DOLDEN
WALLACE
FOLICK LLP

THE MEASURE OF TORT DAMAGES FOR THE LOSS OF A BUILDING

Alex L. Eged

July 2005

18th Floor - 609 Granville St.
Vancouver, BC
Canada, V7Y 1G5
Tel: 604.689.3222
Fax: 604.689.3777

308 - 3330 Richter Street
Kelowna, BC
Canada, V1W 4V5
Tel: 1.855.980.5580
Fax: 604.689.3777

850 - 355 4th Avenue SW
Calgary, AB
Canada, T2P 0J1
Tel: 1.587.480.4000
Fax: 1.587.475.2083

500 - 18 King Street East
Toronto, ON
Canada, M5C 1C4
Tel: 1.416.360.8331
Fax: 1.416.360.0146

TABLE OF CONTENTS

I. INTRODUCTION 2

II. GENERAL PRINCIPLES 2

III. THE SCOPE OF RECOVERY 3
- A. Residential Property 3
- B. Commercial Property 6
- C. Recreational Property 10
- D. Property With Prescribed Minimal Life Expectancy 11

IV. RECOVERY FOR BUILDING CODE UPGRADES 12

V. SUMMARY 13

© Dolden Wallace Folick LLP

I. INTRODUCTION

An insurer that has afforded coverage for its insured's damaged building is often faced with the issue of the extent it can recover its financial outlay from the third party that caused the damage. The question arises because insurers are usually required to "replace" old or worn damaged building components with new ones which results in the insured receiving a "betterment" (i.e. new building components for old, worn or depreciated ones). Since damage awards in tort are based on the principle of compensation or putting the injured party in the place it would have been had the wrong not occurred, insurers are often met by tortfeasor's arguments that the right to recovery is limited to the value of the old or depreciated building components instead of the cost of new replacement components.

This paper will assist insurers in determining the extent to which they can recover from tortfeasors the amounts they have paid to repair or replace damage to their insured's building. It will review the broad principles of recovery in tort claims as they pertain to buildings and thereafter address Canadian jurisprudence on the method of calculating recovery in the context of residential and commercial buildings, recreational property and buildings that have essentially reached the end of their useful lives. It will also discuss the recoverability of insurers' outlays for intervening building code upgrades that act to significantly increase the cost of rebuilding.

It will be shown that the measure of tort damages for the loss of a building will be driven by a multitude of factors including the purpose for which the property is used, its uniqueness and age, the owner's pre-loss plans for the property and whether the owner has rebuilt or could reasonably have rebuilt on the property. It will also be shown that building code upgrade costs are generally recoverable but subject to the overriding condition of reasonableness of the award as a whole.

II. GENERAL PRINCIPLES

The law of damages in tort has long held that an innocent party should be placed in as good a position as it would have been had the wrongful act or omission not occurred. This principle is often referred to as *restitutio in integrum*. The principle, in the context of damages for buildings, is not without a *caveat* – reasonableness to both the plaintiff and defendant. A property owner's right to *restitutio in integrum* is tempered by the reasonableness of his or her desire for reinstatement of the property. Though it may be reasonable to award a plaintiff the entire cost of reinstating a new building destroyed by fire it may not be reasonable to make the same award in the context of a building that the plaintiff intended to demolish in the days immediately subsequent to the loss. What is clear from the cases is that the extent of damages awarded is variable and that every case will turn on its own particular facts.

© Dolden Wallace Folick LLP

III. THE SCOPE OF RECOVERY

A. RESIDENTIAL PROPERTY

1. *Nan v. Black Pine*

The general principles of *restitutio in integrum* and reasonableness are underscored in the leading Canadian case of *Nan v. Black Pine Manufacturing Ltd.* (1991) 55 B.C.L.R. (2d) 241, 1991; CarwsellBC 75 (C.A.). *Nan* was concerned with the amount of recovery available subsequent to a fire. The fire, negligently started by the defendant, destroyed the Nan's thirteen year old home. The cost of rebuilding the home was $69,809. The defendant argued that this figure should be reduced to reflect the element of "betterment" inherent in replacing a thirteen year old home with a new one. The defendant relied on the fact that Nan paid $4,000 for the home, including land, and that the appraised value of the building, at the time of the fire, was $37,500. The defendant argued that any award in excess of that number would result in the plaintiff being in a better position than he would have been had the tort not occurred.

Prior to *Nan* the generally accepted level of recovery for damage to buildings was the actual value of the property damaged. This was often referred to as the "depreciated" value of the building. In *Nan* however, Mr. Justice Wood reaffirmed the general principles and awarded the plaintiff the full cost of replacing his home. In discussing the application of the then accepted level of recovery the Court stated:

> *"To begin with the notion that damages for the reinstatement of property destroyed by negligence should automatically be reduced, either by pre-loss depreciation or post-reinstatement betterment, was discarded as long ago as 1844."*

Regarding the specific issue of betterment the Court drew on the English Court of Appeal case known as *Harbutt's Plasticine* in stating:

> *"The same approach was taken by the Court of Appeal 125 years later in the* ***Harbutt's "Plasticine" Ltd.*** *case. There the plaintiff's factory was completely destroyed by fire as a consequence of the defendant's negligence. The trial judge awarded as damages the full cost of reinstatement. On the issue of betterment the majority (Lord Denning, M.R. and Widgery, L.J.) held that where the injured party had no option but to replace the destroyed property, and had acted reasonably in doing so, the wrongdoer was not entitled to any deduction on account of the fact that the successful plaintiff got new for old."*

The Court further addressed the topic of betterment by referencing with approval the words of the Australian Court in *Evans v. Balog*:

> *"The question is whether it was reasonable for the plaintiffs to desire to reinstate their property. In my opinion, there is only one answer. It undoubtedly was. They*

© Dolden Wallace Folick LLP

had, in effect, lost their family home. That is the nature of their damage and not some diminution in the value of their land. Fair compensation requires that they be given back what they had before; and the only way in which that purpose can be achieved is to award them the sum reasonably necessary to restore their property to the condition in which it was before the defendants effectively destroyed it. This the learned judge did; and, in my opinion, he was right. It is not to the point that the diminution in value basis might on one view produce no damages, while the reinstatement basis produces a substantial sum. The disproportion in question in cases of this kind are not always to be revealed by arithmetical comparison. The cost to a defendant of competing measures is a significant factor. But it is but one ingredient in the calculation of whether the plaintiffs' claim is reasonable or not. There are cases, and this, in my opinion, is one, where the nature of the plaintiffs' loss is such that there is only one mode of fairly repairing it. If that turns out to be more expensive than another, the wrongdoer has no one but himself to blame."

The Court then concluded:

"As to the situation presented by the facts of this case, I can do no better than to apply the words of Samuels, J.A. [above quote], *to this case. In my view the learned judge below was right when she held that it was appropriate to award the respondent the full amount of the cost of replacing his home, without deduction for either pre-loss depreciation or post-reinstatement betterment."*

The result in *Nan* thus entailed an award for the cost of reinstating or "replacing" the plaintiff's home without deduction for betterment or depreciation. The refusal to deduct betterment or depreciation from the award resulted from the Court's view that the plaintiff's desire to reinstate his home was reasonable and that the advantages of reinstatement outweighed the extra cost being borne by the defendant for replacement cost as compared to the depreciated value of the home.

2. *Carrel v. Randy Laur Burner Services*

The law as set forth in *Nan* has been accepted across Canada. The case of *Carrel* v. *Randy Laur Burner Service*, 2004 CarswellOnt 66 involved damage to the 79 year old plaintiff's fifty year old home. The damage occurred as a result of a fuel oil spill in her basement. The spill did not result in a total loss of her home but required extensive remediation of the basement. The remediation entailed the removal of the entire concrete floor at a cost of approximately $75,000. The defendant argued that reinstatement costs should be reduced as the fifty year old home was experiencing a significant "upgrade" through the installation of entirely new concrete basement floor.

In spite of the defendant's protestations the Court awarded the plaintiff the full cost of reinstating her basement. Though the reasons for judgment are silent except as to the

reasonableness of full reinstatement it is our view that reinstatement was granted because:

a) the plaintiff would have little choice in the remedy given her long standing occupancy of the property; and

b) the plaintiff should not be burdened with financing costs for any difference between depreciated value and reinstatement costs.

3. *The Owners, Strata Plan NW 3341 v. Canlan Ice Sports Corp.* [The "*Delta*" Case]

The British Columbia Supreme Court addressed the issue of betterment in the context of residential property repairs in the "leaky building" case commonly referred to as The *Delta* Case (2001), 93 B.C.L.R. (3d) 136, affirmed by the Court of Appeal on other grounds at (2002), 5 B.C.L.R. (4th) 250.

Delta involved a claim by the plaintiff for recovery of costs paid to remediate its leaky building. The defendant Corporation of Delta argued that certain features incorporated into the remediated building constituted betterment or an improvement on the original design and that it should not be required to pay the associated costs. The features that constituted the betterment were the installation of canopies over certain exterior doors and the installation of a superior wall assembly known as a "rain screen" as opposed to the original "face seal" system. The defendant also noted in its argument that there was no by-law or other legal imperative requiring the installation of a rain screen.

In addressing the defendant's argument regarding betterment the Court stated:

> *"The installation of canopies over certain doors was a necessary remedial measure, which speaks more to making those exposed doors useful than an enhancement of the suites involved. The last item, the upgrade in the wall assembly would not be apparent to anyone viewing the building. The stucco repair was not an enhancement, but simply introduced the air space necessary to make the application functional."*

In refuting the defendant's arguments on betterment the Court distinguished enhancement from functionality and determined that the alleged betterment essentially made good sense in avoiding further loss. Based on *Delta* it is likely that "functional betterment" of residential premises is recoverable.

4. Summary

In summary it appears that in most cases insurers will be allowed to recover the replacement or reinstatement costs they incur in rectifying damage done by tortfeasors to the homes of their insureds. Questions of pre-loss depreciation or post-reinstatement betterment will be considered but the unique nature and use of the building and the reasonableness of restoring one's home will almost invariably outweigh the additional cost a wrongdoer must bear in replacing old with new.

© Dolden Wallace Folick LLP

B. COMMERCIAL PROPERTY

1. *James Street Hardware v. Spizziri*

In *James Street Hardware & Furniture Co.* v. *Spizziri,* [1987] 43 C.C.L.T. 9; 1987 CarswellOnt 764 the Ontario Court of Appeal applied the aforementioned general principles of *restitutio* and reasonableness but arrived at a different conclusion with respect to compensating the plaintiff for the loss of its commercial retail building. *James Street* involved a fire loss of the plaintiff's twenty-five year old retail sales building which was rebuilt as a different and larger structure partly because the *Building Code* in place at the time prohibited restoring the building to its pre-fire condition. At trial the plaintiff sought the $340,000 cost of restoring the building to its pre-fire state and the $49,394 cost of complying with *Building Code* upgrades. The defendants argued that the cost of rebuilding was $282,000 and that there should be a reduction of $95,000 for depreciation of the materials in the plaintiff's building.

In making its determination the Court of Appeal found that the plaintiff's reconstruction of its building was reasonable in the circumstances but it did not award the plaintiff the full cost of reinstatement. In arriving at this conclusion the Court took note of the treatment of the issue of betterment and depreciation in Waddams, *The Law of Damages* (1983) where the learned professor stated:

> *"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-old 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 wrong that has caused the need for replacement, and that the plaintiff should not be compelled against his will to invest his money in a replacement he might not have chosen to make. These arguments, however, do not appear to be conclusive. The fact that the defendant is a wrongdoer is not sufficient reason for over-compensation. The argument that the plaintiff is forced to make an unwanted investment can be met by conceding the point and increasing the damages by any loss suffered by the plaintiff's making such an investment."*

The Court went on to state:

> *"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*

© Dolden Wallace Folick LLP

make an unexpected expenditure, the onus of proof with respect to it should lie on him or her."

The Court concluded that there was not enough evidence regarding life expectancy of the building or the increase in value of the building after the fire to arrive at a firm conclusion on betterment versus depreciation. The Court did however "set-off" any betterment received by the plaintiff by not granting an award for the cost of *Building Code* upgrades to which, the Court stated, the plaintiff may well have been entitled.

2. *Prince George v. Rahn Bros.*

The case of *Prince George (City)* v. *Rahn Bros. Logging Ltd.* (2003), 9 B.C.L.R. (4th) 253; 2003 CarswellBC 61 dealt with the damages available to the defendant on its counter-claim for negligent issuance of a building permit.

In 1985 and 1993 the plaintiff City issued building permits to the defendant for the construction of a building and facilities to support Rahn's logging operations. In 2000 the City realized it had made an error in issuing the building permits and thereafter obtained an injunction preventing Rahn from operating on its lands on the basis of zoning issues. Rahn counter-claimed and was awarded damages for the City's negligent issuance of building permits. At trial Rahn testified that had the City not been negligent it would have constructed its building and facilities on other lands zoned for the proper purpose. Rahn sought damages on the basis of the estimated cost to replace its building and facilities. The trial judge found the damage request unreasonable on the basis of Rahn's failure to prove it would actually rebuild given the 1997 downturn in the logging industry. The trial judge granted an award based on the original cost of construction adjusted for inflation and reduced by the useful life of the building and facility already expended. The award, in essence, was for the depreciated value of the building and facility adjusted for increased construction costs.

On appeal the Court found that the trial judge failed to give effect to the *restitutio in integrum* principle by requiring Rahn to prove that it would have rebuilt the facility rather than assessing the chances of that event occurring. The Court however did not award the cost of rebuilding and in doing so specifically distinguished the case at bar from *Nan* on the basis of the commercial purpose of the building and facilities. In discussing Rahn's entitlement to damages the Court stated:

> *"As noted earlier, the trial judge made a deduction from the capital cost figures he had arrived at to take into account a reduction in the useful life of the facilities had they been built on other lands (see paras. 54 to 57 of his reasons quoted in paragraph 62 of these reasons). If a deduction is made from the estimated replacement costs to take into account a portion of their useful life expended, the result would be an award of about $530,000. In my opinion, such a deduction must be made in this case or the result would be that the appellant is placed in a*

© Dolden Wallace Folick LLP

better position than it would have been in had the misrepresentations not been made at all. This was a special use building designed for the appellant's purposes but there is no reason to assume that had it been built on other lands it would not have suffered from deterioration and some obsolescence over a span of years.

I am also of the view that some discounting is required to take into account the possibility that the economy in the logging industry may not improve for some time or at all and for the possibility that, even if the economy does improve, the principal of the appellant will decide not to replace the building and facilities or will replace them on a smaller scale.

…

After making a reduction in the estimated cost of replacement of the building and facilities to take into account their useful life expended and applying a discount to take into account the contingencies noted, I consider that an award of $475,000.00 would be reasonable in the circumstances."

Prince George (City) demonstrates how a Court will take into account depreciation and business contingencies in determining a reasonable basis for *restitutio in integrum*.

3. *Trans North Turbo v. North 60 Petro*

Trans North Turbo Air Ltd. v. *North 60 Petro Ltd.* , 2003 CarswellYukon 44 (Y.T.S.C.); aff'd (2004); 200 B.C.A.C. 126; 2004 CarswellYukon 50 (Y.K.C.A.) represents a case in which the Court considered the particular business parameters of the plaintiff in awarding damages well in excess of the depreciated value of the plaintiff's building while only making marginal reduction for betterment received by the plaintiff.

In *Trans North* the plaintiff leased land from the federal government at the Whitehorse airport. On the leased land was a 50 year old airport hangar used by the plaintiff for 29 years for its helicopter fleet operations. The hangar was valued at $810,000 as of the January 18, 1999 date of loss due to fire. The plaintiff used 20,000 square feet of the 44,000 square foot hangar for its operations renting the remainder to other businesses. The lease expired in 2016 and was not subject to renewal. The impending expiry of the lease made reconstruction of the hangar economically unfeasible. Following the fire the plaintiff ran its operations out of various "make shift" locations finally purchasing 15 acres of land near the airport and renovating the buildings thereon to suit its purposes. The cost of land and renovations was $2,874,849 of which $893,000 was for land. The plaintiff claimed the cost of land and renovations reduced by $380,946 in betterment being the net present value of land ownership in 2016.

At trial the Court addressed the defendant's requests for a reduction in the award for betterment based on an increase in plaintiff's share value, its ownership interest in 15 acres of land, the new buildings thereon and the availability of higher tax deductions. Balanced against these "advantages" was a reduction in the plaintiff's operating area

from 20,000 to 15,000 square feet in the new facility and the lack of direct access to airport runways. In addressing the major issue of land ownership and finding for the plaintiff the trial judge stated:

> *"The major concern is whether TNTA has benefited unreasonably from the fact that it has ownership of 15 acres, as opposed to a lease that expired in 2016. Inevitably, comparisons between the two positions vary considerably, depending upon discount rates assumed. However, in my view, a new location was required as a result of the fire and it was fortunate that a suitable site was arranged within two years of the fire. It is highly speculative to consider whether TNTA will be "better" as a result of its new location. But it has put TNTA into as close a position as possible to its pre-fire position without being unreasonable to the defendants. The final cost to TNTA is well within the potential range of costs, and I have concluded that the amount of $2,788,100 is a reasonable replacement cost in the commercial context of Whitehorse."*

The Court of Appeal upheld the trial judge's decision noting that the award of $2,493,903 was not only more than one million dollars below the reinstatement cost of the 50 year old hangar it was $380,946 below the actual cost of land and facilities paid by the plaintiff.

4. *Upper Lakes Shipping v. St. Lawrence Cement*

As previously discussed, *James Street Hardware* adopts Waddams' suggestion for addressing betterment issues through compensation for "pre-mature" financing costs. In *Upper Lakes Shipping Ltd.* v. *St. Lawrence Cement Inc.* (1992), 89 D.L.R. (4th) 722; 1992 CarswellOnt 3363 the Ontario Court of Appeal provides the methodology for calculating such costs. At paragraph 9 the Court states:

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

Accordingly, when determining the measure of damages in commercial property loss cases involving betterment, plaintiffs are usually entitled to a lump sum payment that, when invested and amortized over the remaining life of the building, equals the financing cost that the plaintiff must bear due to the premature demise of its property.

© Dolden Wallace Folick LLP

5. Summary

Though replacement cost awards can be granted in the context of damage to commercial buildings, Courts are more prone to reduce damage awards for betterment than they are in the context of damage to residential buildings. Courts will, however, recognize increased financing costs faced by plaintiffs from the need to make an early cash outlay to repair or replace their property. Courts will typically afford a measure of damages in this regard in addition to the depreciated value of the building.

C. RECREATIONAL PROPERTY

1. *Taylor v. King*

This type of property may be residential, commercial or otherwise in nature. As such it represents a different type of challenge for the assessment of damages. The British Columbia Court of Appeal addressed this situation in *Taylor* v. *King* (1993), 82 B.C.L.R. (2d) 108; 1993 CarswellBC 209. In this case the defendant negligently burnt down one of two cottages located on the plaintiff's Hornby Island vacation property. The destroyed cottage was either used by guests of the plaintiff or rented to guests. The main cottage on the property was used solely by the plaintiff and was not damaged by the fire. At the date of loss the guest cottage was insured for $8,500 with an assessed value of $11,500. Also, at the date of loss, the reinstatement cost of the guest cottage was estimated at $38,000. Shortly before trial (two years post-loss) the estimated cost of reinstatement was $50,667. The trial judge awarded the plaintiff the estimated cost of reinstatement as of the trial date.

At appeal the defendant argued that the diminution in value was the proper basis for damage assessment since, unlike *Nan*, the guest cottage was neither the plaintiff's main residence nor main vacation residence. The defendant also argued that since the plaintiff had not actually rebuilt or replaced the cottage reinstatement cost was too generous an award. In overturning the trial judge the Court of Appeal found that diminution value was the appropriate measure of damages in cases of this type. It is our view that this award was made on the basis that the majority of the value in the property was in land, not the destroyed building and the large discrepancy between the assessed value of the cottage and its replacement cost. Based on a lack of evidence the matter was referred back to the trial judge in order that damages may be fixed on the basis of market value with and without the cottage as of the date of loss.

2. Summary

Taylor stands for the proposition that failing to expeditiously reinstate non-residential buildings will preclude the recovery of estimated reinstatement costs. It also indicates that reinstatement costs will not be awarded when the value of the building is minor as compared to the value of land and the building is used only intermittently by a plaintiff.

© Dolden Wallace Folick LLP

Diminution in market value will likely be the measure of damages for lost vacation property.

D. PROPERTY WITH PRESCRIBED MINIMAL LIFE EXPECTANCY

1. *Lamont Health Care v. Delnor Construction*

Real property losses can occur with respect to structures previously slated for demolition or already abandoned. The former situation was addressed by the Alberta Court of Queen's Bench in *Lamont Health Care Centre* v. *Delnor Construction Ltd.* (2003) 29 Alta. L.R. (4th) 113; 2003 CarswellAlta 1750.

Lamont involved a fire that caused extensive damage to two wings of a hospital under repair. The May 30, 1995 fire resulted in the demolition of the two wings. After obtaining necessary government approval reconstruction of the new wings commenced in April 1998 with the new, larger, building code compliant facilities being completed in April 1999 at a cost of over $4.7 million. Prior to the fire, a 1992 report had recommended the demolition of the two wings built in 1928 and 1948. Though the recommendation was not adopted by Lamont and the wings were "fully operational" at the time of the fire the Court concluded that the government would have granted approval for a new facility by 2000 with construction being completed in 2002.

The plaintiff sought the reinstatement cost, including building code upgrades, less betterment for a larger building. The Court concurred that the plaintiff's measure for reinstatement cost was correct and that it was reasonable for Lamont to re-build as it did but ultimately refused to award that level of damages. The Court's refusal was based on the fact that the wings would have been demolished shortly in any event of the fire, the new facilities were far better than the old and the old had absolutely no salvage value as of their deemed demolition date in 2001.

After determining that reinstatement or replacement costs were not reasonable in the circumstances the Court considered three alternative methods for calculation damages:

(i) market value of the destroyed buildings estimated at $192,000;

(ii) replacement cost of the wings apportioned over their remaining useful lives estimated at $442,000; and

(iii) financing costs for the replacement estimated at $240,000.

In the end the Court awarded the cost of early financing to the plaintiff as being the true measure of the plaintiff's loss. It rejected the market value assessment because the unique nature of the property made appraisal difficult. The apportionment of replacement cost measure was rejected because the facilities had no salvage value at the time of fire, their life spans having effectively been over by 1992, and because it did not

© Dolden Wallace Folick LLP

take into account the cost of repairs to the old facility the plaintiff would have incurred from the time of fire to the determined demolition year of 2002.

2. Summary

Though the Court in *Lamont* did not refer to either *James Street Hardware* or *Upper Lakes Shipping* the result was consistent with both those decisions insofar as the award was based on early financing costs faced by the plaintiff. It is possible to envisage that in circumstances where demolition is set to occur very shortly after a loss or a building is abandoned and not due for occupancy no award will be granted.

IV. RECOVERY FOR BUILDING CODE UPGRADES

In repairing significant damage to older buildings insurers will often be required to pay sums beyond the simple cost of replacement because of the cost of complying with current *Building Code* standards. The recoverability of such additional costs was addressed in *James Street Hardware*. The Court provided its views on the issue in the context of situations where a plaintiff has rebuilt, and not rebuilt, its damaged premises:

> *"If it had rebuilt according to its pre-fire design and, in so doing, had necessarily incorporated the changes required by the new law, we think it would have been entitled to recover these additional costs subject, if relevant, to the application of the principles respecting betterment which we have earlier discussed. If the appellant had not rebuilt at all, we are inclined to think that this additional "cost" would not have been recoverable. Indeed, in these circumstances, the appropriate measure of damages might simply be the diminution in value of the property rather than cost of replacement."*

Based on the foregoing the Court in *James Street* would have awarded the plaintiff the cost of additional outlays incurred as a result of having to conform with current building code requirements if it had rebuilt according to the pre-fire design. This is the same view taken by the Court in *Lamont* in the context of determining the total replacement cost of rebuilding the damaged hospital. Awards for this outlay are of course subject to the overriding principle of reasonableness to all parties.

In *A.L. Sott Financial (FIR) Inc.* v. *PDF Training Inc.* (2004), 25 R.P.R. (4th) 94; 2004 CarswellBC 2947 the court granted the plaintiff landlord an award for the full estimated cost of restoring its property following a trespass by the defendant tenant on the basis of the restoration's likelihood of occurring. The likely restoration costs included costs for seismic upgrades, handicap access, fire and safety measures and the cost of permits and professional fees associated with these requirements. The Court rejected the defendant's argument that the upgrades amounted to a windfall to the plaintiff since it would have been required to bear such costs upon the next tenancy in the building, or the next tenant would have borne such costs. In determining the final award for code

© Dolden Wallace Folick LLP

upgrades the Court granted an amount it deemed reasonable based on the potential future use of the building and other going forward contingencies.

In summary, in the context of commercial buildings, plaintiffs will likely be granted the cost of conforming with current building code requirements only if they in fact rebuild. It is our view that recovery of upgrades in the context of residential reconstruction is highly likely. Costs of building code upgrades in the context of vacation properties or properties slated for demolition will be relevant but not likely recoverable.

V. SUMMARY

In *Nan* the Court discussed two long established principles applicable to damages in tort actions: the damages awarded shall, as far as possible, put the plaintiff in the same position it would have been had the tort not occurred and; the damages awarded must be reasonable to all of the parties. Factors that Courts will consider in granting awards in the context of real property losses include:

(i) the cost of restoring the property;

(ii) the use and usefulness of the property;

(iii) the property's uniqueness, age and condition;

(iv) the market value of the property;

(v) the diminution in value of the property;

(vi) the cost of financing the restoration of the property; and

(vii) whether the restoration has occurred, and if not, the likelihood that the property will be restored.

What is apparent from Canadian jurisprudence is that Courts will employ many different methods of analysis and scrutinize many types of evidence in striving toward granting a reasonable award for damage to buildings. In doing so it is likely that full reinstatement costs, including the cost of building code upgrades, will be granted for damaged residential buildings. In respect of commercial buildings courts may award full reinstatement costs but are more likely to award the actual or depreciated value of the building with an additional award for the cost of early financing that must be borne by the plaintiff. Finally, with respect to recreational and abandoned or extremely old buildings diminution in value of the property will likely be the measure of damages.

© Dolden Wallace Folick LLP