



An Introduction to Tort Law (2nd edn)

Tony Weir

## 14. Damages

Tony Weir, Fellow of Trinity College, Cambridge

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### Abstract

Celebrated for their conceptual clarity, titles in the Clarendon Law Series offer concise, accessible overviews of major fields of law and legal thought. This chapter focuses on damages. Most victims of torts want money, often, as much as they can. However, a claimant may also be awarded damages when what he really wants is an injunction to put an end to a continuing wrong: here the damages are not compensatory at all, but just a sop, and not one which the complainant would regard as 'just satisfaction'. The chapter discusses damages for economic harm and human harm, payment of damages, fatal accident claims, property damage, aggravated damages, and punitive damages.

**Keywords:** tort law, damages, compensation, economic harm, human harm

Most victims of torts want money, indeed, as much money as they can get. In the old days they had to go to the courts of common law, which, rather like post offices, could issue nothing but money orders, requiring the defendant to pay his debt or come up with damages. Those who wanted an order of a different kind, such as an injunction to stop noise or smells, had to go to a court of equity. Nowadays all courts can issue any order: in particular, they can order a defendant to hand over a specific chattel, or grant a temporary injunction pending the final determination of rights and wrongs, provided the claimant undertakes to pay compensation if its issuance later proves to have been unjustified. Nevertheless, damages remain the order of the day in tort cases where claimants are complaining of harm already suffered. That damages are so characteristic a feature of tort explains Lord Bingham's statement that the Human Rights Act 1998 is not a tort statute, for damages are not

always payable for the invasion of a Convention right if ‘just satisfaction’ can be procured otherwise,<sup>1</sup> whereas damages are payable for a quite harmless trespass, though not for the innocuous invasion of a ‘constitutional’ right.<sup>2</sup> Conversely, a claimant may be awarded damages when what he really wants is an injunction to put an end to a continuing wrong: here the damages are not compensatory at all, but just a sop, and not one which the complainant would regard as ‘just satisfaction’.<sup>3</sup>

## Compensation

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Indeed, while it is relentlessly repeated that damages are compensatory, this needs to be heavily qualified. The very idea of compensation involves redressible damage which can be computed in monetary terms. Yet damages are awarded in cases of trespass and libel though no damage has been established, and as we shall see, damages may be awarded to punish the defendant by making him pay the victim more than would be enough to compensate him. Again, the notion of compensation is put under strain whenever damages are awarded for pain and other non-economic afflictions, since they can hardly be computed in monetary terms, though an estimate has to be made. Finally, when losses, even of an economic variety, which are expected to arise in the future, are met with a lump sum paid in advance, this is commutation, not actual compensation: as Lord Reid said, ‘Such damages can only be an estimate, often a very rough estimate, of the present value of ... prospective loss’.<sup>4</sup> Because of this, statute has provided that where victims of personal injury are claiming damages for future pecuniary loss the court must consider making an order for periodical payments rather than awarding a lump sum, even if the claimant would rather have the lump sum to which, as regards other heads of harm, he is entitled.<sup>5</sup>

## Damage

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If damage is the proper object of compensation, it is surprising how little attention courts and lawyers have paid to the concept. Is it ‘damage’ that one is now going to die sooner than expected? Here Lord Wright said normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given’.<sup>6</sup> This is clearly wrong: life is not a good thing in itself, but merely the neutral condition of other things, good or bad, a point now taken by the legislature.<sup>7</sup> The Court of Appeal, by contrast, was right to hold that a child born handicapped could not complain that but for the defendant’s negligence his mother would have had an abortion: the essence of his complaint was not that he was handicapped but that he was born at all,<sup>8</sup> and being born is no more ‘damage’ than dying. Likewise the proper answer to the question whether the reluctant parents of a healthy unwanted child can claim the cost of bringing it up is to say that to have a healthy child cannot be counted as ‘damage’, even though parenthood involves considerable expense.<sup>9</sup> If ‘value’ is a social construct, so is ‘damage’.

In the normal case, damage consists of having fewer good things to enjoy or more bad ones to put up with than one would otherwise have had. This applies in both the economic and the human spheres, which should be distinguished: the French speak of *dommage matériel* as opposed to *dommage moral* and the Scots

distinguish patrimonial loss from *solatium*. Damage in the former means less income and more expenditure, in the latter less pleasure and more pain, the former being common to natural and legal persons alike, the latter being the privilege and penalty of the human condition.

## Economic Harm

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Let us leave aside for the moment claims by companies and other merely legal persons, noting only that they constantly profess to be unable to prove the trading loss for which they are claiming, though one would suppose that if they couldn't prove it, they couldn't know of it and had probably not suffered it, or at any rate not suffered it by reason of the conduct for which they are trying to make the defendant pay. Their professions in this regard led a ductile Parliament to dispense with their need to prove harm in certain cases, and say, absurdly, that if words were likely to cause loss it is likely that they did so.<sup>10</sup> We shall stay for the moment with human claimants.

## Lost Income

The human victim who has been disabled from working is entitled to the take-home pay he would have earned, subject to deductions discussed below. He is entitled to the wages lost not only through the injury but also through his accelerated death, that is, wages he will now not live to earn. This rather odd rule is designed to help his dependants who, once his own claim has been met, cannot themselves claim what they would have received out of what he would have earned.<sup>11</sup> Even if the injured claimant has not actually lost any wages, having been kept on by his employer at the same wage, he may still be paid something for the disadvantage he would face in the job market if his employer should downsize or be taken over by a predator.<sup>12</sup> One may also claim for lost earnings even if one never had any: recent decisions enabling young adults to sue for any diminution in their earning ability traceable to abuse or inadequate education or care are going to present the courts with formidable problems of estimating how much they would have earned in the absence of such maltreatment or neglect, given that often the prognosis would in any case have been very dismal.<sup>13</sup> Claims by injured infants have the feature that the earnings they would have made lie so far in the future that a relatively small sum, given the interest it would attract over the intervening period, may be adequate.

## Increased Expenditure

Increase in outgoings is as compensable as diminution of income. In the case of personal injury these include, among much else, the cost of medical treatment, post-operative care, prosthetic devices, and specially adapted accommodation. The expenditure has to be actual, already incurred, or to be incurred in the future; thus nothing can be claimed for medical treatment provided free by the National Health Service. Often the care a person needs after being turfed out of the hospital bed is provided free by a relative, who perhaps gives up a job in order to look after him: the gratuitous carer has no claim of his own against the tort-feasor as his loss is purely financial, and he cannot sue his patient unless remuneration was promised, so a fair result is reached by allowing the victim himself to claim a reasonable sum in respect of such care, which he then holds in trust for the carer, unless of course the carer is himself the tortfeasor.<sup>14</sup>

## Set-Offs

Compensation does not mean overcompensation. That is why the disabled victim gets only his take-home pay net of tax (the damages, unlike the interest they earn when invested, not being taxable in the victim's hands), why in his claim for the wages he will now not live to earn he must give credit for being spared the cost of living, and why he must deduct from his claim for lost wages any sums he obtains in alternative employment. Thus a policeman who had to leave the force because of his injury was required to give credit against his lost wages for the wages he obtained in civil employment, and likewise to give credit against his lost police retirement pension for the civil retirement pension he would eventually receive. Quite right. But the House of Lords went on to hold that he did not have to give credit against his lost wages for the disablement pension he was actually receiving: pension and wages were said to be different, and like could be set off only against like. It is true that this principle now applies in respect of social security benefits and is reflected in the judicial holding that the joys of parenthood cannot be set off against the expense of rearing a child originally unwanted,<sup>15</sup> though statute inconsistently provides that where a person is maintained at public expense the value of such maintenance is to be deducted from the damages for lost earnings,<sup>16</sup> and the Court of Appeal has held that a statutory payment to a victim of mesothelioma should be deducted from whatever damages were payable by the firm responsible for his affliction.<sup>17</sup> The result in the policeman case, however, was that he was made better off because of the tort than he would have been without it, and though the House of Lords has subsequently stuck to its guns, the view of the two dissentients is preferable.

The victim would be overcompensated if he could claim full damages from everyone responsible for the harm (and one must remember that everyone whose tort contributes to an indivisible harm is liable for the whole of it). The clear rule therefore is that his claim against a second person is reduced by anything already paid by the first: you are not entitled to double damages just because two people are liable to you. Indeed if you settle with one tortfeasor without reserving your rights against the others, you may be held to have been fully satisfied.<sup>18</sup> The victim of a tort may have a contractual claim in debt against another party. Thus in their suit against the bank which negligently certified the creditworthiness of their customer Hedley Byrne would have to give credit for any sums received from that customer, and the bank that makes a loan to a customer on the basis of a negligent valuation of the property made by the defendant must give credit for any sums the customer has repaid or perhaps can repay. What if the contractual claim of the victim is against his insurer? Here, most unsatisfactorily, sums received from the insurer do not reduce the victim's claim against the tortfeasor. If the insurance is indemnity insurance, the insurer can claim its money back from the insured victim who has recovered from the tortfeasor, lest the victim be unjustly enriched by double compensation; if it is accident rather than indemnity insurance, the victim can keep both the proceeds and undiminished damages: this is said to be the reward for the victim's thrift. Nor need a victim give credit for sums received from persons charitably disposed: it is said that such persons intended to benefit the victim not the tortfeasor.<sup>19</sup> These last two exceptions, though dubious in policy, are less objectionable than the House of Lords' decision that policemen and firemen can claim full damages for lost wages while retaining the disability pension to which the very risks of the job entitled them.

## Social Security Payments

Disabled persons very likely receive some social security benefits. If so, some adjustment to the damages must be made, since one can hardly keep unemployment benefit as well as damages for being unemployed. For years many such benefits were split 50–50 between victim and tortfeasor, who were often employee and employer and had both contributed to the victim's entitlement. It was the state which was the loser under this statutory compromise, for it had no tort claim against the tortfeasor since its loss was purely financial, and it was not subrogated to the rights of the recipient, unlike the Criminal Injuries Compensation Authority. Since 1997, however, the tortfeasor is required to remit to the government the total amount of specified social security payments received by the victim for the five years after the injury.<sup>20</sup> The victim may retain the whole amount of any damages for pain and suffering and loss of amenity, but will receive in respect of other heads of loss only what is left after the deduction of the relevant social security benefits, if anything; there may indeed be nothing left, since the damages will have been reduced for any contributory negligence on his part before the social security benefits are deducted in full.

This system of 'recoupment' is fairly simple and horribly effective, but it works only where the benefits take the form of payments. The National Health Service, by contrast, provides services not money, and since the victim could not claim the value of medical services which he had received free of charge and the tortfeasor did not have to pay the National Health Service for its purely financial loss, the odd result for many years was that the person to blame for the injury did not have to pay the cost of curing it. That has now changed, in a big way. If the victim of any tort has been carried in an ambulance to a National Health Service hospital and had treatment there, any person paying him compensation (including the Motor Insurers Bureau) is liable to pay the State the certified charges, reduced, if the victim was contributorily negligent, by the same percentage as the damages.<sup>21</sup> The effect of this legislation is quite different from that of the recoupment system in that it imposes a new liability on the tortfeasor's insurer without diminishing the damages payable to the victim, who never had any claim for the value of the medical services he did not have to pay for.

Services in kind are often rendered by local authorities to the victims of torts, but the central government has not come to their aid in this regard: the authority cannot claim from the tortfeasor the cost of the care they provide to his victim.<sup>22</sup> Uncertainty about whether such care will be provided or prove adequate makes for grave difficulties in determining the appropriate amount of damages in case of serious injury.<sup>23</sup>

## Duty to Mitigate Damage

As was seen in the case of *PC Parry*, a person claiming damages for lost wages must give credit for any wages he actually receives from alternative employment. Indeed, he must go further and do his reasonable best to find such alternative employment. This is an example of the 'duty to mitigate', which applies to all those claiming damages, for whatever reason. Like contributory negligence, this is not a duty in the sense of a duty to take care, breach of which leads to liability: it is simply that one cannot claim compensation for a loss one could reasonably have avoided, any more than one can claim for a loss to the extent that it is due to one's own fault. It is, however, like the duty to take care in that the claimant need only do what is reasonable. Thus the damages (if any) payable to a woman dismayed to find herself pregnant are not to be reduced because she might have proceeded to an abortion.<sup>24</sup> Had she proceeded to an abortion, however, it would not have counted

against her that she went to a private clinic, for though one might think it reasonable to take free medical treatment if it is available, the victim is permitted by statute to ignore the National Health Service and claim the cost of private treatment (provided that the cost itself is reasonable).<sup>25</sup> The claimant who reasonably attempts to mitigate his loss may claim for any increase in the loss attributable to the attempt; if it is successful, he must give credit for any benefits over and above the avoidance of the loss.

## Human Harm

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In claims for economic loss yet to be suffered, the courts have to scry the future and guess how much the claimant would have earned, what the cost of medical and rehabilitative treatment will probably be, and so on. The guess once made, however, will be in money terms: there is no problem of translation. Similar imponderables also arise in claims for damages for pain and suffering and loss of amenity, but here there is the additional problem of translation into figures, even as regards the past. What is the cost of pain? How much is a leg worth? In giving an answer, the courts generally follow the *Guidelines* issued by the Judicial Studies Board; the Criminal Injuries Compensation Authority presently has an extremely detailed tariff, with 400 types of injury and 25 levels of award; but the law also allows the claimant to decide for himself what his limbs are worth, in the sense that if he insures them, he may keep both the proceeds of such insurance and undiminished damages in tort.

Damage here, as in the economic sphere, includes a reduction in what is good and an increase in what is bad. What is good is pleasure and what is bad is pain. The loss of pleasure may cause pain, but only if one is conscious of the loss. What if the victim is comatose, in a persistent vegetative state? The decision whether such a person should receive substantial damages (over and above medical costs, of course) has split legal systems other than ours. In ours it split the House of Lords in 1963, of which a bare majority was in favour of awarding very substantial damages, Lord Reid saying that 'It is no more possible to compensate an unconscious man than it is to compensate a dead man', with Lord Morris observing that 'the fact of unconsciousness does not eliminate the actuality of the deprivations of the ordinary experiences and amenities of life'.<sup>26</sup> At that time the common law also awarded damages for loss of time on earth, but Parliament has intervened here; no longer can you claim, even if you are alive, just because you are going to die sooner rather than later, but damages may be payable if you are really unhappy at the prospect.<sup>27</sup> The distinction between the subjective and the objective figured also in *Baker v Willoughby*, discussed above, pp. 78–9, where the subsequent and independent amputation of the leg which the defendant had injured put an end to the plaintiff's pain but not to his loss of amenity.<sup>28</sup>

## Payment of Damages

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The old rule that damages must be awarded in a lump sum at the end of the trial has been modified in several respects—we have already seen that the court, when assessing a personal injury victim's future economic loss (loss of earnings, increased medical and care costs) is now bound to consider ordering periodical payments rather than a lump sum. Minor but useful modifications have introduced *interim payments* when it seems wise

to wait for a final award (the question of liability can be resolved before any decision on the quantum of damages), and *provisional damages* when it seems that the claimant's condition may worsen. Nevertheless lump sum payments, desired by the claimant and simpler for the defendant, are still quite frequent. The purpose of damages is clear, namely to put the claimant in the position he would have been in if the tort had not occurred, and although it may be far from easy to say what that position would have been, the damages must be adequate.

In the last decade damages were very greatly increased by judicial decision, both as to economic harm and human harm, which overall are about equal in personal injury cases. As to the former, it was done by reducing the 'discount rate' applied to the gross damages, a discount being necessary when damages are paid in a lump sum, since the money paid now in respect of future losses and expenses will be earning interest in the meantime before the losses would have been incurred. When the House of Lords unanimously decided that the rate applied in the past must be reduced (it has now been reduced still further) the effect in just one of the cases before them was to increase the damages by no less than £300,000.<sup>29</sup> As to human harm, the Law Commission produced a Report which proposed a doubling of the awards in serious cases. Incoherent and impertinent as the Report was, the Court of Appeal responded to it and ordained an increase of up to £200,000 in the most serious cases, proportionally less in other cases, and none at all in minor claims.<sup>30</sup>

At the same time as the judges were increasing the sums they themselves were awarding, they were limiting those which could be awarded by juries in actions for false imprisonment, malicious prosecution, and defamation. As regards defamation, Parliament gave the courts some power to modify jury awards, and the Court started to limit them, Elton John providing an early opportunity.<sup>31</sup> As to awards against the police, the Court of Appeal has now laid down, quasi-legislatively, a limit of £50,000.<sup>32</sup> Much larger sums are awarded to a person who has been wrongly convicted and spent years in prison (Andy Evans was awarded £945,500 for 25 years inside), but this is a statutory award,<sup>33</sup> not damages in tort, for there is no tort unless the police concocted the evidence.<sup>34</sup>

It is amusing that in its Report the Law Commission, normally deeply antipathetic to the civil jury, relied on jury awards in Scotland and Northern Ireland as evidence that the awards made by judges in England were too low. A full Court of Appeal under Lord Denning had effectively abolished the jury in negligence cases in England in 1965,<sup>35</sup> on the stated ground that juries awarded different sums in similar cases, and that the law required like to be treated alike (even if all were treated erroneously?). It is true, indeed, that different juries may award different sums not only in different cases but in the same case. For example, in one Scottish case the jury awarded the pursuer £120,000 as damages for pain and suffering, and when the case was sent back for a new trial on the ground that this award was out of all proportion to the harm in question (the pursuer had had a serious arm injury which affected not only his employment but terminated his career as a clay pigeon shot of international repute), the second jury awarded him £95,000. Although the judges thought the appropriate sum was about £30,000, the House of Lords upheld the decision below to let the second jury's award stand.<sup>36</sup> It is likely, however, that the English judges who abolished the jury were at least as much concerned with the practical advantages of predictability as with the moral quality of uniformity; unpredictability makes the system of 'payment in' less useful, and diminishes the chances of settlement.

## Fatal Accident Claims

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The death of a relative, like personal injury, can cause both economic and human harm—loss of support and grief—but it differs in that the survivors themselves suffer no physical injury, unless they see it happening and suffer pathological shock. This made it difficult for the *common law* to compensate widows and orphans, and it did not and still does not do so: all claims arising out of the unwitnessed death of a person are *statutory*. There are two statutes, the 1934 Act which allows dead victims to sue for pre-death harm and the 1976 Act which grants ‘dependants’ (the inaccurate statutory phrase) a claim for the financial harm they themselves suffer as a result of the death of a specified relative. The 1934 Act may be left aside here: it simply permits the estate of a decedent, whether he died naturally or as a result of a tort, to claim what the decedent himself could have claimed, not including any losses occurring after the death. It did not even cover the claim of a person crushed to death in the Hillsborough disaster, since death supervened so quickly on the injury.<sup>37</sup>

Under the much more important Fatal Accidents Act 1976, originally from 1846, a claim may be brought only for the persons listed therein. These include most relatives as well as former spouses and current partners of whatever sex, who have lived together in quasi-matrimonial mode for at least two years. The claim is only for economic loss, for what they have personally lost as a result of the death, if tortiously caused.

The loss need not result from deprivation of future support, though the statute unfortunately uses the word ‘dependants’ as a global description of those entitled to claim: it is inaccurate because the claimant need not be dependent, as was shown when a person who had received a large capital gift from a relative obtained an indemnity for the tax he had to pay because the defendant tortiously killed the donor within the seven-year period which would have exempted him from payment of the tax.<sup>38</sup> Very usually, however, the loss does take the form of deprivation of money or services which the decedent would have provided out of his earnings. This is not a matter of law but of fact, since it is only earnings, and not investments, apart from annuities, which are terminated by death. Though the ultimate aim in each case is to find out how much each particular claimant has lost, in the normal situation the easiest way is to estimate the family’s monetary loss by guessing how much the decedent would have earned and deducting the amount he would supposedly have spent on himself.

Even where the survivor’s income has diminished as a result of the death, there is one accepted but dubious qualification. Although the statute states clearly that the award is to be for the loss resulting from the death, the courts insist that loss can only be claimed if it is due to the claimant’s relationship with the decedent. On this false basis a husband was unable to claim the loss he had suffered when his wife’s death deprived him of a prize-winning dancing partner,<sup>39</sup> and a husband who lost his care allowance when the wife he was caring for was killed was unable to claim for this loss on the ground that he suffered it in his capacity as carer, not that of husband.<sup>40</sup>

## Grief and Bereavement

Although the original Act of 1846 provided that ‘the jury may give such damages as they may think proportioned to the injury resulting from such death to the parties respectively...’, and although the jury would unquestionably have included a sum for grief resulting from such death, the courts were quick to lay down

that only financial harm could be compensated.<sup>41</sup> This was very harsh on parents whose young child was killed: their grief might be immitigable, but they could claim no more than the expense of the funeral, children being a poor investment. Then the 1934 Act was passed. Though principally designed to allow living victims to sue dead tortfeasors (since quite often a motorist managed to kill himself while injuring others), it also entitled dead victims to sue.<sup>42</sup> The courts were then presented for the first time with the claim 'He killed me', though in order that the harm could be said to occur before the actual death, it was dressed up as a claim not for having been killed but for having been about to be killed. As we have seen, the courts said that if life was good, then its abbreviation must be bad and therefore, if due to a tort, damage which must be compensated. Inevitably (and, one would have thought, foreseeably) there were problems of valuation: some juries awarded a lot to a baby killed in its pram because it was deprived of so many years of life, others a lot to an old man expiring in his bath-chair because every moment of his remaining time was especially valuable. This could not go on, so in 1941 the House of Lords said that compensation could be given only for the good things of life, not for the pains one was spared. Offsetting the bad against the good left a credit balance of £200 in the money of the day (now over £6,000), and that was the sum payable by the tortfeasor to the estate of the deceased, as opposed to the £1,200 awarded at first instance.<sup>43</sup> Since the decision involved a small child, the £200 inevitably went to his parents. Now £200 (or £6,000) is not a wholly inappropriate amount to pay parents who lose a child, so in this roundabout manner a fairly acceptable result was achieved. Then in 1982 damages for being killed (or being about to die) were abolished and, lo and behold(!), 'bereavement damages' were introduced, a fixed sum originally £3,500, now £10,000.<sup>44</sup> Whatever anyone says (and the Law Commission describes this as a 'misconceived impression'), it is manifest that this sum is not designed as compensation for grief but is simply, like the earlier award, a replacement in money for the life lost. The lump sum is standard because people are equal, not because they are equally regretted. It is available only to spouses and parents of unmarried minor children, being split between the parents if the child was legitimate, and it is not heritable.

## Set-Offs

In the old days the courts insisted that any benefits accruing to the plaintiffs from the death had to be set off against any losses alleged to result from it. This included even the proceeds of life insurance and the amount inherited from the estate (or, more accurately, the value of its being received earlier). There was nothing wrong with that, but the courts also held that a husband's death was a benefit to the widow in that she was now free to find another husband to support her. She therefore had to give credit for the chance that she might do so. This involved the judges in making a declaration of nubility, all the more fallible in that a decision that the plaintiff would not remarry rendered remarriage that much more likely. Parliament responded to criticism by passing a statute which provided that in a claim by a widow (but only a widow, not also a widower or orphan!) no account was to be taken of remarriage, prospective or actual. At the same time Parliament provided more widely that in assessing damages no account was to be taken of *any* benefits actually or possibly accruing to the plaintiff as a result of the death.<sup>45</sup> This is pure sentimentality, like the rule that there is no recoupment of social security benefits in wrongful death cases. The relationship of loss and benefit is subtle. What of the case where a feckless mother is killed and the hapless child is looked after by a splendid grandmother: has the child lost at all by the death of the sluttish mother, and does the grandmother's care constitute a benefit resulting from the death, so that it must be disregarded? The decisions are in confusion, as always happens

when tort enters the unhappy home, but it seems that there is a loss, as there are services that only a mother can provide (whether she did so or not?), and that substitute services are a benefit which by statute must be disregarded in computing the damages, part of which may be held in informal trust for the surrogate carer, provided he is not himself the tortfeasor.<sup>46</sup>

It must be said that the whole development of the law of tort when death is in the picture reflects poorly on both the judiciary and the legislature, and hardly justifies smug observations about the 'logical development of the law'.

## Property Damage

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One might think that in comparison with claims for personal injury and death, claims in respect of property would be simple: after all, a damaged thing, if inanimate, is not going to get better or worse after the trial, though a lost thing may be found. But things go up and down in value through time, and the cost of repair may go up through inflation, so it may be critical what date is chosen for the valuation, date of loss or date of judgment or in between? There may also be a choice between the cost of repair or replacement and diminution in value, but repair may cost more than the item is worth, exact replacement may be impossible, and reinstatement may be much more costly than market value and disallowed as unreasonable. Nor is market value a panacea, for there may not be a market—and even if there is, the number of successful lawsuits against professional valuers testifies to the difficulties of valuation. Furthermore, as was noted in connection with remedies for conversion, the loss resulting to the owner from not having the thing may be much greater than its value. In one case a firm whose dredger was sunk by the defendant's fault while engaged on work under a contract stipulating penalties for delay was unable to buy a replacement through lack of money and hired one at exorbitant rates, amounting to far more than the value of the dredger itself.<sup>47</sup> It was held that only the value of the dredger 'as a going concern' was recoverable, not the full loss. The decision seems to be right in the result: a firm should not embark on a risky (and therefore profitable) project without having adequate liquidity or a sufficient policy of insurance, not only against the loss of its equipment but also against the loss to its business as a result of the loss of such equipment.

Unfortunately the sole speech in the House of Lords made the decision turn on causation and remoteness rather than valuation, and the decision came to be treated, and vilified, as laying down a rule that extra expense due to the claimant's 'impecuniosity' could not be recovered. Any such rule has now been disavowed by the House of Lords in a case involving an individual's motor car.

The owner of a car which has been tortiously damaged is entitled to the cost of repair, and to the price of a replacement if it is a write-off. To find the cost of replacement one goes to the market in new or secondhand cars. The owner is also entitled to general damages for the loss of its use during the period required for repair or replacement, and to special damages if he reasonably hires a substitute. Just as the capital value of a car is easily ascertained from Glass's Guide, the value of the use of a car is easily found, since there is a vibrant market in which firms such as Avis and Hertz compete to provide customers with the use of a vehicle. Such firms, however, insist on the production of at least one credit card. Suppose the car-owner has no credit card? Well, there is a market here too. If the owner probably has a claim against a tortfeasor certain firms will

provide him with the use of a car for a notional sum, which they do not expect him to pay since they reimburse themselves out of the damages (which will, of course, include the charge they make for the provision of the car on these terms). The sum they charge is about half as much again as the cost of hiring a car from a car hire company, and this the tortfeasor's insurer is reluctant to pay.

In 2002 the House of Lords decided that the difference was not payable by the tortfeasor since it was not in respect of the use of the car as such, and the owner could have gone to one of Hertz's competitors.<sup>48</sup> The next year, however, the claimant had no such option, being impecunious, and by a majority the House held that the extra charge was compensable: 'a claimant's lack of means should not be taken into account when assessing his loss.'<sup>49</sup> All claimants? Could our courts not distinguish companies and their commercial property from individuals and their private property, as is done by the Consumer Protection Act 1987?

One very human being who dearly loved his car was distraught when it was totalled by the careless defendant, and had it repaired rather than replaced by a different model, doubtless equally good in anyone else's eyes. The court disallowed the cost of repair, which exceeded the value (to others) of the car once repaired.<sup>50</sup> Here we come close to the notion of 'sentimental value'. Although the courts can be counted upon to be hostile, it is not certain that the last-mentioned decision can stand with recent authority in the House of Lords, shaky though it is, allowing what economists, with their usual uncharming jargon, call 'consumer surplus'.<sup>51</sup> A man who wanted a deep swimming-pool was allowed £2,500 because the swimming-pool as built was slightly shallower at the deep end than specified, though the difference made it no less valuable. More recently a businessman who bought a house in the Gatwick area which was worth what he paid for it was allowed to claim money from the surveyor who had failed to report, though specifically asked to do so, that it was subject to aircraft noise.<sup>52</sup> It is true that in these and comparable cases the parties were in a special, indeed a contractual relationship, so it is possible that in the absence of such a relationship of reliance the courts will adhere to their dislike of sentimental value. Nevertheless, if the defendant shoots your pet under your very eyes he will likely have to pay aggravated damages in your trespass claim.

## Aggravated Damages

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Aggravated damages, which do not feature in Scots law,<sup>53</sup> have been awarded recently in cases of malicious falsehood<sup>54</sup> and racial discrimination,<sup>55</sup> but they live in an illogical limbo between compensatory damages, which are very common, and punitive damages, one of the most controversial issues in the area. Aggravated damages are more than compensatory damages since they are triggered by the bad conduct of the defendant, but less than punitive damages. But since anything more than compensation must be punitive, one might suppose that either compensatory damages are not fully compensatory or aggravated damages are punitive. However, just as a dog is said to know whether it has been kicked or just tripped over, and feels more aggrieved in the former case, then perhaps—but only perhaps—there is always more to compensate if the defendant had behaved badly. Nevertheless, it looks very much as if aggravated damages are a compromise or cop-out, and the ambiguity of the concept contributed to the rather disingenuous judicial demolition of the law relating to damages which are frankly punitive. Matters are not greatly clarified by the decision of the Court of Appeal which was designed to diminish the damages which juries were awarding against the police. It was held that the jury should make separate awards for aggravated damages 'where there are aggravating

features about the case which would result in the plaintiff not receiving sufficient compensation for the injury suffered if the award were restricted to a basic award...' and that 'It should also be explained that if aggravated damages are awarded such damages, though compensatory and not intended as a punishment, will in fact contain a penal element as far as the defendant is concerned'.<sup>56</sup> But when the Court of Appeal in 1915 upheld the jury award of £150 (now over £6,000) to a patron who had been quite peaceably evicted from a cinema, were these aggravated or punitive damages?<sup>57</sup> Who can tell?

## Punitive Damages

If the role and nature of aggravated damages is ambiguous, there is no doubt about the function of punitive or exemplary damages: they are awarded to punish the defendant who has behaved deplorably by making him pay his victim a sum greater than the equivalent of the harm he caused. But there is much doubt about whether punitive damages should ever be awarded in a civil claim. The very idea is anathema to our friends on the continent, as is shown by the provision in an EU Regulation ('Rome II') that in the application of foreign law the award of 'non-compensatory damages, such as exemplary or punitive damages shall be contrary to Community public policy'.

The history of the matter in England is depressing. Before 1964 it was accepted law that punitive damages could be awarded whenever the defendant had behaved outrageously, and they were awarded by a jury in the famous case of *Rookes v Barnard*.<sup>58</sup> In that case members of a trade union sought to make an example of a colleague for leaving the union, and threatened to go on strike in breach of contract unless their employer gave him notice, as it did. This factual setting can hardly have conduced to clear thinking, for the Court of Appeal held that the defendants were not liable at all, so that it was only when the case reached the House of Lords that the question of punitive damages arose, and only one of their Lordships, Lord Devlin, addressed the matter at length. He held that they were anomalous (and therefore objectionable), but since on rare occasions they could serve a useful purpose, he proceeded to limit their availability to two categories of case at common law, not suggested to him by counsel on either side: where a government official had acted unconstitutionally and oppressively, and where the defendant had committed the tort with a view to profiting from it. This led Lord Denning shortly afterwards to state that 'Lord Devlin threw out all that we ever knew about exemplary damages' and 'knocked down the common law as it had existed for centuries'.<sup>59</sup> His Court of Appeal accordingly said that the House of Lords decision was wrong (*per incuriam!*), refused to follow it and instructed lower courts to do likewise. This unprecedented rebellion was put down by an affirmed House of Lords which reasserted the Devlin position by a majority, despite serious doubts expressed by Lord Wilberforce and Viscount Dilhorne.<sup>60</sup>

The next stage was in 1993 when the Court of Appeal, by now clearly hostile to punitive damages, decided that even if the case fell within one of Lord Devlin's two categories punitive damages could not be awarded unless such damages had, prior to his decision in 1964, been awarded in the specific tort of which the defendant was alleged to be guilty.<sup>61</sup> The problem with this is that it naturally excludes the most recent torts (such as discrimination on grounds of race or gender, where aggravated damages are available<sup>62</sup>), and is thus at odds with the view of Albert Camus that it is the truths most recently discovered which seem the most fundamental. The Law Commission in its turn was minded to propose the abolition of punitive damages until

it discovered that of those it consulted 49% wanted them to be more widely available, while only 28% were in favour of abolition. It therefore produced a compromise proposal extending their availability but removing their award from the jury.

Then in 2001 the matter came before the House of Lords again—not, one supposes, for the last time. The claim was against the Chief Constable of Leicestershire in respect of the scandalous conduct of one of his constables, allegedly constituting the ‘resurgent’ tort of misfeasance in public office. The courts below struck out the claim for punitive damages because such damages had never before been awarded for that tort. The facts of the case offered the possibility of discussing the propositions (a) that punitive damages should never be awarded, and (b) that they could not be awarded against a defendant whose liability was purely vicarious, but counsel declined to argue these points or to suggest that either of the previous House of Lords cases was wrong, so the only question was as to the correctness of the decision of the Court of Appeal in 1993. On that narrow point the House decided against the Court of Appeal and reinstated the claim as arguable.<sup>63</sup> Lord Phillips and Lord Hutton seemed favourable to an extension of punitive damages, but Lord Scott, distinctly hostile to punitive damages in general, was determined that they should never be awarded in a case of vicarious liability. His speech starts out with a fine example of question-begging, that is, assuming what you are setting out to prove, otherwise known as *petitio principii*: ‘My Lords, the function of an award of damages in our civil justice system is to compensate the claimant for a wrong done to him’. Well, that is *one* of its functions, but it is surely better to agree with Lord Wilberforce that ‘It cannot lightly be taken for granted, even as a matter of theory, that the purpose of the law of tort is compensation, still less that it ought to be...’<sup>64</sup>

This little story reflects no credit on the judiciary. Not the least serious objection to Lord Devlin’s opinion that it has split the common law world, for *Rookes v Barnard* has been repudiated throughout the Commonwealth, as their Lordships were aware in 1973 when they reaffirmed it. In the United States it would be laughed out of court, and rightly so.

## Notes

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1 *R (Greenfield) v Secretary of State* [2005] UKHL 14.

2 *Watkins v Home Office* [2006] UKHL 17.

3 *Jaggard v Sawyer* [1995] 2 All ER 189.

4 *British Transport Commission v Gourley* [1955] 3 All ER 796 at 808.

5 Courts Act 2003, s 100.

6 *Rose v Ford* [1937] AC 826 at 846.

7 Administration of Justice Act 1982, s 1.

8 *McKay v Essex Area Health Authority* [1982] 2 All ER 77L

9 *McFarlane v Tayside Health Board* [1999] 4 All ER 96L

10 Defamation Act 1952, s 3(1).

- 11 *Pickett v British Rail Engineering* [1979] 1 All ER 774.
- 12 *Moeliker v Reyrolle* [1977] 1 All ER 9.
- 13 *Barrett v Enfield London Borough Council* [1999] 3 All ER 193.
- 14 *Hunt v Severs* [1994] 2 All ER 385.
- 15 *Macfarlane v Tayside Health Board* [1999] 4 All ER 961.
- 16 Administration of Justice Act 1982, s 5.
- 17 *Ballantine v Newalls Insulation Co* [2001] ICR 25.
- 18 *Jameson v Central Electricity Generating Board* [1999] 1 All ER 193.
- 19 *Hodgson v Trapp* [1988] 3 All ER 870.
- 20 Social Security (Recovery of Benefits) Act 1997.
- 21 Health and Social Care (Community and Health Standards) Act 2003, s 150 ff.
- 22 *Islington LBC v University College Hospital* [2005] EWCA Civ 596.
- 23 *Sowden v Lodge* [2004] EWCA Civ 1370.
- 24 *Emeh v Kensington and Chelsea Area Health Authority* [1984] 3 All ER 651.
- 25 Law Reform (Personal Injuries) Act 1948, s 2(4).
- 26 *West v Shephard* 1963] 2 All ER 625.
- 27 Administration of Justice Act 1982, s 1.
- 28 [1969] 3 All ER 1528.
- 29 *Wells v Wells* [1998] 3 All ER 48L
- 30 *Heil v Rankin* [2000] 3 All ER 138.
- 31 *John v MGN Ltd* 1996] 2 All ER 35.
- 32 *Thompson v Commissioner of Police* [1997] 2 All ER 762.
- 33 Criminal Justice Act 1988, s 133(1).
- 34 *Darker v Chief Constable* [2000] 4 All ER 193.
- 35 *Ward v James* 1965] 1 All ER 563.
- 36 *Girvan v Inverness Farmers Dairy* 1998 SC (HL) i, [1997] TLR 665.
- 37 *Hicks v Chief Constable* [1992] 2 All ER 65.
- 38 *Davies v Whiteways Cyder* [1974] 3 All ER 168.
- 39 *Burgess v Florence Nightingale Hospital* [1955] 1 All ER 511.
- 40 *Cox v Hockenhull* [1999] 3 All ER 577.
- 41 *Blake v Midland Railway* (1852) 118 ER 35.

- 42 Law Reform (Miscellaneous Provisions) Act 1934.
- 43 *Benham v Gambling* [1941] AC 157.
- 44 Fatal Accidents Act 1976, s 1A.
- 45 Fatal Accidents Act 1976, ss 3(3), 4.
- 46 *MS v ATH* [2002] EWCA Civ 792.
- 47 *The Edison* [1933] AC 449.
- 48 *Dimond v Lovell* [2001] 1 AC 384.
- 49 *Lagden v O'Connor* [2003] UKHL 64.
- 50 *Darbishire v Warran* [1963] 3 All ER 310.
- 51 *Ruxley Electronics v Forsyth* [1995] 3 All ER 268.
- 52 *Farley v Skinner* [2001] 4 All ER 801.
- 53 *D Watt (Shetland) v Reid* (EAT, 25 September 2001).
- 54 *Khodaparast v Shad* [2000] 1 All ER 545.
- 55 *Racial Equality Council v Widlinski* [1998] ICR 1124.
- 56 *Thompson v Commissioner of Police* [1997] 2 All ER 762 at 775.
- 57 *Hurst v Picture Theatres* [1915] 1 KB 1.
- 58 [1964] 1 All ER 367.
- 59 *Broome v Cassell & Co* [1971] 2 All ER 187 at 198.
- 60 *Cassell & Co v Broome* [1972] 1 All ER 801.
- 61 *AB v South West Water Services* [1993] 1 All ER 609.
- 62 *Armitage v Johnson* [1997] IRLR 162.
- 63 *Kuddus v Chief Constable* [2001] 3 All ER 194.
- 64 *Cassell & Co v Broome* [1972] 1 All ER 801 at 860.

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