

MEASUREMENT OF DAMAGES FOR INTERFERENCE WITH PROPERTY INTERESTS IN TORTS AND CONTRACTS

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1. Introduction

This article focuses on the measurement of damages¹ for injury to another's property interests resulting from tort or breach of contract. In contracts law, measurement issues arise where a promisor tenders defective or incomplete performance or where a lessee fails to restore property at the expiration of a lease or as agreed upon. Measurement issues also arise where a defendant has tortiously interfered with another's property. Courts have to determine how best to compensate the plaintiff without undue hardship to the defendant and without conferring a windfall on the plaintiff.

Damages for interference with property interests are intended to be compensatory. Traditionally, the value of the plaintiff's loss is assessed by reference to the market value of the property in question. The focus on pecuniary losses is unsatisfactory because it under-compensates plaintiffs, whose interests in property or performance of a contract include intangible benefits or what economists refer to as consumer surplus. Courts have begun to recognize intangible interests in property and that a plaintiff is entitled to compensation when these interests are interfered with. Thus, reference to a plaintiff's actual loss includes both pecuniary and non-pecuniary interests. This allows courts to compensate plaintiffs fully where the traditional approaches prove unsatisfactory (because the plaintiff will be either over- or undercompensated) by adopting alternate

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1. The term "damages" refers to "the sum of money payable by way of compensation" obtainable by success in an action for injury to the plaintiff's interests arising from a tort and/or breach of contract. See Ogus, *The Law of Damages*, 2 (London: Butterworths, 1973); McGregor, *McGregor on Damages*, 16th ed. (London: Sweet & Maxwell, 1997), para. 1.

measures aimed at recognizing and compensating a plaintiff for their true loss in particular circumstances. This article begins by looking at the traditional approaches to the assessment of damages for interference with property interests, pointing out possible areas of injustice. The article then moves on to examine when it is appropriate to compensate an injured party for intangible interests. I explore some of the difficulties involved in the ascertainment of and compensation for consumer surplus and how courts might avoid opportunistic manipulation by plaintiffs.

2. Assessing Damages for Tortious Damage to Property²

According to the principle of *restitutio in integrum*, a victim of tortious interference with property interests is to be restored to their *status quo ante* in monetary terms. In practice, damages for tortious interference with property interests are assessed by reference to the diminution in value resulting from the defendant's tort. This entitles a plaintiff to recover the difference between the market value of the property immediately before and immediately after the defendant's tort.³ Flexibility is required in assessing the appropriate value to be used in particular cases.⁴ The plaintiff bears the onus of establishing the reduction in the value of the property as a result of the tort.⁵ The diminution in value is normally assessed by reference to the reasonable cost of restoration necessary to bring the property to its pre-

2. Tortious interference with property rights may occur in one of three ways: destruction, damage or misappropriation of goods or land. Destruction of property is usually limited to chattels and is a matter of degree. This may include total destruction — chattel has been damaged beyond repair — and constructive destruction — chattel has not completely fallen apart but is in such a state that it is uneconomic to repair or is a "write-off". Property is damaged where it falls short of destruction. Misappropriation occurs where the plaintiff's interests in property are interfered with, such as wrongful occupation of land or acting in a way inconsistent with a plaintiff's interest in chattels, usually actionable in conversion or detinue. See Ogus, *ibid.*, at p. 121. This article focuses on damage to property interests.
3. See *Montreal Trust Co. v. Hercules Sales Ltd.*, [1969] 1 O.R. 661, 3 D.L.R. (3d) 504 (C.A.); *Miles v. Marshall* (1975), 7 O.R. (2d) 544 at p. 553, 55 D.L.R. (3d) 664 (H.C.J.); *Lengert v. Gladstone* (1970), 11 D.L.R. (3d) 726 (B.C.C.A.); *Deweese v. Morrow*, [1932] 2 W.W.R. 228 (B.C.C.A.).
4. In *Darbishire v. Warran*, [1963] 3 All E.R. 310 (C.A.), Pearson L.J. noted that courts must refrain from a slavish adherence to the pre-accident market value of the damaged property.
5. *Lengert*, *supra*, footnote 3, at p. 728.

accident condition.⁶ The cost of restoration is often accepted as the appropriate measure of the plaintiff's loss for damage to property without any direct reference to its pre-accident market value.⁷ This practice is premised on an assumption that the cost of restoration is equal to or less than the diminution in value of the property due to the defendant's tort.⁸ Entitlement to damages in such circumstances is not dependent upon proof that the plaintiff has executed repairs or will in fact incur the cost, because the cost of reinstatement is considered the diminution in the market value of the property in question to which the plaintiff is entitled.⁹ In *Ruxley Electronics and Construction Ltd. v. Forsyth*¹⁰ the House of Lords emphasized that ordinarily the use to which a plaintiff puts compensation for loss that has been established is not a relevant consideration in the assessment of damages. Lord Jauncey noted:¹¹

damage to an article . . . will entitle the owner to recover the value of the article irrespective of whether he (or she) intends to replace it with a similar one or to spend the money on something else . . . Once that loss has been established intention as to the subsequent use of the damages ceases to be relevant.

Where the market value of the property after reasonable repairs is or would be less than its pre-accident value,¹² the plaintiff is entitled to

6. *Ibid.*, at pp. 727-28, *Darbishire*, *supra*, footnote 4, at p. 315, para. a; *Kromidas v. Reilly*, [1993] B.C.J. No. 2420 (QL), 44 A.C.W.S. (3d) 83 (S.C.); Ogus, *supra*, footnote 1, at p. 135. The plaintiff's loss is assessed as the estimated cost of repairs at the time when it was reasonable for him or her to have remedial work done. This is consistent with the duty imposed on a plaintiff to take reasonable steps to mitigate losses and ensures that the defendant is not burdened by higher repair costs due to the plaintiff's failure to have the item repaired within a reasonable time.
7. See *Murphy v. Brown* (1985) 1 N.S.W.L.R. 131 at p. 135 (C.A.), *per* Priestly J.A.
8. *McGarry v. Richards, Akroyd & Gall Ltd.*, [1954] 2 D.L.R. 367 at p. 389 (B.C.S.C.); *Darbishire*, *supra*, footnote 4, at p. 312, *per* Lord Harman. In *Barcelona v. McInnes* (1989), 57 Man. R. (2d) 106 at p. 109 (Q.B.), Oliphant J. explained the concept of diminution in value, noting that it includes a reasonable repair cost required to restore damaged property to its pre-tort state.
9. *McGregor*, *supra*, footnote 1, at para. 1329; D. Harris, D. Campbell and R. Halson, *Remedies in Contract and Tort*, 2nd ed. (London: Butterworths, 2002), p. 532.
10. [1995] 3 All E.R. 268 (H.L.).
11. *Ibid.*, at p. 276, paras. b-c. See also *Barclays Bank Plc v Fairclough Building Ltd. (No. 2)* (1994), 39 Con. L.R. 144 (Q.B.D.); *Dawson v. Sawatzky*, [1946] 1 D.L.R. 476 (Sask. C.A.); *The King v. Hochelaga Shipping Co.*, [1940] S.C.R. 153.
12. Reference to value in this context generally means the selling price of the chattel after reasonable repairs.

recover the cost of repairs and additional damages for depreciation.¹³ Generally, courts require proof of depreciation from the plaintiff as a precondition for recovery.¹⁴ Where a plaintiff undertakes to do the repairs personally, the plaintiff may be entitled to a reasonable sum for overhead in addition to the actual cost of repairs.¹⁵ However, a plaintiff is not entitled to recover profits, though the plaintiff may be compensated for the value of their time.¹⁶

Sometimes, a plaintiff might insist on having damaged property restored exactly to its pre-accident condition.¹⁷ Generally, courts do not have a problem with such a desire because it is consistent with *restitutio in integrum*. Difficulties arise where the cost of repairs greatly exceeds the replacement cost and diminution in value and/or the pre-accident value of the plaintiff's property. In such cases, according to Harman L.J. in *Darbishire*,¹⁸ the general rule is to limit the plaintiff's damages to the replacement cost, with the repair cost being awarded only in exceptional cases. This position is consistent with the plaintiff's duty to mitigate losses consequent upon a breach of duty. Thus, the principle of *restitutio in integrum* is subject to another principle that requires that damages awarded must be rea-

13. *Payton v. Brooks*, [1974] R.T.R. 169 (C.A.); *Burthwick v. Lucas*, [1940] 4 D.L.R. 288 (Sask. C.A.); McGregor, *supra*, footnote 1, at para. 1326.

14. *Burthwick*, *ibid.*

15. See *British Columbia Hydro and Power Authority v. Marathon Realty Co.* (1992), 11 B.C.A.C. 185, 89 D.L.R. (4th) 419, 22 W.A.C. 185 (B.C.C.A.); *Miller Dredging Ltd. v. "Dorothy Mackenzie" (The)* (1994), 98 B.C.L.R. (2d) 72, 119 D.L.R. (4th) 63, [1995] 1 W.W.R. 270 (C.A.). In *Miller*, the plaintiff's pipeline was damaged due to the defendant's negligence. Damages awarded to the plaintiff included a sum for overhead on labour and equipment costs. O'gus notes that overhead expenses are recoverable provided they give rise to exceptional expenses. In other words, such expenses are not recoverable where the plaintiff would have incurred those expenses anyway: O'gus, *supra*, footnote 1, at p. 134. This is essentially an issue of causation that overhead expenses are not recoverable if they would have been incurred with or without the need to repair the item damaged due to the defendant's tortious conduct. See McGregor, *supra*, footnote 1, at para. 1328.

16. In *Drew v. MacNeil* (1985), 17 D.L.R. (4th) 488 (B.C.C.A.), the plaintiff purchased a boat from the defendant. The defendant's representations about the nature of the engine in the boat turned out to be untrue. The plaintiff, who happened to be a professional boat-builder, installed a new engine and sued the defendant for damages. The court held that the plaintiff was not entitled to be paid at the professional rate but could recover reasonable compensation for the use of his time.

17. For example, see *Lodge Holes Colliery Co. v. Wednesbury Corp.*, [1908] A.C. 323 (H.L.); *Kates v. Hall* (1991), 53 B.C.L.R. (2d) 322 (C.A.).

18. *Supra*, footnote 4, at p. 312.

sonable as between the plaintiff and the defendant.¹⁹ A plaintiff will be entitled to the higher cost of repairs only when it is the most reasonable means of achieving *restitutio in integrum* in the particular circumstances.²⁰ The starting point is a presumption that the cost of repairs is unreasonable and that the plaintiff must be confined to the replacement cost in cases of tortious damage to chattels²¹ and diminution in value for torts affecting land.²² The presumption may be rebutted upon proof that the higher repair cost is the most reasonable measure of the plaintiff's loss in the particular circumstances. Courts are flexible in determining what is fair and just in a given case and tend to be deferential to a plaintiff's preferences, provided they are reasonable.²³

Factors that support recovery of higher repair costs for damaged chattels include the uniqueness of the item in question, the difference between the cost of repair and replacement cost, the benefits of reinstatement to the plaintiff weighed against the burden on the defendant to pay the higher repair cost, the availability of a reasonable replacement on the open market and the plaintiff's interest in having the item repaired. In *O'Grady v. Westminster Scaffolding*,²⁴ involving damage to the plaintiff's automobile, the plaintiff recovered the repair cost (£253) although it exceeded the pre-accident

19. See *Nan v. Black Pine Manufacturing Ltd.* (1991), 80 D.L.R. 153 at p. 157, [1991] 5 W.W.R. 172, 55 B.C.L.R. (2d) 241 (C.A.).

20. See McGregor, *supra*, footnote 1, at para. 1480.

21. *Deweese*, *supra*, footnote 3; *Murphy*, *supra*, footnote 7, at p. 136. The presumption in favour of the replacement cost is consistent with a plaintiff's duty to mitigate. Generally, chattels are considered fungible and therefore usually replaceable on the open market. Seldom will it be reasonable for a plaintiff to insist on repairing a chattel when the cost of repairs exceeds the diminution in value.

22. See McGregor, *supra*, footnote 1, at para. 1475.

23. See *Nan*, *supra*, footnote 19; *Philip v. Smith*, [1996] B.C.J. No. 1863 (QL) at para. 48, 130 W.A.C. 23 (C.A.); *Moore v. DER*, [1971] 2 Lloyd's Rep. 359, [1971] 3 All E.R. 517 (C.A.). In *Rawson v. Maher* (1982), 15 Man. R. (2d) 6 (C.A.), the plaintiff's car was damaged in an accident for which the defendant claimed responsibility. The plaintiff purchased an old car for \$1,600 and installed a rebuilt engine for \$2,622. The insurance company assessed the value of the car at \$2,200. The court held that the plaintiff's claim for damage to his vehicle was not limited to its actual cash value (\$2,200). Rather, the plaintiff was entitled to recover the value of the vehicle to him, so long as it was reasonable. Huband J.A. concluded that although the value of the car to the plaintiff was about \$4,200 it would be unreasonable to grant that amount. Thus, the plaintiff was awarded \$3,000 for his loss.

24. [1962] 2 Lloyd's Rep. 238 (Q.B.).

value of the car (estimated between £185 and £200). In support of his decision that the repair cost was the true reflection of the plaintiff's loss, Edmund-Davies J. noted that the vehicle was unique in the sense that the plaintiff had meticulously cared for it. As well, the car had sentimental value to the plaintiff and was not readily replaceable. Hence, the plaintiff had a greater subjective interest in having the car repaired than in replacing it.²⁵ Although this was not explicitly stated in the judgment, it appears that recovery for the higher cost of repairs was also influenced by the fact that the difference between repair and replacement costs did not vary widely.

By contrast, in *Darbishire*,²⁶ also involving a damaged automobile, the court arrived at a different conclusion. The repair cost was twice the pre-accident market value of the car (repair cost plus hiring charges were £195 and the cost of replacement was £85). The plaintiff had the car repaired despite advice from the garage and plaintiff's insurers that repairs would be uneconomical. There was evidence that like the plaintiff in *O'Grady*, the plaintiff in *Darbishire* had invested a considerable amount of time and effort in maintaining the car. It could therefore be said to be unique and of special value to him. As well, the plaintiff in *Darbishire* preferred to keep a car he knew to be reliable and that met his needs. Yet the court found it unreasonable on his part to have spent that much money repairing the car and confined his damages to the cost of replacement. The court noted that similar cars, though not necessarily the same model, were readily available on the market and it was incumbent upon him to have mitigated his losses by purchasing another vehicle. Factors that influenced the court's decision included the substantial difference between the cost of repairs and replacement. The court noted that it was not reasonable for the defendant to be charged the cost of repairs when it was more than twice the replacement cost and the plaintiff had made no effort to find a replacement. The court also distinguished the result in *O'Grady* on the ground that unlike the present case, the car in that case was unique and a similar vehicle was not readily obtainable in the open market. Although the plaintiff in *Darbishire* thought it reasonable to repair the car, the cost of repair was unreasonable as between the plaintiff and defendant. Thus, even when the property might be considered somewhat unique, a plaintiff may not be enti-

25. See also *Rawson*, *supra*, footnote 23.

26. *Supra*, footnote 4.

tled to the higher cost of reinstatement if it substantially exceeds the cost of replacement or the diminution in value. In *Thee v. Martin*,²⁷ where the defendants negligently logged trees from the plaintiff's adjoining land, the court conceded that the plaintiff's land was unique and that comparable property was not readily available. Yet the plaintiff's claim for cost of restoration (\$170,000 to \$210,000) was denied because it greatly exceeded the diminution in value (\$885) and the value of the entire property (\$66,000). Burnyeat J. noted: "that uniqueness is not sufficient to lead . . . to [the] conclusion that it was reasonable or even possible in the circumstances to require the defendant to restore the property of the plaintiff to its original state prior to the trespass".²⁸

Courts apply slightly different considerations to allow recovery of the higher cost of reinstatement where land is tortiously damaged. These include the nature of the plaintiff's interest in the land prior to the accident, the plaintiff's subsequent plans, the reasonableness of those plans and the plaintiff's genuine interest in restoration. Generally, plaintiffs will be confined to diminution in value where their interest in land is primarily commercial as, for example, where the plaintiff is a reversioner or intends to sell the property eventually or where developers are holding the land for sale. In *Philip v. Smith*,²⁹ the plaintiff bought property as an investment with no intention to build or live on it. The plaintiff's property was damaged by mudslide, which resulted from the defendants' construction of a retaining wall on their property. The court found this to be a trespass but failed to award the plaintiff the cost of reinstatement. Instead, the court noted that given that the plaintiff's interest in the property was commercial and that the cost of reinstatement was substantially higher than the diminution in value resulting from the defendants' tort, the plaintiff should be confined to the diminution in value. Similarly, in *Taylor v. Hepworth*,³⁰ where the plaintiff's vacant property was destroyed by fire, the court declined to award the cost of restoration because the property was in fact a development site and the building would have been demolished in due course. The fire had marginally affected the market value of the property. Given (1) that the plaintiff's interests in the property were purely commer-

27. [1998] B.C.J. No. 387 (QL), 41 C.C.L.T. (2d) 86 (S.C.).

28. *Ibid.*, at para. 20e.

29. *Supra*, footnote 23.

30. [1977] 2 All E.R. 784 (Q.B.)

cial, (2) the advantages to be derived from reinstatement, and (3) the fact that the plaintiff had no genuine interest in rebuilding, it was unreasonable for the plaintiff to recover the cost of restoration.³¹

In contrast, courts have shown a willingness to award the higher cost of reinstatement where the plaintiff holds property for the ongoing purpose of carrying on a business or earning a livelihood. Thus, in *Dominion Mosaic & Tile Co. v. Trafalgar Trucking Co.*,³² when their factory and machinery were destroyed by fire the plaintiffs were awarded the cost of reinstatement even though it exceeded the diminution in value. Recovery was justifiable because the plaintiffs needed another premises to operate their business and it was reasonable for them to rebuild the factory in the circumstances.

The desire to reinstate damaged property is usually considered reasonable, thereby entitling a plaintiff to the higher cost of restoration where the property was for the plaintiff's personal use. In *Evans v. Balog*,³³ the plaintiffs' 75-year-old home was damaged by the negligence of the defendant. The house was situated on property zoned for redevelopment. At trial, the defendants conceded that the cost of restoration was the appropriate measure of the plaintiffs' damages, but argued on appeal that given the development potential of the plaintiffs' land, the house was worthless and therefore the plaintiffs had not sustained any loss resulting from the defendant's wrongs. In awarding the cost of reinstatement, Samuels J.A. noted that it was the only reasonable way to restore the plaintiff to the *status quo ante*. Indeed, the plaintiffs' desire to reinstate was very strong in this case as they had obtained an injunction prohibiting the defendants from engaging in the activities that damaged their house, which was ignored. The defendants were also in breach of an earlier undertaking to restore the plaintiff's home. The plaintiffs had lost their family home and fair compensation in the circumstances was

to give them back what they had prior to the defendants' tortious intervention. Similarly, in *Jens v. Mannix*,³⁴ the plaintiff's house and property were damaged by an oil spill for which the defendant accepted responsibility. The defendant accepted liability for the clean-up cost but disputed the cost of rebuilding the plaintiff's house. The land was designated for commercial use and could have been sold as a commercial property for more than its value with a house built on it. Thus, there was no diminution in the market value of the plaintiff's land due to the defendant's tort. The plaintiff was awarded the cost of rebuilding to enable his family to continue residing in their own home even though it was uneconomical. The court reasoned that the plaintiff had lived at that location for a long time, operated a "car museum" on the premises, and therefore had a practical and sentimental attachment to the property. Also, the property was perceived as a significant community attraction and it was therefore reasonable for the plaintiff to rebuild. Further, the court was satisfied that the plaintiff actually intended to rebuild.³⁵ Thus, the court considered the cost of reinstatement to be the plaintiff's true loss although it substantially exceeded the diminution in the market value of the plaintiff's land.³⁶

Courts also consider the plaintiff's genuine interest or reasonableness of the desire to reinstate in deciding whether to award the

31. See also *Montreal Trust*, *supra*, footnote 3, involving damage to farmland. The Ontario Court of Appeal refused recovery for the cost of restoration less depreciation because it was not a true reflection of the plaintiff's loss. There was evidence that the plaintiff no longer intended to continue farming on the land. Rather, the land was to be subdivided for residential purposes. Given the nature of the plaintiff's interest in the land, the diminution in value due to the defendant's wrongdoing was negligible and the cost of restoration far exceeded the plaintiff's actual loss. A new trial was ordered to assess the plaintiff's true loss.

32. [1990] 2 All E.R. 246 (C.A.). See also *Harbutt's "Plasticine" Ltd. v. Wayne Tank and Pump Co.*, [1970] 1 Q.B. 447 (C.A.); *James Street Hardware & Furniture Co. v. Spizziri* (1987), 62 O.R. (2d) 385, 24 O.A.C. 42, 43 C.C.L.T. 9 (C.A.).

33. [1976] 1 N.S.W.L.R. 36 (C.A.).

34. (1979), 30 D.L.R. (4th) 260, [1986] 5 W.W.R. 563 (B.C.C.A.).

35. See the trial decision: (1978), 89 D.L.R. (3d) 351 at p. 358, [1978] 5 W.W.R. 486, 5 C.C.L.T. 225 (B.C.S.C.). The B.C. Court of Appeal was skeptical about the plaintiff's intention to rebuild, among other things because they had lived in the house in the damaged condition for over four years. Suspecting that cost of reinstatement would confer a windfall on the plaintiff, the Court of Appeal reduced damages due to the anticipated increase in the value of the property after reinstatement.

36. See also *Nan*, *supra*, footnote 19; *Taylor v. King* (1993), 82 B.C.L.R. (2d) 108 at pp. 121-22, [1993] 8 W.W.R. 92, 53 W.A.C. 56 (C.A.), *supp. reasons* 49 A.C.W.S. (3d) 668; *Hollebone v. Midhurst and Fernhurst Builders Ltd.*, [1968] 1 Lloyd's Rep. 38 (Q.B.), where the plaintiff's house was damaged by fire due to the admitted negligence of the defendant's employee. The defendant contended that damages should be based on the value approach — the difference between the values of the house before and after the fire. The plaintiff was awarded the higher cost of restoration, approximately £19,000, rather than the diminution in value, £14,850, because it is the measure of damages that provides *restitutio in integrum* in this particular case. The decision was justified on the bases that not only had the plaintiff already carried out repairs, but it was also reasonable to have done so given that it was the plaintiff's home, the house was unique and comparable properties were not readily available. See also *Fusco v. Georgiou, Georgiou and Homecircle*, [1994] C.L.Y. 1527.

higher cost of repair in respect of both chattels and realty. The test is whether a reasonable person similarly situated would spend the amount in question for remedial work.³⁷ The rationale is to ensure that the plaintiff does not obtain a windfall by pocketing the higher cost of reinstatement or simply to punish the defendant. Courts may be more willing to award the higher cost of repairs where there is a possibility of actually carrying out repairs³⁸ or where the plaintiff has already done so. However, evidence of, or the possibility of reinstatement at the time of judgment, is not necessarily determinative of the reasonableness of the cost approach. The cost of restoration could be astronomical and courts do not intend to give plaintiffs *carte blanche*. In such cases, courts consider the benefit of reinstatement to the plaintiff and the burden on the defendant to pay the higher cost of repairs. Courts have disallowed repair costs when it would cause hardship for the defendant or when it is wholly unreasonable in the circumstances, as when a cheaper alternative is available or where restorative work is unnecessary.³⁹ In such cases,

37. See *Ruxley, supra*, footnote 10, where the House of Lords denied the homeowner the higher cost of reinstatement, among other things because no reasonable person would spend that amount of money on remedial work. See also *Sinkewicz v. Schmidt*, [1994] 4 W.W.R. 569 at p. 578, 118 Sask. R. 112 (Q.B.); *Thee v. Martin, supra*, footnote 27.

38. In *Sinkewicz, ibid.*, the plaintiff bought an acreage with the intention of building a home but had not done so for seven years. The defendant municipality mistakenly removed trees from the plaintiff's land. The court had to decide whether the plaintiff was entitled to the reduction in value of the land as a result of the defendant's tort (\$3,400) or the cost of restoration (\$60,000). The court held that the plaintiff's desire to restore the property to its original state was unreasonable for a number of reasons, including the fact that though the plaintiff had originally intended to build a home on the land, there was only a vague possibility of the plaintiff doing so at the time of judgment. It was therefore inconceivable that the money would be spent on remedial work. See also *Thee v. Martin, ibid.*, where property obtained with the intention of developing it into a home had been idle for 30 years. The plaintiff was 84 years old. The court found that the reduction in the value of the plaintiff's property as a result of the tort was about \$885, the value of the property was \$66,000 and the cost of restoration ranged between \$170,000 and \$210,000. The court concluded that it was unlikely that the plaintiff would ever develop the property and therefore should be confined to the diminution in value.

39. See *Bower v. Rosicky*, [2000] B.C.J. No. 166 (QL) (B.C.S.C.), where the defendant accidentally cut 17 trees on the plaintiff's ranch. The plaintiff claimed \$18,500 as the cost of replanting trees of comparable size. In denying the plaintiff's claim, the court noted that the injury to the plaintiff's property was minor (affected only a small portion of the ranch) and there was no need to replant the trees.

recovery for the higher repair costs can be denied even when a plaintiff has acted in good faith and on expert advice. In *Lodge Holes Colliery v. Wednesbury Corp.*,⁴⁰ the defendant caused damage to a highway for which the plaintiff was responsible. The plaintiff, after seeking expert advice and acting in good faith, restored the highway to its former condition at a cost of £400. The defendant successfully proved that the road could have been reinstated at a much lower cost (£65). The English House of Lords held that a plaintiff is not entitled to a higher cost of restoration where a cheaper alternative that could bring the property to an acceptable level was available.⁴¹

The point of law which was advanced by the plaintiffs, namely that they were entitled to raise the road to the old level, cost what it might and whether it was more commodious to the public or not, will not in my opinion, bear investigation. Such a rule might lead to a ruinous and wholly unnecessary outlay. There is no authority for it . . . *Even those who have been wronged must act reasonably, however wide the latitude of discretion that is allowed to them within the bounds of reason.*

Similarly, as already noted, the plaintiff in *Darbishire* was confined to the reasonable cost of replacement even though he had already carried out repairs and there was no risk of over-compensation. The onus is on the plaintiff to demonstrate that it was not unreasonable as between herself and the defendant to have carried out repairs, though in cases of items for personal use and those with sentimental value to plaintiffs, courts tend to be sympathetic to the plaintiff's preferences.⁴²

The cost approach entitles a plaintiff to recover only the cost of reasonable remedial work to bring the property in question to an acceptable standard. However, a plaintiff cannot be compelled to accept shoddy work or put up with an inferior property just to save

40. *Supra*, footnote 17.

41. *Ibid.*, at p. 325 *per* Loreburn L.C. (emphasis added).

42. Waddams, *The Law of Damages* (Aurora, Ont.: Canada Law Book, 1991+), looseleaf ed., 1.2430. In *Moore, supra*, footnote 23, the plaintiff's 18-month-old vehicle was damaged by defendant's negligence. The plaintiff travelled great distances to and from work and therefore preferred a reliable car. The plaintiff acquired a new vehicle every two years. He chose to get a new vehicle rather than purchase a used one. Delivery of the new car was delayed for about four months due to strikes at the plant. He could have obtained a used car of the same age and model as the damaged car within two weeks. The Court of Appeal allowed the plaintiff's claim for the cost of hiring for the entire duration. The court reasoned that the plaintiff's conduct was reasonable in the circumstances.

the defendant money.⁴³ However, a plaintiff cannot be extravagant at the defendant's expense.⁴⁴ Thus, it may be unreasonable for a plaintiff to insist on being restored to his or her exact pre-tort position. A plaintiff is confined to what a reasonable person would do in similar circumstances. Consistent with the principle of mitigation, the onus is on the defendant to prove that the expenditure was unreasonable in the circumstances.⁴⁵ In *Dodd Properties Ltd v. Canterbury City Council*,⁴⁶ involving damage to a building, the plaintiffs demanded extensive restorative work, which included substantial rebuilding and a new roof, with a price tag of more than double the defendants' suggestion. The defendants challenged the plaintiffs' proposed measure of damages as being unreasonable. In accepting the defendants' modest proposal, Cantley J. noted that the cost of reinstatement only entitled the plaintiffs to reasonable restorative and repair work that would meet their needs. This might not necessarily entail restoration to the *status quo ante* as the plaintiffs had anticipated. He said:⁴⁷

The plaintiff is entitled to the reasonable cost of doing reasonable work of restoration or repair . . . But I do not consider that they are entitled to insist on complete and meticulous restoration when a reasonable building owner would be content with the less extensive work which produces a result which does not diminish to any or any significant extent the appearance, life or utility of the building, and when there is also a vast difference in the cost of such work and the cost of meticulous restoration.

Similarly, in *Prince Rupert*⁴⁸ the defendants cut a substantial number of mature trees on city property. Absence of trees caused

43. In *Prince Rupert (City) v. Pederson* (1994), 98 B.C.L.R. (2d) 84, [1995] 1 W.W.R. 421, 82 W.A.C. 249 (C.A.), the defendants alleged that reasonable restoration could be achieved by a less expensive means than that awarded by the trial judge. Southin J.A. dismissed the defendants' argument, noting that it does not lie in the mouth of wrongdoers to complain about the cost of what is required to reasonably achieve *resitutio in integrum* in the circumstances.

44. See *Darbishire*, *supra*, footnote 4, at p. 315 (paras d-e).

45. See also *Sinkewicz*, *supra*, footnote 37; *Goebel v. Koenig*, [1998] 6 W.W.R. 56, 162 Sask. R. 81, 26 C.E.L.R. (N.S.) 150 (Q.B.); *John Maryon International Ltd. v. New Brunswick Telephone Co.* (1981), 33 N.B.R. (2d) 543 at p. 615 (Q.B.), affd 141 D.L.R. (3d) 193, 43 N.B.R. (2d) 469, 24 C.C.L.T. 146 (C.A.), leave to appeal to S.C.C. refused [1982] 2 S.C.R. viii; *Jordan v. Norfolk County Council*, [1994] 1 W.L.R. 1353 (Ch. D.).

46. [1979] 2 All E.R. 118 (Q.B.), vard on appeal on another point — the time of assessment: [1980] 1 All E.R. 928 (C.A.).

47. *Ibid.*, at p. 124.

48. *Supra*, footnote 43. See also *New Brunswick Telephone*, *supra*, footnote 45.

ecological problems. Replanting was considered necessary to alleviate the problem. However, the Court of Appeal concluded that complete restoration was not reasonable in the circumstances — the ecological damage could be reversed by planting 10 to 12 foot trees instead of the 40 to 50 foot trees that the defendants cut. The Court of Appeal affirmed that an injured party is not expected to put up with a substantially inferior property in order to save the defendant money. However, a plaintiff's recovery could be confined to less expensive remedial work that does not entirely restore the injured party to the *status quo ante* provided restoration is reasonable and meets the plaintiff's needs.⁴⁹

Where a plaintiff is entitled to the cost of repairs, s/he may also recover consequential losses arising from the loss of use of the chattel for a reasonable period necessary to execute repairs and all other special damages reasonably incurred due to the tort.⁵⁰ Different considerations apply in assessing consequential losses depending on the nature of the damaged item and the use to which the plaintiff put it. With respect to profit-earning chattels, the plaintiff is entitled to the normal profit it would have earned but for its detention less operating expenses and savings on depreciation through wear and tear.⁵¹ A plaintiff may also be entitled to the reasonable cost of hiring a replacement to perform the functions otherwise performed by the damaged chattel during the period of repair. This applies to both profit-earning and non-profit-earning property.⁵²

In sum, *resitutio in integrum* in the context of tortious damage to property will often entitle a plaintiff to reasonable restorative work as a reflection of the diminution in value of the property due to the defendant's tort. Cost of restoration may not be an appropriate measure of a plaintiff's loss where it is all out of proportion to the diminution in value. A plaintiff can recover the higher cost of reinstatement only if it is the most reasonable way to achieve *resitutio in integrum* in the particular circumstances. In determining the rea-

49. See *Burrows, Remedies for Torts and Breach of Contract*, 2nd ed. (London: Butterworths, 1994), pp. 137-38.

50. See *Waddams*, *supra*, footnote 42, at paras. 1.1830 to 1.1850.

51. See *The Argentino* (1889), 14 A.C. 519; *The World Beauty*, [1970] P. 144.

52. In *O'Grady*, *supra*, footnote 24, the plaintiff recovered the cost of hiring substitutes while his vehicle was being repaired. See *Ogus*, *supra*, footnote 1, at p. 166. Examples of consequential losses include the cost of renting another premises while repairs are executed, loss of profit or earnings, such as proceeds from visiting attractions on the plaintiff's land, and damages for the loss of use and enjoyment of the property.

sonableness of the higher cost of reinstatement, courts consider a number of factors including the uniqueness of the plaintiff's property, the difference between the cost of restoration and the diminution in value and/or the value of the entire property, the nature of the plaintiff's interest in the property and the genuineness of the plaintiff's desire to reinstate the property to its pre-tort condition.

3. Cost of Repairs or Reinstatement and the Problem of Betterment

For the most part, it would be impractical to repair damaged property with old and worn-out materials. As well, there might not be a secondhand market for the damaged item. Thus, plaintiffs who are awarded cost of repairs or reinstatement could end up with a more valuable asset after repairs than they had before the defendant's tort. This is the problem of betterment. Can making deductions for improvements in assets after restoration eliminate the fear of conferring a windfall on plaintiffs? The issue of betterment arises both in tortious interference with property and breach of contract affecting property interests. The question that arises is whether a deduction should be made in damages that the plaintiff will recover from the defendant to reflect the improved value of the asset. On the one hand, the principle of *restitutio in integrum* would seem to suggest that there should be allowance for betterment in assessing damages to ensure that a plaintiff does not obtain a windfall at the defendant's expense. On the other hand, a deduction could compromise the plaintiff's ability to carry out repairs and therefore be restored to the pre-accident state unless they can afford to invest in the improvements. It also raises concerns about plaintiffs being forced to improve their property when they might not have intended to do so but for the defendant's wrong, or forced to invest money in enhancement sooner than they might otherwise have.⁵³ These considerations have led British courts to conclude that a deduction for betterment would be prejudicial to the plaintiff's interests and should therefore be avoided.⁵⁴

As Cassels notes, it would be difficult not to accept that plaintiffs sometimes benefit from non-deduction and that this is clearly incon-

53. See *Harbutt's*, *supra*, footnote 32, at p. 473, *per* Widgery L.J.

54. See *ibid.*; *Bacon v. Cooper (Metals) Ltd.*, [1982] 1 All E.R. 397 (Q.B.D.); *McGregor*, *supra*, footnote 1, at para. 17; *Harris et al.*, *supra*, footnote 9, at pp. 526 and 532.

sistent with the compensatory objective of tort and contract damages.⁵⁵ However it must also be noted that the value of an asset is not necessarily enhanced after repairs or reinstatement. To be fair to both plaintiff and defendant, the better view is that expressed by Professor Waddams and accepted in some Canadian decisions that a deduction is appropriate where repairs will result in a net increase in the value of the plaintiff's asset.⁵⁶ Plaintiffs must then be compensated for the cost of the unexpected expense that they have had to incur as a result of the defendant's wrong, as for example the cost of borrowing money or returns on investment forgone. A deduction is appropriate where there is unequivocal evidence of improvement in the value of a plaintiff's asset,⁵⁷ or where the plaintiff would have made the expenditure in question anyway at a future date.⁵⁸ Thus, deduction will not be justified where repairs do not result in pecuniary benefit to the plaintiff.⁵⁹ It is up to the defendant to establish evidence and quantification of betterment. The plaintiff bears the burden of demonstrating expenses incurred from reinstatement. Whereas this approach may easily be applied in relation to wasting capital assets because they are bound to be replaced periodically,⁶⁰ it may be difficult where the nature of the asset is such that no repair or replacement would have been required for the foreseeable future but for defendant's wrong, as for example in cases involving realty.

This principled position ensures that plaintiffs will receive ade-

55. Cassels, *Remedies: The Law of Damages* (Concord, Ont.: Irwin Law, 2000), p. 100.

56. Waddams, *supra*, footnote 42, para. 1.2790; Berryman, "Betterment before Canadian Common Law Courts" (1993), 72 Can. Bar Rev. 54; *James Street Hardware & Furniture Co. v. Spizziri*, *supra*, footnote 32; *Birkbank Farms v. Superior Propane Inc.*, [2002] O.J. No. 1410 (QL) (S.C.J.).

57. *Church of Scientology of British Columbia v. Ahmed* (1983), 44 B.C.L.R. 297, 146 D.L.R. (3d) 219 (S.C.); *Nan*, *supra*, footnote 19. In spite of the English position against non-deduction for betterment, Lord Denning appeared to have been saying in *Harbutt's* that he would not have hesitated to make a deduction if rebuilding the plaintiff's factory had resulted in bigger or better property: *supra*, footnote 32, at p. 467.

58. *Upper Lakes Shipping Ltd. v. St. Lawrence Cement Inc.* (1992), 89 D.L.R. (4th) 722 (Ont. C.A.); *Sunnyside Greenhouses Ltd. v. Golden West Seeds* (1972), 27 D.L.R. (3d) 434, [1972] 4 W.W.R. 420 (Alta. C.A.), *affd* 33 D.L.R. (3d) 384n, [1973] 3 W.W.R. 288, [1973] S.C.R. v.

59. *Jens v. Mannix* (1978), 89 D.L.R. (3d) 351, [1978] 5 W.W.R. 486, 5 C.C.L.T. 225 (B.C.S.C.), *var'd on appeal* 30 D.L.R. (4th) 260, [1986] 5 W.W.R. 563 (C.A.); *Nan*, *supra*, footnote 19.

60. *Upper Lakes Shipping*, *supra*, footnote 58; *North York v. Kert Chemical Industries Inc.* (1985), 33 C.C.L.T. 184 (Ont. H.C.).

quate compensation without obtaining a windfall at the defendants' expense. Undoubtedly, even this approach cannot eliminate the possibility of over-compensation in some cases, but it would at least reduce the incidence of plaintiffs obtaining a windfall through being awarded the cost of repairs. However, the requirements on both sides to substantiate their claim will increase the evidential burden and the cost of civil litigation. It is possible that the cost to a defendant to prove evidence of betterment could exceed the amount to be deducted from a damages award for actual or potential increase in the value of the plaintiff's asset after repairs. A plaintiff could also be left with much less than the actual cost of restoration for similar reasons. Given these concerns, Professor Berryman has questioned the propriety of going through the betterment exercise.⁶¹

4. Breach of Contract

A breach of contract deprives a promisee of the expected "value" of the bargain. A plaintiff's interest in performance may include pecuniary and non-pecuniary benefits.⁶² The primary focus of contract damages is to restore the plaintiff to her expected position had the contract been duly performed. This entitles a plaintiff to expectation damages⁶³ and/or wasted expenses (reliance damages) in appropriate cases.⁶⁴ Since the expected position was never realized

61. Berryman, *supra*, footnote 56, at pp. 70-71.

62. Usually, the purpose of the contract would be an improvement in the economic value of the property, but the law equally recognizes that non-pecuniary benefits may be derived from performance such as where the object of the contract is to give the plaintiff intangible benefits — Ogus, *supra*, footnote 1, at pp. 307-309 — happiness, pleasure or enjoyment, which may even depreciate the market value (selling price) of the property.

63. *Ibid.*, at pp. 284-85.

64. See *Ticketnet Corp. v. Air Canada* (1997), 154 D.L.R. (4th) 271, 105 O.A.C. 87 (C.A.). In *Cullinane v. British "Rema" Manufacturing Co.*, [1954] 1 Q.B. 296 (C.A.), the English Court of Appeal held that a plaintiff is not entitled to claim both expectation and reliance damages in relation to the same conduct or sue partly for lost profits and partly for wasted expenses. This suggests that a plaintiff should be confined to one form of damages or the other. The objective of limiting a plaintiff's recovery in this manner is to prevent overcompensation. See also *R.G. McLean Ltd. v. Canadian Vickers Ltd.*, [1971] 1 O.R. 207, 15 D.L.R. (3d) 15 (C.A.). However, Ogus notes that the principle of election may be "ambiguous" and "misleading". Whether or not reliance interests may complement expectation interests depends on what is meant by "profit". Confining the plaintiff's recovery to expectation interests makes sense where the claim is for gross profits because that includes expenses incurred to earn profit. On the other hand, where the claim is for net profit, the plaintiff may claim additional reliance

because of the defendant's breach, courts must determine what is required to restore the plaintiff to the hypothetical position. Expectation damages may be assessed by reference to the cost of performance or diminution in the market value of the plaintiff's property due to the defendant's breach of contract. Cost of performance is intended to allow a plaintiff to secure substitute performance and thereby get the very benefit that she expected from the contract.⁶⁵ The plaintiff's loss is assessed by reference to the actual cost of reinstatement as a reflection of the amount of money necessary to restore her disappointed expectations.⁶⁶

No difficulty arises where the cost of performance and the diminution in value, presumably the selling price, are equal or close. As in the tort cases, difficulties arise where there is substantial disparity between the reduction in the value and the cost of performance. Remedial work may be expensive but the economic benefit to be derived from it may be minimal or nil. Also, it could be economically inefficient to compel a defendant to compensate a plaintiff or perform their undertaking where the value of such performance is grossly disproportionate to the reduction in value due to the defendant's breach. On the one hand, courts are careful not to confer a windfall on a plaintiff. On the other hand, courts are mindful not to reward defendants for renegeing their undertakings as that undermines the freedom and integrity of contracts.

The appropriate measure of damages in each case depends on what the court perceives to be the plaintiff's true loss based on what is reasonable in the circumstances.⁶⁷ In *Miles v. Marshall*,⁶⁸ involving breach of a lessee's covenant to repair, Weatherson J.A. noted that while this would normally entitle the plaintiff to the cost of rein-

losses in appropriate cases. See Ogus, *supra*, footnote 1, at pp. 346-54. See also Baer, "The Assessment of Damages for Breach of Contract — Loss Profit" (1973), 61 Can. Bar Rev. 490; McGregor, *supra*, footnote 1, at paras. 63-65, Cassels, *supra*, footnote 55, at pp. 49-51.

65. In *Radford v. De Froberville*, [1978] 1 All E.R. 33 at p. 55 (Ch. D.), the court justified the use of the cost approach on the ground that this would have been an appropriate case for specific performance but was unrealistic in the circumstance.

66. In *Wroth v. Tyler*, [1974] 1 Ch. 30 at p. 59, Megarry J. pointed out that when a court fails to decree specific performance merely because of its exercise of discretion, damages in lieu of specific performance must approximate what specific performance would have achieved for the plaintiff.

67. See *Phillips v. Ward*, [1975] 1 W.L.R. 471 at p. 473; *Westminster v. Swinton*, [1948] 1 K.B. 524 at p. 534 *per* Lord Denning.

68. (1975), 55 D.L.R. (3d) 664, 7 O.R. (2d) 544 (C.A.).

statement, the cost approach would not be appropriate in all cases.⁶⁹ Where reinstatement is considered appropriate, a plaintiff will be entitled to the cost of restoration whether or not she will in fact effect repairs.⁷⁰

A plaintiff will be confined to the diminution in value where it is unreasonable to restore property to the contractual standard. The reasonableness of the expenditure is often assessed from the plaintiff's point of view, because the plaintiff is the innocent party and is more deserving of the court's sympathy than the defendant wrongdoer. The assessment is based not only on financial loss, but also on functional, aesthetic or sentimental considerations.⁷¹ In *Nu-West Homes*,⁷² involving failure to build to specifications, Moir J.A. noted that the court should not be overcritical in judging the reasonableness of the owner's decision to rectify defects in such a case because it was the defendant's breach that caused the plaintiff to make the decision.⁷³

Like the tort cases, courts consider a number of factors in determining whether it is appropriate to award the higher cost of reinstatement in a breach of contract. One such factor is the nature of the plaintiff's interest in property. A plaintiff will often be confined to the diminution in value where her interest in performance is purely economic. This is consistent with the plaintiff's duty to mitigate and more importantly the value approach can sufficiently protect the

69. See also Sharpe, *Injunctions and Specific Performance*, 3rd ed. (Aurora, Ont.: Canada Law Book, 2000), 7.130 to 7.180; Farnsworth, "Legal Remedies for Breach of Contract" (1970), 70 Col. L. Rev. 1145 at p. 1150; Berryman, *The Law of Equitable Remedies* (Concord, Ont.: Irwin Law, 2000), p. 163. See also McGregor who notes that the normal measure of damages in building contracts is the cost of reinstatement: *supra*, footnote 1, at para. 1149.

70. In *Dunlop Construction Products Inc. (Receiver of) v. Flavell Holdings Inc.* (1996), 31 O.R. (3d) 58, 94 O.A.C. 348, 42 C.B.R. (3d) 302 (C.A.), *supp. reasons* 68 A.C.W.S. (3d) 68, involving failure to restore leased premises, the Ontario Court of Appeal concluded that damages for breach of covenant should be based on the estimated cost of repair even though the landlord had not done the work and clearly had no intention of doing so. See also *Perentes v. Industrial Radiator Service Ltd.* (1989), 73 Sask. R. 144 (Q.B.) at p. 148; *Historic Properties Phase I Ltd. v. Silver Spoon Desserts Enterprises* (1992), 112 N.S.R. (2d) 91 at p. 96 (S.C.), *affd* on this point 117 N.S.R. (2d) 154 (C.A.); *Dean v. Ainley*, [1987] 1 W.L.R. 1729 at pp. 1737-738 (C.A.).

71. Cassels, *supra*, footnote 55, at p. 94.

72. *Nu-West Homes Ltd. v. Thunderbird Petroleums Ltd.* (1975), 59 D.L.R. (3d) 292 (Alta. C.A.).

73. See also *Banco de Portugal v. Waterlow*, [1932] A.C. 452 at p. 506, *per* Lord Macmillan.

plaintiff's expectations in the circumstances. The higher cost of reinstatement is readily justified where the plaintiff's interest in performance includes intangible benefits that are not reflected in the objective market value. In *Radford*, where the defendant failed to construct a wall around the plaintiff's land as promised, the court awarded the plaintiff the cost of building the wall even though absence of the wall did not diminish the value of the land in any significant way and the cost of building the wall was uneconomic. The choice of the higher cost of reinstatement was justified on the ground that the plaintiff had practical and aesthetic interests in the wall. Also, the facts that the wall was intended to provide privacy to the plaintiff's land, that he liked the intended architecture of the wall, and that he genuinely wanted to build the wall influenced the outcome in this case. The decision may also be justified on the ground of unjust enrichment. Oliver J. intimated that the cost of building the wall was reflected in the purchase price. He noted that the plaintiff paid for the cost of constructing the wall when he sold the plot to the defendant.⁷⁴ The defendant's breach gave him a better bargain for the land than the parties had anticipated at the expense of the plaintiff. The plaintiff would likely have demanded a higher price if it had known that the defendant would not have constructed the wall. The plaintiff therefore suffered a pecuniary loss, what he paid for the construction of the wall, which he never received. It appears that the plaintiff would have been entitled to specific performance, but was not possible in the circumstances because the plot had been sold to a third party. Thus, the cost of performance was the reasonable way to remedy the defendant's breach and restore the plaintiff's expectations.⁷⁵

The difference between the cost of reinstatement and diminution in value is also an important factor in determining the appropriate measure of damages. The greater the difference between the cost of reinstatement and diminution in value due to the defendant's breach,

74. *Radford*, *supra*, footnote 65, at p. 55.

75. Recovery of the higher cost of reinstatement in *Radford* is consistent with cases like *Wrotham Park Estate Co. v. Parkside Homes*, [1974] 2 All E.R. 321 (Ch.), where the plaintiff is held entitled to substantial damages even though the defendant's wrong has not resulted in any measurable diminution in the value of the plaintiff's property on the basis that the plaintiff would have been entitled to an equitable remedy, but is not available because of the circumstances of the particular case. See P.D. Maddaugh and J.D. McCamus, *The Law of Restitution* (Aurora, Ont.: Canada Law Book, 1990), p. 436.

the less likely a court is to allow a plaintiff to recover the cost of restoration. In such cases, the plaintiff would be confined to the diminution in value due to the defendant's breach of contract⁷⁶ where performance substantially conforms to the contractual objective.⁷⁷ To do otherwise would constitute economic waste. In *Nu-West Homes*, Moir J.A. noted that the cost of restoration should not be allowed where it is unreasonably high in relation to the value to be gained by its expenditure: "where the cost of rectification is great in comparison to the nature of the defect, the Court will not force a slavish following of the precise specifications of the contract".⁷⁸ Similarly, in *Strata Corp. NW 1714 v. Winkler*, although the builder did not conform to contract specifications, there was nevertheless substantial compliance. The building was functional for the plaintiffs' purposes. There was no evidence of measurable diminution in the value of the building due to the defendant's breach. The British Columbia Court of Appeal denied recovery for the cost of reinstatement because it vastly exceeded the benefit that could be obtained from it.⁷⁹ A plaintiff will often be confined to nominal damages where the breach did not result in any measurable diminution in value.

Courts also consider the likelihood of the plaintiff actually per-

76. McGregor, *supra*, footnote 1, at para. 1150.

77. Ruxley, *supra*, footnote 10, at p. 275, *per* Lord Jauncey. See also Calamari and Perillo, *The Law of Contracts*, 3rd ed. (St. Paul, Minn.: West Publishing Co., 1987), p. 634.

78. *Nu-West*, *supra*, footnote 72, at p. 307. See also *Applegate v. Moss*, [1971] 1 Q.B. 406 (C.A.); *Atkins v. Scott* (1990), 7 Constr. L.J. 215 (C.A.); Osborne, "Expectation Damages for Breach of Contract and the Principle of Restitutio in Integrum" (1993), 7 Auckland Univ. Law. Rev. 305 at p. 313.

79. *Strata Corp. NW 1714 v. Winkler* (1987), 20 B.C.L.R. (2d) 16, 45 D.L.R. (4th) 741, 27 C.L.R. 225 (B.C.C.A.). In *Winkler*, the defendant failed to construct a building according to the contractual specifications. The plaintiffs demanded damages over \$170,000, which included complete replacement of waterproofing, to bring the floor up to the contractual standard, and for disturbance to the plaintiffs' business. The building cost about \$200,000 to construct. The British Columbia Court of Appeal affirmed the trial judge's finding that the cost of reinstatement would be unreasonable. Damages were assessed at \$13,000 for repairs. See also *Williamson v. Joseph Baruch Construction Ltd.* (1977), 2 R.P.R. 197 (Ont. H.C.). The reduction in value due to the defendant's breach of contract was estimated at \$5,000. The cost of restoration would have been \$20,000. The Ontario High Court noted that although the normal measure of the plaintiffs' loss should be the cost of reinstatement, the benefit must reasonably justify the cost. The court was doubtful whether the defect could be remedied. The plaintiff's damages were confined to the diminution in value.

forming the work in determining the appropriateness of the higher cost of reinstatement. This may be satisfied where the plaintiff has already carried out repairs, or intends to do so. In *Dean v. Ainley*, the English Court of Appeal held that the proper measure of damages is the cost of reinstatement where the plaintiff intends to restore the property in accordance with the contract.⁸⁰ Similarly, in *Ahmed*,⁸¹ a case involving failure to restore demised premises to their original condition as promised by the lessee, the defendant's breach did not cause any diminution in the value of the property. Yet the landlord was allowed to recover the reasonable cost of restoration based on evidence that he was likely to restore the premises.⁸²

Diminution in value is considered appropriate where the plaintiff is unlikely to do remedial work. In *Tito v. Waddell (No. 2)*,⁸³ involving failure to restore land as promised, the plaintiffs' claim for specific performance or in the alternative damages for cost of restoration was rejected. In assessing the appropriate measure of damages, Megarry V.-C. noted that the litmus test was whether the plaintiffs had already replanted the land or intended to do so. He said: "if the plaintiff establishes that the contractual work has been or will be done, then in all normal circumstances, it seems to me that he has shown that the cost of doing it is, or is part of, his loss and is recoverable as damages".⁸⁴ Thus, according to *Tito*, diminution in value should be the proper measure of damages unless there is a genuine intention to restore. He stated that a plaintiff could recover the cost of repairs where property has already been restored or by satisfying the court of intention to do so. In the latter situation, a court can never be absolutely certain that a plaintiff will in fact use the higher cost of reinstatement for restorative work. The court was aware of this danger, but Megarry V.-C. stated that evidence of probable intention to reinstate would suffice to justify recovery of

80. [1987] 1 W.L.R. 1729 at p. 1735, *per* Glidewell L.J. (C.A.).

81. *Supra*, footnote 57.

82. Calamari and Perillo argue that the cost of reinstatement should be appropriate where the plaintiff's interests in performance include subjective value, and the defendant should reasonably have been aware of the plaintiff's idiosyncratic value attached to performance. In such cases, they note that granting the cost of reinstatement does not amount to "economic waste" even if there is no measurable diminution in value due to the defendant's breach. See Calamari and Perillo, *supra*, footnote 77, at p. 634. See also *Chitty on Contracts*, 28th ed. (London: Sweet & Maxwell, 1999), para. 27-014.

83. [1977] Ch. 106.

84. *Ibid.*, at p. 333, para. g.

the higher cost of reinstatement. Probable intention to restore may be established where the plaintiff has contracted for the work to be done, is required by law to carry out repairs, or where the property in question is the plaintiff's home and it would be highly inconvenient or unsafe not to repair.⁸⁵ In cases of doubt, the court may require an undertaking to reinstate as a condition for the award of the higher cost of reinstatement. The plaintiffs in *Tito* were confined to diminution in the value because the difference between cost of restoration and diminution was astronomical and the court was not satisfied that the islanders intended to replant the land if awarded the higher cost of restoration. Among other things, this was because the plaintiffs were now living on a different island. The British Columbia Court of Appeal arrived at a similar conclusion in *Winkler*.⁸⁶ In that case, the defendant failed to construct a building according to the contractual specifications. The plaintiffs demanded the cost of reinstatement, which included complete replacement of waterproofing, with a price tag approximately equal to the cost of constructing the building. At the time of trial, the plaintiffs had not done the work nor committed themselves to doing it. In denying the higher cost of reinstatement, the court noted that it was unlikely that restoration work would be done. The plaintiffs would simply reap a windfall, which would be contrary to the object of the award of damages. Plaintiffs were limited to the reasonable cost of repair work that would be necessary to remedy the two major problems.⁸⁷

Intention to reinstate is negated where the plaintiff has alienated her interests in the property or is no longer in possession. In such cases, the promisee is confined to diminution in value due to the defendant's breach, if any.⁸⁸ Disposition by sale is often regarded as

85. *Ibid.*, at p. 333. Similarly, intention to restore may be substantiated where the plaintiff is obliged to obtain performance for the benefit of a third party. In *Radford*, the fact that the plaintiff wanted to construct the wall for the benefit of others bolstered his interest in performance *per se*.

86. *Winkler*, *supra*, footnote 79.

87. The court did not award damages for diminution instead because the plaintiffs abandoned their initial claim for diminution, likely because it was minimal or nil so the court felt precluded from assessing damages on that basis. See also *Procan Exploration Co. v. Golder Associates (Western Canada) Ltd.* (1991), 6 B.C.A.C. 307, 13 W.A.C. 307, 48 C.L.R. 86 (C.A.).

88. See *Eldon Weiss Home Construction Ltd. v. Clark* (1983), 39 O.R. (2d) 129, 20 B.L.R. 1, 26 R.P.R. (3d) 311 (Ont. Co. Ct.), involving defective construction. In this case, the plaintiff sought to recover the balance of the purchase price and the defendants counterclaimed for \$8,000 as the difference between the amount paid and the value of the house as constructed. In dismissing the counterclaim Honey

mitigation of the plaintiff's loss. Compensation is therefore limited to the difference between the diminution in value due to the defendant's breach and the market value, if any. Where the breach did not affect the market value of the property, the aggrieved party is only entitled to nominal damages.⁸⁹ As well, even if the plaintiff wishes to reinstate or complete performance, the cost approach will still not be the appropriate measure of damages where the defect cannot be rectified.

Reference to the plaintiff's intention in the assessment of damages, while presumably at odds with traditional contract principles, can be seen as an attempt to put the plaintiff's loss into perspective and to allay concerns about conferring a windfall on the plaintiff. In this sense, intention to reinstate or otherwise is seen as indicative of what the plaintiff expected from performance. In appropriate cases this could justify recovery for disappointed non-pecuniary expectations without fear of overcompensating the plaintiff.

Although intention to reinstate would often be indicative of the reasonableness of the cost of restoration, such a desire in and of itself would not entitle an aggrieved party to the cost of restoration.⁹⁰ Recovery would be denied if it were unreasonable to reinstate, as,

J. noted that the value approach was the appropriate measure of the defendants' damages. Since the plaintiff's breach did not affect the selling price, there was no diminution in value due to the plaintiff's deficiencies. Honey noted that the defendants would have been entitled to the cost of repair (estimated at \$12,000) if they had sued for the cost of remedying the deficiencies while they were still owners and had demonstrated a genuine interest in having remedial work done. See also *Charles Bentley & Associates Inc. v. Violetis*, [1993] O.J. No. 1056 (QL), especially para. 68, 40 A.C.W.S. (3d) 64 (Ont. Ct. (Gen. Div.)).

89. See *Winkler*, *supra*, footnote 79; *SEDCO v. William Kelly Holding Ltd.*, [1994] 4 W.W.R. 134, 83 Sask. R. 33, 40 C.L.R. 116 (C.A.); *Farmer Construction Ltd. v. Domcaster Holdings Ltd.*, [1990] B.C.J. No. 2881 (QL) (S.C.); *Eldon Weiss*, *ibid.*

90. In *Ruxley*, the trial judge and House of Lords rationalized their decision that the homeowner was not entitled to the cost of rebuilding the pool to the contractual specification on the ground that it was doubtful that the pool would be rebuilt and in any case to do so would be unreasonable. The House of Lords emphasized that intention to reinstate is seen as a good indication of the injured party's real loss and the reasonableness of awarding the cost of reinstatement. Lord Jauncey concluded: "Intention, or lack of it, to reinstate can have relevance only to the reasonableness and hence the extent of the loss which has been sustained." (*supra*, footnote 10, at p. 276, paras. b-c). Beale cautions that intention to rebuild should not be perceived as determinative of a loss of amenity: Beale, "Exceptional Measures of Damages in Contract" in P. Birks ed., *Wrongs and Remedies in the Twenty-First Century* (Oxford; New York: Clarendon Press, 1996), p. 216 at p. 229.

for example, where the cost would be disproportionate to the benefit to be obtained. In such cases, the plaintiff would be confined to the diminution in value whether or not the plaintiff intended to reinstate upon recovery of damages.⁹¹ The requirements of evidence of an intention to restore and the reasonableness of the same are consistent with the Supreme Court of Canada decision in *Sunshine Exploration Ltd. v. Dolly Varden Mines Ltd. (N.P.L.)*,⁹² involving breach of a contract to drill oil wells. The Supreme Court of Canada awarded the full cost of drilling on evidence that the drilling was economically viable and the plaintiff intended to carry out the work. The plaintiff had actually entered into a contract with a third party to drill the wells. From an economic efficiency standpoint, insisting on the reasonableness of the plaintiff's desire as a precondition for awarding cost of reinstatement avoids economic waste and therefore appears sensible. However, this may be contrary to the primary purpose of contract damages, which is to restore the injured party's disappointed expectations. Failure to award cost of restoration in circumstances where a plaintiff has strong and genuine interests in performance, however unreasonable and extravagant the expenses might be, amounts to not restoring the plaintiff to their expected position.

The appropriateness of the higher cost of restoration is premised on an assumption that the plaintiff values performance as an end in itself, regardless of the added value, if any. In *Tito, Megarry V.-C.* said: "The tastes and desires of the owner may be wholly out of step with the ideas of those who constitute the market; yet I cannot see why eccentricity of taste should debar [a plaintiff] from obtaining substantial damages."⁹³ As well, once a court is satisfied about the reasonableness of remedial work and the plaintiff's intention to repair, the fact that the contractual objective can equally be achieved by cheaper or less idiosyncratic means is irrelevant to the assessment of damages. As Megarry noted in *Tito* "what matters is the

91. See *Lodge Holes Colliery, supra*, footnote 17, where the plaintiffs' claim for cost of restoration was denied even though the plaintiffs had actually effected repairs because the court found the cost of restoration to be unreasonable. See *Dunlop Construction v. Flavelle Holdings, supra*, footnote 70, where the B.C. Court of Appeal held that the cost of restoration approach should not be confined to cases where the plaintiff has carried out repairs or is likely to do so. See also Beale, *ibid.*, at p. 229.

92. (1969), 70 W.W.R. 418, 8 D.L.R. (3d) 441, [1970] S.C.R. 2.

93. *Supra*, footnote 83, at p. 332, para. c.

work to which the plaintiff is entitled under the contract".⁹⁴ Presumably, this is because the plaintiff's interest in performance includes intangible benefits that are worthy of protection.⁹⁵ Where there is no consumer surplus involved and the plaintiff does not reinstate, as was in *Dunlop v. Flavelle*, the cost of restoration would be contrary to first principles because it confers a windfall on the plaintiff.

Implicit in the decision to confine a plaintiff to diminution in value is the assumption that their expectation interest can be expressed solely or largely in monetary terms. This assumption can safely be made where the injured party's interest in performance is largely or purely commercial. However, the assumption breaks down in consumer contracts where plaintiffs' interests in performance include excess utility or idiosyncratic value. In such cases, the diminution in value will hardly be an appropriate measure of the plaintiff's damages.⁹⁶ However, awarding damages on the basis of the cost of reinstatement for minor breaches could be Draconian and contrary to the compensatory basis of contract damages. Courts have begun to recognize the potential injustice to both parties by having to choose between the two traditional alternatives and are willing to assess a plaintiff's loss by alternate means to ensure that a plaintiff's need for fair compensation for their actual loss is respected without burdening the defendant. The alternate approach is discussed in section 5.

In sum, there are similar concerns in compensation for torts and breach of contract. The goal is to fully compensate plaintiffs without undue hardship to defendants. Courts are guided by what is reasonable and fair in particular circumstances. Courts tend to view the diminution approach as the appropriate measure of a plaintiff's loss where there is no intention to reinstate and/or the cost of reinstatement is out of all proportion to the benefits to be obtained from performance. Traditionally, a plaintiff's "actual loss" is assessed by reference to the market value of the property in question or the pecuniary benefits expected from performance. Thus, where the plaintiff's interest in performance includes consumer surplus, the traditional approaches often fail to completely restore a disap-

94. *Ibid.*, at p. 333, para. d.

95. This is the issue of consumer surplus and it is explored in detail under alternate measures.

96. See Farnsworth, *supra*, footnote 69, at p. 1168.

pointed promisee to their expected position. In such situations, a plaintiff's interest in performance is completely commercialized and their subjective interest ignored. This may also provide incentives for breach.

Emphasis on a plaintiff's pecuniary interests in performance partly stems from the conventional or Holmesian perception of contractual relations as being predominantly concerned with wealth maximization between profit-making enterprises.⁹⁷ According to Holmes, a promisor is not obligated to actually perform their contractual undertakings. They can elect to pay damages instead of performance. Thus, remedies for breach of contract must be limited to compensation for pecuniary losses arising from non-performance.⁹⁸ For Holmes, specific performance must be avoided.⁹⁹ The Holmesian view advocates a restrictive perception of contract law and assumes that all expectation interests are pecuniary in nature. As Lord Bridge points out in *Ruxley*, "this assumption may not always be appropriate".¹⁰⁰ As well, the "all or nothing" approach between the two traditional alternatives does not fully compensate injured parties in all cases. Even where the plaintiff does not intend to reinstate and/or reinstatement is unreasonable, diminution in value might not adequately reflect their loss, yet the cost of reinstatement could confer a windfall on them. Legal scholars have advocated a middle ground that gives courts discretion to award damages that adequately reflect a party's losses that is not necessarily tied to either of the two alternatives.¹⁰¹ Courts have begun to accept that the two traditional alternatives can be unsatisfactory and are beginning to award damages somewhere in between these two approaches in appropriate cases. The next section explores when an

97. See generally, Harris, Ogus and Phillips, "Contract Remedies and the Consumer Surplus" (1979), 95 L.Q.R. 581; Sharpe, *Injunctions and Specific Performance*, 3rd ed. (Aurora, Ont.: Canada Law Book, 2000), 7.180.

98. Holmes, *The Common Law*, Howe, ed. (Cambridge, Mass.: The Belknap Press, 1967), p. 236. See Kaplan, "Encounters with O.W. Holmes, Jr." in Kaplan *et al.*, *Holmes and the Common Law: A Century Later: Three Lectures* (Cambridge, Mass., Harvard Law School, 1983), p. 1 at p. 7; Gilmore, *The Death of Contract* (Columbus: Ohio State Univ. Press, 1974), pp. 14-15 and 51-3; Osborne, *supra*, footnote 78, at p. 308.

99. See Holmes, *ibid.*; Gilmore, *ibid.*, at p. 14; Berryman, *supra*, footnote 69, at pp. 164-65.

100. *Ruxley*, *supra*, footnote 10, at p. 270.

101. See Farnsworth, *supra*, footnote 69, at pp. 1160-175; Harris, Ogus and Phillips, *supra*, footnote 97.

alternate measure of damages is appropriate and the forms that these awards may take.

5. Alternate Measures

The alternate approaches avoid the problems of over- or under-compensation. Recovery is tailored to the plaintiff's pecuniary and non-pecuniary losses. It also avoids difficulties associated with actual or anticipated enhancement in the value of property after repairs or reinstatement (betterment). Where the cost of reinstatement is likely to confer a windfall on the plaintiff and diminution in value is nil, fair compensation would sometimes mean awarding damages for reasonable remedial work and/or loss of amenities due to the defendant's breach of duty. Courts have applied alternate approaches in the assessment of damages in both torts and contracts.

*Kates v. Hall*¹⁰² illustrates the inadequacies of the traditional approaches to assessing a plaintiff's loss in torts and the application of an alternate approach to ensure justice to both parties. In *Kates*, the defendant deliberately cut down 13 trees on the plaintiff's property. Absence of the trees did not cause a significant reduction in the value of the plaintiff's land. Although the court found the plaintiff's claim for the cost of replanting the trees to their pre-tort condition — \$200,000 — to be unreasonable, it did not think diminution in value would be a true reflection of the loss. The court found that the plaintiff's true loss lay somewhere between the cost of restoration and the diminution in value and awarded a substantial amount for alternate remedial work, damages for lost amenities (aesthetics and privacy) that would not be regained, and punitive damages to reflect the high-handedness of the defendant's conduct.

The *Kates* approach recognizes that even where there is no diminution in value of the plaintiff's property due to the defendant's wrongdoing, the plaintiff's loss may exceed the cost of restoration that the court deems reasonable in a given circumstance. Thus, to compensate the plaintiff fully for their loss the court should be mindful of intangible losses that cannot be remedied through restorative work. This approach is consistent with the underlying principle of the law of damages to compensate a plaintiff fully in monetary terms for all their losses. The *Kates* approach has been adopted in a number of cases involving defendants who cut down

102. (1991), 53 B.C.L.R. (2d) 322 (C.A.).

trees on their neighbours' property without authorization. In all of these cases, the courts recognize that to resort to one of the two traditional approaches for assessing a plaintiff's loss would not sufficiently reflect the plaintiffs' losses. Also, courts recognize that although the defendant's wrongdoing may not have diminished the market value of the plaintiff's property, the plaintiff has nevertheless sustained intangible loss over and above the cost of restoration for which compensation is warranted by way of loss of amenities. Loss of amenities is assessed by reference to factors such as the nature of the plaintiff's interest in the property and the desire to restore damage caused by the defendant's wrongdoing, if any.¹⁰³

One such case is *Hutton v. Morehouse*¹⁰⁴ where contractors logging the defendant's land trespassed on the plaintiff's land — they cut trees on the plaintiff's property and also used part of that property for moving equipment without authorization. The court rejected the plaintiff's estimates of what was necessary for complete restoration. In assessing what was reasonable the court considered the whole context in which the trespasses occurred. The plaintiff testified that he "[took] particular pleasure in [the land's] untouched, natural beauty". The court found that the defendant was clearly determined to log his entire property, which would have diminished the aesthetic value of the plaintiff's property anyway. The court referred to *Kates* in assessing the appropriate measure of the plaintiff's loss, stating that as in that case, the trespasses affected only a small part of the overall property. The plaintiff was compensated for less costly remedial work because the higher restoration costs would not lead to a more satisfactory result than the modest expenditure. However, the court recognized that the plaintiff's loss in this case

103. See *Oran v. Westwood Fibre Ltd.*, [1996] B.C.J. No. 2697 (QL), 68 A.C.W.S. (3d) 449 (S.C.). Factors that influenced the Court of Appeal's decision in *Kates*, *ibid.*, included the nature of the plaintiff's past and future use of the property. The trees in question provided privacy for only a limited portion of the property, mainly a bedroom. The plaintiffs did not spend a great deal of time in the home and the loss of privacy could be remedied by less expensive means than that suggested by the plaintiffs. The court also considered the disparity between the cost of reinstatement and the reduction in the value of the land. Finally, the court was influenced by the fact that it was unlikely the plaintiffs would actually do restorative work, and that they were more interested in punishing the defendant. Here, the court recognized that although the plaintiff's subjective wishes are relevant considerations, they must yield "to the overall consideration of what is reasonable, practical and fair in all of the circumstances": *Kates*, *ibid.*, at p. 331.

104. [1998] B.C.J. No. 668 (QL) (S.C.).

exceeded the reasonable cost of restoration and awarded damages for the loss of amenities due to the absence of the trees that the plaintiff had to live with in addition to the reasonable cost of restoration. McEwan J. noted:¹⁰⁵

It is clear that a very significant component of his loss is the sense of invasion or violation he suffered. He has also lost the enjoyment he derived from the trees, particularly those between his house and the Morehouse property. The trespass has also interfered with his [plaintiff's] plans to move a trailer onto the property for members of his extended family . . . the plaintiff is confronted daily with his loss. I award the plaintiff \$25,000 for loss of amenities.

Damages for loss of amenity is intended to compensate the injured party for the personal satisfaction they derived from the property that they have been deprived of due to the defendant's wrongdoing. Only natural persons may claim loss of amenity. In *Prince Rupert*, the defendants successfully challenged the award of damages to the plaintiff municipality for loss of amenities due to the removal of trees in a park. In reversing this aspect of the decision, Southin J.A. held that as a corporate body, the plaintiff municipality was not entitled to damages for loss of amenities. She said: "Corporate bodies cannot suffer a loss of 'pleasure, protection or shade' any more than they can suffer pain or grief. The inhabitants, or some of them, may regret the loss of these trees, but I know of no authority enabling a municipality to recover for the loss of pleasure suffered by its inhabitants, whether that loss comes from the destruction of a tree or the pollution of a beach."¹⁰⁶

The *Kates* approach is also applicable where the defendant's breach does not diminish the value of the plaintiff's property and no remedial work is required, but the plaintiff has nevertheless suffered some albeit intangible loss. The House of Lords recognized the extension of the *Kates* approach in this way in *Ruxley Electronics and Construction Ltd. v. Forsyth*, involving a breach of contract to build a swimming pool. The completed pool did not meet the con-

105. *Ibid.*, at para. 48. See also *Hamel v. Moilliet*, [1994] B.C.J. No. 2664 (QL), 51 A.C.W.S. (3d) 850 (S.C.) and *Johnstone v. Manion* [1996] B.C.J. No. 974 (QL), 62 A.C.W.S. (3d) 1249 (S.C.). In *Johnstone*, the defendant cut trees on property that was once the plaintiff's home but was up for sale at that time. The plaintiff conceded that absence of the trees did not diminish the value of his property. The court found that the plaintiff had lost amenities in the short term — until the property was sold — beyond the cost of restoration and awarded the cost of restoration damages for loss of amenities.

106. *Prince Rupert*, *supra*, footnote 43, at pp. 289-90.

tract specification, but the pool was functional and safe for diving (the pool was 9 inches shallower than it should have been). As well, the value of the property remained undiminished by the breach of contract. The homeowner's claim for the cost of rebuilding the pool to meet the contractual specifications (£21,500) was dismissed. Instead, the homeowner was awarded £2,500 for loss of amenities because the builder's breach did not diminish the value of his property. In affirming this decision, the House of Lords held that the cost of reinstatement was inappropriate because it was disproportionate to the benefit to be obtained and it would be unreasonable for the homeowner to incur that expense. As well, it was unlikely that he would rebuild the pool and cost of restoration would simply give him a windfall — he would end up with a pool that substantially met his needs and at the same time pocket the cost of rebuilding it. Yet, the House of Lords recognized that diminution in value due to the builder's breach was not a true reflection of his loss. In the end, the court assessed the homeowner's loss as somewhere in between the two conventional approaches. The House of Lords recognized that the homeowner's interest in performance was not solely pecuniary. He expected to have a pool of a particular specification for diving and he now had to live with something less than he had hoped for. Though this interest cannot easily be measured in financial terms, it is nevertheless a compensable loss. In support of this approach, Lord Mustill noted:¹⁰⁷

the law must cater for those occasions where the value of the promise to the promisee exceeds the financial enhancement of his position which full performance will secure. This excess, often referred to . . . as consumer surplus . . . is usually incapable of precise valuation in terms of money, exactly because it represents a personal, subjective and non-monetary gain. Nevertheless where it exists the law should recognise it and compensate the promisee if the misperformance takes it away.

The *Ruxley* decision recognizes that a plaintiff's interest in performance may not necessarily be pecuniary or to enhance the market value of the property but could also be purely subjective or both. Non-pecuniary interests nevertheless deserve to be recognized and protected. However, an aggrieved promisee should not necessarily be entitled to cost of reinstatement simply because s/he attached idiosyncratic value to performance of a contract. Even if the promisee genuinely intends to do remedial work, the cost of rein-

107. *Ruxley, supra*, footnote 10, at p. 277.

statement may not be appropriate where performance was substantially in compliance with the contract as it was in *Ruxley*.¹⁰⁸ In such situations the cost of reinstatement could be an extravagant remedy at the defendant's expense. The House of Lords has unequivocally rejected the "all or nothing" approach in the assessment of damages for breach of contract; the cost of reinstatement is not an automatic alternative where diminution in value due to the breach would be nil or minimal. As Lord Mustill stated, "there are not two alternative measures of damages, at opposite poles, but only one: namely the loss truly suffered by the promisee".¹⁰⁹ The court's task is to ascertain how best to achieve this end. This progressive assessment of contract damages is consistent with the understanding of expectation damages as comprising pecuniary and non-pecuniary interests.

Compensation for loss of amenity maintains the focus of contractual damages on the injured party's loss or disappointed expectation and has no relation to the amount saved by the contract breaker by reason of the breach or the diminution in value of the plaintiff's property. Thus, the availability of this head of damage does not depend on the nature of the breach or whether the breach has in fact resulted in diminution in the market value of the plaintiff's property. Instead, it must be determined by factors such as the nature and subject-matter of the contract and the plaintiff's expectation interests. The value to be placed on a plaintiff's intangible interest in performance remains at the discretion of the court. Damages for consumer surplus threaten the basis of the efficient breach theory. Unless the defendant has full knowledge of the nature of the plaintiff's expectations and considers that in any decision about a deliberate breach, what might appear to be an efficient breach could in fact end up being a costly breach. This, together with the possibility of courts awarding the higher cost of performance in appropriate cases, may be a disincentive for deliberate or efficient breach.

(1) Contract Damages and Consumer Surplus

A consumer surplus argument may more readily be made in relation to consumer contracts. As Harris *et al.* point out, usually consumer contracts are expected to confer pleasure or utility which may have no necessary correlation to the market price. Consumer surplus

108. See also *729806 Ontario Ltd. v. 796105 Ontario Ltd.*, [1994] O.J. No. 1436 (QL), 48 A.C.W.S. (3d) 545 (Gen. Div.).

109. *Ruxley, supra*, footnote 10, at p. 277.

could equally arise in relation to commercial contracts where pecuniary damages are difficult to quantify or where there is evidence of excess utility.¹¹⁰ However, excess utility is more likely to be foreseeable in consumer rather than commercial contracts, thereby making recovery easier in the former than the latter.¹¹¹ In *Ruxley*, Lord Bridge noted: "where the contract is designed to fulfil a purely commercial purpose, the loss will very often consist only of the monetary detriment brought about by the breach of contract".¹¹² The ultimate determinant should be the court's satisfaction that consumer surplus exists in a particular situation, subject to the principles of mitigation and remoteness, and the contract has not been duly performed, thereby robbing the plaintiff of their subjective value in performance. A plaintiff who alleges consumer surplus bears the evidentiary burden of establishing the existence of non-pecuniary interests in the particular circumstances.¹¹³

110. See Cassels, *supra*, footnote 55, at pp. 213-16 and Beale, *supra*, footnote 90, at pp. 223-26 (1996), who note that consumer surplus should be equally available in commercial and non-commercial contracts. Purchasers of commercial real estate have been granted specific performance upon successful proof of the existence of consumer surplus and insistence on the uniqueness of the property. See *Morsky v. Harris*, [1997] 6 W.W.R. 557, 155 Sask. R. 193, 10 R.P.R. (3d) 133 (Q.B.), rev'd [1998] 8 W.W.R. 340, 173 W.A.C. 27, 18 R.P.R. (3d) 192 (C.A.); *Fossum v. Visual Developments Ltd.*, [1997] A.J. No. 1255 (QL) (Q.B.); *11 Suntract Holdings Ltd. v. Chassis Service & Hydraulics Ltd.* (1997), 36 O.R. (3d) 328, 15 R.P.R. (3d) 201 (Gen. Div.), supp. reasons 15 R.P.R. (3d) 234. See also Berryman, *supra*, footnote 69, at pp. 229-32 and Clark, "Will that Be performance . . . Or Cash?: *Semelhago v. Paramadevan* and the Notion of Equivalence" (1999), 37 Alta. L. Rev. 589 at pp. 593-95.

111. Harris, Ogus and Phillips, *supra*, footnote 97, at p. 583.

112. *Supra*, footnote 10, at p. 277. See also *Rowlands v. Collow*, [1992] 1 N.Z.L.R. 178 at p. 207; Berryman, *supra*, footnote 69, at pp. 170-71.

113. The existence of consumer surplus has been a justification for awarding specific performance in real estate contracts. In *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415, 136 D.L.R. (4th) 1, 91 O.A.C. 379, Sopinka J. laid to rest in Canada the longstanding assumption that every piece of real estate is unique, thereby entitling a plaintiff to specific performance in the event of a breach. There is no longer an automatic right to specific performance in land contracts. A plaintiff must satisfy the court that the property in question is unique as a precondition for obtaining specific performance. The *Semelhago* principle does not distinguish between commercial transactions and private residential sales. Purchasers of residential property have been denied specific performance where the court is not satisfied that the property in question is sufficiently unique. See *Haq v. Grossman*, [1999] O.J. No. 4176 (QL), 92 A.C.W.S. (3d) 339 (S.C.J.); *375069 Alberta Ltd. v. 400411 Alberta Ltd.* (2000), 77 Alta. L.R. (3d) 175, 259 A.R. 1, 2 B.L.R. (3d) 134 (Q.B.) and *Corse v. Ravenwood Homes Ltd.* (1998), 226 A.R. 214 (Q.B.).

Consumer surplus should not be confined to cases where intangible interest was the only benefit expected from performance. Consumer surplus should be recoverable in so far as it was part of the injured party's reasonable expectation from performance. This is evident in *Ruxley*, where in an attempt to justify the juridical basis of the award for loss of amenity to the homeowner Lord Lloyd noted that the trial judge's decision was based on the loss of pleasure exception to the rule in *Addis v. Gramophone* but also recognized that the award was a further inroad in the *Addis* rule.¹¹⁴ Lord Lloyd was of the view that damages for consumer surplus was not on all fours with the existing exception to the *Addis* rule as exemplified in the "holiday cases". He preferred to "regard it as a logical application or adaptation of the existing exception to a new situation".¹¹⁵ This is consistent with developments in the law of contracts generally where courts have recognized that recovery for non-pecuniary losses should not be limited to cases where the express subject-matter of the contract involves intangible benefits.¹¹⁶

(2) Assessing Consumer Surplus

Consumer surplus refers to the subjective value of goods to the owner in excess of the market value, calculated based on the difference between what a consumer is willing to pay and the selling price of the good.¹¹⁷ Economists assess consumer surplus by reference to the subjective value consumers as a group derive from a particular good. Given the differences in individual idiosyncratic tastes, different consumers place different values on particular goods. Thus the maximum amount they are willing to pay for a particular good also differs.¹¹⁸ Posner recognizes that it is difficult to measure a par-

114. *Ruxley*, *supra*, footnote 10, at p. 289, para. e.

115. *Ibid.*, at p. 289, paras. e-f.

116. See Cassels, *supra*, footnote 55, at pp. 203-16; See also J. Poole, "Damages for Breach of Contract — Compensation and 'Personal Preferences': *Ruxley Electronics and Construction Ltd v. Forsyth*" (1996), 59 Mod. L. Rev. 272 at p. 283.

117. In *Taberner v. Ernest & Twins Development*, [2001] B.C.J. No. 429 (QL), 89 B.C.L.R. (3d) 104 (S.C.), the court, in granting specific performance of a real estate contract, recognized (indirectly) that the plaintiff had a consumer surplus in the property in question. Lowry J. pointed out that the plaintiff offered to pay \$20,000 more than the market value of the unit because of its unique characteristics.

118. R.S. Pindyck and D.L. Rubinfeld, *Microeconomics*, 4th ed. (Upper Saddle River, N.J.: Prentice Hall, 1998), p. 122.

ticular plaintiff's consumer surplus in individual cases because the concept is based on the aggregate non-pecuniary benefit that *all consumers* derive from the good. Even at the aggregate level, economists concede that there is no precise science for measuring consumer surplus. It is a speculative concept. Therefore, it is almost impossible to ascertain an injured party's consumer surplus with any certainty. Damages for consumer surplus or loss of amenities are bound to be arbitrary.¹¹⁹ Yet the recognition of non-pecuniary interests in property in the assessment of damages is based on a perception that there is more to the acquisition of property than just monetary value and is a welcome development in the assessment of damages.

Given the subjective nature of consumer surplus, its recognition could give rise to opportunism or exaggeration of one's losses resulting from the defendant's breach. Consumer surplus also raises issues of quantification of damages. Courts must approach compensation for non-pecuniary losses with great caution. Plaintiffs are likely to make consumer surplus arguments in an attempt to secure specific performance, where courts deem the higher cost of reinstatement unreasonable or refuse to award the amount suggested by the plaintiff. As well, an injured party could inflate their consumer surplus. To avoid conferring a windfall on the plaintiff or an opportunity to inflate their disappointed expectation in such cases based on assumed personal preferences, consumer surplus should be assessed by reference to both objective factors and the plaintiff's subjective interests. As the House of Lords noted in *Ruxley*, "[The aggrieved party's] personal preference may well be a factor in reasonableness and hence in determining what loss has been suffered but it cannot *per se* be determinative of what that loss is."¹²⁰ Courts must be guided by what is reasonable, practical and fair to both parties in any given case, bearing in mind that true restitution in respect of non-pecuniary interests is not possible. The assessment of consumer surplus is analogous to the award of damages for loss of amenities in personal injury cases.¹²¹ Despite the difficulties of

119. Posner, *Economic Analysis of Law*, 5th ed. (New York: Aspen Law and Business, 1998), pp. 149-50.

120. *Ruxley*, *supra*, footnote 10, at p. 275. See also *Kates*, *supra*, footnote 102, at p. 331.

121. See *Bone v. Seale*, [1975] 1 All E.R. 787 at p. 793, *per* Stephenson L.J. (C.A.). In this case, the plaintiffs successfully brought an action against the defendant for nuisance due to the discharge of noxious smell from the defendant's pig farm on

putting a price tag on non-pecuniary interests courts have not shied away from awarding non-pecuniary damages. In *Andrews v. Grand & Toy Alberta Ltd.*, the Supreme Court of Canada recognized the difficulties in quantifying intangible losses in the context of personal injury claims.¹²² Dickson J. noted: "The monetary evaluation of non-pecuniary losses is a philosophical and policy exercise more than a legal or logical one. The award must be fair and reasonable, fairness being gauged by earlier decisions; but the award must also of necessity be arbitrary or conventional. No money can provide true restitution."¹²³ The Supreme Court of Canada has adopted a functional approach for the assessment of non-pecuniary losses and as a means of keeping non-pecuniary damages to a minimum with a firm ceiling.¹²⁴ The aim is to limit damages to what is reasonable to provide a measure of solace for the plaintiff's misfortune and not to provide direct compensation for their loss. Unlike lost amenity or expectation of life which are irreplaceable, disappointed expectations in the performance of a contract can sometimes be restored but doing so could constitute an economic waste and may therefore be unreasonable. In this sense, consumer surplus is akin to pecuniary losses in personal injury claims and a plaintiff must be compensated for having to live with their disappointed expectations. Courts must recognize the difficulties of assessing consumer surplus in any precise manner, just like non-pecuniary losses in personal injury cases, and must also realize that this loss cannot be replaced in any direct way. No amount of money can restore a plaintiff's disappointed expectations.¹²⁵ Thus, the amount awarded must simply be to give

neighbouring property. The two plaintiffs were each awarded £6,000 for loss of amenity for enduring the smell for over 12 years, which was reduced to £1,000 on appeal. Stephenson noted that although it is difficult to find an analogy for interference with one's enjoyment of property, the closest analogy would be damages for loss of amenities in personal injury cases.

122. *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, [1978] 1 W.W.R. 577, 83 D.L.R. (3d) 452.

123. *Ibid.*, at p. 261.

124. See *Andrews*, *ibid.*; *Thornton v. School District No. 57*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480, [1978] 1 W.W.R. 607; *Arnold v. Teno*, [1987] 2 S.C.R. 287, 83 D.L.R. (3d) 609, 3 C.C.L.T. 272; *Lindal v. Lindal*, [1981] 2 S.C.R. 629, 129 D.L.R. (3d) 263, [1982] 1 W.W.R. 433; *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674, 127 D.L.R. (4th) 577, [1995] 10 W.W.R. 1. See also Cassels, *supra*, footnote 55, at pp. 157-61.

125. For a general discussion of the difficulties in quantifying intangible losses, see Bridge, "Contractual Damages for Intangible Loss: A Comparative Analysis" (1984), 62 Can. Bar Rev. 323.

the plaintiff a measure of happiness for their disappointed expectations. This is similar to the philosophical basis for awarding damages for loss of amenities in personal injury claims.

Beale suggests that as a matter of principle, compensation for intangible interests should be available only where it "was a natural and probable outcome of the breach and could not be avoided by plaintiff taking reasonable steps".¹²⁶ This is an attempt to contain the assessment of damages for consumer surplus within the rules on remoteness and mitigation. Although Beale's position would appear to favour denial of damages for extraordinary losses, it is more likely a call to exercise restraint in awarding damages for loss of amenity than a suggestion for their exclusion.¹²⁷ In fact, Beale also notes that such awards should be kept very low except in very serious cases. This is consistent with damages for loss of amenities in personal injury cases.¹²⁸ The House of Lords decision in *Ruxley* appears to support keeping damages for consumer surplus at moderate levels. In fact, there was a sense in the House of Lords that the award for loss of amenities of £2,500 was very generous. Some commentators have suggested that the fictional reasonable person standard should be adopted in this context, with emphasis on the value a reasonable person in the plaintiff's position would have expected from performance.¹²⁹ Thus, one way of compensating for lost consumer surplus would be to determine what a reasonable person would be willing to pay to obtain the benefit in question. This approach should be satisfactory in so far as courts do not substitute their own ideas for what they think the plaintiff's non-pecuniary expectations should have been. Courts must balance the aggrieved party's subjective loss against the possibility of exaggeration of that loss. What is reasonable in particular circumstances must be assessed in relation to the plaintiff's personal preference and idiosyncratic motivation for entering into the particular contract. As in

126. Beale, *supra*, footnote 90, at pp. 225-26 (1996); McGregor, *supra*, footnote 1, at para. 1153.

127. See Waddams, *supra*, footnote 42, at 3.1430-1450. See also Yates, "Damages for Non-Pecuniary Loss" (1973), 36 Mod. L. Rev. 535 at p. 538.

128. In *Bone*, *supra*, footnote 121, at pp. 793-95, the English Court of Appeal said it is important for the law to be consistent when dealing with analogous situations. Given the parallel between loss of amenity in personal injury claims and interference with the enjoyment of property, assessment of damages in the latter should be moderately consistent with the practice in the former.

129. Harris, Ogun and Philips, *supra*, footnote 97, at pp. 585 and 599-601.

the assessment of intangible interests in other contexts, courts are likely to fix an arbitrary figure, likely somewhere in between the cost of reinstatement and diminution in value that they think would provide some utility in place of the lost expectation.

Generally, no damages should be awarded for non-pecuniary losses where the court decrees specific performance or awards damages in lieu to enable the plaintiff to obtain performance or completion of performance by a third party unless the substitute does not fully meet the plaintiff's contractual expectations. The rationale is that specific or substitute performance would provide the plaintiff with the consumer surplus expected from performance of the contract.¹³⁰ Indeed, courts consider the existence of non-pecuniary interests in granting specific or substitute performance partly because of the difficulties of measurement and also because it may be the best way of fulfilling the aggrieved party's pecuniary and non-pecuniary expectations without having to assess damages for subjective interests.¹³¹ This would sometimes entitle the plaintiff to the cost of reinstatement as was the case in *Radford*. However, reinstatement might not be an adequate measure of the plaintiff's lost expectations where the subjective value of performance to the plaintiff exceeds the contract price.¹³² In such cases, the plaintiff might be entitled to damages for consumer surplus representing their idiosyncratic value in performance in addition to the cost of reinstatement.

Where the cost of performance exceeds the utility the plaintiff expects to obtain upon completion, the *Ruxley* approach serves a dual purpose of recognizing the plaintiff's subjective interest in performance and preventing economic waste. As well, it addresses concerns about windfall to the defendant in cases of deliberate breaches where the difference between the cost of performance and diminution in value is substantial and the plaintiff is confined to the latter. Compensation for consumer surplus ensures that some of the benefits from the breach are transferred to the plaintiff.

130. See Fridman, *Law of Contracts in Canada*, 4th ed. (Scarborough, Ont.: Carswell, 1999), at pp. 808-9 where he notes that to some extent courts recognize consumer surplus when they decree specific performance.

131. See Sharpe, *supra*, footnote 69, at 7.180 to 7.230, c. 8; Berryman, *supra*, footnote 69, at p. 172; see generally, Da Silva, "Case Comment: The Supreme Court of Canada's Lost Opportunity: *Semelhago v. Paramadevan*" (1998), 23 Queen's L.J. 475.

132. See Cassels, *supra*, footnote 55, at p. 209.

6. Conclusion

Traditionally, courts have adopted the cost or value approach in assessing damages for interference with property interests. Although the application of one of these alternatives is often sufficient to do justice in most cases, they have proved inadequate where the plaintiff's losses include non-pecuniary interests. These inadequacies have prompted courts to resort to alternative approaches, which ensure that an injured party is fully compensated for both their tangible and intangible interests. These alternative approaches avoid concerns about over- or undercompensating plaintiffs. The alternate approaches to the assessment of a plaintiff's loss are a welcome development in the law of damages. The availability of these approaches recognizes the reality that sometimes the true nature of a plaintiff's loss cannot be measured by either of the two traditional approaches. The alternate approaches recognize that in appropriate cases, the desire to compensate a plaintiff for their true loss warrants compensation for intangible losses under the head of loss of amenities or consumer surplus. This calls for a subjective assessment of a plaintiff's loss and must be approached with great caution. While this approach seeks to be fair and just to plaintiffs by assessing their true loss, it also favours defendants because the defendant's liability could be substantially less than it would otherwise have been had the court adopted the higher cost of restoration as the appropriate measure of the plaintiff's loss.