2–006 The one variety is bound up with the issue of mitigation and concerns those cases where the claimant is allowed to recover the normal measure of damages that the law awards in such circumstances, although this normal loss has been diminished for the claimant by other events. The principal illustrations of this situation are where a person physically injured collects money on his accident insurance policy,[33] or pension money,[34] or is given gratuitous assistance from a charitable fund[35]; and where a lessor of land, which is delivered to him at the end of the term in disrepair, nevertheless has succeeded in reletting to a new lessee who has covenanted to repair.[36] The rationale of these decisions is that the law regards such events as collateral and therefore not to be taken into account in deciding what is the claimant's loss. The difficulty is in finding a clear yardstick to distinguish what is and what is not collateral.[37] Thus it was for long thought, following a decision of 1920, that where a buyer of goods, which fall short of warranty, has succeeded in reselling them at a price higher than their value in their defective state, the resale is collateral and not to be taken into account in reduction of the buyer's damages[38]; however, in a decision of 1996, the opposite solution was reached.[39] This whole thorny problem is best considered when dealing with mitigation of damage.

2–007 The other variety stems from the frequent impossibility of repairing damaged property without putting it into a better condition than it was before the damage had been inflicted, since repairing with old and worn materials is not a practical possibility. In these circumstances the question arises whether there should be a deduction from the cost of repair of the amount by which the property, after repair, is more valuable than beforehand. The very first cases tended to hold that there should indeed be such a deduction,[40] this solution appearing both in cases where land was tortiously damaged[41] and in cases where lessees were in breach of covenants to repair.[42] But, at a comparatively early date, the cases concerning damage to ships rejected the argument that

Alfred McAlpine Construction Ltd v Panatown Ltd [2001] 1 A.C. 518. The limits of the rule in *The Albazero* were discussed in *DRC Distribution Ltd v Ulva Ltd* [2007] EWHC 1716 QB at paras 71 to 85.

[33] *Bradburn v G. W. Ry* (1874) L.R. 10 Ex. 1.

[34] *Parry v Cleaver* [1970] A.C. 1.

[35] *Redpath v Belfast and County Down Ry* [1947] N.I. 167.

[36] *Haviland v Long* [1952] 2 Q.B. 80 CA. Formerly, the lessor could recover the cost of repairs even where they were not to be done at all, not to be completely done, or to be done at a third party's expense; s.18(1) of the Landlord and Tenant Act 1927 was designed to alter this situation. For details see paras 26–055 *et seq.*, below.

[37] Contrast the different approaches of the three members of the court in *London Building Society v Stone* [1983] 1 W.L.R. 1242 CA.

[38] *Slater v Hoyle & Smith* [1920] 2 K.B. 11 CA.

[39] *Bence Graphics International v Fasson UK* [1998] Q.B. 87 CA.

[40] "Otherwise the plaintiff would be a gainer by the accident": *Lukin v Godsall* (1795) Peake Add. Cas. 15 at 16, per Lord Kenyon.

[41] *Lukin v Godsall* (1795) Peake Add. Cas. 15; *Hide v Thornborough* (1846) 2 C. & K. 250; and *cf. Dodd v Holme* (1834) 1 A. & E. 493.

[42] *Soward v Leggatt* (1836) 7 C. & P. 613 (see especially at 617); *Yates v Dunster* (1855) 11 Ex. 15.

there must be a deduction on account of "new for old"[43] since, as was well expressed by Dr Lushington, if the claimant:

> "derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place on him."[44]

This approach has been adopted in modern times in relation to damage to land, whether caused tortiously[45] or through breach of contract,[46] and has been applied to chattels other than ships.[47] Thus where a contractual breach resulted in the destruction of a factory, the Court of Appeal refused to allow any deduction from the damages, which were based on the costs of rebuilding, on account of what was described as "betterment", for, as Widgery L.J. pointed out, "to do so would be the equivalent of forcing the plaintiffs to invest their money in the modernising of their plant which might be highly inconvenient for them".[48] Lord Denning M.R. pointed out that, when their factory was destroyed, the claimants had no choice but to replace it as soon as they could, not only to keep their business going but also to mitigate their loss of profit.[49] On the other hand, where the necessity of the case does not demand reinstatement, claimants may find themselves limited to claiming for the diminution of the value of the property in question. This is so, for instance, where a house

[43] *The Gazelle* (1844) 2 W. Rob. (Adm.) 279; *The Pactolus* (1856) Swab. 173.

[44] *ibid.* at 281. The analogy of the marine insurance rule of deducting one-third new for old, which Dr Lushington had to reject and on which Lord Kenyon had earlier relied in *Lukin v Godsall* (1795) Peake Add. Cas. 15, is no longer of concern since modern policies either exclude the rule or subject it to important exceptions: see *British Shipping Laws*, Vol.4, 11th edn (1961), para.529. This does not appear in the latest edition of the equivalent volume of *British Shipping Laws, Marsden on Collisions*, 13th edn (London: Sweet & Maxwell, 2003), para.15–41, which simply states that "no deduction is made from the damages in respect of unavoidable betterment".

[45] *Hollebone v Midhurst and Fernhurst Builders* [1968] 1 Lloyd's Rep. 38; *Haysman v MRS Films Ltd* [2008] EWHC 2494 QB.

[46] *Harbutt's "Plasticine" v Wayne Tank & Pump Co* [1970] 1 Q.B. 447 CA. But claimants must not go further than they need: *Scott Wilson Kirkpatrick & Partners v Ministry of Defence* [2001] 73 Con. L.R. 52 CA.

[47] *Bacon v Cooper (Metals)* [1982] 1 All E.R. 397 (rotor for machine for fragmenting steel; breach of contract). And *cf.* at para.35–021, below, *Lagden v O'Connor* [2004] 1 A.C. 1067 where hiring a car from a hire car company brought additional benefits for which the claimant did not have to account: see especially Lord Hope at *ibid.* paras 30 to 35.

[48] *Harbutt's "Plasticine" v Wayne Tank & Pump Co* [1970] 1 Q.B. 447 CA at 473. See similarly at 468 and 476, per Lord Denning M.R. and Cross L.J. respectively.

[49] [1970] 1 Q.B. 447 CA at 468. He distinguished the destruction of a chattel, saying that "if a secondhand car is destroyed, the owner only gets its value; because he can go into the market and get another secondhand car to replace it": at 468. But this may not be possible with all chattels: see *Bacon v Cooper (Metals)* [1982] 1 All E.R. 397, above ("rotors, unlike motor cars, are not bought and sold secondhand": at 399d); even as to cars see *Moore v D.E.R.* [1971] 1 W.L.R. 1476 CA at para.35–066, below. It was on the ground that the rule of no deduction of "new for old" applies only to damaged property repaired and not to destroyed property replaced that Colman J. in *Voaden v Champion, The Baltic Surveyor* [2001] 1 Lloyd's Rep. 739 refused the cost of a replacement ship of greater value than the ship sunk. Such a rigid distinction between the two categories does not appear to accord with principle.

circumstances in which it was impossible to unravel the contribution of each car to the injury.[61] And the discussion of principle by the Court of Appeal in *Hatton v Sutherland*,[62] again before *Fairchild*, suggests that occupational stress-related illness, rather than industrial disease, is another candidate for the *Fairchild* treatment. There are also analogous American cases allowing recovery despite the inability to satisfy the "but for" test, such as the interesting *Sindell v Abbott Laboratories*[63] where women taking injurious drugs were unable to identify the particular manufacturer and damages were awarded against the manufacturers in an imaginative manner by basing them upon market share.[64] But while *Wilsher*[65] still stands as good law, the cases are not likely to be many. One significant pointer, and a pointer to a limited application, is that every one of the myriad of worldwide cases cited in the speeches in the House of Lords in *Fairchild* was a case of personal injury or wrongful death.[66]

8–022 In addition to the cases where, with two or more acts or events or agencies, the wronged claimant is unable to prove which act, event or agency has caused the harm, there are certain cases, starting well before *Fairchild* in which an initial injury has, as it were, become subsumed in a later one so that the "but for" test is not satisfied because the later injury would have been suffered in any event. The leading case on this is *Baker v Willoughby*.[67] The claimant's

[61] All three judgments refer fairly extensively to *McGhee* and *Wilsher*.

[62] [2002] 2 All E.R. 1 CA at paras 35 *et seq*. Nothing said at this point in *Hatton* is affected by *Barber v Somerset CC* [2004] 1 W.L.R. 1089 HL where the House of Lords allowed the further appeal of one of the appellants in four conjoined appeals which had been heard earlier in the Court of Appeal under the title *Hatton v Sutherland*. The discussion of principle in *Hatton*, headed "Apportionment and quantification", deals not only with the above cases before *Fairchild* but also with some of the further ones considered, in relation to certainty of damage, at paras 10–014 *et seq*., below.

[63] 26 Cal. 3d 588; 607 P. 2d 924 (1980).

[64] Unlike this Californian case the House of Lords cases of industrial disease did not for long concern themselves with apportionment, the issue always being the all or nothing one: liability or no liability. Cases of apportionment appeared at Court of Appeal level, such as *Thompson v Smiths Shiprepairers (North Shields)* [1984] Q.B. 405 and *Holtby v Brigham & Cowan (Hull) Ltd* [2000] 3 All E.R. 421 CA, and eventually in the House of Lords in *Barker v Corus (UK) Plc* [2006] 2 A.C. 572. These cases are considered in the context of certainty of damage at paras 10–015 *et seq*., below.

[65] [1988] A.C. 1074.

[66] The Court of Appeal rightly refused in *Clough v First Choice Holidays and Flights Ltd* [2006] P.I.Q.R. P22 CA, p.325 to extend the principles appearing in *Fairchild* and the related authorities to a case of personal injury which arose out of a single incident and which was in no way exceptional. At a swimming pool the claimant, walking with wet feet along the top of a wall which had not been painted by the defendants in charge of the pool with non-slip paint, slipped off the wall to his serious injury. Here the ordinary rule of causation had to apply so that the claimant had to satisfy the court, which he had failed to do, that on the balance of probabilities it was the absence of non-slip paint that caused or materially contributed to his slip and subsequent fall. To show that there was a risk was not enough. The risk of a slip by someone walking along the wall top with wet feet was inevitable and the fact that the claimant slipped did not of itself demonstrate that the slip resulted from the absence of non-slip paint. *Environment Agency v Ellis* [2009] P.I.Q.R. P5 CA, p.85 (facts at para.10–018, below), where *Clough* is considered, is a further personal injury case involving a single incident where again *Fairchild* could have no application: see *ibid*. paras 21 to 25.

[67] [1970] A.C. 467.

leg had been severely injured in a car accident caused by the defendant's negligence but, before his claim in respect of this injury had been heard, he was involved in an armed robbery in which his injured leg was shot and as a result had to be amputated. The House of Lords refused to accept that the fact of the second injury should lead to a substantial decrease in the claimant's damages on the ground that the defendant could not properly be regarded as having caused an injury which would have occurred without his participation. "The later injuries", said Lord Reid, "merely become a concurrent cause of the disabilities caused by the injury inflicted by the defendant"[68]; the defendant is in effect to be held to have caused the damage if his participation would have been necessary to bring it about in the absence of other factors sufficient to do so. Thus cause was here very much an issue, and particularly as the House was reversing the decision of the Court of Appeal that the loss following the amputation was not attributable to the defendant.[69]

8–023 The causal success of the claimant in *Baker v Willoughby*[70] was not repeated in *Jobling v Associated Dairies*[71] where the claimant suffered an injury to his back which partially disabled him and then succumbed to an illness, myelopathy, which totally incapacitated him; it was held by the House of Lords that the supervening illness was to be taken into account and that therefore there could be no recovery for loss of earnings from the date of total incapacity to the date of trial and for the future from the date of trial.[72] However, none of their Lordships was prepared to impugn, though some expressed their doubts as to, the correctness of *Baker v Willoughby* itself—Lord Keith took the view that the decision was correct[73] and if it survives, as it is thought that it should,[74] then the causation basis must survive with it because the claimant's recovery for the total injury must be dependent upon a favourable outcome for him on the causal issue; *Jobling* is then to be regarded as a decision which brings in policy, entirely correctly, in the context of a non-tortious supervening event, to limit the wide scope of recovery based on causation alone. If, however, *Baker* should eventually go—and there is always this possibility in the light of their Lordships' comments on it in *Jobling*—the law on the effect of successive causes will necessarily change.

8–024 Cases involving two consecutive injuries have continued to appear. In *Rahman v Arearose Ltd*[75] an employer was negligent in not protecting his employee from becoming the victim of an assault at work injuring his right

[68] *ibid*. at 494.

[69] Also reported at [1970] A.C. 467.

[70] [1970] A.C. 467.

[71] [1982] A.C. 794.

[72] *cf. Unifi v Massey* [2008] I.C.R. 62 CA (in the footnote at the end of para.8–013, above) where acceleration of a stroke was to be taken into account in the conventional way by discounting and not, as held below, by apportionment: *ibid*. paras 38 to 51.

[73] [2008] I.C.R. 62 CA at 815H.

[74] The implications of the two cases are further considered at paras 38–038 to 38–042, below.

[75] [2001] Q.B. 351 CA.

4. STANDARD OF CONDUCT WHICH THE CLAIMANT MUST ATTAIN WHEN ASSESSING WHAT STEPS SHOULD HAVE BEEN TAKEN BY HIM

(1) *The criterion of reasonableness and the standard of reasonableness*

9–074 In mitigating his loss the claimant victim of a wrong is only required to act reasonably and the standard of reasonableness is not high in view of the fact that the defendant is an admitted wrongdoer. Lord Macmillan put this point well for contract in *Banco de Portugal v Waterlow*[292]; his remarks apply equally to tort. He said:

> "Where the sufferer from a breach of contract finds himself in consequence of that breach placed in a position of embarrassment the measures which he may be driven to adopt in order to extricate himself ought not to be weighed in nice scales at the instance of the party whose breach of contract has occasioned the difficulty. It is often easy after an emergency has passed to criticise the steps which have been taken to meet it, but such criticism does not come well from those who have themselves created the emergency. The law is satisfied if the party placed in a difficult situation by reason of the breach of a duty owed to him has acted reasonably in the adoption of remedial measures and he will not be held disentitled to recover the cost of such measures merely because the party in breach can suggest that other measures less burdensome to him might have been taken."[293]

Whether the claimant has acted reasonably is in every case a question of fact, not of law.[294]

9–075 Moreover, the standard of reasonableness is the same whatever the cause of action; it is not a lower one where the defendant is an intentional tortfeasor. Toulson J. rightly so decided in *Standard Chartered Bank v Pakistan National Shipping Corporation*,[295] an assessment of damages for deceit and conspiracy

[292] [1932] A.C. 452 at 506.

[293] Words adopted and applied in *Bacon v Cooper (Metals)* [1982] 1 All E.R. 397 (facts at para.23–083, below) and in *Al Rawas v Pegasus Energy Ltd* [2007] EWHC 2427 QB (claimant subject to search and freezing orders had not been shown to have acted unreasonably in taking out a loan so as to be able to pay a very large sum into court). *Cf.* the similar remarks of Roskill J. in *Harlow and Jones v Panex (International)* [1967] 2 Lloyd's Rep. 509 at 530, rejecting the argument that the claimants, suing for non-acceptance of goods sold, acted unreasonably, in the light of their liability for storage charges, in not accepting any offer they could get for the goods. See also *Hayes v James & Charles Dodd* [1990] 2 All E.R. 815 CA at 820e, where the claimants might have surrendered the lease of premises at a much earlier date so as to avoid continuing accrual of rent (facts at para.32–013, below), per Staughton L.J.: "but they were placed in a difficult situation through the fault of the defendants, and I would not criticise them for failing to adopt that course."

[294] See para.9–016, above. For a whole series of ways in which the defendant argued unsuccessfully that the claimant should have acted to mitigate his loss see, at great length, *BSkyB Ltd v HP Enterprise Services UK Ltd* [2010] EWHC 86 (TCC), paras 1712 to 1800.

[295] [1999] 1 Lloyd's Rep. 747.

in relation to bills of lading.[296] After a careful analysis of the authorities he "conclude[d] that once a plaintiff discovers that he is a victim of a fraud, the same rule about avoidable loss applies for the purpose of assessing damages in an action of deceit or conspiracy as would apply in any action for tort or breach of contract".[297]

9–076 At the same time, in assessing reasonableness, while it has been said that the claimant is "not bound to nurse the interests" of the defendant,[298] it has also, and for long, been said that the claimant must act with the defendant's as well as his own interests in mind.[299] This is well illustrated by two cases concerning tortious damage to the claimant's motorcar. In *Darbishire v Warran*[300] the claimant was unable to recover the cost of repairing his shooting brake because, although the vehicle was reliable and suited his needs, to repair it was uneconomic. The Court of Appeal pointed out that, while the claimant may have acted reasonably as far as he was concerned, "the true question was whether the plaintiff acted reasonably as between himself and the defendant and in view of his duty to mitigate the damages".[301] In *Dimond v Lovell*,[302] while her damaged car was being repaired, Mrs Dimond hired a substitute car from an accident hire company which had higher charges than an ordinary car hire company because of allowing her credit on the charges until the conclusion of her damages claim. The House of Lords, reversing the courts below, held that the higher charges could not be recovered although it was accepted by all that Mrs Dimond had acted reasonably in going to an accident hire company.[303] That recovery of the higher hire charges should not be allowed was the majority view only.[304]

9–077 The criterion for reasonableness, stated concisely in the words of James L.J. in *Dunkirk Colliery Co v Lever*,[305] which were cited with approval by Viscount Haldane in *British Westinghouse Co v Underground Ry*,[306] is that the

[296] Facts at para.47–039, below.

[297] [1999] 1 Lloyd's Rep. 747 at 760, col.1. The Court of Appeal, [2001] 1 All E.R. Comm. 822, implicitly confirmed that this was the right approach by its silence on the issue. Mitigation was not an issue in the Lords: [2003] 1 A.C. 959.

[298] *Harlow and Jones v Panex (International)* [1967] 2 Lloyd's Rep. 509 at 530, per Roskill J.

[299] *Smailes v Hans Dessen* (1906) 94 L.T. 492 at 493, col.2, per Channell J.

[300] [1963] 1 W.L.R. 1067 CA.

[301] *ibid.* at 1072, per Harman L.J.; see, too, *ibid.* at 1076, per Pearson L.J.; see the case at para.35–005, below, for more detail.

[302] [2002] 1 A.C. 384.

[303] A sale by a claimant may be in the interest of both parties even if a later sale, as advocated by the defendant, would have produced a better price: *Metelmann & Co v N.B.R. (London)* [1984] 1 Lloyd's Rep. 614 CA, especially at 633, col.2 to 634, col.1, per Browne-Wilkinson L.J (facts at para.9–100, below). The need to take into account the interest of both parties was also touched upon in *Koch Marine Inc v D'Amica Società di Navigazione, The Elena d'Amico* [1980] 1 Lloyd's Rep. 75; see at 85, col.2, per Robert Goff J.

[304] See the case, and the subsequent *Lagden v O'Connor* [2004] 1 A.C. 1067, at paras 35–020 and 35–021, below for further detail. The decision was arrived at on the basis of a loss avoided (for avoided loss see paras 9–103 *et seq.*, below) but it is thought only to be justifiable as a case of avoidable loss (see para.9–064, above).

[305] (1878) 9 Ch. D. 20 CA at 25.

[306] [1912] A.C. 673 at 689.

the tort of defamation, the question may be asked, if the defendant has published a book which libels the claimant and the anticipated sales by reason of the libel are huge and far exceed any damage done to the claimant's reputation, whether the claimant should be entitled to ignore compensatory damages and sue for restitutionary damages.

14–020 There is, of course, the means to obtain a measure of recovery obliquely in these cases of assault and defamation by claiming exemplary damages. These are still permitted even after *Rookes v Barnard*[124] where, in Lord Devlin's words there, "the defendant's conduct has been calculated to make a profit for himself which may exceed the compensation payable to the plaintiff".[125] This is, however, a very blunt instrument since recovery is not specifically related to the benefit which has been achieved by the defendant. And indeed it is possible that exemplary damages may just wither away[126]; a claimant in these situations would then be left with no recourse.

2. LIABILITY IN CONTRACT

(1) *The four key authorities*

14–021 **(a) The three forward-looking authorities.** Until *Attorney General v Blake*[127] burst upon the legal scene, damages for breach of contract where there had been benefit to the defendant without loss to the claimant could boast only one clear decision. *Wrotham Park Estate Co v Parkside Homes*,[128] said Lord Nicholls in *Blake*, "still shines, rather as a solitary beacon, showing that in contract as well as tort damages are not always narrowly confined to recoupment of financial loss".[129] Then came *Blake* and the new possibilities opened up there in the Court of Appeal and the House of Lords were seized upon and have been developed by the Court of Appeal in *Experience Hendrix v PPX Enterprises Inc*.[130] Hence we now have three key cases of awards,[131] in cases factually very different from each other, for guidance as to the scope and ambit of contractual restitutionary damages.

[124] [1964] A.C. 1129.
[125] *ibid.* at 1226. See Ch.13, above, at paras 13–021 *et seq.*
[126] *cf.* paras 13–007 and 13–008, above.
[127] [2001] 1 A.C. 268.
[128] [1974] 1 W.L.R. 798.
[129] [2001] 1 A.C. 268 at 283H. Lord Walker in *Pell Frischmann Engineering Ltd v Bow Valley Iran Ltd* [2011] 1 W.L.R. 2370 PC failed to understand why Lord Nicholls had referred to *Wrotham Park* as a "solitary beacon", which he said he found "a little surprising": *ibid.* para.48(3).
[130] [2003] 1 All E.R. (Comm) 830 CA.
[131] A fourth case of an award has not the central importance of the others. There is no satisfactory report of the case and what there is is confusing. All we have for *Esso Petroleum Co Ltd v Niad Ltd* is a digest on the internet ([2001] All E.R. (D) 324) and a digest handout by *New Law Digest* (Commercial Communication 229 of December 3, 2001). The case is considered at para.14–041, below.

14–022 *(i) Wrotham Park Estate Co v Parkside Homes*.[132] An owner of land sold part of it to a developer. The developer covenanted with the seller and his assigns that he and his successors in title would observe and perform certain covenants restricting the buyer's right to develop the land for building purposes other than in strict accordance with a lay-out plan approved by the seller. The defendants, who were successors in title to the buyer built houses on the purchased land in breach of this restrictive covenant, and the claimants, who had succeeded to a part of the land retained by the seller for the benefit of which the restrictive covenant had been taken, sued for a mandatory injunction seeking demolition of the houses erected and for damages. The injunction was refused because removal of the houses would constitute unpardonable economic waste and the question arose as to whether the award of damages should be nominal, as the defendants contended, because the value of the land, as the claimants accepted, was not reduced in value by the erection of the houses.

14–023 Brightman J. regarded this contention as leading to a result of questionable fairness. He asked rhetorically whether "it was just that the plaintiffs should receive no compensation and that the defendants should be left in undisturbed possession of the fruits of their wrongdoing"[133] and proceeded to award as damages in lieu of a mandatory injunction "such a sum of money as might reasonably have been demanded . . . as a quid pro quo for relaxing the covenant".[134] It is clear that Brightman J. saw this measure of damages as representing compensation—it was early days in this complex field—but in the light of *Attorney General v Blake*[135] and *Experience Hendrix v PPX Enterprises Inc*,[136] now to be considered, and of the analysis of *Wrotham Park* in these cases, it should in future be regarded, together with the tort cases of a similar nature,[137] as presenting us with a restitutionary award.

14–024 *(ii) Attorney General v Blake*.[138] The litigation here was complex, with different approaches being taken in the three courts hearing the matter. The defendant was the spy George Blake and the Crown as claimant was seeking to ensure that he should not receive the very substantial royalties from an autobiographical book about his spying experiences written by him after his escape to Moscow. He had become an agent of the Soviet Union during the time that he was employed by the Crown as a member of the Secret Intelligence when he was subject to the Official Secrets Act and to a contractual undertaking not to divulge any official information gained as a result of his employment. The Crown's attempt to hold Blake accountable as a fiduciary

[132] [1974] 1 W.L.R. 798.
[133] *ibid.* at 812H.
[134] *ibid.* at 815D.
[135] [2001] 1 A.C. 268.
[136] [2003] 1 All E.R. (Comm) 830 CA.
[137] See the cases at para.14–011, above, and the consideration, in the context of tort, of the inadequacy of the compensation rationales at paras 14–006 and 14–007, above.
[138] [2001] 1 A.C. 268.

would not be expected to make mathematical calculations but to deal with the matter on broad lines.[118]

17–031 There may not be all that much scope for the operation of *Gourley* in defamation because most claims are by individuals rather than companies and the huge awards that have appeared over the years, now somewhat curbed by the rulings of the Court of Appeal,[119] have been for loss of a good reputation without being in any way related to money matters. Claims by corporations, on the other hand, are geared to financial loss. As it happened, in the particular case of *Lewis* one of the claimants was a company and the other an individual, and the difference between the two is well brought out by Lord Reid who distinguished between the two thus. He said:

> "A company cannot be injured in its feelings, it can only be injured in its pocket. Its reputation can be injured by a libel but that injury must sound in money. The injury need not necessarily be confined to loss of income. Its goodwill may be injured. But in so far as the company establishes that the libel has, or has probably, diminished its profits, I think that *Gourley*'s case applies . . . The position with regard to an individual plaintiff is rather different. He may be entitled to very substantial damages although his income has not been affected by the libel. But if he does attempt to prove loss of income as a result of the libel, then I think that a similar direction must be given to the jury, and it may be necessary to mention surtax[120] as well as income tax."[121]

17–032 There may be even less scope for *Gourley* here than Lord Reid in *Lewis v Daily Telegraph Ltd*[122] thought. It will be seen that their Lordships assumed that, should any of the libel damages be awarded for loss of profit, admittedly not common, those damages would not be taxable in the hands of the claimant. "There can be no difference in principle", said Lord Reid, "between loss of income caused by negligence and loss of income caused by a libel",[123] and it may be assumed that, in saying this, the negligence he had in mind was negligence resulting in personal injury. Yet it is not at all clear that damages specifically awarded for loss of business profits, particularly to a company, would not be taxable in the defamed claimant's hands, unless, which is unlikely, the business has been brought down by the defamation.[124] Defamation does not appear to have produced any cases since *Lewis*[125] in which *Gourley* has been applied. The law has moved on since *Gourley*'s day and it is not difficult to find cases in which damages have been held subject to tax

[118] *ibid.* at 262.
[119] See paras 44–023 to 44–028, below.
[120] Now higher rate tax.
[121] [1964] A.C. 234 at 262.
[122] [1964] A.C. 234.
[123] *ibid.* at 262.
[124] So that the taxable source disappears: see para.17–011, above.
[125] [1964] A.C. 234.

where they represent business profits lost through negligence, whether involving property[126] or of a professional nature.[127]

(4) *Goods: misappropriation, destruction, and damage*

17–033 In relation to tortious conduct affecting goods the question of the incidence of tax on damages has arisen in two different contexts, both where a claimant has been claiming damages for the tort and where the Inland Revenue has been claiming tax from the claimant on the damages recovered by him in his action. Clearly, it is only in the first context that the application of the *Gourley* rule is directly in issue, but this does not mean that the decisions of the courts falling within the second are irrelevant to the question of the scope of the *Gourley* rule in torts affecting goods. For, in the first place, if the Inland Revenue has succeeded in its claim for tax, this proves that factor (2) is absent and that it would therefore be inappropriate to apply the *Gourley* rule in any comparable claim for damages. And, in the second place, if the Inland Revenue has failed to exact the tax claimed, this result may have been arrived at by the court by first deciding that that which the claimant has lost through the tort and for which the damages awarded constituted compensation, would not have been subject to tax; in other words, the court's decision may have been based upon the absence of factor (1), so that once again it would be inappropriate to apply the *Gourley* rule in any comparable claim for damages. Moreover, since the Inland Revenue was vigilant in the pursuit of the exaction of tax from damages awards long before the *Gourley* rule had made its debut in 1955[128] there is in the sphere of claims for tax a much longer line of authority available to assist in marking out the proper application of the *Gourley* rule in claims for damages.

17–034 Where a chattel is tortiously misappropriated, destroyed or damaged, the claimant's primary claim is for the value or the diminished value, as the case may be, of the chattel. If the chattel is a capital asset in the hands of the claimant, then factor (1) will be inapplicable. This is brought out clearly in certain dicta of Lord President Clyde in *Burmah S.S. Co v IRC*,[129] a case in the Scottish Court of Session which involved not tort but contract, the Inland Revenue there claiming that the appellant shipowner was liable to tax on the damages awarded him for breach of contract.[130] Lord Clyde said:

> "Suppose . . . that one of the appellant's vessels was negligently run down and sunk by a vessel belonging to some other ship-owner, and the appellant recovered as damages the value of the sunken vessel, I imagine that there could be no doubt that the damages so recovered could not

[126] See the authorities at paras 17–033 to 17–041, below.
[127] In particular *Deeny v Gooda Walker* [1996] 1 W.L.R. 426 HL, at para.17–048, below.
[128] Thus the leading case was decided over 90 years ago: *Glenboig Union Fireclay Co v IRC* (1922) 12 T.C. 427 HL (Sc.), at para.17–036, below.
[129] (1931) 16 T.C. 67, Court of Session.
[130] See this case at para.17–053, below.

their business and having in view, *inter alia*, the prospect of certain highly profitable dyeing contracts, purchased a boiler from the defendants, an engineering company, who were aware of the claimants' business and that they required the boiler for the business, and who had been informed during the negotiations that the claimants intended to put the boiler into use in the shortest possible space of time. The defendants did not know at the material time the precise role for which the boiler was cast in the claimants' economy, e.g. whether, as the fact was, it was to function in substitution for an existing boiler of inferior capacity, or in replacement of an existing boiler of equal capacity, or as an extra unit to be operated side by side with and in addition to any existing boiler.[199] In an action arising out of a five-month delay in delivery the claimants claimed to include in their damages their loss of business profits, no similar goods having been available on the market. The Court of Appeal held that the defendants could have foreseen that loss of business profits would be liable to result to the claimants from a long delay in delivery, and that, although the defendants did not know of the highly lucrative dyeing contracts so that in the absence of such knowledge the claimants could not "recover specifically and as such the profits expected on these contracts", the claimants were not thereby "precluded from recovering some general (and perhaps conjectural) sum for loss of business in respect of dyeing contracts to be reasonably expected, any more than in respect of laundering contracts to be reasonably expected".[200]

23–047 This decision has broadened and clarified[201] the law as to loss of business profits in contracts for the sale of goods. In the first place, the earlier cases allowing recovery had all concerned delayed delivery of obviously profit-earning ships[202]; any possible limitation of recovery to such cases is now past. In the second place, the Court of Appeal rejected the argument, relied on by the judge below, that there is a critical difference, as far as damages for default in delivery are concerned, between a self-contained profit-earning whole and a part of that whole. "In our view," said Asquith L.J.,

[199] [1949] 2 K.B. 528 CA at 534.

[200] *ibid.* at 543. In these circumstances the court may insist on having evidence of what would constitute a reasonable and normal profit: see *North Sea Energy Holdings v Petroleum Authority of Thailand* [1997] 2 Lloyd's Rep. 418, a case of non-acceptance by a buyer, at para.23–129, below. The Court of Appeal, in affirming ([1999] 1 Lloyd's Rep. 483 CA), did not have to address this point.

[201] In the light of the House of Lords criticism of the terminology of foreseeability in *The Heron II* [1969] 1 A.C. 350 (see paras 8–161 to 8–164, above) a certain amount of rephrasing of the reason for the result reached is perhaps required (*cf.* para.8–180, above), but not even Lord Reid, who was the most critical of the Court of Appeal's terminology, cast any doubt on the correctness of the decision: see especially at 389.

[202] i.e. *Cory v Thames Ironworks Co* (1868) L.R. 3 Q.B. 181; *Re Trent and Humber Co Ex p. Cambrian Steam Packet Co* (1868) L.R. 4 Ch. App. 112; *Steam Herring Fleet v Richards* (1901) 17 T.L.R. 731; see, too, *Fletcher v Tayleur* (1855) 17 C.B. 21 and *Saint Line v Richardsons* [1940] 2 K.B. 99. All these have been referred to above and they were cited by Asquith L.J. in delivering the Court of Appeal's judgment in *Victoria Laundry v Newman* [1949] 2 K.B. 528 CA at 536. He also cited *Wilson v General Ironscrew Colliery Co* (1878) 47 L.J.Q.B. 239 which was, however, a case of breach of warranty.

> "there is no intrinsic magic, in this connection, in the whole as against a part. The fact that a part only is involved is only significant in so far as it bears on the capacity of the supplier to foresee the consequences of non-delivery."[203]

None of the important cases in which recovery for consequential loss has been refused where there has been default in delivery of a part of a profit-making whole has concerned loss of user profits by a buyer.[204] They have concerned loss of user profits by the owner of the part through breach of a contract for its carriage,[205] or loss incurred by the buyer of the part on the resale of the whole into which the part was incorporated.[206] In other words, there has been either a different type of contract or a different type of loss.

(ii) Expenses made necessary. Apart from loss of user profits, expenses may **23–048** be incurred as a result of the loss of use. Thus in *Smeed v Foord*,[207] where a threshing-machine was sold and delivered late, the buyer recovered the resultant expense in stacking his crops and also, the stacked crops having been damaged by rain, the expense of drying them. In *Watson v Gray*,[208] where steel plates were sold and their delivery delayed, the buyer recovered for the increased cost of building barges for which the plates had been intended. And in *Henderson v Meyer*[209] a crane manufacturer sold cranes to a timber importer for use in his timber yard and delivered them late so that the buyer suffered loss in loading by hand. The buyer recovered as damages the extra labour costs of handling his timber by hand instead of by cranes and also the extra cost of loading his lorries by hand. He failed, however, to recover damages in respect of additional demurrage on barges kept waiting to be unloaded and rent for storage of some timber awaiting unloading. Such items were held too remote: the seller as a crane manufacturer could not be expected to have contemplated such expenses as they depended on the length of the timber-importing season.

(b) Loss on a resale. What has already been said in relation to loss on a resale **23–049** occasioned by non-delivery[210] applies also to delayed delivery. There are, however, several cases involving delayed delivery which serve to fill in details and further illustrate the relevant principles.

[203] [1949] 2 K.B. 528 CA at 543 to 544.

[204] *Watson v Gray* (1900) 16 T.L.R. 308 provides an illustration but it is rather an unimportant case.

[205] *Hadley v Baxendale* (1854) 9 Ex. 341; *British Columbia Saw Mill Co v Nettleship* (1868) L.R. 3 C.P. 499.

[206] *Portman v Middleton* (1858) 4 C.B. N.S. 322. Resale losses were however allowed in *Elbinger Aktiengesellschaft v Armstrong* (1874) L.R. 9 Q.B. 473 and in *Hydraulic Engineering Co v McHaffie* (1878) 4 Q.B.D. 670 CA; see paras 23–051 and 23–052, below.

[207] (1859) 1 E. & E. 602.

[208] (1900) 16 T.L.R. 308.

[209] (1941) 46 Com. Cas. 209.

[210] See paras 23–027 *et seq.*, above.

or of the circumstances in which the claimants traded, any loss of goodwill must have been so speculative as to be too remote.[207]

30–046 **(c) Other expenses made necessary by the breach.** Recovery of expenses other than those arising through loss of use or out of a sale has sometimes been allowed in the cases. Thus in *S.S. Ardennes (Cargo Owners) v S.S. Ardennes (Owners)*[208] the increase in import duty which had been imposed during the period of delay was allowed as damages. However, the principal illustration of this type of recoverable expenditure is that of expenses reasonably incurred in inquiring and searching for the missing goods. These have been allowed without much argument in a number of cases, starting with *Hales v L.N.W. Ry*[209] and ending with *Heskell v Continental Express*,[210] the amount generally being small and being concerned with such items as telegrams and hire of transport.[211]

30–047 **(d) Expenses rendered futile by the breach.** As an alternative to claiming loss of profit a claimant may sometimes claim, as consequential loss, for expenses rendered futile by the breach. Not only, however, is this alternative to a recovery for loss of profit[212] but will not be available at all where a claim for loss of profit itself would have been too remote, a situation which, as has been seen, is common in carriage contracts. This, it is submitted, is the explanation of the unpreparedness of the courts to allow as damages wages and expenses of the claimant's employees rendered fruitless by reason of the late delivery of the goods. Thus wages of the claimant's workmen were not allowed in *Gee v Lancashire & Yorkshire Ry*[213] or in *Le Peintur v S.E. Ry*,[214] nor were the expenses of travellers employed by the claimant, such as their hotel expenses while waiting for the goods, in *Wilson v Lancashire & Yorkshire Ry*[215] or in *Candy v Midland Ry.*[216] Similarly the claimant's own hotel expenses, when he was himself a commercial traveller, were not allowed in *Woodger v G.W. Ry.*[217]

[207] *ibid.* at 186, col.2.
[208] [1951] 1 K.B. 55.
[209] (1863) 4 B. & S. 66 (£5 in inquiry and search).
[210] [1950] 1 All E.R. 1033 (£10 in endeavour to trace goods; see at 1046).
[211] *Giachetti v Speeding* (1899) 15 T.L.R. 401 (expenditure on telegrams) is another case. See, too, *Woodger v G.W. Ry* (1867) L.R. 2 C.P. 318 which has a dictum that recovery was allowable for "cab-hire or other reasonable expenses if the plaintiff had to call several times at the company's office in endeavouring to recover the goods": at 321.
[212] See paras 4–024 *et seq.*, above, where the basis for the recovery of expenses rendered futile by the breach of contract is discussed.
[213] (1860) 6 H. & N. 211.
[214] (1860) 2 L.T. 170.
[215] (1861) 9 C.B. N.S. 632.
[216] (1878) 38 L.T. 226. *Contra Black v Baxendale* (1847) 1 Ex. 410, but Bovill C.J. expressed doubts about this decision in *Woodger v G.W. Ry* (1867) L.R. 2 C.P. 318, pointing out that it had been decided before *Hadley v Baxendale* (1854) 9 Ex. 341.
[217] (1867) L.R. 2 C.P. 318.

3. FAILURE TO CARRY OR TO CARRY TO THE RIGHT PLACE

30–048 Where the defendant has failed to carry the goods at all[218] or has carried them to the wrong place, two alternative measures appear to be open to the claimant to put him in the position he would have been in had the carriage contract been performed. First, he may engage substitute transport to get the goods to the contractual place for delivery and claim as damages the cost of so doing less the price he would have paid under the contract with the defendant, i.e. market rate of freight less contract rate of freight, and in addition the amount by which the price at the place of delivery has fallen between the contractual time for delivery and the arrival of the goods by the substitute transport when this is necessarily later.[219] Or, secondly, he may buy similar goods at the contractual place for delivery and claim the cost of so replacing less the sum of the value of the goods at the place of loading, the amount of freight and the amount of insurance.[220]

30–049 If the circumstances allow of either course of action on the claimant's part, i.e. engaging other transport or replacing with other goods, it would seem that on general principles of mitigation he will be bound to adopt that which is less costly, subject always to the consideration that all that is required of him is to act reasonably. Thus if neither course is clearly the more favourable one he will not at his peril adopt the course which in the result may turn out to be the more costly.[221]

[218] A failure to carry may be constituted in a time charterparty by a delay in providing the ship. This is not a case of delayed delivery of the goods, because the charterer's complaint is not that the goods were delivered late but that there was not time to carry as many goods. This situation is illustrated by *Adamastos Shipping Co v Anglo-Saxon Petroleum Co* [1959] A.C. 133, although the issue before the court was limitation of liability. Viscount Simonds described the charterers' claim thus: "Owing to the delay . . . [the ship] was able to complete fewer voyages than she otherwise would have done within the period of charter. The charterers, therefore, claimed damages in a very large sum, the claim being for the difference between the charter and market rates of freight on cargo-carrying voyages which might have been performed within the eighteen months if she had been continuously fit for service": at 157. And where in a time charter the owners wrongfully repudiated so that they failed to provide the ship for the charter for the entire period, it was held in *Koch Marine v D'Amica Societa di Navigazione, The Elena d'Amico* [1980] 1 Lloyd's Rep. 75 that the difference between the contract rate for the balance of the charter period and the market rate of a substitute ship for that period constituted the normal recovery. In *The Wave* [1981] 1 Lloyd's Rep. 521, where the owners' wrongful repudiation amounted to a failure to provide the ship for the time charter from the start, a gloss was put on this normal recovery so as to award as damages the difference between the contract rate of hire and the market rate not at but shortly after the repudiation, this being on the basis that it would take the charterers a little time to obtain a replacement fixture: at 532, col.1.
[219] *Monarch S.S. Co v Karlshamns Oljefabriker* [1949] A.C. 196. And see *The Kaliningrad* [1997] 2 Lloyd's Rep. 35, at paras 46–006 and 46–007, below, where the damages were for loss of business and profits in addition to the cost of a substitute vessel in a claim in tort for procuring the breach of the claimant's sub-charter with the charterer.
[220] *Stroms Bruks Aktie Bolag v Hutchison* [1905] A.C. 515; see especially at 529, per Lord Davey.
[221] *cf.* Lord Davey in *Stroms Bruks Aktie Bolag v Hutchison* [1905] A.C. 515 at 529, where the claimant successfully claimed the cost of replacement and not the cost of reshipment: "There was evidence that it would have been a speculative and very risky thing to send that quantity to Cardiff [i.e. the contractual destination] or elsewhere for sale without having secured a purchaser, and that prices subsequently fell."

the event include the libel action damages, otherwise recoverable from the now defendant, and was marked out by the costs incurred by the now claimant in the litigation which the settlement was designed to avoid. The details of how these damages were worked out are complex,[74] but those costs which the claimant was considered to have reasonably incurred were held recoverable.

34–020 Finally, and most interestingly, costs only. The recovery as damages of only the costs of litigation is in issue where it is the litigation itself that the defendant, who will be a solicitor, has warranted that he has authority to conduct on behalf of his alleged principal. The main case here is *Yonge v Toynbee*.[75] The principal, against whom the claimant was bringing a libel action, had gone insane, a fact which was initially unknown to the claimant or to the solicitor who had warranted his authority to act for the principal in the action. There was no discussion of what costs were recoverable from the solicitor by the Court of Appeal; Buckley L.J. was simply confident that "the measure of damages is, no doubt, the amount of the plaintiff's costs thrown away in the action".[76] This must mean costs on the then solicitor and client basis. A few years later in *Fernée v Gorlitz*[77] the measure was spelt out. Solicitors had brought an action on behalf of an infant acting, as was legally necessary, by her next friend, the action being to set aside a contract on the ground that it was not for her benefit. When it later turned out that the infant's next friend was also an infant, and therefore incompetent to have authorised the solicitors to commence the proceedings, the parties sued by the infant succeeded in having the action dismissed and in recovering from the solicitors their costs incurred in defending the action. As to which costs, effectively claimed as damages, were recoverable by them, Eve J. asked:

> "Is it the costs which they might have recovered from a competent and solvent next friend if they had succeeded in the action, or is it the expense to which they have been put in consequence of this futile proceeding?"[78]

and decided that it should be the latter, which would be, as in, and therefore following, the preceding *Yonge v Toynbee*,[79] costs on the then solicitor and client basis. Had Eve J. chosen the former measure, he would have been

[74] See, for the details of working out, Scrutton L.J. at *ibid.* 646 to 647 and Greer L.J. at 655 to 656. They were not quite in agreement and Slesser L.J., at 657, supported Scrutton L.J.

[75] [1910] 1 K.B. 215 CA.

[76] [1910] 1 K.B. 215 CA 229; Swinfen Eady J. simply said that the defendant was "liable to pay the costs of the party misled": *ibid.* 231. Actions for breach of warranty of authority apart, the court has an inherent jurisdiction to order solicitors commencing proceedings without the authority of their apparent client to pay the costs incurred by the opposing party in consequence of the solicitors' unauthorised conduct. *Yonge v Toynbee* appears to have been such a case. See too, coming to the same result, *Simmons v Liberal Opinion Ltd* [1911] 1 K.B. 966 CA and *Babury Ltd v London Industrial Plc* (1989) 189 N.L.J. 1596.

[77] [1915] 1 Ch. 177.

[78] *ibid.* at 181.

[79] [1910] 1 K.B. 215 CA.

awarding costs on the then party and party basis since this is what would have been recovered from the infant's next friend had there been no breach of warranty of authority and had the action proceeded to an unsuccessful conclusion for the infant. Put in today's terms, a party suing for breach of warranty of authority—the promisee of the warranty—is here held entitled to recover all of the costs reasonably incurred by him and not merely standard basis costs.[80]

It will be seen that this result assumes that the promisee of the warranty is 34–021 not here claiming the normal measure of contract damages to put him in the position he would have been in if the contract had been performed, in other words, if the warranty had been true. While this may not seem strange in this context as the contract of warranty of authority is a very peculiar sort of contract, one with overtones of tort, it is in any event as it should be since, whatever the contract, a contracting party, faced with a breach by the other contracting party, is entitled to elect to claim for wasted expenditure, otherwise called expenditure rendered futile by the breach, and ignore claiming for the benefit of his bargain. This was called by Hutchinson J. in *C.C.C.Films (London) Impact Quadrant Films*[81] an unfettered choice.[82] Thus Colman J., in stating in *Skylight Maritime SA v Ascot Underwriting Ltd*[83] that it is important not to lose sight of the fact that the court is concerned to quantify what benefit has been lost by reason of the fact that the alleged principal is not after all a party to the proceedings,[84] himself loses sight of the entitlement of the promisee of the warranty to elect for the alternative measure of wasted expenditure.

It should be noted, however, that Eve J. in *Fernée v Gorlitz*[85] referred to the 34–022 promisee succeeding in the action with the alleged principal and to the alleged principal being solvent.[86] Thus it is thought that the promisee of the warranty of authority may not be entitled to claim his costs thrown away if in the action against the alleged principal he would have been the loser. For here it may be said that by the premature ending of the claim he will have been spared having to pay costs, or even damages and costs, to the other party. Of course it would be for the party warranting authority to show that the promisee would have lost and this may be difficult, or impossible, for him to do. Nor may the promisee be entitled to the costs thrown away if, though he would have won the action, he would have won it against an alleged principal who was insolvent. Here it may be said that he would have been faced with the inability

[80] This should still be so today even if the new regime with its allowance of standard basis costs only—the regime explained and criticised at paras 20–003 to 20–011, above—is finally accepted.

[81] [1985] Q.B. 16 at 32A to D.

[82] See generally paras 4–024 *et seq.* and especially *Anglia Television v Reed* [1972] 1 Q.B. 60 CA.

[83] [2005] P.N.L.R. 25.

[84] At *ibid.* para.16.

[85] [1915] 1 Ch. 177.

[86] See para.34–021, above.

Parkside Homes,[333] a case which involved not trespass to land but sale of land,[334] and by being a year late lost his place in legal history as damages of this nature are now, 40 years on, universally referred to as "*Wrotham Park* damages" whatever the tort or contract concerned.

37–061 Before turning to the many cases which have appeared since *Bracewell v Appleby*[335] it is worth indicating briefly how in this context the courts have rationalised the recovery of damages. Two rationalisations have surfaced. The one relies on the so-called user principle whereby a person whose property has been used by another without consent should be entitled to claim the amount that giving permission for use of the property would have cost. The other is that the property owner has been deprived of a bargaining opportunity. Together the two rationalisations lead to what has now become the accepted way of calculating the damages by way of a hypothetical licence fee. The difficulty is that neither approach is easy to square with the compensatory role of damages; as to the first there is no loss to the claimant where he would not have used the property himself and as to the second the bargaining opportunity is in most cases one that the claimant property owner would have refused.[336] However, the turn of the century has seen the arrival of restitutionary damages which permits a new rationalisation for future cases, a rationalisation which can lead to different levels of recovery.

37–062 In a number of the cases adopting the same approach in awarding damages in lieu of a mandatory injunction as appeared in the opening case of *Bracewell* it was a right to light that had been infringed.[337] This was so in *Carr-Saunders*

[333] [1974] 1 W.L.R. 798, where only 5% of profit was awarded. But then the profit was £50,000 as compared with the £5,000 in *Bracewell*.

[334] See details of the case at para.25–053, above.

[335] [1975] Ch. 408.

[336] For all this in more detail see paras 14–006 and 14–007, above. *Severn Trent Water Ltd v Barnes* [2004] 2 E.G.L.R. 95 CA is an interesting case among the cases about to be considered because, unusually, it is a case where the rationale of loss of business opportunity makes some sense.In laying a water main in the exercise of its statutory functions the defendant water undertaker committed a trivial, accidental and unintentional trespass by placing part of the main under the extreme corner of an over two acre parcel of the claimant's grazing land. As a statutory undertaker the defendant had been entitled to enter on land and do the mains work subject only to service of notice on the landowner affected and, later, to payment to him of compensation which, in the absence of agreement, would be assessed by the Lands Tribunal. The defendant had not served notice on the claimant because unaware of his land ownership and, when the true position was discovered after the main had been constructed, it was too late for an injunction and damages were claimed. Here the water undertaker under its statutory powers could require a landowner to give up to it the use of his land, in which circumstances it is right to say that the landowner has lost the opportunity to negotiate compensation before the trespass, and, with no choice but to let the defendant proceed, would have bargained for as much compensation as he could muster. At the same time the fact that the defendant could require the claimant to give up the use of his land serves to explain why the amount finally awarded was small compared with awards in other cases. This was, as the Court of Appeal pointed out (*ibid*. para.39), not only because loss and benefit were insignificant but also because in all the authorities cited the defendant would have been unable to proceed without the claimant owner's permission thereby placing him in a much stronger position to negotiate a price or licence fee prior to trespass, being constrained only by market forces.

[337] In *Snell & Prideau v Dutton Mirrors* [1995] 1 E.G.L.R. 259 CA, the infringement of the easement, there a right of way rather than a right to light, was dealt with as wrongful damage rather than wrongful user: see the case at para.37–016, above.

v Dick McNeil Associates[338] where, evidence of the amount of profit the defendants would have made from development of their site being lacking, £8,000 was awarded by way of general damages.[339] In *Deakins v Hookings*,[340] where the infringement had reduced the value of the property by an estimated £1,500, damages were assessed at £4,500 on what was referred to by the trial judge as the user principle.[341] A mandatory injunction was indeed granted here, the assessment of damages being a precaution should there be a successful appeal against the injunction. So too in *HKRUK II (CHC) Ltd v Heaney*[342] a mandatory injunction was awarded but a computation of damages for the infringement was also made, the trial judge taking into account a number of factors to reach £225,000 as the amount that he considered right for the hypothetical licence between the dominant and servient owners. In *Tamares (Vincent Square) Ltd v Fairpoint Properties (Vincent Square) Ltd*[343] infringement of a right to light led to an award based on a substantial proportion of the defendant's profit, but the trial judge simply followed the earlier *Bracewell* and *Carr-Saunders*; the possibility of a restitutionary approach does not appear to have been even raised with him.

37–063 Most of the cases have involved a defendant who has built, or otherwise interfered, over the line. In *Stadium Capital Holdings v St Marylebone Properties Co Plc*,[344] the trespass arose from the defendant's advertising hoarding intruding into the airspace of the claimant's land. Here the Court of Appeal accepted that the damages should be awarded on a restitutionary basis but regarded this as generally meaning a hypothetical licence fee for the trespasser's occupation of the land. The judge was considered wrong, in the circumstances of the case, to have thought in terms of awarding all of the defendant's gains; this amounted to an account of profits. The case was sent back for a reassessment which it fell to Vos J. to make in *Stadium Capital Holdings (No.2) Ltd v St Marylebone Properties Co Plc*.[345] On damages Vos J. started from the position that the parties were in agreement that a hypothetical licence fee was the appropriate way of going about the assessment[346] and that what was in dispute concerned the factors to be taken into account in arriving at the hypothetical licence fee. Vos J. proceeded to conduct a useful review of the relevant authorities[347] and concluded that, in the light of the claimant's holding the trump card of being able to stop the defendant's retention of the hoarding in its place, the hypothetical licence fee should be half of the expected net revenue that the defendant would receive from a

[338] [1986] 1 W.L.R. 922.

[339] *ibid*. at 931C to 932A.

[340] [1994] 1 E.G.L.R. 190.

[341] *cf*. for this principle para.37–050, above.

[342] [2010] EWHC 2245 Ch.

[343] [2007] 1 W.L.R. 2167.

[344] [2010] EWCA Civ 952 CA.

[345] [2011] EWHC 2856 Ch.

[346] *ibid*. para.56.

[347] *ibid*.paras 57 to 68.

In addition, the view that the need to make a discount for the possibility of earlier death is a misconception has been robustly championed by the House of Lords in *Thomas v Brighton Health Authority*,[560] one of the cases in the *Wells v Wells* trilogy.[561] While this holding of their Lordships was in the context of the cost of care,[562] it must apply equally where loss of earnings is concerned.[563]

(2) *Contingencies other than mortality*

38–129 **(a) In general.** Some degree of discount is appropriate for factors other than mortality, for such possibilities as unemployment or failure in business, illness or accident of a non-fatal kind. As Diplock L.J. pointed out some time ago in *Whittome v Coates*,[564] even the second pair of these factors—sickness and accidental injury—are "not reflected in the Registrar-General's tables, because he is concerned with life and death, not with healthy life and unhealthy life so long as life continues".[565] The same is true of the Ogden Tables which, mortality apart,

> "do not take account of the other risks and vicissitudes of life, such as the possibility that the claimant would for periods have ceased to earn due to ill-health or loss of employment."[566]

That a discount is required on such grounds is fully recognised by the courts. Thus at the highest level this was accepted by their Lordships in the *Wells v Wells* trilogy[567]; in *Thomas v Brighton Health Authority*[568] the concession by counsel for the claimant that there is room for a judicial discount when calculating loss of earnings was taken to be correct[569] and in *Page v Sheerness Steel Co*[570] discounts in respect of the claims for loss of earnings and for loss of pension, of a level yet to be considered,[571] were made.

[560] [1999] 1 A.C. 345.
[561] See para.38–120, above.
[562] See para.38–215, below.
[563] And indeed it was an earnings award that the Privy Council had to increase in *Eaton v Johnston* [2008] UKPC 1 on account of the Court of Appeal of the Cayman Islands having, in using Ogden, made a further discount for the possibility of earlier death: see *ibid.* paras 35 to 40.
[564] [1965] 1 W.L.R. 1285 CA; a wrongful death case.
[565] *ibid.* at 1292; cited by Edmund Davies L.J. in *Mitchell v Mulholland (No.2)* [1972] 1 Q.B. 65 CA at 76 to 77. As Lord Diplock he made the same point in *Mallett v McMonagle* [1970] A.C. 166 at 176.
[566] 7th edn (2011) Explanatory Notes, para.19.
[567] See para.38–120, above.
[568] [1999] 1 A.C. 345.
[569] *ibid.* at 378D. Lord Lloyd, only in whose speech the issue of contingencies was fully considered (at 377H to 379G), accepted the concession on the basis that in the case of loss of earnings, as opposed to costs of care, "the contingencies can work in only one direction—in favour of the defendant" (*ibid.* at 378D); yet it is not thought that this is entirely correct in the light of the quotation at para.38–139, below, from *Bresatz v Przibilla* (1962) 108 C.L.R. 541 (High Ct. of Australia).
[570] [1999] 1 A.C. 345.
[571] See paras 38–133 *et seq.*, below.

38–130 Before turning to the question of the appropriate level of discount, a word should be said about the manner in which the courts effect the discount. The method is of course well known; the multiplier is simply reduced by a specified number. In earlier days courts used to produce a number on impressionistic lines without any real explanation of how it has been arrived at. The alternative method, which has come to be used, has been for the court to relate the number by which it is reducing the multiplier to a percentage by which the multiplier is discounted.[572] This is by far the better method as it alone makes clear the precise amount of discount that is being applied. Also, it may not have been appreciated that what appears as a small impressionistic decrease in the multiplier will constitute a large percentage decrease in the multiplier. Thus it only needs a reduction of one in the multiplier to produce a 4 per cent discount on a multiplier of 25 moving up to a 10 per cent discount on a multiplier of 10, while a reduction of two in the multiplier gives an 8 per cent discount on a multiplier of 25 moving up to a 20 per cent discount on a multiplier of 10. In any event, the days of impressionistic reductions of the multiplier have fortunately gone and are a thing of the past.

38–131 The Ogden Tables, since the second edition in 1994, have given guidance on how to adjust for contingencies other than mortality, use this better method and arrive at the discount by specified percentages set out in Tables appearing in Section B of the Explanatory Notes. However, Ogden goes about the exercise in a different way, though one ending up with the same results. Instead of applying a percentage discount, say 10 per cent, to the multiplier, the method used is to multiply the multiplier by a figure which represents the percentage remaining after the discount. Thus to achieve a discount of, say, 8 per cent, Ogden will multiply the multiplier by 0.92. It is done this way to make for ease in calculation; only one operation has to be carried out, viz., multiply by the figure given, rather than two operations, *viz.*, multiply by the discount and subtract the resulting figure from the multiplier. Nevertheless we shall continue here to speak generally in terms of percentage discounts as this makes clearer what is the precise effect of the contingencies adjustment to the multiplier.

38–132 A methodology for assessing contingencies other than mortality is set out in the Ogden Tables. Initially, from 1994, the factors of occupational types and geographic location were thought to be the ones important for the making of the assessment. Later, a new methodology, which has very important consequences, was introduced in the 6th edition of 2007 and repeated in the current 7th edition, replacing the methodology set out in earlier editions with Section B of the explanatory notes entirely recast. The new approach was based upon recent research, the findings of which have shown that educational attainment is a key factor which, when allowed for, makes relatively small the effect of the earlier factors of occupational types and geographic location, which were

[572] Though it has sometimes been a little difficult to marry the reduction in the multiplier with the percentage discounted.

them to be generally of little or even no size. Thus no discount is required where the deceased was 40 or under at the date of death and the trial was within the next three years; changing the age to 60 at death, still with trial within three years, only requires a 2 per cent discount where the deceased is male and 1 per cent where female. Post-trial losses are, as before, based upon the lesser of two periods, namely the expected period for which the deceased would have been able to provide the dependency and the expected period for which the dependant would have been able to receive the dependency.[271] Again, a discount has to be made to allow for the possibility that the deceased might not have survived to trial to provide any post-trial dependency. The necessary discounts are again set out in a convenient table, Table F, in Ogden[272] which again shows them to be of little or even no size, until one gets to ages of 70 and over, though they are somewhat larger than the Table E discounts for pre-trial losses. Detailed illustrations are given in Ogden, the first one[273] positing a trial three years after the death of a man at 37 and coming up with an award of £538,500 if the multiplier is taken at the date of his death but an award of £573,300 if the multiplier is taken at the date of the trial. The disparity between the two amounts will increase, and can increase significantly, as the years between death and trial increase.

39–056 The courts, of course, must first be persuaded to adopt this scheme of calculation which is both more rational and much fairer to claimants. Do the decisions of the House of Lords in *Cookson v Knowles*[274] and *Graham v Dodds*[275] stand in the way? Both the Law Commission and the Ogden Working Party thought not,[276] taking the view that the whole position has been radically changed by the House of Lords in *Wells v Wells*[277] authoritatively laying down for the first time that the Ogden Tables should be the starting point for the assessment of damages for future pecuniary loss—as Lord Lloyd put it, it was "a new approach". However, we consider that what was said in *Wells v Wells* on a very different issue is insufficient to overturn, or sidestep, *Cookson* and *Graham*. This certainly was the view of Nelson J. in *White v ESAB Group (UK) Ltd*[278] where he felt himself bound by the earlier House of Lords decisions still to calculate the multiplier from the date of death, although he personally was persuaded of the merits and correctness of the new

[271] Separate calculations have to be made for before retirement age and after retirement age where retirement is likely to affect the level of support, as in the commonest case of the death of the family breadwinner, but this is not required where retirement is of no significance for the calculation, as with a deceased wife and mother rendering domestic services or a grown-up child supporting elderly parents. But this is all as before.

[272] At p.26.

[273] Example 7 at pp.27 to 28.

[274] [1979] A.C. 556.

[275] [1983] 1 W.L.R. 808 HL.

[276] See para.4.20 of the Law Commission Report and para.6 of the Introduction to the 4th edition of the Ogden Tables. Not said in the later editions but it does remain the view of the Working Party (of which the author is a member).

[277] [1999] 1 A.C. 345.

[278] [2002] P.I.Q.R. Q6, p.76.

thinking.[279] The Court of Appeal has twice endorsed Nelson J., both times stating that it found his reasoning cogent. This happened first in *H v S*[280] where however the precedent of *Cookson* required the rejection of the trial judge's bold use of the new Ogden Tables.[281] Then in *A.Train & Sons Ltd v Fletcher*,[282] in holding that the trial judge could not get round *Cookson* by awarding interest on future as well as past loss and at full rate on both, Sir Mark Potter P. found the Ogden proposal an attractive solution[283] but that the House of Lords was the appropriate forum for reconsideration[284] while Hooper L.J. expressed the hope that the House would reconsider *Cookson*.[285] The time has surely come for a case to be taken to the Lords so that this important improvement in the law can be implemented and, while it looked for a time that *Train* itself would go to the Lords, the case appears to have settled. Scotland has now legislatively abandoned *Cookson v Knowles* and adopted the true rule. Section 7(1)(d) of the Damages (Scotland) Act 2011 provides that

> "any multiplier applied by the court—
>
> (i) is to run from the date of the interlocutor [i.e. judgment] awarding damages, and
>
> (ii) is to apply only in respect of future loss of support".

(iv) Expectation of life of deceased and dependants. As with personal injuries, **39–057** calculation of the multiplier will frequently require a calculation of the expectation of life, or of the working life,[286] of the victim, but with fatal injuries there is the additional factor that the expectation of life of the dependant as well as that of the deceased must be taken into account.[287] Indeed, where the dependant is a parent and the deceased a son or daughter, the controlling life expectancy will be that of the dependant rather than that of the deceased, and it was submitted in the editions of this work since *Cookson*, and *Graham v Dodds*,[288] that here it would be appropriate, the dependant still

[279] *ibid.* at paras 27 and 43.

[280] [2003] Q.B. 965 CA.

[281] *ibid.* at para.36.

[282] [2008] EWCA Civ 413 CA.

[283] *ibid.* para.36.

[284] *ibid.* para.40.

[285] *ibid.* para.41.

[286] Any prospect of early retirement may be taken into account: *Robertson v Lestrange* [1985] 1 All E.R. 950; especially 954h. But contrast para.39–077 (in a footnote), below.

[287] *Price v Glynea and Castle Coal Co* (1915) 85 L.J.K.B. 1278 CA at 1282, per Bankes L.J. ("where a claim is made under Lord Campbell's Act . . . it is not only a question of the expectation of life of the deceased man, but there is also a question of the expectation of life of the claimant"), cited with approval by McCardie J. in *Barnett v Cohen* [1921] 2 K.B. 461 at 472; and see also *Feay v Barnwell* [1938] 1 All E.R. 31 at 35. It has been held, however, in *Baugh v Delta Water Fittings* [1971] 1 W.L.R. 1295, to be wrong in principle to stay a widow's claim until she has submitted to a medical examination: see especially at 1301 to 1302. But see the analogous personal injury cases in the first footnote to para.38–101, above.

[288] [1983] 1 W.L.R. 808 HL.

to damages for distress at the publication of the unauthorised photographs and assessed the damages at £3,750 each.[15] This award was not challenged in the Court of Appeal.[16]

45–005 Then there are cases which do not involve a claimant who is well-known to the public or a defendant who is part of the media. In *Cornelius v de Taranto*[17] there was neither. The claimant was a teacher suing a consultant psychiatrist for the unauthorised disclosure and dissemination of a medico-legal report concerning her; £3,000 in damages was awarded for injured feelings.[18] In *Archer v Williams*[19] the claimant Lady Archer, herself well-known, was much in the public eye because of her husband's being successfully prosecuted for perjury; the defendant was her secretary and personal assistant who had revealed to the press details of her employer's personal and business affairs obtained in the course of her many years of employment by the claimant. An award of £2,500 for injured feelings was made. In *McKennitt v Ash*[20] too the claimant was renowned, here as a composer and performer of folk music; she was objecting to revelations about her personal and business life in a book written by a former friend and colleague, the defendant. What was termed a relatively modest £5,000 was awarded for hurt feelings and distress.[21]

45–006 Then, with a far larger amount awarded, came *Mosley v News Group Newspapers Ltd*.[22] where once again there was a celebrated claimant and a media defendant. A newspaper proprietor had published articles which gave lurid and explicit details of a gathering at which a well-known figure in the racing world had indulged in sado-masochistic practices with prostitutes; the articles also alleged that the gathering had involved an enactment of Nazi behaviour, including a mocking of the victims of the Holocaust. The sado-masochistic practices had indeed taken place but there was no truth in the suggested Nazi overtones. Consideration by Eady J. of this bizarre scenario led to an award in damages of £60,000.

45–007 Eady J.'s award is likely to have included an element of aggravated damages[23] but certainly had no element of exemplary damages which he declined to award.[24] What, however, certainly appears to have been included in the award is an amount, possibly large, on account of vindicatory damages, not by way of vindication of reputation, as appears in defamation, but in the sense of vindication to mark the infringement of a right. Following on from Eady J.'s decision in *Mosley* it was argued in the last edition of this work that

[15] *Douglas v Hello! Ltd* [2004] E.M.L.R. 2, p.13; see at paras 56 and 57.
[16] *Douglas v Hello! Ltd* [2006] Q.B. 125 CA at para.110.
[17] [2001] E.M.L.R. 12, p.329.
[18] Damages were not in issue on the appeal at [2002] E.M.L.R. 6 CA, p.112.
[19] [2003] E.M.L.R. 38, p.869.
[20] [2006] E.M.L.R. 10, p.178.
[21] *ibid.* p.178, para.162. On the appeal, at [2008] Q.B. 73 CA, damages were not addressed.
[22] [2008] E.M.L.R. 20, p.679.
[23] See on this para.45–011, below. It is just possible that it may also have included an element of mitigation of damages: see on this para.45–012, below.
[24] See on this para.45–014, below.

it was by no means established and indeed was inappropriate that the infringement of a right could lead to an award of vindicatory damages, such damages being a far cry from compensation for loss. Since then the Supreme Court in the false imprisonment case of *R.(on the application of Lumba (Congo)) v Secretary of State for the Home Department*[25] has adopted the same view and held, admittedly only by a majority of six to three, that the infringement of a right does not in our law give an entitlement to vindicatory damages. The reasoning of Eady J. and the contrary approach of the majority of the Supreme Court Justices are treated in detail in the chapter on vindicatory damages[26] and need not be repeated here. This sensible development makes it clear that what Eady J. said in *Mosley* on vindicatory damages and privacy has been overtaken by the Supreme Court's decision in *Lumba*.[27] Vindicatory damages will now be confined to the protection of reputation, primarily where defamation is concerned.[28]

45–008 In any event it is thought that, ideas of vindication apart, the figure of £60,000 can be regarded as justifiable simply as *solatium* for injury to feelings, distress and loss of standing in the community. The very fact that the damage, once it is done, is irreversible must in itself surely add to the need for *solatium*. Putting on one side, as Eady J. did, moral disapproval of the claimant's activities, it is obvious that here the invasion of privacy had a far more serious effect than any of the invasions considered above where sums of only a few thousand pounds have been awarded. Thus it is significant that Eady J., when coming to his figure of £60,000, commented that the claimant was hardly exaggerating in asserting that his life was ruined by what had happened.[29] While undoubtedly *Mosley* is an extreme case, higher awards than in the early days are already being both proposed and made in cases which may be regarded as of a more usual nature. Even before *Mosley* was decided, Lord Phillips M.R., giving the judgment of the Court of Appeal in the one episode of the copious *Douglas v Hello! Ltd* litigation which went that far, but in an appeal on pecuniary rather than non-pecuniary loss, remarked that he thought that the combined £7,500 awarded to the two film star claimants for their distress was very modest in the context of the particular litigation.[30] After *Mosley*, Tugendhat J. showed himself clearly to favour higher damages than were awarded in the early privacy cases, commenting in *Spelman v Express Newspapers*,[31] a human rights and injunction case, that it can no

[25] [2012] 1 A.C. 245.
[26] Ch.16, above. See paras 16–013 to 16–015.
[27] Thus Nicola Davies J., in arriving at £15,000 for her award of damages for breach of the right to privacy in *AAA v Associated Newspapers Ltd* [2012] EWHC 2103 QB (facts at para.45–008, below), decided more than a year after *Lumba* in the Supreme Court, was wrong to take into account Eady J.'s support in *Mosley* of vindicatory damages in privacy cases: *ibid.* paras 126 and 127. In affirming, this was not touched upon by the Court of Appeal: [2013] EWCA Civ 554 CA.
[28] See Ch.16 above, at paras 16–002 *et seq.*
[29] [2008] E.M.L.R. 20, p.679 at para.236.
[30] [2006] Q.B. 125 CA at para.110. See the case at para.45–004, above.
[31] [2012] EWHC 355 QB at para.114.

be on the low side as compared with tortious awards, that English courts should be free to depart from the scale of damages awarded by the European court and that English awards by appropriate courts or bodies should provide the appropriate comparator. In calculating awards for anxiety and frustration, counsel suggested, the scales of damages awarded by English courts and tribunals in discrimination cases provided an appropriate comparison.

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

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

Thirdly, section 8(4) requires a domestic court to take into account the principles applied by the European court under article 41 not only in determining whether to award damages but also in determining the amount of an award. There could be no clearer indication that courts in this country should look to Strasbourg and not to domestic precedents. The appellant contended that the levels of Strasbourg awards are not "principles" applied by the court, but this is a legalistic distinction which is contradicted by the White Paper and the language of section 8 and has no place in a decision on the quantum of an award, to which principle has little application. The court routinely describes its awards as equitable, which I take to mean that they are not precisely calculated but are judged by the court to be fair in the individual case. Judges in England and Wales must also make a similar judgment in the case before them. They

> are not inflexibly bound by Strasbourg awards in what may be different cases. But they should not aim to be significantly more or less generous than the court might be expected to be, in a case where it was willing to make an award at all."

48–027 In the English courts, important and valuable contributions to the search for principle and the identification of a principle to distinguish between cases where damages should be awarded and where a finding of breach should be regarded as sufficient just satisfaction have been provided by Laws L.J. in the Court of Appeal, and Lords Reed and Carnworth in the Supreme Court, in *R. (Sturnham) v Parole Board*.[79] This case included a claim for damages under section 8 HRA for breach of Article 5.4 where the defendant's consideration of the release of the claimant, who had been convicted of manslaughter and sentenced to an indeterminate term of imprisonment for public protection, was wrongly delayed by six months. The decision then reached was actually to refuse his release, so the delay did not result in the claimant being incarcerated for longer than he should have been. The trial judge awarded the claimant damages of £300 for frustration and anxiety. This was overturned by the Court of Appeal, but reinstated by the Supreme Court. Giving the judgment of the court, Laws L.J. contrasted the position in English law where damages for breach of a private law wrong are generally a matter of entitlement and breach of a public law wrong where damages are not generally recoverable. Applying a similar distinction to claims for damages under Article 5 (but there seems no reason why this should not apply to any claim for damage under section 8), he said:[80]

> "Now, the distinct territory of section 8 is marked by the fact that the defendant is a public authority and the wrong is a violation of the Convention. Depending on the facts this territory is often a closer neighbour to our public than to our private law. That circumstance brings into focus a distinction of some significance in the search for principle. It is between cases where the violation of the Convention right has an outcome for the claimant which constitutes or is akin to a private wrong, such as trespass to the person, and cases where the violation has no such consequence."

In applying this principle, Laws L.J. drew support from the judgment of Lord Bingham in *Greenfield's case*.[81] As also observed by Laws L.J., the distinction between cases where the violation amounts to a private law wrong and those where it does not is reflected in some of the Strasbourg cases.[82]

[79] [2013] 2 A.C. 254.
[80] *ibid.* para.15.
[81] [2005] 1 W.L.R. 673; see further para.48–026, above.
[82] See, for example, *Migon v Poland* (Application No.24244/94); *Nikolova v Bulgaria* (2001) 31 E.H.R.R. 3; and *Niedbala v Poland* (2000) 33 E.H.R.R. 1137, para.88.

to the deference that was to be shown to jury awards in defamation cases, to the large percentage differences between the juries' awards and those substituted for them in the cases in which the Court of Appeal had been prepared to intervene[101] and to the fact that the increase in the maximum award of general damages in personal injury cases[102] had had the effect of raising the ceiling for juries' libel awards to almost twice the sum awarded here. Simon Brown L.J. proposed a revised procedure for the use of damages brackets and damages comparables in defamation cases tried with juries[103]: and Sedley L.J., not unreasonably, dissented basically because he thought that the disparity with personal injury awards was still too great.[104] Though the principle espoused in *Kiam* remains good law, it is unlikely that today's Court of Appeal would be quite so deferential towards a jury's beyond bracket generosity. As Lord Judge LCJ troubled to observe in *Cairns v Modi*[105]:

> "In *John v MGN*[106] Ltd this court offered guidance about practical steps which might be adopted to assist in the assessment of damages. It was said, for example, that jurors could properly be informed as to earlier libel awards approved or substituted by this court, and also take into account brackets suggested by counsel or by the judge as appropriate to the facts before them. Hitherto, the convention had been to refrain from mentioning such figures to a jury. It was also suggested that reference could be made to the current conventional scale of compensatory damages being awarded in respect of pain and suffering in personal injury cases, not because there could be any precise correlation, but merely as one check on the reasonableness of any figure being considered as an award in libel proceedings. It has now become conventional also to recognise in effect a "ceiling" figure, allowing periodically for inflation, corresponding to the current maximum level of damages for pain and suffering and loss of amenity in personal injury cases . . . the present equivalent, allowing for inflation, and without taking account of any uplift consequential on what are usually described as the Jackson reforms taking effect in April 2013, would be of the order of £275,000. These steps have made for greater consistency in and more predictable libel awards."

Having introduced these conventions with the deliberate intention of moderating unbridled awards, it seems inevitable that, were a jury nevertheless to award damages out of proportion to the tenor of judicial guidance, the appellate Court would regard interference as requisite.

[101] For these cases, see para.51–021, below.
[102] For which see paras 38–273 *et seq.*, above.
[103] See his postscript at [2003] Q.B. 281 CA, para.54.
[104] See his interesting judgment at *ibid.* paras 61 to 78 and the case further at para.51–021, below.
[105] [2012] EWCA Civ 1382 CA.
[106] [1997] Q.B. 586 CA.

(1) *Where the measure of damages is very flexible*

Defamation lies at the heart of this category and it is an action for defamation, 51–020
Rantzen v Mirror Group Newspapers,[107] which served to initiate a more ready interference with jury awards in the wake of the power to reassess damages. The claimant, a television presenter and the founder of a charity for sexually abused children, was awarded £250,000 compensatory damages[108] by a jury in respect of articles in a national newspaper alleging that she had protected a teacher suspected of being a paedophile and was therefore insincere and hypocritical. The Court of Appeal reduced the award to £110,000. Neill L.J., giving the judgment of the court, said:

> "We consider . . . that the common law if properly understood requires the courts to subject large awards of damages to a more searching scrutiny than has been customary in the past. It follows that what has been regarded as the barrier against intervention should be lowered. The question becomes could a reasonable jury have thought that this award was necessary to compensate the plaintiff and to re-establish his [*sic*] reputation?"[109]

In coming to this conclusion the court took into account not only its new power to substitute its own for the jury's award but also the relationship between the common law and Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms which, though not part of English domestic law at the time, provides for the right to freedom of expression and for any restrictions thereon to be prescribed by law and to be necessary in a democratic society.[110]

The result of the decision in *Rantzen*[111] is that effectively all of the 20th 51–021
century case law on appeals against excessive awards where the measure of damages is very flexible becomes otiose since that case law is entirely dominated by libel.[112] After a dearth of successful appeals for a new trial in

[107] [1994] Q.B. 670 CA.
[108] Exemplary damages were not sought.
[109] [1994] Q.B. 670 CA at 692G to H.
[110] Art.10 is set out [1994] Q.B. 670 CA at 685H to 686B.
[111] [1994] Q.B. 670 CA.
[112] The libel cases are fully treated in paras 1828 to 1830 of the 15th edition (1988) of this work. Outside libel one can point in the last century only to *Mechanical & General Inventions Co v Austin* [1935] A.C. 346 (breach of contract concerning patent) and *Loudon v Ryder* [1953] 2 Q.B. 202 CA (assault) in both of which a new trial was refused and to *Dunhill v Wallrock* (1951) 95 S.J. 451 CA (breach of promise of marriage) where a new trial was granted.

correct. And in *Morgan v UPS Ltd*,[190] a personal injury claim, though satisfied that the Recorder's approach to loss of earning capacity and loss of future earnings gave rise to justifiable concern that he had double counted, thereby warranting reappraisal, the Court of Appeal nevertheless held that the combined total awarded was not so excessive that it should be interfered with on appeal.[191]

(2) *Entirely erroneous estimate*

51–032 The distinction taken in relation to awards made by a jury between cases where the measure of damages is very flexible and cases where it is more fixed,[192] is also pertinent to awards made by a judge sitting alone.

51–033 **(a) Where the measure of damages is very flexible.** There are not many cases in the reports where the measure of damages is at large which give assistance, since such cases are of the type still commonly tried with a jury. During the Second World War several defamation cases decided by a judge sitting alone offer some guidance. In *Rook v Fairrie*[193] the Court of Appeal refused to increase the damages awarded by the judge: this refusal was based on the view that, since the judge had been able to express his views on the grossness of the libel in his judgment, he was entitled to award less damages than would a jury, who can only express their similar views by giving heavy damages. Later defamation cases, however, have not endorsed this rule. In *Bull v Vazquez*[194] the Court of Appeal, unimpressed by *Rook v Fairrie*,[195] refused to reduce the damages awarded by the judge, as the judge had in the court's view assessed the damages at a high level because he thought the slander a particularly heinous one.[196] In *Knuppfer v London Express Newspaper*,[197] however, the Court of Appeal, although again unprepared to accept the rule put forward in *Rook v Fairrie*,[198] was emphatic that it would have

[190] [2008] EWCA Civ 375 CA.

[191] Similar is *Smithurst v Sealant Construction Services Ltd* [2012] Med L.R. 258 CA, a personal injury claim in which the court was required to quantify damages for a disc prolapse attributable to the defendant employer's breach of duty. While holding that the judge had erred in law by treating issues as to whether the claimant would have suffered from a similar disc prolapse in the future and, if so, when, as ones of causation rather than ones of the assessment of the claimant's damages, the Court of Appeal nevertheless concluded that the judge's decision to the effect that the claimant would have suffered a similar injury within two years of the material accident was an entirely permissible one.

[192] See paras 51–019 *et seq.*, above.

[193] [1941] 1 K.B. 507 CA.

[194] [1947] 1 All E.R. 334 CA.

[195] [1941] 1 K.B. 507 CA.

[196] [1947] 1 All E.R. 334 CA at 336, per Asquith L.J. The slander alleged that the claimant army officer had been posted home for drinking; the judge had awarded £1,000. *Cf. Williams v Settle* [1960] 1 W.L.R. 1072 CA, where the Court of Appeal refused to reduce the damages awarded by the judge in respect of a flagrant infringement of copyright (see especially at 1086 to 1087): facts at para.46–060, above.

[197] [1943] K.B. 80 CA.

[198] [1941] 1 K.B. 507 CA.

reduced the damages had it not allowed the appeal by the defendant on the issue of liability,[199] Mackinnon L.J. taking the view that the amount awarded "was an extravagance that the most reckless jury would hardly have achieved, and one which should not have been committed by a judge sitting alone".[200] In *Dingle v Associated Newspapers*[201] the House of Lords firmly and unanimously disapproved the *Rook v Fairrie* rule; the disapproval was, however, strictly *obiter* as it did not appear that the judge at first instance had awarded smaller damages because he had expressed his views in his judgment.[202] The *obiter dicta* of their Lordships in *Dingle v Associated Newspapers* were themselves disapproved by the Court of Appeal in *Purnell v Business Magazine Ltd*[203] where Laws L.J. held that the existence of a prior reasoned judgment rejecting a justification defence was at least capable of providing some vindication of a claimant's reputation with the result that the earlier judgment should be taken into account by the damages tribunal depending upon the latter's view of its impact on the vindication issue. If it ever was, this aspect of *Dingle* can therefore no longer be regarded as good law.[204] In *R. v Governor of Brockhill Prison Ex p. Evans (No.2)*[205] a claim for false imprisonment included in an application for leave to apply for judicial review and *habeas corpus* and heard by Collins J. without a jury, the Court of Appeal increased his basic award of damages for the false imprisonment, neither aggravated nor exemplary damages being appropriate, from £2,000 to £5,000 and the House of Lords approved this increase.[206] In the Court of Appeal reference was made to another case of false imprisonment, the unreported *Lunt v Liverpool City Justices*,[207] where the Court of Appeal increased an award of £13,500 to £25,000.[208] *Doshoki v Draeger Ltd*[209] illustrates an entirely erroneous estimate[210] in racial discrimination. The tribunal's award of £750 as compensation for injury to feelings was increased to £4,000. In *Vento v West Yorkshire Police*,[211] a claim for sexual discrimination, an award of £65,000 was felt by the Court of Appeal to be "seriously out of line".[212]

[199] The House of Lords affirmed on this issue: [1944] A.C. 116.

[200] [1943] K.B. 80 CA at 86. Yet Lord Atkin in the House of Lords, while accepting that "the damages awarded are possibly too high", indicated that he would not have interfered with the award had the House held for the claimant on liability: [1944] A.C. 116 at 122. See, too, the Court of Appeal's reduction of libel damages in *Fielding v Variety Inc* [1967] 2 Q.B. 841 CA, where damages for injurious falsehood were also reduced.

[201] [1964] A.C. 371.

[202] The smallness of the judge's award was in fact for another reason: see para.51–030, above.

[203] [2008] 1 W.L.R. 1 CA.

[204] See para.44–033, above on vindicatory damages in defamation.

[205] [1999] Q.B. 1043 CA.

[206] [2001] 1 A.C. 19.

[207] [1991] CA Transcript 158.

[208] See these cases at para.40–014, above.

[209] [2002] I.R.L.R. 340.

[210] On its classification in this manner, see the case in a footnote to para.51–030, above.

[211] [2003] I.C.R. 318.

[212] *ibid.* at para.61.