

REMEDIES IN TORT

Notes adapted from Michael A. Jones, *Textbook on Torts*, Seventh Edition, 2000.

The two principal remedies available to the victim of a tort are damages to compensate for the harm he has suffered and, where appropriate, an injunction to prevent future harm. Damages is the predominant remedy. Certain forms of self-help, such as abatement of a nuisance or self-defence, can be regarded as remedies, but the courts do not encourage this.

DAMAGES

The fundamental principle applied to the assessment of an award of damages is that the claimant should be fully compensated for his loss. He is entitled to be restored to the position that he would have been in, had the tort not been committed, insofar as this can be done by the payment of money (*Livingstone v Rawyards Coal Co* (1880) 5 App Cas 25, 39).

TYPES OF DAMAGES

Nominal and contemptuous

Nominal damages will be awarded where the claimant proves that the defendant has committed a tort but the claimant has suffered no loss.

Contemptuous damages consist of the award of a derisory sum, usually the smallest coin of the realm. They are awarded when the court considers that the claimant's action, although technically successful, was without merit and should not have been brought. The claimant may then be at risk on costs, which are normally awarded to the successful party.

General and special

General damage is the damage that is presumed to flow from torts which are actionable *per se*, and so need not be specifically pleaded (e.g., loss of reputation in a libel action). Special damage refers to the damage that the claimant must plead and prove as part of his cause of action in torts where damage is the gist of the action (e.g., negligence, nuisance, slander).

There is a second and much more commonly used meaning of the distinction between general damages and special damages. In practice, losses that are capable of being calculated with reasonable accuracy are pleaded as 'special damages'. Inexact or unliquidated losses (although they are not presumed and therefore must be pleaded) are compensated by an award of 'general damages'. For example, in a personal injuries action, accrued expenses such as damaged clothing, medical expenses and loss of earnings to the date of trial are special damages. Pain and suffering and loss of amenity (and prospective loss of earnings) are treated as general damages.

Aggravated and exemplary

The court may take into account the manner in which the tort was committed in assessing damages. If it was such as to injure the claimant's proper feelings of dignity and pride then aggravated damages may be awarded. Aggravated damages are solely compensatory, but they are higher than would normally be the case to reflect the greater injury to the claimant.

Aggravated damages should be distinguished from exemplary damages, which are punitive in nature. It has been said that the distinction between aggravated and exemplary damages is that aggravated damages are awarded for conduct that shocks the claimant (and therefore constitutes a real loss), and exemplary damages are awarded for conduct that shocks the court. In *Rookes v Barnard* [1964] AC 1129, the House of Lords held that, except where specifically authorised by statute, exemplary damages should be awarded only in two categories of case:

- (a) Oppressive, arbitrary or unconstitutional action by servants of the government.
- (b) Where the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable.

A SINGLE ACTION AND THE LUMP SUM

Single Action

A claimant can bring only one action in respect of a single wrong. He cannot maintain a second action based on the same facts merely because the damage turns out to be more extensive than was anticipated (*Fetter v Beale* (1701) 1 Ld Raym 339, 692). However, there are some exceptions to this.

Where a single wrongful action violates two distinct rights the claimant can bring separate actions in respect of each right. Although the rule in *Henderson v Henderson* (1843) 3 Hare 100 requires the parties to bring the whole case before the court so that all aspects of the case may be finally decided (subject to any appeal) once and for all, in *Talbot v Berkshire CC* [1994] QB 290 the Court of Appeal gave three examples of special circumstances where the rule would not apply:

- (a) where the claimant was unaware of the existence of the claim;
- (b) where an agreement was made between the parties holding the action in abeyance; and
- (c) where the claimant had not brought his case earlier in reliance on a representation made by the defendant.

A second exception to the rule is where there is a continuing injury, such as a continuing nuisance or trespass to land. In trespass, being actionable *per se*, a fresh cause of action arises from day to day, and in nuisance a fresh cause of action arises whenever further damage occurs (*Darley Main Colliery v Mitchell* (1886) 11 App Cas 127).

The final exception is that where a single wrong produces successive and distinct damage, then in torts which are actionable only on proof of damage (as opposed to torts actionable *per se*), a separate and distinct cause of action will accrue (*Mount Albert BC v Johnson* [1979] 2 NZLR 234).

Lump sum

Damages are assessed once and for all must be awarded in the form of a lump sum. This applies both to accrued and prospective losses. The court has no power to require the defendant to make periodical payments (*Burke v Tower Hamlets Health Authority* [1989] Times Law Reports August 10). In *Wells v Wells* [1998] 3 All ER 481 at 502, Lord Steyn said that the court ought to be given the power, of its own motion, to make an award periodical payments in appropriate cases. Such a power would be consistent with the principle of full compensation for pecuniary loss, but, said his Lordship, this could only be introduced by Parliament.

An exception of very limited application was accepted in *Mullholland v Mitchell* [1971] AC 666. Where there is evidence of a change of circumstances after the trial

but before an appeal, the Court of Appeal will admit the new evidence. New evidence was also admitted by the House of Lords in *Lim Poh Choo v Camden AHA* [1980] AC 174 to 'mitigate the injustices of a lump sum system'.

The lump-sum principle, combined with the rule that damages can be recovered once only, causes serious difficulties in actions for personal injuries, particularly where the medical prognosis is uncertain. There is now a procedure for the award of provisional damages in this type of case (CPR, Part 41). Section 32A of the Supreme Court Act 1981 provides that in personal injury cases where there is a 'chance' that, as a result of the tort, the claimant will develop some serious disease or suffer some serious deterioration in his condition, he may be awarded provisional damages assessed on the basis that the disease or deterioration will not occur. If the event subsequently materialises the claimant can then make an application for further damages, which will more accurately compensate his loss. There can only be one such application in respect of a disease or type of injury specified in the original action.

A claim for provisional damages cannot include a declaration that the claimant's surviving dependants should be entitled to bring a claim under the Fatal Accidents Act 1976 if the claimant should subsequently die as a result of a deterioration of his physical condition. The Damages Act 1996, s3 now permits dependants to claim in respect of losses not compensated by the initial award of damages.

An alternative to provisional damages which is currently available, but little used, is a procedure for separate trials on liability and damages, so that the assessment can be made at a later date when the claimant's medical prognosis is more certain (CPR, Part 3, r3.1(2)(i)). However, this will only be of value where the claimant's medical condition is unstable and needs time to settle.

Structured settlements

A recent development has been the introduction into this country of the North American concept of a 'structured settlement' (for a definition see the Damages Act 1996, s5). This is a private arrangement between the claimant and the defendant's liability insurer whereby the normal lump-sum payment for future losses is taken in the form of periodic payments. These payments can be varied or 'structured' over a period of time. They can be for a fixed period or until the claimant's death, and they can be index-linked. The payments are financed by the purchase of an annuity by the liability insurer with the money that would have been paid to the claimant as a lump sum. This annuity is held by the insurer on behalf of the claimant, and, as a result of a concession by the Inland Revenue, the payment is not taxable as income in the claimant's hands. They depend upon agreement between the claimant and the defendant's insurers; the court has no power to order such an arrangement without the consent of the parties (Damages Act 1996, s2).

Periodic payments made under a structured settlement damages award come within the category of capital treated as income for the purposes of the Income Support (General) Regulations 1987 and will affect a claimant's entitlement to income support (*Beattie v Secretary of State for Social Security*, 9 April 2001, CA).

See also, CPR PD40.

PERSONAL INJURIES

In most actions for personal injuries the claimant suffers two distinct types of loss - pecuniary and non-pecuniary loss. Pecuniary loss is the damage that is capable of being directly calculated in money terms. The commonest example is loss of earnings, both actual and future, but it includes all other expenses attributable to the tort, such as medical expenses, travelling expenses, the cost of special equipment or

of employing someone to carry out domestic duties which the claimant is no longer able to perform, or loss of pension rights. Non pecuniary losses are such immeasurable matters as pain and suffering caused by the injury, and loss of amenity attributable to a disability.

The courts assess damages under several 'heads', but for the purpose of calculating interest there are three broad heads: accrued pecuniary damages; non-pecuniary damages; and loss of future earnings. The House of Lords has stressed, however, that the court should also have regard to the appropriateness of the total award to avoid overlapping of different heads of damages (*Lim Poh Choo v Camden AHA* [1979] 2 All ER 910).

Medical and other expenses

The claimant is entitled to recover his medical and other similar expenses reasonably incurred. Accrued expenses will be awarded as part of the special damages, whereas future medical expenses will be estimated and awarded as general damages.

The Law Reform (Personal Injuries) Act 1948, s2(4), provides that the possibility of avoiding medical expenses or part of them by taking advantage of NHS facilities is to be disregarded.

Section 5 of the Administration of Justice Act 1982 provides that any saving to the injured person which is attributable to his maintenance wholly or partly at public expense in a hospital, or nursing home or other institution shall be set off against any income lost by him as a result of his injuries. A similar proposition had been expressed in *Lim Poh Choo* which effectively applies the same rule to claimants who make savings in domestic expenditure while being looked after in a private institution.

If the claimant has to live in a special institution, such as a nursing home, or receive attendance at home he is entitled to the cost of that, provided that it is reasonably necessary (*Shearman v Folland* [1950] 2 KB 43).

It often happens that a third person, such as a relative or friend, bears part of the cost of the claimant's injury, either in the form of direct financial payments or by providing nursing assistants. Sometimes a spouse or close relative may give up paid employment in order to care for the claimant. The claimant can recover the cost of such care:

- Until recently, the basis for such recovery was the Court of Appeal's decision in *Donnelly v Joyce* [1974] QB 454 where it was held that the existence of a legal or moral obligation to reimburse the third party was irrelevant. It was incorrect, said the court, to think of this as someone else's loss. It was the claimant's loss. His loss was the existence of the *need* for nursing services or special equipment, not the expenditure of the money itself. So far as the defendant was concerned, the question from what source the claimant's needs had been met, who had paid the money or given the services, or whether the claimant was under a legal or moral obligation to repay, were all irrelevant.

- While retaining the general rule that the claimant can recover for the gratuitous provision of care by third party and preserving the principles as to quantum, the House of Lords in *Hunt v Seers* [1994] 2 All ER 385 have altered the basis upon which such an award is made, reverting to the approach suggested by Lord Denning MR in *Cunningham v Harrison* [1973] QB 942, that the award reflects the claimant's obligation to hold that portion of the damages in trust, to be paid to the person supplying the services. One consequence of shifting the focus from the claimant to the third party is that, as in *Hunt v Seers* itself, an award could not be made where the services are provided by the defendant tortfeasor.

LOSS OF EARNINGS

Actual loss

It is not usually difficult to calculate the claimant's actual loss of earnings from the date of the injury to the date of assessment. This is the net loss, after deducting income tax and social security contributions (*British Transport Commission v Gourley* [1956] AC 185). An employee's contributions to a pension scheme are also deducted in calculating his actual loss of earnings (*Dews v National Coal Board* [1987] 2 All ER 545).

Prospective loss

The calculation of future loss of earnings, however presents real problems, largely because the court has to engage in the exercise of prophesying both what will happen to the claimant in the future and what would have happened if he had not been injured, in order to estimate the difference.

The starting-point in this process is to work out the claimant's net annual loss of earnings (as at the date of assessment, not the date of the injury: *Cookson v Knowles* [1979] AC 556). The net annual loss is known as the 'multiplicand', and will be adjusted to take account of the claimant's individual prospects of promotion (*Roach v Yates* [1938] 1 KB 256), but no allowance is made for real increases in average earnings generally.

This sum is then multiplied by another figure, called the 'multiplier', which is based initially on the number of years that the loss is likely to continue. The multiplier is then reduced, or 'discounted' to take account of: (a) the uncertainty of the prediction - the claimant might have lost his job in any event at some point in the future e.g., through redundancy or illness; and (b) the fact that the claimant receives the money now as a capital sum, instead of in instalments over the rest of his working life.

The maximum multiplier that used to be applied by the courts was 18, but it was rarely that high. In the past the multiplier used rested on the assumption that a person who invested a capital sum would receive a return of approximately 4.5% after the effects of tax and inflation had been taken into account (Pearson Commission, 1978). This traditional approach to calculating the multiplier was challenged in three consolidated appeals in the House of Lords, *Wells v Wells* [1998] 3 All ER 481. The House of Lords held that the plaintiffs were entitled to be compensated on the assumption that they would invest in index-linked government securities (ILGS), a view which had been recommended by the Law Commission in 1994. The average return on ILGS in recent years has been approximately 3%, significantly lower than the assumed return of 4.5% upon which the traditional approach was based (because investment in equities carries a premium for the risk involved). Their Lordships indicated, as a matter of guidance rather than precedent, that the appropriate discount rate should be 3% (different economic circumstances might justify a change to the guide figure in the future). This would require a larger initial lump sum, which is reflected in a higher multiplier. The consequence of this change is that for seriously injured claimants awards of damages will increase significantly.

The Damages Act 1996, s1, permits the Lord Chancellor to give general guidance on rates of return, though leaving a discretion to the courts to apply different rates where appropriate. The Lord Chancellor issued a consultation paper on this question in March 2000, but in the meantime the courts are applying the 3% discount rate (*Warren v Northern General Hospital* [2000] 1 WLR 1404, CA).

The lost years

If the claimant's life expectancy has been reduced by his injuries, can he claim for the earnings that he would have received in the period between his expected date of death and the date that he would have stopped working but for the accident? In *Oliver v Ashman* [1962] 2 QB 210 the Court of Appeal held that the losses incurred in these 'lost years' were not recoverable, on the basis that a claimant cannot suffer a loss during a period when he will be dead. This rule effectively penalised the claimant's dependants, since their dependency in the 'lost years' would have been met from the claimant's earnings during that period. This consideration led the House of Lords to overrule *Oliver* in *Pickett v British Rail* [1980] AC 136. Damages for prospective loss of earnings are now awarded for the whole of the claimant's pre-accident life expectancy, subject to a deduction for the money that the claimant would have spent on his own (not his dependents') living expenses during the last years.

Deductions

A person suffers personal injury may receive financial support from a number of sources other than tort damages. The most common source is social security but others include, for example, sick pay, pensions, private insurance and charitable donations.

(a) Social security benefits

The Social Security Act 1989 introduced a scheme of 'recoupment' of prescribed social security benefits from tortfeasors/insurers by the state for accidents or injury occurring on or after 1 January 1989. This system has been further amended by the Social Security (Recovery of Benefits) Act 1997, which applies retrospectively to all settlements made or judgments given on or after 6 October 1997. Benefits are no longer 'recouped'; they are 'recovered' from the compensator. Any 'recoverable benefits' paid to the victim of an accident, injury or disease in the 'relevant period' are recoverable from the compensator.

(b) Other collateral benefits

- The proceeds of a personal accident insurance policy taken out by the claimant are ignored, on the basis that otherwise the claimant's foresight and thrift would benefit the defendant (by reducing the damages payable) instead of himself (*Bradburn v Great Western Railway* (1874) LR 10 Ex 1).
- Gratuitous payments to the claimant from charitable motives are not deducted, again on the assumption that the donor intended to benefit the claimant rather than the defendant (*Redpath v Belfast Railway* [1947] NI 167).
- The House of Lords held in *Parry v Cleaver* [1970] AC 1 that an occupational disability pension should not be deducted from lost earnings, whether the pension was contributory or non-contributory. The majority took the view that the nature of a pension makes it analogous to private insurance effected by the claimant and so within the general principle of *Bradbury v Great Western Railway*.
- In *Longden v British Coal Corporation* [1998] 1 All ER 289, the plaintiff was unable to work following an accident at work. He was awarded an incapacity pension under his occupational pension scheme which he would continue to receive after his normal retirement age of 60, though it was lower than the pension he would have received had he continued to work to age 60. The House of Lords held that (with the exception of a lump sum received on accepting the disability pension) such payments received before the normal retirement age did not have to be brought into account.
- Occupational sick pay will be deducted if paid as a term of the claimant's contract of employment (unless there is a contractual obligation to repay the employer on receipt of tort damages: *Browning v War Office* [1963] 1 QB 750).

- If the claimant is made redundant as a result of his injuries, in the sense that his disability makes him a more likely candidate for redundancy, then any redundancy payment received will be deducted (*Colledge v Bass Mitchells & Butlers Ltd* [1988] 1 All ER 536).
- A compensation payment from a statutory compensation scheme for workers who developed an industrial disease (pneumoconiosis) is deductible from damages awarded in respect of the same illness (*Ballantine v Newalls Insulation* [2000] Times Law Reports June 22).

Loss of earning capacity

Where a person suffers a permanent disability which affects his ability to earn in the future at the same rate as he earned before his injury, then he may or may not suffer loss of earnings. His loss of earnings may be total if he is unable to work at all, or partial, if he is able to take a less remunerative job. But in some cases, although his injuries have affected his ability to earn, the claimant suffers no loss of earnings because his employer continues to employ him at the same rate of pay. In these circumstances the claimant is entitled to damages for his loss of capacity, if there is a real risk that he could lose his existing employment, because his capacity to find an equivalent job has been reduced (*Smith v Manchester Corp* (1974) 17 KIR 1; *Moeliker v Reyolle & Co* [1977] 1 All ER 9). This involves a two-stage test: (1) was there a substantial or real risk that the claimant would lose his present job at some time before the end of his working life? and (2) if so, what is the present value of future risk?

There is no real distinction between damages for loss of earning capacity and damages for future loss of earnings (Pearson Commission; *Foster v Tyne & Wear CC* [1986] 1 All ER 567 at 571-2).

PAIN AND SUFFERING

The claimant is entitled to damages for actual and prospective pain and suffering caused by the injury, by a neurosis resulting from the injury, or attributable to any necessary medical treatment. A person who suffers mental anguish because he knows that his life expectancy has been reduced can recover that anguish (Administration of Justice Act 1982, s1(1)(b), restating the common law position).

Similarly, a person who has been incapacitated and is capable of appreciating his condition will be compensated for the anguish that this creates (*West & Son Ltd v Shepherd* [1964] AC 326).

LOSS OF FACULTY AND AMENITY

The injury itself represents loss of faculty whereas the consequences of the injury on the claimant's activities represents a loss of amenity, e.g., loss of job satisfaction, or loss of leisure activities and hobbies, and loss of family life. It is rarely necessary to distinguish between these heads because the courts usually award a single global sum to cover all the claimant's non-pecuniary losses.

The Law Commission's Report on *Damages for Personal Injury: Non-Pecuniary Loss* (No 257, 1999) suggested that awards for non-pecuniary loss were too low, at least in serious cases and are low in comparison with awards made in defamation cases. In *Heil v Rankin* [2000] 2 WLR 1173 specially constituted five-judge Court of Appeal accepted the thrust of the Law Commission's proposals, while not accepting that there should be an 'across the board' increase in awards for non-pecuniary loss. The Court considered that there should be a tapered increase in awards, with an increase of about a third for the most serious injuries, but no

increase at all for awards which were assessed at under £10,000. The bracket for the most serious injuries should start at £150,000 rising to £200,000 for the very worst cases. These figures will, in future, increase in line with the retail prices index, although the Court accepted that parts of the argument for the tapered increase that they applied was that, over time, the retail prices index does not fully reflect the general increase in prosperity. The public might reasonably expect that such awards bear some relationship to levels of income and wealth in society, particularly since assessing the level of damages was essentially a 'jury function'.

INTEREST ON DAMAGES

The court has a discretion to award simple interest on all or any part of the damages, and in the case of damages for personal injuries or death exceeding £200 the court must award interest unless there are special reasons for not doing so (Supreme Court Act 1981, s35A). Where the claimant has delayed bringing a claim to trial the court has a discretion to disallow all part of the claim for pre-trial interest (*Birkett v Hayes* [1982] 2 All ER 710, 717; *Corbett v Barking AHA* [1991] 1 All ER 498).

Interest on damages for non-pecuniary loss is awarded at a modest rate, currently 2%, from the date of service of the claim form to the date of trial. The reason for this low rate is that a large proportion of nominal interest rates is represented by inflation, and inflation is taken into account when the courts assesses damages for non-pecuniary loss by the general up-rating of 'tariffs' (*Wright v British Railways Board* [1983] 2 AC 773). Note that this rate may now be increased to 3% in the light of the decision of the House of Lords in *Wells v Wells* [1998] 3 All ER 481.

DAMAGE TO PROPERTY

This is not mentioned in the ILEx syllabus but see Jones, p624-6; or *Winfield & Jolowicz on Tort*, p786-792, for further information.

INJUNCTIONS

PROHIBITORY AND MANDATORY

A prohibitory injunction is an order of the court requiring the defendant to cease committing a continuing tort, such as a continuing nuisance or trespass, or restraining the repetition of tortious conduct where it is likely to be repeated. It is negative in nature, in that requires the defendant not to do something or to cease doing something.

A mandatory injunction, on the other hand, requires the defendant to undertake some positive act, such as removing an obstruction that he has caused to the claimant's right of way.

An injunction is an equitable remedy (though note that a number of statutes confer a jurisdiction to grant injunctions, e.g., the Protection from Harassment Act 1997), and as such it is a discretionary remedy. A number of factors will be taken into account in deciding whether to exercise the discretion:

- An injunction will not be granted where damages would be an adequate remedy, nor, possibly, where the harm to the claimant from the tort is trivial.
- If it is impossible for the defendant to comply with the order it will not be granted, but the fact that the defendant will be put to considerable trouble and expense does not make it impossible to comply.

- The conduct of the parties may be taken into account.

Mandatory injunctions are not granted so readily as prohibitory injunctions. In *Morris v Redland Bricks Ltd* [1970] AC 652 the House of Lords said that a mandatory injunction would not be granted unless there was a strong probability that very serious damage to the claimant will result if it is withheld.

QUIA TIMET

In some circumstances the claimant may be entitled to a *quia timet* injunction, which will restrain conduct that is likely to cause substantial damage before any damage has actually occurred (and thus, in torts which are not actionable *per se*, before any cause of action has accrued). The likelihood of substantial damage must be strong, and the damage must be imminent (*Lemos v Kennedy Leigh Development Co* (1961) 105 SJ 178).

The claimant must be able to point to a good cause of action in order to restrain the harm (*Associated Newspapers v Insert Media* [1988] 2 All ER 420).

INTERIM

An interim injunction is a provisional order which may be issued pending a full trial of the action on the merits of the case. This means that on an application for an interim injunction the court does not investigate the merits, and provided there is a 'serious question' to be tried the court will exercise its discretion on the 'balance of convenience' (*American Cyanamid v Ethicon* [1975] AC 396, 408).

Where an interim injunction is granted the claimant will usually be required to give an undertaking to pay damages to the defendant for losses sustained by the defendant as a result of the injunction if, at the hearing on the merits, the claimant's action fails.

See also, CPR PD25.

DISCRETIONARY DAMAGES

The court has a discretion to award damages in addition to or in substitution for an injunction (Supreme Court Act 1981, s50).