complementary movements of thoughts under corrective justice theory. The first is the positive idea that reasoning about liability operates through concepts that are themselves correlative. Every right therefore implies that others are under a duty not to infringe it, and no duty stands free of its corresponding right. The second is the negative idea that corrective justice disqualifies any reasoning that is inconsistent with its relational structure.

The negative idea referred to above, that corrective justice disqualifies any reasoning that is inconsistent with its relational structure, is relevant to the analysis and evaluation of the concerns and considerations raised in Anthoness. Under this idea, in corrective justice, considerations that are unilateral and refer to the position of only one of the parties, such as a party’s worthiness, are completely disregarded. Similarly, moral considerations, including notions of evil, virtue or need, are irrelevant under corrective justice. As will be recalled, corrective justice differs from distributive justice in that distributive justice divides a benefit or burden in accordance with some criterion or criteria that compares the participants’ merits. Distributive justice embodies a proportional equality, in which the parties in the distribution receive their shares.

390 (1960) SR (NSW) 659.
391 Weinrib, Corrective Justice, above n 70, 4, 95.
392 Ibid 4.
393 (1960) SR (NSW) 659.
This makes it clear that corrective justice will not support the concerns and considerations raised in *Anthoness*, such as the following, the defendant’s position as a wrongdoer; the plaintiff’s position as an innocent victim; or that because of the aforesaid considerations the plaintiff’s interest must be preferred and the plaintiff must therefore not be financially disadvantaged. Under a corrective justice remedial conception, the parties should be treated as equals, without one being favoured over the other. It would be inappropriate under corrective justice reasoning to support a view such as that inferred from *Anthoness*, that where there are competing interests between the parties, the plaintiff’s interest must be preferred and must prevail over that of the defendant. Also, if the considerations are unilateral considerations, or relate to moral considerations (such as, the parties’ worthiness, or virtue, or need) they should be completely disregarded under corrective justice reasoning. The punitive goal is also irrelevant to corrective justice, being inconsistent with both the structure and content of corrective justice.

**B Concerns Centred upon the Compensation Goal**

In determining the betterment predicament and whether to account for betterment, the court in *Hoad* recognized that the paramount concern and consideration is not to over-compensate the plaintiff. It pointed out that the ‘overriding principle’ in assessing the plaintiff’s damages is to ‘compensate a plaintiff for his loss’ and that such loss which must reflect the plaintiff’s ‘true loss’ should accordingly be the plaintiff’s ‘net loss’ or ‘net detriment’. The court in *Hoad* therefore more properly confined its concerns and considerations to the compensation goal and

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394 Weinrib, ‘Corrective Justice in a Nutshell’, above n 93, 349. See also, Weinrib, *Corrective Justice*, above n 70, 16.
395 (1960) SR (NSW) 659.
396 Ibid.
398 Ibid 91.
399 Ibid.
400 Ibid 94, 95.
401 Ibid 96.
402 Ibid.
403 Ibid.
principle of a damages award, to the exclusion of considerations falling outside of this purview.

The court’s approach in *Hoad*\(^{404}\) to account for betterment (assuming that betterment can be satisfied on the facts) accords with the overriding compensation goal and principle of a damages award, as well as the corrective justice conception of the damages award. The paramount consideration to compensate the plaintiff for the plaintiff’s net loss or detriment and therefore not to over-compensate the plaintiff in *Hoad*\(^{405}\) renders support to recognise a general approach to account for betterment.

When emphasizing the overriding consideration not to over-compensate the plaintiff, Moffit P in *Hoad*\(^{406}\) also referred to a number of secondary considerations, such as the nature of the property and whether it is real property or chattels, the ease or difficulty of replacing it, and whether capital expense to replace it would not otherwise be incurred by the plaintiff. These factors, as secondary considerations, can be relevant in relation to the exceptions to the general approach to account for betterment.

In determining the betterment predicament and whether to account for betterment, the court in *Hyder*\(^{407}\) adopted the approach that notwithstanding that the paramount concern or consideration is not to over-compensate the plaintiff, there is or there may be a need to weigh this up against the concern not to impose any undue financial burden upon the plaintiff; thereby envisaging that the paramount consideration reflecting the primary dominance of the compensation goal may be displaced by secondary considerations, such as any undue financial burden upon the plaintiff. The approach in *Hyder*\(^{408}\) is unlike that in *Anthoness*,\(^{409}\) as it acknowledges the primary dominance of the compensation goal. This means that the approach in *Hyder*\(^{410}\) is consistent with the compensation goal and principle of a damages award, as well as the corrective justice conception of the damages award.

\(^{404}\) Ibid.
\(^{405}\) Ibid.
\(^{406}\) Ibid.
\(^{407}\) [2001] NSWCA 313.
\(^{408}\) Ibid.
\(^{409}\) (1960) SR (NSW) 659.
\(^{410}\) [2001] NSWCA 313.
The approach in *Hyder*\textsuperscript{411} would fit into the proposed scheme of a general approach to account for betterment, which would be supported by the principal consideration not to over-compensate, with the exceptions supported by the secondary consideration to try not to impose any undue burden upon the plaintiff. Unavoidability and the absence of choice can serve as useful tests when considering the exceptions. This is discussed further in the next Chapter which deals with the exceptions.

IV JUSTIFICATIONS FOR A GENERAL APPROACH TO ACCOUNT FOR BETTERMENT: GREATER JUSTICE AND MORE REASONED OUTCOMES

This Part summarises the analysis, arguments and justifications which can justify and provide strong support to the proposed general approach to account for betterment, subject to reasoned exceptions.

**A Consistent with and Advances the Compensation Goal and Principle of a Damages Award**

1 *Avoidance of Over-Compensation through a General Approach which Accounts for Betterment*

It is recognised that the courts ‘are loathe to award damages which have the effect of over-compensating the plaintiff’ and that in order ‘to address this concern the courts [have] developed the concept of betterment’.\textsuperscript{412}

The proposed general approach to account for betterment is advanced as a matter of principle, based upon the rationale that this approach would best reflect, as well as be the most consistent with the compensation goal and principle, which embodies the foundation and cornerstone of the law of damages.

In the passage below, Ogus provides some support for this approach in the context where property is damaged:

\textsuperscript{411} Ibid.
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.413

The above reasoning would similarly apply in the context where property is destroyed.

2 Complies with and Advances the ‘Net Loss’ (/Indemnity/Restitutio) Principle:

Indemnifies only ‘Actual’ Loss; Avoids ‘Windfalls’ to Plaintiff

Indemnification or restitutio, in cases involving destruction or damage to property, means restoring the value of the plaintiff’s loss, and not merely reimbursing his replacement or repair expenditure. Replacement or repair expenditure is merely a starting point under the assessment process. The value of the plaintiff’s loss refers to the plaintiff’s ‘net’ or ‘actual’ loss. The judges have expressed this in numerous ways. For example, in Haines v Bendall, the High Court made it clear that a plaintiff cannot recover ‘more than [what] he or she has lost.’414 In Hoad, Moffit P equated the plaintiff’s ‘true loss’415 with its ‘net loss’416 or ‘net detriment’.417 He cautioned against awarding damages for ‘greater compensation’418 than the plaintiff’s actual loss. Hodgson JA in Tyco declared that the plaintiff should only ‘be compensated for its loss, and no more’.419 As the purpose of a pecuniary award is to provide ‘full indemnification’, a ‘limit on the award’ must undoubtedly be the ‘plaintiff’s actual loss’.420

The courts have also stated that the plaintiff should not gain a windfall or be enriched, with the words ‘windfall’ and ‘enrichment’ used in the sense of over-compensating the plaintiff. This is similar to the above point that the plaintiff must not receive compensation extending beyond his actual loss suffered. In Hyder, Meagher JA was in

413 Ogus, above n 135, 134.
417 Ibid 96.
418 Ibid 91.
419 [2004] NSW CA333 [260].
support of accounting for betterment to avoid the plaintiff gaining ‘a windfall he was not entitled to’. In Bushells, Macrossan CJ awarded the plaintiff the costs of restoring a damaged awning, subject to a deduction for betterment, as full restoration costs without any deduction ‘would enrich the plaintiff’. In Stephenson v State Bank of New South Wales Ltd, Sheller JA stated that without an appropriate betterment allowance ‘restoration would bring the appellant an enormous and unmerited windfall advantage’.

The commentator, Hammond, observed that doing more than restoring the plaintiff to his ‘rightful position’ under the compensation principle, would be akin to ‘conferring [him] a windfall gain’, thereby over-compensating him, and that this must therefore be avoided. Another commentator, Coote, similarly 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.

It is important to raise a related point, which is also recognized by McGregor in the following passage, in relation to previous arguments made which purportedly support an approach not to account for betterment, on the basis that the plaintiff is ‘deserving’ of receiving a ‘windfall’ and should therefore be over-compensated:

[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.

As argued in this thesis, and also by McGregor in the above passage, the so-called argument that the plaintiff deserves a windfall can be easily demolished by pointing to the dominance of the compensation goal.

421 [2001] NSWCA 313, [22]. In this case the plaintiff received a new pavement in place of an old one.
422 [1948] St R Qd 79, 92.
423 (1996) 39 NSWLR 101, 110. In this case, the New South Wales Court of Appeal held that the purchase price of a house on land substantially damaged by fire prior to settlement should be abated and that the measure of abatement is the cost of reinstatement less an appropriate betterment allowance.
426 Harvey McGregor, ‘Compensation Versus Punishment’ (1965) 28 Modern Law Review 629, 632. Although raised in the context of collateral benefits this passage also applies to betterment.
On the above analysis and also upon the earlier explanation of the concepts of compensation, indemnity and *restitutio* (in Chapter 2), any betterment found to exist, should as a matter of principle, and as a general rule, be accounted to ensure that the plaintiff does not receive more than his actual or net loss. This provides firm support for a general approach to account for betterment to be put in place, rather than one which does not as a general rule account for betterment.

3 Exclusion of Non-Compensatory Considerations

In *Anthoness*427 the court cited various English authorities, such as *The Pactolus*,428 *The Gazelle*429 and *The Munster*,430 to raise the defendant’s status as ‘the wrong-doer’ and to reinforce its view that the ‘wrong-doer must bear the [repair] cost without deduction’.431 It is, clear, however, from the analysis in Parts II and III above that non-compensatory considerations should be excluded from the assessment of compensatory damages.432 The focus should be upon the plaintiff’s loss, and not on other considerations, whether it is the defendant’s moral culpability or financial situation, or any sympathy felt towards the plaintiff, or any other economic or social implications. This clear focus upon the plaintiff’s loss, to the exclusion of other unrelated considerations, steers towards and supports a general approach to account for betterment.

4 Reinstatement Measure of Loss Allows Adjustment for Betterment

To help identify and measure the plaintiff’s loss the courts often use prima facie measures of loss, which would appear as formulae of loss.433 These measures of loss represent rules of practice. As rules of practice, their application must ultimately

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427 (1960) SR (NSW) 659.
428 (1856) Swab 173; 166 ER 1079.
429 (1844) 2 W Rob 279; 166 ER 759.
430 (1896) 12 TLR 264.
431 *Anthoness* (1960) SR (NSW) 659, 666.
432 It has been observed that indemnification must be ‘without reference to sympathy, social cost, insurance premium increases, punishment or financial consequence to the defendant’: Munroe, above n 420, 55.
433 A general formula or prima facie measure of loss can, however, act as a practical qualification upon the compensation principle. The convenience and certainty of applying it may outweigh a strict insistence on accuracy. It may also put the burden of establishing an alternative measure or what should be the proper quantum on the other party who argues for it.
depend upon the extent to which they can give effect to the principle of compensation to
the case at hand.

The reinstatement measure plays an important role in assisting the court to try to
determine the precise amount of the plaintiff’s loss for damage or destruction caused to
the plaintiff’s property. If the plaintiff actually incurs reinstatement costs, this would
bring the formula as close as possible to what the plaintiff in fact lost. But this does not
mean that it may not be subject to adjustments. Being subject to limiting factors, such
as the principles of mitigation, or remoteness of damage, it can similarly be subject to
adjustments for betterment. As a formula of loss which is not conclusive, the
reinstatement measure of loss must be seen as a starting point for assessment of the
plaintiff’s damages, not as the end of the assessment process.

Put in another way, prima facie measures or formulae of loss, based on models of
paradigm loss, do not necessarily reflect the plaintiff’s ‘actual’ loss. The compensation
goal requires the damages award to be based upon the plaintiff’s ‘actual’ loss. Where
they do not reflect the plaintiff’s actual loss in any particular case, formulae should
yield to the notion of compensation and what it means under the compensation
principle. It remains open to determine more precisely the plaintiff’s actual loss. Thus
betterment should be taken into account, where its presence can be satisfied. As Tilbury
put it, 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’, as in the case of the
reinstatement measure of loss.

Another way of characterizing the issue of the plaintiff’s loss is to look upon it as a
question as to whether a ‘concrete or subjective’ versus ‘abstract or objective’
calculation of damages should be applied. This question appears to lie at ‘the heart of
the current debate on the meaning of loss’. Under the concrete or subjective
approach, damages are assessed by reference to the plaintiff’s actual circumstances.
Under the abstract or objective approach, in its pure form, the presumption is made that
the plaintiff’s loss consists of the amount determined on the basis of a fixed formula,
such as the reinstatement measure of loss; it does not as a consequence look at the

434 Tilbury, ‘Reconstructing Damages’, above n 133, 703.
435 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

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plaintiff’s actual circumstances. The countervailing policies should be assessed. There is, of course, a ‘practical need for a simple rule that can be administered in a clear, expeditious and certain way’. 436 However, this must be counterbalanced by a ‘need to calculate damages in a way that expresses the real loss of the claimant.’ 437 It is also described in this way, that there is ‘a policy for damages to express the injured party’s true loss’. 438 This thesis supports the subjective or concrete approach as being the appropriate approach to apply in the case of the reinstatement measure of loss. This approach would accommodate adjustments for betterment.

Although a claim for reinstatement costs may appear similar to some extent to seeking for relief in specie, it remains nonetheless a claim for damages for monetary compensation. As a claim for monetary compensation, and not to replicate relief in specie, there can be no objections to making an adjustment to the reinstatement cost. This point can be illustrated in the context of contract, where a distinction is drawn between the ‘performance interest’ and the ‘compensation interest’. This was discussed earlier in Chapter 2 (Part II C). As was recognized, there is a difference between ‘an award designed to compensate for a loss suffered and an award designed to give effect to a right to performance, even where such awards give the same measure of damages.’439 The distinction between a claim based upon the compensation interest and a claim based upon the performance interest appears from this passage:

Where the claimant seeks cost of cure damages as a means of vindicating his performance interest, the defendant’s liability derives not from the fact of breach and its consequences but from merely his entry into the contract and the obligation to perform arising therefrom. The issue of what losses flow from breach, and which of those losses should properly be borne by the claimant, simply does not arise. 440

A claim based upon the reinstatement cost measure of loss, even if it is argued to be a cost of cure measure, is clearly based upon the plaintiff’s compensation interest and his right to compensatory damages. This is because it is aimed at measuring the actual loss suffered by the plaintiff. It is not in the nature of a performance interest claim. A

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437 Ibid 436-437.
438 Saidov and Cunnington, above n 435, 20.
439 Webb, above n 78, 65.
440 Ibid 67.
performance interest claim is not concerned with the question of the allocation of losses, although it may have the effect of shifting a loss onto the defendant.\footnote{Ibid 68.}

In addition to claiming reinstatement cost the plaintiff is also entitled to consequential damages. A disinclination to allow a deduction for betterment may sometimes stem from subsuming, or not clearly distinguishing the main loss of reinstatement cost, from consequential losses flowing from it. To ensure a principled approach to the assessment of damages the plaintiff’s main loss must be deducted for betterment if necessary, and consequential loss considered and calculated separately. In other words, the role and function of consequential damages must not be usurped or subsumed by the betterment issue.

The above analysis shows that the reinstatement measure of loss serves as a formula of loss which allows adjustments to be made to reflect the plaintiff’s actual loss. It would thus accommodate and allow for betterment to be accounted for on a general basis. This would accord with and support the proposal for a general approach to account for betterment.

B Consistent with a Corrective Justice Conception of a Damages Award

Corrective justice’s conceptualization of the plaintiff’s loss under a damages award, in focusing upon the plaintiff’s loss, provides strong justification for the proposed general approach to account for betterment. Distributive justice reasoning, on the other hand, provides support to the exceptions. The exceptions do not focus exclusively upon the plaintiff’s loss, as they draw in non-compensatory considerations.

The commentator, Hammond, associates the compensation goal and principle of a damages award ‘to restore, as nearly as money can do, the injured party to that person’s rightful position’\footnote{Hammond, above n 424, 222.} with corrective justice reasoning:

The traditional argument for this proposition is based on the straightforward 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. 443

As the above passage reveals (and also as explained in Part IV A 2 above), windfall gains conferred upon the plaintiff, through betterment or otherwise, ought to be avoided or eliminated under corrective justice reasoning.

In the context where the plaintiff’s property is destroyed, the relationship between right and remedy under corrective justice theory recognizes the need to account for betterment. This is because the plaintiff’s entitlement and the defendant’s obligation are both limited to only ‘the object’s equivalent’, 444 which would thus be to the exclusion of any betterment. As Weinrib explains:

[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. 445

Weinrib explains further:

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. 446

In addition, as explained earlier in Chapter 2 (under Part III A), corrective justice links only the two parties to the action, based upon a relationship of correlativity. In linking only the plaintiff and the defendant to correct the injustice and by re-establishing the initial inequality of the gain and restoring it to the other party, corrective justice ignores considerations which are extraneous to the notion of compensation, for example the

443 Ibid.
444 Weinrib, Corrective Justice, above n 70, 91.
445 Ibid 90.
446 Ibid 90-91.
individual interests of the parties, or other unilateral considerations favourable or unfavourable to 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 Weinrib refers to as a ‘hodge-podge of considerations applying to the parties individually and then somehow traded off against one another.’447

The concept of wrongdoing under corrective justice theory is that of fault within the doing, and not of fault within the doer. Moral culpability of the defendant is therefore not a condition of the plaintiff’s claim to repair under the corrective justice theory. Corrective justice, unlike distributive justice, disregards the ‘worthiness’ of persons, and does not include as one of its necessary elements a criterion of distribution in the light of which a determination of worthiness can be made. In contrast, distributive justice, takes into account those determinate features selected by a particular criterion or criteria of distribution.

In light of the above explanation of corrective justice, the concerns and considerations as disclosed in the cases discussed earlier in Part II above, such as *Anthoness*,448 which fall outside the scope of compensation, must be ignored under corrective justice’s conception of a damages award. This would include considerations which refer to the status of the parties, for example, the plaintiff as the innocent party, and the defendant as the wrongdoer; the worthiness of the parties; the needs of the parties, financial or otherwise; or other non-compensatory considerations. With corrective justice’s clear focus upon compensating the plaintiff’s loss, to the exclusion of other unrelated considerations, this steers towards and provides strong support for the proposed general approach to account for betterment.

As for the exceptions to the general approach, these are supported by distributive justice reasoning. As explained in Chapter 2 (Part III A), distributive justice, unlike corrective justice, works towards regulating the fair distribution of common burdens and benefits among individuals and groups (that is, beyond the parties to the action).

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447 Ibid 3.
448 (1960) SR (NSW) 659.
C Consistency of Approaches under Betterment and the Avoided Loss Rule of Mitigation

Under the principle of mitigation (explained earlier in Chapter 2, Part IV C), the plaintiff’s recoverable damages are reduced to the extent to which the plaintiff ought to have avoided, or has in fact avoided the loss in question. The principle of mitigation therefore serves as a corollary to the compensation principle. Under one arm of the mitigation principle known as the ‘avoided loss rule’ of mitigation, the defendant is required to compensate for loss suffered by the plaintiff, to the exclusion of any benefits accruing to the plaintiff from mitigation. A situation which involves mitigation under the avoided loss rule can also sometimes overlap, and hence fall within, a situation which involves betterment. In light of this, it would be necessary for the approaches concerning both mitigation and betterment to be consistent with each other, in order to ensure and maintain consistency under the law of damages.449 This means that betterment should in general be accounted for. This offers strong justification for the proposed general approach to account for betterment.

The scenario in Hoad450 illustrates the type of situation which can overlap a situation involving mitigation and a situation involving betterment. In this case the plaintiff’s farm equipment was destroyed by a fire caused by the defendant’s negligence. The plaintiff purchased a new tractor to replace the destroyed tractor so that it could resume its business and therefore mitigate its business loss. In considering if the plaintiff would benefit from any sale of the tractor when its farm lease expired, it can be argued that such a situation can be looked upon as involving mitigation, as well as involving betterment. In the context of mitigation, any benefit accruing to the plaintiff from mitigation, allegedly any profit from a higher resale price for the tractor, would be excluded under the avoided loss rule; thus, the plaintiff’s damages would be reduced to the extent of such benefit. In the context of betterment, it can be argued that if there is any betterment (in other words, all the elements for betterment can be satisfied), it must be accounted for and deducted from the plaintiff’s damages. With the approach under mitigation to deduct the accrued benefit from the plaintiff’s damages, it would be necessary for the approach under betterment to similarly account for betterment, in

order that there can be consistency and coherence under the law of damages. This is particularly necessary where the situations concerning betterment and mitigation overlap. Parties must not be put in a situation where they can end up with different outcomes, depending upon which approach they choose to argue.

Fisher J in the New Zealand case of *J & B Caldwell Ltd v Logan House Retirement Home Ltd* also recognized that there can be overlaps between situations involving betterment and mitigation:

>[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.451

Fisher J makes a valid distinction between mitigation and betterment, namely that mitigation would operate to *limit* the extent of the plaintiff’s loss, and that betterment would *set off* the plaintiff’s loss. Notwithstanding this distinction, given their similar ultimate outcomes, it would, nonetheless, be necessary for the approaches relating to betterment and mitigation to be consistent with each other.

A case involving a contractual claim, which can also illustrate an overlap between mitigation and betterment, is *British Westinghouse*.452 It was explained in Chapter 1 (under Part I) that betterment can arise under a contract claim, similar to that in *British Westinghouse*,453 where the plaintiff may be forced to replace or repair an item agreed to be supplied under a contract, owing to it being defective or not conforming to contract specifications. Kercher and Noone make this same point that ‘*British Westinghouse* raises the issue of allowances for betterment’.454 They add:

If entirely defective goods are delivered, the plaintiff may be expected to purchase substitute goods. If those substitutes improve the plaintiff’s position by being of superior specification to the original ones, damages may allow for that improvement. However, is an allowance also

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452 [1912] AC 673.
453 Ibid.
454 Kercher and Noone, above n 180, 138.
made merely because of the substitution of new goods for old where it was impractical or impossible to obtain second-hand substitutes? If not, should the same apply where only superior goods are available as substitutes?\textsuperscript{455}

In \textit{British Westinghouse},\textsuperscript{456} steam turbines that were supplied by British Westinghouse to the Railway Co failed to conform to the contract in terms of economy and steam consumption. After using the deficient turbines for several years, the Railway Co replaced them with new turbines which were of superior capacity and design to the turbines contracted for. It was found that the Railway Co’s purchase of the new turbines was a reasonable and prudent course which mitigated its loss of business. The House of Lords held that the superiority and greater efficiency of the new turbines extinguished the plaintiff’s loss, and in fact allowed the plaintiff to make a profit. Viscount Haldane LC stated that in assessing the plaintiff’s damages, the pecuniary advantage of extra profits that resulted from its mitigation, must be taken into account.\textsuperscript{457} This falls under the avoided loss rule of mitigation. Viscount Haldane LC emphasized that the benefit or gain is only to be taken into account and deducted if it is ‘one arising from the consequences of the breach’.\textsuperscript{458} The purchase of the new turbines was found to form part of a continuous dealing and was not an independent or disconnected transaction (\textit{res inter alios acta}).\textsuperscript{459}

The situation in the above case can also be viewed in the context of betterment. The betterment would arise from the plaintiff’s act of replacing defective property, with defective property extending to include property falling below its promised quality. It is sensible, that if a situation involving mitigation can also be viewed in the context of betterment, that both approaches should provide a similar outcome, that is, a deduction of the benefit/betterment involved. The need for consistency between betterment and the avoided loss rule of mitigation justifies and supports the proposed general approach to account for betterment.

D \textit{Preference for a General Approach of Accountability (over a General Approach of Non-Accountability)}

\textsuperscript{455} Ibid 138-139.
\textsuperscript{456} [1912] AC 673.
\textsuperscript{457} Ibid 691-692, 689.
\textsuperscript{458} Ibid 690.
\textsuperscript{459} Ibid 692.
The preferred approach chosen and proposed for adoption under this thesis is for a general approach to account for betterment, subject to displacement by reasoned exceptions. The preferred approach is chosen over the other available alternative of a general approach not to account for betterment, subject to exceptions. The reasons for the proposed approach being preferred over the other alternative include the following discussed below.

Firstly, the preferred approach is more consistent with the compensation goal and principle of a damages award. It would be unjust and unfair to impose upon the parties a general approach which would allow the plaintiff to be over-compensated under a system of damages where compensation is the principal and dominant goal.

This would bring the position more in line with other compensating benefits, where there appears to be a growing trend towards a general approach of accountability. Grubb provides the following explanation in relation to these compensating benefits:

> 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.460

Second, the preferred general approach of accountability is also more consistent with corrective justice reasoning and can deliver greater justice and more reasoned outcomes. Finally, the exceptions to the proposed approach can be more appropriately justified on distributive justice reasoning. There would be more reasoned outcomes in relation to the exceptions.

E Policy Considerations Provide Additional Support

Policy considerations can be based upon practical, social, economic or equitable reasons, as opposed to purely legal arguments based upon precedents and reasoning from them or based upon the wording of a statute.461 According to Justice Cardozo,

461 Tate described policy considerations as those considerations ‘based upon social or practical or equitable reasons why a court should decide a present controversy in a given manner’ as contrasted ‘with
‘the final cause of law is the welfare of society’, which would include public policy which is for the good of the collective body.462

It can be argued based upon an economic rationale, that a general approach to account for betterment will have, or is likely to have, the desired beneficial effect of deterring the plaintiff from carrying out any unnecessary or excessive repair or replacement of damaged or destroyed property. This was discussed earlier under Part III A. Ogus’s remark was also referred to, that such an approach would ‘deter the plaintiff from executing unnecessary repairs at the expense of the defendant.’463 This can lead to the desired effect of avoiding or discouraging ‘economic waste’ on the part of the plaintiff. On a broader scale, it can also lead to and encourage more careful management of economic resources by society generally.

It is also arguable that a general approach to account for betterment can avoid or reduce the dangers and risks posed by any undue recognition of consumer surplus. Consumer surplus is ‘the subjective value of goods to the owner in excess of the market value’.464 The risks and dangers associated with recognizing consumer surplus, which appears from the following passage, can be avoided with a general approach accounting for betterment which focuses strongly upon the actual loss suffered by the plaintiff:

Given the differences in individual idiosyncratic tastes, different consumers place different values on particular goods. … [E]conomists conceded that there is no precise science for measuring consumer surplus. It is a speculative concept. Therefore it is almost impossible to ascertain an injured party’s consumer surplus with any certainty. Damages for consumer surplus or loss of amenities are bound to be arbitrary.465

In addition, it is also arguable that a general approach of accountability would generally avoid risks of exaggerated claims.

purely “legal” or logomachical arguments based upon the wording of a statute or the holding of a precedent and reasoning therefrom’: Albert Tate Jr, “Policy” in Judicial Considerations’ 1959 (20) Louisiana Law Review 62, 62


463 Ogus, above n 135, 134.


465 Ibid.
The questions as to what loss the plaintiff suffered and how it should be measured, in the context of damage or destruction caused to the plaintiff’s property, should be answered by not only applying the reinstatement measure of loss, but also by subjecting it to a deduction for betterment where its existence can be confirmed. However, where there are exceptional circumstances which can justify why an account for betterment ought not to be made, the approach allows for this to be considered. The exceptions will be dealt with in the next chapter.

A general approach to account for betterment, subject to reasoned exceptions, ought to be adopted as it offers a principled approach towards resolving the betterment predicament. Most importantly, it conforms with and is consistent with the compensation goal and principle governing a damages award. It supports an indemnity-based system of compensation for damages in tort and contract. Not only is the approach based upon sound remedial principles under the law of damages, it is also supported by the corrective justice theory and basic notions as to what would be fair and just. It has been therefore been described as a ‘principled approach’.466

In conclusion, the following passage is instructive and brings into sharp focus the main thrust of the betterment predicament and why a general approach to account for betterment should be adopted:

We return to the question of the principle of deduction for betterment. … The contrary argument is that it is the defendant’s wrong that has caused the need for replacement, and that the plaintiff should not be compelled against his will to invest his money in a replacement he might not have chosen to make. These arguments, however, do not appear to be conclusive. The fact that the defendant is a wrongdoer is not sufficient reason for over-compensation. The argument that the plaintiff is forced to make an unwanted investment can be met by conceding the point and increasing the damages by any loss suffered by the plaintiff’s making such an investment. The

plaintiff’s interest can be met by putting the onus of proof on the defendant to show that the plaintiff does not suffer any loss by this reason.467

The proposed general approach to account for betterment, with the flexibility of being displaced by reasoned exceptions (as will be discussed in the next Chapter), will put in place a more principled approach towards resolving the betterment predicament, with delivery of more just and reasoned outcomes to the parties involved.

467 The passage is from the Ontario Court of Appeal’s judgment in James Street Hardware & Furniture Co v Spizziri 43 CCLT 9; 62 OR (2d) 385 [67], quoting Waddams, The Law of Damages (Canada Law Book,1983), 162 [281], 165 [287]. Proof of betterment (referred to in the above passage) will be dealt with in Chapter 7.
CHAPTER 5
EXCEPTIONS TO THE GENERAL APPROACH OF ACCOUNTABILITY

I  INTRODUCTION

II  IDENTIFYING THE EXCEPTIONS: ‘EXCEPTIONAL SITUATIONS’
   A  Necessity to Comply with Requirements of the Law
   B  Necessity to Urgently Reinstate in order to Resume the Plaintiff’s Business
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   B  Absence of Choice in Remediation Carried out to Mitigate Loss: Modification of Mitigation Rule of Avoided Loss
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IV  CONCLUSION
The previous chapter proposed and argued for a general approach to account for betterment, subject to reasoned exceptions. Essentially, it argued that the proposed general approach of accountability is a principled approach, consistent with and supported by the compensation goal and a corrective justice explanation of the law of damages, and would lead to more just and reasoned outcomes. This chapter inquires into what can potentially qualify as exceptions to the general approach to account for betterment, together with the rationalisation and justifications in support thereof. It is essentially argued in this chapter that exceptional circumstances can justify displacing the general approach to account for betterment, and that these can be rationalised and justified under the law, particularly by distributive justice reasoning.

Part II analyses the case law in this area, to identify and categorise what can possibly be recognised as ‘exceptional’ situations or circumstances which can serve as exceptions to the general approach of accountability. Four categories of exceptions are identified. Part III examines the exceptions further and discusses how they can be rationalised and justified. Part IV concludes the chapter.

Before inquiring into the exceptions, it is helpful to make two preliminary points. First, as the analysis of cases will show, it is possible for some of these cases to fall within more than one category of exception, as their factual scenarios are often broad enough to accommodate this. Second, although the courts must continue to retain the discretion and flexibility to accommodate further exceptions, there must be a clear delineation of the scope and ambit of any further exceptions, given that the exceptions in allowing the plaintiff to be over-compensated would in principle infringe the compensation goal. Situations to be exempted from application of the compensatory goal must therefore satisfy as being ‘exceptional’ before they can be recognised. Rix LJ in Voaden v Champion makes a similar point:
Cases where a claimant recovers more than he has lost, as will happen where betterment occurs without a new for old deduction, ought as a matter of principle [to] be exceptional.468

Likewise, Cresswell LJ in *Kuwait Airways Corporation v Iraqi Airways Co*, observed that it ‘ought to be exceptional not to make a deduction for betterment’.469 Lord Nicholls’ observation in *Lagden v O’Connor*, that the exceptions must be ‘sensible and reasonable’ and have ‘regard to practical realities’,470 is also noteworthy.

II IDENTIFYING THE EXCEPTIONS: ‘EXCEPTIONAL SITUATIONS’

The case law analysed below can provide support for at least four categories of exceptional situations or circumstances, where it can be reasonably argued that an account for betterment should not be allowed. These exceptional circumstances would therefore be able to displace the proposed general approach to account for betterment.

A Necessity to Comply with Requirements of the Law

There are a number of cases where in reinstating his destroyed or damaged property the plaintiff was obliged to comply with certain legal or regulatory requirements current at the time, which led to a higher reinstatement cost incurred.

*Bushells*471 is one such example. As explained in Chapter 3 (under Part III A 2), a tank transporter driven by the defendant’s servant collided with the awning attached to the plaintiff’s building. The awning extended over the footpath of the street. As the collision damaged the awning and rendered it unsafe, the plaintiff was obliged to comply with certain requirements pursuant to ordinances made under *The City of Brisbane Acts, 1924 to 1945*. Under the regulations the plaintiff was legally obliged to erect a more substantial structure. Therefore, upon the damaged awning being reinstated in a manner which complied with the regulation, the plaintiff obtained a better and more valuable fixture than the original it replaced. The majority judges

468 [2002] EWCA Civ 8, [85] (Rix LJ, with whom Schiemann and Hale LLJ agreed).
469 [2004] EWHC 2603 (Comm), [321].
470 [2004] 1 All ER 277, [6].
471 (1948) St R Qd 79.
allowed a deduction for betterment from the plaintiff’s damages, justifying this on the ground that the plaintiff would otherwise be ‘enriched’.472

The majority’s decision to account for betterment can be challenged on the ground that they failed to give due and proper consideration to the obligatory legal requirement imposed upon the plaintiff when carrying out the reinstatement. The dissenting judgment of Stanley J is to be preferred, as it raises and highlights the plaintiff’s lack of choice in having to comply with the ordinances when it carried out the reinstatement works. Under the circumstances as he outlined below, Stanley J was unable to agree with the majority’s decision. He made clear that although the defendant’s negligent driving ‘so altered the condition of the old awning that it was rendered dangerous and imperiled the safety of users of the street’473 it ‘remained repairable’.474 He added:

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 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.475

Stanley J noted further that ‘[n]o such circumstance of compulsion exists in any of the cases relied on by the defendant’.476 He concluded that in the circumstances of the case, he could ‘not agree that if the defendant pays the full cost of the repairs the plaintiff is enriched’.477 Stanley J’s judgment can be interpreted in two ways. One interpretation is that Stanley J found an absence of betterment. The other interpretation is that even if betterment was found to exist, based on the circumstance that the plaintiff was compelled under the law and had no choice but to carry out the reinstatement as undertaken, it would be inappropriate to deduct for betterment.

472 Ibid 92. The word ‘enriched’ is used in the sense that the plaintiff would be over-compensated.
473 Ibid 93.
474 Ibid.
475 Ibid.
476 Ibid 94.
477 Ibid.
In this case, not only was there an obligation upon the plaintiff to comply with the law as to the manner of reinstatement of the damaged awning, but the plaintiff would have had to face the prospect of being subjected to legal prosecution if it failed to comply with the regulation, in addition to having to reimburse the local council for any remedial works deemed necessary to comply with the regulation.

It is therefore argued in this thesis that the circumstance of being legally obliged, and consequently not having any other choice in carrying out the reinstatement, other than in a manner which would result in betterment, should be recognized as exceptional enough to justify as an exception to the general approach to account for betterment. The terms ‘unavoidable’, ‘incidental’ and ‘inevitable’ can be used to describe the nature of the betterment which can result from the type of circumstances as in the above case, where betterment effectively was forced upon the plaintiff by the need to comply with legal requirements, including in this case the threat of prosecution and liability to reimburse a third party.

Another case in point is Roberts v Rodier.\textsuperscript{478} In constructing a roadway leading to a driveway to his house, the defendant not only departed from council-approved plans, he also excavated part of the plaintiff’s land. The excavation caused the plaintiff’s land to slip, following heavy rains. The plaintiff sued in trespass, negligence and nuisance for an award of damages. Given that any reinstatement works to be carried out must meet the requirements of Council, Campbell J explained how he would deal with the issue concerning betterment in the context of remediation works:

\begin{quote}
I now turn to apply the principles concerning betterment. Giving the plaintiff the full cost of the Option 1 works will result in the plaintiff’s land being in a better situation than it was prior to the torts being committed. The defendant has shown that performing only part of the Option 1 works would suffice to remedy the plaintiff’s damage, insofar as it relates to slippage. There is no evidence concerning whether the Council would allow only part of the Option 1 works to be carried out on its land when they would only partly remedy the slippage problems of the plaintiff’s land. If the Council would not permit the works to be carried out, and would require the whole of the Option 1 works to be carried out, the situation would arise where the only practical way of remedying the damage which the defendants caused would necessarily involve the plaintiff in receiving betterment. In that situation, the appropriate way of applying the
\end{quote}

\textsuperscript{478} [2006] NSWSC 282 (New South Wales Supreme Court).
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.  

The circumstance upon which Campbell J justified his decision not to account for betterment was the fact that the plaintiff had no choice but to carry out the necessary remediation work, which would not only have to meet Council’s approval, but also at the same time result in betterment. This decision supports an exception to the general approach of accountability, with the plaintiff being legally obliged to comply with approved plans and not having any choice but to carry out reinstatement in a manner which gives rise to betterment. Similar to the earlier case discussed above, the resulting betterment was, in a sense, ‘forced’ upon the plaintiff by the need to comply with the law. Such forced betterment should therefore be excepted from any deduction.

In a more recent case, *Gwam Investments Pty v Outback Health Screenings Pty Ltd* ('*Gwam*') the plaintiff carried out reinstatement in a situation where it had to comply with the requirements of the law, as well as resume its business without delay. The plaintiff operated a business providing health services for mining companies in remote areas. The defendant agreed to construct a mobile health unit for the plaintiff which the plaintiff could fit onto the rear of a truck. When constructed, the combined weight of the mobile health unit which was fitted onto the Isuzu truck (‘the first truck’) which the plaintiff purchased for operating its mobile health business, exceeded the legal limit permitted for driving on public roads. Faced with this problem, the plaintiff purchased another more expensive truck (‘the second truck’) to replace the first truck, in order that it could lawfully travel on public roads carrying the mobile health unit.

The trial judge held that the plaintiff was entitled to damages for negligence in tort, breach of contract and under provisions in the *Sale of Goods Act 1985* (SA). The Full Court dismissed the defendant’s appeal against liability. It allowed the plaintiff’s cross-appeal (relating to damages) to recover an additional sum of about $29,000, being the extra cost incurred for the second truck (that is, the difference in cost of the first and second trucks). Although betterment was alleged on the ground that the second truck was of greater capacity and greater value than the first truck, the majority judges in the Full Court (Gray and Kelly JJ) held that this was not made out by the defendant. Gray J

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479 Ibid [151].
480 [2010] SASC 37 (Full Court of the Supreme Court of South Australia) (Gray, White and Kelly JJ).
stated that ‘the onus of proving the quantum of any unjustified betterment’ was on the
defendant’ and that there was ‘no real attempt’ by the defendant to prove ‘betterment or,
for that matter, unjustified betterment’.\textsuperscript{481} He added that there was ‘no evidence led as
to the greater value’ of the second truck, or ‘the impact on gross net profitability in the
long term.’\textsuperscript{482}

The minority judge, White J, however, held a different view. His Honour stated that it
‘would be inappropriate’ to make any deduction ‘on account of betterment’.\textsuperscript{483} He
reasoned that as ‘the plaintiff was left with a mobile testing unit which was unusable’\textsuperscript{484}
it had no choice but to acquire a ‘bigger and more expensive vehicle’,\textsuperscript{485} and that this
‘can be seen as an incident of a mitigation expense’.\textsuperscript{486} It can be inferred or argued
from White J’s reasoning that it would be inappropriate to account for betterment, in a
situation where remediation results in betterment as a consequence of the plaintiff’s
compliance with requirements of the law. This supports an exception to the proposed
general approach of accountability on the ground that the betterment resulted from the
need to comply with the law.

There are other cases which can provide further discussion as well as support to the
exception proposed. One case is \textit{Harbutt’s},\textsuperscript{487} where town planning requirements, then
in force, compelled the plaintiff factory owner to rebuild the burnt-out factory with a
new one, which was different in design to the original. Denning LJ pointed out that the
plasticine company had to ‘put up a new factory of two storeys’, as it was ‘not allowed
to rebuild the old mill (which was five storeys high) for use as a factory’\textsuperscript{488} under
planning requirements current at the time of reinstatement. Therefore, on Denning LJ’s
analysis, if there was any resulting betterment, the circumstance of having to comply
with town planning requirements would allow this case to be brought within the
exception proposed.

\textsuperscript{481} Ibid [58].
\textsuperscript{482} Ibid.
\textsuperscript{483} Ibid [162].
\textsuperscript{484} Ibid.
\textsuperscript{485} Ibid.
\textsuperscript{486} Ibid.
\textsuperscript{487} [1970] 1 QB 447.
\textsuperscript{488} Ibid 467.
The point made in relation to Harbutt’s is also supported by Nathan J in State Transport, as appears from the following passage in his judgment when he compared and distinguished Harbutt’s from the case before him:

I accept the evidence that it was impracticable, given all the circumstances, to replace the damaged bridge with a 1915 model. However, I accept the evidence that it could, technically, have been done. There is no legal obligation vesting in the Railways to have replaced the bridge with the superior model used rather than the 1915 model. To this extent, this case is to be distinguished from Harbutt’s Plasticine … 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.

Campbell JA in Gagner Pty Ltd v Canturi Corporation Pty Ltd also supports the above point made in relation to Harbutt’s:

A qualification on this principle is that it is not necessary to bring to account, in assessing damages, the extent to which benefits are derived from making good the damage, if the only practicable way of making good the damage involves conferring those benefits. … Reinstatement of the old factory [in Harbutt’s] was not legally permissible, so a new factory was built.

A similar view has also been taken in New Zealand in Badham v Williams. This case involved supply arrangements by a statutory authority. The defendant negligently drove his motor vehicle into a power pole, which resulted in the power main being damaged and the power supply to a detached flat on the plaintiff’s land to be disrupted. It would have cost about £20 to reinstate the power main as it stood before the accident, but this was made impossible by certain arrangements put in place by the Auckland Electric Power Board. The plaintiff was therefore obliged to have a different type of installation at a higher cost of about £136. In this situation where the plaintiff was obliged to spend more to comply with the electricity board’s requirements, Richmond J held that it would be inappropriate to deduct for betterment:

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489 Ibid.
491 [1970] 1 QB 447
493 [2009] NSWCA 413 (Campbell JA, with whom MacFarlan JA and Sackville AJA agreed).
495 Gagner Pty Ltd v Canturi Corporation Pty Ltd [2009] NSWCA 413, [118]. MacFarlan JA and Sackville AJA agreed with Campbell JA.
496 (1968) NZLR 728.
No allowance should be made in favour of a defendant for betterment in a case where the plaintiff has had no reasonable choice except to replace or repair in order to obtain restitution in integrum as regards the use and enjoyment of his property. This appears to accord with the decision in *The Gazelle*.497

It appears from the above analysis that there is considerable support in the cases for an exception not to account for betterment, where the plaintiff as a matter of necessity is obliged to reinstate in a particular manner, in order to comply with requirements of the law.

B Necessity to Urgently Reinstate in order to Resume the Plaintiff’s Business

The cases discussed below are examples where the plaintiff’s only available option was to reinstate urgently in order to resume its business and mitigate its loss of business.

In *Paper Australia*,498 discussed earlier in Chapter 3 (under Part IV B 1), 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. The plaintiff replaced it with a new cylinder as it could not secure a second hand replacement. Bongiorno J pointed out that the ‘only option available to the plaintiff to replace the cylinder was to acquire a new one’.499 He emphasised 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.’500 In taking into account these findings and treating them as significant circumstances, Bongiorno J reached the conclusion that the plaintiff was ‘not obliged to give credit to the defendant for the better MG cylinder’.501

The court’s finding was that the replacement of a new cylinder was the ‘only option available to the plaintiff’.502 This is beyond being merely a reasonable option; it clearly exceeds the threshold required by the test of reasonableness, which is applied when a choice is required to be made between the reinstatement and diminished value measures

497 Ibid 729.
498 [2007] VSC 484 (Supreme Court Victoria) (Bongiorno J).
499 Ibid [350].
500 Ibid.
501 Ibid [363].
of loss. Merely satisfying the test of reasonableness is too low a threshold, as generally this would already be satisfied when the reinstatement measure of loss is applied. Further, the likelihood of substantial market loss if production was not resumed urgently, which can possibly jeopardize or ruin the plaintiff’s business, made it quite plain that replacement as carried out was the only option open to the plaintiff at the relevant time.

In the previous section, *Gwan* 503 was discussed in support of the first exception concerning the need to comply with requirements of the law. This case also provides support for a second exception, based upon the circumstance that the plaintiff carried out reinstatement urgently in order to resume its business. 504 It is argued that as the plaintiff had no choice but to carry out reinstatement to resume its mobile health business urgently, any resulting betterment should accordingly be exempted from the general approach of accountability.

*Harbutt’s* 505 also provides support for this exception to be recognised. The plaintiff had no choice but to reconstruct a new factory building. They did this as quickly as they could to resume their business of making plasticine and to mitigate their loss of profits. All three judges alluded to this. Lord Denning MR said that when the factory was destroyed ‘the plasticine company had no choice’ 506 as it was ‘bound to replace it as soon as they could, not only to keep their business going, but also to mitigate the loss of profit’. 507 Widgery LJ said that ‘it was reasonable for the plaintiffs to rebuild their factory, because there was no other way in which they could carry on their business and retain their labour force’. 508 Cross LJ also similarly remarked that ‘it was obviously right for the plaintiffs to rebuild and re-equip their factory and start business again as soon as possible.’ 509 Assuming that betterment can be made out, the circumstance of having to urgently replace their factory building to resume their business should be able support an exception to the general approach of accountability.

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504 Ibid 162. This circumstance is drawn or inferred from White J’s judgment.
506 Ibid 468.
507 Ibid.
508 Ibid 473.
509 Ibid 475-476.
The English case of *Dominion Mosaics and Tile Co Ltd v Trafalgar Trucking Co Ltd* provides some support for this exception to be recognized, assuming that betterment can be made out. The plaintiff’s building used for conducting its business was destroyed by fire as a result of the defendant’s negligence. As it was impracticable to rebuild, to keep the plaintiff’s business going the plaintiff bought a 36-year lease of another building which had 20 per cent more floor space than the plaintiff’s earlier premises. The court held that the plaintiff was entitled to claim the full costs of acquiring the new premises without any deduction for betterment, presumably because the plaintiff had to urgently reinstate in order to resume its business and mitigate further loss of profits. As Taylor J explained:

> Although the ground area was somewhat greater at Waterden Road than their original premises, I consider that this falls within the sort of betterment for which no reduction should be made. … Here it was a question of finding some existing premises which most nearly matched the respondent’s requirements. Against the extra floor space there would have to be considered the saving in lost profits of obtaining Waterden Road quickly, and the need to adapt and modernise premises not purpose-built for the respondents.  

It is submitted that where the plaintiff’s only available option is to reinstate urgently in order to resume its business and mitigate its loss of business profits, this should be recognized as an exceptional circumstance which can justify as an exception to the general approach to account for betterment.

**C Necessity to Reinstate Items with Long Life or Never Intended to be Replaced**

It is submitted that the plaintiff should be able to recover full reinstatement costs incurred even if betterment arises where buildings or chattels with long or unlimited life spans are damaged or destroyed and need to be reinstated. This is because an argument can be reasonably made that the plaintiff would never have had to replace such property, either in the plaintiff’s lifetime or that of its business, except for the defendant’s default. This should be recognized as the third exception to the general approach to account for betterment.

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510 [1990] 2 All ER 246.
511 Ibid 263.
As buildings can last indefinitely the term ‘non-wasting assets’ is applied to them. Chattels are often categorized as ‘wasting assets’ as they usually require periodic replacement. Moffit P in *Hoad* made some pertinent observations about the characteristics and consequences of wasting and non-wasting assets when comparing farm equipment with buildings:

To replace the destroyed building [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.512

Moffit P added that he did not think that the decision in *Harbutt’s*513 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.’514

In *Von Stanke v Northumberland Bay Pty Ltd*515 the plaintiff’s vessel was severely damaged in a collision with the defendant’s vessel. The collision was caused by the defendant’s negligence. Not being able to find a second hand vessel to replace it, the plaintiff ordered a new vessel, built to similar specifications as the original vessel. In considering whether the plaintiff’s claim should be adjusted for betterment, Lovell J stated that ‘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.’516 Lovell J did not think it would be appropriate to account for betterment in a situation where in the ordinary course of events the plaintiff would never have replaced the property involved.

It is reasonable to argue that where the plaintiff would never have to replace his property, except for the defendant’s default, that this would satisfy as an ‘exceptional’

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512 [1977] 1 NSWLR 88, 94.
516 Ibid [130].
situation and can be justified as an exception to the general approach to account for betterment.

**D  Necessity to Reinstate as Carried Out by Plaintiff in Absence of Any Other Option**

It can be argued, more broadly, that where there is an absence of any other available options, apart from carrying out the requisite replacement or repair as undertaken by the plaintiff, that this should satisfy as an exceptional circumstance, and be recognised as an exception to the general approach of accountability. The discussion below examines a number of cases which offer support to this proposition.

In *South Parklands*, the defendants rendered negligent advice to the plaintiff’s architects and engineers, which resulted in a defective dual-purpose playing-field constructed for the plaintiff. One of the defendant’s argument was that the plaintiff ‘should give the defendant credit for betterment’ because the plaintiff would be ‘getting a new playing surface ahead of time’. Debelle J was of the view that this was ‘one of those cases where a plaintiff has no other reasonable choice but to replace defective workmanship’. If betterment existed, an account for betterment should be considered inappropriate, owing to an absence of any other available option.

A similar conclusion can be drawn from *Hyder* (assuming the existence of betterment can be confirmed), as Sheller JA pointed out that the plaintiff in this case ‘had no choice but to replace the defective pavement with new pavement.’

In the English case of *Bacon v Cooper (Metals) Ltd*, the defendant in breach of contract delivered to the plaintiff for fragmentation a bale of metal, which included a large lump of steel, which broke up the plaintiff’s fragmentiser (which included a rotor which 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 awarding

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517 [2004] SASC 81. This case was also discussed in Chapter 3 (under Part III A.5).
518 Ibid[126].
519 Ibid.
520 Ibid.
522 [1982] 1 All ER 397.
the plaintiff the full cost of a new rotor, Cantley J emphasised that there was ‘nothing else’ the plaintiff could do other than purchase a new rotor to replace the damaged rotor:

When they [the defendants] suddenly put him in that situation there was nothing else he could do. He could not have gone out and bought a rotor with only 3¾ years of life, it had to be a new one.\footnote{Ibid 401.}\footnote{(1844) 2 W Rob 279; 166 ER 759 (Adm).}

Cantley J referred to Dr Lushington’s statement in \textit{The Gazelle}\footnote{[1970] 1 QB 447.} and Widgery LJ’s judgment in \textit{Harbutt’s},\footnote{\textit{Bacon v Cooper (Metals) Ltd} [1982] 1 All ER 397, 402.} to affirm the view that ‘the law will not place this burden on the plaintiff to relieve the defendant from some of the unavoidable consequences of their wrong’ and the plaintiff is therefore ‘entitled to recover the whole cost of the replacement rotor.’\footnote{On the facts disclosed in this case, it is also possible to argue that the second exception can similarly apply, in light that there was a necessity to urgently reinstate in order to resume the plaintiff’s business.} In Cantley J’s view it would be inappropriate to account for betterment where there is an absence of other options open to the plaintiff, other than to reinstate as he did.\footnote{[1970] 1 QB 447, 476.}

Another case which can possibly fall within this exception is \textit{Harbutt’s}, where in delivering judgment, Cross LJ expressed the view that it would be inappropriate to account for betterment where the only option open to the plaintiff was to build a new factory to replace the one destroyed, as undertaken by the plaintiff:

It is not in practice possible to rebuild and re-equip a factory with old and worn materials and plant corresponding to what was there before, and such benefit as the plaintiffs may get by having a new building and new plant in place of an old building and old plant is something in respect of which the defendants are not, as I see it, entitled to any allowance.\footnote{[2008] EWHC 2494 (QB). The plaintiff argued that to the extent that resurfacing of the damaged driveway might bring some improvement in the appearance of the plaintiff’s driveway, or even in its structure, this was ‘the inevitable consequence of the repairs’: at [18].}

In \textit{Glen Haysman v Mrs Rogers Films Ltd},\footnote{\[2008\] EWHC 2494 (QB). The plaintiff argued that to the extent that resurfacing of the damaged driveway might bring some improvement in the appearance of the plaintiff’s driveway, or even in its structure, this was ‘the inevitable consequence of the repairs’: at [18].} assuming that betterment could be satisfied, the court did not think that it would be appropriate to allow a deduction for betterment where resurfacing of the plaintiff’s driveway (which was damaged by the defendant’s filming activities) would be the only available option.
In the Scottish case of *Arthur Clelland v Quinn Direct*, the court considered it inappropriate to account for betterment when the plaintiff ‘had no choice but to accept … the need to have a full re-spray to have his vehicle properly repaired’ where the damaged area to be repainted as a result of the accident damage constituted only 25 per cent of the vehicle’s surface. The court found that the ‘re-painting of the whole vehicle gave rise to a significant degree of betterment given its age and condition at the time of the accident’ and referred to it as an ‘incidental and (unavoidable) benefit’ and also as a ‘necessary’ betterment.

The above examples show that this exception may include an extensive range of cases. It is therefore important not to unduly extend the scope of this exception.

### III RATIONALISING AND JUSTIFYING THE EXCEPTIONS

The discussion in the previous Part recognized at least four categories of exceptional circumstances which can, or should displace the general approach to account for betterment. The analysis in this Part examines the question as to how the exceptions can be rationalised and justified under the law.

**A The Impossibility of Otherwise Effecting Such Indemnification: Unavoidable Betterment; No Choice in Remediation**

Dr Lushington’s judgment delivered in the early maritime case of *The Gazelle* provides a good starting point in seeking the basis upon which the exceptions to the general approach to account for betterment can be rationalised and justified. Dr Lushington made it clear that the plaintiff’s right against the defendant is for *restitutio*. What can be drawn or inferred from his judgment is that, if the plaintiff derived ‘incidentally a greater benefit than mere indemnification’ and this ‘arises only from the impossibility of otherwise effecting such indemnification’ this can serve to justify allowing the plaintiff to retain the betterment without having to account for it. The

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530 Case No A111/08 (22 October 2010, Sheriff CNR Stein).
531 Ibid.
532 Ibid.
533 Ibid.
534 (1844) 2 W Rob 279; 166 ER 759.
reason for this is because the law will not expose him to, or place upon him such a
‘burden’. The relevant portion of Dr Lushington’s judgment is set out below in full:

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.535

What can be inferred from Dr Lushington’s judgment is that it would be justifiable
under the law, not to account for betterment in situations, where there is an
‘impossibility of otherwise effecting such indemnification’.536 One way of interpreting
this is to view the plaintiff as not having been over-compensated. This interpretation
should, however, be rejected as it requires the concept and meaning of ‘indemnification’
to be overly extended or stretched. The better interpretation is to view the plaintiff as
having been justifiably over-compensated; this fits into the scheme of exceptions under
a general approach to account for betterment as proposed in this thesis.

All the four exceptions with their exceptional circumstances as discussed in the
previous section, with betterment resulting from some sort of necessity (whether a legal,
or business, or other more general necessity), can fall within and be rationalized and
justified under what Dr Lushington describes as ‘arising only from the impossibility of
otherwise effecting such indemnification’. Further, as Dr Lushington puts it, the law
will not place upon the plaintiff the ‘burden’ of having to bear the additional expense of
betterment arising under such circumstance. In addition, when Dr Lushington stated
that the ‘the party in fault must bear the inconvenience’,537 it can be reasoned that this
would include the defendant having to bear ‘the inconvenience’ of having to over-
compensate the plaintiff.

535 Ibid 760.
536 Ibid.
537 Ibid.
The above reasoning is also supported by Sheller JA’s analysis in *Hyder*,\(^{538}\) as discussed earlier in Chapter 4 (Part II C). In adapting (rather than adopting) Dr Lushington’s approach in *The Gazelle*,\(^{539}\) Sheller JA shifted the approach from one which does not account for betterment, to one which allows it, but at the same time calls into question whether the alleged betterment can be avoided:

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.\(^{540}\)

As appears from the above discussion, there is clearly a need to try to reconcile or counter-balance the concern not to over-compensate the plaintiff, with the concern not to impose upon the plaintiff any undue burden or loss. It is therefore argued in this thesis that the question whether betterment was avoidable or not (which in turn, is linked to the issue of whether the plaintiff had a choice or not in the remediation carried out) can serve as, or provide a criterion or test upon which the exceptions to a general approach to account for betterment can be based.

In *Hyder*\(^ {541}\) Sheller JA pointed out the significance of the presence or absence of ‘choice’ in carrying out remediation, which in turn would affect the issue of the avoidability of betterment:

> The facts in *Hoad* and *British Westinghouse* are distinguishable from the facts in this case. The plaintiff [in this case] had no choice but to replace the defective pavement with new pavement. It could not do so by paying less for a four year old pavement.\(^ {542}\)

Sheller JA did not find it appropriate to account for betterment on the facts in *Hyder*,\(^ {543}\) because he found that any resulting betterment would be ‘unavoidable’, or as he put it where the plaintiff had ‘no choice’\(^ {544}\) as to how remediation was to be carried out.

\(^{538}\) Ibid.

\(^{539}\) (1844) W Rob 279; 166 ER 759.

\(^{540}\) *Hyde* [2001] NSWCA 313, [30].

\(^{541}\) Ibid.

\(^{542}\) Ibid [55].

\(^{543}\) Ibid.

\(^{544}\) Ibid. It is also possible to argue that betterment was found not to exist on the facts adduced, based on Sheller JA’s statement 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’.  

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Giles JA, the other majority judge, also reached the same conclusion based upon similar reasoning, as indicated below:

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.\textsuperscript{545}

\textbf{B Absence of Choice in Remediation Carried out to Mitigate Loss: Modification of Mitigation Rule of Avoided Loss}

In Chapter 4 (under Part IV C) the mitigation ‘rule of avoided loss’ was explained and discussed, in the context of providing support for a general approach to account for betterment. Under the mitigation rule of avoided loss, if the plaintiff carried out mitigation to avoid loss and thereby avoided more loss than what the law required of him, such loss would have to be taken into account and deducted from the plaintiff’s damages.

The mitigation rule of avoided loss was discussed in the English House of Lords case of \textit{Lagden v O’Connor}.\textsuperscript{546} In this case the defendant negligently damaged the plaintiff’s car. It was held that the plaintiff could recover the credit hire fee incurred for a replacement car during the period of repair, in addition to the repair costs, on the ground that he had no choice but to enter into the credit hire agreement. In reaching this decision Lord Hope, who delivered the leading speech, queried what impact mitigation would have upon ‘benefits’ (which would include betterment) resulting from situations where the plaintiff had no choice in his remediation efforts. Lord Hope questioned, in particular, if the mitigation rule of avoided loss should be modified for situations where the plaintiff had no choice but to receive benefits through reinstatement carried out to mitigate loss.

Although Lord Hope accepted that benefits resulting from mitigation must be brought to account when assessing the plaintiff’s damages, he questioned the impact of mitigation upon such benefits where the plaintiff had no choice in his remediation efforts in the following passage:

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{545} Ibid [105]-[107].
  \item \textsuperscript{546} (2004) 1 All ER 277. Nicholls, Slynn and Hope LJJ delivered the majority decision.
\end{itemize}
\end{footnotesize}
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.547

Lord Hope referred to Dr Lushington’s judgment in *The Gazelle*,548 where he stated 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.’549 His Lordship compared *Harbutt’s*550 where there was no choice on the plaintiff’s part, with *British Westinghouse*551 where the plaintiff had a choice. Lord Hope concluded that if the plaintiff had no other choice available to him, the resulting benefit (extending to betterment) must be seen as being merely incidental to mitigation of his loss, and it would therefore be inappropriate to deduct such benefit. As explained more fully by Lord Hope in *Lagden v O’Connor*:

Of course, the facts in these two cases [*British Westinghouse* and *Harbutt’s*] were quite different from those in this case. But I think that the principles on which they were decided are of general application, and it is possible to extract this guidance from them. It is for the defendant who seeks a deduction from expenditure in mitigation on the ground of betterment to make out his case for doing so. It is not enough that an element of betterment can be identified. 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.552

Lord Hope looked to policy to support the above view:

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547 Ibid [30].
548 (1844) 2 W Rob 279; 166 ER 759.
549 *Lagden v O’Connor* [2004] 1 All ER 277 [31].
551 [1912] AC 673.
552 [2004] 1 All ER 277, [34].
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.\textsuperscript{553}

It is argued on the analysis of Lord Hope in \textit{Lagden v O'Connor}\textsuperscript{554} that the mitigation rule of avoided loss should be modified to the effect that it would be inappropriate to account for resulting benefits (including betterment) where there is a lack of choice in remediation carried out to mitigate the plaintiff’s loss. This would justify the exceptions to displace the general approach to account for betterment in situations involving mitigation as discussed above.

\textit{C Rationalised by Distributive Justice Reasoning}

In the previous chapter (Chapter 4, Part IV B), the general approach to account for betterment was rationalised upon corrective justice’s conception of a damages award, with its focus upon the plaintiff’s loss, to the exclusion of non-compensatory considerations. As explained earlier (in Chapter 2, Part III A), corrective justice links only the two parties to the action based upon a relationship of correlativity and in re-establishing the initial inequality of the gain and restoring it to the other party, corrective justice ignores considerations which are extraneous to the notion of compensation, such as the individual interests of the parties, or other unilateral considerations which may favour or disfavour either of the parties.

The exceptions to the general approach to account for betterment are, on the other hand, rationalised upon distributive justice reasoning as they draw in non-compensatory considerations and do not focus exclusively upon the plaintiff’s loss. Distributive justice allows the plaintiff to be over-compensated under the exceptions to the general approach to account for betterment. In other words, it allows windfall gains to be conferred upon the plaintiff under the exceptions.

Under distributive justice reasoning, considerations extraneous to the compensation goal and unilateral considerations concerning or favouring one party can be taken into account. Thus, all the unilateral considerations which favour the plaintiff under the four

\textsuperscript{553} Ibid [40].

\textsuperscript{554} (2004) 1 All ER 277, [34].
exceptions, can be taken into account to support not deducting for betterment. Under the four exceptions, the unilateral considerations favouring the plaintiff include the following: the plaintiff’s unilateral need to comply with the law, to resume its business urgently, to reinstate items which the plaintiff would never have had to, and to carry out reinstatement in a particular way without any choice. In addition, under distributive justice reasoning, one party, the defendant in this case, cannot complain of being sacrificed to advance the interests of the other party, that is, the plaintiff.

As distributive justice allows unilateral and non-compensatory considerations to be taken into account, it can (unlike corrective justice) take into account the ‘worthiness’ of persons. It can therefore be argued that under the exceptions, the plaintiff can be regarded as the worthier of the two parties for him to be over-compensated.

IV CONCLUSION

The analysis of case law in this chapter identified the following four categories of exceptional circumstances which can be justified as exceptions to the general approach to account for betterment: first, where there is a legal necessity for the plaintiff to comply as to how reinstatement should be carried out; second, where the plaintiff as a matter of business necessity must urgently carry out reinstatement to resume its business; third, where the plaintiff is required as a matter of general necessity to reinstate property with a long life span, or was never intended to be replaced by the plaintiff (where the issue of ‘planned replacement’ may be relevant); and fourth, where there is a general necessity to reinstate in the manner as carried out by the plaintiff in the ‘absence of any other option’.

In considering the question as to how the exceptions can be justified, Dr Lushington’s judgment in The Gazelle where he referred to an ‘impossibility of otherwise effecting such indemnification’ provided a good starting point. The exceptions, justified under the law and distributive justice reasoning, offers a just, reasoned and principled approach to allow over-compensation to the plaintiff under the exceptional circumstances identified.

555 (1844) W Rob 279; 166 ER 759, 760.
The four categories of exceptions are not exclusive, with overlaps expected, given that some categories are more generalized or broader and would therefore be able to accommodate a wider range of situations. Cases can also fall within more than one category, either based on the same facts or on different facts in the case. *Harbutt’s*[^556] is an example where all of the four exceptions can apply depending upon the particular facts emphasized.

Although it may be argued that broader categories may be more useful, it is important to ensure that the exceptions should not be unduly extended, given that they run counter to the compensation goal in allowing over-compensation to occur. It would therefore be prudent to keep the exceptions within clearly delineated categories and marked by well defined criteria.

Notwithstanding the need expressed above to not unduly extend the exceptions, the list of exceptions must remain open. It must, however, be confined to ‘exceptional’ situations, given that they run counter to the compensation principle in allowing over-compensation to occur. The court must be allowed to exercise its discretion and to articulate further exceptions as and when new situations presented to the court reflect a need to do so.

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CHAPTER 6
VALUING THE BETTERMENT

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II VARIOUS APPROACHES AND BASES UPON WHICH TO VALUE THE BETTERMENT
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CHAPTER 6
VALUING THE BETTERMENT

I  INTRODUCTION

Upon making an initial finding of betterment, followed by a further determination that the betterment should be accounted for (and in the absence of any exceptions applying), the next step is for the court to address the question as to how such betterment should be valued in monetary terms. This brings in the third inquiry into betterment, which is addressed in this chapter.

Part II examines the cases affecting this area of law, aimed to identify and categorise the various approaches and bases upon which betterment can possibly be valued. The analysis, in bringing together the cases in this area, provides an insight into the current state of the law relating to the valuation of betterment. Under the analysis, six main approaches to valuing betterment are identified, with their particular circumstances, applicability, strengths and weaknesses highlighted and discussed. Part III discusses a number of salient matters affecting the valuation of betterment, including concomitant disadvantages. Part IV concludes the chapter.

Parties to a betterment dispute must give early and due consideration to the key issue of how betterment should be valued. If, for any reason, the court is unable to determine and assign a monetary value to any betterment found to exist on the facts, no court order can be made for a deduction of betterment from the plaintiff’s damages.

As the analysis of cases below will show, the current state of the law discloses a number of approaches which can be considered when attempting to value betterment. However, given the vast array of factual situations which can possibly arise in betterment disputes and the difficulties they may also raise, the courts have recognised that the list of approaches to value betterment must remain open. Nathan J alluded to this in State Transport when he observed that ‘the diversity of physical and technical situations is so great’ that ‘the list’ of approaches to value betterment ‘could never be closed’.

II VARIOUS APPROACHES AND BASES UPON WHICH TO VALUE THE BETTERMENT

In dealing with a dispute concerning betterment in *State Transport*, Nathan J set out the following four potential approaches as to how betterment can be identified and valued:

1. Betterment may be the *difference in value between the actual cost of reconstruction and the notional cost of replacement* ....
2. Betterment may be the *value of the commercial advantage* obtained within the foreseeable future by having more efficient and superior equipment to that which it replaced.
3. Betterment may be the *value of the cost savings* resulting from the superior replacement.
4. Betterment may be the *value of the extended life* of the reconstructed equipment.

The various approaches (including the above four approaches) which can potentially be used to identify and value betterment are examined below, together with the case law relevant to them.

A Difference between Actual Cost and Notional Cost of Reinstatement

In *State Transport* the betterment value was taken as the difference between the actual reinstatement cost incurred by the plaintiff for its new replacement and the notional cost which the plaintiff would have had to incur if the plaintiff obtained a replica of the original property. ‘Replica’ is used to refer to an exact or close reproduction of the original property.

This case involved the replacement of a new bridge for an old one, when the defendant’s truck negligently struck the underside of the plaintiff’s railway bridge which was designed and built around 1915. Upon engaging consulting engineers, the plaintiff decided to redesign and rebuild a new bridge in order to avoid significant technological and managerial problems, instead of merely replacing the dislodged girder of the old bridge. Nathan J made a finding of betterment, upon accepting that the newly built bridge possessed superior features to the previous bridge, including the following,
that it had a ‘longer life expectancy’; 

562 it was made of ‘more durable materials’; 

563 it had ‘superior physical dimensions’; 

564 it was of ‘greater weight-bearing capacity’; 

565 it could bear heavier duty trains; it was ‘significantly safer’; 

566 and it was ‘less costly to maintain’.

Nathan J awarded the plaintiff the ‘present day costs of constructing a replica’, 

568 instead of the actual reconstruction costs claimed by them, reasoning as follows:

I accept the evidence that it was impracticable, given all the circumstances, to replace the damaged bridge with a 1915 model. However, I accept the evidence that it could, technically, have been done. There is no legal obligation vesting in the Railways to have replaced the bridge with the superior model used rather than the 1915 model.

Nathan J used the first of the four approaches referred to in his judgment (set out in the previous section), namely, that the betterment may be ‘the difference in value between the actual cost of reconstruction and the notional cost of replacement.’

570 He applied this approach owing to the availability of evidence. As Nathan J put it, given that the plaintiffs ‘had available, and produced at the hearing, the design plans of the 1915 bridge’ this would have made it possible for evidence to be given as to the notional cost of replicating the 1915 bridge.

In relation to the ‘commercial advantage’ approach, there was ‘no evidence as to the financial advantages accruing to the Railways by virtue of the superior bridge’. No evidence was also presented as to the ‘cost savings’ approach. As for the ‘extended life’ approach, although Nathan J found ‘strong evidence’ that the new bridge would
have a greatly extended life span, the fact that this would be so far ahead into the future and would also greatly outlast the plaintiff, made it an unsuitable approach.  

The ‘difference between the actual cost and notional cost of reinstatement’ approach is a suitable approach to use if two conditions can be satisfied: that it is possible (physically, practically and legally) to replicate the construction of a replica of the original property; and evidence of such costs can be made available. The nature of the property involved, which in this case was a railway bridge with a long or indeterminate life span, may be an influential factor in making this approach more appropriate than other approaches.

In the course of his judgment Nathan J also raised an important factor to consider when assessing the betterment value, that if the plaintiff’s receipt of betterment brought with it any concomitant disadvantages to the plaintiff, these should be discounted from the betterment sum. The betterment sum must therefore be a ‘net’ sum. This point will be discussed further in Part III.

B Difference in Market Values of Reinstated and Original Property

In Paper Australia, where the plaintiff replaced an old cylinder with a new one in the plaintiff’s paper-making machine and was granted the replacement costs incurred, Bongiorno J was of the view that the betterment sum should ordinarily be the difference in the market values of the reinstated and original property:

[T]he ordinary method of calculating the benefit to the plaintiff of its having acquired a new MG cylinder at the defendant’s expense ... would be to calculate the difference in value of the two MG cylinders and use that sum as the betterment factor.

He found, however, that there was ‘no such evidence’ before the court as to the difference in value between the new MG cylinder and the old one. His Honour

574 On this point, Nathan J stated that there is ‘evidence that the bridge will probably last another century, although the Railways [the plaintiff] may not’: ibid.
575 Ibid 68,620. Nathan J stated that ‘[v]arious estimates were given to the useful life of the damaged bridge. Minimum terms, of 20 to 40 years were suggested, but an average or maximum term was not made clear. However, it is common knowledge that bridges of this type are still in use throughout the State of Victoria more than a century after their construction.’
576 [2007] VSC 484, [149].
577 Ibid [369].
578 Ibid [364].
rejected the defendant’s argument to value betterment by reference to profits allegedly ‘made as a result of having a more efficient MG cylinder’\(^{579}\) with this explanation:

> But all this evidence is beside the point. In the circumstances of this case any claim for betterment would have to be assessed by reference to values, not the resulting profit experienced by the plaintiff.\(^{580}\)

It is unlikely that Bongiorno J’s remarks were intended to limit how betterment should be valued, as he prefaced it with the words, ‘the ordinary method of calculating’.\(^{581}\)

In *Westwood v Cordwell*,\(^{582}\) McPherson J used this approach to quantify the betterment of a reinstated new house which replaced the original, which was destroyed as a consequence of the defendant’s truck colliding into it. The difference between the market value of the new house and the old house was recognised as the betterment value to be deducted from the plaintiff’s damages.

Two observations can be made in relation to the availability and suitability of this approach. First, if the difference in values of the new and old property result in a substantial betterment sum, the plaintiff is likely to end up with recouping only a small portion of his reinstatement costs. Arguably, the plaintiff would be under-compensated under this approach. Other approaches should therefore be considered if this approach delivers what may be viewed as an ‘absurd’ result for the plaintiff. Second, this approach would be unsuitable if there is an absence of information upon which to attach a market value for the original and/or reinstated property. It is also possible for the precise condition of the original property to be unknown and its market value therefore difficult to determine. There may also be situations where there is no second-hand market for certain types of property; this would mean that no market value can be attached to it.

**C Apportioned Sum of the Reinstatement Cost**

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\(^{579}\) Ibid [365].
\(^{580}\) Ibid [367].
\(^{581}\) Ibid [369]. See the above text to n 577.
\(^{582}\) [1983] 1 Qd R 276.
Betterment can be valued as an apportioned sum of the reinstatement costs. The English case of *J Sainsbury plc v Broadway Malyan, Ernest Green Partnership Ltd*\(^{583}\) provides a good illustration of this approach. The court valued the betterment factor, which constituted of extra accommodation in the plaintiff’s store, by calculating the apportioned reconstruction costs for the extra accommodation based upon a per sq foot basis of construction costs of the area involved.

This approach of valuing betterment is suitable where the betterment involved is discrete and can be excised, thereby allowing its value to be apportioned and deducted from the reinstatement cost. The apportioned sum must be based upon some acceptable formula or yardstick which provides some form of link between the betterment and the reinstatement cost.

### D Extended Life of the Reinstated Property

The approach to valuing betterment, based upon the extended life of the reinstated property, was listed as the fourth approach by Nathan J in *State Transport*\(^{584}\) (as set out earlier). Although the plaintiff may receive the benefit of an additional period of time to continue using the reinstated property,\(^{585}\) this begs the question as to how it can or should be precisely valued. The discussion below shows that there are at least three ways to do this.

1 **The Market Value of the Extended Life**

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\(^{583}\) (1998) EWHC Technology 302 (Justice Humphrey Lloyd QC). In this case, a fire deliberately started in the service area of the plaintiff’s store spread to the sales area through a compartment wall. The architect had accepted that it was negligent in designing the compartment wall as the top part of it had only about half an hour fire resistance instead of two hours. The plaintiff claimed £3,631,314 for reconstruction costs of the sales area. It was argued in the case that there was an ‘element of “betterment” in that the sales area was larger after rebuilding than before (by 105 sq m out of 6,391 sq m)’: at [92]. Justice Humphrey Lloyd QC found that the plaintiff had added extra accommodation in the sales area for which a credit for betterment should be given. To calculate the betterment value of the extra accommodation in the sales area, he accepted the approach of a separate cost per sq m for the sales area (instead of the whole store) and arrived at the betterment sum of £150,000. He rejected using the cost per sq m for the entire store as he did not consider that ‘the value of that accommodation can be assessed looking at the overall area of the building’ when ‘the claim is being made in respect of the sales area’: at [126]. The court thus allowed the reconstruction costs to be reduced by the betterment sum of £150,000.


\(^{585}\) Although there may be difficulties concerning whether the existence of betterment can be satisfied in such cases, the discussion in this chapter assumes that the existence of betterment can be satisfied.
One way of valuing the extended life span of the reinstated property is to calculate it as an increment in its value over that of the original property. The basis of valuation of betterment under this approach is directly linked and restricted to the extended life of the reinstated property, unlike the second approach discussed under Part II B.

2 *The Commercial Advantage of the Extended Life*

Another way of valuing the extended life span of the reinstated property is to recognise and calculate it as a commercial advantage gained by the plaintiff. It can be envisaged that the extended life span of the reinstated property may be able to deliver benefits to the plaintiff in a number of ways, for example, by generating greater productivity leading to increased profits for the plaintiff; or by reducing the plaintiff’s overhead or maintenance costs, thereby again resulting in increased profits for the plaintiff; or by making the reinstated property more valuable than the original, which benefit the plaintiff can enjoy and realise through a sale. The basis of valuation of betterment under this approach is directly linked and restricted to the extended life of the reinstated property, which is not so for the approach under Part II E.

3 *Reinstatement Cost Apportioned upon the Extended Life*

A further way of valuing the extended life span of the reinstated property is to calculate it by apportioning the reinstatement cost upon its extended life. This involves spreading the reinstatement costs over the entire life span of the reinstated property and apportioning it for the extended portion of the reinstated property’s life span. The basis of valuation of betterment under this approach is directly linked and restricted to the extended life of the reinstated property, unlike the approach under Part II C.

The assumption is often made that the life spans of both the reinstated and original properties are identical or similar. If otherwise, it would be more difficult to calculate the apportioned reinstatement cost, or it may make this approach inappropriate. In using this approach, it may be necessary to treat the damaged part, or component, as forming an integral part of the larger structure or equipment. In other words, the life span of the larger structure or equipment should be used, instead of the life span of the replaced part or component.
Three cases, namely, *Hyder*,\(^586\) *South Parklands*\(^587\) and *Roman Catholic Trusts Corporation v Van Driel Ltd*,\(^588\) which used or considered this approach, are examined below. They illustrate the approach and some of its difficulties.

In *Hyder*,\(^589\) a pavement constructed for the plaintiff, designed to have a life expectancy of 20 years, collapsed after only four years of use owing to the architect’s negligence. The plaintiff replaced the defective pavement with a new pavement, with a similar life expectancy of 20 years. The architect submitted on appeal that the trial judge erred in failing to reduce the replacement costs incurred by the plaintiffs by 20%, to take into account that the plaintiff enjoyed the benefit of four years’ use from the original pavement out of a life expectancy of 20 years. In other words, the plaintiff gained an additional four years of extended life on the pavement. The majority judges (Sheller and Giles JJA) held that it was not appropriate to reduce the plaintiff’s damages for the four years’ use of the pavement.\(^590\) Notwithstanding their differences, both of the majority judges took the view that they did not think that a deduction if it was to be made, should be based upon what they described as a ‘crude percentage discount’.\(^591\)

The dissenting judge, Meagher JA, used the extended life approach to value the betterment, which he found to exist on the facts. He accepted the defendants’ argument that the plaintiff had ‘gained a windfall’,\(^592\) given that the plaintiff had ‘lost an old pavement and gained a new one’.\(^593\) He therefore accepted that ‘[s]ome allowance’\(^594\) for betterment must be made. His Honour accepted the defendant’s argument for a

\(586\) [2001] NSWCA 313 (New South Wales Court of Appeal) (Sheller, Giles, Meagher JJA).
\(587\) [2004] SASC 81 (Supreme Court of South Australia) (Debelle J). Although this case went on appeal and the replacement cost measure was substituted with the wasted costs measure, Debelle J’s reasoning as to how betterment could be valued as discussed above is still valid, assuming the reinstatement cost measure is applied.
\(588\) [2001] VSC 310 (Supreme Court of Victoria) (Hansen J).
\(589\) [2001] NSWCA 313 (New South Wales Court of Appeal) (Sheller, Giles, Meagher JJA).
\(590\) Sheller JA appeared to ground his decision more upon the difficulty of confirming the existence of betterment on the facts, as he stated 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’: at [55]. Giles JA, on the other hand, took the view that although the design life of the pavement was approximately 20 years, it should not be assumed that it would be ‘usable for 20 years and then become unusable’: at [105]. Giles JA therefore did not think it appropriate to allow a deduction of the plaintiff’s damages based upon ‘an ‘uncertain assessment of use for part of a period of time’: at [105]. Giles JA added further (with Sheller JA agreeing) that if an allowance for betterment was to be made he did not think that it should be made by a ‘crude percentage discount’, referring to the 20% as suggested by the defendant: at [107].
\(591\) Ibid [107].
\(592\) Ibid [22].
\(593\) Ibid.
\(594\) Ibid.
reduction of 20% of the replacement costs of the new pavement, based upon what would be the four-year extended life span of the newly replaced pavement.

It is submitted that Meagher JA’s use of the extended life approach to value betterment is appropriate in the circumstances of the case (assuming the existence of betterment). Even if it can challenged on the ground that it is a ‘crude’ percentage discount, it is arguable that this may be the only practical, convenient and easy way to calculate the value of betterment, in the absence of other available or suitable approaches.

In *South Parklands*, the plaintiffs claimed against the defendants for the cost to rectify the uneven surface of playing fields, which at the time of the trial was almost eight years old. The defendants, the plaintiffs’ engineers and architects, admitted liability for rendering negligent advice in the construction of the plaintiff’s playing fields, which resulted in the playing surface being uneven. The defendants argued that the plaintiffs should give them ‘credit for betterment’ on the ground that the plaintiffs will be ‘getting a new playing surface ahead of the time when the surface would have to be replaced.’ This would mean that, instead of the plaintiffs having to incur expenditure to replace the original playing surface in about 5-6 years’ time (when the original playing surface would have reached its lifetime of 14 years) this would be postponed until expiry of the lifetime of the new replacement.

Although Debelle J accepted evidence that the ‘usual life’ of the playing surface would be 14 years, he noted that its life span can range from 10 to 20 years depending upon the amount of use and maintenance involved. Debelle J awarded the plaintiffs full replacement cost and stated that there was ‘no proper basis upon which to require the plaintiffs to give a credit for betterment’. He explained that the plaintiffs will have to replace the playing surface ‘in another 15 years or so and that is so far into the future that the present value of the advantage in replacing it now is of no real benefit to

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595 [2004] SASC 81 (Supreme Court of South Australia) (Debelle J). As indicated earlier, although this case went on appeal and the replacement cost measure was substituted with the wasted costs measure, Debelle J’s reasoning as to how betterment can be valued is still valid, assuming the reinstatement cost measure is applied.

596 Ibid [126].

597 Ibid.

598 Ibid [123].

599 This is an important point to bear in mind when trying to ascertain the expected life span of an object, that there could be a wide variance here, with the degree of use and maintenance being relevant considerations.

600 [2004] SASC 81, [126].
the plaintiffs’. 601 This can be interpreted to mean that the alleged betterment was too insignificant (or too remote or speculative), or that the extended life approach to value betterment was not appropriate.

Debelle J, however, went on to explain how he would calculate betterment assuming that it can be confirmed. He said that in relying upon ‘conservative accounting advice’ 602 he would take a replacement period of 10 years, despite evidence of a life span of 14 years, and calculate betterment based upon spreading out and amortising 603 the replacement costs over the replacement period. As he explained:

The effect of his evidence is that, generally speaking, a pitch will last fourteen years. A replacement period of ten years is recommended to users as an appropriate period over which to amortise the cost of the surface. That is plainly conservative accounting advice. 604

Although Debelle J’s suggestion to amortise replacement costs would produce a fairer outcome, it is likely to give rise to further complicated issues concerning amortisation and the need for actuarial evidence. His suggestion to use a reduced or more conservative life span is sensible and should be recognised as sound practice.

In Roman Catholic Trusts Corporation v Van Driel Ltd, 605 the plaintiff sued for defects associated with the floor of a hall which the defendant built for the plaintiff. The defendant submitted that the plaintiff’s damages should be reduced to take into account the ‘value of the plaintiff’s use and benefit of the floor’, 606 a reference to the extended life approach of valuing betterment. Hansen J stated that there was ‘insufficient evidence to determine the life expectancy’ 607 of the floor and that he was ‘not presented with a satisfactory basis for valuing the use and benefit of the floor’. 608 Significantly, his Honour expressed the view that the extended life approach is ‘not simply a matter of dividing the value of the floor by X [ie, full life expectancy of floor] to obtain an annual figure’. 609 This indicates that there possibly can be different bases upon which

601 Ibid.
602 Ibid [123].
603 To amortise is to write off the replacement costs over an agreed period.
604 [2004] SASC 81, [123].
605 [2001] VSC 310 (Supreme Court of Victoria) (Hansen J).
606 Ibid [262].
607 Ibid [263].
608 Ibid [266].
609 Ibid.
betterment can be calculated on the extended life approach, depending upon the evidence and arguments presented.

Other jurisdictions, such as the United Kingdom, Canada and the United States, have also used or considered this approach to value betterment. These cases have applied the above approach, or variations of the approach to accommodate the particular circumstances of the cases.

The extended life approach was applied in the United Kingdom in *Voaden v Champion*. In this case, a vessel and the pontoon to which it had been moored were sunk and lost, as a result of the negligence of the defendant. The old pontoon had a remaining life of 8 years and the replacement pontoon, with a life span of 30 years, cost £60,000. In awarding £16,000, the trial judge held that the 'value of the pontoon should be calculated by reference to that amount to which a newly built pontoon would have depreciated on a linear basis over 22 years, namely eight-thirtieths of £60,000'. The betterment of £44,000, valued at 22/30ths of the replacement costs, can be rationalised on the extended life approach. On appeal, Lord Justice Rix, with whom the other two appeal judges agreed, affirmed the trial judge’s decision and his approach as being

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610 See, for example, *Voaden v Champion* (2002) 1 Lloyd’s Rep 62 (discussed above in the text). See also the Scottish case of *Anderson v International Oil Pollution Compensation Fund* [2001] Scots CS 34 (Scottish Court of Session) (Lord Gill). In this case, which comprised a group of six similar claims, each claimant alleged that the defendant’s act caused damage to their roof. (The claimant alleged in particular that the asbestos cement roofing materials was contaminated by dispersants used by the defendant to treat the spill from the wreck of a tanker, the *Braer*.) Gill J found that the replacement roof will bring ‘a degree of betterment’ and he accepted the claimant’s evidence that ‘betterment should be calculated on the basis of a serviceable life of 55 years’: at [241], [243]. Gill J said that the same date for assessing the age of the roof also be used to value betterment, which in this case should be ‘the date of the commencement of the proof’ (presumably, referring to the date of the trial and not the date of the incident) as this would produce a ‘logical and consistent valuation’: at [246].

611 See for example, *Upper Lakes Shipping Ltd v St Lawrence Cement Inc* (1992), 89 DLR (4th) 722 (Ont CA) (discussed above in the text); *Laichkwitat Enterprises Ltd v F/V Pacific Faith (Ship)* (2009) BCCA 157 (CanLII) (Court of Appeal of British Columbia) (discussed in n 619); *Safe Step Building Treatments Inc v 1382680 Ontario Inc* (2004) CanLII 35054 (Superior Court of Ontario) (Lalonde J); *North York v Kert Chemical Industries Inc* (1985) 33 CCLT 184 (Ontario High Court) (Krever J). The last two cases used what has been called ‘the deferred benefit’ approach, whereby betterment was valued based upon the interest which the plaintiff would have been able to save for the period commencing from when the plaintiff would ordinarily have had to expend money for a replacement (if the wrong had not occurred) until the expiry of the extended life span of the new replacement, instead of the above prorated approach. The betterment sum would also be discounted by the extra costs which the plaintiff would have had to incur in having to restore its property (ie, the carrying charges for the plaintiff’s premature expenditure of funds).

612 *Allied Chemical Corporation v Edmundson Towing Co*, 320 F Supp 448 (United States District Court, ED Louisiana, New Orleans Division (1970) (discussed above in the text).

613 (2002) 1 Lloyd’s Rep 62 (Colman J).

614 Ibid [108].

615 This was arrived at as follows: 22/30 x £60,000 = £44,000.

616 *Voaden v Champion* [2002] EWCA Civ 89 (Schiemann, Hale and Rix LJJ).
‘correct in principle.’ It should be noted that the trial and appeal judges did not consider the further question as to compensation for the plaintiff’s loss of use of money in having to expend £44,000 to purchase the replacement pontoon; this would be a concomitant disadvantage suffered by the plaintiff.

The extended life approach was applied in Canada in *Upper Lakes Shipping Ltd v St Lawrence Cement Inc*. This case is useful in illustrating some of the difficulties and challenges of using this approach. The plaintiff had to replace the damaged 3-year old ship conveyor belt (which originally had a life span of 15 years) with a new belt which cost $231,460. Since 12 out of the total 15 years of the belt’s useful life expectancy was lost as a result of the defendant’s negligence, the defendant was required to pay 12/15 or 80% of the replacement costs. The damages award was calculated in a way that took into account that the plaintiff had used the conveyor belt for 3 years before it was damaged and this was valued at 3/15 or 20% of the replacement costs (ie, $46,290). This meant that the betterment of three additional years of use of the new belt was deducted from the replacement costs. The Ontario Court of Appeal took into account that the plaintiff was forced to spend the remaining 20%, 12 years earlier than would

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617 Ibid. In arriving at his decision, the trial judge adopted the lower life span of 30 years, instead of 50 years as was argued in the case. He explained that the prediction of a life expectancy of 50 years is ‘clearly a matter of very considerable uncertainty, if only because the period is so long and sea conditions may vary enormously according to the use to which the pontoon is put and the location in which it is used’, and added that it would be ‘commercially unrealistic to assume ... that a new pontoon would have had a life more than 30 years’.

618 One possible reason for this could rest upon the trial judge’s explanation that he was valuing the lost pontoon as one of ‘total loss’, the starting point of which would be the ‘capital value of that which has been lost’, as opposed to ‘damage to property’ where the starting point is ‘reinstatement’: *Voaden v Champion* (2002) 1 Lloyd’s Rep 62, [106] (Colman J). This demonstrates that there can be differences in the way the extended life approach is or should be applied. The courts are therefore expected to exercise their discretion as to what would be most appropriate to the circumstances at hand.

619 (1992), 89 DLR (4th) 722 (Ont CA). Another Canadian case, *Laichkwitach Enterprises Ltd v F/V Pacific Faith (Ship)* (2009) BCCA 157 (CanLII) (Court of Appeal of British Columbia) (judgment delivered by Low J, to which the other two judges, Newbury and Frankel JJ agreed), also provides further insights as to how the extended life approach can be applied, even if there is difficulty in determining precisely the extended life span of the property involved. The property here was the ramp of the plaintiff’s vessel, which was repaired following a collision between the plaintiff’s and defendant’s vessels. The lack of certainty as to the life span of the ramp was overcome by adopting a more general and conservative estimate of the betterment allowance. The appeal court considered in a general way the percentage of repair costs to be deducted, as judged by the general state and condition of the old ramp, and this resulted in the betterment allowance being reduced from 67% to 33%. Low J said that the trial judge ‘failed to consider the lack of precision in the evidence when he calculated betterment’: at [39]-[40]. However, he did not agree with the plaintiff’s submission that the defendant had to adduce specific opinion evidence of the life span of the old ramp when trying to value betterment, as in his view ‘a reasonable inference from the whole of the evidence’ can be accepted: at [26]. He accepted that the old ramp would not have remained serviceable for a ‘significant portion’ of the 25-year expected life span of the new ramp. As regards the interest component, he said that if it cannot be calculated precisely it can also be ‘considered in a general way’: at [38].

620 This was after the salvage value of $7,000 was taken into account.
otherwise have been the case, and consequently the plaintiff should be ‘compensated to
the extent he has put out money prematurely to obtain that betterment.’ 621 The appeal
court found that the trial judge erred in taking a straight line interest calculation for 12
years, instead of applying amortisation. The trial judge’s order gave the plaintiff all the
interest for 12 years at judgment date, despite the fact that only part of the interest
would accrue in any one year. The appeal court thus adjusted the trial judge’s
assessment on this aspect and provided the following explanation as to how interest on
the betterment allowance should be calculated:

[T]he proper approach in assessing this head of damages is to award to the plaintiff for damages
for loss of interest, an amount, the present value of which, when invested and amortized over the
period from Oct 1981 to October 1993, will produce annually the sum of $5,323.35 representing
interest at the rate of 11.5% per annum on $46,290. The fund would be exhausted at the end of
that period. It would, however, have produced for the plaintiff the interest to which he would
have been entitled on the premature expenditure of his funds.622

The extended life approach has been used in the United States in Allied Chemical
Corporation v Edmundson Towing Co.623 The plaintiff was the owner of a dock facility
which had several pile clusters, with a 20-year life expectancy. The defendant’s vessel
struck a 7-pile cluster, which was three and a half years old, and caused its complete
loss. Heebe J held that the plaintiff was entitled to sixteen and one-half twentieths of
the replacement costs of $3,500.00.624 Betterment was thus valued on the cluster’s
three and a half years extended life.

Some observations can be made about the extended life approach. Based upon an
apportioned straight-line depreciation method, the extended life approach may be fairly
easy to apply. The main strength of the extended life approach is that it offers a rational
basis upon which betterment can be valued without too much difficulty, and with some
certainty and uniformity. The approach also recognises and allows for the betterment
sum to be discounted for concomitant disadvantages (for example, if the plaintiff has
suffered additional costs or other financial disadvantage as a consequence of having to

621 Upper Lakes Shipping Ltd v St Lawrence Cement Inc (1992), 89 DLR (4th) 722, 723-724 [5]. This
meant that the plaintiff lost the opportunity to invest and collect interest on $46,290 for 12 years.
622 Ibid 722 [9]. It should be pointed out that the parties had agreed that the appropriate interest rate to be
applied to the betterment allowance was 12% for the period from October 5, 1981 to March 18, 1988, and
11% for the period from March 18, 1988 to Oct 1993.
623 320 F Supp 448 (United States District Court, ED Louisiana, New Orleans Division (1970).
624 Ibid 450.
incur premature expenditure to restore the damaged property). This makes it a just and fair approach.

One weakness, however, of the extended life approach is its strong focus upon physical obsolescence (due to the age of the property), to the exclusion or minimal influence of other types of obsolescence (such as, technological, economic/functional, social or legal obsolescence). But given that the overall life expectancy of a property is linked to its ‘useful’ life, it would be possible to raise other types of obsolescence where applicable.

Difficulties which can arise in relation to the extended life approach include the following: an absence of or insufficient information upon which the extended life formula can be worked out; or when the life spans of the new replacement and the old property are not similar, or are indefinite; or if a straight-line depreciation method is inappropriate and a more complicated method is required. The extended life approach will also often require experts (for example, actuaries, financiers or bankers) to provide information and give evidence concerning matters relating to finance or other specialised matters.

E  As a Commercial Advantage

Betterment can be valued as a commercial advantage if the facts support this. For example, betterment can be valued as the commercial advantage of higher profits which results from the plaintiff’s higher production capacity, arising from the reinstated property’s superior features.

In State Transport\textsuperscript{625} Nathan J drew upon certain superior qualities of the newly replaced bridge and asserted that betterment can be valued as a ‘commercial advantage obtained within the foreseeable future’.\textsuperscript{626} Reference to the commercial advantage being obtainable ‘within the foreseeable future’ can serve both as a useful guide and as a limit to its availability. As there was ‘no evidence as to the financial advantages accruing to the Railways by virtue of the superior bridge’\textsuperscript{627} this approach could not be applied in this case.

\textsuperscript{625} (1984) Aust Torts Reports 80-596.
\textsuperscript{626} Ibid 68,623.
\textsuperscript{627} Ibid.
In *Port Kembla Coal Terminal Ltd v Braverus Maritime Inc* the court stated that any ‘profits which the plaintiff makes by use of the new article must be brought to account.’ A commercial advantage such as increased profits from use of the reinstated property can therefore provide a basis for valuing betterment.

A number of difficulties can arise when attempting to value betterment under this approach. For example, if a more powerful replacement engine generates greater profits, one possible difficulty would relate to having to determine what the relevant period of time should be for the increased profits to be accounted for as betterment. Another possible difficulty would relate to having to determine how other contributing factors, which may have also contributed to the increased profits, can be excluded from the quantification process.

*Paper Australia* illustrates some of the difficulties under this approach. In rejecting the approach to value betterment through increased profits, Bongiorno J expressed his concern in relation to the difficulties of having to satisfy the causal element, in view that there may be various internal and external factors which can affect the plaintiff’s profitability. His Honour explained as follows:

The plaintiff’s profit is derived from the operation of the whole M2 paper making machine and its business generally not just the MG cylinder. … The paper making processes on the M2 machine is a long one. … Thus, assessments of the plaintiff’s profitability as a result of the new MG cylinder would need to take into account, in some considerable detail, the effect on that profitability of the operation of various parts of the MG paper making machine. … Further, the plaintiff’s profitability is always going to be affected by a large number of business factors quite unrelated to the M2 paper-making machine and its efficiency. … [T]he Australian exchange rate, markets for paper in South East Asia, the United States, New Zealand and Australia, the world spot market for the price of paper, the presence or absence of local and overseas competitors etc all affect the plaintiff’s profitability. To these can be added the plaintiff’s business activities in marketing, advertising and otherwise promoting its products.

No doubt there can be numerous internal and external factors which can affect the plaintiff’s profitability and which can thus make it difficult to use this approach to value

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628 [2004] FCA 1211, [486] (Federal Court of Australia). In this case the defendant’s vessel collided with the plaintiff’s berth causing it to be damaged.

629 [2007] VSC 484 (Supreme Court of Victoria) (Bongiorno J). This case involved the replacement of a roller cylinder in a paper-making machine.

630 Ibid [367]-[368].
and account for betterment. However, although it may be difficult to prove the causal link, this difficulty should not unnecessarily limit the availability of this approach. A situation can arise where this may be the only available approach open to the parties. Having a wider array of approaches to access when considering how to value betterment would be more beneficial in the long run.

If the plaintiff receives a tax credit as a consequence of the reinstatement carried out by the plaintiff, this may arguably be a commercial advantage and be valued as betterment under this approach.631

A major weakness of the commercial advantage approach is that it advances a more indirect way to value betterment. As a consequence, there can often be significant difficulties concerning causality, with complications not only from internal factors, but also external factors, which Bongiorno J in Paper Australia632 aptly demonstrated. As this approach will often not be an easy one to apply, it would be sensible to resort to this approach if the other approaches are not available or cannot be used for some reason.

F Through Cost Savings

Another way of identifying and valuing betterment is to look at the cost saved by the plaintiff, if the cost savings have resulted from the replacement’s superior features. Nathan J in State Transport listed this as a potential approach when he stated that ‘[b]etterment may be the value of the cost savings resulting from the superior replacement’.633 Hely J in Port Kembla Coal Terminal Ltd v Braverus Maritime Inc634 expressed support for this approach when he stated that ‘any savings or profits which the plaintiff makes by use of the new article must be brought to account’.635 In Paper Australia the court applied this approach to one incidence of betterment when it

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631 Although there is some support for this in Nationwide News Ltd v PAWA [2006] NTSC 32 and Decoste Manufacturing Ltd v A&B Roofing Ltd (2004) NSSC 79 (CanLII), [158]; 223 NSR (2d) 5, the argument on this point was rejected in Von Stanke v Northumberland Bay Ltd [2008] SADC 61, [156]-[157].  
632 [2007] VSC 484.  
633 (1984) Aust Torts Reports 80-596, 68,623. With no evidence raised, there was no further discussion on this point.  
634 [2004] FCA 1211 (Federal Court of Australia). In this case the defendant’s vessel collided with the plaintiff’s berth and thereby damaged it.  
635 Ibid [486]. The Federal Court’s statement in full was that while there may not be a general rule which requires a plaintiff to account for any advantage or betterment which the plaintiff has obtained by repairing an old article with new materials, or by acquiring a new article for old in the case of a replacement after total loss, ‘any savings or profits which the plaintiff makes by use of the new article must be brought to account’.  
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accepted that if the replacement resulted in the plaintiff saving expenses for a planned future project, the saved expenditure as a consequence thereof can be deducted from the plaintiff’s damages as betterment.636

Valuing betterment as cost savings of future projects should, however, be limited to those projects which have been seriously planned and committed and also intended to be carried out in the not too distant future as a matter of prudence.

The approach can be used, in addition to any other approaches to value betterment, as there can be more than one incidence of betterment in a case, as was the position in Paper Australia.637 It should generally be a simple approach to apply, assuming that there is clear evidence of the cost saved and its causal link with the new replacement. As the cost savings can also possibly be categorised as a commercial advantage, it can also come under the commercial advantage approach (discussed above in Part II E).

As regards to the nature of cost savings which can be valued as betterment this can be wide ranging. For example, it can include saved expenses of planned future projects, as discussed in Paper Australia.638 Cost savings can also extend to savings of maintenance cost made possible by the superior features of the new replacement, as was referred to in State Transport.639 It can also possibly extend to savings from tax credits resulting from the plaintiff’s new replacement (also discussed under the commercial advantage approach in Part II E above).

III OTHER MATTERS AFFECTING THE VALUATION OF BETTERMENT (INCLUDING CONCOMITANT DISADVANTAGES)

This Part emphasises five salient matters affecting the valuation of betterment, including concomitant disadvantages. This is in addition to the earlier observations made in conjunction with the previous discussion of cases in Part II (concerning the

636 [2007] VSC 484 [167]-[168]. This case involved replacement of a cylinder for a paper-making machine. The evidence showed that the plaintiff’s planned course of action for the not too distant future was to upgrade and improve its cylinder, in order to provide greater safety levels in operating the cylinder. As the plaintiff had budgeted $88,500 for this future project, it conceded that this sum could be saved as a result of the newly replaced cylinder ‘fulfilling’ the future upgrading project. The saved expense was accepted as the value of betterment to be deducted from the plaintiff’s replacement costs.
637 [2007] VSC 484.
638 Ibid.
bases, circumstances, applicability, strengths and weaknesses of the various approaches discussed).

Firstly, it must be emphasised that the diverse factual scenarios of betterment disputes make it necessary for the valuation of betterment to be subject to argument and justification on a case by case basis.

Second, with the current state of the law showing an array and diversity of approaches to value betterment, it should remain open to the parties to consider and persuade the court as to which is the most appropriate approach to apply. The choice is often dictated by what evidence is available, or possibly even by the expense or time involved. If the betterment sum is substantial, the parties would of course be more prepared to give greater consideration, time and resources to this aspect of their case.

Third, if a particular method of valuing betterment results in a substantial amount which drastically reduces the plaintiff’s damages, resulting in an outcome for the plaintiff which can be described as ‘absurd’ or ‘incongruous’, this approach should be rejected as unsuitable.

Fourth, the approaches to value betterment are cumulative, subject of course to no double counting being permitted. Therefore, if there is more than one incident or occurrence of betterment, these separate incidents of betterment should be allowed. For example, there could be two incidents of betterment arising from one factual situation as follows: first, an incident of betterment based upon the extended life span of the newly replaced property; second, an incident of betterment involving a saving of expenditure of planned future upgrading, which can now be dispensed with as the new replacement incorporates such upgrading.

Finally, as raised in the previous Part, it is important to consider and reduce from the betterment sum any concomitant disadvantages which the plaintiff may possibly suffer. As Nathan J in State Transport pointed out, if the plaintiff’s receipt of betterment brought with it any concomitant disadvantages to the plaintiff, these should be discounted from the betterment sum. The betterment sum must therefore be a ‘net’ sum. If, however, there is some valid reason not to discount any of these concomitant

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disadvantages, for example, due to difficulties associated with proving these matters in court, these may be excluded where necessary. Nathan J provides the following useful explanation relating to concomitant disadvantages in *State Transport*:

The betterment factor itself may need to be discounted by a sum representing the unwarranted cost incurred by the plaintiff due to enforced modernisation. Again there will be great difficulty in quantifying those costs due to the diversity of circumstances which arise. The classes of cases in which the betterment factor itself should be discounted for this reason can never be closed. There may be situations where the plaintiff is obliged to borrow extra funds over and above the market rates because of the enforced modernisation. Such extra costs should be discounted from the betterment factor itself.641

The concomitant disadvantages to be discounted from the betterment sum can include not only any interest which the plaintiff may have incurred for any premature expenditure it may be forced to make, but also any other additional expenses which the plaintiff may have to incur in future as a consequence of the new property replacing the old one, such as increased maintenance costs, or increased energy consumption costs. Taking these matters into consideration and trying to calculate and discount them may sometimes prove to be difficult. It may therefore be prudent for the court to consider and evaluate these difficulties. If such an exercise is not worthwhile, perhaps on account of the quantum involved, or in relation to the time or costs involved, it may be sensible to forego such inquiries.

Cases which have referred to concomitant disadvantages include the following. In *State Transport*, Nathan J reached the conclusion that there was ‘no reason for reducing the betterment factor at all’642 as he did not have ‘any evidence to assess in monetary terms why the betterment factor itself should be discounted’.643 Therefore, in relation to concomitant disadvantages it may be important to consider and evaluate the evidence available before pursuing it, particularly in relation to whether these concomitant disadvantages can be quantified in monetary terms. In *Hyder*,644 Sheller JA also rightly pointed out that the extended life approach of valuing betterment must also factor in and allow for any concomitant disadvantages suffered by the plaintiff. On this point, Sheller

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641 Ibid.
642 Ibid.
643 Ibid. Nathan J added that there was ‘no evidence at all of any extra costs incurred by the Railways due to its enforced ... modernisation of the bridge structures.’
JA endorsed the approach adopted by the New Zealand court in *J & B Caldwell v Logan House Retirement Home*, which in accounting for betterment, took into account any ‘allowance to the plaintiff for any disadvantages associated with the involuntary nature of the additional investment’.

**IV CONCLUSION**

This chapter provided a detailed analysis of how betterment can or should be valued, including the various bases of valuation, their particular circumstances, applicability, strengths and weaknesses.

In conclusion, a few important matters can be emphasised. First, it is important that the issue of valuing betterment be given early and due consideration, in light that the court will not be able to order a deduction for betterment if for any reason it is unable to assign a monetary value to it. Second, given the diverse scenarios that can arise in a dispute concerning betterment the list of potential approaches to valuing betterment should remain open. Third, the approaches to value betterment are cumulative, subject to no double counting being allowed. Fourth, concomitant disadvantages should be considered and taken into account, unless it is necessary for some reason not to do so. Fifth, the process of valuing betterment must not be treated as a precise science, and therefore the process should not be entirely mathematically driven. There must be some degree of flexibility, so that a fair and reasonable outcome can be achieved for both parties to the action. There must ultimately be a residual discretion placed upon the court to determine whether the betterment sum arrived at by application of any one of the potential approaches is fair and reasonable. The chosen approach must result in a sensible, fair and reasonable sum, from the point of view of both the plaintiff and defendant. Finally, in choosing the appropriate approach to apply when attempting to value betterment, the parties concerned must carefully consider the necessary evidence to be presented. If there are any potential difficulties or problems, the parties must address and overcome these. In the final analysis, it is important to emphasise that the court must be presented with evidence which can sufficiently provide some basis for a rational assessment of the deduction to be made.

646 *Hyder* [2001] NSWCA 313, [51].
CHAPTER 7
PROVING THE BETTERMENT

I  INTRODUCTION
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CHAPTER 7
PROVING THE BETTERMENT

I  INTRODUCTION

This Chapter deals with the fourth essential inquiry into betterment. It addresses questions relating to how evidential and proof-related matters concerning betterment should be dealt with and allocated between the parties in a damages claim. This generally revolves around three central questions, firstly, which party should bear the burden of proof; second, what type of burden of proof is imposed or should be imposed; and third, what the particular standard of proof is or should be.

Although there are two specific facts in issue to proving betterment, firstly whether betterment exists, and secondly what its monetary value is, it is submitted that both of these facts in issue should be treated and dealt with together. This is because it would be the same party who should bear the burden of proving both of these facts in issue and it would also be the same type of burden. Therefore the discussion below will treat both these facts in issue as one issue, that of proving betterment. References to each of them will only be made if there is a need to do so.

Part II explains the different burdens of proof, and considers as to how they apply or should apply to the betterment issue. Part III discusses and evaluates the cases and the differing judicial views expressed in relation to the question as to which party should bear the burden of proving betterment. Part IV summarises the analysis, arguments and justifications to provide support for the preferred approach advanced by this thesis, that the defendant should bear only the evidential burden of proving betterment, leaving the plaintiff to bear the legal burden as part of his general burden to prove his loss. As the suggested approach can be justified as being consistent with the general legal framework of burdens of proof in a civil action, it would be a principled approach. Part V concludes the chapter.

The cases in this area reveal a lack of precise usage of terminology. This is due mainly to the lack of differentiation between the different types of burden of proof, namely, the legal, the evidential and the tactical burdens. For example, the courts have often simply used ‘burden’ or ‘onus’ without identifying the particular type of burden referred to. It
may therefore be necessary at times to draw inferences from the context and the general expressions used in the cases.

II TYPES OF BURDEN OF PROOF AND CONSIDERATION AS TO HOW THEY SHOULD APPLY TO BETTERMENT

The term ‘burden of proof’ is generally used in two distinct senses in civil cases, one as a legal burden, and the other as an evidential burden.

A Legal Burden of Proof

It is a fundamental requirement of any judicial system for the claimant who takes legal action in a civil suit to prove his case to the court’s satisfaction. This means that the legal burden of proving all facts essential to the plaintiff’s claim should normally rest upon the plaintiff. According to Heydon, the ‘legal burden’ is the ‘obligation of a party to meet the requirement of a rule of law that a fact in issue be proved (or disproved) either by a preponderance of the evidence, or beyond reasonable doubt, as the case may be’. The reference to proof by a ‘preponderance of the evidence’ is another way of describing the standard of proof upon the ‘balance of probabilities’ as required for civil cases. An important general rule which flows from the incidence of the legal burden is that ‘the party bearing the legal burden on an issue also bears the evidential burden.’

Walsh JA in Currie v Dempsey makes clear the plaintiff’s and defendant’s burdens of proof in the following passage:

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647 J D Heydon, *Cross on Evidence* (LexisNexis Butterworths, 7th Australian ed, 2004) 246. The ‘legal burden’ is also sometimes referred to as the ‘burden of persuasion’ or the ‘probative burden’.
648 Ibid 237. The reference to proof ‘beyond reasonable doubt’ describes the proof standard required for criminal cases. The words ‘or disproved’ applies when a negative assertion is an essential part of a party’s case, or when a party has to negative a particular fact because the opposing party has adduced sufficient evidence of its existence. The definition makes it clear that the legal burden applies to particular facts in issue, and that it would fall upon the party who has to either prove (or disprove) the fact in issue.
650 Heydon, above n 647, 243.
The burden of proof in the sense of establishing a case, lies on a plaintiff if the fact alleged (whether affirmative or negative in form) is an essential element in his cause of action ... The onus is on the defendant, if the allegation is not a denial of an essential ingredient in the cause of action, but is one which, if established, will constitute a good defence, that is, an ‘avoidance’ of the claim which, prima facie, the plaintiff has.  

Based upon the above explanation, the general legal framework governing the allocation of burdens of proof in civil claims for damages awards can be summarised as follows. Firstly, that the plaintiff bears the legal burden, accompanied by the evidential burden, of proving the facts in issue of essential elements of the cause of action, including the damage suffered and the consequent loss in monetary terms, upon the balance of probabilities. Second, that the defendant bears the legal burden, accompanied by the evidential burden, of proving any defences (ie, any matter which can avoid or has the effect of avoiding the plaintiff’s claim) to which the defendant may be entitled, also upon the balance of probabilities.

The question arises as to how the legal burden should apply in a situation where betterment is raised as a fact in issue. The answer to this question is dependent upon how betterment is or should be characterised. The following question should therefore be asked: Is betterment a matter of defence (or similar to a defence), or is betterment a matter which concerns the plaintiff’s loss (with loss referring to the plaintiff’s ‘net’ or ‘actual’ loss).

It would be inappropriate to characterise the betterment contention as a matter of defence, or similar to a defence. This is because betterment clearly falls outside of ‘defences’, which concerns matters which can avoid or has the effect of avoiding the plaintiff’s claim. An argument of betterment will not avoid the plaintiff’s claim. It will only result in the plaintiff’s damages being reduced. It would therefore be more appropriate to characterise the betterment contention as a matter which concerns the plaintiff’s loss, or rather the plaintiff’s ‘net’ or ‘actual’ loss. The betterment contention is clearly more in the nature of an argument that the plaintiff is entitled to claim only the

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652 See Currie v Dempsey (1967) 69 SR (NSW) 116, 125; Briginshaw v Briginshaw (1938) 60 CLR 336; Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1991] HCA 66; (1992) 67 ALJR 170, 170-171. See further, Heydon, above n 647, 246; Tilbury, Civil Remedies Vol One, above n 125, 149.

653 In other words, the defendant bears the burden of disproving the plaintiff’s claim. See, Currie v Dempsey (1967) 69 SR (NSW) 116, 125; Heydon, above 647, 246.
plaintiff’s actual or net loss suffered, that is, after betterment is accounted for. The betterment contention seeks to only reduce the plaintiff’s damages, rather than avoid the plaintiff’s claim.

In light of the above rationalisation and characterisation of betterment as a matter which concerns the plaintiff’s loss, rather than as a matter of defence, this thesis takes the view that the plaintiff should bear the legal burden of proving the quantum of the plaintiff’s actual or net loss (that is, to the exclusion of any betterment) as part of an essential element of his claim. Consequently, this thesis argues that if the defendant raises an argument of betterment, the plaintiff should disprove this to avoid any reduction of his claim to account of betterment. The cases, discussed in Part III, present differing judicial views, with some cases adopting a similar approach as that advanced in this thesis, while others adopt a contrary approach. This matter is examined and discussed in detail in Parts III and IV.

B  Evidential Burden of Proof

It is said that the incidence of the evidential burden is a consequence of the civil law system, which frees the judge of the responsibility of investigating and furnishing evidence, placing this responsibility entirely upon the parties to an action.654 According to Heydon, the ‘evidential burden’ is the ‘obligation to show, if called upon to do so, that there is sufficient evidence to raise an issue as to the existence or non-existence of a fact in issue, due regard being had to the standard of proof demanded of the party under such obligation.’655

Williams describes the evidential burden, slightly differently, as the ‘burden of adducing evidence on an issue on pain of having the trial judge determine that issue in favour of the opponent.656 Thayer describes the evidential burden as the ‘duty of going forward in argument or in producing evidence; whether at the beginning of a case, or at any later moment throughout the trial or discussion.657 Thayer’s description of the

654 Under the civil law system the parties to an action are fully responsible for their cases, from investigating, getting up, presenting pleadings, arguing and furnishing evidence in support.

655 Heydon, above n 647, 238. The ‘evidential burden’ is sometimes referred to as the ‘production burden’ or the ‘burden of evidence’.


657 J B Thayer, A Preliminary Treatise on Evidence at the Common Law (Little Brown, 1898) 355. See also, Heydon, above n 647, 236; Williams, above n 656, 167.
evidential burden has, however, been rightly criticised for being too broad and for also conflating it with what can be described as the ‘tactical burden’.658

Although the evidential burden stops at the point of adducing sufficient evidence to raise an issue, the tactical burden goes beyond that by raising counter-evidence. As Heydon puts it:

[B]ecause, in addition to embracing argument as well as adducing evidence, it covers not merely the obligation placed on a party by the law to be able to point to the existence of sufficient evidence to raise an issue, but also the tactical obligation to lead counter-evidence placed upon a party against whom evidence has been adduced.659

The ‘evidential burden’ can refer to two situations. Firstly, the evidential burden can refer to the overall evidential burden as to whether a party has produced sufficient evidence to make out a prima facie case. This is not relevant to the issue of betterment. Second, the evidential burden can refer to a situation where a party must bear the evidential burden in relation to raising a fact in issue in the case. This is relevant, as the fact in issue is whether there is betterment.

The question arises as to how the evidential burden should apply when betterment is raised as an issue. Consistent with the view and argument advanced earlier (in the previous section) that the appropriate approach to adopt is for the plaintiff to bear the legal burden of proving the plaintiff’s loss and to consequently disprove any allegation of betterment made by the defendant, it follows that it would also be appropriate to impose only the evidential burden upon the defendant when an allegation of betterment is made, as this thesis advances. This would mean that the defendant should be required to only adduce sufficient evidence, or at the least some evidence, to raise an issue as to the likelihood of the existence of betterment.

As indicated earlier, the cases discussed in Part III put forward differing judicial views, with some cases embracing this approach while other cases have embraced a contrary approach. This matter is taken up and discussed further in Parts III and IV.

658 See, Heydon, above n 647, 236-37; Williams, above n 656, 167-168. As Thayer’s terminology was too broad, commentators have attempted to refine it, but these refinements have not been uniform and have contributed to some confusion, particularly on the question as to whether burdens of proof can shift. 659 Heydon, above n 647, 236. The ‘tactical burden’ is also referred to as the ‘provisional burden’. 166
C  Tactical Burden of Proof

As indicated earlier, the ‘tactical burden’ has often been addressed and subsumed under the ‘evidential burden’. Although it is possible to loosely typify the tactical burden by using the term ‘evidential burden’ it would be prudent to recognise the tactical burden as a concept separate from the evidential burden. Williams puts it in this way:

[The] source of confusion ... lies in the fact that the expression ‘evidential burden’ is commonly used to refer to two notions that are in fact quite distinct.⁶⁶¹

Therefore, in order to avoid confusion, it is proposed here that the ‘tactical burden’ be recognised as separate from the ‘evidential burden’. Williams shares this view and points out that the reference to the second sense of ‘evidential burden’ in the passage below is in fact a reference to the ‘tactical burden’:

The second sense in which the expression ‘evidential burden’ is used includes the burden resting upon a party who appears to be at risk of losing on any given issue at a particular point in the trial. The party is under an evidential burden in the sense that if the party does not produce evidence or further evidence he or she runs the risk of ultimately losing on that issue.⁶⁶²

The evidential burden ‘involves a question of law’.⁶⁶³ The tactical burden, on the other hand, does not involve a question of law, as it ‘involves merely a tactical evaluation of who is winning at a particular point in time’.⁶⁶⁴ Another point of distinction is that the tactical burden is the only burden which can shift in the course of a trial, unlike the evidential burden and the legal burden which do not shift in the course of a trial.⁶⁶⁵

How should the tactical burden apply when betterment is raised as a fact in issue? As explained below, the tactical burden will play a relevant and significant role under the approach advanced in this thesis.

⁶⁶¹ Williams, above n 656, 168.
⁶⁶² Ibid.
⁶⁶³ Ibid.
⁶⁶⁴ Ibid.
⁶⁶⁵ Ibid 169. Williams points out that where there have been assertions made that the legal burden and evidential burden can shift, this can be attributed to inadequate analysis of the burden of proof concept and a failure to distinguish between the evidential burden and the tactical burden.
When the defendant (as the proponent) adduces evidence on the issue as to whether betterment exists, in order to satisfy the evidential burden on that issue, the plaintiff (as the opponent) will find himself or herself in a position where it would be tactically desirable to put in controverting evidence that betterment does not exist, in order to disprove the defendant’s proposition on that issue, as a failure to do this may lead to the court deciding the particular issue (that betterment exists) in favour of the defendant.

In order to be able to differentiate between the defendant’s (the proponent’s) evidential burden from that of the tactical advantage that the plaintiff (the opponent) would obtain from putting in evidence at this stage, the preferred approach will extend to retain usage of the term ‘tactical burden’ to describe the plaintiff’s (the opponent’s) need to produce evidence at certain stages of the trial.

Taking the discussion one step further in the context of betterment, it would also be tactically desirable for the defendant (the proponent) to subsequently put in evidence to disprove or overcome the plaintiff’s (the opponent’s) countervailing evidence that betterment does not exist, as a failure to do this may lead to the court deciding the particular issue of betterment (that it does not exist) in favour of the plaintiff (the opponent).

As the tactical burden can shift in this way from one party to the other, and then back again to the original party, it is important to show these shifts of the tactical burden and refer to them by the distinct term of ‘tactical burden’, in order to distinguish and set it apart from the ‘evidential burden’.

D Standard of Proof upon Balance of Probabilities

The standard of proof is ‘the degree or level to which the party carrying the burden of proof must meet that burden’. In *Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd* the High Court reiterated a long standing rule that the civil standard of proof upon a

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666 Although there is hardly any reference to the tactical burden in the cases discussed under Part III its usage should continue given its relevance and significance to the issue of betterment as explained above.

667 See Williams, above n 656, 166.
party who bears the onus is ‘proof on the balance of probabilities.’\textsuperscript{668} Under this balance of probabilities standard of proof the court is required to find the existence or non-existence of the fact more probable than its non-existence or existence, before it can make a finding in favour of the party carrying the burden.\textsuperscript{669} In other words, the court must be satisfied on the evidence that the matter found to have occurred is ‘more likely than not to have occurred’.\textsuperscript{670} The standard of proof on a balance of probabilities accordingly applies to the plaintiff’s burden of proving betterment.

Dixon J in \textit{Briginshaw v Briginshaw}\textsuperscript{671} explained that the expression ‘balance of probabilities’ is not a ‘mere mechanical comparison of probabilities independently of any belief in its reality’\textsuperscript{672} as ‘the tribunal must feel an actual persuasion of its occurrence or existence before it can be found’.\textsuperscript{673} Importantly, his Honour pointed out that when determining if such standard of proof has been satisfied the court is entitled to take into account the nature and consequences of the facts to be proved, and that the following considerations in particular can be taken into account - the seriousness of the allegations made; the inherent likelihood of an occurrence or of the fact alleged; and the gravity of the consequences flowing from the finding.\textsuperscript{674} These matters can be particularly relevant and important to a betterment contention. For example, if the nature or consequences of the facts concerning an allegation of betterment is particularly difficult to prove, arguably the seriousness of the betterment allegation should make it easier to persuade the court as to satisfaction of the balance of probabilities standard. Similarly, the graver the consequences which can flow from a finding of betterment, this should make it easier to persuade the court as to satisfaction of the balance of probabilities standard.

\begin{footnotesize}

\textsuperscript{669} Although the court is expected to make positive findings, in appropriate cases it can decide on the basis that the party bearing the burden of proof has failed to discharge it. See, Heydon, above n 647, 291.

\textsuperscript{670} Ibid 291.

\textsuperscript{671} (1938) 60 CLR 336.

\textsuperscript{672} Ibid 361.

\textsuperscript{673} Ibid 361.

\textsuperscript{674} Ibid 361-362. As Dixon J put it: ‘But reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal.’
\end{footnotesize}
Where the defendant satisfies his evidential burden to raise the issue of betterment with sufficient evidence, the plaintiff would then be put to the task of having to produce evidence to counter the defendant’s. In such a case the plaintiff must satisfy his legal burden to disprove betterment upon the balance of probabilities standard. The Briginshaw’s flexible approach to interpretation of this standard would apply. As indicated above, the following particular considerations raised by Dixon J in Briginshaw v Briginshaw675 are likely to be relevant, the seriousness of the betterment allegations by the defendant and the gravity of the consequences flowing from a finding of betterment if it is to be made.

E Weight of Evidence

Evidence, including that relating to betterment, can be of varying degrees of cogency, for example, it can be insufficient, prima facie, or conclusive.676 The expression ‘insufficient evidence’ is generally used to describe the lowest degree of cogency, where the evidence provided in support of an issue is so weak that no reasonable person could properly decide the issue in that party’s favour.677 Another way of putting it is to say that there is a failure to take the case out of the realm of conjecture.

‘Prima facie evidence’ is used in two senses. In the first sense, prima facie evidence signifies the next degree of cogency, where a party’s evidence in support of an issue is sufficiently weighty to entitle a reasonable person to decide the issue in that party’s favour, although it is not obligatory to so.678 In this situation the evidence takes the case out of the realm of conjecture into that of ‘permissible inferences’. In the second sense, prima facie evidence (sometimes referred to as ‘presumptive evidence’) denotes the next degree of cogency, where a party’s evidence in support of an issue is so weighty that no reasonable person could help deciding the issue in that party’s favour in the absence of further evidence.679

675 Ibid.
676 See generally Heydon, above n 647, 115-118. The weight given to evidence is a question of fact.
677 Ibid 115-117.
678 Ibid 116.
679 Ibid.
‘Conclusive evidence’ is used to refer to the next level of cogency where the court finds the fact concerned to be proved.\textsuperscript{680} The term ‘presumption’ is used in a variety of senses as a presumption of either fact or law.\textsuperscript{681} It has been used as a permissible inference in relation to a presumption of fact, or as a rebuttable presumption of law, or where a conclusion must be drawn as a matter of law unless or until evidence of the requisite degree of cogency is given to the contrary.\textsuperscript{682}

III AN EXAMINATION OF CASE LAW: DIFFERING VIEWS EXPRESSED

The cases examined below reveal differing views expressed by the courts in Australia. In the first set of cases examined, the courts have expressed the view that the defendant bears both the legal and evidential burden of proving betterment (‘the first view ’). In the second set of cases examined, the courts have expressed a different view, that the defendant only bears an evidential burden of proving betterment (‘the second view’). Thus, the first and second views co-exist in Australia.

Generally, the position in the United Kingdom appears similar to the Australian position, where the first and second views co-exist.\textsuperscript{683} The first view is more predominant in New Zealand,\textsuperscript{684} Canada\textsuperscript{685} and the United States,\textsuperscript{686} with these courts

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\textsuperscript{680} Ibid 117.
\textsuperscript{681} Ibid.
\textsuperscript{682} Ibid 118.
\textsuperscript{683} See for eg, \textit{Harbutts} [1970] 1 QB 447 (Court of Appeal), 476 (Cross LJ) and \textit{George v Coastal Marine 2004 Ltd} [2009] EWCH 816 (Admiralty) (Gloster J) which support the first view. But see also \textit{Pegler Ltd v Wang (UK) Ltd} [2000] EWHC Technology 137, [245] (Bowsher J) which supports the second view.

\textsuperscript{684} See for eg, \textit{J & B Caldwell Ltd v Logan House Retirement Home Ltd} [1999] 2 NZLR 99,110 (High Court of Auckland) (Fisher J) which support the first view. The approach was justified as ‘a matter of policy’, that the defendant who asserts an affirmative proposition bears the onus of proving it; that it would be difficult for the plaintiff to prove a negative. \textit{La Grouw v Cairns} [2004] 5 NZCPR 4334 (O’Regan J) also endorsed and applied this approach.

\textsuperscript{685} See, for eg, \textit{James Street Hardware & Furniture Co v Spizziri} 43 CCLT 9; 62 OR (2d) 385 (Ontario Supreme Court, Court of Appeal); \textit{St Lawrence Cement Inc v Wakeham & Sons Ltd} (1992) 8 OR (3d) 340 (Ontario Gen Div); \textit{Leichkwitat Enterprises Ltd v F/V Pacific Faith Ship} (2009) BCCA 157 (CanLII (Court of Appeal of British Columbia) which support the first view. See the commentary of Denis Power and Duane E Schippers, ‘Good Intentions, Reasonable Actions: Recovery of Pecuniary Damages for Property Losses’ in Law Society of Upper Canada, \textit{Law of Remedies: Principles and Proofs} (Carswell, 1995) 127, 172, where they view the issue of proving betterment as a matter of ‘defence’ which should therefore be pleaded. See also the commentary of Berryman, ‘Betterment Before Canadian Common Law Courts’, above n 231, 70, where he associates a situation of betterment with one of mitigation and rationalised as follows: ‘[C]onsistent with a defendant’s allegation concerning unreasonable mitigation which must be proven by the defendant in its entirety, logic would suggest that the defendant must provide proof and quantification of the betterment. Once betterment has been proven the onus shifts back to the plaintiff to prove any loss caused by being required to make an unexpected expenditure.’

\textsuperscript{686} See for eg, \textit{Hollingsworth Roofing Co v Morrison} 668 SW 2d 872 (Texas Court of Appeal) 2nd Dist 1984; \textit{Chemical Express Carriers v French} 759 SW 2d 683 (Texas Court of Appeal) 13 th Dist (1988) 684 (Kennedy J); \textit{Pasadena State Bank v Isaac} 228 SW 2d 127 (Texas Supreme Court) (1950) (Harvey J)
placing both the legal and evidential burden of proving betterment more consistently upon the defendant.

A The View that the Defendant Bears Both the Legal and Evidential Burdens

(‘the First View’)

In the first set of cases examined in this section, the Australian courts espoused the first view, that the defendant bears both the legal and evidential burdens of proving betterment. The cases do not, however, offer much in terms of analysis. With few clear and conclusive statements in the cases it is therefore necessary to draw inferences.

In *Gwam* the appeal court set aside the trial judge’s acceptance of the defendant’s submission that the plaintiff as ‘the owner of the CMI-Hino, a more valuable vehicle’ was not entitled to recover damages ‘with respect to that betterment’. The following statements made by Gray J (with Kelly J agreeing) disclose that the court considered that both the legal and evidential burden of proving betterment rest upon the defendant. Gray J averred that the defendant made ‘no real attempt ... to prove betterment’. His Honour further emphasised that the ‘onus of proving the quantum of any unjustified betterment is on the defendant’.

In *Paper Australia* the Supreme Court of Victoria also expressed the view, albeit obiter, that the defendant should bear the legal burden of proving both the existence and value of betterment. The court allowed the plaintiff to claim the full replacement costs for its damaged cylinder, caused by the defendant’s negligence while servicing it. Although the court rejected the defendant’s submission to reduce the replacement costs to account for betterment because it found no evidence of betterment, it went on further which support the first view. In characterising the betterment contention as a matter of ‘defence’ the courts in the United States appear more inclined to impose legal and evidential burdens upon the defendant.

687 [2010] SASC 37 (Full Ct of Supreme Court of South Australia) (Gray, White and Kelly JJ).

688 Ibid [55]. The appeal court granted the plaintiff’s cross-appeal and thereby allowed the plaintiff’s damages to include the difference between the cost of the new truck and the purchase of the initial truck.

689 Ibid [58] (with whom Kelly J agreed).

690 Ibid. Gray J cited as authorities: *Harbutt’s* [1970] 1 QB 447; *Tyco* [2004] NSWCA 333; *Paper Australia* [2007] VSC 484. Gray J stated further, that even if it is ‘accepted that the CMI-Hino truck was a more expensive vehicle, ... it does not follow that betterment has been made out’ and that there was ‘no evidence led as to the greater value, if it be the case, of the heavier truck or the impact on gross net profitability in the long term’: at [58].

691 [2007] VSC 484 (Supreme Court of Victoria; Bongiorno J).
to express the view that the defendant should bear the burden of proving the value of any betterment to be accounted for:

[I]f a case could be made that they should be so reduced, the defendant has failed to discharge its burden of proving the quantum of any such reduction. 692

It reasoned and cited some authorities, for imposing what appears to be both the legal and evidential burden of proving the existence and value of betterment upon the defendant:

That the onus of proving the quantum of any betterment is on the defendant is clear not only from Harbutt but also from the judgement of Handley JA in Tyco Australia Pty Ltd v Optus Networks Pty Ltd. In that case his Honour acknowledged the principle in the law of damages derived from cases such as Fink v Fink and Chaplin v Hicks, that the common law does not permit difficulties of estimating a plaintiff’s loss to defeat his remedy. But he went on to distinguish the position of a defendant who seeks to have damages reduced because of a chance that the plaintiff derived a benefit from the wrong which the defendant committed. He said a defendant does not have the plaintiff’s advantage. He is not in this ‘favoured position’. A defendant must prove the quantum of the reduction he seeks. See also Roberts v Rodier and ors, J & B Caldwell Ltd v Logan House Retirement Home Ltd, and Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd. 693

It is possible to also infer from this passage that the defendant’s status as a ‘wrongdoer’ may have been an influential factor which prompted the court to impose such a burden upon the defendant, rather than upon the plaintiff.

It will be recalled that in Tyco 694 the plaintiff sued the defendant for damage caused to its premises and equipment owing to the defendant’s negligence in the supply and installation of a fire suppressant system and the court had to consider how damages should be dealt with when betterment is alleged. Both Handley 695 and Hodgson JJA were of the view that the defendant bears a legal and evidential burden to prove betterment. As Hodgson JA put it:

692 Ibid [370] (Bongiorno J).
693 Ibid [364].
695 Ibid [197]. The judgment of Handley JA in this case was followed in Paper Australia [2007] VSC 484, as appears from the preceding discussion, to support the imposition of a legal and evidential burden upon the defendant in proving betterment.
[A]lthough the plaintiff has the general onus of proof of damages, there can be legal or at least evidentiary onuses cast on the defendant. ... If a defendant wishes to say a benefit received by the plaintiff was caused by the defendant’s conduct or by expenditure caused by that conduct, it appears that the defendant bears an onus: Monroe v Schneider. The onus or at least standard of proof may also be affected by considerations of who has the capacity to offer proof (Blatch v Archer ...) and, where events have prejudiced the provision of proof, who is responsible for those events (Murphy v Overton Investments Pty Ltd ...).696

In this passage Hodgson JA also raised certain considerations which he pointed out may potentially affect the onus or standard of proof relating to betterment, for example, which party is able (or unable) to offer proof, or whether any inability to offer proof is the fault of either party. It is submitted that it may be possible to persuade the court in certain exceptional circumstances to allow exceptions to be made to any general rule on burdens and that the aforesaid examples may be able to satisfy as exceptional circumstances.

The New South Wales Supreme Court in Roberts v Rodier697 also appears to hold the view that the defendant should bear the legal and evidential burden of proving betterment. The court did not, however, allow an account for betterment as the defendants ‘had not discharged their onus of establishing the quantum of the cost of providing any element of betterment’.698 The court emphasised:

> Once the plaintiff has discharged the onus of proving an amount which will remedy his or her damage, the onus of adducing evidence is on the defendant to prove both the presence of any betterment, and also its quantum.699

### B The View that the Defendant Bears Only the Evidential Burden

(‘the Second View’)

The Australian cases examined in this section, indicate support for the second view, that the defendant bears only the evidential burden of proving betterment. Once again, these cases also do not offer much in terms of analysis.

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696 Ibid [264] (Hodgson JA).
697 [2006] NSWSC 282 (New South Wales Supreme Court) (Campbell J).
698 Ibid [151] (Campbell J).
699 Ibid [87] (Campbell J). The court cited the following as authorities: J & B Caldwell Ltd v Logan House Retirement Home Ltd; Monroe Schneider Associates (Inc) v No 1 Raberem Pty Ltd; Optus Networks Pty Ltd v Leighton Contractors Pty Ltd & Ors.
General Accident Insurance Asia Ltd v Sakr\(^{700}\) involved a claim by the plaintiff, the insured party, against the defendant-insurer, for payment of reinstatement costs of a building damaged by a fire.\(^{701}\) The New South Wales Court of Appeal expressed the view that the defendant bears only the evidential burden of proving betterment.\(^{702}\) Hodgson JA stated that ‘an evidentiary onus was cast on the appellant [the defendant-insurer] to prove some betterment for which a reduction should be made.’\(^{703}\) Sperling J also expressed a similar view, when he stated that evidence of the cost of repair was prima facie evidence of the sum necessary to indemnify against the plaintiff’s loss, and that an ‘evidentiary burden then shifts to the insurer [defendant] to establish that payment of the cost of repair would exceed an indemnity for the loss.’\(^{704}\)

In Gold Coast City Council v Lasica\(^{705}\) the District Court of Queensland expressed a similar view, that the defendant bears the evidential burden of proving betterment, citing the above case as authority. It reasoned:

\[\text{[I]}\text{t seems that there is at least an evidentiary onus on an insurer [the defendant] to establish that, without some deduction for betterment, the effect of paying the cost of repair will be that the insured is obtaining more than an indemnity.}\text{\(^{706}\)}\]

The Supreme Court of New South Wales in On Tai Fung v Stocovaz\(^{707}\) also expressed a similar view that the defendant should bear the evidential burden of proving betterment. In reviewing earlier authorities, the court asserted that if the plaintiff fulfilled his

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\(^{700}\) [2001] NSWCA 402 (New South Wales Court of Appeal).
\(^{701}\) By the general insuring clause in the policy, the insurer agreed ‘to indemnify or otherwise pay [the insured] in respect of’ the insured loss, and by the basis of settlement clause the insured could at its option pay the value of the property at the time of the damage or reinstate, replace or repair the damaged property ‘less a reduction for wear and tear and betterment’; General Accident Insurance Asia Ltd v Sakr [2001] NSWCA 402, [49].
\(^{702}\) This is a similar view to what Hodgson JA expressed in Tyco [2004] NSWCA 333. See earlier discussion on this case.
\(^{703}\) General Accident Insurance Asia Ltd v Sakr [2001] NSWCA 402 (New South Wales Court of Appeal), [77]. Hodgson JA’s statement in full: ‘[T]he onus was on the respondents to prove their damages, relevantly the cost of reinstatement or repair less a reduction for wear and tear and betterment. ...To put the same proposition a different way, an evidentiary onus was cast on the appellants [insurer/defendant] to prove some betterment for which a reduction should be made.’ at [77-78]. Hodgson JA was also one of the judges who heard the case of Tyco [2004] NSWCA 333, discussed below, where he expressed a similar view.
\(^{704}\) General Accident Insurance Asia Ltd v Sakr [2001] NSWCA 402 (New South Wales Court of Appeal), [89].
\(^{705}\) [2002] QDC 261 (District Court of Queensland) (McGill DCJ).
\(^{706}\) Ibid. The case of General Accident Insurance Asia Ltd v Sakr was cited as authority.
\(^{707}\) [2006] NSWSC 1345 (Supreme Court of New South Wales) (Patten AJ).
obligation of establishing prima facie or sound evidence of loss, then the ‘evidentiary onus will be upon the Defendant’\textsuperscript{708} to show that the plaintiff’s loss as claimed should be subject to being accounted for betterment.

It should be noted that although the judges in the above three cases used the terms ‘evidentiary onus’ and ‘evidentiary burden’ the intention to place the ‘evidential burden’ upon the defendant is clear.

IV JUSTIFICATIONS FOR THE PREFERRED SECOND VIEW (THAT THE DEFENDANT SHOULD BEAR ONLY THE EVIDENTIAL BURDEN, WITH THE PLAINTIFF RETAINING THE LEGAL BURDEN)

The preferred approach to proving betterment which this thesis supports and advances is based upon the second view. It can be broken down into three major propositions, as follows. The first major proposition to proving betterment is that the legal burden remains upon the plaintiff, as part of his legal burden to prove his loss and damage. This means that the plaintiff must refute the defendant’s allegation of betterment with countervailing evidence.

The second major proposition to proving betterment is that the defendant bears only the evidential burden. Imposing the evidential burden upon the defendant means that the defendant is obliged to dispute the plaintiff’s quantum of loss, by raising betterment as a fact in issue and showing evidence of its existence, or of such likelihood, and how it may possibly be valued.

The third major proposition to proving betterment relates to the tactical burden. It is tactically important for the plaintiff to produce counter-evidence to refute or overcome the defendant’s allegation of betterment. Although it is possible for the plaintiff to choose to be content with proof given by him of his prima facie loss and to ignore the defendant’s allegation of betterment, he would be taking the risk that the court may find that he has failed to meet his legal burden of proving his loss in the face of the defendant’s allegation of betterment. In other words, if the court finds that the

\textsuperscript{708} Ibid. Patten AJ’s remarks in full: ‘The question for the court in this case on the issue of damage will be whether the Defendant has established that the prima facie or “sound” evidence of loss, proved by the Plaintiff is extravagant and should be subject to deduction. The evidentiary onus will be upon the Defendant.’

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defendant’s allegation of betterment has some merit, it would be incumbent upon the plaintiff to refute this with counter-evidence, failing which the plaintiff will lose on that issue.

The preferred approach can be justified as being a more principled approach to adopt because it is consistent with the general legal framework governing the allocation of burdens of proof in a civil action. This is discussed below in more detail.

A Consistent with the General Law on Burdens of Proof

Williams provides the following explanation as to what would be critical to determining where the burden of proof should lie:

What then determines where the burden of proof lies? Often the question will turn on the form in which a legal rule is traditionally stated. If an issue is commonly listed among the constituent elements of a cause of action, the burden of proof will be said to be on the plaintiff. If the issue is commonly referred to as a factor leading to the avoidance of liability, the burden of proof will be on the defendant. 709

In the context where the plaintiff’s property has been destroyed or damaged by the defendant’s negligence and the defendant disputes the quantum of the plaintiff’s claim for loss on the ground of betterment, such contention would be more concerned with determining the plaintiff’s net loss, that is, with an account taken of any betterment.

The plaintiff’s expenditure in replacing or repairing the destroyed or damaged property can be accepted as proof of the plaintiff’s prima facie loss, assuming satisfaction of the test of ‘reasonableness’ (that the replacement or repair was necessary or reasonable in the circumstances). At this point, the plaintiff can be said to have satisfied his legal and evidential burden of proving his prima facie loss. If the defendant disputes the quantum of the plaintiff’s loss on the ground that it should be reduced to take into account of betterment, the defendant’s challenge here should be viewed, not as a matter which relates to his defence, but as a matter which relates specifically to the plaintiff’s claim and assertion of the quantum of loss suffered. Thus under the general law, the defendant should only bear an evidential burden (and not a legal burden) when he

709 Williams, above n 656, 171.
disputes quantification of the plaintiff’s loss. Under the general law, the plaintiff will continue to bear the legal burden in justifying the quantum of his loss.

The defendant challenges only the quantum of the plaintiff’s loss through an allegation of betterment, which seeks to offset the betterment gain from the plaintiff’s damages. It is not a challenge as to the fact of damage suffered by the plaintiff. The former would only be a matter relating to the plaintiff’s obligation to prove his loss, while the latter would be a matter of defence. It is clear that any off-setting gains resulting from betterment should be treated as intrinsically related to the matter of the plaintiff’s loss and should thus be treated as being part of the plaintiff’s legal burden to prove his loss, rather than be treated as a matter pertaining to the defendant’s defence.

It should also be noted that when a plaintiff puts forward his loss through a claim for replacement cost, he may at an early stage of the trial persuade the court that this measure of loss is not only reasonable, but also necessary or unavoidable. In doing this, the plaintiff may identify the existence and extent of any betterment and thus confront the issue of betterment directly in his own proof of loss. The plaintiff can persuade the court that even if there is betterment there is justification not to deduct his damages. The plaintiff can thus either disprove the incidence of betterment or justify that no deduction should be made.

B As an Exception to the General Rule (that the Party who bears the Legal Burden on an Issue should also bear the Evidential Burden)

As mentioned in Part II A, a general rule flowing from the incidence of the legal burden is ‘that the party bearing the legal burden on an issue also bears the evidential burden’. An objection can therefore be raised that the preferred approach would be contrary to this general rule, given that under the preferred approach the legal burden on the betterment issue is placed upon the plaintiff, with the evidential burden placed upon the defendant.

710 Heydon, above n 647, 243. See also, Williams, above n 656, 175.
711 See, Heydon, above n 647, 243; Williams, above n 656, 175.
The objection can, however, be overcome on the ground that there can be exceptions to the general rule, a point which is also made by Williams in the following passage, with examples given of such exceptions:

The general rule in civil cases is that the party who has the legal burden also has the evidential burden. In a negligence action, for example, the plaintiff has the legal burden of ultimately persuading the tribunal of fact that the defendant owed the plaintiff a duty of care, that the defendant was in breach of that duty, and that the breach caused damage to the plaintiff. If the plaintiff does not discharge this legal burden, then the plaintiff’s claim will fail. As the plaintiff carries the legal burden in respect of these matters, he or she also carries the evidential burden, and the plaintiff’s case will be withdrawn from the jury unless he or she discharges this burden. Several exceptions to this general rule are to be found in the area of tort law. As stated above, while the legal burden on the issue of whether a pre-existing condition would in time have led to the plaintiff’s present state rests upon the plaintiff the evidential burden is upon the defendant. It is also established that, while the legal burden of disproving the existence of offsetting gains is upon the plaintiff, the evidential burden of showing the likelihood of such gains rests upon the defendant.  

One example of an exception given by Williams in the above passage relates to offsetting gains, which would include betterment. With the preferred approach justified as an exception to the general rule, consistency under the general law can thus be maintained.

C Consistent with the Position Adopted for Off-Setting Benefits

Support for the preferred approach can be drawn from analogous situations involving offsetting benefits such as financial gains or collateral benefits, in cases such as Stewart v Dillingham Constructions Pty Ltd, Purkess v Crittenden and Watts v Rake, (relying in turn upon the English authorities of Baker v Dalgleish Steam Shipping Co and Curwen v James) which adopted a similar approach in allocating burdens of proof. These cases have taken the view that the defendant should only bear an evidential burden to show that the plaintiff has made the offsetting gains and that the

712 Williams, above n 656, 175.
714 [1965] HCA 34; (1965) 14 CLR 164.
716 [1922] 1 KB 36.
plaintiff’s legal burden of proving his loss should extend to having to disprove any gains alleged by the defendant.

In *Stewart v Dillingham Constructions Pty Ltd*\(^{718}\) the appeal was confined to the issue of damages, on the ground that the trial judge misdirected the jury that the onus of proving any gains resulting to the plaintiffs from their father’s death rested on the defendant, the plaintiffs’ father’s employer. On appeal, the Supreme Court of Victoria found that the trial judge’s direction was erroneous. The appeal court held that the legal burden of disproving the existence or likelihood of any offsetting gains rested upon the plaintiffs, and that the defendant only carried an evidential burden. It stated that this would be consistent with existing authorities, in particular, *Baker v Dalgleish Steam Shipping Co*\(^{719}\) and *Curwen v James.*\(^{720}\) Stephen J explained as follows:

With respect to the learned trial judge we are of the opinion that he was in error in directing the jury, as he did, that the onus of proving offsetting gains rested on the defendant. What is here in issue is, of course, the true or legal onus and not the evidentiary onus. The distinction needs no elaboration and is well established although the failure clearly to express the distinction and to describe the precision which onus is, in a particular case, being adverted to is of commonplace occurrence...\(^{721}\)

The court explained that the plaintiffs’ legal burden of proving their loss meant that they had to prove their ‘net loss’:\(^{722}\)

It follows that it is that net loss which the plaintiff must prove, and, as Walsh J observed in *Currie v Dempsey*... it lies upon a plaintiff to prove each essential element in his cause of action, the onus of proof, in the sense of the legal onus, lying on the defendant only when by his defence there is raised not merely a denial of some essential element of the plaintiff’s cause of action but some allegation which may constitute a good defence which amounts to an ‘avoidance’ of the plaintiff’s prima facie claim to relief.\(^{723}\)

\(^{718}\) [1974] VR 24; [1974] Vic Rp 3. In this case, the plaintiff’s father, while in the employ of the defendant and when working the flotation chamber of a barge, collapsed and died in circumstances which the jury found involved a wrongful act, neglect or default which would have entitled the deceased to recover damages against the defendant had he survived. The action for damages for loss of dependency was brought by the plaintiff’s infant children. At trial, the plaintiffs’ mother testified of her intended remarriage and the prospective adoption of the plaintiffs by her intended future husband. The trial judge directed the jury that the legal burden of proof rested upon the defendant in relation to the benefits that the plaintiffs might obtain through their mother’s prospective remarriage and their prospective adoption.

\(^{719}\) [1922] 1 KB 36.


\(^{722}\) Ibid 7.

\(^{723}\) Ibid.
The court, in clarifying and relying upon the English cases of *Baker v Dalgleish Steam Shipping Co*\(^{724}\) and *Curwen v James*,\(^ {725}\) explained that it was ‘dealing only with the evidentiary onus of proof’\(^ {726}\) and not the legal burden, when it determined the type of burden that the defendant should bear in relation to showing ‘some gain or the probability thereof’\(^ {727}\) which may affect ‘the prima facie measure of damages’\(^ {728}\) representing the plaintiffs’ ‘gross loss of dependency’\(^ {729}\).

With the above reasoning supported by and consistent with the general law governing burdens of proof and with both collateral benefits and betterment being similar in nature, that is, as offsetting benefits, the above approach should similarly be applied to the betterment contention.

### V CONCLUSION

This Chapter proposed that the preferred approach to proving betterment is for the defendant to bear only an evidential burden to allege betterment and show the existence or likelihood of betterment and how it may possibly be valued, with the legal burden remaining upon the plaintiff to disprove the defendant’s allegation of betterment, together with the tactical burden playing its role as explained above. The preferred approach is not only consistent with the general principles governing the incidence and allocation of the burden of proof between parties to a civil action, but would also generally balance the interests and abilities of both the plaintiff and the defendant in carrying out their respective proof obligations in relation to a contention involving betterment.

\(^{724}\) [1922] 1 KB 36.

\(^{725}\) [1963] 1 WLR 748; [1963] 2 All ER 619.


\(^{727}\) Ibid.

\(^{728}\) Ibid.

\(^{729}\) Ibid. Stephen J also pointed out that in the case hand, it was the plaintiffs who had ‘led the very body of evidence’ relating to the prospective remarriage of the plaintiffs’ mother and the prospective adoption of the plaintiffs: at 9.
CHAPTER 8
CONCLUSION: A GENERAL APPROACH TO ACCOUNT FOR BETTERMENT

I SUBJECT AND OBJECT OF THESIS

II THE ROLE OF JUSTICE THEORY AND VALUES OF CERTAINTY, CONSISTENCY AND PREDICTABILITY

III CONCLUSIONS OF THE FOUR INQUIRIES INTO BETTERMENT
   A A Definition of Betterment
   B A General Approach to Account for Betterment
   C Appropriate Valuation of Betterment
   D An Evidential Burden upon the Defendant
   E An Illustration of the Suggested Approach

IV BENEFITS OF A GENERAL APPROACH THAT ACCOUNTS FOR BETTERMENT
CHAPTER 8
CONCLUSION: A GENERAL APPROACH TO ACCOUNT FOR BETTERMENT

I SUBJECT AND OBJECT OF THESIS

This thesis critically examined the concept of ‘betterment’ and its treatment under the law in the context of assessing damages for damage or destruction to property, where the plaintiff’s claim in tort or contract is for repair or replacement cost. It exposed the difficulties and unresolved questions and issues pertaining to the various aspects of betterment, including the predicament whether it should be accounted for or not. The thesis in its analysis of this area of the law explained, discussed and evaluated the various aspects and issues raised by betterment. It clarified the law in areas of uncertainty, as well as put forward suggestions where there were unresolved questions and issues to be settled. The clarification and suggestions for changes and reform as set out in this thesis will lead to more just and reasoned outcomes for parties involved in betterment disputes.

This thesis was structured into four major inquiries which focused upon the key aspects of betterment. In each inquiry, dealt with in individual chapters, the matters and issues relating to the particular aspect of betterment raised, were examined and clarified, and proposals for changes or reform were put forward where necessary or appropriate. Although the thesis focused mainly upon Australian case law, it also drew upon the case law of other common law jurisdictions, where this was useful to the analysis in this thesis, particularly where there was a lack of Australian cases in the areas discussed.

II THE ROLE OF JUSTICE THEORY AND VALUES OF CERTAINTY, CONSISTENCY AND PREDICTABILITY

The proposals put forward were based upon promoting a more principled and reasoned approach towards resolving betterment disputes. They were supported by principles drawn from the justice theory of law, in particular, corrective justice and distributive justice.

The thesis argued that the law relating to betterment would be made more determinate if the proposals suggested, as supported by the justice theory of law, were adopted and put
in place. It argued, in particular, for the betterment predicament to be assessed for compliance predominantly with corrective justice reasoning. A general approach to account for betterment was therefore argued and proposed in the thesis. It further argued and proposed that exceptions to the general approach that accounts for betterment should be assessed for compliance with distributive justice reasoning. The thesis also referred to other jurisprudential perspectives, for example, the law and economics perspective, where relevant.

The thesis was also driven by values of certainty, consistency and predictability. It argued that the principles of law concerning betterment should be clear, consistent, certain and predictable and that this can be achieved if there are determinate rules with connecting principles in place. The thesis demonstrated that the current state of the law indicated otherwise. Through the analysis, discussion, exposition and clarification of the law relating to betterment under the thesis, together with proposals for reform, the rules relating to betterment were made more determinate. The importance of consistency, certainty and predictability to the law of damages is undoubted, as it would promote reliable and predictable verdicts and outcomes.

### III CONCLUSIONS OF THE FOUR INQUIRIES INTO BETTERMENT

The four major inquiries into betterment generally mirrored the four key inquiries which the court must undertake when dealing with a betterment dispute. The court must in the first inquiry deal with how the existence of betterment can be determined on the facts of the case before it. The court must thereafter deal with the second inquiry concerning the betterment predicament, the question as to whether the betterment found to exist on the facts should or should not be accounted for. The third inquiry the court must deal with concerns how the value of the betterment, found to exist on the facts, should be assessed in monetary terms. Although referred to as the fourth inquiry, which concerns questions relating to proof, in particular as to what the parties’ obligations are and if they have satisfied these obligations, these matters can, or may need to be considered early in the court proceedings.

#### A Definition of Betterment
Under the first major inquiry into betterment, carried out in Chapter 3, the questions as to what meaning should be attached to the term ‘betterment’ and how this can be applied to determine the existence of betterment were examined. As the analysis showed that there were differences in the courts’ expectations as to what would be sufficient to constitute betterment, the inquiry examined and identified the individual elements of betterment. Based upon the elements identified under the inquiry, the following definition of betterment was proposed to serve as an appropriate and useful test or yardstick to identify the existence of betterment in any given case:

‘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.’

B A General Approach to Account for Betterment

The second major inquiry into betterment, carried out in Chapters 4 and 5, addressed the betterment predicament as to whether betterment should be accounted for or not. The analysis showed that there were different views and approaches to dealing with the betterment predicament. This thesis argued and proposed that there should be a general approach to account for betterment, subject to reasoned exceptions. Chapter 4 argued for a general approach to account for betterment, based upon, inter alia, corrective justice reasoning. Chapter 5 argued for reasoned exceptions to displace the general approach of accountability, based upon, inter alia, distributive justice reasoning. In considering the question as to whether the exceptions can be drawn together, the common element linking them was drawn from Dr Lushington’s speech in *The Gazelle* where he referred to an ‘impossibility of otherwise effecting such indemnification’.\(^{730}\)

The four categories of exceptions proposed are not exclusive. The list of exceptions must remain open to allow the court to exercise its discretion to admit further exceptions where circumstances call for this. The exceptions must, however, be confined to ‘exceptional’ situations, in so far as they run counter to the compensation principle in allowing over-compensation to occur.

C Appropriate Valuation of Betterment

\(^{730}(1844) 2 \text{ W Rob} 279; 166 \text{ ER} 759, 760.\)
The third major inquiry into betterment, carried out in Chapter 6, dealt with the question as to how betterment (found to exist on the facts) should be valued in monetary terms. With diverse scenarios that can arise in a dispute concerning betterment, the list of potential approaches to valuing betterment must remain open. The inquiry examined the various approaches which the courts have used. It discussed the various bases, particular circumstances, applicability, strengths and weaknesses of the approaches. The explanation and critique of these various approaches in this thesis will assist litigating parties and the courts when they have to consider and select the most appropriate approach to apply in any given case.

D An Evidential Burden upon the Defendant

The fourth major inquiry into betterment, carried out in Chapter 7, dealt with questions relating to evidential and proof-related matters concerning betterment. The analysis showed that there was a lack of clarity and certainty in the law relating to not only to the question as to whether the plaintiff or defendant should bear the burden of proving or disproving betterment, but also to the type of burden involved. It was argued and proposed, with a view to maintain consistency under the general law relating to burdens of proof and to also balance both parties’ interests, that the better approach is for the defendant to bear only an evidential burden to show the existence or likelihood of betterment and how it may possibly be valued, with the legal burden remaining upon the plaintiff to disprove the defendant’s allegation of betterment.

E An Illustration of the Suggested Approach

The utility of the suggested approach under this thesis can be illustrated and tested against the High Court case of *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*. In this case the tenant of an office building breached an express covenant of the lease which prohibited the tenant from altering the premises without the landlord’s approval when it renovated the foyer. The foyer had in fact been expensively renovated by the landlord about six months prior to commencement of the lease. The sole issue before the court concerned the measure of damages, with no issue raised about the fact of the breach. The High Court affirmed the Full Federal Court’s decision to award the

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landlord the full cost of restoration of the foyer to its original condition before the damage was committed by the tenant. The High Court did not consider the issue whether there should be a deduction for betterment from the reinstatement cost awarded because this issue was not raised by the tenant. The High Court, however, remarked that the landlord would have possibly been better off. As the High Court put it:

In theory, if the Landlord employs the damages ... after the lease expires in 2012 or 2017 on rebuilding the foyer, it would be better off than it would have been if cl 2.13 had not been breached. If it had not been breached, the Landlord would have retaken possession of the foyer which had been subjected to 15 or 20 years’ wear and tear so that, as the trial judge found, the foyer would probably have to be refurbished.

Had the tenant requested a discount in the damages awarded against it to take account of this ‘betterment’ problem, its application, if backed by appropriate evidence, may have had merit.”

Pursuant to the approach suggested in this thesis, under the first inquiry, the court must consider the question as to whether betterment can be said to exist on the facts of the case. This can be determined by testing it against the proposed definition of betterment. The first element of betterment, that there must be an improvement in the plaintiff’s property after reinstatement can be easily satisfied. As the court pointed out above, a newly reinstated foyer upon expiry of the lease would be an improvement over the original old foyer which would have suffered wear and tear over the period of the lease. The other two elements to satisfy before making a finding of betterment is that the aforesaid improvement must a real benefit or advantage to the plaintiff, and that it must lead to an improvement in the plaintiff’s financial position after the wrong. Assuming that the reinstatement and improvement does not result in the landlord being able to secure a higher rental of the premises, the additional elements of betterment are therefore unlikely to be fulfilled. However, for the sake of illustrating the suggested approach, it will be assumed that all the elements of betterment can be satisfied. The court must in the second inquiry deal with the betterment predicament, whether there should be an account made for betterment. Based upon the approach suggested in this thesis an account for betterment should generally be made, unless any of the exceptions, set out in Chapter 5, can be satisfied. On the facts, the fourth exception, based upon the necessity to reinstate as carried out by the plaintiff in the absence of any other option, may be a potential exception which can be satisfied. As the list of exceptions is not closed, it is also possible for other arguments to be put forward to satisfy an exception

732 Ibid [24]-[25].
which may extend beyond those listed in Chapter 5. In the third inquiry, the court must 
deal with the question as to how betterment, found to exist on the facts, should be 
assessed in monetary terms. The various methods of valuing betterment listed in 
Chapter 6 can assist with this task. The ‘apportioned sum of the reinstatement cost’ 
approach may be a potential approach to apply in this situation. As for matters within 
the fourth inquiry, concerning questions relating to proof, it appears from the court’s 
remarks set out above that the evidential burden which the defendant (the tenant in this 
case) should bear, as suggested in this thesis, was not satisfied. To satisfy its evidential 
burden, the defendant is obliged to raise betterment as a fact in issue and show evidence 
of its existence, or of such likelihood, and how it may possibly be valued. On the facts, 
the defendant failed to do this.

The utility of the suggested approach is apparent from the above illustration against the 
case of *Tabcorp Holdings Ltd v Bowen Investments Pty Ltd*.733

IV BENEFITS OF A GENERAL APPROACH THAT ACCOUNTS FOR 
BETTERMENT

There is no doubt that disputes concerning betterment, with its predicament as to 
whether the plaintiff’s damages should be reduced to account for it or not, will continue 
to challenge the courts.

Notwithstanding that the courts must continue to retain flexibility when trying to 
resolve betterment disputes, particularly in light of the diverse circumstances that 
usually accompany betterment disputes, there is a need for the law on betterment to be 
clear and certain, based upon determinate rules with connecting principles in place. The 
analysis, exposition and clarification of the law relating to betterment under this thesis, 
together with proposals for changes and reform, fulfil the aforesaid need. This thesis 
provides disputing parties with sufficient guiding principles upon which they can assess 
their cases and decide to negotiate for settlement, or litigate if necessary. The proposal 
for a general approach to account for betterment subject to reasoned exceptions, 
supported by the justice theory of law, will lead to more just and reasoned outcomes for 
parties engaged in betterment disputes.

733 Ibid [13].
The thesis will assist parties and their counsel to give early attention to damages analysis in disputes concerning betterment. It has been fittingly observed that ‘[w]hat damages a client will recover is often the most important consideration’ but ‘nonetheless, damages are often the least understood, least emphasized, and last aspect of a case to be developed.’

With a clearer and better understanding of the law relating to betterment, disputing parties and their counsel will find themselves in a better position to try to settle disputes amicably if possible, instead of bringing them to the courts. This will lead to a reduction of betterment disputes coming before the courts, thereby saving time and money on the part of litigants and the courts.

Even if the parties are unable to settle the disputes and the courts have to adjudicate, the courts would be in a better position to deal with these disputes in a more effective and expeditious manner and to deliver more consistent reasoning and outcomes.

It is important to emphasise the caution that has often been expressed that the assessment of damages is not an exact science. Although the law of damages, including the law relating to betterment, must generally aim for more precise quantification of the plaintiff’s damages, the quest for scientific precision in disputes concerning betterment may not always be practical or worthwhile for the parties. Although accuracy and precision can often be bought at a price, a balance must be struck between the desire to achieve a high degree of precision in the assessment process on the one hand, and the time and money involved on the other, particularly in disputes concerning betterment.

Fridman aptly points out that the ‘evolution of the law is continuous’ and it is ‘no less true of remedies than of any other aspect of the law.’ It is hoped that this thesis, in bringing together and providing an in-depth analysis of the relevant case law and the various issues raised by betterment, can serve as a catalyst for further discussion and refinement of the law of damages relating to betterment.

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