



Tort Law: Text, Cases, and Materials (5th edn)

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p. 531 9. Damages, Compensation, and Responsibility

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Abstract

All books in this flagship series contain carefully selected substantial extracts from key cases, legislation, and academic debate, providing able students with a stand-alone resource. This chapter deals with remedies, particularly monetary remedies, and remedial issues in relation to torts. Before discussing compensation and responsibility, it first considers the heads of loss for which damages in tort may be awarded, and some serious conceptual difficulties involved with this. It then looks at the potential for non-compensatory awards and the challenge to tort law represented by the growth of damages under the Human Rights Act 1998. It also assesses recent developments with respect to the assessment and delivery of damages, the funding of litigation, and the relationship between tort damages and welfare support.

Keywords: remedies, monetary remedies, torts, damages, tort law, Human Rights Act 1998, litigation, welfare support, compensation, responsibility

Central Issues

- i) This chapter is concerned not with rules of liability, but with remedies, and specifically with monetary remedies. The chapter is at the heart of the book because this is where it belongs. Part III of the book dealt with principles of liability in negligence but, as we explained, no consideration of these principles makes sense without asking what liability is being debated. However, in this chapter we also discuss remedial issues in connection with a wide range of torts. The discussion therefore connects with the analysis in a number of different chapters. In

some torts, however, there is an additional emphasis on non-monetary remedies, namely injunctions. Injunctions are considered in relation to particular torts and especially the law of Nuisance (Chapter 11) and Privacy (Chapter 15).

- ii) We begin by outlining the heads of loss for which damages in tort may be awarded. The heads of damage illustrate the general goal of tort compensation, which is to restore claimants to their pre-tort position. We will see that there are some serious conceptual difficulties involved with this. We will also outline the potential for non-compensatory awards; and explore the challenge to tort law represented by the growth of damages under the Human Rights Act 1998.
- iii) Also considered in this chapter are developments in respect of the assessment and delivery of damages, the funding of litigation, and the relationship between tort damages and welfare support. Despite their apparent technicality, these developments raise important issues about the nature of tort law, and its broader economic role. Following an extensive review of litigation funding in 2009–10, there were very significant changes to the way in which civil litigation as a whole is funded. Some elements of the new regime are actively developing, particularly third-party funding and damages-based agreements.

p. 532 1 Compensatory Damages

Compensatory damages are not the only remedy available in tort. In particular:

- Some monetary awards are not compensatory. We address these later in the chapter.
- Some remedies are available which do *not* take the form of a monetary award. These are not considered in this chapter, though we will make reference to discussion in other parts of the book. Injunctive remedies, in particular, are discussed in relevant substantive chapters particularly Chapter 11 (Nuisance) and Chapters 14 (Defamation) and 15 (Privacy).

Assessment of damages in cases of conversion raise particular issues which are most easily dealt with in Chapter 18.

1.1 The Basic Approach: *Restitutio In Integrum*

The guiding principle for an award of compensatory damages is that the award should repair in full the damage done by the tort. The goal is '*restitutio in integrum*', or 100 per cent compensation.

This guiding principle is common to all torts. Where actions in respect of *personal injuries* are concerned, there is a fundamental problem with this principle. Where non-pecuniary losses are concerned, full compensation is strictly not possible, since damages cannot achieve equality between the circumstances of the claimant before and after the injury.

More generally, in respect of all heads of compensatory damages, it is important to remember that *only* losses that are caused by the tort will be compensated. Rules of causation and remoteness must be applied. In negligence actions at least, only damage which is 'within the scope of the duty' will be compensated (*South Australia Asset Management Company v York Montague Ltd* [1997] AC 191). Any other damage is treated as not attributable to the tort of the defendant.

Also of general importance is the impact of contributory negligence (Chapter 7) in reducing damages. If a reduction for contributory negligence is found to be appropriate, then the reduction will operate in respect of pecuniary and non-pecuniary awards, and in respect of compensatory and non-compensatory aspects of the award, whether delivered in a lump sum, or through periodical payments. In the case of a serious injury, this clearly affects the adequacy of compensation, particularly where future income and expenses are concerned.

1.2 Pecuniary Losses in Personal Injury Claims: Introduction

In personal injury claims, 'pecuniary' losses fall under two general heads:

- lost earnings; and
- expenses.

Both sorts of pecuniary loss may be divided into two further categories:

- lost earnings and expenses *before* trial; and
- future loss of earnings and expenses.

Most of the problematic issues examined in this chapter relate to future losses.

p. 533 1.3 Lost Earnings and Expenses Before Trial

The claimant should be compensated in full for any wages or other earnings lost as a result of the tort whilst awaiting trial, as well as for any expenses reasonably incurred. These may include travel expenses to and from hospital, as well as care costs incurred. Although there is a general principle that only reasonable expenses may be recovered (and that a claimant must 'mitigate his or her loss' by acting reasonably), the claimant is nevertheless not obliged to make use of free care and treatment through the National Health Service. The cost of *private care* may be recovered:

Law Reform (Personal Injuries) Act 1948

2 Measure of damages

- (4) In an action for damages for personal injuries (including any such action arising out of a contract), there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act, 1977, or the National Health Service (Scotland) Act, 1978, or of any corresponding facilities in Northern Ireland.

1.4 Future Lost Earnings

Calculation of future losses poses far more difficulty. 'Calculation', in fact, may not be the right description.

In the case of a serious long-term injury, lost earnings will typically represent one of the largest elements in the claim. Estimation of future lost earnings is necessarily imprecise. There are two large areas of uncertainty:

1. Uncertainty over what *will* happen to the claimant, in the light of the injury. How long will the claimant live? What work, if any, will the claimant be able to secure? Will the condition improve, or deteriorate?
2. Uncertainty over what *would have* happened to the claimant, had it not been for the injury. Would the claimant have secured promotion? Have worked to pensionable age? Or left the job market early (whether through ill-health or for other reasons) in any event?

While some forms of delayed, staged, or periodic payments could deal with the first sort of uncertainty, no amount of delay in determining or delivering damages will deal with the second sort of uncertainty, because it concerns hypothetical events.

Multiplier and Multiplicand

The first step in 'calculating' an award for future lost earnings is to identify two figures, referred to as the multiplier and the multiplicand. These are multiplied, and certain additions and deductions are then applied. Broadly the same technique is used in assessing future expenses (including care costs), but the figures adopted will be different.

p. 534 The Multiplicand

The multiplicand (or figure 'to be multiplied') represents the claimant's net annual loss, taking into account earnings at the time of the accident, and likely promotion prospects lost as a result of the accident. If the claimant is not totally incapacitated or unable to work, this figure should take account of residual earning capacity. The figure used is not gross but net: there are deductions for income tax, social security contributions, and other expenditure which would have been incurred as a condition of earnings. Particularly where a young person with identifiable prospects is injured, there may be 'staged' increases in the multiplicand to reflect promotion prospects.

The following case is a useful illustration of the approach to younger claimants, and shows the kind of 'informed guesswork' that operates, as well as indicating some policy issues.

An Illustration: *Dixon v John Were* [2004] EWHC 2273 (QB)

The claimant was seriously injured in a road traffic accident at the age of 20, when he was a university student.¹ He suffered brain damage and a consequent personality disorder which made him unemployable. Given his previous 'attractive personality and very considerable charm', together with 'his background, the fact of his degree and, to some extent, his contacts' (and even though his predicted grade on graduation was a lower second), it was considered likely that he would have secured a good job at above average national earnings for a professional male.² This having been decided, the multiplicand was then increased in line with the percentage chance of promotions, in a staged increase. There was also allowance in the multiplicand for additional 'benefits' such as a company car and private health insurance, which it was found would most probably have been acquired as part of the employment 'package'. However, the judge rejected an argument that the multiplicand should be further increased to reflect the percentage chance of even higher earnings. Such a possibility was merely speculative, in this case. Had there been a stronger possibility of such a promotion, a 'percentage increase' might have been allowed, on the authority of *Herring v MOD* [2003] EWCA Civ 528.

The Multiplier

The court must also make an informed estimate of the number of years for which the claimant has lost earnings. This figure represents the 'multiplier' (though it will also be varied to deal with matters such as investment return, as explained later). A first step in arriving at a multiplier is to identify the number of years between the accident and the retirement age for the type of employment the claimant would have had but for the accident. However, the court will reduce this figure to reflect the chance that the claimant would not have worked until retirement age, even without the accident. The claimant might have left employment, changed employment, died before retirement, or been incapacitated for some other reason.

p. 535 ← Two sorts of reasons why the multiplier might be reduced ought to be distinguished. First, there may be particular evidence relating to the claimant, which suggests that their earning life would, even without the accident, have been shortened. For example, they may demonstrably have no desire to work, or they may have a predisposition to develop a particular disease or disability at some stage in the future. It is clear that a court should take account of any such evidence in making deductions from the multiplier.

Second, courts might also take into account the general possibility, not connected to particular features of the claimant, that a working life will be shortened. In judicial language, these general factors are referred to as the vicissitudes of life. Historically, it is accepted that some reduction in the multiplier should be applied on account of life's contingencies or 'vicissitudes'. But how much?

The answer to this last question has been transformed through reference to the Ogden Tables.

The Ogden Tables and their Influence

The 'Actuarial tables with explanatory notes for use in personal injury and fatal accident cases' ('the Ogden Tables') were prepared by an inter-professional working party chaired by Sir Michael Ogden QC and their first edition was published in 1984. The most recent version, 'Ogden 8', was published in 2020 and comprises 36 different tables, worked examples and explanatory notes.³ Since the sixth edition, in 2007, these tables have incorporated data from labour force surveys, allowing calculation of expected periods in employment until retirement age according to gender; employment status; educational attainment; and disability. Clearly, these ought to have a significant effect on predicting the multiplier (likely years in employment if the tort had not been committed).

When the Tables first appeared, judges were reluctant to adopt multipliers by reference to them, preferring to trust to their own experience and to specific evidence related to the individual claimant, rather than to the actuarial experience represented in the tables. In *Wells v Wells* [1999] AC 345, Lord Lloyd criticized the habit of deducting too many years from the multiplier, and argued for greater use of the tables.

Lord Lloyd, *Wells v Wells*, at 379

I do not suggest that the judge should now be a slave to the tables. There may well be special factors in particular cases. But the tables should now be regarded as the starting-point, rather than a check. A judge should be slow to depart from the relevant actuarial multiplier on impressionistic grounds, or by reference to 'a spread of multipliers in comparable cases' especially when the multipliers were fixed before actuarial tables were widely used. ...

The result of greater reliance on the tables ought to be that smaller deductions from the multiplier are made on account of the general 'vicissitudes of life'; and that courts have a basis in evidence on which to determine any deduction. It should also mean that settlements are easier to reach.

p. 536 **Rate of Return and the Multiplier**

If damages are awarded as a single lump sum payment (as they always are at common law),⁴ it is assumed the lump sum will be invested, and earn interest. The lump sum should be reduced to take account of the fact that it will yield a return in this way. On the other hand, claimants who are dependent on damages—and particularly those with long-term serious injuries who have no opportunity of making up their losses—should not be expected to invest their lump sums in such a way that they are exposed to significant risk. So courts will reduce the multiplier in order to reflect the fact that the sum will earn interest. But what rate of interest should be assumed?

Historically, the courts assumed a high rate of return on investment and discounted the multiplier by 4–5 per cent: see *Mallett v McMonagle* [1970] AC 166, and *Cookson v Knowles* [1979] AC 556. In *Wells v Wells* [1999] 1 AC 345, the House of Lords took a different and much more protective approach to claimants. Claimants could be assumed to invest their lump sums in index-linked government stock (ILGS), which offers a 'risk-free environment' and (naturally) a much lower rate of return than investment in equities. The House of Lords followed the recommendations of the Law Commission, and of Sir Michael Ogden.⁵

Sir Michael Ogden, *The Ogden Tables* (1st edn, TSO, 1984), 8

Investment policy, however prudent, involves risks and it is not difficult to draw up a list of blue chip equities or reliable unit trusts which have performed poorly and, in some cases, disastrously. Index-linked government stocks eliminate the risks. Whereas, in the past, a plaintiff has had to speculate in the form of prudent investment by buying equities, or a 'basket' of equities and gilts or a selection of unit trusts, he need speculate no longer if he buys index-linked government stock. If the loss is, say, £5,000 per annum, he can be awarded damages which, if invested in such stocks, will provide him with almost exactly that sum in real terms.

Lord Lloyd, *Wells v Wells*, at 373–4

My conclusion is that the judges in these three cases were right to assume for the purpose of their calculations that the plaintiffs would invest their damages in I.L.G.S. for the following reasons.

- (1) Investment in I.L.G.S. is the most accurate way of calculating the present value of the loss which the plaintiffs will actually suffer in real terms.
- (2) Although this will result in a heavier burden on these defendants, and, if the principle is applied across the board, on the insurance industry in general, I can see nothing unjust. It is true that insurance premiums may have been fixed on the basis of the 4 to 5 per cent. discount rate indicated in *Cookson v Knowles* [1979] A.C. 556 and the earlier authorities. But this was only because there was then no better way of allowing for future inflation. The objective was always the same. No doubt insurance premiums will have to increase in order to take account of the new lower rate of discount. Whether this is something which the country can afford is not a subject on which your Lordships were addressed. So we are not in a position to form any view as to the wider consequences.
- (3) The search for a prudent investment will always depend on the circumstances of the particular investor. Some are able to take a measure of risk, others are not. For a plaintiff who is not in a position to take risks, and who wishes to protect himself against inflation in the short term of up to 10 years, it is clearly prudent to invest in I.L.G.S. It cannot therefore be assumed that he will invest in equities and gilts. Still less is it his duty to invest in equities and gilts in order to mitigate his loss.
- (4) Logically the same applies to a plaintiff investing for the long term. In any event it is desirable to have a single rate applying across the board, in order to facilitate settlements and to save the expense of expert evidence at the trial. I take this view even though it is open to the Lord Chancellor under section 1(3) of the Act of 1996 to prescribe different rates of return for different classes of case. Mr Leighton Williams conceded that it is not desirable in practice to distinguish between different classes of plaintiff when assessing the multiplier.
- (5) How the plaintiff, or the majority of plaintiffs, in fact invest their money is irrelevant. The research carried out by the Law Commission suggests that the majority of plaintiffs do not in fact invest in equities and gilts but rather in a building society or a bank deposit.
- (6) There was no agreement between the parties as to how much greater, if at all, the return on equities is likely to be in the short or long term. But it is at least clear that an investment in I.L.G.S. will save up to 1 per cent. per annum by obviating the need for continuing investment advice.

The end result was to recommend that a lower discount, of 3 per cent, would now be applied to the multiplier to account for investment of the capital sum. Lord Steyn explained the wider importance of this technical issue:

Lord Steyn, *Wells v Wells*

[1999] AC 345, at 382

The importance of the issue is shown by a comparison of the awards of the three trial judges, who relied on index-linked government securities to fix the discount rate, and the figures substituted by the Court of Appeal, who used the conventional rate. ... the use of a 3 per cent. discount rate instead of 4.5 per cent. would increase the awards by very roughly the following sums: Margaret Wells (a 58-year-old nurse), £108,000; Page (a 28-year-old steelworker), £186,000; Thomas (aged six years), £300,000. These figures show the impact of the reduction of the discount rate in cases where damages are calculated over many years. But, since a judicial decision ought to take into account general as well as particular consequences, it is important to realise that the proposed modification of the discount rate would lead to an enormous general increase in the size of awards for future losses. Nobody has ventured a prediction of the likely cost. The sums involved would undoubtedly be huge. The implications of a modification of the conventional rate for the insurance industry would be considerable. Inevitably, it would be reflected in increased premiums. The one certain thing is that if the right decision is to make the suggested modification of the discount rate the public would by and large have to pay for the increase in awards.

p. 538 Subsequent Developments in the Discount Rate

In our earlier extract from *Wells*, Lord Lloyd referred to section 1 of the Damages Act 1996.

Damages Act 1996**1 Assumed rate of return on investment of damages**

- (1) In determining the return to be expected from the investment of a sum awarded as damages for future pecuniary loss in an action for personal injury the court shall, subject to and in accordance with rules of court made for the purposes of this section, take into account such rate of return (if any) as may from time to time be prescribed by an order made by the Lord Chancellor.
- (2) Subsection (1) above shall not however prevent the court taking a different rate of return into account if any party to the proceedings shows that it is more appropriate in the case in question.

In June 2001, the Lord Chancellor exercised his power under this section and specified a discount rate: Damages (Personal Injury) Order 2001 (SI 2001/2301). He largely accepted the approach of the House of Lords in *Wells v Wells* and indeed, in light of changed economic circumstances, adopted a *lower* discount, of 2.5 per cent. Subsequently, attempts to use section 1(2) above to argue that a lower discount rate should apply in particular cases were brushed aside by the courts as inconsistent with the Lord Chancellor's approach.

In *Warriner v Warriner* [2003] 3 All ER 447, Dyson LJ explained this narrow approach to section 1(2):

33. We are told that this is the first time that this court has had to consider the 1996 Act, and that guidance is needed as to the meaning of ‘more appropriate in the case in question’ in section 1(2). The phrase ‘more appropriate’, if considered in isolation, is open-textured. It prompts the question: by what criteria is the court to judge whether a different rate of return is more appropriate in the case in question? But the phrase must be interpreted in its proper context which is that the Lord Chancellor has prescribed a rate pursuant to section 1(1) and has given very detailed reasons explaining what factors he took into account in arriving at the rate that he has prescribed. I would hold that in deciding whether a different rate is more appropriate in the case in question, the court must have regard to those reasons. If the case in question falls into a category that the Lord Chancellor did not take into account and/or there are special features of the case which (a) are material to the choice of rate of return and (b) are shown from an examination of the Lord Chancellor’s reasons not to have been taken into account, then a different rate of return may be ‘more appropriate’.

p. 539 Subsequently, in *Cooke v United Bristol Healthcare Trust* [2004] 1 WLR 251, it was argued for the claimants that the costs of care are inclined to rise at a faster rate than inflation, and that the discount method adopted in *Wells v Wells* would therefore leave claimants whose damages include a significant component for future care under-compensated. The claimants wished to bring expert evidence of the likely costs of care over time, and sought a ↵ lower discount than the 2.5 per cent adopted by the Lord Chancellor. The Court of Appeal rejected the claimants’ applications to bring expert evidence to this effect, and said that they amounted to an ‘illegitimate assault’ on the Lord Chancellor’s discount rate (at [30]). Laws LJ conceded that through application of a general discount rate, the 100 per cent compensation principle would only be achieved in a ‘rough and ready way’, but thought that this was the premise of the Lord Chancellor’s decision to set a standard discount.

Subsequently, the general economic position made it even more apparent that the discount rate set in 2001 did not reflect the likely return on investments nor the likely rise over time in costs of care. The severe impact on the most seriously injured claimants is illustrated by the case of *Harries v Stevenson* [2012] EWHC 3447 (QB). The claimant in this case had suffered catastrophic brain damage when he was an infant, and claimed damages from his doctor on the basis of negligent failure to diagnose. The claimant argued that applying the Lord Chancellor’s discount rate of 2.5 per cent, and in light of the actual likely return on investments, he would be undercompensated by an amount in excess of £2 million. The judge concluded however that the argument for a different, lower discount rate was an ‘assault upon’ the Lord Chancellor’s rate, and the argument was rejected. Yet if the approach taken by the Lord Chancellor when setting the discount rate in 2001 were to be applied at the date of that decision, the discount rate ought to be -1 per cent or, in other words, an uplift, rather than a discount.

The underlying difficulty was that the same economic conditions which reduced the rate of return on investment also made unattractive the idea of increased awards of damages the costs of which would fall upon public services or, via insurance, consumers and businesses. A Ministry of Justice review culminated in a controversial announcement on 27 February 2017, that the rate would indeed be cut to -0.75%.⁶ Following a further consultation, the Ministry of Justice proposed that there should be a change in the way that claimants are considered likely to invest their lump sum, which will have far reaching effects.⁷ Although claimants

should be assumed to be low risk investors, they would also be professionally advised to invest in a mixed portfolio, enabling them to achieve a somewhat higher rate of return than through investment in ILGS as assumed by *Wells v Wells*. It was also proposed that although the Lord Chancellor should set the discount rate, they should be advised by an independent expert panel; and that there should be a review at least once every three years. The **Civil Liability Act 2018** adopted these proposals, but substituting five years for three years, inserting a new Sch A1 into the Damages Act 1996.

In the first review after this change to the legislation, the discount rate was increased from -0.75% to -0.25%.

p. 540 **Hypothetical Future Benefits: Balance of Probabilities or Probabilistic Causation?**

‘One hundred per cent compensation’ requires an award for lost future benefits in some circumstances. An important example is *loss of pension rights*. How will the court decide whether the claimant would have remained in employment long enough to have achieved those rights, if the tort had not occurred? This question raises a fundamental issue, related to prediction of future hypothetical events. Should loss of pension rights, for example, be addressed simply *on the balance of probabilities*? If so, the value of a full pension will be awarded if the claimant showed they would probably have stayed in employment for long enough. Or, should the court assess the *degree of likelihood of attaining such rights*, and assess damages accordingly? This would lead to partial compensation, proportionate to the assessed chances.

Brown v Ministry of Defence [2006] EWCA Civ 546 (CA)

Eight weeks into her service with the army, at the age of 24, the claimant B suffered a serious fracture of her ankle. She could no longer pursue her dream of an army career, and retrained as a physiotherapist. The defendants admitted liability, but challenged the substantial damages claimed. The sums claimed included compensation for loss of pension rights (£148,856.31) calculated on the assumption that B would have remained in the army for the required period of 22 years; and compensation for disadvantage in the labour market (£107,028). The sum for lost pension rights was very considerable because, had B remained in the army for 22 years, she would have become entitled to the pension at age 46, rather than at the age of 60 which would be the rule in most employment. The judge accepted B’s argument that she would ‘probably’ have remained in the army for the required period, applying a ‘balance of probabilities’ test—informed by her personal commitment to such a career—as he thought was compatible with the approach in *Herring v MOD* [2003] EWCA Civ 528.

The Court of Appeal found that this approach was wrong, and that he had misunderstood the impact of *Herring v MOD*. He had also overlooked a principle, referred to by the House of Lords in both *Mallet v McMonagle* [1970] AC 166, 176 and *Davies v Taylor* [1974] AC 297, that in respect of hypothetical future events (as opposed to past events), it was appropriate to make decisions to reflect the *probability* of those events occurring, and to assess damages accordingly. He should therefore have made a *proportionate* award.

Davies v Taylor was a dependency claim.

Lord Reid, *Davies v Taylor*

[1974] AC 207, at 212–13

The peculiarity in the present case is that the appellant had left her husband some five weeks before his death and there was no immediate prospect of her returning to him. He wanted her to come back but she was unwilling to come. But she says that there was a prospect or chance or probability that she might have returned to him later and it is only in that event that she would have benefited from his survival. To my mind the issue and the sole issue is whether that chance or probability was substantial. If it was it must be evaluated. If it was a mere possibility it must be ignored. ...

p. 541

← When the question is whether a certain thing is or is not true—whether a certain event did or did not happen—then the court must decide one way or the other. There is no question of chance or probability. Either it did or it did not happen. But the standard of civil proof is a balance of probabilities. If the evidence shows a balance in favour of it having happened then it is proved that it did in fact happen.

But here we are not and could not be seeking a decision either that the wife would or that she would not have returned to her husband. You can prove that a past event happened, but you cannot prove that a future event will happen and I do not think that the law is so foolish as to suppose that you can. All that you can do is to evaluate the chance. Sometimes it is virtually 100 per cent.: sometimes virtually nil. But often it is somewhere in between. And if it is somewhere in between I do not see much difference between a probability of 51 per cent. and a probability of 49 per cent.

Gregg v Scott [2005] 2 AC 176, as we have seen in Chapter 4, rejected a ‘proportionate’ approach to recovery of damages for lost chance of a cure where there was a negligent failure to diagnose cancer. *Davies v Taylor*, like *Brown*, is not a case like *Gregg v Scott*, since it involves the question of hypothetical future actions of individuals.

Lost Life Expectancy

Where the effect of a tort is to shorten the claimant’s life expectancy, difficult issues arise. In this section, we are concerned with *pecuniary* losses. Therefore, we leave aside for the time being questions relating to the award of *non-pecuniary* damages where life expectancy is shortened.

Where a claimant is likely to die earlier because of their injuries, the relevant multiplier for the cost of *expenses* will be lower, since costs will not be incurred beyond the time of their death. But what of the multiplier for *lost earnings*? Should the injured party be able to claim for lost earnings in the years they *would have been earning* but for the tort, which now fall after the expected date of their death? The answer to this depends on the *purpose* of an award for lost earnings. If the purpose of this award is income replacement for the benefit of the claimant, then income that would have been earned during the ‘lost years’ should not be recoverable, even if it was ‘caused by’ the tort. The claimant will not now ‘need’ that income. This, however, would mean that the tort is allowed to reduce the *estate* of the injured party. There will be less money flowing into the estate for the benefit of those inheriting it after his or her death. Is it the claimant, or the claimant’s estate, that should be returned to the pre-tort position?

Pickett v British Rail Engineering Ltd [1980] AC 136

At the age of 51, the plaintiff contracted mesothelioma through his employer's breach of duty. His expectation of life was reduced to one year. He would otherwise have expected to work to age 65. Thus, compensation for earnings which would have been made during the 'lost years' was the major component of the damages claimed. Future expenses and lost earnings during the remaining year of life were relatively small, although there was an award of general damages (for non-pecuniary losses) of £7,000.

p. 542 ← The House of Lords held that the claimant could recover for earnings that would have been made during the lost years. However, an amount must be deducted from this sum to represent the claimant's own living expenses during those years. Leaving aside the interpretation of earlier case law, Lord Scarman encapsulated the difficulties that remained with this solution:

Lord Scarman, at 169–71

Principle would appear ... to suggest that a plaintiff ought to be entitled to damages for the loss of earnings he could have reasonably expected to have earned during the 'lost years.' But it has been submitted by the defendant that such a rule, if it be thought socially desirable, requires to be implemented by legislation. It is argued that a judicial graft would entail objectionable consequences—consequences which legislation alone can obviate. There is force in this submission. The major objections are these. First, the plaintiff may have no dependants. Secondly, even if he has dependants, he may have chosen to make a will depriving them of support from his estate. In either event, there would be a windfall for strangers at the expense of the defendant. Thirdly, the plaintiff may be so young (in *Oliver v. Ashman* [1962] 2 Q.B. 210 he was a boy aged 20 months at the time of the accident) that it is absurd that he should be compensated for future loss of earnings. Fourthly—a point which has weighed with my noble and learned friend, Lord Russell of Killowen—if damages are recoverable for the loss of the prospect of earnings during the lost years, must it not follow that they are also recoverable for loss of other reasonable expectations, e.g. a life interest or an inheritance? Fifthly, what does compensation mean when it is assessed in respect of a period after death? Sixthly, as my noble and learned friend Lord Wilberforce has pointed out, there is a risk of double recovery in some cases, i.e. of both the estate and the dependants recovering damages for the expected earnings of the lost years.

Lord Scarman countered most of these objections but continued:

...

There is, it has to be confessed, no completely satisfying answer to the fifth objection. But it does not, I suggest, make it unjust that such damages should be awarded. The plaintiff has lost the earnings and the opportunity, which, while he was living, he valued, of employing them as he would have thought best. Whether a man's ambition be to build up a fortune, to provide for his family, or to spend his money upon good causes or merely a pleasurable existence, loss of the means to do so is a genuine financial loss. The logical and philosophical difficulties of compensating a man for a loss arising after his death emerge only if one treats the loss as a non-pecuniary loss—which to some extent it is. But it is also a pecuniary loss—the money would have been his to deal with as he chose, had he lived. The sixth objection appears to me unavoidable, though further argument and analysis in a case in which the point arose for decision might lead to a judicial solution which was satisfactory. But I suspect that the point will need legislation. However, if one must choose between a law which in some cases will deprive dependants of their dependency through the chances of life and litigation and a law which, in avoiding such a deprivation, will entail in some cases both the estate and the dependants recovering damages in respect of the lost years, I find the latter to be the lesser evil.

p. 543 ← These damages are justified chiefly on the basis that they maintain the value of the claimant's estate. Thus they raise issues of overlap with the provisions on dependency damages under the Fatal Accidents Act 1976, and with the survival of claims after the death of the injured party under the Law Reform (Miscellaneous Provisions) Act 1934. Indeed this is broadly the sixth point referred to by Lord Scarman, and he was correct to suggest that it would need legislative solution. The risk of double recovery was removed by an amendment to the Law Reform (Miscellaneous Provisions) Act 1934, which now holds that the claim for earnings in 'the lost years' no longer survives the claimant's death. We extract this statute in Section 2 of this chapter.

Not long after *Pickett*, in *Croke v Wiseman* [1982] 1 WLR 71, the Court of Appeal decided no award for earnings in 'the lost years' was appropriate for a 7-year-old with very severe injuries. The court reasoned that the award for 'the lost years' is made for the benefit of dependants, and in the presence of such severe injuries, it is clear the claimant will not have dependants. Yet the House of Lords had appeared to counter any such suggestions quite explicitly in the course of its decision in *Pickett*, and soon before *Croke v Wiseman* it had awarded damages for the 'lost years' to two claimants without requiring any evidence that they had any prospective dependants: the claimants were 15 and 22 years old (*Gammell v Wilson* [1982] AC 27).⁸ Much more recently, in *Iqbal v Whipps Cross University Hospital NHS Trust* [2007] EWCA Civ 1190; [2008] PIQR P9, these matters came to a head as the Court of Appeal decided the case of a child who had been injured at birth and whose claim included an amount for 'the lost years'. It might have been possible to reason that *Croke v Wiseman* was reconcilable with *Pickett*, but only by accepting that each case must turn on its own facts, so that only claimants who were likely to have dependants would be able to claim for 'the lost years'. This was not the interpretation of *Pickett* adopted by the Court of Appeal. Rather, the court decided that *Croke v Wiseman* was inconsistent with *Pickett*. But they went on to reason that they were unable to depart from a decision of the Court of Appeal which was subsequent to the House of Lords authority and which was binding upon them. Only the House of Lords (or now, the Supreme Court) would be able to correct the error. For now, therefore, claimants injured as children will be unable to claim for the lost years, at least if they are claiming as children.⁹ Nevertheless, the Court of Appeal has made clear that in its view the effect of *Pickett* was intended to

be that all claimants could do so as long as a prediction of likely future earning and life expectancy is possible. With enhanced actuarial tools, this will more often seem attainable. On the other hand, any appeal of this issue to the Supreme Court will raise the possibility that *Pickett* itself would be considered incorrect.

1.5 Expenses

In the case of long-term injury, calculation of care costs will involve its own multiplier, relating not to working years, but to the *life expectancy* of the claimant. Since a claimant with a lower life expectancy will benefit from a lower ‘multiplier’ under the expenses head, the result is that \leftarrow the defendant will generally pay less under the heading of pecuniary losses if the accident actually *shortens* the life expectancy of the victim. This shows us a different side of the ‘100 per cent compensation’ principle—if the damages are not ‘needed’, then they are not awarded.

Voluntary Provision of Care

Many injured people are cared for by relatives or friends, who make no charge for the care provided. To the extent that these carers incur pecuniary losses, particularly by giving up paid employment, it is clear that the award of damages may contain an amount to compensate for this. However, this amount is part of the claim made by the injured party. The care-giver has no claim against the tortfeasor in his or her own right. Although the House of Lords in *Hunt v Severs* (below) concluded that this amount is to be ‘held on trust’ by the injured party for the care-giver, the volunteer is still dependent on the injured party to bring the action at all.¹⁰

In *Donnelly v Joyce* [1974] QB 454, the plaintiff was a 6-year-old boy, whose mother gave up her part-time work in order to care for him. The Court of Appeal held that the plaintiff could claim for the cost of the services provided, as an element of his own claim. Rather awkwardly, the cost of services to him was valued in terms of the mother’s lost earnings. This tends to show that the Court of Appeal’s decision, though no doubt fair and just, was based on a fiction. This fiction is encapsulated in the following passage:

Megaw LJ, *Donnelly v Joyce*

[1974] QB 454, at 461–2

Mr Hamilton's first proposition is that a plaintiff cannot succeed in a claim in relation to someone else's loss unless the plaintiff is under a legal liability to reimburse that other person. The plaintiff, he says, was not under a legal liability to reimburse his mother. A moral obligation is not enough. Mr Hamilton's second proposition is that if, contrary to his submission, the existence of a moral, as distinct from a legal, obligation to reimburse the benefactor is sufficient, nevertheless there is no moral obligation on the part of a child of six years of age to repay its parents for money spent by them, as in this case.

We do not agree with the proposition, inherent in Mr Hamilton's submission, that the plaintiff's claim, in circumstances such as the present, is properly to be regarded as being, to use his phrase, 'in relation to someone else's loss,' merely because someone else has provided to, or for the benefit of, the plaintiff—the injured person—the money, or the services to be valued as money, to provide for needs of the plaintiff directly caused by the defendant's wrongdoing. The loss is the plaintiff's loss. The question from what source the plaintiff's needs have been met, the question who has paid the money or given the services, the question whether or not the plaintiff is or is not under a legal or moral liability to repay, are, so far as the defendant and his liability are concerned, all irrelevant. The plaintiff's loss, to take this present case, is not the expenditure of money to buy the special boots or to pay for the nursing attention. His loss is the existence of the need for those special boots or for those nursing services, the value of which for purposes of damages—for the purpose of the ascertainment of the amount of his loss—is the proper and reasonable cost of supplying those needs. That, in our judgment, is the key to the problem. So far as the defendant is concerned, the loss is not someone else's loss. It is the plaintiff's loss.

p. 545 ← The problem with this was exposed in *Hunt v Severs* [1994] 2 AC 350. Referring to the above passage in *Donnelly v Joyce*, Lord Bridge said:

Lord Bridge, *Hunt v Severs*, at 361

With respect, I do not find this reasoning convincing. I accept that the basis of a plaintiff's claim for damages may consist in his need for services but I cannot accept that the question from what source that need has been met is irrelevant. If an injured plaintiff is treated in hospital as a private patient he is entitled to recover the cost of that treatment. But if he receives free treatment under the National Health Service, his need has been met without cost to him and he cannot claim the cost of the treatment from the tortfeasor. So it cannot, I think, be right to say that in all cases the plaintiff's loss is 'for the purpose of damages ... the proper and reasonable cost of supplying [his] needs.'

This passage is correct in its criticism of the reasoning in *Donnelly*. But the conclusion reached in *Hunt v Severs* has itself been widely criticized, and rightly so.

Hunt v Severs [1994] 2 AC 350

The unusual but by no means unique feature of this case was that the defendant was both the tortfeasor, and the care-giver. Through the defendant's negligence, the plaintiff was very severely injured when riding as a pillion passenger on his motorcycle. The defendant later married the plaintiff and provided her with nursing care. Rejecting as a fiction the idea in *Donnelly v Joyce* that the loss represented by the nursing expenses is really the plaintiff's loss, the House of Lords preferred to say that such sums are paid for the benefit of those providing the gratuitous services, and not for the benefit of the plaintiff at all. Unfortunately, the House of Lords went on to hold that *because* the loss is really that of the carer rather than of the plaintiff, *therefore* there could be no claim for such amounts *where the defendant is also the care-giver*; because this would require the defendant to bear the cost of the care twice—once by offering the services, and then again by paying for them:

Lord Bridge, *Hunt v Severs*

[1994] 2 AC 350, at 363

By concentrating on the plaintiff's need and the plaintiff's loss as the basis of an award in respect of voluntary care received by the plaintiff, the reasoning in *Donnelly v Joyce* diverts attention from the award's central objective of compensating the voluntary carer. Once this is recognised it becomes evident that there can be no ground in public policy or otherwise for requiring the tortfeasor to pay to the plaintiff, in respect of the services which he himself has rendered, a sum of money which the plaintiff must then repay to him. If the present case had been brought in Scotland and the claim in respect of the tortfeasor's services made in reliance on section 8 of the Administration of Justice Act 1982, it would have been immediately obvious that such a claim was not sustainable.

p. 546

The case for the plaintiff was argued in the Court of Appeal without reference to the circumstance that the defendant's liability was covered by insurance. But before your Lordships ↵ Mr McGregor, recognising the difficulty of formulating any principle of public policy which could justify recovery against the tortfeasor who has to pay out of his own pocket, advanced the bold proposition that such a policy could be founded on the liability of insurers to meet the claim. Exploration of the implications of this proposition in argument revealed the many difficulties which it encounters. But I do not think it necessary to examine these in detail. The short answer, in my judgment, to Mr McGregor's contention is that its acceptance would represent a novel and radical departure in the law of a kind which only the legislature may properly effect. At common law the circumstance that a defendant is contractually indemnified by a third party against a particular legal liability can have no relevance whatever to the measure of that liability.

This reasoning is very selective about which consequences of an award of damages may be considered. The very point of the claim for care offered by the defendant was that he could then be reimbursed by his liability insurer. To hold that it would be *unfair* to such a defendant to require him to pay 'twice' is misplaced.

Lord Bridge's point in the final paragraph is, essentially, that courts should not distinguish between individual cases depending on whether the *particular* defendant is or is not insured. The existence of an insurance policy should not be a decisive factor. But this misses the point that claims of this sort simply would not be brought unless liability insurance was in place. What benefit could there otherwise be in bringing the claim?¹¹

The Law Commission in its Consultation Paper on *Damages for Personal Injury: Medical, Nursing and Other Expenses* (LCCP 144, 1996) took the view that legislation should reverse the effect of *Hunt v Severs*, but at the same time accepted the House of Lords' decision to ignore the insurance position of the defendant:

3.65 ... Although the existence of insurance was a vital part of the factual picture, and indeed litigation would scarcely have made sense if the defendant had not been insured against such liability, we do not consider that the existence of insurance should be permitted to affect liability. We believe that the question of the defendant's liability must necessarily precede the one of the defendant's insurer's liability.

This argument might have been acceptable (though not especially persuasive), had the House of Lords in *Hunt v Severs* not made an exception to general principle precisely in order to avoid unfairness to the defendant. Decisions as to 'fairness' in particular should not be made without reference to the consequences of the decision for the parties concerned, even if some of the more formal ideas of justice applied to the law of tort do proceed on this basis.

Local Authority Care

Earlier in this chapter, we explained that claimants need not use NHS medical services, but are entitled to choose private medical care, and to claim an amount in respect of this care from the defendant: Law Reform (Personal Injuries Act) 1948, section 2. No equivalent provision exists in respect of care provided by a local authority. Given that local authorities are ↵ in many cases under a statutory obligation to provide such care, or indeed to provide direct financial assistance, the question arises of whether the claimant is obliged to depend upon this care, and whether he or she may claim for the costs of future *private* provision.

In *Sowden v Lodge; Crookdale v Drury* [2005] 1 WLR 2129, the Court of Appeal explained that if claimants generally were permitted to claim for private care for the rest of their lives, claims would tend to be 'astronomically high' (at [90]). The solution must depend on what was reasonable on the facts of the individual case. One alternative was for defendants to set out whether the claimant's reasonable needs may be met by local authority care, allowing for potential 'top-ups'.

In *Peters v East Midlands Strategic Health Authority* [2009] EWCA Civ 145, a later Court of Appeal reached a conclusion which appears to be inconsistent with *Sowden*. It distinguished *Sowden* on the basis that the court had not there been asked to consider whether a claimant was entitled as of right to select private care even if there was a statutory right to provision by the local authority—the key point considered in *Peters*.

Dyson LJ, *Peters v East Midlands Strategic Health Authority* (giving the judgment of the court)

53. ... We can see no reason in policy or principle which requires us to hold that a claimant who wishes to opt for self-funding and damages in preference to reliance on the statutory obligations of a public authority should not be entitled to do so as a matter of right. The claimant has suffered loss which has been caused by the wrongdoing of the defendants. She is entitled to have that loss made good, so far as this is possible, by the provision of accommodation and care. There is no dispute as to what that should be and the Council currently arranges for its provision at The Spinnies. The only issue is whether the defendant wrongdoers or the Council and the PCT should pay for it in the future.

The court reasoned that just as a claimant who is the victim of two torts may choose which tortfeasor to proceed against and then leave the tortfeasors to battle over contribution (Chapter 8), so a claimant who has a choice of routes as between a tortfeasor and another party with an obligation to meet her needs may likewise decide which party to claim against. In this case, the claimant's choice was between claiming damages and purchasing care; and obtaining free care from her local authority. The court held that she was entitled as of right to 'prefer self-funding and damages rather than provision at public expense' (at [89]). It does seem worth pointing out, given this way of phrasing the choice, that payment by the tortfeasor also amounts to payment 'at public expense' in this particular case, since the first defendant was a local health authority. The point made in *Sowden* was that life-time private care costs are likely to be very much more costly than the local authority alternative, while accepting that there may sometimes be a need for more (or better?) care than the local authority can provide. *Peters* seems to replace this fact-sensitive approach with a statement of general principle, that a claimant may choose which way to go, and that the principle of mitigation of loss simply has no application in this context. In *R(Tinsley) v Manchester City Council* [2017] EWCA Civ 1704, a local authority argued, following *Peters*, that it could not be required to provide after-care services to someone who had already received an award of damages to cover the purchase of such care (and who had, up until the time of the claim, purchased the services privately). The application was made because the claimant's adviser was concerned that there were no longer adequate funds to provide for future needs. The Court of Appeal rejected the Council's argument, concluding that it was not an implication of the decision in *Peters* that a claim for local authority services was ruled out in this way.

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1.6 Deductions

The principle of 100 per cent compensation cuts both ways. The common law does not allow recovery, under the head of compensatory damages, of more than has been lost. Therefore, deductions from the damages award will be made to reflect benefits received. However, certain benefits are not deducted in this way. These are payments from first party insurance policies where premiums were paid by the claimant; and 'benevolent' payments from third parties.

In principle, any deductions to reflect benefits received will be made *only* on a 'like for like' basis. If there is a benefit in the nature of *income*, then it will be deducted only from the amount awarded for *loss of earnings*. This being so, in a case where there is no pecuniary loss and the award is entirely made up of damages for

non-pecuniary losses, there will be no deduction on account of financial benefits. No 'double recovery' arises in such a case.

Deductions in Respect of 'Lost Earnings'

Some examples of the principle against double recovery in respect of lost earnings are as follows:

- In *Hussain v New Taplow Mills* (1988) AC 514, a deduction from lost earnings was made in respect of *statutory sick pay*.
- In general, a contributory pension will *not* be set off against the award of damages for lost earnings (*Parry v Cleaver* [1969] 1 All ER 555), *even if* the defendant (generally an employer) also contributed to the pension (*Smoker v London Fire and Defence Civil Authority* [1991] 2 AC 502). However, a disablement pension will be set off against the part of the award which compensates for loss of pension, rather than earnings (*Longden v British Coal Corporation* [1997] 3 WLR 1336).
- By section 5 of the Administration of Justice Act 1982, a claimant who is maintained at public expense will be susceptible to a deduction from damages *if and to the extent that this leads to reduced living expenses*. For example, they may no longer have to pay rent, or 'board and lodgings'.

The 'Thrift or Gift' Exceptions

Two established exceptions to the rule that benefits should be deducted from relevant heads of damage relate to:

1. insurance ('thrift'); and
2. benevolence ('gift').

The general thinking is that it is not appropriate for the defendant to gain the benefit of the claimant's thrift and prudence, or of the good motives of third parties.

p. 549 The Insurance Exception

Lord Reid, *Parry v Cleaver*

[1970] AC 1 14

As regards moneys coming to the plaintiff under a contract of insurance, I think that the real and substantial reason for disregarding them is that the plaintiff has bought them and that it would be unjust and unreasonable to hold that the money which he prudently spent on premiums and the benefit from it should enure to the benefit of the tortfeasor.

The Benevolence Exception

Lord Reid, *Parry v Cleaver*, at 14

It would be revolting to the ordinary man's sense of justice, and therefore contrary to public policy, that the sufferer should have his damages reduced so that he would gain nothing from the benevolence of his friends or relations or of the public at large.

This thinking has not been broadened and indeed if the reasoning adopted in recent cases were to be extended, it would challenge the exceptions themselves.

Hodgson v Trapp [1989] AC 807

The plaintiff sustained injuries in a road traffic accident for which the defendants admitted liability. As a result, she was wholly and permanently dependent on the care of others. The defendants argued that her award should be reduced to take account of statutory care and mobility allowances received. These social security benefits relate to elements of the claimant's *care*.

The plaintiff argued that the allowances should be disregarded, since social welfare benefits of this nature were akin to 'benevolent' payments made out of altruistic motives. The House of Lords rejected the 'benevolence' interpretation, and held that the allowances were deductible.

Note: the effect of Hodgson v Trapp has been modified by the Social Security (Recovery of Benefits) Act 1997. Now, relevant benefits listed in the Act are deducted for a maximum of five years, and the amount deducted is repaid to the state by the party paying compensation. Hodgson v Trapp is still an important authority because common law continues to govern any benefits not listed within the statutory provisions.

In the following short extract, Lord Bridge elaborates on the general reasons for deductions of this nature. The deductions are of course compatible with the 100 per cent principle, but importantly, he also calls attention to the broader economic context of tort damages.

p. 550

Lord Bridge, at 823

In the end the issue in these cases is not so much one of statutory construction as of public policy. If we have regard to the realities, awards of damages for personal injuries are met from the insurance premiums payable by motorists, employers, occupiers of property, professional men and others. Statutory benefits payable to those in need by reason of impecuniosity or disability are met by the taxpayer. In this context to ask whether the taxpayer, as the 'benevolent donor,' intends to benefit 'the wrongdoer' as represented by the insurer who meets the claim at the expense of the appropriate class of policy holders, seems to me entirely artificial. There could hardly be a clearer case than that of the attendance allowance payable under section 35 of the Act of 1975¹² where the statutory benefit and the special damages claimed for cost of care are designed to meet the identical expenses. To allow double recovery in such a case at the expense of both taxpayers and insurers seems to me incapable of justification on any rational ground. It could only add to the enormous disparity, to which the advocates of a 'no-fault' system of compensation constantly draw attention, between the position of those who are able to establish a third party's fault as the cause of their injury and the position of those who are not.

Lord Bridge's comments here are thought-provoking. In particular:

- (a) By extension to the general justification of the 'thrifty' exception, why should the defendant in this sort of case be entitled to pay less simply because the state has stepped in with some support? Lord Bridge's answer is that most of us pay or contribute to insurance premiums, so that ultimately, it is the ordinary person who would have to pay twice if there was no deduction from damages in these cases—once through insurance, and once through tax.
- (b) Since (as Lord Bridge observes) most damages are paid by insurance companies, is it still appropriate to make awards which are recognized to exceed 100 per cent compensation,¹³ in order to avoid benefiting tortfeasors? Those tortfeasors are not very likely to have to pay damages themselves.

1.7 Non-pecuniary Losses in Personal Injury Cases

'Non-pecuniary losses' suffered in a personal injury case may be divided into two main categories:

1. pain and suffering;
2. loss of amenity.

In practice, a single award for 'general damages' will be made covering both of these forms of loss, without itemization between them. Both come close to being purely 'conventional' sums, within a range set out in guidelines from the Judicial Studies Board. In *principle*, the two forms of non-pecuniary loss are rather different. Pain and suffering is supposedly assessed subjectively (how much has the claimant suffered?); 'loss of amenity' is partly ← objective, so that the award is made *for the fact of loss*, rather than for the experience of loss. The true test of this comes in cases where the claimant is so severely injured that she or he has no awareness of their loss, still less of the award of damages which is supposed to 'make it good'.

p. 551

West v Shephard [1964] AC 326

The plaintiff sustained very severe injuries in a road traffic accident caused through the negligence of an employee of the defendant. She may or may not have been able to appreciate the condition she was in. Given that she suffered severe mental impairment and was unable to understand very much if anything that was said to her, she would have no awareness of the award of damages itself. In the face of a strong dissent by Lord Reid, the House of Lords held that substantial damages might be awarded for loss of amenity to a plaintiff who is unable to appreciate the award—and, indeed, even to a plaintiff who is unconscious.

The result in *West v Shephard* was confirmed by the House of Lords in *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174. The claimant here suffered a cardiac arrest when undergoing minor surgery and was left with very severe injuries. She was barely sentient and then only intermittently so. The House of Lords upheld an award of £20,000 for pain, suffering, and loss of amenity, as part of a much larger award including substantial sums for lost earnings and future care costs.

Some fierce arguments have been conducted over non-pecuniary losses, and the decision in *West v Shephard* serves to fuel these arguments. While the ‘100 per cent principle’ clearly requires the court to attempt to quantify pain, suffering, and loss of amenity, it has been argued that these heads of damages are entirely wasteful in a case like *West v Shephard*, and not necessarily justified even in a more typical case. While general damages will usually amount to a small proportion of the damages awarded to a seriously injured claimant, in a small claim general damages may even be the major component of the award. Are tort damages being appropriately targeted?

Increasing General Damages

In its Report on *Damages for Non-Pecuniary Loss* (Report No 257, 1999), the Law Commission proposed that the level of awards for loss of amenity and pain and suffering should be increased considerably. Awards of £3,000 should be increased by 50–100 per cent, and smaller claims over £2,000 should be subject to a tapered increase. Their thinking on this was heavily based on certain empirical studies, and on responses to the Commission’s Consultation Paper. One of the empirical studies was commissioned by the Law Commission itself and carried out by the Office of National Statistics. It sought public opinion on whether damages awards for pain, suffering, and loss of amenity should be increased, and sought to improve the validity of the responses by spelling out to respondents the likely consequence for insurance premiums.

In *Heil v Rankin* [2001] QB 272, the Court of Appeal considered the Law Commission Report, but declined to follow its recommendations. The court did take the important step of recommending a significant increase in the damages to be awarded for pain, suffering, and loss of amenity,¹⁴ but did so only for the more serious cases, defined as awards of over £10,000. These increases should be tapered to a maximum of one-third for ‘the most catastrophic’ injuries. To the relief of the insurance industry, there would be no increase at all for awards of less than £10,000, which make up the majority of tort claims. The Court of Appeal evidently considered the award of general damages to have a serious role to play in compensation awards. But it doubted the frame of reference employed in the Law Commission Report and pointed out, for example, that the research did not explicitly build in the impact on NHS funding. It is of interest that the Court of Appeal mentioned this element of the broader picture.

Heil v Rankin (as well as the Law Commission Report which preceded it) has offered an opportunity for some deeper criticism of the role of non-pecuniary damages.

Richard Lewis, 'Increasing the Price of Pain' (2001) 64 MLR 100, at 107

... let us consider questions which people might have been asked if a wider perspective on tort had been taken. These questions explicitly deal with relative priorities for expenditure. The likely responses to these questions are no less predictable than those asking whether victims should get more money, but they carry very different implications for the future of damages for non-pecuniary loss. The first question begins by explaining that more than two-thirds of accident victims who are so seriously injured that they are unable to work for more than six months are unable to claim any damages at all and, instead, must rely on social security benefits. The remaining third are able to claim not only for their full financial loss but also for their pain and suffering. The question then to ask is: 'When allocating further resources to accident victims, should more money be spent on those already able to claim damages by giving them more for their pain and suffering?'

Similarly, a second question, although taking a narrower focus, could still attack the priority now given to PSLA.¹⁵ It asks people to place in order of importance the losses which they might choose to insure themselves against if they were to take out a policy against being involved in an accident causing personal injury. Which would they regard as the most important loss to insure against: an interruption in earnings; the cost of medical and other care; or PSLA? ... It is clear that those who are knowledgeable about the risks of accident or illness, and seek policies to protect themselves against such eventualities, do not wish to pay much higher premiums for a type of loss for which money cannot easily provide a substitute. If it were left to market forces there would be no cover for PSLA. ...

The second of the 'alternative questions' proposed by Lewis recalls a hypothetical scenario used by P. S. Atiyah in his essay, 'Personal Injuries in the Twenty First Century: Thinking the Unthinkable', in P. B. H. Birks (ed.), *Wrongs and Remedies in the Twenty-First Century* (Oxford University Press, 1996). Atiyah proposed that, if an insurance salesman were to try to sell the tort system door to door, he would have very few takers for the 'policy' it offers, given its costs. Its coverage is far too patchy, leaving the majority of accident victims uncompensated chiefly because of its dependence on showing fault, and providing very expensive benefits only to a lucky few. Atiyah's argument is that it is wrong to force people to pay for a level of 'insurance cover' that they would not buy if left to their own devices—*particularly* if that cover is so full of holes that there is only a 33 per cent chance of recovering under the policy. On this view, the costs of tort law are accepted by the general public only because they are hidden. The appearance (that tort attaches costs to those who wrongfully cause injury) is deceptive.

From April 2013, general damages were strategically increased by 10 per cent across the board. This was not because they were considered too low. Rather, the increase was part of a package of measures designed to provide a new approach to litigation funding, and recommended by Lord Justice Jackson following his extensive review of litigation costs and funding.¹⁶ A number of other key recommendations of that review have been enacted in the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which came into force in April 2013. But the statute did not itself provide for the increase in damages. In *Simmons v Castle* [2012]

EWCA Civ 1039, the Court of Appeal *announced* that general damages in almost¹⁷ all civil claims for pain and suffering, loss of amenity, physical inconvenience and discomfort, social discredit, and mental distress, would be 10 per cent higher than previously, with effect from 1 April 2013. The division of roles between courts and legislature here is unusual, and as the Court of Appeal pointed out, it reflects the close involvement of the judiciary in designing the new costs regime.

Lord Judge CJ (giving judgment of the court), *Simmons v Castle*

[2012] EWCA Civ 1039

- 15 ... the increase we are laying down arises from a different set of facts from those in *Heil v Rankin*. It is attributable to the forthcoming change in the civil costs regime initiated by Sir Rupert Jackson's reforms, as accepted by the executive and enacted by the legislature. As already explained, the increase was recommended by Sir Rupert as an integral part of his proposed reforms, which were unconditionally endorsed and supported as such by the judiciary publicly, and it was plainly on the basis that the 10 per cent increase would be formally adopted by the judiciary that the 2012 Act was introduced and enacted.
- 16 This is, no doubt, an unusual basis on which to rest a judgment or to adjust guidelines. However, the recommendation to adjust the level of damages arises from a report prepared by a judge, which was initiated by the judiciary (as it was Lord Clarke of Stone-cum-Ebony, who, as Master of the Rolls, initiated Sir Rupert's report) and which contains policy recommendations, which is itself unusual (and, we would add, can only be justified in relation to a topic as closely concerned with the administration of, and access to, justice, as legal costs). With the exception of the 10 per cent increase in general damages, the great bulk of those policy recommendations have been adopted in full by the legislature in an Act sponsored by the executive, on the clear understanding that the judges would implement the 10 per cent increase. It would therefore be little short of a breach of faith for the judiciary not to give effect to the 10 per cent increase in damages recommended by Sir Rupert.

The reforms as a whole are explored in Section 6

p. 554 2 Death and Damages: Where the Injured Party Dies

At common law, causes of action were treated as personal. Where death was concerned, this had two important consequences. First, the death of either party extinguished a civil claim. Second, death could not give rise to a right of action for the benefit of others. In both respects, the position has been reformed by statute.

In this section, we consider the relevant issues in three stages:

1. In what circumstances does a civil claim survive the death of the victim of the tort? The answer to this question is governed by the Law Reform (Miscellaneous Provisions) Act 1934.

2. In what circumstances does causing death create a right of action? And who benefits from such an action? The answers to these questions are governed by the Fatal Accidents Act 1976.
3. How has the development of domestic remedies for failure to protect life under Article 2 ECHR affected the picture? These remedies, though not modelled on tort, are provided by the HRA for effectively 'tort-like' failures on the part of public authorities. They are available to a wider range of claimants than the tortious remedies above.

2.1 Claims Surviving Death

Law Reform (Miscellaneous Provisions) Act 1934

1 Effect of death on certain causes of action¹⁸

- (1) Subject to the provisions of this section, on the death of any person after the commencement of this Act all causes of action subsisting against or vested in him shall survive against, or, as the case may be, for the benefit of, his estate. Provided that this subsection shall not apply to causes of action for defamation ... [(1A) The right of a person to claim under section 1A of the Fatal Accidents Act 1976 (bereavement) shall not survive for the benefit of his estate on his death.]
- (2) Where a cause of action survives as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person:—
 - (a) [shall not include—
 - (i) any exemplary damages;
 - (ii) any damages for loss of income in respect of any period after that person's death;]
 - (b) ...
 - (c) where the death of that person has been caused by the act or omission which gives rise to the cause of action, shall be calculated without reference to any loss or gain to his estate consequent on his death, except that a sum in respect of funeral expenses may be included.
- (4) Where damage has been suffered by reason of any act or omission in respect of which a cause of action would have subsisted against any person if that person had not died before or at the same time as the damage was suffered, there shall be deemed, for the purposes of this Act, to have been subsisting against him before his death such cause of action in respect of that act or omission as would have subsisted if he had died after the damage was suffered.
- (5) The rights conferred by this Act for the benefit of the estates of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by [the Fatal Accidents Act 1976 ...] and so much of this Act as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said Acts as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1) of this section.
- (6) In the event of the insolvency of the estate against which proceedings are maintainable by virtue of this section, any liability in respect of the cause of action in respect of which the proceedings are maintainable shall be deemed to be a debt provable in the administration of the estate ...

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Section 1(4) is confusing at first sight, but it deals with two important situations. First, not uncommonly—for example, in a road traffic accident—the tortfeasor dies as a result of his own tort, ‘before or at the same time as’ the injury to the claimant. Second, harm to the victim may be delayed, and the tortfeasor may die (possibly for entirely unrelated reasons) before the cause of action accrues. In both situations, section 1(4) ensures that the action arises notwithstanding the death of the tortfeasor, even if it did not accrue before his or her death.

The statute applies to all causes of action in tort except defamation, and is not confined to personal injury. In defamation claims, it remains the case that the death of either party extinguishes the claim.

The effect of this statute is that a claim which has accrued before death will survive for the benefit of the estate of the deceased victim, subject to a few exclusions. Any reduction in damages on account of contributory negligence will also apply to a claim brought by the estate.

Recoverable Damages

There are certain important exclusions from the damages recoverable under the 1934 Act. Exemplary damages (which are ‘punitive’ rather than compensatory) may not be claimed after the death of either party. Section 1(2)(c) provides that no loss to the *estate* of the deceased may be claimed under the Act, with the exception of a sum for funeral expenses. This is to avoid duplication with the Fatal Accidents Acts, which confer certain rights of action upon dependants in their own right. On the other hand, some losses now (as a matter of legislative policy) fall between the Acts and are not the subject of compensation under either.

In our account of compensatory damages for personal injury, we considered *Pickett v British Engineering Ltd* [1980] AC 136, and the decision that a claimant could recover damages for income that would have been earned in the ‘lost years’, if his life expectancy was cut short. In *Gammell v Wilson* [1982] AC 27, the House of Lords held that such a claim for income in ‘the lost years’ survived under the 1934 Act for the benefit of the estate, as it accrues before the claimant’s death. The new section 1(2)(a)(ii), inserted by the Administration of Justice Act 1982, section 4, reversed the effect of *Gammell v Wilson*, in order to avoid double recovery by dependants via the Fatal Accidents Act 1976 (for loss of dependency) and the 1934 Act (through the survival of the action).

The Administration of Justice Act 1982 also abolished recovery of damages for ‘loss of expectation of life’ in its own right. But it provided that general damages for pain and suffering awarded to a claimant may be increased if awareness of reduced life expectancy added to the claimant’s suffering.

Administration of Justice Act 1982

1 Abolition of right to damages for loss of expectation of life

- (1) In an action under the law of England and Wales or the law of Northern Ireland for damages for personal injuries—
 - (a) no damages shall be recoverable in respect of any loss of expectation of life caused to the injured person by the injuries; but
 - (b) if the injured person's expectation of life has been reduced by the injuries, the court, in assessing damages in respect of pain and suffering caused or likely to be caused to him by awareness that his expectation of life has been so reduced.
- (2) The reference in subsection 1(a) above to damages in respect of loss of expectation of life does not include damages in respect of loss of income.

The interaction of this section with the provisions of the 1934 Act is considered in the following case.

Hicks v Chief Constable South Yorkshire Police

[1992] 2 All ER 65

Lord Bridge of Harwich

My Lords, the appellants are the parents of two girls, Sarah and Victoria Hicks, who died in the disaster at Hillsborough Football Stadium on 15 April 1989 when they were respectively 19 and 15 years of age. In this action they claim damages under the Law Reform (Miscellaneous Provisions) Act 1934 for the benefit of the estate of each daughter of which they are in each case the administrators. The respondent is the Chief Constable of the South Yorkshire Police who does not contest his liability to persons who suffered damage in the disaster. The basis of the claim advanced here is that at the moment of death Sarah and Victoria each had an accrued cause of action for injuries suffered prior to death which survived for the benefit of their respective estates. The action was tried by Hidden J who held that the plaintiffs had failed to prove that either girl suffered before death any injury for which damages fell to be awarded. His decision was affirmed by the Court of Appeal (Parker, Stocker and Nolan LJ) (see [1992] 1 All ER 690). Appeal is now brought to your Lordships' House by leave of the Court of Appeal.

...

p. 557

← The difficulty which immediately confronts the appellants in this House is that the question what injuries Sarah and Victoria suffered before death was purely one of fact and Hidden J's conclusion on the evidence that the plaintiffs had failed to discharge the onus of proving any such injury sufficient to attract an award of damages was a finding of fact affirmed by the Court of Appeal. The appellants must therefore persuade your Lordships to reverse those concurrent findings if they are to succeed ... The evidence here showed that both girls died from traumatic asphyxia. ... Medical evidence which the judge accepted was to the effect that in cases of death from traumatic asphyxia caused by crushing the victim would lose consciousness within a matter of seconds from the crushing of the chest which cut off the ability to breathe and would die within five minutes. There was no indication in the post mortem reports on either girl of physical injuries attributable to anything other than the fatal crushing which caused the asphyxia, save, in the case of Sarah, some superficial bruising which, on the evidence, could have occurred either before or after loss of consciousness. Hidden J was not satisfied that any physical injury had been sustained before what he described as the 'swift and sudden [death] as shown by the medical evidence'. Unless the law were to distinguish between death within seconds of injury and unconsciousness within seconds of injury followed by death within minutes, which I do not understand to be suggested, these findings, as Hidden J himself said 'with regret', made it impossible for him to award any damages.

Mr Hytner sought to persuade your Lordships, as he sought to persuade the Court of Appeal, that on the whole of the evidence the judge ought to have found on a balance of probabilities that there was a gradual build-up of pressure on the bodies of the two girls causing increasing breathlessness, discomfort and pain from which they suffered for some 20 minutes before the final crushing injury which produced unconsciousness. This should have led, he submitted, to the conclusion that they sustained injuries which caused considerable pain and suffering while they were still conscious and

which should attract a substantial award of damages. The Court of Appeal ... carefully reviewed the evidence and concluded, in agreement with Hidden J, that it did not establish that any physical injury was caused before the fatal crushing injury. I do not intend myself to embark on a detailed review of the evidence. In the circumstances I think it sufficient to say that, in my opinion, the conclusion of fact reached by Hidden J and the Court of Appeal was fairly open to them and it is impossible to say that they were wrong.

A good deal of argument in the courts below and before your Lordships was addressed to the question whether damages for physical injuries should be increased on account of the terrifying circumstances in which they were inflicted. This may depend on difficult questions of causation. But on the facts found in this case the question does not arise for decision. It is perfectly clear law that fear by itself, of whatever degree, is a normal human emotion for which no damages can be awarded. Those trapped in the crush at Hillsborough who were fortunate enough to escape without injury have no claim in respect of the distress they suffered in what must have been a truly terrifying experience. It follows that fear of impending death felt by the victim of a fatal injury before that injury is inflicted cannot by itself give rise to a cause of action which survives for the benefit of the victim's estate.

p. 558 The premise of this decision is that fear of death—or knowledge of shortened life expectancy—can only justify an *increase* in damages for pain and suffering (under section 1(1)(b) of the Administration of Justice Act 1982) if there is a valid claim for pain and suffering in the first place. Fear itself cannot be the basis of a claim for damages. Given the terms of ↵ section 1(1)(b), there is little scope to argue with this aspect of the decision. More controversial is the idea that pain endured only for a few seconds, before unconsciousness intervenes, is *not sufficient* to give rise to an action in damages. Given this interpretation, no cause of action on the part of the daughters had accrued before their deaths, so that the only damage recoverable under the Law Reform (Miscellaneous Provisions) Act 1934 was the cost of funeral expenses. Although there is some scope for disagreement with this second stage in the reasoning, it is nevertheless quite logical and is probably designed to avoid closely picking over the circumstances of death, to determine exactly how much the deceased 'suffered'. So why does the decision in *Hicks* seem intuitively unjust?

Arguably, the action brought by the claimants in this case is artificial. Their real complaint perhaps is that the defendant, through negligence, caused the death of their daughters. If so, the action would be better regarded as an action for bereavement, which is not an action that 'survives' the victim's death for the benefit of his or her estate; it is an action on the part of the relatives themselves, arising from the death of a loved one. As such, it is governed by the Fatal Accidents Act 1976 (below). In truth then, it may be the limited recoverability of bereavement damages which chiefly causes the sense of injustice arising out of *Hicks*. Bereavement damages are low because they do not truly attempt to compensate for the loss suffered. 'Real' compensation would be simply impossible. At the same time, they are not available at all in respect of certain deaths. Even parents can only claim bereavement damages in respect of a minor child, and the older daughter in this case was, at 19, not a minor. The sense of bereavement will not be sharply dependent on the age of the deceased.

The HRA, which was not then in existence, adds a further dimension. HRA damages are more flexible in respect of the relationships to which they apply; but the *amount* of damages recoverable tends to be no higher. It is worth noting that the state's duties in relation to Article 2 of the European Convention on Human Rights

(ECHR) include a duty to investigate any death which 'engages' Article 2. The deaths here were related to police negligence and therefore to failures on the part of a public authority. Relatives in a future case such as this may be inclined to seek an enquiry into the deaths which satisfies the requirements of Article 2 ECHR, as developed by the Strasbourg court.¹⁹

2.2 Claims for the Death of Another

By the Fatal Accidents Act 1976, two distinct actions are defined in respect of the death of another.²⁰

- Section 1 defines a cause of action on the part of 'dependants' of the deceased (a category defined in the section), for **loss of dependency**. Loss of dependency is essentially pecuniary in nature.
- Section 1A defines a cause of action for **bereavement**. Bereavement is non-pecuniary in nature, and the damages available are set at a conventional sum of (for the time being) £11,800. Only those people listed in section 1A have the benefit of a claim for bereavement.

The parties with a cause of action for loss of dependency under section 1 will not necessarily have a cause of action for bereavement under section 1A, and vice versa. They are separately defined.

p. 559 **Section 1: Dependency Damages****Fatal Accidents Act 1976****1 Right of action for wrongful act causing death²¹**

- (1) If death is caused by any wrongful act, neglect or default which is such as would (if death had not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.
- (2) Subject to section 1A(2) below, every such action shall be for the benefit of the dependants of the person ('the deceased') whose death has been so caused.
- (3) In this Act 'dependant' means—
 - (a) the wife or husband or former wife or husband of the deceased;[(aa)the civil partner or former civil partner of the deceased;]²²
 - (b) any person who—
 - (i) was living with the deceased in the same household immediately before the date of the death; and
 - (ii) had been living with the deceased in the same household for at least two years before that date; and
 - (iii) was living during the whole of that period as the husband or wife of the deceased;
 - (c) any parent or other ascendant of the deceased;
 - (d) any person who was treated by the deceased as his parent;
 - (e) any child or other descendant of the deceased;
 - (f) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
 - [(fa) any person (not being a child of the deceased) who, in the case of any civil partnership in which the deceased was at any time a civil partner, was treated by the deceased as a child of the family in relation to that civil partnership]
 - (g) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.
- (4) The reference to the former wife or husband of the deceased in subsection (3)(a) above includes a reference to a person whose marriage to the deceased has been annulled or declared void as well as a person whose marriage to the deceased has been dissolved.

- (4A) [The reference to the former civil partner of the deceased in subsection (3)(aa) above includes a reference to a person whose civil partnership with the deceased has been annulled as well as a person whose civil partnership with the deceased has been dissolved.]
- (5) In deducing any relationship for the purposes of subsection (3) above—
 - (a) any relationship by affinity shall be treated as a relationship by consanguinity, any relationship of the half blood as a relationship of the whole blood, and the stepchild of any person as his child, and
 - (b) an illegitimate person shall be treated as the legitimate child of his mother and reputed father.
- (6) Any reference in this Act to injury includes any disease and any impairment of a person's physical or mental condition.

Section 1(3)(b) has survived a challenge on the basis that it is incompatible with the HRA. The claimant in *Swift v Secretary of State for Justice* [2013] EWCA Civ 193 was living with the deceased when the latter was killed in an accident at work, but they had not been cohabiting for two years as required by section 1(3)(b)(ii). Their son, who was born after the death of his father, was able to claim as a dependent; but his mother could not. She argued that this violated her rights under Article 14 ECHR (non-discrimination), together with Article 8 ECHR (protection of private and family life). Though accepting that the subsection might give rise to 'some results which many would regard as unjust', the Court of Appeal concluded that there was no such violation: the legislation raised 'difficult issues of social and economic policy', and it was legitimate for the legislature to require a degree of permanence in relationships to which the legislation would apply. Nor was the qualifying period of two years either disproportionate or arbitrary. In the words of Lord Dyson, 'the requirement of habitation for two years is a simple way of demonstrating a real relationship of constancy and permanence' ([37]). Parliament 'was entitled to prefer a bright-line distinction to an approach which depended on fact-sensitive decisions in each case' ([39]).

Fatal Accidents Act 1976

1A Bereavement²³

- (1) An action under this Act may consist of or include a claim for damages for bereavement.
- (2) A claim for damages for bereavement shall only be for the benefit—
 - (a) of the wife or husband [or civil partner] of the deceased;
 - (aa) of the cohabiting partner of the deceased; and
 - (b) where the deceased was a minor who was never married or a civil partner —
 - (i) of his parents, if he was legitimate; and
 - (ii) of his mother, if he was illegitimate.
- (2A) In subsection (2) ‘*cohabiting partner*’ means any person who—
 - (a) was living with the deceased in the same household immediately before the date of the death; and
 - (b) had been living with the deceased in the same household for at least two years before that date; and
 - (c) was living during the whole of that period as the wife or husband or civil partner of the deceased.
- (3) Subject to subsection (5) below, the sum to be awarded as damages under this section shall be [£15,120].²⁴
- (4) Where there is a claim for damages under subsection (2)(a) and (aa), or under subsection (2) (b), for the benefit of more than one person, the sum awarded shall be divided equally between them (subject to any deduction falling to be made in respect of costs not recovered from the defendant).
- (5) The Lord Chancellor may by order made by statutory instrument, subject to annulment in pursuance of a resolution of either House of Parliament, amend this section by varying the sum for the time being specified in subsection (3) above.

It will be apparent that a limited range of people is entitled to bereavement damages. Before the recent changes to this provision, introduced in 2020, they were still more limited, not extending to co-habiting partners even if they had lived together for over two years. If an unmarried adult, without a civil partner, was killed, and had no children, then there was often no person who could claim bereavement damages. The revisions followed the decision of the Court of Appeal in *Smith v Lancashire Hospitals NHS Trust* [2017] EWCA Civ 1916. This case concerned the death, through admitted negligence of the defendant, of someone who had cohabited with the claimant for 11 years. The Court of Appeal made a declaration, under s.4 Human Rights Act 1998,²⁵ that s1A(2)(a) Fatal Accidents Act, as it was then drafted, was incompatible with art.8 ECHR, since it

was connected to the core rights under art.8, in conjunction with art.14, relating to discriminatory treatment. Although the benefit of bereavement damages was not compelled by the terms of the Convention, their unavailability to the claimant was discriminatory.

Bereavement damages represent a conventional sum, which may be described as compensatory only in a limited sense. The sum is varied periodically by Order. As can be seen from the extract from the Fatal Accidents Act above, this has occurred most recently (at the time of writing) in 2020.

Issues Arising in Respect of Dependency Damages

Relationship between the Section 1 Claim, and a Claim by the Deceased

The action arising under section 1 is an action on the part of dependants in their own right, but by section 1(1) the action will exist only if the deceased, had he or she been injured rather than killed, could have brought an action. A number of issues flow from this.

1. If the claim of the deceased was *time-barred* under the applicable Limitation Act at the time of their death, then the dependants have no action. However, provided the claim is not time-barred at the date of death, the dependants have three years from the death in which to bring a claim (Limitation Act 1980, section 12(2)).
- p. 562 2. It is expressly provided by section 5 of the Fatal Accidents Act 1976 that if damages payable to the deceased would in the circumstances have been reduced by reason of contributory negligence, any damages payable under the Act will also fall to be reduced in the same way.
3. Particular problems arise where more than one tortfeasor is potentially liable for the harm suffered, and the deceased person has settled their claim against one of those parties.

***Jameson v CEBG* [2000] 1 AC 455**

A few days before his death from malignant mesothelioma, J agreed to accept a payment of £80,000 from his former employer B, in 'full and final settlement and satisfaction of all the causes of action in respect of which the plaintiff claimed in the statement of claim'.

The full value of the claim was much greater than £80,000. After J's death, his widow commenced proceedings under the Fatal Accidents Act 1976, section 1 against another former employer, the defendant in this action.

The two employers, the defendant and B, were 'concurrent tortfeasors'. They had committed separate torts, but were each potentially liable in full for the same indivisible damage to which they were to be treated as having made a material contribution.²⁶ By section 4 of the Fatal Accidents Act 1976, the plaintiff if she had succeeded in her action would not have had to account for the benefit that she gained, via her husband's estate, from his settlement of the claim against B:

4 Assessment of damages; disregard of benefits

In assessing damages in respect of a person's death in an action under this Act, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.

There was a chance of over-compensation.

Furthermore, because the two employers were potentially liable *in respect of the same damage*, the provisions of the Civil Liability (Contribution) Act 1978 would apply.²⁷ The defendant, if found liable to the claimant, could claim contribution from B, who had already settled the claim (admittedly below its full value) against the deceased.²⁸

p. 563 The House of Lords decided that the widow could not satisfy the terms of section 1(1) of the Fatal Accidents Act 1976, requiring that the deceased would have had a claim against the defendant had he not died. He would not have had such a claim, because he had settled ↵ his claim in full against B. His hypothetical claim against the defendant was thus precluded. This was *not*, however, because the terms of the settlement with B in any sense 'bound' the deceased not to pursue another tortfeasor—such as the defendant—in separate proceedings. The agreement made no mention of any other tortfeasor. Rather, it was because the deceased's claim for damages was *treated* as having been satisfied in full, even though the full *value* of the claim had clearly not been received.

A later House of Lords in *Heaton v Axa Equity and Law* [2002] UKHL 15; [2002] 2 WLR 1081 (which did not concern a claim under the Fatal Accidents Act) emphasized that *Jameson* laid down no *general* rule. It is not the case that a settlement against one tortfeasor necessarily precludes an action against another concurrent tortfeasor. The question in each case will be whether the claim has been satisfied in full by the settlement. In *Jameson*, it was the deceased's 'loss' which was treated as having been extinguished by the terms and intention of the agreement. In *Heaton*, Lord Bingham proposed that the proposition that '[a] sum accepted in settlement of such a claim may also fix the full measure of a claimant's loss' 'may perhaps have been stated a little too absolutely in *Jameson*' (Lord Bingham, *Heaton v Axa*, at [8]).²⁹

In fact, the reasoning in *Jameson* is none too convincing. It does not seem natural to argue that a settlement at a clear undervalue is intended by both parties to 'extinguish the loss', where there is another party against whom to proceed. After *Heaton*, the way is open for courts to interpret settlements in a less 'absolute' fashion.

Suicide

It is clear that an action for dependency damages may be available even if the deceased committed suicide, provided the usual criteria for liability (including remoteness of damage) are satisfied: *Reeves v Commissioner of Police for the Metropolis* [2000] 1 AC 360 (Chapter 6). In *Corr v IBC* [2006] EWCA Civ 331; (2006) 2 All ER 929, the deceased had been injured through an accident at work and eventually committed suicide in response to depression. Death was within the 'compensable damage' flowing from the injury. On the other hand, three members of the House thought that a deduction for contributory negligence would be appropriate: Chapter 7.

Damages Payable to Dependants

The Act is fairly general in its outline of the damages that will be recoverable:

3 Assessment of damages

- (1) In the action such damages, other than damages for bereavement, may be awarded as are proportioned to the injury resulting from the death to the dependants respectively.

...

p. 564 The general principle is that damages should reflect *what each dependant has actually lost through the death of the deceased*. This process is highly fact-sensitive. The simplest approach is to calculate what income has been lost through the death, chiefly in the form of lost income ← but with deduction for the living expenses and other outlay that the deceased would have incurred, and then to share this between the dependants appropriately. This may involve complex calculation, since the court must arrive at a multiplier and multiplicand in respect of the deceased (what would have happened to the deceased but for the accident?), and must then assess the expectations of the various claimants. Would a spouse or partner, for example, have survived long enough to have the benefit of the deceased's pension? And at what age would a child cease to be maintained by a parent?

In *Haxton v Phillips* [2014] EWCA Civ 4, a widow whose husband had died of mesothelioma was herself diagnosed with the same disease, which was found to be due to breaches of duty by the same defendant: she had contracted the disease through exposure to dust on her husband's overalls. Strikingly, the defendants argued that she could not claim loss of dependency because, through their breach of duty, her life expectancy had been radically curtailed. This would be the effect of the statutory language, if claiming under the statute. However, the Court of Appeal rejected this argument: the loss of a statutory claim for dependency could form part of the widow's *common law* claim in respect of the breach of duty to her, even though the statutory claim in its own right would now fail.

Where deductions are concerned, the law is more generous to those claiming dependency damages, than it is to those claiming in respect of injuries to themselves. By section 4 of the Fatal Accidents Act (extracted above in respect of *Jameson*), no account is to be taken of benefits accruing to the dependant as a consequence of the death. Case law on this point has seemed inconsistent.

In *Auty v National Coal Board* (1985) 1 WLR 784 (CA), the claimant received widow's benefits from her husband's pension fund on his death. Subsequently, in an action under the Fatal Accidents Act, she was clearly able to claim in respect of sums her husband would have *earned* but for his death. There would be no deduction from this sum for the widow's benefits received: they came within section 4. However, she could not *also* claim, on the basis of lost dependency, for a widow's pension that she would have received if her husband had lived until retirement age, and then predeceased her. She was entitled to receive widow's benefits only once—*either* on the event of her husband's death in service (as was the case), *or* in the event of his death in retirement. The court reasoned that there was no 'loss of dependency' arising from the death in respect of the widow's benefits, because she had herself received the alternative payment at an earlier stage. There was no 'injury' within section 3.

In *Harland and Wolff Plc v McIntyre* [2006] EWCA Civ 287, the claimant's husband died of mesothelioma through exposure to asbestos in breach of duty on the part of the appellants. When he became aware of his fatal cancer, he decided to return home and his employment was therefore terminated on grounds of ill health. At this stage he received a payment from the company's Provident Fund. Had he remained in employment, he would have received a payment from the same fund on his retirement. The Court of Appeal held that his widow could claim for loss of dependency in the form of the lost benefits on retirement, and that she did not have to account for the benefits received by the deceased on termination of employment. These fell to be disregarded, in accordance with section 4. *Auty* was distinguished because it was treated as being concerned with the widow's own benefits under the relevant scheme, and not (as here) with benefits paid to the deceased and accruing to the widow through his estate. There is no denying that in *Harland and Wolff*, the widow is allowed to receive substantially the same benefits twice over. But double counting is in some circumstances an inevitable result of section 4.

p. 565 More recently in *Arnup v White* [2008] EWCA Civ 447; [2008] ICR 1064, the Court of Appeal resoundingly accepted this claimant-friendly interpretation of the intention behind ↵ section 4. Applying the section, payments made under an employer's death-in-service and life insurance schemes were disregarded.³⁰ If they were to be treated as benefits 'accruing as a result of the death of the employee' then they were within section 4 and should not be deducted. But the Court of Appeal went much further in its interpretation of the Act, holding that if (in the alternative) the benefits did not result from the death, there was no reason at all to deduct them from a Fatal Accidents Act award. Either way, they should not be deducted.

Auty was not mentioned. But it will be recalled that in that case, the widow had sought to recover for loss of her own future pension rights (a post-retirement widow's pension), when she had already qualified for a widow's pension on her husband's death. There was no loss of her own rights as a consequence of the tort, and that is why this element of the claim could not succeed. *Auty* now seems to be of relatively narrow application, given the approach in *Arnup*.

2.3 Death and Damages Under the HRA 1998

The availability of a civil action for damages under the HRA brings with it a new potential route to liability on the part of 'public authorities' (though not other parties), in cases involving death. In Chapter 5.3, we visited the cases of *Savage* and *Rabone*, and explained the nature of the positive operational duty to protect life which arises under Article 2 ECHR ('right to life'). Though HRA damages are not calculated on the same basis as tort damages, damages awarded under Article 2 invite comparison with bereavement damages in domestic law. Most importantly for the present section, the range of individuals who can bring proceedings in relation to violation of Article 2 is much broader than the category of potential claimants of bereavement damages under the Fatal Accidents Act 1976. A potential claimant need show only that he or she is a 'victim' of a violation of a relevant Convention right, and the category of victim is interpreted in accordance with Strasbourg principles. In *Savage* and *Rabone*, parents of adult victims were able to recover damages to 'mark' the violation, which would not be possible under domestic legislation. In *Morgan v Ministry of Justice* [2010] EWHC 2248 (QB), a fiancée was accepted to be a victim; in the absence of an engagement, the facts would have been scrutinized in order to determine whether or not 'victim' status was established. This is the route not taken by domestic law on bereavement (*Swift*, Section 2.2 of this chapter).

In terms of quantum, how closely do damages for violation of Article 2 resemble bereavement damages? They have, to date, been slightly lower than bereavement damages. In *Savage v South Essex Partnership NHS Foundation Trust* [2010] PIQR P14, Mackay J awarded £10,000, noting that this was in effect a ‘symbolic acknowledgement’ in relation to the death and the violation of the right. In *Rabone v Pennine Care NHS Trust* [2012] UKSC 2, the Supreme Court approved the Court of Appeal’s award of £5,000 to each of two bereaved parents, though noting that no appeal had been made on quantum. Lord Dyson suggested that the award was too low. Unlike tort damages, it appears that quantum may be sensitive to the closeness of family ties, and the gravity of the breach of Article 2. This is consistent with a more general point, that HRA damages reflect all aspects of the case, including the nature of the breach. While performing some of the same functions as bereavement damages, and being reasonably close to those damages in their size to date, they are therefore more flexible ↩ and—unlike bereavement damages—sensitive to many factors and to the experience of awards in Strasbourg. It is relevant, for example, that the violation in these cases was one of failure to safeguard, rather than direct infliction of harm. There is more general discussion of HRA damages in Section 5 of this chapter.

3 Delivery of Compensatory Damages: Lump Sum or Periodical Payments

3.1 Relevant Legislation

At common law, damages are paid solely by means of a single lump sum. The award is final, and should it prove to be insufficient (because the claimant’s condition deteriorates, or they live far longer than expected), or excessive (because they recover quickly, or because they die earlier than expected), then it is simply too late to make any adjustment. An important but limited statutory exception to this was created by the Administration of Justice Act 1982, which inserted the following provision into what is now the Senior Courts Act 1981.

Senior Courts Act 1981

32A Orders for provisional damages for personal injuries

- (1) This section applies to an action for damages for personal injuries in which there is proved or admitted to be a chance that at some definite or indefinite time in the future the injured person will, as a result of the act or omission which gave rise to the cause of action, develop some serious disease or suffer some serious deterioration in his physical or mental condition.
- (2) Subject to subsection (4) below, as regards any action for damages to which this section applies in which a judgment is given in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to award the injured person—
 - (a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and
 - (b) further damages at a future date if he develops the disease or suffers the deterioration.

...

Clearly, this section permits variation in respect of *an identified contingency* of a particular type. That is, it must be established or accepted that the claimant may at some time in the future suffer a serious disease, or experience a significant deterioration in their condition, as a result of the tort. In these circumstances, provisional damages are wholly appropriate. If damages were awarded on the basis of the percentage chance of developing the serious disease or condition, it would be perfectly clear that these damages would turn out to be *either* wholly excessive (the disease or condition does not develop), *or* wholly inadequate (it *does* develop, and only proportionate damages have been awarded).

p. 567 Subsequently, there has been a more far-reaching development in the law, which has extended the ability of the court to make an order for **periodical payments** in place of a ↵ lump sum, or in respect of certain elements of the award. This has only grown in importance as problems with calculating the 'discount rate' applicable to lump sums have intensified with economic conditions.

The following provision of the Damages Act 1996 (substituted by section 100 of the Courts Act 2003 and SI 2005/841) took effect in April 2005. It *requires* courts to consider whether to make an order for periodical payments of damages, rather than a lump sum; and it *permits* the court to make such an order, whether or not the parties have agreed that this would be preferable.

Damages Act 1996

2 Periodical payments

A court awarding damages for future pecuniary loss in respect of personal injury—

- (a) may order that the damages are wholly or partly to take the form of periodical payments, and
- (b) shall consider whether to make that order.

Formerly, section 2 allowed a court to make an order for periodical payments *only* with the consent of both the parties.³¹

3.2 Potential Advantages of Periodical Payments

In *Wells v Wells* (extracted earlier), Lord Steyn strongly criticized the almost universal award of damages through lump sums, and supported the greater use of orders for periodical payments.

Lord Steyn, *Wells v Wells* [1999] 1 AC 345, at 384

Leaving to one side the policy arguments for and against the 100 per cent. principle, there is a major structural flaw in the present system. It is the inflexibility of the lump sum system which requires an assessment of damages once and for all of future pecuniary losses. In the case of the great majority of relatively minor injuries the plaintiff will have recovered before his damages are assessed and the lump sum system works satisfactorily. But the lump sum system causes acute problems in cases of serious injuries with consequences enduring after the assessment of damages. In such cases the judge must often resort to guesswork about the future. Inevitably, judges will strain to ensure that a seriously injured plaintiff is properly cared for whatever the future may have in store for him. It is a wasteful system since the courts are sometimes compelled to award large sums that turn out not to be needed. It is true, of course, that there is statutory provision for periodic payments: see section 2 of the ↵ Damages Act 1996. But the court only has this power if both parties agree. Such agreement is never, or virtually never, forthcoming. The present power to order periodic payments is a dead letter. The solution is relatively straightforward. The court ought to be given the power of its own motion to make an award for periodic payments rather than a lump sum in appropriate cases. Such a power is perfectly consistent with the principle of full compensation for pecuniary loss. Except perhaps for the distaste of personal injury lawyers for change to a familiar system, I can think of no substantial argument to the contrary. But the judges cannot make the change. Only Parliament can solve the problem.

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Periodical payments have the following advantages over lump sums.

1. They are less wasteful. This is because they do not (in their present form) require a calculation of the claimant's life expectancy, which may turn out to be incorrect. So those parts of the award which relate to care costs, for example, may be seriously over-estimated in a lump sum award. Periodical payments,

on the other hand, will simply cease when the claimant dies, so that there is no wasteful expenditure on costs that will never be incurred.

2. They provide the claimant with security, since there is no need to seek investment advice and manage a capital sum to produce income. The award cannot be frittered away. Clearly, the order will provide security *only* if the payments are made from a reliable source, and courts must consider this when making an order:

Damages Act 1996

2(3) A court may not make an order for periodical payments unless satisfied that the continuity of payment under the order is reasonably secure.

NHS Litigation Authorities have been the most significant users of periodical payment orders, although they are reportedly also used by insurers—and particularly motor insurers, including the MIB.³²

3. Periodical payments are in one important respect cheaper for defendants to provide. The interest on lump sums invested by claimants is subject to tax. In order to achieve 100 per cent compensation, the lump sum award is therefore increased to take account of this future and continuing tax on interest. Periodical payments are tax-free in the hands of the claimant. Thus, the increase in respect of tax will not apply to periodical payments. This is, in fact, of no benefit to the claimant, and it means lower revenue to the Exchequer. But it results in lower costs to tortfeasors or their insurers.
4. The order for periodical payments must aim to ensure that they are increased over time to ensure that the claimant is not left under-compensated in future years. However, periodical payments are not inherently sensitive to changes in needs or circumstances. By the statutory instrument extracted below, a court may provide at the time of making an order for periodical payments that it may be varied. This, like the order itself, does not require the consent of the parties. However, like the equivalent provision in respect of provisional damages in lump sums (Senior Courts Act 1981, section 32A), this will have effect *only* in circumstances where there is some identified contingency relating to the claimant's condition. Unlike that section, the contingency may take the form of *improvement* in the claimant's condition, as well as deterioration. There is scope for the periodical payments to be reduced.

p. 569

There are, however, problems of uncertainty that periodical payments cannot resolve. Obviously, no system for delivering damages could resolve the problem of uncertainty over *hypothetical matters*, or what *would have happened to the claimant if he or she had not suffered the accident*. This aspect of the calculation of 'what has been lost' will remain as uncertain under periodical payments as it does under a lump sum award.

3.3 Potential Problems of Periodical Payments

1. It is not obvious that the periodical payments will be cheaper overall. Their delivery will be more expensive, even if the total amount payable is less, since a fund will require long-term administration.

2. Although the payments are secure, the claimant loses the opportunity to invest a capital sum in such a way as to gain an above inflation rate of return. It could be argued that this flexibility is essential in order to protect against higher than inflation rates of increase in certain expenses, because of wage inflation.
3. There is a certain *loss of flexibility* in the hands of the claimant. Although there is provision for foreseen contingencies (in the nature of deterioration and improvement) there is no way of dealing with *unforeseen* circumstances. The claimant with a capital sum can, in principle, draw it down more quickly in certain circumstances. The recipient of periodical payments has no such options.
4. Periodical payments impose a continuing relationship on the claimant and defendant (or defendant's insurer). This may be unwelcome to either side. In *Wallace v Follett* [2013] EWCA Civ 146, the Court of Appeal intervened to set quite detailed terms of a periodical payment in relation to future medical examination (in order to update life expectancy), also requiring periodic letters to confirm the claimant's continued survival.
5. Periodical payments may not be sufficient to cover pecuniary losses in a case where there is a reduction in the award for contributory negligence. Nor is there the opportunity to attempt a high risk, high yield solution, as with a lump sum.

Despite this mixed picture, there is increasing interest in periodical payments as a solution to the mounting problems of assessing a lump sum that is properly adjusted to future economic circumstances. This is reflected in our earlier discussion of the 'discount rate'.

3.4 Protecting the Value of Periodical Payments

Where lump sums are concerned, no increase to the award is applied to allow for inflation. Money is assumed to 'hold its value' over time, and the capital sum is expected to grow in value so as to outstrip inflation. Rather, a discount to the multiplier is applied to account for ↵ investment opportunity. We noted that this discount is now more modest than it has been in the past; but that it is arguably too high for the economic conditions; and that it also creates a potential problem in respect of *expenses*, since no account is taken of the faster than inflation growth in wages, and thus in care costs (*Cooke v Bristol Healthcare Trust*).

In the case of periodical payments, no investment by the claimant is possible. Such payments must instead be 'index linked' to protect them from inflation. But the problem of care costs arises again, because index linking to general inflation may leave the recipient of these payments over-exposed to above inflation rises in the costs of care.

Damages Act 1996

Section 2³³

- (8) An order for periodical payments shall be treated as providing for the amount of payments to vary by reference to the retail prices index (within the meaning of section 833(2) of the Income and Corporation Taxes Act 1988) at such times, and in such a manner, as may be determined by or in accordance with Civil Procedure Rules.
- (9) But an order for periodical payments may include provision—
 - (a) disapplying subsection (8), or
 - (b) modifying the effect of subsection (8).

Tarlochan Singh Flora v Wakom (Heathrow) Ltd [2006] EWCA Civ 1103

The claimant was seriously injured at work. Liability was admitted. Only the form of the order for compensation, and the amount of compensation, were in issue.

The defendant argued that a court should *ordinarily* make the order identified in section 2(8) above, and that subsection (9) should only be triggered in exceptional circumstances. This would provide some symmetry between the approach to be taken in protecting the value of periodical payments and the approach to be taken in protecting the value of lump sums, through adjustments to the multiplier. The claimant argued to the contrary that the statutory language did not suggest a *presumption* that the approach in section 2(8) should be adopted, and that the court was free to substitute another approach whenever it thought this would be more appropriate. In addition, the claimant would be considerably under-compensated if his periodical payments were linked only to the retail price index (RPI). Rather, he should be able to argue at trial that linking to a wage-related index such as the Average Earnings Index (AEI) was a more appropriate mechanism for achieving 100 per cent compensation—and that 100 per cent compensation remained the aim of compensation whether it was delivered through periodical payments, or through a lump sum. The Court of Appeal accepted the claimant's argument, and rejected the analogy with the calculation of lump sums.

p. 571 In response to an argument that courts would as a consequence be besieged by an army of expert witnesses in the nature of accountants, actuaries, and economists (the very problem ← that a single discount rate was designed to prevent: *Cooke v Bristol Healthcare Trust*), Brooke LJ explained that this would be a temporary phenomenon:

- 33 ... if the experience of the past is any useful guide, it is likely that there will be a number of trials at which the expert evidence on each side can be thoroughly tested. A group of appeals will then be brought to this court to enable it to give definitive guidance in the light of the findings of fact made by a number of trial judges. The armies of experts will then be able to strike their tents and return to the offices or academic groves from which they came.

Tameside and Glossop Acute Services NHS Trust v Thompson [2008] EWCA Civ 5

Here, the Court of Appeal went further than it had in *Flora*, which was a decision about what the claimant could *argue*, and actually allowed the use of a different index from the RPI when making an order for periodical payments. This is consistent with the comments of Brooke LJ extracted above. The preferred index was the Annual Survey of Hours and Earnings (ASHE), an annual earnings survey, which was considered to be much more closely linked to rising care costs than the RPI. Perhaps bravely, the defendants had included among their arguments a proposal that a principle of ‘distributive justice’ could be seen at work in recent tort cases, and that this included a need to constrain the potentially enormous sums that might be needed to compensate a claimant with future care costs. The Court of Appeal rejected this argument. Though the social cost of compensation has indeed been recognized in a range of cases, this recognition could not be allowed to interfere with the ‘100 per cent principle’ once liability for personal injury had been established.

Waller LJ, *Tameside and Glossop v Thompson*

47. [The defendant’s] difficulty is that ‘distributive justice’ is not a principle of English law recently adopted so as to allow free rein to ignore basic principles long established. It may come into play when considering whether it is fair, just and reasonable to hold that a duty of care is owed (as in *Frost and Rees*) or in considering a public policy question such as damages for the birth of a healthy child (as in *McFarlane*). It is perhaps also understandable how it plays some part in considering the essentially judgmental question of whether the level of general damages should be increased (as in *Heil*), but this is all a far cry from seeking to influence the calculation of actual financial loss where the 100% recovery principle is fundamental. Once liability is established and once financial loss is being assessed, it is ‘corrective justice’ and not distributive justice with which the court should be concerned.

4 Non-compensatory Damages

Not all pecuniary awards in tort are compensatory in nature. Here, we address some of those that are not.³⁴

p. 572 4.1 Exemplary Damages

Exemplary (or ‘punitive’) damages go beyond what is required to make good the claimant’s loss. These damages are inherently controversial, and there is considerable doubt whether they play an appropriate part in the law of tort. Generally speaking, the argument against exemplary damages is that they are *punitive*, and that punishment should be left to criminal law, where standards of proof and rules of admissible evidence are different.

What are Exemplary Damages?

An important first step is to distinguish between exemplary damages and aggravated damages.³⁵ Exemplary damages have come the closest to extinction; and although the immediate effect of *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122 was expansion in their availability, even though the House of Lords expressed a willingness to restrict or even (in the case of Lord Scott) to abolish exemplary damages without waiting for Parliament to take action.

Aggravated damages are compensatory by nature. The principle behind aggravated damages is that the injury caused to the claimant is made worse by the 'aggravating' behaviour of the defendant. This contributes to mental torment or hurt suffered by the claimant, and this requires compensation (even if it would not give rise to a cause of action in its own right, in a tort requiring damage such as negligence or misfeasance in a public office). Aggravated damages are clearly regarded as an appropriate aspect of defamation awards, for example, if the behaviour of the defendant is particularly aggressive or the defendant unreasonably maintains the truth of defamatory allegations.³⁶ It is for this reason they are not available to corporate claimants: see the following discussion.

The following extract clearly indicates both the compensatory nature of aggravated damages, and the separateness of such damages from a 'basic' compensatory award. The case was an extreme one, and is considered again under exemplary damages, later. The claimants had been imprisoned and sexually enslaved for the profit of the defendants. The judge found no precedents which were directly to the point. Relatively few cases of sexual assault have resulted in civil claims against individuals,³⁷ and it would appear this may be the first in this jurisdiction to result from forced prostitution.³⁸ 'Basic' compensatory damages were also assessed and the final individual awards, incorporating basic, aggravated, and exemplary damages, ranged from £132,000 to £175,000. The 'aggravated' part of the award was around £30,000 in each case. We will explore the exemplary award below. It was important that no two aspects of damages were allowed to replicate one another, as this would lead to 'double recovery', even though the amounts arrived at have a very imprecise quality.

p. 573 **Treacy J, AT & Others v Dulghieru**

[2009] EWHC 225 (QB)

- 56 These Claimants seek additional compensation in the form of an award of aggravated damages. It is important to be aware of the risk of double recovery. These Claimants must not be compensated twice over for the same injury.
- 57 In my award of general damages, I have included an element to cover the psychiatric harm suffered. That, however, is to be distinguished from the injury to feelings, humiliation, loss of pride and dignity and feelings of anger or resentment caused by the actions of the Defendants.
- 58 ... I consider it appropriate in this case to make an award of aggravated damages. I have also considered the observations of Smith LJ in *Choudhary v Martins* [2008] 1 WLR 617, where at paragraph 18 she observed that it was positively helpful if the judge separated the award for psychiatric injury from that for injury to feelings. This, she said, was a helpful process as long as the judge takes care to avoid the risk of double recovery.
- 59 In this case I find that the behaviour of the Defendants amounted to insulting and arrogant treatment of these Claimants, trampling, as it did, upon their rights as autonomous human beings and subjecting them to repeated episodes of degrading non consensual sexual activity over a significant period of time.

Consistently with this account of the nature of aggravated damages, in *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2013] EWCA Civ 1308, the Court of Appeal ruled that aggravated damages are not recoverable by a limited company. The case of *Messenger Newspapers Group Ltd v National Graphical Association* [1984] IRLR 397, concerned with industrial action, was therefore wrongly decided. The judge in that case had noted 'aggravated conduct' on the part of the defendant. This, however, was more appropriately a matter of relevance to *exemplary* damages. Aggravated damages reflect *aggravated harm* to the claimant, not *aggravated conduct* per se.

Exemplary damages by contrast are not intended to compensate the claimant. They are available if the defendant's behaviour is such as to give rise to the need for something *more than* a compensatory award. Thus they punish, or express strong disapproval of, the defendant's wrongdoing or invasion of the claimant's rights, even if that wrongdoing adds no extra element to the injury suffered by the claimant.³⁹ They have a role in 'vindicating the strength of the law'.⁴⁰ This, anyway, is the classic understanding of exemplary damages.

The availability of exemplary damages is limited. In the leading case of *Rookes v Barnard* [1964] AC 1129, Lord Devlin set out the three categories of case in which exemplary damages are available:

1. cases involving 'oppressive, arbitrary or unconstitutional actions by servants of the government';
2. cases where 'the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the payment to the plaintiff';
3. cases where the award of such damages is expressly authorized by statute.

p. 574 ← The general thrust of Lord Devlin's judgment was that exemplary damages were anomalous and should be carefully confined to these three categories of case. On the other hand, he also expressed the view that in the first two categories of case, exemplary damages could serve a valuable purpose.

In *Cassell v Broome* [1972] AC 1207, the House of Lords confirmed that these were the three categories in which exemplary damages are available, and agreed that the categories were not to be extended. Much debate, in *Cassell v Broome* and since, has surrounded the question of whether Lord Devlin intended a further restriction to the availability of exemplary damages, confining them to causes of action in which such damages had been available *before* 1964. This is the so-called 'cause of action condition'. The general consensus is that the House of Lords in *Cassell v Broome* (or at least, some members of the House) thought that Lord Devlin *did* intend to apply this additional restriction. And even if he did not, such a condition was introduced by *Cassell v Broome*.

Kuddus v Chief Constable of Leicestershire [2002] 2 AC 122

The claimant sought exemplary damages against the defendant in an action for misfeasance in a public office (Chapter 2). Exemplary damages had not been awarded before 1964 in this tort, largely because the tort was virtually unrecognized at the time. Lord Nicholls explained that the cause of action condition 'represents in practice an arbitrary and irrational restriction on the availability of exemplary damages' (at [55]). The restriction would no longer be applied. This decision does not mean that the House of Lords wishes to see expansion of exemplary damages. It means rather that the House would prefer to see restrictions on exemplary damages which (unlike the cause of action condition) are consistent and rational.

In every other respect, *Kuddus* is an extremely inconclusive decision. Since only the cause of action condition was directly in issue, other judicial remarks in the case were non-binding. The following summary of the position after *Kuddus* may be found useful:

1. there is no 'cause of action condition' in respect of exemplary damages. If criteria for availability are met, it makes no difference which cause of action is argued;
2. exemplary damages continue to be available in the three categories of case referred to by Lord Devlin;
3. some members of the House of Lords might have preferred exemplary damages for torts to be abolished at common law (particularly Lord Scott at [111], and possibly Lord Mackay);⁴¹
4. some members of the House of Lords would probably prefer to retain exemplary damages, but with variation in the categories they would support (for example, Lord Nicholls seemed to prefer a general criterion of 'outrageous conduct' and did not see why category 1 should be confined to agents of the state), and perhaps with particular emphasis on protection of civil liberties (Lord Hutton), though this may be harder to support given that exemplary damages are not available in relation to violations of Convention rights;

p. 575 5. most members of the House of Lords would not wait for legislation, and would consider departing from *Rookes v Barnard* in order to abolish exemplary damages for torts altogether, or to change the applicable categories, since statutory change is plainly unforthcoming (only Lord Slynn seemed reluctant to question the older decisions).⁴² The House would have been receptive to hearing argument on these points, and regretted that such argument was not put before them in this case (Lord Scott at [106]).

Kuddus v Chief Constable of Leicestershire

[2002] 2 AC 122

Lord Nicholls

- 65 If exemplary damages are to continue as a remedial tool, as recommended by the Law Commission after extensive consultation, the difficult question which arises concerns the circumstances in which this tool should be available for use. Stated in its broadest form, the relevant principle is tolerably clear: the availability of exemplary damages should be co-extensive with its rationale. As already indicated, the underlying rationale lies in the sense of outrage which a defendant's conduct sometimes evokes, a sense not always assuaged fully by a compensatory award of damages, even when the damages are increased to reflect emotional distress.
- 66 In *Rookes v Barnard* [1964] AC 1129, 1226, Lord Devlin drew a distinction between oppressive acts by government officials and similar acts by companies or individuals. He considered that exemplary damages should not be available in the case of non-governmental oppression or bullying. Whatever may have been the position 40 years ago, I am respectfully inclined to doubt the soundness of this distinction today. National and international companies can exercise enormous power. So do some individuals. I am not sure it would be right to draw a hard-and-fast line which would always exclude such companies and persons from the reach of exemplary damages. Indeed, the validity of the dividing line drawn by Lord Devlin when formulating his first category is somewhat undermined by his second category, where the defendants are not confined to, and normally would not be, government officials or the like.
- 67 Nor, I may add, am I wholly persuaded by Lord Devlin's formulation of his second category (wrongful conduct expected to yield a benefit in excess of any compensatory award likely to be made). The law of unjust enrichment has developed apace in recent years. In so far as there may be a need to go further, the key here would seem to be the same as that already discussed: outrageous conduct on the part of the defendant. There is no obvious reason why, if exemplary damages are to be available, the profit motive should suffice but a malicious motive should not.
- 68 ... For the purposes of the present appeal it is sufficient, first, to express the view that the House should now depart from its decision in *Broome v Cassell & Co Ltd* [1972] AC 1027, in so far as that decision confirmed the continuing existence of what has subsequently been described as the 'cause of action' condition and, secondly, to note that the essence of the conduct constituting the court's discretionary jurisdiction to award exemplary damages is conduct which was an outrageous disregard of the plaintiff's rights. ...

Lord Scott

- 120 Your Lordships are, it seems to me, caught on the horns of a dilemma. On the one hand, the cause of action test is not based on principle and has serious practical difficulties. On the other hand, the removal of the cause of action test would expand the cases in which exemplary damages could be claimed. Claims could be made in cases of negligence and cases of deceit provided only that the conduct complained of fell within one or other of the two Devlin categories (*Rookes v Barnard* [1964] AC 1129, 1226). Claims could probably also be made, subject to the same proviso, in actions based upon breach of statutory duty whether or not the statute had expressly authorised such claims.
- 121 My Lords, I view the prospect of any increase in the cases in which exemplary damages can be claimed with regret. I have explained already why I regard the remedy as no longer serving any useful function in our jurisprudence. Victims of tortious conduct should receive due compensation for their injuries, not windfalls at public expense.

No great enthusiasm was displayed in the judgments of Lords Nicholls and Scott for Lord Devlin's second category of case, namely cases where the defendant *seeks to make a profit* at the expense of the claimant. Here, it seems clear that compensatory damages will not be enough to deter the wrongdoing, because the defendant has already taken account of the likely damages in deciding to go ahead and commit the wrong. Both Lord Nicholls, and Lord Scott, hint that there is no longer any need to deal with these cases through exemplary damages, because the law of 'unjust enrichment' (Lord Nicholls) or 'restitution' (Lord Scott) has moved on and remedies will accordingly be available which will deter the wrong. This seems to amount to an argument that a remedy more appropriate to the law of civil obligations has now been fashioned. Exemplary damages can be put aside while keeping the deterrent effect. But it is possible that in some cases, there is a need to express disapproval of an intention to make a gain through gross violation of the claimant's rights, irrespective of the success of the venture (see the discussion of *AT v Dulghieru*, later). It may be the very mismatch between claimants' fundamental rights, and defendants' callous, indeed malevolent profit motive, which makes exemplary damages rather than unjust enrichment appear the better analysis in this case.

There was disagreement, particularly between Lords Hutton and Scott, on the important question of *whether exemplary damages can appropriately be awarded against a vicariously liable party*. Although the House of Lords was not called upon to decide this issue, in this case the defendant's liability was 'vicarious': the chief constable had not himself committed a tort, but was potentially liable for misfeasance in a public office on the part of one of his officers.⁴³

In *Muuse v Secretary of State for the Home Department* [2010] EWCA Civ 453, the Court of Appeal upheld an award of exemplary damages in a case of false imprisonment where the actions of officers were

p. 577 unconstitutional, arbitrary, and outrageous: there was no need to ↵ add 'malice' or similar states of mind to the established *Rookes* criteria.⁴⁴ But in *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245, a claim for exemplary damages was rejected despite evidence not only that an illegal detention policy had been adopted, but that officials had been encouraged to lie about the basis on which their decisions were reached.

Lord Dyson, *R (Lumba) v Secretary of State for the Home Department*

166 Whether the high threshold for the award of exemplary damages has been crossed in any particular case is ultimately a matter of judgment. Opinions can reasonably differ on whether a defendant's conduct has been so outrageous and so unconstitutional, oppressive or arbitrary as to justify the imposition of the penalty of exemplary damages. An appellate court should not interfere with the judgment of the court below unless that judgment is plainly wrong. On the material that was before him, Davis J was entitled to reach the conclusion that he reached. In my view, the Court of Appeal were also entitled to reach the conclusion that they reached on the more extensive material that was before them. Both the judge and the Court of Appeal applied the correct test. In particular, the Court of Appeal were right to place some weight on the fact that the Secretary of State had the statutory power to detain the appellants pending deportation and that, although she in fact exercised that power unlawfully, she could have done so lawfully. They were also right to say that, if her conduct is properly to be described as unconstitutional, oppressive or arbitrary, it was at the less serious end of the scale. It is material that there is no suggestion that officials acted for ulterior motives or out of malice towards the appellants. Nevertheless, there was a deliberate decision taken at the highest level to conceal the policy that was being applied and to apply a policy which, to put it at its lowest, the Secretary of State and her senior officials knew was vulnerable to legal challenge. For political reasons, it was convenient to take a risk as to the lawfulness of the policy that was being applied and blame the courts if the policy was declared to be unlawful.

It would appear that the kind of action sufficient to amount to 'oppressive and unconstitutional' behaviour for this purpose is a matter of degree, and that the threshold is 'high'. Lord Dyson added that because the goal of exemplary damages is not compensatory, a single award of such damages should be made, to be shared between all claimants. It was therefore considered inappropriate to make an award of exemplary damages where there is a large number of potential claimants and they are not all before the court ([167]).

Exemplary Damages and Vicarious Liability

According to Lord Scott in *Kuddus*, the present position in which awards of exemplary damages can clearly be made against vicariously liable parties has arisen without careful consideration and cannot be justified: the reasons underlying vicarious liability are largely compensatory, and no reason of fairness can be found for attaching a *punitive* award to a party who is not personally responsible for the wrongdoing. Lord Hutton

p. 578 questioned this approach, citing with approval the arguments of Patrick Atiyah in *Vicarious Liability in the Law of Torts* (Butterworths, 1967): an award of exemplary damages against vicariously liable parties will encourage superior officers to exert control over the actions of their agents.

In *Rowlands v Chief Constable of Merseyside Police* [2006] EWCA Civ 1773; [2007] 1 WLR 1065, the Court of Appeal considered this question. The claimant had called the police to attend to a neighbourhood noise problem. There was an altercation between the claimant and the police officers, and the officers arrested the claimant in front of her children, handcuffed her, and took her to the police station. She was charged with an offence

and was tried and acquitted seven months later. Hearing her claim for false imprisonment and malicious prosecution, a judge awarded compensatory damages but thought it was not a proper case for aggravated or exemplary damages. The Court of Appeal disagreed, and awarded both.

Moore-Bick LJ, *Rowlands v Chief Constable of Merseyside Police*

47 ... There undoubtedly are strong arguments of principle in favour of limiting the application of an avowedly punitive award to those who are personally at fault, who, in all but a tiny minority of cases brought against the police, could confidently be expected not to include the chief constable. However, since the power to award exemplary damages rests on policy rather than principle, it seems to me that the question whether awards can be made against persons whose liability is vicarious only must also be answered by resort to considerations of policy rather than strict principle. While the common law continues to recognise a power to award exemplary damages in respect of wrongdoing by servants of the government of a kind that has a direct effect on civil liberties, which for my own part I think it should, I think that it is desirable as a matter of policy that the courts should be able to make punitive awards against those who are vicariously liable for the conduct of their subordinates without being constrained by the financial means of those who committed the wrongful acts in question. Only by this means can awards of an adequate amount be made against those who bear public responsibility for the conduct of the officers concerned.

As the Court of Appeal pointed out, the liability of a Chief Constable generally will be vicarious only; and there is a clear purpose in holding those who 'bear public responsibility' accountable in cases which merit exemplary damages. These will be much the same reasons as those behind the vicarious liability of superiors for torts with a strong mental element, such as malicious prosecution and misfeasance in a public office.

Exemplary Damages and Insurance

Generally speaking, it is against the policy of the law to allow enforcement of a contract of insurance indemnifying the insured for the consequences of his or her *criminal* acts.⁴⁵ But assuming the tortious act is also criminal, what of the vicariously liable party? In *Lancashire County Council v Mutual Municipal Insurance* [1997] QB 897, the plaintiff was liable vicariously for an amount including exemplary damages in respect of

p. 579 wrongful arrest and false imprisonment on the part of police officers. The Court of Appeal held that the defendant insurers were liable to reimburse the plaintiff for these amounts under a policy of liability insurance. Two strands to the reasoning are of concern to us. First, where the wrongdoing is *criminal* in nature, then a *vicariously* liable party may still enforce the insurance contract in respect of exemplary damages. The wrongdoer would not be able to do so. Second, where the tortfeasor's wrongdoing does *not* amount to a criminal offence, the Court of Appeal reasoned that both personally responsible parties, *and* vicariously liable parties, should be able to insure against liability for exemplary damages. Against the argument that such damages thereby fail to *punish*, it may be argued that their role is primarily to demonstrate the wrongfulness of conduct, rather than to punish it. In this sense, they are closer to vindicatory damages than is generally assumed.

The Quantum of Exemplary Damages

Another awkward feature of exemplary damages is that there is no clear measure by which they may be ‘calculated’. Given that actions for false imprisonment and malicious prosecution—which for obvious reasons may often raise claims derived from Lord Devlin’s first category—are still in many instances tried by jury, the scope for high awards could be considerable. In *Thompson v Commissioner of Police for the Metropolis* [1998] QB 498, the Court of Appeal moved decisively to limit the amounts awarded in respect of exemplary damages, clarifying that the maximum figure to mark disapproval of ‘oppressive or arbitrary conduct’ should be £50,000. In one of the two cases heard by the Court of Appeal, exemplary damages of £200,000 had been awarded by a jury. The Court of Appeal reduced this award to £15,000.⁴⁶ In *Rowlands* (above), the amount awarded was £7,500. The Court of Appeal reasoned that far less violence had been exercised against the claimant than in *Thompson*; but also thought the damages should recognize the fact that evidence had subsequently been given in criminal proceedings by the officers (malicious prosecution).

4.2 Vindictory Damages?

There has been growing interest in recent years in the possibility of an additional function of damages, distinct from both compensation and punishment, and different also from the goal of avoiding or preventing wrongful gain. That is, that damages may be awarded in order to vindicate rights.

Arguably, the above statement makes little sense, since all damages awards ‘vindicate rights’. To make sense, we need to ask a new question. Does vindication of rights operate as a distinct goal which would permit an award of damages either *in addition to* compensatory, exemplary, and perhaps gain-based awards; or in circumstances where none of those are appropriate? Although this notion has gathered some academic support, the Supreme Court in *R(Lumba) v Secretary of State for the Home Department* [2011] UKSC 12; [2012] 1 AC 245 emphatically rejected the idea: English courts do not recognize an additional head of ‘vindictory’ damages at common law, akin to the idea of ‘constitutional damages’ in certain other jurisdictions.

p. 580 ← Previously, the Privy Council in a number of appeals from the Commonwealth had awarded damages in vindication of *constitutional rights* which clearly *were* additional to the compensatory (including aggravated) damages measure. This was initiated in the cases of *Merson v Cartwright* [2004] UKPC 38 and *Ramanoop v Attorney-General* [2005] UKPC 15; (2006) 1 AC 328.⁴⁷ A similar approach was taken in *Takitoka v Attorney General, Director of Immigration, Minister of National Security* [2009] UKPC 11. This was a case on appeal from the Bahamas, where the claimant, who had lost his papers and passport, had been unlawfully detained, for most of the time in inhumane and deeply degrading conditions, for eight years. The Privy Council thought the compensatory award could not be accepted as it stood since the court had not expressly explained whether it included a sum for aggravated damages, which were clearly appropriate here. This award could legitimately have been larger, therefore. In addition, it upheld an award of \$100,000 for breach of constitutional rights, which are recognized to be ‘vindictory’ in nature following earlier Privy Council decisions.

It is significant that there would not, however, be separate awards of vindictory and exemplary damages, because the English courts have subsequently made clear that they see these as closely analogous awards. How do these developments compare with UK law? We will first compare these vindictory damages for

violation of Convention rights with damages under the HRA; and then turn to the discussion, then rejection of vindictory damages at common law.

Vindictory Damages under the Human Rights Act 1998?

As explored in Chapter 1, the UK incorporated a new set of rights into domestic law, namely the Convention rights derived from the ECHR which were annexed to the HRA. Remedies against public authorities are available in respect of violation of these rights, under section 8 (extracted in Chapter 1). However, the differences from the approach in *Merson*, *Ramanoop*, and *Takitoka* are very marked. When awarded, the quantum of damages will generally be more modest than in tort. This is thought to reflect the primary function of such actions; but it also reflects the fact that remedies as well as rights under the HRA have been deliberately modelled on the Convention itself as interpreted by the European Court of Human Rights in Strasbourg: this is known as the ‘mirror’ principle.⁴⁸ It is clear that the assessment of constitutional damages by the Privy Council is not considered relevant.

Lord Bingham, *R (Greenfield) v Secretary of State for the Home Department* [2005] UKHL 14; [2005] 1 WLR

19 None of the three English cases cited involved a violation of Art.6, and to that extent they have only a limited bearing on the present problem. But there are in my opinion broader reasons why this approach should not be followed. First, the 1998 Act is not a tort statute. Its objects are different and broader. Even in a case where a finding of violation is not judged to afford the applicant just satisfaction, such a finding will be an important part of his remedy and an important vindication of the right he has asserted. Damages need not ordinarily be awarded to encourage high standards of compliance by member states, since they are already bound in international law to perform their duties under the Convention in good faith, although it may be different if there is felt to be a need to encourage compliance by individual officials or classes of official. Secondly, the purpose of incorporating the Convention in domestic law through the 1998 Act was not to give victims better remedies at home than they could recover in Strasbourg but to give them the same remedies without the delay and expense of resort to Strasbourg. This intention was clearly expressed in the White Paper 'Rights Brought Home: The Human Rights Bill' (Cm 3782, October 1, 1997), para.2.6:

"The Bill provides that, in considering an award of damages on Convention grounds, the courts are to take into account the principles applied by the European Court of Human Rights in awarding compensation, so that people will be able to receive compensation from a domestic court equivalent to what they would have received in Strasbourg."

Thirdly, s.8(4) requires a domestic court to take into account the principles applied by the European Court under Art.41 not only in determining whether to award damages but also in determining the amount of an award. There could be no clearer indication that courts in this country should look to Strasbourg and not to domestic precedents. The appellant contended that the levels of Strasbourg awards are not 'principles' applied by the Court, but this is a legalistic distinction which is contradicted by the White Paper and the language of s.8 and has no place in a decision on the quantum of an award, to which principle has little application. The Court routinely describes its awards as equitable, which I take to mean that they are not precisely calculated but are judged by the Court to be fair in the individual case. Judges in England and Wales must also make a similar judgment in the case before them. They are not inflexibly bound by Strasbourg awards in what may be different cases. But they should not aim to be significantly more or less generous than the Court might be expected to be, in a case where it was willing to make an award at all.

This passage makes a sharp distinction between domestic law, and the Strasbourg jurisprudence. Some of the remarks need to be read subject to the more recent decision of the Supreme Court in *R(Faulkner) v Secretary of State for the Home Department* [2013] UKSC 23, which is extracted in Section 5 of this chapter. In *Greenfield*, the House of Lords emphasized that the finding of a violation will itself be an important part of the vindication of the claimant's right. Slightly more problematic, logically speaking, is the modelling of the domestic remedy closely on the Strasbourg remedy under Article 41. This Article provides that there should be 'just satisfaction' (against the state) where a sufficient domestic remedy is lacking. Here, the House of Lords tied the domestic remedy closely to the international remedy for failing to provide a sufficient remedy in domestic law. It is

quite unlike the Privy Council's approach to constitutional damages in the cases mentioned earlier. The idea that a declaration of violation may sufficiently vindicate a Convention right appears to have influenced the Supreme Court in its rejection of 'purely' vindictory damages in *Lumba*. We return to the assessment of damages under the HRA in the following section. But first, we should review the position in respect of vindictory damages at common law.

p. 582 **Vindictory Damages in Tort?**

Earlier editions of this book asked whether vindictory damages might be emerging in the law of tort. It was conceded that vindictory damages had not so far been awarded as a separate head of damages.⁴⁹ Some consideration was given to the issue in *Ashley v Chief Constable of Sussex* [2008] UKHL 25 (extracted in Chapter 2). Here, the Chief Constable had admitted liability to compensate the claimants in full in negligence, but resisted the claim in trespass. The House of Lords permitted the claim in trespass to proceed to trial despite the absence of any reason to seek compensation. The various judgments in this case do not provide any single reason why this was thought appropriate. Some of the judges may simply have concluded that until the claimants were compensated, there was no reason to stop them from selecting their preferred cause of action (there was no risk of double recovery). Alternatively, it may have been thought legitimate to seek a finding that the action of the officer who shot the deceased was a trespass, and therefore an unlawful interference with the rights of the claimant, so that a declaration was worth pursuing in its own right.⁵⁰ This had been the approach taken by a majority of the Court of Appeal. Lord Scott pointed out that the 'vindictory' role inherent in compensatory damages could not really be said to have been achieved if the very issue urged by the claimants—unlawfulness of the shooting of the deceased, rather than carelessness—had not been tested at trial. In this respect, he had the support of Lord Rodger.

Lumba has effectively ended this discussion. It now seems clear that, in English law, the law of tort will not award substantial damages for a *separate* vindictory purpose. Lord Scott's remarks should perhaps be read in the context of his evident hostility to exemplary damages,⁵¹ and the explanation of the Privy Council in *Takitoka* that constitutional damages and exemplary damages perform essentially the same function, at least in many cases.

In *Lumba* itself, as we explained in Chapter 2, no additional detention had been caused to the claimants, because they could and would have been detained under a lawful policy, if such a policy had been followed; and the threshold for exemplary damages had not been passed. Therefore, the question arose whether—in a tort actionable *per se*—substantial damages could be awarded without proof of damage and without an exemplary award. The answer given was no.

Lord Dyson, *R (Lumba) v Secretary of State for the Home Department*

p. 583

101 The implications of awarding vindictory damages in the present case would be far reaching. Undesirable uncertainty would result. If they were awarded here, then they could in principle be awarded in any case involving a battery or false imprisonment by an arm of the state. Indeed, why limit it to such torts? And why limit it to torts committed by the state? I see no justification for letting such an unruly horse loose on our law. In my view, the purpose of vindicating a claimant's common law rights is sufficiently met by (i) an award of compensatory damages, including (in the case of strict liability torts) nominal damages where no substantial loss is proved; (ii) where appropriate, a declaration in suitable terms; and (iii) again, where appropriate, an award of exemplary damages. There is no justification for awarding vindictory damages for false imprisonment to any of the FNPs.

It must be said that the discussion of this issue was neither detailed nor extensive; but the answer was clear. For thoughtful review and analysis of the present state of play in respect of vindictory damages, see the works by Witzleb and Carroll (before *Lumba*), and by Barker (after *Lumba*), included in Further Reading.

4.3 Gain-Based Damages and 'Negotiating' Damages

Why, in *Kuddus*, did Lords Nicholls and Scott think that exemplary damages might no longer be required to deal with the case where the defendant calculates that he might profit from his tort? One reason they hinted at is the extension of gain-based damages in the law of obligations. The development of 'the law of unjust enrichment' referred to by Lord Nicholls is probably a reference to the increasing availability of gain-based damages for civil wrongs, such as torts and breach of contract.

Here we should note that there is little agreement over appropriate terminology, and not everyone would be happy with the idea of 'gain-based damages'. Some would insist that all 'damages' are compensatory. Along these lines, there is a further problem with Lord Nicholls' formulation, since 'unjust enrichment' is generally seen as entirely separate from the law of wrongs (including tort), being concerned with unjust transfers of value which may be made with or without any 'wrong'.

Essentially, 'gain-based' damages are calculated not according to the loss of the claimant, but according to the gain made by the defendant. One form of 'gain-based' award concentrates on stripping defendants of their profits and may be referred to as 'disgorgement damages'. An account of profits (which is clearly available in the action for breach of confidence: see Chapter 15) involves a form of disgorgement. A possibly separate form of gain-based award is referred to as 'restitutionary damages', and this is aimed at reversing 'transfers of value'.⁵²

Two major distinctions must be noted between gain-based damages and exemplary damages. First, gain-based damages are not punitive in nature. On the other hand, accounts of profits generally do seek to *deter*, attacking the profit motive directly. They come close to the second category of exemplary damages, though there the measure of damages is not based upon the profits made. This brings us to the second point, which is that there is a clear measure of gain-based damages. The measure is not the loss suffered by the claimant as in p. 584 compensatory damages, nor the amount required to 'punish' the defendant or vindicate the strength of

the law, as in exemplary damages.⁵³ In the case of disgorgement (profit-based) damages it is the profit wrongfully (in the case of tort) made by the defendant. In the case of restitutionary damages it is the amount gained through the transfer of value.

The following extract gives a general statement of the kinds of actions in which gain-based damages are available for a tort. The author notes the existence of a number of cases in which courts have shown reluctance to interpret tort remedies in terms of restitution: we see two of these, *Devenish Nutrition*, and *Forsyth-Grant v Allen*, below. However, he proposes that 'restitutionary damages' are clearly established in torts protecting property rights (in the case of trespass to land, see particularly *Ministry of Defence v Ashman* [1993] 40 EG 144). More controversially, he goes on to suggest that they should be more widely available on the basis of *deliberate* wrongdoing. Here however, it may be that the courts are content with the tools they already have, in the form of exemplary and aggravated damages, negotiating damages where an injunction has been refused, and accounts of profits where appropriate. Courts are not always keen to add to their armoury of remedies, particularly where it may incentivize additional litigation costs and complicate the applicable analysis.

A. Burrows, *Remedies for Torts and Breach of Contract* (4th edn, Oxford University Press, 2018), 305–6

It is submitted that ... the main picture emerging from all the cases is that, at least for proprietary torts, restitution (reversing the defendant's wrongful gains) is an available remedial response. That is, taking both types of restitutionary remedy together (whether an award of money had and received or an account of profits) the torts for which restitution has been awarded have involved interference with the claimant's property, whether that property be real or personal or intellectual. The cases therefore reveal a judicial desire firmly to deter even innocent interference with the claimant's property; that is, merely to compensate for any loss caused appears to be regarded as insufficient to deter that interference. This seems sensible. Applying Jackman's theory,⁵⁴ restitution is justified as a means of deterring harm to the 'facilitative institution' of private property.

A subsidiary feature exhibited in a few of the account of profits cases (eg for passing off and infringement of trade mark) is that the tort must be committed intentionally if restitution is to be awarded. It can be strongly argued (not least if one takes into account the contract case of *Attorney-General v Blake*) that this category should be expanded so that restitution should be awarded to reverse gains made by, eg, intentionally inducing a breach of contract or an intentional libel. This is particularly so, if the courts can rid themselves of the former emphasis on an account of profits being mathematically exact. Indeed punitive damages can be awarded for these torts under the category of cynically exploiting wrongdoing to make a profit and, since stripping the defendant of its unjust profits by restitution is less drastic than punishment, it is arguable that restitution should follow on the reasoning that the greater should include the lesser. This was supported by the Law Commission.

p. 585 **Gain-based Damages and Non-proprietary Torts**

The extent of availability of gain-based damages in tort was addressed in *Devenish Nutrition v Sanofi-Aventis (France) and Others* [2008] EWCA Civ 1086. This was a case of breach of statutory duty (Chapter 17), the defendants having entered into agreements among suppliers of vitamins which contravened Article 81 of the EC Treaty. The European Commission had imposed fines on the sellers, and the action was brought by a claimant who (as a result of the illegal agreement) had bought vitamins at inflated prices. Compensatory damages were clearly available in principle, but had the claimants suffered loss, given that it had at least arguably been able to pass on the inflated price to consumers? It would be difficult to establish whether this had affected sales, and thus profits, for example. The claimants sought an account of profits.

The Court of Appeal held that such a remedy was not available in respect of an action for breach of a statutory duty. Its availability was confined to certain actions, particularly those interfering with the proprietary rights of the claimant (such as trespass to land and goods, or interferences with intellectual property rights). This was despite the fact that in *AG v Blake* [2001] 1 AC 268, an account of profits had been awarded in respect of a breach of contract. Longmore LJ added that before *Blake*, an account of profits 'had always been available where equitable rights (for example, a breach of confidence) had been infringed', and that the action in *Blake* itself was justified partly because it was 'closely akin to a claim for breach of a fiduciary obligation' (at [145]). Besides, a gain-based award should not be made where compensatory damages provide an adequate remedy.

The reasoning in *Devenish Nutrition* has been criticized by Odudu and Virgo, 'Remedies for Breach of Statutory Duty' (2009) CLJ 32–4. The authors suggest that there may be cases where it is appropriate for an account of profits to be awarded for non-proprietary torts including breach of a statutory duty, for example, where there have been no enforcement proceedings and there is a public interest in the account of profits and its deterrent function. They also argue that even if no account of profits can be awarded, this does not affect the alternative avenue of a claim based in unjust enrichment. Here, passing on of loss to third parties does not destroy the claim. This last point is flatly contradicted by remarks of Longmore LJ:

Longmore LJ, *Devenish Nutrition v Sanofi-Aventis SA (France) & Others*

[147] ... If however the claimant has in fact passed the excessive price on to its own purchasers and not absorbed the excessive price itself, there is no very obvious reason why the profit made by the defendants (albeit undeserved and wrongful) should be transferred to the claimant without the claimant being obliged to transfer it down the line to those who have actually suffered the loss. Neither the law of restitution nor the law of damages is in the business of transferring monetary gains from one undeserving recipient to another undeserving recipient even if the former has acted illegally while the latter has not.

'Negotiating Damages' Contrasted with Gain-based Damages

A distinction needs to be drawn between gain-based damages, particularly an account of profits, and the kind of award that may be made 'in lieu of an injunction' (see particularly Chapter 11, in connection with nuisance; Chapter 18, in connection with trespass to land). The latter sort of award may well incorporate an amount to

p. 586 reflect a hypothetical bargain ↵ between reasonable people in the position of the parties; and this may

include a share of the profits expected to be made (see the discussion in *Tamames (Vincent Square) v Fairpoint* [2007] EWHC 212 (Ch)). This, however, is not a 'disgorgement' remedy (the defendant's full profits are not paid over to the claimant),⁵⁵ nor does it seek to reverse a transfer of value. Such remedies are awarded only if it has been decided *not* to award an injunction, and so the court is scarcely likely to seek to deter the defendants' activities: that would be self-contradictory. Rather, the goal is to arrive at an appropriate amount of damages to reflect the fact that the defendant has interfered with the claimant's rights but in circumstances where there are insufficient grounds to prohibit the defendant's actions (or sufficient grounds not to do so).

In *Morris-Garner v One Step* [2018] UKSC 20, an important decision relating to contract damages, the Supreme Court has clearly determined that such damages are not to equated with gain-based damages, but are compensatory in nature. What is compensated by such awards is the loss of ability to bargain. As such, these damages are to be referred to as 'negotiating damages', and the link with potential injunctive remedies is to be maintained: the door to a new form of gain-based damages is to remain closed. The reasoning in *One Step* is compatible with the reasoning in a number of earlier tort claims, including the following decision.

Forsyth-Grant v Allen [2008] EWCA Civ 505

This action concerned a nuisance which interfered with the claimant's right to light. The defendants had constructed two semi-detached houses, and the claimant argued that these interfered with light to her hotel. She was successful in her claim, but the judge declined to order an account of profits. The Court of Appeal agreed.

Patten J, *Forsyth-Grant v Allen* [2008] EWCA Civ 505 (giving the judgment of the court)

32. An actionable nuisance does not involve the misappropriation of the claimant's rights in the same way, even as in a case of trespass, let alone as in a case of conversion or copyright or trademark infringement. The essence of the tort is that the claimant's rights to the reasonable enjoyment of her property have been infringed by the use which the defendant makes of his own land. On the face of it, this should not entitle the claimant, in my judgment, to more than compensation for the loss which she has actually suffered; but the highest that it could be put on the authorities is that the claimant can, in appropriate cases, obtain an award calculated by reference to the price, which the defendant might reasonably be required to pay for a relaxation of the claimant's rights so as to avoid an injunction. This, as already explained, falls a long way short of being awarded the whole profit for the development, which is far in excess and completely unrelated to the measure of loss suffered by the claimant. The decision in the *Stoke on Trent* case⁵⁶ supports this approach.
33. Mr Ley referred us to a passage in Lord Keith's speech in *Attorney General v Guardian Newspapers Ltd* [1990] 1 AC 109, but that was also an action for breach of confidence where equity has always asserted a jurisdiction to order an account of profits; it is not authority for the making of such an order in a case of nuisance. It seems to me that the judge would have been entitled to reject the claim for an account of profits outright, simply on the basis that it was not an available remedy in an action for nuisance; but even if that is wrong, his acceptance that one needs to show exceptional circumstances is not, in my judgment, open to criticism.

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5 Damages Under the Human Rights Act

There has been considerable progress in recent years in identifying the correct approach to assessment of damages in civil actions under the HRA. As we have seen, these are not actions in tort, but they nevertheless give rise to a liability which operates in parallel with—and sometimes as an alternative to—the law of tort, and which may provide a remedy in circumstances where tort would not. We have dealt with the challenge which this sometimes poses to the boundaries drawn to the law of tort itself (Chapter 5); earlier in this chapter, we have seen that in an HRA action, vindication of rights is not always thought to require a monetary remedy: a declaration of violation is considered adequate. Here we are concerned with the quantum of damages. We will not give separate consideration here to 'right to life' claims, which were discussed in relation to the Fatal Accidents Act earlier in this chapter.

5.1 Relevant Legislation

We extracted the early case of *Greenfield* in Section 4.2 of this Chapter. As Lord Bingham there pointed out, domestic courts are required by section 8(4) of the HRA to have regard to the principles applied in the award of damages by the European Court of Human Rights in Strasbourg. Lord Bingham dismissed any contrast

between ‘principles’ (as used in the section), and ‘practice’ of the Strasbourg Court. It is clear that domestic courts will model their awards on the quantum awarded in similar cases. This means paying attention to all the facts, and attempting to place the violation on a scale of seriousness by reference to Strasbourg cases. That in itself is different from the general approach of the law of tort, which has regard to the claimant’s losses when assessing compensatory damages. However, the matter is more complicated than this. There is some variation in the value of money in different jurisdictions where the Convention applies, and this will affect the appropriate award of damages. Equally, attention needs to be given to the date at which awards in previous cases were made, both because the value of money changes, and because Strasbourg practice too is likely to alter over time.

Practice has of course developed since *Greenfield*. Examples where domestic courts have awarded damages under the HRA include *OOO v Commissioner of Police for the Metropolis* [2011] EWHC 1246 (QB). Here, a failure to investigate on the part of the police amounted to a violation of Articles 3 and 4 (inhuman treatment and slavery). However, the breach was in the nature of a failure to protect, rather than direct perpetration of harm; and the failure extended the claimants’ suffering by a relatively short period. Positioning this case relative to others in Strasbourg, the amount awarded was £5,000 to each claimant.

p. 588 ↩ In *R (Waxman) v Crown Prosecution Service* [2012] EWHC 133 (Admin), Moore-Bick LJ awarded £3,500 in respect of a failure to prosecute an individual who was harassing the claimant. This substantially affected the claimant’s well-being; but did not leave the claimant as vulnerable to abuse as some cases considered in Strasbourg. It was placed on a scale of seriousness, and this yielded the proper award of damages.

In both of these examples, the awards are relatively modest; but they are still substantial. Importantly, in neither case is it likely that an action in tort would succeed at all, given the principles which we have reviewed in Chapter 6. The reasons include the protective approach taken to those involved in the investigation and prosecution of crime; and the nature of the claimants’ suffering. Equally, the assessment of damages is sensitive to the seriousness both of the breach, and of the impact on the claimant. For all these reasons, damages under the HRA are very different from damages in tort.

R (Faulkner) v Secretary of State for Justice; R (Sturnham) v Parole Board and another [2013] UKSC 23

This decision on joined appeals to the Supreme Court marks an important stage in the unfolding domestic jurisprudence on HRA damages. To some extent, it qualifies Lord Bingham’s remarks in *Greenfield*. The cases concerned damages for delay in parole board hearings in relation to convicted prisoners, under Article 5(4) ECHR. Because the claimants remained lawfully detained, neither action would have given rise to an award of damages for false imprisonment (Chapter 2). Though the two cases were factually different, the approach taken by the Court of Appeal was nevertheless difficult to reconcile. The Supreme Court provided the necessary guidance.

In the *Faulkner* case, there had been a delay of around 10 months; and the board would probably have directed the prisoner’s conditional release. There was therefore a deprivation of ‘conditional liberty’ for 10 months, though within the context of a lawful custodial sentence. In such circumstances, the Supreme Court ruled that damages will typically be appropriate. However, the sum of £10,000 awarded by the Court of Appeal was too

high; and was reduced to £6,500. Even so, this award to a convicted prisoner is higher than the damages awarded to each of the bereaved parents in the case of *Rabone*. Most importantly, the case departs from tort principles in that a substantial award is made where no damages at all would be offered by the law of tort.

In the *Sturnham* case, there had been no deprivation of conditional liberty, because the board probably would not have ordered release. Nevertheless, there would still be a modest award for the ‘anxiety and distress’ associated with a delay of several months in a parole hearing. The judge’s award of £300 would be reinstated. While this is a modest sum, it is nevertheless an award of damages in circumstances far removed from those which would give rise to compensation in tort.

Consistently with *Greenfield*, the Supreme Court explained that the requirement in section 8(4) HRA, to give effect to ‘principles’ developed in Strasbourg, is to be broadly read. It is the *practice* of Strasbourg awards which takes priority. In fact, statements of ‘principle’ in that court are rare, and to be regarded with caution. At present, courts should be guided ‘primarily by any clear and consistent practice of the European court’.

Importantly, Lord Reed suggested that the present state of affairs is merely a stage in the development of HRA remedies, through which they will eventually become naturalized. This qualifies the statement of Lord Bingham that courts ‘should look to Strasbourg and not to domestic precedents’. The special role of an international court was identified and ↵ recognized; and it was underlined that ultimately, what is required by the Convention is the existence of a *domestic* remedy. This need not exactly replicate the *international* remedy,⁵⁷ and over time there may even be no need to look to Strasbourg to assess quantum in areas where domestic precedent has been established. Illustrating the last point, the decision in *Sturnham* will now itself be the starting point when assessing Article 5(4) cases (see the following extract). The following guidance appeared at the end of Lord Reed’s judgment.

Lord Reed, *R (Faulkner) v Secretary of State for Justice*

100. ... the following guidance should be followed in any future cases where it is necessary to cite substantial numbers of Strasbourg decisions on the application of article 41 with a view to identifying the underlying principles. That exercise will not of course be necessary in relation to any future case on article 5(4), which should take the present judgment as its starting point.
101. First, the court should be provided with an agreed Scott schedule, that is to say a table setting out the relevant information about each of the authorities under a series of columns. The information required is as follows:
 1. The name and citation of the case, and its location in the bound volumes of authorities.
 2. The violations of the Convention which were established, with references to the paragraphs in the judgment where the findings were made.
 3. The damages awarded, if any. It is helpful if their sterling equivalent at present values can be agreed.
 4. A brief summary of the appellant's contentions in relation to the case, with references to the key paragraphs in the judgment.
 5. A brief summary of the respondent's contentions in relation to the case, again with references to the key paragraphs.
102. Secondly, the court should be provided with a table listing the authorities in chronological order.
103. Thirdly, it has to be borne in mind that extracting principles from a blizzard of authorities requires painstaking effort. The submissions should explain the principles which counsel maintain can be derived from the authorities, and how the authorities support those principles. Otherwise, to adapt Mark Twain's remark about life, the citation of authorities is liable to amount to little more than one damn thing after another; or even, to borrow a well-known riposte, the same damn thing over and over again.

Apart from the practical guidance issued to legal advisors, this is an important addition to our understanding of the relationship between international and domestic courts in this context, in which the role of the domestic courts is to extract guidance from the 'blizzard of authorities' emerging from Strasbourg—while setting relatively little store by any attempt to state general principles in the latter court.

p. 590 **6 The Funding of Litigation**

Undergraduate law courses do not traditionally spend much time considering the way that litigation is funded. But the enormous changes that have been made in respect of the funding of civil litigation in recent years—culminating in significant legislation coming into force in 2013—have a direct impact on the themes of this chapter.

A wide-ranging review of civil litigation costs and funding was led by Lord Justice Jackson. His Final Report was published in January 2010.⁵⁸ Following a period of consultation, the Ministry of Justice announced in 2011 its intention to implement the proposed reforms as a package by 2013. This was achieved through Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 (LASPO), and this came into effect in April 2013. The key provisions are sections 44–6; and sections 56–60. The reforms mark an end to recoverable success fees and after the event (ATE) insurance premiums, in return for ‘one-way costs shifting’ (from losing defendants, but not from losing claimants) in personal injury actions, and an increase in general damages.

6.1 Background to the 2013 Reforms

The general presumption is that costs of civil litigation will be awarded in the cause, which is to say that the losing party would in most cases reimburse the costs of the winning party. Solicitors who wish to stay in business will in most instances be unwilling to take a case for claimants who have no prospect of paying their costs in the event of failure.⁵⁹ Historically therefore, personal injuries claims have often been funded by trades unions, or state-funded through legal aid. Alternatively, claimants with first party insurance may be ‘funded by’ their insurance company—which is to say that it is really the insurer who is seeking indemnification from a potential wrongdoer.⁶⁰ But successive governments determined that the burden of legal aid is simply too great for the state to continue to fund civil claims.

Lord Bingham, *Callery v Gray*

[2002] UKHL 28; [2002] 1 WLR 2000

p. 591

- 1 My Lords, for nearly half a century, legal aid provided out of public funds was the main source of funding for those of modest means who sought to make or (less frequently) defend claims in the civil courts and who needed professional help to do so. By this means access to the courts was made available to many who would otherwise, for want of means, have been denied it. But as time passed the defects of the legal aid regime established under the Legal Aid and Advice Act 1949 and later statutes became more and more apparent. While the scheme served the poorest well, it left many with means above a low ceiling in an unsatisfactory position, too well off to qualify for legal aid but too badly off to contemplate incurring the costs of contested litigation. There was no access to the courts for them. Moreover, the effective immunity against adverse costs orders enjoyed by legally-aided claimants was always recognised to place an unfair burden on a privately-funded defendant resisting a legally-aided claim, since he would be liable for both sides' costs if he lost and his own even if he won. Most seriously of all, the cost to the public purse of providing civil legal aid had risen sharply, without however showing an increase in the number of cases funded or evidence that legal aid was directed to cases which most clearly justified the expenditure of public money.
- 2 Recognition of these defects underpinned the Access to Justice Act 1999 which, building on the Courts and Legal Services Act 1990, introduced a new regime for funding litigation, and in particular personal injury litigation with which alone this opinion is concerned. ... The 1999 Act and the accompanying regulations had (so far as relevant for present purposes) three aims. One aim was to contain the rising cost of legal aid to public funds and enable existing expenditure to be refocused on causes with the greatest need to be funded at public expense, whether because of their intrinsic importance or because of the difficulty of funding them otherwise than out of public funds or for both those reasons. A second aim was to improve access to the courts for members of the public with meritorious claims. It was appreciated that the risk of incurring substantial liabilities in costs is a powerful disincentive to all but the very rich from becoming involved in litigation, and it was therefore hoped that the new arrangements would enable claimants to protect themselves against liability for paying costs either to those acting for them or (if they chose) to those on the other side. A third aim was to discourage weak claims and enable successful defendants to recover their costs in actions brought against them by indigent claimants. Pursuant to the first of these aims publicly-funded assistance was withdrawn from run-of-the-mill personal injury claimants. The main instruments upon which it was intended that claimants should rely to achieve the second and third of the aims are described by my noble and learned friend: they are conditional fee agreements and insurance cover obtained after the event giving rise to the claim.

...

The Solution: Its Components

The solution adopted by the Courts and Legal Services Act 1990 remains essential background to the 2013 reforms. It permitted lawyers to charge on a **no win no fee** or **conditional fee** basis—an arrangement that was unlawful at common law. Such arrangements remain unlawful outside the conditions set by relevant legislation; but the permissible arrangements were broadened in 2013 to incorporate ‘Damages-Based Agreements’ (explained later).

Providing for enforceable conditional fee agreements (CFAs) was not sufficient in itself to secure broad access to justice. The funding regime developed in the 1990s incorporated two additional features.

Fee Uplifts

Lawyers accepting work on a conditional fee basis are taking a risk. If they lose the claim, and costs are awarded in the cause, they will be paid nothing. To make this risk worthwhile, the legislation allowed fee uplifts. The lawyer gained nothing for those claims that are lost; but gained extra fees (above the value of the time spent on the case) for those that were won. Claimant lawyers needed to assess risks appropriately over time.

p. 592 ↩ Since the maximum permissible ‘success fee’ (uplift) was set at 100 per cent, fees could in some cases be demanded which were double the value of the work actually undertaken. The burden of this inflated fee was initially placed on claimants, the ‘success fee’ being reclaimed out of damages. In some instances, this might make the action much less worthwhile, and in a personal injury action might lead to significant under-compensation. By section 58A Access to Justice Act 1999, there was a significant change in the CFA regime. The burden of the success fee was placed upon losing defendants.

Behind these provisions was a deliberate strategy, aiming to displace the costs of litigation *from* the state (via legal aid), *to* losing defendants. This policy goal was bluntly spelt out by Lord Hoffmann in the following case concerned not with personal injury but with breach of confidence.

Lord Hoffmann, *Campbell v MGN (No 2)*

[2005] UKHL 61; [2005] 1 WLR 3394

16 ... there is no doubt that a deliberate policy of the 1999 Act was to impose the cost of all CFA litigation, successful or unsuccessful, upon unsuccessful defendants as a class. Losing defendants were to be required to contribute to the funds which would enable lawyers to take on other cases which might not be successful but would provide access to justice for people who could not otherwise have afforded to sue. In some kinds of litigation, such as personal injury actions, the funds provided by losing defendants were intended to be in substitution for funds previously provided by the state in the form of legal aid.

Given that the goal is to displace risks, from the taxpayer to losing defendants, it is worth noting that a good proportion of losing defendants will be public authorities, or others (such as NHS Trusts) funded at public expense. Ultimately, concerns grew that the costs of litigation were falling on such bodies, or upon insurers (and thus upon those paying insurance policies). The European Court of Human Rights in *MGN Ltd v UK* (2011)

53 EHRR 5 did not agree that the recoverable fee uplift in *Campbell v MGN* was a proportionate restriction on the defendant's freedom of speech, and found a violation of Article 10 ECHR. In that case, the uplift was 100 per cent. The issue of compatibility of the costs regime with the ECHR was considered again by the Supreme Court in *Lawrence v Fen Tigers (No 3)* [2015] UKSC 50 (below).

ATE Insurance

The second additional problem was that, if costs are awarded in the cause, a losing claimant can presume that he or she will be ordered to *pay the winning defendant's costs*. Few claimants in a personal injury action will have the means to do this. Therefore, an essential component of the funding arrangements was after the event (ATE) insurance. This insurance is taken out after the accident or injury, generally at the time of making a claim. In return for a premium, the ATE insurer will pay the defendant's costs if the claim fails. ATE policies are negotiated by claimants' solicitors, rather than by claimants themselves. Initially, ATE premiums were, like success fees, payable by a winning claimant. Through section 29 Access to Justice Act 1999, ATE premiums too became payable by losing defendants.

p. 593 The implications proved troubling. Whereas the possibility of recoverable success fees aimed to transfer the costs of litigation from the state to losing defendants, the recoverability of ATE premiums from losing defendants meant that the claimant paid neither costs nor insurance premiums, win or lose; while claimants' solicitors were indemnified provided ↩ they did not take more unsuccessful than successful claims. Nor was their use confined to personal injury. The problem was the lack of any incentive on claimants and their solicitors to keep costs to a reasonable level; and the lack of any control over costs on the part of defendants. These problems emerged very strongly in case law concerned with recovery of ATE premiums; and the combined effect of recoverable success fees and ATE premiums was a major factor in the most recent reforms. The following case therefore continues to provide important background to the current regime.

***Callery v Gray* [2002] UKHL 28; [2002] 1 WLR 2000**

This was a small-scale road accident case involving minor injuries. There was a very low (even tiny) risk that the claim would be resisted. The claimant entered into a CFA with solicitors, agreeing a fee uplift of 60 per cent despite the straightforward nature of the work. He also paid an ATE insurance premium of £350 to cover the possibility of failure (and therefore of paying costs), even though this possibility was remote. The defendant quickly admitted liability and agreed to pay both damages, and reasonable costs, but then argued that the costs claimed were excessive. The 60 per cent uplift was too high, and there was no need to take out ATE insurance at such an early stage, when there was no reason to think that the claim would be resisted.

A district judge in costs-only proceedings ruled that a success fee of 40 per cent (but not 60 per cent) was reasonable, and that the costs of the insurance premium could also be recovered. This decision was upheld on appeal to a judge. The Court of Appeal ([2001] 1 WLR 2112) agreed that it was reasonable to take out ATE insurance on first consulting a solicitor in respect of a modest claim of this nature, and provided the premium was reasonable this would be recoverable even if there was an early settlement in respect of liability.⁶¹

However, the maximum allowable success fee was 20 per cent. Recoverable costs were reduced accordingly.

The House of Lords declined to interfere with the judgment of the Court of Appeal, noting that that court had ‘front-line responsibility for making the new system work fairly and effectively’ (Lord Bingham at [5]). However, the House noted certain problems associated with the risk-free environment enjoyed by claimants under the new arrangements. Lord Hoffmann described the claim in issue as being ‘as certain of success as anything in litigation can be’ (at [21]), and noted that the Court of Appeal called it a ‘very, very low risk case’. A success fee of 20 per cent, and the early decision to take out ATE insurance, could be justified only by taking a ‘global’ view (taking into account the policy of the changes), and not by reference to the risks of the claim in question. The difficulties were identified by various members of the House.

Lord Hoffmann, *Callery v Gray*

[2002] 1 WLR 2000

- p. 594
- 24 The second argument was that by agreeing to a success fee at the first meeting, the client so to speak insures himself against having to pay a higher one later if his case turns out to be more difficult than at first appeared. (This is very similar to the argument for an early ATE insurance, which I shall come to later.) At first sight, therefore, one could say that agreeing an immediate success fee is no more than economically rational behaviour on the part of any client and that the fee should therefore be recoverable as an expense reasonably incurred.
 - 25 The difficulty is that while, in principle, it may be rational to agree a success fee at the earliest moment, it is extremely difficult to say whether the actual ‘premium’ paid by the client was reasonable or not. This is because the client does not pay the ‘premium’, whether the success fee is agreed at an earlier or later stage. The transaction therefore lacks the features of a normal insurance, in which the transaction takes place against the background of an insurance market in which the economically rational client or his broker will choose the cheapest insurance suited to his needs. Since the client will in no event be paying the success fee out of his pocket or his damages, he is not concerned with economic rationality. He has no interest in what the fee is. The only persons who have such an interest are the solicitor on the one hand and the liability insurer who will be called upon to pay it on the other. And their interest centres entirely upon whether the agreed success fee will or will not exceed what the costs judge is willing to allow.

Although the House was willing to accept the Court of Appeal’s judgment, Lords Hoffmann and Scott rather doubted whether further time and experience would really assist in the judgment of a ‘reasonable’ success fee (uplift) for routine cases, because of the absence of any real market in respect of costs and ATE insurance; and because the judgment of ‘reasonableness’ was now being conducted in ‘global’ terms, rather than by reference to the issues in the particular case.

A number of cases have been included in chapters of this work which were funded through the 1999 regime. One of these, *Lawrence v Fen Tigers (No 3)* [2015] UKSC 50, starkly illustrates the problems. The claimants successfully brought an action in nuisance against the defendants, funded by a CFA. We extract the Supreme Court’s decision in the nuisance action in Chapter 10. The claimants took out an ATE policy; and if they won the case they were liable under the CFA to pay a 100 per cent success fee on top of base costs. At trial, an injunction was ordered together with damages of £20,750. By then, the claimant had incurred costs exceeding

£827,600. The judge ordered the second and third defendants to pay 60 per cent of the claimant's costs, including £312,000 in respect of the success fee and ATE premium. Further costs were incurred through appeals to the Court of Appeal and Supreme Court. The defendants argued that the costs regime infringed Article 6 ECHR (access to a court) and Article 1 of Protocol 1 ECHR (the right to enjoy property). The question divided the Supreme Court but, by a majority, it was concluded that the situation in *Campbell* could be distinguished, and that the regime was broadly compatible with the ECHR.

Lord Neuberger and Lord Dyson MR, *Coventry v Lawrence* (No 3)

42 The submissions of Mr McCracken can be summarised as follows. The system set out in the CPD was incompatible with article 6 and A1P1 of the Convention in that it unjustifiably interfered with the article 6 and A1P1 Convention rights of ‘non-rich’ respondents who unsuccessfully contested litigation instituted by appellants who had the benefit of CFA agreements and ATE insurance.

p. 595 43 The system had a number of shortcomings which were described as ‘flaws’ by Jackson LJ in his Review of Civil Litigation which were summarised by the ECtHR at paras 207–210 of its judgment in *MGN v United Kingdom* 53 EHRR 195. The flaws were (i) the lack of focus of the regime and the lack of any qualifying requirements for appellants who would be allowed to enter into a CFA; (ii) the absence of any incentive for appellants to control the incurring of legal costs and the fact that judges assessed costs only at the end of the case when it was too late to control costs that had been spent; (iii) the ‘blackmail’ or ‘chilling’ effect of the regime which drove parties to settle early despite good prospects of a defence; and (iv) the fact that the regime gave the opportunity to ‘cherry pick’ winning cases to conduct on CFAs. At para 217, the court concluded that:

“the depth and nature of the flaws in the system ... are such that the court can conclude that the impugned scheme exceeded even the broad margin of appreciation to be accorded to the state in respect of general measures pursuing social and economic interests.”

44 These flaws were regarded by the ECtHR as sufficiently serious to lead it to conclude that the system was incompatible with article 10 of the Convention. Mr McCracken submits that the same reasoning necessarily requires the court to hold that the system was also incompatible with article 6 and A1P1.

45 The system was arbitrary. It singled out from the class of unsuccessful litigants a subset of those who happened to have been opposed by CFA/ATE-funded litigants and imposed on that subset the burden of funding other unsuccessful cases which did not involve them at all.

46 The real vice of the system lay in the CPD. CPD 11.7 based the assessment of CFA uplifts and ATE premiums exclusively on the ex ante perspective of the CFA/ATE party; and CPD 11.9 expressly disallowed any reduction on the basis that the overall total of base costs and uplifts appeared to be disproportionate. Decisions on uplift therefore disregarded the financial circumstances of the payer, the importance to the payer of fighting the case and the reasonableness of his decision to fight.

Even in reaching their conclusion that the scheme did not violate ECHR rights, the majority recognized serious shortcomings in the scheme:

Lords Neuberger and Dyson, *Coventry v Lawrence (No 3)*

83 To summarise. It was undoubtedly a feature of the 1999 Act scheme that the costs awarded to successful appellants who had the benefit of CFAs could be very high indeed. For that reason, it had the potential to place respondents under considerable pressure to settle before even more costs were incurred. This is the third flaw identified by the ECtHR in *MGN v United Kingdom* 53 EHRR 195 and the second of Lord Neuberger PSC's four unique and regrettable features. We accept that, in a number of individual cases, the scheme might be said to have interfered with a defendant's right of access to justice. But for the reasons stated earlier ..., it is necessary to concentrate on the scheme as a whole. The scheme as a whole was a rational and coherent scheme for providing access to justice to those to whom it would probably otherwise have been denied. It was subject to certain safeguards. The government was entitled to a considerable area of discretionary judgment in choosing the scheme that it considered would strike the right balance between the interests of appellants and respondents whilst at the same time securing access to justice to those who would previously have qualified for legal aid. It had to find a solution to the problem created by the withdrawal of legal aid. The government has now produced three different schemes. Each was produced after wide consultation. Each has generated considerable criticism. As already indicated, once civil legal aid was constrained to the extent that it was in 1999, it became impossible to come up with a solution which would meet with universal approval. This is relevant to the question whether the 1999 Act scheme struck a fair balance between the interests of different litigants.

p. 596

Jackson LJ, for his part, has stated that '[b]etween April 2000 and April 2013 the CFA regime was an instrument of injustice and, on occasion, oppression': Lord Justice Jackson, 'Fixing and Funding the Costs of Civil Litigation' (2015) CJQ 260, 264; Lord Mance in *Coventry v Lawrence (No 3)* described it as 'unfairly discriminatory' ([117]). These problems form the background to the subsequent reforms.

6.2 The 2013 Reforms

The problems just discussed led to a review of the entire funding regime. Introducing his *Review of Civil Litigation Costs: Final Report* in 2010, Jackson LJ said that:

In some areas of civil litigation costs are disproportionate and impede access to justice. I therefore propose a coherent package of interlocking reforms, designed to control costs and promote access to justice.⁶²

That package has largely remained intact in its implementation, which has been achieved simultaneously through legislation; through changes to the civil procedure rules; and in the case of an increase in general damages, through action of the courts themselves. Between them, the changes mark significant evolution in civil litigation funding.

The key implementing legislation is LASPO 2012: Part 2 of the statute proceeded by amending key provisions of the Courts and Legal Services Act 1990.

No Win No Fee Agreements: CFAs and DBAs (sections 44, 45 LASPO)

In addition to conditional fee agreements (CFAs), introduced earlier, the legislation allows for damages-based agreements (DBAs, sometimes called ‘contingency fees’). In both sets of arrangements, the lawyer’s payment is conditional on the case being successful. If the case is lost, the lawyer is not paid. If the case is won, the lawyer is paid either the normal fee plus an uplift or success fee (in the case of CFAs); or a percentage of the damages recovered (in the case of DBAs). The maximum payment that a lawyer can recover from a claimant’s damages through a DBA is capped at 25 per cent of damages (excluding damages for future care and loss) in personal injury actions; at 35 per cent of damages in employment tribunal cases (the context where p. 597 contingency fees have previously been recoverable in English courts); and at ↵ 50 per cent of damages in all other cases. The recognition of ‘contingency fees’ (as opposed to conditional fees) is an important moment. There have been concerns about such fees, since they reduce the amount of damages remaining to the successful claimant, and might appear to encourage negotiation of higher settlements, as well as enabling lawyers to acquire fees which are unrelated to the level of work undertaken. They have been associated in the minds of English lawyers with the US legal system, though some doubt has been cast on these reasons for hostility.⁶³ The embrace of contingency fees crosses a watershed in our system of civil litigation. Recognizing this, the legislation places safeguards on their operation, particularly for the benefit of personal injury claimants. Such claimants will have a particular need for their damages, for example, to cover living expenses and care costs. Typically, their injuries will also not be covered by first party insurance.

Changes to CFAs (section 44 LASPO)

The previous arrangements meant that the winning party’s ‘success fee’ was payable by the losing party in addition to the ordinary legal costs of the winning party. From 1 April 2013, the ‘success fee’ is no longer payable by the losing side; if such a fee is charged, it will be paid by the winning party, typically out of damages recovered. The ‘success fee’ can be up to 100 per cent of basic fee—this remains unchanged from when CFAs were first introduced in the 1990s. However, in personal injury cases, the success fee that the lawyer may charge must not exceed 25 per cent of the damages, and this must exclude damages for future care and loss. This is intended to ensure that any damages for future care and loss are protected in their entirety (though we have addressed, in earlier sections, some serious problems arising in the calculation of those losses).

DBAs (section 45 LASPO; section 58AA Courts and Legal Services Act 1990)

Successful claimants using DBAs will recover their costs (lawyers’ fees) from defendants in the usual way, but the claimant must pay from damages any shortfall between the solicitors’ costs paid by the losing defendant and the agreed DBA fee. So far as lawyers are concerned, their fee is *restricted* to the DBA fee: if the DBA fee is less than the solicitors’ costs would be in the absence of a DBA, a losing defendant will simply pay less. There have been significant problems with the clarity of the Regulations, which have held back use of DBAs, and an ongoing consultation seeks to smooth the path to greater uptake. In *Zuberi v Lexlaw* [2021] EWCA Civ 16, the Court of Appeal adopted an interpretation of the Regulations which allowed legal advisors to pursue costs for

work done before a client discontinued their claim, as the agreement on such costs was treated as separate from the agreement as to damages. This may encourage further use of DBAs; as, it is hoped, will the technical revisions to be proposed.

Legal Expenses Insurance: BTE and ATE

Before the Event (BTE) Insurance

p. 598 Before the event (BTE) insurance is taken out before an actionable event has occurred. BTE insurance is often purchased as an add-on to existing insurance policies (usually motor or home insurance) although it is available as a stand-alone product. Many consumers who purchase BTE insurance are unaware of the coverage it provides and may not make use of it. Because it is taken out when litigation is merely a 'risk', it operates more like normal insurance than ATE, and is less costly. The promise of BTE insurance is explored by R. Lewis, 'Litigation Costs and Before-the-Event Insurance: the Key to Access to Justice?' (2011) 74 MLR 272.

After the Event (ATE) Insurance

We have seen that after the event (ATE) insurance was a crucial part of the pre-2013 regime. Though it still exists, it is made much less attractive by the 2013 changes, and is no longer a key part of the solution. ATE insurers undertake to pay the defendant's costs in the event that the claimant loses. Because it is bought when litigation is imminent, the risk tends to be high, and the insurance tends to be expensive. As we have seen, the cost has not typically fallen on claimants, win or lose. Rather, it was (under the previous arrangements) recovered from defendants in cases which defendants lost. This too necessarily increases the premium; it is only sometimes recovered. It seems that the premium typically ranged from 30 per cent to 50 per cent of the level of costs incurred; and ATE was therefore implicated in the situation where costs exceeded the claim itself. Crucially, it also contributed to the 'risk-free' environment for claimants.

Jackson LJ, *Review of Civil Litigation Costs: Final Report* (2010), Chapter 9, 4.4

... Any person who finds a willing insurer can take out ATE insurance, whether that person is rich or poor, human or corporate, deserving or undeserving. Furthermore, the protection which a claimant derives from ATE insurance is total. The claimant is not required to make a modest contribution towards adverse costs ... even if he can afford to do so.

In almost all cases, ATE insurance premiums are no longer recoverable if the insurance is taken out after 1 April 2013. ATE insurance remains available, but premiums are payable at the litigant's expense. For *personal injury claims only*, qualified one-way costs shifting (QOCS) is the replacement solution. It is designed to protect claimants, while still on balance benefiting defendants as a class.⁶⁴ This further underlines the recognized vulnerability of personal injury claimants.

Increase in General Damages

We saw earlier in this chapter that a 10 per cent increase in non-pecuniary general damages has been introduced by the courts. This applies to all tort cases, however funded: *Simmons v Castle* [2012] EWCA Civ 1288. In *Summers v Bundy* [2016] EWCA Civ 126; [2016] PIQR Q6, the Court of Appeal clarified that courts have no discretion in whether to apply the uplift, which had been wrongly disappplied in a claim brought by a legally aided claimant.

p. 599 **Sanctions under Part 36 of the Civil Procedure Rules (section 55 LASPO; Offers to Settle in Civil Proceedings Order 2013)**

Under Part 36 of the Civil Procedure Rules, an additional amount must now be paid by a defendant who does not accept a claimant's offer to settle where the court gives judgment that is at least as advantageous as an offer the claimant made to settle the claim. This additional sanction is calculated as 10 per cent of damages where damages are in issue, and 10 per cent of costs for non-damages claims; but is subject to a maximum of around £75,000.

Referral Fees Ban in Personal Injury Cases (sections 57, 59 LASPO)

From 1 April 2013, the payment and receipt of referral fees in personal injury cases is prohibited. 'Referral fees' are payments made by solicitors to third parties for client referrals or introductions. Lord Justice Jackson thought these were unnecessary, since claimants would have little difficulty finding legal representation without such fees. They were also expensive, so that the ban on such fees would reduce costs. His views on this were particularly strong, though such fees have also been defended (Higgins, Further Reading).

Jackson LJ, *Review of Civil Litigation Costs: Final Report*

- 4.11 ... In my view, it is offensive and wrong in principle for personal injury claimants to be treated as a commodity. BTE insurers should not be in the position of auctioning off the personal injury claims of those whom they insure. It is equally unacceptable for claims management companies to buy in personal injury claims from other referrers and then sell them on at a profit. Indeed the very language of the claims management industry characterises personal injury claims as a commodity. Strong cases ready to be pursued are described as 'oven ready'.
- 4.12 The practice is, in my view, even more abhorrent when the referrer not only demands a referral fee from the solicitor but also takes a slice of the claimant's damages (without having added any value to the case). I am aware of one claims management company which charges its clients a fee of £379 out of damages received.

Costs Protection in Personal Injury Claims: Qualified One Way Costs Shifting (QOCS)

A new costs protection regime has been introduced for personal injury claims (including clinical negligence), which aims to replace the old recoverable ATE premium while not exposing personal injury claimants to inappropriate risk. This regime limits the circumstances under which a claimant might have to pay costs to the other side, and is called ‘qualified one-way costs shifting’ (QOCS). It has been introduced by changes to the Civil Procedure Rules. Evidence to the Jackson review suggested that compensators as a whole (an interesting notion, which suggests the true structure of tort law) would be better off if they *gave up* the right to recover costs when they won, provided they did not pay success fees and ATE premiums when they lost (or, importantly, when they reached a settlement). And of course, the need for recoverable success fees and ATE premiums recedes in a context where the claimant is not generally at risk of paying a winning defendant’s costs. The very existence of QOCS as a solution illustrates that defendants in personal injury actions are a class or group of repeat players, who will win and lose over time: it is on this basis that they may win more than they lose through such a change.

There are exceptions to the protection of personal injury claimants through QOCS. The exceptions generally fall into two categories: behavioural (where claimants have acted fraudulently, frivolously, or unreasonably); and financial (can the claimant afford the costs?). Where the lines are drawn will be important; but clarity too is important in this context. It must be clear to potential claimants what would take them outside the protection of QOCS.

Third Party Funding

Another element of the present changes in the funding of civil litigation is the growing use of third-party funding. The £70 million claim in *Moore Stephens v Stone & Rolls Ltd* [2009] UKHL 39, was funded by third parties. The Jackson Report described the market as ‘still nascent’; but noted that a voluntary code (of self-regulation) had been made available since publication of the Interim Report.⁶⁵ In *Excalibur Ventures v Texas Keystone Inc* [2016] EWCA Civ 1144, third parties who had funded hopeless claims were held liable for costs on the indemnity basis.

Fixed Costs

The ‘fixed costs’ regime previously introduced for road traffic claims up to £10,000—which are of course subject to compulsory insurance—has been extended to claims in relation to employers’ liability and public liability. Only the first of these is covered by compulsory insurance, though liability insurance is generally present also for the latter risk. At the same time, the upper limit to which the fixed costs apply has been raised to £25,000, in a measure clearly aimed at controlling costs and increasing the efficiency of the most common types of claims. Following a period of further review and consultation, in September 2021 it was announced that fixed recoverable costs will be extended, covering all claims for between £10,000 and £25,000. There will also be a new category of ‘intermediate cases’ of between £25,000 and £100,000 which will be allocated to the ‘fast track’ and subject to fixed recoverable costs (on a slightly different basis). This is not all claims of this size, but those that satisfy a range of criteria. The goal, clearly, is to improve the predictability of costs in the litigation.

7 Conclusions

- p. 601
- i. This chapter has been concerned both with monetary remedies, and with the costs of delivering the law of tort. Both of these are, in many ways, at the core of the subject. The general principle of tort damages is that they compensate the claimant in full for their wrongful losses. The detailed application of this principle is, however, far from straightforward. Among the reasons for this are the need to anticipate what would have happened, had it not been for the tort; and, in the case of a claimant with continuing needs, the need to anticipate what the costs of care and support will be. It must be admitted that in the face of these difficulties, there is no way to be sure of what is a correct award; and periodical payments while solving this problem raise other difficulties, particularly when it comes to protecting the value of the payments.
 - ii. As with many other aspects of the law of tort, the HRA offers a new set of challenges. In this instance, the HRA raises the question of whether tort's available remedies demonstrate that it is serious about vindicating rights. For the most part, tort damages are more generous than HRA damages; but HRA damages cover a wider scope. The ability of a wider range of relatives to bring actions in respect of wrongful death under the HRA is one illustration; another is the availability of damages for anxiety and distress caused by rights violations under the HRA, in circumstances where tort, since *Lumba*, will offer only nominal damages, if any at all. The question which arises, as in other aspects of the law, is whether the HRA is inclined to influence the law of tort into expanding its remedies; or whether it encourages the courts to play safe with tort remedies, on the basis that rights are now adequately protected elsewhere.
 - iii. Some of the most significant recent developments in the law of tort have not been at the level of legal principle, but in relation to the funding of civil litigation. Responding to the removal of civil legal aid from almost all areas, the reforms of 1999 introduced a range of measures which, in hindsight, imposed on some losing defendants the burden of crushing costs awards, reflecting 'success fees' and ATE insurance premiums charged to the winning claimant. A set of reforms in 2013 has attempted to redress the balance, but at the price of greater risks for claimants and for their lawyers. The reform of civil litigation costs and funding is still work in progress, and has a greater influence on the shape of the law than any individual development of legal principle is likely to have.

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Notes

¹ His damages were reduced by 27.5 per cent to reflect his contributory negligence. The driver (defendant) and all of the passengers (two of whom were killed in the accident) had been drinking heavily.

² Gross J at para [29]. This illustrates an important point. The court must consider what the claimant *has lost*, even if this means that two equally deserving claimants of the same age and with the same injuries will receive very different awards. Their life prospects without the accident will be reflected in the award and in a sense, social injustice (as well as pure luck) are maintained. This is because tort damages aim to be primarily corrective, and do not aim to be distributive, even if the effect of tort law is on some level to distribute the risks of accidents.

³ The Ogden Tables are published by The Stationery Office and available online:

<https://www.gov.uk/government/publications/ogden-tables-actuarial-compensation-tables-for-injury-and-death> <<https://www.gov.uk/government/publications/ogden-tables-actuarial-compensation-tables-for-injury-and-death>>.

⁴ For new possibilities created by statute, see Section 4 of this chapter.

⁵ Cited by Lord Lloyd at 369.

⁶ <https://www.gov.uk/government/news/new-discount-rate-for-personal-injury-claims-announced> <<https://www.gov.uk/government/news/new-discount-rate-for-personal-injury-claims-announced>>. As expected, insurers have been vocal in their condemnation of the rate cut and the likely increased costs to motorists and to the NHS. See, for example, the ABI's news release: <https://www.abi.org.uk/News/News-releases/2017/02/BI-RESPONDS-TO-CHANGES-IN-PERSONAL-INJURY-DISCOUNT-RATE> <<https://www.abi.org.uk/News/News-releases/2017/02/BI-RESPONDS-TO-CHANGES-IN-PERSONAL-INJURY-DISCOUNT-RATE>>. The new rate came into force on 20 March 2017. In what is said to be the first case applying the rate, solicitors acting for a claimant suffering severe brain injuries at birth report an increase in damages of £5.5 million: <https://www.forbessolicitors.co.uk/news/display/38628/15/accrington-solicitor-acts-in-legal-first> <<https://www.forbessolicitors.co.uk/news/display/38628/15/accrington-solicitor-acts-in-legal-first>>. This is, of course, exactly the kind of case where it was felt action was needed to protect claimants in need of long-term care.

⁷ *The Personal Injury Discount Rate: How it Should be Set in Future* (Draft Legislation, Ministry of Justice, September 2017, Cmnd. 9500).

⁸ The House of Lords in this case ruled that a claim for these damages survived the death of the victim for the benefit of the estate, giving rise to the risk of double recovery where there is also an independent action by a dependant for their own loss, under the Fatal Accidents Act 1976. As explained in connection with fatal accidents, below, this possibility was reversed by statute.

⁹ In *JR v Sheffield Teaching Hospital NHS Foundation Trust* [2017] EWHC 1245 (QB), the court allowed a claim relating to the 'lost years' from an adult claimant who had suffered severe brain damage at birth. There was no need to show that were or would be any dependents for such an award to be made.

¹⁰ See J. Herring, 'Where are the Carers in Health Care Law and Ethics?' (2007) 27 LS 51–73.

¹¹ See L. Hoyano, 'The Dutiful Tortfeasor in the House of Lords' [1995] Tort L Rev 63.

¹² Social Security Act 1975.

¹³ Because the claimant has not in fact ‘lost’ all the sums repaid as a consequence of the tort.

¹⁴ It should be pointed out that this was an *additional* increase above the level of the Retail Price Index.

¹⁵ Pain, suffering, and loss of amenity.

¹⁶ *Review of Civil Litigation Costs: Final Report* (TSO, 2010).

¹⁷ Excluded are claimants who are able to recover a ‘success fee’ pursuant to s 44(6) LASPO 2012. The uplift is designed to replace the recoverable success fee.

¹⁸ Sections 1A and 1(2)(a) were inserted and substituted (respectively) by the Administration of Justice Act 1982.

¹⁹ A claim for civil damages can fulfil this duty: *Pearson v UK* (2012) 54 EHRR SE11.

²⁰ For a history of the first Fatal Accidents Act, see D. Nolan, ‘The Fatal Accidents Act 1846’, in T. T. Arvind and J. Steele (eds), *Tort Law and the Legislature* (Hart Publishing, 2013).

²¹ This section was substituted by the Administration of Justice Act 1982, s 3, and amended by the Civil Partnership Act 2004.

²² This subsection and ss 1(2)(fa) and 1(4A) were inserted by the Civil Partnership Act 2004.

²³ Amended by the Civil Partnership Act 2004 and the Fatal Accidents Act 1976 (Remedial) Order 2020/1023 (October 6, 2020).

²⁴ This sum was substituted by the Damages for Bereavement (Variation of Sum) (England and Wales) Order 2020/316 art.2 <[https://uk.westlaw.com/Document/I2A9BDDE06B3811EAB90DD2D62041B807/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=7970a8d4a9bb4a29b63341ea518c59a2&contextData=\(sc.DocLink\)>](https://uk.westlaw.com/Document/I2A9BDDE06B3811EAB90DD2D62041B807/View/FullText.html?originationContext=document&transitionType=DocumentItem&ppcid=7970a8d4a9bb4a29b63341ea518c59a2&contextData=(sc.DocLink)>) (May 1, 2020) and is subject to change in accordance with s.1(5).

²⁵ The declaration is a very different remedy from damages. In this instance, the declaration was issued because the legislation as it stood could not be interpreted so as to make the damages claimed available.

²⁶ See Chapter 8.

²⁷ Section 1(1) of the Civil Liability (Contribution) Act 1978, explained in Chapter 8.

²⁸ It is not clear what a court would do if a widow succeeded in such an action, so that contribution between the two tortfeasors fell to be decided. As we explained in Chapter 8, the factors which can be considered by a court in making the apportionment are not limited to those which are causative of the harm suffered. In principle, the fact that B had already paid a sum to the deceased could therefore be taken into account; what is less clear is *how* this factor ought to be treated in proceedings between tortfeasors in a case where there is an element of double compensation. Which party should bear the cost of the double compensation element? This problem is not insurmountable, since the court could decide to share the double compensation element (which is after all a creation of statute) equitably between the tortfeasors.

²⁹ Lord Hope, who gave the leading judgment in *Jameson*, agreed with Lord Bingham in *Heaton v Axa*.

³⁰ The judge at first instance had instead applied common law principles on deductions.

³¹ R. Wilde, ‘Periodical Payments—A Journey Into the Unknown’ (2005) 4 JPIL 320; R. Lewis, ‘The Politics and Economics of Tort Law: Judicially Imposed Periodical Payments’ (2006) 69 MLR 418.

³² C. Malla, 'PPOs in Catastrophic Injury Claims' (2013) JPIL 169, 172, reporting the findings of a Study published in 2011, by the International Underwriting Association.

³³ The following subsections were added by the Courts Act 2003.

³⁴ We should also note the existence of 'conventional awards', such as the award for bereavement. These are compensatory in a limited sense, because they relate to the claimant's loss. But they do not seek to *make good* the claimant's loss.

³⁵ For discussion of aggravated damages see J. Murphy, 'The Nature and Domain of Aggravated Damages' (2010) CLJ 353. A defence of exemplary damages against certain sorts of attack can be found in J. Edelman, 'In Defence of Exemplary Damages', in C. Rickett (ed.), *Justifying Private Law Remedies* (Hart Publishing, 2008).

³⁶ See, for example, the discussion of *Sutcliffe v Pressdram* in Chapter 13.

³⁷ An exception is *A v Hoare* where the reasons making the claim viable were exceptional: the defendant had bought a winning lottery ticket while on day release. There are of course many recent cases where claims for sexual abuse are brought against *organizations* on the basis of vicarious liability or systemic negligence: see the discussion of *Lister v Hesley Hall* (Chapter 9) and *A v Hoare* (Chapter 7), and associated cases.

³⁸ For comprehensive argument around the possibilities offered by civil liability in this context, see T. Keren-Paz, *Sex-Trafficking: A Private Law Response* (Routledge, 2013).

³⁹ It is this which leads to much of the overlap between aggravated and exemplary damages. Some authors are sceptical that high-handed behaviour which deserves additional sanctions could fail to add to the claimant's injury.

⁴⁰ Lord Devlin, *Rookes v Barnard* [1964] AC 1129, at 1226.

⁴¹ Obviously, such damages would still be available where legislation so provided.

⁴² The House of Lords has the power to depart from its previous decisions under the Practice Direction of 1966. The House did not have this power in 1964; but it is doubtful whether any previous decision of the House of Lords required the retention of exemplary damages at that date.

⁴³ The operation of vicarious liability, and the underlying arguments of policy and justice for such liability, are investigated in Chapter 9. It has been said that vicarious liability should be the usual route in an action for misfeasance, thus protecting individuals from potentially oppressive actions from aggrieved parties: *Adams v Law Society of England and Wales* [2012] EWHC 980 (QB).

⁴⁴ The constitutional role of tort remedies in such a case is emphasized by J. Varuhas, 'Exemplary Damages: "Public Law" Functions, Mens Rea and Quantum' (2011) 70 CLJ 284.

⁴⁵ Indeed in *Gray v Barr* [1971] 2 QB 554, indemnity was denied to a man liable in damages for killing another, even though he had been acquitted of murder and manslaughter. More generally, see our discussion of *ex turpi causa* in Chapter 5; and R. Merkin and J. Steele, *Insurance and the Law of Obligations* (Oxford University Press, 2013), Chapter 11.

⁴⁶ This case is closely comparable to other Court of Appeal decisions in the same period, which limited damages in defamation actions by offering 'guidance' to juries. We consider these cases in Chapter 13: see in particular *John v MGN* [1997] QB 586, referred to by the Court of Appeal in *Thompson*.

⁴⁷ See D. Pearce and R. Halson, 'Damages for Breach of Contract: Compensation, Restitution and Vindication' (2008) 28 OJLS 73–98, for discussion of these cases in the context of contractual remedies and the goal of vindication.

⁴⁸ The process of reasoning is explored and criticized by the present author in J. Steele, 'Damages in Tort and under the Human Rights Act: Remedial or Functional Separation?' (2008) 67 CLJ 606–34. For an argument that damages under the Act ought to be modelled on tort, see J. Varuhas, 'A Tort-based Approach to Damages under the Human Rights Act 1998' (2009) 72 MLR 750–82.

⁴⁹ 'Nominal damages' (a very small amount) might be awarded where a violation of a right did not result in any loss or harm to the claimant; but the idea of 'vindicatory' damages generally implies a substantial award. 'Conventional awards' have also been made, again at a lower level than compensatory awards (see *Rees v Darlington*, [2004] 1 AC 309). For discussion of various gain-based awards where the claimant's rights have been violated, see the next section of this chapter. These too, of course, may be said to 'vindicate the claimant's right'.

⁵⁰ In respect of nominal damages and declarations, as well as 'contemptuous awards', see A. Burrows, Further Reading, Chapter 23.

⁵¹ Apart from Lord Scott's judgment in *Kuddus*, extracted earlier in Section 4.1, note also his article 'Damages' [2007] LMCLQ 465–72.

⁵² J. Edelman, *Gain-Based Damages* (Hart Publishing, 2002) distinguishes between 'disgorgement damages' and 'restitutionary damages', and proposes that both are available for wrongs, including torts.

⁵³ For a recent illustrative case of trespass to land where a judge's gain-based and exemplary awards were *both* upheld by the Court of Appeal (albeit with reduction to the exemplary component), see *Ramzan v Brookwide Ltd* [2011] EWCA Civ 985. Contrast the refusal of the English courts to award both exemplary and vindicatory damages (earlier). Trespass to land in general is dealt with in Chapter 18.

⁵⁴ I Jackman, 'Restitution for Wrongs' [1989] CLJ 302.

⁵⁵ See also R. Cunnington, 'The Assessment of Gain-based Damages for Breach of Contract' (2008) 71 MLR 559–86.

⁵⁶ This is a reference to *Stoke-on-Trent v Wass Ltd* [1988] 1 WLR 1406, listed by Burrows (extracted above as one of five notable 'anti-restitutionary' decisions). Nominal damages were awarded, and a claim for gain-based damages rejected, by the Court of Appeal. The claim in *Wass* was in nuisance.

⁵⁷ For discussion of this issue after *Greenfield*, see Steele, Further Reading.

⁵⁸ *Review of Civil Litigation Costs: Final Report* (TSO, 2010) ('Jackson Report').

⁵⁹ If a claim *settles* the situation is still more unpredictable, since the terms of the settlement may or may not include full costs.

⁶⁰ Examples are *Stovin v Wise*, where a motor insurer tried to displace liability to the local authority, rather than to another motor insurer; and *Murphy v Brentwood*, where a buildings insurer sought to displace liability, also to a local authority.

⁶¹ The reasonableness of the particular premium was confirmed by the Court of Appeal in a second judgment, arrived at with the benefit of further evidence: [2001] 1 WLR 2142.

⁶² Foreword.

⁶³ See the study by R. Moorhead, 'An American Future?' (2010) 73 MLR 752.

⁶⁴ For review of ATE and BTE insurance, and of insurance in general, in civil litigation, see R. Merkin and J. Steele, *Insurance and the Law of Obligations*, Chapter 13.

⁶⁵ Jackson Report, Chapter 10. For an introduction (written by a litigation funder before the Report) see S. Dunn, 'Paying for Personal Injury Claims—What are the Options for Clients and their Representatives?' (2009) JPIL 218–23. See also Mulheron and Cashman, Further Reading.

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