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## Betterment

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*When property is wrongfully damaged the cost of reinstatement is often the appropriate measure of damages. Reinstatement by repair or replacement is, however, often possible only by replacing old materials with new materials that enhance the value of the property, generating "betterment." In such cases courts are faced with a choice whether to abide the betterment and award the cost of reinstatement, or reduce damages to offset the betterment. Examples of both responses to betterment are found in the cases, but no clear principle has been articulated by Canadian courts as to when one is to be preferred over the other. I advance such a principle here, and use it to resolve some difficulties faced by courts in the assessment of damages where betterment is present.*

*Lorsque des biens sont endommagés illégalement, le coût de remise en état est souvent la mesure appropriée des dommages causés. Cependant, la remise en état par réparation ou par remplacement n'est souvent possible que par le remplacement de matériel usagé par du nouveau matériel qui rehausse la valeur des biens et constitue une amélioration. Dans de telles situations, les tribunaux doivent trancher : ils peuvent confirmer l'amélioration et accorder le coût de la remise en état ou réduire le montant des dommages pour compenser l'amélioration. La jurisprudence contient des exemples des deux réponses à l'amélioration, mais les tribunaux n'ont articulé aucun principe clair quant aux situations où une réponse est préférable à l'autre. L'auteur énonce un tel principe dans cet article, et il l'applique à la résolution de certains problèmes qu'éprouvent les tribunaux lorsqu'il s'agit d'évaluer les dommages dans les situations où il y a amélioration.*

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- I. *Damages for injury to property and the problem of betterment*
  - II. *Compensation measured by the cost of reinstatement*
  - III. *Betterment requires proof of enhanced objective value*
  - IV. *The argument from overcompensation*
  - V. *Compensating by overcompensating*
  - VI. *The argument from offsetting enrichment*
  - VII. *Betterment and enrichment*
  - VIII. *Three kinds of betterment*
  - IX. *Betterment that enhances profitability*
  - X. *Betterment that extends the useful life of property subject to periodic replacement*
    1. *Alternative conceptions of this incontrovertible benefit*
    2. *Deferring the necessary expense of replacing an asset*
    3. *Eliminating the necessary expense of acquiring an asset*
    4. *The wrong way down James Street*
  - XI. *Betterment that enhances the market value of the property*
    1. *Realizable but unrealized benefits in the law of unjust enrichment*
    2. *Realizable but unrealized benefits in the law of betterment*
- Conclusion*

I. *Damages for injury to property and the problem of betterment*

It frequently occurs that a defendant wrongs a plaintiff by damaging or destroying his property.<sup>1</sup> Often the wrong is tortious, but damage or destruction of property can also be in breach of contract. Damages awarded for wrongful injury to property are compensatory. They are generally measured by the reasonable cost of repairing or replacing the property, that is, by the reasonable cost of reinstatement.

There are, however, situations in which damages measured by the cost of reinstatement threaten to overcompensate the owner. Damages in the reinstatement measure are compensatory insofar as they afford the owner the funds necessary to restore the property to the condition it would have been in absent the wrong. Often, however, the property was not new when it was damaged. If the repair or replacement in such a case

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1. Throughout the paper I use the masculine pronoun to refer to the plaintiff-owner.

can be undertaken using materials of comparable vintage, then damages measured by the cost of the reinstatement are compensatory. Frequently, however, there is no market in older materials and the only practical way to repair or replace the damaged or destroyed property is with new materials.<sup>2</sup> In such cases damages measured by the cost of reinstatement permit the plaintiff to replace old materials with new. This presents no problem if the new materials add no value to the property. But if the new materials add value to the property (relative to its value had there been no wrong), then reinstatement of the property results in “betterment.”

Betterment is the phenomenon of property being more valuable to the plaintiff after reinstatement than if it had not been wrongfully damaged. Where betterment would result from reinstatement, damages measured by the cost of reinstatement are more valuable to the plaintiff than if the wrong had never occurred.<sup>3</sup> When reinstatement would result in betterment, then, a court is faced with a choice. It could abide the betterment and award the cost of reinstatement, or it could reduce damages to the extent necessary to offset the betterment.

Examples of both these responses to betterment are found in the cases, but no clear principle has been articulated as to when one is to be preferred over the other. Indeed, in one of the leading Canadian judgments on betterment Wood J.A., writing for the British Columbia Court of Appeal, remarked that “[n]o rules can be fashioned” to decide this question, the answer to which always depends “on what is reasonable in the circumstances.”<sup>4</sup> The Canadian case law on betterment has developed ad hoc. In those cases in which a sum for betterment is subtracted, courts typically leave the basis for that deduction unexamined. Often the deduction is justified by invoking a proscription on overcompensating

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2. “[O]ne cannot replace old paint with old paint.” *Raman v Sehmbi*, 1990 CarswellOnt 663, CLD 876 (Dist Ct) at para 30.

3. Courts sometimes invoke betterment principles when betterment is not implicated on the facts. Betterment is not implicated in every case in which assessing damages calls for an assessment of the value of improvements to property. For example, in *Yi v Varadi*, 2013 ABQB 201, 560 AR 297 plaintiff purchaser repaired defects that the defendant home inspector had negligently failed to notice. Taking it as a fact that the plaintiff would not have completed the house purchase had the defects been noted, the court measured damages by the cost of the repairs and, invoking the cases on betterment, held that a sum should be deducted for the increase in value to the home yielded by the repairs. The result is justifiable, but it was an error to invoke betterment to arrive at it. Betterment consists in enhancements yielded by a plaintiff’s reasonable response to the breach of a property right or a right to property. The breach of a right to a non-negligent property inspection sounds in damages that can and should be assessed on ordinary compensation principles without recourse to betterment ideas.

4. *Nan v Black Pine Manufacturing Ltd*, (1991) 55 BCLR (2d) 241, 80 DLR (4th) 153 at para 20 [Nan].

the plaintiff. Preventing overcompensation cannot be the whole story, however, since betterment is tolerated without deduction in other cases.

In this paper I have three main goals. First, I advance a principled account of betterment. I begin by examining what justifies an award of reinstatement damages, and what is required by way of proof to establish betterment. Then, drawing on the law of unjust enrichment, I argue that damages should be reduced on account of betterment if and only if that betterment takes the form of a benefit that would constitute an enrichment for the purposes of the action in unjust enrichment.

Second, I show that the cases on betterment fit my enrichment-based account. My account thus provides a principled basis for much of the Canadian jurisprudence on when damages are to be reduced for betterment.

Third, I bring my account of betterment to bear on the problem of assessing the value of betterment. The ad hoc character of the jurisprudence in this area has generated a lack of clarity on the question of how to measure the sum to be subtracted on account of the betterment. This lack of clarity is particularly troublesome in those cases where betterment extends the useful life of property that is subject to periodic replacement. These cases are common, and quantifying the kind of betterment they embody can be challenging. Drawing on my account of betterment, I explain the correct approach. Further, I argue that this approach has been obscured by an influential but mistaken line of judicial and academic commentary.

## II. *Compensation measured by the cost of reinstatement*

The problem of betterment arises only if damages are measured by the cost of reinstatement. It is sometimes urged that damages for injury to property should be measured not by this cost, but by the diminution in market value of the property due to the wrong.<sup>5</sup> It is useful, in defending my main thesis, to begin by defending the cost of reinstatement against this alternative measure as the correct measure of damages for injury to property.

Where a defendant wrongfully damages property belonging to the plaintiff, the plaintiff suffers a direct (immediate, non-consequential) loss in the form of physical damage to his property.<sup>6</sup> His loss is the difference between the property in its state immediately prior to the wrong, and its state immediately after the wrong. This is not a pecuniary loss, but rather

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5. D Harris, D Campbell & R Halson, *Remedies in Contract & Tort*, 2nd ed, (London: Butterworths, 2002) at 531. And see the cases cited in note 7, below.

6. He may also suffer consequential losses, such as loss of use of the property, or diminished proceeds from its sale. In what follows I am concerned solely with direct losses, and compensation for them.

a loss of certain physical attributes once associated with the property. Damages are awarded in response to this loss.

Damages awarded in response to a loss are compensatory. Compensatory damages are measured by reference to the value of what was lost. How should this value be measured in cases of wrongful damage to property? The law might choose to measure it through the eyes of the market. The loss might thus be measured by the difference (as of the date of the wrong) between the market value of the property had it not been damaged, and its post-wrong market value. There is some authority to the effect that this is how the law measures compensation for wrongful damage to property.<sup>7</sup> However, this “diminution in market value” measure cannot be justified in principle, and the weight of authority does not support it.

Damage to property is a loss to its owner, and its value must be measured from the perspective of the owner, not from the perspective of the market. Compensatory damages should provide the plaintiff with a sum of money equal to the value to him of what he lost.

It might be argued that the diminution in market value of the property is at least sometimes an apt measure of compensation. Consider the special case of a plaintiff who would have sold the property at the time of the wrongful damage, had it not occurred. One might argue that in such a case the plaintiff valued the property, at the time of the loss, precisely as much as the market valued it. The wrong deprived him of the value of a higher-priced sale in the market, justifying a damages award of precisely the diminution in market value. This sum is compensatory, in this special case, because the property attributes eliminated by the damage were valuable to the plaintiff just as insofar as they were valuable to the market.

Even if this argument were sound, it would justify the diminution in value measure of damages only in the special case of damage to property that is valued solely for its market return. For an owner who did not intend to sell his property at the time of the damage, the attributes eliminated by the damage are valuable for reasons other than their capacity to command a price in the market. For such an owner, a damages award in the diminution in market value measure, far from being compensatory, is quite arbitrary.

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7. *Grosvenor Fine Furniture (1982) Ltd v Terrie's Plumbing & Heating Ltd*, [1994] 1 WWR 275, [1993] SJ No. 439 (Sask CA) (Leave to appeal to SCC refused [1994] 1 SCR xi); *Yee v Pro-Western Management Ltd*, [1998] BCJ No. 942, 1998 CanLII 3854 (SC); *Stevens v Abbotsford Lumber Co*, [1924] 1 WWR 660 (BCCA), 1924 CarswellBC 5; *J Clark & Son Ltd v Fimmamore*, 5 NBR (2d) 475, 1972 CarswellNB 115 (CA). In *Coles v Hetherington*, [2013] EWCA Civ 1704 the Court of Appeal held that the normal measure of damage for injury to chattels is the diminution in their value due to the wrong, the reasonable cost of repair being merely evidence of this sum.

But the argument is not sound. Damages awards in the diminution in market value measure are always arbitrary. There are no special cases; an owner never values his property identically with the market. The value of property to its owner consists in the value to him of being an owner of that property. This value is distinct from the value to him of any particular use to which he might decide to put that property, such as selling it in the market. Property possesses a value to its owner that is prior to and independent of any specific end to which he might choose to put it. Property makes available to the owner certain aims and ends that he may adopt as his own. Without your coffee table, you could not choose to set your books upon it, to dust it, to admire it, to sell it, or to use it for firewood. Property increases the range of ends that the owner is able to choose as his own. Understood in this way, property is valuable to its owner simply as a means, as distinguished from a means to some particular end. “[M]eans,” writes Arthur Ripstein, “are not simply tools a person uses to pursue an already determinate end, but rather are essential to setting your own purposes at all.”<sup>8</sup> Because you can only select something as a goal if you believe yourself to have the tools and abilities to achieve it, means not only make it possible for us to achieve our ends, but to adopt them as our own in the first place.

The wrong involved in damaging another’s property is independent of any plans or projects that the owner may have intended to pursue with his property. The damage is wrongful not because it interferes with the owner’s ability to use it to pursue any particular end, but because it interferes with his property as a means. He has been deprived of some degree of purposiveness. The range of choices available to him in the world has been diminished. It is not sufficient, therefore, that damages enable him to replace whatever fruits or profits his undamaged property might have generated for him in pursuit of one goal or another. His damages must, rather, afford him the ability to recover his means. They must enable him to recover his property, undamaged, or to acquire some equivalent means.

It follows, therefore, that damages for wrongful damage to property should be measured by the cost of reinstating the property, by way of repair or replacement, to the condition it would have been in had the

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8. Arthur Ripstein, “As if it Had Never Happened” (2007) 48:5 *Wm & Mary L Rev* 1957 at 1965.

damage not occurred.<sup>9</sup> Damages should be sufficient to afford the plaintiff the ability to reverse the wrongfully caused physical damage. This is indeed how the law measures damages for wrongful damage to property. Damages in such cases are generally measured by the reasonable cost to the owner of reversing the physical loss, that is, the reasonable cost of repair or replacement.<sup>10</sup> Courts diverge from this measure only when the plaintiff does not intend to reinstate the damaged property, or when the cost of reinstatement far outstrips the diminution in the market value, making reinstatement unreasonable (this is a corollary of the mitigation principle).<sup>11</sup>

It is sometimes argued that damages in the reinstatement measure are not compensatory. They seek to eliminate a loss, so the argument goes, and one cannot be compensated for a loss that has ceased to exist.<sup>12</sup> This argument is mistaken. Damages in the reinstatement measure do not aim to reverse or nullify a loss, in any literal sense. A loss, being a datable state

9. According to Lord Blackburn's famous dictum, compensation is that sum of damages that will "as nearly as possible" place the plaintiff "in the same position as he would have been in if he had not sustained the wrong" *Livingstone v Rawyards Coal Co* (1880), 5 AC 25 at 39 [*Livingstone*]. The reference to the plaintiff's "position" is ambiguous as between his being made financially as well-off as if the wrong had not occurred, and his being placed physically and materially in the same position as if the wrong had not occurred. My argument supports the latter reading. On this ambiguity, see J Ren, "The Normal Measure of Damages for Tortious Damage to Chattels Under English Law" (2015) 23 Tort L Rev 148 at 161-162. As Ren puts it, the "claimant had a chattel that was not damaged prior to the tort. And that is the position the claimant should be restored to. Cost of repair does just that...." *Ibid* at 161. See, to similar effect, *Nan, supra* note 3 at para 28 (quoting with approval *Evans v Balog*, [1976] 1 NSWLR 36 (NSWCA)).

10. *Blair's Plumbing & Heating Ltd v McGraw*, 1981 CarswellNB 120, 39 NBR (2d) 356 (CA); *T. Donovan & Sons Ltd v Baker*, 1966 CarswellNB 16, 53 M.P.R. 113 (CA); *Panarctic Oils Ltd v Menasco Manufacturing Co.*, [1983] ABCA 42, 41 AR 451 at para. 57. See also *Darbishire v Warren*, [1963] 1 WLR 1067 (Eng CA). Destruction of and damage to property differ only in degree, and the prima facie measure of damages for destruction of property is the cost of replacement: *Nan, supra* note 4 at para. 20; *Scobie v Wing*, [1992] BCJ No 35, 2 WWR 514 (BCCA) at para 15; *Petersen v Fehr*, 1988 CarswellMan 200, 53 Man R (2d) 210 (QB) [*Petersen*]; *Guelph Light & Heat Commissioners v United Dairy & Poultry Co-operative Ltd*, 1966 CarswellOnt 105, [1966] 2 OR 467 (Ont Co Ct), aff'd, [1966] 2 OR 469n (Ont CA). See also *Liesbosch Dredger v SS Edison*, [1933] AC 449, and *Dominion Mosaics & Tile Co v Trafalgar Trucking Co* (1989), [1990] 2 All ER 246 (Eng CA).

11. On the relevance of the plaintiff's intention to reinstate the property to his recovery of reinstatement damages, see *Scaffidi-Argentina v Tega Homes Developments Inc*, 2016 ONSC 5448, 2016 CarswellOnt 14459; *Taylor v King*, 82 BCLR (2d) 108, 1993 CarswellBC 209 (BCCA); *Kevington Building Corp v Lee*, 36 CLR (2d) 293, [1998] BCJ No. 443 (BCSC); *Philip v Smith*, [1996] BCJ No 1863, BCWLD 2476 (BCCA). In *McGarry v Richards, Akroyd & Gall Ltd* (1953), [1954] 2 DLR 367 (BCSC), 1953 CarswellBC 218, a case involving breach of a construction contract, Davey J observed (at 387) that damages in the reinstatement measure are not available "where the owner does not intend to, or cannot rectify or complete the defective work, or where he would be acting unreasonably or oppressively in doing so."

12. Stephen Smith claims that if an award of reinstatement damages "achieves its purpose, the relevant loss will be eliminated (or prevented)." Therefore, he argues, such an award "cannot plausibly be described as 'compensatory.'" "Substitutionary Damages" in Charles Rickett, ed, *Justifying Private Law Remedies* (Oxford: Hart, 2008) 96-97.



of affairs, cannot be undone. Once suffered, a loss will always have been suffered.<sup>13</sup> (Indeed, a loss in the form of damage to property will always persist, since a thing repaired or replaced is not the same thing.) Damages in the cost of reinstatement measure do not (and do not seek to) render a loss un-suffered. Rather, they afford the owner the means of recovering, through physical reinstatement, the value of which the loss deprived him, thereby making it *as if* it never happened.<sup>14</sup>

The cost of reinstatement is therefore perfectly apt as a measure of compensation for injury to property. My concern in this paper are those situations in which damages measured by the cost of reinstatement threaten to overcompensate the owner by generating betterment. I begin by considering what counts as sufficient evidence of betterment.

### III. *Betterment requires proof of enhanced objective value*

Before examining how courts respond to betterment, I address the threshold question of what is required to establish betterment. Betterment is not in play every time old materials are replaced with new. In a leading case the Ontario Court of Appeal observed that renewal alone is not enough to generate betterment. “[I]n some cases, perhaps many,” wrote the Court, “the repair or replacement of property (the mere substituting of new for old) may well not involve any increase in the value of the property as a whole.”<sup>15</sup> A finding of betterment, then, requires evidence that the reinstatement would yield an improvement with “objective value.” This term is nowhere defined in the cases, and courts often seem concerned only with whether the improvement possessed a market value.<sup>16</sup> But the idea of objective value is potentially wider, and may plausibly include improvements that would be of value to a reasonable person in the owner’s position. In any event, it is clear that not every replacement of new with old yields the requisite objective value. Indeed, betterment claims often falter at this threshold, the defendant failing to prove betterment on the facts.

The value of some things is a function of their age. A newer automobile is more valuable than an older one that is in all other respects identical,

13. “Legal remedies, no matter how powerful they purport to be, cannot create the state of affairs that should have resulted had the plaintiff honored the promise or discharged the duty of care.” Avihay Dorfman, “What is the Point of the Tort Remedy?” (2014) 55 Am J of Jurisprudence 105 at 108.

14. Ripstein, *supra* note 8.

15. *James Street Hardware and Furniture Co Ltd v Spizziri* (1987), 62 OR (2d) 385, [1987] OJ No 1022 at para 64 (Ont CA) [*James Street*].

16. “In the case before me there is no specific evidence that the overall value of the building has been increased by the addition of a new brick front. Its function has not changed. Only its appearance has been enhanced. There is no evidence that it would bring one cent more in the market place in its repaired and renewed condition than it would have before the accident.” *Costa’s Foodateria Co v Huard*, 1986 CarswellOnt 5187, 37 ACWS (2d) 28 (Dist Ct) at para 21.

since the market puts a premium on newness. Similarly, the owner of an asset the useful lifespan of which is shorter than the time its use is required will value it less over time just in virtue of its advancing age, for as time goes on the expense of replacing it looms ever nearer.<sup>17</sup> But these are special cases. In the ordinary case the age of a thing does not bear directly on its value. That a widget is new rather than old does not generally determine whether it is more or less valuable. Many things tend to deteriorate over time, of course, or become less functional with age. Such things will be valued less as their utility or performance declines, but they are not less valuable just in virtue of their becoming older.

Newer is not always better, then, and (putting special cases to the side) betterment is not proved just by demonstrating that reinstatement would result in renewal or modernization of the property. The onus of proving betterment rests with the defendant.<sup>18</sup> Discharging that burden requires proof that reinstating the damaged property with new material would cause its objective value to increase relative to its value absent the wrong.<sup>19</sup> Moreover, often this cannot be proved because the novated property is a functional (if perhaps shinier) equivalent of the old property. For example, where the anticipated lifespan of the damaged property exceeds that of the owner (or of the enterprise or machinery in which the property is employed), reinstatement of the damaged property with new material is often of no consequence to the owner. As Rix L.J. put it in *The Baltic Surveyor*:

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.<sup>20</sup>

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17. Unless the asset is part of an item or an enterprise with a shorter lifespan.

18. Once the plaintiff has established the cost of reinstatement, it falls to the defendant to prove that reinstatement would generate quantifiable betterment: *James Street*, *supra* note 15 at para 66; *Madalena v Comox-Strathcona (Regional District)*, 2009 BCSC 1597, 86 CLR (3d) 295 at para 40 [*Madalena*]; *Decoste Manufacturing Ltd v A & B Roofing Ltd*, 2004 NSSC 79, 223 NSR (2d) 5 at para 159 [*DeCoste Manufacturing*].

19. Despite some previous uncertainty on the point (see J Berryman, “Betterment Before Canadian Courts” (1993) 72 Can Bar Rev 54 at 70), it is now settled that the defendant can discharge this burden without proving the extent of the betterment: *Laichkwiltach Enterprises Ltd v The “Pacific Faith” (Ship)* (2009), BCCA 157, 8 WWR 681 at para 36 [*Laichkwiltach*]. See also *Philp v Brunelle*, 2014 ONSC 6295, 2014 CarswellOnt 15693 at para 122 (aff’d 2016 ONCA 385, 69 RPR (5th) 1).

20. *Voaden v Champion (The Baltic Surveyor)*, [2002] EWCA Civ 89 at para 85.

A few more examples will illustrate the point.<sup>21</sup> In *MacMillan Bloedel Ltd v. Canadian National Railway* the defendant damaged electrical equipment in the plaintiff's mill.<sup>22</sup> The plaintiff replaced the equipment with more modern components. There was no evidence that the old equipment would have been replaced, and the court found that the new, solid-state circuitry did not enhance the profitability of the mill. Repairing the equipment that was damaged was like replacing "two links in a chainsaw."<sup>23</sup> Without the equipment, the mill could not operate; updating it simply put the mill back into operation, restoring the status quo ante.

In *Barrette v. Franki Compressed Pile Co of Canada Ltd* the defendants caused structural damage to a 40-year-old building owned by the plaintiffs.<sup>24</sup> The plaintiffs recovered the cost of completely rebuilding one of the walls using more stable construction techniques and sturdier materials than those in the original wall. "[I]t may be true," wrote the court, "that the present south wall of the foundation of the plaintiffs' property is stronger than the old wall." This did not constitute betterment, however, because "until this very abnormal disturbance was created by the operations of the defendant, that wall proved to be entirely adequate for its purpose; and no one can say that it would not have stood for a very much longer period of time."<sup>25</sup>

Similarly, in *Penn West Petroleum Ltd v. Koch Oil Co* the defendant negligently caused a fire and explosion in a storage tank at the plaintiff's heavy-oil treatment facility.<sup>26</sup> The plaintiff was permitted to recover the cost of building a new factory in place of the old one, no betterment having been proved:

The rebuilt facility is essentially the same as the old facility. It performs the same function. It is not more profitable. It is not more economical to operate. It is not more automated....The only betterment which the Plaintiffs have received is that they have replaced new for old. However,

21. See, in addition to these examples, *Meditek Laboratory Services Ltd v Purolator Courier Ltd*, [1994] 10 WWR 67, MJ No 453, (QB), esp para 27 (overturned on different grounds at [1995] 6 WWR 738 MJ No 233 (Man CA)); *Mercury Earth Coring Ltd v Charles Machine Works Inc*, 2009 SKQB 428, 344 Sask R 86 [*Mercury Earth Coring*]; *Ziehlke v Amisk Drilling Co*, 82 Man R (2d) 29, [1992] 6 WWR 688 (QB), varied on other grounds 92 Man R (2d) 83 (CA); *Goodyear Canada Inc v Wall Beresford Holdings Ltd*, [1992] OJ No 2130, 1992 CarswellOnt 2015 (Gen Div); *Lyons v O'Regan M-B Ltd*, 2016 NSSM 11, CarswellNS 477.

22. [1989] OJ No. 1604, 1989 CarswellOnt 1996 (Sup Ct) [*MacMillan Bloedel*].

23. *Ibid* at para 65.

24. [1955] OR 413, 2 DLR 665.

25. *Ibid* at 429-430. For another case in which the court found no betterment arising from the rebuilding of a wall, see *Strata Plan NW 3341 v Canlan Ice Sports Corp*, 2001 BCSC 1214, 10 WWR 214 (aff'd 2002 BCCA 526, 11 WWR 37).

26. (1994), 16 Alta LR (3d) 318, 4 WWR 630 (QB) [*Penn West Petroleum*].

the evidence clearly indicated that the old [facility] would have lasted for the life of the [oilfield]... [T]he substitution of new for old in this case does not constitute betterment.<sup>27</sup>

Finally, in *Nan v. Black Pine Manufacturing Ltd* the defendant negligently burned down the plaintiff's home.<sup>28</sup> The plaintiff had the home rebuilt at a cost of \$69,809. Despite that its market value was only \$47,000 at the time of the fire, the British Columbia Court of Appeal refused to disturb the trial judge's finding that betterment had not been proved.<sup>29</sup> It would be a mistake, wrote the court, to "assume as a matter of course that simply by getting a new house for an old one [the plaintiff] had enjoyed some element of 'betterment,' which had to be deducted from the damages award in order to prevent overcompensation."<sup>30</sup>

#### IV. *The argument from overcompensation*

Betterment obtains when something of objective value is created for the owner by the reinstatement of his damaged property. The prospect of betterment presents the court with a choice. If betterment would result from reinstatement, should damages be awarded in the reinstatement measure, or should they be reduced to offset and eliminate the potential betterment?

The answer to this question may seem to fall straightforwardly out of the compensation principle. The purpose of damages for wrongful injury to property is compensation, after all, and where compensation is the objective, overcompensation must be avoided. As the Supreme Court of Canada put it, in the tortious context:

The essential purpose and most basic principle of tort law is that the plaintiff must be placed in the position he or she would have been in absent the defendant's negligence (the "original position"). *However, the plaintiff is not to be placed in a position better than his or her original one.*<sup>31</sup>

In view of this, it may seem obvious that if reinstatement would generate betterment, then damages must not be awarded in the reinstatement

27. *Ibid* at paras 112 and 115. The court held that betterment had been demonstrated in respect of certain specific improvements made to the factory.

28. *Nan*, *supra* note 3.

29. As noted above (see note 18 and accompanying text), the defendant bears the onus of proving betterment. This case illustrates a vigorous application of this principle. The established facts make an inference that the market value of the home had been enhanced almost irresistible. The trial judge resisted, however, as no evidence on the matter was adduced by the defendants. I discuss *Black Pine* further below (see text accompanying note 97).

30. *Supra* note 3 at para 11.

31. *Athey v Leonati*, [1996] 3 SCR 458, 140 DLR (4th) 235 at para 32 [emphasis added] [*Athey*].

measure. Some courts and commentators have indeed regarded this as a straightforward requirement of the compensation principle.<sup>32</sup> Ogus, for example, writes:

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.<sup>33</sup>

I call this the argument from overcompensation.

In many cases in which betterment is proved, Canadian courts do indeed reduce damages to avoid the betterment.<sup>34</sup> However, there are some cases in which courts have awarded (or have been prepared to award) plaintiffs the undiminished cost of reinstatement despite that this would place them in a better position than if the wrongful damage had never been suffered.<sup>35</sup> Little effort is made in these cases to reconcile the outcome with the compensation principle, or with the cases in which damages have been reduced on account of betterment. Canadian courts have not articulated a

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32. See R Snyder & H Pitch, *Damages for Breach of Contract*, 2nd ed (Toronto: Carswell, 2009) at 2-25; Kieran AG Bridge, "Comment on *James St Hardware v Spizziri*" (1989) 68 Can Bar Rev 155 at 157; Derek A Brindle, "Owners' Claims Against Contractors—A Primer," (2008) 70 CLP (3d) 7 at 24; *Canada v The "Delta Pride"*, [2003] FCJ No 21, 226 FTR 1 (TD) at para 98; *Fudge v Strata Plan*, NW 2636 [2012] BCJ No 2358, 223 ACWS (3d) 888 at para 91 (Prov Ct) [*Fudge*]; *Moore v Taylor*, 2009 ABPC 138, CarswellAlta 892 at para 21. See also *Lukin v Godsall* (1759), Peake Add Cas 15 at 16, 170 ER 178.

33. AI Ogus, *The Law of Damages* (London: Butterworths, 1973) at 134.

34. See the cases discussed in section X, below.

35. *National Theatres Ltd v Macdonalds Consolidated Ltd*, 1940 CarswellAlta 5, 1 WWR 168 (Alta Dist Ct) [*National Theatres*]; *T. Donovan & Sons Ltd v Baker*, 1966 CarswellNB 16, 53 MPR 113 (CA) [*T Donovan & Sons*]; *Busenius v Pott*, [1988] 87 AR 270, 1988 CarswellAlta 424 (QB) [*Busenius*]; *Petersen*, *supra* note 10; *Sullivan v Weis*, [1989] 99 AR 233, 1989 CarswellAlta 510 (QB) [*Sullivan*]; *Rieberger v JC Olsen Ltd*, [1994] BCJ No 2717, CarswellBC 3090 (Sup Ct) [*Rieberger*]; *Scheller v C & M Holdings Inc*, [1999] SJ No 521, 183 Sask R 130 (QB); *Carrel v Randy Laur Burner Service*, [2004] OJ No 70, CarswellOnt 66 (Sup Ct); *Wainwright (Town) v G-M Pearson Environmental Management Ltd*, 2007 ABQB 576, 92 Alta LR (4th) 320 [*Wainwright*] (rev'd on other grounds, 2010 ABCA 23); *The Ship "Demurra" v Maritime Telegraph & Telephone Co*, [1977] 2 FC 679, 75 DLR (3d) 766 (FCA). See also *Bishop's Falls (Town) v Abitibi-Price Ltd* (1987), 197 APR 100, 64 Nfld & PEIR 100 at para 30 (Sup Ct).

principled approach to the problem of when an allowance should be made for betterment.<sup>36</sup> In what follows, I advance such an approach.

A word about my method. I aim to arrive at a solution to the problem of betterment by showing why the one that is offered by the argument from overcompensation fails. In revealing the limits of the argument from overcompensation, I try to render it as forcefully as I can. That argument can explain the outcome in all those cases where a deduction for betterment should be made. It is, however, limited by certain premises that fail to hold true under some circumstances. I will argue that those premises fail to hold in exactly the circumstances in which betterment should be permitted to stand without a deduction.

#### V. *Compensating by overcompensating*

Damages in the reinstatement measure permit the plaintiff to restore the physical attributes of his property that were destroyed by the wrongful damage. Betterment occurs when this reinstatement must as a matter of practical necessity render the property more valuable than it would have been had the damage never been done. According to the argument from overcompensation the value of any betterment yielded by reinstatement must be subtracted from the cost of reinstatement, in order to avoid overcompensating the plaintiff.

One difficulty with the argument from overcompensation is its premise that overcompensation is forbidden by the compensation principle. The argument takes it for granted that if compensation is the goal, then overcompensation must be avoided. But this is not right. The victim of a wrong is entitled to be compensated, but it does not follow from this that he must not be overcompensated. A remedy that places the plaintiff in a superior position relative to that he would have occupied but for the wrong does not, by virtue of that fact alone, offend against the compensation principle.

Compensation is a (remedial) purpose or goal. Like many goals, it is one that can be simultaneously met and exceeded. A plaintiff who is overcompensated is compensated, albeit not perfectly. The compensation principle is often framed in terms of perfect compensation. In his venerable statement of the principle, Lord Blackburn held that where an “injury is to be compensated by damages” the amount awarded should “as

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36. “No clear test has been enunciated which would allow a court to determine whether on particular facts it should make no deduction on account of betterment or should take it into account and award the plaintiff only the depreciated value of what was lost.” Bridge, *supra* note 32 at 162. See also the remarks of Lalonde J in *Safe Step Building Treatments Inc v 1382680 Ontario Inc*, [2004] OJ No 4119, OTC 876 (Sup Ct) at para 76 [*Safe Step Building Treatments*].

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.”<sup>37</sup> Despite the reference to perfect compensation in this and other renderings of the principle, the compensation principle finds its justification in the goal of sufficient (not perfect) compensation. The compensation principle derives its force from the idea that my entitlement to what is mine (to my means) is unaffected by its infringement. The principle seeks to ensure that a plaintiff is awarded damages sufficient to make it as if his entitlement was not infringed, by reversing the loss caused by the wrong. Mitigation constrains the plaintiff’s recovery to the minimum amount reasonably necessary to achieve this result. This usually yields perfect compensation. But not always. I will argue that in some cases the minimum compensatory sum overcompensates.

Sometimes reversing a loss requires a remedy that overcompensates the plaintiff. This apparent paradox is only an example of the familiar phenomenon of a goal that can be met in practice only by exceeding it, in the sense of overshooting the mark. I cannot pay cash for a grocery bill of \$43.58 except by paying \$43.60. I cannot buy shoes for my son that are big enough for him except by buying shoes that are a little too big for him. And so on. Now consider the law’s response to wrongful damage to property. As we have seen, the law treats such damage as a loss to be reversed. Reversing physical damage is, moreover, a goal that can often be met only by exceeding it. When my tenant ruins the finish on my hardwood floors, I can reverse that damage only by having the floors refinished, despite that they were several years worn before the tenant moved in. When my contractor causes a flood in part of my basement, I can reverse the damage to the sodden half of my five-year-old carpet only by replacing the entire carpet with a new one. And so on.

In cases of damage to property the law regards the plaintiff as having been wrongfully deprived of certain means, namely, his undamaged property. The compensation principle aims to make good the plaintiff’s loss by a remedy that indirectly reverses the physical damage, restoring to the plaintiff those attributes of the property that were eliminated by the wrong. Where this goal can be met only by exceeding it—by replacing old material with new—then the compensation principle requires that it be

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37. *Livingstone*, *supra* note 9 at 39. See also *Athey*, *supra* note 31 at para 35. In *Commonwealth v Amann Aviation Pty Ltd* (1991), 174 CLR 64 at 82 the High Court of Australia referred to what it called a “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 to that which he or she would have been in had the contract been performed.”

exceeded.<sup>38</sup> This excess (the new-for-old) may be of no appreciable value to the plaintiff. But insofar as it is—insofar as the new material is more valuable to the plaintiff than the old—then compensating the plaintiff requires a remedy that overcompensates him.<sup>39</sup>

#### VI. *The argument from offsetting enrichment*

Our question, recall, is whether an owner should recover the full cost of reinstatement in cases where betterment would result. The argument from overcompensation insists that awarding the reinstatement cost would offend against the compensation principle. As I have argued, however, the compensation principle does not proscribe overcompensation. If the wrongfully eliminated attributes of the property can be restored, and compensation achieved, only by replacing old with new, then the compensation principle calls for a remedy that achieves this result, even if achieving it would yield overcompensation in the form of betterment.

A proponent of the argument from overcompensation might concede that practical constraints may make it necessary to improve damaged property in order to reinstate it, but still deny that this justifies an award of reinstatement damages where overcompensation would result. Betterment may be an unavoidable consequence of reinstatement, but overcompensation is not, since it can—and therefore should—be eliminated by subtracting the value of the betterment from the cost of reinstatement.

It is useful, in addressing this argument, to define betterment and the cost of reinstatement as quantities. Let B represent the value of the betterment. B is a measure of the extent to which the property is more valuable after reinstatement than it would have been had the damage never occurred. Let R be the cost to the plaintiff of reinstating the property. The argument from overcompensation insists that compensation is achieved by subtracting from the cost of reinstatement the value of the betterment that would be yielded by the reinstatement: damages should be set at  $R - B$ .

Now as we have seen, in cases of wrongful damage to property the owner suffers a loss of his property, understood as a means. Compensating

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38. Where the plaintiff uses the damage to his property as an opportunity to make improvements that go *beyond* what is practically necessary to reinstate, courts sometimes treat this as a betterment issue and reduce recovery by the value of those improvements. See *Madalena*, *supra* note 18; *Hik v Redlick*, 2014 BCSC 1532, BCWLD 6983; *Restivo v Poly-Mor Canada Inc*, 2014 ABPC 68, CarswellAlta 497. However, such cases are properly resolved not by a betterment deduction, but by the principle of mitigation. Betterment is generated only where the remedial work is necessary to effect reinstatement and recovery of its cost is not precluded by the principle of mitigation. Betterment is a problem that begins only after the compensation principle runs out.

39. In *Rieberger*, *supra* note 35 at para 124 Smith J wrote that compensation is the “fundamental principle of damages [but that] purpose cannot be effected here without the plaintiffs incidentally deriving some betterment.”



the owner therefore calls for a remedy that enables him to recover those means or an equivalent. An award of damages that falls short, by an amount B, of the cost of reinstatement, requires the owner to bear that portion of the cost of reinstatement himself. The sum R-B appears, therefore, to undercompensate the plaintiff. In support of the argument from overcompensation, though, it might be objected that by spending a sum B having his property reinstated the plaintiff acquires improvements that enrich him to exactly the same extent. His investment in the reinstatement *costs* the plaintiff nothing, since it is offset by the resulting improvements. The plaintiff has exchanged money for improvements, and is fully compensated by the sum R-B.

I refer to this as the argument from offsetting enrichment, and treat it as an adjunct to the argument from overcompensation. In the following section I show that the argument is not valid in general, but that it does hold under certain circumstances. I argue that betterment must be subtracted when these circumstances obtain, and that the full cost of reinstatement R must be awarded without deduction when they do not.

#### VII. *Betterment and enrichment*

To see why the argument from offsetting enrichment is not valid generally, consider the involuntary nature of the putative exchange made by the plaintiff. The plaintiff does not enter a voluntary exchange of money in return for improvements to his property. A plaintiff who recovers R-B in damages does not choose to purchase improvements to his property for an amount B. He has no practical choice but to reverse the wrongful damage to his property and recover his means. Indeed, his recovery of damages in the reinstatement measure is premised on his intending to do so, and so he has no choice but to invest B in having his property repaired or replaced with improvements.<sup>40</sup> It is an involuntary exchange, and one that the plaintiff would not have been forced to make had the defendant not damaged his property.

The involuntariness of this exchange would be no obstacle to the argument from offsetting enrichment if betterment were measured by the idiosyncratic subjective value to the plaintiff of the improvements to his property. If B represented the sum of money that a particular plaintiff would be willing to exchange for the improvements, that amount could justifiably be offset against the cost of reinstatement when assessing the damages owed by the defendant. The plaintiff would be made to pay only what he would actually be willing to pay for the improvements if he were

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40. See above, note 11 and accompanying text.

under no compulsion to purchase them (even if this sum is zero), and so would have no basis for objecting to it. However, courts do not measure the value of betterment subjectively.<sup>41</sup> As we have seen, the problem of betterment will not even engage a court unless the reinstatement yields an improvement with some objective value.<sup>42</sup> Moreover, as we shall see, when courts quantify the sum to be subtracted for betterment they focus only on the objective value of the improvement and never inquire into its idiosyncratic subjective value to the plaintiff himself.

The involuntariness of the putative exchange by the plaintiff (of money for improvements) is enough to defeat the argument from offsetting enrichment. That argument holds that a plaintiff who spends a sum B reinstating his property is correspondingly enriched by the improvements. He is therefore fully compensated by an award of  $R-B$ . This argument fails in general because it is generally illegitimate to compel a person to make a purchase that he did not choose to make. This is a lesson clearly taught by the law of unjust enrichment. Consider the stance the law takes toward actions for the recovery of benefits conferred on those who did not choose to acquire them. The law of unjust enrichment guards jealously a recipient's freedom to choose how to invest his wealth, setting its face against any general obligation to pay for benefits that one did not choose to acquire.<sup>43</sup> Courts will not facilitate forced purchases, accepting it as "an elementary principle of justice that people should not be liable to pay for things that they did not choose."<sup>44</sup> The law protects the recipient's freedom of choice by permitting him to "subjectively devalue" the benefit by pleading that despite its objective or market value, and despite that it may actually be beneficial to him, he did not choose to pay for it and

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41. See *Cole v New Maryland (Village)*, 2001 NBQB 105, 241 NBR (2nd) 77 at para 17 (an expropriation case).

42. See section III, above.

43. In *Peel (Regional Municipality) v Canada*, [1992] 3 SCR 762, 98 DLR (4th) 140 [*Peel*] at para 25 McLachlin J (as she then was) referred to the "traditional reluctance of the law to permit recovery to a plaintiff who had provided non-contractual benefits to another," a reluctance that she ascribed to a "philosophy of robust individualism which expected every person to look out after his or her own interests and which placed premium on the right to choose how to spend one's money."

44. J Edelman, *Unjust Enrichment* (London: Hart, 2016) at 143.

was therefore not *enriched* by it.<sup>45</sup> By this plea the defendant denies that a necessary element in the cause of action in unjust enrichment has been established. The plea will defeat the action unless the plaintiff can overcome it (a matter I return to below).

While the action in unjust enrichment per se is not relevant to the problem of betterment, the principles worked out in that context about when a benefit counts as an enrichment have direct application here. Just as the receipt of an unchosen benefit is insufficient to enrich the recipient and ground a claim against him in unjust enrichment, so the betterment of property owned by a plaintiff who did not ask to have it damaged is insufficient to justify forcing him to pay for the betterment through a subtraction from his recovery. The owner must be allowed to deny that he is enriched by the unchosen improvements, to protect his freedom to choose where to direct his wealth.

Canadian courts have not yet applied the principles of enrichment to the problem of betterment. However, judges in betterment cases have long been alive to the concern for freedom of choice that underlies the principle of subjective devaluation. An important example of judicial attentiveness to this concern is the decision of the English Court of Appeal in *Harbutt's Plasticine v. Wayne Tank and Pump Co Ltd*, which has been influential in Canadian courts.<sup>46</sup> The plaintiffs completely rebuilt and redesigned their factory after it was negligently destroyed by the defendants, who took the position that recovery should be reduced to account for the plaintiffs having received a new factory in place of the old one. The Court of Appeal awarded the full cost of reinstatement, holding that it was reasonable for the plaintiffs to rebuild the factory as they had to carry on business and retain their workforce. “Nor do I accept,” Widgery L.J. wrote,

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45. See Mitchell McInnes, “Enrichments and Reasons for Restitution: Protecting Freedom of Choice” (2003) 48 McGill LJ 419; M McInnes, *The Canadian Law of Unjust Enrichment and Restitution* (Toronto: LexisNexis, 2014) at 96-98; Andrew G Spence, “In Defence of Subjective Devaluation” (1998) 43 McGill LJ 889. The principle of “subjective devaluation” is not without its detractors: see AVM Lodder, *Enrichment in the Law of Unjust Enrichment and Restitution* (London: Hart, 2012) at 152ff. My argument here does not depend on the particular features of this doctrine. Subjective devaluation is the device our courts use to protect people from being forced to pay for benefits that they did not choose. That such a principle is required is uncontroversial, even if some assert that a different principle may be better suited to the task.

46. [1970] 1 QB 447, 1 All ER 225 (CA) [*Harbutt's*].

that the plaintiffs must give credit under the heading of ‘betterment’ for the fact that their new factory is modern in design and materials. To do so would be the equivalent of forcing the plaintiffs to invest their money in the modernising of their plant which might be highly inconvenient for them.<sup>47</sup>

In the idiom of enrichment theory, Widgery L.J. held that as much as they may actually prefer the enhanced factory, the plaintiffs must be permitted to subjectively devalue those enhancements.

I have argued that if betterment takes the form of a benefit that could be subjectively devalued for the purposes of an unjust enrichment claim, then no subtraction from the owner’s damages should be made on account of it. As I indicated earlier, however, a plea of subjective devaluation can be defeated. Not all benefits can be subjectively devalued. Some benefits are enrichments despite that the recipient had no choice but to accept them, for sometimes a benefit is such that forcing the recipient to pay for it does not deprive him of any valuable freedom of choice. The law of unjust enrichment characterizes benefits of this kind as “incontrovertible.”<sup>48</sup> The paradigmatic incontrovertible benefit is money, or assets that are money-like in their liquidity, such as shares.<sup>49</sup> Forcing me to pay you \$1000, the market value of the blue-chip shares that you accidentally transferred into my name, deprives me of no significant opportunity to invest that same portion of my wealth in some other project.

Certain non-money-like benefits can also be incontrovertible. Benefits that save the recipient a necessary expense (the elimination of the recipient’s debt, for instance, or the mid-winter repair of his furnace) are also incontrovertible.<sup>50</sup> The recipient of such a benefit had no authentic freedom of choice with respect to the relevant sum, since he had to use it to satisfy the very expense that the benefit has eliminated. Non-money

47. *Ibid* at 473. This concern appears also to have influenced the well-known decision in *The “Gazelle,”* which involved damage to a ship that was subsequently repaired. The defendant argued that damages should be reduced on account of “new articles” supplied in the course of repairing the vessel. Dr. Lushington, the celebrated Admiralty judge, refused to order such a reduction, holding that if the plaintiff “derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him.” (1844) 2 Wm Rob 279 at 281, 166 ER 759. See also *The “Pactohus”* (1856) Swab 173, 166 ER 1079; and *The “Munster”* (1896) 12 TLR 264.

48. In *Peel*, *supra* note 43 at para 43 McLachlin J (as she then was) defined an incontrovertible benefit as something “that is an unquestionable benefit, a benefit that is demonstrably apparent and not subject to debate or conjecture.” On incontrovertible benefits, see M McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, *supra* note 45 at 99ff; AVM Lodder, *Enrichment*, *supra* note 46 at 183-190, and Graham Virgo, *Principles of the Law of Restitution*, 3rd ed (Oxford: OUP, 2015) at 79-86.

49. *Sharwood & Co v Municipal Financial Corp*, [2001] OJ No 927, 197 DLR (4th) 477 at para 18.

50. *Carleton (County of) v Ottawa (City of)*, [1965] SCR 663, 52 DLR (2d) 220.

benefits that are later realized in money (through a sale, for example) are also incontrovertible.<sup>51</sup>

A third category of incontrovertible but non-monetary benefits has been postulated. It is sometimes claimed that benefits that do not eliminate an anticipated expense and that have not been realized in money are nevertheless incontrovertible if they could be realized in money by, for example, being sold. Monetary realizability is a controversial criterion of incontrovertibility that I discuss in section XI, below.

If a defendant can establish that the betterment yielded by reinstatement would incontrovertibly benefit the owner, then a subtraction ought to be made from the owner's damages on account of it.<sup>52</sup> In such cases, the argument from offsetting enrichment goes through. As we have seen, this argument fails in general because it is generally illegitimate to force a person to make a purchase he did not choose to make. The plaintiff must be allowed to deny that he was enriched by subjectively devaluing the betterment. If the betterment takes the form of an incontrovertible benefit, however, then this objection is defeated, the argument from offsetting enrichment goes through, and the correct award of damages is R-B.

### VIII. *Three kinds of betterment*

My task to this point has been to explain when damages should be reduced by the value of the betterment that an owner would enjoy upon the reinstatement of his damaged property. I have argued that damages ought to be reduced if and only if the betterment is incontrovertibly beneficial to the owner. I arrived at this conclusion by way of an argument from principle, divorced from any discussion of how the courts actually respond to betterment when assessing damages. My enrichment-based account of betterment is, thus, fundamentally a prescriptive one. As I will demonstrate in what follows, however, it also fits the decided cases well, supplying a principled basis for most of the existing jurisprudence on the question of when damages are to be reduced for betterment.

I arrange the case law on betterment into three categories. When betterment is established, it gets defined or characterized by the court. The way it is characterized in a particular case depends on the kind of property

51. *Sanderson v Campsall*, 2000 BCSC 583, [2001] BCWLD 515.

52. In *Thai Airways International Public Company Ltd v KI Holdings Co Ltd*, [2015] EWHC 1250 (Comm) [*Thai Airways*], Legatt J had to decide whether benefits accruing to an injured party to a breach of contract as a result of its efforts to mitigate must be subtracted from its recovery. He held that a subtraction is required where the benefits take a pecuniary form. In the course of his judgment Legatt J discussed some betterment cases, including *Harbutt's*, and suggested that these could be explained by reference to the same principle, namely, that "credit must be given for monetary betterment even if it is an unavoidable consequence of a reasonable mitigating act" (at para 77).

that was damaged, the function it serves for the plaintiff, and the way in which the replacement of new for old affects that functionality. Focusing on the way that courts characterize it, three broad categories of betterment can be discerned in the cases. The first category includes improvements to property that enhance the profitability of the plaintiff's enterprise; the second category includes improvements that extend the useful life of property that is subject to periodic replacement; and the third category includes improvements to property that enhance its market value.

These categories are not mutually exclusive. Improvements that fall into either of the first two categories typically also enhance the market value of the property. It is up to the court, based on the evidence before it and the way the issue has been framed by counsel, to define the nature of the betterment. My goal here is not to set out a logical typology of betterment as a pre-judicial concept, but simply to find a convenient way of classifying betterment according to the ways in which judges characterize it.

I turn now to examine how courts respond to each of these kinds of betterment when assessing damages. I do three things in the remaining sections of this paper. First, I demonstrate that courts reduce damages in response to the first two kinds of betterment, but not in response to the third kind, and that this is exactly what my enrichment-based account of betterment would prescribe. Second, I apply my account of betterment to the quantification of damages in cases involving the second kind of betterment (that which extends the useful life of property). The assessment of damages in these cases is often difficult. I clarify the proper approach and expose a mistake in an influential line of authority and commentary pertaining to damages in these cases. And, finally, I argue that the judicial response to the third kind of betterment (that which enhances the market value of the property) can help illuminate a vexed problem in the law of unjust enrichment.

#### *IX. Betterment that enhances profitability*

When profit-making facilities or equipment is damaged, reinstatement may result in improvements that increase the profitability of the enterprise through cost-saving efficiencies or increased productivity. In such cases the betterment is always incontrovertible, since it takes the form of necessary expenses that are avoided, or improvements realized in money. As my account of betterment would prescribe, moreover, where betterment

increases profitability and a value can be ascribed to that increase, courts reduce damages accordingly.<sup>53</sup>

It seems likely that this kind of betterment is often generated by the repair and replacement of commercial and industrial property. However, it rarely forms the basis of a betterment claim. Enhanced profitability flowing from reinstatement is difficult for a defendant to prove.<sup>54</sup> A great many factors affect the profitability of an enterprise of any sophistication. When a productive facility or part of it is modernized or renewed, it can be difficult to isolate the effect of the specific improvements on the overall profitability of the enterprise.<sup>55</sup>

X. *Betterment that extends the useful life of property subject to periodic replacement*

1. *Alternative conceptions of this incontrovertible benefit*

The most common reason in virtue of which the reinstatement of damaged property creates betterment is that it extends the useful life of the property. A ten-year-old printing press with an anticipated useful life of fifteen years is damaged and replaced in 2010 by a new machine with a twenty-year expected life. The owner of the press has clearly benefitted from the reinstatement. This benefit can be understood and assessed either as the elimination of a necessary expense, or as the deferral of a necessary expense. Understood in the first way, the reinstatement saves our owner the expense he would otherwise have incurred of acquiring a printing press for use between 2015 and 2030. Understood in the second way, the reinstatement defers for him the cost of purchasing a new press, from 2015

53. In *MacMillan Bloedel*, *supra* note 22, O’Driscoll J remarked (para 65) that where an older facility or plant is replaced with a new one, the question with respect to betterment is: “[D]oes ‘new’ make the operation more efficient, does it cut costs, or increase profits, or increase production or cut maintenance[?]” In *Rough Bay Enterprises Ltd v Budden*, 2003 BCSC 1796, 22 BCLR (4th) 326 at para 122 the court reduced recovery for damage to a barge by 25% in part because the repairs had “improved its overall condition and usefulness as an accommodation Barge for commercial purposes.” In *Slocan Forest Products Ltd v Trapper Enterprises*, 2009 BCSC 1175, CarswellBC 2292 (aff’d, 2011 BCCA 351, CarswellBC 2155) [*Slocan*] the defendants caused an explosion and fire in a logging camp belonging to the plaintiff. The court found (at para 122) that upon reinstatement the camp “may be expected to be less expensive to maintain than the old camp would have been,” and reduced damages partly on that basis.

54. In *Trans North Turbo Air Ltd v North 60 Petro Ltd*, 2004 YKCA 9, BCWLD 936 the plaintiff’s hangar was negligently destroyed. The court would have reduced damages on account of the “reduced maintenance and structural expenses” associated with a new hangar, but there was insufficient evidence as to quantum (para 33). Similarly, in *Decoste Manufacturing*, *supra* note 18 at para 162 the court entertained a claim for betterment based on efficiencies gained by renewal of the plaintiff’s commercial building, but was not satisfied that such efficiencies were proved.

55. For a discussion from another jurisdiction of the difficulty involved in assessing betterment when it takes the form of enhanced profitability, see *Paper Australia Pty Ltd v Ansell Ltd*, [2007] VSC 484 at paras 367-368.

until 2030. Examples of both ways of understanding the kind of benefit in question can be found in the cases.<sup>56</sup>

Regardless which way the benefit is framed, it constitutes an enrichment for the owner. As we have seen, the elimination of a necessary expense is incontrovertibly beneficial. I will argue, moreover, that a deferral of the expense of replacing an asset is also incontrovertibly beneficial for the owner. My enrichment-based account of betterment requires, therefore, that courts subtract the value of the betterment in cases in this category. And in fact they do.

Assessing betterment is often an imprecise exercise in which judges do the best they can with the meagre evidence available to them regarding the value of the benefit.<sup>57</sup> This imprecision is nowhere more evident than in those cases in which courts are tasked with assessing the value of improvements that extend the useful life of damaged property. In many such cases it is clear that the reinstatement will augment the useful life of the asset, but the evidence does not permit the trier of fact to do more than crudely estimate the extent by which its life will be extended.<sup>58</sup> In such circumstances courts aim to arrive at a figure that is reasonable and fair to both parties. Estimates of the value of the betterment in these cases are conservative.<sup>59</sup> As one court put it, in the absence of clear evidence on the matter, judges should give betterment “very limited application” in cases

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56. Courts in such cases sometimes avoid the problem of betterment altogether by treating the plaintiff’s loss as the loss of the use of a sum of money (the replacement cost) between the date of the wrong (2010 in my example) and the date on which he would otherwise have had to replace the asset (2015). “Where a property has a useful life and the plaintiff will incur the cost of replacing that property at the end of its life, if the useful life has been shortened as a result of the defendant’s intervention, then the plaintiff’s loss is the loss of the use of its money.” *Orlando Corp. v Dufferin Roofing Ltd*, [2001] OJ No 1946, OTC 386 at para 396 (Sup Ct). See also *Dominion Sheet Metal & Roofing Works v 4701 Steeles Holdings*, 2002 CarswellOnt 1268, 21 CLR (3d) 250 (Sup Ct). This approach avoids the betterment problem, but at the expense of ignoring the true loss, which is the loss the plaintiff suffers as an owner of property. As I have argued, to remedy this loss damages must aim at physical reinstatement itself, not its economic consequences.

57. “Courts routinely are forced to venture something of an educated guess.” *MacIntyre v Prosser*, 2013 CarswellNS 645, NSSM 31 at para 22. See, to similar effect: *Connolly v Greater Homes Inc*, 2011 NSSC 291, NSJ No. 449 at para 166; *Fudge*, *supra* note 32 at para 92; *Madalena*, *supra* note 18 at para 44; and *Paul v Riding*, 2013 BCPC 292, CarswellBC 3190 at paras 123-124.

58. For examples of cases in which courts have estimated the value of this kind of betterment see *Dartmouth (City) v Acres Consulting Ltd*, (1995) 138 NSR (2d) 81, 19 CLR (2d) 247 (SC); *Storm Hawk Inc v Ontario (Minister of Transportation & Communications)*, 2002 CarswellOnt 1670, OJ No 1888, (Gen Div), *aff’d* 2002 CarswellOnt 1670, OJ No 1888 (CA).

59. In *Laichkwiltach*, *supra* note 19, the BC Court of Appeal overturned the trial judge’s assessment of betterment on the ground that he “failed to consider the lack of precision in the evidence when he calculated betterment at what I consider to be a high percentage” (para 39). The court reduced the trial judge’s betterment allowance by half.



where reinstatement “produces uninvited and unsought improvement in terms of age and likely life span.”<sup>60</sup>

When the evidence permits them to do so, however, courts assess the value of this kind of betterment methodically. The method they employ in this assessment depends upon which of the two conceptions of the kind of betterment in this category that they adopt. I begin by explaining how courts assess the value of betterment understood as the deferral of the expense of replacing the plaintiff’s property. Next I explain how the value of the betterment is assessed when it is understood as the elimination of the expense of acquiring replacement property. Finally, I discuss an influential judgment in which, I argue, the Ontario Court of Appeal made an error that has been perpetuated by courts and commentators in their treatment of damages in cases in this category.

## 2. *Deferring the necessary expense of replacing an asset*

We are concerned here with how courts assess the value of the kind of betterment that obtains when reinstatement extends the useful life of the plaintiff’s property. I begin by examining cases that conceive of this kind of betterment as the postponement for the plaintiff of the expense of replacing that property. Most cases in the present category have the following familiar pattern. The plaintiff owns an asset that is subject to periodic replacement, such as a shingled roof, a carpet, a boiler, a forklift, or the painted finish on an automobile. The defendant damages the asset at time  $T_1$ , which is  $X$  years in advance of the time,  $T_2$ , when the asset’s expected useful life (of  $L$  years) will elapse. Reinstatement can be achieved only by replacing the old asset with a new one, which is expected to last for  $M$  years, until time  $T_3$ . Reinstatement thereby relieves the plaintiff of incurring the expense of replacing the old asset at time  $T_2$ . The plaintiff is, however, now burdened by the anticipated expense of replacing the new asset at the end of its expected life, at time  $T_3$ . The net effect is that the plaintiff receives the benefit of a deferral, by  $M-X$  years, of the necessary expense of replacing the asset.<sup>61</sup>

The deferral of a necessary expense is clearly beneficial. It makes a sum of money available to the plaintiff to use for a period of time. To have the use of a sum of money during a period in which one would otherwise not have had access to it is a benefit, akin to receiving an interest-free loan for that period. However, the use of money is not necessarily

60. *Castro v Mohammed*, 2003 CarswellOnt 209 at para 15.

61. Sometimes the damage occurs shortly before the property was due to be replaced, i.e.,  $X$  is very small. In such cases, unless  $M$  is significantly greater than  $L$ , the deferral benefit will often be set to nil. See, e.g., *Atco Electric Ltd v Durocher*, 2001 ABPC 22, 8 CPC (5th) 324.

incontrovertibly beneficial.<sup>62</sup> Having the use of money is not the same as acquiring it as one's own. If I am afforded the use of a sum of money for a time, but have not requested or chosen it, then I may be able to subjectively devalue that benefit. If you mistakenly transfer funds into my account I am incontrovertibly benefitted by the receipt of those funds even before I become aware of the transfer, ten days later. However, assuming that the account bears no interest, then I have not been enriched by the availability of that sum for my *use* during those ten days since I did not actually use it, nor did its availability to me for use become realized in money by the accrual of interest.<sup>63</sup>

Even though the use of money is not by its very nature an enrichment, when reinstatement postpones for a plaintiff the inevitable expense of replacing an asset, he will as a matter of fact generally be enriched. The postponement of a necessary expense does not result in a sum of money being transferred to the plaintiff that he may or may not discover or put to use. Rather, the deferral of such an expense typically allows the plaintiff to prolong his ownership of that portion of his reserves of money (or money-like assets) that he would otherwise have used to pay for the expense.<sup>64</sup> The ownership of such reserves generally results in money gains for the owner, in the form of interest or other returns on investment. Indeed, absent clear evidence that if the replacement had not been deferred the plaintiff would have replaced the asset using a particular cache of money that will, in the event, sit idle during the period of the deferral, earning nothing, then it ought to be assumed that the deferral will see the plaintiff realize profits on the retention of the sum in question during the period of the postponement.

Having established that a deferral of the replacement cost of an asset is an incontrovertible benefit, consider now how the value of this benefit is assessed. As noted earlier, it is not uncommon for courts to estimate this value, forgoing any assessment.<sup>65</sup> However, the value of a deferral of the cost of replacing an asset is susceptible of being assessed in a rigorous way. Let *R* again denote the cost of replacing the damaged asset. Reinstatement permits the plaintiff to retain that sum of money and use it for *M-X* years

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62. The use-value of money is a non-monetary benefit. See A Lodder, *Unjust Enrichment*, *supra* note 45 at 76-77.

63. See M McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, *supra* note 45 at 107; A Lodder, *Unjust Enrichment*, *ibid.*, at 189-190.

64. I am ignoring the atypical situation where a plaintiff may have converted a non-monetary asset into cash to pay for the expense.

65. See above, note 57 and accompanying text.

longer than it would otherwise have been available for him to use.<sup>66</sup> The value of the use of a sum of money over a given period can be equated with the interest it would yield if invested over that period. A plaintiff who is awarded the reinstatement cost  $R$  is therefore enriched by the total interest that he could earn on that sum during the relevant period of  $M-X$  years, from  $T_2$  until  $T_3$ .

An accurate assessment must attend to the timing of the enrichment. Reinstatement is deemed to take place at  $T_1$ , the date of the wrong, which occurs  $X$  years prior to  $T_2$ , when the useful life of the old asset was expected to expire. As of  $T_1$  the plaintiff has an asset that will endure for  $M$  years, which is  $M-X$  years longer than it would have endured absent the wrong. However, the reinstatement will generally not enrich the plaintiff until  $X$  years later, at  $T_2$ . It is not until  $T_2$  that the expense that is deferred by the reinstatement would have become payable, so it is not until that time that the renewed asset actually saves the plaintiff from an expenditure. It is not until  $T_2$ , therefore, that the plaintiff enjoys a monetary, and thus incontrovertible, benefit from the extension of the lifespan of the damaged asset. It is not until  $T_2$ , then, that the plaintiff is enriched by that extension. Now, a plaintiff is not required to account to the defendant for betterment until it yields an enrichment. Since damages are awarded in a final lump sum, assessed as of time  $T_1$ , the amount subtracted for betterment must therefore be reduced to account for the fact that the plaintiff is being made to pay for the betterment before it will result in an enrichment. This is achieved by discounting the value of the betterment at  $T_2$  back to its value at the date of the wrong,  $T_1$ .

Assessing the value of betterment conceived as the deferral of the expense of replacing the asset that was damaged is not straightforward. It requires evidence that will permit the useful lives ( $L$  and  $M$ ) of the old and new assets to be determined with some precision.<sup>67</sup> It also typically calls for actuarial evidence as to the value of the use of the sum  $R$  during the relevant period. These evidentiary demands may explain why this method of assessing betterment appears only to have been applied once in the

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66. If the plaintiff would have borrowed the replacement cost at time  $T$ , the betterment analysis is the same but the value conferred is the avoidance of the cost of carrying a loan of that sum for  $N$  years. See *Penn West Petroleum*, *supra* note 26 at para 118.

67. It is necessary to know  $L$  in order to know the value of  $X$ .

reported cases, by Krever J. in *North York v. Kert Chemical Industries*.<sup>68</sup> The defendant in that case negligently damaged sewer lines owned by the plaintiff, with the result that the sewers, built in 1960 with an expected lifespan of forty years, had to be replaced in 1974 at a cost of \$165,766. Krever J. observed that an award of \$165,766 would confer a “deferred replacement benefit” on the plaintiff, for whom the expense of replacing the sewers would be postponed from 2000 to 2014.<sup>69</sup> The value of this benefit (the sum B), was calculated by the plaintiff’s actuary as the value of the interest that the plaintiff stood to earn on \$165,766 between 2000 and 2014, discounted back to 1974 dollars. The court awarded the cost of reinstatement (\$165,766) less this sum B (\$25,428).

### 3. *Eliminating the necessary expense of acquiring an asset*

We are discussing the kind of betterment that extends the useful life of the plaintiff’s property. Recall the typical situation in which this kind of betterment arises. The defendant damages the plaintiff’s property at time  $T_1$ ,  $X$  years before its expected useful life of  $L$  years will elapse, at time  $T_2$ . Reinstatement requires that the damaged asset (or some part of it) be replaced with a new one, which is expected to last for  $M$  years, until time  $T_3$ . The result is that the plaintiff acquires a renewed asset that will endure for  $M-X$  years longer than the old asset would have endured had it not been damaged.

As we have seen, this benefit can be understood as the postponement, by  $M-X$  years, of the inevitable expense the plaintiff will incur of replacing the asset at the end of its useful life. However, it can also be understood as the elimination of an inevitable expense. The reinstatement saves the plaintiff the expense of acquiring an equivalent asset for use during the period of the extension. Had it not been damaged, the old asset would have ceased to function at time  $T_2$  and the plaintiff would have been forced to pay to acquire, or to use, a replacement asset thereafter. As a result of the reinstatement, the plaintiff is spared the expense of acquiring an asset to use between time  $T_2$  and time  $T_3$ , which is the period of the extension.

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68. 1985 CarswellOnt 818, OJ No 510 (HC) [*Kert Chemical*]. In the trial decision in *James Street*, *supra* note 15, Krever J. declined to apply the method he had applied to assess betterment in *Kert Chemicals* (ten days earlier), because he lacked actuarial evidence. In *Safe Step Building Treatments*, *supra* note 36 at para 80 Lalonde J. approved of the *Kert Chemical* method of assessing betterment, but concluded that it could not be applied in the case at bar as there was insufficient evidence on the life-spans of the relevant items of property. The method of assessing betterment applied in *Kert Chemical* is advocated by R Snyder & H Pitch, *Damages for Breach of Contract*, *supra* note 32 at 2-37.

69. *Ibid* at para 41.

The value of this benefit can be posited as a fraction of the cost of reinstatement. Suppose we compute the period of the extension as a fraction of the useful post-reinstatement life of the asset, that is, of  $M$ . We want to determine what fraction of the useful life of the reinstated property constitutes extension. The renewed asset is expected to endure for  $M$  years beyond reinstatement, so the relevant percentage is  $(M-X)/M$ . Having calculated the fraction of the useful life of the reinstated property that comprises extension, we can apportion that fraction of the cost of reinstatement to the extension. That is, we can stipulate that of every dollar spent reinstating the property, that fraction of it went toward extending the useful life of the property beyond its lifespan had it never been damaged.<sup>70</sup> On this basis, we can equate the value of the betterment with the relevant fraction of the cost of reinstatement,  $R$ , such that the value of the betterment is equal to  $R \cdot (M-X)/M$ , yielding a damages award of  $R \cdot X/M$ .

When courts assess the value of betterment as a fraction of the cost of reinstatement, they often do so impressionistically, with little analysis and no recourse to a general formula.<sup>71</sup> I have tried to make explicit the logic that underlies this way of assessing the value of betterment.<sup>72</sup> It is a mathematically simple mode of assessment that calls for no actuarial evidence. Because it relies on a ratio, moreover, it is relatively forgiving when  $M$  and  $X$  are estimated. Two examples will illustrate its application.<sup>73</sup>

In *Byrne Architects Inc v. AJ Hustins Enterprises Ltd* the defendant architect designed a commercial office tower for the plaintiff.<sup>74</sup> The defendant was negligent in selecting certain materials to be used in the construction of the parking deck, resulting in damage to a waterproofing

70. The same assumption underlies the device of straight-line depreciation in accounting practice, namely, that the value of an asset is a linear function of its useful remaining life. On this basis we can stipulate that the value of the plaintiff's asset is equal to the cost of reinstatement at the date of the damage,  $T_1$ , and that it drops at a constant rate to zero at the end of its useful life,  $M$  years later, at time  $T_3$ .

71. The most useful judicial discussion and application of this method of assessing betterment I have come across is the US Fifth Circuit Court of Appeal's decision in *Freeport Sulphur Co v The S/S Hermosa*, 526 F(2d) 300 (5th Cir 1976) at 304-306.

72. It is a logic that may explain some damages awards that lack a clear basis. Consider for example those cases in which a plaintiff sues for breach when a service or product fails  $X$  years before a contractual warranty of  $W$  years was due to expire. In such cases courts sometimes award the injured party  $(X/W)$  times the price of a replacement service or product, with little by way of explanation. See, e.g., *Fontaine v Roofmart Western Ltd*, 2005 MBQB 244, MJ No 415 (aff'd 2007 MBCA 44) [*Fontaine*]; and *Dupuis v Bleakney*, 2003 NBQB 286, 265 NBR (2d) 86. This result can be justified on the basis of the present analysis if it is assumed that the replacement will endure for the same period ( $W$  years) as the warranty.

73. *Mercier v Hawco*, 2014 CarswellOnt 70, OJ No 56 (Sup Ct) is another simple example. See also *411397 BC Ltd v Grammour Holdings Ltd*, 1996 CarswellBC 1187, BCI No 1310, at paras 95-107, in which the reinstated asset (a roof) was nearing the end of its useful life at the time of the wrong.

74. 2003 NSCA 21, 23 CLR (3d) 217 (CA).

membrane that had an anticipated useful life of 20 years. As a result of the negligence, the membrane failed after five years. The court awarded the plaintiff the cost of replacing the membrane with a new one, also expected to last for 20 years, less a deduction of 25% on account of betterment.

*Vancouver (City) v. BC Telephone Co* provides another example.<sup>75</sup> The defendant contractors negligently failed to properly backfill after digging a trench under the plaintiff municipality's street, causing parts of it to collapse. The plaintiff claimed the cost of the repairs that it had undertaken, but its recovery was reduced on account of betterment. The court found that the street surface required replacement every 20 years, and that at the time of the wrong one of the collapsed portions of pavement had 9 useful years of life remaining. The cost of replacing that portion of the street was \$13,000, so the court awarded the plaintiff 9/20ths of that sum.

#### 4. *The wrong way down James Street*

We have been examining the kind of betterment that takes the form of an extension of the useful life of property that is subject to periodic replacement. I turn now to consider an increasingly influential view about how damages are to be assessed in cases involving this kind of betterment. Arising from comments made by way of obiter in a 1987 Ontario Court of Appeal decision, it is a view that has gained currency in the literature and in the cases. I will argue, however, that it is mistaken.

In *James Street Hardware & Furniture Co v. Spizziri* the Ontario Court of Appeal, acknowledging the force of the reasoning in *Harbutt's*, wrote that "if a plaintiff, who is entitled to be compensated on the basis of the cost of replacement, is obliged to submit to a deduction from that compensation for incidental and unavoidable enhancement, he or she will not be fully compensated for the loss suffered."<sup>76</sup> Subtracting a sum for betterment forces the plaintiff "to spend money he... would not otherwise have spent—at least as early as was required by the damages occasioned to him."<sup>77</sup> So far, so good. But now the trouble begins. Having explained that subtracting a sum for unavoidable betterment forces an unjustified expenditure on the plaintiff, the court reasons that the solution is not to forgo the subtraction, but rather to compensate the plaintiff for the "loss" caused by the subtraction.<sup>78</sup> The value of the betterment, B, is to be subtracted from damages and then an amount must be added to compensate the plaintiff for the resulting loss he will suffer in having to

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75. 1991 CarswellBC 815, BCWLD 636 (SC).

76. *Supra* note 15 at para 62.

77. *Ibid* at para 63.

78. *Ibid*.

spend the sum B reinstating his property. He must be compensated for the loss of the use of that sum of money, B, which he would not otherwise have spent repairing or replacing his property, at least not as early as he is now required to do so.

This reasoning is either underdeveloped or mistaken. Without more, it cannot be correct that courts should subtract the value of betterment from damages and then compensate plaintiffs for the loss they suffer in having to contribute that sum toward the cost of reinstatement. Either a betterment subtraction is justified or it is not. If it is justified, then compensation for the subtraction is not warranted. A betterment deduction of B is justified only if reinstatement would enrich the plaintiff by that sum. A plaintiff subject to such a deduction is thereby made to spend that sum reinstating his property. This is by design, and presents no difficulty. If B is the value of the enrichment accruing to the plaintiff, assessed as of the time of the wrong (when reinstatement is deemed to occur) then the plaintiff is fully compensated by the sum  $R-B$ . No further compensation is required.

A number of courts and commentators have endorsed the obiter in *James Street* requiring that a sum be added to compensate plaintiffs for having to contribute to the cost of reinstating their property. Academic and judicial treatment of the *James Street* obiter has focused on cases involving the kind of betterment we have been examining in this section, namely, betterment that takes the form of an extension of the useful life of assets that are subject to periodic replacement. By dint of that obiter the view has emerged that assessing damages in such cases is a two-step process.<sup>79</sup> The first step is to assess the value, B, of the betterment. Then, having arrived at a value for B and subtracted it from the cost of reinstatement, the second step is to compensate the plaintiff for being forced to invest in the asset earlier than he would have been required to do so had it not been damaged. The plaintiff is to be compensated for having to make a “premature expenditure” of the sum B.<sup>80</sup> The betterment subtraction has deprived the plaintiff of the use of this sum between the date of reinstatement and the

79. The following authors and courts have endorsed this two-step approach. J Berryman, “Betterment Before Canadian Courts,” *supra* note 19; Denis J Power & 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* (Toronto: Carswell, 1995) 127 at 172; R Snyder & H Pitch, *Damages for Breach of Contract*, *supra* note 32 at 2-26-2-30; Jamie Cassels & Elizabeth Adjin-Tettey, *Remedies: The Law of Damages*, 2nd ed, (Toronto: Irwin, 2008) at 237-241; *Upper Lakes Shipping Ltd v St. Lawrence Cement Inc* (1992), 84 DLR (4th) 722, 1992 CarswellOnt 3363 (CA) at paras 5-12; *Kew v HA Davis Transport Ltd*, 1997 CarswellBC 130, 68 ACWS (3d) 847 (BCSC) at para 19; and *Penn West Petroleum*, *supra* note 26 at paras 116-121.

80. J Berryman, “Betterment Before Canadian Courts,” *ibid* at 55.

date,  $T_2$ , when he would have had to invest in renewing the asset absent the wrong. He must be compensated for this deprivation.

In my view, the addition of this second, compensatory step is a mistake. If  $B$  represents the value of the betterment at the date of the wrong, then the plaintiff is fully compensated by an award of the sum  $R-B$ . The addition of a loss-of-use sum generates double recovery.

To see why this is so, consider the application of the two-step *James Street* approach to a case we have already examined. If the two-step approach is correct then the judgments I discussed earlier, in *Kert Chemicals*, *Byrne Architects*, and *BC Telephone* are all mistaken, since they omit the second step in the damages assessment. Consider *Kert Chemicals*. The plaintiff in that case paid \$165,766 in 1974 to restore sewers damaged by the defendant. Krever J. subtracted from that amount a sum for betterment. He assessed the value of the betterment at \$25,428, this being the return the plaintiff stood to earn on an investment of \$165,766 between 2000 (when its sewers would ordinarily have required replacing) and 2014 (the deferred replacement date), discounted back to 1974. Jeff Berryman, a proponent of the *James Street* two-step approach, charges the court in *Kert Chemicals* with the following error:

The plaintiff was forced to make an expenditure of \$25,428.... However, this is a payment that the plaintiff is making in advance of when originally contemplated, which was the date of expiry of the original sewer, namely 2000. Unless the plaintiff received some compensation for the cost of making this expenditure twenty-six years prior to its contemplated occurrence the plaintiff will be under compensated.

According to Berryman, the “additional compensation should have been the cost of borrowing \$25,428 for twenty-six years.”<sup>81</sup>

In my view this is incorrect. It is the *James Street* two-step approach to assessing damages that is mistaken, not *Kert Chemicals*. By restoring its sewers in 1974 the plaintiff secured a benefit by bringing it about that the expense of replacing them would be deferred from 2000 until 2014. As we have seen, the deferral of an inevitable expense such as this is incontrovertibly beneficial. To be sure, the enrichment yielded by this deferral only accrues to the plaintiff in 2000, some 26 years after the plaintiff submits to a deduction of the value of that enrichment from its award of damages. This interval between the deduction and the enrichment occurs because the court must fashion a single, lump-sum award that accounts

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81. Berryman advances the same objection against the decision in *Vancouver (City) v BC Telephone*, *ibid* at 65.



both for the loss suffered by the plaintiff at the time of the wrong, and for the enrichment that it will enjoy later. But this problem is addressed by discounting the value of the enrichment back to the date of the wrong. In *Kert Chemicals* the cost of reinstatement was computed in 1974 dollars, and so too was the value of the enrichment that was subtracted from that sum. If the sum of \$25,428 was calculated correctly then the plaintiff should be indifferent between paying that discounted sum in 1974 and paying the full value of the enrichment 26 years later.

Berryman would have the court add to the plaintiff's recovery the cost of borrowing \$25,428 for 26 years so that the plaintiff is not deprived of the use of that sum between 1974 and 2000. But this would make the plaintiff much better off than it would have been had it been made to pay for its enrichment in 2000, rather than in 1974. Had the plaintiff been made to pay for the enrichment in 2000 instead of 1974, it would have retained the use of \$25,428 over this period. The use of this sum would have been valuable to the plaintiff. Let V represent this value. V may be conceived as the cost of borrowing \$25,428 between 1974 and 2000, or as the return on the investment of that sum over the same period. Regardless, Berryman would have the court add V to the plaintiff's damages, to put it in the same position as if it had not been made to pay for the enrichment until 2000. Notice, however, that the value of the enrichment enjoyed by the plaintiff in 2000 is the sum of the 1974 value of that enrichment (\$25,428), plus V. The plaintiff is in the same position whether it pays \$25,428 for the enrichment in 1974, or \$25,428+V for it in 2000. But Berryman would have the court make the plaintiff pay only \$25,428 *minus* V for the enrichment in 1974. This would overcompensate the plaintiff.

The damages regime in Canada requires that courts make once-and-for-all, lump-sum awards. Because of this, there is no way to avoid forcing a plaintiff to part with some of his own cash to reinstate his property on the date it is damaged if that reinstatement would enrich him, even if the enrichment will not accrue until long after the judgment. The system forces some plaintiffs to pay in advance for their enrichment. Courts adjust for this by discounting the amount these plaintiffs are required to pay. The mirror-image of this predicament occurs in the context of personal injury damages, where a final award must be made at judgment date for losses that the injured plaintiff will not suffer until much later.<sup>82</sup> The system forces defendants to pay in advance for these losses. Courts adjust for this

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82. Dickson J was roundly critical of this feature of the remedial regime in *Andrews v Grand & Toy Alberta Ltd.*, [1978] 2 SCR 229 at 236, 83 DLR (3d) 452.

by discounting the amount the defendant will pay, back to judgment-date dollars.

XI. *Betterment that enhances the market value of the property*

1. *Realizable but unrealized benefits in the law of unjust enrichment*

Betterment often takes the form of an improvement that increases the market value of property that the plaintiff continues to own. In such cases the betterment is realizable in money, but has not been realized. The law of unjust enrichment in Canada (and elsewhere in the Commonwealth) is unsettled as to when a realizable but unrealized benefit is to be treated as incontrovertible.<sup>83</sup> The various positions that might be taken on the issue have been staked out primarily by unjust enrichment scholars, and fall on a spectrum. At the relaxed end of the spectrum is the view that a benefit may be incontrovertible just in virtue of its being realizable or realizable without significant prejudice.<sup>84</sup> Toward the restrained end of the spectrum is the view that unless the benefit has been realized,<sup>85</sup> or its realization is “reasonably certain,”<sup>86</sup> or “inevitable,”<sup>87</sup> then the recipient is not incontrovertibly benefitted.

In my view the correct approach to the relationship between realizability and incontrovertibility is found at the restrained end of the spectrum. To treat an unchosen benefit as incontrovertible is to compel the recipient to purchase it. This is justifiable where the benefit is sufficiently money-like that the purchase will not deprive the recipient of any valuable opportunity, or where the benefit is such that the recipient never had

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83. In a recent paper Mitchell McInnes surveyed four recent cases and concluded that Canadian courts have been increasingly prepared to recognize an enrichment “as long as the plaintiff’s services have increased the market value of the defendant’s property. A realizable financial gain, it seems, may be sufficient.” “Improvements to Land, Equity, Proprietary Estoppel, and Unjust Enrichment,” (2016) 2:2 *Can J Comparative & Contemporary Law* 421 at 441. As McInnes himself notes, however, the law remains unsettled on the issue. The four cases McInnes surveyed are striking in the brevity with which they treat this difficult issue, and it remains for the Supreme Court of Canada to clarify the correct approach. In *Stevedored Machinery and Engineering Ltd v Metso Paper Ltd*, 2014 BCCA 91, BCWLD 2392 at para 58 the court observed that Canadian courts have not found it necessary to discuss whether realizability alone can generate an enrichment. “Primarily as a result of the cases involving parties in marriage-like relationships, it has been widely accepted that if there is a causal connection between a plaintiff’s contributions and the acquisition of property by the defendant, there will have been a benefit received by the defendant (even if it has not yet been realized upon), and the plaintiff may be entitled to a declaration of a constructive trust over all or part of the property.”

84. Gareth Jones, ed, *Goff & Jones: The Law of Restitution*, 7th ed (London: Sweet & Maxwell, 2007) at 1-023; and Peter Maddaugh & John McCamus, *The Law of Restitution*, loose-leaf edition (Toronto: Canada Law Book, 2004–) vol 1 at 3:200.10.

85. P Birks, *Unjust Enrichment*, 2nd ed (Oxford: Clarendon, 2005) at 61; A Lodder, *Unjust Enrichment*, *supra* note 45 at 188.

86. A Burrows, *The Law of Restitution*, 3rd ed (Oxford: OUP, 2011) at 49.

87. G Virgo, *Principles of the Law of Restitution*, *supra* note 48 at 81.

any real freedom not to purchase it because it eliminates a necessary expense. But it would be unjust to treat as incontrovertible an unchosen benefit that is neither money-like nor something that the recipient was bound to purchase anyway, simply because it could be sold or otherwise converted into money. If I had a choice never to purchase an asset that is now involuntarily mine, depriving me of that choice may be costly to me, even if I am able to sell the asset. Suppose that you improve property of mine that I did not and do not wish to part with. Forcing me to purchase that improvement will compel me either to sell the property to pay for the purchase—a potentially serious deprivation—or to invest other funds in the improvements, depriving me of the opportunity to make different choices with respect to those funds.

It seems untenable, therefore, that mere realizability should be sufficient to render an unchosen benefit incontrovertible. In my view, protection of the recipient's freedom calls for evidence that he will in fact realize the benefit in question.<sup>88</sup> This position finds support in the proof that is required to demonstrate that a benefit saves the recipient a necessary expense, rendering it incontrovertible. A recipient will be held to have avoided a necessary expense only if it is proved, on the civil standard, that the expense is one that the recipient would in fact have incurred.<sup>89</sup> The mere possibility that he would have incurred it is not sufficient. It must be "clear on the facts (on a balance of probabilities) that had [the payor] not paid, the [recipient] would have done so."<sup>90</sup> By parity of reasoning, neither should it suffice to render an unchosen benefit incontrovertible that the recipient could, or might, convert it into money. It ought to be necessary for the conferring party to prove that the recipient will in fact realize on the benefit.

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88. It goes too far to insist, like Virgo and Lodder, that an unchosen benefit be *realized* before it becomes incontrovertible, or that it be *certain* that it will be realized. These criteria would protect the freedom of a recipient to change his mind and decide not to realize the benefit, but if the finder of fact has determined that the recipient will in fact realize the benefit then the risk of a change of mind is less than the risk that the recipient will end up avoiding paying for a genuine enrichment.

89. My focus here is on factually (as distinguished from legally) necessary benefits.

90. *Peel*, *supra* note 44 at para 46.

## 2. *Realizable but unrealized benefits in the law of betterment*

The law of betterment supports the restrictive view I have taken on whether a realizable but unrealized benefit is incontrovertible. As I will demonstrate, when betterment takes a financially realizable form but generates no financial benefit and eliminates no expense, courts generally refuse to reduce damages on account of it.<sup>91</sup>

My strategy thus far has been to draw on the law of unjust enrichment to fashion an approach to the law of betterment. However, the legal learning can flow in both directions. If betterment raises difficulties that can be illuminated by the law of unjust enrichment, as I have argued that it can, then the law's response to those difficulties can also shine light back on the principles of unjust enrichment. The law's treatment of betterment in cases of realizable but unrealized benefits supports the restrained approach to the incontrovertibility of such benefits that I have advocated as the correct one.

Betterment most often takes the form of realizable but unrealized improvements in those cases in which the improvements enhance the market value of property, such as buildings or vehicles, that the plaintiff owns for use and not for sale. *Harbutt's Plasticine* is an influential example of such a case.<sup>92</sup> The rebuilt and modernized factory possessed a higher market value than the one that was destroyed, but no evidence was led that it was less costly to operate or that the improvements yielded any other efficiencies. The plaintiffs had received a realizable benefit, but as they had no plans to sell the factory there was no evidence it would be realized.<sup>93</sup> The court in *Harbutt's* awarded the full cost of reinstatement, and Lord Justice

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91. Though it is not a betterment case, *Begusic v Clark, Wilson & Co* (1991), 1 BCAC 1, 57 BCLR (2d) 273 supports the position I advance here. The plaintiffs purchased units in a housing co-operative that held a 66-year lease of the land. The lease provided for periodic rent reviews, but the plaintiffs (who were liable for a pro-rata share of the rent payable under the lease) had not been made aware of this when they purchased their units. In order to avoid a series of large rent increases, the co-operative decided to purchase the land. The plaintiffs then sued various participants in the development to recover the cost of acquiring the land. An issue arose as to whether the plaintiffs' damages should be reduced on account of the benefit they acquired in obtaining a freehold interest in the land. The BC Court of Appeal characterized the acquisition of freehold title as a "capital advantage" that affords no deductible benefit to the plaintiffs unless it is realized: "the benefit arises only if the plaintiffs decide to 'unlock' their capital by selling their units" (para 133). The evidence suggested that some plaintiffs would eventually sell their units, while others would not, so the court settled on a "modest" deduction of 20%.

92. *Supra* note 46.

93. Leggatt J offers a similar analysis of *Harbutt's* in *Thai Airways*, *supra* note 53 at para 79. However, it is possible to read *Harbutt's* as holding that no betterment was established on the facts. The judgments of Denning LJ and Cross LJ in particular may support such an interpretation. See *Harbutt's*, *supra* note 46 at at 468 (Denning LJ) and 476 (Cross LJ). This is the way the BC Court of Appeal interpreted *Harbutt's* in *Laichkwiltach*, *supra* note 19 at para 33.

Widgery's emphasis on the coercive effect that a deduction for betterment would have on the plaintiffs finds echoes in a number of Canadian cases involving betterment that takes the form of the enhancement of the market value of buildings.<sup>94</sup>

Consider those cases in which repairs made necessary by the defendant's wrong result in improvements to the residence of the plaintiff. *Nan v. Black Pine Manufacturing* is the leading case. The plaintiff rebuilt his home after the defendant negligently caused it to burn to the ground.<sup>95</sup> As we have seen, the British Columbia Court of Appeal affirmed the trial judge's finding that no betterment was proved by the defendant.<sup>96</sup> However, the Court held that if the facts had revealed that reinstatement added to the realizable value of the home, even sizeably, the full reinstatement cost would still have been recoverable. The Court held that where the damage is "to a private dwelling house which is occupied by the owners as their permanent home," the principle expounded by Widgery L.J. in *Harbutt's* applies and no betterment deduction is to be made.<sup>97</sup>

In *Jens v. Mannix Co* crude oil escaped from the defendant's pipeline, destroying the plaintiff's home.<sup>98</sup> Citing *Harbutt's*, the court awarded the plaintiff the full cost of building a new house and garage on the land, despite that the structures were about 17 years old at the time of the spill.<sup>99</sup> In *Fors v. Overacker* the plaintiff purchaser sought to recover the \$117,000 cost of remediating water-related defects in a house he purchased from the defendant.<sup>100</sup> Among the reasons supplied by the court for refusing to subtract a sum for betterment was that the plaintiff, who purchased the home as his residence with no prospect of selling it in the foreseeable

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94. *National Theatres*, *supra* note 35; *Galatiuk v Regina (City)*, [1984] 6 WWR 262, 36 Sask R 2 (QB), *rev'd* on other grounds, (1986) 49 Sask R 142 (Sask CA); *Wainwright*, *supra* note 35; *Ziehlke v Amisk Drilling Co*, [1994] 2 WWR 107, 110 DLR (4th) 172 (Man CA); *Mercury Earth Coring*, *supra* note 21; *AL Sott Financial Inc v PDF Training Inc*, 2008 BCCA 35, BCWLD 1710; *Medjuck & Budovitch Ltd v ADI Ltd*, [1980] NBJ No 330, 33 NBR (2d) 271 (QB); *Sulisz v Flin Flon (City)*, 1979 CarswellMan 80, 3 WWR 728 (QB).

95. *Nan*, *supra* note 3.

96. See above, note 28 and accompanying text.

97. *Ibid* at para 26. Technically this was obiter as the trial judge found that no betterment had been proved and the Court of Appeal held that this finding was open to her on the evidence.

98. [1978] 5 WWR 486, 89 DLR (3d) 351.

99. No evidence appears to have been led on the issue in *Jens*, but I presume that a newly-built home would be worth more in the market than the 17-year-old structure it replaces. The court found (*ibid* at para 17) that a new home "would not be worth any more to the plaintiffs than the old," and that "in the eyes of the plaintiffs [it might] have less value, not more" [emphases added]. These findings clearly relate to the subjective value of the property to the plaintiffs, not to its market value.

100. 2014 ONSC 3084, OJ No 3108.

future, would “have no way to recover the cost” that would be imposed on him by such a deduction.<sup>101</sup>

Similarly, in *Gemeinhardt v. Babic* the plaintiff discovered extensive latent defects in a farmhouse she had purchased from the defendants.<sup>102</sup> Reinstatement required that the house be completely rebuilt, at a cost of almost \$600,000. The action was in breach of contract and there was no evidence that the value of the rebuilt house would exceed the price paid by the plaintiff, so (as in *Nan*) betterment was not proved on the facts. But the court held, obiter, that the “principle of betterment does not apply in these circumstances where the principal residence needs to be replaced.”<sup>103</sup>

As *Nan*, *Fors*, *Babic* and *Jens* illustrate, courts make no deduction for betterment where the improvements have enhanced the value of the plaintiff’s home.<sup>104</sup> It may be urged, however, that the outcome in these cases cannot be generalized because improvements to real estate attract an especially demanding test of incontrovertibility. Even those whose sympathies lie on the relaxed end of the spectrum, and who allow that benefits may be incontrovertible just in virtue of the fact that they can be realized, may treat improvements to land as special case. The value of improvements to land is, after all, liable to be so high as to force a recipient who is made to account for it to have to sell the land to be able to do so, causing real hardship, especially in the case of a principal dwelling.<sup>105</sup>

The law of betterment does not, however, bear out a distinction between improvement to chattels and land. Betterment does not attract a reduction in damages just because it takes a realizable form, even if it consists in improvements to chattels that could be sold with relatively little inconvenience to the plaintiff. This is illustrated by cases in which repairs made necessary by the defendant’s wrong result in improvements to a vehicle owned by the plaintiff for use.<sup>106</sup> In *Gagnon v. Carillion Canada*, for example, the defendant damaged the already-deteriorating paint and previously-chipped windshield of the plaintiff’s car.<sup>107</sup> The evidence showed that repairs would result in a “more visually appealing” car with

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101. *Ibid* at para 189.

102. 2016 ONSC 4707, 58 CLR (4th) 217 (Sup Ct).

103. *Ibid* at para 430.

104. See also *Middleton v Custeau*, 1982 CarswellBC 1383, BCWLD 237 (SC).

105. See M McLnes, “Incontrovertible Benefits and the Canadian Law of Restitution” (1991) 12:3 Adv Q 323 at 327.

106. In addition to the cases I discuss below, see: *Petersen*, *supra* note 10; *Sullivan*, *supra* note 35; *T Donovan & Sons*, *supra* note 35; *Busenius*, *supra* note 35; *Toronto Transportation Commission v R*, [1946] Ex CR 604, [1947] 1 DLR 657 (Can Ex Ct) (rev’d on other grounds, [1949] 3 DLR 161, SCR 510).

107. 2014 ABPC 156, AWLD 407.

a “chip-free windshield” and a higher market value than it had prior to the wrong.<sup>108</sup> This was a realizable betterment. Refusing to subtract a sum to account for it, the court observed that doing so would compel the plaintiff to “make an expenditure he would not otherwise have made.”<sup>109</sup> The plaintiff may, after all, “have been happy driving the car with one chip in the windshield and some rust around the fenders for years.”<sup>110</sup>

To similar effect is *Marcil v. Eastview Chevrolet Pontiac Buick GMC Ltd.*<sup>111</sup> The defendant dealer sold the plaintiff a 2009-model truck that was dangerously defective. The dealer agreed to take the truck back and, unable to locate an equivalent 2009 model, sold the plaintiff a 2011 vehicle for an additional price. The court awarded the plaintiff a return of that price. It disposed of the betterment claim by highlighting the plaintiff’s lack of choice. “While I recognize that there may well be an element of betterment involved,” wrote the judge, “[the plaintiff] did not request a 2011 vehicle. He asked to be placed in the same position as he was in before, that is, to receive an identical vehicle to that he had before. None was available. Thus he had no alternative but to accept the 2011.”<sup>112</sup>

In sum, then, betterment that takes the form of a realizable increase in the value of the plaintiff’s property is not incontrovertible where there is no evidence that the plaintiff has plans to realize on that value by selling the property. Of course, houses and vehicles are usually sold eventually, so this form of betterment often gets realized in the end. But if at the time of trial the plaintiff has no plans to sell the property, the possibility of a sale and realized gain at some indeterminate future date is regarded as too speculative, and has been held to be “not a matter susceptible of proof.”<sup>113</sup>

### *Conclusion*

When the reinstatement of a plaintiff’s damaged property will unavoidably render it more valuable than if it had never been damaged, the court is faced with a choice. Assuming the owner is otherwise entitled to relief in the reinstatement measure, the court must decide whether to abide the betterment and award that relief, or to reduce damages to offset and eliminate the potential betterment. Examples of both these responses to betterment are found in the cases, but the courts have said little to explain

108. *Ibid* at paras 8-9.

109. *Ibid* at para 6.

110. *Ibid*. The plaintiff claimed somewhat less in damages than what the evidence showed it would cost to reinstate the vehicle, and the court remarked that this was sufficient to address any betterment issues.

111. 2016 ONSC 3594, CarswellOnt 10626.

112. *Ibid* at para 67.

113. *Slocan, supra* note 53 at para 122.

when one is to be preferred over the other. I have argued that damages should be reduced on account of betterment if and only if the betterment takes the form of a benefit that would count as an incontrovertible benefit, and thus as an enrichment, for the purposes of the action in unjust enrichment.



