Damages

Lecture given Lord Scott at the Chancery Bar Association Conference held at the Royal College of Physicians, London on 20 January 2006

It is an obvious truth that good law is simple law that can be easily understood. Law that can be understood only by lawyers does not satisfy this requirement. Many of the complexities of law are not the fault of lawyers, but are thrust upon the public by the legislators and the regulators. There is nothing the lawyers can do about that – unless they happen to be parliamentary draftsmen, but even if they are, their influence is limited to producing in as simple and coherent a form as possible statutes and regulations that achieve the wishes of their executive and legislative masters. But there are vast areas of the common law that have been left untouched, or virtually untouched, by the legislators. In these areas the uncertainties and complexities, produced by an ever developing jurisprudence, are judge-led. I do not intend to downplay the role of academic lawyers and practising lawyers. Their ideas of how the common law should develop in order to meet the changing needs of a changing society are valuable and often highly influential. But, in the last resort, it is the judges, dealing with actual cases, whose acceptance or rejection, or sometimes modification, of the ideas and analytical criticism placed before them by academic lawyers and by professional lawyers acting for actual clients, who shape the development of the law. And if the law they shape appears incoherent, unprincipled or unclear, it is the judges at whom the finger of blame should be pointed.

This is all trite stuff, well-known to all here who practise the law, and it is no more than an introduction to what I want to say about damages – an area of the common law largely, although not entirely, untouched by statutory reform but some aspects of which are at risk, I believe, of becoming – if they have not already become, incoherent.

The incoherence is supported by the number of adjectives attached to the noun 'damages' and intended, I suppose, to indicate important distinctions. The reported cases speak of compensatory damages, aggravated damages, restitutionary damages, exemplary damages, punitive damages, vindicatory damages and now as I have discovered from the October 2005 edition of the ABA Journal, curative damages. This proliferation of adjectives suggests a variety of different purposes for the award of damages. It underlines the over-complication of what should be a simple jurisprudential concept and prompts a re-examination of the purpose or, perhaps purposes, for which damages are awarded in our civil law. Let me move at once to my conclusion. There are, I suggest, only two legitimate purposes for the award of damages in a civil suit – one is compensation for loss or damage caused by wrongful conduct; the other is vindication of a right that has been violated by wrongful conduct.

Let me start with the compensatory purpose.

Conceptually, this purpose is very easy to understand. A breach of contract or a tort has been committed and has caused loss to the victim. The type of loss that can be recovered from the wrongdoer is, of course, limited by remoteness of damage rules with which all here will be familiar and which I do not wish to spend time on. Cut-off points are necessary, just as rules identifying who is entitled to be classed as a "victim" are necessary. But, subject to these rules, the victim of the wrongful act can claim damages, compensatory damages, as compensation for the loss caused by the wrong.

The word "loss", however, needs amplification. 'Loss' is not to be identified in exclusively pecuniary or material terms. Physical injuries caused by negligence may cause relatively little, if any, pecuniary loss but may involve some physical impairment that constitutes a "loss" by any normal yardstick. The "loss" must, therefore, be given a monetary value that can be reflected in an award of compensatory damages. The function of the award is still compensation although the quantum of the award may appear arbitrary. Pain and suffering resulting from the physical injuries, even if transitory, represents for the period of the suffering a loss of the normal blessing of a freedom from those things. Damages awarded for the pain and suffering can be recognised as compensatory in intent.

In relation to some torts the nature of the wrongful conduct produces damage that is of an intangible character. Defamation, an obvious example, involves damage to the reputation. A money value must be put on this, and, here again, the valuation of the loss may appear arbitrary, but the purpose of the award is, or should be, compensatory. An immediate or prompt retraction and apology by the defamer will mitigate the loss and reduce the damages. By contrast, an insistence by the defamer on the truth of the libel or a repetition of it, will increase the damage to reputation, increase the degree of insult to the victim and justifiably increase the amount of compensation. The damages will still be compensatory in character.

It is in this context that reference to "aggravated" damages is often made. Aggravated damages are awarded for the purpose of providing compensation for conduct which has increased the seriousness of the wrong inflicted on the victim and, accordingly, increased the degree of the insult for which compensation must be paid. The function of so-called "aggravated" damages remains compensatory. Aggravated damages are *not* – repeat *not* –extra-compensatory damages. The purpose of the award should be compensation for what has happened.

Invasions of privacy – in jurisdictions that recognise such a tort – and the UK is in a state of certain indecision about this – may often warrant relatively high compensatory awards where the wrongful conduct has been particularly insulting or has been persisted in after protest.

So-called "restitutionary" damages, too, are in my opinion, best explained as compensatory damages; awarded to compensate for a loss caused by a wrong. A distinction needs to be drawn between proprietary monetary claims, where the claimant is alleging that the defendant is holding a fund that belongs to the

claimant, and restitutionary damages claims. The former are *not* damages claims at all. They are proprietary claims. The most recent word on this subject was delivered by the House of Lords in *A.G. v Blake* [2001] 1 AC 268, in which the leading opinion was delivered by Lord Nicholls. The case arose out of the publication by Blake, a convicted traitor, who had escaped from custody in England and made his way to the USSR, his paymasters, of a book describing his experiences as a member of the Secret Intelligence Service, MI6. The book had been written in the USSR but had been published in the UK by a UK company (Jonathan Cape Ltd). The publishers were holding £90,000 due to Blake as royalties. But Blake's writing of the book was a clear breach of the contract he had entered into with MI6 when he joined the service. So the Crown had an unanswerable breach of contract claim against him. But what they wanted was to deprive him of any profit from the writing of the book. So the Attorney General claimed that the £90,000 should be paid to them as damages for Blake's breach of contract. In the lower courts, the A-G claimed that Blake was a fiduciary and that they could claim the fund on that basis. That, therefore, had been a proprietary claim to the royalties fund. But that claim failed on the facts. The book was written long after Blake had ceased to owe any fiduciary duty to the Crown, and the A-G did not contend that anything in the book was any longer confidential information. So breach of contract was the only route to a successful claim to deprive Blake of the £90,000.

The House, in a majority decision, held that the remedy of an account of profits was not confined to cases where a proprietary claim was being put forward but could also represent a just response to a claim for damages for breach of contract. Lord Hobhouse of Woodborough wrote a short, but strong, dissent. I do not want to be drawn into the question whether on the facts of the case the majority's order for an account of Blake's profits and payment of the profits to the Crown as damages for breach of contract was justifiable, but, rather, to invite your attention to Lord Nicholls' remarks about the relationship between restitutionary damages, so-called, and compensatory damages. Lord Nicholls referred to cases when a person had made an unauthorised use of someone else's property to his, the wrongdoer's, advantage but without in any way damaging the property. This often happens where trespass to land has been committed. The wrongdoer has, without making any payment, made an unauthorised use of the land of another but has not in any way damaged the land.

Damages for trespass have always included, in such a case, mesne profits. These are compensatory damages. The unauthorised use of the land has deprived the owner of the opportunity of levying a fair and reasonable charge for the use of his land. The damages for the trespass, the mesne profits, compensates the owner for that loss. Lord Shaw, in a 1914 case referred to by Lord Nicholls, gave the example of a person riding a horse belonging to someone else without the owner's consent. What loss has been caused to the owner by this trespass? The horse was none the worse; on the contrary the horse was the better for the exercise. The damages, however, should reflect the fair charge for the ride that B could have demanded if his permission had been sought. The principle is widely used in patent cases. Damages are assessed by

reference to the royalties that *could* have been demanded. These are compensatory damages, compensating the owner whose property has been used without his, the owner's, authority for being deprived of the ability to charge a reasonable sum for that use.
This principle can be applied also to breaches of contract. In *Wrotham Park v Parkside Homes* in 1974 houses had been built in breach of a restrictive covenant. No damage to the value of the dominant tenement had resulted. An injunction to demolish the houses was refused but the builder was ordered to pay as damages for the breach the fee he might reasonably have been asked to pay for a release of the restrictive covenant. This decision and approach was expressly approved by the House in *A.G. v Blake*. It is a logical application of the principle underlying the assessment of mesne profits and the assessment of damages for patent infringements.

Lord Nicholls, while approving these cases, regarded them as an exception to the general rule that damages should be compensatory. I respectfully disagree. It was true in *Wrotham Park* that the dominant tenement and its value had not suffered from the building of the houses in breach of covenant and true in Lord Shaw's case that the liveryman's horse had not suffered from the unauthorised ride. But in each case the owner had been deprived by the wrongful conduct of the ability to demand a fair fee for the release of the covenant in the one case or the ride on the horse in the other. The loss was not merely conceptual. It was actual and it was capable of having monetary value attributed to it. The purpose of the award of damages in these cases remains compensatory. The approach adopted in these cases was not, in my opinion, an exception to the compensatory principle. Nor was it in the *Blake* case.

In the *Blake* case the Crown had been deprived by Blake's breach of contract of the ability to forbid or to licence on its own terms the publication of the book. This was a loss created by the breach of contract. It was a loss capable of being attributed a monetary value. The correct analysis of the case, in my opinion, is that the royalties due from the publisher to Blake constituted, in the majority's view, the due measure of compensation to the Crown for being deprived of the ability to control the publication by Blake of his experiences as an MI6 officer.

On the same principle, all awards of restitutionary damages should be justified, if they are justifiable at all, as compensatory damages. If, or to the extent, that the "restitutionary" damages cannot be justified as compensation for a loss caused to the victim by the wrongful conduct in question, they are, in my opinion, unprincipled unless, as may sometimes be the case, they can be justified as vindicatory damages. To extra-compensatory damages I must now turn.

Extra-compensatory damages
The most venerable type of extra-compensatory damages, long established in our common law jurisprudence, is nominal damages. Nominal damages are awarded where a legal wrong has been committed but no consequential loss has been caused. The purpose of the award is vindicatory – to mark the existence of the right in question and to mark the fact of its violation by the wrongdoer.

Nominal damages are usually contrasted with substantial damages. I think this is a mis-contrast. Substantial damages may be very small in amount. Consequential loss may be trivial but nonetheless measurable eg a torn shirt. The valid contrast ought, I suggest, be drawn between, on the one hand, damages the justification for which is that they compensate the victim for a consequential loss caused by the wrongful conduct and, on the other hand, damages the justification for which is that they are awarded to vindicate the existence of a right that has been violated by the wrongful conduct or to establish that the conduct was wrongful – two sides of the same coin. Nominal damages fall squarely in the latter category, the category of vindicatory damages.

So, too, exemplary and punitive damages are extra-compensatory. These adjectives need to be examined. "Punitive" damages are awarded, it must be assumed, with the intention to punish. But what business is it of a civil court – otherwise than in contempt of court proceedings – which are *sui generic* – to punish? The business of civil courts is to adjudicate on disputes between private citizens (including, of course, companies as to their respective rights and liabilities) or on disputes between private citizens and the executive as to the legality of the executive's actions or omissions. It is well-recognised that the award by civil courts of punitive damages with the intention not of compensating the victim of the wrongful conduct, nor of marking the existence of a right that has been infringed, but of punishing the perpetrator of the wrongful conduct is anomalous. It was so stated by Lord Devlin in the House of Lords in *Rookes v Barnard* in 1964, repeated by the House in *Broome v Cassell* in 1972 and, again, in the *Kuddus* case in 2002. The question is not whether punitive damages are in accordance with principle – they are not – but whether the anomaly that they constitute serves a useful purpose and should be perpetuated. I do not intend here to repeat what I said in my opinion in *Kuddus* in support of the view that the original justification for the award of punitive damages has disappeared. I remain, however, strongly of that view but must accept that, absent statutory intervention, or a road to Damascus experience by enough of my Law Lord colleagues, punitive damages will remain part of our UK jurisprudence. But I believe it should be very sparingly used.

The adjective "punitive" speaks for itself. The adjective "exemplary" on the other hand is less descriptive. What are "exemplary" damages? What is the *purpose* of an award of "exemplary" damages? The expression is sometimes used as a synonym for punitive damages. But that is unhelpful and confusing. If the purpose of the award is punitive, then call a spade a spade. In the pre *Rookes v Barnard* days the expression "exemplary damages" was sometimes

used for describing what we today might call "aggravated" damages ie damages where extra compensation is due because of aggravating conduct on the part of a wrongdoer that has increased the degree of damage suffered by the victim. But, nowadays, damages are described as "exemplary" in contrast to, and not as a sub-division of, compensatory damages. But if damages are neither aggravated damages awarded for the purpose of compensation nor punitive damages awarded for the purpose of punishment, what is left? Today, I suggest, vindicatory damages, exemplified by two recent Privy Council cases, *A-G of Trinidad v Ramanoop,* an appeal from Trinidad, and, from the Bahamas, *Merson v Cartwright*, cover all the remaining ground that might formerly have been occupied by "exemplary" damages, ie extra-compensatory damages that are substantial (as opposed to nominal) but are not punitive in intent.

Vindicatory damages are particularly appropriate where executive action has infringed constitutional rights. Both *Ramanoop* and *Merson* were cases of that type. In the UK, section 8 of the Human Rights Act 1998 empowers, and indeed requires, the courts to award "just satisfaction" (ss (3)) for a breach by a public authority of a Convention (ECHR) right incorporated by the Act into our domestic law. "Just satisfaction" may require the award of compensatory damages where the infringement has caused consequential loss, but whether or not consequential loss has been caused, just satisfaction may, in an appropriate case, require a vindicatory award in order to demonstrate that the complainant does indeed have the right contended for and/or to emphasise that the defendant's conduct was unlawful and should not be repeated.

In the *Ramanoop* case Lord Nicholls, delivering the judgment of the Privy Council, described the purpose of an award of damages to the victim of a violation by the State of a constitutional right. He said this

> " … the court is concerned to uphold, or vindicate, the constitutional right which has been contravened. A declaration by the court will articulate the fact of the violation, but in most cases more will be required than words. If the person wronged has suffered damage, the court may award him compensation. …An award of compensation will go some distance towards vindicating the infringed constitutional right. How far it goes will depend on the circumstances, but in principle it may well not suffice. The fact that the right violated was a constitutional right adds an extra dimension to the wrong. An additional award, not necessarily of substantial size, may be needed to reflect the sense of public outrage, emphasise the importance of the constitutional right and the gravity of the breach, and deter further breaches. … Although such an award, where called for, is likely in most cases to cover much the same ground in financial terms as would an award by way of punishment in the strict sense of retribution, punishment in the latter sense is not its object. …"

And in *Merson v Cartwright*, where Lord Nicholls presided but where I delivered the judgment (I should add that Baroness Hale, like Lord

Nicholls and myself, was a member of the Board in both cases), I cited the passages from *Ramanoop* that I have just referred to and said that

> "If the case is one for an award of damages by way of constitutional redress … the nature of the damages awarded may be compensatory but should always be vindicatory and, accordingly, the damages may, in an appropriate case, exceed a purely compensatory amount. The purpose of a vindicatory award is not a punitive purpose. It is not to teach the executive not to misbehave. The purpose is to vindicate the right of the complainant, … to carry on his life free from unjustified executive interference, mistreatment or oppression. … In some cases a suitable declaration may suffice to vindicate the right; in other cases an award of damages, including substantial damages, may seem to be necessary."

In *Merson* an award of $100,000 was upheld as a vindicatory award (these were Bahamian dollars which have parity with the US dollar).

These were Caribbean appeals deriving from countries with written constitutions which make provision for the recognition of fundamental human rights and freedoms. The Human Rights Act 1998 now makes similar statutory provision. The damages issues which arose in the two Privy Council cases I have mentioned are likely to arise sooner or later in this country. Perhaps they have already done so. As and when they do, the same approach to the award of damages should, in my opinion, be adopted. Compensatory damages should be awarded as compensation for loss or damage caused by the wrongful conduct. Where no loss or damage has been caused or where compensation for loss or damage seems inadequate to reflect the gravity of the wrong, a vindicatory award may need to be considered.

There should be no element in vindicatory damages of punishment or of retribution. There may, however, be an element of deterrence. Lord Nicholls referred in the *Ramanoop* judgment to the need to "deter further breaches".

It has often been said as one of the justifications of exemplary or punitive damages that the awards are needed to deter repetitions of the unlawful conduct. Lord Hutton said so in *Kuddus* (see paragraph 79). And in the US Supreme Court Justice Kennedy, giving the majority opinion, in *State Farm Mutual Automobile Insurance Co v Campbell* ((2002) 538 US 1) in 2002, said that punitive damages "are aimed at deterrence and retribution" (p 5). I would accept that if the facts of a particular case throw up the need to deter the defendant from repetition of the wrongful conduct, effective vindication of the victim's infringed right may require a vindicatory award to serve the purpose of deterrence. But I think this purpose should be pursued with great caution. The normal remedy granted by civil courts to restrain repetitions of wrongful conduct is the grant of an injunction. If,

however, the injunction is sought on behalf of the public at large and not for the protection of the personal rights of the claimant, it can only be sought by the Attorney General. *Gouriet v UPW* [1978] AC 435 established that that was so. So on what basis can an award of damages for the purpose of deterrence, where the deterrence is not necessary for the protection of the claimant's personal rights but the damages are awarded as general deterrence for the benefit of the public at large, be justified? Such an award tends, I suggest, "to blur the difference between private law and public law" (per Lord Diplock in the *Gouriet* case at 496). It is, I suggest, unprincipled. In my opinion, a deterrent element in an award of vindicatory damages should be limited to an amount calculated to deter the wrongdoer from further infringements of the victim's rights.

The conclusion I come to, therefore, the conclusion I have already foreshadowed, is that damages awards should be directed either to compensation for loss or damage or to vindication of rights infringed. As to punitive damages, they should be treated with the extreme caution that any anomaly warrants and the manner in which punitive damages have developed in the United States should be kept in mind.

Punitive damages awards in the US have come, I suggest, to represent a very great current problem in the tort system of that country. The problem was recognised and addressed by the US Supreme Court in the *State Farm Mutual Automatic Insurance Co.* case in 2002*. The case was based on a bad faith rejection by an insurance company of an insurance claim arising out of a serious motor accident. A jury had awarded $2.6 million compensatory damages and $145 million in punitive damages to the claimant. The trial judge in Utah reduced the compensatory damages to $1 million and the punitive damages to $25 million but the Utah Supreme

*** 538 US 1 (2003)**

Court restored the $145 million punitive award. The US Supreme Court, however, held that the $145 million punitive award was excessive and a violation of the Due Process Clause of the US Constitution. Justice Kennedy, who gave the majority judgment, cited with approval from *BMW of North America v Gore* ((1996) 517 US 559) ("punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition") but referred also to the following comment from the 2nd Restatement of Torts – para 903

> "In many cases in which compensatory damages include an amount for emotional distress, such as humiliation or indignation aroused by the defendant's act, there is no clear line of demarcation between punishment and compensation and a verdict for a specified amount frequently includes elements of both."

This paragraph makes the point I have been trying to make. If there is no clear line of demarcation between compensation and punishment,

the lines have become seriously crossed. The law will have become incoherent. That may well have become the case in the US. But it must not be allowed to become the case here. The way to make sure it does not become the case here is to concentrate on the purpose for which damages are being awarded. If deterrence is the purpose, whose are the rights that are being protected? If protection of the rights of the public at large is the purpose, or if punishment of the wrongdoer is the purpose, are those legitimate purposes to be pursued by a civil court in a private action brought on account of the infringement of the claimant's personal rights?

And, finally, I come to "curative" damages.
I don't know if many of you read John Grisham. I do. Some years ago he wrote a novel called 'The Rainmaker'. It was the story of a young newly qualified lawyer who brought a bad faith claim against a large insurance company. The claim was not unlike that in the *State Farm Mutual* case. In the novel the claimant's lawyer coached his client's response to an anticipated question in cross-examination as to what the client intended to do with the huge sum of punitive damages she was demanding, the purpose of the question being to expose her to the jury as greedy and grasping in seeking a windfall award. The anticipated question was duly asked. The coached answer was this:

> "I don't want a dime of your goddam money. I'm going to give the whole sum to leukaemia research."

She got $40 million punitive damages.

So much for fiction. Now to real life. In Ohio in 1997 (*after* the book had been published), a claimant whose son had been killed by a collision with a train at a level crossing let it be known that the $10 million punitive damages she was seeking would be paid to a charitable foundation whose object was the improvement of road safety. The Ohio jury duly awarded $10 million punitive damages. These were called 'curative' damages because they would assist the claimant's recovery from her feelings of distress at her son's unnecessary death. Five years later, in 2002, the Ohio Supreme Court, in another case directed, on its own motion, that a portion of the punitive damages the jury had awarded should go not to the claimant but to a suitable charity of the claimant's choice. Since then, however, the Oregon Supreme Court has ruled both that the jury must not be told of a claimant's philanthropic intentions regarding the punitive damages that may be awarded and, also, that the court had no power to direct the payment to some other body, whether or not charitable, of punitive damages awarded to a claimant. If and when the issues arising out of curative damages awards come to be considered by the US Supreme Court, I would imagine that that Court will side with Oregon on both issues. I mention this foray by US courts into the proprieties of damages awards made for 'curative' purposes in order to demonstrate

how awards of punitive damages lead the law into incoherence. Punitive damages that constitute huge windfalls at, usually, public expense, tend to bring tort law into disrepute among the general public, however popular the awards may be with the lawyers who succeed in obtaining them. Attempts to meet the adverse public reaction by introducing a charitable element into the punitive awards, compounds the anomaly and merely increases the incoherence.

So, in my opinion, punitive awards should be avoided. Courts should confine themselves to the two acceptable purposes for damages awards, namely, compensation for loss or damage and vindication of rights.