

## Confusing the Tort and Contract Measures of Damage

The Ontario Court of Appeal, on Nov. 22, 2012 released its decision in [Biskey v. Chatham, 2012ONCA802](#).

This decision reminded me that one of the most commonly overlooked issues that I have seen in litigation over the years is the difference between the contract and tort measure of damages. While this may not be an issue in pure contract litigation, or in personal injury litigation, the distinction can be crucial in property damage or negligent misrepresentation litigation.

In multiparty litigation, particularly in construction litigation, or vendor and purchaser litigation, where some parties may be liable in contract and others in negligence, the distinction can be crucial. The various parties may in fact be liable for vastly different assessments of damage depending upon whether their liability is in contract or tort.

In a nutshell, the difference is that a defendant who is liable in contract is liable for the plaintiff's expectation loss, that is, the difference between what the plaintiff was promised and what the plaintiff got. A tort defendant, on the other hand is liable only for the plaintiff's actual out-of-pocket loss, that is the difference between the value of what the plaintiff got and what the plaintiff paid, plus any other out-of-pocket expenses. The difference between these two measures of damages can be substantial.

In *Hauck v. Dixon*, (1975) 64 D.L.R. (3d) 201 (Ont. H.C.), a real estate agent acting for a vendor negligently misrepresented a property as a legal triplex when in fact it was a duplex. The court was asked to award damages based on the difference between the present value of the future earnings as a triplex and as a duplex. The court declined, stating that this would amount to awarding the contract or expectation value of the loss. The measure of damages on the tort measure was the difference between the actual value of the property as a duplex and the purchase price, which was negligible.

In *Parna v. G. & S Properties*, the plaintiff purchased a rental property based on inflated income figures. The trial judge awarded damages of \$24,790 based on the capitalized value of the difference between the actual and represented incomes. The Ontario Court of Appeal ([Parna v. G. & S Properties, 1969 CanLII 28](#)) reversed this decision, finding that the trial judge had erred by applying the contract measure of damages. The Court of Appeal substituted damages of \$4,000 based on the difference between the value of the property and its purchase price. The Court of Appeal noted that the evidence presented at trial of the tort measure of damages was "rather fragile", and the implication is that, had the court not been able to find some evidence as to the tort measure of damages, the plaintiff might have gone away empty handed.

Other cases to the same effect are [Samson v. Lockwood, 1998CanLII1920](#) (Ont. C.A.), [Hepting v. Schaaf, 1993CanLII93](#) (S.C.C.), [Zellagate v. Kipfer, 1996CanLII1342](#) (Ont. C.A.), [Mohn v. Dreiser, 2002CanLII42547](#) (Ont. Supt.Ct.), [2004CanLII34917](#) (Ont. C.A).

In typical construction or vendor and purchaser litigation, the vendor or builder is sued as the primary defendant and one or more of the engineers, architects, real estate agents, solicitors and municipal authorities are added as secondary defendants. In such a case, it is important to keep in mind that the measure of damages may well be the contract measure against the vendor or builder, but the tort measure against the other defendants.

Typically a plaintiff may ask for the cost of rectifying deficiencies, but this measure of damage may be available only against the contract defendants. The other defendants are liable only for the difference between the value of the property and the purchase price, which is typically a much lower figure.

From the standpoint of the tort defendants, they may be able to minimize their damages by hiring a real estate appraiser to appraise the value of the property on an "as is" basis. The difference between the value of the property on an "as is" basis and the purchase price of the property will be the tort measure of damages, and this is often, if not usually, much less than the cost to repair or remediate.

There are several valuable lessons to be taken from this.

1. From the plaintiff's standpoint, if the tort measure of damages may be applicable to any defendant, it is important to ensure that proper evidence be led with respect to that head of damage. If the plaintiff leads evidence only as to the contract measure of damage and the court finds the tort measure of damages is applicable, the plaintiff's case may fail for want of proof.
2. From the defendant's standpoint, it is important to ensure that the court is made aware of the distinction between the measures of damage when the tort measure is applicable. The most effective way of establishing the tort measure of damages in many cases will be by way of a real estate appraisal to compare the value of the property on an "as is" basis to the actual purchase price.
3. Early identification of this issue may facilitate early settlement of the matter with the corresponding savings of costs and avoidance of risk for all parties.

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