Presentation

DAMAGES RECOVERABLE BASED ON TORT THEORIES ASSERTED AGAINST ARCHITECTS, ENGINEERS, CONTRACTORS AND SURETIES

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Damages, whether tort, contract, or statutory are something defense lawyers often cringe at the thought of. Our clients, as defendants, are never supposed to lose on liability. Therefore, why would any defendant have to think about damages?

However, as we all know, our clients do occasionally lose. Moreover, few cases are tried. Effective settlements require effective damage analyses. While damages may be the highlight of the plaintiff's case, defendants must meet that challenge head-on. Defense counsel must learn the theory of damages, not just with some disdain, but even more fluently than plaintiff's counsel lest catastrophe follow.

I. THEORIES IN TORT AS AFFECTING DAMAGES

Within tort, the vast preponderance of cases involving architects, engineers, contractors and sureties are based in negligence (including negligent misrepresentation). The elements of the negligent cause of action are too well known to bear repeating here. However, the striking feature of the negligence cause of action is that plaintiff must prove damages or the action fails. Put another way, damages are not presumed nor inferred by the existence of liability. Rather, the absence of damages is fatal to the cause of action in negligence. Restatement (Second) of Torts, §907 cmt. a. (1979) (hereinafter referred to as "Restatement").

Parties engaged in construction are, of course, subject to occasional charges of the tort of interference with contract. See, Restatement §§766, 766A, 776B. For example, a general contractor might bring an action against an engineer under this intentional tort theory so as to avoid the economic loss defense (see below). See, e.g., Santucci Const. Co. v. Baxter & Woodman, Inc., 502 N.E.2d 1134 (Ill. App. Ct. 1987). In this tort, however, the "...pecuniary loss resulting to the other from the failure of the third person to perform the contract" is generally measured by contract theories of damages. Restatement §§766, 774A.

Conversely, proof of liability for trespass to land carries with it a presumption of at least nominal damages. See, Restatement at §§163, 907. Similarly, defamation in the "per se" category causes damages to be presumed. This paper will not attempt to survey the realm of substantive tort law as to the respective elements of proof for the tort. Defense lawyers, anyway, are well-experienced in those regions. Likewise, damages available in bodily injury causes of action by workers or passers-by to the construction site are beyond the territory surveyed here. Delay damages arise more often in contract actions and have been covered thoroughly in the last previous presentation.

II. DAMAGES RECOVERABLE IN TORT

A. Overview and as Contrasted With Contract

If one were not told that tort law and contract law were "supposed to" have separate theories of damages, the purported distinctions learned in law school between the competing theories

would often not seem to exist. For example, the Restatement points out that the law of torts attempts primarily to restore the injured party to as good a position as he held prior to the tort. Restatement, §901, cmt. a. The substance of many different opinions on tort damages in the construction setting suggests that the "rules" on the proper measure of damages are simply guides and not legalistic formulae to be followed in some sort of an arbitrary or inflexible way. Unlike how commentators in the 90's view the law of 80 years ago, substantial justice is the desired result now rather than legalistic adherence to harsh commandments of the law. Using different words, the Restatement notes that when a loss involves pecuniary injury only, compensatory damages are designed to place the plaintiff in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed. Restatement, §903 cmt. a.

Any personal injury lawyer knows that if the fact of damages is apparent, even if without mathematical certainty, awardable damages exist. So too, defense lawyers might concede that property damages can occasionally benefit from that leniency. Nonetheless, defense counsel should be equally ready with common law cases from their own jurisdiction to argue that if the damage is indeed capable of dollars and cents computation, such computation must be supplied lest the proof fail. See, e.g., Van Brocklin v. Gudema, 199 N.E.2d 457, 460 (Ill.App.Ct. 1964) ("where the dollar amount of damages sustained is capable of precise proof, then evidence of

the exact amount should be offered. However, this does not mean that damages incapable of exact measurement cannot be recovered").

As noted above, technical distinctions in the damages recoverable in tort as compared to contract may, for some, better be left behind in law school. The rules for tort and contract damages might be stated differently, but they are basically the same. See Douglass Fertilizers & Chem., Inc. v. McClung Landscaping, Inc., 459 So.2d 335, 336 (Fl.App.Ct. 1984). (Stating that in both contract and tort, the plaintiff may recover all damages that are the natural and probable consequence of the act, but the plaintiff may not recover damages for remote consequences.)

In those jurisdictions where the Economic Loss Doctrine prevails, the contrast between tort and contract can, nonetheless, be a significant distinction. Generally, a party to a contract may recover damages which are the proximate result of the breach. This statement is often qualified, however, by requiring foreseeability of the damages. Those damages must be contemplated at the time the parties entered into the contract. On the other hand, in tort cases, the defendant is usually argued as being liable for "all consequences" which "naturally result" from the wrongful act or omission, regardless of whether those damages are anticipated or contemplated. Law school memories of Palsgraf v. Long Island R. Co., 162 N.E.99 (N.Y. 1928) flash before us. Public policy, foreseeability, and "natural and probable results" as determined by courts are the key in tort cases. Alternatively, in contract matters virtually the same analysis of foreseeability or

contemplation occurs, but with a deeper factual inquiry into the minds of the contracting parties rather than the public at large.

B. Specific Damages: Repair, Replacement, and Diminution in Value Approaches

Virtually nowhere else in tort theory for construction cases is there as irreconcilable an area as that dealing with physical harm to personal property or real property (including fixtures). In jurisdictions where many reported decisions exist, that jurisdiction's law may well be found to be explicable only by reference to a determination to find substantial justice in damages. In jurisdictions where a plethora of reported decisions exist, the repair versus diminution in value dichotomy is often hopelessly irreconcilable.

Factually, the question, stated in its simplest format, is whether the aggrieved plaintiff is entitled to the costs incurred or to be incurred in repairing the damage or, whether the plaintiff is to be compensated according to the diminution in value between the value before the tort and the value immediately thereafter. Not surprisingly, able counsel for the respective parties typically throw rigid application of the existing precedent out the window or into the brief depending on what is perceived as "fair".

The Restatement at §§928, 929, interestingly, offers the plaintiff the choice of the difference in value versus the reasonable cost of repair and restoration. The Restatement even goes on to note that, as to chattels (§928), due allowance should be granted for the difference in value between the original value

and the value after repairs, apparently recognizing the common sense notion that repair science is often an imperfect art. These notions echo from closing arguments of a plaintiff's personal injury lawyer.

The practitioner should research precedent in her jurisdiction to develop a sense of the parameters of the damages theories which have been accepted or rejected. However, the imaginative practitioner thereafter should check cases elsewhere, whether tort or contract, that might seem to suggest a "fairer" rule for the particular case. Just as one example, in Annotation, Modern Status of Rule as to Whether Cost of Correction or Difference in Value of Structures is Proper Measure of Damages for Breach of Construction Contract, 41 ALR 4th 131 (1985), author John P. Ludington identifies dozens and dozens of different types of property as if to suggest that different rules apply to different features of a building or personalty. The identification of such details include cast iron tubs, hog confinement buildings, wells, trees, appliances and so forth. Swimming pools even have their own annotation (6 ALR 4th 492).

To be sure, courts have made a sizable distinction (whether tort or contract) between a building used as a plaintiff's home versus office buildings, apartment buildings, and other investment properties. The Restatement, for example, at §929 recognizes that a plaintiff homeowner can both cause repairs to be made to the property (even if economically wasteful) and recover the

"discomfort and annoyance to him as an occupant" Restatement §929(1)(c).

In mapping out a damages defense for the repair versus diminution in value approach, the following check list is helpful. It is by no means all-encompassing nor necessarily based upon a distinction recognized in all jurisdictions:

1. Is a repair even technically feasible by ordinarily available workmanship? Alternatively, is appropriate opinion evidence available for diminution in value?

2. Is the damage so extensive as to require removal and replacement lest economic waste occur?

3. Is the plaintiff's home damaged rather than non-owner-occupied buildings?

4. To what extent is public safety at risk if repairs, rather than replacement, is attempted?

5. Can a repair be made consistent with applicable building codes or has the fixture only been permitted to survive by a grandfathering allowance (e.g., an elevator)?

6. In jurisdictions where a distinction exists between total loss and partial loss, is the extent of destruction or damage so severe that precedent will be laid aside in favor of a "just" result?

7. Does the jurisdiction recognize a distinction between permanent damage and non-permanent damage?

8. Has the plaintiff already reduced to a fixed number by (a) actual performance of the repairs/replacement or (b) sale of

the property to fix the diminution in value? If so, what evidentiary presumptions are recognized by the jurisdiction which flow from plaintiff's action--to what legal or practical sense can the defendant challenge plaintiff's numbers?

9. What if plaintiff believes that he has the choice of recovery based on diminution or repairs and fails to offer any evidence of the other: is the case law in that jurisdiction so clear that the methodology plaintiff offered will be followed that no directed verdict motion will lie?

> See, e.g., Millers Mut. Fire Ins. Co. v. Wildish Const. Co., 758 P.2d 836 (Or. 1988) (holding that the proper means of damages was the value of plaintiff's home at the time of its alleged destruction; however, because the plaintiffs did not offer any evidence of the pre-tort value of their house, but instead claimed that the proper measure of damages was the cost of replacement, plaintiffs were not entitled to submit case to jury).

An example of how hopeless or at least difficult it can be to sort out the various decisions in a state with many holdings in the area is exemplified in Williams-Bowman Rubber Co. v. Industrial Maintenance, Welding and Machining Co., 677 F.Supp. 539 (N.D. Ill. 1987) (Zagel, J.) There, the case presented theories of tort and contract for damages to both real and personal property from a fire resulting during remodeling work performed by the defendant.

The memorandum opinion summarizes thoroughly and quickly the Illinois law on damages to personal property in a manner perhaps consistent with many other jurisdictions (677 F. Supp. 540, 541):

> If the personal property is repairable, then the measure of damage is the reasonable cost of repairs. [citations omitted] If, however, the value of the personal property after repairs is less than the value before the injury, then the measure of damages also includes the difference in value [citations omitted].
>
> If, on the other hand, the damage is not capable of being repaired, as where the personal property is totally destroyed, or if the repair costs exceed the fair market value of the personal property before the injury, then the measure of damages is the fair market value of the property immediately prior to the damage [citations omitted] .

With respect to injuries to real property, however, the court noted that it is difficult, if not impossible, to reconcile the decisions of the Illinois courts in this area. The Williams-Bowman court started with a 1902 decision in its survey of Illinois law where the Illinois Supreme Court gave plaintiff the choice of whatever valuation would be most beneficial to him. Just two years later, however, as is noted in Williams-Bowman at 541, the supreme court ruled that the measure of damages was the diminution in value rather than cost of repair.

Still two years later, the Williams-Bowman court at 542 then noted the arrival of an Illinois Appellate Court decision announcing the rule to be that the cost of restoration or the difference in market value are compared, with the lesser of the two being the recoverable damages. The Williams-Bowman court continued

its survey by noting two more appellate decisions from the very next year (1907), which announced somewhat inconsistent positions. On through the years, the decisions are brought forward in Williams-Bowman and analyzed accordingly. Inconsistencies are manifest. The excellent discussion of Illinois law found in the Williams-Bowman opinion can serve to ignite, if not stoke, the imaginative fires for defense (or plaintiff) counsel. As is noted there throughout, perceived logic in the case authorities are often at odds.

The state of confusion in this area of the law is typified by Millers Mutual Fire Ins. Co. v. Wildish Constr. Co., 758 P.2d 836 (Or. 1988). There, the defendant's blasting operations near the plaintiffs' property caused substantial damage. The owner-plaintiffs argued that their home was completely destroyed, and that they should be allowed to recover as damages the cost of replacing the house. Even after exhaustively discussing the court's prior decisions on measures of damages for tortious injury to real property, the court still had a difficult time resolving the case. The court finally concluded that the proper measure of damages was the value of the plaintiffs' house at the time of its alleged destruction. 758 P.2d at 850. However, because the plaintiffs did not offer evidence of the pre-tort value of the house, but only advocated cost of replacement, the plaintiffs were not entitled to submit their case to the jury. Id. The court noted that the plaintiffs "put all their eggs in one basket." Id. at 840.

The Oregon Supreme Court's sharp division in Millers Mutual exemplifies the difficulty courts have experienced in this area. Concurring Justice Jones reasoned that the plaintiffs should indeed be entitled to repair cost, as long as such cost is related to the premises' market value. Id. at 850. (Jones, J., concurring). Dissenting Justice Linde reasoned that the plaintiffs were entitled to the cost of rebuilding the house less any amount by which the reconstruction increases the property's value (to prevent enrichment). Id. at 851. (Linde, J., dissenting). Finally, dissenting Justice Gillette reasoned that the jury should be instructed on the general rule of just compensation without enrichment, then the jury should merely consider the evidence presented and render its verdict accordingly. Id. at 853. (Gillette, J., dissenting).

One court commented that a rule suggesting diminution in value for total losses but repair costs for partial losses was devoid of logic. That court further noted that if the property was 90 percent destroyed, plaintiff might be better off and receive higher damages than if the property were totally destroyed, which reminded that court of the old caps which used to exist on wrongful death awards. Matich v. Gerdes, 550 N.E.2d 622, 627 (Ill.App.Ct. 1990).

C. Specific Damages: Cost of Investigating Extensive Damages

The Restatement at §919 states recovery may be had for "...expenditures reasonably made or harm suffered in a reasonable effort to avert" the harm threatened or further harm, regardless

of whether the efforts are successful. Thus, costs for unsuccessful repairs are recoverable. Restatement, §928 cmt. a.

This reflection of common sense can be found in the reported decisions. In Hendrie v. Board of County Comm'r's, 387 P.2d 266 (Colo. 1963) a swimming pool was constructed in a seriously defective manner. Costs of determining the cause of the problem were allowed, but costs were not allowed for the engineering services attributable to the soil tests and designing of a new and different pool after the original pool proved defective. See also, Carlson Indus. v. E.L. Murphy Trucking, 214 Cal. Rptr. 331, 335 (Cal.Ct.App. 1985) (reversible error in not allowing inspection cost to determine the scope of damages to a crane as a compensable loss in the award of damages; public policy encourages the injured party to make reasonable efforts to avoid loss.)

D. Specific Damages: Attorneys' Fees and Interest

Under the "American Rule", attorneys' fees are not recoverable as damages or court costs, at least absent a statute or contract. Restatement §914 (1). This fundamental concept of American jurisprudence has been so held by the United States Supreme Court. Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 420 (1975).

The rule on pre-judgment interest is not as uniform and is usually the subject of a particular statute in the jurisdiction. As a matter of common law, the Restatement suggests in §913 as to interest that

> (1) except when the plaintiff can and does elect the restitutional measure of recovery,

> he is entitled to interest upon the amount found due
>
> (a) for the taking or detention of land, chattels or other subjects of property, or the destruction of any legally protected interest in them, when the valuation can be ascertained from established market prices, from the time adopted for their valuation to the time of judgment, or
>
> (b) . ...for other harms to pecuniary interests from the time of the accrual of the cause of action to the time of judgment, if the payment of interest is required to avoid an injustice.

This liberal rule in the Restatement is not acclaimed elsewhere when statutes do not exist. See, e.g., D. Dobbs, Law of Remedies §3.6 (1), at 336-38 (2d Ed. 1993):

> ...the most significant limitation on the recovery of pre-judgment interest is the general rule that, apart from statute, pre-judgment interest is not recoverable on claims that are neither liquidated as a dollar sum nor ascertainable by fixed standards...
>
> ...even damages for destruction of property or damages for back pay may be unliquidated and unascertainable if the defendant's obligation is not a fixed sum and not computable from a relatively precise formula...
>
> ...the converse rule is that when the plaintiff is entitled to recover a liquidated sum of money, pre-judgment interest is also recoverable, calculated on the liquidated sum. ...
>
> When the plaintiff is entitled to recover a sum that is not liquidated but that can be ascertained by application of arithmetic or by the application of 'accepted standards of valuation', without reliance on opinion or discretion, the case is treated like a liquidated damages case so as to permit pre-judgment interest.

Given the debate and conflict that can exist on the proper measure of damages in the repair and diminution in value arena, defense counsel should surely be prepared to demonstrate that conflict does indeed exist. Alternatively, under any one branch of the conflicting theories, the approach might be an accepted standard of valuation to argue in support of pre-judgment interest. Even where construction costs or replacement costs are subject to reasonably precise proof, those costs might still be seen as an unliquidated claim so as to avoid the imposition of interest. Hendrie v. Board of County Comm'r's, 387 P.2d 266, 271 (Colo. 1963).

For a different view, consider this. Under New Mexico law, pre-judgment interest may be awarded in a negligence case when the damages are "precisely determinable and can be ascertained with ease". Sharon Steel Corp. v. Lakeshore, Inc., 753 F.2d 851, 856-857 (10th Cir. 1985) (citing the architect malpractice case of Board of Education v. Standhardt, 458 P.2d 795, 800 (N.M. 1969)). Sharon Steel quoted §913 of the Restatement, yet reversed the award of pre-judgment interest, stating at 857:

> ...we do not believe the damages were ascertainable with reasonable certainty, despite the jury's acceptance of plaintiff's figures and its findings that the damages were ascertainable by [a particular date upon which, then, the interest begins to run]. There was much room for argument about the amount of the damages, even for repairs.

E. Non-specific General Damages

As noted above, the Restatement recognizes that in injury to real property, "discomfort and annoyance to him as an occupant" can be recovered. In §929 Comment e, the discomfort and annoyance to the occupant and the members of the household are considered distinct grounds of compensation in addition to the harm to proprietary interests and are different than sickness or other bodily harms. In a case with facts likely to be remembered by even the most jaded legal reader, the Illinois Appellate Court in Van Brocklin v. Gudema, 199 N.E.2d 457 (Ill.App. 1964) eloquently considered the arguments in holding that the law permitted recovery, in negligence, for elements of inconvenience and discomfort. The damages resulted from the temporary loss of a water supply, interrupted when defendant piled manure from his adjoining farm from which polluted water ran onto plaintiff's land and into his well. Even the discussion of proximate causation reveals the careful analysis that the court brought:

> [Plaintiff] testified that the water did run from the manure pile to his well. The evidence is uncontradicted that there was no problem before the pile was there, and that the pollution diminished and eventually disappeared after the pile was removed. The pollution was of a type that could be caused by manure. The color and smell of the water suggested manure. The evidence of the plaintiffs [as against defendant's contention] is that their outdoor toilet was not used, so, on the view of the evidence most favorable to them, the view to which they are entitled on this appeal, there is no other explanation of the pollution. Considering all these circumstances, the evidence of proximate cause was sufficient for the jury.

With respect to the damages for which it was contended there was no evidence of pecuniary damage to the plaintiffs, the court affirmed the judgment entered on the jury verdict of $1500.00, noting at 199 N.E.2d 462:

> The award of the jury was liberal, but not so high as to indicate that it was based upon passion and prejudice. Accordingly, the amount of the verdict provides no ground for reversal.

Defendant contended that plaintiffs "could have offered evidence of the depreciation in the rental value of their property during the time the well was polluted. He also argues that evidence would have been admissable to show the value of [plaintiff's] time in transporting the water from the filling station" 199 N.E.2d at 460. In rejecting those two theories, the court noted plaintiffs were entitled to recover for their inconvenience and discomfort during the period their well was contaminated. 199 N.E.2d at 462. After all, the court observed that the discomfort included having no water supply for eight months, they were forced to drink water from a filling station and take sponge baths, all of which eight-month period of contamination included all of the hot summer months. As the court noted at 461:

> To relegate the plaintiffs to a recovery of lost rental value or the value of the time spent in transporting the water would be to indulge in fiction. There was no question of lost rents. The plaintiffs did not lease the property to others, and had no intention of doing so; they lived on it. The [Plaintiff] spent very little time which could be attributed to transportation of the water from the filling station to his home; he had to make the trip anyway. Neither would the nominal value of the water obtained from the

> filling station be an adequate measure of the damages actually sustained.

In discussing prior holdings from the law of nuisance, damages such as are allowed in nuisance were imported into the law of negligence. Indeed, an 1894 decision involving well pollution by an adjoining livery stable was cited.

A less dramatic and certainly more typical set of facts is exemplified in Dussell v. Kaufman Constr. Co., 157 A.2d 740 (Pa. 1960). There, a construction company damaged homes as a result of pile-driving operations. While the facts may have been less remarkable than the facts in Van Brocklin, fine rhetoric was not lost in Pennsylvania in describing the machinery which caused the damage, 157 A.2d 743:

> A pile driver, when properly harnessed and kept within the channel of its legitimate functions, is, like a steam shovel or a bulldozer, a mastodonic mechanical creature assisting man in laudable conquest over obstacles holding back worthy enterprises in civilization's progress, but a bulldozer, with an unsteady hand at the wheel, can leave its prescribed route of travel and reduce adjoining structures to tin and kindling wood. The vibrations of a pile driver can be as damaging as the gigantic blade of the bulldozer if the operator ignores the existence of structures within the sweep of its invisible fulminations.
>
> A giant striding by a kindergarten school should tread softly. A pile driver operating in the vicinity of frail and unsubstantial structures should restrain or mask its thunderous blows to the extent necessary to avoid inflicting avoidable damage.
>
> The fact that the pile driver itself did not come into physical contact with the plaintiff's houses does not exonerate it from responsibility. Its invisible tentacles of

> terrestrial violence struck at the houses as certainly as a cannon shot hits its target. A pile driver whose operator ignores the presence of dwellings within the periphery of its vibrations is as responsible for the resulting damage as the bulldozer which leaves the road and knocks down adjoining buildings.

The careful practitioner should be alert for the potential of the annoyance claim, even if a cause of action in nuisance is not specifically pleaded. As the Van Brocklin case illustrates, strict adherence to pleading technicalities can be swept aside, particularly in the face of what are perceived as compelling facts.

III. DAMAGE DEFENSES TO TORT CLAIMS

A. Betterment Defenses

The philosophy behind any award of money damages, whether tort or contract, is to make the person whole rather than be made more than whole, receive more than one recovery for the same arm, or even make a profit. Dundee Cement Company v. Howard Pipe & Concrete Prod., Inc., 722 F.2d 1319 (7th Cir. 1983). The goal of restitution area recovery, on the other hand, is not so much in compensating the plaintiff, but taking from the defendant the benefit he received. United States ex rel. Susi Contracting Co. v. Zara Contracting Co., 146 F.2d 606 (2d Cir. 1944).

Courts have stated generally that the plaintiff is not entitled to a windfall nor to be put in a better position than if he had not encountered the wrong. Cordeco Dev. Corp. v. Santiago Vasquez, 539 F.2d 256 (1st Cir.), cert. denied, 429 U.S. 978 (1976); Johnson vs. Monsanto Co., 303 N.W. 2d 86 (N.D. 1981).

"Betterment" is what is argued to result to the plaintiff if, by reason of the projected repair or replacement method, the plaintiff would be in a better position than before the damage had occurred. As an example, consider a roof which is damaged by construction activities on the adjoining property. If the damage is slight and a feasible, simple repair can be made, then the measure of damages is simply those repair costs.

If, on the other hand, the damage is so much more extensive that simple repairs will not suffice and a new roof is required for any appreciable area, "betterment" would result to that owner in receiving the new roof when the existing roof was much older. Technically, it is impossible to apply today a roof that is "ten years old" to match the age of the roof existing immediately before the tort. In other words, a ten-year old roof cannot be replaced with another ten-year old roof. Consequently, an appropriate deduction for the betterment is made to put plaintiff in the same position as before. This could cause plaintiff, however, to have to actually incur out-of-pocket cash to make up the difference for the shortfall between the cost of replacement and the damages actually awarded. In the roofing example, what if the plaintiff did not desire a new roof?

Another angle for understanding betterment is the notion of depreciation. For existing property that requires reproduction, the cost of that reproduction less depreciation can be an appropriate standard. Matich v. Gerdes, 550 N.E.2d 622

(Ill.App.Ct. 1990). The substraction of the depreciation effectively avoids a plaintiff receiving betterment.

Furthermore, some courts use the term "enrichment" to describe the betterment concept. See, e.g., Millers Mutual Fire Ins. Co. v. Wildish Constr. Co., 758 P.2d. 836, 844 (Or. 1988) (stating that the prime goal for allowing damages to the owner of a building injured or destroyed by tort is just compensation without enrichment). Yet, another related phrase, heard more in the context of contract law, is that a property owner should not have to pay for replacement material twice.

For example, in St. Joseph Hosp. v. Corbetta Constr. Co., 316 N.E.2d 51 (Ill.App. Ct. 1974), a hospital contracted with an architect and also a general contractor for construction of a new hospital. Upon substantial completion, the city advised the hospital that it would not be permitted to open because a wall paneling covering rooms and corridors did not comply with the local building code with respect to flame spread rating of the paneling. The hospital withheld a final payment of $453,000 and filed a complaint for declaratory judgment against the architect, contractor and paneling supplier seeking permission to remove the existing paneling and to replace it with an approved paneling, all without prejudice to the rights of any of the parties. The new paneling cost $300,000. A jury determined the cost of reconstructing the corridors of the hospital with an appropriate paneling was over $431,000. The appellate court concluded that the architect should have originally specified the type of paneling

that was ultimately used as the replacement paneling. Yet, the court noted at 62:

> But had [architect] so complied with its contract, the Hospital would have had to pay not the relatively modest cost of the [original] wall paneling material, and the costs of its relatively simple installation, but the greatly increased cost of the [replacement] asbestos paneling, plus the greatly increased costs of its more difficult installation.

The hospital's administrator testified she would have signed a change order specifying more expensive paneling if it was necessary to comply with the applicable building code.

The court went on to state at 62:

> Certainly the Hospital should not receive, without paying more than it originally had agreed to pay for the [original paneling], a windfall in the form of the more expensive [replacement] paneling and the extra labor costs required by its more difficult installation, merely because its architect initially failed to specify it. The same applies to the doorstops, solid core doors and hardware and their installation, which were necessary and were furnished in the reconstruction but were not included in [architect's] original plans and specifications.

The court then reduced the jury's verdict by the difference in the cost of the paneling and the difference in labor of installation, as well as the cost of the additional doorstops, solid core doors and hardware, with installation, which were not originally specified or installed but later added at the time the paneling was replaced.

One of the key distinctions in a betterment analysis is noted in passing in St. Joseph Hospital when it cited with approval Henry

J. Robb, Inc. v. Urdahl, 78 A.2d 387 (D.C. 1951). In Robb, the consulting engineers failed to properly prepare specifications for a heating system. The court there noted that the engineers simply agreed to furnish plans and did not contract to install the system or guarantee that the system could be installed for any specified sum. Thus, the betterment analysis could proceed. No "benefit of the bargain" barrier to the application of betterment existed. In St. Joseph Hospital, the reference to the administrator's testimony by the appellate court underscores the conclusion that the owner should not receive a windfall.

The betterment, if it exists, must be directly related to the damage plaintiff sustains. For example, a developer of a subdivision whose excavation interferes with lateral support of adjacent property cannot escape liability for such damages by showing the benefits of the subdivision as better streets, sewage and lighting. All of those things are simply general benefits to which plaintiff and others would be entitled. Levi v. Schwartz, 95 A.2d 322 (Md.Ct.App. 1953).

The careful practitioner should always be looking for potential betterment facts, as few repairs (much less replacements) can exactly equal the property as it existed before the loss. Careful preparation of the calculations, coupled with effective presentation, can turn the jury's perception of an aggrieved plaintiff to a greedy one.

B. Timing Defenses

The Restatement notes in passing that the fact finder compares the assets affected by the tort at the time before the tort and then as they appear at the time of trial. Restatement, §906, cmt. a. The measurement is at the time of trial. Restatement, §910.

Unfortunately, as anyone who practices in a jurisdiction where the time for trial can be lengthy (to say nothing about how long plaintiff might wait before even filing suit within the statute of limitations), a comparison of value at the time of trial can be unjust.

In St. Joseph Hospital, the court's analysis of the original and replacement wall panelings used the historic costs at the time that the original paneling was actually installed, apparently the time that the contractor purchased same. The court compared the relative costs of purchasing the two different panelings as of the date of actual installation and, then, compared the costs to install the two different panelings, again using the date of actual installation. Actual installation was apparently some 18 months before the hospital was substantially completed. The date that the jury found the damages is not stated in the opinion, but the decision on appeal was 11 years after installation. The opinion does not make clear whether or not the timing issue was actually opposed by the plaintiff. Nonetheless, the court's calculation would appear to be a square holding. See 316 N.E.2d at 62-63.

Defense counsel is well advised to investigate cost increases for materials and labor and argue accordingly. Admittedly, each

case will be different. However, this factual defense has little prospect of success without careful and through investigation and presentation.

C. Economic Loss Doctrine Defense

Many jurisdictions have adopted the Economic Loss Doctrine which, although somewhat differently applied from one jurisdiction to another, holds that economic or financial losses are not recoverable in tort when the product or work itself proves defective. The United States Supreme Court has held, unanimously, that no products liability claims lie in admiralty when the malfunctioning of a defective product purchased in a commercial transaction damages only the product itself and the only injury claimed is economic loss. East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858 (1986). Illinois decisions have often been cited in this area. See, e.g., Moorman Mfg. Co. v. National Tank Co., 435 N.E.2d 443 (Ill. 1982); 2314 Lincoln Park West Condominium Assoc. v. Mann, Jin, Ebel & Frazier, Ltd., 555 N.E.2d 346 (Ill. 1990). (applying Economic Loss Doctrine to architects); Anderson Elec., Inc. v. Ledbetter Erection Corp., 503 N.E.2d 246 (Ill. 1986) (applying Economic Loss Doctrine to subcontractors).

The Palsgraf decision can be analyzed in terms of duty or, alternatively, proximate causation. The Economic Loss Doctrine can be analyzed in terms of duty as a matter of substantive law perhaps even more so than a simple question of damages.

The Economic Loss Doctrine is discussed here because the key to its application in barring recovery is the nature of the damages. Courts which have applied the Economic Loss Doctrine sometimes have not agreed whether, for the doctrine to apply, the damages must be limited solely to the product itself, or whether the damages to that product (or building) need only be the substantial part.

In any event, the application of the Economic Loss Doctrine will apply with respect to negligence actions. Negligent misrepresentation by one who is in the business of supplying information for the guidance of others causes an exception to the doctrine. 2314 Lincoln Park West, 555 N.E.2d at 351. Similarly, intentional misrepresentation blocks application of the doctrine. Id. Architects do not supply information sufficient to set up a negligent misrepresentation claim, ordinarily, simply by supplying a design. Id. at 352.

The common law in nearly any jurisdiction is far from well settled on the Economic Loss Doctrine. Careful review of case precedent is certainly necessary. Some recent decisions concerning the application of the Economic Loss Doctrine are the following:

> Fleischer v. Hellmuth, Obata & Kassabaum, Inc., 870 SW.2d 832 (Mo.Ct.App. 1993) (holding that architect did not owe a tort duty of care and thus is not liable to a general contractor or construction manager for damages for economic losses resulting from the architect's negligent performance of a contract with the owner).
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> State v. Transamerica Premier Ins. Co., 856 P.2d 766 (Alaska 1993) (denying surety's claims against owner for economic loss caused by defective plans, on the grounds that a project

owner's duty to the contractor is purely contractual and not enforceable in a tort action).

Midwestern Elec., Inc. v. Dewild Grant Reckert & Assoc., 500 N.W.2d (S.D. 1993) (holding that electrical subcontractor on public construction project could maintain a professional negligence cause of action for economic damage against engineering firm which assisted in installation of fire detection system).

Casa Clara Condominium Assoc. v. Charley Toppinon Sons, Inc., 620 So.2d 1244 (Fla. 1993) (applying the economic loss doctrine to deny the right of a non-privity homeowner to bring a negligence action for economic losses against a subcontractor-supplier for defective concrete).

Bates & Assoc., Inc. v. Romei, 426 S.W.2d 919 (Ga. 1993) (allowing, as exception to the economic loss doctrine, suit by general contractor against second-tier subcontractor, where general relied on sub's shop drawings in performance of the work).

Foster Wheeler Enviresponse, Inc. v. Franklin County Convention Facility Auth., 621 N.E.2d 410 (Ohio 1993) (holding that general contractor may pursue an action against engineer for economic losses where claim was for negligent supervision and thus involved a wide range of interaction between the contractor and the engineer, which was sufficient "nexus" to satisfy privity requirement).

South Carolina Elec. & Gas Co. v. Westinghouse Elec. Corp., 826 F.Supp. 1549 (D.S.C. 1993) (holding that economic loss doctrine barred owner's recovery for negligent design of power plant system, where owner's damages were solely for the failure of the system to perform).

D. Failure to Mitigate Damages

The Restatement at §918(1) speaks to damages which could have been avoided by reasonable effort or expenditure after the commission of the tort. However, if the defendant is considered to have acted recklessly or intentionally, then the Restatement argues there should be no lessening of damages unless plaintiff herself was equally intentional or heedless. Further, the financial ability of the plaintiff comes into play. §918, cmt. e.

The classic failure to mitigate doctrine is to be distinguished from contributory negligence in that the failure to mitigate concept applies to efforts after the tort. By contrast, contributory negligence concerns what plaintiff did or failed to do at the time of or immediately prior to the damages sustained. Given that distinction, it is no surprise that various jurisdictions have different results for a plaintiff's contributory negligence as opposed to a failure to mitigate damages. Contributory negligence was seen by many states as an outright bar to any recovery whatsoever, and it was then softened to a percentage deduction. Some states refine that further with the modification of the pure comparative negligence approach.

This notion of "avoidable consequences" as compared to contributory negligence can require careful presentation by the defense counsel to avoid a court of review believing that a double deduction was had. In Williams v. Jader Fuel Seal, Inc., 944 F.2d 1388, 1401 (7th Cir. 1991), cert. denied, 112 S. Ct. 2306 (1992), a subsurface coal miner contracted with a strip miner to mine on certain leased land. The strip miner tunneled beyond the boundaries outlined in the contract into an adjacent land. As luck would have it, the strip miner's mine burrowed into the subsurface mine in that adjacent tract, causing flooding and damage to various pieces of mine equipment.

The subsurface miner sued the strip miner alleging negligence in strip mining through the subsurface mine. Judgment on the jury verdict was entered with a finding of 30% contributory negligence.

The appellate court held there was error in failing to strike two of the affirmative defenses which, in turn, had caused the jury to reduce the plaintiff's damages twice: during the liability half of the trial as contributory negligence, and then again in damages with respect to the duty to mitigate.

Naturally, defense counsel's imagination, especially with hindsight, can lead to many defense arguments. Defendants must be careful to raise the appropriate affirmative defenses at the correct time, not confusing contributory negligence and failure to mitigate, which really are two separate defenses. In a factual setting where the damages do not occur all at once with some catastrophic event (e.g., a fire) the chain of events may be difficult to separate into contributory negligence and failure to mitigate defenses. Generally, both should be pleaded and the evidence perceived as one or the other or both, paying due heed to avoiding a double deduction as in Williams.

E. Benefits to Plaintiff Resulting From Defendant's Tort

The Restatement at §920 provides in part:

> When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.

However, the damages resulting from the invasion of one particular interest are not lessened by showing that a different interest has been benefited. See Comment b. Further, the benefit

must result from the tortious conduct. See Comment d. That Comment provides this illustration:

> Thus one who, in boring for oil, fails to control the well, thereby causing the plaintiff's land and house to be covered with petroleum, is not entitled to have the damages reduced by showing that his success in drilling for oil in his land resulted in an increase in value of the plaintiff's land; the increase does not result from the tortious inundation but from the fact that oil is discovered.

In some respects, this section of the Restatement can be compared with the concept of betterment, discussed above. For example, in Counsel of Unit Owners v. Carl M. Freeman Assoc., 564 A.2d 357, 364 (Del. Super. Ct. 1989), a condominium association sued the builders for design and construction defects in contract and tort. The court held that the appropriate measure of damages was the reasonable cost of remedying the defects; the court rejected the defendants' argument that the cost of repairs should be pro-rated for the expired useful lives of defective building parts. The court reasoned that establishing a value of the diminished use as well as the determination of useful lives of those parts presented an overwhelming problem of proof. The court also felt for policy reasons that the concept of determining the useful life might give defendants too much of a benefit while failing to make the plaintiff whole.

Application of this section can certainly lead to some curious factual scenarios. In Heckert v. MacDonald, 256 Cal. Rptr. 369, 372-373 (Cal.Ct.App. 1989), sellers were sued by purchasers claiming that the building's internal wood structure had extensive

dry rot. Plaintiff buyers were awarded $200,000 but the sellers were given judgment on their cross-claim against the broker for complete indemnity. Still further, it was held that sellers were not entitled to their attorneys' fees.

On appeal, it was held the pecuniary benefit the sellers received by their broker's tortious conduct in causing the sale price to be as high as it was more than offset the incurred defense attorneys' fees. Thus there was equity.

An example of how the benefit must result from the tort itself is Kline v. American Aggregates Corp., 582 N.E.2nd 1, 4 (Ohio Ct.App. 1989). There, landowners sued a neighboring quarry, alleging that quarry operations caused their water table to drop, thereby dewatering and polluting their wells. Apparently, they then were annexed by the nearby city, which annexation increased the value of their properties. The quarry was not entitled to a reduction in damages due to that increase in value because the annexation was not a direct result of the pumping of water by the quarry that led to the drop in the water table.

F. Defenses Based Upon Alternative Causation and/or Exceptions to Joint and Several Liability Doctrines

Proximate causation is an element separate from damages. Not all damages might be caused by the same wrongful acts, especially if more than one defendant is involved. To the extent that other actors or causes can be found, a defendant should argue that joint and several does not apply. For example, the Restatement at §881 points out that if two or more persons, acting independently, cause distinct harms, then each is subject to only their pro rata portion

of the total. Compare this with §433A of the Restatement. In the construction setting given the fact that each defendant almost by definition has separate and distinct contractual undertakings, the argument for independent action can certainly be made.

In St. Joseph Hosp. v. Corbetta Constr. Co., 316 N.E. 2d 51 (Ill.App.Ct. 1974), defendants' architect, installer and supplier each filed cross claims against each other alleging that any recovery by the owner hospital against them should be passed on to the other defendants. However, the court found the architect and supplier jointly liable to the owner hospital; the architect specified the paneling to be installed without bothering to ascertain its flammability, and the supplier fraudulently failed to disclose the flammability test results to the owner hospital. St. Joseph's Hosp., 316 N.E.2d at 64, 70-71.

In Richter v. Northwestern Memorial Hosp., 532 N.E.2d 269 (Ill.App.Ct. 1988), the plaintiff patient sued her doctor for failing to diagnose a brain tumor, and sued the hospital for negligent post-operative treatment following surgical removal of the tumor. The acts in question were separated in time by at least two weeks and possibly for many years. Relying on the rule that damages should be allocated if there is a rational basis for doing so, the hospital contended that damages should have been apportioned, rather than issued in the form of a joint and several verdict. While the court held that the hospital waived the issue for purposes of appeal, Richter nevertheless illustrates how

multiple defendants can attempt to argue that the rule of joint and several liability does not apply to them.

IV. CONCLUSION

Defending the damages elements in any construction case requires imagination and willingness to search for case precedents in other jurisdictions if not readily recognized in the trial forum. Affirmative defenses should be pleaded separately, early, and extensively. Defense counsel should pick their showdowns on damages carefully, recognizing that damages typically are the highlight of the plaintiff's case. Nonetheless, an understated attack on one or two elements of the damages might result in multiple benefits.