

Remedies in Tort Law

Background Reading

Book

NJ McBride and R Bagshaw, *Tort Law* (London: Pearson, 2018) chs 23-28.

Articles

J Murphy, “Rethinking Injunctions in Tort Law” (2007) 27 *Oxford Journal of Legal Studies* 509-535.

J Murphy, ““The Nature and Domain of Aggravated Damages” [2010] *Cambridge Law Journal* 353-377.

I. Introduction

There are a number of so-called **self-help remedies** in tort – the most obvious of which is self-defence – but these are better seen as defences.

Our concern is with only the two most general remedies: **damages** and **injunctions**.

- Each having many varieties

But to give a more rounded picture and to tease out some often overlooked features of the law of negligence, we will consider various species of damages generally thought to be unavailable in negligence; but could be available in principle.

There is not the time (or need) to go into the complexities of things such as the following:

- How much for a lost leg or arm or eye?
- How, in detail, are the amounts payable by D determined?
- What allowance should be made for interest?
- Should the damages be paid as a lump sum, or by some other means?

II Damages

“Damages” normally constitute the monetary awards made by the courts in order to make good the various losses that P may suffer – *eg*, personal injury, or financial loss.

But damages are not always compensatory in nature.

A. Types of Damages

1. Compensatory Damages: Two Broad Categories

The overwhelming aim of damages in tort is to compensate. But while some losses can be pinned down with precision; others cannot.

Both **general** and **special** damages are intended as compensation, but they must be distinguished

General damages are for losses the courts presume will occur which cannot be calculated with precision (eg, post-trial financial losses).

- Damages presumed to be paid, but hard to be quantify

Special damages are awarded for a loss that **P must specifically prove** (eg, pre-trial medical expenses).

- Law does not presume so, but one need to prove
- E.g., damages in a car crash, P need to show evidence of it
- Damages to be equivaled with harm suffered

2. Nominal Damages

These are **awarded to make a moral point** (eg, in a battery that causes no physical injury).

Constantine v Imperial Hotels [1944] KB 693

Facts	P wrongly discriminated by person in a hotel; no real trouble but
Held	Get nominal damages The point being vindicate that P has been right, making good of his own name

NB Nominal damages can only be awarded in torts that are **actionable *per se*** (eg, battery and trespass to land).

They **cannot be awarded in negligence** because negligence requires proof of loss/harm.

You might ask: Why bother suing for HKD 50? **An award of nominal damages can be helpful to a plaintiff that:**

- **To vindicate P's right** (as noted in *Constantine*).
 - Low in value, but value being symbolic, e.g., in trespass case, signifying one's land
- **To get at aggravated damages** (see below).
 - Available in respect of infringement of dignity (which cannot be sued just as pure economic loss);
 - but if the infringement occurs with injunction with other wrong > can be recoverable
- **As a sort of declaration of rights.**
 - A mean to establish one's right (e.g., who owns the land)

In Hong Kong, the same considerations apply.

Hon Empire Investments Ltd v Owners of Arts Mansion [1989] HKCU 314

Facts	- D erected a metal fence between D's land and P's land (rooted in P's land) - The fence only intruded a couple of inches and caused no tangible loss to P
Held	It was technically a trespass; and P got nominal damages of HKD 1 P won; nominal damages, signifying the victory

[Apr 3]

3. **Aggravated Damages**

- an award of aggravating damages does perform **a compensatory role**; but with views from some scholar that they are exemplary and it is indistinguishable with punitive damages (see next)
 - the idea has some merits in Australian court, permits this idea
 - English case law makes it clear that aggravated damages are for compensatory
- not available as of right in relation to the violation/infringement of a recognised interest in tort in a free-standing fashion
 - cannot go to the court to say your right is being infringed and get damages from D;
- but rather more like:
 - P recognised a court of law, that one is seeking compensation for the financial loss that is caused by D's negligence; and recognised has no entitlement for suing for economic loss as a general matter
 - but P has entitlement to sue in respect of economic losses that legitimately cause where they are **contingent upon P's suffering some other form of loss** (generally only sue in respect of economic losses where they are **consequential on some other recognised wrong**)
- **compared to consequential economic loss is recoverable**, e.g., if it damaged a property > recoverable
 - If it's consequential on damage to property then you can recover for the economic loss that's associated with the damage to property
 - but cannot claim economic loss as a free standing right
- Here, in a case in which aggravating damages are made available
 - cannot sue for those aggravated damages in respect of a freestanding infringement of your dignity (e.g., if the only thing you have suffered is an infringement of your dignity or your dignitary interest; cannot use dignitary interest as a free-standing interest for which you can sue in the law of tort

- However, where you have suffered an infringement to your dignitary interest **on top of some other recognised wrong**, then we will allow you to recover for that infringement of your dignitary interest
- e.g., someone negligently poured coffee vs deliberately do it > same effect of staining your clothes but the latter is aggravated with contempt, the damage to the individual is enhanced in the second example

➔ recoverable when **on top of other harm > able to sue for injury to dignity (dignitary interest) + some other consequential loss/wrong**

In *Rookes v Barnard* [1964] AC 1129 Lord Devlin stressed the fact that such damages represent **serious aggravation of the injury to P's dignity and pride**.

[I]n cases where the damages are at large the jury (or the judge if the award is left to him) can take into account **the motives and conduct of the defendant** where they aggravate the injury done to the plaintiff. There may be malevolence or spite or the manner of committing the wrong may be such as to **injure the plaintiff's proper feelings of dignity and pride**.

Facts	Intimidation case; 3 parties; union members objected to a particular employee, said to employer if he does not get rid of that one employee they will go on strike
Issue	Can the employee sue for intimidation (unlike negligence, it's one of the economic tools and it <u>does allow you a freestanding action in relation to the economic lost yourself</u>)
Held	<ul style="list-style-type: none"> • can get award for the aggravation for the infringement of your dignity, as intimidation allows a freestanding action • look into the motives and conduct of the defendant where they aggravate the injury to the plaintiff • there maybe malevolence or spite or the manner of committing the wrong may be such as to injure the plaintiff's proper feelings of dignity and pride.

NB Aggravated damages are **controversial**.

The most compelling view seems to be that they **compensate infringements of a person's dignitary interest** (to which there is **no free-standing exigible right**).

Oriental Daily Publisher Ltd v Ming Pao Holdings Ltd (2012) 15 HKCU 1952

Aggravated damages are part of the compensatory award and may be granted to “compensate for additional injury caused to the plaintiff's feelings by the defendant's conduct of the action, as when he persists in an unfounded assertion that the publication was true, or refuses to apologise, or cross-examines the plaintiff in a wounding or insulting way”. (Ribeiro PJ.)

- hk: follow the case above

SOME READING

J. Murphy, "The Nature and Domain of Aggravated Damages" [2010] CLJ 353.

- [revisit]

The Law Commission in England and Wales:

- these are damages that are available in relation to a subspecies of cases or a subcategory of cases in which people are subjected to treatments at the hands of others that then **causes them some kind of psychiatric harm**.
- idea that aggravated damages targeted a special kind of psychiatric harm (about feelings, feeling unbelievably burdened, feeling unbelievably stressed and so on)

Murphy disagrees:

- case law: in cases of mental distress and at work, aggravated damages are hardly awarded at all > different categories of damage

Cf McBride and Bagshaw

- employment appeal tribunal case that sits in contradiction to Murphy's opposition
 - Thompson v police commission case: not available for ppl who is conscious
- objection by murphy:
 - (1) not a proper court of law (the employment appeal tribunal case, that's not even on a par with the first instance decision; only a specialist tribunal, not propical at all)
 - (2) point said in obiter

4. Exemplary Damages

These damages – sometimes known as **punitive damages** – have been very controversial in both the case-law and in their treatment by jurists.

- hk & uk court: hesitant to award it vs common in US

They arguably confuse the roles of the criminal and the civil law.

Reasons being:

- tort as in civil law, but criminal law deals with matter of punishment
- punishment is not something that ever should be meted out against someone, unless we're absolutely certain that they are a wrong-dealing.
- criminal (prove beyond reasonable doubt) vs tort (on balance of probability)
- as to punishment, decided differently: jury trial (a body that is representative of society generally) in criminal court; unlike tort cases > objectionable to have exemplary or, more indignantly, punitive damages.

In stipulating the sum, the accent is upon **the behaviour of the wrongdoer, not P's loss**.

Rookes v Barnard (*supra*)

- Lord Devlin: recognised history of this law; impossible to deny that exemplary damages exist
- but not the kind of thing the civil law should be handing out routinely; have to draw line on the availability;
- accept and recognise that in some circumstances they are allowed, but only allowed in three circumstances; with the 4th rider to bear in mind

The “three types of case” rule

(a) Oppressive, arbitrary or unconstitutional action by government servants

Thompson v Metropolitan Commissioner [1998] QB 498 (CA)

Facts	P arrested in connection of drinking and driving; police use particularly strong-arm tactic; very heavy-handed in arresting the person and placing them in a police cell.
Held	Must be committed by govt servant in this particularly heavy-handed way.
Note	e.g., Heavy arrest, deeply oppressive, false imprisonment

(b) D’s conduct calculated make a profit exceeding a compensatory award payable to P

Cassell v Broome [1972] AC 1027

Facts	retired naval officer suing in the talk of defamation on the basis of libel; Defamation case, things said in a book published by D, that he had done scandalous things (where <u>D has made huge profit</u> from the book sale, <u>more than the amount he got sued</u>)
Held	Exemplary damages available and appropriate
Note	to deter ppl from these conducts (some criminal law element in this)

(c) Cases in which exemplary damages are allowed by statute

- statutory duty imposed (e.g., imposed on employers)

NB Lord Devlin also said in *Rookes* that **exemplary damages** would **only be available in relation to torts where there was a pre-1964 precedent** for them being granted under a particular tort: this was the so-called ***cause of action restriction***.

- no court should ever introduce an award or make an award of exemplary damages in a case involving a tort for which there is no precedent of an award of exemplary damages being made > **only when there are precedents can grant such award**
- issue: but Q if there is no precedent? facing case of a different tort? then there is no pre-existing authority to rely on
- see *Kuddus v Chief Constable of Leicestershire*: bar removed

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

Facts	A kind of tort, senses on the level and <u>malicious conduct by public officers</u> that <u>target members of the public</u> .
Issue	<ul style="list-style-type: none"> But there was no precedent that anyone hadn't been awarded exemplary damages for the commission of this tort. <p>Raised question of if there is no pre-existing authority in relation to the kind of tort that says they're available, which other tort could they be available for, exemplary damages?</p>
Held	<p><i>Rookes v Barnard</i> bar removed, Lord Nicholls also heavily criticised Lord Devlin's formulation</p> <ul style="list-style-type: none"> on the 1st cat.: <ul style="list-style-type: none"> doubt the soundness of the distinction between government officials and companies and individuals 'National and international companies can exercise enormous power. So do some individuals.' on 2nd cat: <ul style="list-style-type: none"> 'the key here would seem to be' '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'.
Note	<p>Misfeasors case; some suggest it is a public tort as it involved a public officers</p> <ul style="list-style-type: none"> but no precedents for allowing exemplary damages for negligence cases Idea that one can never get exemplary damages for negligence, as this is not oppressive arbitrary or unconstitutional conduct see case <i>A.B. v South West Water Services Ltd</i> <p>Murphy:</p> <ul style="list-style-type: none"> tort of negligence: only need to fail below the standard of a reasonable person Negligence can also commit via deliberate conduct > deliberate conduct can then be characterised as oppressive arbitrary or unconstitutional

A.B. v South West Water Services Ltd

Facts	action for public nuisance and negligence
Held	Exemplary damages were not available in those causes of action where such damages had not been awarded prior to the case of <i>Rookes v Barnard</i> (1964), this including public nuisance and negligence.
Note	Bar set in <i>Rookes v Barnard</i> implemented here

In Hong Kong, the law seems to track that found in England.

Allan v Ng & Co (a firm) [2012] 2 HKLDR

The **rationale** for exemplary damages is **not to compensate, but to punish**. They are additional to an award which is intended to compensate a plaintiff fully for the loss he has suffered, both pecuniary and non-pecuniary.

- Paper: (James Goudkamp and Eleni Katsampouka) Punitive Damages and the Place of Punishment in Private Law: nothing that unusual about punishment in the civil law

5. Damages arising out of a death

There are two different actions which may be brought where the tort victim dies.

- Rationale
 - historically, tort claim is personal; but later found problematic
 - practically: if one would not need to pay when P is dead > problematic in many ways e.g., when P's death left with family members who has no income (esp. widows) > govt would need to spend more on them > statutory intervention
- some potential peculiarities
 - ppl who are able to sue are not the victim himself
 - people can get remedies when they were not themselves the victim of the wrong

Survival Action: Law Amendment and Reform Ordinance (Cap 23)

- **allowing the action to survive after the death of the victim**
- any action that would have vested in the now deceased victim survives for the benefit of the estate of that victim.
- The estate of a deceased person: either the person to whom everything is left in the **will** that was made by the deceased person, or if they didn't make a will the person who by the relevant **laws of intestacy** would be entitled to inherit

Under this ordinance, **the victim's right to sue the tortfeasor survives for the benefit of the victim's estate**.

It is the **victim's estate that then sues for damages** which represent compensation for the losses sustained by the victim up to the date of death.

Fatal Accident Ordinance (Cap 22)

The **Fatal Accidents Ordinance** confers **three rights of action**. These exist for the tort **victim's dependants** in cases where the tort has caused the death of the immediate victim.

- adopted from British act, with some differences (see later)
- deals with things that occur after death: creates 3 actions

- impose upon the enterprises that were creating the risks that deprived working men of their lives: impose upon them the burden of making good the losses that were thereby caused, where the losses were felt typically by surviving widows

(i) The dependency action [ie, loss of support]

The action here – brought by **the executor or administrator of the deceased** – is for **loss of dependency** (eg, you negligently killed the breadwinner spouse, and now the remaining spouse is financially worse off, so you must compensate her for this fact).

- e.g., widow, children depend on father who goes to work, no income when the father is dead

The amount claimable is **not limited to the provision of essentials**. It covers the **actual loss** suffered by the dependent.

- dependent for bare necessity, but can be more than that if proven
- as long as you can prove that that was what you typically enjoyed and you were dependent upon the other person for it, then the law would recognise that and allow a claim in respect of that augmented notion of dependency.

Chavez v Fong Ka Yiu [2001] 3 HKLRD 1

Facts	The claim was in respect of not just household expenses. It also included a sum for enjoyment .
Held	There is ... evidence from Mr Ian Foster that the deceased would go out with the 1 st plaintiff to <u>socialise together with friends</u> sometimes in the evenings and weekends, and <u>the deceased would pay all the expenses of the 1st plaintiff on these occasions</u> . This is reasonable. (Suffiad J.)

Who, then, are the dependants, for whom this action exists?

The term **dependants** is defined in s 2(1) of the Ordinance.

The definition is a long one, but the thrust of it is that dependants are as follows:

- surviving spouse, or former spouse or person whose marriage was declared void
- surviving concubine taken before 7 October 1971 (diff from UK act)
- surviving unmarried, heterosexual cohabiting partner who had been cohabiting for the 2 previous years and living as the husband or wife of the deceased;
- any parent (or step-parent) of the deceased;
- any child, step child or other descendant of the deceased;
- any siblings, aunts, uncles and cousins
- any godchild or godparent of the deceased according to Chinese custom.
- people who can make a statutory claim

On the very many oddities surrounding the dependency claim see:

- J Goudkamp and J Murphy, “Tort Statutes and Tort Theories” (2015) 131 LQR 133.
 - opinion that this is an odd tort; object to various statutory interventions for various reasons

(ii) The bereavement action

The second action— under **section 4** of the Ordinance —lies in respect of bereavement. It is made subject to a claim under **Cap 23** (which includes an amount for V’s loss of society: ie, V’s loss of a family relationship), and it is presently a fixed sum of \$231,000. [last updated in 2020]

Making the bereavement claim subject to a Cap 23 claim for loss of society makes sense, because it is more or less the other side of the same coin. **V’s loss of family life** (because he is killed) is the **very same loss of family life as those who are left bereaved**.

This bereavement action can be pursued by

- (i) spouses who had been living together when V died;
- (ii) V’s children;
- (iii) V’s spouse where V & spouse had been living apart for 2 years prior to death;
- (iv) V’s concubine;
- (v) Any cohabitant who had been living with V as husband/wife for the 2 years prior to V’s death;
- (vi) V’s parents;
- (vii) Any child who had been living with V as a child of the family;
- (viii) V’s siblings.

(iii) Funeral expenses

An award for reasonable funeral expenses may be made under **s 6(5)** of the statute so long as such **expenses were incurred by the dependents**

Final Note

It is possible to envisage a way that the **awards *could overlap***, so the courts must be attentive to this prospect to ensure no duplication of damages.

- potential issue:
 - the estate might not be the same as the dependants
 - there might be a diminution in the amount that is awarded to dependents in respect of lost earnings if victim did not make their will in favour of their dependants

6. Vindictory Damages

These don't yet exist in HK so far as I can detect; and nor can they be said clearly to exist under English law, either.

- recognised in Canada & south Africa law, rumbling in Australia
- expressive of some sort of infringement of fundamental right

Two broad arguments exist concerning these:

- We should have (more) of them to **mark the infringement of fundamental rights** (eg, those found in the ECHR). (e.g., freedom of expression, freedom of movement)
- We already have some, but currently call them **licence fee damages** (eg, in trespass to land protruding signs into my private air space which you use to advertise).

Lumba v Secretary of State for Home Department [2011] UKSC 12

Facts	False imprisonment case; someone alleged wrongfully detained pending deportation, deprived of liberty
Held	9-member panel; 3 dissenting judgment; 6:3 victory Majority (6): <ul style="list-style-type: none">• false imprisonment recognised• 3 say there is no such thing as vindication damages• 3 say there should be vindication damages Dissenting (3): <ul style="list-style-type: none">• among them there is also different opinion whether there is vindictory damages
Note	Not a clear rule, no clear status of vindictory (1) judiciary recognition that there are jurisdictions that there is vindictory damage (2) clear approval that there can be such damages among a sizeable member in the panel (such damages is not a non-starter)

7. Licence Fee and Disgorgement Damages

These are special types of damages associated with certain types of tort.

(a) Licence fee damages

Eg, **Licence fee (in trespass to land)**: where D erected at the border of his land and mine, a sign. But the sign itself (containing an advert) extends over the border.

Even though the signpost is anchored to D's land, some use is made of the airspace above P's land

- when D committed tort of trespass > profit at P's expense (using P's land) > pay damages to reflect the loss the gain (based on the money D made) > as a licence for D to do that by paying a fee to allow the use of land
- **gain-based damages:** no loss of P in itself, but it has some inherent value

Morris-Garner v One Step [2018] UKSC 20, [30].

- contract case

There was **contractual term** imposing a promise not to set up in competition after a business had been sold. (e.g., not to use knowledge obtained in the last employment to set up in competition.)

Lord Reed said (obiter, given it was a contract case) that these damages should be considered **compensatory in nature**.

They compensate, he said, for the **loss of the right** to decide how our things should be used.

- but can be think of a loss-based?: loss control over the facility to obtain an injunction to stop new trespassing; losing right of action (injunction) when granting the licence; as now party already allowed trespass
- **Murphy's comment**
 - o only when there is a certain power to control could have the basis to get an injunction
 - o injunction as an equitable remedy, granted as a discretionary matter > not sth you had a right to > then it is not something you strictly have control over.
 - o see article by William Day: damages without loss (steel, 2023 law review)

This analysis relied on an artificial construction of loss – 'loss, albeit not loss of a conventional kind' (ibid); and it has led to academic criticism.

W Day, 'Restitution for Wrongs: One Step Forwards, Two Steps Back' [2018] *Restitution Law Review* 60, 69.

(b) Disgorgement damages

Eg, the tort of **passing off** would yield **disgorgement (of profit) damages**.

- disgorgement: [from dictionary] a situation in which a person or organization is forced to pay back money that they have made in an illegal way
- the kind of tort that sits alongside with the statutory regime for protection of intellectual property
- e.g., passing off case, D engaged in some kind of commercial activity, pretending to be P selling goods & make profit > P can seek disgorgement damages
- gain-based (if no profit made, there would not be disgorge): Disgorge some of your profits

B. Principles Governing Compensatory Damages

The normal response to tortious events is an award of compensatory damages.

- dispute will be about how someone should get

Livingstone v The Ramyards Coal Company (1880) 5 AC 25

[W]here any injury is to be compensated by damages ... [the amount awarded] should as nearly as possible get at the sum of the money which will put the party who has been injured, or has suffered, in the same position as he would have been if he had not sustained the wrong. (Lord Blackburn)

The intention, in short, is to restore the *status quo ante*.

- issue being for some kind of harm, it is hard to measure the loss; and would not fully compensate the loss by money

(a) Duty to Mitigate

Before examining the various heads of loss, we should note a specific restriction on the principle of full compensation: the duty to mitigate loss.

- duty to take reasonably practical steps to mitigate/prevent the loss

Fu Yick Fai v Chan Wai Hung [2014] HKCU 1023

[the mechanic] admitted that when repair of the LGV went under way, he was not occupied only with the LGV as he would attend to other easier repair work. This should to some extent lengthen the time taken for the work on the LGV to finish. Doing the best I can, I find it fair to deduct the Repair Period by 6 days to reflect the period during which the plaintiff was deprived of the use of the LGV by reason of the traffic accident and for which the defendants should be held liable. (Ho J.)

Facts	P has his van damaged by D's negligent driving that requires repair; P did not take the van to the repairment place reasonably promptly, took 28 days (not repairing it in an efficient matter) & cost built up
Held	A duty to mitigate (P should take his van to repair reasonably promptly) > deducting 6 days' worth of loss of the van, cannot claim for all that period

(b) Heads of Loss

(i) Special damages

Special damages are awarded to **compensate, measurable, past losses** (eg, broken vase in the boot of a car, cost of medical care up to trial). They also include **pre-trial financial losses** (such as reasonable costs of medical care – even private health care – and lost earnings).

In each case, a **precise amount can be ascertained and pleaded**.

(ii) General damages

Future financial losses

Damages are awarded under this head to compensate such **future losses** as **lost earnings** and **health care expenditure**.

- Loss of earnings after trial.
- Future medical costs (supplied privately).

There is a **distinct lack of precision** here.

NB 1 The **multiplier method** is used to **'calculate' the loss of earnings**: but in practice the multiplier rarely exceeds 18. This reflects the uncertainty/vicissitudes of life (in *Jobling* terms).

The multiplier method in fact alights upon **two** numbers (i) the **multiplier** (*ie*, no. of years left to work), and (ii) **multiplicand** (amount of annual loss: *ie*, salary).

NB 2 **Deductions** are also made for lump sum awards (which are the norm in tort law) because investment possibilities would conceivably leave P over-compensated.

- not take a rigid view (if paid lump sum > take into account of other things e.g., P's investment, interest, inflation of salary) > discount can be made
- also consider the fact that ppl are afflicted by some problems in some stages of life (e.g., do not assume that you will sail seamlessly through the rest of your working life & might not work up to 65)

Non-financial losses

Damages are awarded for (i) physical injury; (ii) loss of amenity and (iii) pain and suffering.

- not always available, as they are not financial losses

Physical Injury

The courts work towards a fairly standard approach for physical injuries.

Pain and Suffering

These sums are then adjusted to take account of the particular circumstances of the case.

- that associate with physical injury
- no recovery if P in accident left in coma > even suffered brain damage, but cannot say there is loss in pain and suffering (that they are not able to feel it) > no loss for this

Wise v Kaye [1962] 1 QB 638

Facts	Brain injury due to car accident, left in a permanently unconscious state.
Held	No damages for pain and suffering

West v Shepherd [1964] AC 326

An unconscious person will be spared pain and suffering and will not experience the mental anguish which may result from knowledge of what has in life been lost or from knowledge that life has been shortened. The fact of unconsciousness is therefore relevant in respect of and will eliminate those heads or elements of damage which can only exist by being felt or thought or experienced. **The fact of unconsciousness does not, however, eliminate the actuality of the deprivations of the ordinary experiences and amenities of life which may be the inevitable result of some physical injury.** (Lord Morris.)

- left in comma/left in permanently comatose: Just bc there is no pain and suffering does not mean there is no loss amenity (there is loss of capacity to enjoy life)

Loss of Amenity

This means **loss of capacity to enjoy life**. Since everyone's starting position is different, each award is different. Thus: court must address loss of amenity on a **case-by-case basis**.

- Green Book listed with the amount appropriate for different damages: cases alike to be treated alike

C. Contributory Negligence (not applicable to intentional torts)

Before the Law Amendment and Reform Ordinance (Cap 23), contributory negligence formed a complete defence. But nowadays, it simply **reduces the amount of damages payable** (proportionate to responsibility/fault).

- The plaintiff acts in a certain way that is self-disregarded, an act of self that exacerbate the injury he suffers
 - e.g., P failing to wear a seat belt, exacerbate the injury in negligent driving)
- Opinion that: **no difference between contributory negligence and mitigation**
 - only different in timeline (only with different name)
 - Mitigation is a means by which you reduce damages by reference to something that the plaintiff does after the tort has been committed
 - vs. Contributory negligence: P's act of self disregard before the tort has been committed
- Murphy: wrong

- contributory negligence: a system of apportionment, apportion the loss between the two parties (P contributing to the damage, D gets for example 20% deduction)
- in mitigation: it is divisional deduction (e.g., deducting 6 days, process of subtraction)

Section 21(1) provides:

Where any person suffers **damage** as the result **partly of his own fault** and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the **damages recoverable** in respect thereof **shall be reduced to such extent** as the court thinks just and equitable having regard to the **claimant's share in the responsibility for the damage**.

- **in respect of the damage only**, damages that occurs being attributable to fault on the part of both of the parties.
- it's entirely possible that you can be responsible for damage without actually being responsible for the incident out of which the damage arises; there might be no causative contribution to the event
- e.g., not wearing a seat belt > no causative responsibility on your part for the actual crash of the car.

1 Plaintiff's Fault

Section 21(10) states that “**fault**” means “**negligence, breach or statutory duty or other act or omission** which **gives rise to a liability in tort**, *or would, apart from this section, give rise to the defence of contributory negligence*”.

NB It is clear from the words in italics that, while the old law has been replaced by the Ordinance, it is still relevant insofar as those acts/omissions which grounded the defence under the pre-Ordinance case law will continue to do so.

It also follows from s 21(10) that “**contributory negligence**” is **notionally different from the idea of “negligence” within the tort of negligence** (*ie*, D's negligence).

- P doing sth negligent is enough, doesn't have to mean negligence in the strict sense.
- before this, contributory negligence is a full defence & historic conception of contributory negligence did not demand that the claimant do something that would be a tort
- e.g., not wearing a seat belt (not doing anything that is wrong) > but can still be regarded as contributory negligence by common law even it is not negligence in the strict sense; **mere act of genuine self-disregard > regarded as fault here**

NB The Relevance of Minority

Where **children** are concerned, a **lower standard** of care will be required.

Gough v Thorne [1966] 1 WLR 1387

A very young child cannot be guilty of contributory negligence. An older may be; but it depends on the circumstances. A judge should find a child guilty of contributory negligence [only when the child is of an age where he or she can] ... be expected to take precautions for his or her own safety. (Denning MR.)

Facts	P is a child; two lane road, lorry driver pulls over to allow the child to cross the road, waving arm to signal other cars to give way too; <u>child stroke by a car driven by D negligently</u> ; D claimed need not to make full compensation due to child's own contributory negligence (that foolishly relied on this lorry driver)
Held	The courts are hesitant about saying that acts of self disregard from the part of children amounts to contributory negligence

Leung Sze Nok v Tsuen Wan Properties Ltd [2010] HKCU 1584

I do not find Sze Nok had in any way contributed to the accident. As a child, her conduct cannot be viewed in the same way as an adult. (Her Honour Judge HC Wong, at [51]).

Facts	Ice-stating lesson, stated far too close to the teacher, child got injured
Issue	Whether the child has contributory negligence
Held	No
Note	Show generosity to children

2. Apportionment of Damages

Section 21(1) states damages will “be **reduced** to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage”.

- no precise mathematic calculation of this

Stapley v Gypsum Mines Ltd [1953] AC 663

A court must **deal broadly** with the problem of apportionment, and, in considering **what is just and equitable**, must have regard to the **blameworthiness of each party**, but the [claimant's] share in the responsibility for the damage cannot, I think, be assessed without considering the relative importance of the acts in causing the damage apart from his blameworthiness. (Lord Reid.)

Two factors emerge from this dictum as relevant:

- The **moral blameworthiness** of P's act or omission;
- The **causative potency** of P's act or omission. (in relation to the damage)

- If there is no potency > no contributory negligence
- The statute grants the judge hearing the case for first instance, there is very little to be said in favor of your appealing on the quantum of damages.
 - on appeal, judge would also look at previous decisions, whether the decision is fair and just; whether the decision is unreasonable,
 - hard to challenge the decision unless it is so unreasonable that no reasonable judge could have made > appeal court would not tend to disturb the previous decision
- The contributor in evidence is not available for intentional tort (see below)

Hsu Li Yun v The Incorporated Owners of Yuen Fat Building [2000] 1 HKLRD 900

Facts	D engaged person P (now deceased) to install some electrical wiring in D's building, (1) initial negligence of P during the instalment, as well as (2) negligence of D in maintaining the electrics now installed; P claimed the accident is due to D's failure to maintain the electricals, D claimed there is also contributory negligence on part of P himself
Held	Damages reduced; Recognised the two factors (1) the causative potency and (2) moral blameworthiness of P to be taken into account, in what reduction in compensation (75% reduction)

One common example of contributory negligence – **failing to wear a seat belt** – provides a useful illustration of how apportionment ought to work in practice.

- necessarily be far less causative potency, as the person not wearing the seat belt is not playing a part in causing the acts or the event out of which the injury occurs.

Froom v Butcher [1976] QB 286

Facts	Seat belt case , there will be far or less causative potency (only contributing to the injury itself), the one who causes the accident is the driver
Held	Lower reduction <ul style="list-style-type: none"> • Lord Denning: General guideline of 25% reduction if wearing a seatbelt would have prevented the injury altogether • but ~15% reduction where it would have simply reduced the severity of the injury.

Court being generous to cases like the seat belt case other than the child cases, lower reduction, possible reasons:

- anything that is said to be attributable to the plaintiff by the way of a loss will always be bought by the plaintiff
- vs. **for D, their loss (when they pay damages) will be spread**
 - e.g., in an accident, D's losses in the accident will be spread; d would only lose amount due to **compulsory insurance** that is in play

NB Contributory negligence **does not apply to the intentional torts:**

see, eg, *Alliance & Leicester Building Society v Edgestop Ltd* [1993] 1 WLR 1462 (deceit).

Held	<p>Reason behind this:</p> <ul style="list-style-type: none">• D has committed an intentional tort (distinguish the deliberateness/intentionality of D) > cannot be applied in contributory negligence• the intentionality on the part of D is the reason why contributor in evidence cannot be reduced
Note	<p>Murphy disagrees:</p> <ul style="list-style-type: none">• entirely possible to commit a sort of negligence deliberately<ul style="list-style-type: none">○ tort of negligence entails: a failure to act in the way that the reasonable person would act○ the requirement of negligence is not the act has to be done recklessly or intentionally (this can even be done innocently);○ The morally reprehensible state of the defendant is an absolute irrelevance in cases of negligence.• but does not mean it is against the idea of contributory negligence, as historically used as a defence• the statute now only changes in the effect of the defence, that it is only to reduced damages <p>[my note: I personally disagree with Murphy]</p>

As to why, see J Murphy, “Misleading Appearances in the Tort of Deceit” [2016] CLJ 301.

D. Injunctions

There are broadly two types of injunction: **prohibitive** and **mandatory**.

- injunctions are typically linked to highly cherished interest at stake

The former are often sought in connection with **private nuisance** and **harassment**.

- ceasing D to do a thing

The latter could also be used in **nuisance** (eg, remove the platform from around the Tate?).

- require that the defendant must do a thing

It is generally thought injunctions can only meaningfully be sought in torts that contain a **volitional element** and that they cannot be sought in connection with negligence (because it is assumed that that tort turns exclusively on inadvertent conduct).

- rationale behind: negligence is only momentary, not driven by intentionality > not meaningful to impose injunction on negligence

I think this is myopic. **What about a dangerous workplace: mandatory injunction to make it safe.**

- murphy: not sure about the idea the injunction cannot be sought in connection with negligence
- e.g., **non-delegable duties** of employer's duty towards employees > **positive duty** (e.g., employer not checking the computers for employees, not providing a safe place of work)
- **one of those exceptions to the rules against liability for omissions** > there could be **volitional element/ conscious decision involved** (e.g., employer deliberately did not do the best thing to provide a safe workplace to save cost)
- in this sense, **in the context of negligence liability for an omission, possible to get a mandatory injunction**, to require them to do the thing that they're supposed to do (to make sure that they are fulfilling their employer's duty to provide safe plant and equipment, a safe place of work)

J Murphy, "Rethinking Injunctions in Tort Law" (2007) 27 *OJLS* 509-.

E. Tort Remedies: Some Puzzles

Grand contemporary tort theories say that they can explain all of tort law. But they struggle to explain quite a lot of the law on remedies

1. Kantian Corrective Justice Theories

(a) Mandatory injunctions

These confound Kantians because they force X to do something for Y's benefit, but Kantians deny the existence of non-feasance.

- We are all free to pursue our own ends so long as so doing is consistent with others' equal right to do likewise
- It follows, that where I choose to do act, A, and this harms or impedes you, then you may sue me;
- But I cannot be compelled to do beneficial thing, B, to make your life go better for you.

(b) Exemplary damages

These are intended to punish and to deter. Kantians deny that tort law is purposive in this way.

It is about doing justice between P and D, and not about bringing about a safer, better society.

(c) Dependency claim

Under the fatal accidents legislation breaks the bilateralism principle (LQR paper)

2. Rights Theories

(a) Exemplary damages

These are policy-based. And rights theorists set up in direct opposition to policy-based rules and policy-based reasoning.

(b) Contributory Negligence

The reason why contributory fault should not be a defence is that the risks I run in relation to my own interests are nobody's concern but mine. (Robert Stevens.)

If what matters is the fact that P's rights have been violated (or, put differently, that D has breached the duty that he owed P), one would expect P's conduct to be immaterial,

(c) Dependency claim

This breaks the privity principle.

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