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MCGREGOR ON DAMAGES

TWENTY-SECOND EDITION

By

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PREFACE

The period of nearly three and a half years since the last edition has led to changes, sometimes very large, to every chapter of this book. The largest changes in this 22nd edition of the book concern the following areas: (1) the further incorporation of equity and the particular treatment of equitable damages and equitable compensation, including a new chapter on equitable damages; (2) the incorporation of the ranges of damages awards in specialist areas where many damages cases are decided, such as false imprisonment, defamation, harassment and misuse of private information; and (3) the recognition of the numerous developments in the law due to changes in the common law and in legislation. It is necessary to say something about each of these changes.

(1) Further incorporation and treatment of equitable damages/equitable compensation

Until I assumed the authorship of this book, and for the nearly two centuries of the existence of this book, money awards in equity, such as those made by the former Court of Chancery, were largely ignored. Awards of compensation in equity were described as “equitable compensation” while awards of compensation at common law were described as “damages”. As late as 1998, Millett LJ said extrajudicially: “Woe betide a Chancery Junior who spoke of ‘damages for breach of trust’ or ‘damages for breach of fiduciary duty’”.¹ One reason for the stubborn resistance against treating equitable compensation claims as “damages” was that, as in the common law, there are some claims in equity that are more akin to claims for payment of a debt where rules of causation or remoteness of damage do not apply. These claims are not properly described as damages, but an easy error to make was to generalise from the inappropriateness of that description to the proposition that there is something unique about compensation in equity that requires avoiding the description “damages”. To add to the confusion, there are different types of compensation in equity. Like the common law distinction which this book has long described as a distinction between damages for “normal loss” and damages for “consequential loss”, equity applied a distinction which is now described as one between “substitutive compensation” and “reparative compensation”.

That historical blindness was, and is, irrational, although the blinkers were sometimes lifted. As Lord Chelmsford said in *Peek v Gurney*² of a suit in Chancery to recover the loss suffered as a result of fraudulent misrepresentations, the claim was “precisely analogous to the common law action for deceit” and was “a suit instituted to recover damages”.³ And nearly two centuries ago, Lord Cairns’ Act specifically recognised money awards in equity as damages. It is true that, unlike most common law damages at that time, the award of damages under Lord Cairns’ Act was not made by a jury. But that is no longer a relevant distinction in England and Wales and many other common law countries.

The common historical blindness meant that claims for loss suffered by the negligence of a surgeon, a surveyor or a bailee were thought to be governed by

¹ (1998) 114 L.Q.R. 214 at 225.

² (1873) L.R. 6 H.L. 377. And see, now, *Talacko v Talacko* [2021] HCA 15; (2021) 272 CLR 478 at 491, [27].

³ *Peek v Gurney* (1873) L.R. 6 H.L. 377 at 390. See also at 392–393.

principles concerned with damages but claims for loss suffered by the negligence of a company director, an administrator or a trustee were thought to be governed by some separate principle of equitable compensation. The historical blindness also meant that a claim for losses suffered as a result of a breach of a duty not to misuse personal information was thought to be governed by principles concerned with damages, but some different principle was thought to govern a claim for breach of confidence, from which the action for misuse of personal information had itself developed. Similarly, in the early development of remedies for deceit and infringements of trade marks or patents, different approaches to compensation were taken by courts of common law and courts of equity. No such distinctions are drawn anymore. This book treats damages for fraud or deceit, breach of confidence, infringement of trade marks and infringements of patents in the same way irrespective of their jurisdictional origin.

The general principles of damages in equity are now set out in Ch.4 of this edition and the general principles of disgorgement of profits in equity are set out in Ch.16. This edition also continues the integration, within damages for torts and other wrongs, of the equitable claims for compensation arising from fraud or deceit, breach of confidence, infringement of trade marks and infringements of patents. But this integration is not complete. This edition has not included claims for damages for breaches of duty by trustees or other fiduciaries or claims for damages for dishonest participation in a breach of fiduciary duty. Those chapters will be added to future editions which will engage with further developments that might at first blush seem controversial, such as the refusal to award compensation for a breach of what is sometimes said to be a “trust” upon which assets are held due to a breach of fiduciary duty.⁴ Eventually, this book will be a comprehensive analysis, at general law and also with the inclusion of important statutory wrongs, of the claim made in Ch.1, that damages are money awards made for wrongdoing.

(2) Explanation of ranges of damages awards in specialist areas

Historically the assessment of non-pecuniary loss, sometimes called “general damages”, has been little more than an attempt to provide some solace for a loss for which money could never truly compensate. There could never be a single, correct tariff on the value of an arm or a leg, or the loss of liberty for a year of false imprisonment, or the mental anguish from defamation, harassment or the misuse of private information.

In 1992, the Judicial Studies Board, now renamed the Judicial College, first published its invaluable survey of awards of damages for personal injury. That booklet is now in its 16th edition (2022). It is an invaluable resource that is used by every judge assessing a personal injury claim to ensure consistency and parity. There is no equivalent work that provides general ranges for non-pecuniary losses in all other areas. Judges, quite properly, sometimes use analogies with the range of awards for personal injuries in other cases of non-pecuniary loss. Consistency across different areas of law is important. But the non-pecuniary loss that arises from a week of false imprisonment without major consequences should not be assessed in a similar amount as the lifetime loss of a leg. Analogies from ranges of awards in very different areas of law are difficult.

In areas such as damages for false imprisonment, defamation, harassment and misuse of private information, where there has been an explosion of case law,

⁴ *Hotel Portfolio II UK Ltd (In Liquidation) v Ruhan* [2023] EWCA Civ 1120.

judges have struggled to achieve parity in awards. This 22nd edition has begun the task of rationalising the awards of damages for non-pecuniary loss in these areas by identifying broad ranges of damages and by explaining the broad principles from which various different ranges of damages awards are made.

(3) Recognition and discussion of the numerous developments since the last edition

There have been many significant developments in the law of damages since the last edition of this book. Some of the many major developments include: consolidation of the developing principles for the assessment of damages for false imprisonment in *Henry v Attorney General of St Lucia*,⁵ *R. (on the application of Abulbaker) v Secretary of State for the Home Department*,⁶ and *Oluponle v Home Office*,⁷ clarification and refinement of rules of causation of loss in *Davies v Frimley Health NHS Foundation Trust*,⁸ developments in relation to remoteness of damage in *Armstead v Royal Sun Alliance Insurance Co Ltd*⁹ and *Charles B Lawrence & Associates v Intercommercial Bank Ltd*,¹⁰ developments in areas concerning mitigation of damage in *ED & F Man Capital Markets Ltd v Come Harvest Holdings Ltd*,¹¹ exposition of the principled basis for vindictory damages for infringement of constitutional rights by the Privy Council in *Attorney General of Trinidad and Tobago v JM (a minor by his kin and next friend NM)*,¹² examination of principles concerning damage to or destruction of goods (including hire of alternative vehicles following a common car accident) in *Armstead v Royal Sun Alliance Insurance Co Ltd*¹³ and *Arsalan v Rixon*,¹⁴ the consideration of damages for deceit in *Tuke v Hood*,¹⁵ and the consequences for damages for personal injury of the important decision in *Swift v Carpenter*,¹⁶ which was delivered immediately before the publication of the 21st edition of this book and could only be mentioned briefly in that edition.

As usual, the Supreme Court of the United Kingdom has also been active in developing the law concerning damages over the last few years. One of its important decisions is *Armstead v Royal Sun Alliance Insurance Co Ltd*¹⁷ concerning principles of remoteness of damage and including questions of onus of proof, and recoverability of losses suffered due to payments required by the tort under contracts with third parties. Another is *Lloyd v Google LLC*¹⁸ concerning breach of s.4(4) of the Data Protection Act 1998 and touching on issues of licence fee damages. Two others are the decisions in the couplet decided together, *Manchester Building Society v Grant Thornton UK LLP*¹⁹ and *Meadows v Khan*,²⁰ which ad-

⁵ [2023] UKPC 41.

⁶ [2022] EWHC 1183 (Admin).

⁷ [2023] EWHC 3188 (KB).

⁸ [2021] EWHC 169 (QB); [2021] P.I.Q.R. P14.

⁹ [2022] EWCA Civ 497; [2022] R.T.R. 23.

¹⁰ [2021] UKPC 30; [2022] P.N.L.R. 7.

¹¹ [2022] EWCA Civ 1704.

¹² [2022] UKPC 54.

¹³ [2024] UKSC 6.

¹⁴ [2021] HCA 40; (2021) 274 CLR 606.

¹⁵ [2022] EWCA Civ 23; [2022] Q.B. 659.

¹⁶ [2020] EWCA Civ 1295; [2021] Q.B. 339.

¹⁷ [2024] UKSC 6.

¹⁸ [2018] EWHC 2599 (QB); [2019] 1 W.L.R. 1265. On appeal: [2019] EWCA Civ 1599; [2020] Q.B. 747. On further appeal: [2021] UKSC 50; [2022] A.C. 1217. See paras 48-021 and 48-022.

¹⁹ [2021] UKSC 20; [2022] A.C. 783.

dressed issues (which this book has treated, and continues to treat, as separate questions) of when damage which is within the scope of the defendant's duty, an issue which was recognised as separate from remoteness of damage. The Supreme Court decision in *Financial Conduct Authority v Arch Insurance (UK) Ltd*²¹ contains important observations about causation of loss. This 22nd edition also considers the law in relation to areas where the Supreme Court has not been able to venture. For instance, the Supreme Court granted permission to appeal in the important decision on demurrage by the Court of Appeal in *K Line Pte Ltd v Priminds Shipping (HK) Co Ltd (The MV Eternal Bliss)*,²² but the appeal was withdrawn by the parties.

This 22nd edition continues to pay close attention to important decisions in jurisdictions other than England and Wales, particularly Northern Ireland, Scotland, Australia, Canada and the United States. One example is the decision of the High Court of Australia in *Arsalan v Rixon*,²³ which led to revisions to the chapter concerning damage to, or destruction of, goods and, in particular, the principles concerning the assessment of damages relating to the hire of replacement vehicles following a collision caused by negligence. Other examples are decisions in Australia, Ireland and Scotland which have either rejected the reasoning or re-explained the result of the decision of the Court of Appeal of England and Wales in *Parker v Chief Constable of Essex*,²⁴ especially in light of the decision of the UK Supreme Court in *R. (on the application of Hemmati) v Secretary of State for the Home Department*.²⁵ This is a major development in the law of causation. It requires the "but for" test to ask the question of what would have lawfully happened if the wrong had not occurred. Other unlawful events are to be disregarded.

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Professor Jason Varuhas has again produced a magisterial chapter on damages for breaches of human rights and Professor Andrew Higgins has joined the team to develop and update the sterling work on the procedure chapters that Mr Simon Colton KC had produced for the last two editions.

The law is stated as at 15 February 2024 with some late incorporation of very important recent decisions.

JJE

15 February 2024.

²⁰ [2021] UKSC 21; [2022] A.C. 852.

²¹ [2021] UKSC 1; [2021] A.C. 649.

²² [2021] EWCA Civ 1712; [2022] Bus. L.R. 67.

²³ [2021] HCA 40; (2021) 274 CLR 606.

²⁴ [2018] EWCA Civ 2788; [2019] 1 W.L.R. 2238.

²⁵ [2019] UKSC 56; [2021] A.C. 143.

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