50/11; [2011] VSCA 421

SUPREME COURT OF VICTORIA — COURT OF APPEAL

SARIC v TEHAN

Mandie and Harper JJA and Robson AJA

18 August, 15 December 2011

TORT – DAMAGES FOR NEGLIGENCE – MOTOR VEHICLE ACCIDENT – DEFENDANT ADMITTED DRIVING NEGLIGENTLY – LEGISLATIVE PROHIBITION ON CHARGING FOR OR RECOVERING REPAIR COSTS FROM OWNER WHERE VEHICLE REPAIRED WITHOUT WRITTEN APPROVAL – WHETHER THE RESULTING VALUE OF THE BENEFIT TO THE OWNER SHOULD BE TAKEN INTO ACCOUNT IN THE ASSESSMENT OF DAMAGES – CLAIM DISMISSED BY MAGISTRATE ON GROUND THAT NO LOSS WAS SUSTAINED BY PLAINTIFF – WHETHER MAGISTRATE IN ERROR: *ACCIDENT TOWING SERVICES ACT* 2007, S153.

T.'s motor vehicle was badly damaged in an accident caused by the other driver's negligent driving. The repairer who repaired his vehicle failed to obtain T.'s written authorisation. As a result of s153(2) of the *Accident Towing Services Act* 2007 ('Act'), the repairer was not able to sue for or recover any sum for carrying out the repairs. T. sued the other driver for damages totalling $29,091.67 which included the sum of $4598 for a hire car. In making an award only for the cost of the hire car, the Magistrate dismissed T.'s claim for the damage on the ground that T. had suffered no loss. Upon appeal, Bell J granted the appeal and made an order in T's favour for the full amount of the claim plus costs. Upon appeal—

HELD: Appeal dismissed. *Tehan v Saric* [2010] VSC 175; MC18/2010, approved.

1. Adopting the approach outlined by Dixon CJ and Windeyer J in *The National Insurance Company of New Zealand v Espagne* [1961] HCA 15; (1961) 105 CLR 569; [1961] ALR 627; 35 ALJR 4, it is appropriate to consider the character of the Act, and in particular the legislative provision from which the benefit to T. in this case was derived. It was common ground that the Act was a piece of consumer legislation and that s153 of the Act was intended to deter repairers and to protect the owners of motor vehicles involved in accidents as defined. It is obvious that the benefit conferred on the owner, where the repairer had no approval in writing to perform the repairs, was conferred on an owner 'independently of the existence in him of a right of redress against others.' Clearly enough, the legislation manifested no intent that this benefit was intended to be provided in relief of liability in any others to compensate the owner. Indeed, the provision is not restricted to collisions involving other vehicles.

2. Subsequent High Court decisions do not appear to have moved from the approach taken in *Espagne*. The question posed by Mason and Dawson JJ in *Redding v Lee* [1983] HCA 16; (1983) 151 CLR 117; (1983) 47 ALR 241; (1983) 57 ALJR 393; (1983) 2 ANZ Insurance Cases 60-530, while in that case directed to social services payments, was applicable to the present case involving a benefit constituted by immunity from action rather than a monetary payment. The question is: 'was the benefit conferred on him independently of any right or redress against others and so that he might enjoy the benefit even if he enforced the right?' – and, allowing for the different statutory context, the answer must be in the affirmative.

3. To the extent that, as some of the cases have suggested, the question really depends upon reason, justice and policy, in the present case the cardinal principle of compensation was trumped by the intent of the legislation as indicated by the character of the Act and of the particular provision, and the nature of the benefit involved.

4. Per Robson AJA: The relevant provisions of the *Accident Towing Services Act* 2007 were not intended to confer any benefit on Mr Saric as a tortfeasor. On the contrary, the provisions were intended as a penalty to be levied against the repairer for failing to obtain written authority for its repair work.

MANDIE JA:

Introduction

1. The respondent's motor vehicle was badly damaged in an accident caused by the appellant's negligent driving. The respondent sued the appellant in the Magistrates' Court for damages totalling $29,091.67. That amount comprised a little over $24,000 for repairing the vehicle, together with

some smaller amounts for towing services and an assessment fee (hereinafter called 'repair costs') and $4,598 for a replacement hire car. The Magistrate awarded the respondent only $4,598 for the costs of the hire car. The repair costs were disallowed by the Magistrate on the basis that the respondent had suffered no loss in relation to them because the repairer was not entitled to recover them from the respondent as a result of the application of provisions contained in the *Accident Towing Services Act* 2007 (Vic) ('the Act'). The repairer had carried out the repairs without the approval in writing of the respondent and was thus not entitled to sue for or recover any sum or charge for those repairs by virtue of s153 of the Act.

2. The respondent appealed under s109 of the *Magistrates' Court Act* 1989 and a judge in the trial division allowed the appeal, holding that the respondent was entitled to the full amount claimed, including the repair costs. The appellant now appeals (by leave)[1] from that decision.

Relevant Provisions of the Accident Towing Services Act

3. Section 3(1) of the Act relevantly defines an 'accident damaged motor vehicle' to mean a motor vehicle that has been damaged as the result of a road accident so that the motor vehicle cannot be driven safely on a road[2] and a 'road accident' to mean an impact or collision of one or more motor vehicles on a road.

4. Section 153 of the Act relevantly provides as follows:

> (1) A person must not commence or carry out repair work on an accident damaged motor vehicle without the approval in writing of the owner of the motor vehicle.
> Penalty: 30 penalty units.
>
> (2) A person is not entitled to sue for or recover any sum or charge for—
> (a) commencing or carrying out any repair work that is not approved under subsection (1); ...
> ...
>
> (5) If any sum or charge referred to in subsection (2) is recovered in circumstances in which subsection (2) applies, the person on whose behalf it is recovered is guilty of an offence unless the person repays it as soon as practicable.
>
> Penalty: 30 penalty units.

Reasons of judge[3]

5. The learned judge stated his reasons as follows:

> 4. Turning to the legislation, s153(1) of the *Accident Towing Services Act* 2007 criminalises repairing a vehicle without the approval in writing of the owner. Under s153(2), the repairer cannot sue for or recover any sum or charge for carrying out repairs. If, contrary to these provisions, the repairer recovers such a sum or charge, it must be returned as soon as practicable. Under s153(5), failing to do so is also a criminal offence. Section 154(1) creates a three day cooling off-period.
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> 5. These provisions are in Part 5 of the Act. The purpose of that Part is to regulate the provision of towing and repair services to the owners of damaged motor vehicles. To overcome the 'tow truck wars' which used to occur at the scene of motor vehicle accidents, the legislation now regulates the provision of towing and repair services. A prohibition on charging owners without written authority has been introduced to protect owners. Previously they had to make on-the-spot decisions in difficult circumstances. Now the authority to repair must be in writing, and there is a cooling-off period.
>
> 6. While the legislation regulates the relationship between towing and repair service providers on the one hand and the owners of damaged vehicles on the other, it does not affect the separate common law obligation of drivers to pay damages for losses caused by their negligence.
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> 7. In a motor vehicle accident, the act of negligence and the damage to the vehicle usually occur at the same time. At that moment, the owner becomes entitled to sue the negligent driver for the loss. The established rules governing what losses can be recovered by the owner of the damaged vehicle from the negligent driver were stated by the House of Lords in *Dimond v Lovell*.[4] According to those rules, where the vehicle is commercially repairable (not a write-off), the owner is entitled to recover the reasonable cost of repairing it. In the words of Lord Hobhouse, 'the measure of loss is the expenditure required to put [the vehicle] back into the same state as it was before the accident'.[5]

8. Prior to the vehicle being repaired, the vehicle may be destroyed by some later unrelated act. The vehicle may be repaired without cost by the owner themselves, a friend or a relative. It may lie in waste and never be repaired at all. It may be given away, traded in as-is on another vehicle or sold off for its post-accident value. The law of damages does not interfere with the owner's freedom of choice in this regard. Whatever choice the owner makes, the loss represented by the reasonable cost of repairing the vehicle is recoverable against the negligent driver. That is the law's assessment of the damage caused by the negligence of that driver.

9. In some cases, the claim may not be for the cost of repairing the vehicle, but for consequential losses. One common example is a claim by an owner for hiring a substitute vehicle while repairs are being carried out. Such cases can raise complications.

10. In the United Kingdom, the cost of hiring a substitute vehicle is recoverable as damages only if and when the cost of necessary hire is actually incurred.[6] On the other hand, in New South Wales 'injury to property which deprives a party of the use of the thing is compensable. It is irrelevant if a third party provides a substitute for the thing damaged'.[7] I do not need to go into these matters. At issue in this appeal is Mr Tehan's claim for the immediate and direct loss constituted by the damage to the vehicle. [His] successful claim for the cost of hiring a necessary substitute has not been challenged by Mr Saric

11. Mr Tehan's direct and immediate loss was compensable in an award of damages. It is represented by the cost of repairing his damaged vehicle. That loss crystallised and was recoverable when Mr Saric's negligent driving caused the accident resulting in that damage. It is irrelevant in law that, under the towing and repair legislation, repairers cannot charge or recover fees or charges without the written authority of the owner. With respect, the learned magistrate erred in law in deciding otherwise.

12. In the events which happened, Mr Tehan got his vehicle repaired without paying for it. Yet, in my view, he can also obtain damages represented by the cost of those repairs. That significant windfall results from the towing and repair legislation, not from the law of damages, which the legislation does not touch.

13. I reject any suggestion that this outcome is objectionable on grounds of public policy. Drivers should pay damages for the loss caused by their negligence, assessed according to the established rules. Mr Saric would avoid this responsibility if the magistrate's decision was to be upheld. Repairers who fail to obtain the owner's written authority cannot charge for their services, even if they actually do the work. That consequence is deliberately imposed by the legislation to protect vulnerable owners.

Grounds of appeal

6. The appellant appeals on the grounds that the judge:

1. ... wrongly failed to take into account the provisions of Part 5 of [the Act].
2. ... wrongly failed to consider that in the particular case the legislation should have operated so that the plaintiff did not suffer a loss in respect of the costs of repairs to his vehicle.
3. ... wrongly held that [the Act] regulates the relationship between towing and repair service providers on the one hand and the owners of damaged vehicles on the other, but does not affect the separate common law obligations of drivers to pay damages for losses caused by their negligence.
4. ... should have held that if, by reason of the provisions of [the Act] a repairer was not entitled to charge for repairs carried out by it, the owner of the repaired vehicle was not entitled to recover the cost of repairs from a driver whose negligence caused the damage which had been repaired.
5. ... failed to have regard or any proper regard to the fact that, by reason of the non-compliance by the repairer with the provisions of Part 5 of [the Act], the plaintiff had avoided part of his loss and should have held the defendant was entitled to the benefit of that avoidance to the extent that it reduced the damage suffered by the plaintiff
6. ... erred in determining that the plaintiff was entitled to the costs of repairing his damaged vehicle.
7. ... should have held that, in the particular circumstances which occurred, the plaintiff was entitled to recover the costs actually incurred by the plaintiff in repairing his damaged vehicle which in the circumstances was Nil.
8. ... should have held that, having regard to the compensatory principle of damages, as the plaintiff had suffered no loss in respect of the costs of repairing his vehicle he was not entitled to compensation in respect of the cost of repairs.
9. ... should have held that the plaintiff could not recover more than he had lost, and accordingly as he had not lost the 'cost of repairs' he could not recover the same.
10. ... should have held that the question of the quantum of damages was to be determined by the actual facts as known at the time of the trial.

Submissions

7. The appellant relied upon authoritative statements of general principle to the effect that a plaintiff was entitled to receive that amount which would put him in the same position as he would have been had he not been injured, that a plaintiff could not recover more than he had lost[8] and that compensation was the cardinal concept.[9] However, the appellant noted that this appeal involved 'an excursion into a field in which it has been said that logic is conspicuous by its absence.'[10]

8. The appellant submitted that the respondent was not entitled to recover more than the assessed monetary measure or value of that which the appellant's negligence had caused him to lose.

9. The appellant said that the prohibition effected by s153(2) of the Act could properly be considered as an aid, benefit or subvention available to protect consumers from unscrupulous practices of those who might take advantage of them at a time when people are under considerable stress. The appellant said that the consequence of s153 of the Act, in the circumstances, was that the respondent had achieved return to him of his motor vehicle, fully repaired, at no cost to him. The appellant submitted that the cardinal concept of the compensatory principle was applicable unless there was some indication in the legislation that the principle should not be applied.[11]

10. The appellant said that the general rule that damages for tort should be assessed at the time when the cause of action arose had to give way in particular cases in which 'fair' compensation needed to be assessed at some other date.[12] The appellant submitted that the judge fell into error in measuring the respondent's compensable loss at the date of the accrual of the cause of action. The appellant concluded by contending that the respondent had been delivered a windfall in the order of some $25,000.

11. In answer, the respondent did not dispute the compensatory principle but submitted that there was a significant qualification to it recognised in the cases and that not all gains and benefits which accrued to a plaintiff following an injury or damage to property were necessarily to be deducted from damages claimed from a tortfeasor. The respondent submitted that in cases where the statutory or other 'intention' was not clearly identifiable (which was not necessarily this case) it was necessary to look to the character of the payment in the hands of the recipient.[13]

12. Looking to the provisions of the Act, the respondent said that the class of persons to whom the potential benefit of a 'free repair' under s153 accrued included the owner of a vehicle in an accident where there was no other vehicle involved. As I understood it, the respondent was thereby contending that the character of the payment was such that it was intended to benefit the owner of the vehicle and not any other person or party involved. The respondent referred in considerable detail to a range of cases (to most of which I will refer below) involving a variety of benefits in which the courts have had to decide whether those benefits should be taken into account, or not, in mitigation of damages.

13. The respondent accepted that damages need not necessarily be assessed at the time of accrual of the cause of action but contended that the real question in the present appeal was whether the benefit was of a kind which fell within the class of benefits that were to be excepted from the general compensatory principle. The issue was not a temporal issue but one relating to the nature of the benefit.

14. The respondent submitted that the benefit to the vehicle owner in the present case was one that fell within the exception to the general compensatory principle because, whether it be described as too remote, extraneous, collateral or not arising directly out of the relationship between the appellant and the respondent, it was a benefit which was wholly independent of the relationship between them – it was a circumstance accidental to the plaintiff, of which the defendant had no knowledge. The respondent assented to a suggestion from the bench that the legislature must have understood that the repercussions of s153 of the Act would in many cases be that the owner of the vehicle would receive a windfall. The legislation was aimed at abuses in the towing services industry and the benefit of s153 was intended to be directed to the owner of the vehicle and not to a tortfeasor (if one were involved) or, for that matter, the tortfeasor's insurer.

15. The respondent emphasised that the benefit received was entirely fortuitous and independent of the existence in the respondent of any right of redress against a tortfeasor. The benefit had nothing to do with the accident but arose from the deterrent provisions of the legislation.

16. In reply, the appellant accepted that the law recognised circumstances where collateral benefits were not taken into account in the calculation of damages but, with respect, I did not perceive the appellant to have advanced any clear critique countering the respondent's analysis as to, or showing, why the 'benefit' in this case was of a kind that it should be taken into account in mitigation of damages – rather I understood the appellant's argument to be that the cardinal compensatory principle was always applicable unless there was some intention to the contrary made manifest by the statute (or by other circumstances).

Cases concerning events occurring or benefits received after accrual of the cause of action

17. One of the earlier leading cases was *Bradburn v Great Western Railway Co* ('Bradburn'),[14] where the plaintiff suffered injuries as a result of the defendant's negligence and recovered by jury verdict the sum of £217, but he had received £31 under an accident insurance policy. Bramwell B said that the plaintiff was entitled to retain the benefit which he had paid for, in addition to the damages. Pigott B said that there was no reason or justice in setting off what the plaintiff had entitled himself to under a contract with third persons (ie the insurance policy), stating '[h]e does not receive that sum of money because of the accident, but because he has made a contract providing for the contingency…'[15]

18. In a number of marine cases in England, the courts considered whether damages for the cost of repairs to a ship involved in a collision should be reduced by reference to events that had occurred after the collision which arguably reduced the damages suffered. The general approach taken in these cases was to treat the subsequent events as irrelevant. A similar approach was taken in some cases in Queensland involving claims for damages for repair costs of motor vehicles.

19. In *The Endeavour*,[16] a collision action, the defendant counter-claimed the cost of repairing its ship but it had not paid the shipwright because, since the repairs were effected, it had gone into liquidation. Sir James Hannen said:[17]

> *The Endeavour* has been injured. Her owners are entitled to be paid the amount of such injuries. It has been ascertained that that amount is 464 l. That is the measure of the [defendant's] damages, and is the amount [it is] entitled to recover. If somebody out of kindness were to repair the injury and make no charge for it, the wrongdoer would not be entitled to refuse to pay as part of the damages the cost of the repairs to the owner.

20. In *The Greta Holme*,[18] a steamship had collided with a dredger and the dredger could not be used for 15 weeks once it was under repair. Lord Halsbury LC said that the owner of the dredger was entitled to damages for loss of use notwithstanding that no tangible pecuniary loss had been sustained as the owner did not charge for its work done by the dredger nor was a replacement dredger hired. Lord Herschell said that the owner of the dredger had suffered a loss represented by the interest on the money invested in the dredger.

21. In *The Glenfinlas*,[19] the plaintiffs' ship *Western Coast* was damaged by the admitted negligence of the defendants (the owners of the *Glenfinlas*). Permanent repairs were not effected to the *Western Coast* because it was requisitioned by the government and was subsequently struck by a mine and sank. The defendants admitted that the plaintiffs were entitled to the cost of the permanent repairs but denied liability for the estimated cost of dry docking and damages for detention for 12 days. The Registrar said that it was clear law that the owner of a vessel in collision was entitled to the cost of repairs although they had not been executed and this included the estimated cost of dry docking but that the damages for detention were not recoverable being purely consequential damages and it was inappropriate to give damages for a loss of time which had not occurred.

22. In *The London Corporation*,[20] the plaintiff's vessel was damaged by the negligence of the defendants (the owners of the other vessel involved in the collision) but the vessel was never repaired and was subsequently sold for breaking up. There was no evidence that the price paid was affected by the existence of the unrepaired collision damage. The Court of Appeal (Greer, Slesser LJJ and Eve J) held that the cost of repairs was recoverable. Greer LJ said that it was established

by numerous cases that a shipowner could still recover the estimated cost of repairing the ship notwithstanding that the repairs were not carried out as a result of some other transaction such as the loss or the sale of the ship.

23. In *Freese v Collins*,[21] the plaintiff's taxi was damaged in a collision by the negligence of the defendant. The cost of repairs was £298 but the plaintiff sold it in a damaged condition for £110, the maximum price fixed under the *National Security (Prices) Regulations*. The Full Court of the Supreme Court of Queensland dismissed an appeal by the defendant against a magistrate's decision to award damages in relation to the cost of repairs to the taxi. Macrossan CJ said[22] that the plaintiff had suffered damage notwithstanding that the price obtained by the sale was the maximum obtainable. The measure of loss remained that which the plaintiff suffered as the natural result of the negligence i.e. the cost of repairs. It made no difference that the plaintiff had sold the damaged car.[23]

24. In *Cusack v Heath*,[24] the plaintiff sued the defendant for the cost of repairs to her car caused by the negligent driving of the defendant. The evidence disclosed that the plaintiff's parents had, out of charity, paid the repair costs. The magistrate found for the defendant. The Full Court of the Supreme Court of Queensland allowed the appeal. Macrossan CJ referred to a number of authorities supporting recovery of damages in the circumstances and added that, as a matter of general principle, the defendant should not be entitled to have any advantage from the fact that the plaintiff's parents had, out of charity, paid for the repairs.

25. In the leading case of *The National Insurance Company of New Zealand Ltd v Espagne*[25] ('Espagne'), the High Court considered what principle or criteria should govern the question whether a particular benefit ought or ought not be taken into account in assessing damages. In that case, the High Court decided that, in assessing the damages to be awarded in an action for personal injuries caused by negligence, the award of an invalid pension to the injured plaintiff pursuant to the *Social Services Act* was to be disregarded both in its operation up to the date of trial and in its future operation.

26. Dixon CJ said[26] that the trial judge was right in disregarding the invalid pension and refusing to treat it as a matter going to the reduction of damages. He said that he based his opinion not upon any specific authority but upon general reasoning as applied to the character of the statute. He said that there were a number of recent Australian decisions supporting that conclusion. The learned Chief Justice said that in the authorities there was little guidance in the terms used in designating or describing the matters or the considerations which are to be excluded or the relation of the cause of action to them. He said that terms like 'collateral' or '*res inter alios acta*' as a description of the advantage to be disregarded and '*causa sine qua non*' as a description of the relation of the injury to the advantage 'tell me nothing'.[27] His Honour said that no legal rule exists that can be applied to every case where an advantage accrues to the injured man which but for the injuries he would not have obtained.

27. Dixon CJ said that the best approach was to simply say what was the reasoning which led to the conclusion that the pension should not be taken into account in reduction of damages:

> The reasoning begins with a distinction which I think is clear enough in general conception. There are certain special services, aids, benefits, subventions and the like which in most communities are available to injured people. Simple examples are hospital and pharmaceutical benefits which lighten the monetary burden of illness. If the injured plaintiff has availed himself of these, he cannot establish or calculate his damages on the footing that he did not do so. On the other hand there may be advantages which accrue to the injured plaintiff, whether as a result of legislation or of contract or of benevolence, which have an additional characteristic. It may be true that they are conferred because he is intended to enjoy them in the events which have happened. *Yet they have this distinguishing characteristic, namely they are conferred on him not only independently of the existence in him of a right of redress against others but so that they may be enjoyed by him although he may enforce that right: they are the product of a disposition in his favour intended for his enjoyment and not provided in relief of any liability in others fully to compensate him.* This is readily seen in the case of benevolence. If a fund is raised by subscription for the benefit of a badly injured neighbour obviously this cannot operate in relief of the liability of a man who negligently caused the injury. So in a contract of accident insurance; where in the absence of special stipulation the insurer will not succeed by subrogation or otherwise to the insured's right of recourse against others in the case of injury by their negligence. But for the reason given it does not follow that the negligent parties can

> treat the insurance as operating in relief of their liability. It was effected by the money of the plaintiff for his own benefit in the event of an accident, a benefit both independent of and cumulative upon whatever right of redress against others might arise out of the circumstances of the accident.[28]

28. In the same case, Windeyer J said that the decision in *Bradburn* had stood too long and on too firm a foundation of policy and justice to be unsettled by demands for logical consistency. He said that, as he saw it, the question was how far was that decision to be extended by analogy and what general principle was to be extracted from it.[29] He said that the general principle was that the wrongdoer was liable only for such damages as by reason of his wrongdoing the plaintiff sustained and in the application of that principle, matters occurring after the injury that in fact mitigated its consequences were ordinarily to be taken into account in assessing damages. He said that those who invoked the rule in *Bradburn* recognised that it might result in the defendant being liable to pay for harm the consequences of which have already been mitigated, and in the plaintiff therefore getting pecuniary compensation from two sources for the same damage:

> They offer, however, a variety of formulae to explain and define the cases in which this can occur. These are called 'collateral matters', '*res inter alios acta*', '*causa causans*', 'voluntary receipts', 'non-exoneration of wrongdoers', 'remoteness' and by other labels. I shall examine each of these.
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> In *Mayne on Damages*, 11th ed. (1946) p. 151 it is said that: 'Matters completely collateral, and merely *res inter alios acta*, cannot be used in mitigation of damages'. But this does not provide a practical test of relevancy. The expression 'matters completely collateral' is entitled at best only to the qualified approval that Lord Reid gave it: 'I cannot find better words [for a general description of what is too remote] but I do not think that every case can be solved merely be applying those words to it'. Indeed *Mayne's* passage really raises as many difficulties as it allays, as Asquith L.J., as he was, recognized in *Shearman v. Folland*. 'It is easier', he said, 'to formulate this maxim than apply it. What in a given case is, and what is not "collateral"?'

29. Windeyer J said[30] that the question was not whether a harm that the plaintiff had suffered was in the relevant sense a consequence of the defendant's negligence but whether an advantage that the plaintiff had gained was to be regarded as mitigating that harm. After further extensive discussion and analysis, his Honour reached the following conclusion:[31]

> What finally emerges? Phrases such as *causa causans*, collateral matter and so forth being discarded, how are we to ascertain what is remote? Is there a governing principle in all these cases? So far as any rules can be extracted, I think they may be stated, generally speaking, as follows: *In assessing damages for personal injuries, benefits that a plaintiff has received or is to receive from any source other than the defendant are not to be regarded as mitigating his loss, if: (a) they were received or are to be received by him as a result of a contract he had made before the loss occurred and by the express or implied terms of that contract they were to be provided notwithstanding any rights of action he might have; or (b) they were given or promised to him by way of bounty, to the intent that he should enjoy them in addition to and not in diminution of any claim for damages.* The first description covers accident insurances and also many forms of pensions and similar benefits provided by employers: in those cases it is immaterial that, by subrogation or otherwise, the contract may require a refund of moneys paid, or an adjustment of future benefits, to be made after the recovery of damages. The second description covers a variety of public charitable aid and some forms of relief given by the State as well as the produce of private benevolence. In both cases the decisive consideration is, not whether the benefit was received in consequence of, or as a result of the injury, but what was its character: and that is determined, in the one case by what under his contract the plaintiff had paid for, and in the other by the intent of the person conferring the benefit. *The test is by purpose rather than by cause.*
>
> Nevertheless it is not, I think possible, to enunciate an exhaustive rule for all parts of this vexed topic. And the questions that arise can never be determined in the abstract. Each must depend on the terms of the particular contract, pension scheme, charitable benefaction or statute governing the benefit conferred. In this case it is the *Social Services Act*. Invalid pensions are one of the benefits—in an inexact sense a right—that Australians have. No doubt all such social services go to make up the economic and social conditions in which monetary compensation must be weighed. What money will buy, what must be paid for and what may be had free, and what opportunities for rehabilitation and adjustment are available for all citizens are matters of which judges and juries can never really be ignorant or unmindful. Thus in 1951 Lord Normand said: 'no doubt the recent expansion of the social services must be set against the depreciation of the pound sterling' (*Glasgow Corporation v. Kelly*). But to say this is not to say that the amount of a pension is relevant or to be taken into account in determining the damages recoverable from a tortfeasor. I have already said that, in my opinion, invalid pensions granted to persons not permanently blind should be disregarded in assessing damages

> because they are discretionary and are variable according to the damages recovered. Pensions to permanently blind persons are also, I think, to be disregarded; but for a different reason. That reason is that the manifest policy of the Act, as I read it, is that a blind pensioner is to have his pension in addition to whatever rights of action or proprietary rights he may have.

30. In *Adams v Ascot Iron Foundry Pty Ltd*[32] the New South Wales Court of Appeal held that compensation payments under the *Worker's Compensation (Silicosis) Act* 1942 (NSW) should be taken into account in the assessment of damages in an action in negligence by an employee against his former employer relating to exposure to silica dust. Sugerman JA said that benefits of this type could not be held to be given by way of bounty to the intent that they should be enjoyed in addition to any claim for damages. Walsh JA[33] (who differed only as to the extent to which the payments should be taken into account) said:[34]

> There can be no doubt that if he does receive such benefits in respect of a condition found in the action to have been brought about by the defendant's wrongdoing, then the economic loss which the plaintiff has suffered through the destruction, or the diminution of his earning capacity as a result of that wrongdoing, is in fact reduced. Therefore, if the 'dominant rule' is that the wrongdoer is liable only for such damages as, by reason of his wrongdoing, the plaintiff sustained, and if in consequence' matters occurring after an injury that in fact mitigate its consequences are ordinarily to be taken into account in assessing damages' (see *Espagne's* case (23)), then, to allow the plaintiff to recover damages in full from the defendant for his incapacity and also to retain all the benefit under the Act is a departure from the dominant rule. But to say that does not solve the problem, since, in relation to a variety of benefits, it has been accepted that the benefit is irrelevant to the assessment of the damages which the wrongdoer must pay. The problem is, of course, whether or not this is such a case.

31. Referring to Windeyer J's judgment in *Espagne*, Walsh JA said that the decisive consideration was the character of the benefit, to be determined 'by the intent of the person conferring the benefit' and therefore, in that case, the intention disclosed by the Act:[35]

> The difficulty lies in ascertaining the relevant intention from an Act, which does not expressly declare any intention one way or another ... the question may be one to which the Parliament or the draftsmen of the Act do not in fact advert at all. Nevertheless, if it is possible to do so, it is necessary to extract from the Act indications of what was intended. If one cannot find any real indications pointing one way or the other, or if one finds indications both ways which are evenly balanced, it may be that the question must then be resolved by taking the view that the dominant rule to which I referred above should operate.

32. In *Parry v Cleaver* ('Parry'),[36] the plaintiff, a police constable, was severely injured by a car driven negligently by the defendant. He had made compulsory contributions to a police pension fund and was entitled to a pension on being discharged from the police force for disablement which in fact happened. The House of Lords decided that the police pension should be ignored in assessing the plaintiff's financial loss. Lord Reid[37] said that there were two questions. The first was what did the plaintiff lose as a result of the accident in respect of which the universal rule was that the plaintiff cannot recover more than he has lost. The second question was what sums did he receive as a result of the accident which he would not have received if there had been no accident. As to the second question, there was no universal rule. For example, sums received as the proceeds of insurance and sums coming to a plaintiff by reason of benevolence were disregarded:

> The common law has treated this matter as one depending on justice, reasonableness and public policy.[38]

33. *Redding v Lee*[39] involved appeals by two injured plaintiffs. The High Court[40] held that in the assessment of damages to be awarded in an action for personal injuries caused by negligence, in one of the appeals, payments, actual and prospective, of an invalid pension granted for permanent incapacity should be disregarded (following *Espagne*) but, in the other appeal, that unemployment benefits should be deducted from damages for loss of wages.

34. Gibbs CJ[41] said that the invalid pension was intended to provide some relief against destitution for a needy person who was unemployed, whether or not his unemployment was due to an injury and whether or not he had any cause of action for damages. The Chief Justice said that, in his opinion, it should be concluded that the parliament intended that unemployment benefit should inure entirely for the benefit of the person who receives it and should not relieve

from liability any other person who may be liable to pay damages to him. His Honour saw no distinction between the unemployment benefit in that case and the invalid pension in Espagne.

35. Mason and Dawson JJ[42] said that, since *Bradburn*, the courts have declined to measure the insured plaintiff's loss by crediting him with all the financial benefits which he may receive following upon his injury in the nature of insurance, pensions and the like, although not all financial benefits have been disregarded – there has been a more selective approach. They said that[43] the issue turns on the character and purpose of the particular financial benefit which the plaintiff receives:

> Was the benefit conferred on him independently of any right or redress against others and so that he might enjoy the benefit even if he enforced the right?

36. In relation to the unemployment benefit, their Honours thought otherwise for a number of reasons, including that the unemployment benefit was a partial substitute for the wages lost.

37. In *Wollington v State Electricity Commission of Victoria (No 2)*,[44] the trial judge held, in assessing the damages to be awarded for the loss of the plaintiff's personal chattels in a bushfire caused by the defendant's negligence, that *ex gratia* payments by the State government to bushfire victims should not be deducted from the damages otherwise payable. The Full Court of the Supreme Court of Victoria dismissed an appeal from that decision. Young CJ and Menhennitt J said[45] that it was the character of the receipt in the hands of the plaintiff that was really significant in deciding whether it served to diminish the liability of the wrongdoer. Applying *Espagne*, their Honours said that[46] the money received by the respondent from the government had the additional or distinguishing characteristic that it was received by him independently of the existence in him of a right of redress against others but so that it might be enjoyed by him even though he enforced that right.

38. In *Monroe Schneider Associates (Inc) & Anor v No 1 Raberem Pty Ltd & Ors*,[47] the appellants (carpet retailers) falsely informed the respondents (carpet wholesalers) that they had entered into contracts with customers for the supply of carpet on the basis of prices quoted to them by the respondents. The respondents purchased carpet from a third party (Feltex) at a price resulting in a considerable loss. Feltex later agreed to make a substantial payment to the respondents for an advertising campaign and the appellants argued that that payment should be taken into account in reducing the damages payable to the respondents. Burchett J referred to 'the collateral source rule' which applies in the United States, particularly in actions of tort[48] which was stated in these terms in *American Jurisprudence* (2nd edition 1988):

> [T]he courts generally have held that benefits received by the plaintiff from a source wholly independent of and collateral to the wrongdoer will not diminish the damages otherwise recoverable from the wrongdoer.

39. Burchett J said[49] that in his view the principle of *Espagne* was applicable generally and not merely as a rule in actions for damages for personal injuries. The payment by Feltex was made 'independently of the existence ... of a right of redress against others.' It was a collateral transaction.[50]

40. In *Manser v Spry*,[51] the High Court held that worker's compensation benefits should be taken into account in assessing the plaintiff employee's damages in an action against the employer. The Court expressed the relevant principle as follows:

> To ascertain whether a statutory benefit possesses the 'distinguishing characteristic' that it is to be enjoyed independently of, and cumulatively upon, the right to damages, the court must endeavour to discover the intention of the legislature ((15) ibid. at 573, 599-600; *Redding v Lee* [1983] HCA 16; [1983] HCA 16; (1983) 151 CLR 117 at 125, 142, 163; (1983) 47 ALR 241; (1983) 57 ALJR 393; (1983) 2 ANZ Insurance Cases 60-530; *Haines v Bendall* [1991] HCA 15; (1991) 172 CLR 60 at 74-75; 99 ALR 385; [1991] Aust Torts Reports 81-097; (1991) 65 ALJR 349).
>
> There are three possible indicia of a relevant legislative intention: the financial source of the benefit, the presence of a provision which requires a repayment of a statutory benefit out of the damages awarded or paid and the nature of the benefit. If a scheme for provision of a benefit be funded by contributions made by employers and employee-beneficiaries as a kind of insurance against

> misfortune, the principle in *Bradburn v Great Western Railway Co* ((16) [1854] EngR 538; 156 ER 330; (1874) LR 10 Ex 1.) indicates that the benefit is to be enjoyed by a beneficiary who encounters the misfortune without reduction of the damages to which he or she is otherwise entitled. That view has been taken of benefits paid under contributory pension schemes created under statute ((17) *Parry v. Cleaver* [1969] UKHL 2; (1970) AC 1; [1969] 1 All ER 555; (1969) 2 WLR 821; *Smoker v. London Fire Authority* (1991) 2 AC 502; [1991] 2 All ER 449; [1990] IRLR 271; [1991] 2 WLR 422; [1991] ICR 449; and see *Redding v Lee* (1983) 151 CLR at 138.). If statute provides that a particular benefit is to be repaid out of damages, there is a clear indication that that benefit is not to go in reduction of the tortfeasor's liability. When such a provision relates only to one or some of the benefits provided under the statute, the non-repayable character of the other benefits may imply, according to the context, either that the legislature intended that the receipt and retention of the benefit should not be taken into account in the assessment of damages or that it had no such intention ((18) See *Hood Construction Pty Ltd v Nicholas* (1987) 9 NSWLR 60 at 72.). Whether an implication of such a legislative intention should be drawn depends largely on the nature of the benefit ...
>
> Finally, if all indicia of intent fail, the "settled principle governing the assessment of compensatory damages" which the majority stated in *Haines v Bendall* must be applied.

41. In *Dimond v Lovell* ('*Dimond*'),[52] a case to which the judge below referred, the plaintiff's car was damaged as a result of the defendant's negligence. The plaintiff hired a replacement vehicle while her car was being repaired. Under the agreement with the hire company, the payment of the hire charges was postponed until a claim on behalf of the plaintiff by the hire company to recover the plaintiff's damages was concluded. The defendant's insurers refused to pay the sum claimed as hire charges on the ground that the hire agreement was a regulated consumer credit agreement under the *Consumer Credit Act* 1974 (UK).

42. The House of Lords held that the hire agreement was a regulated consumer credit agreement and unenforceable under the statute (because it was 'improperly-executed'). As a result, the plaintiff was not entitled to recover damages for the loss of use of her car because she had obtained a replacement vehicle for which she did not have to pay.

43. Lord Hoffman said that the argument for the plaintiff was that she had been negligently deprived of the use of her car – this was her loss and the fact that she had been lucky enough to obtain the use of another car for nothing was '*res inter alios acta*'. It was no different to a situation where a friendly neighbour who happened to be going on holiday had put his car at her disposal. Lord Hoffman said that this argument had very respectable support in the authorities.

44. Lord Hoffman referred to *Parry* in which Lord Reid said that it would be unjust for damages to be reduced to take into account benefits that the plaintiff received from the benevolence of his friends or relations or of the public at large so that the only gainer would be the wrongdoer. He then referred to *Donnelly v Joyce*[53] in which Megaw LJ derived from previous authorities a general theory that benefits received from third parties were *res inter alios acta*. In that case, a boy who sustained bad injuries in a road accident was looked after by his mother full-time for six months, she giving up her job to do so. The judge said that the fact that the boy had no obligation to repay his mother for her services was irrelevant to his claim – his loss was the existence of the need for daily care and the reasonable cost of supplying same.

45. Lord Hoffman also referred to *McAll v Brooks*.[54] In that case the plaintiff reasonably required a replacement car after his own had been damaged in an accident. His insurance brokers provided the car under an arrangement that was said to be illegal insurance business and would have prevented them from being subrogated to the plaintiff's claim for damages. Lawton LJ said that *Donnelly v Joyce* applied – the relationship between the plaintiff and his insurance company was irrelevant and the plaintiff was entitled to the reasonable cost of satisfying his need for a replacement car.

46. Lord Hoffman said that the last mentioned case was the high watermark of authority but the tide had retreated:[55]

> The courts have realised that a general principle of *res inter alios acta* which assumes that damages will be paid by 'the wrongdoer' out of his own pocket is not in accordance with reality. The truth is that virtually all compensation is paid directly out of public or insurance funds and that through these channels the burden of compensation is spread across the whole community...

47. He referred to *Hunt v Severs*[56] in which Lord Bridge of Harwich rejected the broad principle of *Donnelly v Joyce* stating:

> 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 is being 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'.

48. Lord Hoffman noted that the House in *Hunt v Severs* treated the two cases mentioned by Lord Reid in Parry ('the fruits of insurance which the plaintiff himself has provided' and 'the fruits of the benevolence of third parties') as 'apparent exceptions to the rule against double recovery'. The House declined to create another exception for the case in which the plaintiff claimed compensation for the reasonable cost of necessary services which had in fact been provided voluntarily by a third party. Lord Hoffman saw no need to create an exception in the case before him.

49. Lord Browne-Wilkinson, Lord Nicholls of Birkenhead and Lord Saville of Newdigate agreed with Lord Hoffman. Lord Hobhouse of Woodborough agreed in the result and with much of the reasoning but also said:[57]

> [The plaintiff] was at the time of the accident the owner and person in possession of her car. It was damaged. Its value was reduced. This can be expressed as a capital account loss. This loss can be measured as being the cost of making good the damage plus the value of the loss of its use for a week. Since her car was not unrepairable and was not commercially not worth repairing, she was entitled to have her car repaired at the cost of the wrongdoer. Thus the measure of loss is the expenditure required to put it back into the same state as it was in before the accident. This loss is suffered as soon as the car is damaged. If it were destroyed by fire the next day by the negligence of another, the second tortfeasor would only have to pay damages equal to the reduced value of the car and the original tortfeasor would still have to pay damages corresponding to the cost of putting right the damage which he caused to the car. These questions are liable to arise in relation to any damaged chattel and have long ago received authoritative answers in cases concerning ships. [citations omitted] These cases also distinguish between the cost of the damage to the chattel and consequential losses to the owner of the chattel such as loss of revenue. However, even where the chattel is non profit earning (as was [the plaintiff's] car) there may still be scope for awarding general damages for loss of use …
>
> … Each case depends upon its own facts but loss of use of the chattel in question is, in principle, a loss for which compensation should be paid. However one of the relevant principles is that compensation is not paid for an avoided loss so, if the plaintiff has been able to avoid suffering a particular head of loss by a process which is not too remote (as is insurance), the plaintiff will not be entitled to recover in respect of that avoided loss.

50. *Anthanasopoulos & Ors v Moseley & Ors*[58] was an appeal to the New South Wales Court of Appeal that involved claims in a number of proceedings by owners of private vehicles damaged in collisions against the party at fault for the costs of hiring a replacement vehicle, even though the costs had been paid voluntarily by the owners' insurers where the policy excluded cover for this item. The Court held that the fact that a third party provided a substitute for the damaged property and the basis upon which that replacement was supplied were irrelevant to the owners' claims for damages.

51. Although referring to the decision of the House of Lords in *Dimond* and to passages from the judgments of Lords Hoffman and Hobhouse, Beazley JA (with whom Handley JA agreed) concluded that the line of authority traceable to *The Greta Holme*[59] should be followed and applied.

52. Ipp AJA agreed with Beazley JA and referred with approval to what was said by Lord Hobhouse in *Dimond*, that in the case of a non-income earning chattel there was scope for awarding damages for loss of use, based on the need to replace the damaged chattel while it was being repaired. Ipp AJA considered that the provision of the replacement vehicle was collateral and *res inter alios acta*, referring *inter alia* to the decision of the High Court in *Espagne*.

53. In *Burdis v Livsey*,[60] another case referred to by the judge below, the English Court of Appeal decided five appeals. In the first appeal, the plaintiff's (B) car was damaged as a result of

the defendant's negligence. B borrowed money from a finance company to cover the cost of the damage so that repairs could be carried out without waiting for liability to be established against the defendant. In proceedings brought by B against the defendant, the County Court judge held that the credit agreement was unenforceable so that B did not have to repay the money borrowed but that she could nevertheless recover the cost of repairs from the defendant as damages. On appeal, a High Court judge said that the case did not come within the established exceptions to the rule against double recovery and that there was no valid reason of public policy why B should have the double benefit of having her car repaired free of cost to her and of recovering damages in the amount of the repair costs which she would not have to meet. The appeals in the other actions related to claims for the hire of replacement cars.

54. The Court (Aldous, Tuckey and Jonathan Parker LJJ) allowed the appeal by B, stating that a fundamental distinction had to be drawn between vehicle repair costs, which represented the measure of the claimant's direct and immediate loss resulting from the defendant's negligence, and hire charges, which represented potential future or consequential loss; that in every case a claimant's recoverable loss was limited to the loss which he actually suffered, but where the loss was suffered when the tort was committed (direct loss) subsequent events operated to reduce or extinguish the loss only insofar as such events were referable to the claimant's duty to mitigate, and subsequent events which were not referable in a causative sense to the commission of the tort – viz events which were collateral to the commission of the tort, or *res inter alios acta*, or too remote (which expressions were interchangeable) – did not affect the measure of the loss; that when a vehicle was damaged by the negligence of a third party, the owner suffered a direct and immediate loss representing the diminution in value of the vehicle, and, as a general rule, the measure of that damage was the cost of carrying out the repairs necessary to restore the vehicle to its pre-accident condition; and that the insurance agreement (which resulted in the repairs being carried out at no cost to B) was plainly collateral to the tort and had to be left out of account.[61]

55. The Court said that there was a fundamental distinction between repair costs and hire charges and that, when the action accrued, B suffered direct and immediate loss, the measure of which was the cost of the repairs which were in fact carried out – but it was not a condition precedent to the recovery of compensation for that loss that the car be repaired – the cause of action was complete when the accident occurred.[62] The Court distinguished the hire charges in *Dimond* because they represented a potential future loss (special damage) whereas in the case of a direct loss subsequent events were relevant only where referable to the claimant's duty to mitigate. The Court said that there were two well-established exceptions to the general rule that potential future losses are irrecoverable if they are in fact avoided (insurance payments and benevolent payments). However, the Court of Appeal said that this rule and these exceptions were irrelevant where the claim was for a direct loss suffered when the tort was committed.

56. In *McGregor on Damages*[63] there appears the following pertinent comment on the decision in *Burdis*:

> The decision of the Court of Appeal in *Burdis* is to be applauded. The Court was not deflected by the consideration that the claimant was better off than before the accident, as she had her car in as good a condition as before together with the money representing the costs of the repairs to it. This may seem like over compensation but it is not. The reason that the claimant is better off is not because she has been given too much in damages but because she has benefited from a contract which cannot be enforced against her. There is no reason why her protection as a consumer should be diverted to the tortfeasor.

57. Finally, in *Insurance Australia Ltd v HIH Casualty & General Insurance Ltd (in liq) & Anor*,[64] Ashley JA said that there was:[65]

> ... a broad principle, applicable at least in insurance law and torts law, that credit need not be given by an injured party for monies received by it which are not to be characterised as extinguishing or reducing that party's loss, but are rather to be characterised as having been received independently of right of redress.

Resolution of the appeal

58. For reasons which follow, I would dismiss this appeal.

59. Adopting the approach outlined by Dixon CJ and Windeyer J in *Espagne*, it is appropriate to consider the character of the Act, and in particular the legislative provision from which the benefit to the respondent in this case was derived. It was common ground that the Act was a piece of consumer legislation and that s153 of the Act was intended to deter repairers and to protect the owners of motor vehicles involved in accidents as defined. It is obvious that the benefit conferred on the owner, where the repairer has no approval in writing to perform the repairs, was conferred on an owner 'independently of the existence in him of a right of redress against others.' Clearly enough, the legislation manifests no intent that this benefit was intended to be provided in relief of liability in any others to compensate the owner. Indeed, as the respondent pointed out, the provision is not restricted to collisions involving other vehicles. The problem at hand was assuredly not present to the mind of the drafters but one can impute from the nature of the provision that Parliament would not have intended a tortfeasor to gain from the benefit provided to an owner. It is fair to state, I think, while recognising the conclusory nature of the expression, that the benefit derived by the owner is 'entirely collateral'.

60. Subsequent High Court decisions do not appear to me to have moved from the approach taken in *Espagne*. I consider that the question posed by Mason and Dawson JJ in *Redding v Lee*, while in that case directed to social services payments, is applicable to the present case involving a benefit constituted by immunity from action rather than a monetary payment. The question is: 'was the benefit conferred on him independently of any right or redress against others and so that he might enjoy the benefit even if he enforced the right?' – and, allowing for the different statutory context, the answer must, I think, be in the affirmative.

61. A number of authorities including *Manser v Spry* have emphasised the nature of the benefit as being an important factor in determining the legislative intention. In the present case, I think that this is a key factor as explained above.

62. The English cases have taken a slightly different approach to the problem, as evidenced by the decision in *Dimond* and the distinguishing of that decision in *Burdis*. Nevertheless, there is another line of authority derived from the older English cases involving marine claims that also supports the respondent's position. That line of cases, which emphasises the 'direct' loss incurred at the time of the relevant accident, constituted by the cost of repairs, was adopted by the New South Wales Court of Appeal in *Anthanasopoulos*. However, I prefer to rest my own analysis on the line of authority stemming from *Espagne*. To the extent that, as some of the cases have suggested, the question really depends upon reason, justice and policy, I consider that in the present case the cardinal principle of compensation is trumped by the intent of the legislation as indicated by the character of the Act and of the particular provision, and the nature of the benefit involved.

63. For those reasons, I would, as I have said, dismiss this appeal.

HARPER JA:

64. I have had the considerable benefit of reading, in draft, the judgment of Mandie JA. I respectfully agree with his Honour's conclusion, and his reasons for reaching that conclusion.

ROBSON AJA:

65. I have had the advantage of reading in draft the reasons of Mandie JA. I agree with his analysis of the relevant authorities and their application to the facts of this appeal. In my opinion, the relevant provisions of the *Accident Towing Services Act* 2007 were not intended to confer any benefit on Mr Saric as a tortfeasor. On the contrary, the provisions were intended as a penalty to be levied against the repairer for failing to obtain written authority for its repair work.

66. For the reasons given by Mandie JA, I agree that the appeal should be dismissed.

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[1] Leave to appeal was granted by Neave and Bongiorno JJA on 22 July 2010.
[2] Or 'cannot be driven on a road without compromising the safety of other road users.'
[3] *Tehan v Saric* [2010] VSC 175.
[4] [2002] 1 AC 384.
[5] Ibid 406; see also *Burdis v Livsey* [2002] UKPC 34; [2003] QB 36, [84]; [2002] All ER (D) 155; [2002] 3 WLR 762; [2003] RTR 22 (Aldous LJ, Tuckey and Jonathan Parker LJJ concurring).
[6] *Dimond v Lovell* [2002] 1 AC 384, 400 (Lord Hoffmann); *Burdis v Livsey* [2002] UKPC 34; [2003] QB 36, [86].
[7] *Anthanasopoulos v Moseley* [2001] NSWCA 266; (2001) 52 NSWLR 262, [58] (Beazley JA).

[8] *Redding v Lee* [1983] HCA 16; (1983) 151 CLR 117, 133; (1983) 47 ALR 241; (1983) 57 ALJR 393; (1983) 2 ANZ Insurance Cases 60-530 (Mason and Dawson JJ); see too *Parry v Cleaver* [1969] UKHL 2; [1970] AC 1, 13; [1969] 1 All ER 555; (1969) 2 WLR 821 (Lord Reid).
[9] *Haines v Bendall* [1991] HCA 15; (1991) 172 CLR 60, 63; 99 ALR 385; [1991] Aust Torts Reports 81-097; (1991) 65 ALJR 349 (Mason CJ, Dawson, Toohey and Gaudron JJ):
The settled principle governing the assessment of compensatory damages, whether in actions of tort or contract, is that the injured party should receive compensation in a sum which, so far as money can do, will put that party in the same position as he or she would have been in if the contract had been performed or the tort had not been committed: *Butler v. Egg and Egg Pulp Marketing Board* [1966] HCA 38; (1966) 114 CLR 185, 191; [1966] ALR 1025; 40 ALJR 114; *Todorovic v Waller* [1981] HCA 72; (1981) 150 CLR 402, 412; (1981) 37 ALR 481; (1981) 56 ALJR 59; 12 ATR 632; (1982) 2 ANZ Insurance Cases 60-454; *Redding v Lee* [1983] HCA 16; (1983) 151 CLR 117, 133; (1983) 47 ALR 241; (1983) 57 ALJR 393; (1983) 2 ANZ Insurance Cases 60-530; *Johnson v Perez* [1988] HCA 64; (1988) 166 CLR 351, 355, 386; 82 ALR 587; [1988] Aust Torts Reports 80-224; (1988) 63 ALJR 51; *M.B.P (SA) Pty Ltd v Gogic* [1991] HCA 3; (1991) 171 CLR 657; (1991) 98 ALR 193; (1991) 65 ALJR 203; [1991] Aust Torts Reports 81-082; (1991) 6 ANZ Insurance Cases 61-037; *Livingstone v Rawyards Coal Company* (1880) 5 AC 25, 39; *British Transport Commission v Gourley* [1955] UKHL 4; [1956] LR AC 185, 197, 212; [1955] 3 All ER 796; [1956] 2 WLR 41. Compensation is the cardinal concept. It is the 'one principle that is absolutely firm, and which must control all else': *Skelton v Collins* [1966] HCA 14; (1966) 115 CLR 94; [1966] ALR 449; (1966) 39 ALJR 480, (Windeyer J) 128. Cognate with this concept is the rule, described by Lord Reid in *Parry v Cleaver* [1969] UKHL 2; (1970) AC 1, 13; [1969] 1 All ER 555; (1969) 2 WLR 821, as universal, that a plaintiff cannot recover more than he or she has lost.
[10] *Redding v Lee* [1983] HCA 16; (1983) 151 CLR 117, 133; (1983) 47 ALR 241; (1983) 57 ALJR 393; (1983) 2 ANZ Insurance Cases 60-530 (Mason and Dawson JJ).
[11] Citing *Manser v Spry* [1994] HCA 50; (1994) 181 CLR 428, 436-7; (1994) 124 ALR 539; 68 ALJR 869; [1994] Aust Torts Reports 81-299.
[12] Citing *Johnson v Perez* [1988] HCA 64; (1988) 166 CLR 351, 355-7; 82 ALR 587; [1988] Aust Torts Reports 80-224; (1988) 63 ALJR 51 (Mason CJ):
There is a general rule that damages for torts or breach of contract are assessed as at the date of breach or when the cause of action arises. But this rule is not universal; it must give way in particular cases to solutions best adapted to giving an injured plaintiff that amount in damages which will most fairly compensate him for the wrong he has suffered ...
The general rule that damages are assessed as at the date of breach or when the cause of action arose has been applied more uniformly in contract than in tort and for good reason. But even in contract cases courts depart from the general rule whenever it is necessary to do so in the interests of justice.
Citing also *Narni Pty Ltd v National Australia Bank Ltd* [2001] VSCA 31 [29]; *McCrohon v Harith* [2010] NSWCA 67 [56].
[13] Citing *Wollington v State Electricity Commission of Victoria (No 2)* [1980] VicRp 11; [1980] VR 91; (1979) 1 ANZ Insurance Cases 60-039.
[14] [1854] EngR 538; 156 ER 330; (1874) LR 10 Ex 1
[15] [1854] EngR 538; 156 ER 330; (1874) LR 10 Ex 1, page 1, 3.
[16] (1890) 62 LT 840 and 6 Asp MC 511.
[17] (1890) 6 Asp MC 511, 512.
[18] [1897] AC 596.
[19] [1918] P 363 (Note).
[20] [1935] P 70.
[21] [1948] St R Qd 180.
[22] [1948] St R Qd 180, 182.
[23] This case was followed in *South Australian Railways Commissioner v Haldane* [1950] SASR 50.
[24] (1950) QWN 16, 26.
[25] [1961] HCA 15; (1961) 105 CLR 569; [1961] ALR 627; 35 ALJR 4.
[26] [1961] HCA 15; (1961) 105 CLR 569, 571; [1961] ALR 627; 35 ALJR 4.
[27] [1961] HCA 15; (1961) 105 CLR 569, 572; [1961] ALR 627; 35 ALJR 4.
[28] [1961] HCA 15; (1961) 105 CLR 569, 573; [1961] ALR 627; 35 ALJR 4 (emphasis added).
[29] [1961] HCA 15; (1961) 105 CLR 569, 588; [1961] ALR 627; 35 ALJR 4.
[30] [1961] HCA 15; (1961) 105 CLR 569, 597; [1961] ALR 627; 35 ALJR 4.
[31] [1961] HCA 15; (1961) 105 CLR 569, 599-600; [1961] ALR 627; 35 ALJR 4 (emphasis added).
[32] [1968] 72 SR (NSW) 120; [1968] 3 NSWR 305.
[33] As he then was.
[34] [1968] 72 SR (NSW) 120, 134; [1968] 3 NSWR 305.
[35] [1968] 72 SR (NSW) 120, 135; [1968] 3 NSWR 305.
[36] [1969] UKHL 2; [1970] AC 1; [1969] 1 All ER 555; (1969) 2 WLR 821.
[37] [1969] UKHL 2; [1970] AC 1, 13; [1969] 1 All ER 555; (1969) 2 WLR 821.
[38] [1969] UKHL 2; [1970] AC 1, 13; [1969] 1 All ER 555; (1969) 2 WLR 821.
[39] [1983] HCA 16; (1983) 151 CLR 117; (1983) 47 ALR 241; (1983) 57 ALJR 393; (1983) 2 ANZ Insurance Cases 60-530.
[40] Gibbs CJ, Mason, Murphy, Brennan, Deane and Dawson JJ, Wilson J dissenting.
[41] [1983] HCA 16; (1983) 151 CLR 117, 133; (1983) 47 ALR 241; (1983) 57 ALJR 393; (1983) 2 ANZ Insurance

Cases 60-530.
[42] [1983] HCA 16; (1983) 151 CLR 117, 134; (1983) 47 ALR 241; (1983) 57 ALJR 393; (1983) 2 ANZ Insurance Cases 60-530.
[43] [1983] HCA 16; (1983) 151 CLR 117, 137; (1983) 47 ALR 241; (1983) 57 ALJR 393; (1983) 2 ANZ Insurance Cases 60-530.
[44] [1980] VicRp 11; [1980] VR 91; (1979) 1 ANZ Insurance Cases 60-039.
[45] [1980] VicRp 11; [1980] VR 91, 99; (1979) 1 ANZ Insurance Cases 60-039.
[46] [1980] VicRp 11; [1980] VR 91, 100; (1979) 1 ANZ Insurance Cases 60-039.
[47] [1991] FCA 592; (1991) 33 FCR 1; (1991) 104 ALR 397.
[48] [1991] FCA 592; (1991) 33 FCR 1, 20; (1991) 104 ALR 397.
[49] [1991] FCA 592; (1991) 33 FCR 1, 26; (1991) 104 ALR 397.
[50] In a matter which was complicated on the facts, the other members of the full Federal Court agreed with Burchett J.
[51] [1994] HCA 50; (1994) 181 CLR 428; (1994) 124 ALR 539; 68 ALJR 869; [1994] Aust Torts Reports 81-299.
[52] [2002] 1 AC 384.
[53] [1973] EWCA Civ 2; [1974] QB 454; [1973] 3 All ER 475; [1973] 2 Lloyds Rep 130; [1973] 3 WLR 514.
[54] [1984] RTR 99.
[55] [2002] 1 AC 384, 399.
[56] [1994] UKHL 4; [1994] 2 AC 350; [1994] 2 All ER 385; [1994] 2 WLR 602; [1994] 2 Lloyds Rep 129.
[57] [2002] 1 AC 384, 406.
[58] [2001] NSWCA 266; (2001) 52 NSWLR 262.
[59] See [20] above.
[60] [2002] UKPC 34; [2003] QB 36; [2002] All ER (D) 155; [2002] 3 WLR 762; [2003] RTR 22.
[61] The foregoing summary is taken from the headnote.
[62] The judgment makes reference to *The Glenfinlas, The London Corporation* and *The Endeavour*.
[63] 18th Edition, 32–009.
[64] [2007] VSCA 223; (2007) 18 VR 528; (2007) 14 ANZ Insurance Cases 61-747.
[65] [2007] VSCA 223; (2007) 18 VR 528, 555; (2007) 14 ANZ Insurance Cases 61-747.

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