below. In the revised definition the required wrong is referred to as a civil wrong. This is done *ex abundante cautela* to ensure that wrongs which are crimes are excluded. Formerly, this was not required since in the 1961 definition the wrong had to be a tort or breach of contract.

(1) The requirement of a wrong

1-004 A wrong is a breach of a legal duty. Wrongs can be breaches of contract, torts, breaches of equitable duties or breaches of statutory duties. The requirement of a wrong including, in exceptional cases under Lord Cairns' Act,[5] an anticipated wrong, is entirely necessary; it is an essential feature of damages. There is thus excluded from damages three common types of case giving pecuniary satisfaction by success in an action because they are not dependent on wrongdoing. These are actions for money payable by the terms of a contract, actions for restitution based on unjust enrichment, and actions under statutes where the right to recover is independent of any wrong.

1-005 Actions claiming money due and payable under the terms of a contract are for money which the contracting party has promised to pay. They are based not on a wrong done but on a promise made. They are in a sense a form of specific performance, ensuring that a contractual obligation is carried out. Illustrations are provided by actions for the price of goods sold and delivered, actions for salary or wages for services rendered, actions for rent, actions for freight and actions to recover monies payable under insurance policies.[6] In traditional terminology the contrast is between actions of debt and actions for damages.[7] Actions of debt are to be distinguished from actions for damages for breach of a contract and do not require consideration here.[8]

1-006 Actions claiming monetary restitution in the law of unjust enrichment (actions introduced centuries ago described as quasi-contract, and then implied contract) did not depend upon a wrong done to the claimant. Often there was no wrong available upon which the claimant might sue. Illustrations are provided by actions for

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5 Chancery Amendment Act 1858. See now s.50 of the Senior Courts Act 1981.

6 Curiously, by resort to a fiction, English law does see an action claiming money under a contract of indemnity insurance as an action for damages, with all the unfortunate results to which this leads: see *The Fanti* [1991] 2 A.C. 1 at 35G, per Lord Goff; *The Italia Express* [1992] 2 Lloyd's Rep. 281 and, in particular, *Sprung v Royal Insurance (UK) Ltd* [1999] 1 Lloyd's Rep. I.R. 111 CA. The Law Commission and the Scottish Law Commission produced a Joint Paper (Issue Paper 6) for consultation, entitled *Insurance Contract Law: Damages for Late Payment and the Insurer's Duty of Good Faith*, in which the reversal of *Sprung* was put forward as a solution and the isolation in this matter of England from Scotland and the rest of the common law world documented. Responses to the Joint Paper showed strong support for reform and a full Consultation Paper (No.201) covering more ground, entitled *Insurance Contract Law: Post Contract Duties and Other Issues*, followed at the end of 2011 setting out proposals for reform with responses required within three months. No Law Commission Report on the matter has yet appeared. And see too in relation to insurance *Bedfordshire Police Authority v David Constable* [2009] Lloyd's Rep. I.R. 39 where the term damages was held not to have an established legal meaning in the context of an insurance policy's coverage of police liability under the Riot (Damage) Act 1886.

7 *Bartoline Ltd v Royal & Sun Alliance Insurance Plc* [2007] 1 All E.R. (Comm) 1043, with its detailed discussion, again in an insurance context, of the meaning of damages (paras 77 and following), is a useful illustration of a liability to pay a debt under statute being held not to be a liability to pay damages.

8 A reference to some such actions is retained at the beginning of a number of chapters or sections so as to make the position entirely clear. Otherwise they do not make an appearance.

money paid under a mistake of fact, actions for money paid under a contract which is in some way vitiated, and actions to recover money paid to a third party for which the defendant is primarily liable.[9] Such claims seek payment not of a loss suffered by the claimant but of the value of a benefit received by the defendant by an event which unjustly enriches the defendant. There might be strong reasons to recognise the existence of the same principle based upon the commission of a wrong, but restitutionary awards to reverse a transaction have recently been confined in English law to unjust enrichment.[10]

1-007 Actions claiming money under statutes, where the claim is made independently of a wrong, are not actions for damages.[11] Actions in respect of benefits under the Social Security Acts provide an excellent illustration; further examples are provided in the sphere of employment by claims for redundancy payments and, most probably,[12] by claims for unfair dismissal, both of which are now provided for under the Employment Rights Act 1996.[13] On the other hand, actions claiming money which are based upon statutes which have created a tort are actions for damages and are within the definition adopted here. The statutory tort may be one the existence of which is spelt out by the courts from the general duty imposed by the statute,[14] or the statute may create the tort expressly, as do what is now the Fatal Accidents Act 1976 in favour of a deceased's dependants for loss of dependency[15] and what is now s.90 of the Financial Services and Markets Act 2000 in favour of persons incurring loss through reliance on untrue statements in security listing particulars and company prospectuses[16]; somewhat similar is the liability in damages imposed by s.2(1) of the Misrepresentation Act 1967 for negligent misrepresentation inducing a contract.[17] Further illustrations appeared in the three statutes directed to allowing actions on account of sex, race and disability discrimination, each of the three stating that acts of discrimination could be made the subject of civil proceedings in like manner "as any other claim in tort … for breach of statutory duty".[18] These statutory torts have now been brought under the umbrella of the Equality Act 2010 which, in repealing all three of the earlier statutes and taking over in their stead, unfortunately does not repeat this clear statement.[19] A statute allowing actions for

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9 See generally Mitchell, Mitchell and Watterson (eds), *Goff and Jones: The Law of Unjust Enrichment*, 9th edn (London: Sweet & Maxwell, 2016).

10 For the non-recognition in English law of a concept of restitutionary damages as one analysis of negotiating or licence fee damages, see Ch.14, below.

11 *Bartoline Ltd v Royal & Sun Alliance Insurance Plc* [2007] 1 All E.R. (Comm) 1043, with its detailed discussion, in an insurance context, of the meaning of damages (paras 77 and following), is a useful illustration of a liability to pay a statutory debt being held not to be a liability to pay damages.

12 See para.33-002, below.

13 Pt X for unfair dismissal, Pt XI for redundancy payments.

14 See the treatment of breach of statutory obligation in the standard books on tort.

15 See paras 41-003 and following, below.

16 Before 1986 this provision had appeared in the Companies Act of the day; for the details see para.49-009, below. Although speaking of compensation, this has been held not to be, either as to the amount recoverable or as to the mode of measuring it, something different from damages and its measure is precisely the same as in an action of deceit. It is believed that in legislation going back to mid-Victorian times a tort is created despite the use of the word compensation rather than the word damages.

17 See the subsection at para.49-053, below.

18 Sex Discrimination Act 1975 s.66(1), Race Relations Act 1976 s.57(1), and Disability Discrimination Act 1995 s.25(1).

19 All that we have is a statement in the very lengthy Explanatory Note to the Act that the Act is designed to replicate earlier legislation.

to treat, and understand, common law and equity together as in the vast majority of cases both are concerned with compensation.[43] This more open view is to be preferred. We should not allow in any corner of our legal system a characterisation of substance to be ruled by historic jurisdictional divides.

1-017 While not siding with the traditionalists, this book does not yet cover all money awards of civil wrongs in equity. This is a significant omission because they also fall easily within the revised definition of damages. Slowly, however, in this integrated world, compensation by way of common law damages and by way of equitable damages are being dealt with together. However, it does not yet appear to be settled when the common law rules as to scope of duty, causation and remoteness, which are so central to common law damages for tort and breach of contract, apply in equity; thus Lord Browne-Wilkinson in the important case of *Target Holdings Ltd v Redferns*[44] thought that they did not apply to breach of trust.[45] The same may apply to contributory negligence. Few cases in equity have considered recovery of non-pecuniary loss and the possibility of awarding exemplary damages has rarely been considered.

1-018 It must, however, be acknowledged that the omission of complete treatment of money remedies for equitable wrongs is becoming increasingly difficult to maintain. The observations of Lord Browne-Wilkinson in *Target Holdings v Redferns* referred to in the paragraph above, if applied as an absolute proposition, would not be consistent with those of Lord Toulson in *AIB Group (UK) Plc v Mark Redler & Co Solicitors*,[46] who observed that in *Bank of New Zealand v New Zealand Guardian Trust Co Ltd*,[47] Tipping J had:

> "... rightly observed that while historically the law has tended to place emphasis on the legal characterisation of the relationship between the parties in delineating the remedies available for breach of an obligation, the nature of the duty which has been breached can often be more important, when considering issues of causation and remoteness, than the classification or historical source of the obligation."

Indeed, more and more often cases are presented by counsel on all sides on the assumption that the rules such as those of causation, scope of duty and remoteness that govern recovery for equitable and common law claims were to be treated in the same manner.[48]

1-019 The consequence is that the existence of equitable damages is recognised in the definition of damages in this book but some coverage is still left to other texts. This approach will disappear eventually over subsequent editions of this book. Already,

[43] See Millett LJ again, this time judicially, in *Bristol and West Building Society v Mothew* [1998] Ch. 1 CA at 17G: "Although the remedy which equity makes available ... is equitable compensation rather than damages, this is merely the product of history and ... in my opinion is a distinction without a difference."

[44] [1996] A.C. 421.

[45] "Even if the immediate cause of the loss is the dishonesty or failure of a third party, the trustee is liable to make good the loss to the trust estate if, but for the breach, such loss would not have occurred ... Thus the common law rules of remoteness and causation do not apply": [1996] A.C. 421 at 434E–F.

[46] [2014] 3 W.L.R. 1367 at [59]. Compare Lord Reed SPJ at [136]–[137]. See also *Daniel v Tee* [2016] EWHC 1538 (Ch); [2016] 4 W.L.R. 115.

[47] [1999] 1 N.Z.L.R. 664.

[48] See, for instance, *Sharp v Blank* [2019] EWHC 3096 (Ch) at [891] (causation and remoteness); *LIV Bridging Finance Ltd v EAD Solicitors LLP (In Administration)* [2020] EWHC 1590 (Ch) at [35] (scope of duty).

damages for breach of confidence or breach of a right to private information are fully covered.[49] One reason for these equitable wrongs being covered before the others is that the damages are now widely recognised as the same whether looked at through common law or equitable eyes. Another reason is that courts have often attached the common law label "tort" to this wrong.[50] Another example of integration of equity is the chapter on disgorgement damages,[51] which refers to the disgorgement of profits following an account of profits taken as a result of a common law or equitable wrong. Finally, there is the treatment of licence fee damages which amalgamates those damages in equity under Lord Cairns' Act with the similar damages at common law.[52] Future editions will also feature a chapter on equitable compensation for breach of fiduciary duty and other equitable wrongs.

1-020 However, an immediate qualification must be made. Awards of equitable compensation fall into two categories. In the first category is claims for loss as a consequence of the wrongdoing. In the second category is claims for payment of a sum of money such as a sum that would reconstitute a trust fund or that would require repayment of the value of misappropriated company property. If a trustee has impliedly undertaken to preserve a trust fund then a claim for the trustee to do what was promised are akin to a claim for debt, where rules such as remoteness of damage do not apply. In the House of Lords and Supreme Court decisions of *Target Holdings Ltd v Redferns*[53] and *AIB Group (UK) Plc v Mark Redler & Co*,[54] it was held that the only species of claim available was one in the first category which responded to the consequences of the wrongdoing. But claims for "substitutive compensation" to enforce a claimant's rights have a long history in equity.[55] Lower courts have generally applied the restrictive approach taken in *Target* and *AIB*,[56] but in some cases discussed below, the recognition of the claim for substitutive compensation has seen the restrictive approach distinguished, as it has been in other jurisdictions.[57]

1-021 As the Court of Appeal has recognised, the decisions in *Target Holdings* and *AIB Group (Ltd)* were concerned with the particular circumstances of obligations of solicitors that were defined by express and implied instructions and where "the beneficiary obtained the full benefit for which it bargained" or was placed in the same position as if performance had occurred.[58] An established instance where the loss-based approach of *Target Holdings* and *AIB Group (Ltd)* is not applied is where a company director makes an unauthorised payment of a dividend, in breach of the fiduciary duty owed to the company. In those cases, the director is required to repay the money, irrespective of whether the loss would have been suffered in any event.[59]

[49] At paras 48-026 to 48-033, below.

[50] See the cases discussed at para.48-026, below.

[51] See Ch.15.

[52] See Ch.14.

[53] [1996] A.C. 421.

[54] [2014] UKSC 58; [2015] A.C. 1503.

[55] As to which, see *Agricultural Land Management Ltd v Jackson (No.2)* [2014] WASC 102; (2014) 48 W.A.R. 1.

[56] See, for instance *Wessely v White* [2018] EWHC 1499 (Ch) at [45]–[46]; *LIV Bridging Finance Ltd v EAD Solicitors LLP (In Administration)* [2020] EWHC 1590 (Ch).

[57] For other jurisdictions see in Australia, *Agricultural Land Management Ltd v Jackson (No.2)* (2014) 48 W.A.R. 1, and in the Singapore Court of Appeal, *Ping v Winsta Holding Pte Ltd* [2020] SGCA 35.

[58] *Auden McKenzie (Pharma Division) Ltd v Patel* [2019] EWCA Civ 2291 at [49].

[59] *Bairstow v Queens Moat Houses Plc* [2001] EWCA Civ 712, referred to with approval in *HMRC v*

> "… 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."[51]

This approach has been adopted in modern times in relation to damage to land, whether caused tortiously[52] or through breach of contract,[53] and has been applied to chattels other than ships.[54] 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 LJ 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."[55]

Lord Denning MR 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.[56] 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 has been purchased in reliance on a negligent surveyor's report, the cost of putting the property into the condition described in the report not being required to put the purchaser into the position they would have been in had the surveying contract been properly fulfilled.[57]

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51 *The Gazelle* (1844) 2 W. Rob. (Adm.) 279 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".

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

53 *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.

54 *Bacon v Cooper (Metals)* [1982] 1 All E.R. 397 (rotor for machine for fragmenting steel; breach of contract). And compare at para.37-021, 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 [30]–[35].

55 *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 MR and Cross LJ respectively.

56 [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 the owner 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.37-069, 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.

57 *Philips v Ward* [1956] 1 W.L.R. 471 CA; *Perry v Sidney Phillips & Son* [1982] 1 W.L.R. 1297 CA; *Watts v Morrow* [1991] 1 W.L.R. 1421 CA and *Smith and Smith v Peter North* [2002] Lloyd's Rep. P.N. 111 CA, are the principal cases. Where the cost of putting the property into the condition as described has been allowed, as in *Freeman v Marshall* (1966) 200 E.G. 777, this is only on the basis that this cost does not exceed the amount by which the value of the property as it stands falls below its value as described—or, more accurately, below the price paid. For details see paras 34-050 to 34-060, below.

The fourth variety where, at first glance, it appears that compensation is awarded beyond loss is where the claimant recovers an award commonly, but misleadingly, described as "transferred loss". In *Lowick Rose LLP v Swynson Ltd*,[58] Lord Sumption, delivering the decision with which three other members of the Supreme Court agreed, said that the principles applies where the: **2-010**

> "… known object of a transaction is to benefit a third party or a class of persons to which a third party belongs, and the anticipated effect of a breach of duty will be to cause loss to that third party."

For instance, in cases of carriage of goods by sea even if title and risk to the goods has passed to the consignee, the shipper can still sue the shipowner for negligence causing loss or damage to the cargo.[59] The rationale was given by Lord Diplock as being that, unless the terms provide otherwise, the shipper enters the contract with the shipowner for the benefit of all persons who may acquire an interest in the goods.[60] But expressed only in these terms, this principle of "transferred loss" is an anomaly because it is contrary to rules of privity of contract. As applied to owners of property it became known as the "narrow ground". However, the principle was extended to commercial contracts generally in *Linden Gardens Trust v Lenesta Sludge Disposals Ltd*,[61] where Lord Griffiths re-explained it on a "broad ground" and reconciled it with privity of contract by explaining that the loss was genuinely suffered by the claimant because of the claimant's interest in providing the third party the intended benefit. However, as Lord Sumption emphasised in *Lowick Rose LLP v Swynson Ltd*, the principle can only be applied where (i) there would be a "black hole" because the third parties cannot recover themselves and (ii) the claimant enters the contract with the manifested object of benefitting the third party.[62]

4. COMPENSATION IS NOT DISCRETIONARY

It follows from the previous discussion that an award of compensatory damages is made as a matter of right. It is not a matter of discretion. Even when a right to compensatory damages is created by statute, the use of permissive words like "may award damages" is unlikely to be understood as creating the radical change of making compensatory damages a matter of judicial discretion. This issue was decided as a preliminary issue in *Energy Solutions EU Ltd v Nuclear Decommissioning Authority*.[63] In that case, the primary judge was concerned with a claim for **2-011**

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58 [2017] UKSC 32; [2018] A.C. 313.

59 *Dunlop v Lambert* (1839) 2 Cl. & F. 626.

60 *The Albazero* [1977] A.C. 774 at 847.

61 *Linden Gardens Trust v Lenesta Sludge Disposals Ltd* [1994] 1 A.C. 85. See also *Alfred McAlpine Construction Ltd v Panatown Ltd* [2001] 1 A.C. 518 at 547–548, per Lord Goff, 568, per Lord Jauncey, 577–578, per Lord Browne-Wilkinson, 582–583, per Lord Millett.

62 [2017] UKSC 32; [2018] A.C. 32 at [15]–[16].

63 [2015] EWHC 73 (TCC) at [71], [93]. It was not suggested on the appeals that such a novel concept existed in domestic law: see [2015] EWCA Civ 1262 at [67] and [2017] UKSC 34; [2017] 1 W.L.R. 1373 at [8].

injury to feelings may be included in the damages, and indeed in torts infringing family relationships the injury to feelings represented the principal loss. These torts, however, have all been abolished by statute,[45] so that what were once the most important illustrations of this head of non-pecuniary loss have been removed from the scene, and there are left at common law only those torts in which injury to feelings generally forms a subsidiary element in the damages. Thus injury to feelings would seem to be allowable in torts which primarily protect reputation, certainly in libel and in slanders actionable per se[46] and most probably in malicious prosecution. The same is true of assault[47] and has been recognised as being true of deceit.[48] Invasion of privacy, stemming from breach of confidence in its personal as distinct from its commercial form, has from the beginning of the century begun to attract damages for injured feelings.[49] Increasingly in trespass to property or nuisance there has been an award for mental distress or anxiety[50]; on the other hand, it has been held that this head of non-pecuniary loss cannot be claimed in the tort of conspiracy[51] while the position with injurious falsehood is not yet settled.[52] Negligence resulting in economic loss[53] is unlikely to lead to damages for mental distress.[54] Statutory torts involving discrimination which formerly appeared in

45 Law Reform (Miscellaneous Provisions) Act 1970 ss.4 and 5.

46 *Goslin v Corry* (1844) 7 M. & G. 342 at 346 (damages "for the mental suffering arising from the apprehension of the consequences of the publication"); *Ley v Hamilton* (1935) 153 L.T. 384 HL at 386 (damages for "the insult offered or the pain of a false accusation"); *McCarey v Associated Newspapers* [1965] 2 Q.B. 86 CA at 104 (damages "may also include the natural injury to the feelings"); *Fielding v Variety Inc* [1967] 2 Q.B. 841 CA at 855 ("entitled to be compensated … for the anxiety and annoyance"); *John v MGN* [1997] Q.B. 586 CA at 607F (the sum awarded "must … take account of the distress, hurt and humiliation which the defamatory publication has caused").

47 See *Lane v Holloway* [1968] 1 Q.B. 379 CA.

48 *Doyle v Olby (Ironmongers)* [1969] 2 Q.B. 158 CA at 170 (may be appropriate to consider "worry, strain, anxiety and unhappiness"); *Mafo v Adams* [1970] 1 Q.B. 548 CA at 558 (damages may be increased where there are "circumstances which aggravate the suffering and injury"); *Shelley v Paddock* [1978] Q.B. 120; *Saunders v Edwards* [1987] 1 W.L.R. 1116 CA; *East v Maurer* [1991] 1 W.L.R. 461 CA; *A v B* [2007] EWHC 1246 (QB); *Kinch v Rosling* [2009] EWHC 286 (QB).

49 *Cornelius v de Taranto* [2001] E.M.L.R. 12 at 329 (damages not in issue in CA); *Campbell v MGN Ltd* [2002] E.M.L.R. 30, at 617 (damages not in issue in CA or HL); *Archer v Williams* [2003] E.M.L.R. 38 at 869; *Douglas v Hello! Ltd* [2004] E.M.L.R. 2 at 13 (these damages not in issue in CA); *McKennitt v Ash* [2006] E.M.L.R. 10 at 178 (damages not addressed in CA); *Mosley v News Group Newspapers Ltd* [2008] E.M.L.R. 20 at 679. These first instance cases are considered at paras 47-005 to 47-007, below.

50 Owen and *Smith v Reo Motors* (1934) 151 L.T. 274 CA (explained on these lines by Lord Devlin in *Rookes v Barnard* [1964] A.C. 1129 at 1229); *Drane v Evangelou* [1978] 1 W.L.R. 455 CA; *Millington v Duffy* (1984) 17 H.L.R. 232 CA; and the other cases at para.39-073, below. Also *Scutt v Lomax* (2000) 79 P. & C.R. D31 CA; *Bryant v Macklin* [2005] EWCA Civ 762; *Anslow v Norton Aluminium Ltd* [2012] EWHC 2610 (QB) and compare *Barr v Biffa Waste Services Ltd* [2011] 4 All E.R. 1065: all at para.39-020, below.

51 *Lonrho v Fayed (No.5)* [1993] 1 W.L.R. 1489 CA.

52 Against: *Fielding v Variety Inc* [1967] 2 Q.B. 841 CA at 850 ("the claimants … can only recover damages for their probable money loss, and not for their injured feelings"); in favour: *Joyce v Sengupta* [1993] 1 W.L.R. 337 CA at 348E ("instinctively recoil from the notion that in no circumstances can an injured claimant obtain recompense … for understandable distress").

53 The damages recoverable for non-economic loss by a car owner deprived of their car through negligence would seem to be for inconvenience rather than distress: see *Beechwood Birmingham Ltd v Hoyer Group UK Ltd* at para.37-062, below.

54 *Verderame v Commercial Union Insurance Co Plc* [2000] Lloyd's Rep. P.N. 557 CA, a case of professional negligence, held that where the duty of care arises in respect of economic loss there will be no recovery of damages for mental distress any more than there would be if the professional negligence claim were brought, as is commoner, in contract. For mental distress in contract where

separate statutes[55] have now been brought under the umbrella of the Equality Act 2010 where it is provided, as it had been before, that an award of damages in respect of discrimination "may include compensation for injured feelings".[56] The statutory tort involving harassment[57] allows for damages "for any anxiety caused by the harassment".[58] Another example is the tort of intentional infliction of emotional harm. In *ABC v WH*,[59] damages for the tort of intentional infliction of emotional harm were awarded for "pain, suffering and loss of amenity" including a component for mental distress.

Two particular points should be made on recovery for mental distress. First, with all the intentional torts the damages may be aggravated where the mental distress of the claimant has been exacerbated by the unpleasant nature of the defendant's conduct; consideration of the levels of awards will appear in the chapters devoted to particular torts. Secondly, it is thought that damages for mental distress, whether aggravated or not, should be restricted to individuals and be unavailable to corporate claimants since corporations have no feelings to injure. Such authority as there is, was, for some time, conflicting but moving in the right direction.[60] Fortunately, **5-014**

professional negligence can occasionally lead to an award see paras 5-023 and following, below.

55 Notably the Sex Discrimination Act 1975, Race Relations Act 1976 and Disability Discrimination Act 1995. All three and the Regulations that go with them are repealed by the provisions, in force and prospective, of the Equality Act 2010.

56 Section 119(4); adding, as before, "(whether or not it includes compensation on any other basis)". By contrast, in *R. v Secretary of State for Transport, Ex p. Factortame Ltd (No.7)* [2001] 1 W.L.R. 942 TCC, one of the *Factortame* cases involving discrimination by the United Kingdom against the owners of foreign fishing vessels, it was held that Art.52 of the European Communities Treaty, which gives the right to nationals of one Member State to establish themselves in another Member State, was concerned only with economic loss.

57 Protection from Harassment Act 1997, which has survived the arrival of the Equality Act 2010.

58 Section 3(2). Awards were made on this basis in *S&D Property Investments Ltd v Nisbet* [2009] EWHC 1726 (Ch) (where it was rightly said that anxiety need not amount to mental illness: [2009] EWHC 1726 (Ch) at [72] and following), in *Rayment v Ministry of Defence* [2010] EWHC 218 (QB) (£5,500 for bullying, humiliating and insulting an employee) and *Roberts v Bank of Scotland* [2013] EWCA Civ 882 CA (£7,500 for bombardment of phone calls to customer by bank).

59 [2015] EWHC 2687 (QB).

60 The holding in *Messenger Newspapers Group v National Graphical Association* [1984] I.R.L.R. 397 that aggravated damages may be awarded not only to an individual but to a company or other inanimate body is considered to be wrong; to the contrary is *Columbia Picture Industries v Robinson* [1987] Ch. 38 where, under a cross-undertaking for losses occasioned by a search order, the damages were divided in the proportion of three to one between the individual and corporate claimants as such a split "recognises that contumely and affront affect individuals, not inanimate corporations": at 88H. In *Collins Stewart Ltd v Financial Times Ltd (No.2)* [2006] E.M.L.R. 5 at 100, a defamation case, it has again been rightly held that aggravated damages were not to be awarded to a corporate claimant with no feelings to injure: [2006] E.M.L.R. 5 at [30] and [31]. Rather than saying that *Messenger* was wrong, Gray J unconvincingly distinguished it on the ground that it concerned exemplary damages: [2006] E.M.L.R. 5 at [32]. So too in *McKennitt v Ash* [2006] E.M.L.R. 10 at 178, a claim for breach of confidence and invasion of privacy, damages for hurt feelings and distress were awarded to the individual claimant but not to the company she controlled: *McKennitt v Ash* [2006] E.M.L.R. 10 at [162]. Tugendhat J in *Hays Plc v Hartley* [2010] EWHC 1068 (QB) at [24] stated categorically that "a corporation is not entitled to damages for injury to feelings". He said much the same in *Metropolitan International Schools Ltd v Designtechnica Corp* [2010] EWHC 2411 (QB) at [14] and in *Cooper v Turrell* [2011] EWHC 3269 (QB), with the result that in the latter he awarded more to the individual claimant than to the corporate claimant. And in *Eaton Mansions (Westminster) Ltd v Stinger Compania de Inversion SA* [2012] EWHC 3354 (Ch) on the basis of the above authorities Edward Bartley Jones QC, sitting as a Deputy High Court Judge, held a corporate claimant disentitled to aggravated damages: [2012] EWHC 3354 (Ch) at [70] to [74].

which was adopted, even after a general change of heart had appeared,[135] in *Sampson v Floyd*,[136] and in *Calabar Properties v Stitcher*,[137] breach of the lessor's covenant to repair was held to lead to such damages. The law stood thus when a further edition of this work was being finalised in 1987,[138] but a more limiting attitude was on its way and retraction just round the corner.

5-027 The downturn started with *Bliss v South East Thames Regional Health Authority*[139] holding that damages for mental distress were not recoverable by an employee suing not for wrongful dismissal but for breach of the implied term of trust and confidence; *Cox v Philips Industries*[140] was overruled. Dillon LJ echoed in more detail the sentiment already expressed in *Heywood v Wellers*,[141] but until *Bliss* virtually ignored in the intervening cases, that in effect the appropriate context for damages for mental distress was where the predominant object of the contract was the provision of some mental satisfaction, whether by the giving of pleasure or the removal of distress[142]; a contract of employment was not such a contract. Then in rapid succession came a series of cases in the Court of Appeal refusing damages for mental distress, and for the same reasons, in the other types of contract in which they had formerly been allowed.[143] In *Hayes v James & Charles Dodd*,[144] the defendant solicitor had wrongly advised the claimants that there was essential rear access to the larger business premises they were purchasing so that, without that access, the business had to be closed down and the premises eventually disposed of, but no recovery was allowed to the claimants for their anguish and vexation caused by all this; the contract was a commercial one. In *Watts v Morrow*[145] the defendant surveyor had wrongly pronounced the house the claimants were purchasing to be in good condition but their distress at having to live effectively on a building site while extensive repairs were carried out did not sound in damages; again the contract was a commercial one. In *Branchett v Beaney*,[146] the defendant landlords constructed an access way to a new house which it was proposed to build across the front garden of the claimant, an old lady who was their tenant, but it was held that breach of the covenant for quiet enjoyment in the lease did not give rise to damages for the claimant's injured feelings and mental distress; the term enjoyment in the covenant did not refer to the derivation of pleasure but simply to the exercise, use and benefit of the right. Somewhat later came *Alexander v Rolls Royce Motors*,[147] where no damages for distress and disappointment were awarded against the seller and repairer of a prestigious car. The earlier cases[148] which had apparently produced different results were interpreted as being limited to the distress caused by physical discomfort,[149] which had for long been accorded recovery,[150] or were doubted.[151]

[135] See para.5-027, below.
[136] [1989] 2 E.G.L.R. 49 CA.
[137] [1984] 1 W.L.R. 287 CA; and *Elmcroft Developments v Tankersley-Sawyer* (1984) 15 H.L.R. 63 CA.
[138] The cases up to this time are all to be found there: 15th edn (London: Sweet & Maxwell, 1988), paras 99 and 100.
[139] [1987] I.C.R. 700 CA.
[140] [1976] 1 W.L.R. 638. *Bliss* had already been heralded by *Shove v Downs Surgical* [1984] 1 All E.R. 7 but it was a case of wrongful dismissal.
[141] [1976] Q.B. 446 CA at 463H to 464A, per Bridge LJ: "a clear distinction … between mental distress which is an incidental consequence … of the misconduct of litigation … and mental distress … which is the direct and inevitable consequence of the … failure to obtain the very relief which it was the sole purpose of the litigation to secure."
[142] [1987] I.C.R. 700 CA at 718; his precise formulation was "a contract to provide peace of mind or freedom from distress".
[143] The curious *W v Egdell* [1990] Ch. 359, where the claimant murderer unsuccessfully claimed damages for his distress at the disclosure of a medical report on him by the defendant doctor, was the first case in which *Bliss* was applied but it was not grounded in contract.
[144] [1990] 2 All E.R. 815 CA.
[145] [1991] 1 W.L.R. 1421 CA.
[146] [1992] 3 All E.R. 910 CA.

In *Watts v Morrow*,[152] Bingham LJ summed up the position which had developed, thus: **5-028**

> "A contract-breaker is not in general liable for any distress, frustration, anxiety, displeasure, vexation, tension or aggravation which his breach of contract may cause to the innocent party. This rule is not, I think, founded on the assumption that such reactions are not foreseeable, which they surely are or may be, but on considerations of policy.[153] But the rule is not absolute. Where the very object of a contract is to provide pleasure, relaxation, peace of mind or freedom from molestation, damages will be awarded if the fruit of the contract is not provided or if the contrary result is procured instead."[154]

Thus the House of Lords rightly refused damages for mental distress in *Johnson v Gore Wood & Co*,[155] where the claimant property developer had engaged the defendant solicitor to advise him in connection with an acquisition for development of land over which he had an option to purchase and the solicitor's mishandling of the matter led to anxiety as a result of the protracted litigation process to which the developer was subjected, extra financial embarrassment for him and his family, and deterioration in the family relationships. The contract was purely commercial one. The Court of Appeal refused damages for disappointment and distress on account of a solicitor's poor preparation for divorce proceedings in *Channon v Lindley Johnstone*,[156] and arising from the Official Solicitor's bad handling of litigation in *Howell-Smith v Official Solicitor*.[157] Disappointment at not receiving publicity by way of credits in programmes for a highly successful play did not sound in damages in *Brighton v Jones*,[158] and no damages for distress were given in *Wiseman v Virgin Atlantic Airways Plc*,[159] where airline staff ridiculed the claimant and refused to let him board a plane.

[147] [1996] R.T.R. 95 CA.
[148] Those at para.5-026, above.
[149] In particular, *Perry v Sidney Phillips & Son* [1982] 1 W.L.R. 1297 CA.
[150] See paras 5-017 to 5-019, above. *Holder v Countrywide Surveyors* [2003] P.N.L.R. 3 at 29 again illustrates the appropriateness of recovery for distress accompanying physical inconvenience; see the case at para.5-018, above.
[151] As was *Sampson v Floyd* [1989] 2 E.G.L.R. 49 CA.
[152] [1991] 1 W.L.R. 1421 CA.
[153] Though foreseeable, the mental distress could still be said not to have been in the contemplation of the parties as something for which the defendant would be liable: see further on this at para.8-209, below.
[154] [1991] 1 W.L.R. 1421 CA.
[155] [2002] 2 A.C. 1.
[156] [2002] P.N.L.R. 41 CA at 884.
[157] [2006] P.N.L.R. 21 CA at 394. The earlier solicitor case of *Dickinson v Jones Alexander & Co* [1993] 2 F.L.R. 321 would today probably be regarded as wrong in allowing damages for mental distress to a wife against solicitors who, while aware of her fragile mental health, had handled her divorce proceedings badly so as to leave her with inadequate financial provision. None of the cases of the previous few years which had brought the law into its present position (see para.5-027, above) appears to have been cited.
[158] [2004] E.M.L.R. 26 at 507; see [87] and [88].
[159] [2006] EWHC 1566 (QB).

the non-existence of a pecuniary one but in *Farley* the discomfort and distress caused by the excessive noise was completely independent of its effect upon the market value of the property. Lord Scott's dictum has now been firmly disapproved by Newey J in *Herrmann v Withers LLP*.[174] Citing with approval what is said above in this paragraph, he held the claimant purchasers of a residential property entitled to damages for the disappointment and the loss of amenity in being unable to use a communal garden in addition to the damages awarded representing the diminution in value of the property from the lack of garden use.[175]

5-032 These developments had not directly touched on the House of Lords decision which had laid the foundation for the rule of no damages for mental distress in contract, *Addis v Gramophone Co*,[176] with its refusal of such damages to a wrongfully dismissed employee. Addis had not been addressed by their Lordships over the whole of the last century; then at the beginning of this, it has suddenly fallen for consideration by them on two occasions, first in *Johnson v Gore Wood & Co*,[177] and next in *Johnson v Unisys Ltd*.[178] Although in neither was recovery for mental distress in the context of employment contracts in issue—the former was a claim for mental distress but arising out of a contract with a professional[179] while the latter was a claim arising out of an employment contract but a claim for pecuniary loss only[180]—what was said in those cases about recovery for mental distress may suggest that the continued existence of *Addis*, which Lord Woolf MR in the Court of Appeal in *Unysis*[181] described as "a cornerstone of the law of" employer and employee,[182] may be at risk.

5-033 Thus in *Gore Wood*,[183] Lord Cooke was at pains to distance himself from any approval of *Addis*.[184] He pointed out that, in severely confining damages for wrongful dismissal, their Lordships' House of those days had seen the relationship of employer and employee as no more than an ordinary commercial one which was "a world away from the concept now". He pointed out that *Addis* had not been applied, so as to refuse damages for mental distress in all employment circumstances, in either Canada[185] or New Zealand,[186] and concluded: "I take leave to doubt the permanence of *Addis* in English law."[187]

5-034 The position in *Unisys*,[188] was more complicated. In *Mahmud v Bank of Credit and Commerce International SA*,[189] the House had already decided that where the employee's claim was not simply for damages for wrongful dismissal but for breach of some other term of the contract, in that case of the so-called trust and confidence term, *Addis* did not stand in the way of recovery of pecuniary loss; non-pecuniary

174 [2012] EWHC 1492 (Ch).
175 [2012] EWHC 1492 (Ch) at [125]–[128]. Full facts at para.9-108, below.
176 [1909] A.C. 488.
177 [2002] 2 A.C. 1.
178 [2003] 1 A.C. 518.
179 Facts at para.5-028, above.
180 Facts at para.33-026, below.
181 [1999] 1 All E.R. 854 CA.
182 [1999] 1 All E.R. 854 CA at 858e.
183 [2002] 2 A.C. 1.
184 [2002] 2 A.C. 1 at 50B to F.
185 Citing *Brown v Waterloo Regional Board of Commissioners of Police* 136 D.L.R. (3d) 49 (1982).
186 Citing *Whelan v Wanitaki Meats Ltd* [1991] 2 N.Z.L.R. 74.
187 [2002] 2 A.C. 1 at 50F.
188 [2003] 1 A.C. 518.
189 [1998] A.C. 20.

loss was not an issue. In *Unisys*, again only pecuniary loss was in issue but their Lordships, other than perhaps Lord Steyn, were unable to find breach of the trust and confidence term or any other term. Nor were they prepared to find for a term which dealt with wrongful dismissal because any extension of the law in relation to wrongful dismissal had been precluded by the legislation giving employees a remedy for unfair dismissal. Accordingly, the claim for pecuniary loss failed and a claim for non-pecuniary loss must equally have failed, indeed a fortiori. However, had there been a breach of a term of the employment contract independent of dismissal *tout court*, there are indications that at least some of their Lordships would have been prepared to contemplate recovery for mental distress. Thus Lord Hoffmann referred to the preparedness of a Canadian judge to award damages for mental distress and loss of reputation and prestige where there was breach of an implied obligation on an employer to be honest and to refrain from insensitive and unfair conduct, and added:

> "Such an approach would in this country have to circumvent or overcome the obstacle of *Addis* … Speaking for myself, I think that, if this task was one which I felt called upon to perform, I would be able to do so."[190]

Lord Millett agreed that:

> "… the general rule [namely, of no recovery for non-pecuniary loss whether to feelings or to reputation] would seem to be a sound one, at least in relation to ordinary commercial contracts entered into by both parties with a view of profit."[191]

However, while:

> "… in *Addis*'s case the House of Lords treated a contract of employment as an ordinary commercial contract terminable at will … contracts of employment are no longer regarded as purely commercial contracts entered into between free and equal agents."[192]

Two further cases in this area have followed in the House of Lords, *Dunnachie v Kingston upon Hull City Council*,[193] and *Eastwood v Magnox Electric Plc*,[194] but neither adds to or advances the issue. *Eastwood* was concerned with matters other than mental distress and non-financial loss[195] and *Dunnachie* was limiting its outlawing of recovery for non-financial loss to unfair dismissal claims.[196] Nor does *Edwards v Chesterfield Royal Hospital NHS Foundation Trust*[197] take the matter further as the Supreme Court was disallowing a claim for financial loss, but it would follow that there could a fortiori be no recovery for mental distress.

5-035 The above views appearing in cases at the highest level, admittedly of an obiter nature, suggest that the general rule in *Addis* may soon be abandoned. However, the current position is that there can be no recovery for mental distress arising from the employer's breach of the implied term of trust and confidence, this having been held

190 [2003] 1 A.C. 518 at [44].
191 [2003] 1 A.C. 518 at [70].
192 [2003] 1 A.C. 518 at [71] and [77]. Lord Bingham, without delivering a separate speech, said that he agreed with those of Lords Hoffmann and Millett.
193 [2005] 1 A.C. 226.
194 [2005] 1 A.C. 503.
195 See the case at para.33-031, below.
196 See the case at para.33-003, below.
197 [2012] 2 A.C. 22. See the case at para.33-027, below.

7-007 That the decision on apportionment is so much a matter of impression is dramatically illustrated by *Jackson v Murray*,[20] a case from Scotland of a child running into the path of an oncoming vehicle, a not unfamiliar story in the annals of contributory negligence. Not only was the trial judge's reduction of the 13-year-old girl's damages by 90 per cent changed down by the Scots appeal court to 70 per cent and further changed down by the Supreme Court to 50 per cent but also the reduction by the Supreme Court was only by a bare majority, the minority agreeing with the Scots appeal court's 70 per cent. Reference was made to the potentially dangerous nature of driving a car, which could do much more damage to a person than a person was likely to do to a car. And it was agreed that an appeal court could only interfere with an apportionment made if it could be said that it lay outside the generous ambit within which reasonable disagreement was possible. Clearly, however, different views were taken as to whether here this generous ambit had or had not been crossed. The majority speech and the minority one are both worth perusal.

7-008 This guidance of the Supreme Court Justices in *Jackson* on the correct approach of an appellate court to apportionment in contributory negligence has since been adopted by the Court of Appeal in *McCracken v Smith*,[21] where there had been a collision between a minibus and a trail bike being recklessly and illegally driven. It was again held, though here unanimously, that the generous ambit within which reasonable disagreement was possible had been crossed, and the court increased, rather than reduced, the trial judge's 30 per cent attributed to the claimant, the bike's pillion rider, to 50 per cent (together with an agreed 15 per cent on account of the claimant's not wearing a crash helmet).

7-009 Although an assessment of contributory negligence involves matters of impression, within a range of reasonable disagreement, there are basic principles of law to follow in the exercise of determining the extent of responsibility for damage. Three key points apply in the assessment of contributory negligence, the onus of proof of which is on the defendant.[22] First, as in the example of a failure to wear a seatbelt, the assessment is concerned with responsibility for, and hence contribution to, the damage suffered and not to the event that causes the damage. Secondly, the claimant's contribution must be one cause of that damage. Hence, fault that makes no causal contribution to damage cannot be taken into account no matter how blameworthy the claimant.[23] Thirdly, the extent of the causal potency, and not merely the blameworthiness, will affect the reduction.[24]

7-010 As mentioned above, apportionment is to be assessed upon the degree of blame or blameworthiness of the claimant and not solely on a test of causation, although fault not causally contributing to the damage cannot be taken into account in the

and [13]. If in cases of very serious injury it can be shown, exceptionally, from medical or other evidence that the wearing of a seat belt was likely to have made no difference, the trial judge will be justified in making no reduction in the damages for contributory negligence. This was accepted by the Court of Appeal in a valuable review in *Stanton v Collinson* [2010] EWCA Civ 81 CA of seat belt contributory negligence. The attempt in *Gawler v Raettig* [2007] EWHC 373 (QB) to obtain a substantial increase in the conventional reduction rightly failed.

19 See para.7-002, above.

20 [2015] UKSC 5; [2015] 2 All E.R. 805.

21 [2015] EWCA Civ 380.

22 See *AssetCo Plc v Grant Thornton UK LLP* [2019] EWHC 150 (Comm) at [1095]–[1098].

23 *Caswell v Powell Duffryn Associated Collieries Ltd* [1940] A.C. 152 at 165; *AssetCo Plc v Grant Thornton UK LLP* [2019] EWHC 150 (Comm) at [1097] citing the paragraph below of the previous edition of this work. No issue of contributory negligence arose on appeal.

24 *Jackson v Murray* [2015] UKSC 5; [2015] 2 All E.R. 805 at [40].

first place.[25] The focus on blame is shown primarily by the use of the word "responsibility" in s.1(1), and also by the use there of the term "just and equitable". Denning LJ put it thus in *Davies v Swan Motor Co*[26]:

> "Whilst causation is the decisive factor in determining whether there should be a reduced amount payable to the plaintiff, nevertheless, the amount of the reduction does not depend solely on the degree of causation. The amount of the reduction is such an amount as may be found by the court to be 'just and equitable', having regard to the claimant's 'share in the responsibility' for the damage. This involves a consideration, not only of the causative potency of a particular factor, but also of its blameworthiness."[27]

7-011 An assessment of a claimant's relative blameworthiness will be based upon all circumstances but a key factor will be the extent to which the claimant could have foreseen their loss. This foreseeability will, in turn, be affected by the extent to which the claimant has been "reasonably induced to believe that he may proceed with safety",[28] and particularly where they have been so induced by the defendant.

7-012 One particular issue concerning the operation of apportionment troubled the courts in the wake of the landmark decision in *Banque Bruxelles Lambert v Eagle Star Insurance Co*,[29] commonly called *SAAMCO*, that a claimant lender suing for professional negligence cannot claim for their real loss, however foreseeable, but is restricted to the loss, when less, which is attributable to the breach of duty for

25 This sentence was endorsed in *Natixis SA v Marex Financial* [2019] EWHC 2549 (Comm) at [450]. Fault not causally contributing to the damage and therefore not to be taken into account in the damages is illustrated by *Scullion v Bank of Scotland Plc* [2011] P.N.L.R. 5 at 68 (facts at para.49-071, below): see [2011] P.N.L.R. 5 at [81] to [86]. The Court of Appeal reversed on liability ([2011] 1 W.L.R. 3212 CA) but did not touch on this point. See also *Sahib Foods Ltd v Paskin Kyriakides Sands* [2003] EWCA Civ 1832 at [69].

26 [1949] 2 K.B. 291 CA at 326.

27 This point may seem simple. Yet under the analogous statutory provisions for apportionment between tortfeasors, Hilbery J in *Smith v Bray* (1939) 56 T.L.R. 200 held the basis of apportionment to be causation, although later judges have subsequently disagreed with this view. Thus in *Brian Warwicker Partnership Ltd v Hok International Ltd* [2006] P.N.L.R. 5 CA at 79 which also concerned apportionment in a contribution claim between joint tortfeasors, it was said to be established that in deciding on apportionment the court may have regard to both the causative potency of the claimant's fault and the claimant's blameworthiness: [2006] P.N.L.R. 5 CA at [37], per Arden LJ. In *Sahib Foods Ltd v Paskin Kyriakides Sands* [2003] EWCA Civ 1832; [2004] P.N.L.R. 22 CA at 403, where questions arose of how far the causing and the spreading of a fire was the fault of the defendant and how far the fault of the claimant, causation and blameworthiness, and even duty, required lengthy analysis by the Court of Appeal. In *Rehill v Rider Holdings Ltd* [2012] EWCA Civ 628 CA, a typical road accident personal injury claim, Richards LJ said that he found it difficult to draw a clear distinction between considerations of causation and of fault ([2012] EWCA Civ 628 CA at [30]) while in *Starks v Chief Constable of Hertfordshire* [2013] EWCA Civ 782 CA, again a road traffic accident personal injury claim, Underhill LJ said that it was not a case where the distinction could be made ([2013] EWCA Civ 782 CA at [17]). In *Blackmore v Department of Communities and Local Government* unreported 23 October 2014 County Court, where the cause of an employee's injury and subsequent death was by the combined effect of his smoking and his exposure to asbestos by his employers, the trial judge held that he need not base the deduction for contributory negligence on a mathematical calculation of relative contribution to risk. Instead he considered that the employers should bear the lion's share of responsibility on account of their prolonged breaches of statutory duty and, while the risk from the employee's smoking was probably twice or thrice the risk from the employers' asbestos, he assessed the contributory negligence at 30 per cent.

28 *AssetCo Plc v Grant Thornton UK LLP* [2019] EWHC 150 (Comm) at [1098]–[1099].

29 [1997] A.C. 191.

which the defendant alone is liable.[30] If, as in so many of these cases, the claimant's negligent lending practices have contributed to its loss,[31] is the apportionment to be made on the real loss or on the lesser attributable loss? The House of Lords decided for the first of these alternatives, and thereby in the claimant's favour, in *Platform Homes Loans Ltd v Oyston Shipways Ltd*,[32] reversing the Court of Appeal and resolving a conflict of many earlier first instance decisions.

7-013 Another difficult issue is how to assess the causal potency of the contribution by a company in an action against a negligent auditor for losses arising from a failure to detect the company's wrongdoing. In some jurisdictions it has been held that for the purposes of contributory negligence, where the very duty of the auditors is to detect company wrongdoing, there should be no reduction in the award of damages for contributory negligence based on the company's wrongdoing.[33] However, accepting that auditors should bear some responsibility for the event about which the "very reason" for their duty was to prevent, as in *Reeves v Commissioner of Police of the Metropolis*,[34] does not require one to accept that the auditors were entirely responsible for all the damage. Hence, in *Reeves* there was a reduction of 50 per cent in the liability of the police due to the prisoner's responsibility for his suicide. Similarly, there is a reduction of causation potency, and hence responsibility, of auditors for a company's own wrongdoing.[35]

7-014 One application of this principle can be seen in *AssetCo Plc v Grant Thornton UK LLP*,[36] where Bryan J concluded that notwithstanding the fraud of the directors, the negligence of the accountants was "flagrant", being of the "utmost gravity", "just short of recklessness" and going to the "very heart of an auditor's duties" and a 25 per cent reduction was made for this blameworthiness for both wasted expenditure and a fraudulent related party payment of £1.5 million.[37]

2. Liability in Contract

(1) Scope

7-015 The law was for long in a state of uncertainty as to whether or not the 1945 Act applied to contract at all; the natural reading of that part of the definition of fault which is taken to refer to the defendant's conduct—"negligence, breach of statu-

[30] See para.34-077, below.
[31] See the cases at para.7-022, below.
[32] [2000] 2 A.C. 190. On the particular facts and figures in the case, applying the 20 per cent contributory negligence to the real loss of some £600,000 brought the figure to £480,000 and therefore within the £500,000 overvaluations by the defendants for which alone they were liable and therefore that amount was fully recoverable. Had application of the 20 per cent reduction not taken the claimant's loss within the overvaluation, then the overvaluation figure would have applied to fix the amount recoverable. In either situation no reduction of the overvaluation figure comes into play.
[33] *Livent Inc v Deloitte LLP* [2016] O.N.C.A. 11 at [103]; *AWA Ltd v Daniels* (1992) 7 A.C.S.R. 759 at 842.
[34] [2000] 1 A.C. 360.
[35] *Barings v Coopers and Lybrand (No.7)* [2003] EWHC 1319 (Ch); [2003] EWHC 1319; [2003] Lloyd's Rep. I.R. 566 at [698]–[720] and *Singularis Holdings Ltd v Daiwa Capital Markets Europe Ltd* [2018] EWCA Civ 84; [2018] 1 Lloyd's Rep. 472; [2018] 1 W.L.R. 2777 at [94] (not disturbed on appeal: *Singularis Holdings Ltd (In Liquidation) v Daiwa Capital Markets Europe Ltd* [2019] UKSC 50; [2019] 3 W.L.R. 997); *AssetCo Plc v Grant Thornton UK LLP* [2019] EWHC 150 (Comm) at [1105].
[36] [2019] EWHC 150 (Comm) at [1185]. Not in issue on appeal, [2020] EWCA Civ 1151 at [4].
[37] See *AssetCo Plc v Grant Thornton UK LLP* [2019] EWHC 191 (Comm) at [14], [21].

tory duty or other act or omission which gives rise to a liability in tort"[38]—would appear to leave contract out. Cases on the question moved in either direction.[39] Uncertainty was eventually resolved, but not until 1989, by the Court of Appeal in *Forsikringaktieselskapet Vesta v Butcher*,[40] the relevant facts of which were these. The defendant brokers negligently failed to take action on instructions given to them by the claimant insurance company with the result that the claimants' reinsurers, defendants against whom the claimants also claimed, might have been enabled to repudiate liability to the claimants when a loss occurred eight months later. In the event, the defendant reinsurers were held not entitled to repudiate and were therefore liable to the claimants so that the issue of the damages payable by the defendant brokers did not arise. Nonetheless the liability of the defendant brokers was considered by the court—it would become relevant should the defendant reinsurers' appeal succeed[41]—and it was held that, because the claimants had had ample opportunity in the eight months to put the brokers' failure to take action right, they had been contributorily negligent, and that this contributory negligence entitled the court to make an apportionment and thereby award to the claimants less than their whole loss. It was accepted that the claimants were entitled to formulate the claim made against the brokers in either contract or tort, either for breach of their contractual obligations or for breach of their tortious duty of care.

7-016 The Court of Appeal adopted Hobhouse J below[42] in his identification of three categories of case in which the question of the applicability of the Act can arise, no clear separation between these categories having been made or having appeared in the earlier cases. The categories as stated by Hobhouse J were these:

> "(1) Where the defendant's liability arises from some contractual provision which does not depend on negligence on the part of the defendant.
> (2) Where the defendant's liability arises from a contractual obligation which is expressed in terms of taking care (or its equivalent) but does not correspond to a common law duty to take care which would exist in the given case independently of contract.
> (3) Where the defendant's liability in contract is the same as his liability in the tort of negligence independently of the existence of any contract."[43]

Here the case clearly fell within category (3) and the Court of Appeal decided that to this category the Act applied.[44] O'Connor LJ was fortified, as was Hobhouse J, in this conclusion by the earlier Court of Appeal decision in *Sayers v Harlow UDC*,[45] by which he considered the court bound, where without any discussion of the present issue damages were reduced for a physically injured claimant entitled

[38] See para.7-002, above.
[39] *Quinn v Burch Bros (Builders)* [1966] 2 Q.B. 370 CA and *De Meza & Stuart v Apple Van Straten Shena & Stone* [1975] 1 Lloyd's Rep. 498 CA at first instance favoured the application of the Act to contract and the later first instance decisions in *Basildon District Council v J. E. Lesser (Properties)* [1985] Q.B. 839 and *A.B. Marintrans v Comet Shipping Co* [1985] 1 W.L.R. 1270 held the contrary.
[40] [1989] A.C. 852 CA.
[41] The contributory negligence issue did not go to the House of Lords, their Lordships being concerned only with the defendant insurers' appeal against liability.
[42] [1986] 2 All E.R. 488.
[43] [1986] 2 All E.R. 488 at 508f to g; in the CA at [1989] A.C. 852 at 860F to G.
[44] By contrast, the High Court of Australia has not taken this approach and has held in *Astley v Austrust Ltd* [1999] Lloyd's Rep. P.N. 758 HCA that in no case of contract liability can contributory negligence be introduced to reduce damages.
[45] [1958] 1 W.L.R. 623 CA.

Lord Rodger.[722] Neither assumption of responsibility nor scope of duty was therefore taken up by Lord Rodger and Lady Hale. Lord Rodger said that he had not found it necessary to explore the issues concerning *SAAMCO* and assumption of responsibility[723] while Lady Hale, having indicated that she saw the assumption of responsibility argument as novel,[724] added that she was not immediately attracted to the idea of introducing into the law of contract the scope of duty concept.[725]

8-155 Lord Hoffmann and Lord Hope approached the question from the perspective of scope of duty. For them it was necessary to show that the contracting party had assumed responsibility for the particular loss which had occurred. The essence of this approach, and its difference from the traditional approach, are most clearly put by Lady Hale. In her words, one is required to ask not only whether the parties are to be taken to have had the loss within their contemplation at the time of contracting but also whether they are to be taken to have had liability for the loss within their contemplation at that time.[726]

8-156 This dimension was an attempt on the part of Lord Hoffmann to recognise for contract law damages the same concept of scope of duty which he had recognised in the law of tort in the so-called *SAAMCO* decision[727]; indeed he argues from *SAAMCO* in some detail in his speech.[728] The connection is obvious. Responsibility for loss in cases like *SAAMCO* is based upon an assumption of responsibility. As Roth J and Longmore LJ said in *Wellesley Partners LLP v Withers LLP* the tortious liability in these cases is based on the *Hedley Byrne* principle of liability which requires an assumption of responsibility in a "relationship equivalent to contract".[729] Indeed, as Murphy JA and I explained in *Swick Nominees Pty Ltd v Leroi International Inc (No.2)*,[730] the *Hedley Byrne* doctrine reaffirmed a very old principle that would today be seen as contractual, not tortious.

8-157 When contracting, assumption of responsibility must be determined objectively. Lord Hoffmann accepted that it would only be in unusual circumstances that the particular circumstances of the contract will reveal that the damage was beyond the scope of the duty although it will be more usual that this will be revealed by general expectations in certain markets.[731] Two reasons were given by Lord Hoffmann in *The Achilleas* for placing the relevant damage in that case beyond the scope of the duty. One was that the loss claimed would have been completely unquantifiable at

722 [2009] 1 A.C. 61 at [93]. In the hearings below the majority of the arbitrators, the trial judge and Court of Appeal had all held the loss of the particular fixture to be a not unlikely result of the breach of contract. The question of why Lord Rodger and, somewhat reluctantly, Lady Hale came to the opposite conclusion is addressed when we come to consider what likelihood of a result must be shown: see paras 8-176 to 8-180, below.

723 [2009] 1 A.C. 61 at [63].

724 See the previous paragraph.

725 [2009] 1 A.C. 61 at [93].

726 [2009] 1 A.C. 61 at [92]. Lady Hale refers not simply to loss and liability for loss but to, and italicises, "type of loss" and "liability for … type of loss". The significance and importance of this is considered later: see para.8-186, below.

727 *South Australia Asset Management Corp v York Montague Ltd* [1997] A.C. 191.

728 [2009] 1 A.C. 61 at [14]–[17].

729 *Wellesley Partners LLP v Withers LLP* [2015] EWCA Civ 1146; [2016] Ch. 529 at [163] and [187].

730 [2015] WASCA 35; (2015) 48 W.A.R. 376 at [369]–[372].

731 [2009] 1 A.C. 61 at [11].

the time of contracting; the other that the general understanding of the shipping market was that the claimed loss was not a recoverable loss.[732]

8-158 The view of Lord Hoffmann and Lord Hope commanded a majority to make it into the ratio decidendi of *The Achilleas* because the speech of the fifth member of the court, Lord Walker concluded by saying that the appeal should be allowed not only for the reasons he had given but also for the further reasons given not only by Lord Hoffmann and Lord Hope but also by Lord Rodger.[733] Hamblen J in *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd*[734] recognised that there is confusion about the ratio on account of Lord Walker having agreed with both sides, but he came to the conclusion[735] that, because Lord Walker agreed with Lords Hoffmann and Hope, the rationale of assumption of responsibility has the support of the majority.[736] As Hamblen J recognised, if one says that there was a majority for the broader approach it must equally be the case that there was a majority for the remoteness approach because Lord Walker also agreed with Lord Rodger. That view must be correct once the scope of duty and remoteness constraints are seen as separate as has been explained above.

8-159 In the years that have passed since *The Achilleas* was decided this focus upon scope of duty has been examined and adhered to in a number of first instance cases[737] and in the Court of Appeal.[738] We therefore turn to consider these developments.

(4) The decisions concerning scope of duty since 2008

8-160 As predicted in previous editions of this work, Lord Hoffmann's and Lord Hope's speeches in *The Achilleas* were bound to bring forward defendants, and particularly shipping defendants, who would argue for the additional scope of duty restriction and assert that they could not now be liable for foreseeable losses as they had not assumed responsibility for them in the sense of agreeing to pay for them should they happen. Three cases of this nature soon appeared, the first two involving the chartering of ships and the third the leasing of aircraft, in order *ASM Shipping Ltd of India v TTMI Ltd of England, The Amer Energy*,[739] *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd*[740] and *Pindell Ltd v Airasia Berhad (Pindell)*.[741] The two shipping cases, which were appeals from arbitration awards by defendants in reliance

732 Hamblen J usefully sets out these reasons of Lord Hoffmann in *Sylvia Shipping* [2010] 2 Lloyd's Rep. 81 at [33].

733 [2010] 2 Lloyd's Rep. 81 at [87].

734 [2010] 2 Lloyd's Rep. 81.

735 After citing the contrary argument in an earlier edition of this work authored by Dr McGregor and the one he preferred in *Chitty on Contracts*.

736 See his judgment at [36]–[39]. There is no necessary inconsistency with the approach of Flaux J in *ASM Shipping Ltd of India v TTMI Ltd of England, The Amer Energy* [2009] 1 Lloyd's Rep. 293 who would appear to regard those favouring the additional remoteness restriction as forming the majority, and thus providing the ratio: see at [17] and [18].

737 *ASM Shipping Ltd of India v TTMI Ltd of England, The Amer Energy* [2009] 1 Lloyd's Rep. 293; *Sylvia Shipping Co Ltd v Progress Bulk Carriers Ltd* [2010] 2 Lloyd's Rep. 81; *Pindell Ltd v Airasia Berhad (Pindell)* [2010] EWHC 2516 (Comm); *ARB v IVF Hammersmith Ltd* [2017] EWHC 2438 (QB); [2018] 2 W.L.R 1223.

738 *Siemens Building Technologies FE Ltd v Supershield Ltd* [2010] 1 Lloyd's Rep. 349 CA; *John Grimes Partnership Ltd v Gubbins* [2013] EWCA Civ 37 CA.

739 [2009] 1 Lloyd's Rep. 293.

740 [2010] 2 Lloyd's Rep. 81.

741 [2010] EWHC 2516 (Comm).

Indeed Devlin J in *Biggin v Permanite*,[880] said that the division of *Hadley v Baxendale*,[881] into two rules "has sometimes proved misleading"; since the restatement in *Victoria Laundry v Newman*,[882] there is "only one area of indemnity to be explored".[883] And the common ground between the two rules, or the two limbs of the rule, is again emphasised by the House of Lords in *Jackson v Royal Bank of Scotland Plc*.[884]

8-189 One reason why the division of the rule into two can lead to confusion is pointed out by Devlin J in *Biggin & Co Ltd v Permanite Ltd*,[885] a case which concerned a sale of goods which the claimant buyer intended, to the defendant seller's knowledge, to resell. It is that damages under the second rule in *Hadley v Baxendale*,[886] are sometimes referred to as if the rule embodied a specially beneficial measure to a claimant who would fulfil the necessary conditions. No doubt it is true that the second rule generally operates in the claimant's favour, but Devlin J thought it was capable of operating in either direction.[887] He used the sub-sale by way of illustration. A profitable sub-sale which fails through the breach is often not allowed to augment the damages because it is not within the contemplation of the parties, while conversely an unprofitable sub-sale which is carried through despite the breach cannot, if outside the parties' contemplation, reduce the damages measured by a notional loss in market value.

> "If, however, a sub-sale is within the contemplation of the parties, I think that the damages must be assessed by reference to it, whether the plaintiff likes it or not. … If it is the plaintiff's liability to the ultimate user that is contemplated as the measure of damages and it is in fact used without injurious results so that no such liability arises, the plaintiff could not claim the difference in market value, and say that the sub-sale must be disregarded."[888]

And the same point was made in *The Heron II*[889] by Lord Pearce where he said:

> "[O]f course the extension of the horizon need not always increase the damages; it might introduce a knowledge of particular circumstances, e.g. a sub-contract, which show that the plaintiff would in fact suffer less damage than a more limited view of the circumstances might lead one to expect."[890]

[880] [1951] 1 K.B. 422 at 436; reversed by the Court of Appeal [1951] 2 K.B. 314 CA, on grounds not affecting these remarks.

[881] (1854) 9 Ex. 341.

[882] [1949] 2 K.B. 528 CA.

[883] It can indeed be said to be largely an academic question whether recovery for a contractual loss falls under the first or the second rule in *Hadley v Baxendale* except, formerly, in one case, namely in relation to the recovery of interest for the non-payment of money where the law developed in a curious way. Interest was held to be recoverable as damages as of right if falling within the second rule (*Wadsworth v Lydall* [1981] 1 W.L.R. 598 CA) but not if within the first (*The President of India v La Pintada Compania Navigacion* [1985] A.C. 104). The House of Lords in *Sempra Metals Ltd v Inland Revenue Commissioners* [2008] A.C. 561 has now held such a distinction to be an error: see para.19-065, below.

[884] [2005] 1 W.L.R. 377 HL (facts at para.8-178, above): see in particular the speech of Lord Walker at [46]–[49].

[885] [1951] 1 K.B. 422.

[886] (1854) 9 Ex. 341.

[887] [1951] 1 K.B. 422 at 436.

[888] [1951] 1 K.B. 422 at 436.

[889] [1969] 1 A.C. 350.

[890] [1969] 1 A.C. 350 at 416. See similarly *Trans Trust S.P.R.L. v Danubian Trading Co* [1952] 2 Q.B. 297 CA at 306, per Denning LJ: "The buyer knew that the sellers could not obtain the goods at all unless the credit was provided. The foreseeable loss was the loss of profits, no matter whether the market price of the goods went up or down. It is, therefore, the proper measure of damages."

Louis Dreyfus Trading Ltd v Reliance Trading Ltd,[891] illustrates precisely the operation of the rule that damages must be assessed by reference to a sub-sale in the contemplation of the parties even if this does not suit the claimant. Since the parties to the sale of a cargo of sugar had in their contemplation a sub-sale by the buyer already made and on which the buyer might eventually have made a profit, the sub-sale, it was held, could be brought into account against the buyer.[892] *Duncan Investments Ltd v Underwood*[893] also is illustrative of the situation where what was within the contemplation of the parties led to a reduction rather than an increase in the damages. A portfolio of properties had been bought by the claimant on the negligent advice of estate agents as to the prices which the individual properties would realise. The properties, if sold individually, would realise much more than if sold all together. Since the estate agents had advised on individual prices and knew that the claimant's intention was to sell the properties individually, the individual prices were the proper prices to take for the damages assessment. In the particular circumstances this factor led, on appeal, to a lower award, being based on the amount paid by the claimant for the properties less their individual resale values and not, as was held below, less their resale value as a single portfolio. **8-190**

(b) The extent to which knowledge will be imputed The imputation of knowledge "assumes that the defendant at the time the contract was made had thought about the consequences of breach".[894] Knowledge will be imputed, according to the test in *Victoria Laundry v Newman*,[895] if it is in "the ordinary course of things", and it would seem that somewhat similar criteria will apply in deciding what the defendant should have known as apply to deciding what should have been realised would be not unlikely to result.[896] A simple illustration is the decision of the Privy Council in *Attorney General of the Virgin Islands v Global Water Associates Ltd*[897] where "it must have been clear as daylight" to the Government that if they breached a "design and build" contract with the respondent by failing to provide a site for the building then the respondent would lost profits on the related management contract which was also with the Government. Each case, however, must be taken on its own facts in deciding what knowledge is to be imputed to the defendant. **8-191**

The business or profession of the parties, and particularly of the claimant, may throw light upon what knowledge can be imputed. We have seen that the scope of duty constraint is one reason for generally refusing loss of business or resale profits against a carrier of goods but not a seller of goods. Another reason for the different treatment is that imposing responsibility for these losses on the carrier can be **8-192**

[891] [2004] 2 Lloyd's Rep. 243.

[892] However, it was for the defendant seller to demonstrate on the evidence that the impact of the sub-sale was such that the prima facie measure of damages was inappropriate, and the matter was sent back to the arbitral tribunal initially deciding the case to give the defendant a chance to prove this, the arbitrators having applied the prima facie measure without considering the possibility that it might be displaced. See the case further at para.25-110, below.

[893] [1998] P.N.L.R. 754 CA.

[894] *Attorney General of the Virgin Islands v Global Water Associates Ltd* [2020] UKPC 18; [2020] 3 W.L.R. 584 at [34].

[895] [1949] 2 K.B. 528 CA.

[896] Buckley J's comments to the contrary in *Diamond v Campbell-Jones* [1961] Ch. 22 at 26, have lost much of their force since the disapproval of Asquith LJ's expression "on the cards" in *The Heron II* [1969] 1 A.C. 350.

[897] [2020] UKPC 18; [2020] 3 W.L.R. 584 at [37].

claimant's physical injury caused by the defendant[425]; where there is expenditure upon advertisements to counteract the effect of the defendant's infringement of the claimant's trade mark,[426] upon extensive inquiries to detect the extent of the defendant's unlawful machinations in inducing breaches of contract and in conspiracy,[427] or upon the foundations of a building to counteract the effects of a nuisance.[428] These various examples may be considered as examples of steps taken in mitigation of damage, but some of them are so common, such as medical expenses in personal injury cases, that they tend not to be thought of specifically from this angle.[429] Whether regarded specifically as mitigation or not, the rule allowing recovery for such expenses is at base the corollary of the rule refusing recovery for loss that could reasonably have been mitigated.

9-103 Moreover, the corollary goes further and allows recovery for losses and expenses reasonably incurred in mitigation even though the resulting damage is in the event greater than it would have been had the mitigating steps not been taken.[430] This general principle may be said to be akin to, and even a part of, the rule, met with in remoteness of damage, that a claimant's intervening act reasonably taken to safeguard their interests, whether taken in the "agony of the moment"[431] or not,[432] does not relieve the defendant of liability for the resulting loss.[433] This further dimension of the corollary indeed represents the second of the three rules of mitigation as put forward in this text.[434] It should be noted that in applying to the rules, which he quoted, his analysis of mitigation in terms of causation Robert Goff J in *Koch Marine Inc v D'Amica Società di Navigatione, The Elena d'Amico*[435] applied the analysis to the second rule as much as to the other two, and it is considered that this is of no greater use as an exclusive test here than it was found to be in relation to the central first rule. The test for recovery incorporates causation simply by asking whether the act or omission which caused the increased loss was a reasonable step for the claimant to take.[436]

9-104 At the date of this book's initial compilation and publication in 1961, this principle boasted no clear illustration in English law. The only support found for

[425] Usually costs of care, as in *S v Distillers Co (Biochemicals)* [1970] 1 W.L.R. 114 and countless other cases.

[426] *Spalding v Gamage* (1918) 35 R.P.C. 101 CA: see the case in the footnote at the end of para.48-017, below.

[427] *British Motor Trade Association v Salvadori* [1949] Ch. 556; *R-V Versicherung AG v Risk Insurance and Reinsurance Solutions SA* [2006] EWHC 42 (Comm).

[428] *Delaware Mansions Ltd v Westminster City Council* [2002] 1 A.C. 321; *L.E. Jones v Portsmouth City Council* [2003] 1 W.L.R. 427 CA.

[429] And see *Compagnia Financiera "Soleada" v Hamoor Tanker Corp, The Borag* [1981] 1 W.L.R. 274 CA in the footnote at the end of para.9-039, above.

[430] Of course the unsuccessful steps taken must have been reasonably taken. Thus as the claimant in *Riyad Bank v Ahli United Bank (UK) Plc* [2005] 2 Lloyd's Rep. 409 was held not to have shown that it was reasonable to incur the expenses of buying out shareholders, which increased the loss, the claim for such expenses could not have succeeded: see [2005] 2 Lloyd's Rep. 409 at [168]-[172].

[431] As in *Jones v Boyce* (1816) 1 Stark. 493.

[432] As in *The Metagama* (1927) 29 Ll. L. Rep. 253 HL, otherwise reported as *Canadian Pacific Co v Kelvin Shipping Co* (1927) 138 L.T. 369 HL.

[433] See paras 8-065 to 8-069, above.

[434] See paras 9-003 to 9-006, above.

[435] [1980] 1 Lloyd's Rep. 75 at 88, col.2

[436] See the discussion in relation to the first rule at para.9-019, above.

the principle came in one comment and one decision, both of which are still germane. The comment was that of Lord Atkinson in *Wilson v United Counties Bank*.[437] He there said:

> "If one man inflicts an injury upon another the resort by the sufferer to reasonable expedients for the bona fide purpose of counteracting, curing or lessening the evil effects of the injury done him, does not necessarily absolve the wrongdoer, even though the sufferer's efforts should, in the result, undesignedly aggravate the result of the injury."

The decision, which was the first to get near to being an example of this situation, was *Jones v Watney, Combe, Reid & Co*.[438] It was an action for personal injury in which the defendant contended that he was not liable in damages for the aggravation of the injury to the claimant's foot by reason of her walking on the foot too soon after the accident. Lush J directed the jury to:

> "... look at all the circumstances of the case, the medical advice received, the need for action, the usual or extraordinary character of what is actually done, and the precautions taken during the doing of it. The injured person need not act with perfect knowledge and ideal wisdom, but upon the other hand cannot claim damages for such injuries as are really due to wanton, needless, or careless conduct on his own part. If what is done reasonably and carefully augments the injuries, that may be regarded as a natural consequence of the accident."[439]

The jury held the defendant liable for the total injury.

9-105 Then soon after the promulgation in this text of the principle of recovery for increased loss through unsuccessful mitigating action, the principle started to come into its own. The statement of it was first quoted from the 1961 edition and applied in *Lloyds and Scottish Finance v Modern Cars and Caravans (Kingston)*.[440] The defendants there had sold to the claimants a caravan which was not their property and which was subsequently seized by the sheriff who, upon the defendants protesting, instituted interpleader proceedings against them. At the defendants' suggestion the claimants claimed the caravan, but this claim was withdrawn after legal advice that it was not maintainable, and the claimants paid the costs of the interpleader proceedings. It was held that these costs could be included within the damages for breach of warranty. Edmund Davies J considered that where steps intended to be by way of mitigation were:

> "... taken at the instigation of the defendants, I do not think it is open to them to assert that such steps were not reasonable."[441]

Next came *Esso Petroleum Co v Mardon*.[442] There the defendant had taken a three-year tenancy agreement of a filling station on the strength of the claimant oil company's estimate of the station's potential throughput of petrol, an estimate which proved disastrously optimistic. When the truth came out the defendant gave the claimants notice, but the claimants, eager to keep the station open and controlled by a good tenant, offered to the defendant, who accepted, a new tenancy agree-

[437] [1920] A.C. 102 at 125.

[438] (1912) 28 T.L.R. 399.

[439] (1912) 28 T.L.R. 399 at 400.

[440] [1966] 1 Q.B. 764.

[441] [1966] 1 Q.B. 764 at 782 and 783.

[442] [1976] Q.B. 801 CA.

second half of the 20th. It is true that occasionally, when there had been a tendency in the market towards lower interest rates, interest at 4 per cent[451] and even 3.5 per cent[452] had been awarded, but before the 1960s there appear to be no cases in which interest on damages was awarded at a rate exceeding 5 per cent. Change came about the middle of the decade[453] and by 1973 in *Cremer v General Carriers*,[454] Kerr J was awarding interest at 7.5 per cent, saying that this was the rate which he had been awarding generally in other cases.[455]

19-110 But even before this a more flexible approach was emerging, perhaps first evidenced by Donaldson J's award in *F.M.C. Meat v Fairfield Cold Stores*[456] of interest at 1 per cent over bank rate, an award of which, he said, was his "usual course".[457] In *Miliangos v George Frank (Textiles)*,[458] the parties agreed that, if the interest was to be awarded in accordance with appropriate sterling rates,[459] then 7.5 per cent should be awarded for a particular period and 1 per cent over minimum lending rate—as bank rate had then become—thereafter.[460] And by the time of *Miliangos v George Frank (Textiles) (No.2)*,[461] Bristow J is found to be assuming that this more flexible approach has become the norm, as he there said:

> "The court fixes a rate applicable for plaintiffs in general and has done so in the sterling context[462] by applying its judicial knowledge of what is from time to time the bank rate or minimum lending rate, and its judicial knowledge of the fact that in practice, by and large, it costs about one per cent more than that to borrow the money."[463]

Donaldson J in *F.M.C. Meat v Fairfield Cold Stores*[464] had been prepared to use the bank rate as the basis for awarding interest although appreciating that it presented complications whenever the computation stretched over a long period[465]; and the courts should not be deflected from use of the minimum lending rate on accou[illegible] of the fears expressed by Kerr J in *Cremer v General Carriers*,[466] that the compli[illegible] tions could increase with its use, since the object of the move from the one rate to the other was apparently to enable changes in rate to be made more flexibly and frequently than formerly.[467] In fact the 7.5 per cent rate which Kerr J awarded in that case was very near to the 7.9 per cent rate at which the claimants had arrived using bank rate and minimum lending rate, the period covered being from late 1968 to mid-1973.[468] However, much higher rates were in store after the oil crisis of late 1973; indeed by 1980 the minimum lending rate had risen above 16 per cent. In

451 *Kemp v Tolland* [1956] 2 Lloyd's Rep. 681; see especially at 691.
452 *Neumann v I.R.C.* (1933) 148 L.T. 457; see especially at 461.
453 For the detail in figures see the 14th edition of this work (1980) at para.477.
454 [1974] 1 W.L.R. 341.
455 [1974] 1 W.L.R. 341 at 358A.
456 [1971] 2 Lloyd's Rep. 221.
457 [1971] 2 Lloyd's Rep. 221 at 227.
458 [1975] Q.B. 487.
459 It was subsequently decided that Swiss rates were the appropriate ones: see para.19-121, below.
460 [1975] Q.B. 487 at 492H.
461 [1977] Q.B. 489.
462 He refers to the sterling context because the case itself had foreign overtones: see para.19-121, below.
463 [1977] Q.B. 489 at 496A.
464 [1971] 2 Lloyd's Rep. 221.
465 [1971] 2 Lloyd's Rep. 221 at 227.
466 [1974] 1 W.L.R. 341.
467 [1974] 1 W.L.R. 341 at 357E.
468 [1974] 1 W.L.R. 341 at 357H to 358A.

1979 in *B.P. Exploration Co (Libya) v Hunt (No.2)*,[469] Robert Goff J, in awarding interest "on the basis of bank rate or minimum lending rate plus one per cent", did so "in accordance with the usual practice" in the Commercial Court,[470] and in 1984 Kerr LJ said in *Polish SS Co v Atlantic Maritime Co, The Garden City*,[471] that base rate—by then the equivalent of the former minimum lending rate—plus 1 per cent remained the practice in the Commercial Court.

Cases other than those heard in the Commercial Court also began to attract interest at base rate plus one per cent. Thus in *Tate & Lyle Food and Distribution v Greater London Council*,[472] where dredging costs were incurred by the claimants to deal with a nuisance perpetrated by the defendants,[473] Forbes J preferred the commercial rate to the personal injury rate, saying that it seemed to him that the rate at which a commercial borrower could borrow money was the safest guide.[474] Similarly in *Metal Box v Currys*,[475] where goods were tortiously destroyed in a fire and the owners' insurers were entitled to claim by subrogation, McNeill J, while noting counsel's submission that the case did not involve "a commercial dispute in the strict sense", took the view that:

19-111

> "... if insurers have to borrow at a commercial rate or apply their own funds and so lose their investment value to meet a claim by their insured, then recovery of that amount against a wrongdoer in an action by subrogation would carry interest at the commercial rate."[476]

19-112 Once the courts had accepted this approach of gearing the award of interest to commercial borrowing, the point was made in *Miliangos (No.2)*,[477] that the court is not concerned with the rate of interest at which the particular claimant may in fact have borrowed.[478] Bristow J there said:

> "The court is not concerned with the actual cost of borrowing to the individual concerned in the individual case. Depending on many variables, some people can borrow cheaper than others. The court fixes a rate applicable for plaintiffs in general."[479]

Forbes J's approach in *Tate & Lyle Food and Distribution v Greater London Council*[480] was, however, more flexible. While also saying that the appropriate rate was that at which claimants in general could borrow, he added that this did not:

> "... mean that you exclude entirely all attributes of the plaintiff other than that he is plaintiff. There is evidence here that large public companies of the size and prestige of these plaintiffs could expect to borrow at one per cent. over the minimum lending rate, while for smaller and less prestigious concerns the rate might be as high as three per cent.

469 [1979] 1 W.L.R. 783.
470 [1979] 1 W.L.R. 783.
471 [1985] Q.B. 41 CA at 67B.
472 [1982] 1 W.L.R. 149.
473 See the case further at paras 19-112 and 19-135, below.
474 See [1982] 1 W.L.R. 149 at 154F to 155D. Followed by Slade J in *International Military Services Ltd v Capital & Counties Plc* [1982] 1 W.L.R. 575; see at 587 to 588.
475 [1988] 1 W.L.R. 175.
476 [1988] 1 W.L.R. 175 at 183A.
477 [1977] Q.B. 489.
478 Nor with the rate of profit that the claimant would have achieved with the money: *Tate and Lyle Food and Distribution v Greater London Council* [1982] 1 W.L.R. 149 at 155D, per Forbes J.
479 [1977] Q.B. 489 at 495H to 496A.
480 [1982] 1 W.L.R. 149.

them having been supplied to him by a seller whose agents had induced him to buy by fraud and conspiracy, it was held that he could not recover the fine and the costs he had had to pay. Denning J said:

> "It is, I think, a principle of our law that the punishment inflicted by a criminal court is personal to the offender, and that the civil courts will not entertain an action by the offender to recover an indemnity against the consequences of that punishment."[272]

Yet, once again, it was a case of mens rea, since Denning J found that the now claimant had been guilty of gross negligence, and indeed he diluted his general statement as to non-recovery by introducing the concept of mens rea in such terms as personal responsibility, deterrence and reformation.[273] On the other hand, in *Payne v Ministry of Food*,[274] in which the now claimant had been convicted of selling milk under a false description, the description being that under which it was sold to him by the now defendant, the recovery of both fines and costs was refused without mention of the issue of mens rea.

21-074 This was the somewhat open state of the various first instance authorities when *Osman v J. Ralph Moss*,[275] came to be decided in the Court of Appeal. There, the defendant insurance brokers having led the claimant motorist to believe he was properly insured, the claimant was prosecuted for the absolute offence of driving without an insurance policy, and both the fine imposed and the costs of entering a plea in mitigation were held recoverable because no fault could be attributed to the claimant. Sachs LJ said:

> "Having examined the authorities as to cases where the person fined was under an absolute liability, it appears that such fine can be recovered in circumstances such as the present as damages unless it is shown that there was on the part of the person fined a degree of mens rea or of culpable negligence in the matter which resulted in the fine. The onus in cases such as the present is on the defendants, who were the true cause of the sequence of events leading to the fine, to show that there are circumstances which make that fine irrecoverable as damages by the claimant."[276]

Edmund Davies LJ accepted that "as to the recoverability of a fine in civil proceedings there are conflicting decisions",[277] but as between *Cointat v Myham*,[278] and *Leslie v Reliable Advertising Agency*,[279] he expressed a preference for the former.[280]

21-075 Thus the cases all agree that where the now claimant's conviction has involved mens rea they cannot recover as damages the fine which they have been ordered to pay. The later cases also support the view that there can be no recovery of the costs incurred where there is mens rea, neither the costs which the now claimant has been ordered to pay to the prosecution nor the costs of their own defence. Where,

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[272] [1948] 2 All E.R. 35 at 38.
[273] [1948] 2 All E.R. 35 at 38.
[274] (1953) 103 L.J. 141.
[275] [1970] 1 Lloyd's Rep. 313 CA.
[276] [1970] 1 Lloyd's Rep. 313 CA at 316. See, too, Phillimore LJ who thought, since the claimant had incurred the liability through no fault, negligence or dishonesty on his part but because he was grossly misled by the defendants, that "it would … be quite wrong in such circumstances if he was not able to recover the amount of this fine as a just debt": at 320.
[277] [1970] 1 Lloyd's Rep. 313 CA at 318.
[278] [1913] 2 K.B. 220.
[279] [1915] 1 K.B. 652.
[280] [1970] 1 Lloyd's Rep. 313 CA at 318.

however, there has been no showing of mens rea in the now claimant the law was for long uncertain, but now, since *Osman*,[281] appears to be settled, at Court of Appeal level, in favour of recovery both of fines and of costs.[282]

21-076 **(b) Now claimant sued** Where the wrong is a tort or breach of contract for which the now claimant has been successfully sued, the position is different. Here the general rule is that public policy does not stand in the way of recovery of the damages and costs incurred; indeed, as the substance of this chapter has shown, most of the cases involve unsuccessful defences of civil actions.[283] In two, possibly three, exceptional cases, however, the issue of policy makes an appearance as a potential bar to recovery. Again, these cases are of an early vintage, with some from the 19th century, and again they have dried up, with nothing in the reports for over 50 years.

21-077 The first exception is this. Where the now claimant's tort or breach of contract for which they have been successfully sued has entailed the commission of a criminal offence for which they are not however prosecuted, their claim against the now defendant may be objected to on the ground that the damage is the consequence of their own illegal act.[284] Here the question of whether the now claimant was at fault or not may be even more relevant. Thus in *Askey v Golden Wine Co*,[285] which has already been considered in relation to the now claimant's conviction and his claim to recover the fine and costs, there was a further claim in respect of the amount that he had had to refund to his sub-buyers. This claim also failed, Denning J saying that:

> "… speaking generally, public policy requires that no right of indemnity or contribution or damages should be enforced in respect of expenses which the claimant has incurred by reason of being compelled to make reparation for his own crime."[286]

However, he clearly considered the claimant's negligence a vital factor and distinguished *Crage v Fry*,[287] on the ground that in that case there was no negligence.[288] Somewhat similar is *Marles v Philip Trant*,[289] where a buyer of wheat resold it under a contract which, though not illegal, was performed illegally by his failure to deliver to his sub-buyer certain particulars as required by statute. The sub-buyer successfully claimed damages for breach of warranty from the buyer, who in turn claimed from his own seller both the damages and costs that he had had to pay in the action against himself. The Court of Appeal allowed this latter claim

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[281] [1970] 1 Lloyd's Rep. 313 CA.
[282] *Safeway Stores Ltd v Twigger* [2011] 2 All E.R. 841 CA is a rather special case considering whether a company could recover from its directors and employees a penalty, or fine, exacted from it by the Office of Fair Trading for anti-competition activities.
[283] See the cases at paras 21-041 to 21-045, above. The leading authority of *Hammond v Bussey* (1888) 20 Q.B.D. 79 CA was itself such a case.
[284] That this defence to a claim is different from that where the now claimant has been prosecuted and is claiming the fine and costs is made clear from Rowlatt J's judgment in *Leslie v Reliable Advertising Agency* [1915] 1 K.B. 652.
[285] [1948] 2 All E.R. 35: facts at para.21-073, above.
[286] [1948] 2 All E.R. 35 at 38.
[287] (1903) 67 J.P. 240.
[288] [1948] 2 All E.R. 35 at 39; See *Burrows v Rhodes* [1899] 1 Q.B. 816, a case not involving costs, damages and fines, which Rowlatt J distinguished in *Leslie v Reliable Advertising Agency* [1915] 1 K.B. 652.
[289] [1954] 1 Q.B. 29 CA.

ties when the contract was made should either be considered as arising naturally, i.e. in the usual course of things, or be supposed to have been in the contemplation of the parties. Indeed the decision makes it clear that a type of damage which was plainly foreseeable as a real possibility but which would only occur in a small minority of cases cannot be regarded as arising in the usual course of things or be supposed to have been in the contemplation of the parties … The modern rule of tort is quite different and it imposes a much wider liability."[43]

24-008 Their Lordships' adoption in *The Heron II* of a test of remoteness framed in terms of what the defendant should have realised was not unlikely to result, more commonly now expressed as a realisation that the loss was a "serious possibility" may indeed produce no different result in the great majority of cases than would an application of the reasonable foreseeability test, but there is bound to be at least a residual area of difference.[44] Would not, for instance, the subsequent charter fixture in *The Achilleas*,[45] have been held to have been reasonably foreseeable had there been a liability for a tort?[46] And it is the consideration that contracting parties may contemplate liability on a narrower range than what is reasonably foreseeable that largely explains the general disallowance of recovery for non-pecuniary loss in contract, contract being concerned primarily with commercial matters. Recovery for non-pecuniary loss has indeed been long available in the shape of damages for physical inconvenience and discomfort,[47] and for pain and suffering and loss of amenities,[48] and has at a later date appeared in the field of mental distress,[49] but damages for mental distress remain unavailable in commercial contracts[50] as opposed to consumer and personal contracts,[51] and there are still denied to a claimant

[43] [1969] 1 A.C. 350 at 385. See at 423, per Lord Upjohn: "it is better to use contemplate or contemplation in the case of contract, leaving foresee or foreseeability to the realm of tort". See too [1969] 1 A.C. 350 at 411, 413, 422, 425.

[44] Scarman LJ's view that the difference between the "reasonably foreseeable" tort test and the "reasonably contemplated" contract test is semantic, a view expressed in *Parsons (Livestock) v Uttley Ingham & Co* [1978] Q.B. 791 CA at 807B, is unacceptable.

[45] [2009] 1 A.C. 61.

[46] For more detail on all this see paras 8-173 and following, above.

[47] *Hobbs v L.S.W. Ry* (1875) L.R. 10 Q.B. 111; *Bailey v Bullock* [1950] 2 All E.R. 1167; *Stedman v Swan's Tours* (1951) 95 S.J. 727 CA; *Calabar Properties v Stitcher* [1984] 1 W.L.R. 287 CA; *Elmcroft Developments v Tankersley-Sawyer* (1984) 15 H.L.R. 61 CA. The matter is considered fully at paras 5-017 to 5-019, above.

[48] *Summers v Salford Corp* [1943] A.C. 282; *Griffin v Pillett* [1926] 1 K.B. 17; *Porter v Jones* (1943) 112 L.J.K.B. 173 CA; even where the deterioration in health stems from compensation neurosis: *Wales v Wales* (1967) 111 S.J. 946; *Malyon v Lawrence Messer & Co* (1968) 112 S.J. 623. The matter is considered fully at paras 5-020 and 5-022, above.

[49] Initially for the disappointment resulting from a ruined holiday in *Jarvis v Swan's Tours* [1973] Q.B. 233 CA and *Jackson v Horizon Holidays* [1975] 1 W.L.R. 1468 CA, with holiday cases continuing to this day, culminating in *Milner v Carnival Plc* [2010] 3 All E.R. 701, CA. A different type of case of importance is *Heywood v Wellers* [1976] Q.B. 446 CA. The matter is considered fully at paras 5-023 and following, above.

[50] *Hayes v Dodd* [1990] 2 All E.R. 815 CA; *Watts v Morrow* [1991] 1 W.L.R. 1421 CA; *Branchett v Beaney* [1992] 3 All E.R. 910 CA; *Channon v Lindley Johnstone* [2002] P.N.L.R. 41 CA, p.884; *Howell-Smith v Official Solicitor* [2006] P.N.L.R. 21 CA, p.394; *Wiseman v Virgin Atlantic Airways Plc* [2006] EWHC 1566 (QB): all at paras 5-027 and 5-028, above.

[51] *Farley v Skinner* [2002] 2 A.C. 732; *Ruxley Electronics v Forsyth* [1996] A.C. 344; *Herrmann v Withers LLP* [2012] EWHC 1492 (Ch); see too *Haysman v MRS Films Ltd* [2008] EWHC 2494 (QB) and *Demarco v Perkins* [2006] P.N.L.R. 27 CA at 512: all at paras 5-029 to 5-031, above. The position with employment contracts is uncertain after *Johnson v Gore Wood & Co* [2002] 2 A.C. 1 and *Johnson v Uniysis Ltd* [2003] 1 A.C. 518: see at paras 5-032 to 5-035, above.

complaining of breach of contract damages for non-pecuniary injury to reputation.[52] The most satisfactory rationale of the exclusion of these heads of damage, which are frequent for torts, is that they are not within the contemplation of the parties to a contract, and this rationale is now supported by the fact that the breakthrough in allowing damages for mental distress occurred in contracts where the parties may be taken to have contemplated such damage, as the contracts have not primarily been commercial ones but ones affecting also the claimant's personal and social interests.[53] Also, damages are seldom given in contract for injury to reputation even where the loss is pecuniary, and in the few types of case where they have been allowed, as wrongful dismissal of an actor,[54] failure to advertise properly for the claimant's business,[55] and failure to honour the claimant's drafts[56] or otherwise sustain the claimant's financial credit,[57] the loss has been one that was particularly contemplated by the contract. All these cases illustrate where the liability for a tort is wider because of the limiting doctrine in contract of the contemplation of the parties.

24-009 Difficulties can arise where actions in contract and for torts lie concurrently and, on the particular facts, the damages are wider for torts than in contract. Since the tort of negligence has been expanded to allow recovery for pure economic loss so that in cases of professional negligence there is concurrent liability in contract and for a tort, the question arises whether, where it would make a difference, the victim of the negligence may rely on the wider tortious test of reasonable foreseeability and ignore the stricter and more limiting contractual test of contemplation of the parties. It is thought that there is much to be said for not allowing this to be done. Where the claim for a tort is in the context of a contractual relationship, the parties are not strangers, as most tortfeasors and tort victims are, and they should be bound by what they have brought to their contractual relationship in terms of what risks have been communicated by the one and undertaken by the other.

24-010 The approach suggested in the previous paragraph would not entail depriving the victim of contractual and tortious negligence of the entitlement to take advantage of the longer limitation period available for a tort. The exclusion of the tort remedy on remoteness grounds is geared to what risks the contracting parties have undertaken, a consideration that has no application to the availability of limitation periods.

24-011 The approach suggested in the previous paragraph was approved in *Wellesley Partners LLP v Withers LLP*,[58] and applied with the effect that the test for recoverability of damage for economic loss was held to be the same whether the action was brought for a tort or for breach of contract. The test to be applied in cases of concur-

[52] *Groom v Crocker* [1939] 1 K.B. 194 CA; *Bailey v Bullock* [1950] 2 All E.R. 1167; see *Addis v Gramophone Co* [1909] A.C. 488. But the law may change for employment contracts in the light of *Johnson v Gore Wood & Co* [2002] 2 A.C. 1 and *Johnson v Unisys Ltd* [2003] 1 A.C. 518. The matter is considered fully at para.5-036, above.

[53] See paras 5-025 to 5-031, above.

[54] *Marbé v George Edwardes* [1928] 1 K.B. 269 CA; *Clayton v Oliver* [1930] A.C. 209.

[55] *Marcus v Myers* (1895) 11 T.L.R. 327; *Aerial Advertising Co v Batchelors Peas* [1938] 2 All E.R. 788.

[56] *Rolin v Steward* (1854) 14 C.B. 595; *Kpohraror v Woolwich Building Society* [1996] 4 All E.R. 119 CA; *Nicholson v Knox Ukiwa & Co* [2008] P.N.L.R. 33 at 782.

[57] *Wilson v United Counties Bank* [1920] A.C. 102.

[58] [2015] EWCA Civ 1146; [2016] Ch. 529, CA at [74], per Floyd LJ, at [145]–[163], per Roth J, and at [183]–[187] per Longmore LJ.

wrong in *Hewitt v Rowlands*,[97] in assessing the difference in value between repaired and unrepaired premises:

> "… if he had equated it with what the plaintiff might have to spend on performing the landlord's covenant (assuming the landlord would not perform it himself)".[98]

In *Calabar Properties v Stitcher*,[99] where the lessee held the residue, of over 80 years, of a long lease of a high-class flat and, due to the lessor's breach of repairing covenant, had had to endure dampness and damage to the flat from the penetration of water, the judge below had awarded her the cost of decorating and making good the interior of the flat,[100] coupled with an order that the lessor should carry out the necessary external work to prevent a recurrence of the damage; the Court of Appeal endorsed this award.[101]

28-025 At the same time the court in *Calabar*[102] held that the judge was right to refuse to award, additionally, to the lessee the amount of the diminution in value of the flat as a marketable asset, a claim that was said to have the support of *Hewitt v Rowlands*.[103] To submit that this represented part of the lessee's loss was, in Stephenson LJ's view, "to ask the court to take a wholly unreal view of the facts".[104] If, said Griffiths LJ, she:

> "… did not wish to sell the flat but to continue to live in it after the [lessor] had carried out the necessary structural repairs it was wholly artificial to award her damages on the basis of loss in market value, because once the [lessor] had carried out the repairs and any consequential redecoration of the interior was completed there would be no loss in market value."[105]

It would have been different if the failure to repair had caused the lessee to choose to sell the flat and move elsewhere; then, Griffiths LJ said, the measure of damages would indeed have been the difference in the price she received for the flat in the damaged condition and that which it would have fetched if the lessor had observed the repairing covenant.[106] This view was endorsed in *Wallace v Manchester City Council*,[107] where the Court of Appeal laid down, in the form of propositions of which there were four, certain principles and guidelines for the assessment of damages for breach of landlords' repairing covenants.[108] The fourth proposition[109] was that, if the tenant is forced by the failure to repair to sell or sub-

97 (1924) 93 L.J.K.B. 1080 CA.
98 He added to this "substantial general damages for inconvenience and discomfort" but it is doubtful whether a court in 1924 would have thought of this.
99 [1984] 1 W.L.R. 287 CA.
100 See, similarly, *Bradley v Chorley Borough Council* (1985) 17 H.L.R. 305 CA.
101 But indicated, rightly, that the one-third reduction made for betterment need not, on the authorities, have been made: see [1984] 1 W.L.R. 287 CA at 291D, per Stephenson LJ and 298H, per Griffiths LJ. No such reduction was made in *Bradley v Chorley Borough Council* (1985) 17 H.L.R. 305 CA.
102 [1984] 1 W.L.R. 287 CA.
103 (1924) 93 L.J.K.B. 1080 CA.
104 [1984] 1 W.L.R. 287 at 293D.
105 [1984] 1 W.L.R. 287 at 298A.
106 See [1984] 1 W.L.R. 287 at 297H–298A.
107 (1998) 30 H.L.R. 1111 CA.
108 (1998) 30 H.L.R. 1111 CA at 1120–1121.
109 For the third see para.28-032, below.

let, he may recover for the diminution of the price or of the recoverable rent occasioned by the landlord's breach of covenant.

28-026 From all this it would seem that the normal measure can be cost of repairs or diminution in value, sometimes the one and sometimes the other being the appropriate measure for the particular circumstances of the particular claimant.[110] However, *Wallace v Manchester City Council*[111] has further shown[112] that any award of diminution in value, where the tenant remains in occupation, may simply reflect the lessee's non-pecuniary loss by way of discomfort and inconvenience. This manner of going about the damages will be examined in dealing with non-pecuniary loss.[113]

28-027 It appears that, when diminution in value is considered the appropriate award, it is often calculated in practice by reference to the rent paid during the relevant period; thus it was taken as a percentage of the total rent in *Sturolson & Co v Mauroux*.[114] Where in *Electricity Supply Nominees v National Magazine Co*,[115] no non-pecuniary award was possible for a corporate tenant,[116] so that the damages fell to be assessed at the diminution in value to the tenant of its occupation of the premises, it was held that the rent payable was admissible evidence of such value. Alternatively, where in *City and Metropolitan Properties v Greycroft*,[117] it was envisaged that a company taking the lease of a flat might be able to claim the profit realisable upon a sale of the lease, it was held that this could be regarded as a measure of diminution in value.[118]

28-028 The period taken into account is only that up to the assessment of damages because the covenant to repair is a continuing covenant upon which damages may be recovered from time to time as they accrue and a claimant cannot sue for future unascertained damage.[119] Subsequent actions for breach of the same covenant will not be barred, but the damages recovered in the first action will be relevant in as-

110 *Calabar Properties v Stitcher* [1984] 1 W.L.R. 287 CA at 296B and 297F–G. In *Hawkins v Woodhall* [2008] EWCA Civ 932 CA the cost of repairs appears to have simply been taken as marking the diminution in value: see at [48] and [49].
111 (1998) 30 H.L.R. 1111 CA.
112 As have the cases following it, viz., *Shine v English Churches Housing Group* [2004] H.L.R. 42 CA at 727 and *Niazi Services Ltd v Van der Loo* [2004] H.L.R. 34 CA at 562.
113 See para.28-032, below.
114 (1988) 20 H.L.R. 332 CA. In *Lubren v London Borough of Lambeth* (1988) 20 H.L.R. 165 CA, the award for living with ever-escalating defects over a five-year period seems to have been about half of the rent.
115 [1999] 1 E.G.L.R. 130. The breach was not of a covenant to repair but of a covenant to provide certain services, including the installation of lifts and air-conditioning; but the principles are the same.
116 As a company can only suffer financial loss: see para.5-014, above and Lord Reid at para.18-031, above.
117 [1987] 1 W.L.R. 1085.
118 Compare the normal measure in the far commoner cases of breach of a lessee's repairing covenant at paras 28-045 and following, below. Where diminution in value is awarded it is not right to make a reduction in the damages on account of the fact that the property was not important to the lessee: *McCoy & Co v Clark* (1982) 13 H.L.R. 87 CA.
119 Damage accruing between the commencement of the action and the assessment of the damages at its hearing used to be taken into account under RSC Ord.37 r.6, but it is unclear whether this is still possible in the absence of an equivalent provision in the CPR: see para.11-027, above. And contrast to the old case of *Shortridge v Lamplugh* (1702) 2 Ld. Raym. 798, especially at 802–803, where, in the converse situation of breach of the lessee's covenant to repair, the jury were permitted to consider in assessing damages the fact that the premises had become more out of repair since the commencement of the action.

taken to inflate the normal measure by way of consequential losses, as was also argued by the claimant in *The Arpad*,[37] but will not by that fact represent the normal measure. If it is lower it has been held that it cannot be taken so as to decrease the damages, a point established in the leading case of *Rodocanachi v Milburn*,[38] a decision which, as Maugham LJ said in *The Arpad*,[39] "has constantly been cited and always approved"; in particular it was approved and followed by the House of Lords in *Williams v Agius*,[40] which presented the corresponding situation in sale of goods.[41] In *Rodocanachi v Milburn*, charterers had consigned a cargo for carriage by the defendant's ship and it was lost by the master's negligence. The charterers had sold the cargo at a price which turned out to be less than the market price prevailing at the port of delivery at the time when the cargo should have arrived, and it was held by the Court of Appeal that the relevant price was the market price and not the charterers' sale price, for the value must be taken "independently of any circumstances peculiar to the plaintiff".[42] Generally speaking, to fulfil their contract the charterers would have had to purchase similar goods in the market at the market price, and if their sale were of the identical goods, so that they could not satisfy the contract by buying in the market, they would necessarily be put in breach of their contract and might be liable in damages to their buyer to an extent far beyond the sale price.[43] Yet on the facts of *Rodocanachi v Milburn*, there was no possibility either of the charterers being sued by their buyer or of the charterers repurchasing in the market. This was because the cargo consigned for carriage by the defendant's ship had been sold by the charterers at the lower price on a "to arrive" basis so that non-delivery by the defendant shipper relieved them of all liability to their buyer without any need to go into the market to repurchase. There have indeed been signs of discontent, particularly in *Oxus Gold Plc v Templeton Insurance Ltd*,[44] with the absolute nature of the rule propounded by the Court of Appeal in *Rodocanachi v Milburn*, so that it is considered that the time may have come for its reconsideration, possibly along the lines proposed elsewhere.[45]

32-008 Another method of assessing the value of the goods where there is no market at the time and place of due delivery is to take the claimant's cost price, i.e. the market price at the place where the goods were delivered to the carrier, and add to this the cost of carriage[46] and an amount to cover the reasonable profit in the ordinary course of business of a person transporting goods to the particular place of due delivery. This calculation was adopted in *O'Hanlan v G.W. Ry*.[47]

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37 [1934] P. 189 CA: see at para.32-018, below.
38 (1886) 18 Q.B.D. 67 CA.
39 [1934] P. 189 CA at 227.
40 [1914] A.C. 510.
41 See para.25-010, above.
42 (1886) 18 Q.B.D. 67 CA at 77, 80, per Lord Esher MR and Lopes LJ respectively.
43 See in relation to the corresponding situation in other types of contract Lord Dunedin in *Williams v Agius* [1914] A.C. 510 at 523 (sale of goods) and Evershed J in *Brading v McNeill* [1946] Ch. 145 at 151–152 (sale of business with lease).
44 [2007] EWHC 770 (Comm).
45 For this proposal see para.9-184, above. The whole problem is given extended consideration in the context of mitigation and avoided loss at paras 9-171 to 9-184, above.
46 Although this cost would be included to give the market value, it would generally fall to be deducted again to give the normal measure of market value of goods less market rate of freight.
47 (1865) 6 B. & S. 484. See *Parker v James* (1814) 4 Camp. 112 where the defendant had paid the cost price and shipping charges into court, and the court said that there was no evidence that the goods were worth more.

Delivery of the goods in a damaged condition, as opposed to a failure to deliver, will require the market value of the damaged goods to be ascertained.[48] There is less likely to be an available market for damaged goods than for sound goods. Thus, as Colman J rightly said in *Derby Resources AG v Blue Corinth Marine Co, The Athenian Harmony*,[49] **32-009**

"where the damaged goods are actually resold, the resale price will often be strong evidence of the market price of those goods in their damaged condition".

(c) Time and place at which the market value is to be taken The market value is to be taken at the time and place of due delivery. The fact that the goods are lost, destroyed or converted during transit does not make the time and place of such loss, destruction or conversion the relevant time and place to assess the market value of the goods. Thus in *Ewbank v Nutting*,[50] the goods, converted during transit, had sold at very low prices and the jury were directed to give as damages not the sale price but the cost price together with the expenses of shipping the goods. The court was quite clear that what the goods had sold at was no fair test and that, as Wilde CJ put it, the measure was "the amount of damage the plaintiff had sustained by the unauthorised sale".[51] The court did not specifically look to the market value at the time and place of due delivery, being primarily concerned with whether a measure based upon cost price plus freight could be wrong. But the trend of the judgments suggests that the market value at due delivery would have been accepted as a measure.[52] Similarly in *Acatos v Burns*,[53] where again there was conversion by sale during transit, Brett LJ said that the true measure was "the value of the goods to the owner"[54] and Bramwell LJ agreed.[55] In both these cases the price at which the goods were sold was lower than the market value at the time and place of due delivery. There is, however, no reason why the normal measure of damages should not equally apply where the selling price was higher.[56] **32-010**

Evidence of the market price of the goods at a different place and a different time may be the only means of quantification where there is no available market for the goods shipped at the time and place of due delivery. It is only if the evidence is of prices at places and times so remote that it is of no probative value in arriving at the sound value of the goods—and also, in the case of delivery in a damaged condition, in arriving at the damaged value of the goods—that it can be said that market prices do not help and that there is thus no available market. This was the ap- **32-011**

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48 See para.32-004, above.
49 [1998] 2 Lloyd's Rep. 410 at 416, col.2.
50 (1849) 7 C.B. 797. The action was in tort for conversion, but in this connection the measure of damages in tort and contract would seem to be the same in taking the higher value at due delivery: see para.24-016, above.
51 (1849) 7 C.B. 797 at 809.
52 This appears most clearly from a passage in the argument: "[Cresswell J. Suppose the conversion had been by throwing the cargo overboard, what would have been the measure of damage in that case? What would the cargo have been worth to the owner?] What it would have sold for at the port of destination, minus the freight. [Cresswell J. May we not reasonably conclude that the goods would be worth the invoice price and the cost of carriage?] That might or might not be. [Wilde CJ. It would not be more than an actual indemnity.]": (1849) 7 C.B. 797 at 805.
53 (1878) 3 Ex. D. 282. Again the action was conversion: see the preceding footnote but two.
54 (1878) 3 Ex. D. 282 at 291, 292.
55 (1878) 3 Ex. D. 282 at 288.
56 These cases are further considered at para.24-016, above and para.38-042, below.

conflicting; no deduction was made in *Basnett v J. & A. Jackson*,[89] in this not following the earlier *Stocks v Magna Merchants*.[90] Moreover, in this field of benefit the analogy of the personal injury cases does not point the way to a clear solution, *Mills v Hassell*[91] having refused the deduction and *Wilson v National Coal Board*,[92] an appeal to the House of Lords from Scotland, having allowed it. Not that these form two inconsistent decisions: the contrasting results stemmed from the fact that in *Wilson*, which their Lordships regarded as presenting somewhat exceptional facts, the employee would not have been dismissed at all, and made redundant, but for the incapacity caused by the injury, since he would have been offered, and would have accepted, another job from his employers, whereas there was no evidence for a similar conclusion in *Mills*.[93] Yet on this footing can it not be said, wherever there is wrongful dismissal coupled with redundancy, that the employee would not have been made redundant had they not been wrongfully dismissed and that therefore redundancy payments made to them should always be deducted from their damages? Alternatively, it may be argued that wrongful dismissal cannot here be equated with personal injury, for the redundancy does not *result* from the wrongful dismissal as it may do from the personal injury: in a sense the wrongful dismissal and the redundancy are one and the same thing. Wrongful dismissal gives rise to a right to claim for loss of earnings over a necessarily limited period and the employee would still have received their redundancy payment if, without being wrongfully dismissed, their services had been dispensed with at the end of their contractual term.[94] This points to making no deduction on account of redundancy payments and is thought to be the better approach.[95]

33-016 **(b) The amount the employee has or should have earned in alternative employment** Any amount that the claimant has earned in substituted[96] employment since the breach will be deducted[97] and the loss incurred will vanish when the claimant has immediately passed into other employment on equally good terms.

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89 [1976] I.C.R. 63.

90 [1973] 1 W.L.R. 1505; preferring to follow two first instance unfair dismissal cases holding for no deduction. The arguments put forward on both sides are set out at length in the judgment at [1976] I.C.R. 63 at 67D–73H.

91 [1983] I.C.R. 330.

92 1981 S.L.T. 67 HL (Sc).

93 See further at para.40-179, below.

94 If however, as in *Baldwin v British Coal Corp* [1994] I.R.L.R. 139, the employee would never have become entitled to a redundancy payment but for the dismissal, deduction is appropriate. It was accepted in *Baldwin* that redundancy payments are normally not to be deducted.

95 *O'Laoire v Jackel International (No.2)* [1991] I.C.R. 718 CA shows that a compensatory award for unfair dismissal does not fall to be deducted from damages awarded for wrongful dismissal unless a double recovery for the same loss can be proved. In *Aspden v Webbs Poultry & Meat Group (Holdings)* [1996] I.R.L.R. 521 it was held proved and the full amount of the sum paid by the defendants to the claimant by way of settlement of his unfair dismissal claim was brought into account against the damages for wrongful dismissal since the court was satisfied that there would otherwise be a double recovery.

96 It must be truly a substitute. If the claimant could have taken the new employment in addition to the old, as where the claimant was not required to give their time exclusively to the defendant, the damages will not be affected by the amount earned in the new employment.

97 See, e.g. *Collier v Sunday Referee Publishing Co* [1940] 2 K.B. 647, where the claimant was held entitled to damages amounting to sums payable under the contract less any remuneration earned in other employment after breach, and *Cerberus Software Ltd v Rowley* [2001] I.R.L.R. 160 CA, a somewhat controversial decision on whether the employee was required to take the substituted employment: see first footnote in para.33-018, below.

This is well illustrated by *Reid v Explosives Co*.[98] In that case the claimant was entitled to six months' notice by his employers, the defendant company. The appointment of a manager by order of the Chancery Court at the instance of the debenture holders was held to be a wrongful dismissal of the claimant; but by the instructions of the manager he continued his duties at the same salary for over six months. In these circumstances it was held that he was entitled to no damages. The court will look at the facts that have occurred up till the date of trial and gauge the probabilities of the future. So in *Re Newman, Raphael's Claim*,[99] where the claimant, dismissed during a one-year contractual term, had obtained other employment at the same salary but subject to a week's notice, it was held that the claimant had suffered no damage after he had entered upon this new employment, for there was no substantial doubt that the claimant would keep his new job till the end of the one-year contractual term, the trial being only a few weeks before this date.

33-017 The amount which the employee earns in the substituted employment encompasses commissions, benefits in kind, benefits from pension schemes and the like in the same way as does the amount which they would have earned under the contract that has been broken.[100] A somewhat unusual illustration of this appears in *Lavarack v Woods of Colchester*,[101] where the claimant, after his wrongful dismissal by the defendant company, had taken employment with another company as manager at a comparatively small salary and purchased half of the company's share capital. It was held that, since the claimant's release from his duties under his contract with the defendant company gave him the time to work for and manage the other company and by that work and management to enhance the value of his shareholding in the other company, the amount by which his equity in it had increased up to the time when his contract with the defendants would, but for the breach, have come to an end fell to be taken into account in assessing the damages. "His salary of £1,500", said Lord Denning MR:

> "... was very low for a man of his ability: and it looks as if he was getting, in addition, a concealed remuneration by a profit on his shares in the company."[102]

At the same time, the requirement that benefits conferred by reason of the substituted employment are to be taken into account must not be pressed too far. This is again illustrated by the *Lavarack* case, for the claimant there had purchased shares also in a third company, one which was in serious competition with the defendants, and in which he would therefore, under the terms of his contract with the defendants, have been unable to take a financial interest. It was held, however, that the value to the claimant of this investment did not fall to be taken into account in assessing the damages as it could not be attributed to his release from his employment with the defendants. Lord Denning MR said:

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98 (1887) 19 Q.B.D. 264 CA.

99 [1916] 2 Ch. 309 CA.

100 See paras 33-006 and 33-007, above. And if the claimant has been entitled to commission from the defendant on all orders received from customers introduced by them, which would give an entitlement to commission even after their contract of employment has been determined, the assessment of damages has to take account of the likelihood of pre-existing customers ceasing to deal with the defendant as they are now open to being canvassed by the claimant on behalf of a new employer: see *Roberts v Elwells Engineers* [1972] 2 Q.B. 586 CA, especially per Lord Denning MR (with whom the other members of the court expressed agreement) at 596D.

101 [1967] 1 Q.B. 278 CA.

102 [1967] 1 Q.B. 278 CA at 291.

34-007 Claims by members of Lloyd's against their agents feature prominently. In *Bates v Barrow*[14] and *Brown v K.M.R. Services*,[15] the issue was remoteness of damage while a whole series of *Deeny v Gooda Walker* claims dealt with matters ranging from certainty of damage to tax and interest on damages.[16] Insurance brokers feature in *Osman v J. Ralph Moss*,[17] where the claimant, prosecuted for uninsured driving, recovered as damages the fine imposed and his costs incurred[18]; in *Arbory Group Ltd v West Craven Insurance Services*,[19] where there was recovery of loss of profits resulting from the broker's failure to provide adequate business interruption insurance; and in the important case of *Aneco Reinsurance Underwriting v Johnson & Higgins*,[20] where there was negligence as to £11 million and liability for £35 million.[21] Against architects there has been recovery for the loss of marketing opportunity because of culpable delay in obtaining planning consent in *Hancock v Tucker*,[22] for expenditure on planning permission, planning consultants and other architects in *John Harris Partnership v Groveworld Ltd* and for losses resulting from the inadequate design of terrace houses in *Earl's Terrace Properties Ltd v Nilsson Design Ltd*.[23] The claim was against financial advisers in *Hale v Guildarch*,[24] trade mark agents in *Halifax Building Society v Urquart-Dykes and Lord*,[25] auctioneers in *Thomson v Christie Manson & Woods Ltd*,[26] computer consultants in *Stephenson Blake (Holdings) Ltd v Streets Heaver Ltd*,[27] and computer system designers in *De Beers UK Ltd v Atos Origin IT Services UK Ltd*.[28] The claim in *Van der Garde v Force India Formula One Team Ltd*[29] was for failure to provide services to a motor racing driver.

where the defendant was an aviation technical consultant holding itself out as a specialist in the repair of damaged aircraft. The damages for the failure adequately to effect the repairs and on time, based on loss of use of the aircraft and the diminution of their value, were calculated simply by resort to general principles.

14 [1995] 1 Lloyd's Rep. 680; at para.8-180, above.

15 [1995] 2 Lloyd's Rep. 513 CA; at para.8-185, above.

16 *Deeny v Gooda Walker* [1995] 1 W.L.R. 1206: certainty, at para.10-040, above; *Deeny v Gooda Walker (No.2)* [1996] 1 W.L.R. 426 HL: tax, at para.18-048, above; *Deeny v Gooda Walker (No.3)* [1996] L.R.L.R. 168: interest, at para.19-138, above.

17 [1970] 1 Lloyd's Rep. 313 CA.

18 See the case at para.21-074, above.

19 [2007] 2 Lloyd's Rep. I.R. 491.

20 [2002] 1 Lloyd's Rep. 157 HL.

21 See too *George Barkes (London) Ltd v LFC (1988) Ltd* [2000] P.N.L.R. 21 (inadequate cover arranged; nominal damages as not causative but, if causative, saving in premium deductible) and *Bollom & Co Ltd v Byas Mosley & Co* [2000] Lloyd's Rep. I.R. 136 (inadequate cover advised, leading to limited recovery from insurers).

22 [1999] Lloyd's Rep. P.N. 814.

23 [2004] B.L.R. 273, at para.31-011, above. See, too, *P. & O. Developments v The Guy's and St Thomas' National Health Service Trust* [1999] B.L.R. 3, and *The Royal Brompton Hospital v Hammond & Lerche* [1999] B.L.R. 162 where the claims were against not only the architect but also the project manager, quantity surveyor and engineers of the professional team acting for a hospital in a building contract.

24 [1999] P.N.L.R. 44: advice on home income plan; no liability.

25 [1997] R.P.C. 55: nominal damages.

26 [2005] P.N.L.R. 38 CA at 713: alleged misdescription of auction lot.

27 [2001] Lloyd's Rep. P.N. 44: purchase of alternative system to that negligently advised.

28 [2010] EWHC 3276 (TCC).

29 [2010] EWHC 2373 (QB).

2. PARTICULAR CATEGORIES

34-008 Apart from the miscellany of persons providing professional and other services catalogued in the previous paragraph, there are particular categories that have given rise to a wealth of litigation on damages. Easily in front is the solicitor; the damages case law there is now huge. Close behind come the surveyor and the valuer. Others fall to be dealt with more briefly.[30]

(1) Solicitors

34-009 Solicitors can be negligent in a variety of ways as the cases on damages show; indeed cases against solicitors are becoming legion, thereby making it difficult to deal with them in an organised fashion and to categorise them satisfactorily. An attempt is here made to place the decisions into various categories but this is intended purely for the purposes of exposition, and decisions appearing in one category may well prove useful in relation to another category.[31] Moreover, many of the decisions are dealt with again in other parts of this book, as they tend to give rise to general problems on damages, particularly on questions of certainty[32] and of recovery for non-pecuniary loss in contract.[33]

(a) Pecuniary loss

34-010 (i) *Negligent advice on points of law* In a number of cases the solicitor has given wrong advice or failed to give correct advice to their client upon a point of law.[34] In *Otter v Church, Adams, Tatham & Co*,[35] a solicitor misinformed his client as to the latter's interest in certain property, thus depriving him of the opportunity of increasing his estate by making the property, which was settled property, his own absolutely. The error was discovered only after his death when it was too late to effect a remedy, and in his personal representatives' successful claim for damages the measure was calculated as the loss to the estate occasioned by the passing of the settled property to the next tenant in tail. Due allowance was made for the possibility that the deceased on being properly advised might not have disentailed but it is thought that no discount was required; the reasons are explained elsewhere.[36] In *Hall v Meyrick*,[37] a solicitor failed to advise or warn his client that her marriage would revoke a will made in her favour by her intended husband. The marriage took place, and two years later the husband died intestate. At first instance the claimant

30 While the great bulk of the case law concerns professional negligence in advising, informing and the like, the separate treatment of bankers and stockbrokers (at paras 34-090 to 34-094 and 34-095 to 34-097, below, respectively) is each in relation not to negligent advice or information but to a somewhat special type of contract and contract breach and the separate treatment of travel agents (at paras 34-099 to 34-101, below) is in relation to mismanagement rather than to advice.

31 There may also be claims in tort where there is no contractual relationship between the claimant and the solicitor, as in *Al-Kandari v Brown & Co* [1988] Q.B. 665 CA and *White v Jones* [1995] 2 A.C. 207 CA.

32 See Ch.10, above.

33 See Ch.5, above.

34 Or mixed law and fact.

35 [1953] Ch. 280.

36 See para.10-076, above.

37 [1957] 2 Q.B. 455.

converted has vested in him a right to damages for conversion measured by the value of the property at the date of conversion [applied]".[78]

38-016 Detinue cases of the 19th century reached the same result as *Solloway v McLaughlin*,[79] by ordering the return of the goods where these had not already been delivered up and by then awarding as damages for detention the difference between the market value at default and the market value at judgment. These detinue cases were *Williams v Archer*[80] and *Williams v Peel River Co*[81]; damages based on the market fall were also awarded in *Barrow v Arnaud*,[82] an action on the case similar to detinue.[83] However, in *Brandeis Goldschmidt & Co v Western Transport*,[84] decided after the Torts (Interference with Goods) Act 1977 with its abolition of detinue had come into force,[85] the Court of Appeal, in assessing damages after a Master's order for the delivery up of a consignment of copper had been complied with, awarded a nominal amount only and rejected the claimants' contention that they were entitled to recover as of right under a general rule of law the amount of the fall in the market value of the copper during the period of the defendants' detention. The claimants had imported the copper to refine and sell as cathodes and it had been detained by the defendant transporters en route for the refining process. Since it was thus clear that, as Brandon LJ put it,[86] the claimants had not acquired the copper with the intention of selling it on the market and would not in any event or at any time have used it for that purpose but, on the contrary, would have used it as a raw material for their business with the purpose of making profits from the sale of the finished product, an award based on the fall in the market value was inappropriate; the claimants had not been deprived of the opportunity of selling the copper on the market on the date when the detention began or been compelled to sell the copper on the date when it was delivered up. It is true that the claimants might have suffered a loss of profit on the sale of their finished products but they had expressly abjured this alternative way of putting their case.[87] They did indeed claim bank interest paid during the period of detention on the basis of their practice of reducing the bank borrowings which financed the purchases of the copper by the proceeds of the cathode sales; but this claim also failed because they adduced no evidence that the receipt of sale proceeds would have been advanced had there been no detention of the copper.[88] Brandon LJ examined the three earlier cases in which the fall in market value had been awarded and concluded that it had been a reasonable inference that the claimants in each of these had acquired the goods in question with the intention of selling them at a profit on the market.[89] Damages based on the fall in market value therefore on the facts represented the loss suffered. Brandon LJ, delivering the leading judgment, said that he could not:

[78] [1990] 1 W.L.R. 409 PC at 412B.
[79] [1938] A.C. 247 PC.
[80] (1847) 5 C.B. 318; approved in *Rosenthal v Alderton* [1946] K.B. 374 CA at 378.
[81] (1887) 55 L.T. 689 CA.
[82] (1846) 8 Q.B. 595.
[83] Facts at para.9-044, above.
[84] [1981] Q.B. 864 CA.
[85] See para.38-002, above.
[86] [1981] Q.B. 864 CA at 869B.
[87] [1981] Q.B. 864 CA at 873B.
[88] [1981] Q.B. 864 CA at 873C–G.
[89] [1981] Q.B. 864 CA at 870G–872G.

"... see why there should be any universally applicable rule for assessing damages for wrongful detention of goods, whether it be the rule contended for by the plaintiffs or any other rule. Damages in tort are awarded by way of monetary compensation for a loss or losses which a plaintiff has actually sustained, and the measure of damages awarded on this basis may vary infinitely according to the individual circumstances of any particular case. It is for plaintiffs to prove what loss, if any, they have suffered by reason of a tort, and when, as here, the effect of the tort is potentially adverse interference with the course of their business operations, it is for them to establish by evidence that there was in fact such adverse interference, and that they suffered a properly quantifiable loss by reason of it."[90]

38-017 This sensible decision in *Brandeis Goldschmidt & Co v Western Transport*[91] may appear to sit oddly with the Judicial Committee's awards in *Solloway v McLaughlin*[92] and in *BBMM Finance (Hong Kong) v Eda Holdings*,[93] of the amounts by which the market value of the shares had fallen after the date of the conversion although the claimant had in the first case missed, and in the second had apparently missed, no chance of selling them before their fall.[94] The distinction, it was suggested in an earlier edition of this work, between the *Solloway* and *Brandeis* decisions is that in the one, but not in the other, the defendants made a profit by themselves selling the goods; and it may be said that one could distinguish the *BBMM Finance* and *Brandeis* decisions along similar lines in that the defendants in *BBMM Finance*,[95] had had a profit on their hands but one which they had probably failed to realise.[96] However, the decision in *BBMM Finance* reveals that the true distinction is somewhat different. As Lord Templeman explained:

"The *Brandeis Goldschmidt* case[97] ... [was] concerned with damages caused by temporary deprivation of possession and use of property. A different consideration will apply when the property is irreversibly converted and the plaintiff loses that property."[98]

Here then is the distinction between conversion where the claimant sues for the value of the goods and detinue where they claim the return of the goods, a claim which they are now entitled to make in conversion as it has taken over from detinue.[99] In the first claim they will obtain the value to them at conversion, in the second they may obtain less. There may also be a difference concerning profit made by a defendant. For wherever the goods have been delivered up, whether voluntarily or under a court order, by the defendant to the claimant, as was the position not only in *Brandeis* but also in the three 19th-century cases which the Court of Appeal there distinguished,[100] no question of the defendant's making a profit can arise; and even where the order for delivery up gives the defendant the alternative of pay-

[90] [1981] Q.B. 864 CA at 870D–E.
[91] [1981] Q.B. 864 CA.
[92] [1938] A.C. 247 PC.
[93] [1990] 1 W.L.R. 409 PC.
[94] See paras 38-014 and 38-015, above.
[95] [1990] 1 W.L.R. 409 PC.
[96] See para.38-015, above.
[97] And also, added Lord Templeman, *Williams v Peel River Co* (1887) 55 L.T. 689 CA, one of the Victorian detinue cases: see para.38-016, above. Counsel for the defendants had relied on a passage from Bowen LJ's judgment in this case.
[98] [1990] 1 W.L.R. 409 PC at 413D.
[99] See paras 38-002 to 38-004, above.
[100] See para.38-016, above.

to be too remote. That cargo owners would enter into hedging arrangements was not reasonably foreseeable by shipowners.[377]

38-071 *Kuwait Airways Corp v Iraq Airways Co*,[378] affirmed by the House of Lords,[379] is a decision of enormous complexity—the judgment of the Court of Appeal runs to over 100 pages and to just short of 700 paragraphs—raising many issues of damages among which is that of recovery for lost profits. After the invasion and occupation of Kuwait by Iraq in 1990, 10 aircraft of the Kuwait airline were converted by the Iraqi airline. Four of the planes were subsequently destroyed in a bombing attack by international forces; the other six were taken out of Kuwait and detained until their eventual return to the Kuwait airline in 1992. The Court of Appeal rightly considered that a claim for loss of profits was appropriate for the destroyed aircraft, and could have succeeded[380] but for the fact that the claim failed for other reasons,[381] and that a claim in respect of the detained aircraft was also appropriate in principle but remained subject to proof.[382] While reliance was placed upon the many cases concerning destruction of ships,[383] including in particular *The Liesbosch*,[384] the *Kuwait* case properly seems to go beyond them in its preparedness to allow loss of profits.[385] However, the period for which the loss of profit would be allowable did not extend beyond the time when the destroyed four aircraft could have been replaced and when the detained six were returned. The House of Lords affirmed[386] this award for loss of profits in respect of the detained aircraft[387] without, however, any reference to the authorities on the destruction of ships.[388]

38-072 Outside loss of profits, *Sandeman Coprimar SA v Transitos y Transportes Integrales SL*[389] produced a consequential loss for which there was no recovery because it was of a type that was not reasonably foreseeable. The claimants, exporters of whisky to Spain, acquired from the Spanish tax authorities tax seals of nominal value for use in sealing their whisky bottles to indicate that Spanish excise duty had been duly paid by them. They contracted with a carrier for the carriage by road from Spain to Scotland of cartons containing these tax seals. This carrier sub-contracted the carriage to a second carrier who in turn subcontracted it to a third carrier. The cargo was lost in the course of carriage and the claimants were required to pay to the Spanish tax authorities under a guarantee an amount equivalent to the excise duty which would have been recovered on the bottles to which the seals should have been attached. The claimants failed to recover this amount from the second and third carriers, who were liable as sub-bailees in conversion, as neither

[377] [2007] 2 All E.R. 149 (Comm) at [127]–[131]. This issue was not pursued in the appeal, [2008] 1 All E.R. (Comm) 385 CA, which was by the shipowners. The case is at para.38-020, above.
[378] [2002] 2 A.C. 883 CA.
[379] [2002] 2 A.C. 883 HL.
[380] See [2002] 2 A.C. 883 at CA at [627].
[381] See [2002] 2 A.C. 883 at CA at [404].
[382] See [2002] 2 A.C. 883 at CA at [652].
[383] [2002] 2 A.C. 883 at CA at [587]–[598] and [621]–[626]. These cases are at paras 37-070 to 37-076, above.
[384] [1933] A.C. 449.
[385] See, especially, [2002] 2 A.C. 883 CA at [623].
[386] [2002] 2 A.C. 883 HL.
[387] [2002] 2 A.C. 883 HL at [95] and [130], per Lord Nicholls and Lord Hoffmann, respectively.
[388] Damages for lost profits, user damages and damages to cover the cost of replacement aircraft were eventually assessed and awarded in this very long-running case: *Kuwait Airways Corp v Iraqi Airways Co* [2007] EWHC 1474 (Comm).
[389] [2003] Q.B. 1270 CA.

could reasonably have appreciated the nature of the goods in the cartons or the consequences of their loss. While recognising that:

"... there can be problems in applying a test of foreseeability to carriers who handle consolidated containers of many different varieties of goods,"

Lord Phillips delivering the judgment of the court concluded that:

"... no carrier without specific knowledge of the nature of [tax seals] and of the guarantee that has to be given to the Spanish authorities for their release, could envisage that the loss of a number of cartons could give rise to the type of liability experienced by [the claimants] in this case."[390]

38-073 The problem of the limits within which policy will allow recovery arose in conversion in another, less usual, form in *Thurston v Charles*.[391] The defendant, a member of a town corporation, wrongfully communicated to the other members a letter written to the claimant by a third party which contained statements defamatory of the claimant. A claim in defamation failed because the communication was held privileged, but the claimant succeeded in his claim for trespass and conversion, and compensation for the injury to his reputation was, in effect, given in the damages. On the other hand Lord Esher MR stated categorically in *Dixon v Calcraft*,[392] that such damages in an action for seizing a chattel were unknown to English law. Somewhat similarly in *Brewer v Dew*,[393] an action of trespass for seizing goods under an unfounded claim for debt, damages were given for the annoyance and disturbance to the claimant in his business, and although this was applied to give such compensatory damages in *Smith v Enright*,[394] it appeared to have been interpreted as a case of exemplary damages in *Owen & Smith v Reo Motors*,[395] and so applied; however, Lord Devlin in *Rookes v Barnard*,[396] interpreted the award in *Owen & Smith v Reo Motors*[397] itself, as being one of compensatory damages.

38-074 In *Lonrho v Fayed (No.5)*,[398] a case of conspiracy, the Court of Appeal has now preferred the view expressed in *Dixon v Calcraft*,[399] to the decision arrived at in *Thurston v Charles*.[400] However, it may be that the other cases involving actions for misappropriating goods are not affected by the overturning of *Thurston* for either of two reasons, namely that they are not cases where protection from claims other than in defamation was needed or that they are not cases where the damages were given for non-pecuniary loss of reputation but only for the pecuniary loss and for

[390] [2003] Q.B. 1270 CA at [28]; see also at [25]–[31]. The claim against the second and third carriers, which was in negligence as well as conversion, could not have been in contract because of the absence of privity. For the successful claim in contract against the contracting carrier see para.8-215, above. There were also complex claims under the Convention scheduled to the Carriage of Goods by Road Act 1965 not relevant here.
[391] (1905) 21 T.L.R. 659.
[392] [1892] 1 Q.B. 458 CA. The action was not in tort but upon a statute.
[393] (1843) 11 M. & W. 625.
[394] (1893) 63 L.J.Q.B. 220.
[395] (1934) 151 L.T. 274 CA.
[396] [1964] A.C. 1129 at 1229.
[397] (1934) 151 L.T. 274 CA.
[398] [1993] 1 W.L.R. 1489 CA.
[399] [1892] 1 Q.B. 458 CA.
[400] (1905) 21 T.L.R. 659.