
Damages

Personal Injury

[10.10] What remedy does (and should) the legal system provide to tort victims? Although they may occasionally obtain injunctions intended to prevent ongoing harm, almost all successful tort claimants obtain money damages.¹ A surprisingly large number of difficult and contested issues arise, however, in determining just how much money should be awarded. This chapter explores those issues.

Part of the problem is factual uncertainty, especially, but not only, with respect to losses that will occur in the future, that is, after the trial or settlement of the case. But, in addition, there are fundamental legal questions at issue that centrally arise from disputes about the underlying reasons for awarding tort damages in the first place; whether tort law is ultimately compensatory, a deterrent or concerned with corrective justice is discussed in Chapter 1.

The focus of this chapter will be on damages for bodily injury (and death). The material is organised in this way. First, the question of whether damages should be paid in a lump sum or periodically is addressed. Secondly, consideration is given to the strength of the proof plaintiffs must offer in order successfully to claim their damages.

The focus then shifts to the specific types of recoveries that are allowed.² So, thirdly, considerable attention is given to what are typically termed pecuniary losses – (a) expenses incurred (or to be incurred) because of the harm the tortfeasor has imposed on the victim and (b) the victim’s lost income or lost earning power. Fourthly, compensatory awards for non-pecuniary losses (for example, pain and suffering) are explored. Fifthly, the possibility of receiving exemplary damages (beyond what compensation would require) is examined.

Discussions of other especially contested issues follow. Sixthly, should alternative sources of compensation received by victims impact the amount of tort damages they obtain? Seventhly, when (else) should victims recover less than their full losses? Finally, the chapter concludes with brief reference to tort victims whose property has been damaged or destroyed.

1 The leading Australian work is Luntz, *Assessment of Damages for Personal Injury and Death: General Principles* (4th ed, 2002) and the revised edition (2006); Canada: *Cooper Stephenson*; Waddams; England: McGregor; Kemp & Kemp, *Quantum of Damages*; Ogus, *Law of Damages* (1973); Street, *Damages*. Comparative: McGregor; XI Int Encycl Comp L, ch 9 (Personal Injury and Death).

2 Because the terms “special” and “general” damages have both different meanings from one legal system to another and changed meanings in some places over time, those terms will not be employed here. So, too, for similar reasons, damages for “economic” loss will not be used. Instead, damages will be described as compensating pecuniary and non-pecuniary losses, and non-compensatory damages will be termed exemplary (or punitive).

Along the way it will be shown that the answers to these questions have changed over time, both because of the evolution of the common law and because of legislative interventions that over-ride judicially crafted solutions.

Lump sums v periodic payments

[10.20] The only form of compensation known to the common law is a lump sum award.³ As a corollary to the lump sum rule, the plaintiff must sue reasonably promptly (lest he run afoul of the statute of limitations) “once and for all” for his entire loss: past and future.⁴ In the normal course, therefore, neither may he split his cause of action by suing separately for different heads of damage⁵ nor can a subsequent action be brought by either plaintiff or defendant to increase or decrease the award in case the loss turns out to be greater or less than expected at the time of the trial or settlement.⁶

The lump sum rule should be contrasted with typical arrangements in social insurance schemes, including workers’ compensation in which benefits are paid periodically (for example, monthly) and are often adjusted over time as the claimant’s condition changes.

From the *compensation* perspective, where the amount of damages is determined once and for all, its payment may be spread over time to better match the receipt of damages to when the money is needed. This will reduce the risk that the victim might squander a lump sum and be left in dire financial straits.

A more ambitious approach to periodic tort damages would be to leave them open ended in order to take into account future events that can often cause victims to need rather more or less compensation than can reasonably be predicted at the time of the trial or settlement. In this way, rather than making a speculative guess that may well result either in a windfall or in a denial of adequate redress to the plaintiff, periodic damages could better reflect what turns out to be the victim’s actual loss.

By contrast, from the *deterrence* perspective, two arguments can be made in favour of lump sum awards even in ongoing serious injury cases. First, bringing home a clear and substantial amount of liability to defendants at the time of

3 *Fournier v CNR* [1927] AC 167 (PC).

4 *Fitter v Veal* (1701) 12 Mod 542; 88 ER 1506.

5 In Canada (*Cahoon v Franks* [1967] SCR 455) and most of the US (James & Hazard, *Civil Procedure*, § 8811.11) he can sue only once for the same accident. In England (*Brunsdon v Humphrey* (1884) 14 QBD 141) and Australia (*Marlborough v Charter Travel* (1990) 18 NSWLR 223 (CA) and *Linsley v Petrie* [1998] 1 VR 427 (CA), though Handley JA in *Baltic Shipping Co v Merchant “Mikhail Lermontov”* (1994) 36 NSWLR 361 at 370 stated that the exception “may not survive a direct challenge in this Court”) it may be possible to split personal injury and property damage, but this was doubted in *Talbot v Berks CC* [1994] QB 290 (CA). Some US cases, involving risk exposures that will only cause bodily harm in the future if at all, have allowed victims to sue for and win awards for “medical monitoring” expenses now and then to sue again later if the risk to which they were exposed turns out to injure them. For example, *Friends For All Children, Inc v Lockheed Aircraft Corp* 746 F2d 816 (DC Cir 1984). But US courts have also exercised caution, and have established some conditions on the award of monitoring expenses (for example, that monitoring is likely to help discover disease and that early discovery is likely to help). See *Borgeois v AP Green Indus Inc* 716 So2d, 355 (La 1998). Moreover, if the plaintiff has incurred no detectable harm, recovery for medical monitoring expenses has been denied altogether. See *Metro-North Commuter Railroad Co v Buckley* 521 US 424 (1997).

6 Last minute reopening: *Doherty v Liverpool Hospital* (1991) 22 NSWLR 284 (CA), followed by *Great Wall Resources Pty Ltd v O’Sullivan* [2009] NSWCA 119; *Gamser v Nominal Defendant* (1977) 136 CLR 145; *Mulholland v Mitchell* [1971] AC 666.

trial or settlement may better send a precaution-promoting message to potential injurers generally. Secondly, periodic payments risk enticing victims to malingering, whereas a lump sum payment then frees the victim from negative financial consequences of a faster-than-expected full recovery

It is not obvious which solution best fits the *corrective justice* perspective, although perhaps justice to defendants argues for fixing a specific liability amount once and for all.

Opposition to any general mandatory scheme of variable periodic payments remains strong.⁷ Otherwise courts might have to become like administrative agencies, adding on a substantial apparatus that would oversee those periodic payments. Furthermore, lawyers (for both sides) as well as defendant insurers will generally much prefer to have closed cases, rather than ones for which they have ongoing obligations. Lawyers want their fees and to move on to new disputes. Insurance companies foresee enormous costs in establishing reserves, let alone in indexing benefits against inflation. Moreover, if periodic damages were to be adjusted for changed circumstances this is likely to create some ongoing litigation especially over whether a victim's worsening condition is really a result of the initial injury. To the counter-argument that victims may squander a lump sum, this worry may be met by the purchase of indexed annuities, which are being increasingly used in voluntary so-called structured settlements,⁸ and all Australian States statutorily provide for the approval of structured settlements, in relation to personal injury claims, when both parties consent.⁹

Nevertheless, in several nations one sees a decided movement towards the ordering of periodic payments at least in certain types of serious injury cases. One way to reform the common law lump sum rule is to empower the court to take a more active role in awarding periodic payments instead of a lump sum, as has been done in England. Under the *Courts Act 2003*¹⁰ and the *Damages (Variation of Periodical Payments) Order 2005*,¹¹ not only may courts order that damages for future pecuniary losses be paid periodically, but also courts are required to consider the appropriateness of such an award.¹² Moreover, in structuring the payment of an award over time, the court may make the order variable and subject to later review if there is a chance of significant future deterioration or improvement in the victim's condition.¹³ To be sure, the courts must be satisfied that the payment of ongoing obligations is reasonably secure.¹⁴

Although voluntarily agreed-to structured settlements are increasingly common in Canada, the Supreme Court of Canada concluded in 1989 that

7 See Veitch, "Cosmetic Reform: Periodic Payments & Structured Settlements" (1982) 7 U Tas L Rev 136; Rea, "Lump Sum versus Periodical Damage Awards" (1981) 10 J Leg Stud 131 who stresses the "moral hazard".

8 See Lewis, *Structured Settlements* (1994); LC No 224 (1994).

9 *Civil Liability Act 2002* (NSW), ss 22-6; *Wrongs Act 1958* (Vic), ss 28M – 28N; *Civil Liability Act 2003* (Qld), ss 63 – 67; *Supreme Court Act 1935* (SA), s 30BA; *Civil Liability Act 2002* (WA), ss 14 – 15; *Civil Liability Act 2002* (Tas), ss 7A – 8; *Personal Injuries (Liabilities and Damages) Act* (NT), ss 32 – 33.

10 Cl 39, ss 100 – 101 (amending the *Damages Act 1996*).

11 SI 2005/841. Earlier on, *Pearson*, ch 14 recommended, by majority, variable and indexed periodicals for cases involving death or serious and lasting injury.

12 *Damages Act 1996*, cl 48, s 2(1), as amended by the *Courts Act 2003*, s 100.

13 *Damages Act 1996*, cl 48, s 2(B), as amended by the *Courts Act 2003*, s 100, and *Damages (Variation of Periodical Payments) Order 2005*.

14 *Damages Act 1996*, cl 48, s 2(3).

imposed periodical payments was inappropriate absent legislative authority.¹⁵ Since then, however, several Canadian provinces have created such authority. In British Columbia, for example, in auto accident cases involving awards of more than \$100,000, periodic payments are required when the court concludes that they are in the best interest of the plaintiff.¹⁶ In Manitoba, if either party requests it, a court may order periodic payment of a plaintiff's award, including possible upward adjustments over time.¹⁷ And in Ontario, courts can order a periodic payment scheme whenever the claimant asks that his award take into account taxes, or, in medical malpractice cases, there is an award for future care totalling over \$250,000.¹⁸

In Australia a similar approach has been taken by New South Wales for damages awarded for asbestos-related disease and for claims involving motor vehicle injuries.¹⁹ New South Wales workers' compensation legislation permits courts to award damages according to a structured settlement even if only the plaintiff prefers this.²⁰

Developments along these same lines have come into play in some Continental countries,²¹ and for medical malpractice cases in California where there is a substantial award for future care.²² A different strategy is to defer the final award of a lump sum pending substantial uncertainties, with periodic payments in the interim. This reform has been adopted in South Australia.²³

Standard of proof – all or nothing

[10.30] Proof of past events, which either happened or did not happen, such as the defendant's alleged negligence or the plaintiff's loss, must normally be demonstrated by a "balance of probability" (in contrast with criminal law burdens that may require the government to demonstrate the defendant's responsibility "beyond a reasonable doubt"). Once the civil law burden of proof is met, however, the matter in question is then treated as a certainty. Many believe that this position undergirds the *corrective justice* perspective of tort law in which a trial definitively establishes "the truth". Also, when the evidence is contested and knowing of the "all-or-nothing" rule, the parties can choose to settle cases for appropriately discounted amounts when neither wants to take on the uncertain outcome risk.

15 *Watkins v Olafson* (1989) 2 SCR 750.

16 *Insurance (Vehicle) Act*, RSBC 1996, cl 231, s 99.

17 *Court of Queen's Bench Act* SM 1988089, cl 4. CCSM, cl C280, amendments ss 88.1 – 88.9 (en SM 1993, cl 19, s 6).

18 *Courts of Justice Act*, RSO 1990, cl C43, ss 116 and 116.1; *Ontario Rules of Civil Procedure*, RRO 1990, Reg 194, r 53.09.

19 *Dust Diseases Tribunal Act* 1989 (NSW), s 11A; *Motor Accidents Act* 1988 (NSW), s 81 (for future economic loss other than loss of earning capacity). See also *Motor Vehicles (Third Party Insurance) Act* 1943 (WA), s 16(4) (apparently rarely used because courts insist on mutual agreement). For the Australian situation generally, see [14.40] of Sappideen et al, *Torts* (2009).

20 *Workers Compensation Act* 1987 (NSW), s 151Q(1). In the US, interestingly enough, although periodic payments are the norm in workers' compensation, in many jurisdictions complex long-term disability cases are often compromised on a lump sum basis.

21 Fleming, "Damages: Capital or Rent" (1969) 19 U Tor LJ 295. This can only be done legislatively: *Lim v Camden HA* [1980] AC 174 at 183; *Watkins v Olafson* [1989] 2 SCR 750. Recommended in Tas (Report no 52, 1988).

22 *California Civil Procedure Code*, s 667.7. Under the California provision, the sums not used by the victim are eventually returned to the defendant.

23 *Supreme Court Act* 1935 (SA), s 30B. For example, *Brown v South Australia* (1984) 36 SASR 147. It was earlier recommended in England; *Pearson*, §§ 574-611.

Awarding a lump sum of damages for future “vicissitudes”, however, does not require quite the same “all or nothing” approach. Instead, the law is here content to value the mere chance of ongoing or future injury provided it is a realistic possibility, not merest speculation.²⁴ Thus, such possibilities as the future onset of osteoarthritis or epilepsy,²⁵ or that the disability would have been suffered in any event in the future,²⁶ are to be taken into account by basing a portion of the lump sum award on a percentage corresponding to its “simple” probability. Given the uncertainty of these future damages, it is generally thought more equitable (and more in keeping with the *deterrence* perspective) to base them on probabilities than either to deny them altogether or award them in full.

This sensible practice has, in turn, caused some to doubt the wisdom of the related way in which the common law has traditionally adopted a “yes-no” approach to causation, discussed in Chapter 9.

Indemnity principle

[10.40] The overriding purpose of our law of damages is to compensate the injured, not to punish the injurer: his or her degree of fault is irrelevant to damages (except in cases involving contributory negligence). “Punitive” or “exemplary” damages, over and above compensatory, are allowed (if at all) only against defendants guilty of contumelious disregard of plaintiffs’ rights, as in cases of deliberate libel or wanton physical attack.²⁷

Even in assessing compensatory damages, the law seeks at most to indemnify the victim for the loss he has suffered, not to mulct the tortfeasor for the injury he has caused. Hence the plaintiff must give credit for savings which minimised particular loss items (for example, what he would have spent on food if he had not been in hospital)²⁸ or for any reduction in the anticipated extent of the injury due to subsequent events (like a widow’s remarriage,²⁹ the victim’s death³⁰ or a later accident³¹).

Finally, allowance may have to be made for benefits which offset losses. But to warrant a set-off, the gain must be fairly closely linked to the loss, not

24 *Davies v Taylor* [1974] AC 207 at 212, 220 (Lord Reid: “substantial” rather than “speculative”; Lord Simon: “substantial” rather than “fanciful or remote possibility”). Approved in Australia in *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 at 643 (Deane, Gaudron and McHugh JJ).

25 *Callaghan v Lynch* [1962] NSW 871 (FC); *Jones v Griffith* [1969] 1 WLR 795 (CA); *Schrump v Koot* (1977) 82 DLR (3d) 553 (Ont CA).

26 *Malec v J C Hutton Pty Ltd* (1990) 169 CLR 638 (proof of what might or might not have happened); *Overland Sydney v Piatti* (1992) ATR ¶81-191 (reduction of 7.5% additional to normal deduction of 15% for vicissitudes); *Commonwealth v Elliot* [2004] NSWCA 60 (reduction of 10% additional to existing deduction of 10% for past expenses, but since the risk of the disability increased with time, a reduction of 20% additional to normal deduction of 15% for vicissitudes for future economic loss). See also (1991) 69 Can B Rev 136, and *Gregg v Scott* [2005] 2 WLR 268.

27 Below, [10.130].

28 Preferably by deducting the “domestic element” from cost of medical care: *Lim v Camden HA* [1980] AC 174 at 191. In “lost years” cases (see below) the more speculative criterion of what the deceased would have spent on himself must perforce be used: *ibid*.

29 Below, [29.150]. Discounting for remarriage – see *De Sales v Ingrilli* (2002) 212 CLR 338.

30 *Zeppos v Pridue* (1967) 86 WN (Pt 1) (NSW) 270 (CA); *McCann v Sheppard* [1973] 1 WLR 540 (CA); *Leschke v Jeffs & Faulkner* [1955] QWN 67 (imprisonment).

31 Above, Chapter 9. Even supervening events between trial and appeal may be admitted: see *Mulholland v Mitchell* [1971] AC 666; *Perry v Phillips* [1982] 1 WLR 1297 (CA); *Warr v Santos* [1973] 1 NSWLR 432.

“collateral” or “res inter alios acta”:³² for example, where loss of profits due to inability to replace equipment was mitigated by a later opportunity to purchase a replacement at a lower cost,³³ or where the extra cost of replacing an old tractor with a new one was reduced by reselling it after a short while when it was no longer needed.³⁴ Those transactions were “part of a continuous dealing with the situation in which the plaintiff found himself”³⁵ as the result of the accident; in contrast to independent or disconnected events, for example, where neighbouring land damaged by the blow-out of an oilwell increased in value due to the discovery of oil³⁶ or where a surgeon left a swab in a patient albeit the operation saved his life.³⁷ The distinction is well illustrated by the case of a physician who failed to warn a patient that her sterilisation was not foolproof. In consequence she did not recognise that she was pregnant until an abortion was no longer practicable. Her damages for the trouble of her pregnancy and childbirth were reduced by not having to undergo an abortion. Even more fine-tuned was the holding that, while the joy of having the baby set off the trouble and care of looking after it (both non-economic items), it did not reduce the cost of its upbringing and medical care.³⁸

The indemnity ideal has not, however, been pursued with absolute rigour. For example, the plaintiff need not bring into account many benefits accruing to him from outside sources as the result of the accident and may, to that extent, end up being overcompensated. But the problem of collateral benefits is complex and will be discussed in a separate section.³⁹ In some instances, also, the law has been prepared to compensate a plaintiff beyond his particular needs, for example by awarding heavy damages for loss of the amenities of life to an insentient (living death).⁴⁰ But against these “excesses” must be balanced the fact that the plaintiff’s indemnity is rarely complete because of the adverse biases in calculating his loss (as we shall see) and the fact that he usually has to bear some of his own legal expenses.⁴¹ A tragic feature which belies the indemnitory ideal is that the more serious and permanent the injury, the less adequate will be the compensation in practice.

32 See *Rest 2d*, § 920.

33 *Bellingham v Dhillon* [1973] QB 304; dist *Hussey v Eels* [1990] 2 QB 227 (CA).

34 *Hoad v Scone Motors* [1977] 1 NSWLR 88 (CA); see below, [10.230].

35 12 *Halsbury* (4th ed), p 481.

36 *Green v General Petroleum* 205 Cal 328 at 336 (1928).

37 *Male v Hopmans* (1967) 64 DLR (2d) 105 at 116-117 (benefit not the “direct result” of the injury).

38 *Thake v Maurice* [1986] QB 644; see above, [8.220]. Compare *Cattanach v Melchior* (2003) 215 CLR 1 and *Harriton v Stephens* (2006) 226 CLR 52. Note that several jurisdictions in Australia passed legislation to prevent an award of damages for costs of rearing a child where the child’s birth was at issue: Qld: *Civil Liability Act 2003*, ss 49A, 49B; SA: *Civil Liability Act 1936*, s 67; NSW: *Civil Liability Act 2002*, s 71.

39 Below, [10.140].

40 Below, [10.110].

41 Party-and-party costs awarded to successful plaintiffs rarely meet their actual expenses. In the US where they have to give up one third to one half of the award to their own lawyer, pro-plaintiff rules (pre-tax earnings, award not taxable, collateral source rule) are usually justified on this ground: see Fleming, *The American Tort Process*, ch 6.

Distinguishing types of damages – special and general

[10.50] The designations “general” and “special” damages in personal injury cases have had changing and differing meanings from jurisdiction to jurisdiction.⁴² Originally “general damage” reflected a pleading rule, referring to a loss which was presumed to be the natural and probable consequence of the tort and therefore did not have to be pleaded with specificity. Only if the claim was unusual was notice of “special damage” required.

Today, however, at least in Australia, “specials” refers to all items of damage capable of (more or less) precise quantification, comprising medical and other expenses as well as lost earnings up to the date of trial.⁴³ Even if natural and probable, the defendant is entitled to notice because they are quantifiable and help him to evaluate the claim. “General damages”, on the other hand, comprise all non-pecuniary losses, past and future, as well as future earnings (earning capacity).⁴⁴ Yet, even with respect to general damages, the overriding modern pleading rule is that a defendant is entitled to notice of any unusual circumstances affecting their assessment.⁴⁵ In the United States, by contrast, the phrase “special damages” tends to refer to all pecuniary losses both past and future.

Note, in turn, the importance of the distinction between “pecuniary” and “non-pecuniary” damages, in which the former focuses on lost income/earning capacity and victim expenses (both past and future) and the latter concerns itself with pain and suffering and the like.

To complicate things further, some use the phrase “economic damages” to mean “pecuniary” damages, but others (especially those with a *deterrence* perspective) claim that “non-pecuniary” damages also compensate for “economic loss”.

Finally, a still further distinction that is sometimes made is between “restitution” damages which are sometimes equated with recovery for readily quantifiable past losses (“restitutio in integrum”) and “compensatory” damages which are sometimes equated for these purposes with the remainder of tort damages.⁴⁶ This distinction runs into a yet different common distinction made between “compensatory” damages and “exemplary” or “punitive” damages, a matter to be addressed below.

So as to try to avoid some of these ambiguities, for purposes of analysis in this chapter, the issues addressed next will first follow the conventional distinction between pecuniary and non-pecuniary loss which cuts across the special/general damages distinction.

42 See Jolowicz, “The Changing Use of Special Damage” [1960] *Cam LJ* 214; *Luntz* (2006), pp 88-96; *McGregor*, pp 16-19.

43 *Paff v Speed* (1961) 105 CLR 549 at 558-559; *Sticca v Jouvelet* [1988] VR 899 (FC). In New South Wales known as “out of pocket”. However, in *CSR Ltd v Eddy* (2005) 226 CLR 1, McHugh J noted at 38 that the introduction of Griffiths v Kerkemeyer damages has made the distinction “blurred, if not rendered entirely redundant”.

44 Although the verdict results in a global sum, each item must stand on its own: *Lai Wee v Singapore Bus* [1984] AC 729 (PC).

45 *Domsalla v Barr* [1969] 1 WLR 630 (CA) (plaintiff’s plan to set up his own business); *Ivkovic v Australian Iron and Steel Ltd* [1963] SR (NSW) 598 (FC) (impairment of sexual capacity).

46 *BTC v Gourley* [1956] AC 185 at 208, 212.

Pecuniary loss

[10.60] Pecuniary loss consists of expenditures necessitated by the accident or in diminution of earnings or earning capacity – the first due to increased needs, the second due to lost gains. Both are usually more susceptible to precise calculation than non-pecuniary injury.

The most important item under the first head typically concerns hospital, medical and nursing expenses, past and future. These are recoverable if reasonably necessary.⁴⁷ In Australia and many other countries the value of publicly funded medical and hospital services cannot be claimed because the victim incurred and will incur no expense.⁴⁸ This is not the rule in the United States, however, where no comprehensive national health scheme exists (although the United States solution applies as well to those Americans receiving government paid-for health care).⁴⁹ The Australian approach seems more in tune with the *compensation* perspective, whereas the United States strategy seems to better fit the *deterrence* perspective, leaving open (to be discussed below) whether tort victims who recover tort damages for otherwise funded health care must turn this portion of their recovery over to their health care providers.

What if a spouse or other relative cares for a victim and perhaps gives up a paying job to do so? Under an older view, the value of those services could be claimed as damages by the victim only if they were legally or at least morally incurred by the victim, and not if the injured person received them free⁵⁰ as is often the case. Some modern decisions have permitted the victim to recover the value of such nursing and domestic services provided by others, the test being the victim's need, not expenses incurred.⁵¹ These *Griffiths v Kerkemeyer* damages, as they are called in Australia, may be seen to provide an indirect means for reimbursing the donor⁵² and to prevent the tortfeasor from profiting from this fortuity (thus serving both *corrective justice* and *deterrence* values). And yet, more recently these recoveries have been severely limited by legislative reform.⁵³

47 Australian courts are less forthcoming than Canadian regarding the standard of medical care: cf *Sharman v Evans* (1977) 138 CLR 563 with *Andrews v Grand* [1978] 2 SCR 229 on future home versus institutional care for quadriplegics. Deductible is the "domestic element" in order to preclude overlap in the award for lost earnings: *Lim v Camden HA* [1980] AC 174 at 191.

48 The *Law Reform (Personal Injuries) Act 1948* (UK) specifically allows a plaintiff to choose, and claim the cost of, private treatment. Australian practice agrees: see, for example, *Wyld v Bertram* [1970] SASR 1.

49 *Helpend v Southern California Rapid Transit District* 465 P2d 61 (Cal 1970). More recently, some US states have altered the common law collateral sources rule by statute, Sanders & Joyce, "Off to the Races": The 1980s Tort Crisis and the Law Reform Process" (1990) 27 Hous L Rev 207.

50 For example, *Blundell v Musgrave* (1956) 96 CLR 73.

51 *Griffiths v Kerkemeyer* (1977) 139 CLR 161; *Van Gervan v Fenton* (1992) 175 CLR 327 (market value, not earnings foregone); *Grincelis v House* (2000) 201 CLR 321 (commercial interest rate used); *Hunt v Severs* [1994] 2 AC 350. A plaintiff cannot recover for his own lost capacity to perform gratuitous work for another's benefit: *CSR Ltd v Eddy* (2005) 226 CLR 1 reversed in New South Wales, see n 90.

52 But without obligation: *Kars v Kars* (1996) 187 CLR 354 (as inconsistent with the loss being the plaintiff's). In England, following the Scots statutory rule, in trust: *Hunt v Severs* [1994] 2 AC 350.

53 Abolished in Tasmania (*Common Law (Miscellaneous Actions) Act 1986*, s 5) and subject to limits in Victoria (*Transport Accident Act 1986*, s 93; *Accident Compensation Act 1985*, s 134AB(24)(b)); New South Wales (*Motor Accidents Act 1988*, s 72; *Motor Accidents*

finalised before and after his death: before, he recovers for his own future loss and he can dispose of the award as he likes; after, only dependants can claim and for their own loss.⁵⁹

Then, there is the matter of how future contingencies – so-called vicissitudes – might have impacted on what a victim’s future earnings would have been had he not been injured. On the one hand, even someone with a substantial past work history could have suffered in the future from ordinary vicissitudes such as sickness, accident, unemployment and industrial disputes which could have cut into earnings even without the tort having occurred. On the other hand there are factors that could well have increased his earnings from current levels had there been no tort, such as a developing career,⁶⁰ promotion, and general economic prosperity.⁶¹ In addition, there are vicissitudes peculiar to the particular victim, which may include pre-accident health conditions which probably would have eventually taken their toll in any event, such as a chronic disease that likely would have reduced his career length as compared with the average worker.⁶²

Expenses that would have been necessary for the realisation of earning capacity, such as travelling, but are not incurred when earning capacity is curtailed by the accident, also seem appropriately taken into account. The cost of domestic help or child care that might be avoided because the tort-created disability keeps the victim at home where he can provide that care (assuming that is so) might be taken into account for the same reason, and yet perhaps they should not be deducted from the lost earning capacity award on the ground that they are “expenditures for” personal amenity that the victim should still be entitled to incur.⁶³

[10.80] Taxation creates a further complication. The overwhelming rule is that lump sum tort awards for personal injury are income tax free, even to the extent that they seek to compensate for loss of earnings.⁶⁴ There are several possible justifications for this. One rests on the view that what is being compensated is the loss, not of earnings, but of earning capacity, a capital asset. Another is that under a progressive income tax system it would be unfair to tax all of the tort damages in the single year in which they are awarded.⁶⁵ Also, if the income tax were only to apply to that portion of tort damages applicable to lost earnings, this would create an incentive for victims to conspire with their defendants to settle cases on terms that allocate most of the damages to non-taxable elements. Besides, the victim will generally pay tax on the income earned on the lump sum

59 Below, [29.200] p743. But see *Croke v Wiseman* [1982] 1 WLR 71 (denying damages for lost years to a young man without dependants).

60 See *Beasley v Marshall* (1986) 40 SASR 544; *Taylor v Bristol Omnibus Co* [1975] 1 WLR 1054 at 1059 (father’s position as starting point); *Hughes v McKeown* [1985] 1 WLR 963 (girl’s marriage prospects ignored).

61 While arbitrary deductions are supposedly improper, in practice deductions of 15% or so generally prevail: see *Koeck v Persic* (1996) ATR ¶¶81-386. According to actuarial calculations, a reduction of no more than 2-3% is justified (Traversi, “Actuaries and the Courts” (1956) 29 ALJ 557), which would be balanced by the chance of earning beyond 65 (the usual cut-off point): *Tzouvelis v Victorian Rlys* [1968] VR 112 at 136.

62 Such discounts are also pertinent to non-pecuniary damages.

63 *Wynn v NSW Insurance* (1995) 184 CLR 485.

64 Australia: *Atlas Tiles v Briers* (1978) 144 CLR 202; *Finance Act 1965* (UK), s 27(8). But interest in the award is taxable: *Whitaker v FCT* (1996) 140 ALR 257.

65 The award could be taxed on the basis of the present value of the future tax on the gross income: Yoran, “Tax Aspects in Tort Compensation” (1987) 22 Isr L Rev 37. An alternative division into capital and income is proposed by Bishop and Kay, “Taxation and Damages: The Rule in *Gourley’s Case*” (1987) 104 LQ R 211.

tort award he receives. Furthermore, some find it repugnant to public morality for the tax collector to demand his cut out of the meagre compensation received by victims of misfortune.⁶⁶ Yet, it remains the case that had the victim actually earned income, the victim would have paid tax on those earnings, and this leads many to conclude that the result of the no-tax rule is that the taxpayer makes a substantial contribution to the cost of accident compensation.

Notice that this analysis all assumes that tort compensation for lost earnings/earning capacity is calculated on a pre-tax basis consistent with the *deterrence* perspective which would disfavour having the tortfeasor get the tax benefit with a lowered award.

Yet, from the *compensation* perspective some argue for offsetting the non-taxability of the tort award by basing it on the plaintiff's post-tax earnings. England adopted the latter rule,⁶⁷ and so did Australia after reconsideration.⁶⁸ Canada traditionally followed the predominant American practice of assessing gross earnings,⁶⁹ although there has been a retreat from the traditional American practice in some US cases.⁷⁰ Moreover, Canadian courts and provincial legislatures and others have been struggling to work out a sensible solution to an approach that calls for "grossing up" of damage awards to account for tax.⁷¹

An obvious solution to this problem does not emerge merely by saying that it depends on "justice, reasonableness and public policy".⁷² In favour of the English rule it is sometimes argued that the plaintiff must prove a real loss (not just a technical one), and that to ignore the tax component under modern conditions of high taxation, usually deducted at source, would confer on him an undeserved windfall. But others say that from the perspective of *corrective justice*, tort law should not take it upon itself to undo the non-taxability policy of the revenue code⁷³ and that an "open-handed rather than a close-fisted approach" should be adopted which bases awards on pre-tax earnings,⁷⁴ especially given the point already made that the victim will have to pay tax on the income earned on the lump sum he receives.⁷⁵ Moreover, from an administrative perspective, there is the substantial problem of estimating what post-tax income would actually have been in the future since to calculate this requires predicting future tax rates that may well be different from current rates (higher or lower).

66 This argument has most force in the US because of the contingent fee: Fleming, *Tort Process*, pp 211-214.

67 *BTC v Gourley* [1956] AC 185 (personal injuries); *Lewis v Daily Telegraph* [1964] AC 234 (libel).

68 *Cullen v Trappell* (1980) 146 CLR 1 (banco). Anticipated by *Wrongs Act 1979* (Vic), s 28A; *Common Law Practice Act 1978* (Qld), s 4 (now *Supreme Court Act 1995* (Qld), s 15).

69 *R v Jennings* [1966] SCR 532.

70 A new direction may have been given to the American practice by the adoption of post-tax income for FELA actions in *Norfolk & W Rly v Liepelt* 444 US 490 (1980).

71 *Watkins v Olafson* (1989) 2 SCR 750; Law Reform Commission of British Columbia, *Report on Standardized Assumptions for Calculating Income Tax Gross-up and Management Fees In Assessing Damages* (1994); Ontario, *Courts of Justice Act*, RSO 1990, cl C43.

72 *Parry v Cleaver* [1970] AC 1 at 13 per Lord Reid.

73 Moreover, the tortfeasor if self-insured will often claim tax exemption for the damages awarded against him: cf *Strong v Woodfield* [1906] AC 448. Generally: Bishop and Kay, "Taxation of Damages" (1987) 104 LQR 211. An acceptable formula could be found: for example, to tax damages as ordinary income in the years in which it would have been earned (minority recommendation of the Law Reform Commission (No 7, 1958)).

74 *Cullen v Trappell* (1980) 146 CLR 1.

75 *Taylor v O'Connor* [1971] AC 115; *Watkins v Olafson* [1989] 2 SCR 750 (future care).

Once one determines how much the loss in earning capacity is worth by taking all of these matters into account, yet another important adjustment remains. That is because the claimant will be getting a lump sum now, rather than earning money over many future years. It would be a mistake therefore, to award a lump sum which, once invested, would yield an income equal to the lost earnings. Rather, the goal, as a general matter, is to award the sum which, together with interest thereon, will yield the required replacement income and be exhausted at the end.⁷⁶ In accounting parlance, the stream of future earnings must be reduced to present value.⁷⁷ For example, assuming an interest rate of 5%, the present lump sum value of receiving \$10,000 for 20 years is not \$200,000 but \$124,600.⁷⁸

But 5% is used here just an illustration. What discount rate should actually be used? In an inflation-free economy, many would argue that the appropriate discount rate would be the yield of the safest investments, that is, government securities, whose interest rate, because of their reduced risk, is typically below the market rate for securities generally. The idea here is that the victim ought not to have to take market risks, but rather the victim should be able to invest their sum in these safe securities and still earn sufficient interest to have his or her lost earning capacity fully compensated.

But given the fact that we often have at least some inflation, it must be further appreciated that even the interest rate paid on government securities usually contains a portion that is meant to compensate for the likely falling value of money over time. This argues for discounting by less than the actual interest rate on government securities and to use instead the “true” or “real” underlying interest rate on such securities. This all assumes that one has not increased the amount of earnings it is projected that the victim would have earned absent the tort on account of the fact that future inflation also likely translates into higher wages. Because of the influence of inflation on wages and the ability to earn more from a lump sum in times of inflation broadly offset each other, many have concluded that in assessing earning capacity one should ignore how much inflation would have increased wages that would have been earned absent the tort and that one should discount the lost earning capacity sum by only the amount of the “real” inflation-ignoring interest rate on safe investments. This method has the added advantage of dispensing with the

76 A plaintiff directly disabled from attending to his affairs is also entitled to allowance for fund management: *Treonne v Shaheen* (1988) 12 NSWLR 522 (CA). This has been abolished in SA: *Civil Liability Act 1936* (SA), s 57. Only the additional expenditure in fund management caused by the disability can be awarded: *Nominal Defendant v Gardikiotis* (1996) 186 CLR 49. The High Court has defined what the amount available here as the “amount assessed as allowing for remuneration and expenditures properly charged or incurred by the administrator of the fund during the intended life of the fund”: *Willett v Fletcher* (2005) 221 CLR 627 at 642.

77 Awards for future care are discountable in the same way as are awards for future loss of earnings: *Todorovic v Waller* (1981) 150 CLR 402.

78 See Preveitt, “Actuarial Assessment of Damages” (1972) 35 Mod L Rev 140 at 257. An annuity table, like that in (1959) 33 ALJ 28, computing the present value of various weekly payments, may be handed to the jury with suitable explanation: *Maroney v Christie* [1964] VR 806 (FC); *Luntz* (2002), ch 6; *Lai Wee v Singapore Bus* [1984] AC 729 (comparing English use of “multipliers”). Beyond such purely arithmetical aid, actuarial evidence relating to life expectancy according to sex, occupation, etc, or contingencies of death or remarriage are also occasionally used in Australia, though cautiously: Wickens, “Actuarial Assistance in Assessing Damages” (1974) 48 ALJ 286.

necessity of gaining expert testimony at every trial on both sides of the coin. It has therefore achieved a wide following.⁷⁹

Of course, for this approach to be fair, one has to agree on what the real underlying interest rate on safe investments is. The English courts traditionally used a 4-5% discount rate, but in 1999 the House of Lords concluded that this rate implied that the victim would invest his award in securities that the Lords thought were unduly risky, and instead came down in favour of a 3% rate.⁸⁰ Two years later the Lord Chancellor, under the power conferred to him by Section 1(1) of the *Damages Act of 1996*, set a discount rate of 2.5%.⁸¹ This reduction from 4-5% to 2.5-3% makes an enormous difference in large awards that are meant to cover many years into the future.

In Canada in the late 1970s the Supreme Court approved a 7% discount rate after factoring in an estimated long-term inflation rate of 3.5-4% and an estimated investment income rate of 10%.⁸² But those were years of very high inflation and high investment returns. In response to scholarly criticism the Canadian Supreme Court later emphasised that the discount rate could adapt to changing times and later approved the use of a discount rate as low as 2.25%.⁸³ A number of provinces have set the discount rate by statute, for example, 2.5% in Ontario⁸⁴ and in British Columbia 2.5% to future earnings and 3.5% to future care costs.⁸⁵

Although the Australian High Court also prescribed a rate of 3%,⁸⁶ by statute all Australian States have adopted a higher rate.⁸⁷ Anything more than 3% has been criticised for short-changing plaintiffs.⁸⁸

[10.90] The discussion so far has assumed that the tort victim was working at the time of the accident and indeed had something of a substantial earnings history that could at least plausibly be projected in terms of what he would have earned in the future had there been no tort, taking into account all of the matters already discussed. But, of course, not all tort victims were employed at the time of their injury.

79 US: *Jones & Laughlin v Pfeifer* 462 US 523 (1983). Brady, "Inflation, Productivity, and the Total Offset Method of Calculating Damages for Lost Future Earnings" (1982) 49 U Chi L Rev 1003. Canada: *Arnold v Teno* [1978] 2 SCR 287 (7%); *Lewis v Todd* [1980] 2 SCR 694 (4 1/4% minus 2% productivity factor); Rea, (1980) 58 Can B Rev 280; *Pritchard v Cobden* [1988] Fam 22 (CA). LC Rep No 224 recommended investment in Index-Linked Govt Stock (ILGS): see Kemp, "Discounting Damages for Future Loss" (1997) 113 LQR 195.

80 *Wells v Wells* (1999) 1 AC 345.

81 See *Damages (Personal Injury) Order 2001*, SI 2001/2301. Technically, parties may present evidence that a different discount rate is more appropriate, *Damages Act 1996*, cl 48, s 1(2). But such deviations are rarely justified: *Warriner v Warriner* (2002) 1 WLR 1703; *Page v Plymouth Hospital HNS Trust* (2004) 2 All ER 367.

82 *Andrews v Grand & Toy Alberta Ltd* (1978) 2 SCR 229; *Thornton v Prince George School District No 57* (1978) 2 SCR 267.

83 *Lewis v Todd* (1980) 2 SCR 694.

84 *Rules of Civil Procedure*, RRO, r 53.09(1).

85 *Law and Equity Act*, RSBC 1996, cl 253, s 56.

86 *Todorovic v Waller* (1981) 150 CLR 402 (this includes the tax component on the notional investment income and future changes in wage rates and prices). See Davis, (1982) 56 ALJ 168; Sieper, (1980) 17 MULR 614 (economic analysis).

87 *Civil Liability Act 2002* (NSW), s 14 (5%); *Wrongs Act 1958* (Vic), s 28I (5%); *Civil Liability Act 2003* (Qld), s 57 (5%); *Civil Liability Act 1936* (SA), ss 3, 55 (5%); *Law Reform (Miscellaneous Provisions) Act 1941* (WA), s 5 (6%); *Civil Liability Act 2002* (Tas), s 28A (5%); *Personal Injuries (Liabilities and Damages) Act* (NT), s 22 (5%).

88 For example, Carter and Palmer, (1994) 22 Osg H LJ 197, advocating the offset rule.

Take for example homemakers, who are still predominately women. In the past, economic loss resulting from injury to a housewife was conceived primarily claimable by the husband's action for loss of her services (a claim for lost consortium). This archaism is gradually yielding to the recognition of her own right to assert impairment of her housekeeping capacity, accompanied either by the complete abolition of the husband's action or by its contraction to a claim for non-pecuniary injury.⁸⁹

Assuming she would almost certainly not have gone into the paid labour force absent the tort, the preferable basis for compensating her for her loss of housekeeping capacity would seem to be what it would cost to hire replacement services.⁹⁰

Today many homemakers were only temporarily out of the paid labour force at the time the tort occurred and would likely have returned to work or gone out to work later in their lives but for the tort. Merely compensating them for the cost of replacement housekeeping services will often substantially under-compensate for their loss of earning capacity.⁹¹ But determining when and for how long and at what rate of pay she would have been employed is not easy to decide, and one might justly be concerned that basing any projections on what women generally earn today unfairly incorporates into tort awards lingering effects of employment discrimination against women that might well be eliminated in the marketplace before too long.⁹² Using national average earnings as a minimum is one solution, although this will overcompensate some and only gets at a part of the conundrum. Canadian courts have been especially pressed with complaints that it is unfair to women to use gendered data that draw on the current situation.⁹³

89 See Chapter 29.

90 A niggling hesitation in New South Wales was to disregard replacement services when rendered "in the ordinary course of family life and obligation". *Kovac v Kovac* [1982] 1 NSWLR 656; however this has been disapproved: see, for example, *Van Gervan v Fenton* (1992) 175 CLR 327 at 338 (Mason CJ, Toohey and McHugh JJ) and *Hanzic v Cabramatta Community Centre Inc* [1999] NSWSC 1205. See also, *Hodges v Frost* (1983) 53 ALR 373 (Fed CA); *Franco v Wolfe* (1974) 52 DLR (3d) 355 (Ont CA). However, in most Australian jurisdictions, a housewife can only claim on this basis for services rendered to them because she could not render it to herself, rather than because she could not render it to another: *CSR Ltd v Eddy* (2005) 226 CLR 1. NSW allows damages for the latter: *Civil Liability Act 2002* (NSW), s 15B which reinserted them after *CSR v Eddy* was decided. As proposed in *Burnicle v Cutelli* [1982] 2 NSWLR 26 (CA); *Maiward v Doyle* [1983] WAR 210. In Australia, this appears to be the preferable basis on which to claim damages for loss of a capacity to provide services that fall outside *Griffiths v Kerkemeyer* damages: *Shellharbour City Council v Rigby* (2006) 150 LGERA 11 (NSWCA).

91 See Graycar, "Compensation for Loss of Capacity to Work in the Home" (1985) 10 Syd L Rev 528; Riseley, "Sex, Housework and the Law" (1981) 7 Adel L Rev 121. ALRC recommended valuation based on gross median weekly.

92 Graycar, "Damaged Awards: Vicissitudes of Life as a Woman" (1995) 3 TLJ 160; Cassels, "Damages for Lost Earning Capacity" (1992) 71 Can B Rev 445. A less prejudicial attitude prevailed in *Wynn v NSW Insurance* (1995) 184 CLR 485. See generally, Chamallas, "Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument" (1994) 63 Fordham L Rev 73.

93 For example, in one British Columbia case statistics used at trial suggested that the projected lifetime earnings of a male with some non-university post-secondary education would be nearly double that of a female with the same level of education. *Mullholland (Guardian ad litem of) v Riley* (1993) BCJ No 920 (SC), aff'd (1995) 12 BCLR(3d) 248 (CA). Nowadays, most Canadian courts, even when using female statistics, adjust the damages figure upwards to account for the societal trend toward a diminished gender gap in later years covered by the claimant's award. The Supreme Court of Canada seems to implicitly endorse this approach in *Toneguzzo-Norvell (Guardian ad litem of) v Burnaby Hospital* (1994) 1 SCR

Similar problems arise in determining the value of the lost earning capacity of children and students who have no past work experience but probably would have gone into the paid labour force but for the accident or who would likely have been able to earn higher incomes than they are able to earn given the long term disabling condition caused by the tort. Also complicated, but not quite so much, is trying to sort out the value of the loss of future earning capacity of a past worker who is unemployed at the time of the tort, especially if he has been unemployed for some time.

[10.100] An additional issue that arises in connection with the award of compensation for both lost earnings and reasonable expenses is the matter of pre- and post-judgment interest. Most places at least add interest to any award running from the time of judgment so that if there are delays before the plaintiff actually receives the sum to which he or she is entitled, that delay will be compensated. More controversial is the matter of pre-judgment interest that would apply to past losses that are recouped through trial or settlement. In many jurisdictions even these sums carry interest calculated from the time that a victim paid for expenses and from the time that a victim's earnings would have been received, as a way to discourage delays by defendants.⁹⁴ Note too that even as to losses already incurred by the time of trial there is the matter of the reduced value of money owing to inflation between the time of the accident and the time of trial or settlement, and in some places that loss is taken into account.⁹⁵

The discussion so far has assumed that the goal is to provide a highly individualised award to the victim, especially for lost earnings, that, to the extent possible, puts him in precisely the same financial position he would have been had the tort not occurred. Trying to reach this goal has meant ever increasing complexity in the adjudication of tort claims and growing reliance on experts and computers.⁹⁶ In the end, this search for precise corrective justice is often quixotic. In turn, a highly individualised calculation in each case tends to defeat the aims of predictability and uniformity so devoutly pursued especially by English courts.⁹⁷

114. Moreover some courts have gone even further, suggesting that damage awards should not reinforce social injustice, calling for the use of gender-neutral data. Cf *MacCabe v Westlock Roman Catholic Separate School District No 110* (1998) 226 AR 1 (QB), rev'd in part (2001) 293 AR 41 (CA); *Tucker (Public Trustee) v Asleson* (1991) 86 DLR(4th) 73 (BCSC), rev'd in part (1993) 102 DLR(4th) 518 (BCCA).

94 *Thompson v Faraonio* [1979] 1 WLR 1157; 24 ALR 1 (PC); *Wheeler v Page* (1982) 31 SASR 1 (4%); *Cookson v Knowles* [1979] AC 556 (short-term investment rate); *Civil Procedure Act 2005* (NSW), s 100; *Supreme Court Rules* (ACT), O 42A, r 1; *Supreme Court Act* (NT), s 84; *Supreme Court Act 1995* (Qld), s 47; *Supreme Court Act 1935* (SA), s 30C; *Supreme Court Act 1986* (Vic), ss 58 – 60; *Supreme Court Civil Procedure Act 1932* (Tas), s 34. In New South Wales, Queensland and the Northern Territory, interest is defined according to regulations referred to in legislation, or otherwise, the Commonwealth's 10 year benchmark bond rate: *Civil Liability Act 2002* (NSW), s 18(5); *Civil Liability Act 2003* (Qld), s 60(3); *Personal Injuries (Liabilities and Damages) Act* (NT), s 30. In NSW interest is only exceptionally allowed in motor cases: *Motor Accident Act 1988* (NSW), s 73; *Motor Accidents Compensation Act 1999* (NSW), s 137; *Motor Vehicles (Third Party Insurance) Act 1942* (NSW), s 35D.

95 *Phillips v Ward* [1956] 1 WLR 471 at 474; *Johnson v Perez* (1988) 166 CLR 351 passim; *MBP (SA) Pty Ltd v Gogic* (1991) 171 CLR 657 at 663.

96 See McLachlan, "What Price Disability?" (1981) 59 Can B Rev 1.

97 For a striking illustration see *Paul v Rendell* (1981) 55 ALJR 371 (PC).

Moreover, enormous efforts made at precision when it comes to lost earnings sometimes feel foolish when this part of the award is combined with the far more imprecise award of non-pecuniary damages that will soon be examined.⁹⁸

The individualistic criterion of full compensation, while understandable from the perspectives of *corrective justice* and *deterrence*, has also been questioned on more fundamental grounds.⁹⁹ High earners receive larger tort awards than do modest earners for the same injuries. Yet, generally speaking, all consumers pay the same price for the goods and services that wind up incorporating the cost of tort awards. The result is that tort damage awards, from the *compensation* perspective, are thought by some to be inappropriately regressive – a misguided redistribution from the working class and the poor to the well-to-do. One alternative would be to link awards for lost income to all victims either to average earnings or to social security benefits.¹⁰⁰ A compromise solution would be to cap the amount of lost earnings that tort law will replace.¹⁰¹ Indeed, this latter approach has been recently embraced by Australian states which have tended to cap lost earnings replaced by tort law at three times average earnings.¹⁰²

This discussion of lost earning power has assumed that the victim is alive and is the one on whose behalf the lawsuit is brought. But what if the victim is killed by the defendant's tort? At common law, the death of the victim ended the matter so far as tort law is concerned, and the defendant was dealt with, if at all, via the criminal law. From the tort perspective this yielded the bizarre result that injuring people could be expensive but killing them cost nothing. This inconsistency was overcome by statutes now everywhere in place. These are discussed in Chapter 29, [29.110].

Non-pecuniary loss

[10.110] Non-pecuniary loss poses an entirely different problem from pecuniary loss. Money may compensate for loss of earnings and other pecuniary loss, but can neither undo nor offer an equivalent for pain and distress. For the victim, the most money can furnish is solace, by providing the victim with the means of distraction and substitute activities, and bringing about some satisfaction in the face of having been wronged (and hence supported by those primarily concerned about *corrective justice*).¹⁰³ To be sure, not all of the gold in the Bank of England can make good excruciating pain, loss of sight or limb or cosmetic injuries,¹⁰⁴ but it may finance holidays, recreation and extra comforts as form of substitute *compensation*. Moreover, since pain and suffering are real and things that people would pay to avoid (if need be), the

98 See *Pearson* vol 2, Tables 107, 108. § 4, 1.2.

99 See Luntz, "Damages for Personal Injury: Rhetoric, Reality and Reform from an Australian Perspective" (1985) 38 *Cur Leg Prob* 29; also (1995) 3 *TLJ* 1.

100 For example, Luntz, 3 *TLJ* 1 (1995).

101 *Pearson*, § 391 recommended limitation to five times average industrial earnings, § 427 solatium to 1/2.

102 *Civil Liability Act 2002* (NSW), s 12(2) (3 times); *Civil Liability Act 2003* (Qld), s 54(2) (3 times); *Civil Liability Act 2002* (Tas), s 26(1) (3 times); *Wrongs Act 1958* (Vic), s 28F(2) (3 times); *Civil Liability Act 2002* (WA), s 11(1) (3 times); *Civil Law (Wrongs) Act 2002* (ACT), s 98(2) (3 times); *Personal Injuries (Liabilities and Damages) Act* (NT), s 20 (3 times). There is no South Australian equivalent.

103 For example, *Skelton v Collins* (1966) 115 *CLR* 94 at 131 (Windeyer J); *Andrews v Grand* [1978] 2 *SCR* 229 at 262 (Dickson J).

104 *Ralevski v Dimovski* (1986) 7 *NSWLR* 487 (same for men as for women).

award of non-pecuniary damages is especially favoured by those with a *deterrence* perspective. This makes clear that the social goal in providing non-pecuniary damages is not retribution or punishment¹⁰⁵ as in some other legal systems.¹⁰⁶

The scale of non-pecuniary damages should not be underestimated since in many countries they account for more than half the total amount paid out under the present tort system. An even higher proportion of the sum paid out in the settlement of minor injuries is for non-pecuniary loss, in part because defendant insurers are eager to get these small claims off their books while keeping their administrative costs as low as possible, a reality that victim lawyers are well aware of and generally try to exploit.¹⁰⁷

In the absence of any logical process for assessing such damages for "pain and suffering and loss of amenity (or faculty)", jurisdictions have adopted differing approaches. In the United States, where juries are regularly used in the trial of torts cases, the matter is left entirely up to individual juries with no guidance from the courts as to outcomes in past cases. Jury awards are subject only to review by trial judges on the basis of hard-to-prove claims that individual juries acted on the basis of whim, bias or caprice. The result in America is that many believe that there is a great variation in the amount of non-pecuniary loss awarded in what appear to be essentially identical cases.¹⁰⁸

Courts (and sometimes legislatures) have taken steps both to contain and standardise non-pecuniary loss awards, while also attempting to respond to what is "fair and equitable".¹⁰⁹ The resulting trend toward more or less standardised awards ("flexible judicial tariffs")¹¹⁰ is reinforced by the great value those countries attach to predictability, which, it is hoped, promotes faster and less contested settlements and satisfies a sense of justice demanding equal treatment for equal cases. Uniformity is maintained by appellate control over awards¹¹¹ and by displacing juries from assessing damages¹¹² in favour of judges whose professionalism ensures adherence to prevailing judicially-imposed norms.¹¹³ More recently, statutory schemes have been adopted to

105 Punishment would not only be impermissible, but will also be frustrated because in most instances the award would be paid out of insurance premiums, not the defendant's own pocket: *Prather v Hamel* (1976) 66 DLR (3d) 109 at 127.

106 See Stoll, "Penal Purposes of the Law of Tort" (1970) 18 Am J Comp L 3.

107 *Pearson*, § 382. In South Australia, 44%.

108 Blumstein, Bovbjerg and Sloan, "Beyond Tort Reform: Developing Better Tools for Assessing Damages for Personal Injury" (1991) 8 Yale J Reg 171; Diamond, "Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency" (1998) 48 DePaul L Rev 301.

109 For example, "admonitions such as that 'compensation should aim to be fair rather than full or perfect'": *Warren v King* [1964] 1 WLR 1, passim, (CA). Censured by Edmund Davies LJ in *Fowler v Grace*, *The Times*, 20 Feb 1970.

110 *Pickett v British Rail* [1980] AC 136 at 168 (Lord Scarman).

111 Appellate courts have often more reason, but less authority, to interfere with awards by juries than by judges. A favoured formula is whether the award is so small or large as to shock the appellate tribunal as being out of all proportion: *Thatcher v Charles* (1961) 104 CLR 57; *Precision Plastics v Demir* (1975) 132 CLR 362 (juries); *Bratovich v Mitchell* [1968] VR 556 (judge).

112 The English CA firmly opposed discretionary allowance of a jury even when the injury is very unusual: *H v Ministry of Defence* [1991] 2 QB 103 (unconsented penectomy); *Ward v James* [1966] 1 QB 273. See also Chapter 13 Procedure and Proof.

113 Such guidelines by the Court of Appeal were specifically endorsed in *Wright v British Rlys* [1983] 2 AC 773 at 784. Awards are regularly reported in *Current Law* (see also Judicial

further promote these same goals. In the United States most cases are settled, and seasoned insurance adjustors and victim lawyers rely upon past settlements to get their negotiations started in the same ballpark. Nonetheless, where only the common law still applies, the amount of non-pecuniary damages obtained by seriously injured tort claimants in the United States is, on average, enormously greater than that obtained in other countries by those with similar injuries.¹¹⁴ In response to these huge awards, some of the American states have imposed limits on damages for non-pecuniary loss, as discussed below.

Three types of restrictions are next addressed: thresholds, caps, and schedules.

With respect to thresholds, some efforts have been made to bar completely the recovery of non-pecuniary loss in small injury cases. For example, the Pearson Commission (1978) recommended against awards for the first. New South Wales allows common law damages for victims of motor vehicle accidents, subject to the proviso that non-pecuniary damages are not allowed at all unless the claimant's ability to lead a normal life is significantly impaired.¹¹⁵ More recent legislation in New South Wales, the Australian Capital Territory, Northern Territory, Tasmania and Western Australia provides that there is to be no recovery at all for non-pecuniary loss in any personal injury case if the victim's disability rating is less than a particular amount – 15% in New South Wales.¹¹⁶ Similarly, in at least two states in the United States (Michigan and New York) non-pecuniary loss claims are barred in auto accident claims where the victim's injury is minor.¹¹⁷

Some Canadian provinces have adopted quite a different approach to non-pecuniary loss in minor injuries from auto accidents – imposing a modest cap rather than employing the threshold approach.¹¹⁸

As for caps on very serious injuries, in Canada, for example, in 1978 the Canadian Supreme Court set a limit of \$100,000¹¹⁹ on the amount of non-pecuniary damages that may be awarded in the most serious injury cases, and has demanded that awards in less serious injury cases be appropriately scaled down from that limit.

In 1985, the English Court of Appeal set an upper limit of 75,000 pounds in non-pecuniary damages for a tetraplegic, to which awards for all injuries were to be oriented. By 1999, that maximum had reached about 100,000

Studies Board, *Guidelines for Assessment of General Damages in PI Cases* (1992) and may be cited to a judge, but not a jury: *Waldon v War Office* [1956] 1 WLR 51). The current scale has been criticised as not keeping up with the rate of inflation: LC Consult Paper No 140 (1995).

114 § 388. For an even stronger attack on non-pecuniary loss damages, see Jaffe, "Damages for Personal Injury: The Impact of Insurance" (1953) 18 *Law & Contemporary Probs* 210. California bars an award for pain and suffering if the victim dies before judgment, see *Williamson v Plant Insulation Co* 28 Cal Rptr 2d 751 (Cal App 1994).

115 *Motor Accidents Compensation Act* 1999, s 131, threshold of 10%.

116 *Civil Liability Act* 2002, s 16. See also ACT: *Civil Law (Wrongs) Act* 2002, s 27, Tas *Civil Liability Act* 2002, s 27; WA: *Civil Liability Act* 2002, ss 9 – 10.

117 *New York Insurance Law*, Article 51, as amended. Schwartz, "Auto No-Fault and First-Party Insurance: Advantages and Problems" (2000) 73 *S Cal L Rev* 611.

118 \$2500 in New Brunswick, *Injury Regulation – Insurance Act*, (NB) Reg 2003-20, s 4; \$2500 in Nova Scotia, *Automobile Insurance Tort Recovery Limitation Regulations*, (NS) Reg 182/2003, s 3; and \$4000 in Alberta, *Minor Injury Regulation*, (ALTA) Reg 123/2004, s 6.

119 *Andrews v Grand & Toy Alberta* [1978] 2 SCR 229 (\$100,000 for quadriplegic; since adjusted for inflation (now about \$200,000)). Juries should be instructed on upper limit if damages are likely to fall into upper range: *Ter Neuzen v Korn* [1995] 3 SCR 674.

pounds.¹²⁰ The Law Commission, however, argued that the limit was far too low and proposed a 200% increase in some situations.¹²¹ In 2001 in *Heil v Rankin*¹²² the Court of Appeal partially embraced the Law Commission recommendations, calling for substantial increases for the most serious injuries, moderate increases for less serious injuries but no increases for minor injuries.¹²³ A few years later the highest award for quadriplegia or serious brain injuries reached 205,000 pounds.¹²⁴

In New South Wales, the maximum amount of recovery for non-pecuniary loss is \$235,000 (indexed) for “a most extreme case”, such as quadriplegia, the award in any particular case being in proportion thereto.¹²⁵ Analogous limitations have also been placed on non-pecuniary damages for work injuries against employers.¹²⁶

Since 2007, New South Wales catastrophic injury legislation¹²⁷ has established the Lifetime Care and Support Scheme for persons severely injured in motor accidents occurring in New South Wales. Eligibility for the scheme is determined by the LTCS Guidelines issued by the Lifetime Care and Support Authority.¹²⁸ Importantly, having received damages for future economic loss from “treatment and care needs” relating to the injury disqualifies one from the scheme.¹²⁹ Persons under the scheme (a complete care model) thus must choose between its funding and damages.

Victoria has imposed a cap on non-pecuniary damages of \$305,250 for motor vehicle accidents.¹³⁰ Indeed, there is an increasing legislative pattern in Australia after the tort reforms of 2002 to limit recovery for non-pecuniary damages in all types of personal injury cases,¹³¹ creating both caps and thresholds for damages for non-pecuniary loss.¹³²

120 Deakin, Johnston, and Markesinis, *Tort Law* (5th ed. 2003), p 829.

121 Law Com No 257, *Damages for Personal Injury: Non-Pecuniary Loss* (HC 344, 1999).

122 *Heil v Rankin* (2001) QB 272.

123 Lewis, “Increasing the Price of Pain, Damages, the Law Commission and *Heil v Rankin*”, 64 *Mod L Rev* 100 (2001).

124 Markesinis, Coester, Alpa and Ullstein, *Compensation for Personal Injury in English, German and Italian Law: A Comparative Outline* (2005), p 16.

125 *Civil Liability Act 2002*, s 16; *Motor Accidents Act 1988* (NSW), s 79. The model was an earlier South Australian statute, by which non-pecuniary damages are reduced to a maximum of \$60,000 on a scale of 0 to 60. *Wrongs Act 1936* (SA), s 35(a) (now *Civil Liability Act 1936* (SA), s 52), later extended to train accidents. See *Percario v Kordysz* (1990) 54 SASR 259 (FC). See *Southgate v Waterford* (1990) 21 NSWLR 427 (CA), cited approvingly with regard to similar Western Australian legislation in *Insurance Commission of Western Australia v Weatherall* [2007] WASCA 264. Similar legislation exists in Western Australia: *Motor Vehicle (Third Party Insurance) Act 1943*.

126 *Workers Compensation Act 1987* (NSW), s 151H.

127 *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW).

128 *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW), s 58. The Guidelines are available at <http://www.lifetimecare.nsw.gov.au/>.

129 *Motor Accidents (Lifetime Care and Support) Act 2006* (NSW), s 7(3). There is an exception to this under *Motor Accidents (Lifetime Care and Support) Amendment Act 2009* (NSW), Sch 1[3]. This Act, while passed, has not commenced, but will add an exception through a new s 7A in the 2006 Act for those who have been awarded damages but who had their injury before the Scheme’s commencement.

130 And a limit of \$686,840 on pecuniary loss, *Transport Accidents Act 1986* (Vic), s 93(7).

131 *Civil Liability Act 2002* (NSW); *Civil Liability Act 2003* (Qld); *Civil Liability Act 2002* (Tas); *Wrongs Act 1958* (Vic); *Civil Liability Act 2002* (WA); *Civil Law (Wrongs) Act 2002* (ACT); *Personal Injuries (Liabilities and Damages) Act* (NT); *Civil Liability Act 1936* (SA).

132 *Civil Liability Act 2002* (NSW), s 16 (15% threshold; \$350,000 cap); *Civil Liability Act*

In the United States, a number of individual states have also imposed legislative caps on non-pecuniary damages – sometimes restricting those caps to medical malpractice cases.¹³³ But these caps are very different. Rather than serving as the appropriate sum for those who are most seriously injured and a basis for scaling down of awards for lesser injuries, the American caps merely lop off higher awards for the most seriously injured but in no way restrain the amount awarded in cases where the injury calls for an amount under the cap.¹³⁴

Even if there is a target maximum award for non-pecuniary damages in the most serious injury cases and even if there is a threshold below with no money will be awarded for non-pecuniary loss, the problem remains as to how to deal with the vast ocean of claims falling in between.

In England, a quasi-public agency – the Judicial Studies Board – collects and makes public past awards for a large number of fine-tuned types of harms. Trial judges are clearly aware of these numbers and are very strongly influenced by them. In this way, consistency is strongly assured.

In Australia, an earlier categorical rejection¹³⁵ gave way to the practice of appellate courts considering the proper proportionality to awards not only of like losses but also of other losses, such as comparison between defamation and personal injuries or of paraplegia and cancer.¹³⁶ Even more recently, Australian States via legislation have adopted more prescriptive rules. In New South Wales, for example, injuries are now to be ranked in terms of the percent disabled the tort has caused the victim to be. That percent, in turn, will presumptively determine how much money any victim is to receive for his non-pecuniary loss.

All of these mechanisms embraced in the name of consistency and predictability tend to de-value the extent of the harm that the specific victim has suffered. One way to think about this issue is to recognise that non-pecuniary loss in fact contains several elements. First is actual pain and suffering, an entirely subjective sensation of conscious distress that varies from victim to victim.¹³⁷ Feelings of anger and indignation, as distinct from real anxiety and stress, represent a second element, one that has traditionally been viewed as not

2003 (Qld), s 62 (no threshold, cap determined by formula); *Civil Liability Act 2002* (Tas), s 27 (threshold determined by formula, no cap); *Wrongs Act 1958* (Vic), s 28G (\$371,380 cap), s 28H (no threshold); *Civil Liability Act 2002* (WA), ss 9, 10 (threshold and cap determined by formula); *Civil Law (Wrongs) Act 2002* (ACT), s 139F (no threshold, \$250,000 cap); *Personal Injuries (Liabilities and Damages) Act* (NT), ss 27, 28 (5% threshold, cap determined by Minister); *Civil Liability Act 1936* (SA), s 52 (no threshold, cap determined by formula).

133 For example, *California Civil Code*, s 3333.2 (non-pecuniary damages limited to \$250,000 in medical malpractice cases); *Colorado Rev Stat*, s 13-21-102.5(3)(a) (non-pecuniary damages normally limited to \$250,000 in all cases).

134 Studdert, "Are Damages Caps Regressive? A Study of Malpractice Jury Verdicts in California" (2004) 23 *Health Aff* 54.

135 *Planet Fisheries v La Rosa* (1968) 119 CLR 118 at 124. However, legislation in all States except South Australia, the Northern Territory and the Australian Capital Territory now allows courts to refer to earlier awards in the same or other courts: *Competition and Consumer Act 2010* (Cth), s 87T; *Civil Liability Act 2002* (NSW), s 17A; *Civil Liability Act 2003* (Qld), s 61(1)(c)(ii); *Civil Liability Act 2002* (Tas), s 28; *Wrongs Act 1958* (Vic), s 28HA; *Civil Liability Act 2002* (WA), s 10A.

136 For example, *Sullivan v Micallef* (1994) ATR ¶81-308. A legislative guideline is advocated by Mullany, "A New Approach to Compensation for Non-Pecuniary Loss in Australia" (1990) 17 *Melb UL Rev* 714.

137 But the plaintiff's tender age does not justify substantial reduction: *Del Ponte v Del Ponte* (1987) 11 NSWLR 498 (CA).

compensable.¹³⁸ By contrast, a third element, variously referred to as loss of “faculty”, of “capacity” or “amenities” – the inability to enjoy the normal activities and functions of life consequent, for example, upon loss of a limb – has been traditionally viewed as at the heart of the non-pecuniary award especially in cases of permanent disability (whether partial or total).

As noted above, however, recent strategies have tended to discount individualization of awards on these grounds by generally equating the physical loss with the amount of the award. Hence, in many jurisdictions a loss of, say, an eye is now treated largely the same regardless of how much that loss has compromised your ability to carry on with your previous activities and regardless of how painful that loss is to you. An amateur violin player generally gets the same award for a lost hand as does someone whose recreation was limited to watching television.¹³⁹ In this sense, the more systematic approach to non-pecuniary loss may be termed more “objective” and less “subjective”. This is probably seen as appropriate to those who take either a *deterrence* or *compensation* view of tort damages, but perhaps not so by those who start with a *corrective justice* perspective.

[10.120] The use of what are, in effect, tariffs or schedules raises yet another thorny issue not yet discussed. Should all victims rendered paraplegic, for example, by their tortfeasor receive the same award, or should it matter at what age they were injured?¹⁴⁰ A related matter concerns the question of whether all 25 year olds with the same injury should receive the same non-pecuniary loss award even if they had different life expectancies prior to the tort. When awarding lost earning power one’s predicted pre-tort work life generally matters. And a *corrective justice* perspective would appear to favour making adjustments based on this victim’s life expectancy before the injury rather than the life expectancy for the nation as a whole. Yet, moving in this direction can cause lawyers to offer evidence that many find troubling – including statistical measures of normal life expectancy based on gender and race or ethnicity.

Two further hotly contested matters have also arisen with respect to the years of non-pecuniary loss that a victim suffers. First, what if the tort has caused a reduction in this victim’s life expectancy? What should be done about those “lost years”? One approach would be to base the non-pecuniary award on the number of years the victim had been expected to live before the tort happened. Yet, many victims might claim that the loss of three years of life is worse for them than three years of life with a disability and hence would claim to be under-compensated by such a solution. Defendants may reply that it seems odd to award money to victims to cover years when they will not be alive – although this may be met with the counter-argument that the victim should have more money to spend per year now that he has fewer years to live.

Secondly, and even more puzzling, is what to do with someone who has been rendered effectively unconscious by a tort, but is projected to live a long time in that condition. What should be done about those “lost years”? While this is, on the one hand, an enormous harm to the victim, from the *compensation*

138 *Kralj v McGrath* [1986] 1 All ER 54 at 61. Nor, as already noted, are distress or grief unless causing psychiatric injury or exacerbating physical injury.

139 This issue has not yet been explored in Australian cases discussing the assessment of damages under the civil liability regimes.

140 Comande, “Towards A Global Model for Adjudicating Personal Injury Damages: Bridging Europe and the United States” (2005) 19 *Temple International and Comparative LJ* 241 discusses the Italian practice of gearing such compensation to the age of the victim at the time of the injury.

perspective just what is the point of giving money to someone who is completely incapable of making a decision as to how to spend it? On the other hand, from the *deterrence* and *corrective justice* viewpoints, it would seem altogether wrong to award nothing to someone who has been put in such a vegetative state.

Courts have, over time, treated those suffering permanent unconsciousness in different ways. Starting in the mid-1930s, English courts first sought to provide substantial non-pecuniary loss awards in such cases.¹⁴¹ Their enthusiasm, however, quickly waned, and the claim was first peremptorily frozen to a purely nominal sum,¹⁴² and later abolished either outright.¹⁴³ Later in England an approach prevailed¹⁴⁴ though not without vigorous dissent¹⁴⁵ that calls for a substantial but not personalized award in such situations.¹⁴⁶

The opposing viewpoint, calling for the denial of recovery to those rendered totally unconscious, tended to rest on an analogy to those who were killed by the tort, as they too (better, their estates) could not recover for lost years in wrongful death actions. This position, while perhaps too extreme for practical politics, strongly influenced the Australian compromise that treats the “loss of expectation of life” as compensable, but at a much more modest level than when accompanied by full appreciation of the loss. For example, the High Court approved an award of no more than \$3,000 in 1966 for a permanently comatose plaintiff in comparison with 10 times and more in comparable English cases.¹⁴⁷

A yet third approach focuses instead on ways money could ameliorate the plaintiff’s distress by providing substitute satisfactions.¹⁴⁸ The mentally afflicted plaintiff, for example, would be assessed in the light, not of his appreciation of the loss, but of his capacity to benefit from compensation, such as having better caretaking.¹⁴⁹ While this comes closer to the *compensation* purpose of damages it could potentially create a disincentive to rehabilitation and thus be frowned

141 *Rose v Ford* [1937] AC 826; *Morgan v Scoulding* [1938] 1 KB 786.

142 *Benham v Gambling* [1941] AC 157 (£500); *Sharman v Evans* (1977) 138 CLR 563 at 584 (\$2,000).

143 *Administration of Justice Act 1982*.

144 *West v Shephard* [1964] AC 326 (£17,500 to 41-year old woman rendered virtually insensate); *Lim v Camden HA* [1980] AC 174 at 188 (£20,000). Currently up to £125,000 (top of scale). But though “objective”, the loss is affected by the importance to the victim of the particular faculty lost: a cripple would suffer less from loss of a leg than an athlete; also the relevant period is the victim’s post-accident life expectancy: *Andrews v Freeborough* [1967] 1 QB 1 (CA) (£2,000 for eight-year old who never regained consciousness and died within one year).

145 For example, Lords Reid and Devlin in *West v Shephard* [1964] AC 326. Also *Pearson* § 389.

146 “It would be lamentable if the trial of a personal injury claim put a premium on protestations of misery and a long face was the only safe passport to a large award” (Lord Pearce in *West v Shephard* [1964] AC 326 at 369).

147 *Skelton v Collins* (1966) 115 CLR 94. Of this, Taylor J assumed that about \$2000 of this was for loss of amenities, the rest being for loss of expectation of life. There is an accepted range of \$5000-\$20,000 for loss of expectation of life, *Hannell v Amaca Pty Ltd* [2006] WASC 310 at [347]-[351] (\$15,000 for 22 years of loss).

148 See Ogus, “Damages for Lost Amenities: For a Foot, a Feeling or a Function?” (1972) 35 *Mod L Rev* 1.

149 This was the reason why *Pearson*, § 389 disapproved the claim of a completely insensate plaintiff. Otherwise, a very young child or mentally afflicted victim with no sense of loss but some capacity to benefit. Comparative: Stolker, “The Unconscious Plaintiff: Consciousness as a Prerequisite for Compensation for Non-pecuniary Loss” (1990) 39 *ICLQ* 82.

upon from the *deterrence* perspective. It has nonetheless gained verbal acceptance from the Supreme Court of Canada¹⁵⁰ and from some judges both in England¹⁵¹ and Australia.¹⁵²

In contrast to the earlier described restrictions on the recovery of non-pecuniary damages, this head of damages has also been expanded as more novel types of injury have also come to be recognised, such specifically as loss of enjoyment of sex¹⁵³ or a holiday,¹⁵⁴ depression unconnected with any physical or mental injury, even the effect of imprisonment for crimes resulting from a personality change.¹⁵⁵

Furthermore, note that the award of non-pecuniary damages, even in cases of long-lasting disability, is generally treated as a present loss, and therefore not notionally spread over the whole (future) period and discountable in the way lost earnings/earning power is treated.¹⁵⁶ And it is assessed in monetary values prevailing at the time of assessment.¹⁵⁷

In terms of international comparisons, there are huge variations among so-called developed economies. While tort damage awards for non-pecuniary loss for those suffering serious injuries in England, Australia, and Canada tend to be in the same broad range as those made, for example, in Ireland and Italy, they are dramatically higher than those made in, say, Sweden, Portugal, Greece and Denmark.¹⁵⁸ Awards in the United States for non-pecuniary losses (in jurisdictions without statutory caps) tend on average to be enormously greater than those made to victims with similar serious injuries in England, Australia, and Canada. Yet, one should appreciate that this is perhaps a misleading comparison because victims in the United States must pay for their legal fees out of their awards, a sum typically amounting of one-third of their total recovery. That means that, in some cases, the net recovery in the United States may be no more, or even less than, the victim's pecuniary loss – although, because of the

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- 150 *Andrews v Grand* [1978] 2 SCR 229; *Lindal v Lindal* [1981] 2 SCR 629. *Knutson v Farr* (1984) 12 DLR (4th) 658 thought that this reversed *R v Jennings* [1966] SCR 532, which allowed damages to an unconscious plaintiff.
- 151 Lord Denning was a consistent advocate of the “need” criterion: from *Fletcher v Autocar* [1968] 2 QB 322 at 336 to *Lim v Camden HA* [1979] QB 196 at 216.
- 152 E.g. Windeyer J in *Skelton v Collins* (1966) 115 CLR 94 at 131; *Teubner v Humble* (1963) 108 CLR 491 at 507. For a US view, see *McDougald v Garber*, 533 NE2d 372 (NY 1989).
- 153 *Hodges v Harland & Wolff* [1965] 1 WLR 523; (1996) 4 TLR 253; also *Cook v Kier* [1970] 1 WLR 556 (loss of taste or smell, and impotence).
- 154 *Ichard v Frangoulis* [1977] 1 WLR 556.
- 155 *Meah v McCreamer* [1985] 1 All ER 367.
- 156 Nor, therefore, may the award be increased for tax on income from any notional investment, as in the case of pecuniary loss. By statute prejudgment interest (from accident, except in Victoria, Northern Territory, Queensland and Tasmania: commencement of action: *Supreme Court Act 1986* (Vic) s 58(1); *Supreme Court Act* (NT) s 84; *Supreme Court Act 1995* (Qld) s 47; *Supreme Court Civil Procedure Act 1932* (Tas) s 34) is allowable, but only 4%: *MBP (SA) v Gogic* (1991) 171 CLR 657; *Wright v British Rlys* [1983] 2 AC 773 (2%).
- 157 *MBP (SA) v Gogic* (1991) 171 CLR 657 at 663; *Andjelic v Marsland* (1996) 158 CLR 20 at 27. Inflation thus being taken care of, the rate of interest should be less than the commercial rate. In New South Wales, in deference to a misleading dictum in *Cullen v Trappell* (1980) 146 CLR 1 at 21, for a time this was not recognised (*Bryce v Tapalis* (1989) ATR ¶21,302-4). However, *MBP (SA) v Gogic* (1991) 171 CLR 657 disapproved of *Cullen v Trappell* at 664. In New South Wales, and Queensland, interest is statutorily restricted including for non pecuniary loss: *Civil Liability Act 2002* (NSW), s 18(1); *Civil Liability Act 2003* (Qld), s 60(1). In Victoria, no interest whatever is allowed under motor vehicle legislation: *Transport Accident Act 1986*, s 175.
- 158 McIntosh and Holmes (eds), *Personal Injury Awards in EU and EFTA Countries* (2003).

variability from case to case, for some victims the United States non-pecuniary loss award continues to be much greater than elsewhere even after taking the payment of legal fees into account.¹⁵⁹

By way of conclusion to this section, it should be noted that the desire to restrict the award of non-pecuniary damages (and indeed of pecuniary damages as well) is driven in part by the concern that insurers and corporate defendants may find it increasingly difficult to shoulder catastrophic losses involving multiple victims which occur more frequently with growing technology. One solution is to impose a maximum monetary limit on liability for any one disaster, as an international legislation on nuclear accidents¹⁶⁰ and products liability.¹⁶¹ In the last resort, extraordinary intervention by government is required to settle peculiarly costly catastrophes.¹⁶²

Exemplary damages

[10.130] “Exemplary” or “punitive” damages focus not on injury to the plaintiff but on outrageous conduct by the defendant, conduct that is so reprehensible as to warrant requiring the defendant to pay an additional amount of tort damages.¹⁶³ These damages are explicitly outside the *compensation* function of tort law. Instead, they are sometimes justified in terms of *corrective justice* – the imposition of a penalty designed both to express the public’s indignation and to satisfy the victim’s desire for retribution against someone who intentionally (or close to that) and wrongfully harmed him. Exemplary damages may best serve as a mark of public censure against egregious misconduct,¹⁶⁴ when, as a practical reality, the criminal law is not an effective alternative. Hence, exemplary damages may provide an incentive for private law enforcement where compensatory damages would not be sufficient. A victim seeking exemplary damages need not have been targeted as an individual. For example, it would suffice to prove that the manufacturer of a defective product deliberately disregarded the safety of potential users.

159 Sugarman, “A Comparative Look at Pain and Suffering Awards” (2006) 55 DePaul L Rev 399.

160 The *Nuclear Installations Act 1965* (UK) limits the liability of nuclear operators to £5 mill, and the *Price-Anderson Act 1957* (US) to \$560 mill. On the policy justifying such “subventions” see Green, “Nuclear Power: Risk, Liability and Indemnity” (1973) 71 Mich L Rev 479.

161 For example, EC Directive (1985). Britain did not avail itself of this option.

162 This occurred in Britain and Germany over the Thalidomide disaster. See Fleming, “Mass Torts” [1988] Denning LJ 37. For the rich American experience with mass torts see Fleming, *The American Tort Process* (1988), ch 7; “Claims Resolution Facilities and the Mass Settlement of Mass Torts” (1990) 53 (Pt 4) Law & Contemp Prob. With respect to the US compensatory response to the terrorist attacks on September 11, 2001, see Rabin, “The September 11th Victim Compensation Fund: A Circumscribed Response or an Auspicious Model?” (2003) 53 DePaul L Rev 769-803.

163 While frequently associated with malice, contumelious behaviour even short of actual malice is sufficient. But there must be intent to injure or at least recklessness in the sense not merely of aggravated negligence but of “conduct showing a conscious and contumelious disregard of the plaintiff’s rights”. *XL Petroleum (NSW) v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 at 471 (Brennan J); *John v MGN* [1996] 2 All ER 35 at 56-58.

164 *Australian Consolidated Press v Uren* [1969] 1 AC 590, affg *Uren v John Fairfax & Sons Pty Ltd* (1966) 117 CLR 118. NZ: *Taylor v Bere* [1982] 1 NZLR 81; surviving the ACC: *Donselaar v Donselaar* [1982] 1 NZLR 97; Canada: *Vorvis v ICBC* [1989] 1 SCR 1085. But are precluded in personal injury cases in some jurisdictions: NSW: *Civil Liability Act 2002*, s 21; NT: *Personal Injuries (Liabilities and Damages) Act*, s 19; Qld: *Civil Liability Act 2003*, s 52 (but note these may be allowed if the damage was caused by an unlawful intentional act, for example, sexual assault).

Additionally, or alternatively, exemplary damages are justified on *deterrence* grounds. We clearly do not want people to knowingly act in such socially unacceptable ways, and so we threaten them with additional financial costs if they do so in hopes this will prevent such behaviour. Where the defendant has made a profit from his wrong exceeding the plaintiff's injury, exemplary damages serve the cause of preventing unjust enrichment.¹⁶⁵ Put differently, unless exemplary damages are awarded in such settings, tort law winds up allowing defendants to engage in "takings"; that is, parties could choose to deliberately harm others so long as they are willing to pay the normal tort damage sum due for the harm done.

Nonetheless, some believe that punishment is not properly part of tort law, and as exemplary damages are punitive, they disfavour allowing such awards. Indeed, some jurisdictions have prohibited exemplary damages from claims for personal injury or death.¹⁶⁶ A narrower approach has been to bar exemplary damages in specific types of cases, such as motor accident and industrial injury cases, as has been done in New South Wales,¹⁶⁷ Victoria¹⁶⁸ and to some extent Queensland¹⁶⁹ and South Australia.¹⁷⁰

In somewhat the same vein, in 1964 the House of Lords in *Rookes v Barnard*¹⁷¹ dramatically renounced exemplary damages as incompatible with the essentially compensatory nature of civil liability, except when expressly authorised by statute or against oppressive, arbitrary and unconstitutional acts of government servants or to prevent a tortfeasor reaping a calculated profit from his wrong. Although the types of claims for which exemplary damages

165 Intended to admonish that "tort does not pay", the category has restitutionary implications, but awards are not precisely geared to profits. Restitutionary damages are a feature of proprietary torts, like trespass and conversion: see LC Consult Paper No 132, Pt VII; Berryman, "The Case for Restitutionary Damages, over Punitive Damages" (1994) 73 Can B Rev 320; *Cane*, pp 321-326. These must be distinguished from actions for unjust enrichment to recover the proceeds of a tort: see Gething, (1995) 3 Tort L Rev 123.

166 *Competition and Consumer Act 2010* (Cth), s 87ZB (subject to s 87E); *Civil Liability Act 2002* (NSW), s 21 (subject to s 3B); *Civil Liability Act 2003* (Qld), s 52 (except where unlawful sexual misconduct was involved or where the personal injury was intentional); *Personal Injuries (Liabilities and Damages) Act* (NT), s 19 (applies to all personal injury claims, but subject to s 4). Also in some American states: Franklin, "Learning Curve: Lawyers Must Confront Impact of Changes on Litigation Strategies", 81 ABA J 62 (Aug 1995).

167 *Motor Accidents Act 1988* (NSW), s 81A; *Motor Accidents Compensation Act 1999* (NSW), s 144; *Workers' Compensation Act 1987* (NSW), s 151R.

168 *Transport Accident Act 1986* (Vic), s 93(7); *Accident Compensation Act 1985* (Vic), s 135A(7)(c).

169 Can be awarded against the tortfeasor, but no indemnity is available from the compulsory insurer: *Motor Accident Insurance Act 1994* (Qld), s 55; *Workers' Compensation and Rehabilitation Act 2003* (Qld), s 309.

170 Insurers are excluded from aggravated, exemplary and punitive damages: *Motor Vehicles Act 1959* (SA), s 113A. Also, exemplary and punitive damages have been prohibited for defamation in all Australian States. *Defamation Act 2005* (NSW), s 37; *Civil Law (Wrongs) Act 2002* (ACT), s 139H; *Defamation Act* (NT), s 34; *Defamation Act 2005* (Qld), s 37; *Defamation Act 2005* (SA), s 35; *Defamation Act 2005* (Tas), s 37; *Defamation Act 2005* (Vic), s 37; *Defamation Act 2005* (WA), s 37. As a further example, exemplary damages are barred for personal injuries claims that are against deceased estates in certain jurisdictions. *Administration and Probate Act 1935* (Tas), s 27(3); *Law Reform (Miscellaneous Provisions) Act* (NT), s 6.

171 *Rookes v Barnard* [1964] AC 1129. Category 1 is illustrated (perhaps) by the Copyright Act, category 2 by *Holden v Chief Constable* [1987] 1 QB 380, category 3 by *Cassell v Broome* [1972] AC 1027. For details see LC Consult Paper No 132, Part III (1993).

may be obtained remain quite restricted in England, the courts have been grappling with how to set the boundaries.¹⁷²

The Canadian Supreme Court has taken a somewhat more liberal approach to exemplary damages, although it has recognised that, because of the lack of procedural protections for the defendant (as compared with those available in criminal cases) and the concern about giving plaintiff windfall recoveries, caution must be exercised.¹⁷³

Awards of exemplary damages must be kept within bounds, as American awards have not always been,¹⁷⁴ lest the conventional safeguards against excessive punishment are thrown to the winds.¹⁷⁵ The award should aim exclusively to punish the defendant,¹⁷⁶ and only to the extent that the sum for compensatory damages is itself seen as inadequate to do so.¹⁷⁷ If the defendant has been convicted of a crime and appropriately punished, that may make exemplary damages inappropriate.¹⁷⁸ In setting the amount of the award, the focus should be on how the defendant's behaviour affected the particular plaintiff, not its effect on others.¹⁷⁹ Moreover, the plaintiff's own conduct, such as provocation, may reduce or negate an award.¹⁸⁰ The defendant's wealth is often seen as a relevant factor to assure that the punitive sting is felt.¹⁸¹

On the one hand, if the outrageous conduct was not accompanied by substantial injury, to restrict the award of exemplary damages by the amount of compensatory damages would trivialise the sum of exemplary damages that could be awarded and undermine the punishment and deterrence goals. Nonetheless, because of concerns about runaway juries, the US Supreme Court has concluded that America punitive damages ordinarily should not exceed the amount of the compensatory damages and only in extraordinary cases should exceed 10 times as much.¹⁸²

172 Compare *AB v South West Water Services Ltd* (1993) QB 507 with *Kuddus v Chief Constable of Leicestershire* [2002] 2 AC 122 (HL).

173 *Whiten v Pilot Insurance Co* (2002) 1 SCR 595.

174 See Fleming, *The American Tort Process* (1988), pp 214-224; *BMW v Gore* (1995) 115 S Ct 932.

175 *XL Petroleum (NSW) v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 (should be "moderate": verdict of \$400,000 reduced to \$150,000 against large corporate defendant). More recently, see *Backwell v AAA* [1997] 1 VR 182 (CA) and *Landini v New South Wales* [2008] NSWSC 1280.

176 *Vorvis v ICBC* [1989] 1 SCR 1085 at 1106; *Rookes v Barnard* [1964] AC 1129 at 1227. This restriction is not the law of Australia: see, for example, *Lamb v Cotogno* (1987) 164 CLR 1 and 9; *Gray v Motor Accident Commission* (1998) 196 CLR 1 and 12.

177 *Backwell v AAA* (1996) ATR ¶81-387 (Vic CA) (medical negligence). But do they not differ in their function? Luntz notes at p 78, n 494 (2002) that in Australia, since unsuccessful defendants must pay the plaintiffs' party-and-party costs, and this must be considered when determining if further punishment is necessary.

178 For example, *Walker v CFTO* (1987) 39 CCLT 121 (Ont CA); *Wilmington v Marshall* (1994) 21 CCLT (2d) 198 (not necessarily sufficient); *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 14. In case of several plaintiffs, their awards of compensatory damages should be aggregated and, if insufficient as a penalty, a sum should be added to make it sufficient and it should be divided equally among them: *Riches v News Group* [1986] QB 256 (CA).

179 The very high awards in the US are in part attributable to the deterrence rationale.

180 *Fontin v Katapodis* (1962) 108 CLR 177; *Andary v Burford* (1994) ATR ¶81-302 (SA).

181 *Rookes v Barnard* at 1228; *XL Petroleum (NSW) v Caltex Oil (Aust) Pty Ltd* (1985) 155 CLR 448 at 472 (Brennan J); *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 8.

182 *State Farm Mutual Automobile Insurance Co v Campbell* 538 US 408 (2003).

Liability for exemplary damages is clearly appropriate against an employer who has ordered the commission of a tort;¹⁸³ perhaps even in *cases where he has not* “condoned, encouraged or incited” it.¹⁸⁴ More controversial is the imposition of exemplary damages on a corporation when the outrageous conduct in question was engaged in by a low level employee without the knowledge of management, and in the United States, states are split on the appropriate result in such case.¹⁸⁵ Some jurisdictions prevent the Crown from being vicariously liable for exemplary damages for their police officers’ conduct.¹⁸⁶

The role of liability insurance with respect to exemplary damages where they are awarded is a complicated one. Where insurance is permitted and the defendant has purchased coverage, the result is that, although the damage award will not really punish the wrongdoer, it will still serve to reflect the public’s indignation towards the wrongdoer’s conduct.¹⁸⁷ In some jurisdictions that truly seek to punish defendants for outrageous conduct through the award of exemplary damages, it is forbidden to cover those damages through insurance.¹⁸⁸ Note, too, that ordinary tort liability insurance frequently will not cover exemplary damages because, by contract, coverage is restricted to “accidental” harm. Indeed, where such insurance is in play, the victim may be ill-advised to claim exemplary damages because a successful case might well preclude gaining access to the defendant’s insurance for even the compensatory damages.

The discussion so far has assumed only two categories – exemplary (or punitive) damages and ordinary compensatory damages. However, in some jurisdictions it is permissible to award “aggravated” damages that might be seen as falling in between.

Aggravated damages are said to compensate for intangible losses like injury to feelings and pride (historically largely ignored by the common law),¹⁸⁹ and in that way aggravated damages protect important interests of personality. In *NSW v Ibbett*¹⁹⁰ the High Court described aggravated damages as “a form of general damages, given by way of compensation for injury to the plaintiff, which may be intangible, resulting from the circumstances and manner of the

183 *XL Petroleum v Caltex*; cf *Rest 2d*, § 909.

184 *Semble, Lancs CC v Municipal Insurance* [1996] 3 WLR 493 (CA) (liability insurance effectively covers such a case). *Semble*, contra: *Canterbury Club v Rogers* (1993) ATR ¶¶81-246 at 62,555. This question has been settled in Australia: the High Court in *New South Wales v Ibbett* (2006) 229 CLR 638 approved (at 654) the approach of *Adams v Kennedy* (2000) 49 NSWLR 78. In the latter, Priestley JA said (at 87) that “[t]he amount [of exemplary damages] should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen”.

185 *Rest 2d*, § 909; *California Civil Code*, s 3294(b).

186 *Australian Federal Police Act 1979* (Cth), s 64B(3); *Police Service Administration Act 1990* (Qld), s 10.5(2).

187 *Lamb v Cotogno* (1987) 164 CLR 1 (assault by motor vehicle); the High Court refused to reopen the case in *Gray v Motor Accident Commission* (1998) 196 CLR 1. *Dubitante: Dupont v Agnew* [1987] LI Rep 585. Against intended injury, however, insurance is void.

188 For example, *California Civil Code*, s 1668 and *California Insurance Code*, s 533. American law is divided: 4 *Harper, James & Gray*, § 529.

189 Such injuries are recognised as items of general damages, for example, in defamation, but are generally disallowed as being too trivial and difficult to assess: for example, *Kralj v McGrath* [1986] 1 All ER 54 (mother’s loss of child in birth) where it was questioned whether it was not restricted to dignatory torts, excluding personal injury.

190 *NSW v Ibbett* (2006) 229 CLR 638.

wrongdoing". The Australian jurisdictions which forbid punitive damages for personal injury also prohibit aggravated damages.¹⁹¹

Collateral benefits

[10.140] Nowadays most persons injured in an accident manage to draw on private insurance, an employee benefit program, or on some form of social insurance for meeting part or all of their losses. This raises the question of how tort law should deal with the question of these "collateral benefits".¹⁹²

There are three main competing solutions to this puzzle: the first is to let the injured person enjoy the collateral benefit and both recover and keep his tort damages in full (that is, double recovery); the second is to reduce the tortfeasor's liability by the amount of the collateral benefit; the third is to ignore the collateral source in the tort action but try to ensure that the collateral source and not the victim will be the economic beneficiary of the portion of the tort damages award that duplicates the collateral source.

The latter might be brought about in a number of different ways. The most obvious of these is to confer on the provider of the collateral source a right of recoupment from the tort victim. One might also give the provider of the collateral source a right of subrogation which allows the provider not only a right of recoupment but also a right to seek recovery directly from the tortfeasor especially if the victim is disinclined to proceed. Alternatively, as a partial solution, one might allow the provider of the collateral benefit to cut off the benefit, as by stopping social security payments, once the victim has achieved a successful tort recovery.

All of these solutions have found a place in relation to one or other collateral benefit. The overall position is therefore exceedingly complex, in part because of the disparate nature of the various collateral benefits and in part because of the lack of consensus as to the ultimate policy objectives here. Speaking generally, the *deterrence* perspective would clearly oppose allowing the tortfeasor to obtain an offset, although this viewpoint does not obviously favour either double recovery or repayment to the collateral source. The *compensation* perspective would normally oppose double recovery, but does not obviously prefer one of the other two remaining solutions. What is appropriate from the perspective of *corrective justice* is not at all obvious and may depend on the nature of the collateral source, to which the discussion now turns.

Private insurance

[10.150] It is generally the law that the plaintiff's own private insurance is not available to the tortfeasor in relief of his liability.¹⁹³ This rule applies to property insurance, life insurance, disability insurance (that replaces lost

191 NSW: *Civil Liability Act 2002*, s 21; NT: *Personal Injuries (Liabilities and Damages) Act*, s 19; Qld: *Civil Liability Act 2003*, s 52 (unless the damage is caused by unlawful intentional act or sexual assault).

192 See 2 *Harper, James & Gray*, § 25.23; Fleming, "Collateral Source Rule and Loss Allocation" (1966) 54 Cal L Rev 1478. Comparative: Fleming, XI Int Encycl Comp L, ch 11 (Collateral Benefits).

193 *Bradburn v Gt W Rly* (1874) LR 10 Ex 1 (accident policy). Accepted in Australia through decisions such as *National Insurance Co of NZ v Espagne* (1961) 105 CLR 569; *Redding v Lee* (1983) 151 CLR 117 at 134 (Mason and Dawson JJ), 154 (Wilson J); *Manser v Spry* (1994) 181 CLR 428 at 436; *Kars v Kars* (1996) 187 CLR 354 at 362 (Dawson J).

income), accident insurance (that provides lump sums for certain accidentally caused impairments), and health insurance (in places where private health insurance exists either as a supplement to or substitute for government-provided national health benefits).

Whether or not the tort victim winds up with what could be seen as double recovery depends first on whether, as a matter of law, the insurer is entitled to reimbursement from the tort victim and second, where that is not the case, what the insurance contract provides.

Property insurance (for homes, vehicles, personal property and the like) has traditionally been viewed as giving the insurer a right of reimbursement as a matter of law.¹⁹⁴ Moreover, contemporary property insurance contracts typically provide for this result anyway by their terms. Hence in such cases, the tort victim does not obtain double recovery, and the victim's insurer benefits from the payment made by the tortfeasor, whose liability, in effect, makes it unnecessary for the insurer to cover the loss.

Life insurance is treated altogether differently. Not only is there no right of reimbursement as a matter of law, but also life insurance contracts do not provide for reimbursement. Indeed, such a provision might well be found in violation of public policy. Hence there is cumulative recovery by the tort victim or the victim's survivors in a wrongful death claim – both from the tortfeasor and from the insurance policy. This seems unquestionably correct with respect to life insurance policies that contain (as many do) a substantial “savings” feature. After all, no one would suggest that the tortfeasor should be relieved of liability if his victim has a substantial investment portfolio or that an insurer should be relieved of its obligation under such a policy if the victim happens to die from a tort. Even for term life insurance, there is probably a shared social understanding that, if the insured dies, the proceeds are meant to be added on top of whatever else is in the insured's estate or payable to his survivors. Hence, either to reduce the tortfeasor's liability by the amount of the term life policy or to require repayment of the life insurer from the tort award would be to undermine that social understanding – one that is re-enforced by the fact that the insured, after all, has paid the term life premiums. This result, which seems quite appropriate from both the *corrective justice* and *deterrence* perspectives, may even make sense from the *compensation* perspective if one agrees that such life insurance proceeds are bought with the purpose of being add-ons.

For disability insurance, accident insurance, and health insurance, however, the case for double recovery is much weaker. People buy those insurance policies, not as add-ons, but in order to assure that payments are made if the insured suffers an accident or illness. Most of the claims on these policies will occur when there has been no tort at all. When it happens that there is a tort that brought on the victim's injury, however, the idea that the victim should be able to collect from both the insurer and his tortfeasor (frequently the tortfeasor's liability insurer) is far less compelling than with respect to life insurance. So long as the tort law rule is that private insurance is a collateral source that is to be ignored, the only way to prevent double recovery is to treat these sorts of policies in the way that property insurance is treated. As a legal matter, however, the general rule is that for these sorts of policies the victim's insurer does not have a right of reimbursement as a matter of law. Hence, this leaves it to contract to resolve the matter, and in practice many policies do not provide for reimbursement, especially disability and accident insurance policies

194 Jerry and Richmond, *Understanding Insurance Law* (2007), pp 676-681.

– thus leaving the victim with double recovery. Of course, the tort rule might be changed with respect to this type of insurance, but there is little movement in that direction – perhaps justified by a pervasive feeling that tort damages never fully compensate for the enormity of personal injuries. Moreover, where these insurance contracts are not pervasive and provide only modest benefits double recovery can be more easily tolerated.¹⁹⁵

Gifts

[10.160] If the victim obtains charitable aid, whether in the form of cash¹⁹⁶ or services like free nursing, the general rule is that those too are ignored in the tort case and the tortfeasor must pay for the value of the nursing services and cover what the cash gift has already covered. The common if curt explanation for this result is simply that the donor intended to bestow a benefit on the donee, not on the tortfeasor, which would be the result if the tortfeasor could reduce his liability by taking these gifts into account. As with other collateral sources, this result is congenial to the deterrence perspective and perhaps rests fundamentally on a sense of *corrective justice*. Still, from the *compensation* perspective, why should the victim wind up with money where there has not in fact been a financial loss?

Perhaps the fairest solution would be to justify the tort rule as enabling the victim/donee to repay the gift, bearing in mind that the donor is usually a kin or friend. When this is the outcome, it, in a sense, converts the gift into something of a contingent loan, which might well best reflect the donor's wishes were he to have thought about it. However, unless the donor were to make clear the conditional nature of the transfer at the outset, the general rule is that whether or not the tort victim repays his donor is for him to decide, subject perhaps to extra-legal sanctions.¹⁹⁷

Employment benefits

[10.170] Workers' compensation, the oldest form of social security, has always been strictly handled with the goal of assuring that the tort victim does not obtain double recovery. But this is brought about in different ways in different places. Sometimes tort claims by an injured worker are reduced by compensation already received; other times the worker recovers in full from the tortfeasor and must repay the provider of the worker's compensation benefits. The latter solution seems especially apt in the United States where work-related tort claims are almost always against third parties such as defective product makers and almost never allowed against the worker's employer, and where worker's compensation insurance is privately paid for by the employer.¹⁹⁸

A common feature of modern employment is the provision of "employee" or "fringe" benefits such as disability pay, pensions and, especially in the United

195 Atiyah, "Collateral Benefits Again" (1969) 32 Mod L Rev 397 at 404-405.

196 *National Insurance v Espagne* (1961) 105 CLR 569 at 580, 597-598; *Browning v War Office* [1963] 1 QB 750 at 770; see below, [29.120] (fatal accidents). A gift of cash will reduce damages if the donor's intent was to benefit the tortfeasor by reducing the latter's liability for damages: *Zheng v Cai* (2009) 239 CLR 446. State relief of property damage: *Wollington v SEC* [1980] VR 91 (FC). The rule possibly applies even to compassionate bounty from employers.

197 A few older cases directing repayments have been consistently disavowed in Australia. *Griffiths v Kerkemeyer* (1977) 139 CLR 161 at 174-176, 193. The donor himself has no direct claim against the tortfeasor: *The Amerika* [1917] AC 38; *Rawson v Kasman* (1956) 3 DLR (2d) 376 (Ont CA).

198 Kramer and Briffault, *Workers' Compensation: Strengthening the Social Compact* (1991).

States, health insurance that pays for medical services in case of illness and accident. It is in this area that the great debate over collateral benefits came to be fought out amidst considerable fluctuations of doctrine, reflecting judicial perplexity and lack of direction. Even if one starts from principled opposition to double recovery,¹⁹⁹ it is not obvious whether the proper solution is to allow the tortfeasor to reduce his liability by the amount of the employee benefit or to require the tort victim to repay his employer. In England, after an initial sentiment in favour of reduced tort liability, sentiment later swung sharply against set-off,²⁰⁰ only to lean once more towards the original starting point.²⁰¹

With respect to employer-provided wage replacement²⁰² and wage-alikes such as employer-provided disability benefits²⁰³ and unemployment benefits,²⁰⁴ there is considerable support for the idea that an employee who has these benefits does not actually suffer wage loss (or at least not a full wage loss) because of the tort. Hence, in Australia in *Graham v Baker*, the High Court treated such benefits in the way that free medical services provided by the national health insurance scheme are treated, thereby reducing the tortfeasor's liability. The High Court was not deterred by the argument either that, in Australia, the loss is predominantly considered to be for earning *capacity* rather than earnings, or that the right to disability pay was in effect earned by the plaintiff and thus analogous to insurance benefits.

What if the employer is not contractually bound to make such payments, but does so voluntarily? Are gifts or wages the appropriate analogy? On the one hand, having regard to the extinction-of-loss rationale, why should it matter that the payment was received as a bounty rather than as of right? On the other hand, set-off might discourage benevolence by the employer.²⁰⁵ The resolution of this dilemma remains unresolved.²⁰⁶

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- 199 The influence of *BTC v Gourley* [1956] AC 185 was most evident in *Browning v War Office* [1963] 1 QB 750, the high-water mark of that theory. See McGregor, "Compensation versus Punishment" (1965) 28 Mod L Rev 629. The Australian attitude was much more non-committal.
- 200 In Australia starting with *National Insurance v Espagne* (1961) 105 CLR 569, in England with *Parry v Cleaver* [1970] AC 1, in Canada with *Boarelli v Flannigan* (1973) 36 DLR (3d) 4 (Ont CA). None went as far as the American "collateral source rule" which treats all collateral benefits as *res inter alios acta*: see *Fleming*, Process, pp 206-211.
- 201 *Hussain v New Taplow Paper Mills* [1988] AC 514; *Hodgson v Trapp* [1989] AC 807; *Ratyck v Bloomer* [1990] 1 SCR 940 (though modified by *Cunningham v Wheeler* [1994] 1 SCR 359).
- 202 *Graham v Baker* (1961) 106 CLR 340; *Medlin v State Government Insurance Commission* (1995) 182 CLR 1. *Parry v Cleaver* [1970] AC 1; *Ratyck v Bloomer* [1990] 1 SCR 940 (except where subrogation). So also holiday pay: *Bosch v Liebe* [1976] VR 265 (FC); *North v Thompson* [1971] WAR 103 (FC).
- 203 *Graham v Baker* (1961) 106 CLR 340 at 351; *North v Thompson* [1971] WAR 103 (FC).
- 204 *Westwood v Secretary of State* [1985] AC 20; *Parsons v BNM* [1964] 1 QB 95 (CA).
- 205 *Juranovich v McMahon* [1961] NSW 190 (FC); *Volpato v Zachory* [1971] SASR 166. See the extended discussion of this in Luntz (2002), pp 439-441 [8.3.11]-[8.3.12].
- 206 *Hobbelen v Nunn* [1965] Qd R 105; *Koremans v Sweeney* [1966] QWN 46; *Farmer & Co Ltd v Griffiths* (1940) 63 CLR 603 at 614 (Evatt J); *Dal Zotto v Bonnamy* (1980) 47 FLR 239 at 249 (FC); *Evans v Port of Brisbane Authority* (1992) ATR ¶81-169 (Qld SC; affirmed without reference to this point in ¶81-181 (Qld CA)) required set-off. Not so: *Volpato v Zachory* [1971] SASR 166; *Szittner v Harriott* [1967] 1 NSW 233 at 235 (CA); *Boarelli v Flannigan* (1973) 36 DLR (3d) 4 (Ont CA); cf *Cunningham v Harrison* [1973] QB 942 (pension). In assessing *future* loss of earnings, the prospect that the employer will, as of grace, retain the plaintiff despite his disability is a reducing factor: *Ivkovic v AI & S* [1963] SR (NSW) 598 (CA); *Murphy v Stone-Wallwork* [1969] 1 WLR 1023 (HL) (passim).

Private pensions, on the other hand, have been generally treated like life insurance, so that neither may the tortfeasor offset his liability by the amount of the victim's pension nor may the employer be reimbursed for the pension benefit out of the tort award. Pensions, in effect, are treated as a form of earned savings that the employee victim is entitled to keep on top of any tort award he receives.²⁰⁷

Yet, while at pains to distinguish pensions from wage make-ups, the House of Lords held that a long-term sickness benefit proportioned to pre-accident wages required a reduction in tort liability. Though a fringe benefit and thus in a sense "earned" by the plaintiff, it was not, on any view of "justice, reasonableness and public policy", analogous to a victim's private insurance. "It positively offends [one's] sense of justice that a plaintiff, who has certainly paid no insurance premiums as such, should receive full wages during a period of incapacity to work from two different sources, her employer and the tortfeasor. It would seem still more unjust and anomalous where, as here, the employer and the tortfeasor are one and the same."²⁰⁸

Social welfare

[10.180] Even with regard to benefits from social security or other publicly funded welfare schemes, the courts for long fumbled. One might well have thought that social welfare being plainly based on a philosophy of need and paid out of public funds, there was no justification for allowing a claimant to recover in the aggregate from that source and the tortfeasor more than an indemnity for his net loss. Here the analogy of private insurance and private benevolence is quite unrealistic. Statutory benefits are met by the taxpayer, including such as the plaintiff and defendant. The benefits derive from public funds and are received not as "public benevolence" but as entitlement. Nor is it realistic to ask if it was the statutory intent to benefit the "wrongdoer", considering that the damages will in most cases come out of insurance funds, such as motor vehicle liability insurance to which all vehicle owners contribute.

Mindful of these considerations, the House of Lords eventually insisted on reduced tort liability for statutory benefits received under welfare legislation.²⁰⁹ In response, by statute, England moved in a different direction, refusing to reduce the liability of tort defendants but instead requiring them to directly reimburse the health service and the government for medical and social insurance benefits that have been provided to the plaintiff.²¹⁰

207 *National Insurance v Espagne* (1961) 105 CLR 569 at 573 (Dixon CJ). In Australia, the matter of employment pensions was first broached in *Paff v Speed* (1961) 105 CLR 549, decided *passim* in *Espagne* (a social security pension) and specifically in *Jones v Gleeson* (1965) 39 ALJR 258; in England in *Parry v Cleaver* [1970] AC 1 (where it was noted with satisfaction that this brought personal injuries in line with earlier statutory reform for fatal accidents); *Smoker v London Fire & Civil Defence Authority* [1991] 2 AC 502; *Cunningham v Harrison* [1973] QB 942 (CA); in Canada *Guy v Trizec Eq* [1979] 2 SCR 756.

208 *Hussain v New Taplow Paper Mills* [1988] AC 514 at 532. Even more forceful was Lord Bridge's speech in *Hodgson v Trapp* [1989] AC 807 (below, n 224). *Dicta* in Australia support this: *Samios v Repatriation Commission* [1960] WAR 219 at 233; *Szittner v Harriott* [1967] 1 NSW 233 at 235 (CA); *Peluchetti v Warringah Brick & Pipe Works Pty Ltd* [1961] NSW 259 (FC).

209 *Hodgson v Trapp* [1989] AC 807 at 823.

210 *Social Security Act 1989*, cl 24, later revised into the *Social Security (Recovery of Benefits) Act 1997*, c 27; *Road Traffic (NHS Charges) Act 1999*, cl 3. See also, *Road Traffic (NHS Charges) Regulations SI 1999/784* and *Road Traffic (NHS Charges) (Reviews and Appeals) Regulations SI 1999/786*.

In Australia, the High Court had been on a different tack, in tenacious pursuit of a statutory intent whether the benefits were “conferred on [the plaintiff] 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”. That there was a discretionary element in the grant of the benefit was interpreted as such a sign, as was the general hypothesis that it could not have been the statutory purpose to benefit the “wrongdoer”.²¹¹ In the result the plaintiff would keep both the benefit and the award, with the exception of unemployment benefit as a substitute for wages.²¹² This outcome also had to be reversed by statutory amendments which compels reduction or repayment of certain social security benefits on receipt of any form of compensation for the injury.²¹³

Benefits from tortfeasor

[10.190] The case for crediting the tortfeasor for benefits with which he has himself furnished the plaintiff is perhaps strongest where the defendant is the plaintiff’s employer and has, for example, provided and paid for sick pay for the injured employee.²¹⁴ In recent decisions, the English Court of Appeal, overruling prior authority to the contrary,²¹⁵ has now allowed a defendant employer to reduce his tort liability to an employee by the amount of ex-gratuita payments the employer had made to the claimant.²¹⁶

More controversial is the situation where the defendant is a family member, such as the victim’s spouse, rendering nursing and other assistance in kind, a common occurrence in cases of motor accidents in the family car. The House of Lords earlier held that the value of such services was not recoverable from the defendant because it would oblige the defendant to pay for the plaintiff’s needs twice: once in kind, then in money.²¹⁷ The High Court of Australia reached the contrary conclusion,²¹⁸ in the belief that it would “reduce the anomalies and absurdities” inherent in this vexing problem. It allowed the claim, emphasising that it measures to the full the victim’s need which is alone relevant, that it avoids a windfall to a compulsory statutory insurer that it recognises services rendered in a spirit of affection and dispenses with resort to fictitious contracts.

211 *National Ins v Espagne* (1961) 105 CLR 569 at 573 (Dixon CJ: pension for the blind involving a discretionary element, but should that matter?); *Redding v Lee* (1983) 151 CLR 117 (invalid pension; despite means test which is incompatible with its being intended as bounty, yet operates to relieve public funds if reduction of damages is denied); *Pacific v Gill* [1973] SCR 654 (Canada Pension Plan).

212 *Evans v Muller* (1983) 151 CLR 117 (4:3) (past benefits; for future see *Bertram v Kapodistrias* [1984] VR 619).

213 *Social Security Act 1991* (Cth), Pt 3.14 for social security benefits paid during a “preclusion period”; *Health & Other Services (Compensation) Act 1995* (Cth) for Medicare benefits. For the latter, however, Luntz (2002) notes at p 432 [8.23] that a question of statutory intent is still involved. See also Luntz (2002), p 455 [8.5.7] for social security benefits not affected by legislation and hence still governed by common law.

214 *Hussain v New Taplow Paper Mills* [1988] AC 514.

215 *McCamley v Cammell Laird Shipbuilders Ltd* (1990) 1 WLR 963.

216 See *Williams v BOC Gases Ltd* (2000) PIQR Q253 and *Gaca v Pirelli General plc* (2004) 1 WLR 2683.

217 *Hunt v Severs* [1994] 2 AC 350.

218 *Kars v Kars* (1996) 187 CLR 354.

*Reduced awards**The duty to mitigate*

[10.200] After the accident every claimant has a “duty” to mitigate damages.²¹⁹ In making good his loss, he must not do it at the expense of the defendant. For example, the victim might have to submit to surgery or other disagreeable therapy²²⁰ in order to alleviate his condition and, if he unreasonably refuses to do so, he cannot unload upon the defendant the consequences of his own stupidity or irrational scruples.²²¹ As a result, in failure-to-mitigate cases, the victim’s tort recovery will not fully compensate him for his loss because a portion of that loss is considered his own responsibility. The burden is on the defendant, however, to prove that the plaintiff’s refusal to mitigate was unreasonable.²²² The obligation to take reasonable steps to mitigate one’s loss is easily justified from the *corrective justice* and *deterrence* perspectives.

While the standard applied in determining when a victim must take steps to mitigate his loss is that of reasonableness, courts are appreciative of the fact that it was the defendant’s wrong which put the plaintiff in this position.²²³ In deciding what was reasonable, should the test be sternly objective as enunciated in the older English cases, postulating a reasonable person of “manly character”, or should it compassionately follow the analogy that a tortfeasor takes his victim as he finds him? An acceptable compromise which has gained support in Australia asks whether “a reasonable person in the circumstances as they existed for the plaintiff” would have refused treatment, thereby making allowance for his difficulty of understanding, even for an anxiety neurosis caused by the accident itself.²²⁴

Notice that the plaintiff may be required to spend money or incur expense to mitigate his or her damage, such as paying for treatment where that is required.²²⁵ Yet the plaintiff is not ordinarily expected to lay out capital, nor is he or she obliged to do something he cannot afford.²²⁶ On the other hand, if the plaintiff does spend money to mitigate their own loss, reasonably incurred expenses are recoverable by the plaintiff as part of the compensation for the

219 Contrast conduct unreasonably *aggravating* injury, which may justify apportionment as contributory negligence: see *Commonwealth v McLean* (1997) 41 NSWLR 389 (CA) (application for special leave to HC dismissed: (1997) 4 Leg Rep SL 7).

220 For example, *Clarke v Damiani* (1973) 5 SASR 427 at 432 (wearing eye patch to mitigate double vision).

221 *Watts v Rake* (1960) 108 CLR 158 at 159; *McAuley v London Transport Executive* [1957] 2 Ll Rep 500. US: 62 ALR 3d 9 at 70 (1975).

222 *Janiak v Ippolito* [1985] 1 SCR 146; *Munce v Vinidex* [1974] 2 NSWLR 235 (CA). Contra: *Selvanayagam v Uni WI* [1983] 1 WLR 585 (PC).

223 *Moore v DER Ltd* [1971] 1 WLR 1476 (CA); *Simonius Vischer & Co v Holt & Thompson* [1979] 2 NSWLR 322, 354 (CA).

224 *Fazlic v Milingimbi C* (1982) 150 CLR 345; *Selvanayagam v Uni WI* [1983] 1 WLR 585 (PC); *Karabotsos v Plastex* [1981] VR 675 (FC). But *Janiak v Ippolito* [1985] 1 SCR 146 postulates that a pre-existing psychological infirmity must have deprived him of his capacity to make a reasonable choice. See further Luntz (2002), pp 125-129 [1.10.2]-[1.10.4].

225 *Matters v Baker & Fawcett* [1951] SASR 91; *Hoad v Scone Motors* [1977] 1 NSWLR 88 at 100.

226 *Dodd Properties v Canterbury CC* [1980] 1 WLR 433 (CA); *Bevan v Blackhall (No 2)* [1978] 2 NZLR 97 at 115-116. See Phillips, “Losses Flowing from Impecuniosity” (1982) 20 Osg HLJ 18. See also Luntz (2002), pp 209-210 [2.7.9].

wrong.²²⁷ Moreover, if the victim's personal financial situation makes it necessary to spend more money to mitigate a loss than would reasonably have been spent by a financially better-off victim, the defendant will have to reimburse the full cost incurred by the impecunious claimant.²²⁸

In some cases, even if the plaintiff unreasonably refuses to mitigate, he will not have to bear the entire loss. Suppose, for example, the recommended surgery that he refused had entailed only a 70% chance of success. The contingency should be discounted just like any future loss; for even if he had acted reasonably, he would have faced a 30% risk of failure for which he is entitled to compensation.²²⁹

Defendant-provided benefits

[10.210] When the defendant's wrongful conduct has provided the victim with a benefit, courts have struggled. The issue is well illustrated by the case of a physician who negligently fails to warn a patient that her sterilisation is not foolproof. In consequence, suppose she did not recognise that she was pregnant until an abortion was no longer practicable. First, while she may recover damages for the trouble of her pregnancy and childbirth, they may be reduced by the benefit not having to undergo an abortion. Secondly, while the joy (and benefit) of having the baby may offset the trouble and care of looking after it (both non-pecuniary matters), it may not offset the physician's obligation to pay for the cost of the child's upbringing and medical care.²³⁰

Yet, this benefit principle has its limits. Suppose A carelessly trips B while both are in line waiting to board their flight. B falls and breaks her leg, and because she requires immediate medical care, the plane takes off without her. Sadly, the plane crashes on take-off and all of the passengers are killed. Ironically, then, A has benefitted B since it is better to be alive with a broken leg than dead. Yet in B's tort claim against A this benefit almost surely will not be allowed to be used by A to offset his obligation to pay for B's pecuniary losses, and probably this benefit will also not preclude B from recovering for the pain and suffering she endured from the broken leg.

227 *NZ Forest Products v O'Sullivan* [1974] 2 NZLR 80; *Tucker v Westfield Design* (1993) 123 ALR 278; *Simonius Vischer & Co v Holt & Thompson* [1979] 2 NSWLR 322 (CA); see also dicta of Brennan J in *Fox v Wood* (1981) 148 CLR 438 at 446-447. Even if the effort is abortive or the ultimate cost is greater than if no steps had been taken: *Gardner v R* [1933] NZLR 730; *McGregor*, §§ 243-244. Mitigation most probably assumes a complete cause of action; thus not being available to recover the cost of neutralising risk before *some* damage has occurred: *The Orjula* [1995] 2 LI Rep 395.

228 *Lagden v O'Connor* [2003] UKHL 64; [2004] 1 AC 1067 (reversing the earlier position stated in *The Liesbosch* [1933] AC 449).

229 *Janiak v Ippolito* [1985] 1 SCR 146; *Newell v Lucas* (1964) 82 WN (NSW) 265 (FC); *Plenty v Argus* [1975] WAR 155 (FC).

230 *Thake v Maurice* [1986] QB 644. Compare *Cattanach v Melchior* (2003) 215 CLR 1 and *Harriton v Stephens* (2006) 226 CLR 52. Note that several jurisdictions in Australia passed legislation to prevent an award of damages for costs of rearing a child where the child's birth was at issue: *Civil Liability Act 2003* (Qld), ss 49A, 49B; *Civil Liability Act 1936* (SA) s 67; *Civil Liability Act 2002* (NSW), s 71.

Contributory negligence

[10.220] At the common law, a careless victim was completely barred from recovery in a claim against a careless defendant. Statutory apportionment regimes exist in most jurisdictions today so that damages are reduced in proportion to the negligence of both plaintiff and defendant.²³¹

Property damage

Damages for the harm to the property itself

[10.230] Recovery for damaged or destroyed property – whether real property or personal property – presents relatively little controversy as compared with personal injury. Simply put, the plaintiff is in the first instance entitled to restitution for the loss of its value to him.²³² Yet, there are some difficult issues lurking here as well. How is loss to be assessed? Is it loss of value or cost of replacement or repair? There is no universal answer. Where replacement is cheaper than repair, the owner must generally be content with the replacement value²³³ unless the property has unique qualities or legitimately sentimental value.²³⁴ The same goes for landed property. Despite a widespread impression favouring difference in value, there is in fact no categorical rule. The true test is whether the plaintiff's desire to rebuild, refurbish or be reinstated was reasonable although the cost of this would exceed the amount of diminution.²³⁵ A plaintiff cannot recover a disproportionately high cost of repair where the plaintiff was able to purchase a similar property in the open

231 See Chapter 12 Defences.

232 What date of assessment should be used for the property's value varies, being possibly at the time of the tort, but potentially later. In *Seale v Perry* [1982] VR 193 at 204 Lush J favoured the time of judgment where increase in value was due only to inflation. In *Glenmont Investment Pty Ltd v O'Loughlin (No 2)* (2000) 79 SASR 185, the Court (at 278) stated that when valuing property according to the replacement cost, this "would usually be assessed at the date of trial even if the cost of replacement later increases". *Caltex v Aquabeat* [1983] NZ Recent L 120 refused to allow for inflation with respect to past expenditures on repairs, citing CA of Ontario and BC in 90 DLR (3d) 13; 27 OR (2d) 363.

233 *Darbyshire v Warran* [1963] 1 WLR 1067 (CA); *Jansen v Dewhurst* [1969] VR 421; *Van der Wal v Harris* [1961] WAR 124. Fully stated, the question is whether the cost of a comparable car minus the salvage value of the old is less than the cost of repairs plus the use of a substitute in the interval. In contrast to the preceding cases, in *Bartlett v Small* [1967] NZLR 260 the second was the lesser. Cf *Davidson v Gilbert* [1986] 1 Qd R 1 (owner recovered diminution in value exceeding cost of repair). In Australia, within the context of repairs of damaged motor vehicles, Basten JA in *Stocovaz v Fung* [2007] NSWCA 199 emphasised at [17] that "reasonable costs may lie within a range", although "it seems likely that the liability of a defendant to pay something less than the actual costs of repair will turn on evidence that the repairs could have been done at a lower cost and that the plaintiff acted unreasonably in not obtaining an alternative quotation or further quotations, or in not accepting a lower quotation".

234 As in *Anthoness v Bland Shire Council* [1960] SR (NSW) 659 (FC); *O'Grady v Westminster* [1962] 2 LI Rep 238; cited approvingly in *Collin v Botany Fork & Crane Hire Pty Ltd* (1993) 113 FLR 83 at 87. *Ruxley Electronics v Forsyth* [1996] AC 344 suggests a third alternative of allowing no more than a sum for "lost amenities". This was applied to a similar set of facts in *Willshee v Westcourt Ltd* [2008] WASC 18.

235 *Evans v Balog* [1976] 1 NSWLR 36 (CA). Not if the owner was going to pull the structure down anyway, *Fish Steam Laundry v Col Johnson Electrics* [1992] 2 Qd R 585; *Taylor v Auto Trade* [1972] NZLR 102; *Taylor v Hepworths* [1977] 1 WLR 659; *Waterloo v Swenco Manufacturing* (1975) 58 DLR (3d) 180. A similar rule applies to insurance claims: *Lucas v NZ Ins* [1983] VR 698.

market.²³⁶ On the other hand, a plaintiff may well be justified to insist on the costs to repair or rebuild, as in the case of a home to which the owner has become specially attached,²³⁷ or of a factory without any reasonable alternative for carrying on the business and retaining its labour force.²³⁸

If the plaintiff is entitled to replacement, it often happens that the old thing destroyed can only be replaced by one that is new. Must he then give credit for “betterment”, that is, the extent to which the new one is more valuable either because of a greater life span or efficiency? This was rejected in a case where a gutted factory was replaced by another of equivalent capacity but more modern design, on the ground that to demand a set-off would be equivalent to forcing the plaintiff to invest in modernisation of his plant.²³⁹ It is otherwise where the destroyed item (for example, a tractor) has only a very limited life and, although not intended to have been replaced, would have been sold for less than its replacement model.²⁴⁰

Lost profits from the damage to property

[10.240] In case of damage or destruction of a profit-earning object, the plaintiff may claim either for loss of profits,²⁴¹ or for the cost of a substitute²⁴² pending repair or replacement. Thus when a dredger engaged on work for a harbour board was sunk, the owners recovered, in addition to the cost of a substitute, for the extra cost incurred by them (for example, interest on investments, penalties, etc) through the consequential delay in carrying out that contract.²⁴³ Damages may even include the loss of a future charter to

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- 236 *Public Trustee v Hermann* (1968) WN (Pt 1) (NSW) 442; *Jones v Perth S* [1971] WAR 56 (trespass); *Moss v Christchurch RC* [1925] 2 KB 750 (nuisance); *Mummelly v Calcon* [1978] IR 387 (commercial).
- 237 *Parramatta City Council v Lutz* (1988) 12 NSWLR 293 (CA); *Evans v Balog* [1976] 1 NSWLR 36 (CA); *Ward v Cannock DC* [1986] Ch 546. Some older cases have taken a severer view.
- 238 *Harbutt's Plasticine v Wayne's Tank* [1970] 1 QB 447 (CA). The same criterion is applied to assessment of loss under fire insurance: Ivamy, *Fire and Motor Insurance* (1968), pp 166-167.
- 239 *Harbutt's Plasticine v Wayne's Tank* [1970] 1 QB 447 (CA); *Anthones v Bland S* [1960] SR (NSW) 659 (rare car). But in such a case, it might be fair for the plaintiff to make some allowance for the interest on the accelerated expenditure: *James Street Hardware v Spizziri* (1987) 43 CCLT 9 (Ont CA). See Berryman, “Betterment before Canadian Common Law Courts” (1993) 72 Can B Rev 54.
- 240 *Hoad v Scone Motors* [1977] 1 NSWLR 88 (CA); cited approvingly in *Gagner Pty Ltd v Canturi Corporation Pty Ltd* [2009] NSWCA 413.
- 241 *Lonie v Perugini* (1977) 18 SASR 201 (until replacement trees found); *Glenmont Investment Pty Ltd v O'Loughlin (No 2)* (2000) 79 SASR 185.
- 242 *Athabaska Airways v Sask Government Airways* (1957) 12 DLR (2d) 187 allowed recovery of the latter though it exceeded the former.
- 243 *Liesbosch (Dredger) v The Edison* [1933] AC 449. On the principle that a wrongdoer takes his victim as he finds him, he is chargeable even for exceptionally high profits which the plaintiff would actually have earned (at 464); contra: *The Naxos* [1972] 1 Ll Rep 149 (average rate). Also for outstanding hire purchase balance though in excess of car's value: *Millar v Candy* (1980) 39 ACTR 74. Yet the extra cost of having to hire rather than buy a substitute, because of impecuniosity, was disallowed in *The Edison* as “extrinsic” and too remote – a ruling suspect since the demise of *Polemis* and not followed in modern cases like *A-G v Geothermal Produce* [1987] 2 NZLR 348 (CA) (nuisance); *Doyle v Olby* [1969] 2 QB 158 (deceit); *Bevan v Blackball (No 2)* [1978] 2 NZLR 97 at 119 (architect's negligence); *Freedhoff v Pomalift* (1970) 13 DLR (3d) 523 (impecuniosity caused by wrong); Phillips, (1982) 20 Osg HLJ 18; Wexler, (1987) 66 Can B Rev 129.

commence upon completion of the current voyage.²⁴⁴ Also, extra delay due to a strike while the ship was in dock under repair has been held to be a risk within the defendant's responsibility.²⁴⁵ Loss of a chance, provided it is substantial and not entirely speculative, is compensable, as when a racehorse is injured and loses its chance of winning prize money.²⁴⁶ A plaintiff is also entitled to reimbursement for any payment required by law (though not under a voluntary agreement) for consequential damage to third parties, as when a ship disabled by the defendant damaged an adjacent dock.²⁴⁷

Since awards for lost profits are taxable, the majority view favours recovery at the gross rate.²⁴⁸

Is the plaintiff entitled to damages for loss of use in case of damage to a non-profit earning object, like a pleasure craft or private car? The plaintiff is clearly entitled to the reasonable cost of hiring a substitute during repairs if one is actually hired.²⁴⁹ But what if the plaintiff does not, or if it is lent by a friend "for free"? The guiding principle, here as in the case of personal injury,²⁵⁰ should be that the plaintiff's loss is not the expenditure incurred for a substitute, but the plaintiff's need for it. Thus the plaintiff is entitled to substantial general damages for loss of use, usually calculated as the interest on the capital value of the damaged object at the time of the collision²⁵¹ or (where the plaintiff keeps a stand-by) the daily cost of maintaining it.²⁵²

When the damaged (or destroyed) object is insured, the owner would ordinarily in the first place claim from his insurance company rather than the tortfeasor. If he does so, the former will be subrogated pro tanto to the victim's

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- 244 *The Argentino* (1889) 14 App Cas 519. Provided only that charter was an ordinary engagement.
- 245 *HMS London* [1914] P 72. For a more recent case also giving defendant credit for "betterment" in calculating the amount of his liability, see *Voaden v Champion, The Baltic Surveyor* (2002) 1 Lloyd's Rep 623.
- 246 Although damages must be discounted according to the probability of success in gaining those profits: *Sellars v Adelaide Petroleum* (1992) 179 CLR 332 at 355-356.
- 247 *Esso Petroleum v Hall Russell* [1989] AC 643.
- 248 *Commissioner of Taxation (NSW) v Meeks* (1915) 19 CLR 568 at 580. A more exact, if more complicated, alternative is to assess the net loss but add a supplement for the tax liability of the award. *Williamson v Comm Rlys* [1960] SR (NSW) 252 (CA); approved by Aickin J in *Air Express Ltd v Ansett Transport Industries (Operations) Pty Ltd* (1979) 146 CLR 249 at 302. *Robert v Collier's* [1959] VR 280; *Parsons v BNM Laboratories* [1964] 1 QB 95 (CA); *Bevan v Blackhall (No 2)* [1973] 2 NZLR 45.
- 249 *Martindale v Duncan* [1973] 1 WLR 574 (CA); *Moore v DER Ltd* [1971] 1 WLR 1476; *Penman v St John Toyota* (1972) 30 DLR (3d) 88. See also *Giles v Thompson* [1994] 1 AC 142 (agreement with car-hire company not champertous).
- 250 *Donnelly v Joyce* [1974] QB 454 (CA); *Anthanasopoulos v Moseley* (2001) 52 NSWLR 262 (CA); followed in *Australian Associated Motor Insurers Ltd v NRMA Insurance Ltd* (2002) 124 FCR 518.
- 251 *Millar v Candy* (1981) 38 ALR 299; *McAll v Brooks* [1984] RTR 99. Also *Nauru LGC v NZ Seamen's Union* [1986] 1 NZLR 466 (loss of non-profitable use). In *Lahoud v Lahoud* [2009] NSWSC 623, Ward J rejected interest upon capital value as the basis of calculating damages in favour of the rent of the property.
- 252 *Admiralty Comm v SS Susquehanna* [1926] AC 655 at 662; *Birmingham Corp v Sowsbery* (1969) 113 Sol J 877 (bus). The use of a stand-by is no longer recognised as neutralising the loss, though the plaintiff would most probably have allowed for this expense in his general cost calculations. But should not the cost of hiring an outside substitute represent a ceiling?

tort claim against the latter; but the victim may still retain a beneficial claim of his own with respect to such consequential losses as the “deductible” or forfeiture of a “no-claim” bonus.²⁵³

Finally, allowance may have to be made for benefits which offset losses. But to warrant a set-off, the gain must be fairly closely linked to the loss, not “collateral” or “res inter alios acta”:²⁵⁴ for example, where loss of profits due to inability to replace equipment was mitigated by a later opportunity to purchase a replacement at a lower cost,²⁵⁵ or where the extra cost of replacing an old tractor with a new one was reduced by reselling it after a short while when it was no longer needed.²⁵⁶ Those transactions were “part of a continuous dealing with the situation in which the plaintiff found himself”²⁵⁷ as the result of the accident; in contrast to independent or disconnected events, for example, where neighbouring land damaged by the blow-out of an oil well increased in value due to the discovery of oil.²⁵⁸

Non-pecuniary loss arising from property damage

[10.250] Damages for foreseeable worry and anxiety, or physical inconvenience are awarded in cases of negligently constructed homes,²⁵⁹ and even business premises,²⁶⁰ and, at the least, for the intentional shooting of pets.²⁶¹

253 *Patel v LT Executive* [1981] RTR 29 (CA); contra: *Millar v Candy* (1981) 38 ALR 299, based on wrong approach.

254 See *Rest 2d*, § 920.

255 *Bellingham v Dhillon* [1973] QB 304; dist *Hussey v Eels* [1990] 2 QB 227 (CA).

256 *Hoad v Scone Motors* [1977] 1 NSWLR 88 (CA).

257 12 Halsbury (4th ed), p 481.

258 *Green v General Petroleum* 205 Cal 328 at 336 (1928).

259 *Campbelltown City Council v MacKay* (1989) 15 NSWLR 501 (CA; substantial damages); *Clarke v Gisborne S* [1984] VR 971 (but not “mere” inconvenience); *Perry v Phillips* [1982] 1 WLR 1297 (CA); *Gabolinscy v Hamilton* [1975] 1 NZLR 150; *Young v Tomlinson* [1979] NZLR 441 at 462 (“annoyance, frustration, discomfort and inconvenience”).

260 *Carll v Berry* [1981] 2 NZLR 76; *Rowlands v Callow* [1992] 1 NZLR 178 (defective driveway).

261 *Davies v Bennison* (1927) 22 Tas LR 52; *Borza v Banner* (1975) 60 DLR (3d) 304 (aggravated damages); cf *Newell v CPA* (1976) 74 DLR (3d) 574 (breach of contract: loss of dog). US: 8 ALR 4th 1287 (1981).