# *Birkbank Farms v. Superior Propane Inc., [2002] O.J. No. 1410*

Ontario Judgments

Ontario Superior Court of Justice

Pitt J.

Heard: December 10-14, 2001; written submissions: January

30, 2002.

Judgment: April 12, 2002.

Court File No. 97-CV-132906

**[2002] O.J. No. 1410** | [2002] O.T.C. 235

Between Birkbank Farms, Jeff Wilson and Sharon Stewart Wilson, plaintiffs, and Superior Propane Inc., defendant

(57 paras.)

## Case Summary

**Damages — Limits of compensatory damages — Remoteness, torts — Recoverable damages, purely economic loss — Assessment — Where amount of loss difficult to estimate or determine — Torts affecting goods — Damage to goods — Loss of profits — Valuation of goods before damage — Replacement cost.**

Assessment of Birbank Farms's damages from an explosion and fire. In August 1993, a Superior Propane truck exploded and caused a fire that destroyed four of Birbank's barn buildings and their contents, including a retail market operation, a residence for temporary workers, farming equipment and storage areas. Superior had already paid over $500,000, but Birbank claimed a further $800,000 in relation to building replacement costs, equipment replacement, business interruption and loss of business opportunity, all of which was supported by expert evidence. The defendant admitted a further liability of $150,000, and submitted evidence to contradict Birbank's expert evidence.

HELD: Birbank was awarded total damages of approximately $900,000.

Superior was credited with having already paid $529,000, so Superior owed Birbank $374,000. In the claim for loss of business opportunity, most of Birbank's evidence was unreliable, as there was nothing in writing. There was some reliable expert evidence as to the likelihood that Birbank would have expanded its business in some areas. This category of damages could be awarded so long as Birbank supplied sufficient facts to enable the court to calculate the loss with reasonable certainty. The court awarded only 10 per cent of the amount claimed for loss of business opportunity. For business interruption damages, the court preferred much of Birbank's evidence due to its long experience in the farming industry. The court disallowed a claim for lost income from the early sale of cabbages to a dealer who later went bankrupt and didn't pay, as this loss was too remote. The measure of lost equipment damages was the reasonable cost of replacement or repair, minus any enhancement. The court preferred Superior's method of calculation for this head of damages. With respect to building loss, the court endorsed Birbank's use of a local person with expertise to construct the new buildings, despite the fact that this was the higher quote. The court was not satisfied with the expert's determination of the value of the buildings, and relied to a greater extent on the values proposed by the person who had constructed some of the original buildings and re-built the buildings. Birbank was awarded approximately two-thirds of the amount it had claimed for building damages.

[Editor's note: An addendum re costs and interest was released June 14, 2002. See *[2002] O.J. No. 2326*. Supplementary reasons for judgment were released October 1, 2002. See *[2002] O.J. No. 3743*.]

## Counsel

James M. Regan, for the plaintiffs. Ian Gold, for the defendant.

## PITT J.

**1** This is an assessment of damages arising out of the destruction by fire, of the four barn buildings and contents of the Birkbank Farms located in Orton, Ontario on August 17, 1993, as a result of an explosion of a Superior Propane truck. The farm was comprised of approximately 225 acres and included a retail market operation, above which an apartment was located. The major corps were potatoes and cabbages and the minor crops were carrots, beets, broccoli, turnips, parsley, peas and beans.

**2** With the involvement of experienced counsel, a good deal of the issues were resolved prior to trial.

**3** There are four categories of losses being claimed:

| | | | |
|---|---|---|---|
| (a) | Building (replacement cost): | $ | 516,820.64 |
| (b) | Equipment: | $ | 365,739.24 |
| (c) | Business interruption: | $ | 246,552.40 |
| (d) | Business opportunity: | $ | 180,000.00 |
| | TOTAL: | | $1,309,112.28 |

**4** The defendant has already paid $528,577.00; $150,000.00 of which was paid within a month of the incident, and acknowledges a further indebtedness of $117,832.64, for a total liability of $646,609.64.

**5** Nothing about the evidence would justify the precise figures mentioned above or in the breakdown of these claims; so I shall, in my judgment, use rounded numbers.

**6** In every category, except business opportunity, the defendant acknowledges some liability. In the business interruption category (using that expression in its broadest sense), the claim for housekeeping and travel is modest, and although the issue of the travel claim involves some question of real principle, the quantum does not warrant much expenditure of time, especially as the distance for which compensation is claimed is almost certainly a guesstimate.

**7** In general, I do not accept that either of the parties or the Court can do better than a reasonable estimate of damages, without being overly generous with the defendant's money, or being excessively cautious in compensating the plaintiffs.

BUSINESS OPPORTUNITY

**8** I will begin with the claim for loss of business opportunity. It was, until a recent revision of the written submissions, the largest claim, but supported by the least evidence. Most of the evidence offered can hardly be considered reliable, in the sense of giving comfort to a trier of fact. There was no business plan in existence. In fact, there was nothing in writing. In addition to which, it seemed odd that the first time the new business opportunities arose in the period since the personal plaintiffs became the managers of the farming operation in 1989, was some three to five years after the fire.

**9** These frailties, however, are not in my view, sufficient to reject this claim completely. By 1997, the plaintiff, Jeff Wilson ("Mr. Wilson") was 44 years old. Mr. Wilson's career up to that point was quite impressive. He graduated in Horticulture from the University of Guelph. He was once President of the Horticultural Association. He was involved with new technology dealing with genetically modified plants. He had established a model farm concept with Birkbank. Mr. Wilson won Canada's Young Farmer Award in 1992, which award is based on profitability. He had once been president of the Ontario Fruit and Vegetable Growers Association, and was a recipient of its award of merit in 1999.

Mr. Wilson was somewhat of a public personality. The willingness of Gord Surgeoner, the President of Ontario Agri Food Technologies, which provides ongoing research grants to farms in Ontario and who has some association with the University of Guelph, to testify on these plaintiffs' behalf on this issue cannot be disregarded, although no application for assistance was made to his group or to any other. While neither the evidence of Gord Surgeoner aforementioned, Nick Nasturzio and John Jaques, the last two of whom discussed vague plans to engage in separate ventures with the plaintiffs, nor that of Mr. Wilson himself, would justify a substantial award, it seems to me it would be imprudent to conclude that the fire did not have some impact on the plaintiffs' potential for establishing a Potato Storage and Packing, Pickled Asparagus, and Coleslaw business, in 1998, when they did appear to have an intention to do so. The happening of future events need only be established to a standard of probability. It is enough to prove that there is a reasonable chance of such loss occurring, Schrump et al v. Koot et al *(1977), 18 O.R. (2d) 337*. I find that the plaintiffs have met this standard. In the language of the Court of Appeal, here Osborne, J. A. in Robert McAlpine Ltd. v. Bryne Glass Enterprises Ltd., *[2001] O.J. No. 403* at para. 100:

> "Woodbine submits that there was a "reasonable preponderance of credible evidence" to substantiate an income loss due to the delay. That, however, begs the question - what is the loss? Woodbine also submits that possibilities based on expert evidence must be considered in the assessment of damages and that causation need only be established to a standard of probability. I agree, provided that the existence of the possibility is established in the reasonable balance of probability. See Schrump v. Koot *(1977), 18 O.R. (2d) 337* (Ont. C.A.). I accept that it was open to the Trial Judge to conclude that there was a real possibility that some prospective tenants did not lease space in Woodbine Place during the November 1, 1989 to March 31, 1990 period. But the existence of a real possibility, or probability, of a loss must lead to an assessment of damages that have a principled connection with the evidence that the Trial Judge accepted."

**10** In Robert McAlpine Ltd. v. Bryne Glass Enterprises Ltd. [supra] at para. 62, the Court also referred to Toronto Transit Commission v. Aqua Tax Ltd. (1956), 6 D.L.R. (2d) 721 (Ont. H. Ct.) and adopted the following statement of Gale, J.:

> "It is a well-established principle that where the damages are by their inherent nature difficult to assess, the Court must do the best it can under the circumstances. Such is the case where the Court estimates the damages for loss of expectation of life or for pain and suffering, it being impossible to measure the loss with

mathematical accuracy. That is not to say, however, that a litigant is relieved of his duty to prove the facts upon which the damages are estimated ... Mayne on Damages, 11th ed., points out at pp. 5-6:

> A distinction must be drawn between cases where absence of evidence makes it impossible to assess damages, and cases where the assessment is difficult because of the nature of the damage proved. In the former case only nominal damages can be recovered. In the latter case, however, the difficulty of assessment is no ground for refusing substantial damages, as, for instance, in an action against a banker for not paying his customer's cheque, or on a covenant to pay off encumbrances.
>
> ...
>
> The general rule is that the plaintiff must prove sufficient facts to enable the Court to calculate the loss with reasonable certainty. To this must be added the qualification that, where the damages are, by their intrinsic nature, incapable of assessment with any degree of certainty, the plaintiff must prove the facts and the Court will approximate a sum, even though it may be little better than a guess."

**11** In Houweling Nurseries Ltd. v. Fisons Western Corp. *(1988), 49 D.L.R. (4th) 205* at 210 - 211 (B.C.C.A.), leave to appeal to S.C.C. refused cited, by Ronald G. Slaght, Q.C. and Perry Hancock in Pecuniary Damages for Lost Profits and Opportunities, Law Society of Upper Canada Special Lectures, p. 95 at p. 115, McLachlin, J. said:

> "Even though the plaintiff may not be able to prove with certainty that it would have obtained specific contracts but for the breach, it may be able to establish that the defendant's breach of contract deprived it of the opportunity to obtain such business. The plaintiff is entitled to compensation for the loss of that opportunity. But it would be wrong to assess the damages for that lost opportunity as though it were a certainty."

No doubt the same approach would be applicable in a tort action of this nature.

**12** In light of the uncertain nature and frailty of the evidence, the contingencies, the competitive nature of the industry, and taking into consideration the need for start-up expenditures, I am prepared to award only approximately 10 percent of the revised claim of $180,000.00 or $5,000.00 per year for four years. The range of the claim, $180,000.00 to $522,000.00 is further evidence of its uncertain nature.

BUSINESS INTERRUPTION

**13** This claim is comprised of (a) potato loss; (b) farm market loss; and (c) expenses incurred.

**14** Potato Loss (unharvested acreage): The issues here are how the price should be calculated and when would the potatoes have been sold. The plaintiffs claimed $68,333.27 and the defendant offered $55,114.23.

On the price issue, the plaintiffs used as its benchmark, the November, 1993 Ontario Fresh Potato Growers Marketing Board pricing order of $13.75 per cwt wholesale and $15.25 per cwt retail. The defendant, on the other hand, relied on the plaintiffs' sales invoices for the period September to October, 1993.

**15** I prefer the plaintiffs' evidence which is less speculative. In any event, Mr. Wilson and his expert accountant were more familiar with the trade and the history of the subject business than were the defendant's experts.

**16** I also prefer the plaintiffs' evidence with respect to the time at which the potatoes would have been sold. The defendant's position was arbitrary, while the plaintiffs' position was based on the farm's history, knowledge of the market, and what actually transpired.

**17** More difficult is the question whether commissions or fees should be included in the selling price. The defendant urges the Court to be guided by the practice of a dealer, Lenson Celery which, when billing the plaintiffs for potatoes sold on the plaintiffs' behalf, deducted handling costs and commissions. I do not find that methodology either fair or necessary on all sales.

**18** The total value of the potato loss I find to be $68,000.00 as claimed by the plaintiffs.

**19** Farm Market Loss: The plaintiffs' claim here was for $75,577.72, while the defendant maintains that the claim should be for $29,904.47. The differences arise in two areas, the indemnity period and the margins to be applied.

**20** Again, I reject the defendant's position on the indemnity period, based as it is on the arbitrary decision of the adjuster that 12 months is the appropriate period. I prefer the plaintiffs' evidence, including that of a builder, Wayne McKinnon, who testified that as late as October, 1994, he had been working on the third barn.

**21** Originally the positions of the respective experts were almost identical - separated by about $1,000.00. In fact, the defendant's expert actually changed his position twice, having to prepare 3 reports.

**22** I also prefer the evidence of the plaintiffs that the profit margin on homegrown product was 60 percent, and that on purchased product was 40 percent. I am satisfied that the loss was approximately $75,000.00.

**23** Expenses Incurred: The plaintiffs calculate the expenses incurred to mitigate their losses at $52,651.96 plus $25,292.68 for the value of cabbages lost in the hands of a bankrupt consignee, Lenson Celery, while the defendant calculates the figure at $32,564.32. The areas of dispute are:

(a) Cost of a foreign (Mexican) worker;

(b) The cost of rented trailers;

(c) Housekeeping expenses;

(d) Travel expenses; and

(e) The consignment issue.

**24** Cost of a Foreign Worker: The farm always used foreign workers. I see no reason why the plaintiffs would have used one additional worker if that worker were not necessary, and it seems eminently reasonable that an additional worker would have been required in the circumstances.

**25** Costs of Rented Trailers: With respect to the indemnity period, as I said in other areas, I prefer the evidence of the plaintiffs. I do not agree with the defendant that the hook-up of the electrical fixtures, which remain in place, is a permanent replacement. Mr. Wilson's uncontradicted testimony was that it will be removed when he can afford to do so.

**26** Housekeeping and Travel Expenses: These claims may conveniently be consolidated. I have no difficulty with the housekeeping claim. I agree with the defendant that in a claim for mileage, fixed costs are logically separable from variable costs, even if the exercise may not be easy. That does not mean, however, that the plaintiffs are not entitled to recover the fixed costs, especially as those costs are incurred because of the additional mileage. Such combined travel expenses are routinely provided to those who use their own cars to travel on behalf of the employer. I accept the plaintiffs' claim for the personal expenses.

**27** I find, therefore, that the "mitigation expenses" were $52,600.00, plus $20,200.00 for housekeeping and travel expenses, for a total amount of $72,800.00, from which must be deducted approximately $17,800.00 in saved expenses acknowledged by the plaintiffs, for a net amount of $55,000.00.

**28** The Lenson Celery Receivable: $30,292.65 worth of Cabbage was allegedly shipped to Lenson Celery ("Lenson") in order to mitigate the damages. Normally, no more than $5,000.00 would have been shipped to Lenson at any one time. Lenson made an assignment in bankruptcy and the plaintiffs did not receive the proceeds of the sales of the shipment of cabbage. The plaintiffs are claiming $25,292.65 for this loss.

The evidence is that the plaintiffs delivered the cabbage to Lenson on or about September 3, 1993, because the plaintiffs' storage space was destroyed by the fire. Up to December 9, 1993, apart from one phone call, Mr. Wilson had done nothing to follow-up on Lenson, although it was his testimony that after 45 days, he would normally feel at risk.

I am not satisfied that there is enough reliable evidence to grant this claim, which is also too remote. Even the amount actually delivered by the plaintiffs to Lenson was not proved with certainty.

The total of the proved claim loosely characterized as business interruption, inclusive of the agreed items is, therefore, $246,552.40 - $25,292.68 = $221,259.72 less five percent for contingencies, for a figure of $210,200.00.

EQUIPMENT

**29** It is perhaps in this area, more than in any other, that the experience of counsel and the willingness of the parties to compromise, were of most assistance to the Court. The disputed items were reduced from over 400 to 37, although the difference in the parties' positions is still significant. The plaintiffs estimate the loss at $365,739.24, of which $162,467.14 has been agreed upon, leaving a balance of $203,272.10; while the defendant places the figure at $247,276.51 of which $162,467.14 has been agreed upon, leaving a balance of $84,809.37. There are fundamental differences in the parties' approaches, both of which are regarded by the parties as "principled". With due deference to counsel, I suggest that the preciseness with which their numbers are offered suggests to me, at any rate, that they both have much more confidence in those numbers than I have. I do not feel constrained to accept one or the other.

ANALYSIS OF THE EQUIPMENT ISSUE

**30** This being a tort action, the objective must be to put the plaintiffs in the position that they would have been in if the wrong had not been committed; neither a better nor a worse position. Since it is not possible to put the plaintiffs back in exactly the same position they would have been, the Court must make a valiant effort to achieve the impossible, bearing in mind that it must not put intolerable burdens on an innocent plaintiff to justify a claim to the minutest degree, while recognizing that the defendant is not obliged to be generous to the plaintiff.

**31** I believe the parties' experts agree that the plaintiffs must be remunerated for the cash value of the equipment at the time of the fire; and that in order to achieve such an objective fully, it would be necessary to know the time of purchase, how much was paid, and the condition of the equipment at the time of purchase. That argument naturally led to the troublesome issue of depreciation, with which I shall deal later.

**32** While an insurer is apparently at liberty to impose an extremely onerous burden on an insured making a claim for loss of property from, for example, fire or theft, presumably in contract theory, it is not open to a tortfeasor to adopt the same policy. An insured is required to keep the insurer fully informed and updated on the subject matter covered by the insurance. As an example, insureds are obliged to advise their insurer if they have acquired more expensive paintings, and receive an endorsement to their policies. On the other hand, a tortfeasor who destroys a plaintiff's property cannot be heard to say "I shall pay you nothing unless you produce every invoice for every item claimed."

If that were the case, a tortfeasor, who had destroyed all of the contents of the plaintiff's house (together with invoices) for example, would be in a better position than one who had destroyed only part of the contents of the plaintiff's house, if the latter plaintiff were in possession of some invoices.

**33** Since estimates are to be made, it is useful to bear in mind the language of Mr. Justice Doherty in Donnelly et al v. Gore Mutual Insurance Company, [1989] I.L.R. 1 - 2448 in rejecting an expert's opinion that a depreciation factor of 60 percent should be used in determining the value of a building:

> "Giving the matter my best consideration, and recognizing that the process cannot yield a figure of mathematical precision, especially in light of the evidence adduced in this case, I conclude that 40 percent

> is the appropriate figure to be attributed to depreciation when considering the actual cash value of the building as of April, 1983."

**34** There were literally hundreds of items to deal with, acquired over a period of two decades. Naturally not all of the invoices were available. On the advice of the plaintiffs' accountant, the items were divided into four categories:

(a) New items replaced.

(b) Used items replaced.

(c) New items not replaced for which a quote was obtained.

(d) Old items not replaced for which a quote was obtained.

**35** The plaintiffs' accountant depreciated all new items by a factor of 20 percent and did not depreciate used items since the latter were in a depreciated state. I do not doubt the evidence of Mr. Wilson that he maintained his equipment in good condition.

**36** The defence expert took an approach much more consistent with general accounting principles. Where a replacement invoice or replacement quote was provided, the defence expert adjusted the replacement cost to 1993 values (the year of the loss) based on the changes in the Consumer Price Index. The actual cost value calculation assumed an annual depreciation rate of 10 percent for items less than 7 1/2 years old, a fixed 75 percent depreciation rate for items greater than 7 1/2 years old, and a 50 percent depreciation rate for items that had an unknown purchase date. For the balance of items, the defence expert assumed the original purchase cost as a basis for the replacement cost and adjusted the cost for the actual cash value. I prefer the defendant's approach, which was not arbitrary and was consistent, as I said earlier, with generally accepted accounting principles.

**37** I believe, however, that these principles, in the hands of the defendant's experts, yield something close to a minimum value. It cannot be forgotten that the purpose of the exercise is not simply to determine value in the abstract, but to provide a fund for the plaintiffs to replace their lost property in the condition that is was in at the date of the loss. As Lord Denning said in Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co. Ltd., [1970] 1 Q.B. 447 (C.A.) cited in James Street Hardware and Furniture Co. v. Spizziri *(1987), 62 O.R. (2d) 385*:

> "If a second-hand car is destroyed, the owner only gets its value, because he can go into the market and get another second-hand car to replace it."

Nevertheless, some items had to be replaced whether or not there was a second-hand market for them, and with other items, a depreciation factor consistent with the plaintiffs' approval is fairer. Indeed the defendant acknowledged the latter with, at least one item, the FMG 12 R.C. TR Hydraulic Sprayer.

Factors which may assist the Court in determining value, include the cost of replacement, the value of comparable property, the original cost of the property, the amount for which the property was insured, and the nature and use of the property, Klar, Lewis N., B.A., B.C.L., LL.M., Remedies in Tort, (Toronto: Carswell 1987) at 135 and 136. It is noted that the plaintiffs' personal property was insured for only $55,000.00.

**38** The basic rule applied is that actual cash value means the cost of reinstatement less depreciation, unless circumstances indicate another more appropriate measure. Brown and Menezes, Insurance Law in Canada, (Toronto: Carswell 1999, loose leaf) at p. 11-3. [My emphasis]

**39** In light of the greater danger of undervaluing the innocent parties' loss, I find it appropriate to increase the residual figure of $84,809.37 calculated by the defendant's expert to a figure of $135,000.00. This figure added to the agreed amount of $162,467.14 make a total of $297,467.14. I cannot accept that the list of equipment presented in evidence (37 items of which are shown in Appendix A attached) can, on proper tort law principles, be valued at the figure suggested by the defence expert. I refer especially to items 1, 2, 10, 11, 12, 14, 21, 24, and 28 on Appendix A. However, I agree with the defendant that the proper measure of damages is the reasonable cost of

replacement or repair, less any enhancement. Wertman v. Fox *(1923), 24 O.W.N. 401* (S.C.) aff'd *25 O.W.N. 129* (C.A.); City of Guelph Board of Light and Heat Commissioners v. United Dairy & Poultry Co-Operative Ltd., *[1966] 2 O.R. 467-469* (Co. Ct.) at p. 468.

BUILDING LOSS

**40** I have no difficulty in accepting Mr. Wilson's testimony that the buildings constructed between 1977 and 1989, were very well maintained throughout their lives, with the last significant expenditure of approximately $10,000.00 made in the year of the loss. There were four buildings as described by Wayne McKinnon in his October 29, 1993 report.

> "The first building, constructed in 1977, was a two storey gambrel roofed building 32' x 100' x 12'. Attached to the exterior on the south elevation was a preserved wood deck approximately 10' x 24' and on the west elevation was a flat roofed canopy, 16' x 32' to shade a retail display area.
>
> The second building was constructed in 1979 to serve as a shipping area and cooler storage area. The building was 40' x 72' x 14' with a connecting link to first building of 32' x 12' x 12'. Also attached to this building was a compressor/mechanical room 8' x 10' x 8'.
>
> The third building was constructed in 1989 - 90 as a bulk potato storage.
>
> The exterior dimensions of the building were 40 ' x 80' x 14' with a connecting link 12' x 20' x 10'.
>
> The fourth building was a labourer's quarters located on south side of first building. This building was 19' x 36' x 8' and was comprised of bathroom, kitchen, dining area, and one bedroom."
>
> The insurance coverage on the buildings was $165,000.00.

**41** The plaintiffs obtained three (3) estimates for restoring the buildings. One from Wayne McKinnon Building Ltd. ("McKinnon"), which ultimately got the contract and whose estimate was the highest at $531,493.00. The second was from R.W. Hope Ltd. ("Hope"), which provided an estimate of $475,600.00. The third estimate was from Bachly Affiliated Companies ("Bachly") for $379,762.00 to $420,000.00. These estimates were subjected to a review by Thomas Phelan, an engineer, who reconfigured the estimates by including "missing items" to a range of $510,562.00 (Bachly) to $568,247.0 (McKinnon).

**42** The contract was let out to Mr. McKinnon, who lives in the area, was very familiar with the buildings' history, and had originally constructed the second and third buildings. There was no written building agreement. The final invoice for the work and materials, which did not include the "missing items", was $472,000.00. Neither the evidence, nor commonsense would support the plaintiffs' position that the new facility is no better than what it replaced, although admittedly the new buildings were somewhat smaller. The use of concrete foundations rather than pole construction, dictated by engineering considerations, was just one obvious improvement. The reconfiguration of the buildings was another. The defendant submits that the Hope estimate was the most "objective". Frankly, given the history of McKinnon's long involvement with the farm and his presence in the neighbourhood, I can find no fault with the plaintiffs accepting his bid, on a time and material basis; no doubt based on experience, the plaintiffs were satisfied that they could rely on Mr. McKinnon not to "overcharge" even if he did not sign a contract. Mr. McKinnon understood he was to reconstruct a building similar in type and dimensions as the one destroyed. I believe, in the long run - a concept that is often forgotten in practice - the selection of Mr. McKinnon, as a community person with his enormous experience in the construction of barns, who had done much work in the buildings before, was a financially sound decision.

**43** The debate at trial centered primarily around methodology, in particular, the depreciation factor. Both experts seem to agree that maintenance, modifications, and upgrades, while they increase the value of a building, had no impact on the depreciation factor.

**44** I was not impressed by the fact that the plaintiffs' expert found it necessary to prepare three reports, two in February, 1995 and another in June, 1997, with significant changes that were not explained to my satisfaction. As

an example in the first report, the depreciation factor used appears to be 36.8 percent, while for the second report, although it is not specifically mentioned in the report, I accept the defence expert's finding that a depreciation factor of 27.3 percent was used. In any event, the plaintiffs' expert arrived finally at a figure of $404,000.00, for the actual cash value of the building, a figure considerably higher than the $301,400.00 in his 1995 reports, and a replacement cost of $493,228.00.

**45** The defendant's expert assumed a depreciation rate of 4 percent based on a 25 year estimated life of the building. By multiplying the depreciation rate by the age of the buildings at the date of the fire, he established a depreciation factor, which when multiplied by the square footage reveal a depreciation factor of 41.96 percent.

**46** That methodology produced the following cash values:

(a) With McKinnon's revised reconstruction cost of $552,118.00 - $320,449.00;

(b) with Hope's revised estimate of $449,785.00 - $290,075.00;

(c) with the Bachly unrevised estimate of $379,762.00 - $243,768.00.

**47** On the last day of the trial, during the cross-examination of the defendant's expert, the plaintiffs produced more up-to-date square footage, which indicated that new additions were made to older buildings, which increased the weighted average of the other buildings and decreased the weighted average of the new buildings. This late and unexpected evidence led the defendant's expert to amend the depreciation factor to 46.98 percent. That new rate caused a revision of the cash values as follows:

| | | |
|---|---|---|
| (a) | McKinnon's reconstruction costs: | $ 292,732.00; |
| (b) | Hope revised estimate: | $ 262,986.00; |
| (c) | Bachly estimate: | $ 222,684.00; |

It is this recalculated Hope estimate of $262,968.00 that the defendant submits ought to be used as the proper measure of damages.

**48** With due respect to the expert witnesses (excluding Mr. McKinnon), I am not satisfied that the experts relied enough on their personal inspection of the premises, the surrounding area, and information from Mr. Wilson in arriving at their conclusions; nor did they seek the benefit of the advice of real estate agents or other persons familiar with the premises. The exercises were mostly conducted from their offices. While I am prepared to accept that the depreciation rate of 41.96 percent was carefully calculated by the defendant's expert using a proven methodology, I am not prepared to accept his conclusion without reservations. I found that Mr. McKinnon's testimony, although he did not deal with the methodology of depreciation, combined with the theories of the experts, most helpful in my assessment of the damages to be paid for the loss of the buildings, which were pictorially displayed very effectively at the trial.

**49** Every analysis of such an issue in our Courts, I believe, must start with the Court of Appeal decision in James Street Hardware and Furniture Co. v. Spizziri *(1987), 62 O.R. (2d) 385*. There the Court (Morden, Cory and Robins JJ.A.) enunciated the principles to be followed in a lengthy passage at pages 401 to 405 which I feel obliged to quote verbatim:

> "Before dealing specifically with the question of betterment, it is useful to consider matters and principles of a more general nature. The "general rule from which one must always start in resolving a question as to the measure of damages" (McGregor on Damages, 14th ed. (1980), p. 7), is that the damages are the amount that will put the plaintiff " in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation": Livingstone v. Rawyards Coal Co. (1880), 5

App. Cas. 25 at p. 39. No one quarrels with this as a general starting point proposition. Differences often arise with respect to its application in particular cases.

Dealing directly with the measure of damages with respect to torts affecting land, McGregor on Damages (at p. 761 et seq.) deals with the differing approaches to the measure of damages which were referred to by Widgery L.J. in Harbutt's "Plasticine Ltd. v. Wayne Tank & Pump Co. Ltd., [1970] 1 Q.B. 447 as (1) the amount of the diminution of the value of the land, on the one hand, and (2) the cost of replacement and repair, on the other. McGregor reviews the cases, including Harbutt's "Plasticine" and then says at p. 763:

> The difficulty in deciding between diminution in value and cost of reinstatement arises from the fact that the plaintiff may want his property in the same state as before the commission of the tort but the amount required to effect this may be substantially greater than the amount by which the value of the property has been diminished. The test which appears to be the appropriate one is the reasonableness of the plaintiff's desire to reinstate the property; this will be judged in part by the advantages to him of reinstatement in relation to the extra cost to the defendant in having to pay damages for reinstatement rather than damages calculated by the diminution in value of the land.

The cost of replacement approach often brings with it the question of betterment or enhancement. McGregor deals with it on a general plane in relation to the starting point proposition that damages are to restore a plaintiff to the position he or she would have been in if the tort had not been committed. Having pointed out (p. 8) that there are "a number of important limits" engrafted on the general rule, the text goes on to say (p. 9) that "[a]t the other end of the scale there are certain circumstances in which the plaintiff will recover more than his loss as defined by the general rule ...". It describes (p. 11) one kind of case in this latter category as follows:

> The second variety stems from the frequent impossibility of repairing damaged property without putting it into a better condition than it was before the damage had been inflicted, since repairing with old and worn materials is not a practical possibility. In these circumstances the question arises whether there should be a deduction from the cost of repair of the amount by which the property, after repair, is more valuable than beforehand. The first cases tended to hold that there should indeed be such a deduction, this solution appearing both in cases where land was tortiously damaged and in cases where lessees were in breach of covenants to repair. But, at a comparatively early date, the cases concerning damage to ships rejected the argument that there must be a deduction on account of "new or old" since, as was well expressed by Dr. Lushington, if the plaintiff "derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place on him." [This quotation is from Dr. Lushington's reasons in The Gazelle (1844), 2 W.Rob. (Adm.) 279 at 281.] This approach has been adopted in modern times in relation to damage to land, whether caused tortiously or through breach of contract.

McGregor goes on to say at pp. 11-2:

> On the other hand, where the necessity of the case does not demand reinstatement, plaintiffs may find themselves limited to claiming for the diminution of the value of the property in question.

If the proper approach to the measure of damages was the before-and-after one, i.e., the diminution in the value of the property occasioned by the fire, the question of the degree of depreciation in the pre-fire building would of course, be directly relevant. It is not directly relevant where the cost of replacement approach is used, except in so far as it may relate to the question of betterment.

We return to the question of the principle of a deduction for betterment. The trial judge referred to the treatment of the question in Waddams, The Law of Damages (1983). We shall quote the same passage from Waddams that appears in the trial judge's reasons [at pp. 655-6] and one further one:

> "It commonly occurs that a plaintiff, in making good damage to property, will not be able to restore himself to his pre-loss position without improving it. If the plaintiff's ten-year roof is damaged, he will not be able to purchase a replacement ten-year-old roof. The only reasonable course will be to replace with a new roof. If roofs have a life of twenty years, and the defendant is compelled to pay the full cost of the

> replacement, the plaintiff will be in a better position after satisfaction of the judgment than if the damage had not occurred in the first place. It would seem, therefore, that the damages should be reduced by the value of the improvement of the plaintiff's position. The contrary argument is that it is the defendant's wrong that caused the need for replacement, and that the plaintiff should not be compelled against his will to invest his money in a replacement he might have not chosen to make. These arguments, however, do not appear to be conclusive. The fact that the defendant is a wrongdoer is not sufficient reason for over-compensation. The argument that the plaintiff is forced to make an unwanted investment can be met by conceding the point and increasing the damages by any loss suffered by the plaintiff's making such an investment. The plaintiff's interest can be met by putting the onus of proof on the defendant to show that the plaintiff does not suffer any loss by this reason [para. 281]."
>
> These cases [cases concerned with the principle of mitigation of the plaintiff's loss] seem inconsistent with the rule that improvements to the plaintiff's position by effecting repairs are to be ignored. The increase in the plaintiff's wealth is one that could not have occurred in the absence of the wrong. It is suggested, therefore, that an anticipated benefit accruing to the plaintiff on repairing damaged property ought to be taken into account to reduce damages, with compensation, however, for the cost to the plaintiff of the unexpected expenditure required of him, and with the onus of proof upon the defendant in case of doubt on this question, or on the value of the benefit [para. 287].
>
> We appreciate the logic of the reasoning in Harbutt's "Plasticine" and of the statement of Dr. Lushington in The "Gazelle" (1844), 2 W.Rob. 279, 166 E.R. 759, which is contained in one of the passages from McGregor that we have quoted. Quite simply, if a plaintiff, who is entitled to be compensated on the basis of the cost of replacement, is obliged to submit to a deduction from that compensation for incidental and unavoidable enhancement, he or she will not be fully compensated for the loss suffered. The plaintiff will be obliged, if the difference is paid for out of his or her own pocket, whether borrowed or already possessed, to submit to "some loss or burden", to quote from Dr. Lushington. Widgery L.J. in Harbutt's "Plasticine" called it "forcing the plaintiffs to invest their money in the modernising of their plant which might be highly inconvenient for them."
>
> These considerations, however, do not necessarily mean that in cases of this kind the plaintiff is entitled to damages which include the element of betterment. As Waddams suggests, the answer lies in compensating the plaintiff for the loss imposed upon him or her in being forced to spend money he or she would not have otherwise spent -- at least as early as was required by the damages occasioned to him by the tort. In general terms, this loss would be the cost (if he has to borrow) or value (if he already has the money) of the money equivalent of the betterment over a particular period of time.
>
> Before considering, the application of this approach to the case before us, it would be well to reiterate what has been said in so many previous decisions on the assessment of damages and that is that each case turns on its own facts and that the process of assessing damages should be a practical one designed to do justice between the parties. The process should not be unnecessarily complicated or rule-ridden. The rules applied should be responsive to the particular facts of the case. For example, in some cases, perhaps many, the repair or replacement of property (the mere substituting of new for old) may well not involve any increase in the value of the property as a whole: see, e.g. Barrette v. Franki Compressed Pile Co. of Canada Ltd., *[1955] O.R. 413* at p. 430, *[1955] 2 D.L.R. 665*, and Jens v. Mannix Co. Ltd. *(1978), 89 D.L.R. (3d) 351*, *[1978] 5 W.W.R. 486*, *5 C.C.L.T. 225*. None the less, in cases where there is a serious issue of betterment, the approach outlined in Waddams offers a useful guide to accommodating the interests of the defendant who wishes to avoid paying for a windfall and of a plaintiff who wishes to avoid being forced to spend money that he or she may or may not have. We add the reservation that, where the plaintiff alleges a loss with respect to being required to make an unexpected expenditure, the onus of proof with respect to it should lie on him or her."

**50** More recently the British Columbia Court of Appeal dealt with these issues in Nan v. Black Pine Manufacturing Ltd. *(1991), 80 D.L.R. (4th) 153* (BCCA). In that case, the plaintiffs lost their home of 14 years in a fire. The Court endorsed the idea that in determining damages one needs to look to the reasonableness of rebuilding. If it is reasonable then the plaintiffs are entitled to that value instead of diminution of the value of land.

**51** On the issue of betterment/depreciation in determining damages where the building is replaced, the Court rejected the idea that in all cases it needs to apply either the betterment principle or the depreciation principle. The Court applied the "Gazelle" decision, supra, and the decision of the New South Wales Court of Appeal in Evans v. Balog [1976] 1 N.S.W.L.R. 36 that gave full cost for reinstatement of a damaged building, for a principled approach to compensating the plaintiffs.

**52** The British Columbia Court of Appeal reviewed the valuation methods for the damage and preferred the position from McGregor on Damages that found reasonableness was the primary factor in determining what valuation process is used to determine damages for the property. The Court also endorsed the ideas of Dr. Lushington in the "Gazelle" decision and Lord Justice Widgery in Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co. Ltd. [1970] 1 Q.B. 447 (CA). These cases held that the plaintiff should not have pay for any betterment that was as a result of the fire. Dr. Lushington put it this way in the "Gazelle" decision,

> "The right against the wrongdoer is for a restitutio in integrum, and this restitution he is bound to make without calling upon the party injured to assist him in any way whatsoever." ("Gazelle" (1844) 166 E.R. 759 (Adm.) at 760)

**53** The Court decided that this principle was of great importance and that the practice of granting depreciation/betterment deductions is not always appropriate. It also decided the evidentiary burden for betterment/depreciation deductions lies upon the defendant. The ratio of the decision is captured in the following passage at page 157:

> "The result of the application of these principles, in most cases involving the tortious loss of or damage to property, will be that replacement costs will at least be the starting point for the assessment of damages. Whether or not the damages based on such costs should then be adjusted, either for pre-loss depreciation or post-reinstatement betterment, will depend on what is reasonable in the circumstances. No rules can be fashioned by which it can invariably be determined when such allowances should be made. It must, in all cases, turn on the facts peculiar to the case being considered."

**54** As I suggested earlier, the rigor of the expert testimony in this case is more apparent than real.

**55** The plaintiffs lost their barns in a farming operation. The plaintiffs asked Mr. McKinnon to reconstruct barns similar in size to the ones destroyed. Naturally Mr. McKinnon was required to use new material, with higher cost labour. I find that there is a difference of approximately $200,000.00 between the depreciated value and the reconstruction costs. If one uses the balancing test of the reasonableness of reinstatement and the cost to the defendant of the new construction mandated by James Street Hardware and Furniture Co. v. Spizziri [supra], it would not be fair to have the defendant pay the full cost of the new reconstruction in light of the uses to which the barns would be put and the prompt payment by the defendant of $528,577.00.

I plagiarize the language of Doherty, J. A. in Donnelly et al v. Gore Mutual Insurance Company, supra, (see page 12, paragraph 33) in coming to my conclusion on the value of the property. In light of the evidence of the plaintiffs' own expert and giving the matter my best consideration, and recognizing that the process cannot yield a figure of mathematical precision, especially in light of the conflicting expert evidence adduced, I conclude that the proper amount for the building loss claim is $325,000.00, being a fair depreciated value, and $50,000.00 for part of the cost of the new construction for a total of $375,000.00. In applying the principles enunciated in James Street Hardware and Furniture Co. v. Spizziri, supra, I take into consideration the plaintiffs' need to rebuild as soon as possible after the incident, but also that the defendant made the sum of $528,577.00 available to the plaintiffs by the end of 1994.

DISPOSITION

**56** Judgment is, therefore, granted to the plaintiffs for $374,123.00, made up as follows:

| | | |
|---|---|---|
| (a) | Building: | $ 375,000.00 |
| (b) | Equipment: | $ 297,500.00 |
| (c) | Business interruption: | $ 210,200.00 |
| (d) | Business opportunity: | $ 20,000.00 |
| | | $ 902,700.00 |
| | Less | ($ 528,577.00) |
| | TOTAL | $ 374,123.00 |

COSTS AND INTEREST

**57** Brief written submissions on costs and interest may be made within 20 days of the release of these reasons.

PITT J.

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APPENDIX A

[Editor's note: The chart of Summary of Equipment & Inventory Loss - Birkbank Farms vs. Superior Propane Inc. could not be reproduced online.]

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